301 N.C. App.—No. 2 Pages 174-261

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JUNE 17, 2026

MAILING ADDRESS: The Judicial Department
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OF
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COURT OF APPEALS

CASES REPORTED

Filed 15 October 2025

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ADMINISTRATIVE LAW

Petition for contested case—dismissal of career State employee—insufficient notice of appeal rights—petition dismissed without prejudice—After a career status employee (petitioner) filed a petition for a contested case hearing challenging her dismissal from employment with a county health department (respondent), the final decision from the Office of Administrative Hearings dismissing the petition without—rather than with—prejudice was affirmed, where the administrative law judge properly concluded that petitioner received insufficient notice of her right to appeal her dismissal. Specifically, respondent failed to comply with the notice requirements under N.C.G.S. § 126-35(a) (requiring written notice before dismissing a career State employee for just cause) where it sent petitioner a letter that neither specified what petitioner's appeal rights were nor explained the proper procedure and statutory 15-day deadline for taking appeal, but instead merely stated that petitioner had a right to appeal her dismissal and attached a copy of respondent's appeals policy. **O'Sullivan v. Hyde Cnty. Health Dep't, 194.**

APPEAL AND ERROR

Interlocutory order—denial of summary judgment—defamation—application of "actual malice" standard—substantial right not affected—In a defamation case filed almost thirty years after plaintiff was charged with—but not convicted of—murdering defendant's father, where a local newspaper—reporting on plaintiff's release on parole from multiple burglary charges, all unrelated to the murder—published defendant's statements referring to plaintiff as his father's killer, defendant's appeal from an interlocutory order denying his motion for summary judgment was dismissed after he failed to show that the order affected a substantial right. Although a misapplication of the "actual malice" standard at summary judgment would have implicated defendant's substantial right to free speech under the First Amendment, defendant's appellate brief failed to explain exactly how the trial court misapplied the actual malice standard in this case; furthermore, the trial court's questions during the summary judgment proceeding indicated a proper application of the standard. At any rate, plaintiff forecasted sufficient evidence of actual malice to survive the summary judgment motion, including evidence that defendant knew that the murder charge against plaintiff had been dismissed in exchange for plaintiff's agreement to plead guilty to the unrelated burglary charges. **Lucas v. Childress, 187.**

Preservation of issues—challenge to interest calculations by trial court—impermissible collateral attack—In a proceeding arising from the dissolution of the parties' marriage, plaintiff's argument that the interest owed on defendant's unjust enrichment claim was improperly calculated was an impermissible collateral attack on an order from which no appeal was taken, and accordingly, the argument was dismissed. **Pelc v. Pham, 197.**

CONSTITUTIONAL LAW

Due process—competency to stand trial—sua sponte competency hearing—unnecessary—In a prosecution for possession of a controlled substance on jail premises and related charges, the trial court did not err in declining to order a competency hearing sua sponte where the record lacked substantial evidence indicating that defendant was mentally incompetent to stand trial. First, despite defendant's prior history of drug use and mental health issues, there was no evidence that she was under the influence of illegal drugs at the time of trial or that the purported side effects from her mental health medications hampered her ability to communicate with counsel or understand the trial proceedings. Further, despite defendant's "bizarre" statements and demeanor when declining to testify, her odd explanations for being absent at trial, and her choice to decline a plea offer against her counsel's advice, there was no evidence suggesting that she lacked the capacity to make informed and voluntary decisions about not testifying, waiving her right to be present at trial, and going against her counsel's recommendations. **State v. Stanley, 214.**

Due process—right to be present at trial—knowing and intentional waiver—competency hearing unnecessary—In a prosecution for possession of a controlled substance on jail premises and related charges, the trial court did not err by conducting defendant's trial in her absence without first holding a competency hearing sua sponte, since the record was devoid of substantial evidence indicating that defendant was mentally incompetent to stand trial or to voluntarily waive her constitutional right to be present at trial. In fact, the record showed that defendant missed portions of her trial despite the trial judge's warnings—given with defense counsel present—that proceedings would continue in her absence if she failed to appear, and despite her subsequent acknowledgement in open court that she had understood these warnings. **State v. Stanley, 214.**

Federal—Second Amendment—possession of a firearm by a felon statute—as-applied challenge—not a law-abiding citizen—In an appeal by the State, the trial court's dismissal of a charge of possession of a firearm by a felon (N.C.G.S. § 14-415.1)—arising from the discovery of a gun in defendant's car during a traffic stop—was vacated where the trial court erred in concluding that defendant was a law-abiding citizen, such that the Second Amendment of the United States Constitution protected his right to possess a firearm, given that defendant had been convicted of six felonies (all related to the possession or sale of cocaine) and seven misdemeanors (including violation of a domestic violence protection order and communicating threats). **State v. Williams, 225.**

North Carolina—fruits of labor clause—termination of county board of elections director—sufficiency of pleadings—In a matter arising from plaintiff's termination for cause as the director of a county board of elections, the trial court did not err by dismissing plaintiff's claim that her constitutional right to enjoy the fruits of her labor was violated. Although plaintiff alleged that the county board failed to follow its own procedures when it submitted its recommendation that she be terminated to the North Carolina Board of Elections, plaintiff's allegations were insufficient to raise a colorable constitutional claim because she failed to identify any established rule or policy that may have been violated by the county board. Further, plaintiff failed to sufficiently allege that the county board's process violated open meeting laws. **Allman v. Swain Cnty. Bd. of Elections, 174.**

North Carolina—possession of a firearm by a felon statute—as-applied challenge—Britt factors—reasonable and fairly related to the public peace and safety—In an appeal by the State, the trial court's dismissal of a charge of possession of a firearm by a felon (N.C.G.S. § 14-415.1)—arising from the discovery of a gun in defendant's car during a traffic stop—was vacated where four of the five factors set forth in *Britt v. State*, 363 N.C. 546 (2009), weighed against defendant, who: (1) had been convicted of six felonies and seven misdemeanors; (2) had no history of lawful firearm possession, having previously been convicted of attempted possession of firearm by a felon; (3) only challenged the application of the statute to himself after being indicted for violating it; and (4) had misdemeanor convictions for violation of a domestic violence protection order and communicating threats. Accordingly, the statute as applied to defendant did not violate the right to bear arms pursuant to article 1, section 30 of the North Carolina Constitution. **State v. Williams, 225.**

North Carolina—separation of powers—legislative restructuring—state boards and commissions—executive in character—In a challenge to the constitutionality of two legislative enactments that restructured seven state boards and commissions—the Board of Transportation (BOT), the Economic Investment Committee (EIC), the Commission for Public Health (CPH), the Environmental Management Commission (EMC), the Coastal Resources Commission (CRC), the Wildlife Resources Commission (WRC), and the Building Code Council (BCC)—the decision of the three-judge panel was affirmed in part and reversed in part. Each board or commission was primarily executive in character, because they functioned to implement legislation by promulgating rules and regulations, making final decisions regarding grants and permits, supervising programs, setting standards, conducting investigations, and/or approving plans or applications. Accordingly, since the enactments altered appointment and removal powers as to the BOT, EIC, and CPH in a manner that removed the governor's ability to take care that the laws of the state be faithfully executed, the legislative branch violated the separation of powers

by the North Carolina Board of Elections to file a petition in the Wake County Superior Court) to her claims and asserting that she was entitled to have her claims heard first in the Office of Administrative Hearings as a contested case proceeding, the superior court properly entered summary judgment for defendants (the county and state boards of elections) on this issue. The appellate court rejected plaintiff's interpretation of section 163-22(l) as a venue statute, and determined that, based on the plain language of the statute, the superior court properly determined that it had exclusive jurisdiction over plaintiff's case. **Allman v. Swain Cnty. Bd. of Elections, 174.**

DRUGS

Possession of a controlled substance on jail premises—possession of methamphetamine—lesser-included offense—A criminal defendant was improperly convicted of both possession of a controlled substance on jail premises and possession of methamphetamine, where both counts stemmed from one continuous act of possession (specifically, she had methamphetamine on her person at the time she was strip-searched by a female jail deputy shortly after being taken to the jail for another crime), thereby making the latter charge a lesser-included offense of the former. Thus, the conviction for the lesser-included offense was vacated on appeal and the matter was remanded for resentencing. **State v. Stanley, 214.**

SENTENCING

Prior record level—calculation—clerical error—A judgment entered on defendant's convictions for multiple drug-related crimes and attainment of habitual felon status was vacated, and the matter was remanded for resentencing, where the State conceded a clerical error in the calculation of defendant's prior record level. Specifically, one of defendant's prior felony convictions was denoted as a Class G instead of a Class H, which resulted in defendant's prior record level totaling 14 points instead of 12 and, thus, in defendant being sentenced as a Level V offender instead of as a Level IV offender. **State v. Stanley, 214.**

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.

JUDY ALLMAN, Plaintiff
v.
SWAIN COUNTY BOARD OF ELECTIONS, and NORTH CAROLINA STATE BOARD OF ELECTIONS, Defendants

No. COA24-922

Filed 15 October 2025

1. Declaratory Judgments—termination of county elections director—applicability of N.C.G.S. § 163-22(l)—exclusive jurisdiction in Wake County Superior Court

In a matter arising from plaintiff's termination for cause as the director of a county board of elections, in which plaintiff sought a declaratory judgment challenging the application of N.C.G.S. § 163-22(l) (requiring a person seeking judicial review of a decision by the North Carolina Board of Elections to file a petition in the Wake County Superior Court) to her claims and asserting that she was entitled to have her claims heard first in the Office of Administrative Hearings as a contested case proceeding, the superior court properly entered summary judgment for defendants (the county and state boards of elections) on this issue. The appellate court rejected plaintiff's interpretation of section 163-22(l) as a venue statute, and determined that, based on the plain language of the statute, the superior court properly determined that it had exclusive jurisdiction over plaintiff's case.

2. Constitutional Law—North Carolina—fruits of labor clause—termination of county board of elections director—sufficiency of pleadings

In a matter arising from plaintiff's termination for cause as the director of a county board of elections, the trial court did not err by dismissing plaintiff's claim that her constitutional right to enjoy the fruits of her labor was violated. Although plaintiff alleged that the county board failed to follow its own procedures when it submitted its recommendation that she be terminated to the North Carolina Board of Elections, plaintiff's allegations were insufficient to raise a colorable constitutional claim because she failed to identify any established rule or policy that may have been violated by the county board. Further, plaintiff failed to sufficiently allege that the county board's process violated open meeting laws.

Appeal by Plaintiff from Orders entered 25 August 2023 and 3 November 2023 by Judge William R. Pittman in Wake County Superior Court. Heard in the Court of Appeals 20 May 2025.

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

Attorney General Jeff Jackson, by Special Deputy Attorney General Terence Steed; and Solicitor General Fellow Kaeli E. Czosek for Defendant-Appellee North Carolina State Board of Elections.

Womble Bond Dickinson LLP, by Brian F. Castro, Sean Perrin, and Caitlin T. Augerson, for Defendant-Appellee Swain County Board of Elections.

HAMPSON, Judge.

Factual and Procedural Background

This appeal stems from a Petition for Judicial Review filed in Wake County Superior Court alleging Judy Allman (Plaintiff) was improperly terminated as Director of the Swain County Board of Elections (the County Board). Plaintiff appeals from the Superior Court's Orders: (1) denying her Motion for partial summary judgment and granting Defendants summary judgment against her on the issue of whether the Superior Court of Wake County had exclusive jurisdiction over her claims and (2) dismissing her constitutional claim for violation of her right to the fruits of her labor.

Plaintiff, a former employee of the County Board, was promoted from Deputy Director to Director in August 2020. On 9 December 2022, in accordance with statutory procedures contained in N.C. Gen. Stat. § 163-35.1, the County Board submitted a Petition to the Executive Director of the North Carolina Board of Elections (the State Board) recommending Plaintiff's termination for cause based on various allegations including making misrepresentations to the County Board, insubordination, and unprofessional conduct. The Executive Director sent a copy of the petition to Plaintiff on 13 December 2022. Plaintiff responded on 19 December 2022.

On 9 January 2023, the Executive Director held a virtual hearing. Plaintiff was present for this hearing. The Executive Director reviewed the County Board's Petition, Plaintiff's response, records provided by both parties, correspondence from the parties sent to the State Board, and comments made by both parties at the virtual hearing. That same day, the Executive Director issued a written decision finding cause for termination and granting the County Board's petition to terminate Plaintiff.

The State Board declined to reconsider the decision of the Executive Director as provided by N.C. Gen. Stat. § 163-35.1. Accordingly, the Executive Director's written decision became the Final Decision on 29 January 2023.

Plaintiff filed two simultaneous actions on 30 March 2023: a contested case with the Office of Administrative Hearings (OAH), and her Petition for Judicial Review and Complaint for Declaratory Judgment with the Wake County Superior Court giving rise to this appeal. On 29 August 2023, the OAH dismissed the contested case for lack of subject matter jurisdiction. *Allman v. Swain Cnty. Bd. of Elections N.C. State Bd. of Elections* (OAH 2023 WL 5969287).

Plaintiff's Complaint in Wake County Superior Court alleged several causes of action. The first was a petition for judicial review under Section 163-22(l) of our General Statutes, which requires any person seeking to obtain judicial review of any decision of the State Board of Elections to file a petition in the Superior Court of Wake County. She also requested a declaratory judgment addressing Section 163-22(l) and its constitutionality, arguing that despite its mandate she should be permitted to contest the decision of the State Board in the OAH. She also requested a declaratory judgment that the County Board's actions exceeded its statutory authority and violated Plaintiff's rights, and asserted a constitutional claim based on a violation of her right to the fruits of her labor.

On 29 June 2023, Plaintiff moved for summary judgment on her claim for a declaratory judgment concerning the application of Section 163-22(l) to her claims. The trial court heard arguments on 10 August 2023. Plaintiff argued that, before her case could be heard in the Superior Court of Wake County, it should first go through a contested case proceeding in the OAH. Defendants argued appeal from the State Board decision lies directly in the Superior Court of Wake County, bypassing the OAH. On 25 August 2023, the trial court denied Plaintiff's motion for summary judgment and granted partial summary judgment in favor of Defendant, ordering Plaintiff's case be heard in the Superior Court of Wake County.

Both the County and State Boards moved to dismiss Plaintiff's remaining claims. The County Board argued it could not be sued because, under the statutory procedure for terminating a director, it had not actually terminated Plaintiff but only recommended her termination to the

State Board. The State Board argued it was protected from Plaintiff's claims by sovereign immunity and the existence of an adequate remedy under State law. The trial court dismissed Plaintiff's remaining claims with prejudice on 1 November 2023.

On appeal, Plaintiff challenges only the trial court's dismissal of her constitutional claim and its grant of summary judgment to Defendants based on its interpretation of Section 163-22(l) as granting jurisdiction over Plaintiff's case to the Superior Court of Wake County. She does not challenge the dismissal of her Petition for Judicial Review.

Issues

The dispositive issues are whether: (I) N.C. Gen. Stat. § 163-22(l) vests jurisdiction for judicial review of the State Board's final decision in the Superior Court of Wake County rather than OAH; and (II) Plaintiff's allegations were sufficient to state a claim for violation of her right to the fruits of her labor under the North Carolina State Constitution.

Analysis

I. Jurisdiction under N.C. Gen. Stat. § 163-22(l)

[1] Chapter 163 of our General Statutes governs election law, including the establishment of the State Board of Elections and the various County Boards. A subsection of Article 4 of this Chapter establishes a process by which a county director of elections may be terminated. N.C. Gen. Stat. § 163-35.1 (2023). First, the County Board, by signed petition, recommends the termination to the Executive Director of the State Board of Elections. N.C. Gen. Stat. § 163-35.1(a). The Executive Director must forward a copy of the petition to the county director. *Id.* The county director has 15 days to respond to the petition, and within 20 days of receipt of that reply the Executive Director issues a decision as to termination. *Id.* That decision becomes final unless within 20 days the State Board of Elections chooses to defer it. *Id.*[1] If the State Board elects to defer the decision of the Executive Director, the State Board must give the county director an opportunity to be heard and present witnesses and information to the State Board, then the State Board makes a final decision on termination. *Id.*

1. The statute also provides a process by which the Executive Director may initiate termination proceedings. N.C. Gen. Stat. § 163-35.1(b). This procedure is not relevant to this case. Termination of a county director must be conducted via one of these two processes. N.C. Gen. Stat. § 163-35.1(d).

As described above, the County and State Boards followed this statutory process in this case. Ultimately, the State Board declined to defer the decision of the Executive Director terminating Plaintiff. Plaintiff contested her termination by filing (1) a Petition for Judicial Review in the Superior Court of Wake County and (2) a contested case with the OAH.

The OAH determined it was not the proper forum to review the decision of the State Board and dismissed the contested case. 2023 WL 5969287. The Superior Court of Wake County determined it was the proper forum. Both the OAH and the Superior Court based their respective decisions on N.C. Gen. Stat. § 163-22(l), which provides any review of a decision of the State Board is conducted in the Superior Court of Wake County:

> Notwithstanding any over provision of law, in order to obtain judicial review of any decision of the State Board rendered in the performance of its duties or in the exercise of its powers under this Chapter, the person seeking review must file a petition in the Superior Court of Wake County.

N.C. Gen. Stat. § 163-22(l).

Plaintiff, however, argues Section 163-22(l) should not be interpreted to require direct review of State Board decisions in the Superior Court of Wake County. Instead, she argues cases like hers should first be heard by the Office of Administrative Hearings in a trial-level evidentiary hearing. Then, as OAH decisions are generally reviewed in our Superior Courts, N.C. Gen. Stat. § 150B-45(b), she argues Section 163-22(l) should be interpreted as no more than a venue statute, mandating that such an appeal may only be heard in Wake County.

The Office of Administrative Hearings is a statutorily created, quasi-judicial agency established "to ensure that administrative decisions are made in a fair and impartial manner[.]" N.C. Gen. Stat. § 7A-750. As such, its jurisdiction is limited to matters appearing before it under a provision of our General Statutes. The OAH dismissed Plaintiff's contested case, determining neither the North Carolina Human Resources Act (HRA) nor the Administrative Procedures Act (APA) conferred jurisdiction over the matter. While we are not reviewing the decision of the OAH on appeal, it is instructive to examine that decision for the purposes of this case.

Plaintiff does not advocate for application of the HRA to her case. Rather, Plaintiff asserts only that she may bring her claim under the

APA. Under the APA, "[a]ny person aggrieved may commence a contested case" against a state agency by filing a petition with the Office of Administrative Hearings. N.C. Gen. Stat. § 150B-23. The OAH did not recognize it held jurisdiction over Plaintiff's case under the APA in part because the Swain County Board of Elections is not an "agency" for the purposes of the APA. *Allman*, 2023 WL 5969287 ¶ 4. However, the State Board, which ultimately issued the decision, is. *See McFadyen v. New Hanover Cnty.*, 273 N.C. App. 124, 133, 848 S.E.2d 217, 223 (2020) (Dietz, J., concurring) (termination of county director by State Board of Elections was "unquestionably a 'dispute between an agency and another person that involves the person's rights, duties, or privileges' and thus is subject to the Administrative Procedure Act" under N.C. Gen. Stat. § 150B-22(a)).

The APA applies to every State agency except those specifically exempted by statute. N.C. Gen. Stat. § 150B-1(c). The contested case provisions of the APA likewise apply to "all agencies and all proceedings not expressly exempted from the Chapter." N.C. Gen. Stat. § 150B-1(e). In dismissing Plaintiff's contested case, the OAH held any jurisdiction over appeals of public employee termination decisions derives from the HRA *rather than* the APA, citing our Supreme Court's decision in *Batten v. N.C. Dep't of Correction*, 326 N.C. 338, 389 S.E.2d 35 (1990):

> OAH jurisdiction over appeals of public employee termination decisions derives not from N.C.G.S. chapter 150B, but from N.C.G.S. Chapter 126. The administrative hearing provisions of Article 3, Chapter 150B, do not establish the right of a person "aggrieved" by agency action to OAH review of that action, but only describe the procedures for such review. Batten v. N.C. Dep't of Correction, 326 N.C. 338, 342-343, 389 S.E.2d 35, 38, 1990 N.C. LEXIS 120, *9; overruled on other grounds by Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, Div. of Envtl. Management, 337 N.C. 569, 572, 447 S.E.2d 768, 770, 1994 N.C. LEXIS 492, *1.

Allman ¶ 6. However, *Batten* involved the appeal of a grievance of an employee of the North Carolina Department of Correction—an agency expressly exempted from the administrative hearing provisions of the APA. *Batten*, 326 N.C. at 344, 389 S.E.2d at 39; N.C. Gen. Stat. § 150B-1(e)(7). Accordingly, the Supreme Court has rejected a reading of *Batten* that would suggest the APA does not itself establish the right of an aggrieved person to contest agency decisions:

> Respondents contend we made it clear in *Batten* that the administrative hearing provisions of the NCAPA "do not establish the right of a person 'aggrieved' by agency action to administrative review of that action by the OAH, but only describe procedures for such review." That interpretation is contrary to the language of the statute as interpreted and applied in *Vass*.

Empire Power Co. v. N.C. Dep't of Env't, Health and Nat. Res., Div. of Env't Mgmt., 337 N.C. 569, 579, 447 S.E.2d 768, 774 (1994). As a general proposition then, the APA confers jurisdiction upon the OAH to hear appeals of employee grievances and indeed any appeal of an agency decision against agencies unless the matter is "expressly exempted from the NCAPA." *Id.* at 575, 447 S.E.2d at 772.

For example, in *Vass v. Bd. of Trustees*, the plaintiff was a State employee who contested the denial of a medical claim by filing a breach of contract action in the District Court of Wake County against the Board of Trustees of the State Employees Medical Plan. 324 N.C. 402, 404, 379 S.E.2d 26, 27 (1989). Our Supreme Court held that, because the Board of Trustees was a State agency, it was "subject to judicial review only under the terms of the Administrative Procedure Act" and the plaintiff was required to exhaust administrative remedies under the APA. *Id.* at 409, 379 S.E.2d at 30. His district court action was therefore dismissed. *Id.* Likewise, in *Empire Power Co.* petitioner George Clark was entitled to appeal to the Office of Administrative Hearings from a decision of the Division of Environmental Management, a State agency, when the Division granted a permit to Duke Energy. 337 N.C. at 596, 447 S.E.2d at 784. Clark lived on property adjacent to the proposed cite for a power generation station. *Id.* The Supreme Court reversed this Court's holding that the "organic statute" N.C. Gen. Stat. § 143-215.108(e), which controls the issuance of permits for activity that causes air pollution, provided only the permit applicant or permittee the right to appeal permit decisions to the OAH. The Supreme Court held the plaintiff was an "aggrieved person" and, as the agency at issue was not among those expressly excluded from the APA or its administrative hearing provisions, he was entitled to appeal the decision under the APA. *Id.* at 596, 447 S.E.2d at 784.

Like the agencies in *Empire Power Co.* and *Vass*, the State Board is not among the agencies the APA lists as expressly exempted from any of its provisions, N.C. Gen. Stat. § 150B-1(c), or as expressly exempted from its contested case provisions, N.C. Gen. Stat. § 150B-1(e). In this case, however, the organic statute establishing the powers and duties of the State Board creates an exception, mandating in subsection 163-22(l) that all judicial review of State Board decisions be conducted in the Superior Court of Wake County.

In order for language in an organic statute creating an agency to exempt that agency from provisions of the APA, the language used must "expressly and unequivocally" indicate the exemption. *Cabarrus Cnty. Bd. of Educ. v. Dep't of State Treasurer*, 261 N.C. App. 325, 330, 821 S.E.2d 196, 201 (2018). For example, the following provision does not create an exception to the APA:

> If, after exhaustion of internal appeal handling as outlined in the contract with the Claims Processor any person is aggrieved, the Claims Processor shall bring the matter to the attention of the Executive Administrator and Board of Trustees, which may make a binding decision on the matter in accordance with procedures established by the Executive Administrator and Board of Trustees.

N.C. Gen. Stat. § 135-39.7 (1988). Our Supreme Court rejected the argument that the statute's language allowing the Board of Trustees to make a "binding decision" showed legislative intent to exclude those decisions from being reviewed under the APA. *Vass*, 324 N.C. at 406-07, 379 S.E.2d at 29. The statutory language was not an "express and unequivocal exemption . . . from the requirements of the Administrative Procedure Act" because it did not make "specific provisions to the contrary." *Id.* A decision may bind the parties while still being subject to judicial review.

The text of subsection 163-22(l) is more specific. Under its provisions:

> Notwithstanding any other provision of law, in order to obtain judicial review of any decision of the State Board rendered in the performance of its duties or in the exercise of its powers under this Chapter, the person seeking review must file a petition in the Superior Court of Wake County.

As the parties agree, this language clearly creates an exemption from the requirements of the APA. The parties dispute only the nature of the exemption. Plaintiff argues it is a venue provision that requires appeal from OAH decisions be made in Wake County Superior Court, while Defendant argues it exempts State Board decisions from OAH review entirely, with cases like Plaintiff's proceeding directly to Wake County Superior Court. To resolve this issue, we must construe the meaning of subsection 163-22(l).

> The principal goal of statutory construction is to accomplish the legislative intent. The intent of the General Assembly may be found from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish. If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so.

Lenox, Inc. v. Tolson, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001).

First, a plain reading of the statute indicates a clear process: when the State Board makes a decision, a person seeking review of that decision must file a petition in the Superior Court of Wake County. N.C. Gen. Stat. § 163-22(l). The statute does not indicate the Superior Court of Wake County is to review a decision of the OAH, but the decision of the State Board. Indeed, this procedure has been implicitly recognized by our courts. In *McFadyen v. New Hanover County*, as in this case, a former county director of elections filed an action challenging his termination. 273 N.C. App. 124, 848 S.E.2d 217. As in this case, the county board sent a petition to the Executive Director, requesting that the plaintiff be terminated. *Id.* at 127, 848 S.E.2d at 220. The Deputy Director of the State Board, sitting in place of the Executive Director, granted the petition, and the State Board declined to defer the decision. *Id.* at 128, 848 S.E.2d at 220. The plaintiff then challenged the decision by filing claims in the Superior Court of New Hanover County. *Id.*

We held the Superior Court of New Hanover County was without jurisdiction to hear the plaintiff's appeal because "N.C.G.S. § 163-22(l) requires any appeal taken from a decision of the SBE to be filed in the Superior Court of Wake County." 273 N.C. App. at 132, 848 S.E.2d 223. The plaintiff had at no point filed his petition with the OAH, and we did not suggest in our opinion that the OAH was the proper venue for his claims. Likewise, we have reviewed other cases challenging State Board decisions which were reviewed immediately in the Superior Court of Wake County, bypassing the OAH, and have not in those cases identified issues of jurisdiction. *See, e.g.*, *Griffin v. N.C. State Bd. of Elections*, 915 S.E.2d 212, 218. *See also State v. Gorman*, 221 N.C. App. 330, 333, 727 S.E.2d 731, 733 (2012) ("The issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court sua sponte.").

Beyond the plain language of the statute as implicitly recognized in our courts, there are several indicators of legislative intent at odds with Plaintiff's interpretation. For one, although Plaintiff's case is an employment dispute, the primary role of the State Board is to supervise the primaries and elections in the State, and it promulgates rules and regulations accordingly. N.C. Gen. Stat. § 163-22(a). Accordingly, the bulk of its proceedings are likely to involve election law, including election protests which must be "expeditiously resolved" so that elections may be timely certified. *Bouvier v. Porter*, 386 N.C. 1, 16, 900 S.E.2d 838, 850 (2024). Accordingly, our Legislature set out a process by which review of the State Board's decisions may be completed more quickly, by advancing directly to our courts rather than first being heard in the OAH. This procedure also allows the State Board to litigate these claims in Wake County, where it is located, rather than in the county where the petitioner resides, as it would be required to for contested cases heard by the OAH. N.C. Gen. Stat. § 150B-24.[2]

Thus, under the plain language of N.C. Gen. Stat. § 163-22(l), petitions for review of decisions of the North Carolina Board of Elections terminating a county elections director are properly filed with the Superior Court of Wake County. Therefore, the Superior Court correctly determined it had jurisdiction over Plaintiff's case. Consequently, the Superior Court properly denied Plaintiff's request for a declaratory judgment vesting jurisdiction over this matter in the OAH.

II. <u>Constitutional claim</u>

[2] Plaintiff argues the Superior Court erred by dismissing her claim for a declaratory judgment that the County Board "unconstitutionally

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2. Other portions of Chapter 163 acknowledge that this is the default process, specifically identifying certain State Board decisions which do not bypass the OAH. One section of Chapter 163 assesses civil penalties for violations of certain election law provisions. N.C. Gen. Stat. § 163-278.34. Unlike other sections of the Chapter, this section specifically provides for review of State Board decisions by the OAH:

> (f) OAH Review.--After assessing a civil penalty under subsection (b) of this section or imposing a civil remedy under subsection (c) of this section, appeal of the decision of the State Board of Elections under this section shall be in accordance with Article 3 of Chapter 150B of the General Statutes.

N.C. Gen. Stat. § 163-278.34(f). If all decisions of the State Board were appealed to the OAH under Article 3 of the APA prior to being heard in the Superior Court of Wake County, as Plaintiff argues, this provision would be redundant. *See Hall v. Simmons*, 329 N.C. 779, 784, 407 S.E.2d 816, 818 (1991) ("The rules of statutory construction require presumptions that the legislature inserted every part of a provision for a purpose and that no part is redundant."). "Significance and effect should, if possible, . . . be accorded every part of the act, including every section, paragraph, sentence or clause, phrase, and word." *State v. Williams*, 286 N.C. 422, 432, 212 S.E.2d 113, 120 (1975).

and unjustifiably burdened [her] rights to enjoy the fruits of her labor" by "intentionally failing to comply with its own policies and the relevant law" when it petitioned the State Board to terminate her.

In order to assert a direct cause of action under the North Carolina Constitution: (1) the plaintiff must allege "a state actor . . . violated an individual's constitutional rights;" (2) the plaintiff must establish the claim is colorable, in that it "present[s] facts sufficient to support an alleged violation of a right protected by the State Constitution;" and (3) there must be no alternative "adequate state remedy." *Deminksy v. State Bd. of Educ.*, 377 N.C. 406, 413, 858 S.E.2d 788, 793-94 (2021).

Plaintiff alleges the County Board violated her right to the enjoyment of the fruits of her labor, guaranteed under Article I, Section 1 of the North Carolina Constitution. The County Board, as a government entity, is a government actor. *Deminsky*, 377 N.C. at 414, 858 S.E.2d at 794. However, as Plaintiff has not presented facts sufficient to support an alleged violation of her right to the enjoyment of the fruits of her labor, she has not established a colorable constitutional claim.

The North Carolina Constitution recognizes the right to individuals' "enjoyment of the fruits of their own labor." N.C. Const. Art. I, § 1. Our courts' "duty to protect fundamental rights includes preventing arbitrary government actions that interfere with the right to the fruits of one's own labor." *King v. Town of Chapel Hill*, 367 N.C. 400, 408, 758 S.E.2d 364, 371 (2014).

Plaintiff alleges the County Board failed to follow its own procedures in recommending her termination. Our Supreme Court in *Tully v. City of Wilmington* acknowledged the right to the fruits of one's labor includes "the right to pursue one's profession free from unreasonable government action." 370 N.C. 527, 535, 810 S.E.2d 208, 215 (2018). Accordingly, a governmental entity violates the constitution when it "acts in an arbitrary and capricious manner toward one of its employees by failing to abide by promotional procedures that the employer itself put in place." 370 N.C. at 535-36, 810 S.E.2d at 215. In *Tully*, for example, the Wilmington Police Department did not allow the plaintiff to file a grievance regarding a promotional exam, despite its policy manual stating that candidates for promotion "may appeal any portion of the selection process." *Id.* The failure by the department to follow its own employment-related policies violated the plaintiff's constitutional right.

While *Tully* was limited to the employment promotion process, we addressed its applicability to termination decisions in *Mole' v. City of Durham*, 279 N.C. App. 583, 866 S.E.2d 773 (2021). We held *Tully*'s articulation of Article I, Section 1's protections extends to the process of terminating employees such that public employers must follow their own procedures regarding termination, and a failure to do so implicates the right to the fruits of one's labor. 279 N.C. App. at 590, 866 S.E.2d at 779. Accordingly, the plaintiff stated a claim by alleging he was not given sufficient notice of his pre-disciplinary hearing under his employer's own guidelines. *Id.* at 591, 866 S.E.2d at 780.

Our determination in *Mole'* that *Tully*'s protections apply to the termination context is not binding, as on discretionary review our Supreme Court affirmed that decision without precedential value. 384 N.C. 78, 884 S.E.2d 711 (2023). Nevertheless, *Mole*'s rationale remains persuasive. However, in this case, even assuming a public employer's failure to abide by its own procedures when terminating an employee constitutes a violation of constitutional protections, Plaintiff has not stated a colorable claim for relief.

In order to state a direct constitutional claim grounded in the right to the fruits of one's own labor, a plaintiff must show "(1) a clear, established rule or policy existed regarding the employment [termination] process that furthered a legitimate governmental interest; (2) the employer violated that policy; and (3) the plaintiff was injured as a result of that violation." *Tully*, 370 N.C. at 537, 810 S.E.2d at 216. "If a public employee alleges these elements, he has adequately stated a claim that his employer unconstitutionally burdened his right to the enjoyment of the fruits of his labor." *Id.*

In her Complaint and on appeal, Plaintiff is unable to identify any established rule or policy violated by the County Board when submitting its recommendation to the State Board. The allegation in her Complaint states only:

> 50. There are clear, established policies and statutes that existed regarding Mrs. Allman's employment and the operation of the Swain County Board of Elections and State Board of Elections.
>
> 51. Defendants violated those policies.

On appeal, Plaintiff argues this is sufficient to state a claim under North Carolina's notice pleading standard. Under the notice theory of pleading, "a statement of a claim is adequate if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand its nature and basis and to file a responsive pleading." *Pyco Supply Co., Inc. v. Am. Centennial Ins. Co.*, 321 N.C.

435, 442, 364 S.E.2d 380, 384 (1988). Although this standard does not require detailed factual allegations, "a complaint must nonetheless state enough to give the substantive elements of at least some legally recognized claim or it is subject to dismissal under Rule 12(b)(6)." *Hayes v. Peters*, 184 N.C. App. 285, 287, 645 S.E.2d 846, 847 (2007).

Here, Plaintiff has failed to allege an element of the constitutional claim by failing to identify any "clear, established rule or policies or statutes" the County Board violated. Because she has failed to identify the policy at issue, she has likewise necessarily failed to allege such policy "furthered a legitimate governmental interest." *Tully*, 370 N.C. at 537, 810 S.E.2d at 216. Simply stated, the Complaint is insufficient to put the County Board on notice of any policy or statute it violated and allow it to respond to the litigation.

On appeal, Plaintiff argues she alleged a policy violation by, in a separate section of her Complaint, alleging the County Board failed to "comply with open meeting laws, including Article 33 of Chapter 143 of the General Statutes." Article 33C of Chapter 143 promulgates general rules for meetings held by all public bodies in the State, including the policy that "hearings, deliberations, and actions of these bodies be conducted openly." N.C. Gen. Stat. § 143-318.9. It is not clear that these statutes constitute the type of rule or policy as those "regarding the employment promotional process" required to state a claim under *Tully*, which protected the plaintiff from actions of his employer "that, by their very nature, are unreasonable because they contravene policies specifically promulgated by that employer for the purpose of having a fair promotional process." 370 N.C. at 536-37, 810 S.E.2d at 215-16. Plaintiff's Complaint appears to acknowledge this, as it alleges the County Board failed to comply with open meeting laws separately from her allegation that it failed to follow its own (unidentified) employment policies and procedures. Even assuming violation of our open meeting laws could support a *Tully* claim, those very laws require closed sessions when necessary "to prevent the disclosure of information that is privileged or confidential" and authorize closed sessions "to consider the qualifications, competence, performance, character, fitness . . . of an individual public officer or employee[.]" N.C. Gen. Stat. § 143-318.11. Plaintiff has neither alleged the County Board violated any particular internal employment policies or that it violated our open meeting laws.

Thus, Plaintiff has failed to establish a colorable constitutional claim that Defendants violated her right to enjoy the fruits of her own labor. Therefore, the constitutional claim was properly dismissed. The trial court did not err in dismissing Plaintiff's Petition and claims.

Conclusion

For the foregoing reasons, the trial court did not err in entering summary judgment for Defendants on Plaintiff's claim for declaratory judgment, and it did not err in dismissing her constitutional claim. Accordingly, the trial court's judgment is affirmed.

AFFIRMED.

Chief Judge DILLON and Judge ARROWOOD concur.

ALAN RAY LUCAS, Plaintiff
v.
VIRGINIA BRADLEY CHILDRESS, an individual, Defendant

No. COA25-227

Filed 15 October 2025

Appeal and Error—interlocutory order—denial of summary judgment—defamation—application of "actual malice" standard—substantial right not affected

In a defamation case filed almost thirty years after plaintiff was charged with—but not convicted of—murdering defendant's father, where a local newspaper—reporting on plaintiff's release on parole from multiple burglary charges, all unrelated to the murder—published defendant's statements referring to plaintiff as his father's killer, defendant's appeal from an interlocutory order denying his motion for summary judgment was dismissed after he failed to show that the order affected a substantial right. Although a misapplication of the "actual malice" standard at summary judgment would have implicated defendant's substantial right to free speech under the First Amendment, defendant's appellate brief failed to explain exactly how the trial court misapplied the actual malice standard in this case; furthermore, the trial court's questions during the summary judgment proceeding indicated a proper application of the standard. At any rate, plaintiff forecasted sufficient evidence of actual malice to survive the summary judgment motion, including evidence that defendant knew that the murder charge against plaintiff had been dismissed in exchange for plaintiff's agreement to plead guilty to the unrelated burglary charges.

Appeal by Defendant from order entered 27 August 2024 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 August 2025.

Law Office of Habekah B. Cannon, PLLC, by Habekah B. Cannon, for Plaintiff-Appellee.

Poyner Spruill LLP, by J. Nicholas Ellis and Sydney P. Davis, for Defendant-Appellant.

COLLINS, Judge.

This appeal arises out of a defamation lawsuit instituted by Plaintiff Alan Ray Lucas against Defendant Virginia Bradley Childress. Defendant appeals from the trial court's interlocutory order denying her motion for summary judgment. Defendant argues that her appeal is properly before this Court because the trial court's order affects a substantial right and that the trial court erred in various ways by denying her motion for summary judgment. Because Defendant has failed to show that the interlocutory order denying her motion for summary judgment affects a substantial right, we dismiss Defendant's appeal.

I. Background

Defendant's father, John Roger Bradley, was killed in the early morning hours of 8 May 1992. On 30 July 1993, Plaintiff was arrested and charged with Bradley's murder, conspiracy to commit robbery with a dangerous weapon, and robbery with a dangerous weapon. A Wilson County grand jury later returned true bills of indictment against Plaintiff on those charges.

On 7 February 1995, Plaintiff pled guilty to four counts of second-degree burglary for events not related to Bradley's murder and was sentenced to 86 years' imprisonment. That same day, the charges against Plaintiff stemming from Bradley's murder were dismissed because he agreed to plead guilty to four counts of second-degree burglary and the "evidence in this case not strong enough to sustain a conviction."

Approximately twenty-seven years later, on or around 7 July 2022, Plaintiff was released on parole. That same day, *The Wilson Times* published an article on the Restoration NewsMedia website titled "Wilson man's killer released on parole after 30 years" that included the following statements made by Defendant:

> We have fought many years to keep [Plaintiff] in prison for his role in Dad's murder.
>
> . . . .
>
> Even though he is being paroled to another county, hours away from Wilson, we still must live with the fact that he is out there . . . enjoying life's milestones like weddings, births and birthdays. There is that chance that one day, I could sit down in a restaurant, walk down an aisle in a store, look next to me at a stop light and I could be looking into the eyes of the man that took away my father's life. (ellipses in original).

The same article, entitled "Murder convict paroled," was published on the front page of *The Wilson Times* on 8 July 2022. The article was retracted and corrected, and an apology was issued, on 23 November 2022.

Plaintiff commenced this action by filing a complaint on 20 June 2023 against Defendant, *The Wilson Times* reporter Janelle Clevinger, and Restoration NewsMedia LLC. In the complaint, Plaintiff alleges "defamation libel per se" and "malice." Clevinger and Restoration NewsMedia filed a motion to dismiss pursuant to North Carolina Rules of Civil Procedure 12(b)(2), (4), and (5). Defendant filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). The trial court granted Clevinger and Restoration NewsMedia's motion to dismiss for issues related to improper service; the trial court denied Defendant's motion to dismiss.

Defendant filed her answer and affirmative defenses, and on 10 July 2024, Defendant filed a motion for summary judgment. After a hearing, the trial court entered a written order denying Defendant's motion for summary judgment. Defendant appeals.

II. Appellate Jurisdiction

Defendant appeals from an interlocutory order. "An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dept. of Transp. v. Page*, 119 N.C. App. 730, 733 (1995) (citation omitted). As a general rule, there is no right of immediate appeal from an interlocutory order. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379 (1994). "The reason for this rule is to prevent fragmentary, premature[,] and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Fraser v. Di Santi*, 75 N.C. App. 654, 655 (1985) (citation omitted).

However, a party may immediately appeal an interlocutory order under certain circumstances, including "when 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 (quotation marks and citations omitted). Such a determination "usually depends on the facts and circumstances of each case and the procedural context of the orders appealed from." *Estrada v. Jaques*, 70 N.C. App. 627, 642 (1984) (citation omitted).

The burden rests on the appellant to establish the deprivation of a substantial right as the basis for an interlocutory appeal. *Dailey v. Popma*, 191 N.C. App. 64, 68 (2008). Accordingly, the appellant must include in her opening brief a "statement of the grounds for appellate review" containing "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C. R. App. P. 28(b)(4); *see Beroth Oil Co. v. N.C. Dep't of Transp.*, 256 N.C. App. 401, 411 (2017) (emphasizing that an appellant generally "must present more than a bare assertion that the order affects a substantial right; they must demonstrate why the order affects a substantial right") (cleaned up).

In her Statement of the Grounds for Appellate Review, Defendant acknowledges that she appeals from an interlocutory order and correctly sets forth relevant law. This Court has held that "[a]n order implicating a party's First Amendment rights affects a substantial right." *Sherrill v. Amerada Hess Corp.*, 130 N.C. App. 711, 719 (1998) (citation omitted). We have also "recognized, when considering a motion for summary judgment, a misapplication of the actual malice standard could have a chilling effect on a defendant's right to free speech and implicates a substantial right." *Topping v. Meyers*, 270 N.C. App. 613, 617-18 (2020) (citation omitted).

Defendant then asserts, without supporting facts or argument, that "th[is] interlocutory appeal based on the misapplication of the actual malice standard is properly before this Court." This "bare assertion" fails to allege, much less demonstrate, *how* the trial court misapplied the actual malice standard in this case such that her First Amendment rights were implicated. *See Beroth Oil Co.*, 256 N.C. App. at 411. Defendant's statement thus fails "to support appellate review on the ground that the challenged order affects a substantial right." N.C. R. App. P. 28(b)(4).

Although "[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order," *Jeffreys*, 115 N.C. App. at 380 (citation omitted), we looked in the body of Defendant's brief for support for her argument that the trial court misapplied the actual malice standard; we found none.

"[T]o recover for defamation, a plaintiff generally must show that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Desmond v. News & Observer Publ'g Co.*, 375 N.C. 21, 37 (2020) (quotation marks and citation omitted). In certain circumstances, the First Amendment requires the plaintiff to present clear and convincing proof of actual malice. *Gaunt v. Pittaway*, 139 N.C. App. 778, 785 (2000). To show that a statement was made with "actual malice," a plaintiff must show the statement was made " 'with knowledge that it was false or with reckless disregard of whether it was false or not.' " *Desmond*, 375 N.C. at 42 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

Defendant asserts here, "[I]nstead of applying the standard for actual malice, the trial court asked whether Plaintiff 'ple[]d guilty to charges – what charges led to his incarceration?' " Defendant contends that "the issue of what charges Plaintiff ultimately pled guilty to bears no connection to whether Defendant" acted with actual malice.

Even assuming without deciding here that Plaintiff is required to show actual malice, the trial court's questions do not indicate a misapplication of the actual malice standard; quite the opposite. The questions probed whether there was a genuine issue of material fact that Defendant's statements were made with knowledge that they were false or with reckless disregard of whether they were false. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2024) (A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" and that the party "is entitled to a judgment as a matter of law.").

Furthermore, Plaintiff's forecast of evidence of actual malice, viewed in the light most favorable to her and drawing all reasonable inferences in her favor, was sufficient to survive Defendant's summary judgment motion. *See Cummings v. Carroll*, 379 N.C. 347, 358 (2021); *see also* N.C. Gen. Stat. § 1A-1, Rule 56(e) (2025). Plaintiff was indicted on charges of murder and other crimes stemming from Bradley's murder; however, those charges were dismissed because Plaintiff pled guilty to second-degree burglary stemming from events unrelated to Bradley's murder and the "evidence in this case [was] not strong enough to sustain a conviction." Defendant averred that she "was apprised of, and actively involved in [her] father's homicide investigation" and that in 1994, the State's district attorney called her personally to inform her that Plaintiff had accepted a plea bargain.

In a blog post published to the internet by Defendant in July 2012, Defendant detailed her efforts to keep Plaintiff from being admitted into a program designed to prepare inmates for possible parole. In the post, Defendant shared a letter she sent to the Parole Division opposing Plaintiff's admission into the program wherein she acknowledged that Plaintiff had "entered into a plea agreement to a slew of breaking and entering charges and the charges surrounding the involvement in [her] father's murder were either dismissed or consolidated for judgment." Despite this acknowledgment, the blog post continued to implicate Plaintiff in Bradley's murder. Defendant wrote, "I firmly believe that [Plaintiff], along with the other involved, do not have the right, nor [] should they have any opportunity to enjoy their freedom." She further expressed her feelings on Plaintiff's potential parole:

> I will be honest and admit the amount of rage, hurt, confusion, and emptiness all welled up inside of me at one time.
>
> . . .
>
> The justice system, in my humble opinion, gives the offenders more rights than the victims. . . . Imagine how you would feel if you had to find a way each year to convey why one or more of the 'men' that took your loved one away should stay in prison. Why can't the act of killing someone itself be enough?

Defendant also shared her joy at receiving notification from the Parole Division that Plaintiff had been denied entry into the program: "Well I guess I was successful in conveying the feelings and reasons this murderer shouldn't be released back into society. . . . [H]e was DENIED admittance into the program!!!"

Approximately ten years after publishing this blog post, Defendant made the statements at issue in this case to a reporter:

> We have fought many years to keep [Plaintiff] in prison for his role in Dad's murder.
>
> . . . .
>
> Even though he is being paroled to another county, hours away from Wilson, we still must live with the fact that he

> is out there . . . enjoying life's milestones like weddings, births and birthdays. There is that chance that one day, I could sit down in a restaurant, walk down an aisle in a store, look next to me at a stop light and I could be looking into the eyes of the man that took away my father's life. (ellipses in original).

Defendant has failed to show that the trial court applied the wrong standard to its inquiry into actual malice or that Plaintiff failed to "set forth specific facts showing that there is a genuine issue for trial," N.C. Gen. Stat. § 1A-1, Rule 56(e), regarding actual malice. Defendant has thus failed to show the trial court misapplied the actual malice standard at summary judgment, and Defendant therefore has failed to show that the order denying her summary judgement "affects a substantial right that would be lost without immediate review." *Dailey*, 191 N.C. App. at 67-68 (citation omitted). Accordingly, this interlocutory appeal is improperly before this Court. We thus are without jurisdiction to review the merits of this appeal.

III. Conclusion

For the foregoing reasons, Defendant's appeal from the interlocutory order denying her summary judgment is dismissed.

DISMISSED.

Judges ARROWOOD and FREEMAN concur.

CARMEN T. O'SULLIVAN, Petitioner
v.
HYDE COUNTY HEALTH DEPARTMENT
LUANA GIBBS HEALTH DIRECTOR, Respondent

No. COA25-47

Filed 15 October 2025

Administrative Law—petition for contested case—dismissal of career State employee—insufficient notice of appeal rights—petition dismissed without prejudice

After a career status employee (petitioner) filed a petition for a contested case hearing challenging her dismissal from employment with a county health department (respondent), the final decision from the Office of Administrative Hearings dismissing the petition without—rather than with—prejudice was affirmed, where the administrative law judge properly concluded that petitioner received insufficient notice of her right to appeal her dismissal. Specifically, respondent failed to comply with the notice requirements under N.C.G.S. § 126-35(a) (requiring written notice before dismissing a career State employee for just cause) where it sent petitioner a letter that neither specified what petitioner's appeal rights were nor explained the proper procedure and statutory 15-day deadline for taking appeal, but instead merely stated that petitioner had a right to appeal her dismissal and attached a copy of respondent's appeals policy.

Appeal by Respondent from final decision entered 2 October 2024 by Administrative Law Judge Michael C. Byrne in the Office of Administrative Hearings. Heard in the Court of Appeals 13 August 2025.

Cranfill Sumner LLP, by Benton L. Toups and Tammy L. Neil, for Respondent-Appellant.

No brief filed on behalf of Carmen T. O'Sullivan for Pro Se Plaintiff-Appellee.

COLLINS, Judge.

Respondent Hyde County Health Department Luana Gibbs appeal from a final decision of the Office of Administrative Hearings dismissing without prejudice Petitioner Carmen T. O'Sullivan's petition for a contested case hearing challenging her dismissal from employment with the Health Department. Respondent contends that the Administrative Law Judge erred by concluding that Respondent provided Petitioner insufficient notice of her appeal rights. We affirm the final decision.

I. Background

Petitioner was employed by the Health Department as a "career status employee," as defined by N.C. Gen. Stat. §§ 126–1.1, 126–5(a)(2)c. On 6 August 2024, Respondent dismissed Petitioner from her employment with the Department for "unacceptable personal conduct," as defined by 25 NCAC 01I.2304(b). Respondent gave Petitioner a dismissal letter explaining the specific reasons for her dismissal and the effective date of dismissal, and also stating the following: "As an employee with career status, you have the right to appeal this decision. Attached is a copy of the Hyde County Health Department's Appeals Policy."

Attached to the dismissal letter was a copy of the Health Department's three-page appeals policy, in accordance with 25 NCAC 01I.2304(d). The policy included an explanation of a two-step appeals process for career status employees — first to the Department Director and then to the Office of Administrative Hearings ("OAH") — and the time limits for each step. Petitioner did not appeal her dismissal to the Department Director and, instead, filed a petition for a contested case hearing with the OAH on 23 August 2024.

On 2 October 2024, the Administrative Law Judge ("ALJ") issued a final decision dismissing Petitioner's petition without prejudice. The ALJ concluded that "Respondent failed to give Petitioner legally sufficient notice of her applicable appeal rights in the dismissal letter . . . ." Accordingly, the ALJ concluded that "Petitioner's claims must be dismissed **without prejudice** pending completion of the internal grievance policy."

Respondent appeals.

II. Discussion

Respondent contends that the ALJ erred in dismissing Petitioner's petition without prejudice because the dismissal letter and attached Appeals Policy satisfied the notice requirement in N.C. Gen. Stat. § 126-35(a). Because the time for Petitioner to appeal to the Department Director had expired, Respondent argues that Petitioner's petition for a contested case hearing must be dismissed with prejudice. We disagree.

N.C. Gen. Stat. § 126-35(a) establishes conditions that must be satisfied before disciplinary action is taken against a career State employee.

Emp. Sec. Comm'n v. Wells, 50 N.C. App. 389, 392 (1981). Pursuant to that statute, before a career State employee may be disciplined or dismissed for just cause, the employee must "be furnished with a statement in writing setting forth the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights." N.C. Gen. Stat. § 126-35(a) (2024). The employee has "15 days from the date the statement is delivered to appeal to the head of the agency through the agency grievance procedure for a final agency decision." *Id.*

In *Leiphart v. North Carolina School of Arts*, this Court addressed whether a dismissal letter given to the petitioner met the requirement of N.C. Gen. Stat. § 126-35 "that the employee be furnished with a written statement setting forth his appeal rights." 80 N.C. App. 339, 352 (1986). There, the dismissal letter stated: "You may choose to appeal this decision within 30 days in writing to the State Personnel Office, Employee Relations Division." *Id.* In addition, the letter was accompanied by a copy of the school's grievance procedure. *Id.* We held that the dismissal letter "adequately informed" the petitioner of his appeal rights and thus "complied with all the requirements" of N.C. Gen. Stat. § 126-35. *Id.*

Here, the dismissal letter stated only, "As an employee with career status, you have the right to appeal this decision. Attached is a copy of the Hyde County Health Department's Appeals Policy." Attached to the letter was a copy of Respondent's appeals policy. Unlike the letter in *Liephart*, the letter here failed to notify Petitioner of her "appeal rights" under N.C. Gen. Stat. § 126-35(a) – the right, the procedure, and the time limit to appeal. The purpose of the written statement required by section 126-35(a) is to "advise [the employee] of his rights to appeal the disciplinary action." *Luck v. Emp. Sec. Comm'n*, 50 N.C. App. 192, 194 (1980). Obscuring this information in an attached policy document, as happened here, fails to implement the legislature's intent. Thus, unlike the letter in *Leiphart*, the letter here failed to adequately inform Petitioner of her appeal rights and therefore failed to comply with all the requirements of N.C. Gen. Stat. § 126-35.

Accordingly, the ALJ did not err by dismissing Petitioner's petition without prejudice.

III. Conclusion

For the reasons above, we affirm the final decision.

AFFIRMED.

Chief Judge DILLON and Judge WOOD concur.

JAMES HOWARD PELC, Plaintiff
v.
MONICA ELIZABETH PHAM, Defendant

No. COA25-27

Filed 15 October 2025

1. Contempt—civil—contractual damages—money judgments enforced by execution—lack of subject matter jurisdiction

In a proceeding arising from the dissolution of the parties' marriage, the trial court's order finding plaintiff in civil contempt for his failure to pay defendant contractual damages pursuant to a 2023 order—monetary damages pursuant to a United States Citizenship and Immigration Services Form I-864 Affidavit of Support, equitable damages for plaintiff's failure to repay a loan, and attorney's fees incurred pursuing defendant's claims—was vacated for lack of subject matter jurisdiction because the proper avenue for recouping money judgments is generally an execution proceeding pursuant to N.C.G.S. § 1-302.

2. Appeal and Error—preservation of issues—challenge to interest calculations by trial court—impermissible collateral attack

In a proceeding arising from the dissolution of the parties' marriage, plaintiff's argument that the interest owed on defendant's unjust enrichment claim was improperly calculated was an impermissible collateral attack on an order from which no appeal was taken, and accordingly, the argument was dismissed.

Appeal by defendant from judgment entered 4 April 2024 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 24 September 2025.

Sodoma Law, PC, by Amy Elizabeth Simpson, for the plaintiff-appellant.

Thurman, Wilson, Boutwell & Galvin, P.A., by John D. Boutwell, for the defendant-appellee.

TYSON, Judge.

James Howard Pelc ("Father") appeals from order entered on 4 April 2024, which found him to be in civil contempt for failure to pay Monica

Elizabeth Pham ("Mother") pursuant to a 3 May 2023 order entered on remand. We vacate the trial court's order and remand.

I. Background

This cause returns to this Court following a hearing on remand. *Pelc v. Pham* ("*Pelc I*"), 287 N.C. App. 427, 883 S.E.2d 634 (2023). Mother seeks to enforce and collect on an order entered on 7 June 2021, which awarded her monetary damages pursuant to a United States Citizenship and Immigration Services ("USCIS") Form I-864 Affidavit of Support, equitable damages for Father's failure to repay a loan, and attorney's fees incurred for Mother's Affidavit of Support claims. Although this case has many common elements normally present in a domestic case and much of the terminology is common to the terminology that often appears in domestic cases, the issue presented is one of breach of contract, specifically the process by which one may collect on a money judgement resulting from a breach of contract.

The facts and procedural history are set forth in this Court's prior opinion regarding Father's appeal of that order:

> Father and Mother began a romantic relationship in Perth, Australia, and began cohabitating in 2007. The relationship evolved into a "de facto relationship" per Australian law, which is analogous to a common-law marriage. Mother and Father are parents of one minor son born on 26 June 2009. The parties resided in Australia until 2014, when they moved to the United States (U.S.).
>
> Father holds dual citizenship in the U.S. and Australia. Mother holds dual citizenship in Australia and New Zealand. Their son is a U.S. and Australian citizen because Father is a U.S. citizen. At the time of trial, Father was 62 years old, and Mother was 50 years old.
>
> Father desired to return to the U.S. in 2014 to be closer to his aging parents. Mother was reluctant, but she agreed to move "on a trial basis" to determine whether she would enjoy living in the U.S. Mother was required to obtain a Fiancée Visa prior to immigrating and entering the U.S. Mother and Father completed and signed a USCIS Form I-134, entitled "Intent to Marry," and confirmed their intent to marry within ninety days upon entry into the U.S. Mother and Father married on 21 July 2014 in the U.S.
>
> For Mother to remain in the U.S., Father also signed and submitted a USCIS Form I-864, titled an "Affidavit

of Support," on 7 August 2014. The Affidavit of Support allows the "intending immigrant [to] establish that he or she is not inadmissible to the United States as an alien likely to become a public charge" by requiring the future spouse to promise to financially support the alien.

The trial court found Father "represented that he was not working but had assets and income from his property from which to support [M]other" on the USCIS Form I-864. Father signed the USCIS Form I-864 Affidavit of Support, promising to maintain his alien wife, an Australian/New Zealand citizen, for her to lawfully remain in the United States for permanent residence.

The parties resided together in the U.S. with the minor son until they separated on 4 November 2016. Father failed to pay any support to Mother after the parties separated.

From November 2016 until April 2017, the parties "nested" with the minor son, meaning "Mother and Father would alternate weeks living in Father's residence with the minor child." The parties eventually stopped "nesting" with their son. The parties have maintained separate households since April 2017.

Neither Mother nor Father were employed for 2014 through 2017. Father has not maintained traditional employment since February 2014. Mother resigned from her job in Australia when she moved to the U.S., per Father's request. Mother, however, later secured a part-time employment during 2018 and a full-time position in 2019.

Prior to moving to the U.S., Father identified various properties located in different geographic areas. He intended to use one as the family home, and another to be used as a rental property to generate income. In May 2013, Father purchased residential property located in Charlotte. He also purchased property located in Suwanee, Georgia, in August 2013, which he hoped to rent.

Prior to closing on the property in Suwanee, Mother offered funds to Father to avoid financing the property through a traditional loan and borrowing from a lender. Mother was to receive equity in the home for her investment, or alternatively, Father promised to re-pay Mother the interest she was obligated to pay on her o[w]n separate line of credit. Mother provided $110,000 Australian dollars ("AUD") to Father in two transactions on 11 and 12 June 2013, which Father subsequently transferred to a U.S. bank account and, upon conversion, received currency proceeds of $104,099 U.S. Dollars ("USD"). Father used those funds to partially purchase the property in Suwanee.

The trial court found that Mother "trusted Father" because of their personal relationship, and Mother considered the transaction as a "loan to Father and not a gift." The trial court also found Mother had relied upon Father's promises to re-pay the funds loaned from her line of credit and her reliance was reasonable.

Father paid Mother $4,071 towards the loan proceeds in 2013 and part of 2014, which amount equaled the interest accruing on Mother's line of credit. Father subsequently stopped paying Mother in 2014. In one of Father's responses to a motion before the trial, he "admitted that Mother had loaned him the money, admitted that he had paid for a time on the loan, and admitted that it had not been paid in full." Father sold the Suwanee property for a profit in 2018. Father did not re-pay Mother any of the proceeds from the sale nor make any additional payments on the loan.

Following the dissolution of Mother's and Father's relationship in late 2016, Father initiated this litigation after Mother had threatened to take their minor son back to Australia. He sought permanent child custody, temporary emergency custody, and, in the alternative, a motion for temporary parenting arrangement. The litigation has sadly proceeded in a protracted, expensive, contentious, and a highly-conflicted manner since it began.

Mother counterclaimed for a decree of divorce, child custody, child support, attorney's fees, recovery of personal property, monetary damages resulting from breach of contract for support, specific performance of the contract for support, equitable distribution, interim allocation, postseparation support, alimony, unjust enrichment, constructive trust, and resulting trust.

Mother voluntarily dismissed her post-separation support, alimony, and temporary and permanent child

> support claims without prejudice when trial began. The remaining claims were tried between 9-11 December 2019. No written order was entered until eighteen months later on 7 June 2021.
>
> The trial court found and concluded: (1) Father owed Mother damages for failing to meet his contractual obligation under the USCIS Form I-864 Affidavit of Support; (2) Mother's claim for *quantum meruit*/unjust enrichment should be granted for the funds Mother provided to finance the purchase of the Georgia rental home and awarded Mother $100,028 USD, the converted amount of the funds minus the payments Father made in 2013 and 2014, together with $33,697.10 USD in interest; (3) Mother's claim for attorney's fees arising out of the Affidavit of Support should be allowed in the amount of $20,000 USD; and, (4) both Mother and Father's claims for attorney's fees related to the child custody agreement should be denied.

Pelc I, 287 N.C. App. at 430-33, 883 S.E.2d at 637-38.

In *Pelc I*, this Court affirmed in part, reversed in part, and remanded the matter to the trial court. *Id.* at 430, 883 S.E.2d at 637. On remand, the trial court was instructed to "correct and convert Mother's equitable award from the loan amount" from U.S. Dollars into Australian Dollars, in accordance with N.C. Gen. Stat. § 1C-1823(b) (2023). *Id.* at 448, 883 S.E.2d at 648. The trial court was also instructed to recalculate the damages owed to Mother arising from the Affidavit of Support using the 125% of FPL Guidelines for a one-person household instead of those attributable to a two-person household. *Id.* at 447, 883 S.E.2d at 647-48.

The trial court held a hearing and entered its Order and Judgment from Remand Hearing on 3 May 2023. The order recalculated the amount of damages owed to Mother pursuant to the Affidavit of Support and her unjust enrichment claims and provided: "This Consent Order and Judgment shall be enforceable by the full contempt powers of this Court." Although the court referred to the order as a "Consent Order," it was only signed by the judge, and not the parties. There are also no findings indicating the parties had reached an agreement and requested the Court to enter an agreement they had reached as an order. This appears to be a mis-statement by the Court, as nothing in the record supports this order having been derived from a consent agreement of the parties.

Sixteen days later, the trial court entered a separate order awarding reasonable attorney's fees to Mother. Both orders provided Father was to pay Mother within thirty days from the entry of the order.

Father did not pay Mother any of the money he was required to pay her. Mother filed a Motion for Contempt on 19 July 2023. The trial court issued a Show Cause Order on 21 December 2023, which notified Father a hearing would be held on 23 January 2024.

Father filed a Motion to Claim Exempt Property pursuant to N.C. Gen. Stat. §§ 1C-1601 and -1603 (2023). Father argued certain subsections of N.C. Gen. Stat. § 1C-1601 shielded portions of his house, motor vehicle, household furnishings, and his Australian Government Employees Superannuation Board ("GESB") account from being used to satisfy the damages owed to Mother. Mother objected to Father's exemption.

A second Show Cause Order was filed on 29 January 2024, and a hearing was held on 6 March 2024. An Order of Civil Contempt was entered against Father on 4 April 2024. The trial court made the following findings of fact:

> 24. Plaintiff argued that he had certain property (for example, his house and his retirement account) that should be exempt from execution and/or exempt from consideration of his ability to pay. Defendant argued that this was a contempt proceeding and not a proceeding to execute on or seek a writ of execution on Plaintiff's property, that currently there is not a pending proceeding for a writ of execution under Chapter 1C of the North Carolina General Statutes, and that the contempt statute and contempt case law do not restrict the Court from considering all of Platiniff's income and assets in determining whether Plaintiff has the ability to comply with the Court's Orders.
>
> 25. The Court finds that Plaintiff's Motion to Claim Exempt Property as it pertains to this contempt proceeding should be denied.
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> . . . .
>
> 41. As a result, Plaintiff has a current net estate of $473,600.00 in US Dollars.
>
> 42. As of March 6, 2024, Plaintiff owes the following amounts to Defendant:

> (a) Affidavit of Support: $34,421.59 in US dollars principal plus interest
>
> (b) Attorney Fees: $32,000.00 in US dollars
>
> (c) Unjust Enrichment: $168,652.08 in AUD principal plus interest.
>
> 43. If Plaintiff were to pay Defendant what he owes her, he would still have several hundred thousand dollars left over in his estate.
>
> . . . .
>
> 47. In spite of having the ability to pay Defendant from his GESB, he has willfully refused to do so.
>
> 48. Plaintiff's failure and refusal to abide by the terms of the Orders or to take reasonable measures to do so has been willful and without legal justification or excuse.

The trial court ordered Father to ninety days of imprisonment unless he "purge[d] himself of contempt by making full payment of all amounts" set forth in the Order from Remand and Order on Attorney's Fees.

Father appealed the Contempt Order on 6 May 2024. A second Show Cause Order was filed on 22 May 2024, which scheduled a hearing for 28 May 2024. A second contempt hearing was held, and Father was recommitted to an additional ninety days in prison unless he purged himself of contempt.

Father filed a Petition for Writ of *Supersedeas* and Motion for Temporary Stay before this Court on 18 June 2024. This Court allowed Father's motion on 27 June 2024 and stayed the contempt orders.

II. Jurisdiction

"The appeal of any contempt order . . . affects a substantial right and is therefore immediately appealable." *Guerrier v. Guerrier*, 155 N.C. App. 154, 158, 574 S.E.2d 69, 71 (2002).

III. Issues

Father argues several issues on appeal. He asserts the trial court erred by using a contempt proceeding, instead of an execution proceeding, to enforce its order, in violation of N.C. Gen. Stat. § 1-302 (2023). He further argues the trial court improperly considered certain assets when calculating his ability to pay, arguing those assets would have been exempt property in an execution proceeding. He also asserts the trial court's contempt order is not supported by competent evidence, because he does not have the ability to pay.

Lastly, Father argues the trial court's Order and Judgment from Remand Hearing, which was entered nearly one year before the Contempt Order, erroneously calculated the damages Father owes to Mother.

IV. Trial Court's Jurisdiction to Hold Father in Contempt

[1] Father argues "the trial court has 'blended' for lack of a better word, the remedies associated with both a judgment and order, without legal authority." He asserts enforcement of money judgments are generally governed by execution pursuant to N.C. Gen. Stat. § 1-302 (2023).

A. Standard of Review

"Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). "The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986).

" '[I]t is a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver, or estoppel.' " *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961) (quoting *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 88, 92 S.E.2d 673, 676 (1956)), *appeal dismissed and cert. denied*, 371 U.S. 22, 9 L. Ed. 2d 96 (1962). The record is devoid of evidence to indicate this order was an order entered as a result of an agreement by the parties.

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

B. Analysis

"Where a judgment requires the payment of money or the delivery of real or personal property it may be enforced in those respects by execution[.]" N.C. Gen. Stat. § 1-302 (2023). "[I]t has long been the general rule that 'judgment fixes the amount due, and execution—not contempt proceedings—issues if not paid.' " *Brown v. Brown*, 171 N.C. App. 358, 361, 615 S.E.2d 39, 41 (2005) (quoting *Hildebrand v. Vanderbilt*, 147 N.C. 639, 642, 61 S.E. 620, 621 (1908)).

In *Brown*, this Court explained trial courts have an express statutory basis under N.C. Gen. Stat. § 50-13.4(f) (2023) to "enforce[e] judgments for child support arrearage by contempt proceedings, under specified conditions[.]" *Id.* Because the trial court did not comply with those statutory conditions, the judgment was not enforceable by contempt. *Id.* at 362, 615 S.E.2d at 41. The trial court's award was vacated because the order was "not enforceable by contempt, and the trial court did not have jurisdiction to enter an order finding defendant in contempt." *Id.*

Imposition of contempt is also not the proper procedure and remedy to enforce a judgment entered with the consent of the parties, because a consent judgment is nothing more than an agreement and contract between parties. *See Ibele v. Tate*, 163 N.C. App. 779, 782, 594 S.E.2d 793, 795 (2004) ("As the consent order in this case essentially represents a contract between the parties, the court has no authority to exercise its inherent contempt power, and the parties have no right to grant or accept a power held only by the judiciary, which includes the potential for imprisonment.").

Here, as Defendant correctly argued, execution proceedings with statutory and lawful exemptions, not contempt proceedings, were the proper avenue for recouping damages owed to Mother under the judgment. *Hildebrand*, 147 N.C. at 642, 61 S.E. at 62.

Mother was not seeking child support arrearages from Father, but contractual damages owed to her from unjust enrichment claims and from Affidavit of Support claims, both of which are based in contract law. *See Pelc I*, 287 N.C. App. at 437, 442, 883 S.E.2d at 641, 644. As was held in *Brown* and *Ibele*, the trial court had no power to exercise its contempt power, and the contempt orders are vacated. *Brown*, 171 N.C. App. at 361-62, 615 S.E.2d at 41; *Ibele*, 163 N.C. App. at 782, 594 S.E.2d at 795. Mother is permitted to bring execution proceedings to recover the damages and fees owed to her from Father without prejudice. Because the trial court's contempt order is vacated, Father's remaining arguments about whether competent evidence existed to support its findings are moot.

V. Collateral Attack

[2] Father argues the interest owed for Mother's unjust enrichment claims in the 3 May 2023 order was improperly calculated. Father's argument and challenge is a collateral attack on an earlier order not before us on appeal and is without merit.

"A collateral attack is one in which a party is not entitled to the relief requested 'unless the judgment in another action is adjudicated invalid.' " *In re Webber*, 201 N.C. App. 212, 219, 689 S.E.2d 468, 474 (2009) (quoting *Clayton v. N.C. State Bar*, 168 N.C. App. 717, 719, 608 S.E.2d 821, 822 (2005) (citation and quotation marks omitted)). " 'A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it.' " *Id.* (quoting *Reg'l Acceptance Corp. v. Old Republic Sur. Co.*, 156 N.C. App. 680, 682, 577 S.E.2d 391, 392 (2003) (citation and quotation marks omitted)). "Collateral attacks generally are not permitted under North Carolina law." *Id.* (citation omitted).

Father had the opportunity to appeal the 3 May 2023 order outlining the amount he owed to Mother and any interest calculations thereon, but he failed to do so. Nearly one year after the entry of the 3 May 2023 order, Father appealed the trial court's 4 April 2024 contempt order. Father's argument acknowledges the validity of the 3 May 2023 order, as his arguments have largely centered on the trial court's inability to enforce the judgment through its contempt powers versus through execution. Father's arguments about the trial court's interest calculations in an un-appealed, final order are an impermissible collateral attack. *In re Webber*, 201 N.C. App. at 219, 689 S.E.2d at 474. We overrule and dismiss this argument.

VI. Conclusion

The trial court had no jurisdiction to exercise its contempt power to compel compliance with a money judgment arising from a general breach of contract. The breach of contract issue was and is wholly separate from any domestic relations orders the court may have entered. The Court lacked authority to enter the contempt order, and the contempt order is vacated. *Brown*, 171 N.C. App. at 361-62, 615 S.E.2d at 41; *Ibele*, 163 N.C. App. at 782, 594 S.E.2d at 795. Mother is free to bring forth execution proceedings, subject to Defendant's statutory and lawful exemptions, to enforce the trial court's 3 May 2023 judgment without prejudice. Father's remaining arguments are moot or are an impermissible collateral attack and are dismissed. *In re Webber*, 201 N.C. App. at 219, 689 S.E.2d at 474. The order appealed from is vacated and remanded for further proceedings. *It is so ordered.*

VACATED AND REMANDED.

Judges CARPENTER and STADING concur.

STATE OF NORTH CAROLINA
v.
JACK HOWARD HOLLARS

No. COA24-929

Filed 15 October 2025

1. Criminal Law—competency to stand trial—possibility for meaningful retroactive competency hearing—no abuse of discretion

In a prosecution that resulted in defendant's conviction on numerous sex offense charges—where the matter was remanded for consideration of whether a meaningful retrospective determination of defendant's competency to stand trial was possible and, if so, whether defendant had been competent to stand trial some five years before—the trial court did not abuse its discretion in concluding that it was possible to hold a meaningful retrospective competency hearing. The trial court's findings of fact supported its conclusion that, despite the passage of time, there was ample contemporaneous evidence, including testimony from medical professionals who had personally evaluated defendant before his trial, upon which the court could base its retroactive competency determination.

2. Criminal Law—competency to stand trial—retroactive competency determination—no error

In a prosecution that resulted in defendant's conviction on numerous sex offense charges—where the matter was remanded for consideration of whether a meaningful retrospective determination of defendant's competency to stand trial was possible and, if so, whether defendant had been competent to stand trial some five years before—after concluding that it could hold a meaningful retrospective competency hearing, the trial court did so and made findings of fact (including that two experts found defendant competent six months before his trial and that defendant consistently took his antipsychotic medication from that point until his trial) which were supported by evidence and which, in turn, supported the court's determination that defendant had been competent to stand trial.

Appeal by Defendant from Order entered 14 September 2023 by Judge Gary M. Gavenus in Watauga County Superior Court. Heard in the Court of Appeals 26 August 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Kristin Cook McCrary, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Jack Howard Hollars (Defendant) appeals from an Order entered pursuant to a Retrospective Competency Hearing concluding he was competent to stand trial on 8 January 2018. The Record before us tends to reflect the following:

On 4 May 2015, Defendant was indicted on three counts of Taking Indecent Liberties with a Child and three counts of Second-Degree Sexual Offense. Between his arrest and trial, Defendant underwent at least six forensic psychiatric evaluations relating to his competency to stand trial, which are detailed at length in *State v. Hollars*, 266 N.C. App. 534, 833 S.E.2d 5 (2019), *aff'd*, 376 N.C. 432, 852 S.E.2d 135 (2020).

On 8 January 2018, the first day of trial, defense counsel raised concerns about Defendant's competency, but the trial court did not conduct a competency hearing. *Hollars*, 266 N.C. App. at 539, 833 S.E.2d at 8. The following morning, when questioned by the trial court, defense counsel indicated he no longer held concerns about Defendant's competency. *Id.* at 39-40, 833 S.E.2d at 8-9. Neither the trial court nor defense counsel raised the issue of Defendant's competency again during the trial. *Id.* at 540, 833 S.E.2d at 9. On 12 January 2018, the jury returned verdicts finding Defendant guilty on all charges. Defendant appealed.

On appeal, this Court concluded the trial court erred by failing to *sua sponte* conduct a competency hearing immediately before or during trial. *Id.* at 543, 833 S.E.2d at 11. As such, we remanded the case for a hearing to determine whether a meaningful retrospective determination of Defendant's competency was possible and, if so, whether Defendant was competent to stand trial on 8 January 2018. *Id.* at 544, 833 S.E.2d at 11. The State appealed the decision to our Supreme Court, which affirmed. *See State v. Hollars*, 376 N.C. 432, 852 S.E.2d 135 (2020).

On remand, the trial court conducted hearings on 12 and 13 July 2023 to determine whether a retrospective competency hearing could be held and, if so, to determine whether Defendant was competent at the time of trial in January 2018. The evidence admitted at the hearing included Defendant's medical records, testimony from physicians who had evaluated Defendant, and testimony from the attorneys and the presiding judge in the 2018 trial.

The medical records included reports on the last two evaluations Defendant underwent prior to trial: 28 June and 15 August 2017. Defendant was evaluated by Dr. James Bellard, an independent psychiatrist, on 28 June 2017; in the resulting report, Dr. Bellard opined he believed Defendant was not presently competent to stand trial. Defendant was last evaluated on 15 August 2017 by Dr. David Bartholomew and Dr. Reem Utterback of Central Regional Hospital "[i]n anticipation of" trial; both the doctors believed Defendant was capable of proceeding.

Based on the evidence, the trial court concluded a meaningful retrospective competency hearing was possible and further concluded Defendant had been competent to stand trial in January 2018. The resulting Order was entered on 14 September 2023. In the Order, the trial court emphasized the "medical evidence" from the time period between Defendant's final forensic evaluation in August 2017 and the January 2018 trial. The trial court did not expressly mention the results of Dr. Bellard's 28 June 2017 evaluation. On 20 September 2023, Defendant timely filed Notice of Appeal.

Issues

The issues on appeal are whether the trial court: (I) abused its discretion in concluding it was possible to hold a meaningful retrospective competency hearing; and (II) erred in concluding Defendant was competent at the time of the 8 January 2018 trial.

Analysis

I. Retrospective Competency Hearing

[1] Defendant argues the trial court erred by "failing to incorporate into its analysis that Dr. Bellard found [Defendant] incompetent on June 28, 2017[.]" Defendant contends this alleged error "require[s] a new hearing on whether a retrospective competency hearing is possible, and if so, [a new hearing on] whether [Defendant] was competent at trial."

"The trial court is in the best position to determine whether it can make such a retrospective determination of [a] defendant's competency. Thus, if the trial court concludes that a retrospective determination is still possible, a competency hearing will be held, and if the conclusion is that the defendant was competent, no new trial will be required." *State v. McRae*, 139 N.C. App. 387, 392, 533 S.E.2d 557, 560-61 (2000) (*McRae I*). "If the trial court determines that a meaningful hearing is no longer possible, [the] defendant's conviction must be reversed and a new trial may be granted when he is competent to stand trial." *Id.* "[T]he trial court's conclusions as to whether a meaningful hearing can be held should be reviewed under an abuse of discretion standard as if making the determination before trial." *State v. McRae*, 163 N.C. App. 359, 368, 594 S.E.2d 71, 78 (2004) (citation omitted) (*McRae II*), *disc. review denied*, 358 N.C. 548, 599 S.E.2d 911 (2004).

Here, the trial court concluded a retrospective competency hearing "would be meaningful" under the circumstances. In support of this Conclusion, the trial court found:

> (1) The original trial of Defendant took place in January of 2018. The instant hearing took place in July of 2023. More than five years have passed since the original trial.
>
> (2) The evidence presented before the court included a recording of the last psychological examination before the 2018 trial, dated August 2017, which was played in open court. The Court also had before it witness testimony from Dr. Bellard, who conducted an evaluation of Defendant in 2015 and shortly before the 2017 competency hearing. Dr. Wolfe, expert witness for the State, testified that she had access to and reviewed medication administration records, treatment notes, and other psychological assessments from the time between the recorded psychological evaluation in August 2017, where Defendant was deemed competent, and the trial in 2018. This included treatment team notes from January 4th and January 6th, 2018, days before the trial began.
>
> (3) In addition to the contemporaneous medical evidence between the final psychological evaluation in August 2017 and the trial, the experts also had access to and reviewed the psychological evaluations of Dr. Bartholomew and additional evaluations conducted at Broughton Hospital. In particular, the forensic evaluations of Defendant as well as hospital progress notes dating back to 2013 develop a record of Defendant's illness. Defendant was under the care of the same psychiatrist since 2013, and Defendant's treatment team at Broughton Hospital was generally familiar with Defendant's disposition and illness.
>
> (4) The 2018 trial transcripts were also available for review by the experts and this Court. The Court heard testimony from Mr. Eller, defense counsel in the 2018 trial,

> Judge Coward, the judge presiding at the 2018 trial, and the Honorable Judge Rupp, the prosecuting attorney in the 2018 trial, all of whom had the opportunity to interact with or observe Defendant at the 2018 trial.

The trial court's Findings indicate, despite the passing of five years, there was ample contemporaneous medical evidence before the trial court upon which it could make a retrospective competency determination, as well as the testimony of medical professionals who had personally evaluated Defendant. *See McRae II*, 163 N.C. App. at 368, 594 S.E.2d at 78 (concluding trial court did not abuse its discretion in holding retrospective competency hearing where there were "numerous medical records leading up to three days before" trial as well as the testimony of the doctor who had last examined the defendant). Thus, the Findings support the trial court's Conclusion a meaningful retrospective competency hearing was possible. Therefore, the trial court did not abuse its discretion in proceeding with a retrospective competency hearing.

II. <u>Competency Determination</u>

[2] Pursuant to a retrospective competency hearing, "competency is determined under appropriate standards pursuant to N.C. Gen. Stat. § 15A-1001(a)[.]" *McRae II*, 163 N.C. App. at 367, 594 S.E.2d at 78. "It is defendant's burden of proof to show that he lacked the capacity to proceed." *Id.* at 367-68, 594 S.E.2d at 78 (citation omitted). "As for the ultimate issue of defendant's competency to stand trial, the court's findings of fact on this issue, if supported by 'competent evidence,' are then conclusive on appeal." *Id.* at 368, 594 S.E.2d at 78 (citing *State v. Willard*, 292 N.C. 567, 575, 234 S.E.2d 587, 592 (1977)).

Defendant argues the trial court erred in concluding he was competent to stand trial because the trial court "did not acknowledge in its order that [Defendant] was found incompetent by Dr. Bellard in June 2017." Defendant contends the trial court was required to "reconcile" the fact that Defendant had been found competent in August 2017 when taking 10 milligrams of Olanzapine[1] but was also found incompetent in June 2017 while on the same amount of medication.

"When the trial court . . . determines a defendant's capacity to proceed to trial, it is the [trial] court's duty to resolve conflicts in the evidence[.]" *State v. Heptinstall*, 309 N.C. 231, 234, 306 S.E.2d 109, 111 (1983) (citations omitted). "[W]here there is conflicting evidence, the failure of the trial court to make specific findings upon which to base its

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1. An antipsychotic medication.

conclusions is reversible error." *Mann Contractors, Inc. v. Flair with Goldsmith Consultants-II, Inc.*, 135 N.C. App. 772, 775, 522 S.E.2d 118, 121 (1999). Generally, however, "[t]he court is not required to find all facts supported by the evidence, but only sufficient material facts to support the judgment." *See Medlin v. Medlin*, 64 N.C. App. 600, 603, 307 S.E.2d 591, 593 (1983) (citations omitted). Further, "the [trial] court's findings of fact are conclusive on appeal if there is competent evidence to support them, even if there is also evidence to the contrary." *Heptinstall*, 309 N.C. at 234, 306 S.E.2d at 111 (citations omitted).

Here, we cannot discern a conflict in the evidence before us. The evidence is undisputed Defendant was found incompetent in June 2017 and then was subsequently found competent in August and September 2017. The ultimate question for the trial court was whether Defendant was competent to stand trial on 8 January 2018—and the trial court's Findings, which indicate the trial court's review of "the forensic evaluations of Defendant as well as hospital progress notes dating back to 2013[,]" are supported by competent evidence and, consequently, binding on appeal. *See id.* These Findings, in turn, support the trial court's Conclusion that Defendant was competent at the time of trial.

Moreover, Defendant's asserted conflict does not undermine the trial court's Conclusion that Defendant was competent. Presuming the trial court had made a finding acknowledging the results of the June 2017 forensic evaluation, the trial court's Findings regarding the August 2017 evaluation are, as explained, binding and support the trial court's Conclusion that Defendant was competent in January 2018. Thus, we are not convinced the trial court's alleged failure to make a finding acknowledging the results of the June 2017 evaluation was reversible error.

Defendant further argues the trial court erred in finding he was stable and there was no evidence of decompensation between the August 2017 evaluation and the time of trial. Specifically, the trial court found:

> (4) Defendant was consistently taking his medications during the time of the 2018 trial, under the supervision of his medical team. The medication dosage was the same as the dosage he was taking at the time of the August 2017 evaluation when he was deemed competent. The medical records reflect that Defendant was stable during the time period between the August 2017 evaluation and the 2018 trial.
>
> . . . .
>
> (1) . . . A plethora of medical evidence exists in the time period between the August 2017 evaluation and the January

> 2018 trial. There was no indication of a decompensation in the Broughton Hospital reports between August and January, and these reports were made by a team that was generally familiar with Defendant and his behaviors, both when he was competent and when he was not competent. Defendant's treatment team at the hospital briefly evaluated him just before the trial began, on January 4th and January 6th, 2018, and the team did not observe anything demonstrating a decompensation in Defendant's mental status. Further, records indicate that Defendant received his medication in the days leading up to trial . . . His medication regime did not change . . . .[2]

The Record shows Defendant was consistently taking his medication at the same dosage between August 2017 and January 2018. Additionally, Dr. Bellard testified Defendant's competency was "brittle" but also "relatively stable[.]" Likewise, Dr. Wolfe, expert witness for the State, described Defendant's medical records as showing Defendant "remained stable his last year at the hospital[.]" Thus, the trial court's Findings are supported by competent evidence and binding on appeal, even if there is evidence to the contrary. *See Heptinstall*, 309 N.C. at 234, 306 S.E.2d at 111 (citations omitted). This Finding, as well as the trial court's additional Findings, in turn, support the trial court's Conclusion that Defendant was competent on 8 January 2018. Therefore, the trial court did not err in concluding Defendant was competent to stand trial. Consequently, the trial court did not err in entering its Order.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Order.

AFFIRMED.

Judges TYSON and FLOOD concur.

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2. Defendant argues the trial court's Conclusion of Law (1) is actually a Finding of Fact. We believe it is more properly characterized as a mixed conclusion of law and fact. The portion of the trial court's "Conclusion" that consists of factual findings is reproduced here, and we review it as such. *See Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) ("The labels 'findings of fact' and 'conclusions of law' employed by the trial court in a written order do not determine the nature of our review." (citation omitted)); *Rolan v. N.C. Dep't of Agric. and Consumer Servs.*, 233 N.C. App. 371, 380, 756 S.E.2d 788, 794 (2014) (reviewing factual portions of a mixed finding of fact and conclusion of law under competent evidence standard).

STATE OF NORTH CAROLINA
v.
DEBRA STANLEY

No. COA25-158

Filed 15 October 2025

1. Constitutional Law—due process—competency to stand trial—sua sponte competency hearing—unnecessary

In a prosecution for possession of a controlled substance on jail premises and related charges, the trial court did not err in declining to order a competency hearing sua sponte where the record lacked substantial evidence indicating that defendant was mentally incompetent to stand trial. First, despite defendant's prior history of drug use and mental health issues, there was no evidence that she was under the influence of illegal drugs at the time of trial or that the purported side effects from her mental health medications hampered her ability to communicate with counsel or understand the trial proceedings. Further, despite defendant's "bizarre" statements and demeanor when declining to testify, her odd explanations for being absent at trial, and her choice to decline a plea offer against her counsel's advice, there was no evidence suggesting that she lacked the capacity to make informed and voluntary decisions about not testifying, waiving her right to be present at trial, and going against her counsel's recommendations.

2. Constitutional Law—due process—right to be present at trial—knowing and intentional waiver—competency hearing unnecessary

In a prosecution for possession of a controlled substance on jail premises and related charges, the trial court did not err by conducting defendant's trial in her absence without first holding a competency hearing sua sponte, since the record was devoid of substantial evidence indicating that defendant was mentally incompetent to stand trial or to voluntarily waive her constitutional right to be present at trial. In fact, the record showed that defendant missed portions of her trial despite the trial judge's warnings—given with defense counsel present—that proceedings would continue in her absence if she failed to appear, and despite her subsequent acknowledgement in open court that she had understood these warnings.

3. Sentencing—prior record level—calculation—clerical error

A judgment entered on defendant's convictions for multiple drug-related crimes and attainment of habitual felon status was vacated, and the matter was remanded for resentencing, where the State conceded a clerical error in the calculation of defendant's prior record level. Specifically, one of defendant's prior felony convictions was denoted as a Class G instead of a Class H, which resulted in defendant's prior record level totaling 14 points instead of 12 and, thus, in defendant being sentenced as a Level V offender instead of as a Level IV offender.

4. Drugs—possession of a controlled substance on jail premises —possession of methamphetamine—lesser-included offense

A criminal defendant was improperly convicted of both possession of a controlled substance on jail premises and possession of methamphetamine, where both counts stemmed from one continuous act of possession (specifically, she had methamphetamine on her person at the time she was strip-searched by a female jail deputy shortly after being taken to the jail for another crime), thereby making the latter charge a lesser-included offense of the former. Thus, the conviction for the lesser-included offense was vacated on appeal and the matter was remanded for resentencing.

Appeal by defendant from judgment entered 6 August 2024 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 24 September 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Victor A. Unnone III, for the State.

Michelle Abbott, for the defendant-appellant.

TYSON, Judge.

Deborah Stanley ("Defendant") appeals judgment entered on her 25 July 2024 convictions of possession of a controlled substance on jail premises; possession of methamphetamine; possession of drug paraphernalia; and, attaining Habitual Felon status. Defendant's charge of misdemeanor larceny was dismissed by the trial court at the close of the state's evidence. We discern no error at trial, vacate the conviction and judgment on the lesser-included offense of possession of methamphetamine, and remand for re-sentencing of Defendant on the remaining charges as a prior record level IV.

I. Background

Defendant was accused of stealing $71.48 worth of merchandise from a Walmart store in Smithfield on 15 March 2022. Johnston County

Sheriff's Deputy Stephen Lambert ("Deputy Lambert") investigated the possible larceny and placed Defendant under arrest. Deputy Lambert searched Defendant and discovered drug paraphernalia and a Xanax prescription located on her person. Defendant was placed inside of Deputy Lambert's patrol car and transported to jail.

While traveling to the jail, Deputy Lambert repeatedly asked Defendant if she had any other drugs or drug paraphernalia in her possession. She responded she did not possess any such items each time he asked. After arriving at the jail, Deputy Lambert located a small glass container in the front floor passenger area where Defendant was sitting. Defendant told Deputy Lambert the container was used to store her Xanax. Deputy Lambert suspected Defendant was being untruthful about having additional drug paraphernalia in her possession. He requested a female deputy to perform a strip search of her.

Sheriff's Lieutenant Jennifer Cook performed the search. A small container, with a crystal-like substance therein, fell out of Defendant's pants upon removal. Defendant attempted to hide the container with her foot and to cover it with her clothes. Defendant admitted the substance inside was methamphetamine. The substance was subsequently sent to the North Carolina State Crime Lab for testing, which confirmed the presence of methamphetamine.

Defendant was charged with misdemeanor larceny, possession of drug paraphernalia, possession of methamphetamine, possession of a controlled substance on jail premises, and having attained habitual felon status. Defendant was tried before a jury on these charges on 22 July 2024. The misdemeanor larceny charge was dismissed by the trial court at the close of the State's evidence.

Defendant was present when trial proceedings began, but she returned late following a break for lunch on the first day. The trial court warned Defendant the case would proceed in her absence if she was late again. Defendant acknowledged she understood the trial court's warnings, yet she failed to show up to court on time the second day of her trial. The court issued a warrant for Defendant's arrest.

Defendant arrived at court after the conclusion of the state's presentation of evidence and after defense counsel had rested, but prior to the beginning of closing arguments. Defendant informed the court her tardiness was due to being unable to locate supervision for her dog and asserted a disagreement had ensued between Defendant and her roommate. The trial court allowed Defendant the option to re-open her case if she wished to testify. After a lengthy colloquy with the judge and an extended conversation with her attorney, Defendant decided not to testify. Defendant was subsequently offered a plea bargain agreement by the State, which she declined.

Defendant was convicted of possession of methamphetamine, possession of a controlled substance on jail premises, possession of drug paraphernalia, and attaining habitual felon status. She was sentenced as a prior record level V offender with 14 points to an active term of between 96 months and 128 months of imprisonment. Defendant gave oral notice of appeal in open court and filed written notice of appeal on 9 August 2024.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Issues

Defendant argues four separate issues on appeal: (1) the trial court erred by failing to order a competency hearing *sua sponte*; (2) the trial court erred by conducting the trial in *absentia* without first determining whether Defendant was competent to stand trial; (3) she was improperly sentenced as a prior record level V offender, rather than a level IV; and, (4) the judgment entered for both possession of methamphetamine and possession of a controlled substance on premises of a local confinement facility was improper.

IV. Competency Hearing

[1] Defendant argues the trial court erred by failing *sua sponte* to order a competency hearing. Defendant claims substantial evidence existed, which should have triggered the trial court's obligation to inquire as to her capacity to proceed with standing trial under the Due Process Clause of the Fourteenth Amendment. We disagree.

A. Standard of Review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

B. Analysis

"[U]nder the Due Process Clause of the United States Constitution, '[a] criminal defendant may not be tried unless he is competent.' " *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (quoting *Godinez v. Moran*, 509 U.S. 389, 396, 125 L. Ed. 2d 321, 330 (1993)). A trial tribunal has a constitutional duty to conduct a competency hearing, *sua sponte*, "*if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *Badgett*, 361 N.C. at 259, 644 S.E.2d at 221 (emphasis supplied). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Flow*, 384 N.C. 528, 552, 886 S.E.2d 71, 88 (2023).

The determination of whether a defendant's competency is questionable is a "fact-intensive" issue for the trial tribunal and "will hinge on the unique circumstances presented in each case." *State v. Sides*, 376 N.C. 449, 466, 852 S.E.2d 170, 181 (2020). The standard for competence to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." *Godinez*, 509 U.S. at 396.

There are no "fixed" or "immutable" signs, which invariably indicate the need for a trial court *sua sponte* to conduct a competency inquiry. *State v. Allen*, 377 N.C. 169, 181, 856 S.E.2d 494, 503 (2021). "The mere existence of evidence tending to show . . . defendant has exhibited certain signs of mental disorder in the past or has engaged in what might be deemed unusual behavior during trial does not necessarily require the trial court to inquire into the defendant's competence . . . ." *Id.* at 182, 856 S.E.2d at 504.

1. Prior drug history and use of prescription medication

Defendant argues her prior drug use and her current mental health status established a *bona fide* doubt concerning her competency to stand trial. No evidence in the record tends to show Defendant was under the influence of illicit drugs at the time of trial. Any prior history of drug use is immaterial, as competency to stand trial is a temporal inquiry. *See State v. Chukwu*, 230 N.C. App. 553, 564, 749 S.E.2d 910, 918 (2013) (holding a *bona fide* doubt to competency did not exist simply because defendant was previously suffering from a mental state leaving her incompetent to stand trial).

Defendant's statements at trial regarding purported side effects from her mental health medications did not manifestly require further inquiry through a competency hearing. Physical symptoms during trial are insufficient grounds to determine a lack of competence to stand trial, unless such symptoms rise to a level that prevents a defendant from being able to communicate with counsel or to understand the proceeding at hand. *See State v. Bacon*, 326 N.C. 404, 416, 390 S.E.2d 327, 333-34 (1990). Even considering Defendant's reported medicinal side effects, no substantial evidence compelled the court to question her ability to communicate with counsel or understand the trial proceedings. *See Badgett*, 361 N.C. at 259, 644 S.E.2d at 221. In fact, when asked if her medications interfered with her ability to understand the charges and proceedings, Defendant stated, "I don't believe so."

2. Statement about testifying

Defendant asserts certain statements she made during trial regarding her desire to testify raised a *bona fide* doubt as to her competency to stand trial. When the trial court asked Defendant whether she wanted to testify, Defendant responded her "mental ain't up to it right now." She argues her answer and demeanor was so irrational and bizarre, the trial court should have initiated a formal competency hearing and determination.

None of Defendant's statements called into question her ability to understand the proceeding, to seek and participate with legal counsel, or to make an informed decision on her own behalf. The trial court allowed Defendant to re-open the evidence and gave her the ability to testify after her voluntary absence from the proceedings. The trial court directly addressed Defendant, allowed Defendant to consult with her attorney, permitted Defendant to arrange her personal affairs, and provided her with time to collect herself emotionally prior to deciding whether she would testify. After consulting with her attorney and engaging with the trial judge, Defendant opted not to testify. It is a defendant's right in a criminal trial to choose not to testify. *See State v. Grant*, 293 N.C. App. 457, 458-59, 900 S.E.2d 408, 410 (2024). The record fails to show Defendant lacked the competence to understand the implications of this informed and knowing decision.

3. Absence during trial

Defendant argues her absence and offered explanations, i.e., she was looking for someone to watch her dog and had argued with her roommate, were irrational enough to warrant a *sua sponte* inquiry into her competency. A defendant may waive her right to be present at trial, but only when she is competent to do so. *State v. Minyard*, 289 N.C. App. 436, 444, 890 S.E.2d 182, 188 (2023) (citing *Sides*, 376 N.C. at 456, 852 S.E.2d at 175).

If a trial court has substantial evidence a defendant is incompetent, it is obligated to inquire *sua sponte* to determine whether defendant had the requisite capacity to voluntarily waive her right to be present. *Minyard*, 289 N.C. App. at 444, 890 S.E.2d at 188-89 (" 'Once the trial court had *substantial evidence* that [the] defendant may have been incompetent, it should have sua sponte [sic] conducted a competency hearing to determine whether she had the capacity to voluntarily waive her right to be present during the remainder of her trial.' " (quoting *Sides*, 376 N.C. at 457, 852 S.E.2d at 176)). When there is no indication of incompetence and no observations by the court to prompt such an inquiry, a defendant is free to make the voluntary decision to "absent h[er]self from trial." *Id.* at 442-44, 890 S.E.2d at 188-89.

On the first day of trial, Defendant was warned the proceeding would continue in her absence if she failed to appear at trial again. Defendant acknowledged she understood the instructions in open court. Defendant's decision not to attend portions of her trial, and her personal reasons for doing so, were within her discretionary right. She was represented by counsel at all times, who was present in court. The trial court was not obligated to determine her competency to make such a decision, given there was no "substantial evidence" tending to show such an inquiry was required. *Id.* at 444, 890 S.E.2d at 188-89.

4. Rejection of Plea Offer

Defendant contends her decision to decline a plea offer, against the advice of counsel, was evidence of irrational behavior warranting an inquiry into her competency. Defendant argues her decision reflects a lack of comprehension due to repeated requests for probation, despite being informed by the trial court a probationary sentence was not legally available to her.

Despite Defendant's decision to decline the plea offer, against her counsel's advice, no evidence tends to show Defendant did not understand the ramifications of her decision. She displayed an unequivocal understanding of the judicial process by asking questions about her right to appeal and effectuated a conversation with her counsel about the decision. A defendant retains the right to act contrary to the advice of counsel. *See State v. Buchanan*, 330 N.C. 202, 207-08, 410 S.E.2d 832, 835 (1991) (referencing that even " 'when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control' " (quoting *State v. Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991)). No evidence tends to show Defendant lacked capacity to understand and knowingly decline a plea offer against the express advice of counsel. The decision itself is not sufficient to require the trial court to intervene *sua sponte*.

V. Conducting the Trial in *Absentia*

[2] Defendant argues the trial court erred by conducting her trial in *absentia* without first determining whether Defendant was competent to stand trial. For the reasons above and below, we disagree.

A. Standard of Review

This court reviews a trial court's decision a defendant knowingly and intentionally waived their constitutional right to be present at trial *de novo*. *State v. Sides*, 267 N.C. App. 653, 660, 834 S.E.2d 146, 151 (2019).

B. Analysis

North Carolina criminal courts have a "constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *State v. Hollars*, 376 N.C. 432, 442, 852 S.E.2d 135, 142 (2020) (reinforcing that " 'a competency determination is necessary *only* when a court has reason to doubt the defendant's competence' " (emphasis supplied) (quoting *Godinez v. Moran*, 509 U.S. 389, 401 n.13, 125 L. Ed. 2d 321 (1993)). Here, the record is devoid of such evidence as discussed above. We find no error in the trial court's decision to continue Defendant's trial in *absentia* after she was warned in open court, with counsel present, acknowledged understanding, and her absence was voluntary.

VI. Prior Record Level

[3] Defendant argues she should have been sentenced as a prior record level IV offender, rather than a prior record level V, because one of her prior felonies was incorrectly listed as Class G, instead of being designated Class H. The State concedes Defendant's argument and the error.

A. Standard of Review

The determination of a defendant's prior record level for sentencing purposes is a conclusion of law, *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007), which is subject to *de novo* review, *State v. Braswell*, 269 N.C. App. 309, 312, 837 S.E.2d 580, 583 (2020). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks omitted). It is not required for "an objection be lodged at the sentencing hearing" for prior record level issues to be reviewable on appeal. *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009).

B. Analysis

The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions the court or the jury find to have been proved in accordance with North Carolina law. N.C. Gen. Stat. § 15A-1340.14(a) (2023). A prior offender with at least ten, but no more than thirteen points is classified as a prior record level IV offender. *See id.* at (c)(4). Additionally, a prior offender with at least fourteen, but no more than seventeen points, is classified as a prior record level V offender. *See id.* at (c)(5).

Generally, any class A1 or Class 1 non-traffic misdemeanor offenses are assigned one point towards the total. *See id.* at (b)(5). Class G convictions are assigned four points towards the total. *See id.* at (b)(3). Class H convictions are assigned two points. *See id.* at (b)(4).

Defendant had been previously convicted of six Class A1 or Class 1 misdemeanors, worth one point each, totaling six points. The trial court also included two Class G felony convictions, worth four points each, totaling eight points. The trial court added those two values, six and eight, and sentenced Defendant as a prior record level V with fourteen points.

Defendant argues, and the State agrees, one of the prior felony convictions denoted as a Class G should have been considered a Class H, which is calculated at two points, and not four. Defendant's Prior Record Level Worksheet improperly classified her conviction for sale of a schedule III controlled substance as a Class G felony and not as a Class H felony. N.C. Gen. Stat. § 90-95(b)(2) (2023). Consequently, Defendant's prior record level points should have totaled twelve, not fourteen, and she should have been sentenced as a prior record level IV offender.

The recalculation of Defendant's prior record level will result in an alteration to the imposed sentence. A new sentencing hearing is appropriate. *See State v. Everette*, 237 N.C. App. 35, 43, 764 S.E.2d 634, 639 (2014). We vacate the judgment and remand to the trial court with instructions to resentence Defendant as a prior record level IV offender after correction of the clerical error in the prior record level calculation.

VII. Judgment on Possession of Methamphetamine Charges

[4] Defendant argues the trial court erred by denying her motion to dismiss and by entering judgment against her for possession of a controlled substance on jail premises and possession of methamphetamine, because both counts arose from one continuous act. The State agrees to the error and concedes Defendant's convictions on both counts arose from a single act of possession.

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Upon review, this Court should assess whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). A defendant properly preserves all sufficiency of the evidence issues for appellate review "simply by making a motion to dismiss the action at the proper time." *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020).

B. Analysis

"It is a universal rule that an indictment must allege all the elements of the of[f]ense charged." *See State v. Riera*, 276 N.C. 361, 368, 172 S.E.2d 535, 540 (1970). "It is also well recognized in North Carolina that when a defendant is indicted for a criminal offense he may be convicted of the charged offense or of a lesser included offense when the greater offense charged in the bill contains all the essential elements of the lesser offense[.]" *Id.* "[I]n order for the State to obtain multiple convictions for possession of a controlled substance, the State must show distinct acts of possession separated in time and space." *State v. Barnes*, 229 N.C. App. 556, 569, 747 S.E.2d 912, 922 (2013).

North Carolina statutes criminalize the illegal possession of a controlled substance. N.C. Gen. Stat. § 90-95(a)(3) (2023). Methamphetamine is classified as a Schedule II controlled substance. N.C. Gen. Stat. § 90-90 (2023). It is a Class H felony to violate § 90-95(a)(3) on the premises of a "penal institution or local confinement facility[.]" N.C. Gen. Stat. § 90-95(e)(9) (2023).

A conviction for committing the offense made punishable by section § 90-95(e)(9) necessarily involves a violation of § 90-95(a)(3). *See id.*; *State v. Barnes*, 229 N.C. App. 556, 568, 747 S.E.2d 912, 922 (2013) ("As we have previously noted, a defendant who has been found guilty of violating N.C. Gen. Stat. § 90-95(e)(9) has necessarily violated N.C. Gen. Stat. § 90-95(a)(3) as well. For that reason, the offense made punishable by N.C. Gen. Stat. § 90-95(a)(3) is a lesser included offense of the offense made punishable by N.C. Gen. Stat. § 90-95(e)(9)."). A violation of § 90-95(a)(3) should be treated as a lesser-included offense where a violation of both statutes occurs from one continuous act of possession. *Barnes*, 229 N.C. App. at 568-69, 747 S.E.2d at 922.

Defendant was convicted under § 90-95(a)(3) and § 90-95(e)(9) after methamphetamine was found on her person during a strip search performed by a female deputy at the jail. Defendant was improperly convicted of both the greater and lesser-included possession offenses. Defendant's possession of methamphetamine occurred in one continuous instance, and no separation of time and space occurred to allow conviction on separate possession offenses. *Id.* at 569, 747 S.E.2d at 922

("Moreover, '[i]n order for the State to obtain multiple convictions for possession of a controlled substance, the State must show distinct acts of possession separated in time and space.' " (quoting *State v. Moncree*, 188 N.C. App. 221, 231, 655 S.E.2d 464, 470 (2008)). Defendant was properly convicted of the greater offense of possession of a controlled substance on the premises of a penal institution. We vacate and remand to the trial court to arrest judgment on Defendant's conviction on the lesser-included simple possession charge under § 90-95(a)(3) and for resentencing. N.C. Gen. Stat. § 90-95(a)(3) (2023).

VIII. Conclusion

The trial court was under no obligation to order a competency hearing *sua sponte*, based upon the record before us. The trial court properly conducted Defendant's trial with her counsel present during her informed and voluntary absence and committed no reversible error.

We vacate Defendant's conviction on the lesser-included possession of a controlled substance charge. We remand to the trial court for resentencing on the remaining charges as a prior record level IV offender. *It is so ordered.*

NO ERROR AT TRIAL, JUDGMENT VACATED AND REMANDED FOR RESENTENCING.

Judges CARPENTER and STADING concur.

STATE OF NORTH CAROLINA
v.
DARIUS LAMAR WILLIAMS

No. COA25-38

Filed 15 October 2025

1. Constitutional Law—federal—Second Amendment—possession of a firearm by a felon statute—as-applied challenge—not a law-abiding citizen

In an appeal by the State, the trial court's dismissal of a charge of possession of a firearm by a felon (N.C.G.S. § 14-415.1)—arising from the discovery of a gun in defendant's car during a traffic stop—was vacated where the trial court erred in concluding that defendant was a law-abiding citizen, such that the Second Amendment of the United States Constitution protected his right to possess a firearm, given that defendant had been convicted of six felonies (all related to the possession or sale of cocaine) and seven misdemeanors (including violation of a domestic violence protection order and communicating threats).

2. Constitutional Law—North Carolina—possession of a firearm by a felon statute—as-applied challenge—Britt factors—reasonable and fairly related to the public peace and safety

In an appeal by the State, the trial court's dismissal of a charge of possession of a firearm by a felon (N.C.G.S. § 14-415.1)—arising from the discovery of a gun in defendant's car during a traffic stop—was vacated where four of the five factors set forth in *Britt v. State*, 363 N.C. 546 (2009), weighed against defendant, who: (1) had been convicted of six felonies and seven misdemeanors; (2) had no history of lawful firearm possession, having previously been convicted of attempted possession of firearm by a felon; (3) only challenged the application of the statute to himself after being indicted for violating it; and (4) had misdemeanor convictions for violation of a domestic violence protection order and communicating threats. Accordingly, the statute as applied to defendant did not violate the right to bear arms pursuant to article 1, section 30 of the North Carolina Constitution.

Appeal by the State from order entered 25 July 2024 by Judge Lora C. Cubbage in Superior Court, Forsyth County. Heard in the Court of Appeals 15 August 2025.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant.

ARROWOOD, Judge.

The State of North Carolina ("the State") appeals from an order dismissing a charge of possession of a firearm by a felon, as codified in N.C.G.S. § 14-415.1, against Darius Williams ("defendant"). The State contends the trial court erred in finding N.C.G.S. § 14-415.1 unconstitutional as applied to defendant under the United States and North Carolina Constitutions. For the following reasons, we vacate the order and remand this case to the trial court.

I. Background

On 3 March 2023, defendant was stopped by the Winston-Salem police for an expired vehicle registration. Upon searching the vehicle, police found a gun at the bottom of a large black tote. Police also found a folded dollar bill in defendant's front pocket, which was sent for field testing and tested positive for cocaine. Defendant was charged with one count of felony possession of cocaine and one count of possession of a firearm by a felon, as he had previously pled guilty to felony possession of cocaine with intent to sell or distribute on 10 January 2005. He was indicted on these charges 16 January 2024.

According to defendant's prior record level worksheet, prepared 25 April 2023, defendant had been convicted of seven felonies between 2000 and 2005, all relating to the possession or sale of cocaine except a possession of a firearm by a felon conviction in 2000. Defendant had also been convicted of seven misdemeanors between 2004 and 2014, including violation of a domestic violence protection order and a charge of communicating threats.

On 16 June 2023, defendant filed a motion to dismiss the charge of possession of a firearm by a felon as unconstitutional as applied to him under the Second Amendment of the United States Constitution, and Article 1, Section 30 of the North Carolina Constitution. Defendant filed an updated motion on 15 July 2024, incorporating additional authority that followed the United States Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). The trial court granted defendant's motion, concluding that defendant was a protected person under both Constitutions; that the *Bruen* decision therefore required the State to demonstrate the existence of a historical analogue to the felon in possession statute existing around the years 1797 and 1867 (the years the Second and Fourteenth Amendments were ratified, respectively); that the State failed to do so; and that defendant's rights under both Constitutions were violated by the application of the statute to his conduct. The State gave oral notice of appeal at the hearing, and subsequent written notice 25 July 2024.[1]

II. Discussion

The State raises one issue on appeal: whether the trial court erred by finding that N.C.G.S. § 14-415.1 violated defendant's rights under the federal and state Constitutions. We hold the trial court erred.

A. Standard of Review

"The standard of review for questions concerning constitutional rights is *de novo*. Furthermore, when considering the constitutionality of a statute or act there is a presumption in favor of constitutionality, and all doubts must be resolved in favor of the act." *Row v. Row*, 185 N.C. App. 450, 454–55 (2007) (cleaned up). When engaged in *de novo* review, " 'the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Wright*, 918 S.E.2d 623, 626 (N.C. 2025) (citations omitted).

B. Challenged Statute and Pertinent Caselaw

"It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction . . . ." N.C.G.S. § 14-415.1(a) (2025). A person found to violate the provisions of this subsection is guilty of a Class G felony.[2] *Id.*

> Prior convictions which cause disentitlement under this section shall only include:

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1. Also during this hearing, the State voluntarily dismissed the charge of possession of cocaine.

2. A recent amendment to the statute effective 1 December 2025 added three additional subsections for elevated punishments in certain circumstances, including where the violation occurs during the commission of a felony, involves the brandishing of a firearm, or the discharge of a firearm. Act of Jul. 9, 2025, S.L. 2025-71, § 8, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2025-2026/SL2025-71.pdf (to be codified as amended at N.C.G.S. § 14-415.1(a1)-(a3) (2025)).

> (1) Felony convictions in North Carolina that occur before, on, or after December 1, 1995; and
>
> (2) Repealed by Session Laws 1995, c. 487, s. 3, effective December 1, 1995.
>
> (3) Violations of criminal laws of other states or of the United States that occur before, on, or after December 1, 1995, and that are substantially similar to the crimes covered in subdivision (1) which are punishable where committed by imprisonment for a term exceeding one year.

Id. § 14-415.1(b). Felonies related to antitrust violations, unfair trade practices, and restraints of trade are excepted. *Id.* § 14-415.1(e). A person convicted of only one non-violent felony, whose civil rights were restored at least 20 years prior, may petition the district court of their place of residence to have their firearm rights restored. *Id.* § 14-415.4. Our North Carolina statute is similar to the federal felon in possession statute, which makes it "unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . [to] possess in or affecting commerce, any firearm or ammunition . . . ." 18 U.S.C. § 922(g)(1) (2024).

1. Federal Caselaw

Recent Second Amendment jurisprudence starts with *District of Columbia v. Heller*, in which the Supreme Court considered whether a prohibition on the possession of usable handguns in the home violated the Second Amendment. 554 U.S. 570, 573 (2008). The Court struck down the statute, concluding that a ban on a gun that so many Americans use for self-defense and defense of the home, violated the heart of the Second Amendment's guarantees. *Id.* at 628–29. The Court noted that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . ." *Id.* at 626. *Heller* was followed by *McDonald v. City of Chicago*, which, applying *Heller*, struck down a Chicago handgun ordinance by making the Second Amendment applicable to the states through the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).

In *Hamilton v. Pallozzi*, the Fourth Circuit considered an as-applied challenge to two Maryland statutes prohibiting the plaintiff from possessing firearms; the plaintiff had been convicted of three felonies for financial crimes in Virginia, but had his rights restored in Virginia pursuant to Virginia Code § 18.2-308.2. *Hamilton v. Pallozzi*, 848 F.3d 614, 618 (4th Cir. 2017). The Fourth Circuit addressed the two-prong framework established by *Heller* with the first prong requiring "historical review to evaluate whether [Second Amendment] rights, as understood in 1791, are 'burdened or regulated' by the statute in question[,]" and the second prong assessing whether the statute passes "constitutional muster in accordance with the appropriate level of judicial scrutiny." *Id.* at 623 (citations omitted). The court further recognized that *United States v. Moore*, 666 F.3d 313, 318–19 (4th Cir. 2012), streamlined the analysis for a presumptively lawful regulation; rather than engaging in extensive historical review on the first prong, the court considered "whether the challenger's conduct is within the protected Second Amendment right of 'law-abiding, responsible citizens to use arms in defense of hearth and home[,]' " as well as whether the plaintiff showed "that his factual circumstances remove[d] his challenge from the realm of ordinary challenges." *Hamilton*, 848 F.3d at 624. Applying this framework to the plaintiff's case, the Fourth Circuit determined the plaintiff was unable to rebut the presumption that he fell outside the category of "law-abiding, responsible citizens," due to plaintiff's status as a state law felon that had not received a pardon or had the basis for his conviction declared unconstitutional or otherwise unlawful. *Id.* at 627–28.

The Supreme Court next built on *Heller* and *McDonald* in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, where it considered a New York licensing scheme for the possession of firearms. 597 U.S. at 11. At the time, it was a crime in New York to "possess 'any firearm' without a license, whether inside or outside the home." *Id.* at 11–12. A license to possess a firearm could be obtained by showing a "licensing officer" that the applicant was "of good moral character, has no history of crime or mental illness, and that 'no good cause exists for the denial of the license.' " *Id.* at 12.

The Court began by addressing a two-step approach for evaluating Second Amendment issues developed by the appellate courts since *Heller*. *Id.* at 17. The first step was a historical inquiry into the burdened conduct; if the burdened conduct was historically protected, the courts would proceed to the second step, considering whether the burdened conduct was part of the "core" right to self-defense. *Id.* at 18–19. The Court rejected the two-step approach and provided its own test, drawn from *Heller*: "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 24.

The Court determined that New York had "not met their burden to identify an American tradition justifying the State's proper-cause requirement[,]" and could not adequately justify its statutory scheme for firearm licensure. *Id.* at 70–71. Justice Kavanaugh wrote to underscore that the Second Amendment is not a "regulatory straightjacket," and reincorporated the words of *Heller* that felon in possession laws were not in doubt. *Id.* at 80–81 (Kavanaugh, J., concurring).

The recently decided case of *United States v. Rahimi* addressed the facial constitutionality of a federal statute which prevents someone subject to a domestic violence restraining order from possessing a firearm. 602 U.S. 680, 684 (2024). The Supreme Court noted that "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791[,]" and when performing a historical inquiry, courts should examine whether modern laws used "similar restrictions for similar reasons." *Id.* at 691–92. The Court identified a tradition, stemming from the surety and "going armed" laws, of disarming those who pose a clear threat of physical violence. *Id.* at 698. The Court held this tradition did not need to be a perfect fit for the federal statute, but an "historical analogue" rather than a "twin." *Id.* at 700–01.

In response to Rahimi's argument that *Heller* required a finding of unconstitutionality, the Court pointed to that opinion's language affirming that a number of prohibitions, including the felon in possession of a firearm statutes, were presumptively lawful. *Id.* at 699. The Court further emphasized "[o]ur tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others." *Id.* at 700. At the same time, the Court rejected the State's argument that someone could be disarmed merely because they were not "responsible," but declined to further expound on who were the ordinary class of citizens covered by the Second Amendment. *Id.* at 701–02.

Following *Rahimi*, the Fourth Circuit addressed another challenge to U.S.C. § 922(g)(1) in *United States v. Hunt*. 123 F.4th 697 (4th Cir. 2024), *cert. denied*, 145 S. Ct. 2756 (2025). The court considered the framework for review as it had developed since *Heller*, concluding that recent Fourth Circuit decisions including *Hamilton* and *Moore* could be reconciled with *Bruen*, *Rahimi*, and *Heller*, as the applicability of *Heller*'s language about "longstanding" and "presumptively lawful" prohibitions had been "repeatedly reaffirmed[.]" *Id.* at 703. The Fourth Circuit further emphasized that although *Bruen* had rejected the "means-end scrutiny" prong, *Bruen* " 'did not disturb' . . . [the] 'first step,' including holdings about whether a given situation is 'outside the ambit of the individual right to keep and bear arms.' " *Id.* at 704 (citation omitted). Accordingly, "*Bruen* and *Rahimi* thus provide no basis for a panel to depart from this

Court's previous rejection of the need for any case-by-case inquiry about whether a felon may be barred from possessing firearms." *Id.*

The Fourth Circuit proceeded to address Hunt's challenge under *Bruen*, reviewing "the historical scope of the Second Amendment" to determine "what is and is not protected by the constitutional text." *Id.* at 705 (citing *United States v. Price*, 111 F.4th 392, 401 (4th Cir. 2024) (en banc)). The court reasoned that *Heller* "instructs that the '*pre-existing* right' 'codified' in the Second Amendment protects firearms possession by the law-abiding, not by felons." *Id.* (emphasis in original) (citation omitted). Accordingly, the court determined U.S.C. § 922(g)(1) regulated activity that fell outside the scope of the Second Amendment right as originally understood. *Id.* (citing *Bruen*, 597 U.S. at 18). Although the inquiry was satisfied at the first step, the court further concluded that the statute would survive the second step of the *Bruen* analysis, discussing several historical examples supporting "the categorical disarmament of people 'who have demonstrated disrespect for legal norms of society.' " *Id.* at 706 (discussing punishments for convicted felons and other non-violent offenders including estate forfeiture and death). Finally, noting *Rahimi*, the court concluded:

> Because felons, by definition, have "demonstrated disrespect for legal norms of society," the legislature has determined that "the category as a whole presents an unacceptable risk of danger if armed." That legislative judgment accords with historical tradition regulating non-law-abiding persons and is consistent with the Supreme Court's repeated instruction that longstanding prohibitions "on the possession of firearms by felons and the mentally ill, are presumptively lawful."

Id. at 708 (cleaned up).

2. State Caselaw

While *Heller*, *McDonald*, *Hamilton*, *Bruen*, *Rahimi*, and *Hunt* provide the necessary superstructure for analyzing a Second Amendment matter, we must also address our state jurisprudence as it relates to N.C.G.S. § 14-415.1. We first turn to our own Court's analysis in *State v. Fernandez*, 256 N.C. App. 539 (2017).

Unlike the federal cases outlined above, *Fernandez* concerns an as-applied challenge to the North Carolina felon in possession law itself. *Id.* at 539–40. The defendant, who had previously been convicted of possession of a weapon of mass destruction, was charged with possession of a firearm by a felon after police found a shotgun in his home while investigating an alleged break-in. *Id.* at 541–42.

In evaluating Fernandez's appeal, the Court discussed the two-step analysis used by the federal appellate courts prior to *Bruen*. *Id.* at 545 (citing *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010)). The first prong concerns "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee[,]" requiring a historical inquiry of whether the conduct at issue was "within the scope of the right at the time of ratification." *Id.* (quoting *Johnston v. State*, 224 N.C. App. 282, 290 (2012)). If a regulation "burdens conduct" that was within the scope of the Second Amendment right at the time of ratification, "we move to the second step of applying an appropriate form of means-end scrutiny." *Id.* (quoting *Johnston*, 224 N.C. App. at 290).

The Court recognized that after *Johnston*, the Fourth Circuit streamlined its analysis in *Hamilton* and *Moore*. *Id.* (citing *Hamilton*, 848 F.3d at 623). Accordingly, the Court determined that the defendant was a convicted felon and was unable to "show he is a 'law-abiding, responsible citizen,' " which removed him from the class of protected citizens, and was further unable to rebut the challenged Act's presumption of lawfulness. *Id.* at 546–47 (citing *Hamilton*, 848 F.3d at 629). Therefore, the defendant was unable to pass the first prong of the *Hamilton* analysis, and the Court did not address the second prong. *Id.* at 547.

The most salient case after *Fernandez* is *State v. Nanes*, 297 N.C. App. 863 (2025). Nanes, who had previously been convicted of felony animal cruelty, was charged with and convicted of murder and possession of a firearm by a felon. *Id.* at 864, 870. He appealed the latter charge, arguing that the statute was unconstitutional, both facially and as applied to him. *Id.* at 866. In analyzing Nanes' facial challenge, the Court stated "that section 14-415.1 undoubtedly regulates conduct that the Second Amendment's plain text covers as it revokes an individual's right to keep and bear arms following a felony conviction." *Id.* at 867–68. The Court then engaged in the historical analysis of *Bruen* and *Rahimi*; although this was limited to an analysis of felons convicted of violent crimes, the Court determined there was a sufficient historical tradition of disarming felons, and that the defendant "ha[d] a demonstrated history of violence towards others," such that both challenges failed. *Id.* at 868–71.

C. Federal As-Applied Challenge

[1] "An as-applied challenge requires a defendant to show the statute at issue is unconstitutional as applied to the facts of his specific case."

Nanes, 297 N.C. App. at 870. The question of whether defendant is a member of "the people" within the purview of the Second Amendment is central to our inquiry, as demonstrated by *Bruen*, *Rahimi*, *Hunt*, *Fernandez*, *Nanes*, and the trial court below. *Fernandez* and *Nanes*, however, fundamentally conflict in answering this question.

First and foremost, "a panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court." *In re Civil Penalty*, 324 N.C. 373, 384 (1989). However, since our prior panels conflict without acknowledgement, we are presented with the "rare situation" in which "our Supreme Court has authorized us to disregard our own precedent . . . ." *State v. Gonzalez*, 263 N.C. App. 527, 531 (2019) (citations omitted). This situation arises when "two lines of irreconcilable precedent develop independently—meaning the cases never acknowledge each other or their conflict . . . . In that circumstance, the Supreme Court has authorized us to follow the older of the two cases and reject the more recent precedent." *Id.* at 531 (cleaned up).

Defendant attempts to argue that concluding he is not one of "the people" is wrong "for a host of reasons,"[3] and contends that *Nanes* forecloses any argument to the contrary by way of *In re Civil Penalty*, because the Court in *Nanes* recognized that persons convicted of felonies are part of "the people" protected by the Second Amendment's plain text. On this issue, however, defendant never acknowledges the existence of *Fernandez*, nor, consequently, does he acknowledge the steps we are required to take under *Civil Penalty* when prior panels conflict.

Significantly, *Fernandez* has already answered the question of whether felons subject to N.C.G.S. § 14-415.1 are protected by the Second Amendment. Although *Nanes* concludes that the statute regulated conduct covered by the Second Amendment's plain text, it simply presumes that because Nanes is "an individual," this means he is considered part of "the people[,]" failing to recognize *Fernandez* or

3. The "host of reasons" defendant cites as to why he is one of "the people" comes by way of the recent Third Circuit opinion *Range v. Attorney General*, 124 F.4th 218 (3rd Cir. 2024). There, the Third Circuit noted that the Supreme Court had never explicitly determined who was a member of "the people" in *Heller*, *McDonald*, and *Bruen*, and relying on other text from the Constitution, comments made in non-majority opinions from other federal courts, and its own historical analysis, determined that felons are protected by the Second Amendment. *Id.* at 226–28. However, we are not bound by Third Circuit jurisprudence, and further find the facts and circumstances of *Range* to be distinguishable from this case such that the analysis of that appellant's as-applied challenge is not controlling here.

other relevant federal caselaw. *See Nanes*, 297 N.C. App. at 867–68. Furthermore, apart from *Nanes*, neither we nor the federal courts we are bound to follow have interpreted this phrase to have the meaning *Nanes* gives it. Because *Nanes* does not acknowledge *Fernandez*, we are not bound by its reasoning that the Second Amendment presumptively protects possession of firearms by felons.

In accordance with *Fernandez*,[4] as well as the more recent federal decisions *Bruen* and *Hunt*, we proceed to review "the historical scope of the Second Amendment" to determine "what is and is not protected by the constitutional text[,]" and whether N.C.G.S. § 14-415.1 as applied to defendant is consistent with the historical tradition of firearm regulation.

On the first step, we find the Fourth Circuit's analysis and reasoning in *Hunt* instructive, namely that the "pre-existing right" codified by the Second Amendment protects firearm possession by law-abiding citizens, but not necessarily by convicted felons. *Hunt*, 123 F.4th at 705. This is consistent with *Bruen* which provided that "two ordinary, law-abiding, adult citizens" were part of "the people" protected by the Second Amendment, as was their right to bear arms in public for self-defense, which the Supreme Court recognized as a "pre-existing right[.]" *Bruen*, 597 U.S. at 31–33. In this case, defendant had been convicted of six felonies relating to the possession or sale of cocaine, as well as seven misdemeanors, including violation of a domestic violence protection order and communicating threats. Defendant has not received a pardon for any of these convictions, nor have any of the convictions been declared unlawful.

Accordingly, defendant is unable to establish that he is a "law-abiding citizen" protected by the Second Amendment; pursuant to *Bruen* and *Rahimi*, N.C.G.S. § 14-415.1 is presumptively lawful as applied to defendant. We hold the trial court erred by concluding that defendant "is included in the Second Amendment protected people category as a law abiding and responsible person," and his as-applied challenge, arguing that his rights were violated by the application of § 14-415.1(a), must necessarily fail. As we have concluded that defendant cannot pass the first step of the *Bruen* test, it is unnecessary to address the second step.

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4. Although we note that *Fernandez* was decided prior to the *Bruen* Court's rejection of the two-step analysis, its holding is ultimately unaffected. As previously discussed, the analysis on the first step as guided by *Hamilton* and *Hunt* can be reconciled with *Bruen*, and accordingly *Fernandez* is similarly undisturbed.

D. State Constitutional Challenge

[2] The State also argues the trial court erred in concluding that N.C.G.S. § 14-415.1 was unconstitutional as applied to defendant under the North Carolina Constitution. We agree.

The North Carolina Constitution reads, in pertinent part,

> A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed . . . .

N.C. Const. art. I, § 30. While recognizing this right, our courts have nonetheless held "that regulation of the right to bear arms is a proper exercise of the General Assembly's police power, but that any regulation must be at least 'reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety.' " *Britt v. State*, 363 N.C. 546, 549 (2009) (quoting *State v. Dawson*, 272 N.C. 535, 547 (1968)). Our task, then, is to determine whether application of the felon in possession statute is reasonable as applied to the circumstances of defendant's case. *Britt*, 363 N.C. at 549.

We have developed a five-factor test to guide us in these types of as-applied challenges:

> (1) the type of felony convictions, particularly whether they involved violence or the threat of violence, (2) the remoteness in time of the felony convictions; (3) the felon's history of law[ ]abiding conduct since the crime, (4) the felon's history of responsible, lawful firearm possession during a time period when possession of firearms was not prohibited, and (5) the felon's assiduous and proactive compliance with the 2004 amendment.

State v. Whitaker, 201 N.C. App. 190, 205 (2009) (cleaned up) (quoting *Britt*, 363 N.C. at 550). These factors are not exhaustive, as our courts consider the conduct of the defendants holistically, through the lens of "public peace and safety." The defendant in *Britt*, who had been convicted of one felony count of possession with intent to sell and deliver a controlled substance 20 years prior, had a "long post-conviction history of respect for the law" and "seventeen years of responsible, lawful firearm possession;" further, there was no evidence he had ever committed violence. *Britt*, 363 N.C. at 549–50. By contrast, the defendant in *Whitaker* was found to have demonstrated a "blatant disregard for the law" due to numerous misdemeanor convictions; we also noted that he had been convicted of three felonies and that he had acquired guns after the 2004 amendment prohibited him from possessing them. *Whitaker*, 201 N.C. App. at 206.

By employing both the factors and a holistic view of defendant's criminal history, we agree with the State that defendant hews much closer to the defendant in *Whitaker* than in *Britt*. Defendant has been convicted of seven felonies and seven misdemeanors since 2000, the year he turned 18, more than twice the number of felonies in *Whitaker* and more convictions overall, including four misdemeanor controlled substance convictions nine years after his last felony.[5]

Defendant does not have a history of lawful firearm possession, as he was convicted of attempted possession of a firearm by a felon in 2000. The defendant in *Britt* successfully demonstrated compliance with the 2004 amendment by voluntarily turning in his guns and suing to have his rights restored; here, defendant has only challenged the statute after an indictment for violating it. *See Britt*, 363 N.C. at 548.

A critical distinction between both the *Britt* and *Whitaker* defendants, and defendant here, is the former's absence of a history of violence, while the latter has two convictions indicating a propensity for violence. Although the first factor focuses on violent felony convictions, of which defendant has none, *Britt* and *Whitaker* also examined misdemeanors and noted "lifelong nonviolence towards other citizens," something that defendant here cannot show. *See Britt*, 363 N.C. at 550. Here, defendant has two violence-related misdemeanor convictions: communicating threats and violating a domestic violence protection order, both from 2004. These convictions conflict with the trial court's finding that defendant has "no record of violence," nor was he ever "adjudicated as violent." Because this finding of fact is unsupported by competent evidence, we set it aside. *See State v. Wilkerson*, 257 N.C. App. 927, 929 (2018).

Defendant wishes us to adhere to the strict language of the first factor, which he argues weighs entirely in his favor, while ignoring the full context of *Britt* and *Whitaker*. When applying the necessary lens of "public peace and safety" to defendant's criminal record, we find that, rather than being a law-abiding, peaceful citizen whose rights should not be subject to a single non-violent crime, defendant has demonstrated a sometimes violent disregard for the laws of this State and the peace of its communities. The only factor working in defendant's favor is the

5. As noted below, defendant was convicted of attempted possession of a firearm by a felon in 2000, which indicates a criminal record stretching further back than that represented by the worksheet.

20-year period since his last felony conviction. However, when this factor is viewed in light of the entirety of his criminal record, and the fact that he did not remain conviction-free in the years following, it does not alter our conclusion that defendant's as-applied challenge to the statute on state constitutional grounds must fail.

III. Conclusion

For the foregoing reasons, the order of the trial court dismissing the charge of felony possession of a firearm by a felon is vacated and remanded.

VACATED AND REMANDED.

Judges TYSON and CARPENTER concur.

JOSHUA H. STEIN, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA, Plaintiff

v.

PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; DESTIN C. HALL, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; THE STATE OF NORTH CAROLINA; NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION; and JOHN (JD) SOLOMON, in his official capacity as CHAIR of the North Carolina Environmental Management Commission; CHRISTOPHER M. DUGGAN, in his official capacity as VICE-CHAIR of the North Carolina Environmental Management Commission; and YVONNE C. BAILEY, TIMOTHY M. BAUMGARTNER, CHARLES S. CARTER, MARION DEERHAKE, MICHAEL S. ELLISON, STEVEN P. KEEN, H. KIM LYERLY, JACQUELINE M. GIBSON, JOSEPH REARDON, ROBIN SMITH, KEVIN L. TWEEDY, ELIZABETH J. WEESE, and BILL YARBOROUGH, in their official capacities as COMMISSIONERS of the North Carolina Environmental Management Commission, Defendants.

No. COA24-440

Filed 15 October 2025

Constitutional Law—North Carolina—separation of powers—legislative restructuring—state boards and commissions—executive in character

In a challenge to the constitutionality of two legislative enactments that restructured seven state boards and commissions—the Board of Transportation (BOT), the Economic Investment Committee (EIC), the Commission for Public Health (CPH), the Environmental Management Commission (EMC), the Coastal

Resources Commission (CRC), the Wildlife Resources Commission (WRC), and the Building Code Council (BCC)—the decision of the three-judge panel was affirmed in part and reversed in part. Each board or commission was primarily executive in character, because they functioned to implement legislation by promulgating rules and regulations, making final decisions regarding grants and permits, supervising programs, setting standards, conducting investigations, and/or approving plans or applications. Accordingly, since the enactments altered appointment and removal powers as to the BOT, EIC, and CPH in a manner that removed the governor's ability to take care that the laws of the state be faithfully executed, the legislative branch violated the separation of powers clause of the North Carolina Constitution as to those entities. However, the restructuring of the EMC, CRC, WRC, and BCC left most of the control over the policies to be implemented in the executive branch—if not with the governor—and, thus, those portions of the enactments were constitutional.

Judge MURRY concurring by separate opinion.

Cross appeals by Plaintiff and Defendants from order entered 28 February 2024 by Judges John W. Dunlow, Dawn M. Layton, and Paul A. Holcombe III in Wake County Superior Court. Heard in the Court of Appeals 17 February 2025.

Attorney General Jeff Jackson, by Deputy Solicitors General James W. Doggett and Daniel P. Mosteller, Special Deputy Attorney General Stephanie A. Brennan, and Senior Deputy Attorney General Amar Majmundar, for the State.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jim W. Phillips, Jr., Daniel F. E. Smith, Eric M. David, and Amanda S. Hawkins, for Plaintiff Joshua H. Stein, Governor of the State of North Carolina.

Womble Bond Dickinson (US) LLP, by Matthew F. Tilley, Russ Ferguson, Sean E. Andrussier, Michael A. Ingersoll, and Emmett Whelan, for Philp E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Destin C. Hall, in his official capacity as Speaker of the North Carolina House of Representatives.

Southern Environmental Law Center, by Blakely E. Hildebrand, Brooks Rainey Pearson, and Kimberly Hunter, for Cape Fear River Watch and Haw River Assembly, amicus curiae.

Poyner Spruill LLP, by Andrew H. Erteschik, Edwin M. Speas, Jr., Caroline P. Mackie, and N. Cosmo Zinkow, for Former Governors James G. Martin, James B. Hunt, Jr., Michael F. Easley, Beverly E. Perdue, and Patrick L. McCrory, amicus curiae.

Dowling PLLC, by Troy D. Shelton and Craig D. Schauer, and North Carolina Home Builders Association, by J. Michael Carpenter, for the North Carolina Home Builders Association, amicus curiae.

North Carolina Institute for Constitutional Law, by Jeanette K. Doran, for the North Carolina Institute for Constitutional Law and the John Locke Foundation, amicus curiae.

CARPENTER, Judge.

Joshua H. Stein, in his official capacity as Governor of the State of North Carolina; Philip E. Berger, in his official capacity as President *Pro Tempore* of the North Carolina Senate, and Destin C. Hall, in his official capacity as Speaker of the North Carolina House of Representatives (collectively, "Legislative Defendants"); and the State appeal from the 28 February 2024 order entered by a three-judge panel in Wake County Superior Court (the "Order"). The Order granted in part and denied in part the motions for summary judgment filed by Plaintiff and Legislative Defendants, addressing the constitutionality of two legislative enactments that restructured seven state boards and commissions. On appeal, the Governor and State argue the panel erred by denying in part the Governor's motion for summary judgment, while Legislative Defendants argue the panel erred by denying in part their motion for summary judgment. After careful review, we affirm in part and reverse in part.

I. Factual & Procedural Background

In 2023, the North Carolina General Assembly enacted Senate Bill 512 ("SB 512") and House Bill 488 ("HB 488"). S.L. 2023-136, -108. Together, SB 512 and HB 488 restructured the membership and composition of seven state boards and commissions, including the: Board of Transportation ("BOT"), Economic Investment Committee ("EIC"), Commission for Public Health ("CPH"), Environmental Management Commission ("EMC"), Coastal Resources Commission ("CRC"), Wildlife

Resources Commission ("WRC"), and Building Code Council ("BCC"). S.L. 2023-136, -108.

On 10 October 2023, the Governor brought suit challenging the enactment of SB 512 and HB 488 by filing: a motion for temporary restraining order, a motion for preliminary injunction, and a request to transfer the case to a three-judge superior court panel following the resolution of the motion for temporary restraining order. The Governor argued the General Assembly's restructuring of the seven boards and commissions violated the separation of powers clause of Article I, Section 6 of the North Carolina Constitution. The State supported the Governor's motion for preliminary injunction. On 11 October 2023, the superior court granted Legislative Defendants' motion to transfer the case to a three-judge panel.[1] On 1 November 2023, the panel conducted a hearing on the Governor's motion for preliminary injunction and partially granted the Governor's motion as to the BOT, EIC, and CPH. The panel, however, denied the Governor's motion as to the EMC and CRC. In addition, the panel dismissed without prejudice the Governor's motion concerning the WRC and BCC.

On 8 December 2023, the Governor and Legislative Defendants filed motions for summary judgment, which the panel heard on 16 February 2024. On 28 February 2024, the panel entered the Order, partially granting the Governor's motion as to the BOT and EIC after concluding their restructuring violated separation of powers. The panel partially granted Legislative Defendants' motion as to the remaining five boards and commissions, after concluding their restructuring did not violate separation of powers. In sum, the panel enjoined the restructuring of the BOT and EIC, and allowed the restructuring of the CPH, EMC, CRC, WRC, and BCC. The Governor, Legislative Defendants, and State all timely appealed to this Court.

II. Jurisdiction

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

III. Issues

The issues are whether the panel erred by: (1) enjoining the restructuring of the BOT and EIC; and (2) allowing the restructuring of the CPH, EMC, CRC, WRC, and BCC.

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1. Facial challenges "to the validity of an act of the General Assembly" shall be appointed "to a three-judge panel of the Superior Court of Wake County to hear the challenge." N.C. Gen. Stat. § 1-267.1 (2023).

IV. Analysis

The Governor and State argue the panel erred by denying in part the Governor's motion for summary judgment, thereby allowing the restructuring of the CPH, EMC, CRC, WRC, and BCC. Legislative Defendants argue the panel erred by denying in part their motion for summary judgment, thereby enjoining the restructuring of the BOT and EIC. In essence, the Governor and State contend the restructuring of the seven boards and commissions violates the separation of powers clause of Article I, Section 6 of the North Carolina Constitution, whereas Legislative Defendants disagree.

This Court reviews an order granting or denying a motion for summary judgment de novo. *Cummings v. Carroll*, 379 N.C. 347, 358, 866 S.E.2d 675, 684 (2021). In conducting a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quoting *In re Greens of Pine Glen Ltd. P'Ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

We also review constitutional arguments de novo. *Town of Highlands v. Hendricks*, 164 N.C. App. 474, 478, 596 S.E.2d 440, 444 (2004). Under de novo review, "we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016); *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989) ("[G]reat deference will be paid to acts of the legislature—the agent of the people for enacting laws."). " 'The presumption of constitutionality is not, however, and should not be, conclusive,' with an act of the General Assembly being subject to invalidation if it offends a specific constitutional provision beyond a reasonable doubt." *Cooper v. Berger*, 376 N.C. 22, 33, 852 S.E.2d 46, 56 (2020) (quoting *Moore v. Knightdale Bd. of Elections*, 331 N.C. 1, 4, 413 S.E.2d 541, 543 (1992)).

Separation of powers is one of the " 'fundamental principles on which state government is constructed . . . .' " *Cooper v. Berger* (*Cooper I*), 370 N.C. 392, 407, 809 S.E.2d 98, 107 (2018) (quoting John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 50 (2d ed. 2013)). The separation of powers clause of the North Carolina Constitution mandates that the "legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. "[I]n other words, each branch is directed to perform its assigned duties and avoid encroaching on the duties of another branch." *Harper v. Hall*, 384 N.C. 292, 297, 886 S.E.2d 393, 399 (2023).

The North Carolina Constitution also provides that the "Governor shall take care that the laws be faithfully executed." N.C. Const. art. III, § 5(4). But "the Governor is not alone in this task." *Cooper v. Berger* (*Cooper Confirmation*), 371 N.C. 799, 800, 822 S.E.2d 286, 290 (2018). In addition to the Governor, nine elected officers "assist the executive branch in fulfilling its purpose," including the: Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance. *Id.* at 800, 822 S.E.2d at 290; *see* N.C. Const. art. III, §§ 2, 7. Together, the Governor and the nine executive officers comprise the Council of State. *Cooper Confirmation*, 371 N.C. at 800, 822 S.E.2d at 290; *see* N.C. Const. art. III, § 8. As a result, "the Governor's duty to 'take care that the laws be faithfully executed' . . . is a nonexclusive duty conferred upon all ten Council of State members." *Stein v. Berger*, 387 N.C. 575, 578 n.4, 915 S.E.2d 146, 148 n.4 (2025) (quoting N.C. Const. art. III, § 5(4)).

When a branch is accused of violating separation of powers by encroaching upon the executive branch's authority, we consider whether the accused branch's actions " 'unreasonably disrupt a core power of the executive.' " *McCrory*, 368 N.C. at 645, 781 S.E.2d at 256 (quoting *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001)). Such action generally occurs when the accused branch " 'retains some control' over the executive branch's functions." *See id.* at 645, 781 S.E.2d at 256 (quoting *Wallace v. Bone*, 304 N.C. 591, 608, 286 S.E.2d 79, 88 (1982)). There is, however, no "categorical rule that would resolve every separation of powers challenge" because "each statutory scheme" varies. *Id.* at 646, 781 S.E.2d at 257. Consequently, "we must resolve each challenge by carefully examining its specific factual and legal context." *Id.* at 646–47, 781 S.E.2d at 257. Separation of powers violations, therefore, can be "more nuanced" and occur "when the actions of one branch prevent another branch from performing its constitutional duties." *Id.* at 645, 781 S.E.2d at 256.

In *McCrory*, the General Assembly enacted a statute authorizing itself to appoint the majority membership of three state commissions. *Id.* at 646, 781 S.E.2d at 256. The commissions were "housed in the executive branch" and responsible for executing state laws by promulgating rules, making determinations consistent with legislation, and issuing permits. *Id.* at 636–37, 781 S.E.2d at 250–51. Because the commissions were executive and administrative in nature, the Governor needed "enough control over them" in order to " 'take care that the laws be faithfully executed.' " *Id.* at 645–46, 781 S.E.2d at 256 (quoting N.C. Const. art. III, § 5(4)). In evaluating the Governor's control over the commissions, the Court considered his ability to "appoint the commissioners, to supervise their day-to-day activities, and to remove them from office." *Id.* at 646, 781 S.E.2d at 256.

But through the challenged statute in *McCrory*, the General Assembly restricted the Governor's ability to appoint, supervise, and remove members of the executive commissions. *Id.* at 646, 781 S.E.2d at 256–57. Indeed, the General Assembly gave itself the authority to appoint the majority of each commission's members, and each commission required a majority quorum for the transaction of business. *Id.* at 636–38, 781 S.E.2d at 250–51. Moreover, the Governor could only remove members from the commissions for "misfeasance, malfeasance, or nonfeasance." *Id.* The Court noted:

> When the General Assembly appoints executive officers that the Governor has little power to remove, it can appoint them essentially without the Governor's influence. That leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints. When those officers form a majority on a commission that has the final say on how to execute the laws, the General Assembly, not the Governor, can exert most of the control over the executive policy that is implemented in any area of the law that the commission regulates.

Id. at 647, 781 S.E.2d at 257. The General Assembly, therefore, violated separation of powers. *Id.*

Similarly, in *Cooper I*, the General Assembly enacted a statute restructuring the State Board of Elections to an eight-member bi-partisan board, where the Governor appointed four members each from two lists submitted by the Republican and Democratic parties. 370 N.C. at 415–16, 809 S.E.2d at 112–13. In addition, the Governor could only remove members for "misfeasance, malfeasance, or nonfeasance." *Id.* at 416, 809 S.E.2d at 112 (internal quotation marks and citation omitted). In effect, the General Assembly restricted the Governor's ability to appoint a majority of the board's members from his political party and remove members at will. *Id.* at 416, 809 S.E.2d at 112–13. The Court explained:

> The General Assembly cannot . . . structure an executive branch commission in such a manner that the Governor is unable, within a reasonable period of time, to "take care

> that the laws be faithfully executed" because he or she is required to appoint half of the commission members from a list of nominees consisting of individuals who are, in all likelihood, not supportive of, if not openly opposed to, his or her policy preferences while having limited supervisory control over the agency and circumscribed removal authority over commission members. An agency structured in that manner leaves the Governor with little control over the views and priorities of the [majority of] officers and prevents the Governor from having the final say on how to execute the laws.

Id. at 418, 809 S.E.2d at 114 (alteration in original) (quoting N.C. Const. art. III, § 5(4)). Accordingly, the General Assembly violated separation of powers. *Id.* at 418, 809 S.E.2d at 114.

Later that year in *Cooper Confirmation*, the General Assembly enacted a statute granting the "North Carolina Senate the power to confirm the people that [the Governor] nominates to serve in his Cabinet." 371 N.C. at 800–01, 822 S.E.2d at 290. Although the General Assembly constrained the Governor's appointment authority over his Cabinet members—as the Governor's nominees required confirmation by the Senate—the Governor still had "the power to nominate them," "strong supervisory authority over them," and "the power to remove them at will." *Id.* at 807, 822 S.E.2d at 294. The Court further explained:

> The Governor's power to nominate is significant, and the ultimate appointee will be a person that he alone has chosen, subject only to an up-or-down vote by the Senate. The Governor's supervisory and removal powers, moreover, ensure that the Governor retains ample post-appointment control over how his Cabinet members perform their duties.

Id. at 801, 822 S.E.2d at 290. Because the Governor "retain[ed] enough control over the members of his Cabinet to take care that the laws be faithfully executed[,]" the General Assembly did not violate separation of powers. *Id.* at 809, 822 S.E.2d at 295.

In an earlier case, *Wallace*, the General Assembly enacted a statute authorizing its members to serve on the EMC. 304 N.C. at 607, 286 S.E.2d at 88. The Court explained it is "crystal clear" that the EMC's duties are "administrative or executive in character." *See id.* at 608, 286 S.E.2d at 88. The EMC's duties include: granting and revoking permits; issuing orders; conducting investigations and hearings; supervising air pollution control programs; approving and rejecting applications for dam construction; establishing industry standards; and adopting rules, regulations, and classifications. *See id.* at 607–08, 286 S.E.2d at 88. Because "the legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality," the General Assembly violated separation of powers by authorizing its members to serve on the EMC. *Id.* at 608–09, 286 S.E.2d at 88–89.

As an initial matter, *McCrory* and *Wallace* demonstrate that a state board or commission is administrative or executive in character when its duties function to implement legislation. *Id.* at 607–09, 286 S.E.2d at 88–89; *McCrory*, 368 N.C. at 645–47, 781 S.E.2d at 256–57. Specifically, a state board or commission is administrative or executive in character when it is authorized to create and promulgate rules and regulations, make final decisions regarding grants and permits, supervise programs, set standards, conduct investigations, and approve plans or applications. *Wallace*, 304 N.C. at 607, 286 S.E.2d at 88; *McCrory*, 368 N.C. at 636–37, 781 S.E.2d at 250–51.

Here, based on their responsibilities described in detail below, the seven state boards and commissions likewise function to implement legislation. *See* N.C. Gen. Stat. § 143B-350 (2023) (BOT); N.C. Gen. Stat. §§ 143B-437.52, -437.54, -437.56, -437.57, -437.60 (2023) (EIC); N.C. Gen. Stat. §§ 130A-9, 130A-22, 130A-29 (2023) (CPH); N.C. Gen. Stat. §§ 143B-282, 143B-282.1 (2023) (EMC); N.C. Gen. Stat. §§ 113A-104, -106.1, -107, -107.1, -113, -118, -134.2 (2023) (CRC); N.C. Gen. Stat. §§ 143B-281.1, 143-239 (2023) (WRC); N.C. Gen. Stat. § 143-136 (2023) (BCC). Because they are primarily executive or administrative in character, we next consider whether the General Assembly violated separation of powers by restructuring the executive branch's control over each board and commission.

A. BOT

The BOT oversees the Department of Transportation and "develop[s] transportation policy and projects for the benefit of the citizens of the State." N.C. Gen. Stat. § 143B-350(a). Responsibilities of the BOT include, in pertinent part: formulating "policies and priorities, accountability and performance metrics" for the Department of Transportation; approving highway construction, construction projects, and partnership agreements; promulgating "rules, regulations, and ordinances concerning all transportation functions assigned" to the Department of Transportation; and reviewing and approving the Department of Transportation's financial decisions. *Id.* § 143B-350(f)-(g). Prior to SB 512, the Governor appointed, and could also remove, fourteen of the BOT's twenty members. S.L. 2023-136, § 4.1.(b). The General Assembly appointed, and could also remove, six members. *Id.* The Governor appointed the chair. *Id.* § 4.1.(e). After SB 512, the Governor appoints and removes six members, while the General Assembly appoints and removes fourteen members. *Id.* § 4.1.(b). The BOT selects its own chair and a majority quorum remains required "for the transaction of business." *Id.* § 4.1.(e).

By restructuring the BOT in this manner, the General Assembly removed, and gave to itself, the executive branch's control over the BOT's majority membership and selection of the chair, as the BOT selects its own chair. Now, given the majority quorum along with the General Assembly's majority control, "the General Assembly, not the Governor, can exert most of the control over the executive policy that is implemented" by the BOT. *See McCrory*, 368 N.C. at 647, 781 S.E.2d at 257. Consequently, the General Assembly disrupted a " 'core power of the executive[,]' " *see id.* at 645, 781 S.E.2d at 256 (quoting *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854), by " 'retain[ing] some control' over the executive branch's functions[,]" *see id.* at 645, 781 S.E.2d at 256 (quoting *Wallace*, 304 N.C. at 608, 286 S.E.2d at 88). Accordingly, the General Assembly violated separation of powers. *See id.* at 647, 781 S.E.2d at 257. The panel, therefore, did not err by concluding that the BOT's restructuring violated separation of powers.

B. EIC

The EIC oversees the Department of Commerce's Job Development Investment Grant Program. N.C. Gen. Stat. § 143B-437.52(a). Responsibilities of the EIC include: entering "into agreements with businesses to provide grants;" developing "criteria to be used in" the selection of grant recipients; setting the amount of incentives the Department of Commerce will pay recipients; and approving grants paid by the Department of Commerce. *Id.* §§ 143B-437.52, -437.54, -437.56, -437.57, -437.60. Prior to SB 512, the Governor appointed three of the EIC's five members and the General Assembly appointed two members. S.L. 2023-136, § 1.1.(a). The General Assembly was not permitted to appoint its own members to serve as members of the EIC. *Id.* After SB 512, the Governor appoints three members, the General Assembly appoints two members, and the Speaker of the House and President *Pro Tempore* of the Senate, or their designees, serve as two additional members. *Id.* The EIC "may act only upon a decision of a majority of its members." *Id.*

By restructuring the EIC in this manner, the General Assembly removed the Governor's majority-appointment power and increased its own control by designating additional membership spots to the Speaker and President *Pro Tempore*. In effect, the General Assembly gave itself "the power to appoint a majority of [the EIC's] voting members," *see McCrory*, 368 N.C. at 646, 781 S.E.2d at 256, and ability to serve on the EIC, *see Wallace*, 304 N.C. at 608, 286 S.E.2d at 88. As the General Assembly granted itself membership on the EIC and restricted the Governor's appointment power, supervisory ability, and overall influence, it violated separation of powers. *See id.* at 608, 286 S.E.2d at 88; *McCrory*, 368 N.C. at 646, 781 S.E.2d at 256. Accordingly, the panel did not err by concluding that the EIC's restructuring violated separation of powers.

C. CPH

The CPH is "authorized to adopt rules necessary to implement the public health programs administered by" the Department of Health and Human Resources; create water, sanitary, and mosquito control districts; and establish "reasonable standards governing the nature and scope of public health services rendered by local health departments." N.C. Gen. Stat. §§ 130A-9, -29(b)-(c). Prior to SB 512, the Governor appointed, and could also remove, nine of the CPH's thirteen members, provided that six members work in specified professions. S.L. 2023-136, § 3.1.(a)-(b). The North Carolina Medical Society appointed, and could also remove, the remaining four members. *Id.* After SB 512, the Governor appoints and removes five members, and all must work in specified professions. *Id.* The North Carolina Medical Society and the General Assembly each appoint and remove four members. *Id.* A majority quorum remains required "for the transaction of business." *Id.* § 3.1.(d).

Despite retaining greater appointment and removal power than the General Assembly following the CPH's restructuring, the Governor appoints and removes five members while the General Assembly and North Carolina Medical Society appoint and remove a combined eight members. Even though the North Carolina Medical Society is a nongovernmental organization, its control, when combined with the control the General Assembly removed from the Governor and vested in itself, restricts the Governor's majority-appointment power, supervisory ability, and influence over the CPH. *See McCrory*, 368 N.C. at 645–47, 781 S.E.2d at 256–57. While the General Assembly "clearly has the authority to establish qualifications for commission membership, . . . mandate that differing policy preferences be reflected in the commission's membership[,]" and provide "the commission with a reasonable degree of independence from short-term political influence[,]" the executive branch must nonetheless be able to " 'take care that the laws be faithfully executed.' " *Cooper I*, 370 N.C. at 417–18, 809 S.E.2d at 113–14 (quoting N.C. Const. art. III, § 5(4)).

Granted, separation of powers violations generally "occur when one branch exercises power that the constitution vests exclusively in another branch." *See McCrory*, 368 N.C. at 645, 781 S.E.2d at 256. The General Assembly, however, does not necessarily possess majority control over the CPH as to allow the General Assembly to directly exercise the executive branch's power to take care that the laws be faithfully executed. Nevertheless, there is "no categorical rule" for separation of powers violations, which can be more "nuanced" and occur "when the actions of one branch prevent another branch from performing its constitutional duties." *See id.* at 646, 781 S.E.2d at 257. By giving itself control over four members previously controlled by the Governor, where the North Carolina Medical Society already controls four members, the General Assembly has effectively restricted the Governor's control to less than half of the CPH.

Consequently, the General Assembly has "prevent[ed] another branch from performing its constitutional duties." *See id.* at 645, 781 S.E.2d at 256. Indeed, when a majority quorum is required "for the transaction of business" and the Governor only controls five of thirteen members, the executive branch cannot take care that the laws be faithfully executed as there is no guarantee that the members from the North Carolina Medical Society will support the Governor's policy preferences. *See Cooper I*, 370 N.C. at 415–18, 809 S.E.2d at 112–14. Stated differently, given the Governor's "limited supervisory control" and "circumscribed" authority, the Governor is left "with little control over the views and priorities" of the majority of the CPH's members which "prevents the Governor from having the final say on how to execute the laws"—as the CPH can take action without approval from any of the Governor's appointed members. *See id.* at 418, 809 S.E.2d at 114. As a result, the General Assembly violated separation of powers and the panel erred by concluding that the CPH's restructuring was constitutional. *See id.* at 416, 809 S.E.2d at 112.

D. EMC, CRC, and WRC

The EMC is housed within the Department of Environmental Quality. N.C. Gen. Stat. § 143B-282(a). The EMC's responsibilities include promulgating rules for the "protection, preservation, and enhancement of the water and air resources of the State;" overseeing activities related to air and water pollution; and, if necessary, overruling civil penalty assessments made by the Department of Environmental Quality. *Id.*

§§ 143B-282, -282.1. Prior to SB 512, the Governor appointed nine of the EMC's fifteen members, while the General Assembly appointed six members. S.L. 2023-136, § 2.1.(a). The Governor selected the chair and could remove all members. *Id.* § 2.1.(a)-(b). After SB 512, the Governor appoints seven members, the General Assembly appoints six members, the Commissioner of Agriculture appoints two members, the EMC selects its own chair, the Governor only removes the members he appoints, and a majority quorum remains required. *Id.*

The CRC is housed within the Department of Environmental Quality. N.C. Gen. Stat. §§ 113A-104(a). The CRC's duties include: designating areas of environmental concern in coastal regions and establishing and administering permit rules in those areas; ruling on appeals contesting permit decisions; deciding whether to allow erosion-control structures in state coastal waters; managing public access points to state beaches; and administering the Public Beach and Coastal Waterfront Access Program. *Id.* §§ 113A-104, -106.1, -107, -107.1, -113, -118, -134.2. Prior to SB 512, the Governor appointed nine of the CRC's thirteen members, the General Assembly appointed four members, and the Governor selected the chair. S.L. 2023-136, § 5.1.(a). After SB 512, the Governor appoints six members, the General Assembly appoints six members, the Commissioner of Insurance appoints one member, the CRC selects its own chair, and a majority quorum remains required. *Id.*

The WRC is within the Department of Environmental Quality. N.C. Gen. Stat. § 143B-281.1. The WRC's duties include: administering laws relating to game, freshwater fish, and other wildlife resources; developing wildlife management policy for state lands; creating licensing rules regarding hunting, fishing, and use of public lands; and designating species as endangered or threatened and developing conservation plans. N.C. Gen. Stat. §§ 143B-281.1, 143-239. Prior to SB 512, the Governor appointed eleven of the WRC's nineteen members and the General Assembly appointed eight members. S.L. 2023-136, § 6.1.(a)-(b). The Governor selected the chair while the WRC selected the vice-chair. *Id.* After SB 512, the Governor appoints ten members, the General Assembly appoints ten members, and the Commissioner of Agriculture appoints one member. *Id.* The WRC selects its chair and vice-chair, and a majority quorum remains required. *Id.*

While the Governor does not directly appoint a majority of each commission's members, the executive branch holds majority-appointment power. In fact, the Commissioner of Agriculture and Commissioner of Insurance, both members of the Council of State, along with the Governor combine to grant the executive branch majority-appointment power concerning the EMC, CRC, and WRC. Moreover, given the commissions' majority quorums for the transaction of business, the executive branch "can exert most of the control over the executive policy that is implemented" by the commissions. *See McCrory*, 368 N.C. at 647, 781 S.E.2d at 257. The restructuring of the EMC, CRC, and WRC, therefore, does not violate separation of powers because "the Governor's duty to 'take care that the laws be faithfully executed' . . . is a nonexclusive duty conferred upon all ten Council of State members." *See Stein*, 387 N.C. at 578 n.4, 915 S.E.2d at 148 n.4. Accordingly, the panel did not err by concluding that the restructuring of the EMC, CRC, and WRC was constitutional.

E. BCC

HB 488 takes the certain functions belonging to the BCC and assigns them to a new entity, the Residential Code Council ("RCC"). S.L. 2023-108, § 1.(a). The RCC is housed within the Department of Insurance and is responsible for: revising the building codes applicable to residential properties in the State, hearing appeals, and developing formal interpretations of building codes. *Id.*; N.C. Gen. Stat. § 143-136. Prior to HB 488, the Governor appointed all seven members of the BCC, the BCC selected its own chair, and four members were required for the quorum. S.L. 2023-108, § 1.(a). After HB 488, with the RCC performing functions of the BCC, the Governor appoints seven of the RCC's thirteen members, the General Assembly appoints six members, the Governor selects the chair, the chair appoints members to committees, and nine members are required for the quorum. *Id.*

By restructuring the BCC in this manner, the Governor controls the majority and the chair, who controls the composition of committees. While the change in size and voting structure does not guarantee the Governor total control over the RCC's actions, the Governor nonetheless retains "enough control" because his appointed members constitute seven of the nine members required for the quorum. *See McCrory*, 368 N.C. at 646, 781 S.E.2d at 256; *Cooper Confirmation*, 371 N.C. at 800, 822 S.E.2d at 289–90. Given the quorum requirement, it is not as though the General Assembly's six appointed members can take action without the approval of at least three of the Governor's appointed members. As the General Assembly did not violate separation of powers, the panel did not err by concluding that the restructuring of the BCC was constitutional.

V. Conclusion

We conclude the General Assembly violated separation of powers by restructuring the BOT, EIC, and CPH. The General Assembly, however, did not violate separation of powers by restructuring the WRC, EMC, CRC, and BCC. Accordingly, we affirm in part and reverse in part.

AFFIRMED in part and REVERSED in part.

Judge TYSON concurs.

Judge MURRY concurs by separate opinion.

MURRY, Judge, concurring.

"Deriving a single definition of executive power could never be a simple exercise." Jack N. Rakove, *Original Meaning: Politics and Ideas in the Making of the Constitution* 245 (1996) [hereinafter Rakove, *Original Meaning*]. So too here. Because I agree with each Commission-specific examination of gubernatorial control over the restructured appointment process, I fully concur with the majority's well-reasoned opinion. I write separately, however, for two reasons: (1) to address certain implicit questions of North Carolina's *intra*-Executive Branch separation of powers omitted by Plaintiff in his principal brief and (2) to defend the methodological interpretation most suited to the task of discerning the relevant constitutional provisions at issue—original public meaning based on analogical reasoning from text, history, and precedent.[1] *See* Antonin Scalia, *A Matter of Interpretation* 44–46 (new ed. 2018) [hereinafter Scalia, *Interpretation*]. *Contra, e.g.*, *Harper v. Hall*, 384 N.C. 292, 393 (2023) (Earls, J., dissenting).

I. Executive Structure

As articulated in a separate proceeding, some of Plaintiff's arguments touch upon "the General Assembly's ability to reassign certain

1. I leave the explanation of other originalist theories to minds far greater than my own. *See generally*, *e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 10, 16–17 (1971) (proposing jurisprudence based on "[F]ramers' . . . inten[t]" as determined by "text and history"); Keith E. Whittington, *Constitutional Interpretation* 59 (1999) (advocating originalism based on "a prior and fixed idea . . . contained in the textual language"); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 Nw. U. L. Rev. 751, 752 (2009) (deducing original meaning based on "content of the interpretive rules in place when the Constitution was enacted"); *McKinney v. Goins*, 387 N.C. 35, 60, 62 (2025) (Earls, J., concurring in result) (articulating "extreme originalism" based on circumstantial totality of "confus[ion], extrem[ity], and hypocri[sy]").

duties among executive constitutional officers within the [E]xecutive [B]ranch." *Stein v. Berger*, 387 N.C. 575, 577 (2025) (emphasis omitted). The text of the State Constitution's Article III specifies their respective duties and the General Assembly's role in shaping them. *See* N.C. Const. art. III. Our State's robust corpus of historical scholarship informs that text's meaning as it constitutionally developed. *See*, *e.g.*, Earle H. Ketcham, *The Sources of the North Carolina Constitution of 1776*, 6 N.C. Hist. Rev. 215, 218–20 (1929) [hereinafter Ketcham, *Sources*]; Emery B. Denny et al., *Report of the N.C. State Constitution Study Commission* 104 (1968) [hereinafter *N.C. Const. Report*]; John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1765–67 (1992) [hereinafter Orth, *N.C. Const. Hist.*]. Our precedents reflect State traditions in recognition of *stare decisis*'s "pedigree in the unwritten common law" of North Carolina. *Gamble v. United States*, 587 U.S. 678, 714 (2019) (Thomas, J., concurring) (citing 1 William Blackstone, *Commentaries* *68–89).

A. Text

Contrary to the unitary federal executive, *see* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive* 30–38 (2008), Article III divides our Executive Branch's powers among the plural Council of State, with the Governor chief among them, N.C. Const. art. III, § 1–2, 7–8. Ratified again in 1971, the Article outlines the structure and occupants of that Branch. Section 1 "vest[s] in the Governor" "[t]he executive power of the State." *Id.* art. III, § 1. Section 5 specifies at least eleven constitutional duties within the ambit of that power. *E.g.*, *id.* art. III, § 5, cl. 4 (Take Care Clause); *id.* art. III, § 5, cl. 5 (Commander in Chief Clause). Sections 2, 7, and 8 establish the other nine statewide-elected executive officers that collectively form our Council of State, including the Lieutenant Governor. *See id.* art. III, §§ 2, 7–8. Unlike for the Governor, though, Article III specifies only that the Lieutenant Governor "perform such additional duties as the General Assembly or the Governor may assign to h[er]," *id.* art III, § 6, and that the other Councilors' "duties shall be prescribed by law," *id.* art. III, § 7, cl. 2. Article XIV reaffirms the General Assembly's authority to prescribe these "general laws." *Id.* art. XIV, § 3.

Read together, these Clauses "fairly impl[y]," Antonin Scalia & Bryan A. Garner, *Reading Law* 16 (2012), "at least 'three categories' of executive duties" that fall syllogistically far short of some "[un]precedent[ed] . . . framework," *Stein*, 387 N.C. at 591 (Earls, J., dissenting). *First*, the State Constitution does express specific executive duties of the Governor and Lieutenant Governor. *See id.* at 579 (majority op.). *Second*, it does express that other executive duties be specifically "assigned by law." *Id.* Thus, *third*, it *does* imply a potentially broader category of unspecified "duties inherent in a given executive role." *Id.* But true enough, executive inherency is conceptually opaque enough to invite mischief. *See* Arthur M. Schlesinger, Jr., *The Rise of Presidential War*, *in The Imperial Presidency* ch. 3 (1973); *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure Case*), 343 U.S. 579 (1952). So, unlike in past cases that addressed only *inter*-Branch separations of power, the question is now: To whom and to what extent *within* the State Executive Branch can the General Assembly exercise its legislative power to "alter from time to time" the executive power? N.C. Const. art. III, § 5, cl. 10.

B. History

Our founding Constitution vested plenary power in the Legislative Branch, with the Judicial and Executive Branches only attaining constitutional vestment in 1868. *Compare* N.C. Const. of 1776, Declaration of Rights, § 1 (legislative vesting clause), *with* N.C. Const. of 1868 art. IV, § 4 (judicial vesting clause), *and id.* art. III, § 1 (executive vesting clause). The current Constitution of 1971 semantically simplified but substantively reaffirmed these grants. *See N.C. Const. Report* 71–73. After both houses rejected the originating bills under Article XIII, *see* H.B. 509, 1969 Gen. Assemb., Reg. Sess. (N.C. 1969); S.B. 272, 1969 Gen. Assemb., Reg. Sess. (N.C. 1969), the General Assembly declined to put an amendment to the voters that would have granted the Governor any veto power.[2] *Contra N.C. Const. Report* 101–06.

The Constitution of 1776 disregarded any pretense of coequality by subjecting all executive officers to an annual legislative election and by "restrain[ing]" their "executive [p]owers . . . according the [l]aws of the State." N.C. Const. of 1776, § XIX; *see* Ketcham, *Sources* at 218 ("The legislature was composed of two houses[ ] . . . as supreme as ever John Locke might desire."). *Contra The Federalist No.* 68 (Alexander Hamilton). The Constitution of 1868 vested the General Assembly with analogous authority to "prescribe[ ] by law" the duties of every Councilor of State save the Governor himself. N.C. Const. of 1868 art. III, §§ 13–14. To this day, the Assembly has generally defined the scope and balance of these executive duties through its "prescri[ption of] the functions,

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2. A quarter-century after ratification, the General Assembly reconsidered this decision and put the gubernatorial veto to North Carolina's voters, who collectively ratified an amendment subject to a three-fifths override vote in each house. *See* Act of Mar. 8, 1995, ch. 5, 1995 N.C. Sess. Laws 6.

powers, and duties of the administrative departments and agencies of the State," N.C. Const. art. III, § 5, cl. 10, run by those Councilors whose authorities it "prescribe[s] by law," *id.* art III., § 7, cl. 2.

The opposing two Branches and our citizenry have repeatedly acknowledged the General Assembly's relative power throughout the intervening centuries. *See*, *e.g.*, *Trs. of Univ. v. Foy*, 2 Hayw. 310, 320 (1804) ("The authority of the Executive is too confined" "[by] the [C]onstitution" "to . . . give[ ] cause for apprehension . . . ."); Members of the Gen. Assemb.—Privilege, 19 N.C. Op. Att'ys Gen. 67 (1926–1928) ("Under our Constitution, the Legislative Department is the residuum of all power not otherwise conferred or retained."); *N.C. Const. Report* 104 ("In North Carolina, most of the Governor's powers derive from statute, not the [C]onstitution."). Thus, our Constitution "has its own unique history" of executive power and coequality notions "both in terms of the constitutional text itself and of [our] judiciary's interpretation of that text." *Cooper v. Berger*, 371 N.C. 799, 813 (2018).

C. Precedent *Qua* Tradition

By structuralizing the Governor's historical position as "only the leading member" of a "plural body" "elected either by the assembly or by the people at large," Rakove, *Original Meaning* 252, our Constitution's particularly plural executive requires "unique state . . . theoretical considerations" inapposite to the federal presidency,[3] Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 Duke L.J. 545, 575–77 (2023) (critiquing *Cooper v. Berger*, 371 N.C. 799, on those grounds). State-specific considerations relevant here include at least, *one*, the historical and practical concentration of governmental power in the General Assembly relative to its sibling Branches, *see* Orth, *N.C. Const. Hist.*, 70 N.C. L. Rev. at 1762–63; *Harper*, 384 N.C. at 322 (majority op.), *two*, that same Assembly's legislative ability to strip the Governor "of many of [his] present powers" "in a moment of rashness," *N.C. Const. Report* 104, *three*, the "clear potential for conflict between" "constitutional[ly] independ[ent] . . . office[r]s" of the Executive Branch

3. Our courts' interpretations of the State Constitution's separation of powers between its Branches regularly diverge from those of its federal counterparts (and with some occasional significance). *Contrast*, *e.g.*, *Bacon v. Lee*, 353 N.C. 696, 717 (2001) (reasoning that "judicial review of the exercise of clemency" over a convicted felon "would unreasonably disrupt a core power" of North Carolina's Governor), *with* Bob Woodward & Scott Armstrong, *The Brethren* 415 (1st pbk. ed. 2005) ("jettison[ing]" of Chief Justice Burger's draft "core functions argument" by Associate Justices for what became a "due process" "basis" in *United States v. Nixon*, 418 U.S. 683 (1974)).

as a result of "their differing functions and duties," *Tice v. Dep't of Transp.*, 67 N.C. App. 48, 54 (1984), and, *four*, a State Founding Father's recognition that we lack the judicial "authori[ty] to say that an act is absolutely void merely because, in the opinion of the court, it is contrary to natural justice," *Minge v. Gilmour*, 17 F. Cas. 440, 444 (C.C.D.N.C. 1798) (No. 9,631) (Iredell, Circuit Justice) (interpreting North Carolina's Law of the Land, Jury Trial, and Ex Post Facto Clauses).

II. Original Public Meaning

Recent State and Federal bench proclamations compel a recurrence to fundamental principles of interpretation that I believe should and must control the resolution of these issues. *E.g.*, *State v. Chambers*, 387 N.C. 521, 530 (2025) (Riggs, J., concurring in part and dissenting in part) (rejecting "arcane originalism"); *Stanley v. City of Sanford*, 145 S. Ct. 2058, 2089 n.12 (2025) (Jackson, J., dissenting) (dismissing "incessantly malleable" textualism).[4] Like purposivism and pragmatism, originalism and textualism are jurisprudential schools with divergent individual conceptions of the "correct" inputs and assumptions. *See* Stephen Breyer, *Reading the Constitution: Why I Choose Pragmatism*, Not *Textualism* 104–09 (2024) [hereinafter Breyer, *Constitution*]; Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 35–37 (1999). But all of them draw upon certain fundamental canons of interpretation in hopes of respecting the (small-r) republican principles of *representative* democracy. *Compare* Breyer, *Constitution* at 105 ("[A] purpose-oriented approach . . . is more consistent with the democratic values upon which legislation rests."), *with* Scalia, *Interpretation* 131–33 ("The criterion of 'legislative intent['] . . . invites the judge to impose his will.").

A. Principles

Quite unlike the former two schools, however, originalists emphatically reject the "idea that doctrine, ethos, or prudential concerns can trump the communicative content of the constitutional text." Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L. Rev. 453, 482 (2013) [hereinafter Solum, *Originalism*]. We instead

4. Although bound in part by mutual disregard for drafters' intent, *contra McKinney*, 387 N.C. at 61–62, textualism focuses on the written text to the exclusion of its "broader social purposes," Antonin Scalia, *A Matter of Interpretation* 23 (new ed. 2018). It typically (but not exclusively) applies to statutes instead of constitutions for reasons beyond the scope of this concurrence. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* 16–26 (2012) [hereinafter Scalia & Garner, *Reading Law*].

center a constitution's "text, history, and tradition." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 79 (2022) (Kavanaugh, J., concurring). In lieu of "tradition" per se, though, North Carolinian jurists draw upon precedent to acknowledge both our predecessors' adjudications, *e.g.*, *Ballard v. Hill's Heirs*, 3 Mur. 410, 414 (1819) ("conne[ct]ion with . . . history"); *State ex rel. Wilson v. Jordan*, 124 N.C. 683, 694–95 (1899) ("doctrine of *Hoke v. Henderson*[, 4 Dev. 1 (1833)]"); *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639 (2016) ("text, . . . historical context, . . . and our precedents"), and the States' collective font of American common law, *see* N.C.G.S. § 4-1 (2023); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

So we ground our consideration of the three hierarchical factors—text, history, and precedent—on the twin principles of (1) legal "fixation" by which a provision's meaning *is* determined at the certain point our citizenry commonly understood it as ratified and (2) normative "constraint" by which we *ought* to reduce the projection of our subjective value judgments onto positive law.[5] Solum, *Originalism* at 459–60. Contrary to the exclamations of its harshest critics (and, yes, some of its biggest fans), originalism properly understood does not purport to be "a mechanical process" and does "require judgment" to reach the *most accurate* constitutional meaning. Keith E. Whittington, *The New Originalism*, 2 Geo. J.L. & Pub. Pol'y 599, 611 (2004). But it also decreases the risk of mistaking individual policy preferences

5. To be sure, originalism lacks the epistemic "illuminat[ion of] a path," *State v. Borlase*, 387 N.C. 295, 327 (2025) (Earls & Riggs, JJ., dissenting), towards those "evolving standards of decency that mark the progress of a maturing society," *State v. Kelliher*, 381 N.C. 558, 596 (2022); *State v. Conner*, 381 N.C. 643, 660 (2022); *Dewalt v. Hooks*, 382 N.C. 340, 355 (2022) (Earls, J., dissenting). But after five decades of open debate in the classroom, courtroom, and public square, its established framework is hardly "pseudo-intellectual[ ]." *McKinney v. Goins*, 387 N.C. 35, 61 (2025) (Earls, J., concurring in result).

By virtue of the General Assembly's de facto (much less de jure) supremacy through the people, our State courts lack the opportunities for platonic guardianship that living constitutionalism and its "noninterpretivist" derivatives offer, John Hart Ely, *Democracy and Distrust* 88 n. (1980) ("seeking . . . constitutional judgment in one's [own] rendition of society's fundamental values")—all theories of jurisprudence enviably unburdened by constitutional text, electoral accountability, or self-doubt, *see*, *e.g.*, *McKinney*, 387 N.C. at 60 n.1 (criticizing majority's use of "a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past" (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting)); *accord* Stuart Banner, *The Most Powerful Court in the World* 406 (2024) (then-President Johnson admitting that "to amend the [Federal] Constitution[,] we need a 2/3 majority in Congress and then a vote of 3/4 of the [S]tates" but that then-Justice William Douglas "can do it in one afternoon" (quoting Mr. Justice Douglas' Twenty-Fifth Anniversary on the Supreme Court: Dinner Proceedings 3 (May 14, 1964) (on file with F.D.R. Presid'l Libr., James H. Rowe, Jr. Papers, Box 89))).

for common law or constitutional doctrine, *see*, *e.g.*, *N.C. State Conf. of NCAAP v. Moore*, 382 N.C. 129, 160–65 (2022), in search of "a roving jurisdiction to do good." Bob Woodward & Scott Armstrong, *The Brethren* 106 (1st pbk. ed. 2005) (quoting then-Justice Hugo Black).

B. Considerations

Plaintiff implausibly asserts that the Council of State's executive status is "irrelevant" to his "duty to take care the laws are faithfully executed." But that category of authorities "inherent in a given executive role," *Stein*, 368 N.C. at 579, definitionally falls outside the State Constitution's textually committed separation of powers, thus creating a "construction zone"[6] of "concurrent authorit[ies] . . . in which [their] distribution is uncertain," Solum, *Originalism* at 502 (quoting *Steel Seizure Case*, 343 U.S. at 637 (Jackson, J., concurring)).

To wit, the majority correctly upholds the constitutionality of restructuring the WRC, EMC, and CRC into the Agriculture and Insurance Commissioners' portfolios because doing so preserves the power of the Executive Branch relative to the Legislative. But that conclusion leaves open questions of the assignments to those discrete Councilors per se. These assignments certainly fall within the conceptually "major purposes" of the Councilors' respective "core constitutional roles." *Stein*, 387 N.C. at 581–82 (Dietz, J., concurring) (quoting N.C. Const. art. III, § 11). But the Major Purposes Clause may plausibly modify "as part of its core prepositional phrase" the possible "head noun," *State v. Jenkins*, COA24-899, 2025 WL 2232043, at *5 (N.C. Ct. App. Aug. 6, 2025), of only *administrative departments* and not *offices of the State*, N.C. Const. art. III, § 11. Administrative law being largely a New Deal creation, these two latter Clauses may have materially distinct historical pedigrees relative to their respective *major purposes*. *See* Samuel Estreicher & David L. Noll, *Legislation and the Regulatory State* 445–48 (3d ed. 2022).

6. At the risk of (more) pretension, I refer only to a situation "where the communicative content of the constitutional text is vague" enough to permit multiple reasonable conclusions about the original meaning of North Carolina's executive power. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L. Rev. 453, 502 (2013). The underlying "interpretation–construction distinction" is a compelling principle of but ultimately parenthetical to my broader point here. *Id.* at 490–94, *contested in* Scalia & Garner, *Reading Law* 13–15. *See generally* Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 208 (1999) (defining "construction" as "realiz[ation through] . . . political practice" of "a denser web of values, institutions, procedures, and rights" "established by the constitutional text").

I also agree our Constitution "contemplate[s]" "th[is] mere reallocation of . . . authority within the Council of State," *Stein*, 387 N.C. at 581 (Berger, J., concurring), but could see an implicit "play in the joints" between the Executive Vesting and Administrative Reorganization Clauses, *cf. Locke v. Davey*, 540 U.S. 712, 718 (2004). The "portfolio of responsibilities" "for disfavored members of the Council" are indeed "gutt[able] by legislative fiat" (subject to a presumably overridden veto). *Stein*, 387 N.C. at 592 (Earls, J., dissenting); *accord N.C. Const. Report* 104 ("in a moment of rashness"). And an "ultimate responsibility" for law enforcement does not mean a *singular* one. *Cooper*, 371 N.C. at 799. *Contrast Ultimate*, *Black's Law Dictionary* (4th ed. 1968) ("[L]ast in the . . . sequence tended toward by all that precedes . . . ."), *with Singular*, *id.* ("Unitary; . . . affecting only one person . . . ."). While Plaintiff is "vested" with "[t]he executive power of the State," Article III's specific enumeration of those substantial gubernatorial powers may imply a limitation to them alone. N.C. Const. art. III, § 1. But because the majority's well-reasoned opinion recognizes the breadth and limitations of the General Assembly's power to alter the Executive Branch's own powers, I, with this further explanation, concur in full.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 15 October 2025)

ARMSTRONG L. FIRM, P.A. v. CHAPMAN No. 25-280	Johnston (18CVD001233-500)	Affirmed
DeLOY v. LEKOWSKI No. 25-2	Iredell (22CVS000036-480)	Affirmed
FAIRCLOTH v. FAIRCLOTH No. 25-189	Wake (23CVD000996-910)	Vacated and Remanded for Additional Findings of Fact.
HARRINGTON v. LANEY No. 24-1071	Anson (22CVS000390-030)	Reversed
IN RE B.L.G.D. No. 25-133	Rockingham (23JT000091-780)	Affirmed
IN RE B.S.C. No. 24-1105	Pasquotank (22JT000024-690) (22JT000025-690) (22JT000026-690) (22JT000-027-690)	Affirmed
IN RE C.H. No. 25-271	Polk (22JT000033-740) (22JT000032-740)	Affirmed
IN RE C.R. No. 25-132	Iredell (24JA000106-480)	Affirmed
IN RE J.G. No. 25-176	Mecklenburg (21JA000398-590) (21JA000399-590) (21JA000400-590)	Affirmed and Remanded for correction of clerical error.
IN RE K.R. No. 25-105	Durham (21JA000103-310)	Affirmed
IN RE K.S. No. 24-437	Rutherford (17JA000059-800) (17JA000060-800)	Affirmed
IN RE M.S.R. No. 25-73	Gaston (21JT000114-350)	Affirmed

IN RE N.E.S. No. 25-316	Alamance (21JA000141-000) (21JA000140-000)	Affirmed
IN RE P.S.C. No. 25-180	Forsyth (24JA000005-330) (24JA000006-330)	Affirmed
IN RE P.U.M.C. No. 25-4	Gaston (22JT000057-350) (22JT000058-350) (22JT000056-350)	Vacated and Remanded for New Disposition Hearing.
SKOUTELIS v. GREASY BRANCH WATER CORP. No. 25-161	Swain (23CVS000186-860)	Affirmed
STATE v. CLIFFORD No. 25-211	Forsyth (22CR255640-330)	No Error
STATE v. DOWNING No. 25-428	Washington (20CR050180-930) (20CR050150-930)	Dismissed
STATE v. HINES No. 25-43	Wayne (09CR051448-950)	No Error
STATE v. HUGHES No. 24-723	Cumberland (22CR299040-250)	No Error
STATE v. JUDD No. 24-190	Wake (21CR210767-910) (21CR210768-910) (21CR210770-910) (22CR000230-910)	No prejudicial error in part; no error in part.
STATE v. KEEL No. 25-186	Greene (20CR050166-390) (20CR050258-390) (20CR050268-390)	Affirmed in Part; Remanded in Part
STATE v. LINDSLEY No. 24-965	Cumberland (22CR005130-250)	Vacated and Remanded.
STATE v. McINTYRE No. 24-1117	Montgomery (23CR245364-610)	Affirmed
STATE v. MEAD No. 24-1049	Buncombe (21CR090156-100)	No Error

STATE v. MURELL No. 24-1004	Buncombe (20CR081859-100) (20CR082704-100)	No Error
STATE v. NUNEZ No. 24-1061	Edgecombe (21CR051740-320)	No Error
STATE v. TAJUDDIN No. 24-1104	Guilford (22CR071117-400)	No Error
STATE v. WHITE No. 24-1093	Graham (19CR000157-370)	New Trial.
STATE v. WOODARD No. 24-1058	Mecklenburg (22CR210606-590) (22CR210607-590) (22CR210610-590) (22CR210611-590) (22CR210612-590) (23CR002951-590)	No Error
TEBIB v. BURNETTE No. 25-303	Granville (24CV001860-380)	Dismissed

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