302 N.C. App.—No. 1 Pages 1-153

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JULY 29, 2026

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

CHRIS DILLON

Judges

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

Former Chief Judges

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

Former Judges

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

[1] Died 18 November 2025.

Clerk
EUGENE H. SOAR

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Executive Director
Jonathan Harris

Director
David Alan Lagos

Assistant Director
Michael W. Rodgers

Staff Attorneys
Lauren T. Ennis
Caroline Koo Lindsey
Ross D. Wilfley
Hannah R. Murphy
J. Eric James

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Ryan S. Boyce

Assistant Director
Ragan R. Oakley

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen
Niccolle C. Hernandez
Jennifer C. Sikes

COURT OF APPEALS

CASES REPORTED

Filed 3 December 2025

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

AIDING AND ABETTING

Elements—knowingly advised or encouraged—sexual offenses against a child—lack of affirmative conduct—The trial court erred by denying defendant's motion to dismiss charges alleging that she aided and abetted her boyfriend in the commission of statutory rape and statutory sexual offenses against her two minor children where the State failed to present substantial evidence of the essential element that defendant knowingly advised or encouraged her boyfriend to commit the offenses. Although evidence was presented that defendant was in the home when some of the criminal conduct took place, her physical presence alone was not sufficient to meet the conduct requirement. Further, the State failed to meet the mental state requirement—that defendant had the criminal intent to aid and abet her boyfriend in the commission of his crimes—where there was no evidence that defendant

APPEAL AND ERROR

Preservation of issues—discovery violation—disclosure of expert's opinion the night before testimony—failure to object—In a prosecution against two defendants on multiple felony charges arising from a shooting near a restaurant that injured three people, defendants failed to preserve for appellate review their arguments that the trial court erred by failing to exclude certain expert testimony when the State failed to disclose the expert's opinion until the night before the expert testified. Although one defendant's counsel objected prior to the testimony, after the trial court asked the counsel for both defendants to do "a little more research about what did you get in discovery and the authority," the objecting counsel informed the court that "the data was in the discovery the State provided" and, when asked by the trial court if there was anything further on the issue, responded in the negative. Thereafter, neither counsel objected to the testimony when it was offered. **State v. Allen, 78.**

ARBITRATION AND MEDIATION

Dissolution of family-owned company—scope of arbitrator's authority—future disputes outside of authority—In a dispute between siblings over the dissolution of a family-owned limited liability company in which an arbitrator entered three interim arbitration awards that, among other things, partitioned and distributed the company's land-holdings to the parties, the trial court properly upheld the arbitrator's awards and remedies setting forth various obligations regarding shared resources, where the arbitrator's decisions were authorized by the arbitration clause contained in the company's operating agreement. However, where the arbitrator exceeded its authority by imposing a mandatory requirement for the parties to submit all future disputes to arbitration, which neither party requested, the trial court erred by denying defendant's motion to modify that portion of the interim awards. The affected portion of the trial court's order was vacated, and the matter was remanded for correction pursuant to N.C.G.S. § 1-569.24(a)(2). **Reynolds v. Devotion Fam., LLC, 23.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Felony child abuse—N.C.G.S. § 14-318.4(a2)—"allows the commission of"—knowledge required—In an issue of first impression involving N.C.G.S. § 14-318.4(a2) (felony child abuse), the appellate court interpreted the statutory phrase "allows the commission of any sexual act upon the child" to include instances where a parent knows that sexual abuse has occurred and may continue but does nothing to stop the continued abuse. Therefore, in the present case, in which defendant mother was charged with two counts of felony child abuse based on acts committed by her boyfriend against her two minor children, where there was evidence that defendant's daughter informed defendant about the boyfriend's abuse, but defendant did nothing to stop the continued abuse and was not hindered from doing so, a jury could reasonably infer that defendant allowed the continued sexual acts against her daughter; therefore, defendant's motion to dismiss the charge with regard to her daughter was properly denied. However, where the State failed to present evidence that defendant knew about the sexual acts that her boyfriend committed against her son, defendant could not have "allowed" them under the statute; where defendant's motion to dismiss the charge with regard to her son should have been allowed, that conviction was vacated. **State v. Kleist, 105.**

CONSTITUTIONAL LAW

Effective assistance of counsel—tactical decisions by counsel—prejudice not shown—In a prosecution against two defendants on multiple felony charges arising from a shooting near a restaurant that injured three people, defendants' arguments that they received ineffective assistance of counsel—in the form of their counsels' failure to object to an alleged discovery violation, object to expert witness testimony, and/or hire an expert for the defense in historical cell-site analysis—failed where, even if counsels' tactical choices were deficient, defendants could not demonstrate any prejudice in light of the other, overwhelming evidence against them. **State v. Allen, 78.**

CONSUMER PROTECTION

North Carolina Debt Collections Act—vacated apartment—rent, past-due rent, and court fees owed by tenant—no false representations—In a bench trial addressing a dispute over the habitability of an apartment, which defendants had leased to plaintiff, the trial court properly determined that defendants did not violate the North Carolina Debt Collection Act by falsely representing the amount of debt owed by plaintiff. First, because plaintiff failed to show that the apartment was uninhabitable, there was no merit to his argument that defendant misrepresented his debt by demanding he pay full rent for an uninhabitable property. Second, although defendants counterclaimed for a higher amount in past-due rent than was actually owed, plaintiff failed to show that he suffered any injury or deception, since he never overpaid as a result of defendants' error and even refused to pay rent for five months. Thirdly, the administrative fees (labeled as "court fees" on the resident ledger) were lawful as out-of-pocket expenses under N.C.G.S. § 42-46 (governing fees, costs, and expenses authorized in residential rental agreements). **Horne v. Ginkgo Aurora LLC, 1.**

CONTEMPT

Civil—constitutional argument inapplicable—effective sentence to debtor's prison—noncompliance with temporary restraining order—In an action brought by a group of insolvent insurers (plaintiffs) against a business owner and his company (defendants)—where defendants bought out plaintiffs, caused $1.2 billion held for plaintiffs' policyholders to be invested into defendants' non-insurance affiliate companies, entered into a "Memorandum of Understanding" (MOU) with plaintiffs memorializing a restructuring plan to facilitate repayment of plaintiffs' debts, failed to complete the restructuring plan by the deadline under the MOU, and were held in contempt for violating a temporary restraining order (TRO) prohibiting defendants from selling, encumbering, or otherwise devaluing specified affiliate companies—the trial court's contempt order did not violate Article I, Section 28 of the North Carolina Constitution by "effectively sentenc[ing defendant] Lindberg to debtor's prison"; that provision was inapplicable because defendant Lindberg was held in civil contempt and ordered imprisoned for his willful noncompliance with the TRO—not for his inability to pay. **Southland Nat'l Ins. Corp. v. Lindberg, 53.**

Civil—purge—evidence of violation of temporary restraining order—unchallanged findings of fact—In an action brought by a group of insolvent insurers (plaintiffs) against a business owner and his company (defendants)—where defendants bought out plaintiffs, caused $1.2 billion held for plaintiffs' policyholders to be invested into defendants' non-insurance affiliate companies, entered into a "Memorandum of Understanding" (MOU) with plaintiffs memorializing a restructuring plan to facilitate repayment of plaintiffs' debts, failed to complete the restructuring plan by the deadline under the MOU, and were held in contempt for violating a temporary restraining order (TRO) prohibiting defendants from selling, encumbering, or otherwise devaluing specified affiliate companies—the trial court's contempt order, based upon noncompliance with the TRO was supported by unchallenged, and therefore binding, findings of fact regarding defendants' violations of the TRO, both in the past and as of the date of the contempt hearing. **Southland Nat'l Ins. Corp. v. Lindberg, 53.**

Violation of temporary restraining order—present ability to comply with purge conditions—competent evidence—In an action brought by a group of insolvent insurers (plaintiffs) against a business owner and his company (defendants)—where defendants bought out plaintiffs, caused $1.2 billion held for plaintiffs' policyholders to be invested into defendants' non-insurance affiliate companies, entered into a "Memorandum of Understanding" (MOU) with plaintiffs memorializing a restructuring plan to facilitate repayment of plaintiffs' debts, failed to complete the restructuring plan by the deadline under the MOU, and were held in contempt for violating a temporary restraining order prohibiting defendants from selling, encumbering, or otherwise devaluing specified affiliate companies—the trial court's determination that defendants had the present means and ability to comply with the purge conditions of the contempt order was supported by competent evidence and unchallenged findings of fact. The appellate court emphasized that defendants did not need to have "property free and clear of any liens" with which to purge contempt where funds could be obtained through reasonable measures, including the liquidation of equity in encumbered assets. **Southland Nat'l Ins. Corp. v. Lindberg, 53.**

EVIDENCE

Expert testimony—sexual offenses against minor children—absence of physical injuries—plain error analysis—In a prosecution of a mother and her boyfriend for multiple sexual offenses against two minor children, the trial court did not commit plain error by allowing a sexual assault nurse examiner (who performed forensic examinations of both children) to testify that the absence of physical injuries did not preclude the possibility that sexual abuse had occurred. The statement did not constitute an impermissible vouching of the children's credibility where the expert did not state that sexual abuse had in fact occurred and where she laid a proper scientific foundation for her testimony. Even assuming error, defendants could not demonstrate prejudice in light of (1) the detailed testimony from both children about multiple instances of abuse, and (2) the instructions given to the jury to carefully weigh all evidence, including expert opinions. **State v. Kleist, 105.**

Expert witness testimony—Evidence Rule 702(a)—admissibility requirements met—In a prosecution against two defendants on multiple felony charges arising from a shooting near a restaurant that injured three people, the trial court properly admitted expert witness testimony on historical cell-site "handoff" analysis pursuant to Evidence Rule 702(a) where the court's inquiry addressed the proper three-step framework by evaluating the testimony in question—from a Federal Bureau of Investigations Special Agent—in light of (1) the witness's qualifications and specialized knowledge, (2) his application of reliable principles including manual verification of results produced by software, and (3) his use of sufficient facts and data of the sort customarily relied upon in the scientific field of historical cell-site analysis. Moreover, even had the admission been erroneous, such error would have been harmless where the State's evidence also included: surveillance footage of defendants entering the vehicle from which the shots were fired, eyewitness testimony describing the occupants of the vehicle at the time of shooting, and physical evidence, including the presence of defendants' fingerprints inside the vehicle. **State v. Allen, 78.**

JURISDICTION

Personal—sufficient minimum contacts—consent to general personal jurisdiction—registering to do business in state—In a product liability case brought following the total loss of an airplane and serious injuries to two passengers in a crash caused by elevator cables in the plane's tail snapping during takeoff, the trial court properly denied a motion to dismiss for lack of personal jurisdiction where defendant—a foreign company—did not controvert plaintiff's allegation that defendant was registered to do business in North Carolina, although defendant did aver that it lacked any further connection to or continuing contacts with the state. While no previous decision from a North Carolina state court had determined that holding a certificate of authority to do business in the state, standing alone, subjected a foreign company to the jurisdiction of North Carolina courts, recent cases from the United States Supreme Court and a federal district court in North Carolina—in conjunction with the language of the state's Long Arm Statute and statutes concerning certificates of authority—supported the notion that, in registering to do business in North Carolina, a foreign company consents to general personal jurisdiction. **PDII, LLC v. Sky Aircraft Maint., LLC, 11.**

Subject matter—probation revocation—county of sentencing or residence—judgments vacated—The Guilford County Superior Court lacked jurisdiction to revoke defendant's probation where the original judgment imposing defendant's sentence and probation was entered in Franklin County and where there was no indication that the case had been transferred to Guilford County for supervision. Although defendant's probation violation reports were filed in Guilford County, the State failed to demonstrate beyond a reasonable doubt that defendant was either sentenced in, violated probation in, or resided in Guilford County. Therefore, the judgments revoking probation were vacated. **State v. Crabtree, 90.**

KIDNAPPING

First-degree—forced movement between rooms—not inherent in armed robbery—increased danger—In a prosecution for robbery with a dangerous weapon and first-degree kidnapping arising from a home invasion in which defendant shot the victim in the leg, robbed him, and then forced him to move from the living room to a rear bedroom, the State presented substantial evidence of each element of first-degree kidnapping where the victim's forced movement between rooms was not inherent in the robbery; instead, the victim's restraint was a separate and complete act independent from and unnecessary to the robbery and, further, the movement increased the danger to the victim beyond that inherent in the robbery, due to the victim's wounded leg. Therefore, the trial court properly denied defendant's motion to dismiss the kidnapping charge. Further, even if defendant had, more appropriately, preserved a double jeopardy argument—by asking the court to arrest judgment on the kidnapping charge after the jury convicted him of both kidnapping and robbery, which he did not do—the trial court would not have erred by denying a motion to arrest judgment. **State v. Mosley, 132.**

LANDLORD AND TENANT

Constructive eviction—unfair and deceptive trade practices—habitability of leased apartment—In a bench trial addressing a dispute over the habitability of an apartment, which defendants had leased to plaintiff, the trial court properly entered judgment in favor of defendants on plaintiff's claims of constructive eviction and unfair and deceptive trade practices, both of which were predicated on plaintiff's claim of breach of the implied warranty of habitability, which itself lacked merit because plaintiff failed to show that the apartment was uninhabitable. **Horne v. Ginkgo Aurora LLC, 1.**

Implied warranty of habitability—imminently dangerous conditions—sufficiency of factual findings—In a bench trial addressing a dispute over the habitability of an apartment, which defendants had leased to plaintiff, the trial court properly entered judgment in favor of defendants on plaintiff's claims of breach of the implied warranty of habitability and "imminently dangerous conditions" (per N.C.G.S. § 42-42(a)(4)), where the court's findings of fact—which were not only supported by competent evidence but also unchallenged, and therefore binding, on appeal—included the following: while living at the apartment, plaintiff submitted multiple service requests, including for mold and for a water stain on his bedroom ceiling; defendants made remedial efforts each time plaintiff reported mold in the apartment, after which plaintiff made no further mold-related service requests for over a year; when plaintiff submitted his last service request to address mold, the inspections by property management found no safety or habitability concerns; after plaintiff vacated the apartment, a final inspection revealed no mold and no leak in the bedroom ceiling or other water intrusion in the apartment; and there was no evidence that plaintiff's service requests were ignored or not successfully completed by defendants. **Horne v. Ginkgo Aurora LLC, 1.**

REAL PROPERTY

N.C.G.S. § 41-11—effect of 1927 amendment—independent cause of action for life tenants—In a proceeding that resulted in the entry of an order pursuant to N.C.G.S. § 41-11—ordering that real property be sold, with the value of defendant's life estate paid to him and the balance of proceeds invested for the benefit of the remaindermen (plaintiff and third-party defendants)—the Court of Appeals was bound by the Supreme Court's express holding regarding the effect of the 1927 amendment to the statute: that it established an independent cause of action for life tenants separate from the statute's other provisions. **Zuleger v. Clore, 138.**

N.C.G.S. § 41-11—sale of property and distribution of present value of life estate—permitted—In a proceeding that resulted in the entry of an order pursuant to N.C.G.S. § 41-11—ordering that real property be sold, with the value of defendant's life estate paid to him and the balance of proceeds invested for the benefit of the remaindermen (plaintiff and third-party defendants)—the trial court did not err in concluding that defendant was entitled to the sale of property and a subsequent payout of the value of his life tenancy, less expenses. While the 1927 amendment to the statute only provided for a separate cause of action by life tenants, another provision permitted the distribution of funds received from the sale of property to a life tenant. **Zuleger v. Clore, 138.**

SENTENCING

Felony possession of marijuana—amount requirement—omitted from jury instruction—remand for resentencing—In a prosecution for various crimes including fourteen drug-related charges, the trial court erred in entering judgment against defendant on the charge of felony possession of a schedule VI controlled substance (in this case, marijuana) where, in its jury instruction on the offense, the court omitted the requirement that the jury find defendant had possessed more than 1.5 ounces of marijuana. By failing to mention the amount requirement for the felony offense, the court essentially instructed the jury on simple possession of marijuana—a misdemeanor—and, therefore, the jury's guilty verdict was strictly for simple possession. Although defendant did not object to the instruction at trial, the court's error was still reviewable on appeal as a sentencing error. Ultimately, the felony conviction was vacated and the case was remanded for resentencing on the misdemeanor offense. **State v. McKoy, 127.**

SEXUAL OFFENSES

Statutory sex offense with a child by an adult—penetration—sufficiency of evidence—The State presented substantial evidence of each element of the offense of statutory sex offense with a child by an adult pursuant to N.C.G.S. § 14-27.28(a) to overcome defendant's motion to dismiss for insufficient evidence. In particular, evidence that defendant had penetrated the victim's vagina with his fingers (meeting the definition of "sexual act" pursuant to N.C.G.S. § 14-27.20(4)) was supported by the victim's testimony, corroborating testimony (from the victim's parents, the nurse who conducted a physical examination of the victim, and the forensic interviewer who interviewed the victim), and DNA evidence obtained from the victim's underwear that was consistent with defendant's DNA. **State v. Cruz, 96.**

UNFAIR TRADE PRACTICES

Foreclosure by power of sale—no improper misrepresentation—no genuine issue of material fact—summary judgment—The trial court did not err by entering summary judgment in favor of defendant bank in plaintiff homeowners' action asserting unfair and deceptive trade practices (UDTP) with regard to a foreclosure proceeding. Although plaintiffs alleged that defendant misrepresented its intention to delay foreclosure pending its review of plaintiffs' documents (purporting to show proof of funds and a gift letter in order to cure their default), there was no genuine issue of material fact regarding plaintiffs' failure to satisfy defendant's requirements in order to cancel the foreclosure sale and, in addition, plaintiffs failed to demonstrate deception that would amount to substantial aggravating circumstances. Further, plaintiffs did not raise a breach of contract claim, although any right of plaintiffs to seek reinstatement of their mortgage during the upset bid period, which they asserted was denied to them, would have involved contractual rights under the deed of trust. **Roach v. Wells Fargo Bank, Nat'l Ass'n, 43.**

N.C. COURT OF APPEALS

2026 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	12 and 26
February	9 and 23
March	9 and 23
April	20
May	4 and 18
June	1
August	10 and 24
September	14 and 28
October	12 and 26
November	16
December	1

Opinions will be filed on the first and third Wednesdays of each month.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

BRIAN HORNE, PLAINTIFF
v.
GINKGO AURORA LLC & GINKGO OBC LLC, DEFENDANTS

No. COA25-238

Filed 3 December 2025

1. Landlord and Tenant—implied warranty of habitability—imminently dangerous conditions—sufficiency of factual findings

In a bench trial addressing a dispute over the habitability of an apartment, which defendants had leased to plaintiff, the trial court properly entered judgment in favor of defendants on plaintiff's claims of breach of the implied warranty of habitability and "imminently dangerous conditions" (per N.C.G.S. § 42-42(a)(4)), where the court's findings of fact—which were not only supported by competent evidence but also unchallenged, and therefore binding, on appeal—included the following: while living at the apartment, plaintiff submitted multiple service requests, including for mold and for a water stain on his bedroom ceiling; defendants made remedial efforts each time plaintiff reported mold in the apartment, after which plaintiff made no further mold-related service requests for over a year; when plaintiff submitted his last service request to address mold, the inspections by property management found no safety or habitability concerns; after plaintiff vacated the apartment, a final inspection revealed no mold and no leak in the bedroom ceiling or other water intrusion in the apartment; and there was no evidence that plaintiff's service requests were ignored or not successfully completed by defendants.

2. Landlord and Tenant—constructive eviction—unfair and deceptive trade practices—habitability of leased apartment

In a bench trial addressing a dispute over the habitability of an apartment, which defendants had leased to plaintiff, the trial court properly entered judgment in favor of defendants on plaintiff's claims of constructive eviction and unfair and deceptive trade practices, both of which were predicated on plaintiff's claim of breach of the implied warranty of habitability, which itself lacked merit because plaintiff failed to show that the apartment was uninhabitable.

3. Consumer Protection—North Carolina Debt Collections Act —vacated apartment—rent, past-due rent, and court fees owed by tenant—no false representations

In a bench trial addressing a dispute over the habitability of an apartment, which defendants had leased to plaintiff, the trial court properly determined that defendants did not violate the North Carolina Debt Collection Act by falsely representing the amount of debt owed by plaintiff. First, because plaintiff failed to show that the apartment was uninhabitable, there was no merit to his argument that defendant misrepresented his debt by demanding he pay full rent for an uninhabitable property. Second, although defendants counterclaimed for a higher amount in past-due rent than was actually owed, plaintiff failed to show that he suffered any injury or deception, since he never overpaid as a result of defendants' error and even refused to pay rent for five months. Thirdly, the administrative fees (labeled as "court fees" on the resident ledger) were lawful as out-of-pocket expenses under N.C.G.S. § 42-46 (governing fees, costs, and expenses authorized in residential rental agreements).

Appeal by Plaintiff from judgment entered 3 July 2024 by Judge Bradley B. Letts in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 September 2025.

The Law Offices of Andrew L. Gordon, PLLC, by Andrew Gordon, for Plaintiff-Appellant.

Higgins & Owens, PLLC, by Sara W. Higgins, for Defendants-Appellees.

COLLINS, Judge.

This action arises from a dispute over the habitability of an apartment. Plaintiff, Brian Horne, appeals the trial court's entry of judgment in favor of Defendants, Ginkgo Aurora LLC and Ginkgo OBC LLC. Plaintiff argues that the trial court erred by entering judgment for Defendants on Plaintiff's claims for breach of contract, breach of implied warranty of habitability and violation of the Residential Rental Agreements Act, imminently dangerous conditions, unfair and deceptive trade practices, wrongful eviction, and violation of prohibited acts by debt collectors. Plaintiff further argues that the trial court erred by entering judgment for Defendants for $7,251.21 in past-due rent and related fees. For the reasons discussed below, we affirm the trial court's judgment.

I. Background

Plaintiff filed a complaint in February 2023 against Defendants for breach of contract, breach of implied warranty of habitability and violation of the Residential Rental Agreements Act, imminently dangerous conditions, unfair and deceptive trade practices, wrongful eviction, and violation of prohibited acts by debt collectors. Defendants answered and counterclaimed for $9,339.21 in past-due rent and fees.

A bench trial was held in March 2024 where the evidence presented tended to show the following: Plaintiff entered into an apartment lease with Ginkgo OBC LLC for February 2021 until March 2022. Plaintiff entered into a lease with Ginkgo Aurora LLC for March 2022 until March 2023. Plaintiff resided in the apartment from February 2021 until approximately February 2023, when he voluntarily vacated the apartment and filed the current action.

After Plaintiff vacated the apartment and filed his complaint, Plaintiff received letters from a collection agency attempting to collect $9,339.21 allegedly owed to Defendants. At trial, Defendants acknowledged that this amount included an improper charge for rent when the apartment was being renovated after Plaintiff had moved out and could not have been re-rented.

Both apartment leases required Plaintiff to send maintenance requests to Defendants in writing or through Defendants' online portal. During his tenancy, Plaintiff submitted a number of service requests regarding various issues with the apartment.

Plaintiff reported a water stain on the ceiling of his bedroom. Although the report did not indicate that there was an active leak, Plaintiff testified at trial that there was an active leak and that he had notified management of it.

Plaintiff requested maintenance of the apartment's thermostat and heater on two consecutive days. Both requests were marked as

"Resolved" in the online maintenance portal on the same day Plaintiff submitted them.

Plaintiff twice reported mold in the bathroom. The bathroom was treated after each report. Plaintiff reported mold in the washing machine. The issue was marked as "Resolved" in the online maintenance portal.

Plaintiff hired a certified mold inspector, Ron Yountz, to inspect and test the apartment for mold. Yountz generated three reports based on three different surveys of the apartment. Although Yountz's reports identified mold in the apartment and recommended remediation measures, none of the three reports identified dangerous or uninhabitable conditions. At trial, Yountz testified that if dangerous or uninhabitable conditions had existed on the premises, he would have noted this in his reports.

After the trial, judgment was entered in favor of Defendants on all claims. The trial court found that Plaintiff's apartment was not uninhabitable or imminently dangerous and thus concluded that Defendants did not commit unfair or deceptive trade practices and did not constructively evict Plaintiff. The trial court further found and concluded that Defendants did not violate the Debt Collector's Act and entered judgment in Defendants' favor for $7,251.21 in unpaid rent and related fees. Plaintiff appeals.

II. Discussion

Plaintiff argues that the trial court erred by entering judgment for Defendants on Plaintiff's claims. Plaintiff further argues that the trial court erred by entering judgment for Defendants for $7,251.21 in past-due rent and related fees.

A. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Stikeleather Realty & Invs. Co. v. Broadway*, 242 N.C. App. 507, 515 (2015) (citation omitted). "When we review decisions from a bench trial, findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary." *Onnipauper LLC v. Dunston*, 290 N.C. App. 486, 489 (2023) (cleaned up). "But conclusions of law drawn by the trial court from its findings of fact are reviewable de novo on appeal." *Id.* (citation omitted). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citation omitted).

"The label of fact put upon a conclusion of law will not defeat appellate review." *Id.* (citation omitted). "Thus, findings of fact that are actually conclusions of law will be reviewed as conclusions of law." *Id.* "And determinations reached by application of legal principles are conclusion of law." *Id.* (citation omitted).

Plaintiff has failed to challenge any of the trial court's findings of fact. The facts are thus binding on appeal. *See Carolina Marlin Club Marina Ass'n v. Preddy*, 238 N.C. App. 215, 220 (2014).

B. Implied Warranty of Habitability and Imminently Dangerous Conditions

[1] Plaintiff first argues that Defendants "breached the implied warranty of habitability by failing to maintain the heat and roof at the premises and by failing to repair the imminently dangerous conditions within a reasonable time. . . ." Plaintiff alleges the following three imminently dangerous conditions existed in the apartment: (1) "unsafe ceilings or roofs," (2) "lack of an operable heating facility during the winter," and (3) "excessive standing water, sewage, or flooding problems caused by plumbing leaks or inadequate drainage that contribute to mosquito infestation or mold." (internal record citations omitted).

Under the Residential Rental Agreements Act, a landlord must comply with applicable housing codes, repair imminently dangerous conditions within a reasonable period of time, and maintain in good working order "all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied . . . ." N.C. Gen. Stat. § 42-42(a)(4) (2024). Imminently dangerous conditions include "[e]xcessive standing water, sewage, or flooding problems caused by plumbing leaks or inadequate drainage that contribute to mosquito infestation or mold." *Id.* § 42-42(a)(8)(l).

These statutory requirements "create an implied warranty of habitability, such that a landlord warrants to the tenant that . . . [the] premises are fit for human habitation." *Creekside Apartments v. Poteat*, 116 N.C. App. 26, 34 (1994) (quotation marks and citation omitted). "The implied warranty of habitability is co-extensive with the provisions of the [Residential Rental Agreements] Act." *Miller v. C.W. Meyers Trading Post, Inc.*, 85 N.C. App. 362, 366 (1987). If a landlord fails to comply with the statutory requirements, a tenant has an affirmative cause of action for recovery of rent actually paid. *Id.* at 368.

The trial court made the following relevant findings of fact:

> 13. Plaintiff submitted several service requests regarding various issues in the Premises including a water stain on the ceiling of his bedroom.
>
> . . . .
>
> 15. Landlord addressed the service requests submitted by Plaintiff, although not always to Plaintiff's satisfaction or as quickly as would have been ideal.
>
> . . . .
>
> 21. Deposition evidence establishes that following a request by Plaintiff to address mold, remedial efforts were embarked upon by Defendants in the Premises and[] no further service requests were forthcoming in the portal or in writing by Plaintiff after February 2021, related to mold either on the ceiling or in the washing machine unit until 2022.
>
> . . . .
>
> 28. On November 28, 2022, Landlord's assistant property manager and regional maintenance supervisor both inspected the areas that Plaintiff contended rendered the Premises uninhabitable and concluded that they did not present safety or habitability concerns.
>
> . . . .
>
> 44. After Plaintiff vacated the Premises, the final inspection of the Premises did not indicate the presence of mold or water intrusion. No evidence was adduced at trial that mold remediation was required in the Premises and no leak was found associated with the bedroom ceiling stain.
>
> . . . .
>
> 52. Ms. Leak was aware of the residential lease used by Defendants and the Defendants' policy for management of the Premises. (Plaintiff's exhibit #41). Ms. Leak was the property manager when the Plaintiff resided at the Premises. No evidence exists that the requests for service and repairs were ignored or not successfully completed in the Premises by Defendants on-property maintenance department. (See also Plaintiff's exhibit #42).

These unchallenged findings of fact are binding on appeal. *See Carolina Marlin Club Marina Ass'n*, 238 N.C. App. at 220. Furthermore, our independent review of the record reveals that each finding of fact is supported by record evidence. On these facts, the trial court made the following conclusions of law:

> 57. The only provision of N.C. Gen. Stat. § 42-42(8) that is even potentially implicated by the evidence in this case is subsection (1): "Excessive standing water, sewage, or flooding problems caused by plumbing leaks or inadequate drainage that contribute to mosquito infestation or mold." This provision by its express terms does not apply, however, because there was no evidence of any excessive standing water, sewage, or flooding problems in the Premises.[1]
>
> . . . .
>
> 2. Plaintiff did not meet the burden of proof to show that Landlord breached any warranty of habitability with respect to the Premises or that the Premises were uninhabitable at any time during which he resided at the Premises.
>
> 3. Plaintiff's second claim for relief alleging an imminently dangerous condition in the Premises during his tenancy, pursuant to N.C. Gen. Stat. [§] 42-42(8), does not permit recovery because there was no evidence of any excessive standing water, sewage, or flooding problems in the Premises.

The trial court's findings of fact support its conclusions that Plaintiff failed to show that the apartment was uninhabitable because imminently dangerous conditions existed on the premises. Accordingly, the trial court did not err by entering judgment for Defendants on this claim.

C. Constructive Eviction and Unfair and Deceptive Trade Practices

[2] Plaintiff also argues that Defendants' failure to maintain the apartment in a habitable condition and subsequent demands for rent

---

1. Here, the trial court made both findings of fact and conclusions of law in a section of the judgment labeled "Legal Analysis." Assertion 57, and later 61, require the application of legal principles. "Because we are not bound by the trial court's labels, we will review these 'findings of facts' as conclusions of law, as they were reached by an application of legal principles." *Onnipauper*, 290 N.C. App. at 489.

payment constitute a constructive eviction and unfair and deceptive trade practices.

Constructive eviction is a breach of the lease by the landlord which makes the property untenable, causing the tenant to abandon the property. *Taha v. Thompson*, 120 N.C. App. 697, 705 (1995). Collecting rent for a residence while knowing that the residence is uninhabitable can constitute an unfair or deceptive trade practice under N.C. Gen. Stat. § 75-1.1(a). *Pierce v. Reichard*, 163 N.C. App. 294, 301-02 (2004).

Plaintiff's constructive eviction and unfair and deceptive trade practices claims are predicated on his claim of breach of the implied warranty of habitability. Because Plaintiff failed to show that the apartment was uninhabitable, the trial court did not err by entering judgment in favor of Defendants on Plaintiff's constructive eviction and unfair and deceptive trade practices claims.

D. Prohibited Acts by Debt Collectors

[3] Plaintiff next argues that the trial court erred by concluding that Defendants did not violate the North Carolina Debt Collection Act. Plaintiff argues specifically that Defendants falsely represented to the trial court the amount of Plaintiff's debt, in violation of N.C. Gen. Stat. § 75-54(4), in the following three ways: (1) demanding full rent for an uninhabitable property; (2) improperly claiming in their counterclaim that Plaintiff owed $9,339.21, rather than $7,251.21; and (3) improperly charging Plaintiff multiple administrative fees in excess of the "highest administrative fee authorized by" N.C. Gen. Stat. § 42-46.

Under North Carolina's Debt Collection Act, "[n]o debt collector shall collect or attempt to collect a debt . . . by any fraudulent, deceptive or misleading representation." N.C. Gen. Stat. § 75-54 (2024).

1. Rent

Plaintiff claims that Defendants falsely represented the amount of Plaintiff's debt to the trial court by demanding full rent when the apartment was uninhabitable.

Plaintiff's claim is predicated on his claims of breach of the implied warranty of habitability and constructive eviction. Because Plaintiff failed to show that the apartment was uninhabitable, the trial court did not err by concluding that Defendants did not violate the Act by demanding full rent for the apartment.

2. Incorrect Counterclaim Amount

Plaintiff next contends that Defendants falsely represented to the trial court the amount of Plaintiff's debt by incorrectly alleging in their counterclaim that Plaintiff owed $9,339.21 in past-due rent and related fees.

"Falsely representing the character, extent, or amount of a debt against a consumer or of its status in any legal proceeding" is a fraudulent, deceptive, or misleading representation. *Id.* § 75-54(4). "To prevail on a claim for violation of [section 75-54], one need not show deliberate acts of deceit or bad faith, but must nevertheless demonstrate that the act complained of possessed the tendency or capacity to mislead, or created the likelihood of deception." *Forsyth Mem'l Hosp., Inc. v. Contreras*, 107 N.C. App. 611, 614 (1992) (quotation marks and citation omitted). A Debt Collection Act claim requires the following threshold elements: "the obligation owed must be a 'debt' "; "the one owing the obligation must be a 'consumer' "; and "the one trying to collect the obligation must be a 'debt collector.' " *Reid v. Ayers*, 138 N.C. App. 261, 263 (2000). Once the threshold requirements are met, a Debt Collection Act claim "must then meet the three generalized requirements found in section 75-1.1: (1) an unfair act (2) in or affecting commerce (3) proximately causing injury." *Id.* at 266. "For efficiency's sake, we will start with the proximate-injury element." *Onnipauper*, 290 N.C. App. at 495 (citation omitted).

In this case, after Plaintiff vacated the apartment, Defendants attempted to charge Plaintiff rent for the time period between 8 February 2023 and 8 April 2023. However, during that time period, the apartment was being renovated and no effort was made to re-rent it. Accordingly, Defendants should have represented that Plaintiff owed $7,251.21 instead of $9,339.21.

Nonetheless, Plaintiff has failed to show he suffered injury. Plaintiff never overpaid because of Defendants' error. Indeed, Plaintiff did not feel he owed any outstanding rent and failed to pay rent for five months. Nor did Defendants' error deceive. *See id.* at 496 (concluding no Debt Collection Act violation occurred because defendant failed to show injury).

Plaintiff argues he was harmed by Defendants' false representation because Defendants' debt was reported to the credit bureaus and his credit score was "adversely affected." There is no record evidence, however, that any harm to Plaintiff's credit was caused by the fact that Defendants counterclaimed for an unpaid debt of $9,339.21 as opposed to $7,251.21. Further, Plaintiff failed to show any adverse impact on any specific attempt to open a new line of credit.

Accordingly, the trial court did not err by concluding that Defendants did not violate N.C. Gen. Stat. § 75-54(4) by misrepresenting the amount Plaintiff owed in their counterclaim.

3. Fees

Finally, Plaintiff argues that Defendants falsely represented to the trial court the amount of Plaintiff's debt by improperly charging him three fees, labeled "Court Fees" on the resident ledger, in excess of the "highest administrative fee authorized by" N.C. Gen. Stat. § 42-46.

N.C. Gen. Stat. § 42-46 governs the fees, costs, and expenses authorized in residential rental agreements. Under this statute, a landlord is permitted to charge the following administrative fees: a complaint filing fee, a court appearance fee, and a second trial fee. N.C. Gen. Stat. § 42-46(a)-(g) (2024). Additionally, a landlord is permitted to charge a tenant for out-of-pocket expenses for filing fees charged by the court, costs for service of process, and reasonable attorney's fees actually paid and not exceeding fifteen percent of the monthly rent stated in the lease. N.C. Gen. Stat. § 42-46(h)-(i) (2024). These out-of-pocket expenses may be included in the amount a landlord charges a tenant to cure a default. N.C. Gen. Stat. § 42-46(j) (2024).

The trial court made the following relevant findings of fact:

> 47. The last payment [to Defendants] in the amount of $3,484.11 was made by Plaintiff on August 16, 2022. No more payments were made by Plaintiff after August 2022.
>
> 48. [Defendants'] evidence which is uncontroverted is that Plaintiff failed to pay to Ginkgo Aurora LLC rent *and related charges* in the total amount of $7,251.21. [emphasis added].

These unchallenged findings of fact are binding on appeal. *See Carolina Marlin Club Marina Ass'n*, 238 N.C. App. at 220. Furthermore, the record evidence supports each finding of fact. On these facts, the trial court made the following conclusions of law:

> 6. Defendants did not violate the Prohibited Acts in the Debt Collectors Act, N.C. Gen. Stat. § 75-50, *et seq.* since Defendants were entitled to recover the rent sought from Plaintiff under the leases.

> 7. Defendants have proven their counterclaim by the greater weight of the evidence and the Plaintiff is liable to Ginkgo Aurora LLC for unpaid rent *and related charges* in the total amount of $7,251.21. [emphasis added].

As Defendants are entitled to recover "all litigation costs to the extent permitted by law" under the lease agreements, the fees Plaintiff alleges are improper are recoverable as out-of-pocket expenses under N.C. Gen. Stat. § 42-46(h)-(i).

The trial court's findings of fact support its conclusion that Plaintiff failed to show that Defendants improperly charged him fees in excess of what is authorized by N.C. Gen. Stat. § 42-46. Accordingly, the trial court did not err by entering judgment for Defendants on this claim.

III. Conclusion

For the reasons stated above, we affirm the trial court's judgment.

AFFIRMED.

Judges CARPENTER and FLOOD concur.

PDII, LLC, Plaintiff
v.
SKY AIRCRAFT MAINTENANCE, LLC, STEVEN TRENT, TEXTRON INC.,
AND TEXTRON AVIATION INC., Defendants

No. COA25-202

Filed 3 December 2025

Jurisdiction—personal—sufficient minimum contacts—consent to general personal jurisdiction—registering to do business in state

In a product liability case brought following the total loss of an airplane and serious injuries to two passengers in a crash caused by elevator cables in the plane's tail snapping during takeoff, the trial court properly denied a motion to dismiss for lack of personal jurisdiction where defendant—a foreign company—did not controvert plaintiff's allegation that defendant was registered to do business in North Carolina, although defendant did aver that it lacked any further connection to or continuing contacts with the state. While no previous decision from a North Carolina state court had determined that holding a certificate of authority to do business in the state, standing alone, subjected a foreign company to the jurisdiction of North Carolina courts, recent cases from the United States Supreme Court and a federal district court in North Carolina—in conjunction with the language of the state's Long Arm Statute and statutes concerning certificates of authority—supported the notion that, in registering to do business in North Carolina, a foreign company consents to general personal jurisdiction.

Appeal by defendant from order entered 23 October 2024 by Judge Anna Mills Wagoner in Cabarrus County Superior Court. Heard in the Court of Appeals 9 September 2025.

James, McElroy & Diehl, P.A., by Preston O. Odom, III and John R. Buric, for plaintiff-appellee.

Cranfill Sumner LLP, by Steven A. Bader, Aliyah S. Adams, Mica N. Worthy, and Maria Aguilera, for defendant-appellant.

FLOOD, Judge.

Defendant Textron Inc. appeals from the trial court's denial of its motion to dismiss for lack of personal jurisdiction. On appeal, Defendant argues the trial court erred in denying its motion to dismiss, contending Defendant does not have sufficient minimum contacts with North Carolina. Upon careful review, we conclude the trial court properly denied Defendant's motion to dismiss because Defendant consented to general personal jurisdiction by registering to do business in North Carolina.

I. Factual and Procedural Background

Plaintiff PDII, LLC is a North Carolina limited liability company headquartered in Cabarrus County, North Carolina. In February 2024, Plaintiff suffered a total loss of its Beechjet 400 airplane (the "Airplane") when one or more elevator cables in the Airplane's tail snapped during takeoff, resulting in a crash that seriously injured two passengers. Plaintiff subsequently filed suit against four defendants: (1) Sky Aircraft Maintenance, LLC; (2) Sky's Director of Maintenance, Steven Trent; (3) Defendant; and (4) Textron Aviation, Inc. ("Textron Aviation").

Relevant to this appeal, Plaintiff filed a verified complaint, asserting a products-liability claim against Defendant and Textron Aviation, and alleging the defectiveness of one or more of the elevator cables in the Airplane. Particularly, Plaintiff alleged that Defendant was subject to personal jurisdiction in North Carolina, stating that "[u]pon information and belief, Defendant [] conducts business in North Carolina by directing goods to individuals and businesses residing in the state."

Defendant moved to dismiss for lack of personal jurisdiction. With its motion to dismiss, Defendant submitted an affidavit from Jayne Donegan, the Senior Executive Counsel and Assistant Secretary for Defendant. Donegan explained that Defendant: "is a Delaware corporation with its principal place of business in Rhode Island"; "is registered to do business in North Carolina" but "does not maintain a physical office or facility in North Carolina"; "does not have any employees working in North Carolina"; does not have any "bank accounts or business operations in the State of North Carolina"; "did not manufacture, sell, or contract with any North Carolina resident or entity related to the subject aircraft or the subject aircraft parts in this action"; "does not advertise or market aircraft products or services in North Carolina or to residents in North Carolina"; "does not target North Carolina residents through its online presence"; and thus, "has no continuing or systemic contacts with the State of North Carolina."

Plaintiff filed an unverified response to Defendant's motion to dismiss, arguing:

> In addition to Textron Aviation Inc., another named defendant in this case, one of [Defendant]'s "segments" goes by the name of Jacobsen, . . . which manufactures and offers professional turf maintenance equipment and turf-care vehicles for various golf courses, sporting venues, airports, and municipalities. Jacobsen is headquartered in and maintains a manufacturing plant in North Carolina at 11108 Quality Drive, Charlotte, NC 28273 and 11524 Wilmar Boulevard, Charlotte, NC 28273[.]

Plaintiff included website links and screenshots of a website page, which stated "Jacobsen®, A Textron Company is committed to providing high-quality turf equipment to customers around the world." Plaintiff further argued that "[o]n [Defendant]'s 'Our Locations' webpage, [Defendant] displays a map which identifies its 'Greensboro Service Center' in Greensboro, North Carolina." Plaintiff also contended that Defendant "sells its products to North Carolina distributors," "services its products in North Carolina," and "advertises and markets its products to residents of North Carolina, among other things."

Defendant then filed a memorandum of law in support of its motion to dismiss, arguing that Plaintiff had confused Textron Aviation's Greensboro center with Defendant, and attached a picture from the website to show that the Greensboro center is called "Textron Aviation Greensboro Service Center." Defendant then argued "Jacobsen is a totally separate entity that does not confer jurisdiction on to any of the other companies or brands[,]" and "[t]here is no legal basis for this argument when there is clear separation in ownership and corporate officers."

The trial court subsequently heard arguments by the parties on Defendant's motion to dismiss,[1] and on 23 October 2024, the trial court denied Defendant's motion to dismiss, without making any findings of fact within the order. Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction to hear Defendant's appeal pursuant to N.C.G.S. § 1-277(b), which provides that "[a]ny interested party has the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant[.]" N.C.G.S. § 1-277(b) (2023).

III. Standard of Review

"When the parties have submitted affidavits and other documentary evidence, a trial court reviewing a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2) must determine whether the plaintiff has established that jurisdiction exists by a preponderance of the evidence." *Schaeffer v. SingleCare Holdings, LLC*, 384 N.C. 102, 106 (2023) (citation omitted). "When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694 (2005) (citation and internal quotation marks omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *Real Time Resols., Inc. v. Cole*, 293 N.C. App. 632, 635 (2024) (citation omitted).

"If the trial court chooses to decide the motion based on affidavits, the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror." *Vlassis v. Nissan N. Am., Inc.*, 297 N.C. App. 560, 565 (2024) (citation omitted). "When the record

---

1. No transcript of this hearing is included in the Record.

contains no findings of fact, it is presumed that the court on proper evidence found facts to support its judgment." *Banc of Am. Sec. LLC*, 169 N.C. App. at 694 (citation modified). Thus, when the "record contains no indication that the parties requested that the trial judge make specific findings of fact[,]" this Court must "presume that the trial judge made factual findings sufficient to support her ruling" and "review the record to determine whether it contains any evidence that would support the trial judge's conclusion that the North Carolina courts may exercise jurisdiction over defendants without violating defendants' due process rights." *Id.* at 695.

Here, because the trial court made no findings of fact, and Defendant does not contend it requested findings of fact, we are bound to "presume that the trial judge made factual findings sufficient to support her ruling" and thus, we turn to review the Record "to determine whether it contains any evidence that would support the trial judge's conclusion" that the North Carolina courts may exercise jurisdiction over Defendant without violating its due process rights. *See id.*

IV. Analysis

On appeal, Defendant argues the trial court erred in denying its motion to dismiss for lack of personal jurisdiction. Specifically, Defendant contends it does not have sufficient minimum contacts with North Carolina to be subject to personal jurisdiction. We disagree.

"The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358 (2021). "The primary concern of the Due Process Clause as it relates to a court's jurisdiction over a nonresident defendant is the protection of an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations." *Beem USA Ltd.-Liab. Ltd. P'ship v. Grax Consulting LLC*, 373 N.C. 297, 302 (2020) (citation modified).

For North Carolina courts to exercise personal jurisdiction over "a nonresident defendant, (1) there must be statutory authority for the exercise of jurisdiction, and (2) the nonresident defendant must have sufficient contacts with this State such that the exercise of jurisdiction does not violate the federal due process clause." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 614–15 (2000). North Carolina's Long Arm Statute, N.C.G.S. § 1-75.4 (2023), "grants North Carolina's courts specific personal jurisdiction over defendants to the extent allowed by due process." *Bartlett v. Est. of Burke*, 285 N.C. App.

249, 256 (2022) (citation and internal quotation marks omitted). Our Long Arm Statute provides, in relevant part, that a trial court will have personal jurisdiction over a nonresident defendant if that defendant "[i]s engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise." N.C.G.S. § 1-75.4(1)(d). "[W]hen evaluating the existence of personal jurisdiction pursuant to [N.C.]G.S. § 1-75.4(1)(d), the question of statutory authorization collapses into the question of whether the defendant has the minimum contacts with North Carolina necessary to meet the requirements of due process." *Bruggeman*, 138 N.C. App. at 617 (citation modified).

In order to satisfy due process, the defendant must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation and internal quotation marks omitted). "Minimum contacts are established through some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Schaeffer*, 384 N.C. at 107 (citation and internal quotation marks omitted).

"Minimum contacts may give rise to one of two forms of jurisdiction: general or specific jurisdiction." *Id.*; *see also Vlassis*, 297 N.C. App. at 567 (explaining there are "two kinds of personal jurisdiction: general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction" (citation omitted)). "General jurisdiction requires that a defendant's affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Schaeffer*, 384 N.C. at 107 (citation modified). "Specific jurisdiction is different: It covers defendants less intimately connected with a State, but only as to a narrower class of claims. The contacts needed for this kind of jurisdiction often go by the name purposeful availment." *Ford Motor Co.*, 592 U.S. at 359 (citation omitted). "The defendant . . . must take some act by which it purposefully avails itself of the privilege of conducting activities within the forum State. The contacts must be the defendant's own choice and not random, isolated, or fortuitous." *Vlassis*, 297 N.C. App. at 567 (citation omitted).

Our courts look at the following factors in determining whether minimum contacts exist:

> (1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) the convenience to the parties.

Banc. Of Am. Sec. LLC, 169 N.C. App. at 696 (citation omitted). After a trial court concludes "that a defendant has purposefully established minimum contacts within the forum State, the [trial] court must also consider those contacts in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Id.* at 696 (citation and internal quotation marks omitted).

Additionally, "the plaintiff has the burden of proving prima facie that a statutory basis for jurisdiction exists." *Wyatt v. Walt Disney World, Co.*, 151 N.C. App. 158, 162–63 (2002) (citation modified). "[I]f the defendant supplements his motion to dismiss with an affidavit or other supporting evidence, the allegations in the complaint can no longer be taken as true or controlling and [the] plaintiff cannot rest on the allegations of the complaint." *Banc of Am. Sec. LLC*, 169 N.C. App. at 694 (citation modified). When this happens, the trial court "then considers (1) any allegations in the complaint that are not controverted by the defendant's affidavit and (2) all facts in the affidavit (which are uncontroverted because of the plaintiff's failure to offer evidence)." *Id.* at 693–94.

In *Fungaroli v. Fungaroli*, after the plaintiff filed her complaint, the defendant moved to dismiss for lack of personal jurisdiction. 51 N.C. App. 363, 364 (1981). The evidence before the trial court came from "the parties' pleadings" and from an affidavit from the plaintiff and an affidavit from the defendant. *Id.* at 363. The trial court subsequently denied the defendant's motion to dismiss. *Id.* at 364. On appeal, the defendant maintained "that the only evidence offered by [the] plaintiff with respect to the issue of personal jurisdiction were her statements in her affidavit." *Id.* at 367. The defendant argued the evidence presented by the plaintiff and the defendant were directly in conflict, and "since the record revealed no means by which the conflict in the evidence could be resolved and since the evidence was of equal weight, the trial court erred in ruling in favor of [the] plaintiff, she being the party with the burden of proof." *Id.* This Court affirmed the trial court's decision, and held that

> [a]lthough the trial court in the instant case did not actually make findings of fact in support of its order, we will presume that the trial court did find facts to support its decision and order. Therefore, we must assume that the trial court after reviewing the pleadings and affidavits of both parties decided to take as true [the] plaintiff's contentions.

Id.

Here, Plaintiff filed a verified complaint, which the trial court may take as evidence as an affidavit. *See Vlassis*, 297 N.C. App. at 565; *see also Wilson v. Wilson*, 191 N.C. App. 789, 795 (2008) ("A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." (citation omitted)). Plaintiff's verified complaint alleged Defendant was subject to personal jurisdiction in North Carolina because, "[u]pon information and belief, Defendant [] conducts business in North Carolina by directing goods to individuals and businesses residing in the state." Defendant then presented counter evidence through Donegan's affidavit that although Defendant "is registered to do business in North Carolina[,]" Defendant lacks any further connection and "has no continuing or systemic contacts with the State of North Carolina."

Indeed, Plaintiff filed a response to Defendant's motion to dismiss that was not verified, and we cannot presume the information in the response was admissible as evidence before the trial court because it was unverified. *See Brown v. Refuel Am., Inc.*, 186 N.C. App. 631, 634 (2007) ("Factual allegations in [the d]efendants' unverified answer are not competent evidence; therefore, we assume the trial court did not consider these and do not consider them on appeal."). Thus, we are left with two affidavits as evidence before the trial court—Plaintiff's verified complaint and Defendant's submitted affidavit—and where the "trial court chooses to decide the motion based on affidavits, the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror." *Vlassis*, 297 N.C. App. at 565 (citation omitted). Because the Record contains no findings of fact, we are left to review the evidence before the trial court to determine whether the trial court "found facts to support its judgment." *See Banc of Am. Sec. LLC*, 169 N.C. App. at 694.

Here, while Plaintiff alleged in its complaint that Defendant "direct[s] goods to individuals and businesses residing in the state[,]" Donegan countered in his affidavit that Defendant "did not manufacture, sell, or contract with any North Carolina resident or entity related to the subject aircraft or the subject aircraft parts in this action"; "does not advertise or market aircraft products or services in North Carolina or to residents in North Carolina"; and "does not target North Carolina residents through its online presence[.]" Defendant, however, did not provide any evidence to controvert Plaintiff's allegation that Defendant was registered to do business in North Carolina.

Regarding this registration evidence, Plaintiff argues Defendant "consented to the trial court's exercise of personal jurisdiction by procuring and maintaining a certificate of authority to do business in North Carolina." Although North Carolina has never held that a certificate of authority—alone—subjects a company to jurisdiction to North Carolina courts, Plaintiff argues that the United States Supreme Court's recent decision in *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122 (2023), and the United States Eastern District Court of North Carolina's decision in *Espin v. Citibank, N.A.*, 2023 WL 6447231 (E.D.N.C. Sept. 29, 2023), support this notion. We agree.

In *Mallory*, the Supreme Court held a defendant company consented to Pennsylvania personal jurisdiction by registering to do business in Pennsylvania, and that exercising personal jurisdiction over the defendant company did not violate due process. 600 U.S. at 144. In concluding the defendant company had consented to be subject to Pennsylvania courts, the Supreme Court explained that "Pennsylvania law is explicit that 'qualification as a foreign corporation' shall permit state courts to 'exercise general personal jurisdiction' over a registered foreign corporation, just as they can over domestic corporations." *Id.* at 134 (citing 42 Pa. Cons. Stat. § 5301(a)(2)(i)).

Our statutes provide that "[a] foreign corporation may not transact business in this State until it obtains a certificate of authority from the Secretary of State[,]" N.C.G.S. § 55-15-01(a) (2023), and if it fails to obtain a certificate but proceeds to transact business, the foreign corporation shall not be "permitted to maintain any action or proceeding in any court of this State[,]" N.C.G.S. § 55-15-02(a). Once it has a certificate of authority, the foreign corporation "must maintain a registered office and registered agent as required by Article 4 of Chapter 55D of the General Statutes and is subject to service on the Secretary of State under that Article." N.C.G.S. § 55-15-07 (2023). The "certificate of authority authorizes the foreign corporation to which it is issued to transact business in this State[.]" N.C.G.S. § 55-15-05(a) (2023). Although North Carolina law, unlike Pennsylvania law, does not explicitly state that foreign corporations consent to personal jurisdiction as part of registering to do business in the state, North Carolina law does provide that the corporation "has the same but no greater rights and has the same but no greater privileges as, and is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character." N.C.G.S. § 55-15-05(b).

After *Mallory* was decided, the United States District Court of the Eastern District of North Carolina was presented with the same question as presented here—whether a defendant foreign company consented to jurisdiction in North Carolina as a result of obtaining a certificate of authority. *Espin, N.A.*, 2023 WL 6447231, at *3; *see also Skinner v. Preferred Credit*, 172 N.C. App. 407, 413 (2005), *aff'd*, 361 N.C. 114 (2006) ("Because this case presents an issue of first impression in our courts, we look to other jurisdictions to review persuasive authority that coincides with North Carolina's law."). In holding that the defendant foreign company, Citibank, had consented to North Carolina jurisdiction by obtaining a certificate of authority, the court reviewed key holdings from three older North Carolina Supreme Court cases. *Espin*, 2023 WL 6447231, at *3. The *Espin* court first reviewed the North Carolina Supreme Court's holding in *Oliver v. U.S. Fid. & Guar. Co.*, which provides:

> [W]hen a state, by its statutes, has established and provided a method of personal service of process on foreign corporations doing business therein, one that is reasonably calculated to give full notice to such companies of the pendency of suits against them, these provisions are to be regarded as conditions on which they are allowed to do business within the state, and when they afterwards come into the state and enter on their business they are taken to have accepted as valid the statutory method provided, and *such a service will be held to confer jurisdiction.*

Id. at *3 (quoting *Oliver v. U.S. Fid. & Guar. Co.*, 174 N.C. 417 (1917)) (emphasis added). Next, the *Espin* court highlighted *Steele v. W. Union Tel. Co.*, 206 N.C. 220 (1934), in which our Supreme Court held:

> [W]hen a foreign corporation has property in this state and is here present transacting its corporate business through local agents, such corporation is amenable to service of process according to the provisions of C. S.[2] § 483 . . . and that this statute in the respect here assailed neither offends against the commerce clause of the Federal Constitution (art. 1, § 8, cl. 3) nor runs counter to the Fourteenth Amendment.

Espin, 2023 WL 6447231, at *4 (quoting *Steele*, 206 N.C. at 587). Finally, the *Espin* court noted that in 1955, our Supreme Court held

> that a nonresident has access to the courts of this State is not debatable. That he can sue a foreign corporation is also beyond dispute. But to bring the foreign corporation

2. C.S. refers to "Consolidated Statutes" of North Carolina, which we now refer to as "N.C.G.S."

> into court[,] the service of process must be made upon an officer or agent as defined in [N.C.]G.S. [§] 1-97, and in the following cases only: (1) Where it has property in this State; or (2) where the cause of action arose in this State; or (3) where the service can be made personally upon some officer designated in [N.C.]G.S. [§] 1-97.

Espin, 2023 WL 6447231, at *4 (quoting *Babb v. Cordell Indus., Inc.*, 242 N.C. 286, 288 (1955)). After reviewing the three key holdings in *Oliver*, *Steele*, and *Babb*, the *Espin* court held,

> [i]n light of *Mallory*, North Carolina's statutory requirements[,] which demand, among other things, that foreign corporations be held to the same privileges and duties as domestic corporations, coupled with the undisturbed North Carolina Supreme Court precedent cited above, is sufficient to demonstrate that this [c]ourt has general personal jurisdiction over Citibank.

Id. at *4. The court further noted that "this conclusion does not offend due process, even if it 'took [Citibank] by surprise[,]' " *see id.* at *4 (quoting *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95 (1917)), "as Citibank has 'taken full advantage of its opportunity to do business in [North Carolina,]' " *see id.* *4 (quoting *Mallory*, 600 U.S. at 141).

We also find Georgia's case law to be instructive. Since 1992, Georgia's Supreme Court has held that registration to do business in the state subjects foreign corporations to general jurisdiction in Georgia. *See Allstate Ins. Co. v. Klein*, 262 Ga. 599, 601 (1992). The Georgia statute in *Klein*, which contains similar language to our statute, provides:

> A foreign corporation with a valid certificate of authority has the same but no greater rights under this chapter and has the same but no greater privileges under this chapter as, and except as otherwise provided by this chapter is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.

OCGA § 14–2–1505(b) (2025); *see also* N.C.G.S. § 55-15-05(b). The *Klein* court explained that, under Georgia's Long Arm Statute, the term

> "nonresident" includes . . . a corporation which is not organized or existing under the laws of this state *and is not*

> authorized to do or transact business in this state at the time a claim or cause of action . . . arises.

Klein, 262 Ga. at 601 (quoting OCGA § 9–10–90) (emphasis in original). The court reasoned that because foreign corporations that were registered to do business in Georgia were "authorized to do or transact business," they were "'resident[s]' for purposes of personal jurisdiction over that corporation in an action filed in the courts of this state[,]" and "[a]s a resident, such a foreign corporation may sue or be sued to the same extent as a domestic corporation." *Id.* at 601 (footnote omitted). This holding was reaffirmed in 2021 in *Cooper Tire & Rubber Co. v. McCall*, 312 Ga. 422, 437 (2021) ("[B]ecause Cooper Tire is registered and authorized to do business in Georgia, Cooper Tire is currently subject to the general jurisdiction of our courts under *Klein*'s general-jurisdiction holding, which we have decided to leave in place.").

Similarly, here, North Carolina's Long Arm Statute provides that state courts will have personal jurisdiction "[i]n any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party . . . [i]s a *domestic corporation*[.]" N.C.G.S. § 1-75.4(1)(c) (2023) (emphasis added). Thus, because N.C.G.S. § 55-15-05(b) states that a registered foreign corporation "has the same but no greater rights and has the same but no greater privileges as, and is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a *domestic corporation* of like character[,]" we conclude a registered foreign corporation may sue or be sued to the same extent as a domestic corporation and is subject to personal jurisdiction. *See* N.C.G.S. § 55-15-05(b) (emphasis added); *see also* N.C.G.S. § 1-75.4(1)(c).

Guided by *Mallory*, North Carolina statutes, *Espin*, and *Klein*, we hold a foreign corporation that obtains a certificate of authority consents to general personal jurisdiction in North Carolina; therefore, we affirm the trial court's order denying Defendant's motion to dismiss. *See Mallory*, 600 U.S. at 144; N.C.G.S. § 55-15-05(b); N.C.G.S. § 1-75.4(1)(c); *see also Espin*, 2023 WL 6447231, at *3; *Klein*, 262 Ga. at 601.

V. Conclusion

For the foregoing reasons, we conclude the trial court properly denied Defendant's motion to dismiss because Defendant consented to general personal jurisdiction by registering to do business in North Carolina.

AFFIRMED.

Judges COLLINS and CARPENTER concur.

W. NOAH REYNOLDS, Plaintiff
v.
DEVOTION FAMILY, LLC and BROOK E. REYNOLDS, Defendants

No. COA24-711

Filed 3 December 2025

1. Appeal and Error—interlocutory order—interim arbitration awards—right of direct appeal—Revised Uniform Arbitration Act

In a dispute between siblings over the dissolution of a family company, in which the trial court granted plaintiff's motion to confirm three interim arbitration awards, the appellate court had jurisdiction to immediately review the interlocutory order pursuant to N.C.G.S. § 1-569.28(a)(3) of the Revised Uniform Arbitration Act, which by its plain language (allowing appeal from "[a]n order confirming or denying confirmation of an award") expressly granted defendant a right of direct appeal from the order at issue.

2. Arbitration and Mediation—dissolution of family-owned company—scope of arbitrator's authority—future disputes outside of authority

In a dispute between siblings over the dissolution of a family-owned limited liability company in which an arbitrator entered three interim arbitration awards that, among other things, partitioned and distributed the company's land-holdings to the parties, the trial court properly upheld the arbitrator's awards and remedies setting forth various obligations regarding shared resources, where the arbitrator's decisions were authorized by the arbitration clause contained in the company's operating agreement. However, where the arbitrator exceeded its authority by imposing a mandatory requirement for the parties to submit all future disputes to arbitration, which neither party requested, the trial court erred by denying defendant's motion to modify that portion of the interim awards. The affected portion of the trial court's order was vacated, and the matter was remanded for correction pursuant to N.C.G.S. § 1-569.24(a)(2).

Appeal by Defendant Brook E. Reynolds from order entered 1 March 2024 by Judge Angela B. Puckett in Surry County Superior Court. Heard in the Court of Appeals 26 February 2025.

Robinson & Lawing, LLP, by Attorneys H. Brent Helms and Jeremy Demmitt, for the plaintiff-appellee.

Ferikes Bleynat & Cannon, PLLC, by Attorney Edward L. Bleynat, Jr., for the defendant-appellant Brook E. Reynolds.

STADING, Judge.

Brook E. Reynolds ("Defendant") appeals from the trial court's order granting W. Noah Reynolds's ("Plaintiff") motion to confirm several interim arbitration awards. On appeal, Defendant asserts the trial court erred by confirming the interim awards and erred by denying her motion to vacate or modify. In turn, Plaintiff moved to dismiss Defendant's appeal pursuant to N.C. R. App. P. 37(a), asserting the order appealed from is interlocutory and does not affect a substantial right. After careful review, we hold this Court possesses the requisite jurisdiction to consider Defendant's appeal. *See* N.C. Gen. Stat. §§ 7A-27(b)(4), 1-569.28(a)(3) (2023). Turning to the merits, the trial court erred by denying Defendant's motion to modify since the Arbitrator exceeded his scope of authority by requiring the parties to resolve all future disputes by way of arbitration. Otherwise, the Arbitrator's actions were proper.

I. Factual and Procedural Background

This appeal arises from arbitration between Plaintiff and Defendant over a dispute involving Devotion Family, LLC ("Devotion"), a family-owned limited liability company formed in 2008. The record tends to reflect that Devotion owns approximately 4,135.09 acres of real property across Surry and Alleghany Counties, including buildings, improvements, furniture, vehicles, farm equipment, and tools. At the time of Devotion's formation, William Neal Reynolds, II—the father of Plaintiff and Defendant—was the sole owner.

Following Mr. Reynolds' death in February 2009, Plaintiff and Defendant each obtained a 36.30% ownership interest in Devotion, while their mother, Sandra Reid Reynolds, retained a 27.40% interest. Mrs. Reynolds later transferred her remaining ownership interest in Devotion to Plaintiff and Defendant equally. Following this transfer, Plaintiff and Defendant each possessed a 50% ownership interest in Devotion, maintaining six of the twelve voting shares respectively.

On 23 September 2019, Devotion dissolved, ceasing its existence as a legal entity. Following dissolution, Plaintiff and Defendant were unable to agree on "the winding up of Devotion and the distribution of

Devotion's assets." As a result, Plaintiff filed a claim and demand for arbitration with the American Arbitration Association ("AAA") pursuant to Section 12.6 of Devotion's Amended Operating Agreement (the "Operating Agreement")—the dispute resolution clause—and concurrently filed a complaint against both Defendant and Devotion in the trial court, asserting the following alternative claims for relief:

> **SECOND CLAIM FOR RELIEF (ALTERNATIVE) APPOINTMENT OF A RECEIVER FOR WINDING UP DEVOTION (N.C. GEN. STAT. § 57-D-6-07)**
>
> . . . .
>
> 31. To the extent the matter is not resolved under the arbitration award, the Court should enter an Order appointing a receiver to wind up Devotion and distribute its assets in kind as contemplated by the Operating Agreement.
>
> **THIRD CLAIM FOR RELIEF (ALTERNATIVE) PARTITION OF REAL PROPERTY (N.C. GEN. STAT. § 46A-21)**
>
> . . . .
>
> 34. If the distribution of the Property is not completely settled by the arbitrator, then [Plaintiff] would request that the Court take appropriate measures to partition the Property in kind in the manner identified on Exhibit 2 with the prior and existing easements to ensure adequate road access and that owners have the ability to traverse their respective property tracts in a convenient manner as has been the case during Devotion's ownership of the Property . . . .
>
> 35. [Plaintiff] would further request that the Court distribute tract C-1 to [Plaintiff] and tract C-2 to [Defendant] as identified on Exhibit 2, with any necessary owelty affixed, and further partition by sale the portions of the Property identified as Tracts A and B with either [Plaintiff] or [Defendant] being allowed to purchase either tract from the other through any private sale or listing through a public auction as determined by the Court.

Plaintiff simultaneously moved to compel arbitration and stay litigation. *See* N.C. Gen. Stat. § 1-569.7 (2023).

The parties later entered a consent order, compelling arbitration and staying "litigation pending the completion of the arbitration proceedings before the AAA." After reviewing the relevant materials, the Arbitrator entered three interim arbitration awards;[1] however, only the second and third awards[2] are at issue in the matter *sub judice*.

The second award partitioned Devotion's property into four tracts, awarding Tracts A and C-1 to Plaintiff, awarding Tract C-2 to Defendant, and designating Tract B for sale.[3] The second award also required the parties to enter a Declaration of Easements, Covenants, and Restrictions ("DECR"), establishing obligations related to road maintenance, reservoir restoration, easement negotiation, and mandatory arbitration of future disputes. Finally, the second award concluded that "[s]ubsequent orders may be entered to finalize the winding up of Devotion and to complete this arbitration proceeding including a Third Interim Order dealing with [Defendant's] Objections to the DECR."

The third award addressed several objections raised by Defendant regarding the DECR. Defendant contested, inter alia, that the DECR distributed "rights unfairly, burdening [her] property and benefiting [Plaintiff's] property[.]" She also asserted that "given the transactions and occurrences between the [Plaintiff and Defendant] over the course of this arbitration it is unfair to expect future cooperation to achieve resolution of business ventures such as hunting and fishing rights, road maintenance and use of the water reservoir." After consideration, the Arbitrator overruled Defendant's objections in the third interim award.

---

1. *Compare* ARBITRATION AWARD, Black's Law Dictionary (12th ed. 2024) ("A final decision by an arbitrator or panel of arbitrators; specif., a written decision by an arbitral tribunal setting forth the final and binding determination of the merits of a claim, defense, or issue, whether or not the decision resolves the entire dispute. An arbitration award may consist merely of a grant of interim relief."), *with* INTERIM AWARD, Black's Law Dictionary (12th ed. 2024) (noting that an interim award is an "arbitral panel's decisions on the applicable law and its jurisdiction made before the panel decides the issues in an arbitration. – Also termed *partial award; preliminary award.*"), *and with* PARTIAL AWARD, Black's Law Dictionary (12th ed. 2024) ("An arbitral award that disposes of some but not all of the claims, defenses, or issues to be decided.").

2. The Arbitrator entered the second and third interim arbitration awards on 11 December 2023.

3. We note a minor discrepancy in the record. The second interim award states: "Devotion . . . will execute deeds to transfer tract A and C-1 to [Plaintiff.]" On the other hand, the trial court's order states: "The second interim award . . . distributes tracts C-1 and C-2 to the parties; requires tracts A and B to be sold[.]" Thus, it is unclear whether Tract A was awarded to Plaintiff in the second interim award or was designated for sale. In any event, neither party raises the issue, and the distinction is immaterial to our analysis.

On 19 December 2023, Plaintiff moved the trial court to confirm the second and third interim awards. In response, Defendant moved the trial court to vacate or modify both awards. After considering the parties' arguments, the trial court granted Plaintiff's motion to confirm the second and third awards. The trial court denied Defendant's motion to vacate or modify, reasoning:

> 10. Defendant . . . contends that both the Second Interim Arbitration Award and the Third Interim Arbitration Award should be vacated in whole or in part or modified because the Arbitrator exceeded his authority, in various ways, in violation of N.C. Gen. Stat. § 1-569.23(a)(4).
>
> 11. . . . the Court finds and concludes that the Arbitrator did not exceed his authority in any of the manners contended by Defendant . . . . Rather, the issues that the Arbitrator addressed and ruled upon in both . . . [awards] were either jointly submitted by the parties or were otherwise within the Arbitrator's scope of authority.
>
> 12. As the Arbitrator did not exceed his authority, there are no grounds to vacate or modify either the Second Interim Arbitration Award or the Third Interim Arbitration Award, and Defendant['s] . . . Motion is **DENIED**.

Defendant timely appealed from the trial court's order. Defendant also moved the trial court to stay execution of the trial court's order pending resolution of her appeal. N.C. Gen. Stat. §§ 1A-1, Rule 62(d) and 1-291 (2023). The parties later entered a consent order, granting Defendant's motion to stay.

II. Jurisdiction

[1] As a preliminary matter, we must address whether this Court has jurisdiction to consider Defendant's appeal from an interlocutory order. Defendant argues that she has a statutory right to immediate appeal under N.C. Gen. Stat. §§ 7A-27(b)(4) and 1-569.28(a)(3) because she appealed from an order confirming an arbitration award. Alternatively, Defendant maintains this Court has jurisdiction to consider her appeal pursuant to N.C. Gen. Stat. § 7A-27(b)(3)(a) (2023), as it concerns an appeal from an interlocutory order that affects a substantial right. In response, Plaintiff moved this Court to dismiss Defendant's appeal, asserting she does not have a statutory right to appeal and failed to demonstrate the implication of a substantial right. *See* N.C. R. App. P. 37 ("Motions in Appellate Courts").

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 218, 794 S.E.2d 497, 499 (2016) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). Generally, interlocutory orders are not immediately appealable. *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). "The purpose of this rule is 'to prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard.' " *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578–79 (1999) (citation omitted).

Defendant asserts that a plain reading of N.C. Gen. Stat. § 1-569.28(a)(1)–(6) allows for appeals from both interlocutory orders and final judgments since the statute uses the disjunctive conjunction "or," and subsection (a)(6) enumerates a separate category for appeals from final judgments. Absent such a construction, Defendant maintains that subsection 1-569.28(a)(6) would be rendered meaningless. We agree.

We begin with a pertinent observation—whether Defendant maintains a direct right to appeal an interlocutory order under N.C. Gen. Stat. §§ 7A-27(b)(4) and 1-569.28(a)(3) is a question that has not been directly resolved by our jurisprudence. *Cf. Ruffin Woody & Assocs., Inc. v. Person Cnty.*, 92 N.C. App. 129, 132, 374 S.E.2d 165, 167 (1988) (noting that "the specific instances in which an appeal may be taken from an arbitration order are set out in G.S. 1-567.18, and the statute does not permit an appeal to be taken from the denial of an application to stay arbitration"); *Laws v. Horizon Hous., Inc.*, 137 N.C. App. 770, 771, 529 S.E.2d 695, 696 (2000) (citation omitted) (holding that G.S. 1-567.18 "does not provide for an immediate appeal from an order compelling arbitration, and . . . 'that there is no immediate right of appeal from an order compelling arbitration' "); *Bullard v. Tall House Bldg. Co.*, 196 N.C. App. 627, 676 S.E.2d 96 (2009), abrogated in part by *Stokes v. Crumpton*, 369 N.C. 713, 719, 800 S.E.2d 41, 45 (2017) (holding that "an appeal can be justified under section 7A-27 even if there is no right to appeal under the relevant arbitration statute," and "[t]o the extent *Bullard* suggests otherwise, it is abrogated"); *Bluffs, Inc. v. Wysocki*, 68 N.C. App. 284, 285, 314 S.E.2d 291, 293 (1984) (noting that "there is no right of appeal from an order compelling arbitration" under G.S. 1-567.18).[4]

That said, when determining whether a court possesses jurisdiction to consider an appeal from an arbitration order or award, our analysis begins with assessing whether the appellant possesses a statutory right of appeal under the relevant arbitration statute; if unavailable, we then conduct a substantial rights analysis under N.C. Gen. Stat. § 7A-27:

> In *Bluffs, Inc. v. Wysocki*, 68 N.C. App. 284, 314 S.E.2d 291 (1984), the threshold issue before the court was whether there is an immediate right to appeal an order compelling arbitration under the Uniform Arbitration Act (UAA), which the court held did not exist. The court began its analysis by reviewing the bases for appeal enumerated in N.C.G.S. § 1-567.18(a) and concluding that an order compelling arbitration does not fall under the statute. After reaching this conclusion, the court then addressed whether the order affected a substantial right. Ultimately, the court held that an order compelling arbitration is not appealable under either the UAA or section 7A-27.
>
> Subsequent Court of Appeals cases relying on *Wysocki* have followed a similar analytical framework—conducting a substantial rights analysis under section 7A-27 *after* concluding that the order at issue did not fall under the enumerated bases for appeal set out in the relevant arbitration statute. *See, e.g.*, *Smith v. Shipman*, 153 N.C. App. 200, 569 S.E.2d 34, 2002 N.C. App. LEXIS 2342, 2002 WL 31055991 (2002) (unpublished); *N.C. Elec. Membership Corp. v. Duke Power Co.*, 95 N.C. App. 123, 381 S.E.2d 896, *disc. rev. denied*, 325 N.C. 709, 388 S.E.2d 461 (1989). *Wysocki* and its progeny do not explicitly address the relationship between appeals under an arbitration statute and interlocutory appeals under section 7A-27. Implicit in these cases, however, is support for the conclusion that a

4. N.C. Gen. Stat. § 1-567.18 is the predecessor of N.C. Gen. Stat. § 1-569.28 with respect to the statutory right to appeal from arbitration orders or awards. *See Laws*, 137 N.C. App. at 771, 529 S.E.2d at 696 (providing the six enumerated grounds on which an appeal may be taken from an arbitration order or award under G.S. 1-567.18). The language contained in the former version of the statute is nearly identical to the statute's current form. *Compare id.*, *with* N.C. Gen. Stat. § 1-569.28(a)(1)–(6).

> right to appeal can be based on section 7A-27 even if there is no right to appeal under the arbitration statute.

Stokes v. Crumpton, 369 N.C. 713, 717–18, 800 S.E.2d 41, 44–45 (2017) (citations omitted). We therefore consider whether Defendant possesses a direct right to appeal pursuant to the Revised Uniform Arbitration Act ("RUAA"). *See* N.C. Gen. Stat. § 1-569.1 et seq. (2023).

"In construing . . . statutory language, we are guided by long-standing rules of statutory interpretation. . . . [I]f a statute is clear and unambiguous, no construction of the legislative intent is required[,] and the words are applied in their normal and usual meaning." *Misenheimer v. Burris*, 360 N.C. 620, 623, 637 S.E.2d 173, 175 (2006); *Belmont Ass'n v. Farwig*, 381 N.C. 306, 310, 873 S.E.2d 486, 489 (2022) (quoting *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)) ("Statutory interpretation properly begins with an examination of the plain words of the statute."). But "if the plain reading of a statute leads to a result so absurd that no reasonable legislator could have intended it, we can ignore that absurd interpretation and find a reasonable one." *C Invs. 2, LLC v. Auger*, 277 N.C. App. 420, 430, 860 S.E.2d 295, 302 (2021).

Our Courts have previously determined that "the disjunctive [conjunction] 'or' is used to indicate a clear alternative. The second alternative is not a part of the first, and its provisions cannot be read into the first." *Aman v. Nicholson*, 288 N.C. App. 1, 11, 885 S.E.2d 100, 108 (2023) (quoting *In re Duckett's Claim*, 271 N.C. 430, 437, 156 S.E.2d 838, 844 (1967)) (brackets in original). Additionally, "it is a fundamental principle of statutory interpretation that courts should 'evaluate [a] statute as a whole and . . . not construe an individual section in a manner that renders another provision of the same statute meaningless.' " *Lunsford v. Mills*, 367 N.C. 618, 628, 766 S.E.2d 297, 304 (2014) (alterations in original) (citation omitted).

The RUAA is codified under Chapter 1, Article 45C of the North Carolina General Statutes. *See* N.C. Gen. Stat. § 1-569.1 et seq. Relevant here, subsection 1-569.28(a)(1)–(6) of the RUAA enumerates the circumstances where an arbitration order or award may be directly appealed:

> (a) An appeal may be taken from:
>
> > (1) An order denying a motion to compel arbitration;
> >
> > (2) An order granting a motion to stay arbitration;
> >
> > (3) *An order confirming or denying confirmation of an award*;

> (4) An order modifying or correcting an award;
>
> (5) An order vacating an award without directing a rehearing; *or*
>
> (6) A final judgment entered pursuant to this Article.
>
> (b) An appeal under this section shall be taken as from an order or a judgment in a civil action.

(emphasis added). The RUAA expressly provides a right to appeal from "an order confirming . . . an award[.]" *Id.* § 1-569.28(a)(3). Separated by the disjunctive conjunction "or," the statute further provides a right to appeal from a "final judgment" entered pursuant to the RUAA. *Id.* § 1-569.28(a)(6).

Read in pari materia, N.C. Gen. Stat. § 7A-27(b)(4) allows a party to directly appeal to the North Carolina Court of Appeals from "any other order or judgment of the superior court from which an appeal is authorized by statute." Unlike subsections 7A-27(b)(1) and (2), subsection 7A-27(b)(4) does not require that the order or judgment being appealed be a "final judgment."[5] *Compare id.* § 7A-27(b)(1), (2), *with id.* § 7A-27(b)(4). And unlike subsection 7A-27(b)(3)—which is expressly limited to interlocutory orders and judgments—subsection 7A-27(b)(4) allows for an appeal "[f]rom *any other* order or judgment." *Compare id.* § 7A-27(b)(3), *with id.* § 7A-27(b)(4) (emphasis added).

In the instant case, a plain reading of N.C. Gen. Stat. § 1-569.28(a)(3) grants Defendant a right to appeal from the trial court's interlocutory order. *Misenheimer*, 360 N.C. at 623, 637 S.E.2d at 175. That is, notwithstanding its interlocutory nature, Defendant appealed from the trial court's civil order that confirmed the second and third interim arbitration awards. *Cf. Stokes*, 369 N.C. at 717–18, 800 S.E.2d at 44–45. A plain reading of the statute shows the use of the disjunctive conjunction "or," which indicates that no individual provision possesses a bearing on the other. *Aman*, 288 N.C. App. at 11, 885 S.E.2d at 108 (citation omitted); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012) ("Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives."). For that reason, the statute expressly provides that an appeal from a "final judgment entered pursuant to this Article" is a clear alternative

5. "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Atkins v. Beasley*, 53 N.C. App. 33, 36, 279 S.E.2d 866, 869 (1981) (citation omitted).

to an appeal from an order confirming an arbitration award. *Compare* N.C. Gen. Stat. § 1-569.28(a)(6), *with id.* § 1-569.28(a)(3). Moreover, the enabling statute—N.C. Gen. Stat. § 7A-27(b)(4)—possesses no express requirement that the order or judgment being appealed from be a final order or judgment.

We recognize our common law's longstanding mandate, that generally, interlocutory orders are not immediately appealable. *Turner*, 363 N.C. at 558, 681 S.E.2d at 773. However, interpreting N.C. Gen. Stat. § 1-569.28 in any other manner would render its individual provisions meaningless—in particular, subsection 1-569.28(a)(6)—and contravene a plain reading of the statute. *Lunsford*, 367 N.C. at 628, 766 S.E.2d at 304; *Auger*, 277 N.C. App. at 426, 860 S.E.2d at 300 ("The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish."). Moreover, our Supreme Court in *Stokes* contemplated the scenario whereby an appellant could possess a direct right to appeal an interlocutory order under a corresponding arbitration statute. 369 N.C. at 718–19, 800 S.E.2d at 45. For all these reasons, we hold that Defendant's appeal is properly before this Court and deny Plaintiff's motion to dismiss.

III. Analysis

[2] Defendant argues the trial court erred by granting Plaintiff's motion to confirm the second and third interim arbitration awards because "an arbitrator's authority is specifically limited to what the agreement to arbitrate allows." Defendant maintains the Arbitrator exceeded his scope of authority by imposing the following provisions in the DECR: (1) requiring Defendant to financially contribute to the rehabilitation of a shared water reservoir on Tract C-2; (2) requiring the parties to submit to a traffic count mechanism to allocate maintenance costs; (3) requiring the parties to negotiate a utilities easement; and (4) requiring the parties to resolve all future disputes under the DECR pursuant to arbitration with the AAA. As such, Defendant contends the trial court should have granted her motion to vacate or modify the interim awards. *See* N.C. Gen. Stat. §§ 1-569.23 and 1-569.24 (2023).

After careful consideration, we disagree with Defendant's first three arguments: The arbitration clause contained in the Operating Agreement does not preclude the actions complained about, and the parties submitted those issues and requests for relief to the Arbitrator. *See Faison & Gillespie v. Lorant*, 187 N.C. App. 567, 578, 654 S.E.2d 47, 54 (2007). Defendant also fails to establish how any of the remedies provided contravene North Carolina law and how the arbitration clause unequivocally precludes them. *See R.E.M. Constr. v. Cleveland Constr., Inc.*, 285 N.C. App. 167, 173, 876 S.E.2d 851, 855 (2022) (citation omitted). Notwithstanding, the Arbitrator exceeded his authority by mandating future arbitration under the DECR. The trial court therefore erred by denying Defendant's motion to modify the interim awards on this basis under N.C. Gen. Stat. § 1-569.24(a)(2).

"When reviewing a trial court's decision to confirm or vacate an arbitration award, 'we accept findings of fact that are not clearly erroneous and review conclusions of law *de novo*.' " *Flynn v. Schamens*, 250 N.C. App. 337, 338, 792 S.E.2d 833, 835 (2016) (quoting *Carpenter v. Brooks*, 139 N.C. App. 745, 750, 534 S.E.2d 641, 645 (2000)) (citation omitted); *First Union Secs., Inc. v. Lorelli*, 168 N.C. App. 398, 400, 607 S.E.2d 674, 676 (2005). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Lynn v. Fannie Mae*, 235 N.C. App. 77, 81, 760 S.E.2d 372, 375 (2014) (citation omitted).

"After a party to an arbitration receives notice of an award, the party may make a motion to the court for an order confirming the award" under the RUAA. N.C. Gen. Stat. § 1-569.22 (2023). When such a motion is made, "the court shall issue a confirming order *unless* the award is *modified or corrected* pursuant to G.S. 1-569.20 or G.S. 1-569.24 or is *vacated* pursuant to G.S. 1-569.23." *Id.* (emphasis added); *FCR Greensboro v. C & M Invs.*, 119 N.C. App. 575, 577, 459 S.E.2d 292, 294 (1995) ("Generally, parties who have agreed to abide by an arbitrator's decision will not be heard to attack the regularity or fairness of an award, . . . and the trial court must confirm the award unless grounds exist to either vacate or modify the award.").[6]

---

6. Our Courts have demonstrated a longstanding policy of upholding arbitral awards and resolving doubts as to the scope of arbitrable issues in favor of arbitration. *See Carolina Virginia Fashion Exhibitors, Inc. v. Gunter*, 41 N.C. App. 407, 415, 255 S.E.2d 414, 420 (1979) (first quoting *T.W. Poe & Sons, Inc. v. Univ. of N.C.*, 248 N.C. 617, 625, 104 S.E.2d 189, 195 (1958)) (then quoting *Patton v. Garrett*, 116 N.C. 847, 858, 21 S.E. 679, 682 (1895)) ("If an arbitrator makes a mistake, either as to law or fact, it is the misfortune of the party, and there is no help for it. There is no right of appeal and the Court has no power to revise the decisions of "'judges who are of the parties' own choosing.' " An award is intended to settle the matter in controversy, and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award, it opens a door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus . . . arbitration, instead of ending would tend to increase litigation."); *see also R.E.M. Constr. v. Cleveland Constr., Inc.*, 285 N.C. App. at 172, 876 S.E.2d at 854 (quoting *W.M.S., Inc. v. Weaver*, 166 N.C. App. 352,

Relevant here, an award "shall" be vacated if "[a]n arbitrator exceeded the arbitrator's powers[.]" N.C. Gen. Stat. § 1-569.23(a)(4). On the other hand, an award "shall" be modified if:

> (1) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;
>
> (2) The arbitrator has made an award on a claim not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the claims submitted; or
>
> (3) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

N.C. Gen. Stat. § 1-569.24(a)(1)–(3) (2023); *FCR Greensboro*, 119 N.C. App. at 577, 459 S.E.2d at 294 (citation omitted) (noting that only "awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators exceeding their authority shall be modified or corrected by the reviewing courts"); *Howell v. Wilson*, 136 N.C. App. 827, 830, 526 S.E.2d 194, 196 (2000) (providing that "an arbitrator exceeds his authority when he arbitrates *additional* claims and matters not properly before him"). That said, "[a]n award is ordinarily presumed to be valid, and the party seeking to set it aside has the burden of demonstrating an objective basis which supports his allegations that one of these grounds exists." *G. L. Wilson Bldg. Co. v. Thorneburg Hosiery Co.*, 85 N.C. App. 684, 686, 355 S.E.2d 815, 817 (1987).

With respect to an arbitrator exceeding his or her scope of authority, "[t]he duty to arbitrate is contractual, therefore, only disputes which the parties agreed to submit to arbitration may be resolved." *FCR Greensboro*, 119 N.C. App. at 577, 459 S.E.2d at 294. "To determine whether the parties agreed to submit a particular dispute or claim to arbitration, we must look at the language in the agreement, *viz.*, the arbitration clause, and

---

357, 602 S.E.2d 706, 709 (2004)) ("Since this appeal arises from a decision on a motion to confirm an arbitration award, we first note that a strong policy supports upholding arbitration awards."); *see also Servomation Corp. v. Hickory Constr. Co.*, 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986) ("There is a strong public policy favoring the settlement of disputes by arbitration, and doubts concerning the scope of arbitrable issues will be resolved in favor of the party seeking arbitration."); *see also Epic Games, Inc. v. Murphy-Johnson*, 247 N.C. App. 54, 62, 785 S.E.2d 137, 143 (2016) (quoting *Johnston Cty. v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992)) ("[O]ur strong public policy requires that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration.").

ascertain whether the claims fall within its scope." *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 23–24, 331 S.E.2d 726, 731 (1985); *see also*, *e.g.*, *Thomasville Chair Co. v. United Furniture Workers*, 233 N.C. 46, 49, 62 S.E.2d 535, 537 (1950) (noting that the "power and authority of the arbitrators here was limited by the terms of the agreement and the grievance submitted, and the scope of the inquiry and decision must be determined in accord with that standard. The question is not whether the arbitrators decided wisely but whether they went beyond the limits established by the agreement between the Company and the Union."). "[W]hether a claim falls within the scope of an arbitration clause and is thus subject to arbitration depends not on the characterization of the claim as tort or contract, but on the relationship of the claim to the subject matter of the arbitration clause." *Rodgers Builders*, 76 N.C. App. at 24, 331 S.E.2d at 731.

The same logic applies to the remedies an arbitrator may fashion—an arbitrator possesses the latitude to grant any remedy he deems appropriate unless the arbitration clause specifically limits the types of relief he may grant:

> [A]bsent clearly restrictive language, an arbitrator must be allowed latitude in fashioning an appropriate remedy. By submitting to arbitration, it is implied that the arbitrator has the power to order an appropriate remedy, even though the contract may be silent as to any specific or general relief the arbitrator may grant. . . . If a contract specifically limits the authority of the arbitrator to grant a particular type of relief, then the remedies are confined to what is stated, but an arbitrator is allowed flexibility in formulating remedies . . . where the contract requiring arbitration was not explicit on the subject of remedies and *did not prohibit the arbitrator's use of a specific remedy*.

Lorant, 187 N.C. App. at 576, 654 S.E.2d at 53 (citation omitted). Indeed, "this Court has recognized with regard to the award of remedies that 'an arbitrator does not exceed his powers if (1) state law allows the remedy for the specified cause of action, and (2) the arbitration contract does not unequivocally preclude it[.]' " *R.E.M. Constr.*, 285 N.C. App. at 173, 876 S.E.2d at 855 (quoting *Weaver*, 166 N.C. App. at 359, 602 S.E.2d at 711). Rule 49 of the AAA similarly provides that an arbitrator may grant any remedy he deems just and equitable if the matter falls within the scope of the parties' arbitration agreement: "The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." *Am. Arb. Ass'n*, Commercial Arbitration Rules & Mediation Procedures, R. 49(a) (2022).

A. Water Reservoir, Traffic Count, & Utilities

Defendant asserts the Arbitrator exceeded his scope of authority by "imposing obligations on [her] to contribute as much as $60,000.00" to the rehabilitation of a water reservoir shared between Plaintiff and Defendant. Defendant maintains "nothing in the Operating Agreement or its arbitration clause allows such massive and comprehensive future obligations to be imposed on [her.]" Defendant further contends that the Arbitrator exceeded his scope of authority by requiring the parties "to submit to a traffic count mechanism to allocate maintenance costs," and by requiring the parties to negotiate the terms and conditions of a new utilities easement.

However, Defendant has failed to demonstrate how these claims or remedies are precluded by the arbitration clause contained in the Operating Agreement. *R.E.M. Constr.*, 285 N.C. App. at 173, 876 S.E.2d at 855 (providing that an arbitrator does not exceed his powers if "(1) state law allows the remedy for the specified cause of action, and (2) the arbitration contract does not unequivocally preclude it"); *Rodgers Builders*, 76 N.C. App. at 23–24, 331 S.E.2d at 731 ("To determine whether the parties agreed to submit a particular dispute or claim to arbitration, we must look at the language in the agreement . . . , the arbitration clause, and ascertain whether the claims fall within its scope."); *Lorant*, 187 N.C. App. at 578, 654 S.E.2d at 54 ("An arbitrator's award cannot be modified for error of law unless that error caused the arbitrator to act beyond the scope of his authority. . . . [And] an award may not be vacated merely because the arbitrator erred as to law or fact.").

Here, the arbitration clause provides:

> Any dispute arising out of or in connection with this Agreement or the breach thereof shall be decided by arbitration to be conducted in North Carolina in accordance with the then prevailing Commercial Arbitration Rules of the American Arbitration Association, and judgment may be entered in any court having jurisdiction thereof. The prevailing party in arbitration shall receive immediate reimbursement from the non-prevailing party of the reasonable costs (including reasonable attorneys' fees) associated with the arbitration.

The arbitration clause thus provides a broad scope for the resolution of disputes, as it plainly states, "[a]ny dispute arising out of or in connection with" the Operating Agreement "shall be decided by arbitration[.]" *See Bass v. Pinnacle Custom Homes, Inc.*, 163 N.C. App. 171, 176, 592 S.E.2d 606, 609 (2004) (citation omitted) ("[P]arties can draft a contract provision which makes arbitration the method of resolving *any* controversy related to the contract. This Court has interpreted that to mean that 'there is no legislative bar to arbitration of these claims as long as they arise out of or relate to the contract.' "); *see also Rodgers Builders*, 76 N.C. App. at 25, 331 S.E.2d at 732 ("[T]he language of the arbitration clause here is sufficiently broad to include *any* claims which arise out of or are related to the contract or its breach, regardless of the characterization of the claims as tort or contract."); *see also Epic Games*, 247 N.C. App. at 63, 785 S.E.2d at 143 ("These broad phrases indicate the drafter, Epic Games, intended for an extensive range of issues relating to Johnson's employment or the Employment Agreement to fall within the arbitration clause's scope.").

Moreover, the arbitration clause grants the Arbitrator broad discretion in fashioning remedies since it is silent on the subject outside of incorporating the AAA's rules. *See, e.g.*, *Lorant*, 187 N.C. App. at 576, 654 S.E.2d at 53 ("[A]n arbitrator is allowed flexibility in formulating remedies . . . where the contract requiring arbitration was not explicit on the subject of remedies and *did not prohibit the arbitrator's use of a specific remedy*."); *see also R.E.M. Constr.*, 285 N.C. App. at 173, 876 S.E.2d at 855–56 ("The Subcontracts do not explicitly preclude the equitable remedy that the panel fashioned; rather, they expressly vest the arbitration panel with broad discretion to craft equitable remedies through the specific adoption of the AAA Rules[.]").

Defendant overlooks the fact that the arbitration clause allows for the resolution of these claims and does not preclude the fashioning of these remedies. *Rodgers Builders*, 76 N.C. App. at 23–24, 331 S.E.2d at 731; *Lorant*, 187 N.C. App. at 576, 654 S.E.2d at 53. Additionally, the remedies fashioned are permitted by subsection 1-569.21(c) and Rule 49(a) of the AAA. *See R.E.M. Constr.*, 285 N.C. App. at 173, 876 S.E.2d at 855; *see also* N.C. Gen. Stat. § 1-569.21(c); *see also Am. Arb. Ass'n*, Commercial Arbitration Rules & Mediation Procedures, R. 49(a). And through their pleadings, Plaintiff and Defendant requested the Arbitrator to grant such relief as he deemed appropriate, which our Court previously determined allows an arbitrator to grant relief beyond what is expressly asked for in the prayer for relief sections of the parties' pleadings. *Lorant*, 187 N.C. App. at 575, 654 S.E.2d at 53 (citation omitted) ("A prayer for general equitable relief justifies a court in granting relief beyond what is asked for in specific prayers, as long as such relief is consistent with the pleadings and the evidence does not surprise the opposing party.").

Additionally, Defendant, through her responsive pleading, requested that the Arbitrator resolve the dispute over access to the water reservoir:

> Regarding the rights to the water reservoir located on Tract C-2, following the division, the owners of B and C-1 would have no right to access the reservoir system on Tract C-2 and no right to go onto Tract C-2 to inspect the pipes on that property, etc. As part of the division, Tract C-2 would not be granting any water utility easement to Tract B or Tract C-1. Tract B and Tract C-1 will make their own arrangements for water.

Lorant, 187 N.C. App. at 573, 654 S.E.2d at 51 (citations omitted) ("An arbitrator's ability to act is both created and limited by the authority conferred on him by the parties' private arbitration agreement. Only those claims submitted to the arbitrator may be decided by him."); N.C. Gen. Stat. § 1-569.24(a)(2) (providing "the court shall modify or correct the award if . . . [t]he arbitrator has made an award on a claim not submitted to the arbitrator"). And with respect to the traffic count and utilities easement provisions, the Arbitrator imposed these remedies in response to the parties' joint request to partition the real property equitably:

> [Plaintiff] and [Defendant], in their respective pleadings, have requested the Arbitrator divide and partition part of the real property between themselves and to sell part of the real property. In light of the unique circumstances of the real property, the mutual desire of [Plaintiff] and [Defendant], and the authority to both sell and distribute the property in kind under sections 11.1(d) and 11.5 of [the Operating Agreement], the Arbitrator has elected to divide Devotion's real property . . . .

Defendant maintains the shared water reservoir maintenance provision is erroneous because requiring her to make capital contributions for the rehabilitation project violates Sections 8.2 and 11.3 of the Operating Agreement. Defendant, however, neither cites authority in support of how sharing maintenance costs constitutes a capital contribution nor defines such a legal term of art. Instead, Defendant provides general citations to the North Carolina Limited Liability Company Act's winding up, judicial dissolution, and marshaling of assets provisions. *See generally* N.C. Gen. Stat. §§ 57D-6-03, -07, and -08 (2023). As it is not this Court's task to make arguments for an appellant, we deem this argument to be abandoned. *See* N.C. R. App. P. 28(b)(6); *see also K2HN Constr. N.C., LLC v. Five D Contractors, Inc.*, 267 N.C. App. 207, 215, 832 S.E.2d

559, 565 (2019) (citation omitted) (noting "it is not the role of this Court to create an appeal for an appellant or to supplement an appellant's brief with legal authority or arguments not contained therein").

Defendant also argues that the shared water reservoir maintenance and utilities provisions run afoul of *Swaim v. Simpson*, but that case dealt with whether a trial court "increasing the extent and scope of" an ingress and egress easement comported with the original grantor's intent. 120 N.C. App. 863, 863–64, 463 S.E.2d 785, 786–87 (1995). We fail to see the relevance of the *Swaim decision to this case*. Moreover, "[a]n arbitrator's award cannot be modified for error of law unless that error caused the arbitrator to act beyond the scope of his authority. . . . [And] an award may not be vacated merely because the arbitrator erred as to law or fact." *Lorant*, 187 N.C. App. at 578, 654 S.E.2d at 54.

As to the traffic count provision, Defendant maintains the remedy runs afoul of North Carolina law under *Foxx v. Davis*, *Tr. Of Walter Glen Davis*, *Jr. Revocable Living Trust*, 289 N.C. App. 473, 482, 890 S.E.2d 519, 526 (2023). Yet, that case dealt with a trial court's review of a motion for summary judgment that asked, inter alia,[7] whether paving a road "constituted an improvement" under the plain language of an easement created by deed. *Id.* at 481, 890 S.E.2d at 526. We fail to see the relevance of the *Foxx* decision to the matter *sub judice*. Furthermore, after providing a cursory reference to the *Foxx* decision, Defendant made no argument as to how the traffic count mechanism violated *Foxx* or other established North Carolina law. *See* N.C. R. App. P. 28(b)(6); *see also K2HN Constr.*, 267 N.C. App. at 215, 832 S.E.2d at 565.

As Plaintiff correctly observes, this Court's decision in *R.E.M. Constr. v. Cleveland Constr.*, *Inc.*, 285 N.C. App. 167, 876 S.E.2d 851 (2022) is particularly instructive. That decision arose "out of an arbitration proceeding" under the AAA between REM Construction and Cleveland Construction ("CCI"). *Id.* at 168, 876 S.E.2d at 853. The arbitral panel entered an award, determining that "REM shall be entitled to monetary compensation from CCI in accordance with the terms of the Subcontracts." *Id.* Upon reviewing the Subcontracts, the arbitral panel concluded there was insufficient evidence to determine REM's actual direct cost. *Id.* at 170, 876 S.E.2d at 853–54. The arbitral panel thus fashioned an equitable remedy pursuant to the AAA's provisions. *Id.* REM later moved the trial court to confirm the award, and CCI moved to

---

7. We only address this portion of the *Foxx* case as it is the only passage cited in Defendant's appellate brief.

modify or partially vacate the award. *Id.* at 171, 876 S.E.2d at 854. The trial court ultimately granted REM's motion to confirm the award and denied CCI's motion to modify or partially vacate. *Id.*

On appeal, CCI argued, "the trial court should have vacated the panel's award of damages under N.C. Gen. Stat. § 1-569.23(a)(4), which provides that a trial court may vacate an arbitration award where '[a]n arbitrator exceeded the arbitrator's powers[.]' " *Id.* at 172, 876 S.E.2d at 855 (alterations in original) (citation omitted). CCI maintained that the panel "exceeded its authority" by fashioning a remedy "outside of what was contemplated in the negotiated contract[.]" *Id.* at 172–73, 876 S.E.2d at 855. Upon review, this Court upheld the trial court's confirmation of the arbitration award, reasoning that: (1) the Subcontracts did not "explicitly preclude[ ] the equitable remedy fashioned by the panel"; (2) "AAA Rule 48(a), which the Subcontracts specifically adopt[ed], authorize[d] the arbitration panel to 'grant *any remedy* or relief that the arbitrator deem[ed] just and equitable and within the scope of the agreement of the parties, *including*, but not limited to, *equitable relief*"; (3) "the arbitration panel did not provide REM with any of the forms of compensation prohibited by the Subcontracts"; and (4) the "parties could have—but did not—write into the contract a limiting provision forbidding the arbitration panel from fashioning this specific remedy." *Id.* at 173–75, 876 S.E.2d at 856 (cleaned up). The Court thus concluded that "the arbitration panel did not act contrary to the express authority conferred on them by statute and by the language of the parties' private arbitration agreement." *Id.* at 175, 876 S.E.2d at 856.

As in *R.E.M. Constr.*, the Arbitrator in the instant case adhered to the scope of the arbitration clause, subsection 1-569.21(c), and AAA Rule 49(a) when fashioning remedies. *See* N.C. Gen. Stat. § 1-569.21(c) ("As to all other remedies . . . an arbitrator may order any remedies the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under G.S. 1-569.22 or for vacating an award under G.S. 1-569.23."); *see also Am. Arb. Ass'n*, Commercial Arbitration Rules & Mediation Procedures, R. 49(a). Indeed, like *R.E.M. Constr.*, the arbitration clause in question does not explicitly preclude the remedies Defendant complains of on appeal, and the arbitration agreement incorporates the AAA's rules. Had the parties intended to limit the remedies available via arbitration proceedings or the claims which could be resolved, it could have expressly written such a limiting provision into the arbitration clause. *R.E.M. Constr.*, 285 N.C. App. at 175, 876 S.E.2d at 856 (quoting *Lorant*, 187 N.C. App. at 577, 654 S.E.2d at 54) ("'[T]he parties could have—but did not—write into the contract a limiting provision' forbidding the arbitration panel from fashioning this specific remedy."); *accord Calvine Cotton Mills, Inc. v. Textile Workers Union*, 238 N.C. 719, 723, 79 S.E.2d 181, 184 (1953).

For all these reasons, we hold the Arbitrator did not exceed his authority when evaluating these claims and imposing these remedies. In turn, the trial court did not err by confirming the interim awards and denying Defendant's motion to modify or vacate on these bases.

B. Mandatory Arbitration Clause

Last, Defendant asserts the Arbitrator exceeded his authority by requiring the parties to address all future disputes concerning the DECR through arbitration. Defendant maintains that the scope of the arbitration was "to wind up the affairs of an insolvent limited liability company and to terminate its very existence." We agree.

As noted above, an arbitrator's authority to act is derived from the underlying arbitration agreement as well as the claims the parties submitted. *Lorant*, 187 N.C. App. at 573, 654 S.E.2d at 51 (citations omitted); *see also*, *e.g.*, *Thomasville Chair Co.*, 233 N.C. at 49, 62 S.E.2d at 537. Additionally, the duty to arbitrate is contractual in nature, meaning that parties may only be subjected to arbitral proceedings by way of mutual agreement. *FCR Greensboro*, 119 N.C. App. at 577, 459 S.E.2d at 294 ("The duty to arbitrate is contractual, therefore, only disputes which the parties agreed to submit to arbitration may be resolved."); *Rodgers Builders*, 76 N.C. App. at 23, 331 S.E.2d at 731 ("[P]arties 'may include in a written contract a provision for the settlement by arbitration of *any* controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof.' "). Indeed, arbitration agreements merely provide the mechanism by which the agreeing parties obtain the "contractual right to arbitrate a dispute[.]" *T.M.C.S., Inc. v. Marco Contractors, Inc.*, 244 N.C. App. 330, 340, 780 S.E.2d 588, 595 (2015).

Here, the Arbitrator exceeded his scope of authority by according relief on a matter not submitted to him. *Lorant*, 187 N.C. App. at 573, 654 S.E.2d at 51 (citations omitted). In initiating arbitration, Plaintiff never requested the Arbitrator to ensure that future disputes—following the closure of Devotion and distribution of its assets—would be subject to a certain type of legal proceeding, forum, or law. Nor did Defendant in her responsive pleadings. Instead, the parties requested that the Arbitrator distribute the property equitably minimizing owelty due between them, as indicated in the parties' stipulation:

> The parties agree to request that the arbitrator make a division of the remaining real property of Devotion Family, LLC in a manner that minimizes and attempts to avoid, to the extent possible, any owelty due from one party to the other, and further avoids to the extent possible any division where an owelty would be affixed to either remaining tract due to insufficient funds being available from the sale of Tract A, Tract B, and the personal property.

Nevertheless, the Arbitrator imposed a mandatory obligation to resolve all future disputes under the DECR via arbitration with the AAA:

> **Arbitration**. Any controversy or claim arising out of or relating to this Declaration, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

As in *Thomasville Chair Co.*, the "power and authority of the arbitrators here was limited *by the terms of the agreement and the grievance submitted*, and the scope of the inquiry and decision must be determined in accord with that standard." 233 N.C. at 49, 62 S.E.2d at 537 (emphasis added).

Although "an arbitrator is allowed flexibility in formulating remedies," *Lorant*, 187 N.C. App. at 576, 654 S.E.2d at 53, this latitude is not unlimited. And as Defendant aptly noted in her objections to the second interim award: "With the completion of this Arbitration proceeding . . . the arbitration clause governing the parties' rights will have been fulfilled and no longer be operative." Accordingly, we hold the trial court erred by denying Defendant's motion to modify the interim awards to the extent that the imposition of the mandatory arbitration clause exceeded the Arbitrator's authority. *See FCR Greensboro*, 119 N.C. App. at 577, 459 S.E.2d at 294 (citation omitted) ("[E]rrors resulting from arbitrators exceeding their authority shall be modified or corrected by the reviewing courts."); *see also* N.C. Gen. Stat. § 1-569.24(a)(2) (providing that "the court shall modify or correct the award if" the arbitrator "made an award on a claim not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the claims submitted").

IV. Conclusion

After careful consideration, we conclude the Arbitrator exceeded his authority by requiring the parties to submit to arbitration for all future disputes concerning the DECR; we thus vacate this portion of the trial court's order. Otherwise, the Arbitrator's actions were well within his realm of authority. Therefore, we affirm the trial court's order confirming the second and third interim arbitration awards in part and remand in part for correction under N.C. Gen. Stat. § 1-569.24(a)(2).

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges CARPENTER and MURRY concur.

WILLIAM MICHAEL ROACH and JULIE G. ROACH, Plaintiffs
v.
WELLS FARGO BANK, NATIONAL ASSOCIATION, Defendant

No. COA24-177

Filed 3 December 2025

Unfair Trade Practices—foreclosure by power of sale—no improper misrepresentation—no genuine issue of material fact—summary judgment

The trial court did not err by entering summary judgment in favor of defendant bank in plaintiff homeowners' action asserting unfair and deceptive trade practices (UDTP) with regard to a foreclosure proceeding. Although plaintiffs alleged that defendant misrepresented its intention to delay foreclosure pending its review of plaintiffs' documents (purporting to show proof of funds and a gift letter in order to cure their default), there was no genuine issue of material fact regarding plaintiffs' failure to satisfy defendant's requirements in order to cancel the foreclosure sale and, in addition, plaintiffs failed to demonstrate deception that would amount to substantial aggravating circumstances. Further, plaintiffs did not raise a breach of contract claim, although any right of plaintiffs to seek reinstatement of their mortgage during the upset bid period, which they asserted was denied to them, would have involved contractual rights under the deed of trust.

Appeal by Plaintiffs from order entered 2 June 2023 by Judge Vinston M. Rozier, Jr. in Wake County Superior Court. Heard in the Court of Appeals 13 August 2024.

Davis Hartman & Wright, LLP, by R. Daniel Gibson, for Plaintiffs-Appellants.

Womble Bond Dickinson (US) LLP, by B. Chad Ewing, for Defendant-Appellee.

CARPENTER, Judge.

William M. Roach and Julie G. Roach (collectively, "Plaintiffs") appeal from the trial court's order granting summary judgment for Wells Fargo Bank, N.A. ("Defendant") on Plaintiffs' unfair and deceptive trade practices claim. On appeal, Plaintiffs argue the trial court erred in granting summary judgment in favor of Defendant. After careful review, we affirm.

I. Factual & Procedural Background

In December 2001, Plaintiffs purchased a lakefront home in Cornelius, North Carolina (the "Property"). In May 2003, Plaintiffs refinanced the Property through Wachovia Bank, N.A. ("Wachovia"). In the refinancing transaction, Plaintiffs provided Wachovia with a promissory note denoting its obligations to Wachovia. Plaintiffs also granted Wachovia a lien against the Property, which was duly recorded in Mecklenburg County (the "Deed of Trust").

In December 2008, Defendant acquired Wachovia via merger and assumed control over Plaintiffs' obligations to Wachovia. In 2009, Plaintiffs began to experience financial difficulties and struggled to maintain their payment obligations for the Property. In 2011, Plaintiffs applied for a loan modification and Defendant modified their loan. After the 2011 modification, however, Plaintiffs submitted four additional modification applications: two in 2014, one in 2017, and one in 2018. Defendant denied all four applications.

After Plaintiffs defaulted, Defendant sought to foreclose under the terms of the Deed of Trust. In 2015, the trial court entered an order allowing foreclosure on the Property. On 17 December 2015, Plaintiffs received a notice of foreclosure and notice of the 19 January 2016 sale date for the Property. On 4 January 2016, Plaintiffs were contacted by Defendant's representative, a Home Preservation Specialist, who advised they could contact him if they needed assistance. On 5 January 2016, Plaintiffs contacted Defendant to discuss their options and were informed that the deadline to request assistance had passed the day prior.

Subsequently, Plaintiffs' counsel contacted Defendant about the outstanding obligations on the Property. Defendant informed Plaintiffs that their loan default could be cured and mortgage reinstated by remitting a payment of $105,335.86. Additionally, Defendant instructed Plaintiffs that to request a sale postponement, Plaintiffs needed to send proof of funds and a gift letter to Defendant by fax. Defendant advised Plaintiffs that if they submitted the appropriate documentation, the foreclosure sale would not continue while the documents were under review.

On 18 January 2016, Plaintiffs' counsel faxed Defendant a "formal sale postponement request." The cover page of the fax stated that a gift letter and proof of funds were included in the fax. The "gift letter" was a copy of an email from Tom Sides and Laura Graybeal, individuals who were considering a loan to Plaintiffs to satisfy the requisite payoff. The email stated:

> To: Wells Fargo
>
> We are actively investigating supplying the funds in the amount of $105,335.86 to [Plaintiffs], our brother-in-law and sister, to be applied to cure their mortgage arrearage regarding the [P]roperty . . . . The source of the funds is our personal savings.
>
> Signed,
>
> Tom Sides and Laura Graybeal

Attached to the email was a one-page screen shot of the balance of Sides and Graybeal's TD Ameritrade account, which contained sufficient funds to cover the balance. On 19 January 2016, the date of the sale, Plaintiffs' counsel called Defendant about the status of the postponement request. Defendant indicated the documents were "illegible" so Plaintiffs' counsel resubmitted documents at 11:38 a.m., including a similar cover page, the same "gift letter," and an additional nine pages containing information about Sides and Graybeal's TD Ameritrade account.

On 20 January 2016, Plaintiffs' counsel again called Defendant to check the status of the postponement request. Defendant informed counsel that the request had been denied, and the Property had sold at the scheduled foreclosure sale the day prior. On 26 January 2016, Plaintiffs' counsel called Defendant to inquire about a reinstatement quote.[1] Defendant responded that Plaintiffs could not obtain a reinstatement quote because a third-party was "the high bidder at Plaintiffs' foreclosure sale." As a result, Plaintiff-Julie filed for Chapter 13 bankruptcy to avoid losing the Property.

On 16 January 2020, Plaintiffs filed a complaint against Defendant for unfair and deceptive trade practices. Plaintiffs alleged that Defendant made a false representation when it "advised the [P]laintiffs that upon the submission of 'the required documentation,' the foreclosure sale would not be conducted while the documents were being reviewed." Further, "[P]laintiffs' expressed intention and desire to cure the default and maintain possession and ownership of their [Property]" but Defendant proceeded with the foreclosure sale. In response, Defendant moved for summary judgment on 6 April 2023, arguing that

> Plaintiffs' claim fails as a matter of law because the documents submitted by Plaintiffs do not qualify as proof of funds or a gift letter on their face. The "letter" does not state that anyone has or will make a gift of any funds to Plaintiffs. The proof of funds shows that the alleged funds were in a third party's SEP IRA account and were not funds owned by, controlled by, or available for Plaintiffs' use.

During a 10 May 2023 deposition, Plaintiff-Julie mentioned another potential unfair or deceptive act committed by Defendant. She asserted that Defendant's refusal to allow the reinstatement of the mortgage pursuant to paragraph 16 of the Deed of Trust—"Borrower's Right to Reinstate"—during the ten-day upset bid period following the foreclosure sale constituted an unfair and deceptive trade practice.

On 15 May 2023, the trial court held a hearing on Defendant's motion. At the hearing, the trial court heard the parties' arguments on whether Defendant committed unfair and deceptive trade practices when it: (1) proceeded with the foreclosure sale, despite Plaintiffs' submission of the gift letter and proof of funds; and (2) refused to allow Plaintiffs to reinstate the loan following the sale, even though the Deed of Trust

---

1. "The statutory right to redemption provides that a debtor may terminate the power of sale by tendering the remaining obligation secured by the deed of trust and expenses incurred in the sale of the property . . . within the upset bid period." *Lynn v. Fed. Nat. Mortg. Ass'n*, 235 N.C. App. 77, 81 n.4, 760 S.E.2d 372, 375 n.4 (2014).

provided a right of reinstatement. During the hearing, Plaintiffs' counsel moved for summary judgment in favor of Plaintiffs. Ultimately, on 2 June 2023, the trial court entered an order granting Defendant's motion for summary judgment.

In granting Defendant's motion for summary judgment, the trial court held that Defendant did not commit an unfair or deceptive act when it failed to cancel the foreclosure sale because Plaintiffs "did not provide the required gift letter." The trial court further held that neither of the two emails constituted a "gift letter." Finally, the trial court held that Plaintiffs had no right to reinstate their mortgage through the Deed of Trust, and even assuming they did, Defendants did not commit an unfair or deceptive act by refusing to reinstate Plaintiffs' mortgage during the upset bid period pursuant to the Deed of Trust. On 29 June 2023, Plaintiffs filed notice of appeal.

II. Jurisdiction

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

III. Issue

The issue is whether the trial court erred in granting summary judgment in favor of Defendant.

IV. Analysis

Plaintiffs argue the trial court erred in granting summary judgment in favor of Defendant because: (1) Defendant acted unfairly and deceptively when it sold the Property at foreclosure despite representations to the contrary; (2) Defendant unfairly and deceptively deprived Plaintiffs of their right to reinstate the mortgage; and (3) the interpretation of Plaintiffs' gift letter raises a genuine issue of material fact. We disagree.

A. Standard of Review

We review appeals from summary judgment orders de novo. *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Herring*, 385 N.C. 419, 422, 894 S.E.2d 709, 712 (2023). " 'Under 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)).

A trial court should grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2023). "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action . . . . The issue is denominated 'genuine' if it may be maintained by substantial evidence." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

At summary judgment, the movant "bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002). "If the movant successfully makes such a showing, the burden then shifts to the nonmovant to come forward with specific facts establishing the presence of a genuine factual dispute for trial." *Id.* at 579, 573 S.E.2d at 124 (citing *Lowe v. Bradford*, 305 N.C. 366, 369–70, 289 S.E.2d 363, 366 (1982)).

"When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the non-moving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted). At the summary judgment stage, a trial court's duty "is strictly confined to determining whether genuine issues of material fact exist and does not extend to resolving such issues." *Pennington*, 356 N.C. at 579, 573 S.E.2d at 124; *see also Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) ("The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact.").

B. Unfair and Deceptive Trade Practices

The purpose of the Unfair and Deceptive Trade Practices Act is to "provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public in this State, and it applies to dealings between buyers and sellers at all levels of commerce." *Bhatti v. Buckland*, 328 N.C. 240, 245, 400 S.E.2d 440, 443–44 (1991) (cleaned up); N.C. Gen. Stat. § 75-1.1 (2023). To demonstrate a violation of section 75-1.1, a plaintiff must prove: "(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business." *Furr v. Fonville Morisey Realty, Inc.*, 130 N.C. App. 541, 551, 503 S.E.2d 401, 408 (1998) (citation omitted).

"[A]ctions for unfair or deceptive trade practices are distinct from actions for breach of contract[;] a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under [section 75-1.1]." *Branch Banking & Tr. Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992). As a result, after establishing a breach, a plaintiff must make a showing of "substantial aggravating circumstances that attend the breach in order to recover under the Act." *Mitchell v. Linville*, 148 N.C. App. 71, 75, 557 S.E.2d 620, 623–24 (2001) (cleaned up); *Norman Owen Trucking, Inc. v. Morkoski*, 131 N.C. App. 168, 177, 506 S.E.2d 267, 273 (1998) ("Simple breach of contract . . . do[es] not qualify as [an] unfair or deceptive act[], but rather must be characterized by some type of egregious or aggravating circumstances before the statute applies."). "A violation of Chapter 75 is unlikely to occur during the course of contractual performance, as these types of claims are best resolved by simply determining whether the parties properly fulfilled their contractual duties." *Mitchell*, 148 N.C. App. at 75, 557 S.E.2d at 624.

Nevertheless, "unfairness or 'deception either in the formation of the contract or in the circumstances of its breach' may establish the existence of substantial aggravating circumstances sufficient to support an unfair and deceptive trade practices claim." *SciGrip, Inc. v. Osae*, 373 N.C. 409, 426, 838 S.E.2d 334, 347 (2020) (quoting *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989)). Several past cases addressing substantial aggravating circumstances

> have generally involved forms of forgery or deception. *See Garlock v. Henson*, 112 N.C. App. 243, 246, 435 S.E.2d 114, 115 (1993) (finding substantial aggravating circumstances where the evidence showed "defendant repeatedly denied the sale of the bulldozer when he knew it had been sold" and "defendant forged a bill of sale in an attempt to extinguish plaintiff's ownership interest in the bulldozer"); *see also Talbert v. Mauney*, 80 N.C. App. 477, 480–81, 343 S.E.2d 5, 8 (1986) (holding "plaintiffs' allegations of wrongful and intentional harm to their credit rating and business prospects" along with allegations defendant told a potential investor "plaintiffs' credit documents were 'probably forged' " was sufficient to state a claim under the Unfair and Deceptive Trade Practices Act); *Walker v. Sloan*, 137 N.C. App. 387, 395–96, 529 S.E.2d 236, 243 (2000) (holding plaintiffs' allegations were sufficient to support a claim where defendant "attempted to break up the employee group . . . by attempting to bribe the portfolio managers into withdrawing from the group . . .; refus[ed] to participate [in negotiations] in good faith . . .; and . . . terminat[ed] the plaintiffs [from employment]").

Chapel H.O.M. Assocs., LLC v. RME Mgmt., LLC, 256 N.C. App. 625, 629, 808 S.E.2d 576, 579–80 (2017).

Under section 75-1.1, the first question is whether the defendant " 'committed the alleged acts, and then it is a question of law for the court as to whether these proven facts constitute an unfair or deceptive trade practice.' " *Richardson v. Bank of America, N.A.*, 182 N.C. App. 531, 540, 643 S.E.2d 410, 416 (2007) (quoting *United Lab., Inc. v. Kuykendall*, 322 N.C. 643, 664, 370 S.E.2d 375, 389 (1988)).

1. Failure to Postpone Foreclosure Sale

The sole contention in Plaintiffs' complaint is that Defendant falsely and deceptively misrepresented the steps necessary to delay the foreclosure sale. Specifically, Plaintiffs allege Defendant stated that "the estimated payoff would be $105,335.86 and in order to request sale postponement, Plaintiffs needed to [fax] proof of funds and a gift letter." In their amended response to interrogatories, Plaintiffs allege Defendant advised Plaintiffs that "upon the submission of 'the required documentation,' the foreclosure sale would not be conducted while the documents were being reviewed . . . ."

Here, Defendant did not fraudulently conceal its intent or unfairly exercise its right to foreclose. Indeed, Plaintiffs admit they received formal notice of the 19 January 2016 foreclosure sale on 17 December 2015. After Plaintiffs defaulted, Defendant attempted to work with Plaintiffs to address their outstanding obligations and forestall the foreclosure sale, despite being under no legal or contractual obligation to do so. Plaintiffs' eleventh-hour attempts through counsel—the day before and under an hour before the sale—to ostensibly comply with Defendant's accommodation criteria do not create a genuine issue of material fact as to whether Defendant acted unfairly or deceptively by failing to postpone the sale. Considering the evidence in the light most favorable to Plaintiffs, Plaintiffs failed to forecast evidence which rises to the level of substantial aggravating circumstances.

2. Reinstatement

In a prehearing deposition, Plaintiffs raised an additional theory which the trial court addressed in its summary judgment order. The trial court held Defendant did not commit an unfair or deceptive act by refusing to allow Plaintiffs to reinstate their loan during the upset bid period because (1) paragraph 16 of the Deed of Trust did not provide Plaintiffs a right to reinstate their loan because the section applied to "proceedings begun by Lender" and here, the foreclosure proceedings were initiated by the substitute trustee; and (2) even if paragraph 16 of the Deed of Trust provided such right, Defendant did not commit an unfair or deceptive act when it refused to allow Plaintiffs to reinstate the loan.

A foreclosure is a "legal proceeding to terminate a mortgagor's interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property." *S. Shores Realty Servs., Inc. v. Miller*, 251 N.C. App. 571, 581, 796 S.E.2d 340, 349 (2017) (citation and internal quotation marks omitted). In its answer, Defendant admitted that "it caused Mecklenburg County Special Proceed[ing] [ ] to be commenced to foreclose [upon] the deed of trust securing Plaintiffs' obligations to it." In the light most favorable to Plaintiffs, we conclude the foreclosure proceedings were initiated by Defendant and proceed to the trial court's alternative holding.

A foreclosure proceeding may be initiated by "(1) foreclosure by judicial sale . . . or, (2) if expressly provided within the deed of trust or mortgage, by power of sale under N.C. Gen. Stat. § 45–21.1 *et seq.*" *Banks v. Hunter*, 251 N.C. App. 528, 534, 796 S.E.2d 361, 367 (2017) (citation omitted). As here, "power of sale is a contractual provision in a deed of trust conferring upon the trustee the power to sell real property pledged as collateral for a loan in the event of default." *In re Simmons*, 291 N.C. App. 30, 32, 893 S.E.2d 271, 273 (2023) (citation and internal quotation marks omitted). Moreover, "the right to foreclose by power of sale is contractual in nature and permits parties to expeditiously resolve mortgage defaults through a non-judicial proceeding if authorized in the parties' mortgage or deed of trust." *Id.* at 32, 893 S.E.2d at 273 (cleaned up).

Here, the Deed of Trust provides, in relevant part, "[Plaintiffs] [ ] hereby grant and convey to Trustee in trust with power of sale" to the Property. The Property was sold at foreclosure by power of sale, *i.e.*, a non-judicial foreclosure sale. Thus, Defendant's actions surrounding the reinstatement of Plaintiffs' mortgage is a contractual issue, as "[n]on-judicial foreclosure by power of sale arises under contract and is not a judicial proceeding." *See In re Lucks*, 369 N.C. 222, 225, 794 S.E.2d 501, 504 (2016).

Even assuming the Deed of Trust afforded Plaintiffs the right to reinstate, because foreclosure by "power of sale is a contractual provision in a deed of trust," Plaintiffs' claim would sound in breach of contract rather than a claim for unfair or deceptive trade practices. *See Simmons*, 291 N.C. App. at 32, 893 S.E.2d at 273 (citation omitted). Similar to our conclusion above, the pleadings and evidence before the trial court failed to forecast evidence of substantial aggravating circumstances attendant to a breach. At most, these facts could possibly support a claim for breach of contract—a cause of action not before the trial court. Accordingly, the trial court did not err by granting summary judgment for Defendant.[2]

V. Conclusion

As the trial court observed during the hearing, the competing interests in this case are Plaintiffs' contentions that Defendant's actions were not "right" in a moral sense, contrasted against Defendant's legal and contractual rights to foreclose. We hold the trial court did not err by granting summary judgment in favor of Defendant where no genuine issue of material fact remained as to Plaintiffs' unfair and deceptive trade practices claim. If the Deed of Trust provided Plaintiffs a right to reinstate the loan during the upset bid period, Plaintiffs' cause of action lies in breach of contract, a claim not before us, rather than unfair and deceptive trade practices. We therefore affirm the trial court's grant of summary judgment for Defendant.

AFFIRMED.

Judges ZACHARY and WOOD concur.

2. We do not reach Plaintiffs' argument concerning the sufficiency of the "gift letter." This question of fact is not material in light of the foregoing analysis. *See Coastal Plains Utils., Inc. v. New Hanover Cnty.*, 166 N.C. App. 333, 340, 601 S.E.2d 915, 920 (2004).

SOUTHLAND NATIONAL INSURANCE CORPORATION in Liquidation, BANKERS LIFE INSURANCE COMPANY in Rehabilitation, COLORADO BANKERS LIFE INSURANCE COMPANY, in Rehabilitation, and SOUTHLAND NATIONAL REINSURANCE CORPORATION, in Rehabilitation, Plaintiffs

v.

GREG E. LINDBERG, GLOBAL GROWTH HOLDINGS, LLC, EDWARDS MILL ASSET MANAGEMENT, LLC, NEW ENGLAND CAPITAL, LLC, and PRIVATE BANKERS LIFE AND ANNUITY CO., LTD., Defendants

No. COA25-183

Filed 3 December 2025

1. Appeal and Error—motion to take judicial notice on appeal—not a proper matter—not crucial to disposition of appeal

In an action brought by a group of insolvent insurers (plaintiffs) against a business owner and his company (defendants)—where defendants bought out plaintiffs, caused $1.2 billion held for plaintiffs' policyholders to be invested into defendants' non-insurance affiliate companies, entered into a "Memorandum of Understanding" (MOU) with plaintiffs memorializing a restructuring plan to facilitate repayment of plaintiffs' debts, failed to complete the restructuring plan by the deadline under the MOU, and were held in contempt for violating a temporary restraining order prohibiting defendants from selling, encumbering, or otherwise devaluing specified affiliate companies—defendants' request, made pursuant to Appellate Rule 37, that the appellate court take judicial notice of a motion to dissolve a temporary restraining order was rejected for two reasons. First, the motion to dissolve and its contents were not matters subject to judicial notice because they were neither public records of other courts within the state court system nor notoriously true facts not subject to reasonable dispute. Second, the motion to dissolve did not bear upon a fact crucial to the disposition of the appeal because its contents concerned actions by defendants that occurred after the contempt hearing.

2. Contempt—violation of temporary restraining order—present ability to comply with purge conditions—competent evidence

In an action brought by a group of insolvent insurers (plaintiffs) against a business owner and his company (defendants)—where defendants bought out plaintiffs, caused $1.2 billion held for plaintiffs' policyholders to be invested into defendants' non-insurance affiliate companies, entered into a "Memorandum of Understanding" (MOU) with plaintiffs memorializing a restructuring plan to facilitate repayment of plaintiffs' debts, failed to complete the restructuring plan by the deadline under the MOU, and were held in contempt for violating a temporary restraining order prohibiting defendants from selling, encumbering, or otherwise devaluing specified affiliate companies—the trial court's determination that defendants had the present means and ability to comply with the purge conditions of the contempt order was supported by competent evidence and unchallenged findings of fact. The appellate court emphasized that defendants did not need to have "property free and clear of any liens" with which to purge contempt where funds could be obtained through reasonable measures, including the liquidation of equity in encumbered assets.

3. Contempt—civil—constitutional argument inapplicable—effective sentence to debtor's prison—noncompliance with temporary restraining order

In an action brought by a group of insolvent insurers (plaintiffs) against a business owner and his company (defendants)—where defendants bought out plaintiffs, caused $1.2 billion held for plaintiffs' policyholders to be invested into defendants' non-insurance affiliate companies, entered into a "Memorandum of Understanding" (MOU) with plaintiffs memorializing a restructuring plan to facilitate repayment of plaintiffs' debts, failed to complete the restructuring plan by the deadline under the MOU, and were held in contempt for violating a temporary restraining order (TRO) prohibiting defendants from selling, encumbering, or otherwise devaluing specified affiliate companies—the trial court's contempt order did not violate Article I, Section 28 of the North Carolina Constitution by "effectively sentenc[ing defendant] Lindberg to debtor's prison"; that provision was inapplicable because defendant Lindberg was held in civil contempt and ordered imprisoned for his willful noncompliance with the TRO—not for his inability to pay.

4. Contempt—civil—purge—evidence of violation of temporary restraining order—unchallanged findings of fact

In an action brought by a group of insolvent insurers (plaintiffs) against a business owner and his company (defendants)—where defendants bought out plaintiffs, caused $1.2 billion held for plaintiffs' policyholders to be invested into defendants' non-insurance affiliate companies, entered into a "Memorandum of Understanding" (MOU) with plaintiffs memorializing a restructuring plan to facilitate repayment of plaintiffs' debts, failed to complete the restructuring plan by the deadline under the MOU, and were held in contempt for violating a temporary restraining order (TRO) prohibiting defendants from selling, encumbering, or otherwise devaluing specified affiliate companies—the trial court's contempt order, based upon noncompliance with the TRO was supported by unchallenged, and therefore binding, findings of fact regarding defendants' violations of the TRO, both in the past and as of the date of the contempt hearing.

Appeal by defendants from an order entered 30 August 2024 by Judge A. Graham Shirley II in Wake County Superior Court. Heard in the Court of Appeals 26 August 2025.

Monica Langdon Jackson, for defendants-appellants.

Michael G. Newell, for defendants-appellants.

Williams Mullen, by Wes J. Camden, Caitlin M. Poe, Lauren E. Fussell, for plaintiffs-appellees.

FLOOD, Judge.

Defendant Greg E. Lindberg and Defendant Global Growth Holdings, LLC ("Global Growth") (collectively, "Defendants") appeal from the trial court's order holding them in civil contempt for violation of a Temporary Restraining Order. Upon careful review, we affirm the trial court's civil contempt order.

I. Factual and Procedural Background

The following factual and procedural background is derived in part from the facts set forth in this Court's prior opinion of *Southland Nat'l Ins. Corp. v. Lindberg*, 289 N.C. App. 378 (2023), issued upon Defendants Greg E. Lindberg, Global Growth Holdings, Inc. f/k/a Academy Association, Inc., and New England Capital, LLC's prior appeal to this Court.

The Plan

Southland National Insurance Corporation, Bankers Life Insurance Company, Colorado Bankers Life Insurance Company, and Southland National Reinsurance Corporation (collectively, "Plaintiffs") are insolvent insurers, who were purchased by Defendant Lindberg in 2014.

In 2014, Lindberg re-domesticated Plaintiffs to North Carolina in order to take advantage of this State's favorable regulations as to insurance companies' investments. Prior to this re-domestication, Lindberg, acting as owner of Plaintiffs, made a special agreement with former North Carolina Commissioner of Insurance, Wayne Goodwin, allowing Lindberg to invest up to forty percent of Plaintiffs' assets into Lindberg's affiliated business entities. Lindberg then invested up to forty percent of Plaintiffs' money into the purchase of other, non-insurance companies, also owned by Lindberg. Simply put, Lindberg created a scheme in which he caused $1.2 billion that was held for Plaintiffs' policyholders to be invested into other non-insurance companies he also owned or controlled.

In November 2016, Wayne Goodwin lost re-election and his seat as Commissioner of Insurance to Mike Causey, who then reduced the cap on affiliated investments from forty percent to ten percent. Lindberg struggled to untangle his affiliated investments and, as the deadline for diversification drew near, the North Carolina Department of Insurance ("NCDOI") grew concerned over "mismatch between investments and policyholder liabilities." In other words, because Lindberg had invested so much of Plaintiffs' money into his affiliated companies, NCDOI worried Plaintiffs might experience a shortfall on their obligation to pay claims by individual policyholders.

To address this problem, in June 2019, Lindberg and many of his companies entered into a series of agreements with Plaintiffs for timely repayment of the policyholders, and Plaintiffs gave one of Lindberg's companies an additional $40 million loan to prevent his non-insurance borrower companies from immediate collapse. They also agreed to grant Lindberg's borrower companies more favorable lending terms to facilitate them paying the loans over a longer period. These agreements resulted in the parties entering into, *inter alia*, a Memorandum of Understanding (the "MOU") on 27 June 2019, wherein Lindberg agreed that, on or before 30 September 2019, the borrower companies—or Specified Affiliated Companies (the "SACs")—would be placed under a New Holding Company governed by an independent board, charged with protecting Plaintiffs' policyholders. These companies were called SACs because, as the MOU provided, some of the affiliated companies—companies either directly or indirectly owned and controlled by Lindberg—would not be contributed to the New Holding Company and would remain under Lindberg's control. On the same day the parties entered into the MOU, Lindberg agreed to have Plaintiffs enter into rehabilitation. During the period of rehabilitation and upon execution of the MOU, Defendants had either direct or indirect control over most of the SACs and the authority to contribute those entities to the New Holding Company.

The Breach

On 1 October 2019, Plaintiffs filed suit against Defendants for breach of the MOU and fraud, alleging Lindberg failed to make the SACs subsidiaries of the New Holding Company on or before 30 September 2019. Plaintiffs requested specific performance of the MOU, compensatory damages, and punitive damages. Plaintiffs also filed a Motion for Preliminary Injunction and sought a Temporary Restraining Order (the "TRO") against Defendants. The TRO, which was approved by the trial court, prohibited Defendants from, *inter alia*, selling, encumbering, or otherwise devaluing the SACs. The TRO also contained restrictions on, not just the SACs, but any company affiliated with Lindberg because Lindberg had created a complex web of companies and investments through which he controlled the flow of capital—which included "multiple tiers of operating and holding companies; loans that had been syndicated and repackaged, then transferred several times; underlying loan agreements and sellers' notes; equity equivalence agreements; and third-party financing agreements." *Southland Nat'l Ins. Corp.*, 289 N.C. App. at 392. Finally, the TRO restrained Defendants from dissipating their own assets. On 7 October 2019, with the consent of the parties, the trial court entered a Consent Extension of the TRO, for which there has yet to be a hearing.

The Trial Court's Initial Order and the Parties' Initial Appeal

After a bench trial held by the trial court from 21 June to 30 June 2021, the trial court entered a judgment in favor of Plaintiffs, and ordered specific performance of the MOU, but not compensatory or punitive damages. On 26 May 2022, the trial court entered an Amended Judgment and Order to correct clerical errors. On 13 June 2022, Defendants appealed to this Court from the Amended Judgment and Order. On 21 June 2022, Plaintiffs cross-appealed on the narrow issue of whether the trial court erred in failing to award fraud damages. On 20 June 2023, this Court issued its opinion, affirming the trial court's award of specific performance of the MOU and directing the trial court to enter an immediate award of damages in favor of Plaintiffs. *Id.* at 394.

After this Court issued its opinion, Defendants petitioned the Supreme Court for discretionary review. On 13 December 2023, the Supreme Court granted Defendants' petition for discretionary review in part, reviewing only the issue of whether Plaintiffs' reliance on Defendants' fraudulent representations was reasonable. *See Southland Nat'l Ins. Corp. v. Lindberg*, 385 N.C. 610 (2023). Our Supreme Court heard oral arguments on 24 October 2024, and on 17 October 2025, the Supreme Court concluded "that Defendants' petition for discretionary review was improvidently allowed by order on 13 December 2023." *Southland Nat'l Ins. Corp. v. Lindberg*, 920 S.E.2d 504 (2025) (per curiam).

Plaintiffs' Motion for an Order to Show Cause and the Modified TRO

On 18 November 2022, Plaintiffs filed their Motion for Order to Show Cause, along with supporting materials, requesting the trial court to issue an order directing Defendants to appear and show why they should not be held in civil contempt for their apparent violations of the TRO. The trial court granted Plaintiffs' motion on 21 December 2022. On 5 January 2023, Plaintiffs moved to withdraw their Motion for Order to Show Cause and "refile the motion following additional analysis of Defendants' financial transactions"; the motion was granted by the trial court later the same day.

On 15 April 2024, Plaintiffs filed a Verified Renewed Motion for Order to Show Cause, wherein Plaintiffs again requested for the trial court to find probable cause exists that Defendants violated the TRO and to enter an order directing Defendants to appear and show why they should not be held in contempt. In their motion, Plaintiffs alleged an analysis of financial records revealed that, between October 2019 and January 2023, Defendants violated the TRO through numerous transactions totaling tens of millions of dollars.

To support their allegations, Plaintiffs attached to their motion an affidavit of forensic accountant, Carey Miller, in which Miller identified the flow of funds on a transaction-by-transaction basis. Plaintiffs argued Miller had identified two transactions whereby Defendants had violated the TRO: first, Defendants had transferred a net amount of approximately $64 million from Global Growth and the SACs to personal entities Lindberg had used to avoid holding assets in his own name (the "Lindberg Personal Vehicles"), and second, a group of the SACs—the financing companies, or the "FinCos,"—transferred a net total of approximately $65 million to Global Growth. Plaintiffs alleged the former transaction violated the TRO because these funds were transferred to personal-use entities and were not used for ordinary business expenses. As to the latter transaction, Plaintiffs argued Defendants violated the TRO's provision prohibiting distributions because the FinCos are shell companies that were run entirely by Defendants.

As a result of Defendants' violations, on 10 May 2024, the trial court entered an order modifying the TRO (the "Modified TRO"). In its order, the trial court stated that the 1 October 2019 TRO's restrictions would continue to apply, and imposed additional restrictions on Defendants, including a restraint on engaging in transactions of funds from the SACs over $10,000, without prior court approval. The trial court also ordered imposition of a limited receiver over Global Growth, to monitor compliance with the Modified TRO. After his appointment, the limited receiver submitted a report, identifying various transactions Global Growth made in May 2024 that potentially violated the Modified TRO including: a transfer of $633 million of preferred equity in Global Growth; a payment of over $500,000 of Lindberg's personal expenses; and a payment of over $1 million to a non-SAC company controlled by Lindberg.

Based on these reported violations, on 12 July 2024, the trial court entered an order wherein the court further amended the Modified TRO (the "Re-Modified TRO"), lowering the threshold amount for restrained transactions to $5,000, and clarifying that the restriction applies to transfers by Lindberg or Global Growth, even if the relevant funds originate from non-SAC companies. That same day, Defendants filed a motion asking the trial court to permit the limited receiver to approve transactions of over $5,000, specifically from the SACs to fund Global Growth expenses. In response to this motion, on 17 July 2024, the limited receiver filed a response stating, *inter alia*, that due to Defendants' "numerous flagrant and repeated violations of the TRO," he would be unlikely to approve the requested transactions. On 29 July 2024, the trial court denied Defendants' motion.[1]

The Trial Court's Order to Show Cause

On 16 April 2024, the day after Plaintiffs filed their Verified Renewed Motion for an Order to Show Cause, Defendants filed a motion requesting, *inter alia*, a continuance of the show cause hearing to allow them to depose Miller and to retain their own rebuttal expert. In their response, Plaintiffs consented to a discovery period limited to expert issues, and presented a proposed discovery schedule.

On 22 April 2024, the trial court heard several pending motions, including the two motions set forth herein. During the hearing, when discussing a potential discovery schedule before the show cause hearing, Defendants' counsel requested to disclose their expert reports after deposing Miller. The trial court rejected Defendants' request, and Defendants did not otherwise object to Plaintiffs' proposed discovery schedule.

---

1. We note that Defendants appealed from the trial court's 12 July and 29 July 2024 orders, but that appeal is separate from this appeal.

On 16 May 2024, the trial court entered its order memorializing its oral rulings from the 22 April 2024 hearing. The trial court found that probable cause supported a finding that Defendants violated the Modified TRO, set the show cause hearing for 1 August 2024, and required "Lindberg and a representative for [Global Growth] . . . to personally appear[.]" Finally, the trial court set a schedule for a limited expert discovery period.

On 17 June 2024, Defendants filed a notice of rebuttal expert designations, designating Michael Fahlman and Emilio Mendoza as "experts who may offer testimony in the show cause hearing to rebut the opinions of" Miller. Defendants did not attach a report or opinion to their notice of rebuttal expert designations but stated Fahlman and Mendoza would provide opinions after Defendants deposed Miller. In response to Defendants' notice, Plaintiffs filed a motion *in limine*, alleging Defendants' notice was non-compliant and requesting the trial court prevent Defendants from introducing expert testimony at the show cause hearing. The trial court held a hearing for Plaintiffs' motion on 10 July 2024, where Defendants orally moved for a continuance because, as Defendants' counsel admitted, one of their experts had refused Defendants' request to do more work because they had not paid for his previous work. The trial court found Defendants had failed to show good cause for an extension of time to serve expert reports, and on 18 July 2024, entered an order granting Plaintiffs' motion *in limine*.

The Show Cause Hearing

The trial court held the show cause hearing on 1 August 2024. Global Growth's chief operating officer Robert "Bo" Gaddy appeared at the hearing as a representative of Global Growth; Lindberg, however, did not appear, and his counsel was unable to explain his absence. Due to Lindberg's failure to appear, the trial court held Lindberg in criminal contempt and issued a warrant for Lindberg's arrest.

After the trial court explained to the parties that Defendants had the burden of proving why they should not be held in contempt, counsel for Defendants introduced numerous exhibits and deposition transcripts. Gaddy and Global Growth's chief financial officer, Surinder Jain, also testified as to why Defendants should not be held in civil contempt.

Plaintiffs presented testimonial evidence from the following witnesses: Miller; Peter Nordberg, Global Growth's former general counsel; and John Hulbert, a representative for a Lindberg-affiliated company known as American Academy of Professional Coders ("AAPC").

Miller testified about her review and analysis of financial records from 1 October 2019 through 31 January 2023. Miller testified that her findings show "[t]he FinCos transferred $67 million in cash to [Global Growth] between October of 2019 and April of 2022." In summarizing her findings regarding transfers from Global Growth and the SACs to the Lindberg Personal Vehicles, Miller testified, "[o]n a net basis, [Global Growth] transferred just over $64 million to the Lindberg [P]ersonal [V]ehicles, and the SACs transferred just over $18 million to the Lindberg [P]ersonal [V]ehicles for a total of about $83 million . . . ."

Hulbert testified regarding a potential sale of AAPC. Hulbert specifically testified that if sold, the net proceeds—which Hulbert believed would exceed $70 million—would flow to a trust and then to Global Growth. After Defendants' counsel objected to Hulbert's testimony, based on relevance, the trial court stated it was considering Hulbert's testimony to determine if Defendants had an asset that could be liquidated:

> [L]et me tell you where my mind's going. They could decide to sell, and if they do sell, that money could be used to pay any funds that this [c]ourt requires to purge [Global Growth] and [] Lindberg of contempt. The only hurdle being that [] Lindberg or [Global Growth] could stop the sale. So it appears that there is an asset that can be liquidated that Global [Growth] – at least as of right – sitting here right now, that could be liquidated to – if this [c]ourt deems it necessary to enter an order requiring to transfer a certain amount of funds back.

Hulbert further testified that, as long as Global Growth did not exercise its veto power of such a sale, AAPC would be willing to enter a sale process, and the sale process would take approximately six to twelve months.

The Trial Court's Order of Contempt

On 8 August 2024, the trial court heard arguments from the parties regarding the evidence presented at the show cause hearing. The trial court entered an order, on 30 August 2024, holding Defendants in civil contempt (the "Contempt Order"). In the Contempt Order, the trial court found: (1) the net total of funds Global Growth sent to entities that Lindberg used for personal expenses, Global Growth's spending on private planes, and Global Growth's payments for a ghostwriter for Lindberg's book "Failing Early & Failing Often" were in violation of the TRO in the total amount of $52,424,571; (2) that certain transfers from the SACs to Lindberg's personal entities were in violation of the TRO; and (3) that certain transfers in a net total of $56,901,099 from

SAC non-operating shell entities to Global Growth were in violation of the TRO. In holding Defendants in civil contempt, the trial court found Defendants were capable of purging their contempt by either using the proceeds from the sale of AAPC, or borrowing against their company interest, and ordered each Defendant to take the following steps to purge their contempt:

1. As to Defendant [Global Growth]:

    a. Pay $56,901,099 for the benefit of the FinCo entities;

2. As to Defendant Lindberg:

    a. Pay $52,424,571 for the benefit of [Global Growth];

    b. Pay $964,429 for the benefit of GB Capital;

    c. Pay $1615 for the benefit of Eli Global, LLC;

    d. Pay $1,879,341 for the benefit of Eli Research, LLC;

    e. Pay $10,420,588 for the benefit of the ARM Companies; and

    f. Pay $85,000 for the benefit of the ECL Group;

On 18 September 2024, Defendants timely filed their notice of appeal.[2]

II. <u>Jurisdiction</u>

The parties agree the Contempt Order on appeal is an interlocutory order as it does not resolve all pending claims. *North Carolina Dep't of Transp. v. Page*, 119 N.C. App. 730, 733 (1995) ("An order . . . 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."). An appeal of right lies directly with this Court from any interlocutory order of a superior court that affects a substantial right. N.C.G.S. § 7A-27(b)(3)(a) (2023). "The appeal of any contempt order, [] affects a substantial right and is therefore immediately appealable." *Guerrier v. Guerrier*, 155 N.C. App. 154, 158 (2002).

III. <u>Defendants' Motion for Judicial Notice</u>

[1] As an initial matter, we address Defendants' Motion for Judicial Notice. Defendants filed a Motion for Judicial Notice on 24 March 2025,

2. Lindberg and Global Growth are the only Defendants subject to the trial court's contempt order; thus, Lindberg and Global Growth are the only Defendants to appeal.

requesting that we take judicial notice of one public record filed in the North Carolina state court system: a Motion to Dissolve the TRO and Motion to Discharge Limited Receiver and Special Master (the "Motion to Dissolve").

Pursuant to Rule 37 of the North Carolina Rules of Appellate Procedure, a party may request this Court to take judicial notice of matters outside of the record on appeal. *See Coiner v. Cales*, 135 N.C. App. 343, 346 (1999) ("[A] request that this Court take judicial notice of certain material must be made by motion pursuant to [N.C. R. App.] P. 37."). Defendants request that we take judicial notice of the Motion to Dissolve because "[t]he Motion to Dissolve provides record support for significant facts of" Defendants' appeal. We deny Defendants' Motion for Judicial Notice for two reasons.

First, the Motion to Dissolve and the contents therein are not matters that are subject to judicial notice. This Court may take judicial notice of "the public records of other courts within the state judicial system[,]" *see State v. Thompson*, 349 N.C. 483, 497 (1998), as well as "a fact which is either so notoriously true as not to be the subject of reasonable dispute or is capable of demonstration by readily accessible sources of indisputable accuracy[,]" *see West v. G. D. Reddick, Inc.*, 302 N.C. 201, 203 (1981). Our Supreme Court has described what kind of matters a court may properly take judicial notice of:

> A matter is the proper subject of judicial notice only if it is 'known,' well established and authoritatively settled. Matters of which a court will take judicial notice are necessarily uniform or fixed and do not depend on uncertain testimony. A disputable matter cannot be classified as common knowledge and will not be judicially recognized.

Hughes v. Vestal, 264 N.C. 500, 506 (1965) (citation omitted).

Here, the Motion to Dissolve, and its content therein, is—by its very nature—argumentative and the subject of dispute. Although Defendants assert one of the exhibits attached to the Motion to Dissolve shows Defendants allegedly purged their contempt when they completed their obligations under the MOU in October 2024, Plaintiffs contend the parties will dispute the legal effect of the Motion to Dissolve at the trial level. Where the Motion to Dissolve does not contain facts that are "well established and authoritatively settled[,]" such matters cannot be classified as common knowledge, and this Court will not judicially recognize such facts. *See Hughes*, 264 N.C. at 506.

Second, the Motion to Dissolve does not bear upon a fact crucial to the disposition of this appeal. It is well established this Court "may take judicial notice *ex mero motu* on 'any occasion where the existence of a particular fact is important . . . .' " *Lineberger v. N.C. Dep't of Correction*, 189 N.C. App. 1, 6 (2008) (quoting *West*, 302 N.C. at 203); *see also State v. Watson*, 258 N.C. App. 347, 352 (2018) (taking judicial notice of several documents, including a motion and order continuing sentencing, because the content within the documents contained "a fact critical to the disposition" of the appeal).

Here, our review of the Motion to Dissolve does not reveal any fact that is crucial in determining whether the trial court erred by holding Defendants in civil contempt. While Defendants argue they purged themselves of any possible contempt by substantially complying with the MOU in October 2024, such action was after the contempt hearing, and what Defendants did *after* the contempt hearing has no bearing on whether Defendants were in willful contempt at the time of the contempt hearing. As such, the Motion to Dissolve, and its contents therein, is immaterial in deciding whether the trial court erred by entering the Contempt Order on 30 August 2024.

Therefore, we deny Defendants' request to take judicial notice of the Motion to Dissolve.

IV. Analysis

On appeal, Defendants argue the trial court erred by issuing a contempt order that is not valid under North Carolina law. Specifically, Defendants argue the Contempt Order should be vacated for the following reasons: (A) the trial court's finding regarding Defendants' present ability to comply with the purge conditions is not supported by competent evidence; (B) the Contempt Order violates Article I, Section 28 of the North Carolina State Constitution; and (C) Defendants "have purged themselves of any possible contempt[.]" We address each argument, in turn.

A. Present Ability to Comply with the Purge Conditions

[2] Defendants first argue the trial court's finding that they had the present means and ability to comply with the purge conditions is not supported by competent evidence. We disagree.

When this Court reviews civil contempt orders, "we are limited to determining whether there is competent evidence to support the findings of fact and whether those findings support the conclusions of law." *Morris v. Powell*, 269 N.C. App. 496, 501 (2020); *see Hartsell v. Hartsell*, 99 N.C. App. 380, 385 (1990), *aff'd*, 328 N.C. 729 (1991) ("Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment."). In a contempt proceeding, "the trial court is the sole judge of credibility and weight of the evidence," *see Cnty. of Durham by & through Durham DSS v. Burnette*, 262 N.C. App. 17, 23 (2018), *aff'd*, 372 N.C. 64 (2019), and thus, "findings based on competent evidence are conclusive on appeal, even if there is evidence to the contrary[,]" *see Hancock v. Hancock*, 122 N.C. App. 518, 527 (1996) (citation and internal quotation marks omitted). Moreover, where an appellant fails to challenge specific findings of fact, the unchallenged findings of fact are "presumed to be supported by competent evidence and [are] binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97 (1991); *see Yeun-Hee Juhnn v. Do-Bum Juhnn*, 242 N.C. App. 58, 62–63 (2015) ("However, [the] defendant fails to set forth any specific challenges to the findings of fact and instead presents a broad argument . . . . It is well established by this Court that where a trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal."). "The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*." *Tucker v. Tucker*, 197 N.C. App. 592, 594 (2009) (citation and internal quotation marks omitted).

The purpose of civil contempt "is to provide a remedy for an injured suitor and to coerce compliance with an order[.]" *Blue Jeans Corp. v. Amalgamated Clothing Workers of Am., AFL-CIO*, 275 N.C. 503, 508 (1969). To hold an alleged contemnor in continuing civil contempt, the trial court must make four findings: "(1) the order remains in force, (2) the purpose of the order may still be served by compliance, (3) the non-compliance was willful, and (4) the non-complying party is able to comply with the order or is able to take reasonable measures to comply." *Shippen v. Shippen*, 204 N.C. App. 188, 190 (2010); *see* N.C.G.S. § 5A–21(a) (2023).

If a trial court holds a defendant in civil contempt, the trial court may order imprisonment of the defendant. N.C.G.S. § 5A–21(b) ("A person who is found in civil contempt may be imprisoned as long as the civil contempt continues . . . ."). Under N.C.G.S. § 5A-22, however, the court order "holding a person in civil contempt must specify how the person may purge himself of the contempt." N.C.G.S. § 5A-22(a) (2023). This Court has previously construed N.C.G.S. §§ 5A-21 and 5A-22 *in pari materia*, and "[w]hen so construed, these statutes require that a person have the present ability to comply with the conditions for purging the contempt before that person may be imprisoned for civil contempt." *McMiller v. McMiller*, 77 N.C. App. 808, 809 (1985). Accordingly, "[t]o justify conditioning [the] defendant's release from jail for civil contempt upon payment of a large lump sum of arrearages, the district court must find as fact that [the] defendant has the present ability to pay those arrearages." *Id.*

"A general finding of present ability to comply is sufficient when there is evidence in the record regarding defendant's assets." *Watson v. Watson*, 187 N.C. App. 55, 66 (2007) (citing *Adkins v. Adkins*, 82 N.C. App. 289, 292 (1986)). This Court has held "present ability" includes "the present ability to take reasonable measures that would enable [the alleged contemnor] to comply[] with the order." *Jones v. Jones*, 62 N.C. App. 748, 749 (1983) (citation omitted). "Reasonable measures" that would enable a contemnor to comply with an order include borrowing money, selling property, or liquidating other assets. *See Gordon v. Gordon*, 233 N.C. App. 477, 484 (2014) (holding the plaintiff could take reasonable steps to comply with the order "by paying a portion of his $15,000 monthly income, taking out cash advances from his credit cards, ceasing to voluntarily pay the expenses of other family members, and/or transferring any expenses in excess of his income to his credit cards for those months"); *but see Jones*, 62 N.C. App. at 749 (holding the defendant could not take reasonable measures to comply with the order because the defendant's car was broken and the land he owned was already heavily mortgaged). Where a trial court finds the contemnor "owns some property or has some income," the trial court must also determine whether "the actual value of that property or the amount of income [is] sufficient to satisfy the purge conditions." *See Burnette*, 262 N.C. App. at 38.

In *McMiller*, this Court held the trial court's findings of fact did not support holding the defendant in contempt because the trial court failed to make the requisite findings for a holding of contempt. 77 N.C. App. at 809. We noted that while the trial court made a finding regarding the defendant's past ability to comply with the order, the trial court failed to make a finding relating to the defendant's present ability to pay the arrearages necessary to purge himself from contempt. *Id.* at 810. Thus, because there was no finding regarding the defendant's present ability to comply with the order, this Court reversed the trial court's order. *Id.*

In *Adkins*, this Court considered what evidence is sufficient to support a trial court's finding that the contemnor had the present means to purge their contempt. 82 N.C. App. at 291. In *Adkins*, after the plaintiff and the defendant separated in 1969, the trial court ordered the defendant to pay $15.00 per week child support. *Id.* at 290. The defendant made some child support payments but stopped making the payments in February 1971. *Id.* In April 1985, the plaintiff filed a motion in the cause requesting the trial court hold the defendant in contempt for failing to pay the child support. *Id.* During the contempt hearing the following evidence was introduced: the defendant had put a new home up for sale "when the motion in the cause was filed; the defendant "owns a 280–Z, a new Monte Carlo, and a Ford Bronco;" and the defendant "owns at least three tractor-trailer trucks in his furniture business." *Id.* at 292. In finding the defendant had willfully failed to pay the ordered child support and had the present ability to comply with the order, the trial court held the defendant in civil contempt and ordered the defendant imprisoned "until such time as he paid $11,070 in arrearages and resumed the required $15.00 per week payments." *Id.* at 290.

On appeal, the defendant argued "the trial court erred in ordering him imprisoned without having established that he had property free and clear of any liens that he could use to presently purge himself of the alleged contempt." *Id.* at 291. In affirming the trial court's order, this Court clarified the standard for the present means to purge the contemnor's contempt:

> The standard is not having property free and clear of any liens, but rather that one has the present means to comply with the court order and hence to purge oneself of the contempt. Put differently, is the individual able to take reasonable measures to comply with the order? Reasonable measures may well include liquidating equity in encumbered assets.

Id. at 291–92. This Court then analyzed the trial court's finding of fact that "the defendant . . . presently possesses the means and ability to comply with" the order. This Court distinguished *McMiller* on the basis that the order in *McMiller* contained no finding pertaining to "the defendant's present means to purge himself of the contempt[.]" *Id.* at 292. In *Adkins*, however, the trial court did make the finding that the defendant had the "present means to comply[,]" and although the finding was not specific, the finding was nonetheless "minimally sufficient to satisfy the statutory requirement for civil contempt[,]" and the uncontroverted evidence regarding the defendant's assets supported the trial court's finding. *Id.*

This case is also distinguishable from *McMiller*, because unlike the trial court in *McMiller*, the trial court here made four findings of fact relating to Defendants' present ability to comply with the order and present ability to purge their contempt:

> 84. At the Show Cause Hearing, Plaintiffs offered the testimony of John Hulbert, a representative of AAPC, a non-SAC in which Defendants hold an economic interest.
>
> 85. [] Hulbert testified that AAPC is owned by non-depository trust in which [Global Growth] owns an economic interest, such that any funds that flow to the trust could be distributed to [Global Growth]. He testified that neither [Global Growth] nor Lindberg can compel sale of AAPC, but they could block sale.
>
> 86. [] Hulbert testified that if AAPC were sold, after the company's existing debts were paid off, the remaining proceeds would flow to the trust and then could be distributed to [Global Growth]. He testified that such distributable proceeds likely would exceed $70 million.
>
> 87. Finally, [] Hulbert testified that AAPC had no objection to being sold for fair market price and otherwise fair terms. He estimated such sale could occur within six months to year. He testified that necessary precondition to engaging in costly and distracting sales process would be receiving assurances that [Global Growth] would not exercise its veto of any sale.

The trial court also took judicial notice of an order of the United States District Court for the Middle District of North Carolina indicating that Lindberg has a history of using corporate assets to pay personal expenses:

> 80. On September 21, 2023, the United States District Court for the Middle District of North Carolina entered an Order finding, among other things, that "since the May 2022 Judgment, Defendant Lindberg gave significant monetary gifts to friends, made significant monetary transfers and payments for hundreds of thousands of dollars for [Lindberg's] girlfriend, purchased multiple homes for several million dollars, and made unexplained monetary transfers between entities that Defendant owns or maintains a beneficial interest in . . . which are outside of the ordinary course of business as they were for Defendant's personal expenses or personal benefit." . . . .

> 81. That court further found that "Defendant [Lindberg] uses various corporate entities for payment of his personal expenses, and admitted at the hearing this was specifically to avoid attachment of his personal accounts" . . . . That court further found, "Defendant has also been inconsistent in how he describes or discloses these assets, leading to further concern that the corporate structure he has created has been used to hide assets even from the state courts." . . . .

Although the trial court's findings do not specifically state Defendants had the present ability to purge their contempt, it is clear from the evidence that Defendants had the present ability to take reasonable measures to purge their contempt. *See Watson*, 187 N.C. App. at 66; *see also Plott v. Plott*, 74 N.C. App. 82, 85 (1985) ("Though the findings are not explicit, it is clear that plaintiff both possessed the means to comply with the order and has willfully refused to do so. While explicit findings are always preferable, they are not absolutely essential where the findings otherwise clearly indicate that a contempt order is warranted."). Moreover, because unchallenged findings of fact are binding on appeal, and Defendants do not specifically challenge any of the trial court's findings of fact, Findings of Fact 80, 81, 84, 85, 86 and 87, pertaining to Defendants' present ability to purge their contempt, are binding on appeal. *See Yeun-Hee Juhnn*, 242 N.C. App. at 62–63; *see also Tucker*, 197 N.C. App. at 594 (holding the findings of fact regarding the contemnor's assets were binding on appeal because although the contemnor testified he spent the money before the contempt proceeding, the trial court found his testimony was not credible, and the contemnor did not challenge any of the factual findings on appeal).

In addition to the unchallenged findings of fact, the trial court made several conclusions of law[3] detailing Defendants' present ability to purge their contempt:

---

3. Although the parties do not challenge the trial court's labeling, we note that these "conclusions of law" are more appropriately classified as "findings of fact" because they require "logical reasoning from the evidentiary facts[.]" *See Barnette v. Lowe's Home Centers, Inc.*, 247 N.C. App. 1, 6 (2016) ("Regardless of how they may be labeled, we treat findings of fact as findings of fact and conclusions of law as conclusions of law for purposes of our review."); *see also Peters v. Pennington*, 210 N.C. App. 1, 15 (2011) (treating a "finding of fact" as a "finding of fact" because, although labeled as a "conclusion of law," the trial court reached its determination "through logical reasoning from the evidentiary facts" (citation modified)).

112. [Global Growth] and Lindberg failed to show that they lack the means to purge their contempt.

113. Defendants presented evidence regarding their supposed lack of liquid funds to satisfy an order to purge their contempt. However, the evidence at the Show Cause Hearing demonstrates that they have other assets available to purge their contempt.

114. The evidence presented at the Show Cause Hearing showed that [Global Growth] has an interest in AAPC as the recipient of any funds that would flow to the non[-]depository trust that owns AAPC. Moreover, Lindberg has an interest in these funds as the sole shareholder of [Global Growth]. The evidence further showed that AAPC has substantial value above its current debt burden. In other words, AAPC is a valuable asset in which the Defendants have an economic interest.

115. Moreover, the evidence showed that Defendants have the ability to turn their economic interest in AAPC into cash. The [c]ourt credits the testimony of [] Hulbert as AAPC's representative that AAPC would be willing to enter into a sale of the company if [Global Growth], and its controlling person Lindberg, would not exercise their veto of such a sale.

116. The evidence further supports the inference that, in the alternative, Defendants could borrow against or sell [Global Growth]'s interest in the trust that owns AAPC.

117. Defendants failed to credibly rebut the evidence regarding their ability to use AAPC as a potential source of repayment in an amount in excess of $70 million.

118. Although Defendants elicited testimony regarding the steps that would be necessary to sell AAPC, Defendants did not show that such steps are not reasonable measures. Defendants also failed to show that they could not take reasonable measures to borrow against or sell their interest in the trust that owns AAPC. The [c]ourt does not credit counsel's argument that such interest has no value because the argument had no basis in the evidence presented at the Show Cause Hearing.

> 119. Defendants otherwise failed to show that they lack the means to purge their contempt.
>
> 120. . . . . The [c]ourt finds that Defendants have assets that could be liquidated to purge their contempt.

Here, assuming, *arguendo*, Defendants had challenged specific findings of fact, our review of the Record shows there is competent evidence to support the trial court's factual findings. Although Defendants presented evidence indicating Global Growth did not have enough readily available cash to purge its contempt, counsel for Defendants conceded if AAPC were liquidated, the sale proceeds would "flow up" to Defendants. Hulbert testified that as long as Defendants gave assurances they would not use their veto power to block the sale of AAPC, the Board of AAPC would be willing to sell the company, from which the sale proceeds would go to Global Growth, and then to Lindberg as the sole shareholder of Global Growth. Moreover, while Defendants presented evidence indicating the process to sell AAPC would be a "very long" process, Plaintiffs presented evidence showing that on 2 June 2024, Lindberg submitted a "Motion for Order Approving Sale of Assets" in a separate case, stating there were several parties interested in purchasing AAPC assets, and the value of the AAPC's assets was approximately $2.6 billion. In considering the plethora of evidence before it, the trial court—as the sole judge of credibility—found Hulbert's testimony credible and Defendants' evidence "failed to credibly rebut" the evidence showing Defendants presently own a valuable asset that could be liquidated to purge their contempt. This Court will not reweigh the evidence on appeal, even if there is evidence to the contrary. *See Burnette*, 262 N.C. App. at 23; *see also Hancock*, 122 N.C. App. at 527.

Therefore, because the trial court's factual findings regarding Defendants' present ability to comply with the purge conditions is supported by competent evidence, and the trial court's conclusion that Defendants have the present means and ability to comply with the order or are able to take reasonable measures is supported by the findings of fact, we are required to affirm this portion of the contempt order. *See Tucker*, 197 N.C. App. at 597.

Defendants nonetheless argue "there is absolutely nothing Lindberg can do to immediately, or even reasonably quickly, comply with the" Contempt Order. Defendants further assert, "[o]ther courts, when faced with similar situations, have allowed defendants a reasonable time to pay ordered amounts." The standard, however, is not whether an individual has property or assets that can be "quickly" liquidated to purge their contempt, but rather, whether the individual has the present ability to comply with the order "by either making immediate payment *or* by taking reasonable measures[.]" *See Teachey v. Teachey*, 46 N.C. App. 332, 335 (1980) (emphasis added); *see also Adkins*, 82 N.C. App. at 291. Generally speaking, selling any real property, liquidating any asset, or borrowing money can be difficult and can take an indefinite amount of time, yet these methods are reasonable measures the contemnor can take to purge their contempt. *See generally*, *e.g.*, *Tucker*, 197 N.C. App. at 597 (affirming the trial court's order holding the defendant in contempt because the uncontested facts regarding the defendant's "401K money, [] cashier check, [] boat, and motor vehicle" supported the trial court's conclusion of law that the defendant had the present means and ability to comply with the order or take reasonable measures that would enable him to comply with the order). Trial courts, however, are not required to give contemnors a "reasonable time" after the entry of an order to sell their property or liquidate their assets to acquire funds to satisfy their purge conditions. *See Adkins*, 82 N.C. App. at 290 (affirming the trial court's order holding the defendant in civil contempt and imprisoning him until he purged his contempt).

Here, based on the evidence, the trial court made several findings of fact showing Defendants have assets they could liquidate to purge their contempt, and thus concluded Defendants had the present ability to comply. Accordingly, the evidence supports the trial court's findings of fact, and the findings of fact support the trial court's conclusion that Defendants could take reasonable measures to purge their contempt.

B. Article I, Section 28 of the North Carolina State Constitution

[3] Defendants next argue the Contempt Order violates Article I, Section 28 of the North Carolina State Constitution. Specifically, Defendants assert that "[b]y ordering Lindberg to pay $65.7 million without any finding of fact that he has the current ability to do so, and without giving Lindberg any reasonable amount of time to do so, the Contempt Order effectively sentence[d] Lindberg to debtor's prison in violation of Article I, [Section] 28 of the North Carolina [State] Constitution." Contrary to Defendants' assertion, however, we hold that Article I, Section 28 of the North Carolina State Constitution is inapplicable in the instant case.

Article I, Section 28 of the North Carolina State Constitution states, "[t]here shall be no imprisonment for debt in this State, except in cases of fraud." N.C. Const. art. I, § 28. Generally, North Carolina's constitutional provision against imprisonment for a debt "is only applicable to actions arising out of or founded upon contract." *State v. Locklear*, 21 N.C. App. 48, 50 (1974) (holding taxes do not constitute a debt within the meaning of Article I, Section 28 because taxes "are not [] contractual obligations of the taxpayer to the state"). Article I, Section 28 is *not* applicable, however, where the court imprisons the defendant, not for the defendant's inability to pay, but for his willful disobedience of a court order. *See Cobb v. Cobb*, 54 N.C. App. 230, 234 (1981) (dismissing the defendant's argument that the contempt order violates the constitutional provision against imprisonment for a debt because the contempt order sought to enforce the divorce decree between the parties); *see also Wilson v. Wilson*, 261 N.C. 40, 44 (1964) ("A willful failure of the husband to comply with the court's order is a contempt, and can be punished as such by imprisonment. It is not within the constitutional inhibition against imprisonment for debt.").

Here, because the trial court held Defendants in civil contempt and ordered Defendants to be imprisoned for their willful noncompliance with the TRO—not for their inability to pay—North Carolina's constitutional provision against imprisonment for a debt is inapplicable. *See id.* at 231. Accordingly, we dismiss Defendants' argument that the Contempt Order violates Article I, Section 28 of the North Carolina State Constitution.

C. Compliance at the Time of the Contempt Hearing

[4] Defendants lastly argue the Contempt Order is invalid because Defendants have purged themselves of any possible contempt, and because the Record lacks competent evidence showing Defendants were in violation of the TRO as of the date of the contempt hearing. Specifically, Defendants argue, pursuant to N.C.G.S. § 5A-23(a1), Plaintiffs had the burden to prove Defendants were in willful violation of the TRO, and Plaintiffs failed to do so because "Miller's affidavit can in no way prove, one way or another, whether Defendants[] were in continuing violation of the MOU or TRO as of the date" of the contempt hearing. We disagree.

"Civil contempt or punishment [a]s for contempt is applied to a continuing act, and the proceeding is had to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties." *Rose's Stores, Inc. v. Tarrytown Ctr., Inc.*, 270 N.C. 206, 214 (1967) (citations and internal quotation marks omitted). Thus, "a district court[] 'does not have the authority to impose civil contempt after an individual has complied with a court order, even if the compliance occurs after the party is served with a motion to show cause why he should not be held in contempt of court.' " *Ruth v. Ruth*, 158 N.C. App. 123, 126 (2003) (quoting *Reynolds* *v. Reynolds*, 147 N.C. App. 566, 573 (2001)). This Court will affirm the trial court's contempt order, however, where the contemnor has the burden of showing why he should not be held in contempt, and he fails to carry that burden. *See Plott*, 74 N.C. App. at 86 (affirming the trial court's order because the plaintiff failed to carry her burden, and thus, "the court was warranted in finding her in contempt").

To determine which party has the burden of proof, we must consider how the civil contempt proceedings were initiated. *See* N.C.G.S. § 5A-23 (2023). Proceedings for civil contempt may be initiated in one of three ways:

> (1) by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt;
>
> (2) by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt; or
>
> (3) by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt.

Moss v. Moss, 222 N.C. App. 75, 77 (2012) (citation modified); *see Plott*, 74 N.C. App. at 85 ("Civil contempt proceedings are initiated by a party interested in enforcing the order by filing a motion in the cause. The motion must be based on a sworn statement or affidavit from which the court determines there is 'probable cause to believe that there is civil contempt.' " (quoting N.C.G.S. § 5A-23 (1979))).

The method used to initiate the contempt proceedings determines which party carries the burden:

> Under the first two methods for initiating a show cause proceeding, the burden of proof is on the alleged contemnor. However, when an aggrieved party rather than a judicial official initiates a proceeding for civil contempt, the burden of proof is on the aggrieved party, because there has not been a judicial finding of probable cause.

Moss, 222 N.C. App. at 77 (citations modified). Where the alleged contemnor refuses to present evidence showing why he should be held in contempt, he does so "at his own peril." *Hartsell*, 99 N.C. App. at 387.

Here, the proceeding was initiated by Plaintiffs filing a Verified Renewed Motion for Order to Show Cause, and the trial court entering an order, finding probable cause to believe Defendants were in civil contempt and directing Defendants to appear and show why they should not be held in civil contempt. As such, Defendants had the burden to prove why they should not be held in civil contempt. *See Moss*, 222 N.C. App. at 77. Moreover, Defendants never objected to the trial court's allocation of the burden of proof, and thus, Defendants have waived "the right to complain about this" on appeal. *See id.* at 79 (holding the defendant waived the right to argue the trial court erred by misallocating the burden of proof to her because she failed to object to the trial court's action).

Defendants concede Miller's affidavit "demonstrated finite points in time wherein Defendants[] were out of compliance," but nonetheless rely on *Pocoroba v. Gregor* to argue that their past noncompliance with the TRO alone is insufficient for civil contempt. 296 N.C. App. 508 (2024). Defendants' reliance, however, is misplaced.

In *Pocoroba*, the plaintiff had obtained a no contact order against the defendant after the defendant attempted to break into the plaintiff's house. *Id.* at 508. The no contact order prohibited the defendant from, *inter alia*, coming within one hundred feet of the plaintiff. *Id.* The year after the plaintiff obtained the no contact order, the trial court found that the defendant had violated the no contact order on two separate occasions. *Id.* at 509. In reversing the trial court's order, this Court reasoned that the trial court's findings were insufficient to support an order holding the defendant in civil contempt because even though the trial court found the defendant had violated the order in the past, the trial court failed to find the defendant was in violation of the court order at the time of the hearing. *Id.* at 510. The trial court's findings regarding the defendant's past noncompliance, as this Court noted, were more likely to support an order holding the defendant in criminal contempt, not civil contempt. *Id.*

Unlike the trial court in *Pocoroba*, however, the trial court in the instant case made the following findings of fact regarding Defendants' violations of the TRO in the past *and* as of the date of the hearing:

> 50. From October 2019 through April 2022, [] Miller identified net total of $131,266,348 that was transferred from SACs to [Global Growth]. This included $314,568,897 in gross funds moved from SACs to [Global Growth], offset by $183,302,549 that [Global Growth] transferred to SACs. . . .

51. During the same period, [Global Growth] received a total of $58,544,722 from non-SACs. [Global Growth] also transferred a total of $41,774,468 to the Lindberg Personal Vehicles. . . .

52. Defendants argued that this analysis showed that funds from the non-SACs were sufficient to pay for the $41,774,468 that went from [Global Growth] to the Lindberg Personal Vehicles. While it is true that $58 million is greater than $41 million, [] Miller's analysis shows that the $58 million from non-SACs was not, in fact, used for the $41 million in transfers from [Global Growth] to the Lindberg Personal Vehicles. Paragraphs 89 and 90 of her affidavit show that almost all of the $58 million in cash from the non-SACs came from the refinancing of AAPC, which occurred in March 2022. . . . . By contrast, [Global Growth] sent to the Lindberg Personal Vehicles over $3.5 million in October through December 2019, over $6 million in 2020, over $15 million in 2021, and over $16 million in January through April 2022. During all of those periods, the only way [Global Growth] could have had the funds to make those transfers to the Lindberg Personal Vehicles was by using the cash it received from the SACs. . . .

53. Defendants presented no evidence that [Global Growth] later returned the cash it had received from the AAPC refinancing to the SACs to reimburse them for the funds that [Global Growth] took from the SACs and then sent to the Lindberg Personal Vehicles.

54. In other words, [] Miller's analysis shows that the transfers from [Global Growth] to the Lindberg Personal Vehicles were only possible due to funds that originated with the SACs. [Global Growth] did not then replace the funds it received from the SACs.

. . . .

61. To the extent that Defendants argue that the transfer of net total of $58,544,722 from the non-SACs to [Global Growth] has cured their violation, . . . the [c]ourt rejects that argument. Defendants also presented [] Gaddy's testimony that [Global Growth] has not recently had access to liquid assets in excess of $250,000. Accordingly, the funds from the non-SACs are no longer are in [Global Growth]'s

> possession. [Global Growth] has not presented evidence that [Global Growth] then spent the money on permitted uses. Defendants did not present evidence that the $58,544,722 that non-SACs transferred to [Global Growth] subsequently was spent on ordinary business operations. The [c]ourt further notes that Table of [] Miller's report, which covers longer time period, shows that [Global Growth] sent a net total of $64,174,784 to the Lindberg Personal Vehicles.

While Defendants challenge the sufficiency of the evidence, Defendants failed to challenge any specific finding of fact; thus, these findings are binding on appeal. *See Yeun-Hee Juhnn*, 242 N.C. App. at 62–63; *see also Tucker*, 197 N.C. App. at 594. Accordingly, we limit our consideration to whether the findings of fact in this case support the trial court's conclusions of law. *See Morris*, 269 N.C. App. at 501.

Here, although Miller's affidavit contained an analytical report discussing the Defendants' financial records from October 2019 to January 2023, Defendants concede that Miller's affidavit does identify "finite points" at which Defendants were not in compliance with the TRO. Indeed, Plaintiffs presented evidence that Defendants violated the TRO, but Defendants—not Plaintiffs—had the burden to show they were no longer in violation of the TRO by the date of the contempt hearing. *See Ruth*, 158 N.C. App. at 126. Yet, the trial court found that Defendants, to their own peril, did not present any evidence showing that Global Growth had transferred the money back to the SACs. *See Hartsell*, 99 N.C. App. at 387. Moreover, while Defendants argued at the hearing that the transfer of net total of $58,544,722 from the non-SACs to Global Growth cured their violation, the trial court found Defendants' evidence was not credible, because at the time of the hearing, the funds were no longer in Global Growth's possession, and Defendants did not present any evidence that the funds were spent on uses permitted by the TRO. Without credible evidence to rebut Plaintiffs' evidence showing that Defendants had violated the TRO, the trial court based its factual findings on competent evidence, and the factual findings support the trial court's conclusion that Defendants were in violation of the TRO at the time of the contempt hearing. *See Hancock*, 122 N.C. App. at 527. Therefore, the trial court did not err in holding Defendants in civil contempt.[4]

4. To the extent Defendants argue the Contempt Order is contrary to North Carolina law because as of "October 2024, the parties to this action accomplished the very thing the trial court concluded would purge Defendants of any civil contempt[,]" we decline to

V. Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's order holding Defendants in contempt.

AFFIRMED.

Judges TYSON and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
KRISTAN JEVON ALLEN

STATE OF NORTH CAROLINA
v.
KEON JAYKWON RUSH

No. COA25-336

Filed 3 December 2025

1. Evidence—expert witness testimony—Evidence Rule 702(a) —admissibility requirements met

In a prosecution against two defendants on multiple felony charges arising from a shooting near a restaurant that injured three people, the trial court properly admitted expert witness testimony on historical cell-site "handoff" analysis pursuant to Evidence Rule 702(a) where the court's inquiry addressed the proper three-step framework by evaluating the testimony in question—from a Federal Bureau of Investigations Special Agent—in light of (1) the witness's qualifications and specialized knowledge, (2) his application of reliable principles including manual verification of results produced by software, and (3) his use of sufficient facts and data of the sort customarily relied upon in the scientific field of historical cell-site

---

entertain such argument. Whether Defendants complied with the TRO *after* the contempt hearing or otherwise purged their contempt has no bearing upon our decision in the instant case. *See Hancock*, 122 N.C. App. at 522 (dismissing the plaintiff's argument that she had purged herself of her contempt after the contempt hearing because the "information [was] not part of the official record and ha[d] no bearing upon our decision").

analysis. Moreover, even had the admission been erroneous, such error would have been harmless where the State's evidence also included: surveillance footage of defendants entering the vehicle from which the shots were fired, eyewitness testimony describing the occupants of the vehicle at the time of shooting, and physical evidence, including the presence of defendants' fingerprints inside the vehicle.

2. Appeal and Error—preservation of issues—discovery violation—disclosure of expert's opinion the night before testimony—failure to object

In a prosecution against two defendants on multiple felony charges arising from a shooting near a restaurant that injured three people, defendants failed to preserve for appellate review their arguments that the trial court erred by failing to exclude certain expert testimony when the State failed to disclose the expert's opinion until the night before the expert testified. Although one defendant's counsel objected prior to the testimony, after the trial court asked the counsel for both defendants to do "a little more research about what did you get in discovery and the authority," the objecting counsel informed the court that "the data was in the discovery the State provided" and, when asked by the trial court if there was anything further on the issue, responded in the negative. Thereafter, neither counsel objected to the testimony when it was offered.

3. Constitutional Law—effective assistance of counsel—tactical decisions by counsel—prejudice not shown

In a prosecution against two defendants on multiple felony charges arising from a shooting near a restaurant that injured three people, defendants' arguments that they received ineffective assistance of counsel—in the form of their counsels' failure to object to an alleged discovery violation, object to expert witness testimony, and/or hire an expert for the defense in historical cell-site analysis—failed where, even if counsels' tactical choices were deficient, defendants could not demonstrate any prejudice in light of the other, overwhelming evidence against them.

Appeal by defendants from judgments entered 31 May 2024 by Judge Alyson A. Grine in Forsyth County Superior Court. Heard in the Court of Appeals 5 November 2025 in session held at Wake Forest University School of Law in the City of Winston-Salem pursuant to N.C. Gen. Stat. § 7A-19(a) (2023).

Attorney General Jeff Jackson, by Assistant Attorney General, J. Blake Norman, for the State.

Center for Death Penalty Litigation, by Kailey Morgan, for defendant-appellant Keon Jaykwon Rush.

Blass Law PLLC, by Danielle Blass, for the defendant-appellant Kristan Jevon Allen.

TYSON, Judge.

Kristan Jevan Allen ("Defendant Allen") and Keon Jaykwon Rush ("Defendant Rush") both appeal from a jury's verdicts of guilty of two counts of assault with a deadly weapon with intent to kill inflicting serious injury, one count of assault with a deadly weapon with intent to kill, and seven counts of discharging a firearm into occupied property. We discern no prejudicial error.

I. Background

Approximately eleven shots were fired from 9 mm and .45 caliber handguns by occupants of a blue Hyundai vehicle located near Kermit's Hot Dog restaurant in Winston-Salem on 25 March 2022. The shooting caused gunshot injuries to three victims and damaged the restaurant. Prior to the shooting, Defendant Allen and Defendant Rush were observed entering into a blue Hyundai vehicle on Marble Street with two other people. Defendant Rush was the driver and Defendant Allen was sitting in the rear passenger seat. Approximately six minutes later, the group drove to Kermit's Hot Dog restaurant. Camera footage from businesses in the area around the restaurant showed the vehicle passing the restaurant just before and just after the time of the shooting in that area.

Ross Flynt was struck by a bullet in his right side, causing severe pain and a collapsed lung, with the bullet remaining near his heart. Patrick Carter sustained multiple gunshot wounds to his right upper leg and buttock. Loeza Miranda, who was inside the restaurant, was hit in the face by what was described as "little pieces of the bullet" when projectiles entered the glass doors. Sixteen shell casings were found outside the restaurant and several projectiles and metal fragments were found inside the restaurant.

After the shooting, Defendants Allen and Rush went separate ways. Defendant Allen went back to Marble Street and entered into a gold Chevrolet Malibu driven by Asia Baines ("Baines"), Defendant Allen's ex-girlfriend. Defendant Rush did not return.

Later in the evening, law enforcement officers observed Baines' gold Chevrolet Malibu pulling into a driveway. The officers approached the vehicle and ordered both Baines and Defendant Allen to exit the vehicle. Defendant Allen was handcuffed and frisked. Officers at the scene saw a 9mm handgun on the backseat floorboard behind the driver's seat and a box of ammunition in the driver's side door.

The blue Hyundai was found abandoned behind a vacant residence at 2610 Marble Street after a key fob recovered near the scene was used to locate the vehicle. Inside the blue Hyundai, Officer Young found a broken firearm magazine and ammunition scattered on the backseat floorboard.

Forensic evidence linked both Defendants to the Hyundai vehicle and the scene. The latent print examiner identified Defendant Allen's fingerprint and palm print on the exterior rear passenger door of the blue Hyundai. He also identified Defendant Rush's fingerprint on the exterior gas tank filler of the blue Hyundai and on a cup found in the center console of the vehicle.

Federal Bureau of Investigation ("FBI") Special Agent Harrison Putman ("Agent Putman") qualified and testified as an expert witness in historical cell site analysis. Agent Putman prepared a written cellular analysis survey team ("CAST") report illustrating which cell site towers were accessed and used by Defendant Allen's T-Mobile cell phone and by Defendant Rush's AT&T cell phone on the day of the shooting. Agent Putman's expert report indicated neither of Defendants' phones had initiated cell site service in the area around Kermit's Hot Dog restaurant on the day of the shooting.

At trial, Agent Putman testified to a new opinion, not contained in his original written report, which he had formed on the sixth day of trial. Agent Putman testified that at 2:22 p.m. and at 2:26 p.m., Defendant Rush's AT&T phone had used the cell tower site next to Kermit's Hot Dog restaurant, which likely provided coverage to the area, which he described as "handoff" data stored by the cell service providers.

Agent Putman based his opinion upon voluminous data from the cell service providers. This data is produced by cell providers for billing and is not used to determine the location of a person or particular cell phone. Agent Putman admitted this data can be unreliable and testified some of the data was, indeed, unreliable, but he could also determine which data is reliable through his training and experience. Agent Putman explained how "handoff" data is collected and stored, how this data is reflected in the records, and how this data can be especially useful to show movement of a cellular device across a stated or identified time and territory.

During trial, counsel for Defendant Rush objected to Agent Putman's testimony and the use of "handoff" data, because he did not believe such information had been provided in his discovery packet. Prior to the lunch recess, the trial court asked Defendant Rush's counsel to do "a little more research about what you did get in discovery and the authority." As soon as they returned, Defendant Rush's counsel stated he had verified the "handoff" data was provided in the discovery packet of evidence by the State. Counsel was then asked by the court if he had any concerns regarding the provision of the discovery. He responded he did not. Defendant Allen's counsel did not object to Agent Putman's testimony.

Both Defendants were convicted of two counts of assault with a deadly weapon with intent to kill inflicting serious injury, one count of assault with a deadly weapon with intent to kill, and seven counts of discharging a firearm into occupied property.

The trial court sentenced Defendant Allen as a Prior Record Level III offender with 6 prior record level points to three consecutive active sentences, in the presumptive range consisting of two 77-to-105-month sentences, and a 26-to-44-month sentence, as well as a concurrent 26-to-44-month sentence. The trial court sentenced Defendant Rush as a Prior Record Level II offender with 4 prior record level points to three consecutive active sentences, in the presumptive range consisting of two 67-to-93-month sentences and a 23-to-44-month sentence, as well as a concurrent 23-to-40-month sentence. Defendant Allen and Defendant Rush gave oral notice of appeal on 5 June 2024.

II. Jurisdiction

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

III. Issues

Both Defendants argue the trial court erred in admitting Agent Putman's expert testimony on historical cell-site "handoff" analysis and in failing to find a discovery violation due to purported "sandbagging" of discovery and delivery of evidence to both Defendants at trial. Both Defendants also argue they received ineffective assistance of counsel ("IAC").

IV. Expert Witness

A. Standard of Review

"Trial courts enjoy wide latitude and discretion when making a determination about the admissibility of [expert] testimony." *State v. King*, 366 N.C. 68, 75, 733 S.E.2d 535, 540 (2012) (citation omitted). A trial court's ruling on Rule 702(a) is reviewed for abuse of discretion "only upon [a] showing . . . its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (citations omitted).

When the issue is whether "the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*." *State v. Parks*, 265 N.C. App. 555, 563, 828 S.E.2d 719, 725 (2019) (citation omitted).

B. Rule 702 (a)

[1] North Carolina's Rule of Evidence 702(a) provides, *inter alia*:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2023).

Rule 702(a) governs the admission of expert witness testimony. *Id.* In 2011, our General Assembly amended Rule 702(a) to reflect the federal rule, which itself was amended in 2000 in response to the standards the Supreme Court of the United States articulated in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993), and later clarified in both *General Electric Co. v. Joiner*, 522 U.S. 136, 139 L. Ed. 2d 508 (1997) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238 (1999). Our Supreme Court held: "North Carolina is now a *Daubert* state." *State v. McGrady*, 368 N.C. 880, 888, 787 S.E.2d 1, 8 (2016).

In *McGrady*, our Supreme Court stated and interpreted the 2011 amendments to Rule 702(a) as and were enacted to "adopt[] the federal standard for the admission of expert witness testimony articulated in the *Daubert* line of cases[,]" and further held "the meaning of

North Carolina's Rule 702(a) now mirrors . . . the amended federal rule." *McGrady*, 368 N.C. at 884, 787 S.E.2d at 5.

Rule 702(a) sets out specific elements and allows for testimony by qualified experts "in the form of an opinion, or otherwise" if "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2023). *See Daubert*, 509 U.S. at 588, 125 L. Ed. 2d at 480. "In order to assist the trier of fact, expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience." *McGrady*, 368 N.C. at 889, 787 S.E.2d at 8 (citation and internal quotation marks omitted).

The court's inquiry under Rule 702(a) involves a "three-step framework–namely, evaluating qualifications, relevance, and reliability[,]" *id.* at 892, 787 S.E.2d at 10, and requires "expert testimony must satisfy each [factor] to be admissible." *Id.* at 889, 787 S.E.2d at 9.

1. Objection and Preservation

Defendant Rush and Defendant Allen were tried together, but each was represented by separate counsel. During the *voir dire* of Agent Putman, the trial court addressed each of Defendants' counsels individually:

> THE COURT: Thank you. [Defendant Allen's attorney], do you want to be heard?
>
> [DEFENDANT ALLEN'S ATTORNEY]: No, Your Honor.
>
> THE COURT: Sir, do you have any objection?
>
> [DEFENDANT ALLEN'S ATTORNEY]: I do not, Your Honor.

Defendant Allen failed to preserve this issue for appellate review. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion stating the specific grounds for the ruling the party desired the party to make[.]" N.C. R. App. P. 10(a)(1).

Our appellate rules provide:

> Plain Error. In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4). Defendant Allen does not argue the admission of Agent Putman's testimony amounted to plain error. Defendant Allen failed to "specifically and distinctly contend[] . . . plain error" and is not entitled to plain error review on this issue. *Id.* His brief did not "specifically and distinctly" allege the admission of the expert testimony amounted to plain error. *See State v. Smith*, 269 N.C. App. 100, 105, 837 S.E.2d 166, 169 (2019) (citation omitted).

The trial court then heard from Defendant Rush's counsel arguing his Rule 702 objection. Presuming, without agreeing or deciding, Defendant Allen in any manner preserved this issue for appellate review, as held below, neither Defendant is entitled to any relief.

2. Sufficient Facts or Data

Agent Putman's testimony was grounded in "sufficient facts or data" and "reliable principles and methods" to satisfy Rule 702(a)(1). N.C. Gen. Stat. § 8C-1, Rule 702(a) (2023). He described in detail his "specialized knowledge" of and "experience, training [and] education" in CAST methodology, explaining how historical cell call detail and tower relation records are created by cellular providers, how those records are interpreted for forensic purposes, and how they can be mapped to approximate the general area of a device's use. *Id.* Agent Putman further testified he had manually verified each plotted record by comparing the raw provider data to its mapped rendering in order to ensure consistency and accuracy. This testimony tends to show Agent Putnam "applied the principles and methods reliably to the facts of the case." *Id.*

North Carolina courts have long held when an expert bases an opinion on data customarily relied upon in the field and explains how those data entries support the conclusion reached, the factual basis of the opinion affects the weight, not the admissibility, of the testimony. *Pope v. Bridge Broom, Inc.*, 240 N.C. App. 365, 374, 770 S.E.2d 702, 710 (2015).

Here, the data underlying Agent Putman's analysis, including the provider's tower-usage records and geographic coordinates, are standard sources used in historical cell-site analysis nationwide. *State v. Perry*, 243 N.C. App. 156, 178, 776 S.E.2d 528, 542 (2015) (upholding admissibility of "ping" data). Federal courts have echoed this conclusion. *United States v. Jones*, 918 F. Supp. 2d 1 (D.D.C. 2013); *United States v. Schaffer*, 439 F. App'x 344, 347 (5th Cir. 2011); *United States v. Davis*, 2013 U.S. Dist. LEXIS 70371 (S.D. Fla. 2013); *United States v. Reynolds*, 2013 U.S. Dist. LEXIS 80828 (E.D. Mich. 2013). Defendants' counsels cross-examined Agent Putman thoroughly on matters including tower load, handoff data, error margins, and signal variance, but such questions go to credibility of the evidence and testimony, not to its admissibility. The trial court acted within its discretion in reviewing and concluding Agent Putman's testimony was based on sufficient facts and data.

3. Reliable Principles and Application

Agent Putman testified the CAST software is used merely as a mapping tool and does not form conclusions on its own. CAST software simply expedites the plotting of GPS coordinates derived from the carrier's records. Agent Putman further testified he had independently audited each plotted point, rather than relying solely on the software output. This level of manual verification directly addresses the *Daubert* factors as codified in Rule 702 concerning the expert's ability to explain *e.g.*, error rate, standards controlling operation, and methodological reliability. *Daubert*, 509 U.S. at 594, 125 L. Ed. 2d at 483; N.C. Gen. Stat. § 8C-1, Rule 702 (2023).

Agent Putman also explained the inherent limitations of the CAST methodology, including tower load variability, overlapping coverage, and possible handoffs, and cautioned the jury that cell-site data provide only general approximations, not precise GPS-level tracking. This transparency enhances, rather than undermines, the reliability of the report and testimony. The trial court had ample basis to conclude Agent Putman's methodology was reliable and properly applied. Defendant Rush's argument is overruled.

C. Harmless Error

Presuming, *arguendo*, the admission of Agent Putman's testimony fell short of the requirements of Rule 702, any such error was harmless. A new trial is warranted only when "there is a reasonable possibility . . . , had the error not been committed, a different result would have been reached at trial." *State v. Babich*, 252 N.C. App. 165, 172, 797 S.E.2d 359, 364 (2017) (citation omitted). Given the other extensive corroborative evidence admitted in this case, no such possibility exists. *See State v. Lance*, 277 N.C. App. 627, 636-37, 861 S.E.2d 1, 8 (2021).

The State presented surveillance footage showing both Defendants entering the blue Hyundai vehicle shortly before the shooting, eyewitness testimony describing four occupants of a vehicle consistent with the Hyundai, forensic results identifying both Defendants' fingerprints recovered from inside and outside the vehicle, and physical evidence, including broken firearm magazines, found within the blue Hyundai. Additional testimony placed Defendant Allen in constructive possession of a 9mm firearm shortly after the offense. In light of this overwhelming independent evidence, the cell-site analysis merely corroborated what the remainder of the State's case independently established. Even if the admission of Agent Putman's testimony was erroneous, Defendants have not met their burden to show prejudice.

Agent Putman's testimony satisfied the requirements of Rule 702. His opinions were grounded in sufficient facts and data, derived from methods consistently accepted by courts, and applied reliably to the facts of the case. The trial court acted within its broad discretion in determining Agent Putman's testimony would assist the jury and met the reliability thresholds mandated by *Daubert*, *Kumho Tire*, *Joiner*, and Rule 702(a). N.C. Gen. Stat. § 8C-1, Rule 702(a) (2023).

Even if any aspect of Agent Putman's testimony was admitted in error, Defendants cannot demonstrate a reasonable possibility of a different outcome considering the substantial independent evidence linking them to the offense. The trial court did not abuse its discretion in admitting the expert testimony. Defendants' Rule 702 challenge is without merit and overruled.

V. Discovery Violation

[2] Both Defendants argue the trial court erred by failing to exclude the State's expert testimony when the State had failed to disclose its expert's opinion until the night before the expert testified. We disagree.

During trial, and prior to Agent Putman testifying, Defendant Rush's counsel objected to the introduction of the cell "handoff" evidence. Prior to a lunch recess, the trial court asked both Defendants' counsels to conduct "a little more research about what you did get in discovery and the authority." Upon returning, Defendant Rush's counsel stated "one of the court's requests over the break was for me to verify the data was in the discovery the State provided. It is in there." The trial court then asked if there was "Anything further?" Defendant Rush's counsel responded, "No, Your Honor." Neither Defendant Rush nor Defendant Allen objected to this testimony. Both Defendants failed to preserve this issue on appeal. *See State v. Herring*, 322 N.C. 733, 748, 370 S.E.2d 363, 373 (1988) ("When the State offered footprint comparison evidence, the defendant did not object or request sanctions against the State. The defendant may not now complain that the trial court abused its discretion in failing to sanction the State for this alleged discovery violation. Having failed to draw the trial court's attention to the alleged discovery violation, the defendant denied the court an opportunity to consider the matter and take appropriate steps."). Defendants' arguments are overruled.

VI. Ineffective Assistance of Counsel

[3] Defendants alternatively assert their counsels' failure to: object to the alleged discovery violation, object to Agent Putman's surprise testimony, or to hire an expert in historical cell site analysis constituted IAC.

In order to show IAC, a defendant must satisfy the two-pronged test announced by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). The *Strickland* test for IAC has been adopted by the Supreme Court of North Carolina for state constitutional purposes. *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985).

To show a counsel's purported deficient performance prejudiced him, a defendant "must show that his counsel's conduct fell below an objective standard of reasonableness." *Id.* at 561-62, 324 S.E.2d at 248 (citing *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 693.)

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 80 L. Ed. 2d at 693; *accord Braswell*, 312 N.C. at 561-62, 324 S.E.2d at 248.

Our Supreme Court stated it "ordinarily do[es] not consider it to be the function of an appellate court to second-guess counsel's tactical decisions[.]" *State v. Lowery*, 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986). The Court added that when reviewing an IAC claim, "this Court engages in a presumption that trial counsel's representation is within the boundaries of acceptable professional conduct." *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004) (citation omitted).

The trial transcript shows both defense attorneys demonstrated meaningful command of cell-site methodology during *voir dire* and cross-examination of Agent Putman. Both counsels probed records maintenance, triangulation, tower distance, error sources, reliability, and tower handoffs. Their examination reflected familiarity with the field and targeted potential weaknesses in the State's presentation. On this record, the decision not to object to the handoff data admittedly provided by the State during discovery reasonably falls within permissible trial strategy, not constitutionally deficient performance. *State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002).

Presuming, without agreeing or deciding, any deficiency existed, Defendants failed to and cannot show prejudice. Independent of the cell-site analysis, the State presented substantial evidence placing Defendants in the blue Hyundai before, during, and after the shooting. Surveillance identified both Defendants entering the car and depicted the vehicle in the area around the time of the offense, eyewitnesses identified the car and its occupants, fingerprints from both Defendants were inside and outside of the vehicle, broken firearm magazines were recovered from the car, Defendant Allen returned to Baines's vehicle after the shooting and Defendant Allen's constructively possessed a 9mm handgun when located. In light of this evidence, Defendants have not established a reasonable probability of a different result absent the challenged conduct. *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693.

Defendants fail to satisfy either *Strickland* prong. The challenged decisions, how to engage with Agent Putman's testimony, and whether to object to handoff data disclosed in discovery, were decided within the wide range of reasonable professional assistance. That is particularly true in these cases given counsels' demonstrated technical familiarity at *voir dire* and during cross-examination. *See Prevatte*, 356 N.C. at 236, 570 S.E.2d at 472.

If those tactical choices were deemed deficient, the State's non-cell-site data proof, being surveillance, eyewitness identification with seating positions, forensic fingerprint matches inside the blue Hyundai, physical firearm components and ammunition recovered from inside the vehicle, post-offense movements of participants, and Allen's constructive possession of a 9mm and ammunition, independently and powerfully corroborate guilt. On this record there is no "probability sufficient to undermine confidence in the outcome." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citation omitted). Defendants' arguments are overruled.

VII. Conclusion

The trial court acted within its discretion in admitting Agent Putman's testimony under Rule 702; any asserted discovery violation under N.C. Gen. Stat. § 15A-903(a)(2) was unpreserved. Defendants' IAC claims fail on this record. Defendants received a fair trial free from prejudicial errors they preserved and argued. There is no reversible error demonstrated in the jury's verdicts or the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges WOOD and FREEMAN concur.

STATE OF NORTH CAROLINA
v.
JOHN MICHAEL CRABTREE

No. COA25-395

Filed 3 December 2025

1. **Appeal and Error—defective notice of appeal—meritorious argument—subject matter jurisdiction—certiorari granted**

   Although defendant's pro se notice of appeal from the trial court's judgments entered after revocation of probation was facially defective because the notice failed to direct the appeal to the correct appellate court and did not contain a certificate of service on the prosecutor, the appellate court granted defendant's petition for a writ of certiorari to review the judgments where defendant made a good faith and timely effort to appeal and raised a potentially meritorious argument regarding subject matter jurisdiction.

2. **Jurisdiction—subject matter—probation revocation—county of sentencing or residence—judgments vacated**

   The Guilford County Superior Court lacked jurisdiction to revoke defendant's probation where the original judgment imposing defendant's sentence and probation was entered in Franklin County and where there was no indication that the case had been transferred to Guilford County for supervision. Although defendant's probation violation reports were filed in Guilford County, the State failed to demonstrate beyond a reasonable doubt that defendant was either sentenced in, violated probation in, or resided in Guilford County. Therefore, the judgments revoking probation were vacated.

Appeal by Defendant from judgments entered 13 September 2024 by Judge Tonia A. Cutchin in Guilford County Superior Court. Heard in the Court of Appeals 14 October 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Douglas E. Conant, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Brandon B. Mayes, for the Defendant.

WOOD, Judge.

John Michael Crabtree ("Defendant") appeals from judgments revoking his probation and activating his six to seventeen months consecutive sentences. On appeal, Defendant raises three issues: (1) the trial court lacked subject matter jurisdiction to hear the probation violations; (2) the trial court erred by revoking Defendant's probation for committing new crimes when there was no evidence his new convictions were greater than Class 3 misdemeanors; and (3) the trial court erred by revoking Defendant's probation for absconding when there were no allegations, evidence or findings of absconding.

I. Factual and Procedural Background

On 27 June 2022, in Franklin County Superior Court, Defendant was convicted of one count of felony fraudulently burning a dwelling and one count of criminal conspiracy and sentenced to consecutive sentences of six to seventeen months of imprisonment for each charge. The Franklin County Superior Court suspended the sentences for sixty months of supervised probation with special conditions: "Defendant shall be allowed to travel outside the state for work with prior notice to his probation officer. . . . May transfer to Guilford County for supervision."

On 31 August 2024, in Guilford County, Probation Officer McDougal ("Officer McDougal") filed two probation violation reports, both of which list Defendant's address as Washington, Pennsylvania. The first violation report alleged Defendant failed to pay the restitution ordered, left North Carolina without obtaining permission, and committed three misdemeanors in Pennsylvania. The second report alleged Defendant left North Carolina without obtaining permission and committed three misdemeanors in Pennsylvania.

On 9 September 2024, the trial court in Guilford County held Defendant's probation violation hearing. At the hearing, the State read the probation violation reports. Defendant admitted the violations alleged in the reports except for travelling to Pennsylvania without permission. Defendant argued he received verbal permission from his prior probation officer to travel to Pennsylvania for work. Officer McDougal testified he checked Defendant's probation file and that the narratives did not include a permission permit to travel to Pennsylvania. Officer McDougal stated:

> When I got the case, I noticed that he was on unavailable status. So I went through the narratives, and I saw that he had traveled to Pennsylvania. I looked for a travel permit. There was no travel permit. There was nothing in the narrative that said she gave him permission to travel to Pennsylvania. So I did my research, and I found out that he had got new convictions.

Once Officer McDougal learned of Defendant's new convictions in Pennsylvania, he filed violation reports and cited Defendant to court for a violation hearing. However, Defendant did not appear as ordered. Officer McDougal later learned that Defendant had been arrested and jailed in Pennsylvania for violating a protective order.

Defendant's attorney informed the trial court that Defendant believed he was authorized by his former probation officer to go to Pennsylvania for work. Defendant traveled to Pennsylvania after securing a job but did not start the job because before he could, a family altercation occurred that resulted in the new charges in Pennsylvania. Defendant's attorney contended the new Pennsylvania misdemeanors had not been classified by the trial court as anything above Class 3 and therefore could not be grounds to revoke Defendant's probation.

At the end of the hearing, the trial court concluded:

> The Court will find that on or about August 31st, 2023, it's alleged that [Defendant] left the state of North Carolina without permission from his probation officer, was convicted of new charges in the state of Pennsylvania, and also failed to comply with the monetary obligations. After consideration of the record, the evidence presented, and review of the violation reports, this Court will find and conclude that [Defendant] did violate the terms and conditions of his probation. It was willful without lawful justification. It did occur during the period of supervised probation. And at least one of the violations in and of itself is sufficient basis that justifies revocation.
>
> This Court will for good cause shown in the Court's discretion revoke [Defendant's] probation. I will activate the two consecutive sentences, 6 to 17 months.

On 13 September 2024, the trial court entered orders of revocation for each of the original charges. In its first order revoking Defendant's probation for his conviction for fraudulently burning a dwelling, the trial court determined Defendant waived the hearing and admitted the violations as set forth in paragraphs 1-3 of the violation report dated 31 August 2024 and then revoked probation "for the willful violation of the condition(s) that he/she not commit any criminal offenses, G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-1343(b)(3a), as set out above." The second order revoking Defendant's probation for his conspiracy conviction also stated, Defendant waived the hearing, admitted the violations as set forth in paragraphs 1-2 of the violation report 31 August 2024 but did not check the box revoking probation. Defendant filed timely appeal from these judgments on 27 September 2024.

II. Analysis

On appeal, Defendant raises three issues: (1) the trial court lacked subject matter jurisdiction to hear the probation violations; (2) the trial court erred by revoking Defendant's probation for committing new crimes when there was no evidence his new convictions were greater than Class 3 misdemeanors; and (3) the trial court erred by revoking Defendant's probation for absconding when there were no allegations, evidence or findings of absconding. We first address Defendant's petition for writ of certiorari.

A. Petition for Writ of Certiorari

[1] Defendant filed a timely *pro se* notice of appeal on 27 September 2024 and the trial court entered Appellate Entries on 25 October 2024. Defendant acknowledges this notice was facially defective as it failed to direct his appeal to this Court and did not include a certificate of service on the prosecutor. On 27 May 2025, Defendant filed a writ of certiorari with this Court. Rule 21(a)(1) of our Rules of Appellate Procedure expressly allows this Court to issue a writ of certiorari to permit review of trial court orders pursuant to N.C. Gen. Stat. § 15A-1422(c)(3). N.C. R. App. P. 21(a)(1).

"Ultimately, the decision to issue a writ of certiorari rests in the sound discretion of the presiding court." *Cryan v. Nat'l Council of YMCAs of U.S.*, 384 N.C. 569, 573, 887 S.E.2d 848, 851 (2023). However, our Supreme Court has established a two-factor test to determine whether *certiorari* is appropriate: (1) whether the petitioner demonstrates merit and (2) extraordinary circumstances. *Cryan*, 384 N.C. at 572, 887 S.E.2d at 851. Additionally, this Court has granted petitions for writ of certiorari where petitioners demonstrated good faith efforts in making a timely appeal and because the appeal had merit. *State v. Owens*, 917 S.E.2d 505, 510 (N.C. Ct. App. 2025).

In the case *sub judice*, Defendant clearly made a good faith and timely effort to appeal and has raised a meritorious argument involving subject matter jurisdiction. Therefore, we exercise our discretion to permit the writ of certiorari and address the merits of this case.

B. Jurisdiction

[2] "[A] defendant may properly raise the issue of subject matter jurisdiction at any time, even for the first time on appeal." *State v. Williams*, 230 N.C. App. 590, 595, 754 S.E.2d 826, 829 (2013). "It is well settled that a court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute." *State v. Tincher*, 266 N.C. App. 393, 395, 831 S.E.2d 859, 861 (2019). However, "[a] trial court must have subject matter jurisdiction over a case in order to act in that case." *State v. Reinhardt*, 183 N.C. App. 291, 292, 644 S.E.2d 26, 27 (2007). "The State bears the burden in criminal matters of demonstrating beyond a reasonable doubt that a trial court has subject matter jurisdiction." *Williams*, 230 N.C. App. at 595, 754 S.E.2d at 829.

In the case of probation violations, N.C. Gen. Stat. § 15A-1344(a) provides:

> probation may be reduced, terminated, continued, extended, modified, or revoked by any judge entitled to sit in the court which imposed probation and who is resident or presiding in the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, ***where the sentence of probation was imposed, where the probationer violates probation, or where the probationer resides***.

N.C. Gen. Stat. § 15A-1344(a) (emphasis added).

Therefore, in the case *sub judice*, the State was required to "demonstrat[e] beyond a reasonable doubt" that Defendant was either (1) sentenced in Guilford County; (2) violated probation in Guilford County; or (3) resided in Guilford County. *Williams*, 230 N.C. App. at 595, 754 S.E.2d at 829. It is clear Defendant's sentence, and probation was imposed in Franklin County. The judgment imposing Defendant's sentence stated that his probation "[m]ay [be] transfer[red] to Guilford County for supervision," but did not transfer Defendant's probation to

Guilford County. Although the violation was filed in Guilford County, the State does not contend that Defendant violated his probation in Guilford County but, rather, contends Defendant violated his probation in Pennsylvania by absconding and committing new crimes there. There is no indication in the record Defendant resided in Guilford County. The violation reports included in the record list Defendant's address as Washington, Pennsylvania. The only references to Guilford County are the initial trial court judgment from Franklin County which allowed Defendant's probation to be transferred to Guilford County for supervision and the probation violation reports that were filed in Guilford County.

Absent evidence that Defendant was a resident of the county at issue or violated probation in that county, a trial court's permissive statement that probation *may* be transferred is not enough to provide jurisdiction to the trial court. In *Ward*, we held "the trial court's statement in the actual Judgment that probation '[m]ay transfer to [another] County for supervision' cannot, in this context, reasonably be construed as granting the State unilateral authority to decide whether to transfer supervision to [that] County." *State v. Ward*, 278 N.C. App. 128, 135, 862 S.E.2d 20, 26 (2021). Without evidence beyond the initial trial court's statement that probation *may* be transferred to Guilford County, the Guilford County Superior Court did not have subject matter jurisdiction to hear Defendant's probation violation. "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *Williams*, 230 N.C. App. at 595, 754 S.E.2d at 829. We conclude the trial court lacked jurisdiction to revoke Defendant's probation and vacate the trial court's 13 September 2024 judgments. Because we vacate the probation revocation judgments, we need not address Defendant's remaining arguments on appeal.

III. Conclusion

Because of the lack of evidence that Defendant was either (1) sentenced in Guilford County; (2) violated probation in Guilford County; or (3) resided in Guilford County, we vacate the trial court's judgments revoking Defendant's probation for lack of subject matter jurisdiction.

VACATED.

Judges STROUD and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
ROGELIO ROJAS CRUZ

No. COA25-456

Filed 3 December 2025

Sexual Offenses—statutory sex offense with a child by an adult—penetration—sufficiency of evidence

The State presented substantial evidence of each element of the offense of statutory sex offense with a child by an adult pursuant to N.C.G.S. § 14-27.28(a) to overcome defendant's motion to dismiss for insufficient evidence. In particular, evidence that defendant had penetrated the victim's vagina with his fingers (meeting the definition of "sexual act" pursuant to N.C.G.S. § 14-27.20(4)) was supported by the victim's testimony, corroborating testimony (from the victim's parents, the nurse who conducted a physical examination of the victim, and the forensic interviewer who interviewed the victim), and DNA evidence obtained from the victim's underwear that was consistent with defendant's DNA.

Appeal by Defendant from judgment entered 26 February 2024 by Judge Peter B. Knight in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 November 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Lauren Clemmons, for the State-Appellee.

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

COLLINS, Judge.

Defendant Rogelio Rojas Cruz appeals from judgment entered upon a jury's guilty verdict of one count of statutory sex offense with a child by an adult and one count of indecent liberties with a child. Defendant argues that the trial court erred by denying his motion to dismiss the charge of statutory sex offense with a child by an adult at the close of evidence. Because the State presented sufficient evidence of all of the requisite elements of the offense, the trial court did not err by denying Defendant's motion to dismiss for insufficient evidence. We find no error.

I. Background

Defendant was indicted on 24 May 2021 on one count of statutory sex offense with a child by an adult and one count of indecent liberties with a child. The case came on for jury trial on 5 February 2024. The evidence presented at trial tended to show the following:

A. State's Evidence

1. Daniela's Testimony

In or around August 2020, Daniela was living in Charlotte, North Carolina with her husband, Martin (together, the "Parents"), and their two minor children: Sarah (born in November 2015) and Nate.[1] On 15 August 2020, the Parents asked Martin's sister, Wendy, to watch Sarah and Nate while the Parents attended a wedding in Chapel Hill, North Carolina. Wendy also lived in Charlotte with her husband, Hector, and their three minor children. The Parents dropped their kids off at Wendy's house around noon on 15 August 2020, and Wendy told them that she and her husband were going to take Sarah, Nate, and their children to a gathering at Defendant's house. Defendant is Hector's father and Wendy's father-in-law.

The Parents checked in with Wendy regularly throughout the day. They picked Sarah and Nate up from Wendy's house around midnight; Sarah and Nate were awake and seemed normal. The next morning, 16 August 2020, Daniela was sitting on her back porch with Sarah when Sarah disclosed to her "that her [p]rimos' grandfather touched her colis." Sarah knew Defendant as her cousins' grandfather; "primos" means "cousins" in English. Daniela further testified that Sarah, who was four years old at the time, "didn't know the word 'vagina,' but she did know how to specify the area." "Colis" was the word Sarah used to describe her vagina.

Daniela immediately began recording her conversation with Sarah on her phone. On video, Sarah repeated what she had disclosed to Daniela. This video was introduced into evidence.

Later that day, the Parents took Sarah to the hospital, and they brought with them in a plastic bag the blue underwear that Sarah had been wearing the day before. At the hospital, Sarah was examined by doctors, and the Parents spoke to law enforcement officers. The hospital recommended that they take Sarah to Pat's Place Child Advocacy

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

Center, which is a "support place for children that have been sexually abused." The Parents took Sarah to Pat's Place the next day.

2. Sarah's Testimony

At the time of trial, Sarah was eight years old. When asked why her parents took her to the hospital on 16 August 2020, Sarah responded,

> A: I went to the doctor because my cousins' grandfather was touching my inappropriate part.
>
> Q: . . . So when you say "inappropriate part" of your body, are you referring to a part that you use to go to the bathroom?
>
> A: Yes.
>
> Q: Is that the front part or the back part?
>
> A: The front part.

3. Martin's Testimony

Martin testified that prior to 15 August 2020, he and Daniela had left his children in Wendy's care many times; the two families were very close and spent a lot of time together. He recounted that on the morning of 16 August 2020, when his wife called him to come out onto the back porch, "[Sarah] repeated what happened. And as soon as she repeated it, I got on the phone. I called Wendy, and I said, you need to come to my house right now. We need to talk." Wendy, Hector, and their children showed up a short time later. Sarah repeated what happened to Wendy and Hector, and Wendy suggested they go to the hospital.

Martin further testified, "My daughter had said that after she got touched, she went to the bathroom to wipe herself off and there was blood on the toilet paper."

4. Nurse Ashlyn Beeman's Testimony

Ashlyn Beeman is a registered nurse with a primary concentration in pediatrics. She was tendered and admitted as an expert in forensic and pediatric nursing. In August 2020, Beeman was working as a "sexual assault nurse examiner" at Atrium Health Levine Children's Hospital in Charlotte, North Carolina. She completed a physical exam of Sarah on 16 August 2020 and documented her findings in a written report. This documentation was entered into evidence, and Beeman testified about its contents.

According to Beeman's written report, when she asked Daniela what brought them to the hospital, Daniela responded, "I was sitting on my back porch and [Sarah] came to me and told me, quote, my cousins' grandpa touched my colis." Daniela further told Beeman, "I kept telling her she would not get in trouble. Then she told me that her cousins' grandpa put his fingers in her and it hurt a lot. She said she went to the bathroom, and when she wiped herself there was blood."

Beeman then met with Sarah, and based on Beeman's written report, the following colloquy ensued:

> I asked, "Do you know why you are here today?"
>
> [Sarah] said, "No."
>
> I asked, "Did anything happen yesterday that you want to tell me about?"
>
> [Sarah] said, "We went to my cousins' grandparents house and he touched me on the cheek -- in the cheek with his fingers, and he put his fingers in my colis and, quote, it hurt."

During her physical exam of Sarah, Beeman found redness on the hymen tissue and a 0.25 millimeter laceration located at the bottom of Sarah's labia minora that went into the vagina. Beeman testified that Sarah's injuries—the redness and laceration—were visible to the naked eye. Photos of the injury were introduced into evidence for illustrative purposes. Beeman testified that based on her experience and training, Sarah's injuries were consistent with blunt force trauma, and nothing about her physical examination of Sarah led Beeman to doubt the report given by Daniela and Sarah as to what happened.

5. Forensic Interviewer Abbie DiIanni's Testimony

Abbie DiIanni is employed as a coordinator of forensic services at Pat's Place, which is a "center where kids go when there is an allegation of child abuse or neglect." DiIanni was tendered and admitted, without objection, as an expert in forensic interviewing and child abuse assessments.

DiIanni first interviewed Sarah on 17 August 2020. According to DiIanni, Sarah "reported that her colis was broken." Sarah identified that part of her body by pointing to it. The video of this interview was introduced into evidence for illustrative purposes. Sarah presented as "very normal" during this interview and often tried to change the subject to avoid talking about the alleged assault. Overall, Sarah was not very responsive during this interview, which, DiIanni testified, was not uncommon:

> [I]f a child is just presenting as like this has been enough, gone on enough, especially with the little ones, we want to be really sensitive to that. So we, with our little ones, it is not atypical for us to do a follow-up interview or a second-session interview based on the age and the needs of the child.

DiIanni interviewed Sarah for a second time on 30 March 2021. At this point, Sarah was five years old. DiIanni testified,

> [Sarah] reported that her cousin's grandpa put his, in quotes, whole finger into her colis. She again identified that part of her body by pointing to it and reporting that it hurt. She reported that her pants were down when this happened. And I believe also described how her undergarments were down. She reported that she had wiped herself and there was blood on the paper.

This second interview was also recorded and introduced into evidence for illustrative purposes.

6. DNA Analyst Shannin Guy's Testimony

Shannin Guy worked as a DNA analyst for the Charlotte Mecklenburg Police Department in the crime lab. She was tendered and admitted, without objection, as an expert in forensic DNA analysis.

Guy testified, "The case narrative I received indicated there was digital penetration." Guy analyzed Sarah's sexual assault kit which included Sarah's buccal standard, her external genitalia swab, and Sarah's left and right hand fingernail swabs. Guy also swabbed various areas of the underwear Sarah was wearing the day of the alleged assault, including the inside front panel, waistband, back panel, and crotch area.

All of the parts of the underwear that Guy tested detected male DNA. Guy then conducted YSTR DNA testing, which specifically targets male DNA. Guy testified, "The partial YSTR DNA profile obtained from the extract from the swabs from the front inside panel of the -- and waistband of the underwear was consistent with the YSTR DNA profile obtained from [Defendant]." Guy did not find any other indication of other male DNA profiles in this sample. Furthermore, Guy opined "that [Defendant] or his paternal male – his paternal male relative cannot be excluded as a source of this profile."

At the conclusion of Guy's testimony, the State rested its case.

B. Defendant's Evidence

At the close of the State's evidence and before putting on his own evidence, Defendant moved to dismiss, arguing that the State failed to present sufficient evidence of each element of the offenses charged; the trial court denied the motion. Defendant then informed the trial court that he intended to put on evidence and testify in his own defense.

Defendant testified that on 15 August 2020, he spent several hours grilling and drank "about four or five beers." After he was done grilling, he drank two or three additional beers before falling asleep at a table. Defendant testified that he did not wake up until the next morning. According to Defendant, he was never alone with Sarah, and he never touched her inappropriately.

Hector, Defendant's son and Wendy's husband, also testified on Defendant's behalf. He corroborated Defendant's story that Defendant had several drinks before eventually falling asleep in his chair. Hector testified that he and his wife helped Defendant get to his bed before leaving Defendant's house around 10:00 p.m. on 15 August 2020. According to Hector, Sarah was crying because she had misplaced her shoes and her socks were wet. Defendant's wife gave Sarah dry socks, and Defendant came downstairs briefly to say goodbye. Hector testified that Sarah was "whiney," "but as soon as [they] got in the car and drove off, she was good . . . ."

Defendant's wife, Defendant's granddaughter, and Wendy also testified on Defendant's behalf.

C. Jury's Verdict

At the close of all evidence, Defendant renewed his motion to dismiss, arguing that "[t]he State has not met its burden of proving each element beyond a reasonable doubt." The trial court denied Defendant's motion.

On 19 February 2024, the jury returned guilty verdicts on both charges. The trial court consolidated the convictions into one judgment and sentenced Defendant to an active term of 300 to 420 months' imprisonment. The trial court also ordered Defendant to register as a sex offender for a period of thirty years.

Defendant appeals.

II. Discussion

Defendant argues that the trial court erred by denying Defendant's motion to dismiss the charge of statutory sex offense with a child because the State presented insufficient evidence of penetration, an essential element of the charge under N.C. Gen. Stat. § 14-27.20(4). Defendant's argument lacks merit.

This Court reviews the denial of a motion to dismiss for insufficient evidence de novo. *State v. Crockett*, 368 N.C. 717, 720 (2016). Under a de novo review, the appellate 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 (2008) (quotation marks and citations omitted).

"The question for a court on a motion to dismiss for insufficient evidence is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Tucker*, 380 N.C. 234, 236-37 (2022) (quotation marks and citation omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion"; it must be "more than a scintilla of evidence." *State v. Burns*, 278 N.C. App. 718, 721 (2021) (quotation marks and citation omitted); *Tucker*, 380 N.C. at 237.

"In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75 (1993) (citation omitted). We must "disregard[] defendant's evidence unless [it is] favorable to the State." *Tucker*, 380 N.C. at 237 (quotation marks and citation omitted). Any contradictions or discrepancies in the evidence "do not warrant dismissal of the case but are for the jury to resolve." *Barnes*, 334 N.C. at 75 (citation omitted).

"Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452 (1988) (citation omitted).

> If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in

> combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

Barnes, 334 N.C. at 75-76 (cleaned up). In other words, "[w]hen ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence." *State v. Fritsch*, 351 N.C. 373, 379 (2000) (citation omitted).

"A person is guilty of statutory sexual offense with a child by an adult if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." N.C. Gen. Stat. § 14-27.28(a) (2021). A "sexual act" is defined as "the penetration, however slight, by any object into the genital or anal opening of another person's body." *Id.* § 14-27.20(4) (2021). The term "any object" includes parts of the human body, such as fingers. *See State v. Lucas*, 302 N.C. 342, 346 (1981) (concluding that "the Legislature did not intend to limit the meaning of the words 'any object' to objects foreign to the human body"). At trial, "[t]he State may elicit evidence of penetration from the victim" as well as "additional corroborative evidence of actual penetration." *In re J.D.*, 376 N.C. 148, 157 (2020) (citations omitted).

Here, the State presented substantial evidence supporting the element of penetration. Sarah testified that Defendant touched her "inappropriate part," which she indicated meant her vagina. When asked what part of Defendant's body he used to touch Sarah's body, Sarah responded, "His hand." Both of Sarah's parents testified that Sarah had told them that Defendant touched her vagina. Martin, Sarah's father, testified, "My daughter had said that after she got touched, she went to the bathroom to wipe herself off and there was blood on the toilet paper."

Beeman, a registered nurse, testified to the following: Sarah told her parents "that her cousins' grandpa put his fingers in her and it hurt a lot." Sarah told Beeman that Defendant "put his fingers in [her] [vagina] . . . ." Sarah told a forensic interviewer at Pat's Place "that her cousins' grandpa put his, in quotes, whole finger into her [vagina]."

Beeman completed a physical examination of Sarah at the hospital and found redness on her hymen tissue and a laceration located at the bottom of Sarah's labia minora that went into her vagina. *See Burns*, 278 N.C. App. at 722 ("This Court has concluded that . . . [evidence] of being touched in between the labia is sufficient evidence to survive a motion to dismiss by the defendant."). Beeman further testified that Sarah's injuries were consistent with blunt force trauma, and based on her examination of Sarah, Beeman had no reason to believe that the story Sarah and her Parents provided was false.

Finally, the State's expert in DNA analysis, Shannin Guy, testified that she analyzed Sarah's sexual assault kit as well as the underwear Sarah was wearing during the alleged assault. Guy testified that the DNA profile obtained from the front inside panel of Sarah's underwear "was consistent with the [] DNA profile obtained from [Defendant]."

Accordingly, the State presented sufficient evidence by offering the victim's testimony that she was touched by Defendant and corroborating testimony from her mother, her father, the nurse that examined her at the hospital, and the forensic interviewer who interviewed her. According to Beeman and DiIanni, Sarah said that Defendant had put his fingers inside her vagina. *See State v. Corbett*, 264 N.C. App. 93, 99 (2019) (determining that victim testimony of penetration, alone, is sufficient evidence of the element of penetration). The State further presented evidence suggesting the presence of Defendant's DNA on the inside of Sarah's underwear. We therefore conclude that the State's evidence supporting the element of penetration "is sufficient for jury consideration" on whether Defendant committed the offense of statutory sex offense with a child by an adult. *Fritsch*, 351 N.C. at 379 (citation omitted).

III. Conclusion

For the foregoing reasons, the trial court did not err by denying Defendant's motion to dismiss at the close of evidence.

NO ERROR.

Judges ARROWOOD and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
JAMIE T. KLEIST and KALA D. LIPSCOMB, Defendants

No. COA24-677

Filed 3 December 2025

1. Aiding and Abetting—elements—knowingly advised or encouraged—sexual offenses against a child—lack of affirmative conduct

The trial court erred by denying defendant's motion to dismiss charges alleging that she aided and abetted her boyfriend in the commission of statutory rape and statutory sexual offenses against her two minor children where the State failed to present substantial evidence of the essential element that defendant knowingly advised or encouraged her boyfriend to commit the offenses. Although evidence was presented that defendant was in the home when some of the criminal conduct took place, her physical presence alone was not sufficient to meet the conduct requirement. Further, the State failed to meet the mental state requirement—that defendant had the criminal intent to aid and abet her boyfriend in the commission of his crimes—where there was no evidence that defendant took any affirmative steps to assist or encourage his actions. Therefore, defendant's convictions of aiding and abetting were vacated.

2. Child Abuse, Dependency, and Neglect—felony child abuse—N.C.G.S. § 14-318.4(a2)—"allows the commission of"—knowledge required

In an issue of first impression involving N.C.G.S. § 14-318.4(a2) (felony child abuse), the appellate court interpreted the statutory phrase "allows the commission of any sexual act upon the child" to include instances where a parent knows that sexual abuse has occurred and may continue but does nothing to stop the continued abuse. Therefore, in the present case, in which defendant mother was charged with two counts of felony child abuse based on acts committed by her boyfriend against her two minor children, where there was evidence that defendant's daughter informed defendant about the boyfriend's abuse, but defendant did nothing to stop the continued abuse and was not hindered from doing so, a jury could reasonably infer that defendant allowed the continued sexual acts against her daughter; therefore, defendant's motion to dismiss the charge with regard to her daughter was properly denied. However, where the State failed to present evidence that defendant knew about the sexual acts that her boyfriend committed against her son, defendant could not have "allowed" them under the statute; where defendant's motion to dismiss the charge with regard to her son should have been allowed, that conviction was vacated.

3. Evidence—expert testimony—sexual offenses against minor children—absence of physical injuries—plain error analysis

In a prosecution of a mother and her boyfriend for multiple sexual offenses against two minor children, the trial court did not commit plain error by allowing a sexual assault nurse examiner (who performed forensic examinations of both children) to testify that the absence of physical injuries did not preclude the possibility that sexual abuse had occurred. The statement did not constitute an impermissible vouching of the children's credibility where the expert did not state that sexual abuse had in fact occurred and where she laid a proper scientific foundation for her testimony. Even assuming error, defendants could not demonstrate prejudice in light of (1) the detailed testimony from both children about multiple instances of abuse, and (2) the instructions given to the jury to carefully weigh all evidence, including expert opinions.

Appeal by defendants from judgments entered 3 August 2023 by Judge Todd Pomeroy in Superior Court, Cleveland County. Heard in the Court of Appeals 20 May 2025.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for defendant-appellant Lipscomb.

Christopher J. Heaney for defendant-appellant Kleist.

STROUD, Judge.

Defendants Jamie T. Kleist (Kleist) and Kala D. Lipscomb (Lipscomb) (collectively, Defendants) were convicted on multiple charges related to Kleist's sexual acts on Lipscomb's two children. A jury found Kleist guilty of one count of statutory rape and two counts of statutory sexual offense with a child by an adult. It found Lipscomb guilty of aiding and abetting those crimes and two separate counts of felony child abuse by sexual act. Both Defendants appeal.

Lipscomb challenges the sufficiency of the evidence supporting her convictions and the jury instructions. Both Defendants challenge the admission of expert testimony. We hold that the trial court erred in denying Lipscomb's motion to dismiss her aiding and abetting convictions and one count of felony child abuse. The trial court did not err in admitting the expert testimony or denying Lipscomb's motion to dismiss the other felony child abuse count.

I. Background

In December 2020, Lipscomb lived with her boyfriend Kleist and her two children, Val and Luke,[1] in a camper in King's Mountain, North Carolina. Val was seven years old; Luke was nine.

Near the end of December, Lipscomb called her cousin Billy Byers in Tennessee and asked him to "come and get her and the camper." Billy went to King's Mountain, but on arrival, he saw that the camper was "not movable" and "non-livable." It was "falling apart," had windows "busted out," "looked like it had mold in it," and lacked running water. And as for the children, Billy found Val and Luke "very thin" with "shaved heads." Luke's shoes were also too small.

Billy brought Lipscomb and the children back to his Tennessee home, where they stayed for about a week. Bridget Byers, Billy's wife, noticed that the children appeared "very underweight" and "were constantly wanting to eat." Lipscomb told Bridget that the children's heads were shaved because they had lice. During their stay, neither child mentioned "anything . . . about any type of sexual activity."

Around New Year's Day, Lipscomb asked Bridget to drive her and the children to a trailer park in the next county. Bridget dropped them at a trailer home and helped them unload their belongings onto the porch. No one seemed to be home. Soon after, the Byerses asked Billy's mother—Lipscomb's aunt—to contact Lipscomb about keeping the children for the weekend to go to church. Lipscomb agreed and dropped the children off at her aunt's.

Without telling Lipscomb, Bridget contacted the children's biological father, Leon Lipscomb, in Alabama. She testified that she was concerned about the children's welfare. The next day, Leon came to Tennessee, filed a petition for temporary custody, and took Val and Luke to Alabama.

1. We use pseudonyms to protect the minor children's identities.

One to two weeks later, Luke told Leon that Kleist had threatened him with waterboarding-style torture. Kleist said, according to Leon's testimony, that he would "tie[ ] [Luke] to a chair," place "a towel . . . over his face," "lean[ ] [him] back," and pour water over him. Both children "expressed fear" that Lipscomb and Kleist would "find them and take them back." Leon consequently contacted Child Protective Services (CPS) in Alabama.

On 15 January 2021, Jill Hansel from CPS interviewed Luke and Val. Eleven days later, the children participated in forensic interviews at Brooks Place Child Advocacy Center. During these interviews, the children disclosed both sexual and physical abuse Kleist had committed against them. Luke described Kleist forcefully pulling him from the top bunk and throwing him against the door. And Val reported that Kleist had "sexual[ly] abuse[d]" her.

Hansel testified that Luke appeared "nervous" and "uncomfortable" during his interview. He slid off the couch and began crawling on the floor when asked about living with Defendants. Val's demeanor similarly changed when discussing that period: "Her tone of voice changed. She began to look down, kind of curling inward. She was sliding off the couch. She changed to three different positions in the room." In her forensic interview, Val stated that "she didn't tell" Lipscomb "what was happening" with Kleist. She instead asserted that Kleist had "told [Lipscomb] what had happened," and, in response, Lipscomb had "cussed him out."

On 24 February 2021, sexual assault nurse examiner Liana Hill performed forensic examinations of both children. Hill, who the State proffered as an expert in forensic sexual assault examinations, testified that the children's physical examinations were "normal" but confirmed this "neither concludes nor rules out sexual assault." Her medical reports[2] included this statement, which Hill read to the jury: "Given the overwhelming fact that the majority of children [who] disclose sexual abuse have normal genital exams, the absence of injury on the examination in no way lessens any concern[ ] for sexual abuse."

In March 2021, a King's Mountain criminal investigator received the Alabama CPS report "alleging sexual abuse." Investigators located Defendants at a Tennessee motel. Both were later indicted on multiple charges arising from child sexual abuse. Their cases were joined for trial in July 2023.

2. These reports were admitted as State's Exhibits 18 and 19.

Trial began on 31 July 2023, in Superior Court, Cleveland County. Luke and Val testified about Kleist's actions. In particular, Luke testified that Kleist forced him to touch Kleist's penis, performed oral sex on him, and anally penetrated him. Each assault occurred once. Though Luke never disclosed the abuse to Lipscomb, he believed that she knew.

Val testified that Kleist inserted his penis into her vagina and anus, inserted his finger and a red bottle into her anus, forced her to perform oral sex on him, and performed oral sex on her. Kleist had also put his "front private part" in her mouth and "made [her] drink" the "white stuff" that came out. Kleist warned her not to "tell anybody or else," which Val understood to mean that "if [she] told anybody, [she] would get hurt."

Unlike her forensic interview, Val did not testify that Kleist told Lipscomb about the abuse. Asked if Lipscomb ever saw what Kleist did, Val said "No." And asked if Lipscomb knew, Val responded, "After a little while, yes"—because Val had "told her what [Kleist] had been doing to [her]." But Val could not remember what she said to Lipscomb, the words she used, or how Lipscomb responded. Still, Val testified that Kleist continued abusing her "very often" after she informed Lipscomb.

Neither Defendant testified or presented evidence. The jury found Kleist guilty of one count of statutory rape of a child by an adult and two counts of statutory sexual offense with a child by an adult. It also found Lipscomb guilty of two counts of felony child abuse by sexual act, one count of aiding and abetting statutory rape, and two counts of aiding and abetting statutory sexual offense with a child by an adult. Both Defendants gave oral notice of appeal.

II. Discussion

On appeal, Lipscomb raises four arguments, and Kleist raises one argument that Lipscomb incorporates by reference.

First, Lipscomb argues that the trial court erred by denying her motion to dismiss. She contends that the State presented insufficient evidence that she had the requisite intent for aiding and abetting under North Carolina General Statutes Sections 14-27.23(a) and 14-27.28(a) or that she feloniously "allow[ed] the commission of any sexual act" on her children under North Carolina General Statute Section 14-318.4(a2). Second, she claims that the court committed plain error in failing to instruct the jury that it could convict her only if it found that she aided specific, identified criminal acts with actual knowledge of those particular crimes and the requisite intent to facilitate them. Third, she challenges her sentences as "violat[ing] federal and state constitutional proportionality provisions."

Both Defendants argue that the trial court committed plain error in admitting Hill's testimony that the absence of physical injuries "should in no way lessen any concern[ ] for sexual abuse."

We hold that the trial court erred in denying Lipscomb's motion to dismiss her aiding and abetting convictions and one count of felony child abuse as to Luke. The State failed to present substantial evidence of the conduct and mental state required for aiding and abetting. The State also failed to prove that Lipscomb knew Kleist had committed sexual acts on Luke, and without knowledge, she could not have "allow[ed]" those acts under Section 14-318.4(a2). The State showed, however, that Lipscomb knew Kleist had committed sexual acts on Val and took no action to prevent further acts, so the trial court did not err in denying the motion to dismiss the felony child abuse charge as to Val. This holding makes it unnecessary to address Lipscomb's remaining arguments. We also hold that the trial court did not commit plain error in admitting Hill's testimony.

A. Lipscomb's Motion to Dismiss

We start with Lipscomb's convictions for one count of statutory rape by aiding and abetting under Section 14-27.23(a) and two counts of statutory sexual offense with a child by an adult by aiding and abetting under Section 14-27.28(a). We then turn to her conviction for two counts of felony child abuse by sexual act under Section 14-318.4(a2).

This Court reviews the denial of a motion to dismiss to determine whether "substantial evidence" (1) supports "each essential element of the crime" and (2) shows "that the defendant is the perpetrator." *State v. Golder*, 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020) (quoting *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015)). Substantial evidence is the "amount . . . necessary to persuade a rational juror to accept a conclusion." *Id.* We view the evidence "in the light most favorable to the State," giving it "every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* "[W]hether the State presented substantial evidence of each essential element of the offense is a question of law," which we review *de novo*. *Id.* (quoting *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018)).

1. Aiding and Abetting Under Sections 14-27.23(a) and 14-27.28(a)

[1] Section 14-27.23(a) provides that a "person is guilty of statutory rape of a child by an adult if the person is at least 18 years" old and has "vaginal intercourse with a . . . child under the age of 13 years." N.C. Gen.

Stat. § 14-27.23(a) (2023). Section 14-27.28(a) states a "person is guilty of statutory sexual offense with a child by an adult if the person is at least 18 years" old and "engages in a sexual act with a . . . child under the age of 13 years." N.C. Gen. Stat. § 14-27.28(a) (2023).

Lipscomb argues that the State failed to prove that she "knowingly assisted, cooperated, or encouraged Kleist in specifically intended instances of rape and statutory sex offenses against" her children. She notes that the evidence shows she was absent, asleep, or incapacitated during Kleist's acts. She neither participated in nor encouraged Kleist's conduct and learned of it only shortly before leaving with Billy and her children. Without "knowing, intentional conduct such as 'assistance, promotion, encouragement, or instigation of criminal actions,' " Lipscomb contends, there's no aiding and abetting. She also asserts that the State failed to identify which specific acts she allegedly aided.

The State responds that the evidence, viewed in the light most favorable to it, establishes each essential element of the charged offenses. Lipscomb, according to the State, "knew or should have known that Kleist was sexually abusing her children." The State cites *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982), arguing that parents have a "special duty" to protect their children. Under *Walden*, "a parent who is present" and fails "to take all steps reasonably possible to protect" her "child from an attack by another person constitutes an act of omission by the parent showing" her "consent and contribution to the crime being committed." *Id.* at 476, 293 S.E.2d at 787.

The State claims that "[s]ubstantial evidence exists" that Lipscomb (1) "knew Kleist had sexually assaulted Val," (2) failed "to protect her children," and (3) allowed the abuse to continue "very often." So in its view, the trial court properly denied Lipscomb's motion to dismiss. We disagree.

A defendant aids and abets a crime when the State proves: (1) another person committed the crime; (2) the defendant "knowingly advised, instigated, encouraged, procured, or aided" that person "to commit th[e] crime"; and (3) the defendant's "actions or statements caused or contributed" to the crime's commission. *State v. Melvin*, 364 N.C. 589, 592, 707 S.E.2d 629, 632 (2010) (quoting *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999)).

Lipscomb does not dispute that Kleist committed these crimes. So we focus on element two, which contains both a conduct requirement—the defendant must have "advised, instigated, encouraged, procured, or aided" the perpetrator—and a mental state requirement—she must have done so "knowingly." *Id.* On both fronts, the State's evidence falls short.

a. Conduct Requirement

The conduct requirement demands some form of assistance, encouragement, or other supportive behavior by the defendant. *State v. Bowman*, 188 N.C. App. 635, 648, 656 S.E.2d 638, 648 (2008). The defendant must "aid[ ] or actively encourage[ ] the person committing the crime or in some way communicate[ ] . . . h[er] intention to assist in its commission." *Goode*, 350 N.C. at 260, 512 S.E.2d at 422 (citation omitted). And when a defendant "does not actually participate" in the crime, the State must show she "by word or deed, gave active encouragement to the perpetrator" or communicated that she was "standing by to lend assistance when and if it should become necessary." *State v. Gaines*, 260 N.C. 228, 231-32, 132 S.E.2d 485, 487 (1963) (citations omitted). Courts may infer this communication from the defendant's "actions" and her "relation to the actual perpetrators." *Goode*, 350 N.C. at 260, 512 S.E.2d at 422 (citing *State v. Sanders*, 288 N.C. 285, 291, 218 S.E.2d 352, 357 (1975)).

Here, the State presented no such evidence. Val testified that Kleist committed his acts when Lipscomb was "gone," in "the bathroom," at "the laundromat," or "[a]sleep." Luke testified that "[s]ometimes [Lipscomb] was [awake] and sometimes she was asleep." But neither he nor anyone else indicated that Lipscomb actively encouraged Kleist or communicated her intent to assist him.

This evidence does not satisfy the conduct requirement. Someone who is absent or unconscious cannot "active[ly] encourage[ ]" the perpetrator or communicate that she is "standing by to lend assistance . . . when and if it become[s] necessary." *Gaines*, 260 N.C. at 232, 132 S.E.2d at 487 (citations omitted). And someone who is merely present—even if awake—cannot satisfy these requirements without some evidence she witnessed the acts, communicated encouragement, or otherwise signaled her intent to assist. Luke's testimony that Lipscomb was "[s]ometimes" awake when the abuse occurred does not cure this deficiency. There was no evidence she saw the acts or took any action to encourage them. Physical presence in the same home, without more, is not enough.[3]

The State's closing argument confirms the gap in its evidence. Presumably presenting its best argument based on the evidence, the

---

3. Some of the evidence actually suggests the opposite of encouragement: Val testified that when Kleist supposedly told Lipscomb about his actions, Lipscomb "cussed him out." This reflects opposition, not assistance, even if this form of opposition was woefully inadequate to protect the children from future harm.

State asserted that Lipscomb "provided access to the children," "kept them in [Kleist's] presence," and "was present in the home when those acts occurred." But again, the State presented no evidence that Lipscomb was present *and* aware while Kleist engaged in any sexual act with Val. As for Luke, the State presented no evidence that Lipscomb encouraged Kleist, assisted him, or communicated her intent to do so. The State proved only that Lipscomb lived with Kleist and the children and failed to provide even minimal basic care for them. But maintaining a household with a partner, without more, is not aiding and abetting. *Goode*, 350 N.C. at 260, 512 S.E.2d at 422 ("A person is not guilty of a crime merely because he is present at the scene even though he may silently approve of the crime or secretly intend to assist in its commission[.]" (citation omitted)).

Substantial evidence does not support the conduct requirement.

b. Mental-State Requirement

The mental state requirement demands that the defendant (1) know that "the perpetrator was committing a crime" and (2) intend "to facilitate the perpetrator's unlawful purpose." *Bowman*, 188 N.C. App. at 648, 656 S.E.2d at 648 (citation omitted). The State must show that the defendant had the "subjective knowledge" that her actions would "aid[ ] a criminal act." *Id.* at 649, 656 S.E.2d at 649 (emphasis omitted).

The State argues that the "sum of the evidence" shows that Lipscomb "was aware that Val had been sexually abused by Kleist." It points to Val's forensic interview, where she said that Kleist told Lipscomb himself, prompting Lipscomb to "cuss[ ] him out." The State also relies on Val's trial testimony, where she gave a different account, testifying that she had personally told Lipscomb.

We assume, taking Val's statements as true and viewing them in the light most favorable to the State, that Lipscomb learned of Kleist's abuse at some point—either from Val or Kleist—and that Kleist continued abusing Val after Lipscomb gained this knowledge. *State v. Miles*, 222 N.C. App. 593, 599, 730 S.E.2d 816, 822 (2012) (noting that in "review[ing] the trial court's denial of a motion to dismiss," this Court "resolv[es] any contradictions or discrepancies in the State's favor" (citations omitted)). Even so, the State presented no evidence of affirmative conduct by Lipscomb actively encouraging or communicating her intent to help Kleist commit these offenses against Val. *See Gaines*, 260 N.C. at 231-32, 132 S.E.2d at 487 (citations omitted).

As for Luke, the State's evidence is even weaker. Neither Luke nor Val claimed that Lipscomb knew about Luke's abuse at all. Luke testified:

> [Kleist's Counsel:] You said that after it happened, you never told . . . Lipscomb about it?
>
> [Luke:] Yes.
>
> [Kleist's Counsel:] All right. And you said that you did not tell . . . Lipscomb about it because she was asleep; is that right?
>
> [Luke:] Yes.

The State therefore failed to show that Lipscomb knew that Kleist "was committing a crime" against Luke. *Bowman*, 188 N.C. App. at 648, 656 S.E.2d at 649.

Still, the State suggests that Lipscomb "could easily have heard or seen Kleist abusing her children" because "one could see from one end of the camper to the other." Accepting the State's assumption that Lipscomb "could easily have heard or seen" Kleist's actions requires not reasonable deduction but "pure surmise." *State v. Ham*, 238 N.C. 94, 98, 76 S.E.2d 346, 349 (1953); *see also State v. Evans*, 279 N.C. 447, 453, 183 S.E.2d 540, 544 (1971) ("If . . . the evidence i[s] sufficient only to raise a suspicion or conjecture as to whether the offense charged was committed, the motion [to dismiss] should be allowed even though the suspicion so aroused by the evidence is strong."). Without evidence of actual knowledge, the State cannot prove that Lipscomb knew Kleist was committing a crime against Luke.

Even assuming the State presented substantial evidence that Lipscomb knew Kleist had committed the charged crimes against Val and Luke, it failed to show that Lipscomb "inten[ded] to facilitate" those crimes. *Bowman*, 188 N.C. App. at 648, 656 S.E.2d at 648 (citation omitted). The State's theory (again) rests on the inference that because Lipscomb lived with Kleist and the children, she must have intended any resulting "access" to facilitate his acts. But this conflates ordinary domestic arrangements with criminal intent. "A person is not guilty of a crime merely because [s]he is present at the scene"—even if she "silently approve[s] of the crime" or "secretly intend[s] to assist in its commission." *Goode*, 350 N.C. at 260, 512 S.E.2d at 422 (citation omitted).

The State also invokes parents' "special duty to [their] children." Parents have "an affirmative legal duty to protect and provide for their minor children." *Walden*, 306 N.C. at 473, 293 S.E.2d at 785 (citations omitted). When a parent knows her child faces danger, she must "aid the child if reasonably possible." *Id.* If that parent "is present" and fails "to take all steps reasonably possible to protect [her] child from an attack," that failure "constitutes an act of omission . . . showing the parent's consent and contribution to the crime being committed." *Id.* at 476, 293 S.E.2d at 787.

The State cites three cases applying this principle for support: (1) *Walden*; (2) *State v. Noffsinger*, 137 N.C. App. 418, 528 S.E.2d 605 (2000); and (3) *State v. Ainsworth*, 109 N.C. App. 136, 426 S.E.2d 410 (1993). None help. These cases all involved parents who were present during the abuse, witnessed it, and failed to intervene.

In *Walden*, the mother "looked on the entire time" her boyfriend was beating her child and "did not say anything or do anything to stop the . . . beating." 306 N.C. at 469, 293 S.E.2d at 783. The Court limited its focus to scenarios in which the parent "*was present* when her child was assaulted but failed to take reasonable steps to prevent the assault." *Id.* at 468, 293 S.E.2d at 782 (emphasis added). In *Noffsinger*, the defendant admitted (four times) that she "was present when . . . the child's injuries occurred." 137 N.C. App. at 426, 528 S.E.2d at 611. This Court explained that "a parent has a duty to take affirmative action to protect her child and may be held criminally liable *if she is present* when someone harms her child and she does not take reasonable steps to prevent it." *Id.* at 426, 528 S.E.2d at 611 (emphasis added). And in *Ainsworth*, the mother watched "her twelve[-]year[-]old child [engage] in intercourse with an adult" and "did not take any reasonable steps to prevent this intercourse." 109 N.C. App. at 143, 426 S.E.2d at 415.

In each case, the parent was present during the abuse, witnessed it, and failed to intervene. But here, the State never proved that Lipscomb was present during Kleist's acts or witnessed them. Val testified that Kleist acted when Lipscomb was "gone"—at the laundromat, in the bathroom, or asleep. Luke testified that "[s]ometimes [Lipscomb] was [awake] and sometimes she was asleep" but never that she witnessed anything and then failed to intervene.

And even if the parental "special duty" doctrine could apply here, the State forfeited any reliance on it. It did not develop this theory at trial[4] or request a "special duty" instruction, and the trial court did not

4. The State mentioned this theory only once—while the jury was out during argument on Lipscomb's motion to dismiss—when it stated that Lipscomb "ha[d] an affirmative duty to protect her children."

give one. "[T]he State did not advance th[is] argument[ ]" below, so it is "waived" and "not properly before this Court." *State v. Romano*, 369 N.C. 678, 693, 800 S.E.2d 644, 654 (2017) (citation omitted); *see also State v. Quick*, 226 N.C. App. 541, 543, 739 S.E.2d 608, 610-11 (2013) (declining to address the State's argument when "it was not raised at the trial court hearing"). Beyond that, the jury in *Walden* received explicit instructions on this parental "special duty" theory. *Walden*, 306 N.C. at 471, 293 S.E.2d at 784. Not so here. The State cannot now rely on this doctrine to sustain Lipscomb's conviction.

Finally, the State claims that Lipscomb "should have known that Kleist was sexually abusing her children." But "should have known" is not enough. *In re C.B.C.B.* makes this clear. 379 N.C. 392, 866 S.E.2d 434 (2021). There, our Supreme Court examined whether a mother had aided and abetted her boyfriend's murder of her son. *Id.* The trial court found that the mother "knew or should have known of the extreme risk" her boyfriend posed. *Id.* at 403, 866 S.E.2d at 442. The Supreme Court acknowledged this finding showed actual knowledge when "read in context," but rejected the "should have known" language as "an inaccurate statement of law." *Id.* at 404, 866 S.E.2d at 442. A parent, the Court explained, "has knowingly aided the perpetrator's commission of the harm," when that parent "has actual knowledge of harm to his or her child and fails to reasonably protect that child from harm." *Id.* at 403, 866 S.E.2d at 442 (citing *Walden*, 306 N.C. at 473-76, 293 S.E.2d at 785).

Substantial evidence does not support the mental-state requirement.

In short, the State failed to present substantial evidence that Lipscomb aided and abetted Kleist in committing statutory rape under Section 14-27.23(a) or statutory sexual offense with a child under Section 14-27.28(a). We vacate those convictions.

2. Felony Child Abuse Under Section 14-318.4(a2)

[2] We now turn to Lipscomb's conviction for two counts of felony child abuse under North Carolina General Statute Section 14-318.4(a2). That provision states: "Any parent or legal guardian of a child less than 16 years of age who commits or allows the commission of any sexual act upon the child is guilty of a Class D felony." N.C. Gen. Stat. § 14-318.4(a2) (2023).

According to North Carolina Pattern Jury Instruction 239.55B—which the trial court gave here—a person is guilty under Section 14-318.4(a2) if (1) she's a "parent or legal guardian of [the] child"; (2) her child is "less than 16 years" old; and (3) she "commits or allows the commission of any sexual act" on her child. N.C.P.I.–Crim. 239.55B. Lipscomb does not contest the first two elements, so we proceed to the third.

Element three has two components. First, "commits or allows the commission of"—in legalese, the actus reus, or "[t]he wrongful deed that comprises the physical components of [the] crime." *State v. Barnes*, 229 N.C. App. 556, 563, 747 S.E.2d 912, 918 (2013) (citation omitted). Second, "any sexual act." Section 14-318.4(a2) does not define "sexual act," nor is it defined elsewhere in the subchapter. Here, the trial court instructed the jury that a sexual act may include "fellatio"; "anal intercourse"; and "an immoral, improper, or indecent touching or act by . . . Kleist upon the child or inducement by . . . Kleist of an immoral or indecent touching by the child for the purpose of arousing or gratifying sexual desire." No one disputes that instruction.

Lipscomb instead challenges the meaning of "allows" in Section 14-318.4(a2). She contends that "allows" is "equivalent to aiding and abetting" and that the State "failed to present substantial evidence that [she] allowed Kleist to rape and sexually assault her children." The State counters in conclusory fashion that the evidence satisfies the statute and was "sufficient to deny [Lipscomb's] motion to dismiss."

This is an issue of first impression. Subsection (a2) was added to Section 14-418.4 in 1983 and remains substantially unchanged. *Compare* An Act Entitled the Child Protection Act of 1983, ch. 916, § 1, 1983 N.C. Sess. Laws 1265 *with* N.C. Gen. Stat. § 14-318.3(a2) (2023). Despite its four decades on the books, no published decision has addressed what "allows" means under this provision.[5]

Our "principal goal" in "statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d

---

5. Lipscomb points to one unpublished case from this Court addressing "allows" under Section 14-318.4(a2): *State v. Hunter*, 2002 N.C. App. LEXIS 2333, No. COA01-1126, at *1 (Aug. 6, 2002) (unpublished). *Hunter*, however, did not engage with Section 14-318.4(a2)'s text. Instead, it relied primarily on the parents' "duty to protect and provide for their minor children." *See id.* at *13-14 (citing *State v. Walden*, 306 N.C. 466, 473, 293 S.E.2d 780, 785 (1982)). Without examining what "allows" means, *Hunter* held that the trial court did not err in denying a motion to dismiss where "[t]he sum of the evidence indicate[d] [that the] defendant was aware, or should reasonably have been aware, that her daughters were in danger of molestation." *Id.* at *19. But statutory interpretation "must begin with an examination of the relevant statutory language." *N.C. Dep't of Revenue v. Philip Morris USA, Inc.*, 388 N.C. 181, 187, 919 S.E.2d 175, 180 (2025) (citation omitted). We are not bound by our unpublished decisions and decline to follow *Hunter*'s approach. N.C. R. App. P. 30(e).

513, 517 (2001). "The best indicia of [legislative intent is] the language of the statute" itself. *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980). We thus "begin with an examination of the relevant statutory language." *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 547, 809 S.E.2d 853, 858 (2018). And when this language "is clear and . . . [un]ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *State v. Watterson*, 198 N.C. App. 500, 505, 679 S.E.2d 897, 900 (2009).

We first address Lipscomb's argument that "allows" is "equivalent to aiding and abetting." These terms have different meanings. As noted above, to "aid and abet" means that the defendant "knowingly advised, instigated, encouraged, procured, or aided" another person "to commit th[e] crime" and the defendant's "actions or statements caused or contributed" to the crime's commission. *Melvin*, 364 N.C. at 592, 707 S.E.2d at 632 (quoting *Goode*, 350 N.C. at 260, 512 S.E.2d at 422). Someone who advises, instigates, encourages, procures, or aids another in committing a crime no doubt "allows" that crime to happen. But aiding and abetting requires some sort of affirmative action promoting or encouraging the crime's commission. The term "allow," by contrast, covers a *failure* to act when the defendant should act.

We now examine the plain meaning of "allows." Courts "consult dictionaries for the purpose of determining the plain meaning of statutory terms." *State v. Fletcher*, 370 N.C. 313, 327, 807 S.E.2d 528, 538 (2017). The most common definition of "allows" is "[t]o let do or happen; permit." *Allow*, The American Heritage Dictionary (2d ed. 1982). The dictionary states that "allow" "implies refraining from any hindrance," while "permit" suggests "authoritative consent." *Id.* Put differently: to allow something is to refrain from stopping it. *See* Bryan A. Garner, *Garner's Modern English Usage* 39 (4th ed. 2016) (noting that "[a]llow suggests merely the absence of opposition").

Two points follow from this definition. First, one cannot "allow" what one does not know about. To "let" something happen requires awareness it is happening. *Allow*, The American Heritage Dictionary (2d ed. 1982). Second, one cannot allow what one lacks the capacity to prevent. As the dictionary put it, "[i]nherent in . . . [allow] is capacity to prevent an act." *Id.* So to "allow[ ] the commission of any sexual act" on a child, a parent must have reason to believe another person will sexually abuse the child, be in the position to stop it, and fail to take any action to protect the child. N.C. Gen. Stat. § 14-318.4(a2).

But one question remains: when does a parent "allow" ongoing abuse? Must she witness each specific act as it occurs? Or does learning about past abuse create a duty to prevent future abuse? The plain meaning supplies the answer. If a parent knows sexual abuse has occurred and may continue, and she does nothing to stop it, she is "let[ting it] . . . happen"—she is "refraining from any hindrance." *Allow*, The American Heritage Dictionary (2d ed. 1982). That is what "allow" means.

The statutory context confirms this reading. "[W]ords in a statute are not construed in isolation[.]" *State v. Hill*, 291 N.C. App. 633, 640, 896 S.E.2d 216, 222 (2023); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) (imploring judges "to consider the entire text, in view of its structure and of the physical and logical relation of its many parts"). Section 14-318.4(a2) creates two distinct offenses: "commit[ting] *or* allow[ing] the commission of any sexual act upon [a] child." N.C. Gen. Stat. § 14-318.4(a2) (emphasis added); *see also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* at 116 ("Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives."). "Commits" covers the parent who perpetrates the sexual act herself. "Allows" must mean something different, or it would be surplusage. *State v. Coffey*, 336 N.C. 412, 417, 444 S.E.2d 431, 434 (1994) ("[A] statute should not be interpreted in a manner which would render any of its words superfluous." (citation omitted)).

What "allows" covers, then, is a parent who knows someone has committed sexual acts on the child in the past or has engaged in a course of conduct of sexual acts on the child yet does nothing to prevent future abuse. If "allows" required physical presence during each act, the statute would fail to reach conduct squarely within its scope: a parent who learns sexual acts have occurred or may occur and does nothing to prevent further acts. Such a parent has knowledge. She has the capacity to intervene. And she is "let[ting] [it] happen" by doing nothing. *Allow*, The American Heritage Dictionary (2d ed. 1982). But under a presence requirement, she would escape liability simply because she was not physically present when the acts occurred. The legislature could not have intended this absurd result. *See State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Off.*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978) ("In construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results.").

A parent thus "allows the commission of any sexual act" under Section 14-318.4(a2) when she: (1) has actual knowledge that a sexual act on her child has occurred or is occurring; (2) has the capacity to prevent further sexual acts; and (3) fails to take reasonable action to protect her child, thereby letting such acts continue. Physical presence during each act is not required. What matters is knowledge and failure to intervene.

Here, viewing the evidence in the light most favorable to the State, substantial evidence supports Lipscomb's Section 14-318.4(a2) conviction regarding Val. *See Miles*, 222 N.C. App. at 599, 730 S.E.2d at 822 (citations omitted).

Val testified that she told Lipscomb about Kleist's conduct. This shows that Lipscomb had actual knowledge Kleist had committed sexual acts on her daughter. Val also testified that the acts happened "very often" *after* she told Lipscomb. The jury could therefore reasonably infer that Kleist's sexual acts continued after Lipscomb learned about them.

Lipscomb also had the capacity to prevent further sexual abuse. When she learned of the sexual abuse, she could have removed Val from Kleist's presence, reported the conduct to authorities, or sought help from family members immediately. The record contains no evidence suggesting that she lacked the ability or means to intervene.

Finally, there was no evidence that Lipscomb took any action to protect Val after learning of Kleist's sexual acts. She did not report to authorities, remove Val from the home, or otherwise intervene. By "refraining from any hindrance," *Allow*, The American Heritage Dictionary (2d ed. 1982), despite knowing sexual acts had occurred and having the capacity to prevent further acts, Lipscomb "allow[ed] the commission of [a] sexual act" on Val under Section 14-318.4(a2). N.C. Gen. Stat. § 14-318.4(a2).

Lipscomb nonetheless insists that she could not have "allowed" sexual acts that occurred in her absence or while she was asleep. This argument succeeded as to her aiding and abetting convictions under Sections 14-27.23(a) and 14-27.28(a) because "aiding and abetting" differs from "allow[ing]." Section 14-318.4(a2) does not require Lipscomb to personally witness the abuse or be physically present during each act. The phrase "[a]llows the commission of any sexual act" encompasses permitting ongoing conduct by continuing to grant Kleist unsupervised access to Val in the same place and circumstances where Kleist had previously abused her. Once Lipscomb knew Kleist had committed sexual acts on Val, the law required her to prevent further abuse. Whether later incidents occurred in her presence or absence, while she was awake or asleep, makes no difference. By doing nothing after gaining knowledge, she allowed Kleist's conduct to continue.

The trial court did not err in denying Lipscomb's motion to dismiss the felony child abuse charge as to Val.

But the evidence as to Luke differs critically. The State presented no substantial evidence that Lipscomb "allow[ed]" any sexual acts on Luke because it failed to prove that she knew Kleist had committed them. Neither Luke nor Val testified that Lipscomb knew about the sexual acts on Luke. Luke testified that he never told Lipscomb what happened:

> [Kleist's Counsel:] You said that after it happened, you never told . . . Lipscomb about it?
>
> [Luke:] Yes.
>
> [Kleist's Counsel:] All right. And you said that you did not tell . . . Lipscomb about it because she was asleep; is that right?
>
> [Luke:] Yes.

One cannot "allow" what one does not know about. Again, the plain meaning of "allow"—"to let do or happen; permit"—requires awareness of the conduct being permitted. *Allow*, The American Heritage Dictionary (2d ed. 1982). Without knowledge, there can be no allowing.

Still, the State claims that Lipscomb "could easily have heard or seen Kleist abusing her children" because "one could see from one end of the camper to the other." But speculation cannot substitute for evidence of actual knowledge. "If . . . the evidence i[s] sufficient only to raise a suspicion or conjecture as to whether the offense charged was committed, the motion [to dismiss] should be allowed even though the suspicion so aroused by the evidence is strong." *Evans*, 279 N.C. at 453, 183 S.E.2d at 544. To infer that Lipscomb knew about the sexual acts on Luke based solely on the camper's layout—despite Luke's testimony that Lipscomb was asleep and he never told her—requires "pure surmise." *Ham*, 238 N.C. at 98, 76 S.E.2d at 349.

Without evidence that Lipscomb knew Kleist committed sexual acts on Luke, she could not have "allow[ed]" them under Section 14-318.4(a2). We vacate her conviction on that count.

In sum, the trial court did not err in denying Lipscomb's motion to dismiss the felony child abuse charge as to Val. It did, however, err in denying her motion to dismiss the felony child abuse charge as to Luke. We thus vacate that conviction.

B. Expert Testimony

[3] Kleist and Lipscomb[6] argue that the trial court committed plain error by admitting Hill's testimony that "the absence of physical injuries 'should in no way lessen any concern[ ] for sexual abuse.' " Hill stated in both her report and testimony, that "[g]iven the overwhelming fact that the majority of children who disclose sexual abuse have normal genital examinations, the absence of injuries on the examination should in no way lessen any concern[ ] for sexual abuse." Defendants maintain that this testimony "invaded the jury's province by telling the jurors" how to weigh the evidence about "a lack of physical injuries." We disagree.

To preserve an issue for appellate review, a party must generally "raise the issue and secure a ruling from the trial court." *State v. Reber*, 386 N.C. 153, 157, 900 S.E.2d 781, 785 (2024) (citing N.C. R. App. P. 10(a)(1)). For evidentiary challenges, "this typically requires the party challenging the evidence . . . to make a timely objection." *Id.* Without an objection, the party "waive[s] the right to raise the alleged error on appeal." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (citing *State v. Oliver*, 309 N.C. 326, 334, 307 S.E.2d 304, 311 (1983)). Because Defendants failed to object, we review only for plain error. *Id.*

Plain error review "exists for the rare cases where the harshness of this preservation rule vastly outweighs its benefits." *Reber*, 386 N.C. at 158, 900 S.E.2d at 786 (citation omitted). Defendants must show: (1) "a fundamental error occurred at trial"; (2) "absent the error, the jury probably would have returned a different verdict"; and (3) this is an "exceptional case" warranting plain error review. *Id.*

We begin with the first requirement. Defendants argue that Hill's testimony violated *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002) (per curiam) and its progeny by improperly vouching for the children's credibility. They invoke the general rule that one witness cannot "vouch for the veracity of another witness." *State v. Robinson*, 355 N.C. 320, 335, 561 S.E.2d 245, 255 (2002). This rule exists because "the truthfulness of a particular witness should be determined by the jury rather than by a witness for one party or the other." *State v. Caballero*, 383 N.C. 464, 475, 880 S.E.2d 661, 669 (2022). So by letting one witness vouch for another's credibility, Defendants contend, the trial court improperly prevented

6. Lipscomb incorporates by reference Kleist's plain error arguments. N.C. R. App. P. 28(f).

jurors from “drawing [their] own conclusions from the evidence.” *State v. White*, 154 N.C. App. 598, 605, 572 S.E.2d 825, 831 (2002). Because (1) there “is precedent for holding that testimony affecting a witness’s credibility is plain error,” and (2) this error “infringed so clearly on the jury’s fact-finding role,” Defendants insist that this alleged error was “fundamental and exceptional.”

Our Supreme Court applied these vouching principles in *Stancil*, 355 N.C. at 266, 559 S.E.2d at 788. There, after a “thorough examination and a series of tests revealed no physical evidence of sexual abuse,” the trial court still allowed a pediatrician to testify that the victim was “sexually assaulted” and suffered from emotional, physical, and sexual “maltreatment.” *Id.* at 267, 559 S.E.2d at 789. The pediatrician based her opinion on “two examinations of the child and her review of” a psychologist’s “in-depth interview with the child.” *Id.* The Court held that “[i]n a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred.” *Id.* at 266, 559 S.E.2d at 789. “[A]bsent physical evidence supporting a diagnosis of sexual abuse,” the Court explained, “such testimony is impermissible opinion regarding the victim’s credibility.” *Id.* at 266-67, 559 S.E.2d at 789. Yet *Stancil* made clear that “an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.” *Id.* at 267, 559 S.E.2d at 789.

Hill’s testimony fell squarely within *Stancil*’s boundaries. Unlike the pediatrician in *Stancil* who testified that sexual abuse had “*in fact* occurred,” Hill never opined that either Val or Luke was actually abused. *Id.* at 266, 559 S.E.2d at 789. She confirmed only that the absence of injuries “neither concludes nor rules out sexual assault.” This statement only told the jury that normal physical findings do not definitively prove or disprove abuse.

Hill also laid a proper scientific foundation for her testimony. She testified about her extensive qualifications: For instance, Hill stated that she had conducted nearly 2,500 forensic examinations and was the forensic nurse program director for “Protective Services.” The trial court accepted her as an expert in “the field of forensic sexual assault examinations.” She then explained the medical science: children’s bodies “can heal quickly after a genital injury,” making the absence of injuries medically inconclusive. This scientific explanation distinguishes this case from situations where experts offer bare conclusions without a medical basis. *See State v. Davis*, 265 N.C. App. 512, 517, 828 S.E.2d 570, 574 (2019) (finding error where the nurse's testimony "was not based on any science or other medical knowledge she may have possessed").

Defendants, however, raise two specific objections to Hill's phrasing. First, Defendants object to Hill's use of "overwhelming fact" to describe how commonly sexual abuse victims have normal physical examinations. They think this told "the jurors how much weight to give" the absence of physical evidence. But this merely describes a statistical reality Hill indicated was based on her "training and experience" and "medical literature." This differs markedly from an opinion about whether these particular children were abused.

Second, Defendants challenge Hill's statement that the absence of physical injuries "should in no way lessen any concern[ ] for sexual abuse." They argue that this improperly "presumed that there was a 'concern for sexual abuse' " in the first place and told jurors how to weigh the absence of physical evidence. In their view, this language crossed the "line carefully drawn" in *Davis*, 265 N.C. App. at 512, 828 S.E.2d at 570, and *Stancil* because it did more than say "an absence of physical injury is consistent with sexual abuse"—which they concede "is permissible."

But Hill's statement did not improperly tell jurors how to weigh the evidence. Read in context, Hill was explaining that normal physical findings are medically inconclusive: they neither prove nor disprove abuse. The phrase "should in no way lessen any concern" instructs jurors not to draw the false inference that normal physical findings rule out abuse. *Davis* found this type of expert testimony permissible—testimony clarifying "that the lack of physical evidence does not necessarily rule out that sexual abuse may have occurred" and "might aid the trier of fact to understand that the lack of physical evidence does not necessarily mean that the defendant is not guilty." *Id.* at 517, 828 S.E.2d at 574. Hill's testimony did the same; it made clear that normal examinations "neither conclude nor rule out" abuse.

Importantly, Hill never commented on the children's credibility or truthfulness. She examined Val and Luke and found normal physical examinations. Her testimony addressed only what those normal findings medically signify—nothing more.

The cases Defendants cite are distinguishable. In *State v. Towe*, the victim's exam revealed no physical findings of sexual abuse. 366 N.C. 56, 60, 732 S.E.2d 564, 566 (2012). Still, the expert testified that the victim was "in the category" of 70-75% of sexually abused children who show no abnormal findings. *Id.* at 60, 732 S.E.2d at 567. This effectively told the jury that the victim had been abused despite no physical evidence. The Court thought this improper because "the only bases for [the expert's] conclusory assertion that the victim had been sexually abused were the victim's history" and statements from others—"evidence that, standing alone, [wa]s insufficient to support an expert opinion that a child was sexually abused." *Id.* at 62, 732 S.E.2d at 568. Here, Hill did not categorically label the children as abuse victims; she simply clarified what physical findings can and cannot medically establish.

In *State v. Frady*, the expert testified that the victim's "disclosure was consistent with sexual abuse." 228 N.C. App. 682, 685, 747 S.E.2d 164, 167 (2013). But the "alleged 'disclosure' " was the victim's "description of the abuse." *Id.* at 685, 747 S.E.2d at 167. And the expert based her opinion only on "the consistency of [the victim's] statements over time," "the fact that [the victim] could provide sensory details," and that the victim's "knowledge of the sexual act [wa]s beyond her developmental level." *Id.* at 686, 747 S.E.2d at 167. This Court declared that testimony was improper because it "essentially expressed [the expert's] opinion that [the victim] is credible." *Id.* The expert had not "personally examined or interviewed" the victim; she based her opinion entirely on what the victim said. *Id.* Hill, by contrast, personally examined both children and testified only about the medical significance of her physical findings.

Because no fundamental error occurred, Defendants cannot satisfy the first prong for plain error review.

Even if an error occurred, Defendants cannot demonstrate prejudice. *Reber* requires showing that "the jury probably would have reached a different result" without the challenged evidence—that acquittal was "significantly more likely than not." *Reber*, 386 N.C. at 159, 900 S.E.2d at 787.

Defendants cannot meet this burden. The children provided detailed testimony about multiple instances of abuse. Luke testified that Kleist made him touch Kleist's penis, inserted his penis into Luke's mouth and ejaculated, and had anal sex with him. Val testified that Kleist had vaginal intercourse with her, digitally penetrated her anus, had anal sex with her, inserted a bottle into her vagina and anus, made her perform oral sex on him, and performed oral sex on her. Their accounts were corroborated by evidence of their outcries to family members and behavioral changes observed by multiple witnesses.

The trial court properly instructed the jury on evaluating expert testimony and witness credibility, specifically reminding the jurors that they were "not bound" by expert opinions and should consider whether the opinion was "reasonable" and "consistent with other believable evidence." Given this substantial evidence and proper instructions, Defendants have not shown that the jury "probably" would have acquitted them absent Hill's medically accurate explanation. At most, they have shown that acquittal was possible, which falls far short of the plain error standard. *See id.* at 162, 900 S.E.2d at 789 ("[I]t is certainly *possible* that the jury would have acquitted . . . . But [the defendant] has not shown that the jury *probably* would have done so.").

The trial court did not commit plain error in admitting Hill's testimony.

III. Conclusion

The trial court erred in denying Lipscomb's motion to dismiss her convictions for aiding and abetting statutory rape and statutory sexual offense under Sections 14-27.23(a) and 14-27.28(a). No substantial evidence showed that Lipscomb satisfied either the conduct or mental state requirements for aiding and abetting. We vacate those convictions.

The trial court also erred in denying Lipscomb's motion to dismiss one count of felony child abuse under Section 14-318.4(a2) as to Luke. Without substantial evidence that Lipscomb knew Kleist had committed sexual acts on Luke, she could not have "allowed" those acts. We vacate that conviction. But the trial court did not err in denying Lipscomb's motion to dismiss the felony child abuse charge as to Val. Substantial evidence indicated that Lipscomb learned of Kleist's sexual acts on Val and took no action to prevent further acts.

Finally, the trial court did not err in admitting Hill's testimony. She explained the medical significance of the children's physical examinations without opining that abuse had, in fact, occurred. Her testimony fell within *Stancil*'s permissible boundaries.

VACATED IN PART; NO ERROR IN PART.

Judges CARPENTER and WOOD concur.

STATE OF NORTH CAROLINA
v.
DARION TYQUAN McKOY

No. COA25-195

Filed 3 December 2025

Sentencing—felony possession of marijuana—amount requirement —omitted from jury instruction—remand for resentencing

In a prosecution for various crimes including fourteen drug-related charges, the trial court erred in entering judgment against defendant on the charge of felony possession of a schedule VI controlled substance (in this case, marijuana) where, in its jury instruction on the offense, the court omitted the requirement that the jury find defendant had possessed more than 1.5 ounces of marijuana. By failing to mention the amount requirement for the felony offense, the court essentially instructed the jury on simple possession of marijuana—a misdemeanor—and, therefore, the jury's guilty verdict was strictly for simple possession. Although defendant did not object to the instruction at trial, the court's error was still reviewable on appeal as a sentencing error. Ultimately, the felony conviction was vacated and the case was remanded for resentencing on the misdemeanor offense.

Appeal by Defendant from Judgments entered 10 May 2024 by Judge Jessica Locklear in New Hanover County Superior Court. Heard in the Court of Appeals 24 September 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Lisa B. Finkelstein, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Darion Tyquan McKoy (Defendant) appeals from Judgments entered 10 May 2024, finding him guilty of Felony Possession of a Schedule VI Controlled Substance (Marijuana), Possession with Intent to Manufacture, Sell, or Deliver a Schedule VI Controlled Substance

(Marijuana), Felony Possession of a Schedule II Controlled Substance (Cocaine), Possession of a Stolen Firearm, Fleeing to Elude Arrest, Hit and Run, Unsafe Movement, and Improper Turn.[1] The Record before us tends to reflect the following:

On 3 July 2023, Defendant was indicted in 23 CRS 287848, 23 CRS 287865, 23 CRS 287860, and 23 CRS 290485 on twenty-two charges, including fourteen drug-related charges. Defendant was indicted on three additional charges in 23 CRS 289771 on 23 October 2023. In total, Defendant was indicted on twenty-five charges.

Defendant pleaded not guilty to all charges. At trial, the State voluntarily dismissed the charge of Possession of a Schedule I Controlled Substance (MDMA) with Intent to Manufacture, Sell, or Deliver. The jury was instructed on the remaining twenty-four charges. Relevant to this appeal, the trial court instructed the jury on the charge of Felony Possession of a Schedule VI Controlled Substance (Marijuana) in 23 CRS 287848 as follows:

> The defendant has been charged with possessing marijuana, a controlled substance. For you to find the defendant guilty of this offense, the State must prove beyond a reasonable doubt that the defendant knowingly possessed marijuana.
>
> Marijuana is a controlled substance. A person possesses marijuana when a person is aware of its presence and has both the power and intent to control the disposition or use of that substance. If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant knowingly possessed a controlled substance, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt, it would be your duty to return a verdict of not guilty.

The jury found Defendant guilty on eight charges: Felony Possession of a Schedule VI Controlled Substance (Marijuana) in 23 CRS 287848; Fleeing to Elude Arrest, Possession of a Schedule II Controlled Substance (Cocaine), Possession with Intent to Manufacture, Sell, or Deliver a Schedule VI Controlled Substance (Marijuana), Fleeing to

1. The Judgments contained in the Record are not file-stamped. However, the Statement of Organization of Trial Tribunal in the settled Record reflects the Judgments were, in fact, entered.

Elude Arrest, Unsafe Movement, and Improper Turn in 23 CRS 287860; and Possession of a Stolen Firearm in 23 CRS 290485.

The trial court entered two Judgments: one Judgment in 23 CRS 290485 for Possession of a Stolen Firearm and a second Judgment consolidating Defendant's seven other convictions into 23 CRS 287860. The trial court sentenced Defendant to eight to nineteen months of imprisonment in the Judgment for Possession of a Stolen Firearm. That sentence was suspended; Defendant was instead placed on twenty-four months of supervised probation. In the consolidated Judgment, the trial court sentenced Defendant to seven to eighteen months of imprisonment.

Defendant timely provided Notice of Appeal in open court.

Issue

The issue on appeal is whether the trial court erred by entering Judgment against Defendant on Felony Possession of a Schedule VI Controlled Substance.

Analysis

In North Carolina, marijuana is a schedule VI controlled substance. N.C. Gen. Stat. § 90-94(b)(1) (2023). Simple possession of marijuana is a class 3 misdemeanor. *Id.* § 90-95(d)(4) (2023). Possession of more than 1.5 ounces of marijuana is a class I felony. *Id.* The distinguishing factor between these two offenses is the amount possessed: simple possession requires evidence the defendant possessed any amount of marijuana; a conviction for felony possession of marijuana, by contrast, requires evidence the defendant possessed more than 1.5 ounces of marijuana. *See State v. Gooch*, 307 N.C. 253, 257, 297 S.E.2d 599, 602 (1982).

On appeal, Defendant challenges only his conviction for Felony Possession of a Schedule VI Controlled Substance. Specifically, Defendant argues the trial court erred in entering Judgment on the offense of Felony Possession because the jury was instructed on Simple Possession of Marijuana, rather than Felony Possession. Defendant asks this Court to vacate the Judgment on Felony Possession and remand for resentencing on the misdemeanor offense of Simple Possession.

In *State v. Gooch*, the jury returned a verdict finding the defendant guilty of "possession of more than one ounce of marijuana." *Id.* at 254, 297 S.E.2d at 600. The defendant's conviction was vacated on appeal because, although the trial court "properly referred to the offense as 'possessing a quantity of marijuana more than one ounce[,]' " the trial court failed to instruct the jury on the amount of marijuana the defendant must have possessed in order to be found guilty of felony possession. *Id.* at 256, 297 S.E.2d at 601.

Here, as in *Gooch*, the trial court did not instruct the jury it was required to find Defendant possessed more than 1.5 ounces of marijuana. Moreover, the verdict sheets merely listed the offense as "possession of [a] Schedule VI controlled substance[,]" and the trial court instructed the jury: "The defendant has been charged with possessing marijuana, a controlled substance." Simply put, nothing in the Record indicates the jury was instructed on the amount possessed.

Generally, "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict[.]" N.C. R. App. P. 10(a)(2) (2024). Defendant, however, has not challenged the trial court's jury instruction on appeal. Rather, Defendant argues, and we agree, the ultimate issue in this case is a sentencing error: the trial court improperly entered Judgment against Defendant on an offense the jury was not instructed on.[2]

The State, in addition to arguing Defendant's argument is not preserved, argues *State v. Davis* controls our analysis in the instant case. 283 N.C. App. 328, 871 S.E.2d 580, 2022WL1311660 (2022) (unpublished). Notably, *Davis* is unpublished, and unpublished decisions of this Court do not constitute controlling legal authority. N.C. R. App. P. 30(e)(3) (2024). Additionally, our decision in *Davis* is readily distinguishable. There, the defendant admitted at trial that he had possessed "5 pounds of marijuana[.]" As such, the amount of marijuana in his possession was not a disputed fact for jury consideration. Here, in contrast, Defendant pleaded not guilty, "and thus did not admit to possession of any amount of marijuana[,]" which is "an essential element for jury determination." *Gooch*, 307 N.C. at 256-577, 297 S.E.2d at 601.

Regardless of any evidence adduced at trial that Defendant possessed more than 1.5 ounces of marijuana, "[i]n failing to submit the amount requirement, as discussed above, the trial court essentially

---

2. Sentencing errors are generally preserved for appellate review even without an objection in the trial court. *See State v. Fleming*, 247 N.C. App. 812, 821, 786 S.E.2d 760, 767 (2016) (" 'An error at sentencing is not considered an error at trial for the purpose of [Appellate] Rule 10(a) because this rule is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal.' " (alteration in original) (quoting *State v. Curmon*, 171 N.C. App. 697, 703, 615 S.E.2d 417, 422 (2005))).

submitted to the jury the offense of simple possession of marijuana . . . and the jury convicted defendant of that offense." *Id.* at 257, 297 S.E.2d at 602. Accordingly, "it follows that the verdict the jury returned must be considered a verdict of guilty of simple possession of marijuana[.]" *Id.* at 258, 297 S.E.2d at 602 (citing N.C. Gen. Stat. § 90-95(a)(3) (1981)).

Thus, because the jury was not charged with finding whether Defendant possessed more than 1.5 ounces of marijuana, the trial court's jury instruction amounted to an instruction on Simple Possession of Marijuana. *Id.* at 257, 297 S.E.2d at 602. Therefore, the jury found Defendant guilty of Simple Possession of Marijuana. Consequently, the trial court erred in sentencing Defendant on Felony Possession of Marijuana.

Conclusion

Accordingly, for the foregoing reasons, we vacate Defendant's conviction for Felony Possession of a Schedule VI Controlled Substance (Marijuana) in the consolidated Judgment in 23 CRS 287860 and remand for resentencing on the misdemeanor offense of Simple Possession of Marijuana.[3] *See State v. Stokes*, 367 N.C. 474, 479, 756 S.E.2d 32, 36 (2014) ("When the actual instructions given are sufficient to sustain a conviction on a lesser included offense, we consider the conviction a verdict on the lesser charge and then remand for appropriate sentencing." (discussing *Gooch*)); *State v. Hardy*, 242 N.C. App. 146, 160, 774 S.E.2d 410, 420 (2015) ("When the trial court consolidates multiple convictions into a single judgment but one of the convictions was entered in error, the proper remedy is to remand for resentencing when the appellate courts 'are unable to determine what weight, if any, the trial court gave each of the separate convictions . . . in calculating the sentences imposed upon the defendant.' " (alteration in original) (quoting *State v. Moore*, 327 N.C. 378, 383, 395 S.E.2d 124, 127-28 (1990))).

REMANDED FOR RESENTENCING.

Judges ZACHARY and WOOD concur.

3. Defendant does not challenge his other convictions. As such, we leave those undisturbed.

STATE OF NORTH CAROLINA
v.
FRANKLIN JAMES MOSLEY, Defendant

No. COA25-53

Filed 3 December 2025

Kidnapping—first-degree—forced movement between rooms—not inherent in armed robbery—increased danger

In a prosecution for robbery with a dangerous weapon and first-degree kidnapping arising from a home invasion in which defendant shot the victim in the leg, robbed him, and then forced him to move from the living room to a rear bedroom, the State presented substantial evidence of each element of first-degree kidnapping where the victim's forced movement between rooms was not inherent in the robbery; instead, the victim's restraint was a separate and complete act independent from and unnecessary to the robbery and, further, the movement increased the danger to the victim beyond that inherent in the robbery, due to the victim's wounded leg. Therefore, the trial court properly denied defendant's motion to dismiss the kidnapping charge. Further, even if defendant had, more appropriately, preserved a double jeopardy argument—by asking the court to arrest judgment on the kidnapping charge after the jury convicted him of both kidnapping and robbery, which he did not do—the trial court would not have erred by denying a motion to arrest judgment.

Judge ARROWOOD concurring in result only.

Appeal by defendant from judgment entered 5 June 2024 by Judge Joseph N. Crosswhite in Forsyth County Superior Court. Heard in the Court of Appeals 25 September 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Samuel R. Gray, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

DILLON, Chief Judge.

This case presents the question of whether the movement by Defendant Franklin J. Mosely of his robbery victim between rooms constituted a separate and complete act sufficient to sentence Defendant separately for kidnapping or whether the moving of the victim was merely inherent and inevitable to his robbery with a deadly weapon for which he was separately convicted. For the reasoning below, we conclude Defendant received a fair trial, free of reversible error.

I. Background

Defendant went to the victim's home, shot the victim in the leg and the arm, and robbed the victim of his money and personal property. During the robbery Defendant forced the victim to move from the living room to a rear bedroom despite the victim's wounded leg. Defendant was arrested and indicted on multiple charges, including robbery with a dangerous weapon ("RWDW") and first-degree kidnapping. The jury convicted Defendant. Defendant timely appealed.

II. Analysis

Defendant's sole argument on appeal is that the trial court erred when it denied Defendant's *motion to dismiss* the first-degree kidnapping charge. The basis of Defendant's argument is that there was no evidence to show any kidnapping was separate from the robbery. For the reasoning below, we conclude Defendant's argument is misplaced. Specifically, there was clearly sufficient evidence to show Defendant kidnapped the victim; and, therefore, the trial court did not err in submitting the charge to the jury. Indeed, if the kidnapping was inherent with the robbery in this case *and* the jury convicted Defendant of both, the appropriate argument is a Double Jeopardy argument, that the trial court erred by denying a *motion to arrest judgment* on the kidnapping. However, on appeal, Defendant fails to show he asked the trial court to arrest judgment on the kidnapping charge after the jury came back. Notwithstanding Defendant's failure to preserve a Double Jeopardy argument, we conclude no Double Jeopardy violation occurred, as the evidence, in the light most favorable to the State, shows that the kidnapping was not inherent in the robbery.

A. Motion to Dismiss

We review a denial of a motion to dismiss *de novo*. *State v. Cox*, 367 N.C. 147, 151 (2013). "Upon [a] defendant's motion for dismissal, the question . . . is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State* *v. Davenport*, 386 N.C. 454, 460 (2024) (citations omitted). "Substantial evidence is the 'amount . . . necessary to persuade a rational juror to accept a conclusion.' " *State v. Beck*, 385 N.C. 435, 438 (2023) (citations omitted). We view the evidence, and draw "every reasonable inference" from that evidence, in favor of the State. *Id.*

The crime of first-degree kidnapping is committed when:

> (a) [A] person . . . unlawfully confine[s], restrain[s], or remove[s] from one place to another, any person . . .without the consent of such person . . . if such confinement, restraint or removal is for the purpose of:
>
> . . .
>
> (2) Facilitating the commission of any felony . . . or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person[.]

N.C.G.S. § 14-39 (2023).

In this matter, there was clearly sufficient evidence to show Defendant committed the crime of first-degree kidnapping. Indeed, Defendant does not really argue the evidence was insufficient as such. He merely argues the kidnapping was inherent in the robbery. Accordingly, we conclude the trial court did not err by denying Defendant's motion to dismiss the kidnapping charge during the trial.

B. Double Jeopardy

Defendant's argument regarding the trial court's failure to dismiss the kidnapping charge is more appropriately a Double Jeopardy argument, where the focus of Defendant's contention is that Defendant should not be punished for both the kidnapping and robbery the jury found he committed. However, Defendant did not properly preserve his Double Jeopardy argument, as he did not ask the trial court to arrest judgment after the jury came back. *See State v. Mulder*, 233 N.C. App. 82, 86-87 (2014).

Notwithstanding, we note that even if Defendant had requested judgment be arrested on the kidnapping charge, the trial court would not have erred by denying such request.

Our Supreme Court has repeatedly explained that because certain felonies necessarily require some confinement, restraint, or movement of the victim, the General Assembly did not intend for our kidnapping statute to apply to restraint that "is an inherent, inevitable feature of such other felony[.]" *State v. Fulcher*, 294 N.C. 503, 523 (1981); *see also State v. China*, 370 N.C. 627, 633–34 (2018). Constitutional issues are avoided, though, when the restraint "is a separate, complete act, independent of and apart from the other felony." *China*, 370 N.C. at 634 (quoting *Fulcher*, 294 N.C. at 523–24). Restraint is separate, complete, and independent from the other felony if (1) it "exposed [the victim] to greater danger than that inherent in the armed robbery itself" or (2) the victim is "subjected to the kind of danger and abuse the kidnapping statute was designed to prevent." *State v. Pigott*, 331 N.C. 199, 210 (1992) (alterations in original) (citation omitted).

For instance, in *Pigott*, the defendant went to his employer's apartment late at night seeking a loan. *Id.* at 202. After the employer refused, the defendant returned, armed with a gun. *Id.* The defendant then bound the employer's hands and ransacked the apartment. *Id.* After searching for money, the defendant further bound the employer's hands and feet and shot the employer in the head. *Id.*

Our Supreme Court held that there was sufficient evidence of restraint separate from the robbery, reasoning the restraint needed for the armed robbery was the defendant's "threating [of] the victim with the gun[,]" and the subsequent binding of the employer's hands and feet "exposed [the employer to a] greater danger" as it "increase[ed] the victim's helplessness and vulnerability beyond the threat that" permitted the defendant to commit the initial robbery. *Id.* at 210. *See also China*, 370 N.C. at 635–36 (holding that, after the victim was hit and sexually assaulted, there was substantial evidence of restraint for a kidnapping charge when the defendant pulled the victim off of the bed prior to kicking and stomping the victim); *but see State v. Irwin*, 304 N.C. 93, 103 (1981) (holding that restraint—defendant's movement of the victim—was inherent to an attempted armed robbery because it was *necessary* for the victim to be moved to the back of the store to open a safe).

However, it is important to note, that some of our precedent delineates between restraint and movement *prior to or after* a robbery has begun or is completed, *see, e.g.*, *State v. Stokes*, 367 N.C. 474, 482 (2014) (holding there was separate restraint when the victim was ordered to move *after* the armed robbery was complete); *State v. Stokley*, 276 N.C. App. 249, 256 (2021) (explaining the restraint and removal occurred *before* a shooting and robbery), and restraint and movement during an *ongoing* robbery, *see, e.g.*, *State v. Cartwright*, 177 N.C. App. 531, 537 (2006) (holding that the movement of the victim after the robbery began was not sufficient for the kidnapping charge because the victim was not placed in greater danger); *State v. Payton*, 198 N.C. App. 320, 328 (2009) (holding that the victims were not placed in greater danger when they were moved during an ongoing robbery). But the "key question" remains to be whether the victim is exposed to greater danger than what is inherent in the underlying felony or experiences the danger or abuse our kidnapping statute seeks to prevent. *See Pigott*, 331 N.C. at 210 (citation omitted); *China*, 370 N.C. at 634.

Here, Defendant was also convicted of RWDW. The elements of RWDW are: "(1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use, or threatened use of firearms or other dangerous weapon, implements, or means; and (3) a danger or threat to the life of the victim." *State v. Murrell*, 370 N.C. 187, 194 (2017); N.C.G.S. § 14-87 (2023).

To determine whether the entry of judgment on both kidnapping and robbery in this case requires us to view the evidence in a light most favorable to the State. The evidence at trial tended to show as follows: After Defendant entered the victim's home and the two briefly conversed in the living room, Defendant pulled out two handguns and shot the victim's right leg. From there, Defendant took the victim's wallet, the $92 and cards therein, and his cell phone. Defendant again pointed a gun at the victim, ordered him to get up and go to the victim's bedroom, even though the victim had just been shot. Due to the injury, the victim's leg gave out when the victim first attempted to stand and follow Defendant's command. Then, the victim dragged himself along the wall approximately ten to eleven feet until he reached his bedroom. Once there, Defendant ordered the victim to sit down on the bed, and Defendant began searching the victim's closet. After a futile search, the victim offered two gold chains. Defendant took the chains, shot the victim's left arm, and departed.

Here, as was the case in *Pigott*, the restraint that was inherent to Defendant's RWDW was completed by Defendant "threatening [the victim] with the gun." However, by forcing the victim, after shooting him in the leg, to move into another room, Defendant "exposed [the victim to a] greater danger than that inherent in the [RWDW] itself." This is so because the movement increased the victim's "helplessness and vulnerability beyond" what was needed to commit the RWDW: the victim was required to remain under Defendant's supervision, precluding possible escape, earlier medical treatment, or intervention from a passerby, and required the victim to drag himself along the wall from the living room to the bedroom on a badly wounded leg that gave out when the victim first attempted to place weight on it.

To that end, despite the movement occurring during an ongoing robbery, the restraint was sufficient to support the kidnapping charge because of the victim's exposure to a greater danger. Moreover, to commit a RWDW against the victim, it was not necessary for Defendant to relocate the victim from the living room to the bedroom. *Cf. Irwin*, 304 N.C. at 103 ("To accomplish [the] defendant's objective of obtaining drugs it was necessary that [the victim] go to the back of the store to the prescription counter and open the safe.").

Thus, the restraint of the victim was a separate, complete, and independent of the restraint inherent in Defendant's RWDW, and the trial court would not have erred by denying a motion by Defendant to arrest judgment on the kidnapping conviction.

III. Conclusion

Defendant received a fair trial, free of reversible error.

NO ERROR.

Judge MURRY concurs.

Judge ARROWOOD concurs in result only.

CHADWICK ZULEGER, Plaintiff
v.
ROBERT M. CLORE, JR., Defendant/Third-Party Plaintiff
v.
NOELLE ZULEGER LOWRY, and ERIC MELVIN ZULEGER, Third-Party Defendants

No. COA25-160

Filed 3 December 2025

1. Appeal and Error—interlocutory appeal—court-ordered sale of real property—parties' property rights extinguished—substantial right affected

In an appeal from a judgment, entered pursuant to N.C.G.S. § 41-11, ordering that real property be sold with the value of defendant's life estate paid to him and the balance of proceeds invested for the benefit of the remaindermen (plaintiff and third-party defendants)—which was interlocutory because it left plaintiff's waste claim pending—immediate review was proper where the order appealed from affected a substantial right because the order of sale extinguished the property rights of both plaintiff and defendant.

2. Real Property—N.C.G.S. § 41-11—effect of 1927 amendment—independent cause of action for life tenants

In a proceeding that resulted in the entry of an order pursuant to N.C.G.S. § 41-11—ordering that real property be sold, with the value of defendant's life estate paid to him and the balance of proceeds invested for the benefit of the remaindermen (plaintiff and third-party defendants)—the Court of Appeals was bound by the Supreme Court's express holding regarding the effect of the 1927 amendment to the statute: that it established an independent cause of action for life tenants separate from the statute's other provisions.

3. Real Property—N.C.G.S. § 41-11—sale of property and distribution of present value of life estate—permitted

In a proceeding that resulted in the entry of an order pursuant to N.C.G.S. § 41-11—ordering that real property be sold, with the value of defendant's life estate paid to him and the balance of proceeds invested for the benefit of the remaindermen (plaintiff and third-party defendants)—the trial court did not err in concluding that defendant was entitled to the sale of property and a subsequent payout of the value of his life tenancy, less expenses. While the 1927 amendment to the statute only provided for a separate cause of action by life tenants, another provision permitted the distribution of funds received from the sale of property to a life tenant.

Appeal by Plaintiff from judgment entered 5 April 2024 by Judge Alan Z. Thornburg in Haywood County Superior Court. Heard in the Court of Appeals 11 September 2025.

Hyde Brown Wilson PA, by Mark A. Wilson, for Plaintiff and Third-Party Defendants.

Smathers & Smathers, by Patrick U. Smathers, for Defendant/Third-Party Plaintiff.

GRIFFIN, Judge.

Plaintiff Chadwick Zuleger and Third-Party Defendants Noelle Zuleger Lowry and Eric Melvin Zuleger appeal from the trial court's judgment entered on 5 April 2024 ordering property to be sold, the value of Defendant's life estate be paid to him, and the balance be invested for Plaintiff and Third-Party Defendants as the remaindermen. Plaintiff and Third-Party Defendants contend the trial court committed several errors. We disagree and affirm the trial court.

I. Factual and Procedural Background

On 10 June 2019, Plaintiff filed a complaint against Defendant alleging waste of property located at 264 Doctors Drive, Clyde, North Carolina 28721, recorded in Deed Book 626, page 614, Haywood County Registry ("the property"). Upon the death of Latane J. Clore, owner of the property, the property was devised to Defendant, Latane Clore's husband, as life tenant, and then to Plaintiff, Latane Clore's son, upon Defendant's death. On 15 August 2019, Defendant answered and filed a counterclaim against Plaintiff for sale of the property under N.C. Gen. Stat. § 41-11, alleging the income from the property "is insufficient to pay the taxes and upkeep of the real property." In addition, Defendant filed a third-party complaint of the same section 41-11 claim for sale of the property against two additional Third-Party Defendants. Plaintiff and Third-Party Defendants answered and motioned to dismiss the section 41-11 action on 3 September 2019.[1] On 6 January 2020, District Court Judge Donna F. Forga transferred the section 41-11 action to the Clerk of Superior Court.

1. For ease of reading and clarity, Plaintiff and Third-Party Defendants will be hereinafter referred to collectively as Plaintiff unless within a quotation.

On 12 April 2021, the Clerk of Superior Court entered an order denying Defendant's section 41-11 claim, finding, *inter alia*, the property was not subject to section 41-11. Defendant appealed, and Superior Court Judge Mark E. Powell set aside the 12 April 2021 Order and remanded the section 41-11 action to the Clerk of Superior Court for further hearing and proceedings. On 6 March 2023, the Clerk of Superior Court found that it was "in the best interest of all the parties that the [property] be sold at a private sale and the proceeds be distributed and invested pursuant to [section] 41-11." Further, the Clerk of Superior Court ruled "after all costs of sale, the value of Defendant's life estate shall be determined and invested pursuant to [section] 41-11, and the balance distributed equally to the Plaintiff and Third Party Defendants, being those who own the remainder interest in said real property." The Clerk of Superior Court based its conclusions on the following findings of fact:

> 1. That Defendant is a citizen and resident of the County of Haywood, State of North Carolina. That he is the former husband of Latane Clore, who deceased on the 23rd day of June, 2014. That at the time of her death, Latane Clore was the owner of certain real property as described in Deed Book 626, Page 614, Haywood County Registry. That the Last Will and Testament of Latane Clore was admitted to probate on the 28th day of February, 2019, in Haywood County File No. 2014 E 380. The said Will provides that Defendant is to have a life estate in the real property described in Deed Book 626, Page 614, Haywood County Registry, which is the subject matter of this action. That said real property is a 3 bedroom, 2 bath, ranch style house. That at the time of the death of Latane Clore, the house was in a deteriorating condition, needing necessary maintenance and repairs, and since her death, has continued to need repair and maintenance, and continues to deteriorate. That Defendant is retired, suffers from poor health, whose source of income is social security. That Defendant has managed to pay the taxes and insurance on said real property, but since the death of Latane Clore, has not had sufficient income to maintain and make necessary repairs for said real property. That Defendant attempted to obtain a loan to do repairs, but has not able to qualify for a loan. That in addition to being the residence of [] Defendant, the home generates rental income in the amount of $700.00 per month, which is paid to [] Defendant. That due to the lack of Defendant's social security and rental income,

> Defendant, as life tenant, cannot maintain and repair the premises as needed to keep it in a good state of order and repair.
>
> 2. That the current tax value of said real property is $315,100.00.
>
> 3. That the current needs for repair and maintenance to said real property are at a minimum in excess of $25,000.00. That all Parties acknowledge the repairs will be substantial.
>
> 4. That Plaintiff and Third Party Defendants are children of the late Latane Clore and owners of the remainder interest in that real property described in Deed Book 626, Page 614, Haywood County Registry, pursuant to the Last Will and Testament of Latane Clore. That since the death of Latane Clore, [] Plaintiff and Third Party Defendants have not contributed any funds for the maintenance, repairs or upkeep of the premises, nor paid any taxes and insurance.
>
> 5. That due to the lack of income of [] Defendant and income produced by the real property, it is in the best interest of all the parties that said real property be sold pursuant to N.C.G.S. 41-11, to prevent continued deterioration of said real property and loss in value, and the same is in the best interest of all the Parties.

Plaintiff appealed the 6 March 2023 judgment to superior court. On 5 April 2024, Superior Court Judge Alan Z. Thornburg adopted the Clerk of Superior Court's findings of fact in full, but modified the conclusions of law, ordering that the property still be sold but "after all costs of sale, the value of Defendant's life estate shall be determined and paid to life tenant, [Defendant], in fee simple, and the balance shall be invested for the benefit of [] Plaintiff and Third[-]Party Defendants being the remaindermen, as provided in [section] 41-11."

Plaintiff appealed to this Court.

II. Analysis

[1] Before we address Plaintiff's arguments, we must determine if we have jurisdiction. *Lannan v. Bd. of Governors of Univ. of N.C.*, 285 N.C. App. 574, 581, 879 S.E.2d 290, 297 (2022).

Plaintiff concedes that the judgment in this case is interlocutory as the waste claim is outstanding. "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Can Am S., LLC v. State*, 234 N.C. App. 119, 122, 759 S.E.2d 304, 307 (2014) (quoting *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990)). "However, a party may appeal an interlocutory order if either: (1) the trial court certifies there is no just reason to delay appeal under N.C. Gen. Stat. § 1A-1, Rule 54(b) or (2) if delaying the appeal would affect a substantial right." *Bolden v. V & A Invs., LLC*, 300 N.C. App. 346, 349, 921 S.E.2d 558, 560 (2025) (quoting *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994)). The trial court has not certified this case for appeal; however, "our courts have recognized the . . . deprivation of a significant property interest to be substantial rights." *Hanna v. Wright*, 253 N.C. App. 413, 415, 800 S.E.2d 475, 476 (2017) (quoting *Bessemer City Express, Inc. v. City of Kings Mountain*, 155 N.C. App. 637, 639, 573 S.E.2d 712, 714 (2002)); *see Phoenix Ltd. P'ship of Raleigh v. Simpson*, 201 N.C. App. 493, 499, 688 S.E.2d 717, 721 (2009) (agreeing a substantial right was implicated where a trial court granted the plaintiff specific performance and ordered a property conveyed from the defendant to the plaintiff). Therefore, we agree with both parties that this case affects a substantial right because the trial court's order of the sale of the property extinguishes the property rights of both parties upon the court-ordered sale of the property.

[2] Plaintiff argues the trial court erred in its conclusions of law by finding Defendant is entitled to sale of the property and subsequent payout of the value of his life tenancy pursuant to section 41-11 of the North Carolina General Statutes. Specifically, Plaintiff challenges conclusions of law 2c and 2d, in which the trial court ruled,

> [2]c. That it is in the best interest of all the Parties that the subject property described in Deed Book 626, Page 614, Haywood County Registry, be sold at private sale and the proceeds be distributed pursuant to N.C.G.S. 41-11 ;
>
> [2]d. That in distributing the proceeds of the sale, after costs of sale and expenses, that the proceeds shall be distributed with payment to Defendant, as life tenant, the value of his share during his probable life, to be ascertained as now provided by law, absolutely. N.C.G.S. 41-11. "The purpose of that statute (N.C.G.S. 41-11) is to ascertain and pay the life tenant the present value of his interest, while protecting the interest of the remainderman", *FMB*, *Inc. v. Creech*, 198 N.C. App 177 (2009). The statute contemplates that the proceeds of the sale, less expenses and perhaps the present worth of the life tenant's share,

> will be reinvested, either in purchasing or in improving real estate, *Crumpton v. Crumpton*, 290 N.C. 651 (1976). "The statutory authority now given to ascertain and pay over to the life tenant the present value of his interest was inserted in what is now G.S. 41-11", *Menzel v. Menzel*, 250 N.C. 649 (1956). "And after the sale of such property to all proceedings hereunder, where there is a life estate, in lieu of said interest or investment of proceeds to which the life tenant would be entitled to, or to the use of, the Court may, in its discretion, order the value of said life tenant's share during the probable life of such life tenant, to be ascertained as now provided by law, and paid out of the process of such sale absolute, and the remainder of such proceeds be reinvested as herein provided", *Stepp v. Stepp*, 200 N.C. 237 (1931).

We review these challenged conclusions of law de novo. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

Further, since our review pertains to the interpretation of section 41-11, our "primary goal . . . is to accomplish legislative intent, which, in the first instance, is discerned from the plain language of the enactment. If the statute's plain language is clear and unambiguous, this Court applies the statute as written and does not engage in further statutory construction." *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Hebert*, 385 N.C. 705, 711, 898 S.E.2d 718, 724 (2024) (citations omitted). Additionally, "this Court does not read segments of a statute in isolation. Rather, we construe statutes *in pari materia*, giving effect, if possible, to every provision." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188, 594 S.E.2d 1, 20 (2004) (citing *Dockery v. Hocutt*, 357 N.C. 210, 219, 581 S.E.2d 431, 437 (2003)).

A. Independent Cause of Action

In support of this argument, Plaintiff first contends the 1927 amendment to section 41-11 establishes an independent cause of action for life tenants separate from the other provisions contained in the statute, changing the evidentiary standard used by the trial court and preventing Defendant from being paid the cash value of his life tenancy.

In 1927, now-section 41-11 was amended to include, *inter alia*,

> That any person or persons owning a life estate in lands which are unproductive and from which the income is insufficient to pay the taxes on and reasonable upkeep of said lands shall be entitled to maintain an action, without

> the joinder of any of the remaindermen or reversioners as parties plaintiff, for the sale of said property and reinvestment of the funds under the provisions of this section, but in every such action when the rights of minors or other persons not *sui juris* are involved, a competent and disinterested attorney shall be appointed by the court to file answer and represent their interests.

S.L. 1927-124, 1927 N.C. Sess. Laws 17; *Stepp v. Stepp*, 200 N.C. 237, 240, 156 S.E. 804, 805 (1931).

The 1927 amendment[2] as currently codified in section 41-11 states,

> Any person or persons owning a life estate in lands which are unproductive and from which the income is insufficient to pay the taxes on and reasonable upkeep of said lands shall be entitled to maintain an action, without the joinder of any of the remaindermen or reversioners as parties plaintiff, for the sale of said property for the purpose of obtaining funds for improving other nonproductive and unimproved real estate so as to make the same profit-bearing, all to be done under order of the court, or reinvestment of the funds under the provisions of this section, but in every such action when the rights of minors or other persons not sui juris are involved, a competent and disinterested attorney shall be appointed by the court to file answer and represent their interests. The provisions of the preceding sentence, being remedial, shall apply to cases where any title in such lands shall have been acquired before, as well as after, its passage-- March 7, 1927.

N.C. Gen. Stat. § 41-11 (2024).

However, as mentioned by Plaintiff, our Supreme Court has been expressly clear about the function of this amendment in relation to the whole statute.

> It will be noted that the [1927] amendment says that in certain particular cases "any person or persons owning [. . .] lands which are unproductive and from which the income

2. For clarity and consistency, we refer to the portion of statutory text quoted below as currently codified in section 41-11 as the 1927 amendment throughout this opinion.

> is insufficient to pay the taxes on and reasonable upkeep of said lands shall be entitled to maintain an action, without the joinder of any of the remaindermen or reversioners as parties plaintiff."
>
> This amendment, where the land is unproductive, etc., *extends the right of action* [in section 41-11] to include life estates where there are vested remaindermen and reversioners without their joinder. The section [ ] which is amended theretofore had reference only to contingent remainders. . . .
>
> The language in the amendment of 1927 . . . is clear and unmistakable. We must give it force and effect.

Stepp, 200 N.C. at 240–41, 156 S.E. at 805–06 (emphasis added).[3]

"This Court has no authority to overrule decisions of our Supreme Court, and we have the responsibility to follow those decisions until otherwise ordered by our Supreme Court." *Andrews v. Haygood*, 188 N.C. App. 244, 248, 655 S.E.2d 440, 443, *aff'd*, 362 N.C. 599, 669 S.E.2d 310 (2008) (citation modified). Thus, we are bound by our Supreme Court's longstanding ruling that the 1927 amendment "extends the right of action" in section 41-11 and need not proceed further with Plaintiff's argument as to an independent right of action. *Stepp*, 200 N.C. at 240, 156 S.E. at 806.

B. Conclusion of Law 2(c)

[3] Plaintiff next contends the trial court erred in conclusion of law 2(c) by "incorrectly stating the evidentiary burden required by the 1927 amendment" by looking to "if the interest of all parties require or would be materially enhanced by it" instead of "if the land is unproductive, and the sale is for the purpose of improving other unproductive land or for reinvestment of the funds." N.C. Gen. Stat. § 41-11. Additionally, Plaintiff argues "even if the correct standard . . . had been adopted, no findings of fact existed to support the conclusion of law" because "there is no

---

3. Our Supreme Court's decision in *Stepp* cites to 3 C.S. § 1744 (1924). The portions of section 1744 cited to and quoted by the Supreme Court in *Stepp* are materially the same as codified today in section 41-11. Portions of section 1744 regarding investment specifically in liberty bonds are no longer contained in section 41-11, and portions of section 41-11 pertaining to where the resident judge can make a ruling and mortgaging properties were not present in section 1744. None of these portions of either section are at issue in this case.

finding of fact that the income from the property was 'insufficient to pay the taxes on and reasonable upkeep of the property.' " We disagree.

Plaintiff's argument again rests on the premise Defendant's "claims must be claims asserted pursuant to the 1927 amendment," in line with his argument that the 1927 amendment constitutes an independent cause of action. But, as noted above, pursuant to *Stepp v. Stepp*, the 1927 amendment "extends the right of action" in section 41-11 from solely including contingent remainders "to include life estates where there are vested remaindermen and reversioners without their joinder." 200 N.C. at 240, 156 S.E. at 806. Therefore, we continue to interpret the statute as a whole. *Rhyne*, 358 N.C. at 188, 594 S.E.2d at 20.

"When interpreting a statute, 'it must be presumed that the means employed by the Legislature to express its will are adequate to the purpose and do express that will correctly.' " *State v. Daw*, 386 N.C. 468, 476, 904 S.E.2d 765, 772 (2024) (quoting *State v. Barco*, 150 N.C. 792, 796, 63 S.E. 673, 674 (1909)). Section 41-11 states, in part, "[t]he court shall, if the interest of all parties require or would be materially enhanced by it, order a sale of such property or any part thereof for reinvestment." N.C. Gen. Stat. § 41-11. The 1927 amendment to section 41-11 that Plaintiff emphasizes says in part "[a]ny person or persons owning a life estate in lands which are unproductive and from which the income is insufficient to pay the taxes on and reasonable upkeep of said lands shall be entitled to maintain an action." *Id.* Considering the text of the whole statute and giving all of the statute's text meaning, this text emphasized by Plaintiff serves as a factual basis upon which an action could be maintained as well as the factual basis upon which a court can conclude it is in the interest of the parties or materially enhances the parties for the court to order sale of the property. *Id.* Additionally, following our Supreme Court's holding this amendment to be an extension of actions permitted under section 41-11, the evidentiary standard of "if the interest of all parties require or would be materially enhanced by it" also applies to claims under section 41-11 extended by the 1927 amendment. *Id.*

Here, the trial court adopted the findings of fact from the Clerk of Superior Court, and these findings are unchallenged in this appeal. Thus, the Clerk of Superior Court's findings of fact as adopted by the trial court are binding on appeal. *Biber*, 365 N.C. at 168, 712 S.E.2d at 878 ("[W]hen, as here, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." (citing *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984))). The findings of fact adopted by the trial court found that Defendant generates $700.00 per month in rental income and "managed to pay taxes and insurance" on the property, but "has not had sufficient income to maintain and make necessary repairs for said real property," could not obtain a loan for repairs, is retired, suffers from poor health, receives his source of income from social security, and "cannot maintain and repair the premises as needed to keep it in good state of order and repair" due to the lack of his social security and rental income. Further, the Clerk of Superior Court found that the "current needs for repair and maintenance to said real property are at a minimum in excess of $25,000" and "all Parties acknowledge the repairs will be substantial." In addition, the Clerk of Superior Court found "since the death of Latane Clore, [] Plaintiff and Third-Party Defendants have not contributed any funds for the maintenance, repairs or upkeep of the premises, nor paid any taxes and insurance."

These findings of fact are sufficient to show that the property was unproductive with mounting maintenance and financial constraints bringing the property's value and income potential down. Likewise, the findings show that Defendant could not pay both the taxes and reasonable upkeep on the income he earned, including both the social security income and the monthly rental income. Thus, these findings of facts properly serve as the basis for the maintenance of this action and as the factual basis for the trial court's conclusion of law 2(c). In other words, upon finding that the property is unproductive and Defendant could not pay for taxes and reasonable upkeep, it is in the best interest of the parties for the court to order sale of the property.

Thus, the trial court did not err with conclusion of law 2(c).

C. Conclusion of Law 2(d)

Plaintiff argues that the trial court erred in conclusion of law 2(d) "by providing for the distribution of proceeds from the sale of the property in a manner inconsistent with the 1927 amendment." Specifically, Plaintiff contends "[t]he 1927 amendment, despite specifically establishing a cause of action for a life tenant, notably does not provide any basis for a life tenant to be paid the cash value of their life tenancy." We disagree.

Plaintiff again premises his argument on the 1927 amendment to section 41-11 creating a separate action from the rest of section 41-11. However, as reasoned above and in line with our Supreme Court's decision that the 1927 amendment extended section 41-11, we review section 41-11 as a whole, including the 1927 amendment.

Plaintiff is correct that the 1927 amendment to section 41-11 did not include language specifying that a life tenant could "cash in" the value of the life tenancy, as our Supreme Court observed in *Stepp*. 200 N.C. at 241, 156 S.E. at 806 ("The amendment says 'reinvestment of the funds under the provisions of this section.' This amendment does not seem to permit the life tenant to 'cash in.' "). Rather, the 1927 amendment, as currently codified in section 41-11 states that the life tenant, subject to conditions discussed above,

> shall be entitled to maintain an action . . . for the sale of said property for the purpose of obtaining funds for improving other nonproductive and unimproved real estate so as to make the same profit-bearing, all to be done under order of the court, or reinvestment of the funds under the provisions of this section.

N.C. Gen. Stat. § 41-11.

Although the 1927 amendment itself did not include in its text the distribution of funds received for sale of property to the life tenant as found in conclusion of law 2(d) in this case, other portions of section 41-11 provided this option to the trial court. As noted by the Supreme Court in *Stepp*, 200 N.C. at 241, 156 S.E. at 806, section 41-11 says, in relevant part,

> And after the sale of such property in all proceedings hereunder, where there is a life estate, in lieu of said interest or investment of proceeds to which the life tenant would be entitled to, or to the use of, the court may in its discretion order the value of said life tenant's share during the probable life of such life tenant, to be ascertained as now provided by law, and paid out of the proceeds of such sale absolutely, and the remainder of such proceeds be reinvested as herein provided.

As cited by the trial court, our Supreme Court confirmed the availability of the trial court's ability to order sale of a property and order the life tenant to be paid the present value of the life tenant's share after costs and judgment under section 41-11 thereafter in *Menzel*, stating, "[t]he statutory authority now given to ascertain and pay over to the life tenant the present value of his interest was inserted in what is now [section] 41-11." 250 N.C. at 656, 110 S.E.2d at 338. Further, in *Crumpton*, the Supreme Court said section 41-11 "contemplates that the proceeds of the sale, *less expenses and perhaps the present worth of the life tenant's share*, will be reinvested, either in purchasing or in improving real estate." 290 N.C. at 655, 227 S.E.2d at 591 (emphasis added). In reliance on *Crumpton* and *Menzel*, this Court has held "[t]he purpose of [section 41-11] is to ascertain and pay the life tenant the present value of his interest, while protecting the interests of the remainderman." *FMB, Inc. v. Creech*, 198 N.C. App. 177, 182, 679 S.E.2d 410, 413 (2009) (first citing *Crumpton*, 290 N.C. at 655, 227 S.E.2d at 591; and then citing *Menzel*, 250 N.C. at 656, 110 S.E.2d at 338).

Further, the Supreme Court heard an appeal from a seemingly similar fact pattern to the facts in this case in *Parrish v. Parrish*, 247 N.C. 584, 101 S.E.2d 480 (1958). There, the remaindermen filed a waste action against the life tenant. *Id.* at 584, 101 S.E.2d at 481. In her defense, the life tenant averred and stated, "on account of the condition of said premises and her inability to make the necessary repairs, she hereby agrees that her dower interest may be computed to cash upon a public sale of said property for a division and will to join in the necessary proceedings for that purpose." *Id.* at 584–85, 101 S.E.2d at 481. The life tenant then requested "the court decree a sale of said land for division and that [the life tenant's] dower interest be computed and paid to her in cash." *Id.* at 585, 101 S.E.2d at 481. After a jury found the life tenant committed waste and damages of $1,200, the "plaintiffs tendered judgment that they recover $1,200, and if the sum is not paid on a day to be fixed by the court, that the plaintiffs recover the property." *Id.* The trial court refused to sign the judgment, instead entering a judgment that the plaintiffs recover $1,200 and ordering sale of the property pursuant to section 41-11 and *Stepp* with the life tenant share to be "diminished in the amount of this judgment and the costs, and the balance remaining [. . .] shall be paid [. . .] to the life tenant absolutely." *Id.*

On appeal, the Supreme Court held that the trial court committed error, not because section 41-11 or its 1927 amendment did not permit the life tenant be paid for the value of her life tenancy, but because "a sale under [section 41-11] can be ordered only in a 'special proceeding' which must be instituted before the clerk of the superior court," which was not done in that case. *Id.* at 482, 101 S.E.2d at 586. The Supreme Court did not premise the dispersal of the present value of the life estate to the life tenant upon her needing to show that the purpose of the sale is for improving nonproductive lands or reinvestment, nor did it reject the trial court's basis of its order on *Stepp* or distinguish between the 1927 amendment and the rest of section 41-11.

Unlike the error in *Parrish*, the special proceedings here were instituted before the Clerk of the Superior Court. Thus, the sale and distribution of the value of the life tenancy less any judgment or court fees was permissible under section 41-11 here.

Plaintiff contends the trial court incorrectly relied on the cases cited in conclusion of law 2(d), which included *Creech*, *Crumpton*, *Menzel*, and *Stepp*. While Plaintiff is correct that *Creech* and *Crumpton* contained different procedural postures and factual scenarios and that *Crumpton* and *Menzel* did not address the text contained in the 1927 amendment, Plaintiff is incorrect that these cases are inapplicable and unsupportive of the trial court's conclusion.

Each case the trial court cited and the reasoning for which it was cited was a broadly applicable legal ruling about the purpose and function of section 41-11, of which the 1927 amendment is a part. *Crumpton*, 290 N.C. at 655, 227 S.E.2d at 591; *Menzel*, 250 N.C. at 656, 110 S.E.2d at 338; *Stepp*, 200 N.C. at 240–41, 156 S.E. at 806; *Creech*, 198 N.C. App. at 182, 679 S.E.2d at 413. Plaintiff's contention these cases are inapplicable solely because they do not specifically address the 1927 amendment, is, as addressed above, based upon divisions in the statute which neither the legislature nor the courts have devised. Furthermore, in *Stepp*, as previously noted, the Supreme Court recognized the text of the 1927 amendment did not "permit the life tenant to 'cash in,' " 200 N.C. at 241, 156 S.E. at 806, yet immediately before said,

> It may be further noted that . . . "in lieu of said interest or investment of proceeds to which the life tenant would be entitled to, or to the use of, the court may in its discretion order the value of said life tenant's share during the probable life of such life tenant, to be ascertained as now provided by law, and paid out of the proceeds of such sale absolutely[.]"

Id. (quoting 3 C.S. § 1744). Thus, our Supreme Court recognized that section 41-11 permits the sale of the property and distribution of the present value of the life estate to the life tenant, less expenses.

Therefore, the trial court did not err in conclusion of law 2(d).

III. Conclusion

We hold there was no error in the trial court's 5 April 2024 judgment and affirm the trial court's order to sell the property and distribute the proceeds from the sale in accordance with section 41-11.

AFFIRMED.

Judges HAMPSON and WOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 3 December 2025)

BRIEN v. LYNCH No. 25-104	Mecklenburg (23CVS011771-590)	Affirmed
EASTWOOD CONSTR. PARTNERS, LLC v. WAXHAW DEVS., LLC No. 25-174	Mecklenburg (21CVS000876-590)	Affirmed
GLOVER v. TROGDON No. 24-917	Randolph (20CVD001034-750)	VACATED IN PART, AFFIRMED IN PART, AND REMANDED.
IN RE A.M.B. No. 25-341	Forsyth (23JT000155-330)	Affirmed
IN RE A.R.-B. No. 25-228	Durham (22JA000090-310)	Affirmed.
IN RE D.V.P. No. 25-140	New Hanover (23JT000125-640)	Affirmed
IN RE I.H. No. 25-375	Chowan (21JT000002-200) (21JT000003-200) (21JT000017-200)	Affirmed
IN RE Z.R.B. No. 25-475	Moore (21JT000025-620) (21JT000026-620) (21JT000027-620)	Vacated and Remanded
JRM, INC. v. HJH COS., INC. No. 25-421	Davidson (21CVS002155-280)	Affirmed
LONGMIRE v. PROOF HOSP. 1, LLC No. 25-352	New Hanover (24CVS000444-640)	Affirmed
SAWYER v. BILLUPS No. 24-805	Perquimans (22CVD000268-710)	Remanded
SIMUEL v. N.C. ADMIN. OFF. OF THE CTS. No. 25-142	Wake (24CV009561-910)	Affirmed
STATE v. PITTMAN No. 24-896	Nash (19CR052513-630)	No Error

STATE v. BALLARD No. 24-582	New Hanover (21CR058802-640) (21CR058803-640)	No Error
STATE v. BRYANT No. 25-24	New Hanover (23CR432121-640)	Affirmed in part; dismissed in part
STATE v. CREIGHTON No. 25-373	Pitt (23CR001163-730) (23CR284161-730) (23CR284168-730)	No Error
STATE v. CROMARTIE No. 25-5	Durham (21CR054184-310)	No Error in Part, Dismissed without Prejudice in part.
STATE v. CURRIN No. 25-360	Johnston (23CR004343-500) (23CR004344-500) (23CR266278-500)	No Prejudicial Error.
STATE v. GIRADO No. 25-307	Wayne (22CR051714-950)	Affirmed in part and vacated and remanded in part.
STATE v. HARAZ No. 25-135	Union (22CR281893-890)	No Error.
STATE v. HOLSCLAW No. 24-964	Wilkes (22CR000374-960) (22CR050115-960) (23CR000159-960)	No Error in Part; Vacated in Part
STATE v. HUNTER No. 24-1009	Forsyth (16CR053781-330) (16CR055182-330) (22CR000572-330)	NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.
STATE v. JONES No. 24-1118	Gaston (20CR060040-350) (22CR001652-350)	No Error
STATE v. JONES No. 25-90	Durham (22CR050219-310)	No Error
STATE v. LOVE No. 25-241	Cabarrus (23CR309671-120)	No Error

STATE v. LUCAS No. 25-146	Nash (22CR050972-630)	Vacated and Remanded
STATE v. PERKINS No. 25-26	Watauga (24CR000162-940) (24CR219407-940)	No Error
STATE v. REID No. 25-232	Mecklenburg (22CR006277-590)	No Error
STATE v. RODRIGUEZ No. 24-750	Wake (21CR211407-910)	No Error.
STATE v. ROGERS No. 25-46	Stanly (23CR000070-830)	No Error.
STATE v. SCHLAGETER No. 24-881	Iredell (19CR056237-480)	No Error
STATE v. WHICHARD No. 24-1111	Pitt (22CR260632-730)	No Error
STATE v. YOUNG No. 25-14	Cleveland (23CR000829-220) (22CR000532-220) (22CR051218-220)	No Plain Error
STATE v. ZINK No. 25-334	Buncombe (22CR084436-100) (22CR084628-100)	No Error

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS