302 N.C. App.—No. 2 Pages 154-322

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AUGUST 26, 2026

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

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[1] Died 18 November 2025.

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COURT OF APPEALS

CASES REPORTED

FILED 17 DECEMBER 2025

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Interlocutory appeal—temporary restraining order—use and control of assets—substantial right—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, failed to timely complete the restructuring plan, and were held in contempt for violating a temporary restraining order prohibiting defendants from selling, encumbering, or otherwise devaluing specified affiliate companies (SACs)—defendants' interlocutory appeal (from a modified temporary restraining order, which among other things, lowered the threshold amount for restrained transactions, and from an order denying defendants' motion to allow the receiver the additional authority to approve transfers from the SACs to fund certain expenses or obligations) affected a substantial right: defendants' ability to use and control their assets. Accordingly, the orders were immediately appealable. **Southland Nat'l Ins. Corp. v. Lindberg, 237.**

Modification of temporary restraining order—Civil Procedure Rule 62(c)—lack of cited legal authority—issue deemed abandoned—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, failed to timely complete the restructuring plan, and were held in contempt for violating a temporary restraining order prohibiting defendants from selling, encumbering, or otherwise devaluing specified affiliate companies (SACs)—defendants argued that the trial court erred in modifying the TRO, after the appeal was taken, to extend beyond the MOU's specified scope in that the modified TRO restrained the individual defendant and non-SAC businesses from making any transaction over $5,000 without court approval. Civil Procedure Rule 62(c) authorizes a trial court to, in its discretion, modify a TRO during the pendency of an appeal, but defendants focused their appellate arguments on the interpretation of contracts and failed to cite any legal authority regarding tailoring the terms of relief under the TRO pursuant to Rule 62(c). In light of that violation of Appellate Rule 28(b)(6), the argument was deemed abandoned and was dismissed. **Southland Nat'l Ins. Corp. v. Lindberg, 237.**

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, failed to timely complete the restructuring plan, and were held in contempt for violating a temporary restraining order prohibiting defendants from selling, encumbering, or otherwise devaluing specified affiliate companies—defendants' request, pursuant to Appellate Rule 37, that the appellate court take judicial notice of a motion to dissolve a temporary restraining order (TRO) and an order denying in part the limited receiver's motion for authority to recover transfers made in violation of the TRO was rejected. The motion to dissolve and its contents were not matters subject to judicial notice because they were not notoriously true facts not subject to reasonable dispute, and, while the order regarding the limited receiver's motion appeared to have been denied because it concerned the subject matter of a pending appeal, it did not bear upon a fact crucial to the disposition of the appeal. **Southland Nat'l Ins. Corp. v. Lindberg, 237.**

Oral notice of appeal—untimely—defense counsel assaulted by defendant—absent during entry of judgment—certiorari denied—In a criminal case where defendant physically assaulted his trial attorney, resulting in their removal from the courtroom during trial and subsequent absence during the entry of the final judgment, defendant's appeal from his criminal convictions was dismissed because, even though his attorney had announced to the court (prior to the assault) his intention to give oral notice of appeal "at the appropriate time," this statement—assuming that it qualified as an oral notice of appeal under Appellate Rule 4—was premature and therefore in violation of Rule 4. Additionally, defendant's petition for a writ of certiorari was denied where, given his actions and failure to file a written notice of appeal, defendant failed to show that he had lost his right of appeal through no fault of his own. **State v. Jordan, 274.**

Petition for writ of certiorari—motion to enforce settlement agreement—untimely appeal—no extraordinary circumstances—In an appeal from the trial court's order enforcing a settlement agreement arising from a serious car accident, in which plaintiffs filed a conditional petition for writ of certiorari, the Court of Appeals declined to grant certiorari because plaintiffs failed to show extraordinary circumstances justifying issuance of the writ where they failed to give timely notice of appeal. Although plaintiffs had filed a motion to reconsider, pursuant to Civil Procedure Rule 54(b), following the court's oral decision to grant the motion to enforce but several days before the court reduced its ruling to a written order, their motion to reconsider was improper and did not operate to toll plaintiffs' time to take appeal. **Welbourne v. Barbee, 301.**

Untimely notice of appeal—motion to enforce settlement agreement—Civil Procedure Rule 59(e)—not a proper ground for relief—In a settlement agreement enforcement proceeding arising from a serious car accident, where plaintiffs filed a motion to reconsider, pursuant to Civil Procedure Rule 54(b), following the court's oral decision to grant the order to enforce but several days before the court entered its written order, plaintiffs' time to appeal was not tolled under Civil Procedure Rule 59(e) by plaintiffs' motion to amend. Motions to enforce settlement agreements are treated as motions for summary judgment, for which Rule 59 is not a proper ground for relief. **Welbourne v. Barbee, 301.**

Untimely notice of appeal—oral ruling—final judgment—motion to reconsider of no effect—In a settlement agreement enforcement proceeding arising from a serious car accident, where plaintiffs filed a motion to reconsider, pursuant to Civil Procedure Rule 54(b), following the court's oral decision to enforce the settlement but several days before the court entered its written order to enforce, the oral ruling was a final judgment under Appellate Rule 3 preventing any further action by plaintiff. Thus, plaintiffs' motion to reconsider was improper, was not left pending, and did not toll the deadline for taking appeal from the motion to enforce, rendering plaintiffs' eventual notice of appeal untimely. **Welbourne v. Barbee, 301.**

ATTORNEY FEES

Child support action—insufficient means to defray litigation costs—sufficiency of findings and evidence—In an action between the divorced parents of a minor child, the trial court did not abuse its discretion in ordering the father to pay attorney fees to the mother—both to defray the mother's cost of litigating the child support action, pursuant to N.C.G.S. § 50-13.6, as well as to fulfill his obligation to pay attorney fees in connection with a prior civil contempt order—where the court made the necessary statutory findings and where the evidence—including the mother's testimony and an affidavit from her attorney—supported the court's finding that the mother had sufficient means to defray a portion, but not all, of her legal expenses in connection with the lawsuit. Importantly, it was within the trial court's discretion to decide whether to compare the parties' relative estates when entering an award of attorney fees. **Brown v. Miller, 154.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Abuse and neglect proceeding—minor parent—assertion of right against self-incrimination—without input from guardian ad litem—In an abuse and neglect matter involving allegations that the parents inflicted—or allowed the infliction of—serious injuries upon their daughter when she was a baby, the trial court did not reversibly err when it allowed the mother, a teenaged minor represented by a Rule 17 guardian ad litem (GAL), to decide whether to assert her Fifth Amendment right against self-incrimination—if asked about certain felony charges pending against her—during her compelled testimony at the adjudication hearing. The hearing transcript showed that, although the GAL was silent regarding the mother's Fifth Amendment rights, the mother's attorney did object to her testifying at the hearing, after which the court advised the mother of her right to remain silent, which she affirmatively acknowledged (and clearly understood, as evidenced by her testimony, during which she answered all questions on direct examination except one, for which she expressly invoked her right to remain silent). Ultimately, there was no evidence that the GAL could have done anything—beyond merely repeating the attorney's arguments—to secure a more favorable outcome for the mother. **In re A.H.-G., 177.**

Adjudication of abuse—baby's non-accidental injuries—inference that parents were responsible—evidentiary support—The trial court did not err in adjudicating the daughter of teenaged parents as an abused juvenile where clear and convincing evidence supported the court's findings of fact, which in turn supported an inference that the parents repeatedly inflicted—or allowed the infliction of—serious injuries to the child when she was a baby. Specifically, the court found that: the parents had a history of domestic violence, with the child having been present for at least one of their altercations; between the ages of three to four months, the child suffered multiple trauma incidents resulting in serious injuries, including rib fractures, a broken tibia, an eye hemorrhage, and several unexplained bruises; each incident occurred while the child was under her parents' care or during the parents' visitation with the child, which was sometimes unsupervised (and, therefore, unauthorized under the family's safety plan); subsequent medical examinations indicated that the child's injuries were inflicted rather than accidental; and both parents failed to provide consistent or credible explanations for these injuries. **In re A.H.-G., 177.**

CHILD CUSTODY AND SUPPORT

Child support arrears—judgment and lien on real property—inadequate description—The trial court in a child support matter did not err by reducing the father's child support arrears to a judgment and placing a lien on any real property owned by him pursuant to N.C.G.S. § 50-13.4(f)(8), where the court expressly provided that the judgment was for a sum certain of $84,790 and that it be docketed in any county in which the father was employed or owned property. However, the child support order was nevertheless vacated—and the issue was remanded—where the court failed to include an adequate description of the real property on which there would be a lien. **Nzewunwah v. Nzewunwah, 223.**

Child support calculation—ambiguity regarding therapy expenses—recalculation required—In a child custody and child support action between the divorced parents of a minor child, the trial court abused its discretion by including the child's recurring therapy expenses both as an extraordinary expense in its child support calculation and as a separate obligation under a prior temporary custody order, resulting in the father being charged twice for the same expense. Additionally, the trial court's order directed the mother to pay 100% of the child's unreimbursed therapy expenses while also ordering the father to pay for part of that therapy expense as part of his child support obligation. Ultimately, the child support provisions of the trial court's order were reversed and the matter was remanded for a recalculation of child support and for clarification on the extent to which each party was responsible for paying their child's therapy expense. **Brown v. Miller, 154.**

Child support calculation—father's income—imputation of income due to bad faith—miscalculation of prospective support—The trial court in a child support matter did not abuse its discretion by imputing income to the child's father when calculating his income for child support purposes, where the court's finding that the father acted in bad faith by voluntarily leaving his high-paying job (with a company based in Nigeria) was supported by competent evidence, including evidence that the father failed to pay child support during the six months before he quit his job and that he had "engaged in international travel for pleasure" after quitting. However, the trial court did err in converting the father's salary at the exchange rate (for Nigerian Naira to U.S. dollars) as of the day of separation for the entire amount of child support, where that exchange rate should have only been used when calculating the father's retroactive child support obligation and where the applicable exchange rate as of the day of the child support hearing should have been used to calculate his prospective child support obligation. Consequently, the trial court's child support order was vacated and the matter was remanded. **Nzewunwah v. Nzewunwah, 223.**

Child support calculation—work-related child care expenses—live-in nanny care included—Montessori school expense not included—The trial court in a child support matter did not err by including the mother's use of live-in nanny care as a work-related child care expense for purposes of calculating the father's child support obligation where, given the mother's work schedule as a full-time physician's assistant in emergency medicine, a regular daycare center would not be a viable child care option. However, the court did err in classifying the cost of the child's Montessori school attendance as a work-related child care expense where, although the mother applied to the school and was hopeful that the child would be admitted, there was no evidence that the child was actually enrolled at the school. Accordingly, the child support order was vacated and the matter was remanded for additional findings. **Nzewunwah v. Nzewunwah, 223.**

Unincorporated separation agreement—child support provision—presumption of reasonableness—inapplicable—In an action between divorced parents who, after separating, entered into an unincorporated separation agreement that included a child support provision, the trial court did not err in making an initial child support determination that differed from what the parties had agreed to under the separation agreement. Typically, with respect to such agreements, the parties' mutually agreed-upon amount of child support is presumed to be just and reasonable; however, this rebuttable presumption did not apply to the parties' separation agreement, since it also included a provision giving either party the option, in the event of a substantial change of circumstances, to unilaterally seek a judicial determination of child support. **Brown v. Miller, 154.**

CIVIL PROCEDURE

Motion to reconsider—improper—motion to amend—no abuse of discretion—In a settlement agreement enforcement proceeding arising from a serious car accident, plaintiffs' motion to reconsider, pursuant to Civil Procedure Rule 54(b), and motion to amend, pursuant to Civil Procedure Rule 59(e), were improper where there was no trial on the merits. Further, plaintiffs failed to demonstrate that the trial court abused its discretion in denying plaintiffs' motion to amend, pursuant to Civil Procedure Rule 60(b), for any alleged misrepresentation; to the extent plaintiffs' Rule 60(b) motion was based upon an alleged misunderstanding of the legal definition of "tender," Rule 60(b) provides no relief from an error of law. **Welbourne v. Barbee, 301.**

CONSTITUTIONAL LAW

Inculpatory statements—interrogation rather than clarification—plain error analysis—In a prosecution on drug- and firearm-related charges—arising from the discovery of contraband where a property owner gave law enforcement officers permission to enter the home where defendant was a tenant—defendant could not establish plain error in the admission of statements he made when an officer, having seen drug paraphernalia strewn about the living room, asked, "Who lives here?" While defendant's replies, including that he lived in the home, were admitted in error—because defendant had already been arrested on an outstanding warrant, but had not been read his *Miranda* rights, and because the officer's question was seeking inculpatory information rather than simply clarifying defendant's earlier statement that he had permission to be in the home—the State did not rely on those statements to prove that defendant constructively possessed the drugs and firearm underlying the charges against him. Accordingly, the appellate court could not say that, absent the erroneous admission, the jury would have "almost certainly" returned a different result. **State v. Mitchell, 278.**

Right to counsel—forfeiture—obstruction and delay—In a prosecution for resisting a public officer, speeding, and related charges, the trial court properly concluded that defendant forfeited his right to counsel where defendant's actions obstructed and delayed trial proceedings in both district and superior court. Defendant caused his attorneys to withdraw on three occasions by seeking to have them file baseless motions or pursue improper claims. Further, defendant made improper discovery requests, questioned the impartiality of the trial court, and continuously interrupted the trial court. **State v. Jacobs, 265.**

CONTEMPT

Criminal contempt—direct—summary proceeding—lack of opportunity to be heard—In a criminal matter, the trial court erred by finding defendant in direct, summary criminal contempt where defendant was not given an adequate opportunity to be heard as required by N.C.G.S. § 5A-15. Summary proceedings were no longer appropriate where the trial court first delayed (after a recess on the day in question) and then deferred the imposition of contempt (by readdressing the issue the next day). Therefore, the trial court's six contempt orders—including one for each time defendant told the court to "[a]dd some more" after the initial contempt adjudication—were reversed. **State v. Jacobs, 265.**

CRIMINAL LAW

Motion to dismiss—drug and firearm charges—sufficiency of evidence—In a prosecution on drug- and firearm-related charges—arising from the discovery of contraband when a property owner gave law enforcement officers permission to enter the home where defendant was a tenant—had the trial court properly excluded the constitutionally inadmissible statements defendant made to an officer, the trial court would have been obligated to dismiss all but a single charge. However, because, on appeal, defendant could show error but not prejudice in the admissions—and because, on appellate review of the denial of a motion to dismiss, all evidence admitted, whether competent or incompetent, must be considered in the light most favorable to the State—the appellate court found that the State presented sufficient evidence to withstand defendant's motion to dismiss on each of the charges against him. **State v. Mitchell, 278.**

EMPLOYER AND EMPLOYEE

Wrongful discharge—based on temporary disability—no cause of action—In an action filed against a corporation (defendant) by a former employee (plaintiff), an attorney recruited for a senior legal role at the company but fired shortly after she requested a medical leave and short-term remote work due to medical complications relating to a miscarriage, the trial court properly dismissed—pursuant to Civil Procedure Rule 12(b)(6)—plaintiff's claim of wrongful discharge based on temporary disability in connection with her miscarriage, where North Carolina's employment discrimination laws only protected those with disabilities that substantially limit at least major life activities, thereby excluding short-term disabilities of the sort that plaintiff alleged in her complaint. **Edwards v. Strata Solar, LLC, 168.**

Wrongful discharge—discrimination based on pregnancy—no cause of action—In an action filed against a corporation (defendant) by a former employee (plaintiff), an attorney recruited for a senior legal role at the company but fired shortly after she requested a medical leave and short-term remote work upon experiencing health complications relating to a miscarriage, the trial court properly dismissed—pursuant to Civil Procedure Rule 12(b)(6)—plaintiff's claim of wrongful discharge based on discrimination relating to her pregnancy, where pregnancy was not a protected category under the Equal Employment Practices Act and where neither the Act nor any other North Carolina statute articulated a public policy prohibiting any adverse employment action on the basis of pregnancy. **Edwards v. Strata Solar, LLC, 168.**

Wrongful discharge—sex discrimination—allegations in complaint—sufficiency—The trial court's order granting a motion to dismiss under Civil Procedure Rule 12(b)(6) was reversed in part where, the court improperly dismissed a claim by plaintiff—an attorney recruited by defendant for a senior legal role—against her former employer (defendant) on the basis of sex discrimination. Plaintiff's complaint alleged sufficient facts that, if taken as true, supported an inference that defendant fired her because of her sex, including that plaintiff: was the only woman on the company's legal team; suffered medical complications from a miscarriage, which required her to take a medical leave from work; saw a sudden negative shift in management's attitude toward her when she returned from leave and asked to work remotely during her recovery, as her superiors began questioning her honesty and reliability, and rescinded prior promises of job advancement; was required to provide medical documentation for her remote work, which was not required of male colleagues at the company who requested remote work or time off for medical reasons; and was fired for not being a "team player" even though she had received a very positive performance evaluation—citing her exceptional professionalism—shortly before her termination. **Edwards v. Strata Solar, LLC, 168.**

JURY

Right to twelve jurors—presence of alternate juror—during selection of foreperson—no per se error—There was no error in defendant's criminal trial by the presence of an alternative juror in the jury room after the trial court had instructed the jury to select a foreperson and not to begin deliberations until it had done so where, after defense counsel noticed that the alternate juror had gone with the jury, the trial court immediately ordered the bailiff to retrieve the alternate juror. The trial court was not required to conduct an inquiry, pursuant to *State v. Bindyke*, 288 N.C. 608 (1975), to ask the jurors whether they had begun deliberations, where the jurors were presumed to have followed the trial court's instructions and there was no indication that the jury had begun deliberations before the alternate juror was recalled to the courtroom. **State v. Smith, 292.**

LARCENY

Attempted misdemeanor larceny—intent to take and carry away property—circumstantial evidence—sufficiency—In a case arising from the theft of property from an unused building on the victims' property that had been broken into at night, the trial court properly denied defendant's motion to dismiss the charge of attempted misdemeanor larceny. The State presented substantial evidence, even if circumstantial, to support the essential element that defendant had an intent to take and carry away the property of another, including that: hours after the break-in occurred, defendant was present without authorization on the victims' property; defendant was riding in a car that had no lights on; the vehicle was driven by the tenant from an adjacent property in whose house the stolen property was later found; and defendant had been seen visiting the tenant's house on prior occasions. **State v. Brown, 253.**

MEDICAL MALPRACTICE

Rule 9 certification—death after surgery—explanation of mortality risks—"professional services"—clinical judgment—Where plaintiffs' claims against defendants (two doctors) arising from their child's death after undergoing pediatric cardiac surgery met the broad statutory definition of medical malpractice (N.C.G.S. § 90-21.11(2)(a)), plaintiffs—despite bringing claims of constructive fraud and breach of fiduciary duty—were required to comply with the certification requirements set forth in Civil Procedure Rule 9(j) and the three-year statute of limitations pursuant to N.C.G.S. § 1-15(c). Defendants' alleged failure to provide sufficient information regarding the mortality risks of the proposed surgery involved a decision about what data to disclose to plaintiffs—a decision that involved defendants' clinical judgment and professional skill and, thus, constituted "professional services" under the medical malpractice statute. Therefore, because plaintiffs did not comply with the mandatory Rule 9 certification or file their complaint within the relevant statute of limitations, the trial court properly granted summary judgment in favor of defendants. **Jones v. Mill, 201.**

POSSESSION OF STOLEN PROPERTY

Felony possession of stolen goods—elements—circumstantial evidence—sufficiency—In a case arising from the theft of property after an unused building on the victims' property was broken into at night, the trial court properly denied defendant's motion to dismiss the charge of felony possession of stolen goods where the State presented substantial evidence, even if circumstantial, to support each element of that offense, including that defendant had constructive possession of goods that he knew or should have had reasonable grounds to know had been stolen, and that he acted with a dishonest purpose to deprive the victims of their property. Just hours after the break-in occurred, defendant was present without authorization on the victims' property; defendant was riding in a car that had no headlights on driving down the victims' unlit driveway; the vehicle was driven by the tenant from an adjacent property in whose house the stolen property was later found; and defendant had been seen visiting the tenant's house on prior occasions. **State v. Brown, 253.**

REAL PROPERTY

Distribution of sale proceeds—promissory note with a single signer—deed of trust with multiple parties named—In an action arising from a dispute between a homeowner, who was the sole signer of a promissory note supported by a deed of trust on the property, and the heirs of her deceased boyfriend, who had possessed a fifty percent interest in the property as reflected in the deed, but who had not signed the promissory note, about how the proceeds from the sale of the property should be distributed—specifically, whether the balance of the loan should be deducted from the total proceeds before dividing the remainder between the homeowner and the heirs, or whether the loan balance should be deducted from the homeowner's portion alone—the trial court's grant of summary judgment in favor of the heirs was affirmed. Read together, the note and the deed of trust—particularly a section of the deed specifying that any person who signed the deed, but did not execute the note, was not personally obligated to pay the loan secured by the deed—evidenced an intent to encumber the heirs' interest in the property but not require them to pay the loan. **Law Off. of Robert Forquer, PLLC v. Arcuri, 208.**

Distribution of sale proceeds—summary judgment—promissory note with a single signer—deed of trust with multiple parties named—In an action arising from a dispute between a homeowner, who was the sole signer of a promissory note supported by a deed of trust on the property, and the heirs of her deceased boyfriend, who had possessed a fifty percent interest in the property as reflected in the deed, but who had not signed the promissory note, about how the proceeds from the sale of the property should be distributed—specifically, whether the balance of the loan should be deducted from the total proceeds before dividing the remainder between the homeowner and the heirs, or whether the loan balance should be deducted from the homeowner's portion alone—the homeowner's challenges to the findings of fact in the summary judgment order failed. Some of the challenged findings concerned only uncontested facts, and those findings that were erroneous did not affect the outcome on appeal because a correct decision on summary judgment—as existed in this matter—will not be disturbed even if the court gives a wrong or insufficient reason therefor. **Law Off. of Robert Forquer, PLLC v. Arcuri, 208.**

RECEIVERSHIP

Trial court's vested authority—limited receiver—limitation or expansion of powers—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

SEARCH AND SEIZURE

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.

BROWN v. MILLER

[302 N.C. App. 154 (2025)]

TRACY BROWN, Plaintiff-Mother
v.
DAVID D. MILLER, Defendant-Father

No. COA24-1045

Filed 17 December 2025

1. Child Custody and Support—unincorporated separation agreement—child support provision—presumption of reasonableness—inapplicable

In an action between divorced parents who, after separating, entered into an unincorporated separation agreement that included a child support provision, the trial court did not err in making an initial child support determination that differed from what the parties had agreed to under the separation agreement. Typically, with respect to such agreements, the parties' mutually agreed-upon amount of child support is presumed to be just and reasonable; however, this rebuttable presumption did not apply to the parties' separation agreement, since it also included a provision giving either party the option, in the event of a substantial change of circumstances, to unilaterally seek a judicial determination of child support.

2. Child Custody and Support—child support calculation—ambiguity regarding therapy expenses—recalculation required

In a child custody and child support action between the divorced parents of a minor child, the trial court abused its discretion by including the child's recurring therapy expenses both as an extraordinary expense in its child support calculation and as a separate obligation under a prior temporary custody order, resulting in the father being charged twice for the same expense. Additionally, the trial court's order directed the mother to pay 100% of the child's unreimbursed therapy expenses while also ordering the father to pay for part of that therapy expense as part of his child support obligation. Ultimately, the child support provisions of the trial court's order were reversed and the matter was remanded for a recalculation of child support and for clarification on the extent to which each party was responsible for paying their child's therapy expense.

3. Attorney Fees—child support action—insufficient means to defray litigation costs—sufficiency of findings and evidence

In an action between the divorced parents of a minor child, the trial court did not abuse its discretion in ordering the father to pay attorney fees to the mother—both to defray the mother's cost of litigating the child support action, pursuant to N.C.G.S. § 50-13.6, as well as to fulfill his obligation to pay attorney fees in connection with a prior civil contempt order—where the court made the necessary statutory findings and where the evidence—including the mother's testimony and an affidavit from her attorney—supported the court's finding that the mother had sufficient means to defray a portion, but not all, of her legal expenses in connection with the lawsuit. Importantly, it was within the trial court's discretion to decide whether to compare the parties' relative estates when entering an award of attorney fees.

Appeal by defendant from order entered 29 June 2024 by Judge J. Rex Marvel in Mecklenburg County District Court. Heard in the Court of Appeals 27 August 2025.

Modern Legal, by Theresa E. Viera, for plaintiff-appellee.

Sodoma Law, by Rebecca K. Watts, for defendant-appellant.

ZACHARY, Judge.

Defendant David D. Miller ("Father") appeals from the trial court's order awarding permanent child support, permanent child custody, and attorney's fees to Plaintiff Tracy Brown ("Mother").[1] After careful review, we affirm in part, reverse in part and remand.

I. Background

Mother and Father were married in 2005 and divorced in 2013. They have one minor child. On 14 September 2011, the parties executed a "Contract of Separation, Property Settlement, Alimony, Child Custody and Support Agreement" ("the Separation Agreement"). The Separation Agreement was never formalized as a court order.

The Separation Agreement included, inter alia, the following provisions pertinent to child support:

> [Father] shall pay to [Mother] as child support the sum of $219.00 per month, payable on the first day of the month

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1. On appeal, Father does not challenge the trial court's child custody award. Accordingly, that portion of the court's order remains undisturbed. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

> following the separation of the parties and payable thereafter on the first day of each month subject to the modifying or terminating events set forth hereafter.
>
> Child support is based upon the following factors: [Mother]'s gross monthly income of $5292 (a 37.47% share of income), [Father]'s gross monthly income of $8833 (a 62.53% share of income), and a 50/50 timeshare. The parties agree to re-calculate the child support amount annually or as salaries are adjusted.

The Separation Agreement also provided for an annual renegotiation of the child support obligation or, at the option of either party, a judicial determination of the child support obligation:

> On or before April 15 of each year, the parties will exchange their tax returns, W-2 forms and 1099 forms to determine if either party has a change in income such that an adjustment in child support may be appropriate.
>
> During any such renegotiation of child support, the parties shall provide each other full documentation of all income and shall recalculate child support according to the Child Support Guidelines to ensure they are making fully informed decisions regarding support for the child. This computation shall not automatically obligate either parent to such child support figure. *However, each party understands that in the event of a substantial change in circumstances, child support shall be subject to modification by a court of competent jurisdiction.* The annual exchange of documentation shall be the basis for determining for the succeeding 12 months the ratio of the parties' gross incomes to each other for the purpose of determining each parties' share of the expenses set forth in subparagraphs (a) through (h).

(Emphasis added).

On 1 April 2022, Mother filed a complaint for child custody and motion for attorney's fees. On 23 May 2022, Father filed his answer and counterclaim for child custody. On 24 June 2022, the trial court entered a temporary custody order ("the Temporary Custody Order") awarding Mother sole legal and physical custody of the parties' child and Father scheduled visitation. Under the terms of the Temporary

Custody Order, Mother and Father were required to equally share the costs of their child's therapy.

Father did not pay any child support to Mother during the month following the entry of the Temporary Custody Order. On 25 July 2022, Mother filed a motion in the cause raising claims for breach of contract and specific performance related to Father's alleged violations of certain child support provisions of the Separation Agreement, as well as advancing claims for judicially determined child support and attorney's fees. On 16 March 2023, Mother voluntarily dismissed her claims for breach of contract and specific performance.

The parties reached an agreement concerning temporary child support pending a hearing on permanent child support, and the trial court entered a memorandum of judgment/order recording the terms of the parties' agreement on 14 August 2023. The parties agreed, *inter alia*, that Father would pay Mother temporary child support in the amount of $1,346.00 per month, together with "$700 per month towards any potential arrearage that may, or may not, be determined at a future hearing." They also agreed to "equally divide the child's uninsured medical, health, and therapy expenses" beginning on 1 September 2023.

On 6 March 2024, Mother filed a motion for civil contempt and attorney's fees, alleging Father's "explicit refusal to comply with" the terms of the memorandum of judgment/order. The civil contempt matter came on for hearing on 23 April 2024. By order entered on 13 May 2024, the trial court held Father in civil contempt for willful violations of the terms of the memorandum of judgment/order and directed him to pay Mother $5,420.25 for her attorney's fees in monthly increments of $200.00 beginning on 1 May 2024. The court found, *inter alia*, that Father had failed to pay: (1) $4,038.00 in ongoing temporary child support for the months of February to April 2024; (2) $2,100.00 in child support arrears for the months of February to April 2024; and (3) $5,918.57 for his share of the child's unreimbursed medical, health, and therapy expenses through 22 January 2024. The court ordered that Father be held in the custody of the Mecklenburg County Sheriff but stayed execution of this decree and allowed Father until 9:00 a.m. on 30 April 2024 to purge himself of his contempt of court by paying Mother $12,056.57. However, Father had not satisfied the purge condition as of the second contempt hearing on 30 April, which he failed to attend.

On 31 May 2024, the parties' child custody, child support, and attorney's fees claims came on for trial. On 29 June 2024, the trial court entered an order that included the following findings of fact regarding its calculation of child support:

> 47. As of the date of trial on May 31st, Mother had received only $10,000.00 of the amount owed under the Civil Contempt Order and [memorandum of judgment/order].
>
> 48. From January 23, 2024, through the date of trial, Father has failed to pay his 50% portion of unreimbursed medical, health, and therapy expenses as required by the [memorandum of judgment/order] in the total amount of $1,525.00.
>
> 49. Pursuant to the Child Custody arrangement defined in the decretal portion of this Order, the [c]ourt applies North Carolina Guidelines Worksheet A finding the following based on the evidence and exhibits presented:
>
> a. Mother's income is $4,880.22/month.
>
> b. Father's income is $14,517.00/month.
>
> c. Mother pays $84.32 for the child's portion of health insurance premium costs.
>
> d. Mother pays $974.25/month for the child's extraordinary expenses.
>
> 50. Beginning August 1, 2022, (the 1st of the month following Mother's claim for Child Support), Father owes a child [support] obligation to Mother in the amount of $2,294.00 per month. . . .
>
> 51. From August 2022 through June 2024, Father owes a total ongoing child support obligation of $52,762.00.
>
> 52. From August 2022 through June 2024, Father owes a total of $7,443.57 for his 50% portion of unreimbursed health expenses. This is from $5,918.57 (to account for Father's 50% portion of unreimbursed medical, health, and therapy expenses through January 22, 2024 as found by the [c]ourt in the Civil Contempt Order) plus $1,525.00 (to account for his 50% portion of unreimbursed medical, health, and therapy expenses from January 23, 2024, through the date of trial).
>
> 53. As of June 30, 2024, Father's total child support arrears = $60,205.57.

> 54. Under the [memorandum of judgment/order] and in response to the Civil Contempt Order, Father has made payments toward his child support obligation as of the date of trial in a total amount of $22,276.00. . . .
>
> 55. After credit, Father's remaining child support arrears owed as of June 30, 2024 = $37,929.57.

Based on these findings, the trial court ordered the following with regard to child support:

> 2. Child Support. Beginning July 1, 2024, and continuing on the 1st of each month thereafter, Father shall pay ongoing child support to Mother in the amount of $2,294.00 per month until the minor child graduates from high school or turn[s] eighteen, whichever occurs later.
>
> 3. Child Support Arrears. Father's child support arrears are $37,929.57 as of June 30, 2024. Beginning July 1, 2024, and continuing on the 1st of each month thereafter, Father shall pay $706.00 per month toward this child support arrears until paid in full.
>
> 4. Health Insurance. Mother shall continue to maintain health insurance for the minor child for so long as she is under an obligation to provide child support toward the minor child pursuant to [N.C. Gen. Stat. § 50-13.4].
>
> 5. Uninsured Medical, Health, and Therapy Expenses. Beginning June 2024, Mother shall pay 100% of the child's unreimbursed medical, health, and therapy expenses.

The court also made a series of findings of fact specifically related to its award of attorney's fees:

> 57. Per the Civil Contempt Order, Father was also ordered to pay $5,420.25 in attorney's fees, to be paid in increments of $200.00/month starting May 1, 2024. Mother has not received any payments toward said attorney's fees as of the date of trial.
>
> 58. The [c]ourt received into evidence the Affidavit of Attorney's Fees, submitted by [Mother's counsel], which

detailed time expended and fees incurred related to Mother's claims for Child Custody and Child Support through May 30, 2024 (including estimated fees related to trial on May 31, 2024).

59. Mother entered into an agreement with [her counsel], under the terms of which she agreed to pay [her counsel] at the regular hourly rate billed for her time by her firm, . . . as well as to pay other attorneys and legal assistants working on her case at their regular hourly rates.

60. [Mother's counsel] and her colleagues at [her firm] have rendered valuable legal services to Mother in connection with her claims for Child Custody and Child Support. The fees incurred by Mother in connection with said claims are reasonable in nature, scope, skill, time and rate.

61. Considering the applicable hourly rates and the time involved as set forth on the Affidavit of Attorney's Fees, the nature and value of the services rendered, and the skill and ability called for, the [c]ourt finds that the reasonable value of the services rendered by [Mother's counsel] and her firm to Mother in connection with her claims for Child Custody and Child Support (separate from the Civil Contempt matter) is at least $75,615.75. Such value is customary for like work performed by legal counsel of similar qualifications and experience in Mecklenburg County, North Carolina.

62. Mother has sufficient means to defray a portion, but not all, of the attorney's fees and costs related to her claims for Child Custody and Child Support. Mother has insufficient means to defray the entire cost of the litigation in relation to her claims and she is entitled to an award of attorney's fees pursuant to [N.C. Gen. Stat. § 50-16.4].

63. It is reasonable and appropriate that Father pay the sum of $30,000.00 to Mother to reimburse Mother for the efforts on her behalf by [her counsel] and her firm. Considering Father's liquid assets, income, and earning potential, Father can afford to pay $30,000.00 in attorney's fees at a rate of $1,250.00 per month (to be paid in full by June 2026). Said amount is in addition to the attorney's fees ordered in the Civil Contempt Order of $5,420.25 payable in increments of $200.00 per month, until said amount is paid in full.

Based on these findings, the court concluded that "Mother has insufficient means to defray a portion of the attorney's fees, costs and litigation expenses of this action, and Mother is entitled to an award of attorney's fees in the Child Custody and Child Support action pursuant to" N.C. Gen. Stat. § 50-13.6. The court further concluded that "[t]he award of attorney's fees set forth herein is reasonable, customary, and appropriate." The court ordered that Father "pay to Mother the sum of $30,000.00 to reimburse her attorney's fees and costs at a rate of $1,250.00 per month" beginning on 1 July 2024, in addition to the attorney's fees awarded in the Civil Contempt Order.[2]

Father timely filed notice of appeal.

II. Discussion

On appeal, Father raises several arguments regarding the trial court's child support and attorney's fees awards. First, Father asserts that the court erred by failing "to give proper consideration to the parties' unincorporated separation agreement" in determining his child support obligation. He next contends that the court "erred in its . . . past prospective (arrears) calculation and prospective calculation" because it included in both calculations "uninsured medical expenses that were also addressed and ordered to be paid outside of the [G]uideline calculation." Lastly, Father challenges the sufficiency of the findings of fact supporting the court's award of attorney's fees to Mother.

A. Child Support

1. Standard of Review

"Our review of a child support order is limited to determining whether the trial court abused its discretion." *Jackson v. Jackson*, 280 N.C. App. 325, 328, 868 S.E.2d 104, 108 (2021) (citation omitted). "Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation omitted). "The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Id.* (citation omitted).

2. At the conclusion of the 31 May 2024 trial, the court executed an order for Father's arrest.

2. Unincorporated Separation Agreement

[1] Father first asserts that "the trial court's order making an initial child support determination that differs from the parties' contracted[-] for child support obligation [wa]s in error" because the court did not "give proper consideration to the parties' unincorporated separation agreement." We disagree.

Our Supreme Court has long affirmed that "[f]reedom of contract is a fundamental basic right." *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 467, 144 S.E.2d 393, 400 (1965). Where a separation agreement has not been incorporated into a court order, it remains "a contract between the parties and the court is without power to modify it except (1) to provide for adequate support for minor children, and (2) with the mutual consent of the parties thereto where rights of third parties have not intervened." *Jackson*, 280 N.C. App. at 328, 868 S.E.2d at 108 (citation omitted). Our appellate courts have long recognized that "where parties to a separation agreement agree upon the amount for the support and maintenance of their minor children, there is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable." *Fuchs v. Fuchs*, 260 N.C. 635, 639, 133 S.E.2d 487, 491 (1963).

This Court has established a detailed analytic framework to guide the trial court's child support determinations in cases involving unincorporated separation agreements. In *Pataky v. Pataky*, we explained:

> [I]n an initial determination of child support where the parties have executed an unincorporated separation agreement that includes provision for child support, the court should *first apply a rebuttable presumption that the amount in the agreement is reasonable and, therefore, that application of the* [G]*uidelines would be inappropriate. The court should determine the actual needs of the child at the time of the hearing, as compared to the provisions of the separation agreement.* If the presumption of reasonableness is not rebutted, the court should enter an order in the separation agreement amount and make a finding that application of the [G]uidelines would be inappropriate. If, however, the court determines by the greater weight of the evidence that the presumption of reasonableness afforded the separation agreement allowance has been rebutted, taking into account the needs of the children existing at the time of the hearing and

> considering the factors enumerated in the first sentence of [N.C. Gen. Stat.] § 50-13.4(c), the court then looks to the presumptive [G]uidelines established through operation of [N.C. Gen. Stat.] § 50-13.4(c1) and the court may nonetheless deviate if, upon motion of either party or by the court *sua sponte*, it determines application of the [G]uidelines would not meet or would exceed the needs of the child or would be otherwise unjust or inappropriate.

Pataky v. Pataky, 160 N.C. App. 289, 305, 585 S.E.2d 404, 414–15 (2003) (cleaned up) (emphasis added), *aff'd in part, disc. review improvidently allowed in part*, 359 N.C. 65, 602 S.E.2d 360 (2004) (per curiam). The substance of this analysis—now familiarly referred to as the "*Pataky* presumption"—has been incorporated into the Child Support Guidelines. *See* N.C. Child Support Guidelines, at 1 (2023).

Father argues on appeal that the trial court erred by ordering a child support obligation in accordance with the Child Support Guidelines that differs from the amount of child support provided in the Separation Agreement without first undertaking the *Pataky* analysis. Although the court referred to the Separation Agreement in its findings of fact, it neither presumed that the amount of child support established in the Separation Agreement was reasonable nor determined that any such presumption was rebuttable.

It is undoubtedly true that, as Father explains, "the trial court must afford sufficient weight to the parties' agreement" when determining child support in the face of the parties' child support provision in an unincorporated separation agreement. Indeed, the intricate process prescribed in *Pataky* is properly grounded in respect for the parties' fundamental right to contract. Here, however, there is a fatal flaw in Father's logic. The Separation Agreement in this case provides that "each party understands that in the event of a substantial change in circumstances, child support shall be subject to modification by a court of competent jurisdiction."[3] This provision plainly evinces the parties' intent that they would both have the option to unilaterally solicit a judicial determination of child support. Consequently, giving "proper consideration" to the Separation Agreement, as Father requests, the application of the rebuttable presumption of reasonableness is simply not necessary to protect the bargained-for benefits of the parties' contract.

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3. Neither party disputes that a substantial change of circumstances has arisen in the 11 years since the parties executed the Separation Agreement.

Therefore, we conclude that the *Pataky* presumption of reasonableness is inapplicable to the case at bar, in which the parties have executed an unincorporated separation agreement that explicitly provides that either party may seek a judicial determination of child support. Defendant's argument is overruled.

B. Uninsured Medical Expenses

[2] Father next argues that "[t]he trial court erred in its child support calculations, both for past prospective (arrears) calculation and prospective calculation when it included in the calculation uninsured medical expenses that were also addressed and ordered to be paid outside of the [G]uideline calculation." We agree.

In *Lawrence v. Tise*, we acknowledged that uninsured medical and dental expenses are "extraordinary expenses" under the Child Support Guidelines, which the trial court may apportion at its discretion. 107 N.C. App. 140, 150, 419 S.E.2d 176, 183 (1992). There are two methods by which a trial court may apportion uninsured medical and dental expenses: 1) by including the expense as an extraordinary expense in the child support calculation, which results in a pro rata division of the expense between the parties, or 2) by ordering each party to pay a set percentage of the expense in addition to the ordered child support payment. The determination of which method to employ is in the discretion of the court.

In the instant case, the child has a regularly recurring therapy expense of $974.25 per month. On 29 June 2024, the court entered an order obligating Father to contribute $2,294.00 toward the support of the parties' child. This sum is payable to Mother and includes Father's pro rata share of the child's therapy expense as an extraordinary expense. The court ordered that Father's past prospective child support obligation was to be assessed as beginning on 1 August 2022, the month following the filing of Mother's claim for child support. Additionally, the court found that Father was in arrears for his unpaid portion of the therapy expense for the period from August 2022 to June 2024, for which he was obligated under the Temporary Custody Order.

The court ordered that Father's monthly prospective child support payments begin on 1 July 2024, together with a monthly payment toward his arrears. These arrears arose from two time periods: (1) the past prospective arrears that accumulated from August 2022 to June 2024; and (2) the arrears for Father's unpaid share of the child's uninsured medical, health, and therapy expenses that accumulated from August 2022 to June 2024 under the Temporary Custody Order.

In the 29 June 2024 order, the trial court twice assessed Father with payment of a portion of the therapy expense: as an extraordinary expense in the past prospective child support calculation *and* as an obligation under the Temporary Custody Order. This double-counting is in error and "could not have been the result of a reasoned decision." *Jackson*, 280 N.C. App. at 328, 868 S.E.2d at 108 (citation omitted). Thus, the court abused its discretion, and the order must be reversed and remanded for recalculation of Father's arrears obligation. Upon remand, "the trial court shall rely upon the existing record, but may in its sole discretion receive such further evidence and further argument from the parties as it deems necessary and appropriate to comply with the instant opinion." *Heath v. Heath*, 132 N.C. App. 36, 38, 509 S.E.2d 804, 805 (1999).

Father additionally notes confusion with the court's order that Mother "pay 100% of the child's unreimbursed medical, health, and therapy expenses" beginning with the month of June, 2024, while the court also orders that Father pay his child support obligation of $2,294.00, which includes his pro rata share of the therapy expense as an extraordinary expense. This provision raises some ambiguity as to whether the court intended for Mother to shoulder the full cost of the child's therapy (in which case the expense should not be included in Father's child support obligation), or whether the court intended for Mother to pay the full cost of therapy at the point of service and then have Father reimburse her for his pro rata share through payment of his child support obligation. On remand, the trial court shall clarify its intent with respect to this issue.

C. Attorney's Fees

[3] Finally, Father argues that the trial court erred by awarding attorney's fees to Mother "when no evidence was presented, and no findings made that [Mother] had insufficient means to defray the costs of the action." We disagree.

1. Standard of Review

Our General Statutes provide that "[i]n an action or proceeding for the custody or support, or both, of a minor child, . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit." N.C. Gen. Stat. § 50-13.6. "Whether these statutory requirements have been met is a question of law, reviewable on appeal." *Conklin v. Conklin*, 264 N.C. App. 142, 144, 825 S.E.2d 678, 680 (2019) (citation omitted).

"[W]hen these requirements have been met . . . the standard of review change[s] to abuse of discretion for an examination of the amount of attorney's fees awarded." *Id.* (citation omitted). "Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute will establish an abuse of discretion." *Sarno v. Sarno*, 255 N.C. App. 543, 548, 804 S.E.2d 819, 824 (2017) (cleaned up). "In addition, the trial court's findings of fact must be supported by competent evidence." *Conklin*, 264 N.C. App. at 144, 825 S.E.2d at 680.

2. Analysis

Father does not contest Mother's satisfaction of the first statutory requirement—that Mother is "an interested party acting in good faith," N.C. Gen. Stat. § 50-13.6. Instead, he limits his challenge to a contention that "no evidence was presented, and no findings made that [Mother] had insufficient means to defray the costs of the action."

"A party has insufficient means to defray the expense of the suit when he or she is unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit." *Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33, 35 (cleaned up), *reh'g denied*, 343 N.C. 517, 472 S.E.2d 25 (1996).

Father alleges that "[t]he only evidence presented by [Mother] in support of her attorney's fees claim w[as] (1) her attorney's affidavit and (2) her testimony." Of these, Father candidly admits that he takes "no issue with the attorney's affidavit in that it listed the time expended on the case and the amounts charged"; rather, he challenges the evidence that Mother "had insufficient means to defray the costs of the action."

Because N.C. Gen. Stat. § 50-13.6 "does not require the parties to allege or prove that one spouse is a dependent spouse and the other a supporting spouse, there is no need to compare the parties' relative estates when considering whether to award attorney's fees in child custody and support actions." *Id.* at 57, 468 S.E.2d at 37. Of course, "while the trial court should focus on the disposable income and estate of" the parent ordered to pay attorney's fees, the court is not prohibited from making "any comparison with [the other parent]'s estate, for example, in determining whether any necessary depletion of [the other parent]'s estate by paying [his or] her own expenses would be reasonable or unreasonable." *Van Every v. McGuire*, 348 N.C. 58, 62, 497 S.E.2d 689, 691 (1998). These precedents thus place the decision of whether to compare the parties' relative estates in the discretion of the trial court, and such decision will only be reversed upon "a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute." *Sarno*, 255 N.C. App. at 548, 804 S.E.2d at 824 (citation omitted).

Here, the trial court made the findings required by N.C. Gen. Stat. § 50-13.6; Father merely challenges the evidentiary support for the court's finding that "Mother has insufficient means to defray the entire cost of the litigation in relation to her claims." The court found that Mother's monthly income was $4,880.22 and that the reasonable value of her attorney's service to her was at least $75,615.75 (not including the $5,420.25 in attorney's fees that Father already owed to Mother pursuant to terms of the Civil Contempt Order). Father "does not appeal these findings and they are binding on appeal." *Kuttner v. Kuttner*, 193 N.C. App. 158, 160, 666 S.E.2d 883, 885 (2008).

Moreover, these findings—as well as those detailing Father's previous noncompliance with court orders in this matter—support the trial court's determination that "Mother has insufficient means to defray the entire cost of the litigation in relation to her claims." Father is unable to show that the award of attorney's fees "was unsupported by reason and could not have been a result of competent inquiry." *Sarno*, 255 N.C. App. at 548, 804 S.E.2d at 824 (citation omitted). This is especially true in light of the trial court's finding that "Mother has sufficient means to defray *a portion, but not all*, of the attorney's fees and costs related to her claims" (emphasis added), and ordered Father to pay less than half of the total amount that Mother had incurred to date.

Father has not demonstrated that the trial court abused its discretion. Accordingly, we will not disturb the court's award of attorney's fees.

III. Conclusion

For the foregoing reasons, the trial court's order is affirmed as to the award of attorney's fees, reversed as to the calculation of Father's child support obligation and arrears, and remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judges WOOD and STADING concur.

REBECCA EDWARDS, Plaintiff
v.
STRATA SOLAR, LLC, Defendant

No. COA25-605

Filed 17 December 2025

1. Employer and Employee—wrongful discharge—discrimination based on pregnancy—no cause of action

In an action filed against a corporation (defendant) by a former employee (plaintiff), an attorney recruited for a senior legal role at the company but fired shortly after she requested a medical leave and short-term remote work upon experiencing health complications relating to a miscarriage, the trial court properly dismissed—pursuant to Civil Procedure Rule 12(b)(6)—plaintiff's claim of wrongful discharge based on discrimination relating to her pregnancy, where pregnancy was not a protected category under the Equal Employment Practices Act and where neither the Act nor any other North Carolina statute articulated a public policy prohibiting any adverse employment action on the basis of pregnancy.

2. Employer and Employee—wrongful discharge—based on temporary disability—no cause of action

In an action filed against a corporation (defendant) by a former employee (plaintiff), an attorney recruited for a senior legal role at the company but fired shortly after she requested a medical leave and short-term remote work due to medical complications relating to a miscarriage, the trial court properly dismissed—pursuant to Civil Procedure Rule 12(b)(6)—plaintiff's claim of wrongful discharge based on temporary disability in connection with her miscarriage, where North Carolina's employment discrimination laws only protected those with disabilities that substantially limit at least major life activities, thereby excluding short-term disabilities of the sort that plaintiff alleged in her complaint.

3. Employer and Employee—wrongful discharge—sex discrimination—allegations in complaint—sufficiency

The trial court's order granting a motion to dismiss under Civil Procedure Rule 12(b)(6) was reversed in part where, the court improperly dismissed a claim by plaintiff—an attorney recruited by defendant for a senior legal role—against her former employer (defendant) on the basis of sex discrimination. Plaintiff's complaint alleged sufficient facts that, if taken as true, supported an inference that defendant fired her because of her sex, including that plaintiff: was the only woman on the company's legal team; suffered medical complications from a miscarriage, which required her to take a medical leave from work; saw a sudden negative shift in management's attitude toward her when she returned from leave and asked to work remotely during her recovery, as her superiors began questioning her honesty and reliability, and rescinded prior promises of job advancement; was required to provide medical documentation for her remote work, which was not required of male colleagues at the company who requested remote work or time off for medical reasons; and was fired for not being a "team player" even though she had received a very positive performance evaluation—citing her exceptional professionalism—shortly before her termination.

Appeal by plaintiff from order entered 25 February 2025 by Judge John M. Dunlow in Durham County Superior Court. Heard in the Court of Appeals 18 November 2025.

Elliot Morgan Parsonage, PLLC, by R. Michael Elliot and Suzanne Reynolds, for plaintiff-appellant.

Nelson Mullins Riley & Scarborough LLP, by Phillip J. Strach and Nathaniel J. Pencook, for defendant-appellee.

ARROWOOD, Judge.

Rebecca Edwards ("plaintiff") appeals from the trial court's order granting a motion to dismiss pursuant to Rule 12(b)(6) in favor of Strata Solar, LLC ("defendant"). Plaintiff contends her complaint sufficiently asserted a prima facie case for wrongful discharge from her employment on the basis of sex discrimination. For the following reasons, we affirm in part, reverse in part, and remand.

I. Background

Plaintiff filed a complaint in Durham County on 18 October 2024. Her complaint alleged the following:

Plaintiff is an attorney who began employment with defendant on 28 November 2022, following a period of recruitment for a senior legal role at the company. During the recruitment process, defendant "actively and aggressively pursued" plaintiff and represented that she would be groomed for the Deputy General Counsel role, with defendant's General Counsel allegedly repeatedly communicating that the advancement would be swift: "[I]f you are in the same place in a year, we will have failed you." Plaintiff expressed her concern about being the only woman on the legal team, but she accepted the position on the basis of defendant's communications. Plaintiff worked in defendant's legal department for about three months and received positive feedback in her only performance evaluation.

Plaintiff learned that she was pregnant in December 2022, after many years of difficulty becoming a parent. Given the early stage of the pregnancy and her "anxiety" that defendant would "hold her desire to be a mother against her" in advancement considerations, she did not inform defendant at the time.

Plaintiff experienced a miscarriage in January 2023. Beginning January 20 and throughout the subsequent two weeks, plaintiff experienced a series of medical emergencies requiring professional attention and regularly communicated with defendant about her inability to be present in the office, citing medical reasons. Then, on January 29, plaintiff contacted her supervising General Counsel to fully inform him of the pregnancy's termination and her need for remote work in the coming week. At his request, she contacted defendant's Human Resources, who informed her that management sought documentation to verify her medical visits. Plaintiff alleges upon information and belief that defendant made no similar requests of male colleagues who requested either remote work or time off for medical appointments, and that defendant's General Counsel had authority to approve her remote work accommodations personally. Plaintiff provided medical records, but alleges that the General Counsel "remained cold and skeptical" and "was noticeably resentful of her need to work remotely."

After returning to work the following week, plaintiff met with the General Counsel, who allegedly remained skeptical about the miscarriage and expressed that plaintiff had "work to do" to repair her relationship with defendant's CEO. The following week, on 16 February 2023, plaintiff and the General Counsel met once again, where he allegedly said he "had never considered [plaintiff]" for the Deputy General Counsel position. On 28 February 2023, plaintiff and General Counsel discussed her performance review, which described her as meeting expectations generally and exceeding expectations as to professionalism. However, on 3 March 2023, plaintiff met with the General Counsel and two Human Resources representatives, who terminated her employment, allegedly because she wasn't "trustworthy" or a "team player." Plaintiff alleges that this explanation was pretextual, and that defendant terminated her due to her sex, her pregnancy and the disability accompanying her miscarriage, and "the concerns she voiced on multiple occasions regarding the disparate treatment." Plaintiff alleges financial, emotional, personal, and professional injury after the fallout of her termination.

Plaintiff initially filed suit in Wake County Superior Court on 23 April 2024 asserting a single claim for wrongful discharge in violation of public policy. Defendant moved to dismiss the complaint pursuant to Rule 12(b)(6) because pregnancy is not a protected category under the North Carolina Equal Employment Practices Act and because plaintiff failed to state a claim based on sex discrimination alone. The court dismissed her action without prejudice on 1 August 2024.

Plaintiff filed her present complaint in Durham County Superior Court on 19 October 2024, asserting claims for wrongful discharge in violation of public policy based on (1) sex and pregnancy and (2) disability. Defendant again moved to dismiss pursuant to Rule 12(b)(6) and the trial court dismissed plaintiff's action with prejudice on 25 February 2025. Plaintiff filed her notice of appeal 21 March 2025.

II. Discussion

We review de novo a trial court's order granting a motion to dismiss for failure to state a claim. *Bridges v. Parrish*, 366 N.C. 539, 541 (2013). The Court must determine "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Id.* "In reviewing a trial court's Rule 12(b)(6) dismissal the issue for the court is not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claim." *Bill Clark Homes v. Town of Fuquay-Varina*, 281 N.C. App. 1, 4 (2021) (citation and internal quotation marks omitted). In ruling upon a motion to dismiss for failure to state a claim, "the complaint is to be liberally construed, viewing all permissible inferences in the light most favorable to the nonmovant, and the court should not dismiss the complaint unless it appears beyond doubt the plaintiff could prove no set of facts" in support of a claim which would entitle the plaintiff to relief. *Gouch v. Rotunno*, 291 N.C. App. 7, 10 (2023) (cleaned up).

The employer-employee relationship is governed in North Carolina by the at-will employment doctrine: "[I]n the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party." *Kurtzman v. Applied Analytical Indus., Inc.*, 347 N.C. 329, 331 (1997), *reh'g denied*, 347 N.C. 586 (1998). However, we recognize a cause of action for wrongful discharge in violation of the state's public policy. *See Coman v. Thomas Mfg. Co., Inc.*, 325 N.C. 172, 175 (1989). "While there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy." *Id.* (citation omitted). "Public policy has been defined as the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Id.* at 175 n.2.

In order to state such a claim, "an employee must plead and prove that the employee's dismissal occurred for a reason that violates public policy." *Brackett v. SGL Carbon Corp.*, 158 N.C. App. 252, 259 (2003) (citation, quotation marks, and alterations omitted). Furthermore, "[t]he public policy exception to the at-will employment doctrine is confined to the express statements contained within our General Statutes or our Constitution." *Whitings v. Wolfson Casing Corp.*, 173 N.C. App. 218, 222 (2005). Therefore, it is not sufficient to simply point to public policy that may be implicated in issues that an employee has raised in a wrongful termination action; the employee must show that defendant violated the statutorily expressed public policy in terminating plaintiff from at-will employment.

Judicially created exceptions to the at-will employment doctrine must be interpreted narrowly, and expansion of public-policy protections is a matter reserved to the General Assembly. *Kurtzman*, 347 N.C. at 333–34. When the legislature is aware of a subject and chooses not to act, courts may not create an expanded cause of action. *See Jarman v. Deason*, 173 N.C. App. 297, 300 (2005) (holding no wrongful discharge claim exists based on employer size where legislature did not include employers with fewer than 15 employees under statute).

A. <u>Wrongful Discharge Based on Pregnancy</u>

[1] Plaintiff contends that the trial court erred in dismissing her wrongful discharge claim to the extent it was premised on alleged discrimination related to her pregnancy and subsequent miscarriage. Insofar as her complaint alleges discrimination based on pregnancy rather than sex, we find the trial court's dismissal was not erroneous because the General Assembly has stated no such public policy.

The North Carolina Equal Employment Practices Act ("NCEEPA") declares it to be the public policy of this State to safeguard the right and opportunity to seek and hold employment without discrimination or abridgement on account of "race, religion, color, national origin, age, sex or handicap." N.C.G.S. § 143-422.2. Notably, pregnancy is not included among the protected classifications identified in the statute, and neither the Act nor any other North Carolina statute articulates a public policy expressly prohibiting adverse employment action on the basis of pregnancy.

This statute was based on Title VII of the Civil Rights Act of 1964, and North Carolina courts look to federal Title VII jurisprudence for guidance on its interpretation. *N.C. Dep't of Corr. v. Gibson*, 308 N.C. 131, 136 (1983). The Supreme Court held in *Gilbert* that when enacting Title VII, Congress did not intend its term "sex" to encompass pregnancy. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 146 (1976). In so doing, the Court explained:

> Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

Gilbert, 429 U.S. at 134–35. No such "inclusion" came forth from North Carolina's General Assembly, despite their awareness of discrimination due to pregnancy. Indeed, defendant cites opportunities when the General Assembly has declined to pass legislation that would add pregnancy to the protected categories under North Carolina employment-discrimination law—further confirming that the existing statute does not encompass pregnancy-based claims. *See* S.B. 474, 2017-2018 Gen. Assemb., Reg. Sess. (N.C. 2017) (proposing to amend § 143-422.2 to change "race, religion, color, national origin, age, sex or handicap" to "race, sex, sexual orientation, national origin, citizenship, religion, age, veteran status, genetic information, pregnancy, handicap, or disability"); H.B. 186, 2017-2018 Gen. Assemb., Reg. Sess. (N.C. 2017) (same).

Adopting a theory of pregnancy discrimination enlarges the scope of § 143-422.2 beyond its text and would judicially recognize a cause of action the legislature has not enacted. Furthermore, aside from a criminal statute excepting breastfeeding women from indecent exposure prohibitions, plaintiff largely cites to executive orders, rather than statutes, to show the existence of a public policy protecting mothers from employment discrimination due to pregnancy. The language plaintiff offers is insufficient to point us to such a policy's expression.

As we will discuss later, this does not in itself prevent plaintiff from surviving a 12(b)(6) motion to dismiss if she adequately pleads a claim alleging wrongful discharge on the basis of sex. However, insofar as plaintiff's wrongful discharge claim is premised on discrimination due in particular to her pregnancy, miscarriage, or pregnancy-related medical leave, the trial court properly concluded that she failed to allege a violation of a recognized North Carolina public policy or statute, and dismissal of that portion of her claim was appropriate.

B. Wrongful Discrimination Based on Disability

[2] Plaintiff next argues that the trial court erred in dismissing her wrongful discharge claim to the extent it relied on allegations of disability discrimination. Again, we must conclude that dismissal of this claim was proper.

The NCEEPA establishes a public policy protecting employment opportunities without discrimination "on account of . . . handicap." N.C.G.S. § 143-422.2. The term "handicap" is defined within the Persons with Disabilities Protection Act ("NCPDPA"), N.C.G.S. § 168A-3(7), which limits the term to physical or mental impairments that substantially limit one or more major life activities and excludes temporary or transitory impairments of short duration. "[T]he remedial provisions of this statute are intended to aid only those who are presently disabled." *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 528 (1979). Thus, to sustain a wrongful discharge action based on disability discrimination, a plaintiff must identify a public policy expressed in the North Carolina statutes or Constitution prohibiting discharge because of disability, while adequately pleading facts demonstrating that she had, had a record of, or was perceived as having a qualifying disability at the time of termination.

Here, plaintiff alleges that she experienced medical complications surrounding her miscarriage and required short-term remote work and recovery time. She does not allege that these conditions persisted beyond several weeks or continued to affect her after she returned to the office, nor does she allege that defendant maintained knowledge of any ongoing physical or mental impairment at the time it made the termination decision. As such, these allegations are insufficient as a matter of law to establish a qualifying disability under § 168A-3(7). Thus, we conclude that plaintiff failed to plead facts demonstrating the existence of a legally cognizable disability at the time of her termination or that defendant was then aware of such a disability. Accordingly, we affirm the trial court's dismissal of plaintiff's disability-based argument for failure to state a claim upon which relief can be granted.

C. Wrongful Discharge Based on Sex Discrimination

[3] Plaintiff also argues that the trial court erred in dismissing her claim for wrongful discharge to the extent it alleges discrimination on the basis of sex in violation of the public policy expressed in N.C.G.S. § 143-422.2. We agree that plaintiff has adequately stated a claim under this theory and conclude that dismissal at the Rule 12(b)(6) stage was premature.

The NCEEPA expressly declares it the public policy of North Carolina to protect the right of individuals "to seek, obtain and hold employment without discrimination or abridgement on account of . . . sex." N.C.G.S. § 143-422.2. Clearly, a claim that defendant discharged plaintiff because of sex discrimination falls squarely within the text of the public policy identified by the General Assembly. Accordingly, at the pleading stage, plaintiff was required to include facts supporting her claim that (1) she was a member of a protected class (women), (2) that she was qualified and met the expectations of the employment, and (3) that her employer terminated her. Plaintiff's complaint satisfied these first three prongs. Lastly, plaintiff is also required to include facts giving rise to an inference of discriminatory motive on the basis of sex, typically satisfied in federal jurisprudence with facts alleging that employees of the other sex were retained under similar circumstances. *See Gibson*, 308 N.C. at 137–38; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Here, plaintiff alleges that prior to disclosing her medical circumstances, she had been encouraged to expect rapid advancement within defendant's legal department. After returning from approved medical leave, she alleges a sudden and negative shift in management's attitude, including questioning of her professional reliability and honesty, statements indicating that she would need to "repair" her relationship with management, and rescission of previously communicated expectations regarding promotion. She further alleges that similarly situated male attorneys were not subject to comparable scrutiny or distrust, and that as the only woman working full-time in the department, she was singled out by this treatment and terminated shortly thereafter. She was terminated despite a highly positive performance evaluation the previous week, including the conclusion that her professionalism was exceeding expectations. In short, plaintiff alleges that she experienced a serious medical episode particular to her sex, that defendant imposed requirements on her which it did not require of male co-workers who missed work or worked remotely due to medical matters, and that in the aftermath, defendant fired her for professionalism reasons, despite its recent evaluations taking no issue with her performance.

Taking plaintiff's allegations as true, as we must, they permit the reasonable inference that plaintiff's sex was plausibly a motivating factor in the termination decision. The complaint's alleged facts support other reasonable interpretations, to be sure, but this particular reasonable inference is what matters to survive defendant's motion to dismiss. Whether plaintiff can ultimately prove such a theory remains a matter for later discovery and fact-finding.

Defendant is correct that the General Assembly excluded a pregnancy-specific discrimination claim from its employment statutes, but this exclusion does not thereby extinguish all potentially litigable sex discrimination claims by women whose complaints plead some facts related to childbearing. Such a plaintiff may include such facts in her complaint if they support a reasonable inference that she suffered wrongful discharge on the basis of sex; if sufficient facts are so pled, her complaint should survive the pleading stage.

Workplace sex discrimination occurs and gives rise to a legitimate claim for relief, as our General Assembly intended. A plaintiff is not foreclosed from the benefit of inferences that may be drawn regarding allegations of sex discrimination, because as here, she also includes allegations regarding her pregnancy. Allegations in pleadings regarding a woman's pregnancy could be relevant to and implicated in the allegations in her sex discrimination complaints, without her pregnancy being *itself* the reason for the defendant employer's allegedly adverse actions. In reading the complaint at issue here, the trial court was obligated to grant plaintiff this reasonable inference. Recognizing the viability of these complaints does not enlarge North Carolina's narrow public policy framework; such claims seek only the enforcement of our statutes, not their expansion.

Further, the fact that plaintiff alleges discrimination due to "sex and pregnancy" rather than just "sex" does not forestall this claim's survival of the pleading stage. A motion to dismiss asks whether the complaint's allegations are sufficient to state a litigable claim for relief under some legal theory, whether that theory is properly labeled or not. *Driver v. Burlington Aviation*, 110 N.C. App. 519 (1993). Where the legal theory is improperly labeled, what matters is whether the allegations supporting that legal theory nevertheless give sufficient notice of the wrong complained of. *McAllister v. Ha*, 347 N.C. 638 (1998). As discussed above, plaintiff alleged facts that, taken as true, were sufficient to support a reasonable inference that defendant discriminated against her on the basis of her sex. It is a question for determination at later procedural stages as to whether her sex was the motivating factor in defendant's decision to terminate her. It makes no difference here that she claims she suffered wrongful discharge due to "sex and pregnancy" and included facts about her pregnancy and miscarriage.

III. Conclusion

Accordingly, we affirm dismissal as to plaintiff's pregnancy and disability-based claims and hold that the trial court erred in dismissing plaintiff's wrongful discharge claim based on sex discrimination pursuant to Rule 12(b)(6). That portion of the lower court's Order must be reversed and the matter remanded for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges CARPENTER and WOOD concur.

IN RE A.H.-G.

No. COA25-152

Filed 17 December 2025

1. **Child Abuse, Dependency, and Neglect—abuse and neglect proceeding—minor parent—assertion of right against self-incrimination—without input from guardian ad litem**

   In an abuse and neglect matter involving allegations that the parents inflicted—or allowed the infliction of—serious injuries upon their daughter when she was a baby, the trial court did not reversibly err when it allowed the mother, a teenaged minor represented by a Rule 17 guardian ad litem (GAL), to decide whether to assert her Fifth Amendment right against self-incrimination—if asked about certain felony charges pending against her—during her compelled testimony at the adjudication hearing. The hearing transcript showed that, although the GAL was silent regarding the mother's Fifth Amendment rights, the mother's attorney did object to her testifying at the hearing, after which the court advised the mother of her right to remain silent, which she affirmatively acknowledged (and clearly understood, as evidenced by her testimony, during which she answered all questions on direct examination except one, for which she expressly invoked her right to remain silent). Ultimately, there was no evidence that the GAL could have done anything—beyond merely repeating the attorney's arguments—to secure a more favorable outcome for the mother.

2. Child Abuse, Dependency, and Neglect—adjudication of abuse—baby's non-accidental injuries—inference that parents were responsible—evidentiary support

The trial court did not err in adjudicating the daughter of teenaged parents as an abused juvenile where clear and convincing evidence supported the court's findings of fact, which in turn supported an inference that the parents repeatedly inflicted—or allowed the infliction of—serious injuries to the child when she was a baby. Specifically, the court found that: the parents had a history of domestic violence, with the child having been present for at least one of their altercations; between the ages of three to four months, the child suffered multiple trauma incidents resulting in serious injuries, including rib fractures, a broken tibia, an eye hemorrhage, and several unexplained bruises; each incident occurred while the child was under her parents' care or during the parents' visitation with the child, which was sometimes unsupervised (and, therefore, unauthorized under the family's safety plan); subsequent medical examinations indicated that the child's injuries were inflicted rather than accidental; and both parents failed to provide consistent or credible explanations for these injuries.

Judge COLLINS concurring in part and dissenting in part.

Appeal by Respondent-Mother and Respondent-Father from orders entered 9 September 2024 and 15 October 2024 by Judge David E. Sipprell in Forsyth County District Court. Heard in the Court of Appeals 23 September 2025.

Theresa A. Boucher for Petitioner-Appellee Forsyth County Department of Social Services.

Mercedes O. Chut for Respondent-Appellant Mother.

Robert W. Ewing for Respondent-Appellant Father.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Justin B. Lockett and Michael W. Mitchell, for guardian ad litem.

PER CURIAM.

Mother and Father appeal from an order adjudicating their minor child abused and neglected and from a disposition order maintaining the child's custody with the Forsyth County Department of Social Services. Mother argues that the trial court committed reversible error by allowing her, a minor parent with a Rule 17 guardian ad litem, to decide whether to waive her Fifth Amendment right against self-incrimination during her compelled testimony. Father argues the trial court erred in adjudicating the minor child as an abused juvenile because the findings of fact do not support the inference that Mother and Father inflicted the child's injuries or allowed them to be inflicted. We affirm the orders as to both Mother and Father.

I. Background

Mother and Father are the biological parents of Amy, a minor child born in December 2023.[1] In March 2024, when Amy was approximately three months old, the Forsyth County Department of Social Services ("DSS") received a report that Amy had been physically injured "by other than accidental means on multiple occasions while in the care of her parents[.]" Amy was taken to Brenner Children's Hospital on 4 March 2024, where she was diagnosed with nonaccidental trauma. Dr. Sarah Northrop examined Amy and completed a full skeletal survey, diagnosing Amy with "healing rib fracture[s]" on her right sixth, seventh, and eighth ribs, a "healing right tibia fracture," and bruises on her chest and back; Dr. Northrop noted that all fractures appeared to be about three weeks old. Dr. Northrop explained that Amy "is a developmentally[ ]appropriate 3 month old who is not mobile" and "cannot roll and cannot injure herself." Dr. Northrop opined that the injuries were all consistent with inflicted injury and inflicted trauma.

DSS began an investigation into Amy's injuries and learned that, prior to the hospital visit on 4 March 2024, Amy was living with Mother and Father in the home of her maternal grandparents ("Grandmother" and "Grandfather") and that there was domestic violence history between Mother and Father. On 2 February 2024, Mother called Grandmother and reported that Father had assaulted her; Mother said that Father was holding Amy at the time of the assault and threatened to leave the home with Amy. Grandfather called law enforcement, and the police arrived at

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

the home, but Mother and Father denied that any domestic violence had taken place; Father agreed to leave the home that night. Grandfather reported that he and Grandmother believed Amy sustained her injuries during the alleged domestic violence altercation and explained that Mother and Father did not let them see Amy for approximately three weeks after the alleged altercation. In late February, while giving Amy a bath, Grandmother observed a large bruise and mark on Amy's ribs. Grandmother confronted Mother and Father about the mark; Mother said that it was "a scratch" that had "happened on its own, and that it was not a concern." However, Grandmother also noticed that Amy was crying during the night, and she urged Mother to take Amy to see a doctor, which Mother did the following morning on 4 March 2024.

Following Dr. Northrop's examination of Amy and her findings of inflicted injury, Mother denied that Amy had any bruises or marks prior to Dr. Northrop's medical evaluation. Mother did not provide any further explanation as to the cause of Amy's multiple fractures and unexplained bruising. Mother stated that Amy "could have been hurt . . . during [a] birthday celebration when [she] was passed around to multiple house guests at the birthday celebration." When Father was asked about the alleged domestic violence altercation, he denied any physical abuse and stated that he had a "verbal altercation" with Mother. Father also stated that Amy might have been hurt "by a guest" at the birthday celebration but otherwise did not provide any explanation as to the cause of Amy's multiple fractures and unexplained bruising. Due to Amy's injuries, Mother and Father entered into an agreement with DSS whereby Amy would live with her paternal grandmother in a temporary safety placement while the DSS investigation proceeded. Mother, Father, and the paternal grandmother all signed a "Safety Agreement" with DSS and agreed that Amy would have no unsupervised contact with Mother or Father. Dr. Northrop scheduled a follow-up "Child Medical Evaluation" for 15 March 2024.

On 15 March 2024, Dr. Northrop again examined Amy and found new injuries. Dr. Northrop noted that Amy had an "unexplained subconjunctival hemorrhage" in her eye, consistent with "direct impact trauma to the globe itself" or from "pressure events, such as smothering or suffocation." Dr. Northrop further noted that Amy had a new, unexplained fracture on her right second rib and that there was no "reasonable explanatory history" for these injuries. Dr. Northrop explained that the subconjunctival hemorrhage was "not the result of self-inflicted injury in [Amy's] age group and [was] not caused by routine handling or care of infants, or by routine infant processes such as crying, coughing[,] or vomiting." Dr. Northrop opined that the injuries were more likely than not the result of inflicted injury, and she explained that the subconjunctival hemorrhage was a type of "sentinel injury" that was a "frequent[] harbinger[] for future more severe abuse." She also noted that Amy's new injuries were especially concerning in light of the open investigation by DSS and the Safety Agreement that Mother, Father, and the paternal grandmother signed with DSS.

After the medical evaluation on 15 March 2024, DSS interviewed Mother, Father, and the paternal grandmother. Mother and Father admitted that, between 4 March 2024 and 15 March 2024, they visited Amy every other day while her paternal grandmother supervised the visits. Aside from confirming that Mother and Father had visited with Amy, the paternal grandmother did not report anything to DSS. Due to Amy's new injuries, Mother and Father entered into another safety agreement whereby Amy would live with her paternal aunt and the parents would not have unsupervised contact with Amy. Dr. Northrop scheduled another follow-up "Child Medical Evaluation" for Amy on 5 April 2024.

At the medical exam on 5 April 2024, Dr. Northrop again found that Amy had a "third episode of unexplained injuries" and had "unexplained/poorly explained bruising . . . to the right shoulder, right thigh, and left back." Dr. Northrop said that the "provided history of a single impact to the shoulder [from being dropped into a sink while being bathed by the paternal aunt] does not adequately explain" the multitude of "impact injuries" on Amy's body, and she expressed further concern of "supervisional neglect" because the injuries occurred while Amy was in a second safety placement. She specifically found that "[a] fall or slip while being bathed in a sink would also not adequately explain [Amy's] injuries." She stated that Amy's status as a four-month-old child and the "lack of appropriate supervision could lead to escalating injuries to include death." Based on the series of unexplained injuries inflicted on Amy, she was admitted to Brenner Children's Hospital for her safety.

Mother, Father, and the paternal aunt were interviewed by DSS following Amy's third medical exam. Mother stated that she had visited Amy seven times and that she never saw any marks or bruises on Amy; Father stated that he had visited Amy six times. The paternal aunt stated that Amy's new bruises "occurred when [Amy] slipped from her grasp while she was bathing her over a sink . . . on the morning of 4/5/24." She also stated that it was possible her own one-year-old child might have bitten Amy. The paternal aunt stated that Mother visited Amy "so often and for so long that there were some periods of time" when the paternal aunt could not supervise the visits. She also reported that the relationship between Mother and Father "is very toxic" and that she witnessed "frequent aggressive events between [Mother] and [Father] with [Amy] present."

Amy's paternal grandmother was also interviewed by DSS on 5 April 2024 following Amy's third medical exam; she told DSS that, on 13 March 2024, Mother and Father took Amy into a bedroom alone for approximately thirty minutes and she "was not able to supervise the visitation." She said that Father "left the house at one point to obtain medicine for [Amy] and she did not understand why." When Father returned, he went back into the bedroom with Mother and Amy and locked the door. The paternal grandmother heard a verbal altercation between Mother and Father, and she heard a "physical struggle and pushing in the room." She threatened to call law enforcement on Mother and Father, and she kicked them out of her home. The paternal grandmother "observed [Amy] to be well, and to be calm, and that she did not notice the redness in [Amy's] eye until the next morning." She did not report this violation of the Safety Agreement to DSS when it occurred on 13 March 2024, and she did not report the violation when first interviewed by DSS on 15 March 2024 following Amy's second medical exam.

On 9 April 2024, DSS filed a juvenile petition alleging that Amy was an abused and neglected juvenile and obtained nonsecure custody of Amy on the same day. At the time of the filing of the petition, Mother was a sixteen-year-old juvenile and Father was an eighteen-year-old adult. On 2 August 2024, the matter came on for an adjudication hearing, and the trial court determined that Amy was an abused and neglected juvenile. The trial court held a disposition hearing on 30 August 2024 and, by order entered 15 October 2024, concluded that it was in Amy's best interest that she remain in DSS custody. The trial court allowed Mother to have supervised visitation with Amy for two hours per week, and it allowed Father to have separate supervised visitation with Amy for two hours per week. Mother and Father both gave proper written notices of appeal from the adjudication and disposition orders.

II. Discussion

A. Mother's Appeal

[1] Mother's sole argument on appeal is that the trial court "committed reversible error by allowing [Mother], a minor parent with a Rule 17 [guardian ad litem], to decide whether to assert her Fifth Amendment right to remain silent during her compelled testimony." We disagree.

Whether a trial court acts contrary to a statutory mandate is a question of law reviewed de novo by this Court. *In re G.C.*, 230 N.C. App. 511, 515–16 (2013).

Our General Statutes mandate that "a guardian ad litem shall be appointed in accordance with the provisions of [N.C. Gen. Stat. §] 1A-1, Rule 17, to represent a parent who is under the age of 18 years and who is not married or otherwise emancipated." N.C. Gen. Stat. § 7B-602(b) (2023). Pursuant to Rule 17, the trial court must appoint a Rule 17 guardian ad litem ("GAL") for minor parents and incompetent adults when they are defendants in actions or special proceedings. *See* N.C. Gen. Stat. § 1A-1, Rule 17(b)(2) (2023). "The guardian so appointed shall . . . file his answer to the complaint," and "the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said infant or incompetent persons or defendants." *Id.*

Rule 17 "[GALs] are appointed to stand in place of minor children in all civil actions and proceedings as minors are presumed by law not to have the requisite capacity to handle their own affairs," and "the duties of the [GALs] are dictated by the action or proceeding in which the [GAL] has been appointed." *In re Papathanassiou*, 195 N.C. App. 278, 285–86 (2009) (citing *In re Clark*, 303 N.C. 592, 598 (1981)). While a Rule 17 GAL appointed to a minor parent "divest[s] the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination," *In re J.A.A.*, 175 N.C. App. 66, 71 (2005) (citation omitted); *see* N.C. Gen. Stat. § 1A-1, Rule 17(b)(2), a Rule 17 GAL's role is to act "as a guardian of procedural due process for the parent, to assist in explaining and executing her rights . . . to the fullest extent feasible and to do all things necessary to secure a judgment favorable to such party," which is dependent on the individual facts of the case, *In re A.S.Y.*, 208 N.C. App. 530, 538–40 (2010) (citations and internal marks omitted) ("[W]hile in many cases the GAL may fulfill his or her duties in a termination proceeding by merely assisting the parent, at times it will be necessary for the GAL to take further action during the proceeding in order to represent the parent to the fullest extent feasible and to secure a judgment favorable to that parent.").

Once appointed, as our General Statutes prescribe for guardianships, the Rule 17 GAL "should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent." N.C.

Gen. Stat. § 35A-1201(a)(5) (2023).[2] Further, "[t]o the maximum extent of his capabilities, an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him." *Id.* In addition, "Rule 17 contemplates active participation of a GAL in the proceedings for which the GAL is appointed" such that "[t]he presence and active participation of a GAL appointed according to the provisions of Rule 17 effectively removes any legal disability of the party that is so represented." *In re D.L.P.*, 242 N.C. App. 597, 601 (2015) (quoting *In re A.S.Y.*, 208 N.C. App. at 538).

Here, Mother was appointed a Rule 17 GAL due to her age and status as a minor parent who was not married or otherwise emancipated. The trial court appointed Mother's Rule 17 GAL at some point before 14 May 2024, when the first hearing took place on the need for Amy to remain in nonsecure custody with DSS.[3] The transcript indicates the Rule 17 GAL was present at the adjudication hearing. The Rule 17 GAL did not speak when the trial court gave Mother a statement of her rights, and the trial court did not ask the Rule 17 GAL whether Mother should waive her right against self-incrimination under the Fifth Amendment to the Constitution of the United States. However, Mother's attorney did speak and object to Mother testifying at the adjudication hearing, and the trial court fully explained to Mother her right to remain silent, which Mother affirmatively acknowledged.

The trial court had the following exchange with Mother's attorney and Mother when DSS called Mother to testify:

> [Mother's Attorney]: Your Honor, just for the record I would object to the County calling [Mother]. I understand that she is a parent in this case. However, she is also a juvenile and has the services of a Rule 17 Guardian ad Litem. So I would just like to put that objection on the record.

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2. While section 35A-1201(a) refers to guardians and not GALs, we find the statute instructive here as GALs function in a more limited scope and duration than a guardian. *See In re Q.B.*, 375 N.C. 826, 837 n.4 (2020) (noting guardianships under Chapter 35 are more stringent than Rule 17 GAL appointments); *Stark v. Ford Motor Co.*, 226 N.C. App. 80, 86 (2013) (contrasting "general guardian[s]" and GALs).

3. There is no order in the record showing the initial appointment of the Rule 17 GAL for Mother. However, in an order entered 14 May 2024, the trial court listed "Miya Bryant, Rule 17 GAL for [Mother]" as "present for the hearing," indicating that she was appointed some time before the first hearing on the need for Amy to remain in nonsecure custody with DSS. There also is no record evidence that Mother's Rule 17 GAL filed an answer.

> The Court: All right. Well, the objection is overruled at this point. I will give her the same advisement. Is she, is she charged as well?
>
> [DSS]: She is under a Juvenile Petition.
>
> The Court: Okay.
>
> [Mother's Attorney]: That is, that is correct, Your Honor.
>
> The Court: Felony charges?
>
> [Mother's Attorney]: Yes, there are three felonies, Your Honor.
>
> The Court: Okay. All right. So, with regard to those three felony charges, [Mother], you do have the right to remain silent, okay. . . . .
>
> [Mother]: Thank you, your Honor.
>
> The Court: Now, I'm at this point, like with regard to the father that testified, I'm not willing to accept just a blanket refusal to testify based on the Fifth Amendment in this case. Because there again, are plenty of questions that could be asked of you that would be relevant to this proceeding, but not necessarily incriminating in your juvenile case. So I have to take it on a case-by-case basis. But just understand that you have that right. If you feel you are being asked a question that might, if answered, incriminate you in your criminal case then you have that right to raise your Fifth Amendment, and you can stop and decide whether or not it's something that you need to answer. Okay?
>
> [Mother]: Okay. Thank you, Your Honor.
>
> The Court: You have any questions about that?
>
> [Mother]: No, Your Honor.

Mother then testified for approximately one hour and gave what she contends to be potentially incriminating answers during her testimony, including that she lied to DSS and to her mother about Amy; that she was Amy's "primary care" during the time period in which Amy sustained her first set of injuries; and that she rejected Dr. Northrop's medical opinion that constipation did not cause Amy's rib fractures. Mother answered every question on direct examination except for one:

> [DSS Attorney]: So let's get back to [Amy's] injuries. How did she get the broken tibia?
>
> [Mother]: I couldn't -- I'd like to exercise my right to remain silent.
>
> [DSS Attorney]: So you're refusing to answer that question?
>
> [Mother's Attorney]: Objection, Your Honor. She's already exercised her right.
>
> The Court: Court notes that she is exercising her right to remain silent with regard to that question.

Our Supreme Court dealt with a similar issue in *In re W.K.*, 376 N.C. 269 (2020).[4] In that case, the respondent-father asserted his Rule 17 GAL was insufficient because "the Rule 17 GAL spoke on the record only five times during [one] hearing and did not speak on the record at the August 2019 hearing." *Id.* at 275. Our Supreme Court said,

> As to the Rule 17 GAL's participation during the August 2019 hearing, [the] respondent-father now contends that the Rule 17 GAL could have been more active by making statements in support of [the] respondent-father's counsel's motion for a continuance and could have "worked with" [the] respondent-father's counsel to present evidence in [the] respondent-father's favor at the August 2019 hearing after the motion for a continuance was denied.
>
> We disagree given that [the] respondent-father has not identified any actions his Rule 17 GAL could have taken that would have improved his chances to obtain a decision in his favor, has not shown the Rule 17 GAL did not guard his due-process rights, and has not shown his Rule 17 GAL did not otherwise adequately assist him in executing his legal rights. It is well-established that "we will not presume error from a silent record." For example, there is no evidence of what, if anything, the Rule 17 GAL could have offered in support of [the] respondent-father's arguments to the trial court regarding the potential replacement of

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4. *In re W.K.* involves termination of parental rights proceedings and cites to N.C. Gen. Stat. § 7B-1101.1. This case involves an adjudication of abuse and neglect and cites to section 7B-602. However, the language in sections 7B-1101.1(a)-(d) and sections 7B-602(a)-(d) is identical.

> [the] respondent-father's trial counsel. Similarly, [the] respondent-father argues his GAL should have addressed the trial court in support of his counsel's multiple motions to continue, but there is no evidence that the Rule 17 GAL could have offered anything beyond repeating counsel's arguments. [The r]espondent-father contends his Rule 17 GAL could have worked with his counsel to present evidence favorable to him, but [the] respondent-father does not show his GAL had any such evidence. Moreover, the record establishes that the evidence needed by [the] respondent-father's counsel could only come from [the] respondent-father, not from his GAL.
>
> [The r]espondent-father's arguments are founded on unwarranted assumptions that presume error where none is shown on the record. We therefore reject [the] respondent-father's . . . appellate argument because he has failed to show any reversible error by his Rule 17 GAL in the execution of his role in [the] respondent-father's case.

Id. at 275–76 (internal citations omitted).

Likewise, here, Mother has not shown what actions her Rule 17 GAL could have taken to secure a more favorable decision for her beyond that of the objection by her attorney. Mother's attorney stated his objection to Mother being called and objected after Mother invoked her Fifth Amendment right. Requiring the Rule 17 GAL, who was present at Mother's hearings, to also object is not a feasible step to act as a guardian of Mother's due process rights because, as our Supreme Court reasoned in *In re W.K.*, "there is no evidence that the Rule 17 GAL could have offered anything beyond repeating counsel's arguments." *Id.* at 276.

In addition, immediately after Mother's attorney objected, the trial court explained to Mother her right against self-incrimination, which Mother affirmatively acknowledged. Mother also stated she did not have any questions about the trial court's explanation. Further, there is no evidence provided in the record to indicate that she was legally incompetent for any reason other than her age, marital status, and unemancipated status, so that her affirmative acknowledgment of the trial court's right to remain silent explanation fell outside of her comprehension or judgment. Rather, after her attorney objected to her testifying and after the trial court explained her Fifth Amendment right, Mother chose to answer certain questions but expressly exercised her right to remain silent herself in response to the broken tibia question.

While neither Rule 17 nor N.C. Gen. Stat. § 7B-602 specify what constitutes "active participation" by a Rule 17 GAL, the Rule 17 GAL's not repeating the objection of Mother's attorney nor interjecting to assert Mother's Fifth Amendment right where Mother affirmatively acknowledged she understood the trial court's explanation of her right does not reach the level of error, without additional evidence, for which our Courts have found a violation of Rule 17. *See*, *e.g.*, *In re W.K.*, 376 N.C. at 275–76 (affirming termination of parental rights where a Rule 17 GAL "spoke on the record only five times during" a hearing, did not speak on the record during another hearing, and could not offer "anything beyond repeating counsel's arguments"); *In re D.L.P.*, 242 N.C. App. at 602 (vacating adjudication and disposition orders when the trial court conducted the hearing without the presence and participation of the Rule 17 GAL); *In re A.S.Y.*, 208 N.C. App. at 540 (vacating an order of parental rights where the respondent-mother was not represented by a Rule 17 GAL during the termination hearing). Whether it be for the absence of additional evidence or actions by the Rule 17 GAL, the absence of an order defining the guidelines of the Rule 17 GAL's appointment in the record evidence, or the absence of any on-the-record discussion between Rule 17 GAL and Mother, "we will not presume error from a silent record." *In re W.K.*, 376 N.C. at 276.

Mother, DSS, and the Rule 17 GAL each rely substantially on *In re P.D.R.*, 224 N.C. App. 460 (2012). However, because *In re P.D.R.* was premised on statutory text which has since been amended or eliminated, S.L. 2013-129, 2013 N.C. Sess. Law 152, §§ 17, 32, we decline to use *In re P.D.R.* to guide our review here.

Therefore, the trial court did not err by allowing Mother to decide whether to assert her Fifth Amendment right.

B. Father's Appeal

[2] Father argues on appeal that "the trial court erred in adjudicating Amy as an abused juvenile because the trial court's competent evidentiary findings of fact do not support the inference that the respondent parents inflicted Amy's injuries or allowed them to be inflicted." Father does not challenge the trial court's adjudication of neglect.

We review a trial court's abuse adjudication to determine whether the trial court's findings of fact are supported "by clear and convincing evidence." *In re F.C.D.*, 244 N.C. App. 243, 246 (2015) (citation omitted). In turn, the trial court's conclusions of law must be properly supported by those findings of fact. *In re Gleisner*, 141 N.C. App. 475, 480

(2000). The trial court's findings of fact supported by clear and convincing evidence in an abuse adjudication are deemed conclusive even when there is evidence supporting contrary findings. *In re J.A.M.*, 372 N.C. 1, 8 (2019) (citations omitted). 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). The determination that a child is abused is a conclusion of law, which this Court reviews de novo. *In re Ellis*, 135 N.C. App. 338, 340 (1999) (citation omitted). Under de novo review, we "consider the matter anew and freely substitute our own judgment for that of the lower tribunal." *In re A.K.D.*, 227 N.C. App. 58, 60 (2013) (cleaned up).

An abused juvenile is any person less than 18 years old whose parent "(a) inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means" or "(b) creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means." N.C. Gen. Stat. § 7B-101(1)(a), (b) (2023). The trial court "is granted some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside." *In re A.D.*, 278 N.C. App. 637, 642 (2021) (quotation marks and citation omitted). "This Court has previously upheld adjudications of abuse where a child sustains non-accidental injuries, even where the injuries were unexplained, where clear and convincing evidence supported the inference that the respondent-parents inflicted the child's injuries or allowed them to be inflicted." *In re K.L.*, 272 N.C. App. 30, 39 (2020) (internal quotation marks and citation omitted). With young infants, "the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396 (1999).

Here, Father challenges certain findings of fact which determined that Amy was in the care of Mother and Father when she sustained her injuries. Father argues that there is not clear and convincing evidence to support that Mother and Father "were Amy's exclusive caretakers when she sustained her injuries" and that the trial court erred in concluding that Amy was an abused juvenile based on those unsupported findings. However, Father's argument is misplaced, as "[t]he adjudication of a child as abused concerns only the status of the child, not the fault or culpability of the parent." *In re K.W.*, 272 N.C. App. 487, 491 (2020) (citing *In re Montgomery*, 311 N.C. 101, 109 (1984)). And, here, the unchallenged findings of fact support that Amy was an abused child.

The trial court made the following relevant findings of fact:

> 10. On March 4, 2024, [Amy] was diagnosed with nonaccidental trauma at Brenner Children's Hospital. Dr. Sarah Northrop examined the child, reviewed her full skeletal survey, and interviewed the child's mother. [Amy] was determined to have the following injuries:
>
> > a. Healing lateral aspect of the right sixth, seventh, and eight[h] ribs
> >
> > b. Healing nondisplaced f[r]acture proximal right tibia metadiaphysis with callus formation and periosteal reaction consistent with a fracture that is at least 3 weeks of age.
>
> 11. Dr. Northrop provided an assessment that:
>
> > a. High concern for physical abuse
> >
> > b. Multiple unexplained fractures
> >
> > c. Unexplained bruise to chest
> >
> > d. Dermal melanocytosis
>
> 12. Dr. Northrop provided a medical opinion as follows:
>
> > a. [Amy] is a previously healthy 3-month-old who presents with concern for stomach pain and was found incidentally to have a healing rib fracture on abdominal x-ray and a healing right tibia fracture on skeletal survey. Both the rib fractures and the leg fracture are estimated to be about 3 weeks old. No history has been provided to explain these findings. No history has been provided to explain the bruise to the chest or back, which [Mother] states has been there for a few days.
> >
> > b. [Amy] is a developmentally appropriate 3-month-old who is not mobile. She cannot roll and cannot injure herself. No history of trauma has been provided. These injuries are all concerning for inflicted injury. They are not consistent with injuries from birth as while they are healing, they are estimated to be 3 weeks old, and [Amy] is 3 months old. While she has not completed a full evaluation for bone health or for coagulopathies, she has no other history of fractures, she has no radiographic signs of problems with bony metabolism, she has not had any

> bruising or petechiae at sights of medical intervention (PIV site, blood pressure cuff), and there is no current laboratory evidence or family history of coagulopathies or of bony metabolic problems. These injuries are all most consistent with inflicted trauma.

13. Upon investigation, [DSS] learned that prior to the March 4, 2024, hospital visit, [Amy] lived with her parents in the home of her maternal grandparents. The primary caretakers for [Amy] were [M]other and [F]ather who had a history of reported domestic violence between them. On February 2[], 2024, [Mother] called her mother reporting that she was assaulted by [Father] with [Amy] present.

14. Reportedly, [Father] was holding the infant child, threatening to leave the home with [Amy]. The maternal grandparents were not in the home as they were working out of town and had not provided a plan for supervision for their 16-year-old daughter other than her boyfriend [Father], who they knew to be violent toward their daughter. [Grandfather], the maternal grandfather of [Amy], called law enforcement to investigate the altercation in the home involving his daughter and granddaughter.

. . . .

18. [Mother] denied that [Amy] had any bruises or marks prior to the medical evaluation by Dr. Northrop on March 4, 2024. [Mother] stated her child had been crying on the night of March 3rd and that she became worried and took the child to the doctor the next day. [Mother] provided no further explanation as to the cause of [Amy's] multiple fractures and unexplained bruising.

19. . . . [Father] stated that all was well with [Amy] until the night of March 3, 2024, when she would not stop crying. [Father] stated that he and [Mother] agreed to take the child to the doctor the next day. [Father] provided no further explanation as to the cause of [Amy's] multiple fractures and unexplained bruising.

20. After the medical examination of [Amy] on March 4, 2024, [DSS] and the parents entered into an agreement whereby [Amy] would reside in the home of her paternal grandmother . . . as a temporary safety provider, while the

Child Protective Services Investigation proceeded. [The paternal grandmother] and [Mother] and [Father] signed a Safety Agreement with [DSS] that the parents of [Amy] would have no unsupervised contact with [Amy]. Dr. Northrop scheduled a follow up Child Medical Evaluation for [Amy] on March 15, 2024.

21. On March 15, 2024, [Amy] was again examined by Dr. Northrop at Brenner Children's Hospital. Dr. Northrop noted additional injuries to [Amy], as follows:

a. High concern for new physical abuse

b. Unexplained subconjunctival hemorrhage

c. Unexplained likely new fracture to right second posterior lateral rib

d. Multiple old fractures as seen on previous inpatient consultation, hearing

e. Resolution of previously noted bruises

22. Dr. Northrop provided a medical opinion as follows:

a. [Amy] is a 3-month-old infant previously well-known to the [C]hild Protection Team from an inpatient consult on 3/5/2024. . . . She presents with new injuries that were first seen on day of presentation, 3/14/202[4]. The [subconjunctival hemorrhage] is most consistent with inflicted trauma and is not well-explained by coughing or crying. While severe coughing can cause [subconjunctival hemorrhages] in adults, this is not seen in the infant population. [subconjunctival hemorrhages] are a sentinel injury in infants and are concerning for more abusive injuries. A skeletal survey was done because of this, and it revealed a likely right second rib fracture. This will be confirmed on follow up skeletal survey, but it appears to have a fracture line which is more consistent with an actual fracture than a physiologic finding.

b. [Subconjunctival hemorrhages] are broken blood vessels under the surface of the eye and are usually the result of direct impact trauma to the globe itself. More rarely these can be resultant from increased intrathoracic pressure events, such as smothering or suffocation. These are not the result of self-inflicted injury in

> this age group and are not caused by routine handling or care of infants, or by routine infant processes such as crying, coughing, or vomiting. The medical workup has failed to reveal underlying diagnoses that could contribute to their etiology. In the absence of a reasonable explanatory history these findings are more likely than not the result of inflicted injury.
>
> c. In non-mobile infant[]s subconjunctival hemorrhages are considered sentinel injuries and while not life-threatening themselves they are frequently harbingers for future more severe abuse.

. . . .

27. [Paternal grandmother] was interviewed on April 5, 2024. She reported that she cared for [Amy] from March 4 to March 15, 2024. [Amy's] parents visited her every other day. [Paternal grandmother] reported that the parents did not reside in the home with her and [Amy] during that time. [Paternal grandmother] reported that on March 13, 2024, [Mother] and [Father] took [Amy] with them into one of the rooms and [paternal grandmother] was not able to supervise the visitation. She did not report this violation of the Safety Plan to [DSS]. [Paternal grandmother] also did not report this incident when she was interviewed on or about March 14, 2024.

28. After the medical examination of [Amy] on March 15, 2024, [DSS] and the parents entered into another agreement whereby [Amy] would reside in the home of . . . [Amy's] paternal aunt, as a temporary safety provider, while the Child Protective Services Investigation proceeded. [Paternal aunt], [Mother], and [Father] signed a Safety Agreement with [DSS] that the parents of [Amy] would have no unsupervised contact with [Amy]. Dr. Northrop scheduled a follow up Child Medical Evaluation for [Amy] on April 5, 2024.

29. Dr. Northrop examined [Amy] again on April 5, 2024. Dr. Northrop reported that: [Amy] is a previously healthy 4-month-old infant for a CME evaluation and was found to have her third episode of unexplained injuries. Unexplained/poorly explained bruising in a non-mobile infant:

> a. The provided history of a single impact to the shoulder does not adequately explain bruising to the right shoulder, right thigh, and left back. A fall or slip while being bathed in a sink would also not adequately explain these injuries.
>
> b. The bruising to the leg and the shoulder could be consistent with teeth marks as in a bite, however no history of a bite has been provided.
>
> c. Bruises are the result of impact injuries, and these injuries represent impact to the back, shoulder, and front of the right thigh. [Amy] cannot roll and is not mobile. These injuries are considered sentinel injuries and while not life-threatening injuries they are frequently harbingers for future more severe abuse. This injury occurred while in a second Temporary Safety Placement.

. . . .

32. After the medical evaluation of April 5, 2024, [DSS] again interviewed [Mother] and [Father], along with [paternal aunt], the temporary safety provider. [Mother] reported that she had visited [Amy] seven times while the child remained with [paternal aunt]. [Mother] stated that she did not notice any marks or bruises on [Amy] during these visits. [Mother] stated that her last visit with [Amy] was on April 3, 2024. [Father] reported he visited [Amy] six times while [Amy] remained with [paternal aunt]. [Father] stated that he did not notice any marks or bruises on [Amy] during these visits. [Father] stated that his last visit with the child was on March 29, 2024.

33. [Paternal aunt] reported that the bruises seen on [Amy] on April 5, 2024, occurred when the child slipped from her grasp while she was bathing her over a sink in her home on the morning of April 5, 2024. [Paternal aunt] stated that it was also possible that her own one-year[-]old child might have bitten [Amy]. [Paternal aunt] stated that [Amy's] parents visited the child was she was acting as a caretaker for [Amy]. [Mother] visited daily and was present so often and for so long that there were some brief periods of time when [paternal aunt] could not supervise her at all times. [Paternal aunt] reported that [Amy's] parents visited on

one occasion at the same time, but they were all outside and she supervised them both. . . . .

. . . .

38. [Amy] suffered multiple rib fractures and a broken leg which have not been explained consistent with the medical findings by the child's parents.

39. [Amy] suffered at least 3 separate trauma incidents which resulted in injury to the child.

40. [Mother] and [Father] did not comply with the Safety Plan outlined with [DSS] after her injuries were first diagnosed and her need for a safe caretaker identified.

. . . .

42. Based upon the expert testimony of Dr. Northrop, an expert Pediatrics and Child Abuse, the court finds:

> a. [Amy] at age four months old could not inflict the diagnosed injuries on herself[.]
>
> b. The parents and caretakers for [Amy] have no[t] provided a reasonable explanation consistent with the medical findings and consistent with safe care for the child[.]
>
> c. [Mother] and [Father's] explanation that [Amy] was injured at her grandmother's birthday party while family members visited and the child was at all times being supervised by her parents and grandparents is not plausible and this explanation is not credible to the court as neither parent expressed that the child showed no distress or pain during that celebration.
>
> d. The eye injury suffered by [Amy] is the result of inflicted trauma and the parents' explanation that she scratched herself causing the injury is not plausible and this explanation is not credible to the court[.]
>
> e. The bruise injuries suffered by [Amy] are the result of inflicted trauma and the parents' explanation is not plausible and this explanation is not credible to the court. The explanation that [Amy] received bruising from being dropped in the kitchen sink while bathing

is also not plausible and this explanation is not credible to the court.

These unchallenged findings of fact show that Amy sustained "unexplained" and "non-accidental" injuries and support the inference that Mother and Father "inflicted [Amy's] injuries or allowed them to be inflicted." *In re K.L.*, 272 N.C. App. at 39 (quotation marks and citation omitted). The unchallenged findings further show that Mother and Father "created or allowed to be created a substantial risk of serious physical injury" to Amy. *See* N.C. Gen. Stat. § 7B-101(1)(b); *In re M.G.*, 363 N.C. 570, 573 (2009). In turn, these unchallenged findings of fact support the trial court's conclusion of law that Amy "is an abused . . . juvenile as pursuant to [N.C. Gen. Stat. §] 7B-101(1)[.]"

III. Conclusion

Because the trial court did not err by allowing Mother to invoke her Fifth Amendment right against self-incrimination, we affirm the trial court's adjudication and disposition orders as to Mother. As the unchallenged findings of fact support the trial court's conclusion of law that Amy is an abused juvenile, we affirm the trial court's adjudication and disposition orders as to Father.

AFFIRMED.

Before a panel consisting of Judges STROUD, COLLINS, and GRIFFIN.

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

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

I concur with the majority opinion's Section II.B, which affirms the trial court's adjudication and disposition orders as to Father. Because I believe that the record shows that Mother's GAL did not actively participate in the court proceedings and that the trial court erred by allowing Mother to decide whether to assert her Fifth Amendment right, I respectfully dissent from the majority opinion's Section II.A.

Whether a trial court acts contrary to a statutory mandate is a question of law reviewed de novo by this Court. *In re G.C.*, 230 N.C. App. 511, 515-16 (2013).

Our General Statutes mandate that "a guardian ad litem shall be appointed in accordance with the provisions of [N.C. Gen. Stat. §] 1A-1, Rule 17, to represent a parent who is under the age of 18 years and who is not married or otherwise emancipated." N.C. Gen. Stat. § 7B-602(b) (2023). Pursuant to Rule 17, the trial court must appoint a Rule 17 Guardian ad Litem ("GAL") for minor parents and incompetent adults when they are defendants in actions or special proceedings. *See* N.C. Gen. Stat. § 1A-1, Rule 17(b)(2) (2023). "The guardian so appointed shall . . . file his answer to the complaint" and "the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said infant or incompetent persons or defendants." *Id.*

Rule 17 "[g]uardians ad litem are appointed to stand in place of minor children in all civil actions and proceedings as minors are presumed by law not to have the requisite capacity to handle their own affairs." *In re Papathanassiou*, 195 N.C. App. 278, 285 (2009) (citing *In re Clark*, 303 N.C. 592 (1981)). As such, a Rule 17 GAL appointed to a minor parent "divest[s] the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination." *In re J.A.A.*, 175 N.C. App. 66, 71 (2005) (citation omitted); *see* N.C. Gen. Stat. § 1A-1, Rule 17(b)(2). A Rule 17 GAL's role is to act "as a guardian of procedural due process for the parent, to assist in explaining and executing her rights . . . to the fullest extent feasible and to do all things necessary to secure a judgment favorable to such party." *In re A.S.Y.*, 208 N.C. App. 530, 540 (2010) (citations omitted).

" 'Rule 17 contemplates *active participation* of a GAL in the proceedings for which the GAL is appointed' " such that " 'the presence and *active participation* of a GAL appointed according to the provisions of Rule 17 effectively removes any legal disability of the party that is so represented.' " *In re D.L.P.*, 242 N.C. App. 597, 601 (2015) (emphasis added) (quoting *In re A.S.Y.*, 208 N.C. App. at 538). Thus, when a Rule 17 GAL is appointed, the Rule 17 GAL is the one who must decide whether the minor parent will waive important rights–not the minor parent. *In re P.D.R.*, 224 N.C. App. 460, 470-71 (2012) (vacating and remanding the order on appeal after determining that a parent who had a Rule 17 GAL could not independently waive her right to counsel and must obtain her Rule 17 GAL's consent to waive counsel).

Here, Mother was appointed a Rule 17 GAL due to her age and status as a minor parent who was not married or otherwise emancipated. The trial court appointed Mother's Rule 17 GAL at some point before 14 May 2024, when the first hearing took place on the need for Amy to remain in nonsecure custody with DSS.[1] There is no record evidence that Mother's Rule 17 GAL filed an answer, as required by Rule 17. Although the transcript indicates that the Rule 17 GAL was present at the adjudication hearing, the transcript does not indicate that the Rule 17 GAL participated in the hearing. The Rule 17 GAL did not speak when the trial court gave Mother a statement of her rights, and the trial court did not ask the Rule 17 GAL whether Mother should waive her right against self-incrimination under the Fifth Amendment to the Constitution of the United States.

The trial court had the following exchange with Mother's attorney and Mother when DSS called Mother to testify:

> [Mother's Attorney]: Your Honor, just for the record I would object to the County calling [Mother]. I understand that she is a parent in this case. However, she is also a juvenile and has the services of a Rule 17 Guardian ad Litem. So I would just like to put that objection on the record.
>
> The Court: All right. Well, the objection is overruled at this point. I will give her the same advisement. Is she, is she charged as well?
>
> [DSS]: She is under a Juvenile Petition.
>
> The Court: Okay.
>
> [Mother's Attorney]: That is, that is correct, Your Honor.
>
> The Court: Felony charges?
>
> [Mother's Attorney]: Yes, there are three felonies, Your Honor.
>
> The Court: Okay. All right. So, with regard to those three felonies, [Mother] you do have the right to remain silent, okay.
>
> [Mother]: Thank you, your Honor.
>
> The Court: Now, I'm at this point, like with regard to the father that testified, I'm not willing to accept just a blanket

1. There is no order in the record showing the initial appointment of the Rule 17 GAL for Mother. However, in an order entered 14 May 2024, the trial court listed "Miya Bryant, Rule 17 GAL for [Mother]" as "present for the hearing," indicating that she was appointed some time before the first hearing on the need for Amy to remain in nonsecure custody with DSS.

> refusal to testify based on the Fifth Amendment in this case. Because there again, are plenty of questions that could be asked of you that would be relevant to this proceeding but not necessarily incriminating your juvenile case. So I have to take it on a case-by-case basis. But just understand that you have that right. If you feel you are being asked a question that might, if answered, incriminate you in your criminal case then you have that right to raise your Fifth Amendment, and you can stop and decide whether or not it's something that you need to answer. Okay?
>
> [Mother]: Okay. Thank you, Your Honor.
>
> The Court: You have any questions about that?
>
> [Mother]: No, Your Honor.

Mother then testified for approximately one hour with no apparent participation or guidance from her Rule 17 GAL. Mother gave numerous potentially incriminating answers during her testimony, including that she lied to DSS and to her mother about Amy; that she was Amy's "primary caretaker" during the time period in which Amy sustained her first set of injuries; and that she rejected Dr. Northrop's medical opinion that constipation did not cause Amy's rib fractures. Mother answered every question on direct examination except for one:

> [DSS Attorney]: So, let's get back to [Amy's] injuries. How did she get the broken tibia?
>
> [Mother]: I couldn't -- I'd like to exercise my right to remain silent.
>
> [DSS Attorney]: So, you are refusing to answer the question?
>
> [Mother's Attorney]: Objection, Your Honor. She's already exercised her right.
>
> The Court: Court notes she is exercising her right to remain silent.

Because Mother's Rule 17 GAL was responsible for determining whether Mother should waive or invoke her Fifth Amendment right against self-incrimination when being compelled to testify, *In re P.D.R.*, 224 N.C. App. at 464-65, the trial court erred by allowing Mother to waive her Fifth Amendment right without the active participation of her Rule 17 GAL.

DSS cites *Wall v. Timberlake*, 272 N.C. 731 (1968), and *State v. Bond*, 345 N.C. 1 (1996), to support its argument that "[i]t is well-established that our courts will not presume error from a silent record." *Wall* is not pertinent to the issue before us and *Bond* is distinguishable. In *Bond*, the Court concluded that Defendant could not show error in an unrecorded bench conference. 345 N.C. at 26. Unlike in *Bond*, the silent record in this case *is the evidence* that the GAL did not actively participate in the hearing. And, while Rule 17 and N.C. Gen. Stat. § 7B-602 do not specify what constitutes "active participation" by a Rule 17 GAL, the record must indicate that the Rule 17 GAL participated in some manner. *See In re J.E.B.*, 376 N.C. 629, 636 (2021) (affirming termination of parental rights where a Rule 17 GAL presented arguments to the trial court on two grounds, "examined witnesses" and "otherwise performed trial functions" "in coordination with [the parent's attorney]"); *In re W.K.*, 376 N.C. 269, 275-76 (2020) (affirming termination of parental rights where a Rule 17 GAL "spoke on the record only five times during" a hearing, did not speak on the record during another hearing, and could not offer "anything beyond repeating counsel's arguments").[2]

Mother was a minor parent who, by law, lacked the capacity to make an informed decision about whether to waive a fundamental right, and she was unable to act on her own behalf in a court proceeding. I thus dissent from the majority opinion's determination in Section II.A that the trial court did not err by allowing Mother to decide whether to assert her Fifth Amendment right.

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2. *In re J.E.B.* and *In re W.K.* involve termination of parental rights proceedings and cite to N.C. Gen. Stat. § 7B-1101.1. This case involves an adjudication of abuse and neglect and cites to N.C. Gen. Stat. § 7B-602. However, the language in N.C. Gen. Stat. § 7B-1101.1(a)-(d) and N.C. Gen. Stat. § 7B-602(a)-(d) is identical.

TASHA L. JONES AND THOMAS O. JONES, PLAINTIFFS
v.
MICHAEL R. MILL, MD, IN HIS INDIVIDUAL CAPACITY; PAMELA RO, MD, IN HER INDIVIDUAL CAPACITY; AND JOHN DOE 1-5, IN HIS/HER INDIVIDUAL CAPACITY, DEFENDANTS

No. COA24-983

Filed 17 December 2025

Medical Malpractice—Rule 9 certification—death after surgery—explanation of mortality risks—"professional services"—clinical judgment

Where plaintiffs' claims against defendants (two doctors) arising from their child's death after undergoing pediatric cardiac surgery met the broad statutory definition of medical malpractice (N.C.G.S. § 90-21.11(2)(a)), plaintiffs—despite bringing claims of constructive fraud and breach of fiduciary duty—were required to comply with the certification requirements set forth in Civil Procedure Rule 9(j) and the three-year statute of limitations pursuant to N.C.G.S. § 1-15(c). Defendants' alleged failure to provide sufficient information regarding the mortality risks of the proposed surgery involved a decision about what data to disclose to plaintiffs—a decision that involved defendants' clinical judgment and professional skill and, thus, constituted "professional services" under the medical malpractice statute. Therefore, because plaintiffs did not comply with the mandatory Rule 9 certification or file their complaint within the relevant statute of limitations, the trial court properly granted summary judgment in favor of defendants.

Appeal by plaintiffs from order entered 23 July 2024 by Judge Allen Baddour in Orange County Superior Court. Heard in the Court of Appeals 11 June 2025.

The Lile-King Firm, by Phyllis Lile-King, and Brown, Moore & Associates, PLLC, by Jon R. Moore and Matthew Berthold, for plaintiffs-appellants.

Robinson, Bradshaw & Hinson, P.A., by Matthew W. Sawchak and Erik R. Zimmerman, for defendants-appellees Michael R. Mill, M.D., and Pamela Ro, M.D.; Walker Allen, LLP, by Barry S. Cobb and Dennis W. Dorsey, for defendant-appellee Michael R. Mill, M.D.; and Huff Powell & Bailey, PLLC, by Pankaj K. Shere, Katherine Hilkey-Boyatt, and Rachel Samuelson, for defendant-appellee Pamela Ro, M.D.

No brief filed on behalf of defendants-appellees John Doe 1-5.

Tatum & Atkinson, PLLC, by Jon Ward, and Miller Law Group, PLLC, by MaryAnne M. Hamilton, for amicus curiae North Carolina Advocates for Justice in support of plaintiffs-appellants.

Ellis & Winters LLP, by Michelle A. Liguori, Madeleine M. Pfefferle, and David A. Keirstead, for amicus curiae North Carolina Association of Defense Attorneys in support of defendants-appellees.

Michael Best & Friedrich LLP, by Justin G. May, Carrie E. Meigs, and Matthew B. Couch, for amici curiae North Carolina Healthcare Association, North Carolina Medical Society, American Medical Association, North Carolina Health Care Facilities Association, North Carolina Assisted Living Association & North Carolina Senior Living Association in support of defendants-appellees.

ZACHARY, Judge.

Plaintiffs Tasha L. Jones and Thomas O. Jones appeal from the trial court's order granting the motions for summary judgment filed by Defendants Michael R. Mill, M.D., and Pamela Ro, M.D. After careful review, we affirm.

I. Background

This case arises from the death of Plaintiffs' daughter Skylar as a result of complications following cardiac surgery. In 2013, pediatric cardiologists diagnosed Skylar with an atrial septal defect. Doctors informed Plaintiffs that Skylar's condition may eventually require surgery.

In 2016, Skylar presented to UNC Children's Hospital, where she was seen by Dr. Ro. Dr. Ro referred Plaintiffs to Dr. Mill, director of the Pediatric Cardiac Surgery ("PCS") program at UNC Children's Hospital. Dr. Mill discussed with Plaintiffs the anticipated procedure as well as "the risks and benefits and alternatives," including "data related to the operation that was proposed." The Society of Thoracic Surgeons ("STS") categorizes congenital cardiothoracic operations into five "STAT" categories, with Level 1 procedures being the least complex and Level 5 the most complex. The procedure that Skylar was believed to require—repair of an atrial septal defect—is categorized as a STAT Level 1 procedure. Plaintiffs opted to proceed with the surgery.

During the procedure, however, Dr. Mill discovered that Skylar's initial diagnosis was incorrect: she had an unroofed coronary sinus, a rare condition that required a more complex procedure, which Dr. Mill performed. The night after surgery, Skylar developed complications that ultimately required her to remain in the hospital for two months. During that period, Skylar was placed on and taken off of life-support several times and had further surgical procedures. On 30 July 2016, Skylar died.

On 31 May 2019, the New York Times published an article about the PCS program at UNC Children's Hospital that featured Plaintiffs. *See* Ellen Gabler, *Doctors Were Alarmed: 'Would I Have My Children Have Surgery Here?'*, N.Y. Times (May 31, 2019), https://www.nytimes.com/interactive/2019/05/30/us/children-heart-surgery-cardiac.html. The article discussed, *inter alia*, concerns about Dr. Mill and the PCS program, as well as the STS's data on cardiothoracic procedures and mortality rates for hospitals nationwide.

On 5 December 2019, Plaintiffs filed a complaint in Orange County Superior Court against Dr. Mill; Dr. Ro; and two other doctors, Kevin Kelly, M.D., and Timothy Hoffman, M.D.; along with five unnamed individuals, identified as "John Doe 1-5." Plaintiffs asserted claims for constructive fraud and breach of fiduciary duty against all Defendants. The principal focus of Plaintiffs' complaint was an allegation that "[a]s a result of . . . Defendants' wrongful acts and omissions, Plaintiffs . . . were deceived and induced into allowing their gravely ill child[ ] to undergo surgery in what was, unknown to them, one of the most dangerous pediatric cardiac surgery programs in the United States."

On 20 December 2019, Dr. Mill, Dr. Ro, Dr. Kelly, and Dr. Hoffman filed a joint motion to dismiss. On 10 July 2020, the trial court entered an order, *inter alia*, granting the motion in part and dismissing all claims against Dr. Kelly and Dr. Hoffman, but denying the motion as to Dr. Mill and Dr. Ro. Dr. Mill and Dr. Ro filed their answers on 30 July 2020, and the parties proceeded with discovery.

On 28 January 2021, the Chief Justice of our Supreme Court designated this case and two others pending against Dr. Mill as exceptional cases pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts. Chief Justice Paul Newby appointed the Honorable R. Allen Baddour, Jr., to preside over these cases.

Dr. Mill and Dr. Ro filed separate motions for summary judgment on 24 and 25 June 2024. In their motions, Dr. Mill and Dr. Ro asserted that they were entitled to summary judgment because, despite Plaintiffs' characterization of their claims as "constructive fraud" and "breach of fiduciary duty," Plaintiffs' action sounded in medical malpractice. As such, Dr. Mill and Dr. Ro contended that Plaintiffs' claims were barred because Plaintiffs failed to (1) comply with the mandatory certification requirements for medical-malpractice claims set forth by Rule 9(j) of the North Carolina Rules of Civil Procedure, and (2) timely file their action within the three-year statute of limitations applicable to medical-malpractice claims. *See* N.C. Gen. Stat. § 1-15(c) (2023).

Each party submitted extensive documentary evidence before the summary judgment motions came on for hearing on 18 July 2024. On 23 July 2024, the trial court entered an order granting Dr. Mill's and Dr. Ro's motions for summary judgment and dismissing Plaintiffs' claims with prejudice as to all Defendants. Plaintiffs timely filed notice of appeal.

II. Discussion

On appeal, Plaintiffs argue that the trial court erred by granting Dr. Mill's and Dr. Ro's motions for summary judgment because "Plaintiffs proffered evidence of each element of breach of fiduciary duty and constructive fraud." Plaintiffs also assert that the trial court erred to the extent that it concluded that Plaintiffs' claims sounded in medical malpractice. We disagree.

A. Standard of Review

"Summary judgment is appropriate 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." *Gause v. New Hanover Reg'l Med. Ctr.*, 251 N.C. App. 413, 417, 795 S.E.2d 411, 415 (2016) (citation omitted). This Court reviews a trial court's grant of summary judgment de novo, "and evidence is viewed in the light most favorable to the non-moving party." *Id.* (citation omitted).

B. Analysis

The dispositive issue in this appeal is whether Plaintiffs' claims sound in medical malpractice. If so, their claims were barred by Plaintiffs' failure to comply with Rule 9(j), and summary judgment was appropriately entered in favor of Defendants.

"Whether an action is treated as a medical malpractice action . . . is determined by our statutes," rather than the descriptor assigned by the author of a complaint. *Id.* at 418, 795 S.E.2d at 415 (citation omitted); *see also Bennett v. Hospice & Palliative Care Ctr. of Alamance-Caswell*, 246 N.C. App. 191, 192–95, 783 S.E.2d 260, 261–63 (reviewing a complaint to determine whether any of its claims fell within the statutory definition of a "medical malpractice action," notwithstanding the plaintiff's characterization of her various claims), *disc. review denied and appeal dismissed*, 368 N.C. 917, 787 S.E.2d 374 (2016).

"The statutory definition of medical malpractice is a broad one." *Gause*, 251 N.C. App. at 418, 795 S.E.2d at 415 (citation omitted). Our General Statutes provide, in relevant part, that a "medical malpractice action" is "[a] civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider." N.C. Gen. Stat. § 90-21.11(2)(a).

The crux of the present appeal is whether Plaintiffs' claims concern "the furnishing or failure to furnish professional services" by Dr. Mill and Dr. Ro. *Id.*

> The term "professional services" is not defined by our statutes but has been defined by this Court as "an act or service arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual."

Gause, 251 N.C. App. at 418, 795 S.E.2d at 415 (citation omitted). "Our courts have classified as medical malpractice those claims alleging injury resulting from activity that required clinical judgment and intellectual skill." *Id.* On the other hand, we "have classified as ordinary negligence those claims alleging injury caused by acts or omissions in a medical setting that were primarily manual or physical and which did not involve a medical assessment or clinical judgment." *Id.*

On appeal, Plaintiffs insist that their claims for breach of fiduciary duty and constructive fraud do not constitute claims for medical malpractice, as they do not allege that Dr. Mill and Dr. Ro "failed to describe the surgical procedure or failed to meet a standard of care. Rather, the claims are that [Dr.] Mill and [Dr.] Ro concealed/misrepresented their program quality and outcomes in an attempt to persuade [Plaintiffs] to have surgery at UNC." In response, Dr. Mill and Dr. Ro contend that Plaintiffs' "claims are medical malpractice claims" because "[w]hether to disclose that type of data in a discussion about the risks of a surgery is a matter of clinical judgment."

In their complaint, Plaintiffs based their constructive fraud claim on Defendants' alleged failure to provide them with sufficient information regarding the PCS program. Plaintiffs asserted that "[m]ortality data, complication rate, volumes of procedures, outcomes, experience and success rate and physicians' concerns about a program's negative outcomes for patients are material facts for parents choosing pediatric cardiac surgery for their children." Similarly, Plaintiffs grounded their breach of fiduciary duty claim on Defendants' alleged "failure to disclose information to Plaintiffs about Defendants' concerns, and UNC's mortality, outcomes, safety, success and complication data for pediatric cardiac patients in an effort to persuade Plaintiffs to schedule Skylar for surgery at UNC."

In their joint appellate brief, Dr. Mill and Dr. Ro respond that "the services at issue are disclosures of mortality data in discussions about the risks of a surgery" and that these "are professional services" because "[w]hen a doctor decides whether to disclose mortality data in discussions about the risks of a surgery, the doctor needs to use her clinical judgment and intellectual skill." Dr. Mill and Dr. Ro explain that the "mortality data here covers hundreds of surgeries of different types and complexities" and that "[m]ortality rates vary for different categories of surgeries." Dr. Mill and Dr. Ro persuasively explain how the decision to provide mortality rates regarding a particular surgery to a particular patient implicates a doctor's clinical judgment:

> [T]o decide whether to tell a patient about the mortality rate for the surgeries in any particular category, a doctor must decide whether that mortality rate is relevant to the surgery at issue. That decision requires clinical judgment about the surgeries in the different categories and how they relate to each other.
>
> . . . .
>
> [W]hether mortality rates for highly complex STAT [Level] 5 surgeries are relevant to the risks of a minimally complex STAT [Level] 1 surgery is a question that requires medical analysis and judgment.

Dr. Mill and Dr. Ro further note that the deposition testimony of both parties' experts supports this point. For example, one of Plaintiffs' expert witnesses agreed that it was not "the duty of every congenital heart surgeon to share with patient families overall complication rates for all surgeries in the program . . . regardless of the surgery to be performed" because the STS database contains hundreds of different surgical procedures, and "complication rates vary widely between the different kinds of congenital heart surgeries." The expert also agreed that he discouraged "overestimat[ing] the risk of the congenital heart surgery" that a child needed because it was "terrifying [to] the patients."

Indeed, one of the expert witnesses for the defense testified that "sometimes you can include everything under the sun to discuss [with] a parent, but there is·such a thing as a reality of limited time to discuss and to explain things." He explained that "we refer patients on a case-by-case basis and [do] not conveniently put them in a category and decide where they should go for surgery"; that "there are many nuances of patients and situations that are not reflected in the collection of data, assuming dat[a]·collection is accurate, and that one has to interpret the STS database with that in mind"; that the volume of various PCS programs "makes the statistics sometimes very difficult to interpret"; and that "the point of the data in the database" was "not necessarily" to provide "a basis for referral of patients." By way of example, this expert observed that "sometimes surgeons change, programs change, units change. And you don't always get that information when you look at a database." The STS database, he added, is "simply reflecting the output without any sort of attention paid to . . . the type of input."

Another defense expert further articulated how interpreting mortality rates within STAT categories "require[s] medical personnel to use clinical judgment and intellectual skill" on a case-by-case basis—activity that our courts have consistently held supports a claim for medical malpractice where injury arises. *Id.* at 420, 795 S.E.2d at 416. This expert explained that "there are a number of procedures within each STAT category. Some that are completely different operations, completely different heart lesions, that have potentially no relevance whatsoever to the outcome of the individual procedure you're performing." Because there are a "[d]ifferent set of complications" and "[d]ifferent set of risks" for each procedure, the expert did not "believe that outcomes within a STAT category . . . are necessarily relevant to what you would tell a family."

Our careful review of the record indicates that the determination of whether and how to provide the information and data at the core of Plaintiffs' claims clearly "involves specialized knowledge and skills which are predominantly mental or intellectual." *Id.* The allegations underlying Plaintiffs' claims thus concern "the furnishing or failure to furnish professional services" by Dr. Mill and Dr. Ro. N.C. Gen. Stat. § 90-21.11(2)(a). Although Plaintiffs framed their claims in the language of breach of fiduciary duty and constructive fraud, their action nevertheless sounds in medical malpractice as broadly defined by § 90-21.11(2)(a) and our case law that has interpreted it. *See Gause*, 251 N.C. App. at 418, 795 S.E.2d at 415; *Bennett*, 246 N.C. App. at 192–95, 783 S.E.2d at 261–63.

Consequently, Plaintiffs' claims are subject to the pleading requirements of Rule 9(j), which mandates their dismissal. Under Rule 9(j), "medical malpractice actions cannot be brought without prior review of the medical care and relevant medical records by a person reasonably expected to qualify as an expert and to testify that the defendant provided substandard care." *Gause*, 251 N.C. App. at 418, 795 S.E.2d at 415; N.C. Gen. Stat. § 1A-1, Rule 9(j)(1)–(2). "Failure to allege compliance with Rule 9(j) in a complaint for medical malpractice requires dismissal." *Gause*, 251 N.C. App. at 418, 795 S.E.2d at 415.

Plaintiffs' complaint did not comply with Rule 9(j). Dr. Mill and Dr. Ro are thus "entitled to a judgment as a matter of law." *Id.* at 417, 795 S.E.2d at 415 (citation omitted). Accordingly, the trial court did not err by granting Dr. Mill's and Dr. Ro's motions for summary judgment and dismissing Plaintiffs' claims with prejudice.

III. Conclusion

For the foregoing reasons, we affirm trial the court's order.

AFFIRMED.

Judges TYSON and COLLINS concur.

THE LAW OFFICE OF ROBERT FORQUER, PLLC, Interpleader Plaintiff
v.
SUSAN ARCURI, JONATHAN BERNARD RENEGAR and STEPHANIE ANN VINCENT, Interpleader Defendants
And
SUSAN ARCURI, JONATHAN BERNARD RENEGAR and STEPHANIE ANN VINCENT, Crossclaim Plaintiffs and Crossclaim Defendant

No. COA25-522

Filed 17 December 2025

1. Real Property—distribution of sale proceeds—promissory note with a single signer—deed of trust with multiple parties named

In an action arising from a dispute between a homeowner, who was the sole signer of a promissory note supported by a deed of trust on the property, and the heirs of her deceased boyfriend, who had possessed a fifty percent interest in the property as reflected in the deed, but who had not signed the promissory note, about how the proceeds from the sale of the property should be distributed—specifically, whether the balance of the loan should be deducted from the total proceeds before dividing the remainder between the homeowner and the heirs, or whether the loan balance should be deducted from the homeowner's portion alone—the trial court's grant of summary judgment in favor of the heirs was affirmed. Read together, the note and the deed of trust—particularly a section of the deed specifying that any person who signed the deed, but did not execute the note, was not personally obligated to pay the loan secured by the deed—evidenced an intent to encumber the heirs' interest in the property but not require them to pay the loan.

2. Real Property—distribution of sale proceeds—summary judgment—promissory note with a single signer—deed of trust with multiple parties named

In an action arising from a dispute between a homeowner, who was the sole signer of a promissory note supported by a deed of trust on the property, and the heirs of her deceased boyfriend, who had possessed a fifty percent interest in the property as reflected in the deed, but who had not signed the promissory note, about how the proceeds from the sale of the property should be distributed—specifically, whether the balance of the loan should be deducted from the total proceeds before dividing the remainder between the homeowner and the heirs, or whether the loan balance should be deducted from the homeowner's portion alone—the homeowner's challenges to the findings of fact in the summary judgment order failed. Some of the challenged findings concerned only uncontested facts, and those findings that were erroneous did not affect the outcome on appeal because a correct decision on summary judgment—as existed in this matter—will not be disturbed even if the court gives a wrong or insufficient reason therefor.

Chief Judge DILLON concurring in result by separate opinion.

Appeal by crossclaim defendant from order entered 20 February 2025 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 October 2025.

Fitzgerald Hanna & Sullivan, PLLC, by Andrew L. Fitzgerald, for crossclaim plaintiff-appellees.

Savage Law PLLC, by Donna P. Savage, for crossclaim defendant-appellant Arcuri.

ARROWOOD, Judge.

The crossclaim defendant, Susan Arcuri ("Arcuri"), appeals from the trial court's order granting summary judgment to the crossclaim plaintiffs, Stephanie Ann Vincent and Jonathan Bernard Renegar ("the Renegars").[1] For the following reasons, we affirm the trial court's order.

I. Background

In 2018, Arcuri was the sole owner of a property at 5107 Waldron Meadow Drive in Charlotte ("Waldron Meadow"). She conveyed a 50% interest in the property to John Wayne Renegar ("Mr. Renegar") in 2019. On 17 February 2021, Arcuri signed a promissory note ("the Note") for a $245,000.00 loan from Fairway Independent Mortgage Corporation. Arcuri was the only signer on the Note which indicated her as the borrower. The Note was supported by a Deed of Trust ("the Deed") that was signed by Arcuri and Mr. Renegar and identified them both as "borrowers."

The Deed is a standard "Fannie Mae" form transferring legal title to Waldron Meadow to a trustee as security for the Note. Section 13 of the Deed states that the "Borrower's obligations and liability shall be joint and several." However, the same section also clarifies:

> [A]ny Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; [and] (b) is not personally obligated to pay the sums secured by this Security Instrument[.]

On 4 May 2023, Mr. Renegar died testate. His interest in Waldron Meadow passed pursuant to his will to his two children, the Renegars in equal shares. Thus, after Mr. Renegar's death, Arcuri owned a 50% interest in Waldron Meadow while the Renegars each owned a 25% interest. On 20 November 2023, Arcuri and the Renegars entered into a contract for the sale of Waldron Meadow to a third party, free from encumbrances.

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1. Stephanie and Jonathan are the adult children of John Wayne Renegar; Jonathan was sued in his individual capacity and as executor of the Estate of John Wayne Renegar.

After entering the contract, a dispute arose between Arcuri and the Renegars about the distribution of the proceeds of the sale. Specifically, they disagreed about whether the Renegars' sale proceeds should be used to help pay the remaining balance on the note and satisfy the lien on Waldron Meadow. Arcuri claimed that she and the Renegars were all responsible for paying off the remaining loan balance. Under her argument, after the mortgage was paid, she would be entitled to 50% of the net proceeds while the Renegars would each be entitled to 25%, in accordance with their ownership interests. Meanwhile, the Renegars contended that the remaining loan balance should be deducted solely from Arcuri's share of the proceeds.

The parties entered into an Escrow Agreement to allow them time to resolve their dispute about the proceeds while still fulfilling their contract to sell Waldron Meadow. The parties did not come to a resolution and so the escrow agent, the Law Office of Robert Forquer PLLC, filed an interpleader complaint on 3 July 2024. In August 2024, Arcuri and the Renegars filed crossclaims against each other claiming different distributions of proceeds. Both parties moved for summary judgment and the matter came for hearing on 7 October 2024.

The trial court issued an order granting summary judgment in favor of the Renegars on 20 February 2025. The court found that Arcuri was the sole obligor on the Note and that the Deed only encumbered her one-half interest in Waldron Meadow. Accordingly, the court ordered that Arcuri was entitled to receive 50% of the sale proceeds, minus the remaining note balance, and the Renegars were each entitled to 25% of the sale proceeds. Arcuri gave notice of appeal to this Court on 18 March 2025.

II. Discussion

Arcuri contends that the trial court erred in granting summary judgment in favor of the Renegars. In accordance with her argument, Arcuri challenges several of the trial court's findings. For the following reasons, we affirm the trial court's order.

A. Standard of Review

We review orders granting summary judgment *de novo*. *Bryan v. Kittinger*, 282 N.C. App. 435, 437 (2022). Under *de novo* review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower court[]." *N.C. Farm Bureau Mutual Ins. Co., Inc. v. Herring*, 385 N.C. 419, 422 (2023) (quoting *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018)).

B. Distribution of Sale Proceeds

[1] Arcuri argues that the note balance should be deducted from each party's share of the sale proceeds because the Deed encumbered the Renegars' interest in Waldron Meadow and thus subjected the Renegars' interest to the payment of the mortgage. Meanwhile, the Renegars contend that because the Deed states that they are not personally obligated to pay the Note, they are also not obligated to use their portion of the sale proceeds to satisfy the lien on their property interest. This is an issue of first impression before our court.

"A deed of trust is a three-party arrangement in which the borrower conveys legal title to real property to a third party trustee to hold for the benefit of the lender until repayment of the loan." *Skinner v. Preferred Credit*, 361 N.C. 114, 120 (2006). "When the loan is repaid, the trustee cancels the deed of trust, restoring legal title to the borrower, who at all times retains equitable title in the property." *Id.* at 121. While the loan remains unpaid, the deed of trust gives the lender "a contractual remedy for default, namely a right to foreclose under the instrument." *In re Foreclosure Under That Deed of Trust Executed by Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 51 (2000).

A deed of trust is a contractual arrangement and is therefore governed by ordinary rules of contract interpretation. *See id.* at 52; *In re Clayton*, 254 N.C. App. 661, 667 (2017). "When interpreting contracts, 'all contemporaneously executed written instruments between the parties, relating to the subject matter of the contract, are to be construed together in determining what was undertaken.' " *In re Clayton*, 254 N.C. App. at 667 (quoting *In re Hall*, 210 N.C. App. 409, 416 (2011)). "Thus, where a note and a deed of trust are executed simultaneously and each contains references to the other, the documents are to be considered as one instrument and are to be read and construed as such to determine the intent of the parties." *Id.* (quoting *In re Hall*, 210 N.C. App. at 416).

However, a promissory note and a deed of trust still represent separate obligations and, absent an agreement to the contrary, are independently enforceable. *Demai v. Tart*, 221 N.C. 106, 109 (1942). Additionally, being a borrower on a deed of trust does not automatically entitle the borrower to the rights and obligations contained in the note or other parts of the loan agreement. *See In re Clayton*, 254 N.C. App. at 668–70. In *In re Clayton*, a widow who had signed a deed of trust as a "borrower" with her late husband contested the foreclosure of their mortgaged property. *Id.* at 662. The widow pointed to a provision in the deed of trust that only allowed the note holder to accelerate the note if the borrower died and the property was not the principal residence of at least one "surviving borrower." *Id.* at 667. This Court held that the wife was not a "surviving borrower" as contemplated by the deed because she was not a borrower on the note and had not qualified for the reverse-mortgage that the deed supported. *Id.* at 668–70.

Here, when read together, the Note and the Deed evidence an intent to encumber the Renegars' interest in the property but not require them to pay the underlying loan. The Note and the Deed each have a separate purpose. The Note outlines the borrower's duty to pay the loan. Meanwhile, as explained in the Note, the purpose of the Deed is to "describe[] how and under what conditions [the borrower] may be required to make immediate payment in full" and "protect[] the Note Holder from possible losses" if the borrower does not keep the promises made in the Note. The Deed accomplishes that by transferring legal title of Waldron Meadow to the trustee and granting the trustee the power of sale. Thus, the duty to pay the loan is encompassed in the Note while the security of the Note is encompassed in the Deed.

The separation of the agreements and obligations contained in the Note versus the Deed is further reinforced in Section 13 of the Deed which provides the duties of a "co-signer." That section specifies that any person who signs the Deed but does not execute the Note is not personally obligated to pay the sums secured by the Deed but rather signs "only to mortgage, grant, and convey" their interest as security. In doing so, the Deed specifies that the obligations and liabilities of each agreement are separately enforced only upon the signers of that agreement. Therefore, only the signers of the Note are responsible for paying the Note.

Arcuri argues that by subjecting his property to the mortgage lien, Mr. Renegar assumed the obligation to satisfy the mortgage lien in the event of a sale. Essentially, Arcuri's argument treats payment of the note and the release of the lien as distinct actions and assigns the release of the lien as a duty of every mortgagor. However, that mischaracterizes the relationship between a loan, a promissory note, and a deed of trust. The promissory note represents the loan debt. Meanwhile, the deed of trust merely provides security for the loan agreement by ensuring a remedy in the case of default—it does not create an independent payment obligation.

While it is true that the only way to release the Deed was to pay the remaining balance on the Note, payment of the Note is still solely Arcuri's responsibility. Indeed, Section 23 of the Deed states that the

Deed will be released “upon payment of all sums secured by” the Deed. Since the Deed also states that the Renegars are “not personally obligated to pay the sums secured by” the Deed, it follows that the Renegars are not responsible for the release of the Deed.

Altogether, the Deed and the Note are clear that Mr. Renegar did not assume any obligation on the Note when he signed the Deed. Rather, as the only borrower on the Note, Arcuri is the sole party responsible for paying the note balance. The parties’ obligations on the Note are the same, whether payment on the Note is made in monthly installments, or all at once using the proceeds from a voluntary sale of the property. Though the Renegars’ interest in Waldron Meadow was subject to the lien, there is no relevant distinction between satisfying the lien and paying the note balance. Therefore, the proceeds from the sale should be distributed such that the remaining balance on the Note is deducted solely from Arcuri’s share.

Our determination that the Renegars are not obligated to pay the note balance is consistent with interpretations of the same deed of trust language in other jurisdictions. For example, courts have recognized that Section 13 clarifies that persons signing the deed but not the note encumber their property interest without assuming any obligation on the note.

In *Beckhart v. Nationwide Tr. Servs.*, No. 11-CV-231, 2012 WL 3648105, at *5–7 (E.D.N.C. Aug. 12, 2012), the court applied North Carolina state law to interpret section 13 of a “Fannie Mae” deed. There, a couple had both signed the deed of trust but only the husband had signed the promissory note. *Id.* at *1–2. The couple challenged the validity of the deed, claiming that it misidentified the wife as a borrower on the note. *Id.* at *5. The court disagreed and interpreted the term “Borrower” as an overarching term that includes a subset, “co-signers,” that are not obligated on the promissory note. *Id.* at *6. Similarly, in *In re Mertz*, No. A11-8099, 2012 WL 907780, at *4–5 (Bankr. D. Neb. Mar. 15, 2012), a bankruptcy court applied the same reasoning to find that, despite not signing the promissory note, a co-signer of the deed had encumbered their property.

Additionally, courts have found that co-signers are not entitled to the same rights under the note as signed borrowers on the note. In *Calle Monsalve v. CMG Financial*, No. EP-21-CV-00058, 2021 WL 2444168, at *4–5 (W.D. Tex. June 15, 2021), the court considered whether a co-signer to the deed had standing to bring a breach of contract claim against the holder of the note. The court reasoned that because the co-signer was not personally liable on the loan, there was no contractual obligation between her and the defendant and so she did not have standing. *Id.* at *4–5. Similarly, a federal district court in Maryland considered whether a co-signer had standing under the Real Estate Settlement Procedures Act which only grants standing to "borrowers" in the mortgage industry. *Robinson v. Nationstar Mortg. LLC*, No. TDC-14-3667, 2019 WL 4261696, at *5–6 (D. Md. Sep. 9, 2019). The court determined that because a co-signer had no contractual obligations under the promissory note, they did not have standing. *Id.* at 6.

Likewise, the Missouri Court of Appeals has found that co-signers do not have the same obligations as borrowers on the note. *See Cornerstone Mortg., Inc. v. Ponzar*, 254 S.W.3d 221, 224–25 (Mo. App. 2008). In *Cornerstone Mortgage, Inc.*, a couple refinanced a loan on which they were both borrowers. *Id.* at 224. However, on the new loan, only the husband signed the note. *Id.* The couple later rescinded the loan, and the court held that because the wife had no obligation on the note, she had no duty to tender the loan proceeds. *Id.* at 225.

Notably, the Ohio Court of Appeals has specifically found that a co-signer has no duty to use proceeds from the sale of the encumbered property to pay the note. *See Ogan v. Ogan*, 122 Ohio App. 3d 580, 585 (1997). Ohio allows surviving spouses to seek contribution for payments on a note under which the spouses had a joint obligation. *Id.* at 584. In *Ogan*, a widow was seeking reimbursement under that rule for the amount she paid under a note her late husband had signed. *Id.* at 582–84. The husband's note was secured by a deed that he and the widow both signed as borrowers. *Id.* at 582. After her husband's death, the widow continued to make monthly payments on the note and eventually sold the encumbered property and used the proceeds to satisfy the lien. *Id.* at 583. The widow argued that her status as a "borrower" on the deed made her obligated on the note, entitling her to reimbursement. *See id.* at 583–84. The court disagreed and found she was not obligated on the note in part because she was merely a co-signer to the deed. *Id.* at 585. Importantly, the court found that none of her payments under the note were obligatory—even where she used the sale proceeds to satisfy the lien on the property. *See id.*

These cases demonstrate that courts have consistently recognized that Fannie Mae deeds constitute an agreement separate from a promissory note with its own limited rights and obligations. Moreover, they repeatedly affirm, in a number of different contexts, that co-signers have no obligation on the note. Our decision applies the same principle here to find that because Mr. Renegar was merely a co-signer on the deed, the Renegars have no obligation to use their sale proceeds to pay the remaining balance on the note. Notably, Arcuri has not offered any authorities that support her interpretation to the contrary.

We note that there could be a scenario where the parties intended for the co-signer of the deed of trust to also be responsible for the loan despite not signing the promissory note. Where there is evidence of such an agreement, it could be relevant to the determination of whether the co-signer is responsible for payment of the note. Additionally, the stage of proceeding could affect the present obligations of the parties.

However, here, the parties sought a declaratory judgment of the proper distribution of the sale proceeds. Additionally, Arcuri presented no evidence outside of the Note and the Deed that Mr. Renegar had agreed to be obligated on the Note. Thus, we must look to the intent expressed by the language of the Note and the Deed. The language of the agreements, particularly Section 13, clearly states that co-signers are not responsible for the payment of the debt contained in the Note. Accordingly, the Renegars are not obligated to use their sale proceeds to pay the note balance. Therefore, we affirm the trial court's order that the Renegars are each entitled to 25% of the sale proceeds and Arcuri is entitled to the remaining 50%, minus the balance that was left on the Note.

C. Challenges to Trial Court's Findings

[2] Arcuri challenged specific findings in the trial court's order. Arcuri's challenges can be categorized into three groups: challenges to findings of fact, challenges to conclusions of law regarding the encumbrance of the Renegars' property interest, and challenges to conclusions of law regarding the distribution of the proceeds. We address each group of challenges below.

1. Findings 20–22

Findings 20–22 of the order state:

> 20. Nothing in the forecast of evidence indicates that Renegar received any personal benefit from the proceeds of the $250,000 personal loan obtained by Arcuri. And none of these funds appear to have been deposited into Renegar's bank account.
>
> 21. Nothing in the forecast of evidence indicates that prior to his death, Renegar agreed to or intended to pay off any portion of Arcuri's personal loan.

> 22. John Bernard Renegar and Stephanie Vincent never agreed to pay off any portion of Arcuri's personal loan.

Arcuri argues that Finding 20 is not a material fact, is based on speculation by the trial court, and is not supported by competent evidence. Arcuri also argues that Findings 21 and 22 are incorrect because the legal effect of the mortgage was to agree that Mr. Renegar's interest in the real property was responsible for payment of the mortgage.

Findings of fact are improper at the summary judgment stage. *Raymond v. Raymond*, 257 N.C. App. 700, 708 (2018). The basis of summary judgment is that there is no dispute of material fact. *Id.* Accordingly, while a trial court may recount uncontested facts in a summary judgment order, it should not resolve any contested facts. *Id.*

Here, the Renegars alleged in their crossclaim complaint that Mr. Renegar had not received any personal benefit from the proceeds and that none of the funds had been deposited into his account. In her answer, Arcuri denied that allegation and claimed it was immaterial. Thus, it was not proper for the trial court to find that none of the proceeds had been deposited into Mr. Renegar's bank account.

However, we agree that Finding 20 is not a material fact and thus not necessary to the trial court's order. Though evidence of Mr. Renegar receiving benefits from the loan could have been relevant to determining whether there was a separate agreement that Mr. Renegar would be responsible for paying the note, the parties here have admitted that no separate agreement exists. Therefore, though Finding 20 was made in error, it does not warrant reversal as it is surplusage to the question to be determined. *Cf. City of Charlotte v. McNeely*, 8 N.C. App. 649, 653 (1970) (holding that irrelevant findings of fact "do not vitiate the judgment of dismissal and may be treated as surplusage.").

As to Findings 21 and 22, for the reasons stated above, we disagree with Arcuri's argument that the Deed contained an agreement to use Mr. Renegar's property interest to pay the mortgage. Therefore, Arcuri's challenge to these findings fail.

2. <u>Findings 30–32</u>

Findings 30–32 generally state that the Renegars' interest in Waldron Meadow was not encumbered by the Deed. As explained above, though the Deed created no obligation for the Renegars to pay the Note, it did encumber their property interest. Thus, Findings 30–32 are erroneous. However, "a correct decision of the lower court will not be disturbed because the court gave a wrong or insufficient reason therefor." *In re*

T.M.L., 377 N.C. 369, 375 (2021) (quoting *Temple v. Temple*, 246 N.C. 334, 336 (1957)). Accordingly, despite the error in Findings 30–32, we affirm the trial court's ultimate judgment in favor of the Renegars. *See Hanson v. Legasus of N.C., LLC*, 205 N.C. App. 296, 300–01 (2010) (affirming trial court's judgment despite errors of law).

3. Findings 19, 23–24, 33–39

Findings 19, 23–24, and 33–39 outline the distribution of the sale proceeds and generally state that Arcuri was solely responsible for payment of the note. Some portions of Findings 35 and 36 also state that the Renegars' property interest was not encumbered by the deed of trust. Arcuri argues that these findings are erroneous because the Renegars' property interest is subject to and thus responsible for payment of the mortgage.

For the reasons above, we affirm the trial court's distribution of proceeds from the sale of Waldron Meadow. The deed of trust encumbered the Renegars' property interest but did not impose any obligation to use their property interest to pay the note absent default.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order granting summary judgment in favor of the Renegars.

AFFIRMED.

Judge HAMPSON concurs.

Chief Judge DILLON concurs in result by separate opinion.

DILLON, Chief Judge, concurring in result.

This case raised a quite interesting real estate issue.

Defendants Susan Arcuri and her boyfriend, John Wayne Renegar, now deceased, owned a home (the "Property") as tenants in common. In 2021, Arcuri and Renegar executed a deed of trust to secure a debt to a bank. However, the promissory note evidencing the debt was signed *only* by Arcuri. That is, though Renegar was not a borrower on the note, he pledged his tenant-in-common interest to secure the debt evidenced by the note.

Mr. Renegar died in 2023, and his two children were his heirs. In 2024, Arcuri and the Renegar heirs contracted to sell the Property. To satisfy the obligation of Arcuri and the Renegar heirs to the buyer to convey clear title, the closing attorney used some of the purchase price to pay off the outstanding debt, as required by the bank to release the deed of trust.

This matter concerns a dispute between Arcuri and the Renegar heirs as to how to split the *net* proceeds from the closing. Arcuri contends the net proceeds should be split 50/50 between her and the Renegar heirs. The Renegar heirs, however, contend the payoff of the note should be charged against Arcuri's share, as only she was an obligor on the note. By way of illustration, assume the Property sold for $400,000.00 and the amount due on the note was $80,000.00. Based on Arcuri's contention, Arcuri and the Renegar heirs would split the net proceeds of $320,000.00 50/50, with each getting $160,000.00. Based on the Renegar heirs' contention, however, the heirs and Arcuri would each be entitled to split the entire $400,000.00 50/50, but that the $80,000.00 from Arcuri's half would be used to pay off the note such that the Renegar heirs would receive $200,000.00 but that Arcuri would only receive $120,000.00.

In any event, the closing attorney wisely did not make the call but utilized the interpleader process under Rule 22 of our Rules of Civil Procedure. Arcuri and the Renegar heirs each filed pleadings, each seeking a declaration that her/their contention was correct.

The trial court entered summary judgment for the Renegar heirs, concluding the loan payoff would be paid entire from Arcuri's half. I agree with the majority that the trial court got it right, however, based on slightly different reasoning.

The majority generally agrees with the Renegar heirs, that since only Arcuri was liable under the note (as only she, and not Renegar signed it), any proceeds from the sale of the Property used to pay off the note *automatically* should come from Arcuri's portion. I believe the issue is much more nuanced.

As explained below, I believe the fact that Arcuri was the sole borrower does <u>not</u> *conclusively* require the payoff to come from her share. Rather, the issue turns on whether Renegar was acting as a *surety* in the 2021 loan transaction for the benefit of Arcuri, in which case the trial court got it right, <u>**or**</u> whether Arcuri was not acting as a surety in pledging his property interest because the loan transaction was intended to benefit both him and Arcuri.

Further, summary judgment is only appropriate where the evidence before the trial court established that Renegar was merely acting as a surety in pledging his interest in Property. At the summary judgment hearing, no competent evidence was offered to show that Renegar was not acting as a surety. Therefore, I believe the key issue on appeal is whether the nature of the 2021 loan transaction—where Arcuri and Renegar each pledged their respective interests in the Property but where only Arcuri signed the underlying note—creates a rebuttable presumption that Renegar was a surety *or* whether the nature of the 2021 transaction merely constitutes *some* evidence (but not a rebuttable presumption) Renegar was acting as a surety. Because I conclude the nature of the transaction created a rebuttable presumption Renegar was acting as a surety (to the extent of his interest in the Property)—a presumption Arcuri failed to produce *competent* evidence at summary judgment to rebut—I agree the trial court did not err by granting summary judgment for the Renegar heirs.

Discussion

The classic "surety" relationship involves a person ("S") co-signing a promissory note with the principal obligor ("P"), promising to repay a debt to the creditor. In such situation, both S and P are jointly and severally liable *to the creditor* for the note's repayment: "the [creditor] may sue [both] or either[.]" *National Bank v. Carr*, 121 N.C. 113, 113 (1897). *See In re Suttles*, 311 N.C. 325, 332 (1984) (reiterating that "the obligation of the surety is primary" and may "be sued jointly with the principal"). In such a case, however, the surety may seek indemnification from the principal if called on by a creditor to satisfy the debt. *See Graebe v. Sides*, 151 N.C. 596, 599 (1909) (recognizing an implied covenant that the principal will indemnify the surety).

This case, however, involves another type of surety, one where S has not co-signed the note but rather has pledged property to secure the P's debt. Specifically, our Supreme Court has held one who pledges interest in real property to secure the debt of another is generally treated as a surety to the extent of her interest in the property pledged:

> It is settled by abundant authority that where a [debtor] mortgages his property for his debt, and in the same mortgage [the co-owner] conveys her own separate property as security for the same debt, her property so conveyed will be treated in all respects as a surety[.]

Foster v. Davis, 175 N.C. 541, 544 (1918) (internal marks and citations omitted). This is true even if the one pledging the real estate interest is not *personally* liable *to the lender* for the debt being secured:

> [Wife] has not promised to pay [her husband's] debt . . . and [therefore] no judgment can be recovered against her [by the lender].
>
> She has simply transferred her property to secure her husband's debt, and her property is treated as a surety.

Edwards v. Jefferson Standard Life Ins. Co., 173 N.C. 614, 618 (1917). *See also Hinton v. Greenleaf*, 113 N.C. 6, 7 (1893).

With that said, it must be remembered that it is the party who asserts he is a surety who has the burden to prove he is, in fact, a surety. *See Raleigh Banking & Trust Co. v. York*, 199 N.C. 624, 629 (1930) (burden is to prove "by the greater weight of the evidence" that he is a surety and not a principal); *Federal Land Bank v. Lieben*, 86 N.C. App. 342, 346 (1987) (same).

Where the note on its face states a party is signing as a principal, this creates a *presumption* the signer is a principal. However, that signer may bring forth parol evidence to show that he, in fact, signed as—and should be treated as—a surety. *College Rd. v. Cottrell*, 236 N.C. App. 259, 267 (2014).

And where a note on its face states a party is signing as a surety, this creates a *presumption* that he is, in fact, a surety. However, in such a case, the principal may introduce parol evidence to show that the purported surety is, in fact, a principal with him, and therefore liable for contribution, i.e., for his share of the obligation:

> As between the makers and [the lender] of a note, [the note] is the exclusive proof of the contract, and cannot be contradicted by extrinsic proof. . . . But, as between the signers, [the note] is not made or intended to be exclusive proof of the agreement or relation between them. . . . Where one of two parties to a note signed with the addition of a *surety* to his name and the other without any addition, . . . the legal *presumption* was, that the signer who had the word *surety* attached to his name was surety, but it was not conclusive, and that the real purpose and relation of the parties might be shown by parol.

Williams v. Glenn, 92 N.C. 253, 256 (1885) (emphasis in original). *See also Davis v. Alexander*, 207 N.C. 417, 419 (1934); *Federal Land Bank*, 86 N.C. App. at 346.

As stated above, the facts of this present case are different from a typical surety relationship where both are personally obligated on the promissory note. Here, Renegar did not sign the note but rather only a deed of trust. By the terms of the deed of trust, specifically Section 13 thereunder, Renegar's liability for the obligations *imposed by the deed of trust* were "joint and several" with Arcuri, except that he had no obligation to make payments due on the promissory note.[1]

And since the evidence at the summary judgment hearing (based on the admitted pleadings) conclusively shows that only Arcuri signed the note and that much of the proceeds from the sale of the Property went to pay off the note, I conclude a rebuttable *presumption* was created that Renegar's interest in the Property is to be treated as a surety.

However, this does not end the inquiry. Arcuri could have offered evidence at the summary judgment hearing to rebut the rebuttable presumption.

For instance, Arcuri could have produced evidence that the loan proceeds were, in fact, used for the benefit of both Arcuri and Renegar, such as for improvements to the Property. Or Arcuri could have produced evidence that the loan proceeds were used to refinance an existing mortgage to take advantage of lower interest rates (where it was shown that Renegar's credit was bad and, therefore, the lender did not want Renegar to be a co-borrower on the note).

In any event, Arcuri did not produce any such evidence at the summary judgment to rebut the rebuttable presumption that Renegar's pledge should be viewed as a surety. Arcuri did deny in her responsive pleading an allegation by the Renegar heirs that the proceeds from the 2021 loan were used for Arcuri's sole benefit. However, Arcuri's responsive pleading was not verified and, therefore, not competent to create an issue of fact to survive summary judgment. *See Kessing v. National Mortg. Corp.*, 278 N.C. 523, 535–36 (1971) (unverified pleading is not competent to create an issue of fact for purposes of summary judgment); *In re M.A.C.*, 291 N.C. App. 35, 41 (2023) (same).

Therefore, since (1) the nature of the relationship between Renegar and Arcuri was properly pleaded and before the trial court, (2) the fact that Renegar only signed the deed of trust (and not the note) created a

1. I note the deed of trust imposes other obligations in addition to the obligation Arcuri had to repay the note. For instance, both Arcuri and Renegar bore the responsibility to maintain the Property, such that they would have been jointly and severally liable for any money expended by the lender to maintain the Property should Arcuri and Renegar have committed waste.

rebuttable presumption Renegar's pledge should be treated as a surety, and (3) Arcuri failed to offer competent evidence to rebut this presumption, the trial court properly determined that the payoff should come entirely out of Arcuri's share of the net proceeds.[2]

JOE-PHILIP O. NZEWUNWAH, Plaintiff
v.
RODALYN GONZALEZ NZEWUNWAH, Defendant

No. COA25-590

Filed 17 December 2025

1. Child Custody and Support—child support calculation—father's income—imputation of income due to bad faith—miscalculation of prospective support

The trial court in a child support matter did not abuse its discretion by imputing income to the child's father when calculating his income for child support purposes, where the court's finding that the father acted in bad faith by voluntarily leaving his high-paying job (with a company based in Nigeria) was supported by competent evidence, including evidence that the father failed to pay child support during the six months before he quit his job and that he had "engaged in international travel for pleasure" after quitting. However, the trial court did err in converting the father's salary at the exchange rate (for Nigerian Naira to U.S. dollars) as of the day of separation for the entire amount of child support, where that exchange rate should have only been used when calculating the father's retroactive child support obligation and where the applicable exchange rate as of the day of the child support hearing should have been used to calculate his prospective child support obligation. Consequently, the trial court's child support order was vacated and the matter was remanded.

2. Child Custody and Support—child support calculation—work-related child care expenses—live-in nanny care included—Montessori school expense not included

2. If the sales price was $400,000.00 but the loan payoff was $250,000.00, in my view then (as a surety) the Renegars would be entitled to the entire $150,000.00 in net proceeds *and* to seek indemnity from Arcuri for $50,000.00 to be made whole.

The trial court in a child support matter did not err by including the mother's use of live-in nanny care as a work-related child care expense for purposes of calculating the father's child support obligation where, given the mother's work schedule as a full-time physician's assistant in emergency medicine, a regular daycare center would not be a viable child care option. However, the court did err in classifying the cost of the child's Montessori school attendance as a work-related child care expense where, although the mother applied to the school and was hopeful that the child would be admitted, there was no evidence that the child was actually enrolled at the school. Accordingly, the child support order was vacated and the matter was remanded for additional findings.

3. Child Custody and Support—child support arrears—judgment and lien on real property—inadequate description

The trial court in a child support matter did not err by reducing the father's child support arrears to a judgment and placing a lien on any real property owned by him pursuant to N.C.G.S. § 50-13.4(f)(8), where the court expressly provided that the judgment was for a sum certain of $84,790 and that it be docketed in any county in which the father was employed or owned property. However, the child support order was nevertheless vacated—and the issue was remanded—where the court failed to include an adequate description of the real property on which there would be a lien.

Appeal by plaintiff from order entered 11 March 2025 by Judge George M. Cleland IV in Forsyth County District Court. Heard in the Court of Appeals 19 November 2025.

Harvey W. Barbee, Jr., for plaintiff-appellant.

Jackson Family Law, by Jill Schnabel Jackson, for defendant-appellee.

FLOOD, Judge.

Plaintiff-Father Joe-Philip O. Nzewunwah appeals from the trial court's order requiring Father to pay child support. On appeal, Father argues the trial court erred: first, in calculating his income; second, by including certain work-related child care expenses in the calculation of his child support obligation; and third, by reducing his child support arrears to a judgment and placing a lien on any real property owned by him, when the trial court failed to comply with N.C.G.S. § 50-13.4(f)(8).

Upon careful review, we conclude the trial court erred in calculating Father's income, by including certain work-related child care expenses that were not supported by competent evidence in the child support calculation, and by failing to adequately describe the real property affected as required by N.C.G.S. § 50-13.4(f)(8).

I. Factual and Procedural Background

Father and Defendant-Mother Rodalyn Nzewunwah were married in 2017, separated in 2022, and subsequently divorced. Father and Mother are the biological parents of one minor child, Luke,[1] born in 2020. Following their separation, on 16 June 2023, Father filed an action against Mother seeking, *inter alia*, child custody and child support. On 1 September 2023, Mother filed an answer and counterclaims seeking, *inter alia*, child custody and both retroactive and prospective child support.

Prior to the parties' separation, and until August 2023, Father worked for a Nigerian-based company that was an affiliate of ExxonMobil ("Exxon-Nigeria"), which required Father to primarily reside in Nigeria. In August 2023, Father quit his job; became "self-employed"; moved to Atlanta, Georgia; and rented an apartment for approximately $2,183.19 per month. Mother worked as a full-time physician's assistant in emergency medicine; after the separation, she hired "in-home nanny care[,]" given her emergency department work schedule. Mother also applied for Luke to attend Montessori School, which Luke was supposed to begin on 1 August 2024.

On 12 April 2024, the trial court entered a child custody order, granting Mother sole legal and physical custody of Luke. Father was awarded visitation with Luke; however, none of Father's visitations were allowed to take place outside of the United States. The trial court subsequently held a hearing on child support on 25 June 2024, and entered an order on 11 March 2025, requiring Father to pay child support in the amount of "$3,902.00 per month[.]" Further, the trial court reduced Father's child support arrears—which was an amount of $84,790—to a judgment, and placed a lien on any real property owned by him.

In computing the child support amount, the trial court found, regarding Father's income, that: Father had acted in "bad faith," such that quitting his job "reflect[ed] a deliberate disregard of his financial responsibility to support his child"; Father "alleged he had no earned

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1. A pseudonym is used to protect the identity of the juvenile. *See* N.C. R. App. P. 42(b).

income"; "[Father's] testimony was not credible"; and Father's income to be "$15,935.00 per month based upon his prior actual income and his current income-earning abilities." Additionally, regarding Mother's expenses, the trial court found the live-in nanny care of $2,800 per month to be a necessary work-related expense, given Mother's emergency department schedule, and found the Montessori school to be a work-related child care expense, thus increasing "work-related child[] care expenses to $3,626.80 per month."

Father timely appealed.

II. Jurisdiction

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

III. Standard of Review

"Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Jonna v. Yaramada*, 273 N.C. App. 93, 100 (2020) (citation omitted). "Under this standard of review, the trial court's ruling will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Biggs v. Greer*, 136 N.C. App. 294, 296–97 (2000) (citation and internal quotation marks omitted). "The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Spicer v. Spicer*, 168 N.C. App. 283, 287 (2005). "This Court's review of a trial court's child support order is limited to whether there is competent evidence to support the findings of fact, despite the fact that different inferences may be drawn from the evidence." *Hodges v. Hodges*, 147 N.C. App. 478, 482–83 (2001). "If unchallenged on appeal, findings of fact are deemed supported by competent evidence and are binding upon this Court." *In re M.J.S.M.*, 257 N.C. App. 633, 636 (2018) (citation omitted).

"Where a party asserts an error of law occurred, we apply a de novo standard of review." *Jonna*, 273 N.C. App. at 100 (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." *In re S.W.*, 298 N.C. App. 39, 44 (2025) (citation omitted). Additionally, this Court reviews de novo questions of statutory interpretation. *See State v. Williams*, 297 N.C. App. 512, 522 (2024).

IV. Analysis

On appeal, Father argues the trial court erred (A) in calculating his income; (B) by including certain work-related child care expenses in the child support calculation; and (C) by reducing Father's child support arrears to a judgment and placing a lien on any real property owned by Father, when the trial court failed to comply with N.C.G.S. § 50-13.4(f)(8). We address each argument, in turn.

A. Father's Income

[1] Father first argues the trial court erred in calculating his income. Specifically, Father argues the trial court erred by (1) imputing income to Father where the evidence did not support a finding that he acted in bad faith, and (2) converting Father's Nigerian salary into American dollars by utilizing the exchange rate on the date of separation for the entire child support amount, rather than using two different exchange rates for retroactive and prospective child support. We disagree.

1. Bad Faith

Although "[i]t is well established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified[,]" a party's "capacity to earn income may become the basis of an award if it is found that the party deliberately depressed his income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for his child." *Ellis v. Ellis*, 126 N.C. App. 362, 363 (1997) (citation modified). The North Carolina Child Support Guidelines provide, in relevant part:

> **(3) Potential or Imputed Income**. If the court finds that a parent's voluntary unemployment or underemployment is the result of the parent's *bad faith or deliberate suppression* of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income . . . . In determining whether a parent's voluntary unemployment or underemployment is the result of the parent's bad faith or deliberate suppression of income, the court shall consider the specific circumstances of the parent . . . .
>
> The amount of potential income imputed to a parent must be based on the parent's assets, residence, employment potential and probable earnings level, based on the parent's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the

> community and other relevant background factors relating to the parent's actual earning potential.

N.C. Child Support Guidelines, at 3 (2023) (emphasis added); *see also Wachacha v. Wachacha*, 38 N.C. App. 504, 507 (1978) ("When a court concludes as a matter of law on the basis of the evidence presented that a husband has failed to exercise his reasonable capacity to earn because of a disregard of his marital and parental obligations to provide reasonable support for his wife and minor child, the court may base an alimony and/or child support award on the individual's ability to earn as distinguished from his actual income.").

"The primary issue is whether a party is motivated by a desire to avoid his reasonable support obligations." *Mason v. Erwin*, 157 N.C. App. 284, 289 (2003) (citation and internal quotation marks omitted). The trial court can impute income if the evidence presented shows that a party has disregarded his or her parental obligations by:

> (1) failing to exercise his reasonable capacity to earn, (2) deliberately avoiding his family's financial responsibilities, (3) acting in deliberate disregard for his support obligations, (4) refusing to seek or to accept gainful employment, (5) willfully refusing to secure or take a job, (6) deliberately not applying himself to his business, (7) intentionally depressing his income to an artificial low, *or* (8) intentionally leaving his employment to go into another business.

Id. at 289 (citation omitted) (emphasis added).

In making these determinations, "[t]he trial court is the sole judge of credibility and is free to weigh the testimony in its discretion." *Icenhour v. Icenhour*, 298 N.C. App. 502, 513 (2025) (citing *State v. Johnson*, 378 N.C. 236, 242 (2021)). "[A] determination of bad faith in conjunction with suppression of income is best made on a case-by-case basis[,]" and intent "must ordinarily be proven . . . by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be inferred." *Roberts v. McAllister*, 174 N.C. App. 369, 378–79 (2005) (citations omitted).

Here, the trial court made the following, relevant findings of facts:

> 22. [Father] voluntarily left his position with Exxon-Nigeria several months after the parties' date of separation to become self-employed.

> 23. [Father] voluntarily chose to move to Atlanta, Georgia, and to rent an apartment with a rental payment of approximately $2,183.19 per month.
>
> 24. That after [Father] voluntarily left his Position with Mobile Producing Nigeria, he engaged in international travel for pleasure.
>
> . . . .
>
> 35. That [Father] voluntarily and in bad faith left his position with Mobile Producing Nigeria in avoidance of and with a naive indifference to his obligation to support the parties' minor child.
>
> 36. That [Father] went at least 18 months wherein he paid no support for the parties' minor child.

At the child support hearing, Father testified that he was "looking for employment" and had been "looking for employment almost a year now[,]" but was unsuccessful. Father explained he left his job for a "few reasons[,]" stating that management had changed, and he would have "to be in the office all the time" in Nigeria, such that

> it was impossible for me to be in America and be in Nigeria at the same time. I was supposed to be stationed in Nigeria for a long time. I couldn't see myself being able to resolve matters with my ex-wife and be able to have a relationship with my son if I was going to continue to stay in that role in Nigeria.

Father, however, admitted that even when he was still fully employed with Exxon-Nigeria, he failed to pay child support from January 2023 through July 2023. The trial court found that "[Father's] testimony was not credible[,]" and stated at the hearing:

> So, just conveniently, the nine months that we have been waiting to talk about child support, you with an Ivy League MBA, I mean, if you were sitting here, and I was telling you, you need to pay three grand a month or whatever, and you haven't paid it, then I'm going to put you in that holding cell and send you through the tunnel to the jail, you would not eat dinner in the jail tonight, you would be out of that jail before supper time if I said I need three grand right now. I know it . . . and I just know it.
>
> . . . .

> You are the most – you may be the most employable person in the building as we speak right now, and you conveniently will not work.

The trial court, being the "sole judge of credibility," *see Icenhour*, 298 N.C. App. at 513, found Father's testimony uncredible. Although Father claimed he was not "motivated by a desire to avoid his reasonable support obligations[,]" *see Mason*, 157 N.C. App. at 289, the trial court inferred bad faith from other "circumstantial evidence," *see Roberts*, 174 N.C. App. at 379, including evidence that Father had not paid child support for six months leading up the time he quit his job, and had even "engaged in international travel for pleasure" after leaving his job. Therefore, we conclude the trial court did not abuse its discretion in determining Father acted in bad faith; thus, we affirm the trial court's imputation of Father's capacity to earn. *See Jonna*, 273 N.C. App. at 100.

2. Converting Salary

Father argues the trial court erred by converting his salary at the exchange rate of the day of separation for the entire amount of child support. Specifically, Father contends that, while the retroactive portion of the child support order was correctly calculated from the exchange rate as of 30 March 2022—the date of separation—the prospective child support portion should have been calculated by converting his salary to the exchange rate as of the date of the child support hearing. We agree.

"In the absence of an existing child support order, an amount of child support awarded prior to the date a party files a complaint therefor[e] is properly classified as retroactive child support[.]" *Biggs*, 136 N.C. App. at 300 (citation modified); *see also Respess v. Respess*, 232 N.C. App. 611, 628 (2014) ("Child support awarded prior to the time a party files a complaint is properly classified as retroactive child support . . . " (citation omitted)).

Prospective child support, however, "generally includes the period between the filing of the complaint for child support and the hearing date." *Cole v. Cole*, 149 N.C. App. 427, 433 (2002); *see also State ex rel. Miller v. Hinton*, 147 N.C. App. 700, 706 (2001) ("[T]he implied presumption that child support payments should begin at the time the complaint was filed.").

As mentioned above, "child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified[.]" *Ellis*, 126 N.C. App. at 362. The North Carolina Child Support Guidelines provide that for retroactive child support, a trial court "may determine the amount of parent's obligation [] by determining the amount of support that would have been required had the guidelines been applied at the beginning of the time period for which support is being sought . . . ." N.C. Child Support Guidelines, at 2.

Here, the retroactive portion of the child support would be from the date of separation—30 March 2022—until the date of the first filed claim for child support—16 June 2023, with the income determined on 30 March 2022. *See Biggs*, 136 N.C. App. at 300. The prospective portion of the child support would then be from 16 June 2023 onward, *see Cole*, 149 N.C. App. at 433, and should have been calculated by determining Father's income on the date of the hearing—25 June 2024, *see Ellis*, 126 N.C. App. at 362. In determining Father's income for the retroactive period, the trial court used the published exchange rate for Naira–to–U.S. dollars on 30 March 2022, which was 0.002406 and resulted in converting Father's salary from 79,478,690.57 Naira to $191,225.70 U.S. dollars. The trial court did not conduct another income determination for prospective child support, and instead, used the same exchange rate of 30 March 2022 for the prospective child support portion, which should have been calculated based on the income, including the exchange rate, for 25 June 2024.

Because the trial court used only one income determination date for both retroactive child support and prospective child support, the trial court did not properly apply the Guidelines. *See Biggs*, 136 N.C. App. at 300; *see Ellis*, 126 N.C. App. at 362. Accordingly, we remand to the trial court for proceedings consistent with this opinion.

B. Work-Related Child Care Expenses

[2] Father next argues the trial court erred by including certain work-related child care expenses in the calculation of his child support obligation. Specifically, Father contends the trial court erred by including: (1) work-related child care expenses in the amount of $2,800.00 per month for live-in nanny care, where Finding of Fact 12 was not sufficiently supported by evidence at trial; and (2) the Montessori school expense by incorrectly classifying it as a work-related child care cost that was not supported by evidence. We disagree with Father's argument regarding the live-in nanny care expenses, but we agree the inclusion of the cost of the Montessori school was not supported by evidence.

1. Live-In Nanny Care

Father first argues "[t]he evidence in this case falls short of establishing that $2,800.00 per month spent on a live-in nanny is either reasonable or that this amount was a necessary expense that was incurred by [Mother] as a result of her employment."

The Guidelines provide that "[r]easonable child care costs that are, or will be, paid by a parent due to employment or job search are added to the basic child support obligation . . . . Other reasonable child care costs . . . may be the basis for a deviation." N.C. Child Support Guidelines, at 4.

Here, the trial court's Finding of Fact 12 states: "At the time of separation and through the date of this hearing, [Mother] paid $2,800 per month, on average, for in-home nanny care which is necessary given [] Mother's Emergency Department work schedule." Mother testified that the nanny care she used consisted of women from the Dominican Republic, where Mother's family resides, and she included flight costs for the nannies in her calculation of her monthly average on nanny care. At trial, the following, relevant conversation took place regarding nanny care costs:

> Q: In your opinion, has it ever been feasible for you to use an 8 a.m. to 6 p.m. daycare?
>
> A: No.
>
> Q: Are you aware of any daycares that would work with working a shift that gets off at 2 a.m. in the morning?
>
> A: No.
>
> . . . .
>
> Q: And approximately how much cash did you pay to each of the nannies you have had since the date of separation?
>
> A: A thousand six hundred dollars ($1,600.00) a month.
>
> Q: In addition to the $1,600.00 a month, what do you provide for them in-home?
>
> A: I provide them with a, you know, full-time home, food, [and] their toiletries. I try to cover their basic necessities around the house. And then, you know, when we go out, we kind of go out as a family of three. They help me out, obviously, but also just, you know, partake in our activities, like going to the children's museum, or the zoo, or the aquarium, [or] the science center. They don't necessarily participate in every single trip, but when they do, I cover that cost, obviously.

> Q: Do they contribute to the utilities in your home for the utilities they use?
>
> A: No.
>
> Q: Do they pay for their own medications, their over-the-counter medications?
>
> A: No; I cover their Omeprazole and their ibuprofen, and their Tylenol.
>
> . . . .
>
> Q: How much do you pay on average each month for cash, groceries, toiletries, utilities, room and board, transportation, food, toiletries, dining out, gasoline, and outings?
>
> A: At least $2,800.00 is what I have estimated.
>
> . . . .
>
> Q: When coming up with this calculation, have you used an average of those flights?
>
> A: Yeah; more or less. An average of like $400.00, sometimes it -- you know, if it lands during holidays or Mother's Day, summertime, that's particularly popular to travel to and from the Dominican Republic, it's been more.
>
> . . . .

Father argues that "[w]hile [Mother] may certainly be entitled to some credit for a work-related child[]care cost, she is not entitled to simply include and be credited for the entire cost of having a nanny live with her 24 hours a day, 7 days a week[.]" The trial court, however, is afforded substantial deference in determining child support matters, *see Jonna*, 273 N.C. App. at 100, and there is competent evidence from Mother's testimony that Mother requires a live-in nanny as compared to a regular daycare center due to her Emergency Department work schedule, *see Hodges*, 147 N.C. App. at 482–83.

Additionally, Father argues "the trial court erred by failing to separate or apportion the cost of those child[]care expenses which were actually necessary and reasonably related to [Mother's] employment from those which were superfluous, excessive and not tied to actual work-related child[]care[,]" such as paying for the medication for the nannies, as well as for nannies to accompany Mother and Luke to the zoo or other activities. Father abandoned this portion of his argument, however, because he has not provided any legal authority to support his contention that these expenses are unreasonable. *See K2HN Constr. NC, LLC v. Five D Contractors, Inc.*, 267 N.C. App. 207, 213 (2019) ("This Court has routinely held an argument to be abandoned where an appellant presents argument without . . . authority[.]"); *see also* N.C. R. App. P. 28(b)(6) (providing that "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned"). Even if Father had not abandoned his argument, we do not discern any abuse by the trial court in finding these expenses were reasonably related to providing adequate child care. *See Jonna*, 273 N.C. App. at 100.

2. Montessori School

Father next contends the trial court erred by including the cost of the minor child's attendance at the Montessori school as a work-related child care expense, and that this finding of fact was not supported by evidence. We agree.

At the hearing, Mother admitted that, although she had applied for Luke to attend the Montessori preschool, he had "not been accepted." She testified that the people at the school were "pretty confident that we'll be able to get in." The trial court found that "[b]eginning August 1, 2024, the minor child will begin attending Montessori School which, in addition to his in-home child[]care, will increase work-related child[] care expenses to $3,626.80 per month." There is no competent evidence in the Record that Luke was set to begin attending the school on 1 August 2024; there was only competent evidence that Mother had applied and was hopeful Luke would get in. Accordingly, we vacate the child support order and remand to the trial court for further findings of fact as to the Montessori school inclusion. *See Hodges*, 147 N.C. App. at 482–83.

C. Child Support Arrears to a Judgment

[3] Father lastly argues the trial court erred by reducing his child support arrears to a judgment and placing a lien on any real property owned by him when the trial court failed to comply with N.C.G.S. § 50-13.4(f)(8). Specifically, Father contends the trial court "was without authority to reduce [Father's] support arrears to a judgment[,]" and even if it had the authority, its order "fail[ed] to provide for any periodic payments to be made towards the arrearages." We disagree, but remand for an adequate description of any real property on which the judgment will be a lien.

"[O]ur Supreme Court has held that statutory interpretation properly begins with an examination of the plain words of the statute." *State* *v. Campbell*, 285 N.C. App. 480, 487 (2022) (citation modified). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *JVC Enters., LLC v. City of Concord*, 376 N.C. 782, 785 (2021) (citation omitted).

Under N.C.G.S. § 50-13.4(f), "[r]emedies for enforcement of support of minor children shall be available as follows[,]" including, in relevant part:

> Except as provided in Article 15 of Chapter 44 of the General Statutes, a judgment for child support shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments and may include provisions for periodic payments.

N.C.G.S. § 50-13.4(f)(8) (2023). The statute further provides that "[t]he specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available." N.C.G.S. § 50-13.4(f)(11).

Here, Mother, in her counterclaims, asked the trial court to "enter a retroactive order for child support, establish arrears, and enter a prospective order for child support pursuant to the North Carolina Child Support Guidelines[,]" and for the arrears, the trial court should "require the immediate payment" from Father.

The trial court's Finding of Fact 29 provides:

> That the child support arrears of $84,790 should be reduced to JUDGMENT and said JUDGMENT should be DOCKETED RECORDED AND INDEXED in the Judgment Docket in Forsyth County, North Carolina, and in any other jurisdiction where [Father] resides, is employed or owns the property with interest running on the same at the legal rate.

The trial court then concluded as a matter of law "[t]hat reduction of arrears to judgment with interest accruing at the legal rate is proper."

Father argues there had been no "past due periodic payments" that could have been reduced to a judgment under N.C.G.S. § 50-13.4(f)(8), and there were no motions in the cause filed nor separate actions to establish a judgment for past due periodic support payments. Although we agree with Father's argument as it would apply to the latter half of N.C.G.S. § 50-13.4(f)(8), we are not dealing with "past due periodic payments." This is an initial child support order which may be reduced to judgment, and, as the first part of N.C.G.S. § 50-13.4(f)(8) plainly provides, a judgment will be a lien against real property if the "judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected[.]" *See* N.C.G.S. § 50-13.4(f)(8); s*ee also Dula v. Parsons*, 243 N.C. 32, 35 (1955) ("A docketed judgment, directing the payment of money, is a lien on the real property situated in the county in which the judgment is docketed and owned by the judgment debtor at the time the judgment is docketed . . . .").

Here, the trial court expressly provided the judgment was for the sum certain of $84,790, and that it be docketed in any county in which Father is employed or owns property, but failed to describe the real property on which there would be a lien. Accordingly, we vacate and remand to the trial court for further findings of fact to adequately describe the real property affected.

V. <u>Conclusion</u>

Upon careful review, we conclude the trial court properly imputed income to Father but erred by failing to calculate his prospective child support obligation as of the date of the hearing. The trial court also erred by including the cost of the Montessori school as a work-related child care expense without hearing evidence and making sufficient findings of fact to support the inclusion of that expense, and by failing to adequately describe the real property to be affected by the judgment lien, as required by N.C.G.S. § 50-13.4(f)(8). Accordingly, we affirm in part, vacate in part, and remand for additional findings of fact. In its discretion, the trial court may hear additional evidence.

AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

Judges ZACHARY and STADING concur.

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. COA25-167

Filed 17 December 2025

1. **Appeal and Error—interlocutory appeal—temporary restraining order—use and control of assets—substantial right**

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, failed to timely complete the restructuring plan, and were held in contempt for violating a temporary restraining order prohibiting defendants from selling, encumbering, or otherwise devaluing specified affiliate companies (SACs)—defendants' interlocutory appeal (from a modified temporary restraining order, which among other things, lowered the threshold amount for restrained transactions, and from an order denying defendants' motion to allow the receiver the additional authority to approve transfers from the SACs to fund certain expenses or obligations) affected a substantial right: defendants' ability to use and control their assets. Accordingly, the orders were immediately appealable.

2. **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, failed to timely complete the restructuring plan, and were held in contempt for violating a temporary restraining order prohibiting defendants from selling, encumbering, or otherwise devaluing specified affiliate companies—defendants' request, pursuant to Appellate Rule 37, that the appellate court take judicial notice of a motion to dissolve a temporary restraining order (TRO) and an order denying in part the limited receiver's motion for authority to recover transfers made in violation of the TRO was rejected. The motion to dissolve and its contents were not matters subject to judicial notice because they were not notoriously true facts not subject to reasonable dispute, and, while the order regarding the limited receiver's motion appeared to have been denied because it concerned the subject matter of a pending appeal, it did not bear upon a fact crucial to the disposition of the appeal.

3. Appeal and Error—modification of temporary restraining order—Civil Procedure Rule 62(c)—lack of cited legal authority—issue deemed abandoned

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, failed to timely complete the restructuring plan, and were held in contempt for violating a temporary restraining order prohibiting defendants from selling, encumbering, or otherwise devaluing specified affiliate companies (SACs)—defendants argued that the trial court erred in modifying the TRO, after the appeal was taken, to extend beyond the MOU's specified scope in that the modified TRO restrained the individual defendant and non-SAC businesses from making any transaction over $5,000 without court approval. Civil Procedure Rule 62(c) authorizes a trial court to, in its discretion, modify a TRO during the pendency of an appeal, but defendants focused their appellate arguments on the interpretation of contracts and failed to cite any legal authority regarding tailoring the terms of relief under the TRO pursuant to Rule 62(c). In light of that violation of Appellate Rule 28(b)(6), the argument was deemed abandoned and was dismissed.

4. Receivership—trial court's vested authority—limited receiver—limitation or expansion of powers

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, failed to timely complete the restructuring plan, and were held in contempt for violating a temporary restraining order prohibiting defendants from selling, encumbering, or otherwise devaluing specified affiliate companies—defendants' argument that the trial court's denial of their motion to allow the limited receiver to approve transfers from the individual defendant's borrower companies constituted impermissible interference with the authority of the limited receiver was rejected. The trial court's order denying defendants' motion was an exercise of the court's exclusive authority to direct the receiver and to resolve matters relating to the receivership—including to limit or expand the powers of a receiver at any time—as provided in N.C.G.S. §§ 1-507.23 and 1-507.28.

Appeal by defendants from orders entered 12 July 2024 and 29 July 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.

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

FLOOD, Judge.

Defendant Greg E. Lindberg, Defendant Global Growth Holdings, LLC ("Global Growth"), and Defendant New England Capital, LLC ("New England Capital") (collectively, "Defendants") appeal from two orders: first, the trial court's order entered on 12 July 2024 amending a modified temporary restraining order (the "Re-Modified TRO"), and second, the trial court's order entered on 29 July 2024 denying Defendants' motion to allow the limited receiver to approve transfers from Lindberg's borrower companies—or the Specified Affiliated Companies (the "SACs")—to fund expenses or obligations, "whether personal or business in nature," of Global Growth (the "Motion to Allow"). On appeal, Defendants contend the trial court erred by, first, amending the Modified TRO to extend beyond the specified scope of a memorandum of understanding that Defendants and Plaintiffs entered into (the "MOU"), and second, denying Defendants' Motion to Allow because the trial court's order interferes with the limited receiver's authority. Upon careful review, we affirm in part, dismiss in part, and remand for further proceedings.

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 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 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 held for Plaintiffs' policyholders to be invested into other non-insurance companies that he also owned or controlled.

In November 2016, Wayne Goodwin lost 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 that there would be a "mismatch between investments and policyholder liabilities." In other words, because Lindberg had invested so much of Plaintiffs' money into affiliated non-insurance companies, NCDOI worried Plaintiffs might experience a shortfall on their obligation to pay individual policyholders.

To address this problem, in May 2019, the parties agreed to negotiate a restructuring of the affiliated business entities' obligations. On 27 June 2019, the parties entered into, *inter alia*, the MOU, wherein Lindberg agreed that, on or before 30 September 2019, the SACs would be placed under a New Holding Company ("NHC") governed by an independent board, charged with protecting Plaintiffs' policyholders. Importantly, Article II, Section I of the MOU limited the restructuring to the SACs and excluded affiliated companies that were non-SAC entities. 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 NHC.

The Breach

On 1 October 2019, Plaintiffs filed suit against Defendants for breach of the MOU and fraud, alleging Lindberg had failed to make the SACs subsidiaries of NHC 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 trial court approved the TRO, which prohibited "Defendants, or any third-party acting in concert with them," from, *inter alia*, selling, encumbering, or otherwise devaluing the SACs. The TRO also contained restrictions on, not just the SACs, but "any affiliated company" 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." *Id.* 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, extending its duration until the trial court ruled on Plaintiffs' Motion for a Preliminary Injunction, 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 did not order 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, solely on 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*).

The Modified TRO

On 15 April 2024, Plaintiffs filed a Motion to Modify the TRO and Appoint a Receiver, alleging Defendants had violated the terms of the TRO. On 22 April 2024, the trial court held a hearing on Plaintiffs' Motion to Modify the TRO and Appoint a Receiver. After hearing arguments from both parties, the trial court orally granted Plaintiffs' motions, entered a written order (the "Receivership Order") appointing Bill Janvier (the "Receiver") "to serve as a limited receiver over [Global Growth], effective immediately [and] to monitor [Global Growth's] compliance with the [Modified] TRO[,]" and stated that a written order further setting forth the terms of the Modified TRO and the Receiver's duties and obligations would follow.

On 10 May 2024, the trial court entered an order modifying the TRO (the "Modified TRO") and detailing the Receiver's powers and duties. The trial court stated that the TRO's restrictions would continue to apply, and imposed additional restrictions on Defendants, "and any entity directly or indirectly controlled by Defendants[,]" including a restraint on engaging in transactions of funds from the SACs over $10,000, without prior court approval. The Modified TRO also provided that the Receivership Order was still in place and ordered Defendants to provide "the Receiver with notice of any proposed transaction involving cash, cash equivalents, or assets in excess of $10,000 at least 72 hours in advance of any such transaction."

On 18 June 2024, the Receiver submitted a report to the trial court 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. This matter came on for hearing on 25 June 2024, and after hearing arguments from Defendants, Plaintiffs, and the Receiver, the trial court stated it was going to further amend the Modified TRO and the Receivership Order.

Before the trial court entered an order amending the Modified TRO and the Receivership Order, on 2 July 2024, Defendants asked the Receiver to approve "a request for a $500,000 distribution from the ARM trust to" Global Growth. The following day, the Receiver responded via email to Defendants' request, stating:

> I'm not certain that this type of transaction falls within the scope of the modification to the TRO announced by [the trial court] -- I'll need to see the written order (which has not yet been entered) to know for sure. That said, if given the power to authorize this transaction, I would approve it. If the proposed order has not yet been submitted, I would urge the parties to do so quickly.

On 12 July 2024, Defendants filed the Motion to Allow, attaching the Receiver's email and asking the trial court to give the Receiver the additional authority of approving transfers from the SACs to fund expenses or obligations, "whether personal or business in nature," of Global Growth.

Seven minutes after Defendants filed the Motion to Allow, the trial court entered the Re-Modified TRO, amending the Modified TRO and modifying the Receivership Order. In the Re-Modified TRO, the trial court stated that, due to Defendants' violations of the Modified TRO in May 2024, the threshold amount for restrained transactions in the Modified TRO was lowered to $5,000, and that the restriction applies to transfers by Lindberg or Global Growth, even if the relevant funds originate from non-SAC entities.

On 17 July 2024, the Receiver filed a response to Defendants' Motion to Allow, stating he would be unlikely to approve the requested transactions due to Defendants' "numerous flagrant and repeated violations of the TRO[.]" The Receiver also asked the trial court to hold a status hearing to discuss Defendants' non-compliance with the Receivership Order and "specific inappropriate suggestions that the Receiver's expenses will be paid contingent upon the Receiver approving certain transfers."

The trial court heard the Motion to Allow and held a status hearing on 18 July 2024. During the hearing, counsel for Defendants acknowledged the Re-Modified TRO did not have a "personal expense authorization[,]" but argued there was confusion about whether the payment of personal expenses violated the TRO: Defendants thought the payment of personal expenses did not violate the TRO, but the Receiver thought paying personal expenses did violate the TRO. Defendants attempted to persuade the trial court into "reconsidering the order it did enter and entering [Defendants'] version instead." The Receiver asserted that even if he was given the additional authority as requested by Defendants in the Motion to Allow, he would "be extremely hesitant to use it" because, due to "Defendants repeatedly violat[ing] [the c]ourt's order[,]" he was "pretty confident [the money] will be misused[.]" On 29 July 2024, the trial court entered an order denying Defendants' Motion to Allow (the "29 July 2024 Order").

Defendants timely appealed from the Re-Modified TRO and the 29 July 2024 Order.

II. Jurisdiction

[1] As an initial matter, we note the Re-Modified TRO and the 29 July 2024 Order are interlocutory orders because they do not dispose of all pending matters before the trial court. *See Veazey v. City of Durham*, 231 N.C. 357, 362 (1950) ("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.") "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725 (1990). Under N.C.G.S. § 7A-27, however, a party may appeal an interlocutory order if the interlocutory order "[a]ffects a substantial right." N.C.G.S. § 7A-27(b)(3)(a) (2023).

"[T]he appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380 (1994). "Whether an interlocutory appeal affects a substantial right is determined on a case-by-case basis[,]" *Grant v. High Point Reg'l Health Sys.*, 172 N.C. App. 852, 853 (2005), in which "it is usually necessary to consider the particular facts of a case and the procedural context in which the interlocutory order arose[,]" *Barnes v. St. Rose Church of Christ, Disciples of Christ*, 160 N.C. App. 590, 591 (2003). In determining whether an immediate review of an interlocutory appeal is warranted, this Court applies a two part test: (1) "that the right in question qualifies as substantial"; and (2) "that, absent immediate appeal, the right will be lost, prejudiced or less than adequately protected by exception to entry of the interlocutory order." *Barnes v. Kochhar*, 178 N.C. App. 489, 497 (2006) (citation and internal quotation marks omitted).

Defendants assert, and Plaintiffs do not contest, the Re-Modified TRO and the 29 July 2024 Order deprive Defendants of a substantial right to use and control their assets, and that right will be lost absent immediate appellate review. To support their argument, Defendants cite *Schout v. Schout*, where this Court held that the trial court's interlocutory order affected a substantial right of the defendant because the order "jeopardize[d the] defendant's right to maintain the assets for [the] plaintiff's educational needs." 140 N.C. App. 722, 726 (2000). Similar to Schout, this Court has held that "[a]n appellant's right to use and control its assets is a substantial right that warrants immediate review when that right is prohibited during the pendency of case resolution." *SED Holding, LLC v. 3 Star Props., LLC*, 246 N.C. App. 632, 635 (2016); *see Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co.*, 184 N.C. App. 292, 294–95 (2007) (holding that an order for provisional remedies affected a substantial right because of "the large amount of money at issue[,] . . . the fact that the trial court impinged appellant's right to the use and control of those assets, and the unavoidable and lengthy delays, acknowledged by both parties").

Here, the Re-Modified TRO and the 29 July 2024 Order affect Defendants' substantial right of using and controlling their assets. While the Re-Modified TRO was issued "to protect the rights and interests of Plaintiffs and Plaintiffs' policyholders[,]" Defendants have shown that they lack full control over their assets because the Re-Modified TRO prohibits any expense exceeding $5,000 absent court approval, which—in effect—freezes Defendants' entire financial operations as Defendants must submit piecemeal requests to the trial court every time they seek to transfer money in excess of $5,000. The process of seeking court approval any time Defendants wish to use their assets has led to substantial delays, such one instance where it took twenty-seven days for the Receiver to grant a prior request to approve a payment of over $5,000. Accordingly, Defendants' substantial right to use and control their assets is affected by the Re-Modified TRO and the 29 July 2024 Order, and this Court has jurisdiction to review Defendants' appeal from the Re-Modified TRO and the 29 July 2024 Order.

III. Motion for Judicial Notice

[2] Next, we address Defendants' Motion for Judicial Notice. Defendants request that we take judicial notice of two public records filed in the North Carolina state courts: first, the Motion to Dissolve the TRO and Motion to Discharge Limited Receiver and Special Master, and second, the 31 December 2024 Order granting in part and denying in part the

Limited Receiver's Motion for Authority to Recover Transfers made in Violation of the TRO.

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 and the 31 December 2024 Order because they provide "record support for significant facts of" Defendants' appeal. Specifically, Defendants assert that the Motion to Dissolve contains documents showing Defendants fully complied with the terms of the MOU by transferring all their interests in the SACs on 11 October 2024, and the 31 December 2024 Order reverses the Re-Modified TRO. 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 of which a court may properly take judicial notice:

> 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 the content therein, is—by its very nature—argumentative and the subject of dispute. Indeed, the parties question in their briefs to this Court the effect of this Motion: on one hand, Defendants assert the Motion to Dissolve shows the SACs were transferred to NHC in October 2024 pursuant to the MOU; on the other hand, Plaintiffs assert the legal effect of the Motion to Dissolve will be contested at the trial court level. This Court has previously denied taking judicial notice of certain documents that are disputable in nature. *See In* *re Hackley*, 212 N.C. App. 596, 601–02 (2011) (taking judicial notice of a recorded deed because it was "capable of accurate and ready determination[,]" but holding we could not take judicial notice of "emails, letters, and affidavits" because the accuracy of the documents were "subject to question"). 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 31 December 2024 Order does not bear upon a fact crucial to the disposition of this appeal. It is well-established that 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, Defendants contend the 31 December 2024 Order contains language specifically excluding the regulation of the non-SAC entities by the Receiver. While the 31 December 2024 Order denied the motion as to non-SAC entities "[f]or the avoidance of doubt," it appears the trial court denied the motion, not on the merits, but because the motion concerned the subject matter of a pending appeal. Our review of the 31 December 2024 Order, however, does not reveal any fact indicating the trial court reversed or amended the Re-Modified TRO. The fact that the Receiver can renew his motion to recover from transfers made in violation of the TRO after this appeal is decided has no bearing on whether the trial court erred in modifying the Modified TRO or whether the trial court impermissibly interfered with the Receiver's authority. Therefore, because the 31 December 2024 Order has no bearing on our decision in this case, we decline to take judicial notice of the 31 December 2024 Order. *See Lineberger*, 189 N.C. App. at 6.

Accordingly, we deny Defendants' request to take judicial notice of the Motion to Dissolve and the 31 December 2024 Order.

IV. Analysis

On appeal, Defendants argue the trial court erred by (A) modifying the TRO to extend beyond the MOU's specified scope and (B) denying Defendants' Motion to Allow on 29 July 2024. We discuss each argument, in turn.

A. Modification of the Modified TRO

[3] Defendants first argue the trial court erred by modifying the TRO to extend beyond the MOU's specified scope. Specifically, Defendants assert that Article II, Section I of the MOU makes it clear that the MOU does not govern any of the non-SAC entities, nor does it govern Lindberg's other personal assets, and the Re-Modified TRO contradicts the plain language of the MOU because it "purports to restrain Lindberg and all of his businesses from making any transaction over $5,000 without court approval."

Generally, a temporary restraining order will be issued as "an ancillary remedy for the purpose of preserving the status quo or restoring a status wrongfully disturbed pending the final determination of the action." *Hutchins v. Stanton*, 23 N.C. App. 467, 469 (1974); *see Seaboard Air Line R. Co. v. Atl. Coast Line R. Co.*, 237 N.C. 88, 94 (1953) (stating that a temporary restraining order will be issued "to prevent an injury being committed or seriously threatened"). Rule 65 of the North Carolina Rules of Civil Procedure governs the issuance and extension of a temporary restraining order. *See* N.C. R. Civ. P. 65(b); *see also Taylor v. Centura Bank*, 124 N.C. App. 661, 663 (1996) ("All [temporary restraining orders] must be obtained pursuant to N.C. R. Civ. P. 65."). When the trial court grants a temporary restraining order, the temporary restraining order must "set forth the reasons for its issuance; [] be specific in terms; [] describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained[.]" N.C. R. Civ. P. 65(d). A temporary restraining order may be extended before the original duration expires for a longer period of time, if the restrained party consents to the extension of the temporary restraining order or if good cause is shown. *See* N.C. R. Civ. P. 65(b). Moreover, Rule 62(c) authorizes a trial court to, in its discretion, modify a temporary restraining order during the pendency of an appeal:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court[,] in its discretion[,] may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

See N.C. R. Civ. P. 62(c).

In their principal brief to this Court, Defendants fail to cite a single legal authority regarding the trial court's authority to modify a temporary restraining order. Under our Rules of Appellate Procedure, an appellant's brief must include "[a]n argument, to contain the contentions of the appellant with respect to each issue presented[,]" and within the body the appellant must include "citations of the authorities upon which the appellant relies." N.C. R. App. P. 28(b)(6). Moreover, "it is the appellant's burden to show error occurring at the trial court, and 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." *Thompson v. Bass*, 261 N.C. App. 285, 292 (2018). Consequently, when an appellant presents an argument but fails to cite applicable legal authority and thus violates Rule 28(b)(6), the argument will be taken as abandoned. *See K2HN Constr. NC, LLC v. Five D Contractors, Inc.*, 267 N.C. App. 207, 213 (2019) ("This Court has routinely held an argument to be abandoned where an appellant presents argument without such authority and in contravention of [Rule 28(b)(6)]."); *see also Thompson*, 261 N.C. App. at 292 (deeming the issue on appeal as abandoned "[b]ecause [the] plaintiff [] failed to submit any meaningful argument as to how the trial court erred").

Here, Defendants' entire argument in their principal brief to this Court solely focused on how the trial court should have construed the MOU and tailored the Re-Modified TRO to the terms of the MOU. The issue before the trial court was not an issue of contract interpretation; rather, the issue was whether Plaintiffs were entitled to a modification of the Modified TRO. While Defendants cite several cases involving the interpretation of contracts to support their argument, Defendants failed to cite any legal authority in tailoring the terms of relief under the TRO. Since Defendants had the burden of showing the trial court erred, but failed to comply with Rule 28(b)(6), we are unable to determine if the trial court erred by entering the Re-Modified TRO and modifying the Modified TRO to extend beyond the MOU's specified scope. *See Thompson*, 261 N.C. App. at 292.

We note that, in their reply brief, Defendants pivot their argument and assert—for the first time on appeal—that the trial court had no authority to "issue blanket injunctions on matter unrelated to injunctions[,]" the TRO is "overly restrictive" and "violates due process[,]" and the TRO is not based on concrete and adjudicated rights. Although Defendants cite authority to support these new issues, Defendants waived these issues by failing to assert them in their principal brief to this Court. *See State v. Dinan*, 233 N.C. App. 694, 698–99 (2014) ("[A] reply brief is not an avenue to correct the deficiencies contained in the original brief."); *see also Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 708 (2009) ("By raising his condition precedent argument for the first time in his reply brief, [the appellant] has frustrated the adversarial process by depriving [the appellee] of the opportunity to respond to his argument."). Moreover, while Plaintiffs, in their brief to this Court, generally discussed the trial court's authority to enter a temporary restraining order under Rule 65 and Rule 62(c), Defendants' arguments in their reply brief raise entirely new arguments that exceed "the framework for the matters to be decided on appeal." *See Animal Prot. Soc. of Durham, Inc. v. State*, 95 N.C. App. 258, 269 (1989) (declining to address the appellant's newly-raised constitutional argument because, although the appellee generally discussed "cases upholding the constitutionality" of the statutes, the appellant could not use her reply brief to raise new matters). As such, we decline to address Defendants' arguments regarding the modification of the Modified TRO. *See Hardin*, 199 N.C. App. at 708.

Therefore, because Defendants, in their principal brief to this Court, cite no applicable legal authority to support their claim that may allow this Court to determine whether the trial court erred by modifying the Modified TRO to extend beyond the MOU's specified scope, this issue is deemed abandoned and dismissed.

B. Limited Receiver

[4] Defendants lastly argue the trial court erred by denying Defendants' Motion to Allow. Specifically, Defendants argue "[t]he trial court disregarded the purpose of appointing a limited receiver[,]" and the trial court's denial of the Motion to Allow "was an unwarranted interference with [the Receiver]'s discretion and authority under the [10 May 2024] Receivership [O]rder." We disagree.

This Court has never addressed the issue of whether a trial court has impermissibly interfered with the authority of a limited receiver. As such, we find a discussion relating to the powers and duties of a receiver germane to our analysis.

A receivership is used only as a means to reach an end of completing justice between the parties. *See Lowder v. All Star Mills, Inc.*, 309 N.C. 695, 704 (1983) ("The ultimate end of the receivership is to enable the court to accomplish, so far as practicable, complete justice between the parties before it."). As defined by the North Carolina Commercial Receivership Act, a receivership is the case in which the court appoints a receiver, and the receiver "takes possession of, manages, or disposes of the debtor's property." N.C.G.S. § 1-507.20(b)(26) (2023). Generally, a receivership is "ancillary to some equitable relief," *Murphy v. Murphy*, 261 N.C. 95, 101 (1964), and will be ordered only when "there is no other safe and expedient remedy[,]" *Neighbors v. Evans*, 210 N.C. 550, 554

(1936). After all, "[t]he judicial creation of a receivership is a harsh, drastic, and extraordinary remedy." *Lowder*, 309 N.C. at 701.

"A receiver may be appointed by a trial court both pursuant to statute and the trial court's inherent authority." *Barnes*, 178 N.C. App. at 499. Pursuant to N.C.G.S. § 1-502, a trial court may appoint a receiver "after judgment" for various reasons, including, "to carry the judgment into effect[,]" or "to preserve [the property] during the pendency of an appeal[.]" N.C.G.S. § 1-502(2), (3) (2023). "Indeed, a trial court's decision whether to appoint a receiver is ordinarily reviewed under an abuse of discretion standard." *Haarhuis v. Cheek*, 261 N.C. App. 358, 368 (2018), *writ denied*, *review denied*, 372 N.C. 298 (2019).

The receiver has multiple duties, including the duty to act in conformity with the court's orders, and the duty to "act in the best interests of the receivership and the receivership property." N.C.G.S. § 1-507.28(c)(5). The extent of a receiver's powers, however, depends on whether the trial court ordered a limited receivership or a general receivership. *See* N.C.G.S. § 1-507.28(b) (enumerating ten additional powers a general receiver has if the trial court ordered a general receivership). A limited receiver has the powers as set forth in N.C.G.S. § 1-506.28(a), as well as any powers specifically conferred to the limited receiver by a court order, rule, or statute. *Id.* The trial court has the authority to limit or expand the powers of the receiver, *see* N.C.G.S. § 1-507.28(d) and may, "[a]t any time, . . . order a general receivership to be converted to a limited receivership and a limited receivership to be converted to a general receivership[,]" N.C.G.S. § 1-507.23 (2023).

While the receiver is entrusted with a considerable amount of responsibility and authority, the receiver does not have unbridled authority. The receiver, as a court-appointed person, becomes "the court's agent, [] subject to the court's direction," who will "take possession of, manage, control, and, if authorized . . . dispose of receivership property." N.C.G.S. § 1-507.20(b)(25). At all times during the receivership, "[t]he receiver is an officer of the court, and is amenable to its instruction in the performance of his duties; and the custody of the receiver is the custody of the law." *See Lambeth v. Lambeth*, 249 N.C. 315, 321 (1959) (citation omitted). Once a trial court appoints a receiver, the trial court has broad powers to:

> [D]irect the receiver and determine all controversies relating to the receivership or receivership property, wherever located, including, without limitation, authority to determine all controversies relating to the collection, preservation, improvement, disposition, and distribution of

> receivership property, and all matters otherwise arising in or relating to the receivership, the receivership property, the exercise of the receiver's powers, or the performance of the receiver's duties.

N.C.G.S. § 1-507.22.

Here, the trial court's order denying Defendants' motion was not, as Defendants contend, an "overreach of judicial authority[,]" but rather, an exercise of its exclusive authority to direct the Receiver and resolve matters relating to the receivership. When the trial court appointed the Receiver, the trial court specifically limited the Receiver's powers to the those conferred in the Modified TRO, which included, *inter alia*, the power "to seek and obtain instruction from the [c]ourt with respect to any matter relating to the receivership property, the exercise of the Receiver's powers, or the performance of the Receiver's duties[.]"

Due to confusion between the parties, however, the Receiver used its court-given authority to request the trial court to hold a status hearing and discuss the Receiver's authority to approve certain transactions. *See* N.C.G.S. § 1-507.28(a)(4) ("[A] receiver, whether general or limited, shall have . . . [t]he power to seek and obtain instruction from the court with respect to any matter relating to the receivership property, the exercise of the receiver's powers, or the performance of the receiver's duties."). Thus, when the matter came on for hearing on 18 July 2024, the trial court was subsequently faced with, as Defendants argued, a proposition to reconsider the authority it had already given the Receiver. In other words, the trial court was faced with a controversy relating to the receivership and the disposition of the receivership property, which it had the "exclusive authority" to determine. *See* N.C.G.S. § 1-507.22.

While the trial court ultimately denied Defendants' proposition to expand the Receiver's powers, the trial court had the vested authority to limit or expand the powers of the Receiver at any time, *see* N.C.G.S. §§ 1-507.23, 1-507.28(d), and when the trial court declined to extend the Receiver's authority, the trial court's determination was based on the Motion to Allow, the Receiver's response to the Motion to Allow, and the arguments of counsel. On the other hand, the Receiver, as an officer of the court and subject to its instruction in the performance of his duties, had the duty to act in conformity with the trial court's order—not vice-versa. *See* N.C.G.S. § 1-507.28; *see also Lambeth*, 249 N.C. at 321.

Therefore, because the trial court had the authority to modify the Receiver's authority, the trial court did not err in denying Defendants' Motion to Allow.

V. Conclusion

Upon careful review, we conclude Defendants abandoned their argument asserting the trial court erred by modifying the TRO to extend beyond the MOU's specified scope, where Defendants failed to cite appropriate authority to allow this Court to determine whether the trial court erred; thus, Defendants' argument is dismissed. We also conclude the trial court did not err by denying Defendants' Motion to Allow, where the trial court had statutory authority to limit the Receiver's powers at any time throughout the receivership. Accordingly, we affirm in part, dismiss in part, and remand for further proceedings.

AFFIRMED IN PART; DISMISSED IN PART; AND REMANDED.

Judges TYSON and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
JODY TRAVIS BROWN

No. COA24-949

Filed 17 December 2025

1. Possession of Stolen Property—felony possession of stolen goods—elements—circumstantial evidence—sufficiency

In a case arising from the theft of property after an unused building on the victims' property was broken into at night, the trial court properly denied defendant's motion to dismiss the charge of felony possession of stolen goods where the State presented substantial evidence, even if circumstantial, to support each element of that offense, including that defendant had constructive possession of goods that he knew or should have had reasonable grounds to know had been stolen, and that he acted with a dishonest purpose to deprive the victims of their property. Just hours after the break-in occurred, defendant was present without authorization on the victims' property; defendant was riding in a car that had no headlights on driving down the victims' unlit driveway; the vehicle was driven by the tenant from an adjacent property in whose house the stolen property was later found; and defendant had been seen visiting the tenant's house on prior occasions.

2. Larceny—attempted misdemeanor larceny—intent to take and carry away property—circumstantial evidence—sufficiency

In a case arising from the theft of property from an unused building on the victims' property that had been broken into at night, the trial court properly denied defendant's motion to dismiss the charge of attempted misdemeanor larceny. The State presented substantial evidence, even if circumstantial, to support the essential element that defendant had an intent to take and carry away the property of another, including that: hours after the break-in occurred, defendant was present without authorization on the victims' property; defendant was riding in a car that had no lights on; the vehicle was driven by the tenant from an adjacent property in whose house the stolen property was later found; and defendant had been seen visiting the tenant's house on prior occasions.

Appeal by Defendant from judgment entered 1 December 2023 by Judge Donald Ray Cureton in Caldwell County Superior Court. Heard in the Court of Appeals 28 October 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Julie M. Faenza, for the State-Appellee.

Blackrose Law, by Gina Balamucki, for Defendant-Appellant.

COLLINS, Judge.

This appeal arises out of a criminal conviction for felony possession of stolen goods and attempted misdemeanor larceny. Defendant Jody Travis Brown argues that the trial court erred by denying his motion to dismiss for insufficient evidence. Because the State presented substantial evidence to support the convictions, we affirm the trial court's denial of Defendant's motion to dismiss.

I. Background

In February 2022, Jerry and Janice Moses lived on a fifty-acre property in Caldwell County bordered by the Yadkin River and the Route 321 highway. Their primary residence, 3288 Blowing Rock Boulevard, was located near the front of the property. The property also included a "River House" located at the end of the Moses' driveway. The River House was primarily used for storage. A mower shed sat between the River House and 3288 Blowing Rock Boulevard.

A neighboring home, the "Rock House," abutted the northern end of the Moses' property. The Rock House was rented by Joni and Rodney Nelson. Sundie Plonk occasionally lived at the Rock House with the Nelsons, including in February 2022.

The Moses' property could be accessed through a break in Route 321. Because the entrance did not appear to be a private driveway, motorists would sometimes mistakenly enter the property and promptly exit. These motorists would enter by crossing a short wooden bridge at the property's entrance. The Moseses often recognized unintended visitors by the sound of the bridge's loose wooden boards rumbling twice in quick succession – first when a vehicle entered, and again when it exited.

While home on the evening of 14 February 2022, Mr. Moses heard an initial rumble but not a second. After stepping outside, Mr. Moses did not see any vehicle on their property.

Around 5:00 p.m. the next day, 15 February 2022, Mr. Moses again heard the bridge rumble and looked out the window. He saw and photographed a tan pickup truck with a dent on the right side heading toward Route 321. He saw a person jump from the ground into the bed of the truck to adjust a tarp covering the back. He could not see any identifying characteristics of the individual who jumped into the truck. The truck departed onto Route 321.

After the truck left, the Moseses checked the River House. They found the house in disarray: lampshades and household items were scattered outside; safe doors were either broken or had a chisel driven in between the top of the safe and its door; and multiple items – including rugs, tools, and a Hitachi air compressor – were missing. Mr. Moses explained that "[i]t looked very much like some thought was given to the items taken, the containers they were placed in, and the general condition of how things were left."

Mr. Moses called law enforcement, who arrived and took a report. Expecting the driver to return, Mr. Moses placed a motion detector on the bridge leading into the property.

Around 10:00 p.m. that night, the detector activated. Mr. Moses stepped outside, asked his wife to call the police, and drove his golf cart towards the River House. The area was in total darkness – the Moseses did not "generally have lights on at night" – but Mr. Moses saw the brake lights of a vehicle near the mower shed backing up to the River House.

The vehicle's headlights appeared to be off. Mr. Moses returned to the entrance to meet and guide responding officers to the vehicle.

Mr. Moses watched law enforcement approach the vehicle as it drove away from the River House with its headlights then on. Law enforcement encountered a dark-colored Mazda sedan driving from the direction of the River House toward Route 321.

Officers stopped the car and identified Defendant as a passenger and Ms. Plonk – who was living at the neighboring Rock House with Mr. and Ms. Nelson – as the driver. The backseat and trunk of the Mazda, registered to Ms. Plonk, were empty. Officers questioned both occupants but allowed them to leave without taking them in for questioning or arrest.

While one officer questioned Ms. Plonk and Defendant, Mr. Moses took the other officer to inspect the River House. No one was inside the River House and, besides the signs of the earlier break in, neither the officer nor Mr. Moses noted anything unusual. The officer and Mr. Moses believed that the River House had not been reentered after law enforcement's earlier inspection.

Law enforcement later learned that the tan truck Mr. Moses had seen in his driveway around 5:00 pm that day belonged to Ms. Nelson. Pursuant to a warrant, officers searched the Rock House and found several items belonging to the Moseses, including the Hitachi air compressor, rugs, and other household goods.

Defendant was indicted for felonious breaking and entering, felonious larceny, and felonious possession of stolen goods.

At trial, Ms. Nelson testified that Ms. Plonk, while living at the Rock House, would occasionally drive Ms. Nelson to and from her doctor's appointments using Ms. Plonk's tan truck. But, on one occasion on or around 14 February 2022, Ms. Plonk used Ms. Nelson's truck to pick Ms. Nelson up from her doctor's appointment without Ms. Nelson's permission to do so. As for the Moses' goods, Ms. Nelson explained that Ms. Plonk had given Mr. Nelson the Hitachi air compressor as a gift. Otherwise, she did not know how the Moses' property reached the Rock House.

Ms. Nelson further testified that she allowed Ms. Plonk to live at the Rock House starting around Christmas in 2021. Between then and 15 February 2022, Ms. Nelson saw Defendant visit Ms. Plonk at the Rock House on multiple occasions. On one occasion, Ms. Nelson spotted Defendant exiting Ms. Plonk's Rock House room at approximately 3:00 A.M. when someone was knocking on the Rock House's door.

At the close of the State's evidence, Defendant moved to dismiss for insufficient evidence on each of the three charges. The trial court denied Defendant's motion to dismiss. Defendant did not introduce evidence and renewed his motion to dismiss at the close of all evidence. The trial court again denied Defendant's motion to dismiss.

The jury found Defendant not guilty of felony breaking and entering but guilty of felony possession of stolen goods and attempted misdemeanor larceny. The trial court arrested judgment on the attempted misdemeanor larceny conviction and imposed a suspended sentence of four to fourteen months' imprisonment with twenty-four months of supervised probation on the felony possession of stolen goods conviction. Defendant gave oral notice of appeal.

II. Discussion

Defendant argues that the trial court erred by denying his motion to dismiss the felony possession of stolen goods and attempted misdemeanor larceny charges. We disagree.

A. Standard of Review

"We review the denial of a motion to dismiss for insufficient evidence de novo." *State v. Ingram*, 283 N.C. App. 85, 87 (2022) (citation omitted). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *State v. McVay*, 287 N.C. App. 293, 296 (2022) (citation omitted).

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Chekanow*, 370 N.C. 488, 492 (2018) (quotation marks and citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Rivera*, 216 N.C. App. 566, 568 (2011) (quotation marks and citation omitted). "[S]o long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence." *State v. Miller*, 363 N.C. 96, 99 (2009) (quotation marks and citation omitted).

"In making its determination, the trial court must consider all evidence admitted . . . in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *Chekanow*, 370 N.C. at 492 (quotation marks and 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." *Id.* (citation omitted). "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 . . . satisfy [the jury] beyond a reasonable doubt that the defendant is actually guilty.' " *Id.* at 379 (quoting *State v. Barnes*, 334 N.C. 67, 75-76 (1993)).

B. Felonious Possession of Stolen Goods

[1] The elements of N.C. Gen. Stat. § 14-71.1, felony possession of stolen goods, are: "that a defendant (1) possessed personal property; (2) which was stolen pursuant to a breaking or entering; (3) knowing or having reasonable grounds to believe the property was stolen pursuant to a breaking or entering; and (4) acted with a dishonest purpose." *State v. Hester*, 287 N.C. App. 282, 288 (2022) (citations omitted); *see* N.C. Gen. Stat. § 14-71.1 (2023).

1. Possession of Personal Property

Possession of personal property may be actual or constructive. *Chekanow*, 370 N.C. at 493. A defendant may constructively possess property where they have "the intent and capability to maintain control and dominion over" the property, even if the defendant does not actually possess it. *Id.* (quotation marks omitted).

The evidence must "provide circumstances linking the contraband specifically to the [d]efendant." *State v. Norris*, 294 N.C. App. 475, 478 (2024) (citation omitted), *cert. granted*, 387 N.C. 435 (2025). If the defendant lacks exclusive control of the location where the property is found, the State must prove additional incriminating circumstances – including suspicious or unusual behavior. *State v. Garrett*, 246 N.C. App. 651, 655 (2016). Evidence that a defendant "regularly visited the premises where the" property was found constitutes an incriminating circumstance which permits an inference of constructive possession. *State v. Rice*, 252 N.C. App. 480, 484 (2017) (citation omitted).

Here, Defendant was the passenger in Ms. Plonk's car without the headlights on as they drove at night through the Moses' unlit property. The car was found on the Moses' property the night after the Moseses suspected a vehicle had entered their property without leaving, and just hours after the break in at the River House. Defendant had previously visited Ms. Plonk on previous occasions at the Rock House. Some of the stolen goods, including the Hitachi air compressor, rugs, and other household goods, were found in the Rock House, where Ms. Plonk was living. This is substantial evidence to support a conclusion that Defendant possessed the property through constructive possession.

2. Stolen Pursuant to a Breaking or Entering

The second element requires substantial evidence that the property was stolen pursuant to a breaking or entering. *Hester*, 287 N.C. App. at 288. Misdemeanor breaking or entering requires "only proof of the wrongful breaking or entry into any building" for a misdemeanor offense. *State v. Freeman*, 307 N.C. 445, 451 (1983); *see also* N.C. Gen. Stat. §14-54(b) (2023).

The River House was broken into on 15 February 2022 and several items were stolen, including a Hitachi air compressor, rugs, and other household goods. Those items were later found at the Rock House when law enforcement executed a search warrant. This is substantial evidence that the property found at the Rock House was stolen pursuant to a breaking or entering of the River House.

3. Knowing or Having Reasonable Grounds to Believe the Property Was Stolen Pursuant to a Breaking or Entering

The State must present substantial evidence that the defendant had actual knowledge that the possessed property was stolen or that the defendant had reasonable grounds to believe that the property was stolen. *State v. Parker*, 316 N.C. 295, 303-04 (1986).

Here, Defendant was found without authorization in the Moses' private driveway, mere hours after a breaking and entering. Ms. Plonk drove the car without headlights across the Moses' long, unlit driveway at night. Defendant was known to visit Ms. Plonk, at the neighboring Rock House, where many of the stolen items were later found pursuant to a search warrant. Taken together, these facts provide substantial evidence that Defendant either knew or had reasonable grounds to believe the items were stolen.

4. Acted With a Dishonest Purpose

The State may prove that a possessor of stolen property acts with a dishonest purpose by "showing that the possessor acted with an intent to aid the thief, receiver, or possessor of stolen property. . . ." It is sufficient if he intends to assist another wrongdoer in permanently depriving the true owner of his property." *Id.* at 305-06.

Here, Defendant was present without authorization at the Moses' property just hours after a break-in. Defendant was seated in a vehicle which Mr. Moses saw traversing his long driveway at night without the aid of headlights or external lights. Defendant was seated with Ms. Plonk, who was staying at the Rock House where the Moses' personal property was later found. Defendant was known to visit Ms. Plonk regularly. Taken together, these facts provide substantial evidence that Defendant intended to assist Ms. Plonk in permanently depriving the Moseses of their personal property.

Because the State provided substantial evidence of each element of the felonious possession of stolen goods charge, the trial court did not err by denying Defendant's motion to dismiss that charge.

C. Attempted Misdemeanor Larceny

[2] The elements of attempted misdemeanor larceny are "(1) [a]n intent to take and carry away the property of another; (2) without the owner's consent; (3) with the intent to deprive the owner of his or her property permanently; (4) an overt act done for the purpose of completing the larceny, going beyond mere preparation; and (5) falling short of the completed offense." *State v. Weaver*, 123 N.C. App. 276, 287 (1996).

Defendant contests only the sufficiency of the evidence of the first element – an intent to take and carry away the property of another. Accordingly, Defendant has waived review of the sufficiency of the evidence to support the remaining elements. *See* N.C. R. App. P. 28(a).

Here, the State presented substantial evidence that Defendant had the intent to take and carry away the Moses' property. Defendant was present without authorization on the Moses' property just hours after a break-in at the River House. Defendant was in a vehicle seen at night driving through the Moses' unlit driveway without its headlights on. Defendant was seated with Ms. Plonk, who was staying at the Rock House where the Moses' property was later found. Defendant was seen visiting Ms. Plonk on prior occasions. These facts provide substantial evidence that Defendant intended to take and carry away the Moses' property.

III. Conclusion

Because the State presented substantial evidence of each element of the offenses, we affirm the trial court's denial of Defendant's motion to dismiss.

AFFIRMED.

Judges FLOOD and MURRY concur.

STATE OF NORTH CAROLINA
v.
JUAN DERAS ESCALANTE, Defendant

No. COA25-64

Filed 17 December 2025

Search and Seizure—surveillance order—standing to challenge—cell-site location information—no ownership or possessory interest in phone—no expectation of privacy

The trial court's order denying defendant's motion to suppress was affirmed where the trial court properly determined that defendant lacked standing to assert that his Fourth Amendment right to be free from unreasonable search and seizures was violated by the issuance of a surveillance order to collect real-time cell-site location information after a fatal shooting took place. Defendant failed to carry his burden of showing that his temporary use of a phone within twenty-four hours of the shooting created an expectation of privacy and that he had ownership or possessory interest in the phone.

Appeal by Defendant from order entered 8 February 2024 by Judge Justin Davis in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 October 2025.

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

Tin Fulton Walker & Owen, PLLC, by Noell P. Tin, for Defendant.

GRIFFIN, Judge.

Defendant Juan Deras Escalante appeals from the trial court's order denying his motion to suppress. Defendant argues the surveillance order was issued without probable cause and moved to suppress the fruits of an unlawful search warrant. We hold the trial court did not err in determining Defendant failed to establish standing.

I. Factual and Procedural Background

On 29 April 2019, Domingo Vanancio-Tapio was shot and killed outside of Lempira Restaurant, located in Charlotte, North Carolina. Charlotte Mecklenburg Police Department ("CMPD") detectives obtained an arrest warrant for Defendant. After obtaining the warrant, CMPD requested the Violent Criminal Apprehension Team ("VCAT") to locate Defendant. VCAT obtained a trap and trace court order, and then the United States Secret Service deployed its cell-site simulator to locate Defendant via a phone call he made to Defendant's mother. The United States Secret Service promptly located Defendant, and then VCAT detectives surrounded the residence where Defendant was located. Defendant came out of the residence after several hours and was arrested.

After Defendant's arrest, CMPD took Defendant to the Mecklenburg County Jail, where Defendant made a phone call in which he admitted to shooting Vanancio-Tapio and believed he had been snitched on. Despite Defendant's objection, this phone call conversation was admitted into evidence at trial.

Defendant moved to suppress "fruits of a seizure resulting from unlawful electronic surveillance of Defendant." The trial court denied Defendant's motion to suppress. At Defendant's trial on 7 February 2024, the jury found Defendant guilty of first-degree murder under the felony murder rule. Defendant timely appeals from the trial court's order denying his motion to suppress.

II. Analysis

In reviewing a trial court's denial of a motion to suppress, this Court must determine " 'whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law.' " *State v. Faulk*, 256 N.C. App. 255, 262, 807 S.E.2d 623, 628–29 (2017) (quoting *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011)). Findings of fact supported by competent evidence are conclusive on appeal even if conflicting evidence exists. *State v. Downey*, 251 N.C. App. 829, 832, 796 S.E.2d 517, 519 (2017) (citation omitted). Additionally, on appeal, unchallenged findings of fact are deemed supported by competent evidence and binding. *State v. Carrouthers*, 200 N.C. App. 415, 418, 683 S.E.2d 781, 784 (2009) (citation omitted). We review conclusions of law de novo. *State v. Aguilar*, 287 N.C. App. 248, 252, 882 S.E.2d 411, 415 (2022) (citation omitted).

The Fourth Amendment of the United States Constitution protects people from unreasonable searches and seizures of "their persons, houses, papers, and effects." U.S. Const. amend. IV. Generally, an individual "may not object to a search or seizure of the premises or property of another." *State v. Greenwood*, 301 N.C. 705, 707, 273 S.E.2d 438, 440 (1981) (citation omitted). A defendant must have standing "to challenge the reasonableness of a search or seizure." *State v. Swift*, 105 N.C. App.

550, 556, 414 S.E.2d 65, 68–69 (1992). To have standing to contest the validity of a search, an individual must have (1) "ownership or possessory interest in the premises or property" and (2) a reasonable expectation of privacy. *Greenwood*, 301 N.C. at 707–08, 273 S.E.2d at 440 (citation omitted); *Swift*, 105 N.C. App. at 556, 414 S.E.2d at 69; *State v. Sanchez*, 147 N.C. App. 619, 626, 556 S.E.2d 602, 608 (2001) (citation omitted).

"[I]ndividuals have a reasonable expectation of privacy in the whole of their physical movements." *Carpenter v. United States*, 585 U.S. 296, 310, 315 (2018) (citation omitted). However, the context of such a reasonable expectation of privacy concerns protections from "a detailed chronicle of a person's physical presence compiled every day, every moment, over several years." *Id.* at 315. It is not a shield for when someone uses a phone or for a person's movement at a certain time. *Id.* The United States Supreme Court declines to express a view on real-time cell-site location information ("CSLI"). *Id.*

A defendant has the burden of demonstrating a search infringed on his or her personal rights to in turn establish his or her standing to challenge the validity of a search. *Greenwood*, 301 N.C. at 708, 273 S.E.2d at 440 (citation omitted). "[T]emporary use of property does not automatically create an expectation of privacy in that property." *State v. Boyd*, 169 N.C. App. 204, 207, 609 S.E.2d 785, 787 (2005). Our Courts do "not assume ownership or a possessory interest in property based on mere possession." *State v. Stitt*, 201 N.C. App. 233, 241, 689 S.E.2d 539, 547 (2009) (citation omitted).

Here, Defendant does not challenge any of the trial court's findings of fact. Therefore, the trial court's findings are deemed supported by competent evidence and binding on this appeal. *Carrouthers*, 200 N.C. App. at 418, 683 S.E.2d at 784. Defendant argues the trial court incorrectly concluded he lacked standing to challenge the validity of the search in question. We disagree.

The trial court found Defendant had used *a* phone within a day of Vanancio-Tapio's murder. The trial court's findings also stated Defendant was in contact with his family and friends through the number associated with the phone Defendant used within twenty-four hours of Vanancio-Tapio's murder. However, Defendant's temporary use of the phone does not automatically create an expectation of privacy, and we do not assume ownership or a possessory interest in the phone based on mere possession.

Additionally, CMPD collected five cell phones from the residence where Defendant refused to exit prior to his arrest and none of those phones had the number from the CSLI search. This weakens Defendant's argument that he had ownership or possessory interest because, as the U.S. Supreme Court expressed, a "cell phone faithfully follows its owner;" Defendant would have likely had that phone with him. *Carpenter*, 585 U.S. at 311. Therefore, the findings did not demonstrate ownership or possessory interest in the phone associated with the search.

Defendant has failed to offer evidence of ownership or possessory interest in the cell phone at either the suppression hearing or on appeal. Rather, Defendant emphasizes he simply used the phone.

Defendant claims the CSLI search violated his expectation of privacy in his movements and heavily bases his argument on *Carpenter v. United States*. Yet, unlike the gathering of about four months of historical CSLI data in *Carpenter*, the gathering of real-time CSLI used here was for less than an hour of real-time data. Moreover, the U.S. Supreme Court in *Carpenter* explicitly declined to address real-time CSLI, the technology used here. Here, Defendant was "using a phone," what the U.S. Supreme Court expressed that *Carpenter* was "not about." Thus, this case differs drastically, and Defendant's argument fails.

Consequently, because Defendant failed to carry his burden of showing the search infringed on his personal rights, we hold the trial court did not err and Defendant lacks standing.

III. Conclusion

All in all, Defendant did not satisfy his burden of demonstrating both ownership or possessory interest in the cell phone and reasonable expectation of privacy. Therefore, the trial court did not err in its determination Defendant lacked standing to challenge the search.

AFFIRMED.

Chief Judge DILLON and Judge FLOOD concur.

STATE OF NORTH CAROLINA
v.
CINQUAN MARQUECE JACOBS

No. COA24-1081

Filed 17 December 2025

1. Constitutional Law—right to counsel—forfeiture—obstruction and delay

In a prosecution for resisting a public officer, speeding, and related charges, the trial court properly concluded that defendant forfeited his right to counsel where defendant's actions obstructed and delayed trial proceedings in both district and superior court. Defendant caused his attorneys to withdraw on three occasions by seeking to have them file baseless motions or pursue improper claims. Further, defendant made improper discovery requests, questioned the impartiality of the trial court, and continuously interrupted the trial court.

2. Contempt—criminal contempt—direct—summary proceeding—lack of opportunity to be heard

In a criminal matter, the trial court erred by finding defendant in direct, summary criminal contempt where defendant was not given an adequate opportunity to be heard as required by N.C.G.S. § 5A-15. Summary proceedings were no longer appropriate where the trial court first delayed (after a recess on the day in question) and then deferred the imposition of contempt (by readdressing the issue the next day). Therefore, the trial court's six contempt orders—including one for each time defendant told the court to "[a]dd some more" after the initial contempt adjudication—were reversed.

Appeal by Defendant from Judgments entered 13 May 2024 and Orders entered 14 May 2024 by Judge William Anderson Long, Jr., in Cabarrus County Superior Court. Heard in the Court of Appeals 24 September 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Jonathan D. Jones, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David S. Hallen, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Cinquan Marquece Jacobs (Defendant) appeals from Judgments entered pursuant to jury verdicts finding him guilty of Resisting a Public Officer, Failure to Heed Light or Siren, Reckless Driving, and Speeding. The Record before us tends to reflect the following:

On 20 November 2021, a vehicle passed Officers Bradley Oppy and Sean Honey while going approximately fifteen miles-per-hour over the speed limit. Officer Honey activated the blue lights and siren on his patrol vehicle, but the speeding vehicle did not stop; the officers pursued the vehicle until it eventually turned into the driveway of a house several minutes later.

The driver told Officer Honey he did not have identification. However, he was wearing an employee ID which allowed the officers to identify him as Defendant. Officer Honey arrested Defendant for Resisting a Public Officer, Failure to Heed Light or Siren, Reckless Driving, and Speeding.

In Cabarrus County district court, the district court concluded Defendant had forfeited his right to counsel after two of Defendant's appointed attorneys withdrew from representation. The district court subsequently found Defendant guilty of all charged offenses. Defendant appealed to superior court.

On 6 December 2022, Defendant was appointed counsel in the superior court proceedings. On 28 March 2023, Defendant's counsel made a Motion to Withdraw, alleging Defendant wished to have a new attorney because of a disagreement over filing certain documents with the court. The trial court set a Forfeiture of Counsel Hearing for 30 March 2023.

At the Forfeiture of Counsel Hearing, Defendant stated he did not want to represent himself pro se and continued to question the trial court's jurisdiction. The trial court found Defendant "willfully forfeited his rights to counsel due to his misconduct and his insisting upon counsel filing frivolous actions or motions not supported by either fact or law[,]" and concluded Defendant had forfeited his right to counsel.

The case proceeded to trial. Defendant repeatedly objected to proceeding without counsel. The trial court threatened to remove Defendant from the courtroom if he "continue[d] to disrupt this trial by referencing counsel."

The jury returned verdicts finding Defendant guilty of all charges. The trial court sentenced Defendant to three consecutive forty-five-day sentences, which were suspended for a consolidated period of twenty-four months of supervised probation, split with three consecutive eleven-day terms of imprisonment.

At sentencing, Defendant asked if he could "put a motion to appeal in[.]" The trial court told Defendant he could "appeal it all you want." Defendant said he would "see [the trial court] in federal court," which the trial court interpreted as a threat:

> [Defendant]: Can I put a motion to appeal in? Motion to appeal.
>
> [Trial Court]: You can appeal it all you want.
>
> [Defendant]: On the record. And can I get a transcript sent to the jail where I'm at? And can I have that on the record too? Both transcripts, the one from last time and the one from this time. Thank you so much.
>
> [Trial Court]: I wish you the best.
>
> [Defendant]: Yeah. I'll see you in federal court, bucko.
>
> [Trial Court]: I'm going to hold you in contempt for that threat. I'm going to add 30 days to the 33.

Defendant then told the trial court to "[a]dd it up, bro[,]" leading to the following exchange:

> [Defendant]: Add it up, bro.
>
> [Trial Court]: And then I'm going to add another 30 to that.
>
> [Defendant]: Add some more.
>
> [Trial Court]: That's 90.
>
> [Defendant]: And more.
>
> [Trial Court]: 120.
>
> [Defendant]: Let me get more.
>
> [Trial Court]: 150.
>
> [Defendant]: More.
>
> [Trial Court]: 180. That's going to be 100 days of contempt, six for each threat or response, and that's going to run consecutively. 180, that's six contempts [sic].

The trial court then took a one-minute recess before briefly coming back on the Record to clarify it "felt like contempt was appropriate given . . .

what the Court deemed to be a threat and then an ongoing response engaging the Court in debate and argument and further threat." At this point, the trial court concluded the proceedings.

The following day, Defendant was brought back before the trial court to address a sentencing error. The trial court adjusted Defendant's sentences to two consecutive forty-five-day sentences which were immediately suspended for a consolidated period of twenty-four months of supervised probation.[1] Each sentence included an active term of eleven days of imprisonment as a special condition of probation.

The trial court then addressed Defendant's allegedly contemptuous behavior at sentencing the previous day. The trial court stated it had not "decided in final" how it was going to handle the issue and was giving Defendant "an opportunity to be heard on [sic]." Defendant argued his statement had not been a threat and he was "just trying to exercise [his] right to go to a higher court[.]" The trial court decided Defendant's behavior warranted six consecutive thirty-day sentences for criminal contempt, as it had indicated the day prior.

The trial court entered six corresponding Criminal Contempt Orders finding Defendant "willfully display[ed] behavior during court that directly interrupted regular court proceedings" and "willfully disrespect[ed] the authority of the court." Each Order sentenced Defendant to thirty days in custody.[2] Defendant gave oral Notice of Appeal from the Criminal Contempt Orders.

Issues

The issues on appeal are whether the trial court erred by: (I) concluding Defendant had forfeited his right to counsel; and (II) holding Defendant in direct criminal contempt.

Analysis

I. Forfeiture of Counsel

[1] This Court reviews alleged violations of a defendant's constitutional rights, including the right to counsel, de novo. *State v. Anderson*, 222 N.C. App. 138, 142, 730 S.E.2d 262, 265 (2012) (citations omitted).

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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.

2. On 11 June 2024, the trial court—apparently *sua sponte*—consolidated the contempt sentences into a single, thirty-day active sentence.

The right to counsel may be forfeited. *State v. Blakeney*, 245 N.C. App. 452, 460, 782 S.E.2d 88, 93 (2016). " '[F]orfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right.' " *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 69 (2000) (quoting *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d. Cir. 1995)).

"A finding that a defendant has forfeited the right to counsel requires egregious[,] dilatory[,] or abusive conduct on the part of the defendant which undermines the purposes of the right to counsel . . . ." *State v. Smith*, 292 N.C. App. 656, 660, 899 S.E.2d 394, 397 (2024) (alterations in original) (citations and quotation marks omitted). More specifically, forfeiture of the right to counsel can occur when a defendant's conduct "constitutes a '[s]erious obstruction of the proceedings[,]' " *State v. Jones*, 292 N.C. App. 493, 501, 898 S.E.2d 784, 790 (2024) (quoting *State v. Simpkins*, 373 N.C. 530, 538, 838 S.E.2d 439, 447 (2020)), such as when he refuses to confirm his desire for counsel, refuses to participate, or causes significant delays. *Id.* (citation omitted). " 'Even if a defendant's conduct is highly frustrating,' however, 'forfeiture is not constitutional where any difficulties or delays are not so egregious that they frustrated the purposes of the right to counsel itself.' " *Smith*, 292 N.C. App. at 661, 899 S.E.2d at 398 (alterations and internal quotation marks omitted) (quoting *State v. Atwell*, 383 N.C. 437, 449, 881 S.E.2d 124, 132 (2022)).

In *Smith*, this Court affirmed the trial court's determination the defendant had forfeited his right to counsel where the defendant questioned whether the trial court could be impartial, refused to cooperate with his attorneys, and was "combative and interruptive" during his court appearances. *Id.* at 661, 899 S.E.2d at 398. The defendant had insisted "his attorneys pursue defenses that were barred by ethical rules" and "refus[ed] to cooperate when they would not comply with his requests[,]" ultimately resulting in the withdrawal of six different attorneys. *Id.* The withdrawals resulted in a two-year delay in the case being tried, which this Court determined to be "a significant delay of the proceedings." *Id.* at 662, 899 S.E.2d at 398 (citing *Atwell*, 383 N.C. at 449, 881 S.E.2d at 132). This Court held the totality of the defendant's conduct undermined the purpose of the right to counsel. *Id.*

In the case *sub judice*, the Record indicates Defendant obstructed and delayed the trial proceedings. Defendant's conduct caused his attorneys to withdraw on three occasions between his November 2021 arrest and the March 2023 Forfeiture of Counsel Hearing. Although fewer than the six attorneys in *Smith*, this Court has noted causing as few as two attorneys to withdraw is conduct which may warrant a forfeiture of the right to counsel. *See State v. Boyd*, 200 N.C. App. 97, 102, 682 S.E.2d 463, 467 (2009) (determining the defendant had forfeited his right to counsel where he was "uncooperative with counsel to the extent that both his court-appointed attorneys withdrew.").

As in *Smith*, the Record shows that while in the district court, Defendant insisted on pursuing causes of action improper under the law and the Rules of Professional Conduct and Criminal Procedure, resulting in the withdrawal of both of his attorneys in the district court proceedings. In superior court, Defendant's continued requests to file baseless motions caused his third attorney to request to withdraw from representation. During the hearing where Defendant's third attorney made his Motion to Withdraw, Defendant made improper discovery requests and questioned the impartiality of the trial court as well as those who "get paid by the State[.]" Defendant criticized the trial court for "trying to trick [him]" and expressed his desire to "settle the matter privately." Defendant's disruptive behavior continued at the Forfeiture of Counsel Hearing, where he continuously interrupted the trial court, questioned the trial court's jurisdiction and the "other party's standing[,]" referred to documents from the "IRS website," and suggested the possibility of proceeding under "admiralty" jurisdiction.

Thus, Defendant obstructed and delayed the trial proceedings. Therefore, Defendant's conduct effectively undermined the purpose of the right to counsel. Consequently, the trial court did not err in concluding Defendant forfeited his right to counsel.

II. Criminal Contempt

[2] Defendant argues the trial court erroneously held him in direct criminal contempt without providing him with an adequate opportunity to be heard. Criminal contempt proceedings are governed by statute. *See* N.C. Gen. Stat. § 5A *et seq.* (2023). A trial court's violation of a statutory mandate is an error of law which this Court reviews de novo. *State v. Harding*, 258 N.C. App. 306, 321, 813 S.E.2d 254, 265 (2018) (citation omitted).

Criminal contempt is direct when the contemptuous act:

> (1) Is committed within the sight or hearing of a presiding judicial official; and
>
> (2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and

> (3) Is likely to interrupt or interfere with matters then before the court.

N.C. Gen. Stat. § 5A-13(a) (2023). "The presiding judicial official may punish summarily for direct criminal contempt according to the requirements of [N.C. Gen. Stat. §] 5A-14 or may defer adjudication and sentencing as provided in [N.C. Gen. Stat. §] 5A-15." *Id.* "If proceedings for direct criminal contempt are deferred, the judicial official must, immediately following the conduct, inform the person of his intention to institute contempt proceedings." *Id.*

A trial court "may summarily impose measures in response to direct criminal contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt." *Id.* § 5A-14(a) (2023).

> "When a judicial official chooses not to proceed summarily against a person charged with direct criminal contempt or when he may not proceed summarily, he may proceed by an order directing the person to appear before a judge at a reasonable time specified in the order and show cause why he should not be held in contempt of court."

Id. § 5A-15(a) (2023). However, "[n]otice and a formal hearing are not required when the trial court promptly punishes acts of contempt in its presence." *In re Owens*, 128 N.C. App. 577, 581, 496 S.E.2d 592, 595 (1998), *aff'd per curiam*, 350 N.C. 656, 517 S.E.2d 605 (1999).

In the instant case, Defendant argues the trial court erred by failing to provide him with an opportunity to respond before holding him in direct criminal contempt.[3] The State, for its part, effectively argues Defendant received an opportunity to be heard because Defendant "continued talking after each notice of contempt[.]"[4]

We believe the present case resembles *State v. Randell*, where the defendant protested briefly after the trial court told him it was going to hold him in contempt for failing to stand when the bailiff had called for all to rise. 152 N.C. App. 469, 470, 567 S.E.2d 814, 816 (2009) (per curiam). Before the trial court had him removed from the courtroom

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3. Summary notice and summary opportunity to respond are each required by statute. N.C. Gen. Stat. § 5A-14(b) (2023). Here, however, Defendant argues only that he did not receive an opportunity to respond.

4. To the extent the State has presented arguments Defendant received summary notice, we do not address them because Defendant has not raised that issue on appeal.

and placed in custody, the defendant asserted the law didn't require him to stand and he had been "getting [his] books." *Id.* at 470-71, 868 S.E.2d at 816. Later that day, the trial court gave the defendant an opportunity to be heard but continued to find him in contempt of court. *Id.* at 471, 567 S.E.2d at 816. This Court reversed because the "defendant was not accorded the summary hearing before being found guilty of contempt[,]" notwithstanding that the defendant had received "ample opportunity to explain himself after the fact[.]" *Id.* at 472, 567 S.E.2d at 817.

Likewise, each instance here where Defendant told the trial court to "add some more" is analogous to the protestations the *Randell* defendant made, as opposed to "an opportunity to present reasons not to impose a sanction[ ]" provided by the trial court. *In re Owens*, 128 N.C. App. at 581, 496 S.E.2d at 594. Thus, we agree Defendant was not afforded summary opportunity to respond, even though he was given a full opportunity to respond the following day. *See Randell*, 152 N.C. App. at 472, 567 S.E.2d at 817.

Moreover, the Record tends to indicate summary proceedings were no longer appropriate when the trial court readdressed the issue the following day. Summary proceedings are appropriate so long as measures are imposed "substantially contemporaneously with the contempt." N.C. Gen. Stat. § 5A-14(a) (2023). This Court has recognized the imposition of summary contempt may be substantially contemporaneous with the contemptuous conduct even well after the contemptuous conduct occurred. *State v. Robinson*, 281 N.C. App. 614, 625, 868 S.E.2d 703, 711 (2022) (discussing *State v. Johnson*, 52 N.C. App. 592, 279 S.E.2d 77 (1981)). In *Johnson*, this Court upheld the trial court's imposition of direct criminal contempt through summary proceedings where the contemptuous conduct occurred during a "relatively short" bond hearing, "the court was adjudicating, and the defendant was put on notice, that the defendant's conduct was so disruptive and contemptuous[,]" and imposing confinement during the hearing "could well have antagonized the already infuriated defendant and resulted in further disruption and delay of the hearing." 52 N.C. App. at 596-97, 279 S.E.2d at 79-80.

In *Robinson*, however, we clarified that where there is an unnecessary delay between the contemptuous behavior and the imposition of criminal contempt, summary proceedings are no longer appropriate and plenary proceedings in accordance with N.C. Gen. Stat. § 5A-15 must be conducted instead. 281 N.C. App. at 625-26, 868 S.E.2d at 711. Here, as in *Robinson*, the circumstances did not necessitate a delay between Defendant's allegedly contemptuous conduct and the trial court imposing summary contempt. Rather, the Record shows the trial court took a recess before coming back on the Record to specify why he "sentenced contempt six times" and concluding the proceedings. There is no indication that at any point before or after this recess the trial court could not have placed Defendant on notice of the contempt charges, provided him with an opportunity to respond, and drafted and served Defendant with the Criminal Contempt Orders before concluding the sentencing hearing. *See id.* at 625, 868 S.E.2d at 711.

In fact, the Record tends to show the adjudication and sentencing of Defendant's allegedly contemptuous behavior in the instant case was deferred—not just delayed. Indeed, when Defendant was brought back before the trial court the following day, the trial court stated: "The contempt . . . I've not decided in final how I'm going to handle it." Section 5A-13 is clear that when adjudication and sentencing of direct criminal contempt is deferred, the judicial official must conduct plenary proceedings in accordance with Section 5A-15. *See* N.C. Gen. Stat. § 5A-13(a) (2023). Thus, because the trial court ultimately chose to defer its contempt ruling, summary contempt proceedings were no longer appropriate. Therefore, the trial court was required to provide Defendant with plenary notice and an opportunity to be heard in accordance with N.C. Gen. Stat. § 5A-15 before holding Defendant in direct criminal contempt. Consequently, the trial court erred by holding Defendant in direct, summary criminal contempt.[5]

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial and affirm the Judgments. We reverse the trial court's Criminal Contempt Orders.

NO ERROR IN PART; REVERSED IN PART.

Judges ZACHARY and WOOD concur.

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5. Because we conclude the trial court erred in holding Defendant in direct criminal contempt without an appropriate opportunity to respond, we do not reach the issue of whether Defendant's conduct was, in fact, contemptuous.

STATE OF NORTH CAROLINA
v.
DAVID JORDAN, JR.

No. COA25-107

Filed 17 December 2025

Appeal and Error—oral notice of appeal—untimely—defense counsel assaulted by defendant—absent during entry of judgment—certiorari denied

In a criminal case where defendant physically assaulted his trial attorney, resulting in their removal from the courtroom during trial and subsequent absence during the entry of the final judgment, defendant's appeal from his criminal convictions was dismissed because, even though his attorney had announced to the court (prior to the assault) his intention to give oral notice of appeal "at the appropriate time," this statement—assuming that it qualified as an oral notice of appeal under Appellate Rule 4—was premature and therefore in violation of Rule 4. Additionally, defendant's petition for a writ of certiorari was denied where, given his actions and failure to file a written notice of appeal, defendant failed to show that he had lost his right of appeal through no fault of his own.

Appeal by defendant from judgments entered 1 May 2024 by Judge Timothy W. Wilson in Nash County Superior Court. Heard in the Court of Appeals 15 October 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Wendy J. Lindberg, for the State.

Johneric C. Emehel for defendant-appellant.

ZACHARY, Judge.

Defendant David Jordan, Jr., appeals from the trial court's judgments entered upon a jury's verdicts finding him guilty of assault with a deadly weapon with intent to kill and possession of a firearm by a felon. We dismiss Defendant's appeal and, in our discretion, deny his petition for writ of certiorari.

I. Background

Defendant's case came on for jury trial on 29 April 2024 in Nash County Superior Court. At the conclusion of the trial, the jury returned verdicts finding Defendant guilty of assault with a deadly weapon with intent to kill and possession of a firearm by a felon. The trial court entered judgments against Defendant sentencing him to a term of 33 to 52 months' imprisonment in the custody of the North Carolina Department of Adult Correction for his conviction for assault with a deadly weapon with intent to kill and a consecutive term of 13 to 25 months' imprisonment for his conviction for possession of a firearm by a felon.

During the court's pronouncement of its second judgment, Defendant physically assaulted his trial attorney. Bailiffs subdued Defendant, took him into Sheriff's custody, and removed him from the courtroom; Defendant's counsel was helped to judge's chambers to receive medical attention. While Defendant's trial attorney had earlier indicated his intent to give oral notice of appeal "at the appropriate time," Defendant's assault of counsel rendered his trial attorney unavailable to give oral notice of appeal upon entry of the final judgment. Defendant was also unavailable to give oral notice of appeal after entry of the final judgment, as he had been taken into custody and removed from the courtroom following the attack. In counsel's absence, the court stated that defense counsel "does give[ ] notice of appeal." The record on appeal does not contain a written notice of appeal.

Defendant's appellate counsel filed a petition for writ of certiorari to this Court on 1 April 2025, to which the State filed a response on 9 April 2025.

II. Appellate Jurisdiction

As a preliminary matter, we must determine whether this Court has jurisdiction to hear this appeal.

"Notice of appeal shall be given within the time, in the manner and with the effect provided in the rules of appellate procedure." N.C. Gen. Stat. § 15A-1448(b) (2023). Notice of appeal in a criminal matter may be taken by:

> (1) giving oral notice of appeal at trial, or
>
> (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment or order or within fourteen days after a ruling on a motion for appropriate relief made during the fourteen-day period following entry of the judgment or order.

N.C. R. App. P. 4(a).

Oral notice of appeal must be given after entry of the final judgment. *State v. Jones*, 296 N.C. App. 512, 515, 909 S.E.2d 373, 376 (2024), *disc. review denied*, 387 N.C. ___, 916 S.E.2d 259 (2025). "[W]hen a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320, *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005).

In the instant case, after the trial court sentenced Defendant on his first conviction, defense counsel stated: "At the appropriate time, we would be entering notice of . . . appeal." The court responded: "All right." As the trial court was pronouncing the second judgment, Defendant "attacked his attorney, . . . grabbed him, knocked him to the ground, where a melee ensued." Once Defendant was subdued, bailiffs took Defendant into custody and removed him from the courtroom. When court resumed, defense counsel was receiving medical attention in the trial judge's chambers. The trial court noted the circumstances and stated: Defense counsel "does give[ ] notice of appeal on behalf of his client."

Defendant concedes that his "right to appeal was possibly lost due to the notice of appeal not being given by . . . [D]efendant or his attorney after the completion of the entry of the judgements (sic) in his cases." It is not at all clear that defense counsel's statement of *his intention* to give oral notice of appeal at the appropriate time constituted oral notice of appeal, premature or otherwise. Assuming, *arguendo*, that it did, this Court has determined on similar facts that such oral notice of appeal was premature and in violation of Rule 4. *See State v. Smith*, 292 N.C. App. 662, 665, 898 S.E.2d 909, 912, *cert. denied*, 386 N.C. 277, 899 S.E.2d 372 (2024); *State v. Gardner*, 299 N.C. App. 251, 254, 917 S.E.2d 494, 497 (2025). Furthermore, Defendant neglected to file written notice of appeal. Accordingly, this Court does not have jurisdiction to hear Defendant's direct appeal. *See Jones*, 296 N.C. App. at 515, 909 S.E.2d at 376.

Nevertheless, although we lack authority to review his direct appeal, this Court may exercise its discretion pursuant to N.C. R. App. P. 21 to consider the matter by allowing Defendant's petition for writ of certiorari. *See State v. Lopez*, 264 N.C. App. 496, 503, 826 S.E.2d 498, 503 (2019) (cleaned up).

A criminal defendant may seek certiorari review "when provided for by [the Criminal Procedure Act], by other rules of law, or by rule of the appellate division." N.C. Gen. Stat. § 15A-1444(g). "The writ of certiorari may be issued in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." N.C. R. App. P. 21(a)(1). This Court has previously allowed "petitions for writ of certiorari where

. . . [the] defendant lost [his] right to appeal through no fault of [his] own but rather due to [his] trial counsel's failure to give proper notice of appeal." *State v. Robinson*, 279 N.C. App. 643, 645, 865 S.E.2d 745, 748 (2021) (cleaned up), *aff'd*, 383 N.C. 512, 881 S.E.2d 260 (2022).

As the State aptly alludes, "[w]hether to allow a petition and issue the writ of certiorari is not a matter of right and rests within the discretion of this Court." *State v. Biddix*, 244 N.C. App. 482, 486, 780 S.E.2d 863, 866 (2015). However, our Supreme Court has explained that "[t]he only exception to the entirely discretionary nature of certiorari review is the circumstances of a criminal defendant's loss of the right to appeal due to some error or act of the court or its officers, and not to any fault or neglect of the defendant." *State v. Diaz-Thomas*, 382 N.C. 640, 651, 888 S.E.2d 368, 377 (2022) (cleaned up), *cert. denied*, 599 U.S. 3, 216 L. Ed. 2d 1225 (2023). Indeed, it is well settled that "[c]ertiorari may not be used as a substitute for an appeal expressly provided for by law, unless the right of appeal has been lost through no fault of the petitioner." *Johnson v. Taylor*, 257 N.C. 740, 743, 127 S.E.2d 533, 535 (1962) (italics omitted).

In the present case, Defendant maintains that his petition should be allowed because: 1) "[A]s the record demonstrated, [Defendant] intended to appeal and took reasonable efforts to give notice of appeal"; 2) "[T]he record is silent on the issue of whether . . . [D]efendant was aware that his attorney was not in the courtroom to give proper notice of appeal"; and 3) Defendant "has four meritorious issue[s] to present on appeal." Yet, Defendant admits in his petition for writ of certiorari that "the right to appeal was most likely waived unfortunately as a result of his actions." It is plain that Defendant is not without fault in the loss of his appeal where it stemmed from his attack of his trial counsel during sentencing and subsequent failure to file a written notice of appeal. *See id*. Thus, Defendant has failed to demonstrate that the "loss of the right to appeal [was] due to some error or act of the court or its officers, and not to any fault or neglect of" his own. *Diaz-Thomas*, 382 N.C. at 651, 888 S.E.2d at 377 (cleaned up).

Accordingly, in our discretion, we deny Defendant's petition for writ of certiorari.

III. Conclusion

For the reasons stated herein, Defendant's appeal is dismissed and his petition for writ of certiorari is denied.

DISMISSED.

Judges TYSON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
TIMOTHY ALLEN MITCHELL

No. COA25-405

Filed 17 December 2025

1. Constitutional Law—inculpatory statements—interrogation rather than clarification—plain error analysis

In a prosecution on drug- and firearm-related charges—arising from the discovery of contraband where a property owner gave law enforcement officers permission to enter the home where defendant was a tenant—defendant could not establish plain error in the admission of statements he made when an officer, having seen drug paraphernalia strewn about the living room, asked, "Who lives here?" While defendant's replies, including that he lived in the home, were admitted in error—because defendant had already been arrested on an outstanding warrant, but had not been read his *Miranda* rights, and because the officer's question was seeking inculpatory information rather than simply clarifying defendant's earlier statement that he had permission to be in the home—the State did not rely on those statements to prove that defendant constructively possessed the drugs and firearm underlying the charges against him. Accordingly, the appellate court could not say that, absent the erroneous admission, the jury would have "almost certainly" returned a different result.

2. Criminal Law—motion to dismiss—drug and firearm charges—sufficiency of evidence

In a prosecution on drug- and firearm-related charges—arising from the discovery of contraband when a property owner gave law enforcement officers permission to enter the home where defendant was a tenant—had the trial court properly excluded the constitutionally inadmissable statements defendant made to an officer, the trial court would have been obligated to dismiss all but a single charge. However, because, on appeal, defendant could show error but not prejudice in the admissions—and because, on appellate review of the denial of a motion to dismiss, all evidence admitted, whether competent or incompetent, must be considered in the light most favorable to the State—the appellate court found that the State presented sufficient evidence to withstand defendant's motion to dismiss on each of the charges against him.

Appeal by defendant from judgment entered 28 May 2024 by Judge Reggie E. McKnight in McDowell County Superior Court. Heard in the Court of Appeals 15 October 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Stuart M. Saunders, for the State.

Mary McCullers Reece, for defendant.

ARROWOOD, Judge.

Timothy Allen Mitchell ("defendant") appeals from judgment entered after trial by jury on five drug- and firearm-related convictions. Defendant contends that the trial court erred by denying his motion to suppress statements he made to law enforcement after his arrest because he had not first been informed of his constitutional rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Defendant also contends that the trial court erred by denying his motion to dismiss the charges against him where the evidence was insufficient to submit the case to the jury.

I. Background

A. The Events of 25 September 2022

Chet Saylor owns a 60-acre farm in Marion and lives in the property's main farmhouse, located at 2294 Mud Cut Road. Defendant lived as Mr. Saylor's tenant in a double wide trailer with his dog on the opposite side of the property, at 2290 Mud Cut Road, accessible by a separate driveway. There is conflicting evidence as to the extent of defendant's work responsibilities on the property, which did not have an active farming operation.

Mr. Saylor has a long criminal record, including larcenies and drug charges. On 30 August 2022, he was arrested on a warrant in Burke County and remained in custody until 25 September 2022. Mr. Saylor testified that he was on probation and not keeping contraband in the house at the time of his arrest, though officers testified that his home was under surveillance at the time for suspected drug activity.[1] He also testified that several people were staying on the property with his permission at the time of his arrest. Nevertheless, he claimed to have learned from

1. All testimony discussed in this section was given in the State's case-in-chief.

his family that defendant moved into the farmhouse while he was in jail, and that he had become concerned about ongoing criminal activity at the property in his absence, which would affect his probation status.

On 25 September 2022, upon his release from jail, Mr. Saylor went directly to the home of his friend Walter Taylor. He testified that he asked Mr. Taylor to carry a message to the property, ordering the defendant to get everyone out of the house, including himself. That evening, Mr. Taylor sent a group of four relatives to the property, including two juveniles. When they arrived, a man drove to the gate at Mud Cut Road and 16-year-old Amy Cowart exited the car to hand him the message. Ms. Cowart testified that this man was not the defendant and was able to describe his appearance. She and her aunt April Thomas both testified that when Ms. Cowart asked him to deliver their note to defendant, the man pulled a gun on them and chased them away from the property in his vehicle.

After they returned to Mr. Taylor's home, Mr. Saylor called local police to report the incident and, according to three officers' testimony, gave them permission to enter the farmhouse and remove its inhabitants. Deputy Alicia Lund and Deputy Christopher Dvorak arrived at the property in separate patrol cars at about 8:45 p.m. Officer Lund testified that she was familiar with the property, had been on the premises before, and understood that its owner had consented to their entering the property. Both officers testified that they knocked on the home's sliding glass door, where they saw defendant sitting in an armchair and two women, Hayley Johnson and Candace Smith, sitting nearby. Both officers testified that he invited the officers into the large living room, where they instantly saw copious drug paraphernalia in plain view on surfaces throughout, describing empty cellophane baggies, aluminum foil, burnt spoons, loaded and unloaded needles, and bottles of Narcan. Officer Lund testified that she was familiar with all three individuals and was aware that defendant was a convicted felon. The officers collected the three individuals' information to check for warrants.

At this time, the three inhabitants were still free to move around the living room, and both officers testified that at one point, defendant got up from the chair to get a drink, and Officer Dvorak testified that because of the report of the gun, they were watching him carefully. Both officers testified that defendant denied knowing anything about the earlier firearm incident and made two further statements: that he had permission to be present in the house, and that he was supposed to keep people out of the house. Officer Lund testified that the women said they were "just visiting."

The officers received communication that defendant had an active warrant, and they immediately told him to stand up from the armchair and handcuffed him, hands in front. Both officers testified that they noticed for the first time a plastic bag, which they believed to contain methamphetamine, in the seat of the armchair where he had been sitting. Due to the officers' relative inexperience and the amount of drug paraphernalia, Officer Lund decided to call Lieutenant Kirk Hensley for back-up. After the arrest, while waiting several minutes for Lt. Hensley to arrive on the scene, neither officer gave defendant *Miranda* warnings.

Thereafter, Lt. Hensley arrived at the property and saw the two patrol cars and defendant's pick-up truck. He testified that the officers informed him that defendant had said he had permission to be there, and that he immediately recognized all three individuals upon entering the living room. Lt. Hensley testified that he then asked all three individuals, "Who lives here?" According to his testimony, defendant responded that he lived there, that he had written permission to stay in the house, and that the written permission was in the master bedroom. All three officers testified that he then led Lt. Hensley into the master bedroom, where he briefly looked for it but did not see it. Lt. Hensley testified that defendant said that this was the bedroom where he stays, and that he uses the facilities in the attached master bathroom. He testified that the room was "well lived in" and extremely messy "like a Hoarders TV show," strewn with male clothing, with an open box of shotgun shells on the bed and a tablet screen turned on atop a corner shelf.

At this point, Lt. Hensley decided to freeze until he had written consent from Mr. Saylor to fully search the house. Mr. Saylor arrived at the property, signed a written consent form, and according to Lt. Hensley, expressed concern that he would get in trouble for the "stuff" found in the house. With written permission secured, Lt. Hensley testified that he returned to the bedroom and quickly found, under the bed, a black bag containing two bundles of white powder substance, which he believed to be fentanyl. In the adjoining bathroom, Lt. Hensley testified that they discovered a shotgun partially hidden behind a bookcase. This was not the weapon used during the earlier assault on Ms. Cowart. The officers seized the shotgun and the bags containing suspected contraband. Neither Ms. Johnson nor Ms. Smith was arrested, but Ms. Johnson was permitted to take defendant's dog and the pick-up truck, which had been in defendant's possession.

Although all officers testified that they saw no one else on the property, the CAD report names two other individuals who were apparently present: Sandra Labonte and Brian Russell. Mr. Saylor also confirmed on redirect that another individual, T.J. Bowman, had been on the property at or around this time.

Lt. Hensley decided not to test the shotgun for fingerprints, both because he had already formed the opinion that it was possessed by defendant, and because it was not the gun used in the earlier incident. Officer Dvorak testified that the reason he believed defendant possessed the shotgun and the items discovered in the bedroom was because of defendant's statements to Lt. Hensley. Defendant was charged with possession of a firearm by a felon, trafficking opium or heroin, possession with intent to sell and deliver a Schedule II controlled substance, maintaining a dwelling place for controlled substance, and possession with intent to sell and deliver methamphetamine.

B. Pretrial Hearing on Defendant's Motions to Suppress

The case was heard at trial by jury before the Honorable Reggie E. McKnight beginning 22 May 2024. Defendant filed motions to suppress his statements and evidence obtained without a search warrant.

At the pretrial hearing, Lt. Hensley and Officers Lund and Dvorak testified as witnesses for the State. All testified that they knew the residence belonged to Mr. Saylor and understood that Mr. Saylor had given them verbal consent to enter the residence: Lund and Dvorak testified that defendant had invited them inside, where they saw drug paraphernalia in plain view. Furthermore, the State introduced Mr. Saylor's written consent, which the officers obtained before the thorough search of the residence was conducted. The court found that the officer seized the items pursuant to valid consent, overruling defendant's objection to the introduction of the tangible evidence.

In support of the admission of the statements defendant made to Lt. Hensley, the State conceded that defendant was in custody when Lt. Hensley asked, "Who lives here?" but argued that the question did not constitute interrogation. According to the State, Lt. Hensley "merely asked [defendant] to further explain the statement he had voluntarily given" earlier: his assertion that he had permission to be in the house. Therefore, Lt. Hensley did not "[intend] to elicit an inculpatory response." For this reasoning, the State relied upon *State v. Porter*, 303 N.C. 680 (1981), in which our Supreme Court held: "An officer's request in the heat of an emotional situation that the accused explain or clarify a volunteered statement is not a procedure designed to elicit an inculpatory response," and therefore not an interrogation within the meaning of *Miranda*. *Id.* at 692–93. The trial court agreed with the State and found that defendant's rights under state and federal law were not violated, overruling defendant's motion.

Defendant's custodial statements were introduced at trial. Defendant moved to dismiss for insufficient evidence at the close of the State's evidence and again at the close of all evidence, which was denied by the trial court. Defendant was found guilty on all counts, sentenced to a minimum term of 225 months, and fined $500,000.00. Defendant entered notice of appeal in open court.

II. Discussion

On appeal, defendant first argues that the trial court erred when it overruled his motion to suppress his post-arrest statements. Defendant also argues that the trial court erred by denying his motions to dismiss the charges for insufficiency of the evidence. For the following reasons, we conclude that the trial court erred when it introduced defendant's statements to Lt. Hensley. Furthermore, we conclude that absent those statements' introduction, the State's evidence would have been insufficient as to most of the charges, and the trial court would have been obligated to grant defendant's motion to dismiss them. However, because defendant's counsel failed to object to their introduction at trial, we are required to review for plain error, a threshold defendant is unable to reach.

A. Defendant's Motion to Suppress

[1] In *Miranda*, the United States Supreme Court held that:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.... Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

Miranda v. Arizona, 384 U.S. 436, 444 (1966). In the present case, there is no dispute that defendant was in custody and had not been apprised of his *Miranda* rights at the time of his inculpatory statements. Thus, the dispositive issue is whether Lt. Hensley's question constituted interrogation. We conclude that it did, and therefore, admission of defendant's responsive statements was erroneous.

"The Supreme Court has defined the term 'interrogation' as follows: 'Any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect.' " *State v. Brewington*, 352 N.C. 489, 503 (2000) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). The State is correct that *Porter* is relevant to our inquiry, insofar as it excludes from the definition of interrogation "an officer's request in the heat of an emotional situation that the accused explain or clarify a volunteered statement." *Porter*, 303 N.C. at 686. In that case, the defendant was in custody when a nearby officer contacted his supervisor via radio to tell him that two suspects had been apprehended. *Id.* at 691. The defendant had not yet been advised of his *Miranda* rights. *Id.* The supervisor asked if the officer found a bank bag, and defendant, overhearing the question, said the bag was "in the car." *Id.* The nearby officer immediately responded, "What bank bag?" and defendant replied, "The bag from the robbery." *Id.* These statements were introduced at trial, and on appeal, our Supreme Court found that the officer's question was a request to explain the preceding volunteered statement, and "an immediate response in an emotional situation, made before [he] had the opportunity to form a design or motivation to elicit incriminating statements." *Id.*

We have applied this reasoning in subsequent cases. In *State v. Earwood*, 155 N.C. App. 698 (2003), a defendant shot himself and sought out police, and responding to initial questions by officers and again in an ambulance, the record showed that defendant "spontaneously and voluntarily" told them he had killed his mother. *Id.* at 703. We cited *Porter* and held that "even if defendant had been in custody," officers had asked him to clarify volunteered spontaneous utterances, which did not constitute interrogation. *Id.*

We later came to a different conclusion in an instructive unpublished case, *State v. Wright*, 184 N.C. App. 380 (2007). In that case, while several officers arrested defendant during a controlled purchase operation outside his home, one officer asked the unwarned defendant whether "there [was] anything else in the residence that we needed to know about." *Id.* Defendant said there was "some stuff" still in the house and said he would show them. *Id.* The defendant brought officers inside his bedroom, and a second officer asked, "Where's it at?" *Id.* Defendant "nodded with his forehead to the closet door" and stated, "the last coat." *Id.* The second officer asked, "[Is] that it?" and defendant stated, "there [are] some scales in a gym bag." *Id.* In both the coat and the bag, the officers found contraband. *Id.* Defendant challenged the introduction of the statements made inside the bedroom. *Id.* In our analysis, we noted that the second officer's questions were "at least several minutes after defendant was taken into custody outside the residence" and thus not "a request in the heat of an emotional situation," that the defendant's questions were "a clear response to the officer's inquiries inside the residence…for the purpose of eliciting an incriminating response in that they sought information…about the whereabouts of additional contraband," and that the defendant's initial statements had been in response to questioning and not "spontaneous volunteered statements like those in *Porter* and *Earwood*." *Id*. Thus, we determined that the trial court's admission of the statements constituted constitutional error. *Id*.

Though this case is not on all fours with the facts of *Wright*, both clearly present a different set of factual circumstances from the interaction in *Porter*. Analyzing the record, it is clear that Lt. Hensley's question was neither a request to clarify the earlier statements in the heat of an emotional situation, nor a question for a purpose other than eliciting an incriminating response.

Here, before he was in custody and while still free to move around the home, defendant volunteered to Officers Lund and Dvorak that he had permission to be in the home. Several minutes later, Lt. Hensley arrived at the home, which he knew belonged to Mr. Saylor. He then heard from the officers that defendant claimed permission there and observed the vast supply of drug paraphernalia in plain view throughout the home.

Importantly, several minutes had already passed because the officers had "froze[n]" while waiting for Lt. Hensley. The officers' own testimony shows they saw no overriding or urgent need for defendant to explain his volunteered statement once he was in handcuffs, despite the unlocated gun. Furthermore, in the pretrial hearing, the trial court received several arguments from the State justifying admission of the challenged statements, including the public safety exception to *Miranda* due to the officers' concern about the firearm. The court quickly dismissed this argument, reasoning that the women present were both under the influence and posed no threat, defendant was already in custody, and "at least three law enforcement officers" were present.

Crucially, Lt. Hensley must have known the question "Who lives here?" was likely to invite an incriminating response. Consider the circumstances at that moment. Lt. Hensley, knowing that Mr. Saylor was the home's permanent resident, entered the home and saw in plain view a plethora of syringes, Narcan bottles, and empty baggies, which he described in great detail. Immediately, any experienced officer would know that any person "living" in such a home at that moment, in its owner's absence, would likely be responsible for dangerous illegal drug activity, irrespective of whether he had the owner's "permission" to be there. Nevertheless, he addressed all present, including a suspect he could see was already in custody, to ask who was living there. Any affirmative disclosure in response to this question would be seriously incriminating.

Furthermore, "Who lives here?" is not a logically apt or permissible follow-up question that would have effectively clarified defendant's volunteered statement. *Porter* is highly instructive here. "What bag?" is an inherently and obviously clarifying simple question, immediately responsive to Porter's volunteered statement, "The bag is in the car." In the present context, clarifying questions to defendant's volunteered statement may have been, for example, "Who gave you permission?" or "When did you get permission?" or "Permission to be *inside* the house?" or even "Written permission or verbal permission?" By comparison, asking "Who lives here?" was a non-sequitur, unrelated to defendant's statement, and unhelpful to understand it. The inherent responsiveness and direct continuity of "What bag?" is nowhere to be found in these facts. Indeed, determining whether a person *lives* in a house is a wholly different inquiry from determining whether a person has *permission* to be there.

Lastly, and crucially, Lt. Hensley was not even on the scene when the defendant made volunteered statements, which places the case at bar at a significant removal from the circumstances of *Porter* and *Earwood*, where officers made "an *immediate response* in an emotional situation . . . before [they] had the opportunity to form a design or motivation to elicit incriminating statements." *Porter*, 303 N.C. at 691 (emphasis added).

In sum, we cannot agree with the trial court that the question was intended to clarify defendant's prior volunteered statement, because no competent facts in the record adequately support this conclusion. Therefore, Lt. Hensley's question arose pursuant to custodial interrogation, and the erroneous introduction of defendant's responses was a clear violation of his fundamental constitutional protection against self-incrimination.

B. For Some Charges, the State's Evidence Would Have Been Insufficient Without Defendant's Coerced Statements

[2] Before moving on to consider whether defendant has met the standard for plain error, it is worthwhile considering whether the State could have properly proceeded with its prosecution without this erroneous admission. Here, not all the charges against defendant would have been affected by their exclusion. However, careful review of the full record, as well as the State's appellate brief, reveals that this prosecution would have fallen short of its burden of proof on several of its charges had the trial court properly excluded these statements.

Defendant's counsel preserved the issue of sufficiency of the evidence by making and renewing a motion to dismiss that the trail court denied. *State v. Golder*, 374 N.C. 238, 246 (2020). In evaluating the issue *de novo*, the reviewing court examines the evidence in the light most favorable to the State, giving the State all reasonable inferences. *State v. Fritsch*, 351 N.C. 373, 378–79 (2000). We ask whether substantial evidence supported every element of the offense and that defendant committed the offense. *State v. Jones*, 110 N.C. App. 169, 177 (1993), *disc. review denied*, 336 N.C. 612 (1994). Evidence is substantial if reasonable mind might accept it as adequate to form a conclusion. *State v. Smith*, 300 N.C. 71, 78–79 (1980). "If, however, when the evidence is so considered, it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed. This is true even when the suspicion aroused by the evidence is strong." *State v. Malloy*, 309 N.C. 176, 179 (1983) (citations omitted).

The charges against defendant fell into two categories: first, the possession of various contraband, and second, keeping or maintaining a dwelling for sale of illegal drugs. Because the possession charges here required application of the same rules, we will briefly consider them here first. It is uncontested that defendant lacked actual physical possession of any of the contraband in this case, so the State was required to prove defendant's constructive possession. *State v. Chekanow*, 370 N.C. 488, 492 (2018) (citation omitted). This occurs where a person lacking actual physical possession nevertheless has, considering the totality of the circumstances, "the intent and capability to maintain control" over the contraband. *State v. Givens*, 95 N.C. App. 72, 76 (1989) (quotes omitted). However, where possession of the premises is nonexclusive, as here, other incriminating circumstances are required. *State v. Brown*, 310 N.C. 563, 569 (1984) (citation omitted). Therefore, the court must consider the following factors: (1) defendant's ownership and occupation of the property, (2) defendant's proximity to the contraband, (3) indicia of defendant's control over the place where the contraband is found, (4) defendant's suspicious behavior at or near the time of its discovery, and (5) other evidence found in his possession linking him to the contraband. *Id.* at 496 (citations omitted). The most frequently considered factors are his proximity to and the indicia of control over the place where the contraband is found. *State v. Miller*, 363 N.C. 96, 100 (2009).

With or without the incriminating statements, the State presented sufficient evidence that defendant constructively possessed the bag of methamphetamine found in the chair. Officer Lund and Dvorak both testified that defendant was seated in an armchair when they arrived, that no other person sat in that chair between their arrival and the arrest, and that they discovered that defendant had been sitting on the bag when he stood up to be handcuffed. Although defendant argues that there was no evidence as to defendant's awareness of the bag or whether it was on the chair before he entered the home, the officers' testimony was fully sufficient to show defendant's proximity and control over it, as compared to other parties who had access to the property. Further, because the officers discovered the bag before the defendant made unwarned statements, the trial court's error would have had no effect on the State's evidence on this charge.

For the fentanyl discovered in the bedroom and the firearm in the bathroom, the same result does not follow. On appeal, the State points to only three pieces of evidence from its case-in-chief showing defendant's constructive possession of these exhibits: (1) defendant's statement to Lt. Hensley that he lived in the farmhouse and had written permission to be there; (2) his familiarity with the bedroom when he accompanied Lt. Hensley there to look for the permission; and (3) the presence of men's clothes, which Mr. Saylor testified belonged to defendant. Absent the trial court's error, the first two would have been properly excluded. Further, on cross, Mr. Saylor admitted that the clothes in the bedroom included articles defendant had given to him before his jail time. The State's case-in-chief also included testimony from four different witnesses that defendant was not the only male present at and having access to the property on the evening in question. Lastly, the jury heard from both Officer Dvorak and Lt. Hensley that the inadmissible statements established the basis for their belief that he possessed both the fentanyl and the firearm.

Thus, the constitutionally admissible evidence establishes the following: that defendant was in the home, claimed he had permission to be present, and was sitting on a bag of methamphetamine at the time of his arrest; that there was male clothing in the bedroom where the other contraband was discovered, the ownership of which was in controversy; that the home was strewn with a large amount of drug paraphernalia; that two other individuals who appeared under the influence of drugs were present in the home when officers arrived; and that at least two other males (Mr. Bowman and Mr. Russell) were on the property on the evening in question.

Viewed in the light most favorable to the State and affording it all reasonable inferences, this evidence is indeed sufficient to raise a reasonable "suspicion or conjecture" that defendant constructively possessed the contraband. *Malloy*, 309 N.C. at 179. However, without admission of his statements to Lt. Hensley that he stayed in the master bedroom, used its bathroom, and kept his written permission there, the State would have fallen impermissibly short of its burden to prove the "identity of the defendant as the perpetrator," as opposed to the other males present that evening. *Id.*

As to the State's burden to prove defendant maintained a dwelling to sell controlled substances, the same conclusion follows. The question whether a person keeps or maintains a dwelling is a multi-factor analysis, considering: ownership of the property, occupancy of the property, repairs to the property, payment of taxes, payment of utility expenses, payment of repair expenses, and payment of rent. *State v. Bowens*, 140 N.C. App. 217, 221–23 (2000). Mere occupancy of a property is insufficient, but "evidence of residency, standing alone, is sufficient to support the element of maintaining." *State v. Moore*, 188 N.C. App. 416, 424 (2008). In *Moore*, defendant "used, treated, and perceived the dwelling as his residence and not merely as a place he occupied . . . from time to time." *Id.* at 424. By comparison, in *Bowens*, there was no evidence that the defendant owned or leased the dwelling or had any responsibility for its upkeep or utility payments; testimony that he was present in the dwelling on multiple occasions, as well as testimony that an officer believed he lived there, did not support the conclusion that he kept or maintained it. *Bowens*, 140 N.C. App. at 221–22.

Here, the State introduced no evidence that defendant owned, leased, or made any payments for upkeep or services at the farmhouse. Its owner, Mr. Saylor, testified in the State's case-in-chief that defendant leased the doublewide trailer across the property and had some responsibilities for the upkeep of the surrounding area. But other than the clothing, the only evidence which, viewed in the light most favorable to the State and giving it all reasonable inferences, tended to show that defendant treated the house as his present residency, rather than somewhere he had permission to go, was contained in defendant's inculpatory inadmissible statements. Indeed, these are the only pieces of evidence on which the State relies on appeal.

Accordingly, absent the inadmissible statements, the State's evidence would have again fallen short of the minimum standard required to survive defendant's motion to dismiss. Therefore, the trial court would have been obligated to grant defendant's motion to dismiss as to all charges other than possession of methamphetamine.

C. Plain Error

However, because defendant's counsel failed to object at trial when his statements were admitted, this is not the end of our analysis. Because of counsel's failure to object, we are limited to reviewing the erroneous admission of defendant's statements for plain error. N.C. R. App. P. 10(a)(4). Here, defendant must first show that a fundamental and "grave" error occurred at trial, amounting to "a denial of a fundamental right of the accused." *State v. Odom*, 307 N.C. 655, 660 (1983) (citation omitted). Defendant then must show both that the error "had a probable impact on the outcome, meaning that absent the error, the jury probably would have returned a different verdict" and that the "error is an exceptional case," requiring a showing that it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *State v. Reber*, 386 N.C. 153, 158 (2024) (citations and quotation marks omitted).

As to the probable impact of the error, this Court's review requires defendant to meet an extremely high bar. "The test examines the state of all the evidence except for the challenged evidence and asks whether, in light of that remaining evidence, the jury probably would have done something different." *Id.* at 162. "In ordinary English usage, an event will 'probably' occur if it is 'almost certainly' the expected outcome; it is treated as synonymous with words such as 'presumably' and 'doubtless.' " *Id.* at 158. "A close case is not enough to prevail on the prejudice prong of plain error." *Id.* at 162. Circumstantial evidence may be sufficient to support a conviction even when "the evidence does not rule out every hypothesis of innocence." *State v. Maddux*, 371 N.C. 558, 566 (2018) (quotes omitted).

As already discussed, because the State did not rely on defendant's erroneously introduced statements to prove that defendant constructively possessed the methamphetamine, defendant cannot meet his burden to show that the jury would have returned a different result on that charge. However, the State's other evidentiary burdens present closer cases, and defendant must show, not that the State's constitutionally admissible evidence was insufficient, but that we can be certain that absent the error the jury would have "almost certainly" and "doubtless" returned a different result. *Reber*, 386 N.C. at 158. Despite the circumstantial nature of all the State's remaining evidence, defendant does not meet this near-insurmountable burden.

Our earlier finding that the remaining evidence would have been insufficient to survive a motion to dismiss is relevant here, but it only leads us to the conclusion that the jury *very plausibly*, or even *very likely*, would have reached a different verdict. Again, the State's admissible evidence was "sufficient only to raise a suspicion or conjecture as to . . . the identity of the defendant as the perpetrator." *Malloy*, 309 N.C. at 179. But even this conclusion is below the plain error threshold. The remaining evidence provided a framework, however shaky, within which a reasonable jury could have spun the coarse web of conjecture necessary to convict defendant, relying in part on its observation of his credibility. Our conclusion is bolstered by the fact of the owner's testimony, that it was defendant and not he who was responsible for the presence of the contraband, and the lack of any evidence that police had seen suspicious evidence of drug use and dealing behavior while surveilling the house before the owner was taken into custody. Therefore, despite the State's insufficient and circumstantial evidence, defendant falls short of the plain error standard by a hair's breadth.

The other two prongs of this analysis are easily addressed. A defendant's right against compelled self-incrimination is enshrined in both the United States Constitution and the Constitution of the State and is therefore integral to criminal due process. Violation of this fundamental right affects the fairness, integrity, or public reputation of judicial proceedings, because "it is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State." *Corum v. Univ. of N.C.*, 330 N.C. 761, 783 (1992) (citing *King v. South Jersey Nat. Bank*, 66 N.J. 161 (1974)).

Nevertheless, because defendant's attorney did not object to the erroneous and unconstitutional introduction of these statements at trial, defendant is bound by the plain error standard on appeal, which he cannot meet.

<u>D. Defendant's Motion to Dismiss</u>

Following the above conclusions on the evidence and defendant's motion to suppress, we return to defendant's motion to dismiss.

We review a trial court's denial of a motion to dismiss for insufficient evidence de novo. *State v. Smith*, 186 N.C. App. 57, 62 (2007). Denial of a motion to dismiss in a criminal trial is proper if there is substantial evidence of the essential elements of the offense and that the defendant was the perpetrator. *Fritsch*, 351 N.C. at 378. "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Teague*, 286 N.C. App. 160, 181–82 (2022) (citation omitted), *writ denied*, *review denied*, 891 S.E.2d 281 (N.C. 2023).

Viewing all the evidence in the light most favorable to the State, we find the State presented sufficient evidence to withstand defendant's motion to dismiss on each of the charges.

III. Conclusion

For the foregoing reasons, we find no error with respect to defendant's conviction for possession of methamphetamine and no plain error with respect to the remaining charges.

NO ERROR; NO PLAIN ERROR.

Judges TYSON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
MARTY DRU SMITH

No. COA25-15

Filed 17 December 2025

Jury—right to twelve jurors—presence of alternate juror—during selection of foreperson—no per se error

There was no error in defendant's criminal trial by the presence of an alternative juror in the jury room after the trial court had instructed the jury to select a foreperson and not to begin deliberations until it had done so where, after defense counsel noticed that the alternate juror had gone with the jury, the trial court immediately ordered the bailiff to retrieve the alternate juror. The trial court was not required to conduct an inquiry, pursuant to *State v. Bindyke*, 288 N.C. 608 (1975), to ask the jurors whether they had begun deliberations, where the jurors were presumed to have followed the trial court's instructions and there was no indication that the jury had begun deliberations before the alternate juror was recalled to the courtroom.

Chief Judge DILLON dissenting.

Appeal by Defendant from judgment entered 20 February 2024 by Judge Cy A. Grant, Sr. in Pitt County Superior Court. Heard in the Court of Appeals 25 September 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Lisa Bradley, for the State.

Attorney Jarvis John Edgerton IV, for Defendant-Appellant.

MURRY, Judge.

Marty D. Smith (Defendant) appeals the trial court's judgment entered upon a jury verdict convicting him of two counts of taking indecent liberties with a child. Defendant argues that he is "entitled to a new trial because his constitutional right to trial by a jury of twelve was violated when an alternate juror was initially sent back with the jury for deliberations." For the following reasons, this Court holds no error.

I. Background

On 1 September 2023, a grand jury indicted Defendant on two counts of taking indecent liberties with a child. Following Defendant's not-guilty pleas, this case came for a jury trial on 19 February 2024. After the presentation of evidence and jury instructions on each charge, the trial court explained to the jurors how to proceed before excusing them to the jury room:

> The very first thing that you are to do upon retiring is to select a foreperson. The foreperson is someone who will assist and direct you in your deliberations. Once I think you've had an opportunity to select a foreperson I will have the bailiff take into you the verdict sheet.

Upon excusing the jurors, the trial court instructed them, "Do not begin discussing the case until you have selected a foreperson." The transcript indicates the following exchange after the jurors departed:

> THE COURT: Any objections?
>
> DEFENSE COUNSEL: Your Honor, you sent the alternate back with the twelve.
>
> . . . .

> STATE: No objections and nothing else, Your Honor.
>
> THE COURT: Let the record reflect that I'm handing the verdict sheet along with a pen and pad to [the bailiff]. . . take these to the jury.
>
> (Jury deliberating.)

(Brackets omitted.) The record does not indicate any other objections or inquiries until the jury gave its verdict, which found Defendant guilty of both counts of taking indecent liberties with a minor. The trial court consolidated the judgments and ordered consecutive sentences of imprisonment. Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction over Defendant's appeal of a final judgment of the trial court under N.C.G.S. §§ 7A-27, 15A-1444 because the trial court entered final judgment upon a jury's guilty verdict to which Defendant pled not guilty. *See* N.C.G.S. § 7A-27(b) (2025) (final judgment of a trial court); *id.* § 15A-1444(a) (pled not guilty but found guilty).

III. Analysis

On appeal, Defendant argues that he "is entitled to a new trial because his constitutional right to trial by [a] jury of twelve was violated when an alternate juror was initially sent back with the jury for deliberations." As a threshold matter, we address whether Defendant's argument is preserved for our review despite his failure to object on constitutional grounds. *See* N.C. R. App. P. 10(a)(1). Recognizing that "the jury is perhaps *the* hallmark of the American criminal justice system," our Supreme Court has held that "issues related to the structure of the jury that found defendant guilty were preserved notwithstanding defendant's failure to object at trial." *State v. Chambers*, 387 N.C. 521, 524 (2025); *see State v. Bunning*, 346 N.C. 253, 257 (1997) ("[A] trial by a jury which is improperly constituted is so fundamentally flawed that the verdict cannot stand."). Thus, Defendant's argument is properly preserved for appellate review and we address it now.

Both our State and Federal Constitutions afford a criminal defendant the right to a trial by a twelve-member jury. *See* U.S. Const. amend. VI; N.C. Const. art. 1, § 24; *State v. Dalton*, 206 N.C. 507, 512 (1934) ("[T]hat the term 'jury' as understood at common law and as used in the Constitution imports a body of twelve men duly summoned, sworn, and impaneled . . . ."); N.C.G.S. § 15A-1215(a) (2025) (codifying 12-member-jury requirement). Our appellate courts consistently reject any "variation in the number of jurors." *Chambers*, 387 N.C. at 526; *see, e.g.*, *Whitehurst v. Davis*, 2 Hayw. 113, 113 (1800) (per curiam) (invalidating thirteen-member jury verdict because "any innovation . . . in the least degree to a departure from the ancient mode[ ] may . . . endanger or pervert this excellent institution").

Likewise, an alternate juror's presence "in the jury room after a criminal case has been submitted to the regular panel of twelve is always error," *State v. Bindyke*, 288 N.C. 608, 623 (1975), and "is prejudicial when the alternate's presence occurs during the actual *deliberations* of the jury," *State v. Godwin*, 95 N.C. App. 565, 569 (1989) (first citing *Bindyke*, 288 N.C. at 627; then citing N.C. Const. art. I, § 24; and then citing N.C.G.S. § 9-18). In *State v. Bindyke*, our Supreme Court held that "any time an alternate is in the jury room *during deliberations* he participates by his presence and . . . void[s] the trial" regardless of whether he says little or nothing. *Bindyke*, 288 N.C. at 627–28. Because there is "no substitute for common sense," however, the *Bindyke* Court also specified an exception to the rule when "the alternate's presence in the jury room is *inadvertent and momentary*," such that the trial court can "clearly see[ ] or immediately determine[ ] that the jury has not begun its function as a separate entity." *Id.* at 628 (emphasis added). In support, it cited *People v. Rhodes*, 38 Ill. 2d 389 (1967), recognizing that the Illinois Supreme Court "sensibly held" in that case that the trial court did not err per se where an alternate juror went into the jury room to retrieve her coat before the jury had begun deliberations. *See Bindyke*, 288 N.C. at 628. Based on this reasoning, the *Bindyke* Court held that where an alternate juror's "presence in the jury room is discovered so promptly that the trial [court] believes it probable [that] no deliberations have begun," the trial court may recall the jury and inquire to the extent of the jury's deliberations. *Id.* at 629–30. If jury deliberations have not begun, the trial court may excuse the alternate and have the jury return to consider its verdict; but if the jury has started to deliberate, the trial court must declare a mistrial. *Id.*

Our Supreme Court has acknowledged that "[a]t the heart of the Court's holding in *Bindyke* was the appearance of impropriety during the *deliberations* of the jury." *State v. Kennedy*, 320 N.C. 20, 30 (1987). But in *State v. Jernigan*, 118 N.C. App. 240, 246–47 (1995), this Court clarified that the selection of a foreman does not "constitute [ ] 'deliberations,' 'discussion of the case,' or 'comment with reference to what the verdict should be,' as proscribed by *Bindyke*." Additionally, we presume that jurors "attend closely to the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *State v. Jennings*, 333 N.C. 579, 618 (1993). Thus, absent any evidence to the contrary, we presume that jurors "followed the [trial] court's instructions." *State v. Best*, 324 N.C. 502, 516 (1996). Because jurors are presumed to follow the trial court's instructions, and because selecting a foreperson differs from deliberating a verdict, *Bindyke* does not apply to an alternate's presence during foreman selection.

This case is instead similar to *State v. Jernigan*, where the trial court accidentally allowed an alternate to exit with the juror after it instructed them to select a foreperson and to not discuss the case. *Jernigan*, 118 N.C. App. at 240. The *Jernigan* Court recognized that *Bindyke*'s requirement did not apply because the jury "had not retired to discuss the case." *Id.* at 247. Rather, in the absence of any evidence to the contrary, the trial court assumed that the jurors followed its instructions and found no error as a result. *Id.*; *see Best*, 324 N.C. at 516.

Here, the trial court instructed the jurors "not to begin discussing the case until [they] had selected a foreperson." When defense counsel noticed an alternate juror exit with the other twelve, the trial court promptly ordered that the alternate "come back" and directed the bailiff to retrieve her. The record does not suggest that the alternate entered the jury room, communicated with jurors, or participated in any discussion regarding the verdict. Rather, the transcript indicates that the jury did not begin deliberating until after the trial court retrieved the alternate juror.

Following *Jernigan*, we hold that the presence of an alternate juror during the jury's selection of a foreperson, where the trial court has instructed jurors not to begin deliberations, does not constitute error per se. *Jernigan*, 118 N.C. at 246–47. Here, the trial court instructed the jury to select a foreperson and not to deliberate until they did so. Absent any evidence to the contrary, this Court may properly assume that the jury followed its instructions. Thus, the trial court had no need to conduct a *Bindyke* inquiry to ask whether the jury had begun deliberations and did not err by conducting no such inquiry. Accordingly, we discern no error.

IV. Conclusion

For the reasons above, this Court holds that the trial court did not err because the alternate juror did not intrude upon the jury's deliberations at any point.

NO ERROR.

Judge ARROWOOD concurs.

Chief Judge DILLON dissents by separate opinion.

DILLON, Chief Judge, dissenting.

Defendant has been convicted by a jury of horrific crimes. These convictions were certainly supported by strong evidence presented by the State at trial.

On appeal, though, Defendant argues his right under our state constitution to have his fate decided by a jury composed of 12 individuals, no more or no less, was violated when the alternate juror was sent back with the jury for a brief period after the jury was given the case. Though, from my review of the record, I highly doubt the jury had begun deliberations prior to the removal of the alternate from the jury room, there is nothing in the record to indicate the jury had *not* begun its deliberations prior to the alternate's removal. Therefore, I conclude we have no choice but to order a new trial based on binding precedent from our Supreme Court, as explained below.

Binding precedent from our Supreme Court mandates that unless it is obvious from the record the jury had not yet begun deliberations prior to the removal of the alternate from the jury room, the defendant is entitled to a new trial, even if the defendant made no objection at trial. The seminal case on this issue was decided in 1975, where our Supreme Court considered a similar situation, where the alternate juror in that case retired with the jury for "three or four minutes" after the jury was given the case. *State v. Bindyke*, 288 N.C. 608, 621 (1975). Like in the present case, in *Bindyke*, the defendant argued on appeal the alternate's brief presence violated his right to a 12-person jury under Article 1, section 24 of our state constitution. In considering the defendant's argument, our Supreme Court first noted two things: (1) the trial judge "summarily recalled and dismissed the alternate *without making any effort to ascertain whether the jury had begun its deliberations*" and (2) "the defense counsel *did not move for a mistrial*" or otherwise ask the trial court to ascertain whether the jury had begun deliberations. *Id.* at 622 (emphasis added).

Then after reviewing cases from around the country, our Supreme Court stated North Carolina would follow the "majority" rule, that "the presence of an alternate in the jury room during the jury's deliberations violates N.C. Const. art. I, § 24 and G.S. 9-18 and constitutes reversible error per se[.]" *Id.* at 627.

Prior to reaching our Supreme Court, *our* Court had held the alternate's presence for "only three or four minutes" was not prejudicial error because "the alternate did not participate in the deliberation and verdict of the other twelve." *Id.* at 629 (quoting *State v. Bindyke*, 25 N.C. App. 273, 277 (1975)).

Our Supreme Court, however, reversed our Court, as there was nothing definitive in the record to show the jury had not started deliberations, stating "it cannot be assumed that observations and deliberations which take place *during the first few minutes* after the jurors retire are less significant to the verdict than later deliberations." *Id.* at 629 (emphasis added). Specifically, the Court reasoned:

> We cannot adopt a rule which would allow the trial judge to attempt to determine whether the alternate was present in the jury room a "substantial" length of time during deliberations or had participated in the deliberations to defendant's prejudice. Where would the court draw the line between insubstantial and substantial presence? . . . We hold at any time an alternate is in the jury room *during deliberations* he participates by his presence and, whether he says little or nothing, his presence will void the trial.

Id. at 627-28.

The Court, however, noted that this foregoing *per se* reversible error rule has "no application where the alternate's presence in the jury room is inadvertent and momentary, *and it occurs under circumstances from which it can be clearly seen or immediately determined that the jury has not begun its function as a separate entity.*" *Id.* at 628 (emphasis added). That is, a new trial is not required where the record *clearly shows* the jury had not begun deliberations prior to the removal of the alternate from the jury room. In so holding, the Court cited with approval cases from the California and Illinois supreme courts. *Id.* In those cases, it was held the temporary presence of an alternate in the jury room was not prejudicial where the trial court learns after an inquiry that no deliberations had yet begun. *People v. French*, 12 Cal. 2d 720, 771 (1939) (courtroom sheriff's affidavit); *People v. Rhodes*, 38 Ill. 2d 389, 395 (alternate juror sworn testimony).

Our Supreme Court, though, did provide a process by which a new trial may be avoided, where an alternate is inadvertently allowed to be in the jury room for a brief time, namely, to conduct a limited inquiry to determine whether the jury had, in fact, begun deliberations:

> [The general] rule, as previously stated is this: The presence of an alternate juror in the jury room at any time during the jury's deliberations will void the trial. The alternate has participated by his presence; and the court will conduct no inquiry into the nature or extent of his participation. During that relatively short period, however, if the inadvertent presence of the alternate in the jury room is discovered, and no deliberations have begun before he is removed, his mere temporary presence would not invalidate the trial. Therefore, if the judge, from his trial experience and knowledge of the circumstances of the particular case, believes it probable that the jury has not begun its consideration of the evidence, he may properly recall the jury and the alternate and, in open court, inquire of them whether there had been any discussion of the case. If the answer is No, the alternate will be excused and the jury returned to consider its verdict. If the answer is Yes, there must be a mistrial. No inquiry into the extent or nature of the deliberations is permissible.

Bindyke, 288 N.C. 628-29. The Court, though, did order a new trial in *Bindyke* because the trial court failed to conduct an inquiry of the jurors to determine whether they had begun deliberations. *Id.* at 629 ("In our view, in this case, the trial judge could have properly conducted this limited inquiry. However, he did not do so.").

In 1999, our Supreme Court, following its rationale in *Bindyke*, held that a defendant was *not* entitled to a new trial because the trial judge in that case *did* inquire the jury and determined deliberations, in fact, had not yet begun while the alternate was with them in the jury room. *State v. Parker*, 350 N.C. 411, 426 (1999).

In the present case, though, the trial judge failed to make any inquiry of the jurors to determine whether deliberations had begun prior to the bailiff retrieving the alternate from the jury room. To be sure, the portion of the transcript cited in the majority opinion comprises only a single page and can be read by an appellate judge in well under a minute. However, there are no timestamps in the transcript. We do not know how long after the jury departed that the defense counsel pointed out to the court the alternate had been in the jury room with the regular jurors. We do not know if there were any pauses between statements appearing in the transcript prior to the trial judge finally sending the bailiff to the jury room with the verdict sheet and to retrieve the alternate. Perhaps they were back in the room for only a minute or two. However, again as our Supreme Court emphasized, "it cannot be assumed that observations and deliberations which take place *during the first few minutes* after the jurors retire are less significant to the verdict than later deliberations." *Bindyke*, 288 N.C. at 629 (emphasis added).

Perhaps the trial court's error was harmless beyond a reasonable doubt, the standard used for most constitutional errors. However, the presence of an alternate during deliberations is per se error. *See also State v. Malachi*, 371 N.C. 719, 735 (2018) (reiterating the holding in *Bindyke* that the presence of an alternate during deliberations is per se reversible).

Indeed, this past year, our Supreme Court again reiterated its holding in *Bindyke* that "the presence of an alternate in the jury room was error per se" which was preserved "notwithstanding defendant's failure to object at trial." *State v. Chambers*, 387 N.C. 521, 524 (2025). In this recent case, the Court considered the constitutionality of G.S. § 15A-1215, which allows deliberations to proceed where an alternate juror is allowed to take the place of a regular juror after deliberations have begun. *Id.* at 526. The Court held the statute was constitutional because it provided that (1) "in no event shall more than [twelve] jurors participate in the jury's deliberations" and (2) the trial court must instruct juries to "begin . . . deliberations anew" if an alternative juror is substituted after jury deliberations have begun." *Id.* The Court reasoned:

> When a jury follows the trial court's instruction and restarts deliberations, as it is presumed to do, *see State v. Prevatte*, 356 N.C. 178, 254 [] (2002), there is no longer a risk that the verdict will be rendered by thirteen people. This is because any discussion in which the excused juror participated is disregarded and entirely new deliberations are commenced by the newly-constituted twelve: the original eleven jurors and the substituted alternate. Therefore, the ultimate verdict is rendered by the constitutionally requisite jury of twelve.

Id. at 526-27. However, the safeguards in *Chambers* is not present here.

I am constrained to follow Supreme Court precedent regarding the sanctity of a 12-person jury, no matter the horror of the crime alleged. And I appreciate that the remedy of granting a new trial is a high price for what appears to be such a minor mistake. However, our Supreme Court also considered this cost:

> As much as we regret the necessity of imposing upon the State the penalty of a retrial of this case, we are persuaded that higher considerations require it, and that the rule which we have adopted will, in the long run, create certainty and promote judicial economy.

Bindyke, 288 N.C. at 629-30.

In my view, our Court's decision in *State v. Jernigan* cited by the majority is easily distinguishable. The trial judge in that case had expressly told the jury *not* to begin deliberations but to only pick its foreperson during the time when the alternate was in the jury room. However, such was not the case here, where the circumstances or more akin to those in *Bindyke* and *Parker*.

Accordingly, because the trial court told the jury they were allowed to begin deliberations after picking a foreperson, the alternate was sent with the jury to the jury room, and the trial court did not make an inquiry as to whether the jury had begun deliberations during the few minutes the alternate was with them, my vote is to vacate the judgment and award Defendant a new trial.

STEPHANIE WELBOURNE, in her individual capacity,
and STEPHANIE WELBOURNE, in her capacity as the Administratrix of the
ESTATE OF ZACHARY THOMAS WELBOURNE, Plaintiffs
v.
KNOX BENNETT BARBEE and GEROMY TAD BARBEE, Defendants

No. COA25-325

Filed 17 December 2025

1. Appeal and Error—untimely notice of appeal—oral ruling—final judgment—motion to reconsider of no effect

In a settlement agreement enforcement proceeding arising from a serious car accident, where plaintiffs filed a motion to reconsider, pursuant to Civil Procedure Rule 54(b), following the court's oral decision to enforce the settlement but several days before the court entered its written order to enforce, the oral ruling was a final judgment under Appellate Rule 3 preventing any further action by plaintiff. Thus, plaintiffs' motion to reconsider was improper, was not left pending, and did not toll the deadline for taking appeal from the motion to enforce, rendering plaintiffs' eventual notice of appeal untimely.

2. Appeal and Error—untimely notice of appeal—motion to enforce settlement agreement—Civil Procedure Rule 59(e)—not a proper ground for relief

In a settlement agreement enforcement proceeding arising from a serious car accident, where plaintiffs filed a motion to reconsider, pursuant to Civil Procedure Rule 54(b), following the court's oral decision to grant the order to enforce but several days before the court entered its written order, plaintiffs' time to appeal was not tolled under Civil Procedure Rule 59(e) by plaintiffs' motion to amend. Motions to enforce settlement agreements are treated as motions for summary judgment, for which Rule 59 is not a proper ground for relief.

3. Appeal and Error—petition for writ of certiorari—motion to enforce settlement agreement—untimely appeal—no extraordinary circumstances

In an appeal from the trial court's order enforcing a settlement agreement arising from a serious car accident, in which plaintiffs filed a conditional petition for writ of certiorari, the Court of Appeals declined to grant certiorari because plaintiffs failed to show extraordinary circumstances justifying issuance of the writ where they failed to give timely notice of appeal. Although plaintiffs had filed a motion to reconsider, pursuant to Civil Procedure Rule 54(b), following the court's oral decision to grant the motion to enforce but several days before the court reduced its ruling to a written order, their motion to reconsider was improper and did not operate to toll plaintiffs' time to take appeal.

4. Civil Procedure—motion to reconsider—improper—motion to amend—no abuse of discretion

In a settlement agreement enforcement proceeding arising from a serious car accident, plaintiffs' motion to reconsider, pursuant to Civil Procedure Rule 54(b), and motion to amend, pursuant to Civil Procedure Rule 59(e), were improper where there was no trial on the merits. Further, plaintiffs failed to demonstrate that the trial court abused its discretion in denying plaintiffs' motion to amend, pursuant to Civil Procedure Rule 60(b), for any alleged misrepresentation; to the extent plaintiffs' Rule 60(b) motion was based upon an alleged misunderstanding of the legal definition of "tender," Rule 60(b) provides no relief from an error of law.

Appeal by plaintiffs from orders entered 3 January 2025 and 22 August 2024 by Judge James Thomas Davis in Rutherford County Superior Court. Heard in the Court of Appeals 28 October 2025.

White & Stradley, PLLC, by J. David Stradley and Ann C. Ochsner, and Farmer & Morris Law, PLLC, by Joshua Farmer, for plaintiffs-appellants.

Robinson Gooding Law, by William C. Robinson and Dorothy M. Gooding, for defendants-appellees.

FLOOD, Judge.

Plaintiffs, Stephanie Welbourne, in her individual capacity and in the capacity as the Administratrix of the Estate of Zachary Thomas Welbourne, appeal from the trial court's order enforcing a settlement agreement between Plaintiffs and Defendants Knox Barbee and his father, Geromy Barbee. On appeal, Plaintiffs argue the trial court erred, first, by granting Defendants' motion to enforce the settlement agreement and, second, by denying Plaintiffs' motion to amend the trial court's judgment pursuant to Rules 59(e) and 60(b). Upon careful review, we conclude first, we do not have jurisdiction to hear Plaintiffs' first argument, and second, we affirm the trial court's denial of Plaintiffs' motion to amend.

I. Factual and Procedural Background

On 20 July 2023, Defendant Knox was driving his father's vehicle at a speed of around 100 miles per hour down a two-lane road when he crossed the solid double yellow lines and collied head-on with a vehicle carrying Plaintiff Stephanie Welbourne and her husband, Zachary Welbourne. Mr. Welbourne died as result of the crash, and Ms. Welbourne suffered serious injuries. Mr. Welbourne and Ms. Welbourne also have a minor son who was not involved in the crash and is now an heir of Mr. Welbourne's estate. Additionally, Defendant Knox had two other individuals in his father's vehicle, Jonathan and Jaydon Huntsingers, who were injured as a result of the crash. Jaydon was a minor at the time of the crash.

Defendant Knox's vehicle was insured through a policy issued by Horace Mann, which provided liability and underinsured motorist ("UIM") limits of $50,000 per person, $100,000 per accident. Plaintiffs' vehicle was insured by Ohio Security Insurance Company, which provided UIM coverage of $1 million per accident.

On 20 October 2023, Horace Mann communicated a conditional offer of settlement to Plaintiffs and the Huntsingers:

> Unfortunately, Horace Mann has limited coverage and will likely not be able to pay the entirety of each claim. For that reason Horace Mann hereby tenders its full policy limits and will agree to make payment to your clients provided that all claims are resolved with Covenants Not to Execute against Mr. Knox and of Release as to Horace Mann.

On 8 November 2023, Plaintiffs' counsel responded to Horace Mann's counsel with an email stating:

> We are agreeable to settling the liability portion of this claim for Stephanie Welbourne and the Estate of Zachary Welbourne, for $25,000 each. I believe this will require court approval for the Estate of Zachary Welbourne, since there is a minor child involved. We are working on getting this estate opened as quickly as possible. We will also be continuing to pursue UIM funds after this. Please let me know how you want to proceed. Thank you.

Horace Mann responded a few minutes later, explaining "[o]nce you all agree, we can set that up and . . . we can do the paperwork for the court approval." Counsel for the Huntsingers responded shortly thereafter:

> I am agreeable to splitting the proceeds as recommended: 25% ($25K) to each taker.
>
> We will forward your tender offer to our UIM carriers today, giving them the 30 days to advance. If we hear back from them before the expiration of the 30 days, we will of course let you all know.

Horace Mann then responded to both parties that same day, stating:

> Per the emails from each of you, we will settle each claim for $25K. With four claimants, that will be $25K each. We will need to do a minor settlement for the Zachary Welbourne claim. Your clients will be responsible for any bills and liens, if any, and valid. We will prepare covenants that allow you to prosecute your UIM claims. I will need payment instructions from each of you and W9s. PLEASE EACH CONFIRM YOUR ASSENT.

On 29 November 2023, Plaintiffs' counsel sent an email to Horace Mann, stating "[w]e are agreeable to the $25,000 for [Plaintiff as an individual] and the $25,000 settlement for the Estate of [Mr. Welbourne]."

Plaintiffs' counsel then acknowledged that the estate settlement would require court approval, but asked: "Is there any way the $25,000 for [Plaintiff as an individual] can go ahead and be released?"

Additionally, that same day, the Huntsingers' counsel informed Horace Mann that the Huntsingers had "three other UIM policies. One has tendered. One has waived their right to subrogation. The third, we have not heard back from yet." The Huntsingers' counsel then stated, "I believe you have $50k per-passenger in UIM as well, correct? Are you tendering the UIM as well?"

Horace Mann did not respond to Plaintiffs' counsel or the Huntsingers' counsel at that time.

Several days later, on 5 December 2023, Plaintiffs' counsel asked Horace Mann: "Were you able to find out if the $25,000 can be released promptly to [Plaintiff as an individual] for her portion of the liability settlement?" Horace Mann did not respond. Two days later, on 7 December 2025, the Huntsingers' counsel emailed Horace Mann a single case citation—*Benton v. Hanford*, 195 N.C. App. 88, *disc. review denied*, 363 N.C. 744 (2009)—regarding UIM coverage.

On 11 and 12 December 2023, Plaintiffs' counsel informed Horace Mann that Plaintiffs had received "an offer from the UIM carrier for their limits," explained they were "now working on a petition for court approval of the settlement for both the liability and UIM amounts[,]" and asked Horace Mann to call them "as soon as possible" to discuss the matter further. Horace Mann did not respond to either request.

On 22 December 2023, Plaintiffs' counsel wrote to Horace Mann and Attorney Robert McCune—the attorney representing Plaintiffs' UIM carrier—in an attempt to schedule the estate's settlement approval for the minor child for 19 January 2024. Horace Mann responded, "we will try to do it if possible."

After the holidays, on 5 January 2024, the Huntsingers' counsel wrote Horace Mann:

> My folks are wanting me to get some movement on this case. I sent you that *Benton* cite a month ago, though obviously the holidays happened in between the two. Still, I need to formally demand that you agree to pay the $25K liability and $25K UIM to each of my clients ($50K total to each, $100K payout from your policy to my clients collectively), within a week. I understand we will have to set

> up court approval on the younger boy. But please confirm within a week that you're agreeing to pay this out.

Horace Mann did not respond.

On 9 January 2024, Horace Mann emailed Plaintiffs' counsel:

> [Horace Mann] is in the process of wrapping up an issue related to [the Huntsingers] and intends that the settlements requiring approval to be taken care of at the same time—given they are seeking funds from the same Horace Mann policy. I hate to throw a wrench in the plans, but we will need to resolve the approvals at the same time.

Plaintiffs' counsel, after speaking with the Huntsingers' counsel, emailed Horace Mann, asking when Horace Mann believed it would resolve the issues related to whether it was going to pay UIM to the Huntsingers since they were passengers in the at-fault vehicle. Horace Mann responded it was working on a decision and asked Plaintiffs to reschedule the estate settlement approval hearing for Plaintiffs and the minor child, because Horace Mann wanted to resolve both minors'—Plaintiffs' minor child and Jaydon Huntsingers'—settlement cases at the same time. Plaintiffs' counsel responded to Horace Mann's counsel on 16 January 2024:

> Your client has tendered their pro rata policy limits over two months ago in exchange for covenants that prohibit us from pursuing your insured further but allow us to pursue our own first party coverage. Up until this point, we've agreed to accept those amounts for our two claims. Your tender was NOT contingent upon acceptance of other offers by other parties.
>
> I've repeatedly pressed to cooperatively determine a date on which our resolution can be approved by the court. [Horace Mann's counsel] agreed to a hearing date this Friday weeks ago and is withdrawing his agreement. . . .
>
> . . . .
>
> We are told that the holdup is not a dispute with us but rather relates to a dispute with [the Huntsingers' counsel] and his clients over access to certain UIM benefits under your client's policy[.] We have no intention of agreeing to wait until you resolve this with [the Huntsingers' counsel].

> Your failure to be prepared to proceed this Friday could result in your client losing the benefit of our current agreement and subjecting him to, what will surely be, an excess verdict.

Horace Mann responded:

> While I understand your frustration, nothing I have said should be construed as backing out of any agreement. To be crystal clear, we are not backing out of any agreement. I do just want to clarify that my understanding is Horace Mann made the full tender with the intention that any claims against [Defendants] and/or Horace Mann would be resolved. The tender was not made on a "pro rata" basis, and I understand that your office and [the Huntsingers' counsel's] office worked together to determine the split of the liability limits. . . .
>
> I am simply asking to momentarily postpone the hearing so that the same judge can handle both settlement approvals—which is always the best practice. . . .

On 29 January 2024, Plaintiffs' counsel emailed Horace Mann a time-limited demand, stating in part:

> We will compromise the claims of Zachary's Estate and [Plaintiff as an individual] against [Defendants] and agree to a covenant not to enforce judgment against [Defendants] (see attached for the covenants we are prepared to execute) in return for the payment of $25,000 to the Estate of Zachary Welbourne and $25,000 to [Plaintiff as an individual]. I will allow you until Wednesday, January 31, 2024 to communicate your agreement to these terms and until February 5, 2024 to have delivered to me [the] payments[.]

Horace Mann did not respond by 31 January 2024.

On 1 February 2024, Plaintiffs filed a suit against Defendants, alleging negligence against Defendant Knox Barbee and vicarious liability against Defendant Geromy Barbee under the family purpose vehicle doctrine. Separate from the present appeal, however, Plaintiffs also filed a petition for approval of a wrongful death settlement (the "Petition") on 1 February 2024. The Petition sought court approval of the distribution of $475,000 of UIM proceeds from Ohio Security Insurance Company payable to Mr. Welbourne's estate, to be divided evenly between Plaintiff, as an individual, and the Welbournes' minor child. The trial court held a hearing on this Petition on 8 February 2024.

At the 8 February hearing, Plaintiffs' counsel explained to the trial court:

> So there is a primary liability carrier [that's] tendered $50,000. They have not been—they have not paid it yet and there's some delay in that. And quite honestly, Your Honor, I believe that they have missed an opportunity to pay that in good faith and there may be further litigation over that.

The trial court approved the distribution of UIM proceeds to the estate. In its order, the trial court noted:

> It further appears to the [c]ourt that [Defendants'] insurance carrier has tendered its liability limits for the accident by tendering to each of the four claimants the sum of $25,000.00.
>
> It further appears to the [c]ourt that Ohio Security Insurance Company provided an auto insurance liability policy . . . and that said policy provided [UIM] coverage with a single limit of $1,000,000.00 for each accident, reduced to $950,000.00 total available UIM coverage by virtue of the liability carrier [Horace Mann's] tender totaling $50,000.00 to [Plaintiffs].

Defendants then filed an answer on 20 February 2024 to Plaintiffs' negligence and vicarious liability claims. A few weeks later, on 12 March 2024, Horace Mann agreed to pay the Huntsingers' UIM benefits and, on 21 March 2024, the Huntsingers accepted Horace Mann's offer of $25,000 UIM to each Huntsinger.

Then, on 20 April 2024, Defendants filed a Motion to Enforce the Settlement Agreement (the "Motion to Enforce") in the present appeal. The trial court held a hearing on the Motion to Enforce on 24 July 2024. At the hearing, Defendants' counsel argued that "[Plaintiffs' counsel] can't say to the court on February the 8th that there is a tender of $25,000" and "[w]e want you to use that so that we can get this million dollars, but at the same time, say we don't want to honor the agreement for the tender."

The trial court orally granted Defendants' Motion to Enforce, explaining its reasoning:

> [W]hat appears to me to be the conclusive, undisputed facts based on what I'm looking at, and they are that you

> did, in fact, make an offer to tender the whole policy limits to two groups of parties, that if you could settle at all, that you would pay those limits, and that they would not pursue the defendants in any further claims. . . . It appears, clearly, that . . . was accepted under those terms. In fact, it was even confirmed by [Plaintiffs' counsel] in his email.
>
> In my opinion – the only question, an agreement did exist as a matter of law. I don't think there's any question about that. Second issue, though, that I see that could possibly exist would be whether or not there was ability to back-out of the deal. . . . It does appear, though that [Plaintiffs' counsel] has, after that date on February 8th, represented to the court while he couched it in terms of it was a tender, it appears to me that he represented – it was actually represented to the court that there was in existence an agreement with the liability carrier that still existed that required – that allowed $50,000 more to be paid. So despite his letter, it appears to me that he has not canceled, formally canceled that agreement, and, in fact, made use of the agreement at a later time so the agreement still exists.
>
> . . . .
>
> [I]t appears to me that an agreement – as a matter of law, an agreement was made. That agreement is still on the table, and it is acknowledged by all the parties to the extent that the [c]ourt's going to enforce that agreement. You got to tender those mon[ies], though.

On 14 August 2024, before the trial court entered its written order on Defendants' Motion to Enforce, Plaintiffs filed a motion for reconsideration under Rule 54(b) (the "Motion to Reconsider"), and in the alternative, a motion to alter or amend the judgment pursuant to Rule 59(e) or Rule 60(b) (the "Motion to Amend"). In the Motion to Reconsider, Plaintiffs requested the trial court "to reconsider and revise the ruling made from the bench on July 24, 2024." On 22 August 2024, however, the trial court entered a written order on Defendants' Motion to Enforce Settlement Agreement (the "Order to Enforce"), and did not discuss either of Plaintiffs' recently filed motions.

About four months later, on 3 January 2025, the trial court entered an order denying Plaintiffs' Motion to Reconsider and Motion to Amend (the "3 January Order"). On 9 January 2025, Plaintiffs appealed the 3 January Order and the Order to Enforce.

II. Jurisdiction

As a preliminary matter, Defendants filed a Motion to Dismiss, arguing Plaintiffs failed to timely appeal the Order to Enforce and requesting this Court dismiss the portions of Plaintiffs' appeal regarding the Order to Enforce. Specifically, Defendants argue: (A) the Order to Enforce was a final judgment, such that Plaintiffs' Motion to Reconsider pursuant to Rule 54(b) did not render it interlocutory; and (B) Plaintiffs' Motion to Amend pursuant to Rule 59(e) did not toll the appealing period. If this Court agrees with Defendants, Plaintiffs, in the alternative, (C) filed a petition for writ of certiorari ("PWC"). We address each argument, in turn.

A. Rule 54(b)

[1] Defendants first argue a portion of this appeal should be dismissed since the Order to Enforce "disposes of the cause as to all the parties and leaves nothing to be judicially determined between them by the trial court[,]" which is, thus, a final judgment subject to Rule 3 statutory time periods. Plaintiffs argue, however, that the Order to Enforce was not a final judgment where Plaintiffs' Motion to Reconsider pursuant to Rule 54(b) was still pending.

"In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure[,]" and "failure to follow the rule's prerequisites mandates dismissal of an appeal." *Bailey v. State*, 353 N.C. 142, 156 (2000). North Carolina Rules of Appellate Procedure Rule 3 requires that an appeal be taken "within thirty days after entry of judgment," N.C. R. App. P. 3(c)(1), or "within thirty days after service upon the party of a copy of the judgment if service is not made within" three days after entry, N.C. R. App. P. 3(c)(2). The last subsection of Rule 3 provides:

> [I]f a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty-day period for taking appeal [will be] tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subdivisions (1) and (2)[.]

N.C. R. App. P. 3(c)(3).

With the exception of interlocutory orders that affect a "substantial right" or are certified pursuant to North Carolina Rule of Civil Procedure

54(b), Rule 3 statutory language generally permits an appeal only from a *final* judgment of the superior court. *See Veazey v. City of Durham*, 231 N.C. 357, 361 (1950) ("Judgments and orders of the Superior Court are divisible into these two classes: (1) Final judgments; and (2) interlocutory orders."). "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." *Holland v. Harrison*, 254 N.C. App. 636, 640 (2017) (citation omitted). "Conversely, an order or judgment is interlocutory if it does not settle all of the issues in the case but rather directs some further proceeding preliminary to the final decree." *Id.* (citation and internal quotation marks omitted). A judgment is entered when "it is reduced to writing, signed by the judge, and filed with the clerk of court. The announcement of judgment in open court is the mere rendering of judgment, not the entry of judgment." *Green v. Branch*, 916 S.E.2d 824, 829 (N.C. Ct. App. 2025) (citation omitted).

Here, Plaintiffs filed the Motion to Reconsider, pursuant to Rule 54(b), on 14 August 2024, several days before the trial court entered its Order to Enforce on 22 August 2024. Plaintiffs' counsel conceded at the hearing that, after the oral rendering of the trial court's judgment, "there really is nothing left to pursue" "[u]nless [Defendants] had other UIM, which I don't think they have." The trial court noted that upon payment to Plaintiffs, "[t]his case would be subject to dismissal as a result of that settlement[,]" and "that agreement bars the claim here on payment of those things." Under *Holland*, this rendered ruling "dispose[d] of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court[,]" and was thus a final judgment. *See Holland*, 254 N.C. App. at 640.

Plaintiffs argue, however, that because the "[t]he trial court's [Order to Enforce] didn't address that pending motion or purport to be a final judgment[,]" the Order to Enforce was not appealable under Rule 3. Plaintiffs direct us to language from *Chappell v. Stallings*, in which our Supreme Court held that it is "improper for a court to take action in a cause while an undetermined motion is pending before it, unless the subsequent determination of the motion either way can not affect the validity of the action taken." 237 N.C. 213, 219 (1953) (holding that a superior court clerk could not confirm a sale when there was a pending, undetermined motion challenging its validity before him). Plaintiffs essentially argue this Court should construe Rule 54(b) to allow complete and final rendered judgments to be reviewed by the trial court before they are entered. We disagree with this application of Rule 54(b).

Rule 54(b) "grants broader discretion to trial courts to amend their *interlocutory* orders before entry of a final judgment." *Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, 250 N.C. App. 791, 798 (2016) (emphasis added). North Carolina Rule of Civil Procedure 54(b) provides, in full:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

N.C. R. Civ. P. 54(b). The plain language of "such judgment" and "such a final judgment" refers to the type of final judgment discussed directly above—"a judgment as to one or more *but fewer than all of the claims*[.]" *Id.*; *see also State v. Beck*, 359 N.C. 611, 614 (2005) ("If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning."). Therefore, under the plain language of the statute, Rule 54(b) contemplates revision only to judgments "as to one or more but fewer than all of the claims[,]" and does not provide revision as to a final judgment of an entire case. N.C. R. Civ. P. 54(b).

This interpretation is confirmed by the Editor's official commentary discussing the drafting of this provision. In commenting on the reasoning behind Rule 54(b), the editors provided:

> The modification here is that when there is no just reason for delay and when there is an express determination to

> that effect, *the unit to which the finality concept shall be applied is by this rule made a smaller one*. Thus, if two claims are presented to the trial court and one of them is the subject of a disputed ruling, an appeal will lie if the ruling would have been appealable in an action involving that claim alone and if the judge makes the requisite determination.

N.C. R. Civ. P. 54(b) cmt. (emphasis added). This comment confirms the plain language of the statute. The authors drafted Rule 54(b) to deal with the "finality concept" as to "smaller" claims, rather than complete final judgment renderings. *See id.* Therefore, under the plain language of the statute, we hold that a party cannot use Rule 54(b) to move the trial court to reconsider a complete final judgment of a case, even where that final judgment has not yet been entered. *See* N.C. R. Civ. P. 54(b); *see also Tetra Tech Tesoro, Inc.*, 250 N.C. App. at 798. Rule 54(b) provides revision time only for judgments not "adjudicating *all* the claims and the rights and liabilities of all the parties." *See* N.C. R. Civ. P. 54(b) (emphasis added).

Here the trial court's oral decision to grant Defendants' Motion to Enforce the Settlement Agreement was a rendered final judgment of the entire case. *See Green*, 916 S.E.2d at 829; *see also* N.C. R. Civ. P. 54(b). Further, although this was not yet an entered judgment, it was a final judgment as the judgment prevented any further action by Plaintiffs, and Rule 54(b) could not help Plaintiffs. Thus, Plaintiffs' Rule 54(b) Motion to Reconsider was improper, and when the Order to Enforce was entered and notice was served on 22 August 2024, Plaintiffs were required to file a notice of appeal from the Order to Enforce on or before 23 September 2024. *See* N.C. R. App. P. 3(c).

B. Rule 59

[2] Plaintiffs contend, however, that even if we conclude the Order to Enforce was not rendered interlocutory by Rule 54(b), the time to appeal it was tolled when Plaintiffs filed the Motion to Amend under Rule 59(e).

Rule 3 provides, in relevant part, that "if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty-day period for taking appeal [will be] tolled as to all parties until entry of an order disposing of the motion[.]" N.C. R. App. P. 3(c)(3). Here, Plaintiffs filed the Motion to Amend pursuant to Rule 59(e), and, therefore, the time to appeal the Order to Enforce would be tolled if this motion was proper. *See id.*

Rule 59(e) provides that "[a] motion to alter or amend the judgment under section (a) of this rule shall be served not later than 10 days after entry of the judgment." N.C. R. Civ. P. 59(e). Under Rule 59(a), "[a] new trial may be granted" for the following grounds:

> (1) Any irregularity by which any party was prevented from having a fair trial;
>
> (2) Misconduct of the jury or prevailing party;
>
> (3) Accident or surprise which ordinary prudence could not have guarded against;
>
> (4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;
>
> (5) Manifest disregard by the jury of the instructions of the court;
>
> (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
>
> (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;
>
> (8) Error in law occurring at the trial and objected to by the party making the motion, or
>
> (9) Any other reason heretofore recognized as grounds for new trial.
>
> On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

N.C. R. Civ. P. 59(a). "All of the enumerated grounds in Rule 59(a), and the concluding text addressing 'an action tried without a jury,' indicate that this rule applies only after a trial on the merits or, at a minimum, a judgment ending a case on the merits." *Tetra Tech Tesoro, Inc.*, 250 N.C. App. at 797. This includes judgments ending a case on the merits from "bench trials." *Baker v. Tucker*, 239 N.C. App. 273, 278 (2015).

Plaintiffs and Defendants dispute what constitutes a judgment on the merits as required for a proper Rule 59(e) motion to toll an appeal. Defendants argue Plaintiffs' Motion to Amend pursuant to Rule 59(e) did not toll the appealing period because there was no trial on the merits, contending summary judgment is not a trial on the merits under *Bodie Island Beach Club Ass'n, Inc. v. Wray*, 215 N.C. App. 283 (2011) and *Doe v. City of Charlotte*, 273 N.C. App. 10 (2020). Plaintiffs argue, however, this is an open issue of law with contradictions, such that it is unclear what is a "trial on the merits" as required before Rule 59(e) tolls an appeal. Plaintiffs argue *Muse v. Charter Hosp. of Winston-Salem, Inc.*, 117 N.C. App. 468, 471, *aff'd*, 342 N.C. 403 (1995), contradicts this Court's later opinions in *Bodie Island* and Doe. Plaintiffs contend that under *Muse*, "Rule 59 motions can challenge final summary judgment orders—refuting the lynchpin of *Bodie* [*Island*] and *Doe*'s reasoning." We disagree with Plaintiffs' contention regarding Rule 59 and summary judgment regarding *Muse* and *Bodie Island*, and do not reach the alleged differences between *Muse* and *Doe* regarding Rule 59 and interlocutory orders.

In *Muse*, the plaintiffs brought a wrongful death action against the defendant hospital. *Id.* at 471. Although the opinion does not clarify the timeline of motions, at some point during trial, the trial court entered summary judgment "in open court" on the issue of punitive damages. *Id.* at 480. The plaintiffs then filed a Rule 59 motion to reconsider the summary judgment based on newly found evidence. *Id.* at 480. The trial court granted the plaintiffs' motion, reconsidered the evidence, and reversed its summary judgment ruling. *Id.* After rendering its verdict, the jury awarded punitive damages. *Id.* at 471. On appeal, the defendant challenged only the timeliness of the plaintiffs' Rule 59 motion, which we overruled and held the motion had been served within ten days as required. *Id.* at 480–81.

Several years later, we decided *Bodie Island*. In *Bodie Island*, the plaintiffs sued a group of defendants, including the defendants SRS North Carolina Properties, LLC ("SRS"), to set aside a deed due to fraud and undue influence. *Bodie Island*, 215 N.C. App. at 284. After SRS failed to timely respond to the plaintiffs' complaint or request an extension of time, the plaintiffs filed a motion for summary judgment as to SRS, and "upon the [trial] court's own motion, default [judgment] was entered against SRS." *Id.* at 286 (citation modified). The trial court held a hearing on the plaintiffs' summary judgment motion. SRS did not attend that hearing, but instead sent a follow up letter "apologizing for having missed the . . . hearing for plaintiffs' summary judgment motion, asking the court to reconsider the entry of default against SRS, and requesting that should the trial court enter summary judgment against SRS, that the order be certified final and, therefore, immediately appealable." *Id.*

Subsequently, the trial court granted summary judgment in favor of the plaintiffs against SRS, writing that "the court has reviewed the substance of the requests for relief reflected in the Letter" and concluded that "SRS has made no showing of good cause for any such relief." *Id.* In relevant part, SRS subsequently filed a motion with the trial court to set aside the summary judgment under Rule 59(a)(8) and (9), which the trial court denied. *Id.* at 294. On appeal to this Court, we held:

> Because both Rule 59(a)(8) and (9) are post-trial motions and because the [] case concluded at the summary judgment stage, the court did not err by concluding that "it was not proper to set aside default against [] SRS and vacate the summary judgment pursuant to Rule 59(a)(8) and (9)."

Id. at 294–95 (cleaned up).

Plaintiffs contend *Muse* allows the use of Rule 59 with summary judgments and that *Bodie Island* has created conflicting precedent. We disagree.

"[O]ne panel of the Court of Appeals may not overrule the decision of another panel on the same question in the same case." *In re Civil Penalty*, 324 N.C. 373, 384 (1989). The same question, however, was not presented in *Muse* and *Bodie Island*. In *Muse*, the question was whether the plaintiffs' Rule 59 motion had been timely served; we did not hold or explicitly discuss the relationship between Rule 59 and summary judgment. 117 N.C. App. at 480–81. In *Bodie Island*, however, we were explicitly presented with the question of whether the "trial court erred in denying SRS' Motion to Set Aside the Summary Judgment under N.C.[G.S.] § 1A–1, Rule 59(a)(8) and (9) when it found that '[a] Rule 59(a) motion is not a proper ground for relief from an entry of summary judgment.' " 215 N.C. App. at 294. We concluded it was not. *Id.* at 294–95.

Here, because our courts have elected to treat motions to enforce settlement agreements as summary judgments, *see Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 694–95 (2009), and because Rule 59 is not a proper ground for relief from summary judgments, *see Bodie Island*, 215 N.C. App. at 294, Plaintiffs' Motion to Amend was not a proper Rule 59 motion. In holding Plaintiffs' Motion to Amend was not a proper Rule 59 motion, we further hold Plaintiffs' appeal time was not tolled. *See N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp.*, 183 N.C. App. 466, 470 (2007) ("[W]hen a party makes a motion pursuant to Rule 59 that is not a proper Rule 59 motion, the time for filing an appeal is not tolled." (citations omitted)). Accordingly, where Plaintiffs failed to timely appeal the Order to Enforce, *see* N.C. R. App. P. 3, we do not have jurisdiction to review that portion of Plaintiffs' appeal.

C. PWC

[3] In the event we would conclude Plaintiffs did not timely appeal the Order to Enforce, Plaintiffs filed a PWC pursuant to Rules 2 and 21 of the North Carolina Rules of Appellate Procedure.

Rule 2 allows this Court to "suspend or vary the requirements" of the North Carolina Rules of Appellate Procedure in order "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest[.]" N.C. R. App. P. 2. "Rule 2[, however,] may not be used to reach the merits of an appeal in the event of a jurisdictional default." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198 (2008); *see also Bailey*, 353 N.C. at 156 ("In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 . . . . The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal." (citations omitted)). Thus, we decline to grant Plaintiffs' request to review the Order to Enforce pursuant to Rule 2, and we proceed to analyze Rule 21.

Pursuant to Rule 21, this Court may grant a PWC "in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1). A PWC, though discretionary, is "to be issued only for good or sufficient cause shown, and it is not one to which the moving party is entitled as a matter of right." *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579 (1927) (emphasis added). Our Supreme Court recently clarified the test for this Court to use when determining whether to issue the writ of certiorari:

> First, a writ of certiorari should issue only if the petitioner can show "merit or that error was probably committed below." This step weighs the likelihood that there was some error of law in the case.
>
> Second, a writ of certiorari should issue only if there are "extraordinary circumstances" to justify it. We require extraordinary circumstances because a writ of certiorari "is not intended as a substitute for a notice of appeal." If courts issued writs of certiorari solely on the showing of some error below, it would render meaningless the rules governing the time and manner of noticing appeals.
>
> There is no fixed list of "extraordinary circumstances" that warrant certiorari review, but this factor generally

> requires a showing of substantial harm, considerable waste of judicial resources, or “wide-reaching issues of justice and liberty at stake.”

Cryan v. Nat’l Council of Young Men’s Christian Ass’ns of U.S., 384 N.C. 569, 572–73 (2023) (citations omitted). In our discretion, we decline to grant Plaintiffs’ PWC because Plaintiffs have failed to show extraordinary circumstances to justify it. *See id.* at 573. Thus, because we do not have a proper appeal before us from the Order to Enforce, and because we deny Plaintiffs’ PWC, we deny Defendants’ Motion to Dismiss this portion of the appeal since we lack appellate jurisdiction, and we review only Plaintiffs’ appeal from the trial court’s denial of Plaintiffs’ Motion to Amend pursuant to Rule 59(e) and Rule 60(b).

III. Standard of Review

This Court reviews a trial court’s denial of Rule 59 and Rule 60(b) motions for an “abuse of discretion.” *Davis v. Davis*, 360 N.C. 518, 523 (2006). “A trial court may be reversed for abuse of discretion only upon a showing that its actions are ‘manifestly unsupported by reason.’ ” *Id.* at 523 (quoting *Clark v. Clark*, 301 N.C. 123, 129 (1980)).

IV. Analysis

[4] On appeal, Plaintiffs argue the trial court erred in its 3 January Order by denying Plaintiffs’ Motion to Reconsider pursuant to Rule 54(b), and Plaintiffs’ Motion to Amend pursuant to Rule 59(e) or Rule 60(b). We disagree.

First, we address the trial court’s denial of Plaintiffs’ Motion to Reconsider pursuant to Rule 54(b) and Motion to Amend, specifically as to Rule 59(e). Because we have determined this specific use of Rule 54(b) was improper regarding a non-interlocutory order, *see* N.C. R. Civ. P. 54(b); *see also Tetra Tech Tesoro*, *Inc.*, 250 N.C. App. at 798, and Plaintiffs’ Rule 59(e) motion was improper where there was no trial on the merits, *see Bodie Island*, 215 N.C. App. at 294, we overrule Plaintiffs’ arguments and affirm the trial court’s denial of Plaintiffs’ Motion to Reconsider pursuant to Rule 54(b) and Motion to Amend, specifically as to Rule 59(e).

Next, we address the trial court’s denial of Plaintiffs’ Motion to Amend pursuant to Rule 60(b). In Plaintiffs’ Motion to Amend, Plaintiffs did not specify which subsection of Rule 60(b) they were relying upon. “If a party is unsure under which of subsections (1), (2) and (3) or (6) of Rule 60(b) to proceed, ‘he need not specify if his motion is timely and the reason justifies relief.’ ” *McGinnis v. Robinson*, 43 N.C. App. 1, 7 (1979) (quoting *Brady v. Town of Chapel Hill*, 277 N.C. 720, 723 (1971)). In the Motion to Amend, Plaintiffs made two arguments: first, that Defendants' counsel made misrepresentations to the trial court, and second, that the trial court erred in its understanding of the legal definition of "tender."

Rule 60(b) provides several reasons why a court may relieve a party from a final judgment or order, including as relevant here,

> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), *misrepresentation*, or other misconduct of an adverse party; [or]
>
> . . . .
>
> (6) Any other reason justifying relief from the operation of the judgment.

N.C. R. Civ. P. 60(b) (emphasis added). "Rule 60(b)[, however,] provides no specific relief for errors of law." *Davis*, 360 N.C. at 523 (holding that because the defendant "based his Rule 60 motion on alleged errors of law[,]" and Rule 60 does not provide relief from errors of law, the defendant "failed to demonstrate that the trial court abused its discretion in denying [his] Rule 60(b) motion"); *see also Jenkins v. Richmond Cty.*, 118 N.C. App. 166, 170 (1995) ("Motions pursuant to Rule 60(b) may not be used as a substitute for appeal.").

Here, Plaintiffs contend that at the hearing on Defendants' Motion to Enforce, "Defendants' counsel asserted that [Plaintiffs'] counsel had represented to the court that approved [the] UIM settlement that [Plaintiffs] 'settled' [the] liability claims." Specifically, Plaintiffs argue that, at the 24 July 2024 hearing, Defendants' counsel misrepresented to the trial court what had been said by Plaintiffs' counsel at the 8 February 2024 hearing regarding the Petition—whether Plaintiffs' counsel represented that there had only been a tender or acknowledged a settlement. We disagree.

The trial court acknowledged this exact issue in its ruling at the 24 July 2024 hearing, explaining that while Plaintiffs' counsel had "couched it in terms of it was a tender, it appears to me that he represented – it was actually represented to the court that there was in existence an agreement with the liability carrier that still existed[.]" We further note that Defendants provided the trial court with a copy of the transcript from the 8 February 2024 hearing, which indicates to us the trial court was able to make its own determination about what was discussed at that hearing. Therefore, we conclude the trial court did not abuse its discretion in denying Plaintiffs' Motion to Amend for misrepresentation. *See Davis*, 360 N.C. at 523.

Moreover, Plaintiffs' second argument—that the trial court misunderstood the legal definition of "tender"—effectively asserts that the trial court made an error of law. As stated above, however, Rule 60 does not provide relief from errors of law. *See id.*; *see also Jenkins*, 118 N.C. App. at 170. As such, we conclude the trial court did not abuse its discretion in denying Plaintiffs' Motion to Amend. *See Davis*, 360 N.C. at 523.

V. Conclusion

Upon careful review, we conclude we do not have jurisdiction to hear Plaintiffs' first argument regarding the Order to Enforce, and we affirm the trial court's denial of Plaintiffs' Motion to Amend.

AFFIRMED.

Judges COLLINS and MURRY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 DECEMBER 2025)

BLACKROCK EQUESTRIAN RANCH, LLC v. HARDIN No. 25-359	Macon (24CV001476-550)	Dismissed
HWANG v. CAIRNS No. 22-31-2	Durham (18CVS002942-310)	Affirmed in Part; Reversed in Part and Remanded.
IN RE S.A.B.S. No. 25-366	Wilkes (20JA000145-960)	Vacated and Remanded
KERLEY v. KERLEY No. 25-279	Alexander (24CVD000211-010)	Affirmed
LASSITER v. N.C. DEP'T OF TRANSP. No. 25-494	N.C. Industrial Commission (TA-29226)	Affirmed
POWELL v. CITY OF WILMINGTON No. 25-283	New Hanover (23CVS001980-640)	Affirmed
ROWELL v. ERIE INS. No. 25-335	Buncombe (24CV207703-100)	Affirmed
STATE v. BRICHIKOV No. 25-358	Wake (18CR207577-910)	No Prejudicial Error
STATE v. DOBBINS No. 25-23	Mecklenburg (21CR211323-590) (21CR211322-590)	No Error
STATE v. FLORES-ROCA No. 25-225	Gaston (23CR305026-350)	Affirmed
STATE v. JOHNSON No. 25-272	Caswell (21CR050148-160)	Vacated and Remanded
STATE v. MASHORE No. 24-1112	Rowan (22CR282428-790) (22CR282583-790) (24CR000206-790)	Vacated and Remanded for New Trial
STATE v. McNEIL No. 25-458	McDowell (21CR050320-580)	No Prejudicial Error

STATE v. MILLER No. 25-35	Wilkes (22CR000410-960) (22CR000503-960) (22CR000521-960)	Dismissed in part; no plain error in part.
STATE v. VEBBER No. 25-137	Pitt (20CR055390-730)	No Error
STATE v. WARNER No. 25-326	Iredell (22CR051375-480) (22CR051381-480)	No Error.
STATE v. WATERS No. 25-175	Beaufort (21CR050054-060)	No Error
STEWART v. BOSLEY No. 25-254	Mecklenburg (23CVD010270-590)	Vacated and Remanded
STROUPE v. MILLS No. 25-70	Cleveland (24CVD000405-220)	Affirmed
TAGNE v. UNIV. OF N.C. AT CHAPEL HILL No. 25-296	Orange (24CVS000447-670)	Affirmed.
TIMMONS v. HERRING No. 25-230	Cumberland (23CVS003287-250)	Affirmed
VENTERS v. CITY OF RALEIGH No. 24-683	Wake (23CV004711-910)	Dismissed
WYATT v. THOMAS No. 25-153	Cumberland (24CVD601010-250)	Affirmed.

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