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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

SEPTEMBER 17, 2026

MAILING ADDRESS: The Judicial Department
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APPEAL AND ERROR

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or res judicata principles may apply—had no preclusive effect on plaintiff's constitutional claims, which fell outside the ALJ's jurisdiction and, at any rate, were never litigated before the ALJ. Second, res judicata did not apply where plaintiff advanced different legal theories in the current action—including claims of constitutional violations—from those it litigated in the prior contested case. Finally, even if collateral estoppel principles did apply, it would have been unfair to allow plaintiff to use the doctrine offensively under the facts and circumstances of the case. **LDI Shallotte 179 Holdings, LLC v. State of N.C. Dep't of Env't Quality, 494.**

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Confrontation Clause—expert testimony—toxicology results—data generated by lab machines—In a prosecution on drug-related charges, including death by distribution, defendant's rights under the Confrontation Clause were not violated by the admission of testimony from an expert in forensic toxicology, which was based on a toxicology report generated from tests performed by forensic chemists using liquid chromatography. The forensic chemists did not use their judgments in the testing process or independently opine on the quantity of each drug found in the victim's system; rather, a machine-produced chromatograph provided the data, and, for purposes of the Confrontation Clause, toxicology data of liquid samples generated by lab machines. **State v. Robinson, 538.**

Double Jeopardy Clause—sentencing—death by distribution—sale of a controlled substance—In a prosecution on drug-related charges, the trial court did not violate defendant's constitutional protection from multiple punishments for the same offense by sentencing her on convictions of both death by distribution and sale of a controlled substance. Even assuming that defendant had preserved this argument for appeal by raising it in the trial court—which she concedes she did not—sale of a controlled substance was not a lesser included offense of death by distribution because the latter charge applied only to a smaller subset of the list of drugs that could sustain a sale of controlled substances conviction. Further, using North Carolina's definitional approach, the alleged greater offense (death by distribution) was actually narrower in terms of defendant's actions since she was found guilty of death by distribution for, without malice, unlawfully selling a specific controlled substance which proximately caused the victim's death, while the sale and/or delivery of the controlled substance broadened defendant's possible guilty actions to include selling, delivering, or both. **State v. Robinson, 538.**

Due process violation—procedural and substantive—environmental agency withholding review of stormwater permit application—insufficiency of allegations—In an action filed by a land developer (plaintiff) against the Department of Environmental Quality (defendant), where defendant refused to process plaintiff's application for a stormwater permit to cover a land parcel unless plaintiff met certain conditions, which included resolving three outstanding notices of violation connected to the stormwater permit issued to the property's previous owner, the trial court properly dismissed—for failure to state a claim, pursuant to Civil Procedure Rule 12(b)(6)—plaintiff's claims alleging that defendant had violated plaintiff's due process rights. The complaint failed to establish a procedural due process violation where plaintiff was able to obtain review of defendant's actions in a contested case hearing before the Office of Administrative Courts. Further, plaintiff did not adequately plead a substantive due process violation where the complaint did not allege that defendant's actions improperly targeted plaintiff or were inconsistent with

defendant's regular practice, nor did it allege any other facts tending to show defendant's conduct fell so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency. **LDI Shallotte 179 Holdings, LLC v. State of N.C. Dep't of Env't Quality, 494.**

Effective assistance of counsel—expert testimony—sentencing—no error— In a prosecution on drug-related charges, defendant could not show that she received ineffective assistance when her counsel failed to object to expert forensic toxicology testimony and/or defendant's sentence on convictions of both death by distribution and sale of a controlled substance. Neither the admission of the testimony nor defendant's sentencing was erroneous; accordingly, her counsel did not err, let alone plainly err. **State v. Robinson, 538.**

Right to counsel—forfeiture—retroactive application of new rule—procedural bar—ability to raise issue in previous motion—Where defendant was procedurally barred from claiming that he was denied his constitutional right to counsel in a criminal trial, pursuant to N.C.G.S. § 15A-1419(a)(1), the trial court's order denying defendant's second motion for appropriate relief (MAR) was affirmed. Defendant was in a position to adequately raise a newly-formulated rule regarding forfeiture of counsel in a prior MAR but failed to do so; the new rule, set forth in *State v. Simpkins*, 373 N.C. 530 (2020), predated defendant's first MAR by five months. Further, defendant failed to demonstrate that he was entitled to either exception to the procedural bar under section 15A-1419(b): first, there was no good cause to excuse the procedural bar because, although *Simpkins* announced a new rule for retroactivity purposes, defendant's failure to raise the new rule was not as a result of the announcement of the new forfeiture standard and, second, any argument that a fundamental miscarriage of justice had occurred was insufficiently supported and thus deemed abandoned. **State v. Haizlip, 523.**

CRIMINAL LAW

Right to open and close arguments—error assumed—prejudice analysis— In a prosecution on drug-related charges, including death by distribution, although the trial court erred by failing to allow defendant the opportunity to both open and close the jury arguments, as required by Rule 10 of the General Rules of Practice for the Superior and District Courts when no evidence is introduced by a defendant—an error the appellate court assumed without deciding—defendant failed to show a reasonable possibility that a different verdict would have been returned absent the error, especially in the face of the evidence mounted against her. **State v. Robinson, 538.**

DIVORCE

Equitable distribution—business bank accounts—marital portion not distributed—An equitable distribution order was reversed in part where the trial court erred by failing to distribute the marital portion of two business checking accounts that, as of the date of separation, held $98,843.09 in earned income (and, therefore, marital property). While the court's findings acknowledged the existence of the business accounts and the marital portion of those funds, it adopted a valuation method that excluded the accounts and then failed to distribute the accounts separately. Likewise, the trial court erred by denying plaintiff's motion to amend the equitable distribution order on this issue. **Lawrence v. Lawrence, 487.**

Equitable distribution—valuation of residence—competent evidence—exercise of discretion—In an equitable distribution proceeding, where the trial court made findings of fact supported by competent evidence, considered all the evidence before it—including the impact of a recent hurricane on property values and the real estate market—and properly exercised its discretion in adopting plaintiff's expert's valuation of a residence located in Cape Coral, Florida, the court's valuation was affirmed. Likewise, the trial court did not err by denying plaintiff's motion to amend the equitable distribution order on this issue. **Lawrence v. Lawrence, 487.**

EMINENT DOMAIN

Inverse condemnation—flooding event—failure of private storm pipe—no municipal control—no taking—The trial court properly dismissed with prejudice plaintiffs' inverse condemnation action against a town (defendant), in which plaintiffs alleged that defendant's failure to maintain a storm pipe resulted in plaintiffs' property being swamped by a landslide after a rainstorm. Competent evidence supported the court's findings that a heavy rain event occurred that led to serious flooding and major landslides in addition to completely filling the storm pipe with mud and debris. In turn, the court's conclusion that there was no taking of plaintiffs' property by defendant was supported by the findings of fact, including, notably, that defendant had not installed the storm pipe and had not assumed responsibility for its maintenance. **Firley v. Town of Marshall, 481.**

Inverse condemnation—unconstitutional taking—environmental agency withholding review of stormwater permit application—sufficiency of allegations—In a dispute between a land developer (plaintiff) and the Department of Environmental Quality (defendant) regarding plaintiff's application for a stormwater permit to cover a land parcel it intended to develop, where defendant had previously issued the parcel's former owner three notices of violation (NOVs) pertaining to his own stormwater permit for the property, the trial court erred in dismissing—for failure to state a claim, pursuant to Civil Procedure Rule 12(b)(6)—plaintiff's claims of inverse condemnation and an unconstitutional regulatory taking, where the complaint alleged that defendant's refusal to process plaintiff's permit application until plaintiff resolved the NOVs resulted in plaintiff being deprived of all economically beneficial use of the property for approximately two years. Notably, the fact that defendant never formally denied plaintiff's request for a stormwater permit was not fatal to plaintiff's claim, since plaintiff challenged a regulatory action rather than the validity of a specific land-use regulation and, therefore, was not required to allege a "final deprivation" to establish an unconstitutional taking. **LDI Shallotte 179 Holdings, LLC v. State of N.C. Dep't of Env't Quality, 494.**

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Impeachment—bias and lying or mistaking the facts of particular case—rehabilitative evidence of character for truthfulness—error—In a trial for taking indecent liberties with a child, in which the victim testified as a main witness, the trial court abused its discretion in allowing the State to introduce evidence of the victim's good character for truthfulness following her cross-examination, during which defendant questioned the victim about prior inconsistent statements she had made in her previous accounts of the alleged incident, highlighted her delay in disclosing the incident, and attempted to expose the victim's potential bias against defendant after he reported her mother for violating probation. Defendant's impeachment of the victim was not aimed at suggesting that she was a liar in general, but rather that she was either lying or mistaken about the facts of this particular case. Accordingly, defendant's impeachment of the victim—though certainly an attack on her credibility as a witness—was not an attack on her character for truthfulness and, therefore, did not open the door to introducing rehabilitative evidence of her good character for truthfulness under Evidence Rule 608(a)(2). Furthermore, the admission of this rehabilitative evidence prejudiced defendant where the victim's credibility was the central issue of the trial. On appeal, the judgment entered upon defendant's conviction was vacated and the case was remanded for a new trial. **State v. Braswell, 512.**

JURISDICTION

Standing—party—no sufficient stake in an otherwise justiciable controversy—In a pair of appeals from orders entered in Nash and Forsyth counties arising from the largest drunk-driving verdict in North Carolina history (in which one driver was killed), the Forsyth County orders were vacated due to that trial court's lack of subject of matter jurisdiction. Where (1) the receivers appointed after the decedent's estate's attempts to execute the tort judgment proved unsuccessful filed a complaint against Integon Indemnity Corporation (the insurer of the tort defendants) in Nash County superior court and (2) Integon National Insurance Company (which did not insure any party in the drunk-driving case) filed a complaint in Forsyth County superior court against the tort defendants and the decedent's estate, Integon Indemnity's purported appeal from orders entered in the Forsyth County matter, including the abatement of that action, were of no avail due to its own error of inadvertently naming Integon National—which had no stake in an otherwise justiciable controversy—as plaintiff instead of Integon Indemnity. Accordingly, the appellate court did not reach the merits of Integon Indemnity's purported appeal from the Forsyth County orders and instead remanded the matter to the trial court with instructions to dismiss the action without prejudice. **Eagles v. Integon Indem. Corp., 468.**

VENUE

Residence of parties—receivers—proper—In a pair of appeals from orders entered in Nash and Forsyth counties, arising from the largest drunk-driving verdict in North Carolina history (in which one driver was killed)—where (1) the receivers appointed after the decedent's estate's attempts to execute the tort judgment proved unsuccessful filed a complaint against Integon Indemnity Corporation (the insurer of the tort defendants) in Nash County superior court; and (2) Integon National Insurance Company (which did not insure any party in the drunk-driving case) filed a complaint in Forsyth County superior court against the tort defendants and the decedent's estate—the Nash County superior court's denial of Integon Indemnity's motion to dismiss on the basis that Nash County was an improper venue was affirmed. An action must be tried in the county in which a party—including a receiver—resides at its commencement (N.C.G.S. § 1-82), and since one receiver resided in Nash County, that was a proper venue. While the receivers were appointed by the Franklin County Superior Court—which retained jurisdiction of the original tort action—that did not affect the separate matter filed by the receivers. Further, since the Forsyth County action by Integon National was a nullity, the denial of Integon Indemnity's alternative motion to stay pending the outcome of that case was also proper. **Eagles v. Integon Indem. Corp., 468.**

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.

BENJAMIN L. EAGLES, in his capacity as court-appointed Receiver for Shemaro Deann Webb; and JOSEPH P. TUNSTALL, in his capacity as court-appointed Receiver for LaDorothy Foreman, Plaintiffs
v.
INTEGON INDEMNITY CORPORATION, Defendant

INTEGON INDEMNITY CORPORATION, Plaintiff
v.
BENJAMIN L. EAGLES, in his capacity as court-appointed Receiver for Shemaro Deann Webb; and JOSEPH P. TUNSTALL, in his capacity as court-appointed Receiver for LaDorothy Foreman, Defendants

No. COA25-263

Filed 21 January 2026

1. Jurisdiction—standing—party—no sufficient stake in an otherwise justiciable controversy

In a pair of appeals from orders entered in Nash and Forsyth counties arising from the largest drunk-driving verdict in North Carolina history (in which one driver was killed), the Forsyth County orders were vacated due to that trial court's lack of subject of matter jurisdiction. Where (1) the receivers appointed after the decedent's estate's attempts to execute the tort judgment proved unsuccessful filed a complaint against Integon Indemnity Corporation (the insurer of the tort defendants) in Nash County superior court and (2) Integon National Insurance Company (which did not insure any party in the drunk-driving case) filed a complaint in Forsyth County superior court against the tort defendants and the decedent's estate, Integon Indemnity's purported appeal from orders entered in the Forsyth County matter, including the abatement of that action, were of no avail due to its own error of inadvertently naming Integon National—which had no stake in an otherwise justiciable controversy—as plaintiff instead of Integon Indemnity. Accordingly, the appellate court did not reach the merits of Integon Indemnity's purported appeal from the Forsyth County orders and instead remanded the matter to the trial court with instructions to dismiss the action without prejudice.

2. Appeal and Error—interlocutory order—improper venue—motion to dismiss—substantial right

In a pair of appeals from orders entered in Nash and Forsyth counties arising from the largest drunk-driving verdict in North Carolina history (in which one driver was killed), Integon

Indemnity's appeal from the trial court's denial of its motion to dismiss (in which it asserted that Nash County was an improper venue), although interlocutory, was immediately appealable as affecting a substantial right.

3. Venue—residence of parties—receivers—proper

In a pair of appeals from orders entered in Nash and Forsyth counties, arising from the largest drunk-driving verdict in North Carolina history (in which one driver was killed)—where (1) the receivers appointed after the decedent's estate's attempts to execute the tort judgment proved unsuccessful filed a complaint against Integon Indemnity Corporation (the insurer of the tort defendants) in Nash County superior court; and (2) Integon National Insurance Company (which did not insure any party in the drunk-driving case) filed a complaint in Forsyth County superior court against the tort defendants and the decedent's estate—the Nash County superior court's denial of Integon Indemnity's motion to dismiss on the basis that Nash County was an improper venue was affirmed. An action must be tried in the county in which a party—including a receiver—resides at its commencement (N.C.G.S. § 1-82), and since one receiver resided in Nash County, that was a proper venue. While the receivers were appointed by the Franklin County Superior Court—which retained jurisdiction of the original tort action—that did not affect the separate matter filed by the receivers. Further, since the Forsyth County action by Integon National was a nullity, the denial of Integon Indemnity's alternative motion to stay pending the outcome of that case was also proper.

Appeal by Integon Indemnity Corporation from orders entered 27 August 2024 by Judge Edwin G. Wilson in Nash County Superior Court and Forsyth County Superior Court. Heard in the Court of Appeals 10 September 2025.

McAngus, Goudelock & Courie, PLLC, by Jeffrey B. Kuykendal, for plaintiff-appellant/defendant-appellant Integon Indemnity Corporation.

White & Stradley, PLLC, by J. David Stradley and Ann C. Ochsner, for plaintiffs-appellees/defendants-appellees Benjamin L. Eagles and Joseph P. Tunstall.

ZACHARY, Judge.

Before us are related appeals arising from the aftermath of a jury's $40,000,000 verdict against Shemaro Deann Webb and LaDorothy Breanna Foreman, which this Court has recognized as "appear[ing] to be the largest drunk[-]driving verdict in North Carolina history." *Chappell v. Webb*, 295 N.C. App. 13, 18, 905 S.E.2d 346, 353 (2024), *disc. review denied*, 916 S.E.2d 252 (N.C. 2025). The instant appeals involve Integon Indemnity Corporation ("Integon Indemnity"), which issued automobile liability insurance policies to Webb and Foreman, and Benjamin L. Eagles and Joseph P. Tunstall ("the Receivers"), the court-appointed receivers for judgment debtors Webb and Foreman, respectively. COA25-263 concerns the Receivers' claims filed against Integon Indemnity in Nash County Superior Court ("the Nash County Action"), while COA25-264 concerns Integon Indemnity's declaratory judgment action filed in Forsyth County Superior Court ("the Forsyth County Action").

In COA25-264, the Forsyth County appeal, Integon Indemnity appeals the trial court's orders (1) abating the Forsyth County Action "under the prior pending action doctrine"; and (2) denying Integon Indemnity's motion for reconsideration of the order denying its motion to compel a deposition. In COA25-263, the Nash County appeal, Integon Indemnity appeals the trial court's orders (1) denying Integon Indemnity's motion to dismiss the Nash County Action or, in the alternative, to transfer venue or stay proceedings; and (2) denying Integon Indemnity's motion for reconsideration of the denial of its motion to compel a deposition, entered in the Forsyth County Action.

After careful review, we first conclude that Integon Indemnity never properly invoked the trial court's subject-matter jurisdiction over the Forsyth County Action. Consequently, in COA25-264, the Forsyth County appeal, we vacate and remand to the trial court with instructions to dismiss Integon Indemnity's complaint without prejudice. In COA25-263, the Nash County appeal, we affirm the trial court's order denying Integon Indemnity's motion to dismiss the Nash County Action or, in the alternative, to transfer venue or stay proceedings.

I. Background

On 18 September 2020, Susan Renee Chappell suffered fatal injuries in a car accident following a head-on collision with another vehicle. The second vehicle was driven by Webb and owned by Foreman, who was also involved as a passenger. *Id.* at 14, 905 S.E.2d at 351. Both Webb and Foreman had automobile liability insurance policies issued by Integon Indemnity. Each policy provided a maximum liability coverage of $30,000 per person and $60,000 per accident for bodily injury.

The Chappell estate rejected Integon Indemnity's initial settlement offer but submitted a counteroffer. After Integon Indemnity failed to respond within 30 days, the Chappell estate withdrew its counteroffer and filed a wrongful-death action against Integon Indemnity's insureds (Webb and Foreman) in Franklin County Superior Court. Following a trial, a Franklin County jury found Webb and Foreman jointly and severally liable for $15,000,000 in compensatory damages; the jury also awarded punitive damages, finding Webb liable for $5,000,000 and Foreman liable for $20,000,000. *Id.* at 15, 905 S.E.2d at 351. On 28 April 2023, the trial court entered judgment upon the jury's verdicts.

However, the Chappell estate's attempts to execute the judgment proved unsuccessful: the estate had writs of execution issued against the judgment-debtors' property, which were returned unsatisfied. Consequently, the estate initiated supplemental proceedings in aid of execution by filing a motion in Franklin County Superior Court seeking the appointment of receivers for the judgment-debtors, Webb and Foreman. A receiver would be able to prosecute any claims that Webb and Foreman might raise against Integon Indemnity arising from its handling of the Chappell estate's offer to settle its wrongful-death claim and the resulting $40,000,000 judgment against Webb and Foreman. If successful, the proceeds could then be applied toward satisfaction of the judgment. *See* N.C. Gen. Stat. §§ 1-362, 1-363 (2023).

On 21 August 2023, Integon National Insurance Company ("Integon National") initiated the Forsyth County Action by filing a complaint against Webb, Foreman, and the Chappell estate. Integon National sought a declaratory judgment determining that there had been no bad-faith refusal to settle, no violation of the Unfair and Deceptive Trade Practices Act, and no breach of contract.

The Franklin County Superior Court appointed the Receivers by order entered on 18 September 2023 ("the Receivership Order"). On 21 September 2023, the Chappell estate and the Receivers filed a motion in the Forsyth County Action to substitute the Receivers as real parties in interest, together with a motion to dismiss.

On 29 September 2023, the Receivers initiated the Nash County Action by filing a complaint against Integon Indemnity in Nash County Superior Court, asserting claims for breach of the contractual duty to settle, unfair or deceptive trade practices, and bad-faith refusal to settle.

The Chappell estate and the Receivers filed an amended motion to substitute real parties in interest, an amended motion to dismiss, and an answer in the Forsyth County Action on 5 October 2023. In the amended motion to dismiss, they contended that Integon National lacked standing to file the Forsyth County Action because Integon Indemnity issued the insurance policies to Webb and Foreman, and therefore, the action should be dismissed with prejudice pursuant to N.C. R. Civ. P. 12(b)(6).

On 16 October 2023, Integon National moved to amend its complaint in the Forsyth County Action, seeking to change the plaintiff from Integon National to Integon Indemnity. That same day, Integon National voluntarily dismissed its claims against the Chappell estate.

On 2 November 2023, Integon Indemnity filed a motion to dismiss the Nash County Action pursuant to Rule 12(b)(3) of the Rules of Civil Procedure, asserting that the Receivers were "precluded as a matter of law from raising claims against Integon [Indemnity] in [Nash County] based on the governing Receivership Order." In the alternative, Integon Indemnity moved to transfer venue to either Forsyth County or Franklin County, or to stay the proceedings in the Nash County Action pending the outcome of the Forsyth County Action.

The trial court entered an order in the Forsyth County Action on 15 November 2023 substituting the Receivers as defendants in place of Webb and Foreman. On 7 December 2023, the court entered orders denying the Receivers' amended motion to dismiss, granting Integon National's motion to amend its complaint "to identify Integon Indemnity" as plaintiff, and deeming the amended complaint properly filed. On 5 January 2024, the Receivers filed a motion to dismiss Integon National's amended complaint, along with, *inter alia*, an answer, counterclaims, and a motion to abate the Forsyth County Action.

On 9 February 2024, the parties filed a joint motion recommending that both actions be designated as exceptional pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts and requesting that the cases be assigned to the Honorable Edwin G. Wilson. 20 February 2024, the Chief Justice of the North Carolina Supreme Court designated the Forsyth County Action and the Nash County Action as exceptional and assigned them to Judge Wilson.

Meanwhile, in May 2024, Integon Indemnity sought to schedule the depositions of certain attorneys involved in the Franklin County wrongful-death action. The Receivers filed a motion for a protective order seeking to bar such depositions in both actions; in response, Integon Indemnity filed a motion to compel the depositions in both actions.

On 12 July 2024, the court entered an order in the Forsyth County Action granting the Receivers' motion for a protective order and denying Integon Indemnity's motion to compel the depositions. On 17 July

2024, Integon Indemnity filed a Rule 54(b) motion for reconsideration of the order denying its motion to compel as to one of the attorneys whose deposition it sought.

At a hearing on 22 July 2024, the trial court announced its intention 1) to deny Integon Indemnity's motion for reconsideration and deny its motion to dismiss the Nash County Action, and 2) to abate the Forsyth County Action. Integon Indemnity filed notices of appeal from these oral rulings in both cases on 21 August 2024. On 27 August 2024, the court entered written orders reflecting its oral rulings. Neither the trial court's order denying Integon Indemnity's motion to compel nor Integon Indemnity's motion for reconsideration were entered in the Nash County Action.

Integon Indemnity timely filed amended notices of appeal from the 27 August 2024 orders.

II. The Forsyth County Action

[1] We first address Integon Indemnity's appeal from orders entered in the Forsyth County Action. On appeal, Integon Indemnity argues that the trial court erred by abating the Forsyth County Action and by denying its motion for reconsideration of the denial of its motion to compel a deposition. However, our careful review of the record reveals that Integon Indemnity failed to properly invoke the subject-matter jurisdiction of the trial court.

A. Standard of Review

"Standing is a necessary prerequisite to the court's proper exercise of subject[-]matter jurisdiction. If a party does not have standing to bring a claim, a court has no subject[-]matter jurisdiction." *In re Menendez*, 259 N.C. App. 460, 462, 813 S.E.2d 680, 683 (2018) (cleaned up). "The issue of standing may be raised for the first time on appeal and by this Court's own motion." *Id.*

"Whether a trial court possesses subject-matter jurisdiction over a case is a question of law, which this Court reviews de novo." *Bassiri v. Pilling*, 287 N.C. App. 538, 543, 884 S.E.2d 165, 169 (2023). "When conducting de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Id.* at 544, 884 S.E.2d at 169 (cleaned up).

B. Analysis

"A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Intrepid*

Direct Ins. Agency v. Amerex Corp., 298 N.C. App. 384, 388, 915 S.E.2d 196, 199 (2025) (citation omitted). "Therefore, 'whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.' " *Id.* (brackets omitted) (quoting N.C. Gen. Stat. § 1A-1, Rule 12(h)(3)).

As our Supreme Court has explained, "[s]tanding refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that [it] may properly seek adjudication of the matter." *Town of Midland v. Harrell*, 385 N.C. 365, 371, 892 S.E.2d 845, 850 (2023) (citation omitted). "If a plaintiff does not have standing to assert a claim for relief, the trial court lacks subject[-]matter jurisdiction over the claim." *Id.* "Standing is measured at the time the pleadings are filed. In other words, a plaintiff must have standing at the time of filing to have standing at all. Subsequent events cannot confer standing retroactively." *Id.* (cleaned up).

In the Forsyth County Action, Integon National filed the initial complaint. Yet, as Integon National acknowledged in its motion to amend the complaint, "[t]he insurer who issued the relevant policies of insurance about which the Complaint is based is Integon Indemnity." Accordingly, Integon National did not have "a sufficient stake in an otherwise justiciable controversy" such that it may have properly sought adjudication of the matter. *Id.* (citation omitted). "Lacking subject-matter jurisdiction, the trial court was not authorized to rule upon [Integon National]'s motion to amend, and moreover, was bound to dismiss this matter." *Intrepid Direct*, 298 N.C. App. at 389, 915 S.E.2d at 199; *see* N.C. Gen. Stat. § 1A-1, Rule 12(h)(3).

Integon Indemnity asserts that "[e]ven accepting as true that Integon National did not have standing to file the Forsyth County Action, the Receivers' attempt to dismiss the Forsyth County Action was denied and Integon Indemnity filed an amended complaint." Integon Indemnity correctly notes that the "Receivers never appealed that ruling." And according to Integon Indemnity, "[i]t is a perverse reading of North Carolina law for a party to actively participate in litigation for years, including prosecuting a counterclaim, only to then seek to invalidate the action in its entirety after an adverse ruling is rendered or a certain time limit has expired."

To the contrary, "[i]t is the continuing duty of this Court to [e]nsure, even *sua sponte*, that the trial court had subject[-]matter jurisdiction in every action it took." *Quevedo-Woolf v. Overholser*, 261 N.C. App. 387, 409, 820 S.E.2d 817, 832 (2018), *disc. review denied and appeal* *dismissed*, 372 N.C. 359, 828 S.E.2d 164 (2019). "Further, the parties cannot create subject[-]matter jurisdiction by consent, waiver or estoppel, and therefore failure to object to the jurisdiction is immaterial." *Sinclair v. Sinclair*, 291 N.C. App. 435, 438, 896 S.E.2d 256, 258 (2023) (cleaned up). It is of no moment that the trial court granted Integon National's motion to amend its complaint, as the court had no jurisdiction to do so. "Because [Integon National] lacked standing to bring these claims, the complaint was a nullity; consequently, the trial court lacked subject-matter jurisdiction to consider the motion to amend . . . and was therefore required to grant [the Receivers'] motion[ ] to dismiss." *Intrepid Direct*, 298 N.C. App. at 387–88, 915 S.E.2d at 198.

Integon Indemnity's plea to overlook these fundamental principles threatens to set a precedent that parties can excuse a trial court's lack of subject-matter jurisdiction where convenient and proceed with litigating a nullity in the interest of judicial economy. It is the duty of this Court to reject this argument. Due to its own error, Integon National was inadvertently named as plaintiff instead of Integon Indemnity at the time of the complaint's filing, "a mistake that deprived the trial court of subject-matter jurisdiction" over the Forsyth County Action. *Id.* at 389, 915 S.E.2d at 199.

"[W]hen a trial court determines that it lacks subject-matter jurisdiction over a matter because of the plaintiff's failure to establish standing, . . . the matter is properly dismissed without prejudice pursuant to Rule 12(b)(1)." *Pugh v. Howard*, 288 N.C. App. 576, 588, 887 S.E.2d 734, 744 (2023). Accordingly, we vacate the orders on appeal in COA25-264 "and remand this matter to the trial court to dismiss the [Forsyth County Action] without prejudice." *Id.* at 589, 887 S.E.2d at 745.[1] In light of this disposition, we do not address the merits, if any, of the arguments that Integon Indemnity raises on appeal from the Forsyth County Action. *See id.*

III. The Nash County Action

In the Nash County Action, Integon Indemnity appeals from the trial court's order denying its motion to dismiss the Nash County Action or, in the alternative, to transfer venue or stay proceedings. For the following reasons, we conclude that Nash County is a proper venue and disagree with Integon Indemnity's arguments otherwise.

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1. The Receivers have filed with this Court a motion to dismiss the appeal in COA25-264 for lack of subject-matter jurisdiction. We dismiss the motion as moot.

Integon Indemnity also attempts in the Nash County Action to appeal from the trial court's order denying its motion for reconsideration of the order denying its motion to compel a deposition. However, the motion for reconsideration and the order denying the motion were only filed in the Forsyth County Action, which we have determined is a nullity. Consequently, the order denying the motion for reconsideration is a nullity as well. We shall not consider any arguments on that issue.

A. Interlocutory Jurisdiction

[2] As a threshold issue, we first consider Integon Indemnity's invocation of our interlocutory jurisdiction. Generally, this Court only hears appeals from final judgments. *See* N.C. Gen. Stat. § 7A-27(b)(1)–(2). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 218, 794 S.E.2d 497, 499 (2016) (citation omitted). "An appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to [the] appellant if not corrected before appeal from final judgment." *Id.* (cleaned up); *see also* N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3)(a).

Integon Indemnity claims that the trial court's order denying its motion to dismiss the Nash County Action affects a substantial right sufficient to invoke our interlocutory jurisdiction.[2] First, Integon Indemnity cites several opinions of this Court for the proposition that "the trial court's order denying the motion to dismiss for improper venue affects a 'substantial right' and is, thus, immediately appealable." But Integon Indemnity fails to address the important distinction between mandatory and discretionary changes of venue.

As our Supreme Court has explained, "[a] party may move for a change of venue (1) when the venue is legally improper or (2) when the change would promote the convenience of witnesses and the ends of justice. Our cases treat the first of these venue changes as mandatory; the second is discretionary." *Stokes v. Stokes*, 371 N.C. 770, 773, 821 S.E.2d 161, 164 (2018) (cleaned up); *see also* N.C. Gen. Stat. § 1-83(1)–(2). "An interlocutory order changing venue as of right affects a substantial right

2. The motion and order for reconsideration were filed in the Forsyth County Action, the proceedings of which we have determined are a nullity. Thus, we will not address appellate jurisdiction with regard to the order for reconsideration.

and thus is immediately appealable." *Stokes*, 371 N.C. at 773, 821 S.E.2d at 164. However, "an appeal from a discretionary ruling as to venue is interlocutory, does not affect a substantial right, and is not immediately appealable." *Id.* at 774, 821 S.E.2d at 164 (citation omitted).

Here, Integon Indemnity asserts that Nash County is a "legally improper venue" and that therefore the trial court's denial of its motion to dismiss affects a substantial right, rendering it immediately appealable. We agree that this Court has jurisdiction to entertain this appeal and proceed to the merits.

B. Venue

[3] Integon Indemnity argues that "[t]he Nash County Action should have been dismissed" as Nash County is a legally improper venue. In the alternative, Integon Indemnity asserts that the Nash County Action "should have been stayed in favor of the Forsyth County Action," but this argument is without merit in that we have determined that the Forsyth County Action is a nullity. Integon Indemnity also contends that "if the Nash County Action were not dismissed or stayed it should have been transferred to Forsyth County or Franklin County." Ultimately, Integon Indemnity's appeal of this issue is entirely based upon the premise that Nash County is a legally improper venue, a contention with which we disagree.

1. Standards of Review and Applicable Legal Principles

"Venue" is defined as "the proper or a possible place for a lawsuit to proceed, usually because the place has some connection either with the events that gave rise to the lawsuit or with the plaintiff or defendant." *Stokes*, 371 N.C. at 773, 821 S.E.2d at 163 (cleaned up). "This Court has articulated a two-step analysis for review of issues of venue." *Osborne v. Redwood Mountain, LLC*, 275 N.C. App. 144, 147, 852 S.E.2d 699, 702 (2020). "The first step is determining the proper venue for a case, which is based upon the substantive statute for the particular type of claim. This determination of proper venue under the substantive statute presents a question of law which is reviewed de novo." *Id.* (citation omitted).

"The next step is determining whether a change of venue is appropriate under the procedural statute regarding changes of venue." *Id.* (cleaned up). "Generally, a trial court's denial of a motion to change venue will not be disturbed absent a showing of a manifest abuse of discretion." *Jarman v. Twiddy & Co. of Duck, Inc.*, 289 N.C. App. 319, 325, 889 S.E.2d 488, 494 (2023) (cleaned up).

2. Analysis

We begin our analysis with the first of the two steps described above: "determining the proper venue" for the Nash County Action, "which is based upon the substantive statute for the particular type of claim." *Osborne*, 275 N.C. App. at 147, 852 S.E.2d at 702 (citation omitted). "It has long been understood that venue is regulated by statute. Indeed, for certain causes of action the appropriate venue is designated by statute." *Id.* at 147–48, 852 S.E.2d at 702 (citation omitted). "However, there are specific venue statutes for only a limited number of actions; thus, it is well established that all civil actions are governed by venue statutes of general application, unless subject to a venue statute of more specific application." *Id.* at 148, 852 S.E.2d at 702 (cleaned up); *see also* N.C. Gen. Stat. §§ 1-82–84.

In this case, the Receivers asserted claims for breach of the contractual duty to settle, unfair or deceptive trade practices, and bad-faith refusal to settle. As there are no specific venue statutes governing these claims, we turn to the general venue statutes.[3] Section 1-82 provides, in pertinent part, that "the action must be tried in the county in which

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3. The North Carolina Commercial Receivership Act specifically provides: "Unless the court orders otherwise, an action by or against the receiver or relating to the receivership or receivership property shall be commenced *in the court in which the receivership is pending*." N.C. Gen. Stat. § 1-507.38(b) (emphasis added). By its own terms, however, the Commercial Receivership Act only applies to receiverships "in which the debtor is an entity or an individual business debtor," *id.* § 1-507.21(a); it expressly states that "no individual other than an individual business debtor may be a debtor in a receivership under this Article, and this Article shall not apply to receiverships of such persons," *id.* § 1-507.21(b). An "[i]ndividual business debtor" is defined as "[a]n individual owing consumer debt," *id.* § 1-507.20(b)(15); "[c]onsumer [d]ebt" is defined as "[d]ebt incurred by an individual primarily for a personal, family, or household purpose," *id.* § 1-507.20(b)(4). Moreover, § 1-507.21(c) provides that "[u]nless explicitly displaced by a particular provision of this Article, the provisions of other statutory law and the principles of common law and equity remain in full force and effect and supplement the provisions of this Article." *Id.* § 1-507.21(c). Accordingly, the specific venue statute found in § 1-507.38(b) does not govern this case.

Further, this recent legislative enactment supports an inference that the *Hartford* line of cases still governs as to venue in receiverships that are beyond the scope of the Commercial Receivership Act. The legislature is presumed to be familiar with that precedent and to have chosen not to disturb it. *See, e.g.*, *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763 (1992) ("To ascertain legislative intent with regard to the recent enactment, we presume that the legislature acted with full knowledge of prior and existing law and its construction by the courts."). "Had the General Assembly intended" to abrogate the residence-of-receivers principle articulated in the *Hartford* line of cases, "it knew how to say so." *Fabrikant v. Currituck County*, 174 N.C. App. 30, 42, 621 S.E.2d 19, 28 (2005).

the plaintiffs or the defendants, or any of them, reside at its commencement." *Id.* § 1-82.

With regard to a receiver's county of residence, our Supreme Court has long recognized that "in determining the residence of fiduciaries for the purpose of venue or citizenship, the personal residence of the fiduciary controls, in the absence of statute. This is true as to receivers, trustees, executors and administrators." *Hartford Accident & Indem. Co. v. Hood*, 225 N.C. 361, 362, 34 S.E.2d 204, 204 (1945) (citations omitted).[4] Thus, an action is properly brought by a receiver in the county in which the receiver resides where there is no statute providing otherwise.

Accordingly, we conclude that, under § 1-82 and our well-settled precedent, the counties of residence of the Receivers are legally proper venues for the Nash County Action. Consequently, in that Nash County is the residence of Tunstall, one of the Receivers, Nash County is a legally proper venue for this case.

Integon Indemnity further argues that, in the Receivership Order, the Franklin County Superior Court retained exclusive jurisdiction of the claims advanced in the Nash County Action, notwithstanding the determinations of our Supreme Court and our General Assembly. The Receivership Order provides in part:

> This Court *hereby takes exclusive jurisdiction and possession of any chose in action belonging to either* [*judgment debtor*] *which is related to matters that arose from the motor vehicle collision described in the Complaint which killed* [*the*] *decedent*, *Susan Renee Chappell*, including but not limited to: (a) any claim for damages against any insurer or against any employee or agent of any insurer; and (b) any claim for the breach of a duty to properly advise either [judgment debtor] about the proper course of handling a legal claim.

(Emphasis added.)

Based on the emphasized language, Integon Indemnity contends that the Receivers "depriv[ed] Franklin County of its 'exclusive jurisdiction and possession' over" the Nash County Action and that "the Receivers were not permitted to file a lawsuit outside of Franklin County other than as related to the already pending Forsyth County Action." Our

4. The pertinent portions of § 1-82 have not been changed from the version in effect in 1945. *See* N.C. Gen. Stat. § 1-82 (1943).

careful review of the receivership statutes reveals that, to the extent that a superior court limits the legally proper venues in which a receiver may file related claims, it exceeds its statutory authority.

Section 1-501 governs the general judicial appointment of receivers and provides in relevant part:

> Any resident judge of the Superior Court Division or any nonresident judge of the Superior Court Division assigned to a district who appoints receivers pursuant to the authority granted hereby while holding court in that district may, in his discretion, *retain jurisdiction and supervision of the original action*, *of the receivers appointed therefor and of any other civil actions pending in the same district involving the receivers*, following his rotation out of the district.

N.C. Gen. Stat. § 1-501 (emphasis added).

We do not read this statute as authorizing the appointing court to retain exclusive jurisdiction over future actions brought by appointed receivers such that the court may functionally abrogate § 1-82 and our precedents interpreting it. Under § 1-501, the Franklin County Superior Court could retain jurisdiction and supervision of the original action, which here was *Chappell v. Webb*; the Receivers themselves; and any other civil actions pending in the same district involving the Receivers. However, § 1-501 does not authorize the trial court's retention of jurisdiction over any future actions that the Receivers may bring.

Accordingly, we conclude that the Receivership Order does not bear upon our analysis of the legally proper venue for the Nash County Action. As Nash County is a legally proper venue for this action under § 1-82 and our longstanding precedent interpreting it, the trial court did not err by denying Integon Indemnity's motion to dismiss for improper venue. Further, as the Forsyth County Action is a nullity, the court did not err by denying Integon Indemnity's motion, in the alternative, to stay proceedings pending the outcome of that case.

Finally, Integon Indemnity makes no argument on appeal that the trial court abused its discretion by denying its motion to transfer; its sole argument in support of this position is grounded in the errant premise that "Nash County is an improper venue" for this action. In that we have rejected the underlying basis for this proposition, we are bound to conclude that the trial court did not abuse its discretion by denying Integon Indemnity's motion to transfer.

IV. Conclusion

For the foregoing reasons, in COA25-264, we vacate the orders on appeal in the Forsyth County Action and remand to the trial court with instructions to dismiss the action without prejudice. In COA25-263, we affirm the trial court's order denying Integon Indemnity's motion to dismiss the Nash County Action or, in the alternative, to transfer venue or stay proceedings.

COA25-263: AFFIRMED.

COA25-264: VACATED AND REMANDED.

Chief Judge DILLON and Judge FREEMAN concur.

CARL FIRLEY AND STEPHANIE FIRLEY, PLAINTIFFS
v.
TOWN OF MARSHALL, NORTH CAROLINA, A MUNICIPAL CORPORATION,
JAMES C. BLAINE, TRUSTEE, AND STATE EMPLOYEEES CREDIT UNION, DEFENDANTS

No. COA25-408

Filed 21 January 2026

Eminent Domain—inverse condemnation—flooding event—failure of private storm pipe—no municipal control—no taking

The trial court properly dismissed with prejudice plaintiffs' inverse condemnation action against a town (defendant), in which plaintiffs alleged that defendant's failure to maintain a storm pipe resulted in plaintiffs' property being swamped by a landslide after a rainstorm. Competent evidence supported the court's findings that a heavy rain event occurred that led to serious flooding and major landslides in addition to completely filling the storm pipe with mud and debris. In turn, the court's conclusion that there was no taking of plaintiffs' property by defendant was supported by the findings of fact, including, notably, that defendant had not installed the storm pipe and had not assumed responsibility for its maintenance.

Judge FREEMAN concurring in the result only.

Appeal by Plaintiffs from order entered 2 December 2024 by Judge R. Gregory Horne in Madison County Superior Court. Heard in the Court of Appeals 20 November 2025.

Van Winkle, Buck, Wall, Starnes, and Davis, PA, by Brian D. Gulden & Taylor D. Osborne, for Plaintiffs-Appellants.

Leake & Stokes, PLLC, by Jamie A. Stokes, for Defendant-Appellee.

MURRY, Judge.

Carl and Stephanie Firley (collectively, "Plaintiffs") appeal the trial court's dismissal with prejudice of their takings claim against the Town of Marshall in Madison County (Defendant).[1] They argue that the trial court erred by concluding that Defendant did not "take" their property to a degree requiring compensation and by finding certain facts in support of that holding. For the reasons below, this Court disagrees and affirms the trial court in all respects.

I. Background

Plaintiffs' rental property sits at 632 Walnut Drive (632 Walnut) downhill along Candler Drive from a non-party's property at 107 Candler Drive (107 Candler), all within the municipality of Marshall. A storm pipe installed by a different non-party at some point prior to 2019 sits halfway up the hill alongside Candler Drive; it diverts excess rainwater away from downhill properties. A massive and unexpected rainfall flooded the area of the municipality on 19 April 2019, causing multiple landslides throughout the area—including one at 107 Candler. More specifically, the rainfall collapsed the ground beneath its driveway, sending mud and debris down Candler Drive to the point of irreparably clogging the storm pipe. The resulting overflow so extensively swamped 632 Walnut that Plaintiffs' tenants had to find new housing.

Plaintiffs sued Defendant for effecting an inverse condemnation as a result on 30 June 2023, alleging that its failure to maintain the storm pipe "permanently and negatively impact[ed] the fair market value of" 632 Walnut. *See* N.G.G.S. § 40A-51 (2025) (inverse-condemnation

1. The long-title caption of the appealed order lists both James C. Blaine and the State Employees Credit Union as co-Defendants. Because neither the trial court's order nor Plaintiffs on appeal substantively reference these other two parties in any manner, though, we discuss the Town of Marshall as the singular defendant throughout this opinion.

statute). Defendant responded by denying the complaint's relevant allegations and by moving for summary judgment, which the trial court denied on 22 August 2024. Both parties utilized supporting affidavits from expert witnesses in their respective filings.

On 18 November 2024, the trial court sat as factfinder to adjudicate the dispute. Plaintiffs offered as an expert witness Jeffrey Brown, a consultant engineer who performed their survey work for the case. He testified that, although "[i]t clearly provides benefit to the Town," only a private resident would have "installed the storm pipe" in accordance with standard practice across Western North Carolina's geography. Defendant's Town Administrator, Forrest Gilliam, confirmed that Defendant maintained Candler Drive itself but not the adjacent storm pipe. In maintaining Candler Drive, Defendant's agents placed "concrete bags" along its side after the rainfall to further divert debris away from its surface.

On 2 December 2024, the trial court entered an order concluding that "[n]o taking of . . . Plaintiff['s] land by . . . Defendant occurred." It found in relevant part that the "heavy rain event" occurred on 19 April 2019 (Finding #1). It also found that—despite Plaintiffs' expert "finding a reported 0.59-inch rainfall"—their own photographs and a concurrent gubernatorial "emergency declaration" indicated an amount "far in excess of . . . 0.59 inches" (Finding #6). (Brackets omitted.) Finally, it found that this "heavy and excessive rainfall . . . erode[d] and wash[ed] out" 107 Candler's driveway "into Candler Drive," "completely filling the storm pipe with mud and debris" as a result (Finding #7). Plaintiffs timely appealed this order.

II. Jurisdiction

This Court has jurisdiction to hear Plaintiffs' appeal because the trial court's dismissal of their claim with prejudice is the "final judgment of a superior court." N.C.G.S. § 7A-27(b)(1) (2025).

III. Analysis

On appeal, Plaintiffs argue that the trial court erred by dismissing their complaint against Defendant with prejudice. More specifically, they assert (1) that Defendant assumed sufficient control of the stormwater facilities to the extent that the flooding amounted to a constitutional taking[2] and (2) that the order's findings of fact relied on incompetent

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2. At the outset, we note the unusual amount of time between the dates of Plaintiffs' alleged injury (19 April 2019) and the filing of their complaint (30 June 2023). The applicable

evidence. We review the former claim *de novo*, *Asheville Sports Props., LLC v. City of Asheville*, 199 N.C. App. 341, 344 (2009), but review the latter's findings only for whether "any competent evidence" supports them even if the record may contain some contrary evidence, *Hooper v. City of Wilmington*, 42 N.C. App. 548, 554 (1979). Based on these considerations, this Court affirms the trial court on both counts.

A. Property Taking

First, Plaintiffs argue that the trial court erred in concluding that Defendant did not "take" their property at 632 Walnut by failing to adequately maintain the storm pipe. Both our State Constitution and statutes "protect[ ] against an uncompensated taking and the fundamental right to just compensation" against the State government or one of its municipal subsidiaries. *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 853 (2016) (quotation omitted) (Law of the Land Clause); *see Cnty. of Moore v. Acres*, 284 N.C. 250, 256 (2022) (N.C. General Statutes). But an occupation need not be physical; a municipality may affect a taking by "substantial[ly] interfer[ing] with elemental rights growing out of the ownership of the property"—even if doing so accidentally. *Kirby*, 368 N.C. at 855.

More specifically, "increased flooding" and land damage as a "foreseeable direct result of government structures" may substantially interfere with a plaintiff's property rights to an actionable degree. *Lea Co. v. N.C. Dep't of Transp.*, 308 N.C. 603, 617 (1983). Because this situation "effectuates a taking without first initiating a formal condemnation proceeding," though, an injured party may "obtain[ ] just compensation [only] through an action in inverse condemnation" under N.C.G.S. § 40A-51. *Acres*, 284 N.C. App. at 256. Section 40A-51 allows an aggrieved property owner to sue a state-government entity where "property has been taken by an act or omission . . . and no complaint containing a declaration of taking has been filed." N.G.G.S. § 40A-51(a) (2025) (citation omitted). This statute necessarily requires the plaintiff to show "injury . . . inflicted to its property" that "directly result[s] from the *defendant's* structures." *Lea Co.*, 308 N.C. at 629 (emphasis added).

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statute of limitations requires an inverse-condemnation "action [to] be initiated within 24 months of the date of the taking." N.C.G.S. § 40A-51(a) (2025). Contrary to their complaint's assertion, Plaintiffs did not in fact "initiate" "this case . . . within 24 months of the date of taking." (Brackets omitted.) Although Defendant adequately pleaded this "affirmative defense" at the "appropriate procedural stage" of its initial answer, *McKinney v. Goins*, 387 N.C. 35, 49 (2025), we "take this argument as abandoned" because Defendant failed to renew it for our review on appeal, N.C. R. App. P. 28(b)(6) (brackets omitted).

Although the *Asheville* decision discusses municipal "control and management" of drainpipes in the context of a negligence claim, *Asheville*, 199 N.C. App. at 352, we find it materially instructive as to whether *Defendant's* "structures caused an actual permanent invasion" of Plaintiff's land here, *Lea Co.*, 308 N.C. at 618. Logic dictates that a municipality cannot take a property in law with an instrumentality it does not control in fact. In *Asheville*, the plaintiff corporation owned a business with a parking lot directly atop a "storm water drainage system." *Asheville*, 199 N.C. App. at 343. The parking lot's previous owner installed the pipe system in 1978, which remained undisturbed until the system's partial collapse in 2006 created "a large sinkhole" across the lot. *Id.* The plaintiff sued the defendant municipality for negligence after an adjacent sinkhole appeared the next year. *Id.* We affirmed the trial court's summary judgment for the defendant, reasoning that the plaintiff proffered "no evidence that the City . . . us[ed the] plaintiff['s] storm drains, that the City control[led] any pipes or drains immediately above or below [the] plaintiffs' property, or that . . . [it] performed any repair or other work on the pipes that ultimately connect with [the] plaintiff['s] pipes." *Id.* at 351. In short, the *Asheville* Court could discern no legal or factual control of any municipal instrumentality that somehow caused the damage alleged by the plaintiff. *See id.* at 353 ("Plaintiffs have pointed to no evidence of *any* . . . affirmative acts taken by the City in this case." (emphasis added)).

So too here. In their initial complaint and here on appeal, Plaintiffs' argument hinges on the storm pipe's failure to safely channel excess rainwater and debris from the surrounding landscape. But a municipality must "undert[ake] to erect [the] structure" for this purpose to open itself to liability from this "reasonably foreseeable" failure. *Elliott v. Dep't of Transp.*, 291 N.C. App. 404, 408 (2023) (citing *Lea Co.*, 308 N.C. at 614). Through gritted teeth, Plaintiffs concede at trial and on appeal that Defendant "did not install the storm pipe." They also acknowledged at trial that Defendant "never maintained the pipe" next to the "ditch" because it "do[es]n't have the resources." So, Plaintiffs instead rely on expert testimony of tangential "benefits from the storm pipe['s] . . . collecti[on of] water from the top of the hill" by 107 Candler. But to maintain an inverse-condemnation suit as a matter of law, our case law has consistently required at least *some* degree of municipal appropriation of a utility *before* the alleged injury. *See Acres*, 284 N.C. App. at 258 (collecting cases on point). At no point did Defendant attempt to modify or correct any portion of Candler Drive until it placed concrete bags along its side—an action that Plaintiffs' own expert could not pinpoint to a specific time. Thus, this Court affirms the trial court's conclusion that Defendant did not "tak[e] . . . certain property rights of [P]laintiffs without just compensation." *Kirby*, 368 N.C. at 848.

B. Summary Judgment

Second, Plaintiffs argue that the trial court erred by relying on incompetent evidence in adjudicating this dispute for Defendant. They believe that "clear, cogent and convincing . . . evidence" must support Findings #1 and #6–#8.[3] (Quoting *In re Allen*, 58 N.C. App. 322, 325 (1982).) We disagree in no small part because Defendant correctly notes the more lenient standard of review applicable to the trial court's findings in this context. As noted above, a trial court sitting as a factfinder need only support its findings with "*any* competent evidence" to bind this Court on appeal. *Hooper*, 42 N.C. App. at 554 (emphasis added). Contrary evidence in the record cannot overcome this presumption so long as "the trial court has the ability to view and hear witnesses' testimony, weigh the evidence presented, and resolve conflicts [there]in." *State v. Crisp*, 297 N.C. App. 400, 407 (2024).

Here, competent evidence clearly supports the trial court's findings that "a "serious flooding" from "a heavy rain event" caused "major landslides" collapsing Candler Drive. Plaintiffs contest Finding #1 only to the extent that their expert witness's affidavit drew upon that information. But they would have no reason to bring suit absent this landslide causation. Their complaint would similarly fall apart had the driveway's landslide collapse not "completely fill[ed] the storm pipe with mud and debris." And although Brown "reported a 0.59[-]inch rainfall" the day of the "rain event," a trial court could reasonably infer "a level of rainfall far in excess" of this post hoc assessment based on "Plaintiffs' [own] photographs" of the scene and the sitting Governor's concurrent emergency declaration. *See* Exec. Order No. 127, 34 N.C. Reg. 1932 (May 1, 2020) (declaring state of emergency in Defendant Town based on "rain event that resulted in devastating flooding"). Thus, this Court holds that competent evidence supports the trial court's Findings #1–#8.

IV. Conclusion

Based on the above considerations, this Court affirms both the trial court's findings of fact and conclusions of law that it reached in dismissing Plaintiffs' complaint with prejudice.

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3. Plaintiffs urge this Court to "examine" Findings #2–#5 but offer no argument to do so beyond a conclusory allegation that they "fail to support the trial court's conclusions of law." Because they fail to "point to some evidence in the record to support [t]his argument," though, *State v. Ingram*, 227 N.C. App. 383, 389 (2013), we "take it as abandoned," N.C. R. App. 28(b)(6) (brackets omitted).

AFFIRMED.

Judge GRIFFIN concurs.

Judge FREEMAN concurs in the result only.

JAMES LAWRENCE, Plaintiff
v.
MARY ANN LAWRENCE and MARY ANN LAWRENCE AS TRUSTEE FOR MARY ANN LAWRENCE TRUST, Defendants

No. COA25-304

Filed 21 January 2026

1. Divorce—equitable distribution—business bank accounts—marital portion not distributed

An equitable distribution order was reversed in part where the trial court erred by failing to distribute the marital portion of two business checking accounts that, as of the date of separation, held $98,843.09 in earned income (and, therefore, marital property). While the court's findings acknowledged the existence of the business accounts and the marital portion of those funds, it adopted a valuation method that excluded the accounts and then failed to distribute the accounts separately. Likewise, the trial court erred by denying plaintiff's motion to amend the equitable distribution order on this issue.

2. Divorce—equitable distribution—valuation of residence—competent evidence—exercise of discretion

In an equitable distribution proceeding, where the trial court made findings of fact supported by competent evidence, considered all the evidence before it—including the impact of a recent hurricane on property values and the real estate market—and properly exercised its discretion in adopting plaintiff's expert's valuation of a residence located in Cape Coral, Florida, the court's valuation was affirmed. Likewise, the trial court did not err by denying plaintiff's motion to amend the equitable distribution order on this issue.

Appeal by Defendants from judgment and order entered 13 November 2023 and order entered 21 May 2024 by Judge Hal G. Harrison in Watauga County District Court. Heard in the Court of Appeals 15 October 2025.

Deal Moseley Di Santi Garrett & Martin, LLP, by Chelsea Bell Garrett and Bryan P. Martin, for Defendants-Appellants.

Miller & Johnson, PLLC, by Andrea M. Miller, for Plaintiff-Appellee.

COLLINS, Judge.

Mary Ann Lawrence and Mary Ann Lawrence as trustee for Mary Ann Lawrence Trust (collectively, "Defendant") appeal from an equitable distribution judgment and order ("ED order") and an order denying her motion to amend the ED order. Defendant argues that the trial court erred by failing to distribute the marital portion of bank accounts associated with Plaintiff John Lawrence's construction company and that the trial court's valuation of a Florida residence was not supported by competent evidence. We affirm in part, reverse in part, and remand for further proceedings.

I. Background

Plaintiff and Defendant were married in March 1999, separated in July 2021, and divorced in May 2023. Plaintiff filed a complaint for equitable distribution in January 2022. At the time they separated, the parties owned two marital assets at issue here: (1) the James M. Lawrence Construction, LLC, ("company"); and (2) a residence located in Cape Coral, Florida ("residence"). In the final pretrial order, the parties stipulated that the company and the residence were marital property but did not stipulate to the value of either asset. The case came on for a bench trial in August 2023.

A. Company valuation

Two company bank accounts contained a total of $273,869.30, which included money the company had already earned as well as money it was holding in trust for clients for overhead and material costs. Of the $273,869.30, it is undisputed that $98,843.09 had been earned as of the date of separation and was therefore marital funds.

Plaintiff's expert valued the company at $62,591.57 and expressly did not include the company bank accounts in his valuation. Defendant's expert valued the company at $323,000.

B. Residence valuation

On 28 September 2022, Hurricane Ian made landfall in Florida, damaging the residence. Defendant recovered $105,094.38 in insurance proceeds to repair the residence and, at the time of trial, was still litigating over an additional $20,000.

Plaintiff's expert valued the residence at $840,000 in December 2021 and $900,000 in May 2022. Plaintiff's expert opined that the damage to the residence would not decrease its value from his last appraisal of $900,000 because "values have pretty much remained the same due to the influx of people moving to Florida from up north, which is causing the prices in Florida to increase dramatically."

Defendant's expert valued the residence at $545,000 in February 2021, $596,000 in July 2021, and $485,000 in November 2022.

C. ED order

The trial court entered the ED order on 13 November 2023. The trial court adopted Plaintiff's expert's $62,591.57 valuation of the company. The ED order does not separately distribute the $98,843.09 in marital funds contained in the business accounts, nor does it state that those funds were included in the company valuation. The decretal chart assigns the company to Plaintiff at his expert's value, but the chart does not list the bank accounts as separate items.

The trial court also adopted Plaintiff's expert's $900,000 valuation of the residence and found Defendant's expert not credible. The decretal chart assigns sole ownership of the residence to Defendant.

Defendant filed a motion to amend the findings of fact and judgment on 27 November 2023. The trial court denied this motion on 21 May 2024. Defendant timely appealed both the ED order and the order denying the motion to amend.

II. Discussion

Defendant argues that the trial court erred by failing to distribute the marital portion of the bank accounts associated with the company and that the trial court's valuation of the residence was not supported by competent evidence.

A. Standard of review

"[T]he trial court is vested with wide discretion" in cases of equitable distribution. *Edwards v. Edwards*, 152 N.C. App. 185, 187 (2002) (quotation marks and citation omitted). "Accordingly, the trial court's judgment will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (quotation marks and citation omitted).

"A trial court's findings of fact in an equitable distribution case are conclusive if supported by any competent evidence." *Edwards v. Edwards*, 251 N.C. App. 549, 550 (2017). "In an equitable distribution proceeding, the trial court is to determine the net fair market value of a property based on the evidence offered by the parties." *Id.* (cleaned up). "Questions of witness credibility . . . are exclusively within the province of the trial court" and are binding on appeal when supported by competent evidence. *Watkins v. Watkins*, 228 N.C. App. 548, 558 (2013). "The mere existence of conflicting evidence or discrepancies in evidence will not justify reversal." *Edwards*, 251 N.C. App. at 550.

B. Company bank accounts

[1] Defendant argues that the trial court erred by failing to distribute the $98,843.09 in marital funds contained in the two company bank accounts or, in the alternative, that the trial court's valuation of the company was erroneous because Plaintiff's expert's valuation did not take into account the $98,843.09 in marital funds.

When making an equitable distribution between parties, "the trial court must conduct a three-step analysis: (1) determin[e] which property is marital property; (2) calculat[e] the net value of the marital property . . . and, (3) distribut[e] the property in an equitable manner." *Hamby v. Hamby*, 143 N.C. App. 635, 638 (2001). The failure to distribute a marital asset is reversible error. *See id.*

The trial court made the following findings of fact:

> 118. As of the date of separation, the Plaintiff's business accounts had the following values:
>
> . . . .
>
> b. First Citizens Account ending 5459: $26,226.91; and
>
> c. First Citizens Account ending 5483: $247,642.39
>
> . . . .
>
> 122. Plaintiff's cash on hand that was earned was $98,843.09. The amount of money that belongs to the projects being completed at 322 and 268 Hemlock are $176,838.97 and, therefore, should not be considered in valuing Plaintiff's business.
>
> . . . .

> 126. Based upon his appraisal of James Construction, LLC, [Plaintiff's expert] valued the business around the date of separation to be $62,591.57.

Here, it is undisputed that the company maintained two business checking accounts. It is also undisputed that, as of the date of separation, $98,843.09 in those accounts represented earned income and therefore marital property. The trial court adopted the valuation of Plaintiff's expert, who did not expressly include the business bank accounts in his valuation. On direct examination, Plaintiff's expert was asked, "When you were creating this valuation, did you ignore the amount of money that his business had on hand in cash at the time?" Plaintiff's expert responded, "Yes." The trial court then distributed the company to Plaintiff at his expert's value of $62,591.57.

The ED order does not separately distribute the $98,843.09 in marital funds contained in the business accounts, nor does it state that those funds were included in the company valuation. The decretal chart awards the company to Plaintiff at his expert's value but does not list the bank accounts as separate items.

The trial court's findings acknowledge the existence of the business accounts and the marital portion of those funds. Yet the trial court adopted a valuation method that excluded the accounts and then failed to distribute the accounts separately.

Plaintiff argues that distributing the company necessarily distributed all assets of the business, including the accounts. That argument is inconsistent with the trial court's findings and with the valuation it adopted. If the trial court accepted a valuation that excluded the accounts, it could not simultaneously treat the accounts as included.

Because the trial court failed to distribute $98,843.09 in marital funds, we reverse the ED order on this issue. For these same reasons, the trial court erred by denying Plaintiff's motion to amend the ED order on this issue.

C. The residence

[2] Defendant next argues that the trial court's findings of fact as to the value of the residence are not supported by competent evidence. Defendant specifically argues that Plaintiff's expert's valuation of the residence was not competent because the expert did not re-appraise the residence after it was damaged by Hurricane Ian.

The trial court made the following findings of fact:

> 67. The home is in a very desirable area and the market in that area has appreciated rapidly.
>
> 68. Both parties' expert real estate appraisers testified as to their opinion as to the fair market value of the property. Each appraiser considered the sales comparison approach, the income approach, and the cost approach. Both appraisers utilized the sales comparison approach in their final valuations.
>
> . . . .
>
> 70. [Plaintiff's expert] conducted three (3) appraisals of the home, one on 11/5/2021, one on 12/10/2021, and one on 5/23/2022.
>
> . . . .
>
> 77. On 28 September 2022, Hurricane Ian caused total devastation in some areas in the Cape Coral area.
>
> 78. [Plaintiff's expert] opined that while the hurricane caused some slow down in the market, the values and desirability in the area have remained the same due to the demand from people moving south and less inventory.
>
> . . . .
>
> 87. [Defendant's expert] has been found in violation by the governing board of appraisers for failing to exercise reasonable diligence in developing an appraisal report.
>
> . . . .
>
> 91. Various other judgments have been entered against [Defendant's expert] for non payment of debts, including foreclosure proceedings. [Defendant's expert], instead of answering the question was evasive and blamed his ex wife on those various judgments.
>
> 92. [Defendant's expert] is not a credible expert witness and this court attaches no credibility to his opinion on values.
>
> . . . .
>
> 97. [The] Court finds that while Hurricane Ian likely initially decreased the value of the home, the market is such that any diminution of value is negligible given the desirability

> of the area and market appreciation. Further, Defendant testified that most of the repairs have been made to the property from the insurance proceeds.
>
> 98. The Court adopts the opinion of [Plaintiff's expert's] value of the property and therefore finds that the marital/divisible value of the Cape Coral residence is $900,000.00. While the value is as of 23 May 2022, this Court finds $900,000.00 to be an accurate value as of the date of this hearing given the market and testimony of [Plaintiff's expert] as to the minimal impact Hurricane Ian has on current values.

Plaintiff's expert specifically addressed the effect of Hurricane Ian on the property market and the value of the residence. The fact that Plaintiff's expert did not re-appraise the property after Hurricane Ian goes to the weight rather than the competence of his testimony. *See Grasty v. Grasty*, 125 N.C. App. 736, 739 (1997). The trial court found Plaintiff's expert to be credible and accepted his valuation.

The trial court found Defendant's expert not to be credible and attached no weight to his opinion on values. Credibility determinations are the exclusive province of the trial court and are binding on appeal when supported by competent evidence. *Watkins*, 228 N.C. App. at 558. The record contains ample evidence supporting the trial court's credibility finding.

The trial court considered all the evidence before it and exercised its discretion in adopting Plaintiff's expert's valuation. The trial court's findings of fact are supported by competent evidence, and Defendant's argument to the contrary is overruled. For these same reasons, the trial court did not err by denying Plaintiff's motion to amend the ED order on this issue.

III. Conclusion

We reverse the portion of the ED order and the order denying the motion to amend the ED order addressing the marital funds in the company bank accounts and remand for the trial court to distribute the marital portion of the company bank accounts and, if necessary, adjust the distributive award. We affirm the ED order and the order denying the motion to amend the ED order addressing the trial court's valuation of the residence.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges GORE and STADING concur.

LDI SHALLOTTE 179 HOLDINGS, LLC, Plaintiff
v.
STATE OF NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF ENERGY MINERAL, AND LAND RESOURCES, Defendant

No. COA24-443

Filed 21 January 2026

1. Eminent Domain—inverse condemnation—unconstitutional taking—environmental agency withholding review of stormwater permit application—sufficiency of allegations

In a dispute between a land developer (plaintiff) and the Department of Environmental Quality (defendant) regarding plaintiff's application for a stormwater permit to cover a land parcel it intended to develop, where defendant had previously issued the parcel's former owner three notices of violation (NOVs) pertaining to his own stormwater permit for the property, the trial court erred in dismissing—for failure to state a claim, pursuant to Civil Procedure Rule 12(b)(6)—plaintiff's claims of inverse condemnation and an unconstitutional regulatory taking, where the complaint alleged that defendant's refusal to process plaintiff's permit application until plaintiff resolved the NOVs resulted in plaintiff being deprived of all economically beneficial use of the property for approximately two years. Notably, the fact that defendant never formally denied plaintiff's request for a stormwater permit was not fatal to plaintiff's claim, since plaintiff challenged a regulatory action rather than the validity of a specific land-use regulation and, therefore, was not required to allege a "final deprivation" to establish an unconstitutional taking.

2. Constitutional Law—due process violation—procedural and substantive—environmental agency withholding review of stormwater permit application—insufficiency of allegations

In an action filed by a land developer (plaintiff) against the Department of Environmental Quality (defendant), where defendant refused to process plaintiff's application for a stormwater permit to cover a land parcel unless plaintiff met certain conditions, which included resolving three outstanding notices of violation connected to the stormwater permit issued to the property's previous owner, the trial court properly dismissed—for failure to state a claim, pursuant to Civil Procedure Rule 12(b)(6)—plaintiff's claims alleging that defendant had violated plaintiff's due process rights.

The complaint failed to establish a procedural due process violation where plaintiff was able to obtain review of defendant's actions in a contested case hearing before the Office of Administrative Courts. Further, plaintiff did not adequately plead a substantive due process violation where the complaint did not allege that defendant's actions improperly targeted plaintiff or were inconsistent with defendant's regular practice, nor did it allege any other facts tending to show defendant's conduct fell so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency.

3. Collateral Estoppel and Res Judicata—final decision in a contested case—effect on subsequent action before trial court—environmental agency withholding review of stormwater permit application

In an action filed by a land developer (plaintiff) challenging the refusal by the Department of Environmental Quality (defendant) to process its application for a stormwater permit—to cover a land parcel that plaintiff intended to develop into a residential subdivision—unless plaintiff met certain conditions, where plaintiff had previously challenged defendant's conduct in a contested case before the Office of Administrative Hearings and had obtained a favorable ruling from the presiding administrative law judge (ALJ), the trial court properly denied plaintiff's motion for partial summary judgment after concluding that it was not bound by the ALJ's final decision under the principles of res judicata and collateral estoppel. First, the ALJ's final decision—a quasi-judicial determination to which collateral estoppel or res judicata principles may apply—had no preclusive effect on plaintiff's constitutional claims, which fell outside the ALJ's jurisdiction and, at any rate, were never litigated before the ALJ. Second, res judicata did not apply where plaintiff advanced different legal theories in the current action—including claims of constitutional violations—from those it litigated in the prior contested case. Finally, even if collateral estoppel principles did apply, it would have been unfair to allow plaintiff to use the doctrine offensively under the facts and circumstances of the case.

Appeal by Plaintiff from judgment entered 21 February 2024 by Judge Jason C. Disbrow in Brunswick County Superior Court. Heard in the Court of Appeals 5 November 2024.

Shipman & Wright, LLP, by Gary K. Shipman and Thomas R. Harvey, III, for Plaintiff-Appellant.

Attorney General Jeff Jackson, by Special Deputy Attorney General T. Hill Davis, III, and Assistant Attorney General Carolyn A. McLain, for Defendant-Appellee.

CARPENTER, Judge.

LDI Shallotte 179 Holdings, LLC ("Plaintiff") appeals from the trial court's: 21 February 2024 order (the "Dismissal Order") granting the motion to dismiss filed by The North Carolina Department of Environmental Quality, Division of Energy Mineral, and Land Resources ("Defendant"); and 21 February 2024 order (the "Summary Judgment Order") denying Plaintiff's motion for partial summary judgment. On appeal, Plaintiff argues the trial court erred by granting Defendant's motion to dismiss and denying Plaintiff's motion for partial summary judgment. After careful review, we conclude Plaintiff adequately alleged an unconstitutional temporary regulatory taking. Thus, the trial court erred by granting Defendant's motion to dismiss on this basis. The trial court did not err by granting Defendant's motion to dismiss as to Plaintiff's procedural and substantive due process claims. Finally, the trial court properly denied Plaintiff's motion for partial summary judgment. Accordingly, we affirm in part, reverse in part, and remand.

I. Factual & Procedural Background

On 8 February 2001, Defendant issued a stormwater permit (the "Owendon Permit") to Don Owen covering a parcel of land he planned to develop into a residential subdivision called Owendon Plantation. Owen intended to develop the parcel in five phases and completed phases one and two. Sometime in 2004, Owen decided against developing phases three, four, and five (the "Property") and formally withdrew the Property from the Declaration of Owendon on 1 October 2004. Thereafter, in October 2004, February 2005, and April 2005, Defendant issued three notices of violation ("NOVs") to Owen concerning the Owendon Permit. According to Plaintiff, beyond the continued requirement of the maximum built upon area, the NOVs were for violations associated with activity on phases one and two of Owendon Plantation, not the Property. Owen did not resolve the NOVs and Defendant did not take any action to enforce Owen's compliance.

Eventually, after a series of conveyances, Plaintiff purchased the Property in May 2021. Like Owen, Plaintiff planned to develop the Property into a residential subdivision called Summers Walk. Shortly after purchasing the Property, Plaintiff commenced efforts to obtain a stormwater permit from Defendant. Pursuant to the Express Review

Program, Plaintiff submitted a Request for Express Permit Review and Express Stormwater Narrative,[1] seeking permission to submit an application to modify the Owendon Permit. On 14 July 2021, Defendant emailed Plaintiff advising that Plaintiff was not eligible for the Express Review Program, because the "current permittee," Owen, was "not the entity requesting the modification" and "transfers cannot be processed" through the Express Review Program. Defendant purportedly based its decision on a footnote included in the Express Application Review Fee Chart "disallowing applications for properties that in its opinion (a) overlapped with another permit and (b) would not resolve existing compliance issues."

In the correspondence, Defendant provided Plaintiff with a "recommended path forward," which included the following steps: (1) apply to transfer the Owendon Permit to Plaintiff and submit a plan to resolve the NOVs; (2) apply to modify the Owendon Permit to divide the original development plan into two parts, resulting in a new Owendon Permit and the need for a separate permit for the Property; (3) apply to obtain a new permit for the Property; and then (4) apply to transfer the new Owendon Permit to the Owendon Home Owners Association. Thereafter, Plaintiff submitted two applications to Defendant: one to transfer the Owendon Permit; and another to obtain a new permit for the Property. Defendant confirmed it received Plaintiff's new permit application, but it did not review or process the new application as Plaintiff had yet to apply to modify the Owendon Permit to divide the original development plan into two parts, per Defendant's "recommended path forward." Then, on 18 November 2021, Defendant requested that Plaintiff assume responsibility for the NOVs. Plaintiff did not respond to the request, and on 20 December 2021, Defendant returned Plaintiff's application to transfer the Owendon Permit to Plaintiff because Plaintiff did not submit a plan for bringing the Owendon Permit into compliance.

On 5 January 2022, Defendant suggested an alternative avenue by which Plaintiff could obtain a stormwater permit for the Property. Defendant advised it could issue a new permit for the Property if Owen submitted an application to transfer and modify the Owendon Permit

1. The Express Review Program was created by our General Assembly. *See* N.C. Gen. Stat. § 143B-279.13(a) (2023). Under section 143B-279.13(a), Defendant is required to develop an Express Review Program and "determine the project applications to review from those who request to participate in the program." *See id.* The statute further provides that the Express Review Program may be applied to a number of programs, including stormwater permits. *See id.* at § 143B-279.13(a)(1).

and, in doing so, resolve the NOVs. Disinclined to take that approach, Plaintiff requested that Defendant modify or revoke the Owendon Permit in accordance with Defendant's discretionary authority under section 15A N.C. Admin. Code 2H.1040(6).[2] Defendant elected not to exercise its discretionary authority to modify or revoke the Owendon Permit.

In March 2022, Defendant sent Owen a Transfer Notice Request, asking if he would jointly file, with Plaintiff, an application to transfer the Owendon Permit to Plaintiff. In the notice, Defendant informed Owen that the NOVs must be resolved as part of the joint application to transfer the Owendon Permit to Plaintiff. Defendant provided Owen with six months to submit a plan for compliance. Owen informed Defendant that he had no objection to the Owendon Permit being transferred to Plaintiff, but advised that he would not be resolving the NOVs. Ultimately, Owen did not apply to transfer the Owendon Permit to Plaintiff.

On 19 April 2022, Plaintiff filed a petition for contested case hearing in the Office of Administrative Hearings ("OAH"). On 28 June 2022, Defendant filed a motion to dismiss Plaintiff's petition, and on 8 July 2022, Plaintiff filed a response. On 15 August 2022, Administrative Law Judge Donald R. van der Vaart (the "ALJ") denied Defendant's motion to dismiss. On 19 August 2022, Plaintiff moved for summary judgment. On 29 August 2022, Defendant filed a response to Plaintiff's motion and also moved for summary judgment. On 14 September 2022, the ALJ conducted a hearing.

On 15 November 2022, the ALJ issued a Final Decision favorable to Plaintiff. The ALJ concluded that Defendant erred at the outset by excluding Plaintiff from the Express Review Program because the footnote upon which Defendant relied was not an enforceable statutory provision or regulation but was a "policy statement" and the "North Carolina Administrative Procedure Act prohibits policy statements masquerading as rules . . . ." The ALJ further concluded that "[i]n the series of proposed 'paths forward' that included as preconditions strategies to correct past violations, [Defendant] erred by withholding review of [Plaintiff's] application." Additionally, the ALJ concluded Defendant did not have authority to impute responsibility of the Owendon Permit NOVs to Plaintiff and also erred by "refus[ing] to exercise its authority to modify the [Owendon Permit] under 15A N.C. Admin. Code 2H.1040(6),

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2. The North Carolina Administrative Code provides Defendant's director with the authority to revoke or modify a stormwater permit on sixty days' written notice "for good cause" including "violations of any terms or conditions of the permit . . . ." *See* 15A N.C. Admin. Code 2H.1040(6)(a) (2023).

which provides for precisely situations like this one." Accordingly, the ALJ ordered that Defendant "revoke [the Property] from the current permit holder," Owen, and "review [Plaintiff's] application for [the Property] under the Express Review Program as a new permit."

On 16 December 2022, Defendant filed a petition for judicial review of the ALJ's Final Decision in superior court (the "trial court"). On 4 January 2023, Plaintiff filed a motion to dismiss Defendant's petition. On 13 February 2023, the trial court conducted a hearing on Plaintiff's motion and dismissed Defendant's petition with prejudice because it was not timely.[3] Defendant eventually processed Plaintiff's application and issued a new stormwater permit for the Property on or about 1 August 2023, approximately six months after the trial court dismissed Defendant's petition for judicial review.

On 3 August 2023, Plaintiff filed a complaint against Defendant, asserting claims for inverse condemnation, unconstitutional taking, denial of substantive due process, and denial of procedural due process. In addition to damages, Plaintiff requested certain declaratory relief. On 16 October 2023, Defendant filed a motion to dismiss. On 19 January 2024, Plaintiff filed an amended complaint (the "Complaint"). On 29 January 2024, Plaintiff filed a motion for partial summary judgment, arguing the trial court and the parties were bound by the ALJ's Final Decision under the principles of res judicata and collateral estoppel. On 30 January 2024, Defendant filed a motion to dismiss the Complaint. On 1 February 2024, Plaintiff filed a request for judicial notice.

On 12 February 2024, the trial court conducted a hearing on the motions. The trial court denied Plaintiff's motion for partial summary judgment and granted Defendant's motion to dismiss. On 21 February 2024, the trial court entered the Dismissal Order and Summary Judgment Order. In the Summary Judgment Order, the trial court concluded that the ALJ lacked "the authority to decide constitutional matters" and, as a result, his finding and conclusions did "not have any res judicata or collateral estoppel effect." In the Dismissal Order, the trial court concluded the Complaint failed to state claims upon which relief could be granted under Rule 12(b)(6). On 29 February 2024, Plaintiff filed written notice of appeal from both orders.

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3. "To obtain judicial review of a final decision under this Article, the person seeking review must file a petition in superior court within 30 days after the person is served with a written copy of the decision. A person that fails to file a petition within the required time waives the right to judicial review under this Article." *See* N.C. Gen. Stat. § 150B-45(a) (2023).

II. Jurisdiction

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

III. Issues

The issues are whether the trial court erred by: (1) granting Defendant's motion to dismiss; (2) denying Plaintiff's motion for partial summary judgment; and (3) denying Plaintiff's request for certain declaratory relief.

IV. Analysis

A. Motion to Dismiss

First, Plaintiff asserts the trial court erred by granting Defendant's motion to dismiss because the Complaint adequately alleged a temporary taking and procedural and substantive due process violations. Because the Complaint sets forth sufficient allegations of a temporary regulatory taking by Defendant, the trial court erred by granting Defendant's motion to dismiss on this basis. The trial court did not err by granting Defendant's motion to dismiss Plaintiff's due process claims. Accordingly, we affirm in part, reverse in part, and remand.

1. Standard of Review

This Court "review[s] *de novo* an order granting a Rule 12(b)(6) motion to dismiss." *Taylor v. Bank of America, N.A.*, 382 N.C. 677, 679, 878 S.E.2d 798, 800 (2022). " 'Under a *de novo* review, [this Court] considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quoting *In Re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

In reviewing a motion to dismiss, "[t]he appellate court, just like the trial court below, considers '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.' " *Taylor*, 382 N.C. at 679, 878 S.E.2d at 800 (quoting *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013)).

2. Inverse Condemnation & Unconstitutional Taking

[1] Plaintiff argues it sufficiently alleged claims for inverse condemnation and unconstitutional taking because it set forth facts in the Complaint demonstrating that Defendant's refusal to consider Plaintiff's application for a stormwater permit until Plaintiff resolved the NOVs resulted in Plaintiff being deprived of all economically beneficial or productive use of the Property for approximately two years. We agree.

Before analyzing the sufficiency of the Complaint, we first address Defendant's argument that Plaintiff did not "clear[] the initial hurdle of showing a final deprivation of a property interest." In essence, Defendant contends that no taking could have occurred because Defendant never formally denied Plaintiff's request for a stormwater permit. Defendant cites two cases in support of its argument: *Cary Creek Ltd. P'ship v. Town of Cary*, 203 N.C. App. 99, 690 S.E.2d 549 (2010) and *Messer v. Town of Chapel Hill*, 125 N.C. App. 57, 479 S.E.2d 221, *vacated on other grounds*, 346 N.C. 259, 485 S.E.2d 269 (1997). These cases, however, are distinguishable for the reasons set forth below.

Cary Creek involved a stormwater management ordinance enacted by the Town of Cary which required riparian buffers for lands adjacent to certain enumerated streams and surface waters. 203 N.C. App. at 101, 690 S.E.2d at 551. The plaintiff sought, and was denied, a variance from the riparian buffer requirement. *Id.* at 101, 690 S.E.2d at 551. Thereafter, the plaintiff pursued a certiorari proceeding challenging the Town's denial of its request for a variance and sought declaratory relief that the relevant ordinances were invalid and unenforceable, or in the alternative, that the Town of Cary was required to compensate the plaintiff under principles of inverse condemnation. *Id.* at 100, 690 S.E.2d at 550. The Town of Cary moved to dismiss for lack of subject-matter jurisdiction and failure to state a claim, which the trial court denied. *Id.* at 100, 690 S.E.2d at 550. Then, the Town of Cary and the plaintiff filed cross-motions for summary judgment. *Id.* at 100, 690 S.E.2d at 550. After the trial court granted summary judgment in favor of the Town of Cary, the plaintiff appealed, and the Town of Cary cross-appealed, arguing, in pertinent part, that the trial court should have dismissed the plaintiff's inverse condemnation claim for lack of subject-matter jurisdiction. *Id.* at 101, 690 S.E.2d at 551.

Relying on *Messer*, this Court determined that the trial court lacked subject-matter jurisdiction over the plaintiff's inverse condemnation claim because the claim was not ripe for adjudication. *Id.* at 102, 690 S.E.2d at 552 (citing *Messer*, 125 N.C. App. at 61, 479 S.E.2d at 223). We explained the plaintiff's claim was

> based on the theory that *if* the riparian buffer ordinance is upheld as valid and enforceable in the instant case and *if* [the plaintiff] does not prevail in its certiorari proceeding, a taking will have occurred. Because neither of these

> prerequisite events had occurred at the time [the plaintiff] filed its claim, there had been no taking and there was no concrete controversy ripe for adjudication.

Id. at 101, 690 S.E.2d at 552.

Messer also involved a challenge to a zoning ordinance which reduced the number of residential units allowed on a portion of the plaintiffs' property. 125 N.C. App. at 60, 479 S.E.2d at 222. The plaintiffs filed a complaint challenging the validity of the zoning ordinance and the Town of Chapel Hill moved to dismiss. *Id.* at 60, 479 S.E.2d at 222. The trial court granted the motion and the plaintiffs appealed to this Court. We concluded the trial court properly dismissed the plaintiffs' takings claim because the plaintiffs failed to allege that they "had applied for a development permit or a variance." *Id.* at 61, 479 S.E.2d at 223. In other words, without a determination as to how or if the zoning ordinance would affect the plaintiffs' use of their property, the plaintiffs could not maintain an action for inverse condemnation. *Id.* at 61, 479 S.E.2d at 223.

Cary Creek and *Messer* support the proposition that to properly allege an unconstitutional regulatory taking based on a zoning ordinance, the plaintiff must first establish that the zoning ordinance will impact the plaintiff's use of the property. *See Cary Creek*, 203 N.C. App. at 101, 690 S.E.2d at 552; *Messer*, 125 N.C. at 61, 479 S.E.2d at 223. To make that determination, it is necessary for the plaintiff to have applied for, and been denied, a variance. Only then can the plaintiff demonstrate that he has been denied all economically beneficial use of his property. *See Nies v. Town of Emerald Isle*, 244 N.C. App. 81, 95, 780 S.E.2d 187, 198 (2015). Absent a variance denial, the effect of the zoning ordinance on the relevant property is speculative at best.

Here, Plaintiff's takings claim, like those in *Cary Creek* and *Messer*, is regulatory in nature. Plaintiff's claim, however, does not concern the validity of a land-use regulation. Instead, Plaintiff attacks Defendant's regulatory action, or inaction, in applying certain land-use regulations. Because Plaintiff challenges a regulatory action rather than a regulation itself, a "final determination," or "final deprivation" as characterized by Defendant, is not required in this context as there are no questions regarding whether a particular land-use regulation will impact the Property. *See Messer*, 125 N.C. at 61, 479 S.E.2d at 223. To the contrary, Plaintiff's claim sounds in the adverse effects of Defendant unjustifiably withholding review of Plaintiff's application for a stormwater permit. Because Plaintiff's allegations are ripe for review, *Cary Creek* and *Messer* are distinguishable.

To be clear, Defendant does not argue that Plaintiff's claim is unripe. Instead, Defendant isolates the "final decision" language appearing in *Cary Creek* and *Messer* and contends it is a substantive element of takings claim. In our view, the absence of a definitive denial of Plaintiff's request for a stormwater permit is not necessarily fatal to Plaintiff's takings claim. By Defendant's logic, it could indefinitely hold applicants in bureaucratic purgatory by simply refusing to process their requests for stormwater permits. We decline to adopt a rule permanently foreclosing temporary takings claims after excessive administrative delays. There may be instances where grossly protracted inaction, if pleaded in detail, may well survive a motion to dismiss and warrant discovery.

In sum, while a "final decision about what uses of the property will be permitted" is needed to fulfill the ripeness requirement for a regulatory taking based on a challenge to a regulation or ordinance, *see Messer*, 125 N.C. App. at 61, 479 S.E.2d at 223, *Cary Creek* and *Messer* do not hold that a "final deprivation" is required to establish an unconstitutional temporary taking. Thus, we are not persuaded by Defendant's argument that Plaintiff was precluded from asserting a takings claim because Defendant never formally denied Plaintiff's request for a stormwater permit. Indeed, Defendant eventually processed Plaintiff's application and issued a new stormwater permit following the ALJ's Final Decision, but the question remains as to whether Plaintiff is entitled to compensation for the two-year period in which Defendant refused to process Plaintiff's application for a stormwater permit.

Having established Plaintiff was not required to allege that a "final deprivation" occurred, we address the sufficiency of the Complaint. "The fundamental right to property is as old as our state." *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 852–53, 786 S.E.2d 919, 923–24 (2016) (citations omitted). "Property encompasses every aspect of right and interest capable of being enjoyed as such upon which it is practicable to place a money value and includes not only the thing possessed but the right of the owner to the land; the right to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use." *Id.* at 853, 786 S.E.2d at 924 (cleaned up). Although "our state constitution does not contain an express constitutional provision against the taking or damaging of private property for public use without payment of just compensation, we have long recognized the existence of a constitutional protection against an uncompensated taking . . . ." *Id.* at 853, 786 S.E.2d at 924 (internal quotation marks and citation omitted).

A temporary taking occurs where a landowner is denied all use of his property for a finite period and "requires just compensation for the use of the land during the period of the taking." *City of Charlotte v. Combs*, 216 N.C. App. 258, 261, 719 S.E.2d 59, 62 (2011) (cleaned up). A regulatory taking may occur if the governmental action "den[ies] an owner all economically beneficial or productive use of the property." *Nies*, 244 N.C. App. at 95, 780 S.E.2d at 198 (internal quotation marks and citation omitted).

"Determining if governmental action constitutes a taking depends upon 'whether a particular act is an exercise of the police power or of the power of eminent domain.' " *Kirby*, 368 N.C. at 854, 786 S.E.2d at 924 (2016) (quoting *Barnes v. N.C. State Highway Comm'n*, 257 N.C. 507, 514 126 S.E.2d 732, 737–38 (1962)). "Under the police power, the government *regulates* property to prevent injury to the public." *Id.* at 854, 786 S.E.2d at 924 (citation omitted). "Police power regulations must be 'enacted in good faith, and ha[ve] appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens.' " *Id.* at 854, 786 S.E.2d at 924 (quoting *City of Durham v. Eno Cotton Mills*, 141 N.C. 615, 642 54 S.E. 453, 462 (1906)) (alteration in original). But "[a]n exercise of police power outside these bounds may result in a taking." *Id.* at 854, 786 S.E.2d at 924.

The governmental action, or rather inaction, relevant here is Defendant's alleged refusal to review and process Plaintiff's application for a stormwater permit. Plaintiff alleged that Defendant's failure to act temporarily deprived Plaintiff's land of all economically-viable use. This falls within the scope of the police power. *See N.C. Dep't of Envtl. Quality v. Dev., LLC*, 259 N.C. App. 597, 607, 816 S.E.2d 232, 239 (2018) (explaining the enforcement of environmental regulations is a "core police power"). An "ends-means" test is used to determine whether an exercise of police power was excessive. *Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 351, 757 S.E.2d 466, 479 (2014). The test involves a "two-part inquiry" as to whether: (1) "the exercise of police power is legitimate, that is, whether the ends sought are within the scope of the power[;]" and (2) "the means chosen to regulate are reasonable." *Id.* at 339, 757 S.E.2d at 472 (cleaned up).

Here, Plaintiff alleged Defendant's failure to review or process its application for a stormwater permit until Plaintiff resolved the NOVs "deprived [Plaintiff] of all reasonable use of its property, and the value of [Plaintiff's property] was substantially impacted, and [Plaintiff] was deprived of the opportunity to make substantial profits." Plaintiff further alleged Defendant's conduct "lacked any real, rational or substantial relationship with health, safety, morals or the general welfare." Plaintiff's allegations were sufficient to allege a temporary regulatory taking as the Complaint sufficiently describes the conduct at issue, explains the conduct was not a proper exercise of the police power, and alleges a denial of the full use of its Property for the relevant time frame. At the motion to dismiss stage, taking all of Plaintiffs allegations as true, Plaintiff sufficiently alleged an unconstitutional temporary taking and a claim for inverse condemnation. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2023). Accordingly, we reverse and remand on this issue.

3. Due Process Claims

[2] Plaintiff also argues Defendant's refusal to process its stormwater permit application constituted a violation of its procedural and substantive due process rights. We disagree.

"The Fourteenth Amendment states that the government shall not 'deprive any person of life, liberty, or property, without due process of law.' " *Clayton v. Branson*, 170 N.C. App. 438, 451, 613 S.E.2d 259, 269 (2005) (quoting U.S. Const. amend. XIV, § 1). "Not every property interest requires procedural due process. A protected property interest arises when one has a legitimate claim of entitlement as decided by reference to state law." *Dyer v. Bradshaw*, 54 N.C. App. 136, 139, 282 S.E.2d 548, 550 (1981) (citation omitted). "While the United States Supreme Court has consistently held that some form of hearing is required prior to a final deprivation of a 'protected' property interest, the exact nature and mechanism of the required procedure will vary based upon the unique circumstances surrounding the controversy." *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998) (citation omitted).

As stated in *Godrey Lumber Co., Inc. v. Howard*, Defendant "could only have committed an unconstitutional deprivation if it failed to provide due process to [P]laintiff." 151 N.C. App. 738, 741, 566 S.E.2d 825, 827 (2002). In *Godrey*, this Court determined that through the Administrative Procedure Act and the contested case proceeding, the plaintiff received "constitutionally adequate due process of law." *Id.* at 740, 566 S.E.2d at 826. Similarly here, Plaintiff received "constitutionally adequate due process of law" because it obtained review of Defendant's actions in the contested case hearing in the OAH and beyond. *See id.* at 740, 566 S.E.2d at 826. Accordingly, the trial court did not err by dismissing Plaintiff's procedural due process claim.

"In general, substantive due process protects the public from government action that unreasonably deprives them of a liberty or property interest." *Town of Beech Mt. v. Genesis Wildlife Sanctuary, Inc.*, 247 N.C. App. 444, 459, 786 S.E.2d 335, 346 (2016) (cleaned up). To establish an as-applied violation of substantive due process, the plaintiff " 'must demonstrate (1) that [it] had property or a property interest; (2) that the state deprived [it] of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that *no process* could cure the deficiency.' " *Id.* at 460, 786 S.E.2d at 347 (quoting *MLC Auto., LLC v. Town of S. Pines*, 532 F.3d 269, 281 (4th Cir. 2008)). In deciding whether regulatory action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense," we consider, among other factors, whether: "(1) the [regulatory] decision is tainted with fundamental procedural irregularity; (2) the action is targeted at a single party; and (3) the action deviates from or is inconsistent with regular practice." *MLC Auto*, 523 F.3d at 281.

Here, Plaintiff did not allege that Defendant's regulatory decision making was targeted at Plaintiff or that Defendant's actions were inconsistent with its regular practice. Under these circumstances, Plaintiff did not adequately plead facts tending to show that Defendant's conduct "[fell] so far beyond the outer limits of legitimate governmental action that *no process* could cure the deficiency." *See Town of Beech Mt.*, 247 N.C. App. at 460, 786 S.E.2d at 347 (internal quotation marks and citation omitted). Thus, the trial court did not err in dismissing Plaintiff's substantive due process claim.

B. Partial Summary Judgment

[3] Next, Plaintiff asserts the trial court erred by denying its motion for partial summary judgment because Defendant should have been precluded from litigating issues raised and resolved by the ALJ under the principles of res judicata and collateral estoppel. We disagree.

1. Standard of Review

"We review a trial court order granting or denying a summary judgment motion on a *de novo* basis, with our examination of the trial court's order focused on determining whether there is a genuine issue of material fact and whether either party is entitled to judgment as a matter of law." *Bartley v. City of High Point*, 272 N.C. App. 224, 227, 846 S.E.2d 750, 754 (2020) (internal quotation marks and citation omitted). "In doing so, we view the evidence in the light most favorable to the nonmoving party and draw all inferences of fact against the movant and in favor of the nonmovant." *Id.* at 227, 846 S.E.2d at 754. "Summary judgment is appropriate if: (1) the non-moving party does not have a factual basis for each essential element of its claim; (2) the facts are not disputed and only a question of law remains; or (3) if the non-moving party is unable to overcome an affirmative defense offered by the moving party." *Hillsboro Partners, LLC v. City of Fayetteville*, 226 N.C. App. 30, 35, 738 S.E.2d 819, 823 (2013) (citation omitted).

2. ALJ Jurisdiction

We first address Defendant's assertion that res judicata and collateral estoppel cannot apply because the ALJ lacked jurisdiction to determine Plaintiff's "constitutional claims." It is a "well-settled rule that a *statute's constitutionality* shall be determined by the judiciary, not an administrative board." *Carolinas Med. Ctr. Emp'rs & Carriers*, 172 N.C. App. 549, 553, 616 S.E.2d 588, 591 (2005) (emphasis added). Here, Plaintiff did not challenge the constitutionality of a statute or regulation during the contested case hearing, instead pursuing other issues—including those explicitly listed in section 150B-23 (a)(1)–(5). *See* N.C. Gen. Stat. § 150B-23 (a)(1)–(5) (2023) (providing the proper procedure and pleading requirements for commencement of a contested case hearing). Thus, the precedent offered by Defendant on this issue, which concerns challenges to an ALJ's determination that a particular statute was unconstitutional, are distinguishable. In our view, the ALJ had jurisdiction to consider the specific issues Plaintiff alleged in its petition for contested case hearing. *See id.*

3. Res Judicata & Collateral Estoppel

Res judicata and collateral estoppel "generally appl[ly] to administrative decisions." *Hillsboro Partners, LLC*, 226 N.C. App. at 36, 738 S.E.2d at 824; *see Intersal, Inc. v. Hamilton*, 373 N.C. 89, 107, 834 S.E.2d 404, 417 (2019) ("The fact that the original claim arose in a quasi-judicial administrative hearing does not preclude the applicability of res judicata.") (citation omitted). With respect to issue preclusion, "[e]ssential issues of fact which have been litigated and determined by an administrative decision [are] conclusive between the parties in a subsequent action." *Maines v. City of Greensboro*, 300 N.C. 126, 133, 265 S.E.2d 155, 160 (1980). But whether an administrative decision will be given collateral estoppel or res judicata effect "depends on its nature." *Catawba Mem'l Hosp. v. N.C. Dep't of Hum. Res.*, 112 N.C. App. 557, 565, 436 S.E.2d 390, 394 (1993) (internal quotation marks and citation omitted). Collateral estoppel or res judicata will not apply to a decision that was "purely administrative," but may apply if the decision was "quasi-judicial." *Hillsboro Partners, LLC*, 226 N.C. at 36, 738 S.E.2d at 824 (citing *In re Mitchell*, 88 N.C. App. 602, 605, 364 S.E.2d 177, 179 (1988)). "Though the distinction between a 'quasi-judicial' determination and a purely 'administrative' decision is not precisely defined, [our] courts have consistently found decisions to be quasi-judicial when the administrative body adequately notifies and hears before sanctioning, and when it adequately provides under legislative authority for the proceeding's finality and review." *In re Mitchell*, 88 N.C. App. at 605, 364 S.E.2d at 179.

Here, the ALJ's Final Decision was not purely administrative because the parties were notified of the proceedings beforehand and were provided an opportunity to appeal pursuant to section 150B-45. Thus, the OAH proceeding satisfied both requirements of a quasi-judicial determination and the ALJ's Final Decision may have res judicata or collateral estoppel effect.

Having determined the contested case hearing was quasi-judicial, we address the applicability of res judicata and collateral estoppel. "Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Intersal*, 373 N.C. at 107, 834 S.E.2d at 417 (citation omitted). For res judicata to apply, a litigant must show: "(1) final judgment on the merits in an earlier lawsuit; (2) an identity of the cause of action in the prior suit and in the later suit; and (3) an identity of parties or their privies in both suits." *Nicholson v. Jackson Cty. Sch. Bd.*, 170 N.C. App. 650, 654, 614 S.E.2d 319, 322 (2005) (citation omitted). Although we often use the terms "claim" and "cause of action" interchangeably in our jurisprudence, the focus of res judicata analysis is on the underlying claim or claims supporting the legal theories or causes of action. *See Epcon Homestead, LLC v. Town of Chapel Hill*, 294 N.C. App. 653, 657, 905 S.E.2d 83, 87 (2024) ("Although seemingly synonymous, claims and causes of action are distinct."). "[A] claim is a pattern of allegations that may, or may not, support a cause of action." *Id.* at 657, 905 S.E.2d at 87. "A cause of action, on the other hand, is the legal theory or 'vehicle for pursuing a claim.' " *Venters v. City of Raleigh*, 302 N.C. App. 322, 923 S.E.2d 893, (2025) (unpublished) (quoting *Epcon Homestead LLC*, 294 N.C. App. at 657, 905 S.E.2d at 87)). The distinction may be material in this context because "[w]hen a party asserts a previously adjudicated claim in a later lawsuit, it is 'clear that subsequent actions which attempt to proceed by asserting a new legal theory or by seeking a different remedy are prohibited under principles of res judicata.' " *Epcon Homestead LLC*, 294 N.C. App. at 657, 905 S.E.2d at 87 (emphasis omitted) (quoting *Bockweg v. Anderson*, 333 N.C. 486, 494, 428 S.E.2d 157, 163 (1993)).

For collateral estoppel to apply, the following elements must be met:

> (1) the issues to be concluded are the same as those involved in the prior action; (2) the issues in the prior action were raised and actually litigated; (3) the issues were material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action was necessary and essential to the resulting judgment.

Nicholson, 170 N.C. App. at 655, 614 S.E.2d at 322 (citation omitted).

"The primary difference between the two doctrines is res judicata precludes a party 'from bringing a subsequent action based on the 'same claim' as that litigated in an earlier action,' while collateral estoppel 'precludes the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim.' " *Farmers & Merchs. Bank v. Henley*, 300 N.C. App. 256, 264, 920 S.E.2d 886, 893 (2025) (emphasis omitted) (quoting *Whitacre P'ship v. Biosignia Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004)). "Though distinct, both doctrines 'advance the twin policy goals of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation.' " *Id.* at 264–65, 920 S.E.2d at 893 (quoting *Whitacre*, 358 N.C. at 15–16, 691 S.E.2d at 880).

Issue preclusion has potential offensive and defensive applications. Defensive use occurs where a "stranger to the judgment, ordinarily the defendant in the second action, 'relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an element of his defense.' " *Shehan v. Gaston County*, 190 N.C. App. 803, 807, 661 S.E.2d 300, 303 (2008) (quoting *Mays v. Clanton*, 169 N.C. App. 239, 241, 609 S.E.2d 453, 455 (2005)). Offensive use occurs where the plaintiff "seeks to foreclose the defendant from relitigating an issue that the defendant has previously litigated unsuccessfully in another action . . . ." *Rymer v. Estate of Sorrells*, 127 N.C. App. 266, 269, 488 S.E.2d 838, 840 (1997).

When a plaintiff utilizes collateral estoppel offensively, as is the case here:

> [It] might be unfair to a defendant, if among other things: (1) the defendant had little incentive to defend vigorously in the first action; (2) the judgment relied upon as the

> basis for the estoppel is inconsistent with previous judgments; and (3) the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.

Id. at 270, 488 S.E.2d at 841 (citing *Parklane Hosiery Company v. Shore*, 439 U.S. 322, 330–31, 99 S. Ct. 645, 651–52, 58 L. Ed. 2d 552, 561–62 (1979)).

Here, in its petition for contested case hearing, Plaintiff's primary claim was its entitlement to a stormwater permit. In support of this claim, Plaintiff made several allegations consistent with section 150B-23. *See* N.C. Gen. Stat. § 150B-23(a)(1)–(5). Plaintiff alleged Defendant: (1) deprived Plaintiff of property; (2) exceeded its authority or jurisdiction; (3) acted erroneously; (4) failed to use proper procedure; (5) acted arbitrarily or capriciously; (6) failed to act as required by law or rule; and (7) otherwise substantially prejudiced Plaintiff's rights. The parties are the same as the OAH proceeding and are positioned in the same adversarial roles. The ALJ issued a Final Decision, but the contested case hearing did not adjudicate the types of issues raised in the Complaint—whether Defendant's alleged refusal to process Plaintiff's application for a stormwater permit constituted a taking without the payment of just compensation, an inverse condemnation, or a violation of due process. Though Plaintiff alleged Defendant deprived Plaintiff of property and substantially prejudiced Plaintiff's rights, the trial court action was not a "second suit based on the same cause of action," *see Intersal*, 373 N.C. at 107, 834 S.E.2d at 417 (citation omitted), because the legal theories Plaintiff asserted in its Complaint—inverse condemnation, unconstitutional taking, and violations of procedural and substantive due process—were not the subject of the prior action. In fact, section 150B-23(a)(1)–(5) seemingly acts to limit the issues a petitioner may bring forth when commencing a contested case hearing. *See* N.C. Gen. Stat. § 150B-23(a)(1)–(5). Thus, res judicata did not apply and the trial court properly denied Plaintiff's motion for partial summary judgment on this basis.

Plaintiff's collateral estoppel argument also fails. Assuming without deciding that the elements of collateral estoppel were present, the trial court did not err by denying Plaintiff's motion for partial summary judgment on this basis because it would have been "unfair" to allow Plaintiff to use the doctrine offensively under the facts and circumstances of this case. *See Rymer*, 127 N.C. App. at 270, 488 S.E.2d at 841. The ALJ lacked the authority to award Plaintiff money damages, a remedy that is available in the current action. Because Defendant "had little incentive to defend vigorously" in the OAH proceeding, the trial court did not err by denying Plaintiff's motion for partial summary judgment based on collateral estoppel. *See id.* at 270, 488 S.E.2d at 841. Accordingly, we affirm the trial court's denial of Plaintiff's motion for partial summary judgment.

C. Declaratory Judgment

Lastly, Plaintiff argues it was entitled to declaratory relief as to "the legal applicability of the doctrines of res judicata and collateral estoppel to the factual determinations set forth in the Final Decision." Because the trial court properly determined that neither doctrine applied, Plaintiff was not entitled to declaratory relief. Accordingly, we affirm.

V. Conclusion

The trial court partially erred by granting Defendant's motion to dismiss as to Plaintiff's inverse condemnation and unconstitutional temporary takings claim but did not err by granting Defendant's motion to dismiss the due process violations. The trial court did not err by denying Plaintiff's motion for partial summary judgment or request for declaratory judgment. Accordingly, we affirm in part, reverse in part, and remand.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges STROUD and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
RICHARD D. BRASWELL, Defendant

No. COA25-286

Filed 21 January 2026

Evidence—impeachment—bias and lying or mistaking the facts of particular case—rehabilitative evidence of character for truthfulness—error

In a trial for taking indecent liberties with a child, in which the victim testified as a main witness, the trial court abused its discretion in allowing the State to introduce evidence of the victim's good character for truthfulness following her cross-examination, during which defendant questioned the victim about prior inconsistent statements she had made in her previous accounts of the alleged incident, highlighted her delay in disclosing the incident, and attempted to expose the victim's potential bias against defendant after he reported her mother for violating probation. Defendant's impeachment of the victim was not aimed at suggesting that she was a liar in general, but rather that she was either lying or mistaken about the facts of this particular case. Accordingly, defendant's impeachment of the victim—though certainly an attack on her credibility as a witness—was not an attack on her character for truthfulness and, therefore, did not open the door to introducing rehabilitative evidence of her good character for truthfulness under Evidence Rule 608(a)(2). Furthermore, the admission of this rehabilitative evidence prejudiced defendant where the victim's credibility was the central issue of the trial. On appeal, the judgment entered upon defendant's conviction was vacated and the case was remanded for a new trial.

Appeal by Defendant from judgment entered 7 October 2024 by Judge W. Taylor Browne in Johnston County Superior Court. Heard in the Court of Appeals 16 October 2025.

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

Gammon & Zeszotarski, PLLC, by Joseph E. Zeszotarski, Jr., for Defendant-Appellant.

CARPENTER, Judge.

Richard D. Braswell ("Defendant") appeals from judgment entered after a jury found him guilty of one count of taking indecent liberties with a child. On appeal, Defendant argues the trial court erred by allowing the State to introduce evidence of the accusing witness's good character for truthfulness and admitting an officer's statements improperly vouching for the accusing witness's credibility. After careful review, we vacate the trial court's judgment and remand for a new trial.

I. Factual & Procedural Background

On 1 August 2022, a Johnston County grand jury indicted Defendant for one count of taking indecent liberties with a child. On 23 September 2024, Defendant's case proceeded to trial, and the evidence tended to show the following.

P.B. ("Penny") and her twin brother, Paul, (collectively, the "Twins")[1] were born in December 2008 and lived with their grandparents for most of their childhood. The Twins' mother had substance abuse issues and was incarcerated several times, whereas their father, who did not live with the family, struggled with alcoholism. Although Penny and her father "weren't the closest," Penny "loved [her] dad." Penny and Defendant's daughter, Kate, were best friends. Through her friendship with Kate, Penny became close with Defendant and his wife.

After the Twins' father took his own life in 2018, the Twins began spending more time with Defendant's family. Eventually, Penny came to think of Defendant and his wife as "second parents." Defendant and his wife "cared" for the Twins and "took [them] places," including Defendant's beach house, church, and family vacations. The Twins also spent Christmas with Defendant's family and regularly received gifts from Defendant. Defendant told Penny he planned to put a house in her name. Defendant also told Paul that he planned to put eight acres of land in Paul's name.

Penny was a cheerleader and ran track with Kate. Defendant often attended Penny's cheerleading events and the girls' track meets and award ceremonies. After track meets, Defendant occasionally gave Penny and Kate calf massages. On one occasion, Defendant massaged Penny's calves while she was at the beach with Defendant's family.

1. Pseudonyms are used to protect the identities of the minor children and for ease of reading. *See* N.C. R. App. P. 42(a).

Defendant also massaged Penny's thighs at his beach house—once in the living room and once in his bedroom in Paul's presence. Penny did not think Defendant's calf massages were unusual but "knew something wasn't right" when Defendant massaged her thighs.

When Penny was approximately twelve, she started working in the office at Defendant's RV park. Paul also occasionally performed "outside work" at the RV park. Defendant's older daughter, Amanda, regularly worked at the RV park. On 18 April 2022, while Penny was working at the RV park, Defendant asked Penny to meet him in the conference room. At the time, Paul was outside "bush hogging." Amanda was not working that day.

According to Penny, once she and Defendant were alone and seated at the table in the conference room, Defendant "told [Penny] to put [her] legs on his legs." After Penny did so, Defendant began massaging Penny's calves then moved his hands to Penny's thighs. While massaging Penny's thighs, Defendant "got close, pretty close, very close" to Penny's vagina. Then, Defendant unbuttoned and unzipped Penny's pants and "went under [her] underwear." Defendant touched the outside of Penny's vagina with his fingers. Penny did not know what to do but "knew it was wrong." Defendant asked Penny if "it felt good," but she did not respond. Defendant stopped touching Penny when she said she had to go to the bathroom. When Penny came out of the bathroom, Defendant told Penny that "he wanted [her] to experience this because [her] dad wasn't here to let [her]."

Later that day, Defendant took the Twins home. At first, Penny did not tell anyone about the inappropriate touching; instead, she "tried to act like it didn't happen." Penny was concerned that if she told someone about the inappropriate touching, "they wouldn't believe [her]." Penny tried to avoid being alone with Defendant but rode in the car with him from his beach house during Memorial Day weekend. Before travelling back to Johnston County, Defendant and Penny drove to pick up Paul from a friend's house. At that time, Defendant again massaged Penny's thighs.

A few months later, on 5 June 2022, Penny disclosed the improper touching to a friend during a birthday party at Defendant's house. Earlier that day, the Twins attended church with Defendant and his family. After church, everyone gathered at Defendant's house to eat and swim in the neighborhood pool. Penny changed into her bathing suit upstairs then joined Kate in Defendant's bathroom. When Penny and Kate began to exit the bathroom, Defendant stood in the doorway, and Penny felt "traumatized all over again." Penny entered the living room and informed her friend, Mia, that Defendant had "touched [her] inappropriately" in the conference room at the RV park. Mia told Penny that she should tell Kate and Defendant's wife what happened.

Penny informed Kate first, then Defendant's wife with Kate present. Penny, Kate, Mia, and Defendant's wife all cried. Afterward, Penny went to the pool with her friends for a few minutes before Defendant's wife took the Twins home. When they got home, Penny told her grandmother about the inappropriate touching at the RV park. Penny's grandmother called their pastor, Dennis Pollock, who arrived at the house to "pray[] over" everyone. The next morning, Penny went to the Johnston County Sheriff's Office with Paul and her grandparents to report the inappropriate touching.

Detective Meredith Langston interviewed Penny. Subsequently, Detective Langston and Major Jeff Caldwell interviewed Defendant. During his interview, Defendant denied touching Penny inappropriately. Detective Langston interviewed Penny a second time on 8 June 2024. On 24 June 2024, Penny provided a written narrative describing her version of events to the Johnston County District Attorney's Office.

Later that month, Penny visited the TEDI Bear clinic for a forensic interview and physical examination. Kendall Maready, a nurse practitioner admitted as an expert "in the area of family nurse practitioning and child medical evaluations," testified regarding Penny's visit to the TEDI Bear Clinic. Maready opined that Penny's presentation was consistent with child sexual abuse.

On Penny's cross-examination, Defendant challenged her credibility by pointing out inconsistencies in her trial testimony, interviews, and written narrative. Defendant also emphasized Penny's delayed disclosure and questioned whether Penny was upset with Defendant for reporting that Penny's mother was using drugs in violation of her probation. Based on Defendant's impeachment of Penny, the trial court allowed the State to present evidence of Penny's good character for truthfulness. Thereafter, five of the State's witnesses, including Kate, Mia, Pastor Pollock, Defendant's wife, and Student Pastor Stephen Braswell, testified as to Penny's good character for truthfulness. The jury found Defendant guilty of one count of taking indecent liberties. The trial court sentenced Defendant to between twenty and thirty-three months in custody of the Department of Adult Correction. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a1) (2023).

III. Issues

The issues are whether the trial court erred by allowing the State to introduce evidence of Penny's good character for truthfulness and admitting an officer's statements improperly vouching for Penny's credibility.

IV. Analysis

Defendant asserts the trial court erred by allowing five of the State's witnesses to testify regarding Penny's good character for truthfulness because Defendant did not open the door to this testimony. Defendant argues his impeachment of Penny, which included scrutiny of Penny's prior inconsistent statements and an attempt to expose Penny's potential bias toward Defendant, was not an attack on Penny's character for untruthfulness. We agree.

"The trial court's decision to exclude or admit evidence is generally reviewed under an abuse of discretion standard of review." *State v. Morgan*, 183 N.C. App. 160, 168, 645 S.E.2d 93, 100 (2007) (citing *State v. Hyatt*, 355 N.C. 642, 662, 566 S.E.2d 61, 74 (2002)). " 'An abuse of discretion results only where a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Black*, 197 N.C. App. 731, 733–34, 678 S.E.2d 689, 691 (2009) (quoting *Clark v. Sanger Clinic, P.A.*, 175 N.C. App. 76, 84, 623 S.E.2d 293, 299 (2005)). An abuse of discretion may occur where the trial court "acts under a misapprehension of law." *Cash v. Cash*, 284 N.C. App. 1, 7, 874 S.E.2d 653, 658 (2022) (citing *Riviere v. Riviere*, 134 N.C. App. 302, 307, 517 S.E.2d 673, 676 (1999)).

In general, the term "impeachment" refers to "an attack upon the credibility of a witness." *State v. Anderson*, 88 N.C. App. 545, 548, 364 S.E.2d 163, 165 (1988). " '[T]he primary purpose of impeachment is to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to [her] testimony in arriving at the ultimate facts in the case.' " *Hill v. Boone*, 279 N.C. App. 335, 347, 865 S.E.2d 722, 729 (2021) (quoting *State v. Bell*, 249 N.C. 379, 381, 106 S.E.2d 495, 498 (1959)). Impeachment is a powerful tool, particularly in cases that turn on a witness's credibility, because skillful impeachment of the complaining witness could sway the jury.

Litigants have a variety of options to impeach a witness. For example, our Rules of Evidence allow: reputation or opinion evidence of a witness's character for untruthfulness; inquiry on cross-examination into specific conduct if probative of untruthfulness; and evidence of prior convictions involving felonies and crimes of dishonesty. *See* N.C. Gen. Stat. § 8C-1, Rules 608(a), 608(b), & 609 (2023). Litigants may question a witness's perception of relevant events by highlighting issues with their memory or sensory capabilities. *See State v. Williams*, 330 N.C. 711, 720, 412 S.E.2d 359, 364–65 (1992); *see also Anderson*, 88 N.C. App. at 548, 364 S.E.2d at 165 (explaining impeachment "is accomplished by such methods as showing . . . defective ability to observe, remember, or recount the matter about which the witness testifies"). Similarly, scrutinizing a witness's prior inconsistent statements and suggesting bias are permissible means to attack credibility. *See* N.C. Gen. Stat. § 8C-1, Rules 610 & 613 (2023); *see also Anderson*, 88 N.C. App. at 548, 364 S.E.2d at 165. Finally, other methods of impeachment may be implicitly permitted by our Rules. *See* N.C. Gen. Stat. § 8C-1, Rule 607 (2023) ("The credibility of a witness may be attacked by any party, including the party calling him."); *see also* N.C. Gen. Stat. § 8C-1, Rule 611(b) (2023) ("A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.").

Not all attacks on credibility, however, trigger rehabilitative evidence of a witness's character for truthfulness under Rule 608(a)(2). *See* N.C. Gen. Stat. § 8C-1, Rule 608(a)(2) (2023). Rule 608(a)(2) provides, in pertinent part, that "evidence of truthful character is admissible only after the *character of the witness for truthfulness* has been attacked by opinion or reputation evidence or otherwise." *Id.* (emphasis added). Put differently, litigants are restricted from presenting evidence of a witness's character for truthfulness until that witness's character for untruthfulness, not their credibility in general, has been attacked. *See id.* "Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty . . . ." *State v. Baldwin*, 125 N.C. App. 530, 536, 482 S.E.2d 1, 5 (1997) (internal quotation marks and citation omitted). Therefore, we first examine which impeachment methods implicate a witness's character for untruthfulness and which ones do not.

While not controlling, federal case law interpreting and applying Rule 608(a)'s federal counterpart is instructive on the difference between attacks on credibility that challenge a witness's character for untruthfulness and those that do not—an issue our courts have yet to thoroughly address.[2] *See, e.g.*, *State v. Wilson*, 322 N.C. 117, 132, 367

2. The Official Commentary to Rule 608(a) states "[t]his rule is identical to Fed. R. Evid. 608, except for the addition of the phrase 'as provided in Rule 405(a)' to subdivision (a)."

S.E.2d 589, 598 (1988) ("Since the case law concerning collateral statements under this rule of evidence in this State is negligible, we shall look to the federal courts for guidance on this point in interpreting its federal counterpart."); *E. Bay Co., Ltd. v. Baxley*, 296 N.C. App. 444, 450, 909 S.E.2d 533, 536 (2024) ("When this Court reviews an issue of first impression, it is appropriate to look to decisions from other jurisdictions for persuasive guidance.") (citing *Skinner v. Preferred Credit*, 172 N.C. App. 407, 413, 616 S.E.2d 676, 680 (2005)).

In drawing the distinction, federal courts analyze whether the attack on credibility was "indirect" or "direct." *See United States v. Dring*, 930 F.2d 687, 691 (9th Cir. 1991); *see also Renda v. King*, 347 F.3d 550, 554 (3d Cir. 2003). Impeachment methods challenging a witness's "*general character* for truthfulness"—that is, methods tending to show that the witness is a liar in general—constitute "indirect" attacks that trigger rehabilitative evidence under Rule 608(a)(2). *See Dring*, 930 F.2d at 691 (emphasis added). This is because such impeachment evidence "require[s] the jury to infer that the witness is lying at present simply because he has lied often in the past." *King*, 347 F.3d at 550 (explaining indirect attacks "directly call into question the witness's moral character for truthfulness"). For example, opinion or reputation evidence of a witness's character for untruthfulness elicited under Rule 608(a) constitutes an attack sufficient to warrant rehabilitative evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 608(a). Likewise, impeachment evidence elicited under Rule 609 qualifies as an attack on a witness's character for untruthfulness because "[t]he premise behind [this] rule is that a witness who has previously been convicted of a felony, or a crime involving dishonesty or a false statement, is more likely to lie than is a person with a spotless past." *United States v. Norton*, 26 F.3d 240, 243 (1st Cir. 1994).

On the other hand, impeachment methods challenging whether the witness is being truthful "*in the instant case*" constitute "direct" attacks that do not automatically trigger rehabilitative evidence. *Dring*, 930 F.2d at 691 (emphasis added). For instance, pointing out inconsistencies in prior statements does not qualify as an attack on a witness's character for untruthfulness. *See, e.g.*, *State v. Aguilar*, 292 N.C. App. 596, 604, 898 S.E.2d 914, 920 (2024) (determining that defense counsel's impeachment

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N.C. Gen. Stat. § 8C-1, Rule 608(a) cmt. Indeed, Rule 608(a) is substantially the same as Rule 608(a) of the Federal Rules of Evidence. *Compare* N.C. Gen. Stat. § 8C-1, Rule 608(a), *with* Fed. R. Evid. 608(a). Fed. R. Evid. 608(a) provides, in pertinent part, that "evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked." Fed. R. Evid. 608(a).

methods, which included pointing out inconsistent statements, did not implicate Rule 608(a)); *State v. Caballero*, 383 N.C. 464, 479, 880 S.E.2d 661, 671 (2022) (determining that pointing out inconsistencies in prior statements does not trigger rehabilitative evidence under Rule 608(a)). This is because pointing out inconsistencies in prior statements implies that the witness is mistaken or misrepresenting the facts of the instant case—not that they are a liar in general. *See Dring*, 930 F.2d at 691–92.

Our Courts have not yet addressed evidence or questions concerning bias in this context. Nevertheless, we conclude a suggestion of bias, like a suggestion that the witness has been inconsistent regarding the facts of the case, does not constitute an attack on the witness's character for untruthfulness. Instead, such evidence tends to imply the witness is being untruthful because she has a reason or motivation to lie—not that she is a liar in general. *See Dring*, 930 F.2d at 691 ("[E]vidence of a witness's bias for or against a party in the instant case, or evidence of a witness's interest in the outcome of the instant case, constitutes a direct attack that does not trigger rehabilitation under Rule 608(a)[] . . . [because] [s]uch evidence directly undermines the veracity and credibility of the witness in the instant case . . . ."). The Official Commentary to North Carolina Rule of Evidence 608(a) supports our conclusion. The Commentary clarifies that:

> Opinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence of misconduct, including conviction of crime, and of corruption also fall within this category. Evidence of bias or interest does not. Whether evidence in the form of contradiction is an attack upon the character of the witness must depend upon the circumstance.

N.C. Gen. Stat. § 8C-1, Rule 608 cmt. (citing McCormick §49; 4 Wigmore §§ 1106, 1107).

In sum, a party only opens the door to rehabilitative testimony concerning a witness's good character for truthfulness if he employs an impeachment method attacking the witness's character for untruthfulness—*i.e.*, a method implicating the witness as a liar in general. *See* N.C. Gen. Stat. § 8C-1, Rule 608(a). Opinion or reputation evidence of a witness's character for untruthfulness and any "other" impeachment method attacking a witness's character for untruthfulness qualifies under this Rule. *See id.* (providing rehabilitative evidence is only admissible after the witness's character for untruthfulness "has been attacked by opinion or reputation evidence *or otherwise*") (emphasis added).

Were we to hold differently, any attack on credibility aside from opinion or reputation evidence of a witness's character for untruthfulness under Rule 608(a) would result in rehabilitative evidence bolstering the witness's good character for truthfulness. *See id.* Instead, the key consideration is whether the impeaching party suggested that the witness is lying or mistaken about the instant case or is a liar in general. *See Dring*, 930 F.2d at 691. The distinction is narrow, but decisive.

Here, Defendant challenged Penny's credibility by pointing out certain inconsistencies between her trial testimony and prior statements. For example, Defendant suggested that Penny had been inconsistent regarding why she ultimately disclosed the inappropriate touching. Defendant also highlighted certain details in Penny's testimony that she failed to disclose during her interviews with Detective Langston and the TEDI Bear clinic. Additionally, Defendant attempted to establish Penny's bias against Defendant because Defendant reported Penny's mother to the probation office. Specifically, defense counsel asked Penny:

> **Defense counsel:** Do you remember that in 2022, right around the time of all these things that we're talking about, do you remember that [Defendant] actually found your mom to be using drugs and turned her into probation?
>
> **Witness:** Yes, sir, but I don't have control over what my mom does.
>
> **Defense counsel:** And as a result of [Defendant] doing that, your mom wound up going back into prison, right?
>
> **Witness:** Yes, sir.
>
> **Defense counsel:** And you were upset about that, weren't you, ma'am?
>
> **Witness:** I don't remember.
>
> **Defense counsel**: You don't remember whether you were upset?
>
> **Witness:** No, sir. She's been in and out so much, I don't really remember.

The State contends Defendant's impeachment, as a whole, constituted an attack on Penny's character for untruthfulness sufficient to warrant rehabilitative evidence under Rule 608(a)(2). But none of Defendant's impeachment methods portrayed Penny as a liar in general. On the contrary, Defendant's questions concerning Penny's inconsistent statements and failures to disclose certain details implied she was mistaken or lying about the facts of the case. These attacks on credibility do not trigger rehabilitative evidence. *See Caballero*, 383 N.C. at 479, 880

S.E.2d at 671; *see also Aguilar*, 292 N.C. App. at 604, 898 S.E.2d at 920. The same is true for Defendant's questions attempting to establish bias. *See Dring*, 930 F.2d at 691. Thus, Rule 608(a) was not triggered in this case, and the evidence concerning Penny's good character for truthfulness was improperly admitted.

In determining whether to allow the rehabilitative evidence, the trial court considered Defendant's questions about Penny's prior inconsistent statements and the questions about her potential bias, concluding Penny's "character for truthfulness [had been] sufficiently attacked." Defendant also elicited evidence "of a motivation to fabricate," which the trial court reasoned took the impeachment evidence "one step further." The trial court concluded that because Defendant implied Penny was either lying or mistaken about the events in question, evidence bolstering her character for truthfulness was admissible. The trial court's application of what was, in essence, a totality of the circumstances test was not the proper standard to evaluate whether Defendant attacked Penny's character for untruthfulness.

Further, implying a witness is mistaken or lying about the facts of the case does not automatically trigger rehabilitative evidence under Rule 608(a)(2). *See Dring*, 930 F.2d at 691. As outlined above, the triggering event is impeachment implying the witness is a liar in general. The trial court misapprehended the law because it assessed Defendant's impeachment of Penny in totality and erroneously concluded that credibility attacks implying the witness is lying or mistaken trigger rehabilitative evidence. *See Caballero*, 383 N.C. at 479, 880 S.E.2d at 671; *see also Aguilar*, 292 N.C. App. at 604, 898 S.E.2d at 920. Accordingly, we conclude the trial court abused its discretion by allowing the testimony concerning Penny's character for truthfulness.

Having established the rehabilitative testimony was improperly admitted, we next consider whether Defendant was prejudiced. To establish prejudice, the defendant must demonstrate "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *Aguilar*, 292 N.C. App. at 604, 898 S.E.2d at 920 (citing N.C. Gen. Stat. § 15A-1443(a) (2023)). Defendant argues the improper rehabilitative testimony prejudiced him because the case hinged on Penny's credibility. We agree.

Here, the State's evidence consisted of the testimony of Penny and others given in reliance on Penny's re-telling of the events that transpired at the RV Park. There was no physical evidence of inappropriate touching. After defense counsel called Penny's credibility into question about the facts of the case, five of the State's witnesses testified that Penny generally had a good character for truthfulness. Kate testified that Penny has a "very strong reputation for truthfulness in the community." Mia testified that Penny "is very truthful, doesn't lie." Pastor Pollock testified that Penny had a "good" reputation for truthfulness. Defendant's wife testified that Penny "is an honest young lady." Finally, Pastor Braswell testified that Penny's "reputation [for truthfulness] is great."

Because Penny's credibility was the central issue in this case, we conclude the rehabilitative testimony was prejudicial. Absent the testimony concerning Penny's good character for truthfulness, there is a reasonable possibility that the outcome of Defendant's trial would have been different. *See Aguilar*, 292 N.C. App. at 604, 898 S.E.2d at 920. Not only did the rehabilitative witnesses include religious leaders and a member of Defendant's own family, but the number of witnesses reinforcing the message that Penny was honest likely had a powerful impact on the jury. Defendant's cross-examination of Penny raised questions as to her credibility, which were diminished by Kate, Mia, Pastor Pollock, Defendant's wife, and Pastor Braswell. *See Aguilar*, 292 N.C. App. at 605, 898 S.E.2d at 921 (citing *State v. Aguallo*, 318 N.C. 590, 599, 350 S.E.2d 76, 82 (1986)). Therefore, we conclude the improper testimony was prejudicial. Accordingly, we vacate and remand for a new trial. Because this issue is dispositive, we do not reach Defendant's remaining argument.

V. Conclusion

The trial court erred by allowing five of the State's witnesses to testify concerning Penny's general good character for truthfulness because Defendant did not open the door to this testimony. Defendant was prejudiced by the error. We therefore vacate and remand for a new trial.

NEW TRIAL.

Judges HAMPSON and FREEMAN concur.

STATE OF NORTH CAROLINA
v.
DWAYNE HAIZLIP, Defendant

No. COA25-469

Filed 21 January 2026

Constitutional Law—right to counsel—forfeiture—retroactive application of new rule—procedural bar—ability to raise issue in previous motion

Where defendant was procedurally barred from claiming that he was denied his constitutional right to counsel in a criminal trial, pursuant to N.C.G.S. § 15A-1419(a)(1), the trial court's order denying defendant's second motion for appropriate relief (MAR) was affirmed. Defendant was in a position to adequately raise a newly-formulated rule regarding forfeiture of counsel in a prior MAR but failed to do so; the new rule, set forth in *State v. Simpkins*, 373 N.C. 530 (2020), predated defendant's first MAR by five months. Further, defendant failed to demonstrate that he was entitled to either exception to the procedural bar under section 15A-1419(b): first, there was no good cause to excuse the procedural bar because, although *Simpkins* announced a new rule for retroactivity purposes, defendant's failure to raise the new rule was not as a result of the announcement of the new forfeiture standard and, second, any argument that a fundamental miscarriage of justice had occurred was insufficiently supported and thus deemed abandoned.

Appeal by defendant from order entered 20 March 2024 by Judge Tonia A. Cutchin in Guilford County Superior Court. Heard in the Court of Appeals 19 November 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Zachary K. Dunn, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

FLOOD, Judge.

Defendant Dwayne Haizlip appeals from the trial court's order denying his motion for appropriate relief ("MAR"). On appeal, Defendant argues the trial court erred in denying his MAR for three reasons:

first, the trial court erred in determining that his claim was procedurally barred; second, there has been a retroactively effective change in applicable law pertaining to forfeiture of counsel affecting his MAR; and, third, he did not waive or forfeit his right to counsel. After careful review, we conclude Defendant's claim is procedurally barred under N.C.G.S. § 15A-1419(a)(1). We therefore affirm the trial court's denial of his MAR and deny Defendant's request for a new trial.

I. Factual and Procedural Background

On 2 July 2012, a Guilford County Grand Jury indicted Defendant on charges of trafficking in cocaine by possession, trafficking in cocaine by transportation, possession with intent to sell and deliver cocaine, and attaining the status of a habitual felon. Following a jury verdict finding Defendant guilty, the trial court entered a judgment imposing two concurrent sentences of 144–185 months in prison to run after expiration of any sentence he was already serving.[1]

After he was indicted, Defendant initially hired private Attorney A. Wayne Harrison to represent him at trial. On 12 March 2013, the morning of Defendant's trial, Attorney Harrison made a motion to withdraw as counsel. Defendant stated, "I don't want this man representing me and I don't know enough about the law to represent myself." After an inquiry by the trial court, Defendant requested that the trial court discharge Attorney Harrison.

The trial court denied Attorney Harrison's motion to withdraw but allowed Defendant's motion to discharge his attorney. In denying Attorney Harrison's motion, the trial court noted that "mere disagreement over trial tactics, or deterioration of relationship . . . is insufficient to allow the motion." The case was then set for trial on 20 May 2013. The trial court informed Defendant that he would need to hire an attorney for the new trial date. After the trial court reinformed Defendant of the charges against him, the trial court recapitulated Defendant's desires that he "[did not] want to represent [him]self," did "not wish [to have] court-appointed counsel," and "wish[ed] to retain [his] own attorney," all of which Defendant confirmed. The trial court then had Defendant fill out and sign a Waiver of Counsel form, Form AOC-CR-227. When filling out the Waiver of Counsel form, Defendant checked Box 1, which

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1. Because Defendant's appeal focuses on the court's alleged denial of Defendant's right to counsel on the day of trial, the facts of Defendant's underlying conviction are largely irrelevant to this appeal. Thus, this statement of facts focuses primarily on issues related to Defendant's right to counsel.

addressed solely the waiver of assigned counsel, but he did not check Box 2, which would have indicated a waiver of all assistance of counsel.

After Defendant signed the waiver of assigned counsel, the trial court advised Defendant on the urgency of obtaining hired counsel:

> You're going to have to do this mighty quickly because, again, they [have] 60 days to get ready. The case is set [for] May 20th for trial. . . .
>
> In any event, you need to work on this as quickly as you can so the matter can be tried May the 20th. In your review in court, we'll see that the [c]ourt has bent over backwards to let you state your reasons for the record. . . . I'm going to give you this 60 days to go out and hire you another lawyer and see what you can do with your case.

Defendant indicated he understood and thanked the court. Defendant then requested that he be released from local jail and transferred back to the prison, as it would assist him in hiring new counsel. The State indicated it would do "[w]hatever [it] can to accommodate [Defendant] and his arrangements for an attorney," including "releasing him from his writ" that week. The trial court warned Defendant, however, that "[t]his is a problem of your own making, so you're going to have to go out and find an attorney now, [wherever] you're situated." Although the Record does not reflect that the trial court orally warned Defendant at any time he would be forced to proceed without counsel if he did not hire an attorney prior to 20 May 2013, the trial court entered an order after the proceedings, stating, "[t]he [c]ourt informed [] Defendant he would have to proceed as [p]ro-[s]e if he failed to hire new counsel by the next court date."

On 2 April 2013, the case came before the trial court for a status hearing. Despite the State's promise to release Defendant the week of 13 March to assist him in retaining a new attorney, Defendant was still being held on the writ at the time of the status conference. When asked about his efforts to secure new counsel, Defendant stated, "Yes, Your Honor, I'm working on it, it's going great. I should have counsel soon"; however, he complained that the State's failure to release him from the local jail to prison had delayed the time he had to obtain an attorney. The trial court subsequently allowed Defendant's motion to release the writ from the local jail and entered a second written order stating it had "informed the Defendant he would have to proceed as [p]ro-[s]e if he failed to hire new counsel by the scheduled court date." The Record lacks any indication that this oral warning took place. In releasing Defendant from the writ "to hire counsel[,]" however, the trial court stated that if Defendant did not hire counsel by the scheduled date, "the waiver of [assigned] counsel having previously been executed by you and accepted by the [c]ourt, will continue to be honored and this matter will be set for trial during the May 20th term[.]" This colloquy was in reference to the waiver of *assigned* counsel Defendant signed at the previous hearing, but Defendant did not sign a new waiver of "all assistance of counsel" at the 2 April 2013 hearing.

Prior to trial, Defendant had contacted private counsel Eddie Meeks. On 20 May 2013, Defendant's case came on for trial, and Attorney Meeks was present in the courtroom but had not yet made a general appearance on Defendant's behalf. Attorney Meeks moved to continue the case (the "Motion to Continue"), indicating to the trial court that he had requested discovery in Defendant's case two weeks prior but had not received any discovery nor seen Defendant's file. The trial court denied Attorney Meeks's Motion to Continue, explaining "[t]he [c]ourt made a specific order that indicates the [c]ourt informed[][D]efendant he would have to proceed pro se if he failed to hire new counsel by the scheduled court date," and although the trial court would like to "accommodate" Attorney Meeks, "it's clear that [the previous trial court judges] indicated that[][D]efendant was going to have to proceed pro se if he did not get counsel in place, and he has not done so."

Defendant's trial commenced the next day. Attorney Meeks was again present in court and objected on Defendant's behalf "to the trial going forward," arguing that continuing the trial would violate Defendant's Sixth Amendment right to counsel and Fourteenth Amendment right to due process under the United States Constitution. The trial court again denied the motion, concluding that, based on the trial court's previous written orders, Defendant "ha[d] effectively waived his right to counsel by inaction" because he failed to retain counsel in proper time. The trial court then continued to trial, where Defendant represented himself pro se. The jury ultimately returned verdicts finding Defendant guilty of all charges, including attaining the status of a habitual felon.

Following his conviction, Defendant filed a direct appeal to this Court. *State v. Haizlip*, 235 N.C. App. 425, 2014 N.C. App. LEXIS 873, at *8 (2014) (unpublished). In relevant part, Defendant argued "the trial court prejudicially erred by forcing [him] to proceed pro se when [he] did not voluntarily and understandingly waive his constitutional right to counsel[.]" *Id.* This Court held that Defendant had forfeited his right to counsel because he "exhibited a pattern of refusing to cooperate with his attorney." *Id.* at 12. This Court's conclusion was based on then-current caselaw from this Court holding that "[a]ny willful actions on the part of the defendant that result in the absence of defense counsel constitute[] a forfeiture of the right to counsel." *Id.* at 10 (quoting *State v. Leyshon*, 211 N.C. App. 511, 518 (2011)); *see also State v. Boyd*, 200 N.C. App. 97, 102 (2009); *State v. Quick*, 179 N.C. App. 647, 649–50 (2006).

Several years later, on 8 July 2020, Defendant filed a motion for appropriate relief (the "First MAR") in Guilford County Superior Court, alleging that the denial of his Motion to Continue "deprived [him] of his right to counsel and was an abuse of the trial court's discretion." On 17 December 2020, the trial court denied Defendant's First MAR. The trial court concluded that Defendant's argument on direct appeal—that the trial court abused its discretion in denying his Motion to Continue—was "premised on Defendant's right to counsel." Since the First MAR was similarly premised on the trial court's alleged abuse of discretion in denying Defendant's right to counsel, the trial court, citing N.C.G.S. § 15A-1419(a)(2) and (3), concluded that Defendant's claim was procedurally barred because it had previously been determined on the merits on Defendant's direct appeal. Defendant did not seek review of the order denying the First MAR.

Beginning in 2020, the North Carolina Supreme Court overruled, in part, this Court's prior cases holding that "any willful" action by a defendant can result in a forfeiture of counsel. *See State v. Simpkins*, 373 N.C. 530 (2020); *State v. Atwell*, 383 N.C. 437 (2022); *State v. Harvin*, 382 N.C. 566 (2022). The *Simpkins* Court held for the first time that, only "in situations evincing egregious misconduct by a defendant, a defendant may forfeit the right to counsel." *Simpkins*, 373 N.C. at 535; *see also Atwell*, 383 N.C. at 449 ("Forfeiture of the right to counsel is not an express choice to proceed pro se, but rather is a loss of the right to counsel which is imposed as a result of a defendant's 'egregious misconduct.' "); *State v. Moore*, 290 N.C. App. 610, 635 (2023) (recognizing the change in the law). Though *Simpkins* was decided five months prior to Defendant's First MAR, Defendant did not argue in the First MAR that a retroactive change of law occurred to allow him to overcome the procedural bar under N.C.G.S. § 15A-1419(a)(2).

On 19 December 2023, Defendant filed a second MAR with the trial court (the "Second MAR"), again arguing that his right to counsel was violated when the trial court improperly required him to proceed pro se at trial. Defendant acknowledged that he raised this issue on direct appeal, and that his First MAR raised the issue of waiver and forfeiture of counsel. Defendant argued, however, that this Second MAR was not procedurally barred because there had been a "retroactively effective change in the law controlling such issue[,]" N.C.G.S. § 15A-1419(a)(2) (2023), based on *Atwell*, 383 N.C. at 438, and *Moore*, 290 N.C. App. at 611.

On 20 March 2024, the trial court denied Defendant's Second MAR. In its order, the trial court concluded that "the allegations made [in the Second MAR] . . . have previously been determined on the merits, barred from reasserting, wholly insufficient, and completely without merit." The trial court's order, however, did not specifically address Defendant's argument that a "retroactively effective change in the law controlling such issue" had occurred.

Defendant subsequently filed a petition for writ of certiorari with this Court, seeking review of the denial of the Second MAR, which this Court granted on 23 January 2025.

II. Jurisdiction

By virtue of this Court's grant of Defendant's petition for writ of certiorari under Rule 21 of the North Carolina Rules of Appellate Procedure, we have jurisdiction to review the trial court's denial of the Second MAR pursuant to N.C.G.S. § 15A-1422(c)(3) (2023).

III. Standard of Review

"This Court reviews a lower court's order on [MARs] to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Tucker*, 385 N.C. 471, 484 (2023) (citations and internal quotation marks omitted). "We review issues of law de novo." *Id.* (citations omitted). Under a de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33 (2008) (citations and internal quotation marks omitted).

IV. Analysis

On appeal, Defendant argues the trial court erred in denying the Second MAR. Specifically, Defendant contends: (A) the Second MAR was not procedurally barred because he was not in a position to adequately raise *Simpkins* in his First MAR; (B) the trial court erred in failing to consider whether *Simpkins* and *Atwell* are retroactively applicable to Defendant's case under *Teague* to overcome the procedural bar; and (C) the trial court erred in concluding that Defendant waived or forfeited his right to counsel by conduct because *Simpkins* and *Atwell* are retroactively applicable to Defendant's claim. We disagree, and because we conclude Defendant's Second MAR was procedurally barred, we do not reach Defendant's remaining issues.

A. Procedural Bar

Defendant first argues the trial court erred in denying the Second MAR because (1) he was not in a position to adequately raise the forfeiture issue in his First MAR, as the rule was not explicitly announced until after Defendant's First MAR; and (2) alternatively, even if we conclude he was in a position to adequately raise the forfeiture issue, he is nevertheless entitled to an exception to the procedural bar because there has been a retroactively effective change in the forfeiture law since his First MAR. We disagree.

Section 15A-1419 lists several grounds for the denial of a MAR. Relevant here, an MAR may be denied in the following instances: if, "[u]pon a previous [MAR], the defendant was in a position to adequately raise the ground or issue underlying the present [MAR] but did not do so[,]" N.C.G.S. § 15A-1419(a)(1) (2023), or if

> [t]he ground or issue underlying the [present MAR] was *previously determined on the merits . . . upon a previous [MAR]* or proceeding in the courts of this State or a federal court, unless *since the time* of such previous determination there has been a retroactively effective change in the law controlling such issue.

N.C.G.S. § 15A-1419(a)(2) (2023) (emphasis added). If any of these circumstances are present, "the court shall deny the motion . . . unless the defendant can demonstrate" that an exception applies. N.C.G.S. § 15A-1419(b) (2023). Thus, we must first address whether Defendant was in a position to raise the forfeiture issue in his First MAR under N.C.G.S. § 15A-1419(a)(1), and if so, whether Defendant demonstrated that an exception applies.

1. Position to Adequately Raise an Issue

Defendant argues that the trial court erred in determining the Second MAR was procedurally barred under N.C.G.S. § 15A-1419(a)(1) because he was not in a position to adequately raise the issue in his First MAR. Specifically, Defendant argues that, because *State v. Patterson*, 272 N.C. App. 569, 574–75 (2020)—decided after Defendant's First MAR—was the first case to explicitly announce a new change in the law regarding forfeiture, Defendant is not procedurally barred for failing to raise *Simpkins*—decided five months prior to his First MAR—in his First MAR. Defendant acknowledges that *Simpkins* predated his First MAR, but nonetheless argues that, even if he could have raised *Simpkins* in his First MAR, "he was not in a position to 'adequately' do so until *Patterson*, *Moore*, *Atwell*, and *Harvin* had been decided" because this Court's prior reasoning that any willful action constitutes forfeiture was rejected only in a footnote in *Simpkins*. We disagree, and conclude Defendant was in a position to raise the forfeiture issue in his First MAR.

"[MARs] generally allow defendants to raise arguments that could not have been raised in an original appeal, such as . . . claims based on rights arising by reason of later constitutional decisions announcing new principles or changes in the law." *State v. Price*, 331 N.C. 620, 630 (1992) (citation omitted). Our Supreme Court has explained that N.C.G.S. § 15A-1419's procedural bar " 'is not a general rule that any claim not brought on direct review is forfeited on state collateral review' and requires the reviewing court, instead, 'to determine whether the particular claim at issue *could* have been brought on direct review.' " *State v. Hyman*, 371 N.C. 363, 383 (2018) (quoting *State v. Fair*, 354 N.C. 131, 166 (2001)) (emphasis added).

Here, Defendant does not dispute that *Simpkins* predated his First MAR. Defendant argues, however, that he was not in a position to adequately raise *Simpkins* in his First MAR because the new change in law was not unambiguously announced until *Patterson*, *Atwell*, and *Harvin*, which were all decided after Defendant's First MAR. Defendant further contends there was a "later constitutional decision[]announcing new principles or changes in the law" regarding forfeiture that Defendant could not have adequately raised in his First MAR. *See Price*, 331 N.C. at 630. We disagree.

In his First MAR, Defendant argued that he did not forfeit his right to counsel, and the trial court abused its discretion by forcing him to proceed to trial pro se. Defendant did not, however, raise *Simpkins* or argue that a new change in law had occurred since the time of his direct appeal. Because both Defendant's direct appeal and First MAR were premised on the same legal arguments regarding forfeiture, the trial court therefore denied Defendant's First MAR on the ground that it had previously been determined on the merits on direct appeal.

In arguing that he was not in a position to raise *Simpkins* in his First MAR, Defendant contends that, because "this Court's prior reasoning was rejected in a footnote [in *Simpkins*,] . . . [e]ven a seasoned attorney would not immediately recognize the sea change of law that was about to happen"; thus, according to Defendant, he was not in a position to adequately raise the forfeiture issue in his First MAR until *Patterson* had been decided, clearly identifying the footnote change in *Simpkins*.

Notably, however, *Patterson* was heard by this Court on 29 April 2020, just sixty days after our Supreme Court's decision in *Simpkins*. *See Patterson*, 272 N.C. App. at 569. Despite this short timeframe, the *Patterson* defendant nevertheless raised and argued *Simpkins* before this Court. As the *Patterson* defendant was able to adequately raise *Simpkins* for the issue of forfeiture just two months after it was decided, we conclude Defendant here was similarly in a position to adequately raise *Simpkins* in his First MAR, filed five months after it was decided, but failed to do so. *See Patterson*, 272 N.C. App. at 574; *see also* N.C.G.S. § 15A-1419(a)(1).

Consequently, because *Simpkins* was announced prior to Defendant's First MAR, it was not a "*later* constitutional decision[] announcing new principles or changes in the law" that would excuse Defendant's failure to raise *Simpkins* in his First MAR and thus allow him to overcome the procedural bar of N.C.G.S. § 15A-1419(a)(1). *Price*, 331 N.C. at 630 (emphasis added); *see also Hyman*, 371 N.C. at 383 (holding a defendant's claim is procedurally barred if "the particular claim at issue *could* have been brought on direct review" (emphasis added)).

In sum, because the grounds underlying the issue of forfeiture were established at the time Defendant filed his First MAR, we conclude that, despite *Simpkins* being decided only five months prior to Defendant's First MAR, Defendant was "in a position to adequately raise the ground or issue underlying the present motion but did not do so"; therefore his claim is procedurally barred unless Defendant can demonstrate that his claim falls into an exception. N.C.G.S. § 15A-1419(a)(1).

2. Exceptions to the Procedural Bar

Defendant argues in the alternative that, should this Court determine his claim is procedurally barred under N.C.G.S. § 15A-1419(a), he is nevertheless entitled to an exception because he can show good cause and actual prejudice. Specifically, Defendant argues that, "even assuming *arguendo* a procedural bar exists, it is excused by N.C.[G.S.] § 15A-1419(c)(2)."

An exception to the procedural bar applies only if the defendant can demonstrate the following: (1) "[g]ood cause for excusing the ground for denial listed in subsection (a) of this section *and* . . . actual prejudice resulting from the defendant's claim," or (2) "[t]hat failure to consider the defendant's claim will result in a fundamental miscarriage of justice." N.C.G.S. §§ 15A-1419(b)(1), (2) (2023) (emphasis added). We address each exception, in turn.

a. Good Cause

"[G]ood cause" may be shown "if the defendant establishes by a preponderance of the evidence that his failure to raise the claim" was, as relevant here, "[t]he result of the recognition of a new federal or State right which is retroactively applicable[.]" N.C.G.S. § 15A-1419(c)(2) (2023). Our Supreme Court has adopted the federal test set forth in *Teague v. Lane*, 489 U.S. 288 (1989), as the test of retroactivity for new federal constitutional rules of criminal procedure on state collateral review. *See State v. Zuniga*, 336 N.C. 508, 513 (1994) ("[W]e hereby adopt *Teague* as the test of retroactivity for new federal constitutional rules of criminal procedure on state collateral review.").

Under the *Teague* test, the Supreme Court explained that "new rules should always be applied retroactively to cases on direct review, but that generally they should not be applied retroactively to cases on collateral review." *Teague*, 489 U.S. at 303. The *Teague* Court, however, announced two narrow exceptions to this rule, the second of which is relevant here. Under the second exception to *Teague*'s bar to retroactivity on collateral review, "a new rule will be applied retroactively if it is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Zuniga*, 336 N.C. at 512 (internal quotation marks and brackets omitted) (citing *Teague*, 489 U.S. at 311). In other words, new rules should be applied retroactively to cases on collateral review if the new rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *See id.*

In *Edwards v. Vannoy*, the United States Supreme Court clarified the contours of this exception. 593 U.S. 255 (2021). In *Edwards*, the Court was presented with two issues: first, whether the Supreme Court's decision in *Ramos v. Louisiana*, 590 U.S. 83 (2020)—which mandated unanimous jury verdicts in serious criminal cases—announced "a new rule of criminal procedure, as opposed to applying a settled rule"; and second, if so, whether "it fall[s] within [*Teague*'s] exception for watershed rules of criminal procedure that apply retroactively on federal collateral review[.]" *Edwards*, 593 U.S. at 264–65.

The Court explained that "[a] rule is new unless it was 'dictated by precedent existing at the time the defendant's conviction became final.' " *Edwards*, 593 U.S. at 265 (quoting *Teague*, 489 U.S. at 301). "In other words, a rule is new unless, at the time the conviction became final, the rule was already apparent to all reasonable jurists." *Id.* (citation and internal quotation marks omitted). "The starkest example of a decision announcing a new rule is a decision that overrules an earlier case." *Id.* (citation omitted). This "watershed exception is extremely narrow and applies only when, among other things, the new rule alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Id.* at 267 (citation and internal quotation marks omitted).

The *Edwards* Court first concluded that *Ramos* did announce a new rule because "the critical point is that reasonable jurists who considered the question before *Ramos* interpreted [the prior case] to allow non-unanimous jury verdicts in state criminal trials." *Id.* at 266. Nevertheless, the Court determined that the new rule that jury verdicts must be unanimous in serious criminal cases does not apply retroactively on federal collateral review, as it was not a "watershed rule of criminal procedure." *Id.* at 273. The *Edwards* Court reasoned that, "[b]y renouncing [the pre-*Ramos* case] and expressly requiring unanimous jury verdicts in state criminal trials, *Ramos* plainly announced a new rule for purposes of this Court's retroactivity doctrine. And new rules of criminal procedure ordinarily do not apply retroactively on federal collateral review." *Id.*

In rejecting the defendant's contention that *Ramos* should apply retroactively, the Court explained it "has identified only one pre-*Teague* procedural rule as watershed: *the right to counsel* recognized in the Court's landmark decision in *Gideon v. Wainwright*, 372 U.S. 335, 344–345[][](1963)." *Edwards*, 593 U.S. at 267 (emphasis added).

Here, we agree with Defendant that *Simpkins* announced a "new rule" for retroactivity purposes, and we further agree that the forfeiture issue in *Simpkins* constitutes a "watershed rule of criminal procedure." *Id.* at 273. We disagree, however, that Defendant's failure to raise *Simpkins* in his First MAR was the "*result* of [that] recognition," and therefore conclude Defendant has not shown good cause to excuse the procedural bar. *See* N.C.G.S. § 15A-1419(c)(2) (emphasis added).

In *Simpkins*, the defendant was convicted by a jury after having been forced to proceed pro se at trial. 373 N.C. at 531. The trial court did not conduct the required colloquy for waiver of counsel under N.C.G.S. § 15A-1242 (2019), as it determined that the defendant had waived counsel by his conduct. *Id.* at 531–32. On appeal, this Court vacated the defendant's conviction for the trial court's failure to comply with the statutory requirements of N.C.G.S. § 15A-1242, and the case was then taken up by the North Carolina Supreme Court to determine whether, in the absence of valid waiver, a defendant may nevertheless *forfeit* his right to counsel by conduct. *Id.* at 535.

In affirming this Court's decision to vacate the defendant's conviction, our Supreme Court explained, "[w]e have never previously held that a criminal defendant in North Carolina can forfeit the right to counsel. However, the Court of Appeals has recognized, in addition to waiver of counsel, that a defendant who engages in serious misconduct may forfeit his constitutional rights to counsel." *Id.* (internal citations and quotation marks omitted). "We agree and hold that, in situations evincing egregious misconduct by a defendant, a defendant may forfeit the right to counsel." *Id.*

In overruling prior decisions of this Court finding forfeiture by "any willful action," the *Simpkins* Court explained in a footnote:

> The Court of Appeals has previously stated that "[a]ny willful actions on the part of the defendant that result in the absence of defense counsel [constitute] a forfeiture of the right to counsel." *State v. Quick*, 179 N.C. App. 647, 650[] [] (2006). This statement is unsupported. *Quick* cites the Court of Appeals decision in *Montgomery*, which states nothing of the sort. [*State v.*] *Montgomery*, 138 N.C. App. [521,] 524[] [2000]. Further, it is far too broad a statement to be consistent with the constitutional guarantee of the right to counsel and the law of this state.

Id. at 538 n.7.

The Court ultimately concluded that "Simpkins's conduct, while probably highly frustrating, was not so egregious that it frustrated the purposes of the right to counsel itself. As a result, his conduct[] did not amount to 'such serious misconduct as to warrant forfeiture of the right to counsel.' " *Id.* at 539–40 (quoting *Blakeney*, 245 N.C. App. 452, 468 (2016)).

Here, we agree *Simpkins* announced a new rule for purposes of the *Teague* test. First, although pre-*Simpkins* opinions by this Court discussed ways in which a defendant may forfeit his right to counsel, the standard for forfeiture was not explicitly announced as binding until our Supreme Court's decision in *Simpkins*, decided after Defendant's direct appeal but before his First MAR. In other words, prior to *Simpkins*, this Court was permitted to find forfeiture by any willful action, and *Simpkins* was the first case to mandate that the *only* way to forfeit was through egregious misconduct. As *Edwards* clarified, "a rule is new unless, at the time the conviction became final, the rule was already apparent to all reasonable jurists"; and, here, "the critical point is that reasonable jurists who considered the question before [*Simpkins*] interpreted [the prior caselaw] to allow [forfeiture by any willful action] in state criminal trials." *See Edwards*, 593 U.S. at 265–66.

Consequently, the *Simpkins* forfeiture standard was not "*dictated* by precedent existing at the time the defendant's conviction became final"; i.e., at the time of Defendant's direct appeal. *Id.* at 265 (citation omitted) (emphasis in original). We therefore conclude *Simpkins* did announce a "new rule" for retroactivity purposes.

In concluding *Simpkins* announced a "new rule," we must now determine whether it constitutes "a watershed rul[e] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Whorton v. Bockting*, 549 U.S. 406, 417 (2007) (internal citations and quotation marks omitted). As *Simpkins* was the first case to overrule prior decisions of this Court holding that "any willful actions" by a defendant could be grounds to force a defendant to proceed to trial without counsel; and, because "[t]he right to counsel in criminal proceedings is not only guaranteed but is considered to be fundamental in character[,]" *State v. Atwell*, 383 N.C. 437, 446 (2022) (citation and internal quotation marks omitted), we conclude that *Simpkins* announced a new "watershed rul[e] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *See Whorton*, 549 U.S. at 417 (internal citations and quotation marks omitted); *compare Zuniga*, 336 N.C. at 514 ("[W]e believe that a rule striking down an arbitrary unanimity requirement has the same 'primacy and centrality' of *Gideon*. Therefore, we hold that the [] rules fall within the second *Teague* exception and should be applied retroactively.").

Having determined that *Simpkins* did "recogn[ize] a new federal or State right which is retroactively applicable[,]" we next address whether Defendant's failure to raise *Simpkins* in his First MAR was the *result* of this recognition. *See* N.C.G.S. § 15A-1419(c)(2). "When determining whether good cause exists to overcome a procedural bar, the question is whether, at the time of the procedural default, the claim was available at all." *Tucker*, 385 N.C. at 494. "Accordingly, for cause sufficient to overcome the procedural bar, it must exist beyond the control of counsel—it must not be subject to counsel's manipulation, but rather, truly unavailable." *Id.* Importantly here, "the legislature specifically exempted from the definition of good cause '[a] trial attorney's ignorance of a claim, inadvertence, or tactical decision to withhold a claim.' " *Id.* at 493 (quoting N.C.G.S. § 15A-1419(c)).

Here, the trial court denied Defendant's Second MAR on the ground that the forfeiture issue had been determined on the merits in his First

MAR. As explained above, because *Simpkins* had been binding law for five months at the time of Defendant's First MAR, we conclude Defendant's failure to raise *Simpkins* in his First MAR was the result of his "attorney's ignorance of [the] claim," not the result of our Supreme Court's announcement of the new forfeiture standard in *Simpkins*. *Id.*

As such, we conclude Defendant has failed to show good cause to excuse the procedural bar, and we need not address whether Defendant has shown actual prejudice. *See* N.C.G.S. § 15A-1419(b)(1) (An exception to the procedural bar applies only if the defendant can demonstrate "[g]ood cause . . . *and* . . . actual prejudice resulting from the defendant's claim[.]" (emphasis added)).

b. Fundamental Prejudice

Defendant may, however, alternatively be excused from the procedural bar that prevents him from bringing another forfeiture claim by showing a fundamental miscarriage of justice occurred; thus, we address whether such a miscarriage of justice has occurred here where Defendant proceeded pro se during his trial. *See* N.C.G.S. § 15A-1419(b)(2) ("The court shall deny the [MAR] under any of the circumstances specified in this section, unless the defendant can demonstrate[] . . . [t]hat failure to consider the defendant's claim will result in a fundamental miscarriage of justice.").

A "fundamental miscarriage of justice" occurs only where "[t]he defendant establishes that, more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense[.]" N.C.G.S. § 15A-1419(e) (2023).

Here, Defendant generally addresses the fundamental miscarriage of justice issue in passing, arguing simply that "failure to address this claim would result in a fundamental miscarriage of justice." Defendant makes no argument to support a conclusion that a different result would have been reached but for the trial court's denial of his Motion to Continue; and, thus, this argument is 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 . . . 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"). We therefore conclude Defendant has failed to meet his burden to show that he is entitled to either exception to the procedural bar under N.C.G.S. § 15A-1419(b).

In sum, we conclude that Defendant's claim is procedurally barred under N.C.G.S. § 15A-1419(a)(1) because he was in a position to adequately raise *Simpkins* in his First MAR, but he failed to do so. Moreover, Defendant failed to show he is entitled to either exception to the procedural bar under N.C.G.S. § 15A-1419(b). Since we conclude Defendant's claim is procedurally barred under N.C.G.S. § 15A-1419(a)(1), we need not address whether Defendant is procedurally barred under N.C.G.S. § 15A-1419(a)(2). *See* N.C.G.S. § 15A-1419(b) ("The court *shall* deny the [MAR] under *any* of the circumstances specified in this section[.]" (emphasis added)).

Further, because we conclude Defendant's claim is procedurally barred, we do not address the merits of whether he forfeited his right to counsel under the new standard announced in *Simpkins* and its progeny. We emphasize, however, that we affirm the trial court's decision today solely on procedural grounds. Due to the unique procedural posture of this case, our holding is narrow. Because Defendant had an opportunity to, but failed to raise the issue of forfeiture in his First MAR in 2020 after *Simpkins* was decided, we hold that the trial court did not err in denying Defendant's Second MAR. *See* N.C.G.S. § 15A-1419(b).

V. Conclusion

Upon review, we conclude Defendant's claim is procedurally barred under N.C.G.S. § 15A-1419(a)(1), and thus, the trial court did not err in denying Defendant's Second MAR.

AFFIRMED.

Judges ZACHARY and STADING concur.

STATE OF NORTH CAROLINA
v.
EMILY JEAN ROBINSON, Defendant

No. COA25-199

Filed 21 January 2026

1. Criminal Law—right to open and close arguments—error assumed—prejudice analysis

In a prosecution on drug-related charges, including death by distribution, although the trial court erred by failing to allow defendant the opportunity to both open and close the jury arguments, as required by Rule 10 of the General Rules of Practice for the Superior and District Courts when no evidence is introduced by a defendant—an error the appellate court assumed without deciding—defendant failed to show a reasonable possibility that a different verdict would have been returned absent the error, especially in the face of the evidence mounted against her.

2. Constitutional Law—Confrontation Clause—expert testimony—toxicology results—data generated by lab machines

In a prosecution on drug-related charges, including death by distribution, defendant's rights under the Confrontation Clause were not violated by the admission of testimony from an expert in forensic toxicology, which was based on a toxicology report generated from tests performed by forensic chemists using liquid chromatography. The forensic chemists did not use their judgments in the testing process or independently opine on the quantity of each drug found in the victim's system; rather, a machine-produced chromatograph provided the data, and, for purposes of the Confrontation Clause, toxicology data of liquid samples generated by lab machines.

3. Constitutional Law—Double Jeopardy Clause—sentencing—death by distribution—sale of a controlled substance

In a prosecution on drug-related charges, the trial court did not violate defendant's constitutional protection from multiple punishments for the same offense by sentencing her on convictions of both death by distribution and sale of a controlled substance. Even assuming that defendant had preserved this argument for appeal by raising it in the trial court—which she concedes she did not—sale of a controlled substance was not a lesser included offense of death by distribution because the latter charge applied only to a smaller subset of the list of drugs that could sustain a sale of controlled substances conviction. Further, using North Carolina's definitional approach, the alleged greater offense (death by distribution) was actually narrower in terms of defendant's actions since she was found guilty of death by distribution for, without malice, unlawfully selling a specific controlled substance which proximately caused the victim's death, while the sale and/or delivery of the controlled substance broadened defendant's possible guilty actions to include selling, delivering, or both.

4. Constitutional Law—effective assistance of counsel—expert testimony—sentencing—no error

In a prosecution on drug-related charges, defendant could not show that she received ineffective assistance when her counsel failed to object to expert forensic toxicology testimony and/or defendant's sentence on convictions of both death by distribution and sale of a controlled substance. Neither the admission of the testimony nor defendant's sentencing was erroneous; accordingly, her counsel did not err, let alone plainly err.

Appeal by Defendant from judgment entered 28 May 2024 by Judge Edwin Wilson in Alamance County Superior Court. Heard in the Court of Appeals 21 October 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Zachary K. Dunn, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for Defendant.

GRIFFIN, Judge.

Defendant Emily Jean Robinson appeals from judgment entered after a jury found her guilty of death by distribution, sale or delivery of a controlled substance (fentanyl), possession with intent to sell or deliver a controlled substance (fentanyl), maintaining a dwelling to keep controlled substance, and possession of drug paraphernalia. Defendant argues (1) the trial court erred by denying her right to open and close the arguments, (2) the trial court erred by allowing an expert to testify about toxicology results, (3) the trial court erred by allowing sentencing for both death by distribution and sale of a controlled substance, and (4) she received ineffective assistance of counsel. We hold the trial court did not prejudicially err.

I. Factual and Procedural Background

On 14 September 2021, Robert Starner told his friend, Adlai Walters, "he wanted to get . . . some 'boy.' " Walters understood "boy" to mean heroin, and, thus, tried to dissuade Starner from getting it. Starner ignored his friend's advice and called Defendant. Then, Starner, Walters, and Starner's girlfriend, Kora Bott, drove about thirty minutes to a residential house to obtain drugs. Starner went around to the back door of the house and Defendant opened it. After a few minutes of chatting with Defendant, Starner returned to the vehicle. Once inside the car, Starner snorted a small amount of a drug from his hands and Bott also partook in some of the drugs. Starner offered Walters some of the drugs, but Walters turned him down.

Shortly after snorting drugs, Starner began driving away from the house. However, once on the road, Starner started to drive erratically, going too fast and talking "crazy." Walters then told Starner to stop the car and Walters replaced Starner as the driver. As Walters drove, Starner and Bott were both moaning and making a lot of noise. Neither Starner nor Bott responded to Walters' request for directions back to Bott's apartment, so Walters drove back to town instead and ended up at Starner's parents' house.

When he arrived at the house, Walters thought Starner and Bott were just sleeping off the drugs, so he parked the car, took the keys, and went inside the home, where he told Starner's mother that Starner and Bott were inside the car on drugs. Walters left the keys inside to prevent Starner and Bott from attempting to drive in their current state, checked on the couple one last time, went back inside to tell Starner's parents he was going to stay with an old girlfriend that night, and then went to his old girlfriend's house. When Walters last checked on Starner and Bott, they were still squirming and making noises.

At about 12:30 a.m. on 15 September 2021, Burlington Police Department Officer Bralin Haith responded to a possible overdose call at Starner's parents' home and found Starner and Bott in the car in the driveway. Officer Haith secured a bag containing some substance from the back seat and placed it in an evidence envelope; he also found loose pills in the vehicle but refrained from seizing them.

When police and medical services arrived, Bott had difficulty breathing, but ultimately survived. Starner was not responding, so Emergency Medical Services ("EMS") tried to revive him. However, EMS was unable to revive him and Starner died at the scene. Walters learned Starner died and returned to the scene, where he told the police about the prior night's events. Later, Walters rode with the police to try to locate the residence where the group had purchased the drugs. The police and Walters successfully located the house on the second trip.

On 16 September 2021, officers spoke with Defendant at her friend's house and searched her bag to discover she possessed a substance they suspected was fentanyl. Then, Defendant voluntarily went to the police station for an interview. During the interview, she initially denied using or selling fentanyl, but later admitted she used and sold fentanyl and specifically sold to Starner and Bott. The police executed a search warrant of Defendant's home and found off-white powder in various locations, suspected Xanax, digital scales, corner baggies, and bindles. Additionally, text messages showed Defendant had communicated with both Starner and Bott dating back to June 2021.

Dr. Michelle Aurelius, Chief Medical Examiner at the North Carolina Office of the Chief Medical Examiner and expert in pathology and forensic pathology, began assessing Starner's body on 15 September 2021. Dr. Aurelius refrained from conducting a full autopsy examination on Starner's body, but took samples of Starner's urine, which tested positive for methamphetamine, cocaine, fentanyl, amphetamine, and THC. Dr. Aurelius then submitted the urine samples to the toxicology laboratory for examination. Dr. Aurelius made a findings report that was admitted into evidence at trial.

Dr. Justin Brower, forensic toxicologist and expert in forensic toxicology, approved Starner's toxicology report, performed by other forensic chemists using liquid chromatography. Dr. Brower testified his job is to analyze the results of such forensic chemists and evaluate the data for completeness and accuracy. Dr. Brower additionally testified, in his expert opinion, the test results from the toxicology report indicated Starner had used methamphetamine, cocaine, and fentanyl prior to his death. Furthermore, Dr. Brower opined Starner likely ingested such drugs within twenty-four hours of his death and reasoned 9.5 nanograms per milliliter, the amount of fentanyl in Starner's body, was sufficiently fatal.

At trial, the State delivered the first opening and closing arguments and Defendant followed both times. Defendant objected and asserted that, because the defense did not put on evidence, it was error to not allow the defense to open and close the closing arguments, under Rule 10 of the North Carolina Rules of Superior and District Courts. However, the trial court responded to this objection stating it had discretion to allow the State to have the first closing argument. Defendant then moved for a mistrial using the same argument, but the trial court determined any potential error was not substantial or irreparable prejudice to Defendant.

At the close of the trial, the jury found Defendant guilty of all charges. The trial court entered a single consolidated sentence for all of Defendant's offenses and sentenced her to a term of sixty to eighty-four months imprisonment. Defendant timely appeals.

II. Analysis

A. Opening and Closing Arguments

[1] Defendant argues the trial court erred in failing to allow Defendant the opportunity to both open and close the jury arguments and denying her motion for mistrial. "This Court reviews a trial court's denial of a motion for mistrial under an abuse of discretion standard." *State v. McDougald*, 279 N.C. App. 25, 27, 862 S.E.2d 877, 880 (2021) (citation omitted).

Rule 10 of the General Rules of Practice for the Superior and District Courts of North Carolina states in part:

> In all cases, civil or criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him. If a question arises as to whether the plaintiff or the defendant has the final argument to the jury, the court shall decide who is so entitled, and its decision shall be final.

N.C. Super. and Dist. Ct. R. 10. A defendant has the right to have his or her counsel at least conclude the jury argument. *State v. Raper*, 203 N.C. 489, 491, 166 S.E. 314, 315 (1932). However, there may be exceptions to this rule. *See State Tr. Co. v. Braznell*¸ 227 N.C. 211, 215, 41 S.E.2d 744, 747 (1947) (holding the right to the concluding argument was not infringed upon where one of the two defendants delivered the closing argument prior to the other defendant); *see State v. Lee*, 277 N.C. 205, 209, 176 S.E.2d 765, 767 (1970) (citation omitted) (explaining a codefendant's introduction of evidence waives the other defendant's right to closing argument).

When a trial court refused to permit all of a defendant's counsel to address the jury during final argument, our Supreme Court held prejudicial error per se. *State v. Mitchell*, 321 N.C. 650, 659, 365 S.E.2d 554, 559 (1988). However, appellate courts generally refrain from finding prejudicial error per se. *State v. Malachi*, 371 N.C. 719, 735, 821 S.E.2d 407, 419

(2018). Normally, a defendant must demonstrate prejudice, in addition to statutory error, before receiving a new trial. *State v. Griffin*, 298 N.C. App. 85, 91–92, 914 S.E.2d 8, 12–13 (2025) (citation omitted). The burden is on the defendant to show prejudice by presenting a reasonable possibility of a different verdict had the error not been committed. N.C. Gen. Stat. § 15A-1443(a); *State v. Conner*, 335 N.C. 618, 630, 440 S.E.2d 826, 833 (1994) (citation omitted).

The test as to whether a defendant "introduced," or put an object into, evidence is whether a party offered the object as substantive evidence such that a jury may examine it and evaluate whether the object bolsters or undermines a witness's testimony. *State v. English*, 194 N.C. App. 314, 318, 669 S.E.2d 869, 871 (2008) (citation omitted). Conversely, a party that presents an object to a witness to refresh his or her recollection has not introduced evidence. *Id.*

Generally, testimony elicited from a witness during cross-examination is deemed as coming from the party who calls the witness, despite the reality that cross-examination tends to support the cross-examiner's case. *State v. Matthews*, 218 N.C. App. 277, 279, 720 S.E.2d 829, 831 (2012) (citation omitted). Yet, evidence may still be "introduced," under its meaning within Rule 10, during cross-examination when (1) an object is offered into evidence and accepted as such by the trial court, or (2) a new irrelevant matter is presented to the jury. *Id.* at 279, 720 S.E.2d at 832 (citation omitted). Accordingly, new relevant matters raised during a cross-examination do not amount to evidentiary "introduction." *State v. Shuler*, 135 N.C. App. 449, 453, 520 S.E.2d 585, 588 (1999) (citation omitted). Otherwise, a defendant would have an intolerable burden of either refraining from the "constitutional right to cross-examine and thereby suffer adverse testimony to stand in the record unchallenged and unimpeached or forfeit the valuable procedural right to [open and close] closing argument." *Id.* at 453, 520 S.E.2d 588–89 (cleaned up).

Another consideration in determining whether an object was introduced is whether the object was the witness's own; for instance, a witness reading aloud her own report will likely not constitute an introduction of evidence. *State v. Hennis*, 184 N.C. App 536, 539, 646 S.E.2d 398, 400 (2007) (citation omitted); *State v. Wells*, 171 N.C. App. 136, 140, 613 S.E.2d 705, 707–08 (2005) (citation omitted). On the other hand, a witness reading aloud a report made by another person who did not testify will likely qualify as an evidentiary introduction. *State v. Macon*, 346 N.C. 109, 113–14, 484 S.E.2d 538, 540–41 (1997) (citation omitted).

Here, Defendant concluded the argument to the jury, but did not deliver the first argument. Therefore, Defendant's right to at least conclude the jury argument was protected. *Raper*, 203 N.C. at 489, 166 S.E. at 315. Still, we acknowledge Rule 10 gives Defendant the ability to both open and close the jury argument when he or she does not introduce evidence.

Assuming arguendo that Defendant did not introduce evidence within the meaning of Rule 10 and the trial court erred in denying her ability to both open and close the arguments to the jury, Defendant failed to show how the trial court's error prejudiced her. Unlike *Mitchell*, Defendant's sole counselor delivered the final argument to the jury. Given the distinction between *Mitchell* and our case at hand, we refrain from holding prejudicial error per se. So, Defendant maintains the burden to demonstrate prejudice along with a Rule 10 statutory error. Defendant argued "she lost the ability to explain the law before the State argued" and lost the primacy effect in influencing the jury. However, Defendant inadequately explains that there was a reasonable possibility of a different verdict absent the error, especially in the face of the evidence mounted against her. Thus, we refrain from granting Defendant a new trial.

B. Expert Testimony

[2] Defendant contends the trial court erred by allowing Dr. Brower to testify about the toxicology results because it allegedly violated the Confrontation Clause.

"This Court reviews alleged constitutional errors in the admission of testimony in violation of the Confrontation Clause de novo." *State v. Pabon*, 380 N.C. 241, 252, 867 S.E.2d 632, 640 (2022) (citation omitted). However, a defendant may waive issues on appeal if the issues are not raised at trial. *State v. Wiley*, 355 N.C. 592, 624, 565 S.E.2d 22, 44–45 (2002) (citations omitted). Defendant concedes she failed to raise this issue at trial and therefore waived appellate review. We agree Defendant waived this testimonial admission issue, but assuming it was properly preserved, we find no error.

The Confrontation Clause, as guaranteed by the Sixth Amendment of the United States Constitution, ensures a defendant has the right to confront the witnesses against him. U.S. Const. amend. VI. Thus, the Confrontation Clause bars the admission of an absent witness' testimonial statements, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Smith v. Arizona*, 602 U.S. 779, 783 (2024) (quoting *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004)).

The Confrontation Clause applies in full force to forensic evidence. *Id.* at 783. However, in North Carolina, the Confrontation Clause does not apply to computer-generated data created by a machine without human judgment. *State v. Lester*, 387 N.C. 90, 98, 910 S.E.2d 642, 648 (2025) (citation omitted). Since machines are not people, they cannot be declarants, and therefore cannot offer testimonial statements, within the meaning of the Confrontation Clause. *Id.* at 98–99, 910 S.E.2d at 648–49 (citation omitted).

Specifically, toxicology data of liquid samples generated by lab machines, such as chromatographs, are not out-of-court "statements," within the meaning of the Confrontation Clause. *Id.* at 99, 910 S.E.2d at 649; *see U.S. v. Washington*, 498 F.3d 225, 229–30 (4th Cir. 2007). Thus, an expert's testimony regarding a toxicology report containing machine-generated data does not violate the Sixth Amendment of the U.S. Constitution. *Washington*, 498 F.3d at 230.

Here, we acknowledge Dr. Brower relied on drug test results produced by other forensic chemists. However, the forensic chemists did not use their judgments or independently opine on the quantity of each drug in Starner's system; rather a machine-produced chromatograph provided the data. The output of the drug screening results, produced by liquid chromatography, is not an out-of-court statement barred by the Confrontation Clause. Furthermore, Dr. Brower analyzed all of the data himself and testified about the drugs in Starner's body based on the machine-generated data. Since Dr. Brower's testimony did not come from out-of-court statements made by forensic chemists, the trial court's allowance of Dr. Brower's testimony was not error.

C. Sentencing Consolidation

[3] Defendant claims the trial court erred in sentencing her to both death by distribution and sale of a controlled substance, in alleged violation of her constitutional protection from multiple punishments for the same offense.

This Court reviews alleged constitutional rights violations de novo. *State v. Cromartie*, 257 N.C. App. 790, 795, 810 S.E.2d 766, 771 (2018) (citation omitted). However, an unpreserved constitutional question will not ordinarily be considered on appeal. *Id.* Here, Defendant concedes she failed to raise the issue of double jeopardy to the trial court.

Although the issue is unpreserved on appeal, Defendant's argument would still fail, even assuming it was preserved properly.

When "one offense is a lesser-included offense of another, the two offenses are considered the same criminal offense." *State v. Schalow*, 251 N.C. App. 334, 352, 795 S.E.2d 567, 579 (2016) (citation omitted). The U.S. Constitution's Double Jeopardy Clause in part prohibits multiple punishments for the same offense, absent clear contrary legislative intent. *State v. Mulder*, 233 N.C. App. 82, 87, 755 S.E.2d 98, 102 (2014) (citation omitted). To analyze whether two offenses are actually one offense, we use the Blockburger Test, where we determine "whether each provision requires proof of a fact which the other does not" when the same factual circumstance constitutes violations for two separate statutory provisions. *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (citations omitted). In other words, if the same conduct constitutes two offenses, each requiring proof of a unique fact, the Blockburger Test reveals the Double Jeopardy Clause is not violated. *United States v. Dixon*, 509 U.S. 688, 689 (1993). Nevertheless, "double jeopardy does not prohibit multiple punishment for offenses when one is included within the other under the *Blockburger* test if both are tried at the same time and if the legislature intended for both offenses to be separately punished." *State v. Gardner*, 315 N.C. 444, 454, 340 S.E.2d 701, 709 (1986).

To determine whether a crime is a lesser included offense of another offense, North Carolina courts use the definitions of each offense, as opposed to the facts. *State v. Nickerson*, 365 N.C. 279, 281, 715 S.E.2d 845, 847 (2011) (citation omitted). Accordingly, all essential elements of the lesser crime must also be essential elements of the greater crime. *Id.* at 281–82, 715 S.E.2d at 847. Yet, if "the lesser crime has an essential element which is not *completely* covered by the greater crime, it is *not* a lesser included offense." *Id.* at 282, 715 S.E.2d at 847 (citation modified).

At the applicable time, death by distribution of certain controlled substances had the following elements: (1) the "person unlawfully sells at least one certain controlled substance;" (2) the "ingestion of the certain controlled substance or substances causes the death of the user;" (3) the "commission of the offense in subdivision (1) of this subsection was the proximate cause of the victim's death;" and (4) the "person did not act with malice." N.C. Gen. Stat. § 14-18.4(b) (2021). On the other hand, the sale and/or delivery of a controlled substance comprises a transfer of a controlled substance "by either sale or delivery, or both." *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001) (citation omitted); *State v. Chevallier*, 264 N.C. App. 204, 211, 824 S.E.2d 440, 447 (2019) (citation omitted).

The defined "controlled substances" for death by distribution and sale and/or delivery of a controlled substance differ. Specifically, the alleged lesser included offense, sale and/or delivery of *a* controlled substance, includes "*a* controlled substance," which indicates any controlled substance. N.C. Gen. Stat. § 90-95 (2021) (emphasis added). The sale and/or delivery of a controlled substance statute contains multiple lists of controlled substances. *See* N.C. Gen. Stat. § 90-95; N.C. Gen. Stat. § 90-89 (2021); N.C. Gen. Stat. § 90-90 (2021); N.C. Gen. Stat. § 90-91 (2021); N.C. Gen. Stat. § 90-92 (2021); N.C. Gen. Stat. § 90-93 (2021); N.C. Gen. Stat. § 90-94 (2021). On the other hand, the alleged greater offense, death by distribution, features a limited list of certain controlled substances, which is a smaller subset of controlled substances in comparison to the sale and/or delivery of a controlled substance. N.C. Gen. Stat. § 14-18.4. Thus, this alleged lesser crime has an essential element which is not completely covered by the greater crime; therefore, sale and/or delivery of a controlled substance is not a lesser included offense of death by distribution.

Furthermore, using North Carolina's definitional approach, the alleged greater offense is actually narrower in terms of Defendant's actions. For death by distribution a person is guilty if he or she unlawfully *sells* at least one certain controlled substance, in addition to satisfying the offense's other elements. Alternatively, the sale and/or delivery of a controlled substance broadens Defendant's possible guilty actions to include selling, delivering, or both.

The North Carolina session law enacting the death by distribution statute included a preamble that identified a few of the North Carolina General Assembly's reasons for passing this legislation. 2019 N.C. Sess. Laws 83. Section 14-18.4's preamble states the General Assembly's intent is to "strengthen the laws to act as a greater deterrent to persons who want to illegally distribute opioids and further exacerbate the opioid epidemic." *Id.* The General Assembly also expressed its concern about dramatic increases in opioid-related overdoses in the past twenty years and desire to limit opioid distribution to legitimate medical prescriptions. *Id.* Additionally, the General Assembly included its legislative intent within the statute itself stating it enacted "this law to encourage effective intervention by the criminal justice system to hold illegal drug dealers accountable for criminal conduct that results in death." N.C. Gen. Stat. § 14-18.4(a). This highlights the General Assembly's intent to particularly punish illegal drug dealing that *ends in the death of the user*, which is a separate intent from punishing solely the sale and/or delivery of a controlled substance.

In consideration of the preamble sections explaining the statute's purpose as well as the express legislative intent within the statute itself, the General Assembly expressly indicates its legislative intent. The General Assembly highlights this new legislation is necessary in light of increased opioid-related overdoses specifically in the last two decades, illuminating a particular need to bolster the deterrent to those distributing opioids. These sentiments of the General Assembly signal death by distribution and sale of a controlled substance are offenses intended to be separately punishable. Therefore, the Double Jeopardy Clause is not violated. We hold the trial court did not err in sentencing Defendant for both death by distribution and sale of a controlled substance.

D. Ineffective Assistance of Counsel

[4] Defendant argues she received ineffective assistance of counsel because her counsel failed to object to (1) Dr. Brower's testimony and (2) convictions of both death by distribution and sale of a controlled substance.

Both federal and North Carolina law regard ineffective assistance of counsel claims in the same manner. *State v. Braswell*, 312 N.C. 553, 562–63, 324 S.E.2d 241, 248 (1985). A defendant must show (1) his or her counsel's performance at trial was deficient and (2) such deficiency prejudiced Defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006). Courts presume trial counsel's conduct was professionally acceptable. *Strickland*, 466 U.S. at 689–90; *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004) (citation omitted).

When counsel errs such that he or she falls below an objective standard of reasonable professional conduct as to no longer constitute "counsel" as guaranteed by the U.S. Constitution, counsel's performance was deficient. *Strickland*, 466 U.S. at 687; *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Allen*, 360 N.C. at 316, 626 S.E.2d at 286. To demonstrate counsel's deficient performance prejudiced a defendant, a defendant must show, but for counsel's errors, there is a substantial probability there would have been a different proceeding outcome. *Allen*, 360 N.C. at 316, 626 S.E.2d at 286; *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citation omitted).

Ineffective assistance of counsel "claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). This Court must dismiss such a claim without prejudice if we determine it is prematurely brought. *State v. Thompson*, 359 N.C. 77, 122–23, 604 S.E.2d 850, 881 (2004).

Since we hold no error for both Dr. Brower's testimony and the sentencing of death by distribution and sale of a controlled substance, Defendant failed to show how counsel erred, let alone deficiently erred. Thus, Defendant's ineffective assistance of counsel claim fails.

III. Conclusion

Despite losing the ability to argue first and last, Defendant did not demonstrate how this prejudiced her. The trial court did not err in allowing expert testimony of machine generated data and in sentencing Defendant for both death by distribution and sale of a controlled substance. Lastly, Defendant did not receive ineffective assistance of counsel.

NO PREJUDICIAL ERROR.

Judges COLLINS and STADING concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 21 January 2026)

CEASAR v. SAVYELYEVA No. 25-170	Mecklenburg (22CVD019329-590)	VACATED IN PART, AND REMANDED
CLEMENTS v. ARC NCCHRNC001, LLC No. 25-488	Mecklenburg (24CV030897-590)	Dismissed
IN RE A.B.T. No. 25-100	Watauga (23JB000005-940)	REVERSED IN PART; VACATED IN PART.
IN RE D.B. No. 24-51	Surry (22JA000148-850) (22JA000149-850)	Affirmed
INTEGON INDEM. CORP. v. EAGLES No. 25-264	Forsyth (23CVS004230-330)	Vacated and Remanded.
LONG PROPS., LLC v. CITY OF TRINITY No. 25-278	Randolph (24CVS000243-750)	Reversed and Remanded.
MEYER v. GRIBBEN No. 25-88	Union (19CVD001638-890)	Affirmed
ROSS v. N.C. DEP'T OF ADULT CORR. No. 24-920	N.C. Industrial Commission (TA-026268)	Affirmed
STATE v. BOLLINGER No. 25-269	McDowell (21CR051229-580) (21CR051230-580) (21CR051231-580) (22CR000301-580)	Dismissed
STATE v. BRITT No. 25-431	Rockingham (23CR297236-780)	No Error
STATE v. CAIN No. 25-544	Columbus (21CR050462-230) (21CR050463-230)	No Error
STATE v. DARDEN No. 24-568	Onslow (19CRS056396-660) (19CRS056400-660) (19CRS056402-660)	No Error

STATE v. HERNANDEZ No. 25-468	Scotland (21CR051581-820)	No Error in part; Dismissed in part.
STATE v. MADSEN No. 25-52	Richmond (19CR053069-760) (19CR053067-760) (19CR053068-760)	No Error
STATE v. MONTAGUE No. 25-224	Dare (18CR051587-270) (19CR050210-270) (19CR050212-270)	Vacated and Remanded
STATE v. ROGER-STUBBS No. 25-531	Guilford (23CR298358-400)	No Error
STATE v. WALL No. 25-200	Davidson (23CR267148-280)	No Plain Error
STATE v. WILSON No. 21-34-2	Cleveland (16CR054918-220) (16CR054919-220) (16CR054920-220) (16CR054922-220) (16CR054929-220)	No Error
TAYLOR v. MYERS No. 25-169	Davidson (20CVD001469-280)	Affirmed

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