302 N.C. App.—No. 5 Pages 552-712

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

SEPTEMBER 24, 2026

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

THE COURT OF APPEALS

OF

NORTH CAROLINA

Chief Judge

CHRIS DILLON

Judges

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

Former Chief Judges

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

Former Judges

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

Clerk

EUGENE H. SOAR

Assistant Clerk

Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Executive Director

Jonathan Harris

Director

David Alan Lagos

Assistant Director

Michael W. Rodgers

Staff Attorneys

Lauren T. Ennis

Caroline Koo Lindsey

Ross D. Wilfley

Hannah R. Murphy

J. Eric James

ADMINISTRATIVE OFFICE OF THE COURTS

Director

Ryan S. Boyce

Assistant Director

Ragan R. Oakley

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen

Niccolle C. Hernandez

Jennifer C. Sikes

COURT OF APPEALS

CASES REPORTED

Filed 4 February 2026

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Commitment order for civil contempt—release ordered—mootness—possibility of future commitment—In a contentious custody and child support matter, a father's appeal from an amended commitment order for civil contempt was not rendered moot by entry of the trial court's release order. Although the release order gave the father a temporary respite from the commitment order based on his military service, since the trial court found that the father continued to be in contempt following his release from confinement and had not satisfied the purge conditions that had been set forth in a prior contempt order, the father was subject to commitment again upon returning from deployment if he did not pay the purge amount. **Roybal v. Raulli, 600.**

ARBITRATION AND MEDIATION

Motion to compel arbitration—choice of law—specific performance not requested—arbitration clause inapplicable—In plaintiff's breach of contract action to recover unpaid fees from an investment advisor (defendant) who had hired plaintiff to expunge his notice of termination from publicly accessible databases, the trial court properly denied defendant's motion to compel arbitration because specific performance was not requested as a remedy and, therefore, the arbitration clause in the parties' contract did not apply. The appellate court also noted that North Carolina law rather than Colorado law controlled because: (1) defendant accepted plaintiff's offer and executed the contract in North Carolina, and (2) since the breach

CHILD CUSTODY AND SUPPORT

support claim. The existence of a temporary child support order does not alter the presumption (set forth in N.C.G.S. § 50-13.4(c)) that permanent prospective support begins as of the date a complaint is filed (per the Child Support Guidelines), absent written findings addressing why a deviation is appropriate. The trial court made no finding that application of the Guidelines would be unjust or addressing why a deviation was appropriate. Accordingly, the order was vacated and the matter was remanded for the entry of an order consistent with the Guidelines or for further findings of fact. **Flores v. Gutierrez, 582.**

Primary physical custody with mother—relocation with child to foreign country—best interests of child—insufficiency of findings—In a child custody dispute, the trial court's order granting the mother primary physical custody of the parties' child and allowing her to relocate with the child to her homeland in Israel was vacated—and the case was remanded—where the court's findings of fact, though extensive, consisted of mere recitations of testimony which failed to resolve the primary disputes between the parties—including the safety of relocating to Israel during a time of war, the safety of the proposed neighborhood where the mother and child would live, and the impact this relocation would have on the child's relationship with the father—and did not adequately address how these disputed issues affected the child's welfare. Additionally, the court made insufficient findings regarding factors relevant to determining whether relocation to another country would be in the child's best interests. **Cohen v. Hefetz, 563.**

Support order—temporary—operation of time—removal from active docket—In a child support order, the trial court erred by treating an earlier child support order as a permanent order where the earlier order specifically noted its temporary nature, was entered without prejudice to either party, and stated a clear and specific reconvening time in the relatively near future. Although the matter was continued several times, it was apparent that the parties were trying to mediate the child support issue, and, moreover, at no point was the case inactive for more than six months. Nor did an order removing the matter from the trial docket of active cases—or the trial court's observation therein that it appeared that all issues had been resolved—have any legal effect on the parties or the case. Accordingly, the order on appeal was vacated and the matter was remanded for further findings of fact. **Flores v. Gutierrez, 582.**

CONSTITUTIONAL LAW

Firearm law—possession of firearm by a felon—facial challenge—binding precedent—Defendant's constitutional challenge to N.C.G.S. § 14-415.1, which criminalizes possession of a firearm by a felon, was unavailing given binding precedent upholding the law as facially constitutional. **State v. Pride, 684.**

North Carolina—right to twelve-person jury—alternate juror substituted after deliberations began—In a trial for charges including second-degree kidnapping, assault on a female, and assault with a deadly weapon, the trial court did not violate defendant's constitutional right to a twelve-person jury—under Article I, Section 24 of the North Carolina Constitution—by substituting an alternate juror after deliberations had already begun where, after doing so, the court properly instructed the jury to begin deliberations anew, as required under N.C.G.S. § 15A-1215(a), thereby eliminating the risk that thirteen people—the alternate juror, the juror whom the alternate replaced, and the remaining eleven jurors—would render the verdict. **State v. Toomer, 689.**

CONTEMPT

Civil—purge conditions—present ability to pay—lack of findings—remand— In a contentious custody and child support matter, the trial court's amended commitment order for civil contempt—which found the father in civil contempt and ordered him to be immediately arrested, although the trial court subsequently entered a release order giving the father a temporary respite based on his military service—was reversed because the trial court did not hear evidence or make any findings regarding the father's present ability to pay the amount set forth as a purge condition in a prior contempt order. The matter was remanded for further proceedings on the contempt order, including consideration of the father's potential right to appointed counsel were he to be subject to incarceration. **Roybal v. Raulli, 600.**

CONTRACTS

Breach of contract—arbitration clause inapplicable—discovery properly served—failure to respond constituted admission—In plaintiff's breach of contract action to recover unpaid fees from an investment advisor (defendant) who had hired plaintiff to expunge his notice of termination from publicly accessible databases, the trial court properly granted summary judgment in favor of plaintiff where there was no genuine issue of material fact regarding the elements of the claim. First, contrary to defendant's assertion, the dispute was not subject to arbitration because specific performance was not requested as a remedy; therefore, the narrow applicability of the arbitration clause in the parties' contract was not invoked. Second, since defendant was properly served with plaintiff's requests for admission, his failure to respond constituted an admission of the elements of breach of contract. **Advisor Law, LLC v. Holland, 552.**

DIVORCE

Equitable distribution—classification of property—post-separation passive appreciation of joint stock account—An equitable distribution order was vacated—and the matter was remanded for reconsideration—where, although the trial court properly classified a joint stock account as marital property, the court erred by failing to: classify the post-separation passive appreciation of the account as divisible property; enter factual findings regarding evidence presented by plaintiff-wife at the equitable distribution hearing, including a financial statement showing that the account had essentially tripled in value between the date of separation and the date of the hearing; and properly distribute the account's post-separation gain between the parties. **Cunningham v. Cunningham, 578.**

EVIDENCE

Impeachment—older prior convictions—Rule 609(b)—insufficient findings—misapprehension of the law—no prejudicial error—In a trial for charges including second-degree kidnapping, assault on a female, and assault with a deadly weapon, the trial court abused its discretion, but did not commit prejudicial error, in allowing the State to impeach defendant with his prior convictions for second-degree kidnapping and armed robbery—offenses committed more than ten years earlier—under Evidence Rule 609(b). First, the court failed to enter findings of fact demonstrating that the convictions' probative value substantially outweighed their prejudicial effect and explaining how the convictions bore on defendant's credibility. Second, acting under a misapprehension of the law, the court admitted the prior convictions into evidence to show that they involved the same plan, intent, or pattern seen in the charged offenses—a use permitted under Evidence Rule 404(b) but not under Rule 609(b). Nevertheless, because the court also admitted substantial evidence of defendant's untruthfulness apart from the convictions, and given the overwhelming evidence of defendant's guilt of the charged crimes, the court's error was not prejudicial. **State v. Toomer, 689.**

Possession of firearm by a felon—airsoft gun excluded—relevance—no evidentiary link to defendant—In a prosecution for possession of a firearm by a felon, arising from an incident in which defendant banged on a woman's door while holding an object (which the woman told a 911 operator was a gun), the trial court did not abuse its discretion by excluding an airsoft gun from evidence where, because there was no evidentiary link between defendant and the airsoft gun, any probative value of introducing the gun would be substantially outweighed by the risk of confusing the issues put forth to the jury. **State v. Pride, 684.**

FIREARMS AND OTHER WEAPONS

Possession of firearm by a felon—identification of firearm—sufficiency of evidence —The State presented substantial evidence of each element of possession of a firearm by a felon to overcome defendant's motion to dismiss, including testimony from a witness who saw defendant holding something in his hand outside her home and who called 911 to report seeing someone at her door with a gun. Further, doorbell camera footage showed defendant outside the home of the witness, and the jury viewed the video twice during deliberations, including once in slow motion. Despite defendant's contention that the State needed to exclude the possibility that he had been holding an airsoft gun, the evidence and surrounding circumstances were sufficient to defeat defendant's motion. **State v. Pride, 684.**

INDICTMENT AND INFORMATION

Variance—misdemeanor death by vehicle—predicate offense of failure to maintain lane—Where defendant was convicted of misdemeanor death by vehicle (MDBV)—arising from defendant losing control of his vehicle while speeding on a winding mountain road, crashing into a tree and killing a passenger—there was no fatal variance between his indictment and the proof offered at trial. A person commits MDBV when he unintentionally causes the death of another person when engaged in the violation of any motor vehicle law or ordinance other than impaired driving, and the predicate offense here was failure to maintain a lane of travel. Even though defendant did not intentionally leave his lane of travel, his deliberate action of speeding culminated in him losing control over his vehicle, departing from his lane, colliding with a tree on the other side of the road, and killing his passenger. **State v. Gibbon, 644.**

JURISDICTION

Subject-matter—misdemeanor death by vehicle—presentment and indictment—The superior court had subject-matter jurisdiction to enter judgment upon defendant's conviction of misdemeanor death by vehicle (MDBV)—arising from defendant losing control of his vehicle while speeding on a winding mountain road, crashing into a tree and killing a passenger—where defendant was initially charged in the district court for violating the MDBV statute, but was actually tried in the superior court by way of a grand jury's return of a presentment and indictment. While a superior court lacks original jurisdiction to try a stand-alone misdemeanor initiated through an indictment, a presentment charging such a misdemeanor conveys jurisdiction to the superior court (N.C.G.S. § 7A-271(a)(2)). Further, the assistant district attorney discharged her statutory duty to investigate the background of every presentment returned and submit a bill of indictment only when appropriate (N.C.G.S. § 15A-641(c)). Accordingly, the trial court properly denied defendant's motion to dismiss the MDBV charge for lack of jurisdiction. **State v. Gibbon, 644.**

MEDICAL MALPRACTICE

Corporate negligence—negligent supervision—proximate cause—failure to forecast evidence of physician's negligence—In a medical malpractice action brought against defendants (an oral surgeon and multiple medical practices) for negligence and other torts after plaintiff was diagnosed with naso-oropharyngeal cancer—where plaintiff argued that the oral surgeon's failure to order a biopsy of a mass on his lower left jaw caused a delay in his cancer diagnosis—the trial court properly granted summary judgment for the corporate defendants on plaintiff's claims for corporate negligence and negligent supervision because plaintiff failed to forecast that the oral surgeon's negligence proximately caused his injuries. **Griffin v. Brown, 590.**

Standard of care—causation—speculation—improved chance of recovery— In a medical malpractice action brought against defendants (an oral surgeon and multiple medical practices) for negligence and other torts after plaintiff was diagnosed with naso-oropharyngeal cancer—where plaintiff argued that the oral surgeon's failure to order a biopsy of a mass on his lower jaw caused a delay in his cancer diagnosis—the trial court properly granted summary judgment for the oral surgeon on plaintiff's ordinary negligence claims. Plaintiff failed to forecast sufficient evidence to establish causation where, although his experts believed the oral surgeon violated the applicable standard of care, their speculation that an earlier diagnosis might have benefited plaintiff's outcome did not constitute proof of proximate cause, which, in a medical malpractice case, required more than showing that a different treatment would have improved the patient's chances of recovery. **Griffin v. Brown, 590.**

REAL PROPERTY

Restrictive covenants—breach of contract—real covenant to run with the land—privity—sufficiency of claim—In a breach of contract action brought by plaintiffs (a property development owners' association) alleging that a Farmhouse Tract—which, along with plaintiffs' property development, had been split off and sold from an initial 250-acre tract—was subject to a declaration of covenants (as set forth in a prior consent judgment and memorandum of settlement, which purported to bind all successors in interest), the trial court properly granted summary judgment in favor of two individually-named defendants who were not owners of the Farmhouse Tract and whose names did not appear on the Farmhouse Tract deed; therefore, plaintiffs could not enforce a real covenant against the individual defendants due to lack of privity. The trial court erred, however, in granting summary judgment in favor of defendant real estate company, since it owned the Farmhouse Tract and, viewing the relevant real estate documents in the light most favorable to plaintiffs, defendant real estate company was chargeable with notice of the covenants' existence. **Valle Cay Prop. Owners Ass'n, Inc. v. Slocum Mountain Real Est., LLC, 704.**

SEARCH AND SEIZURE

Warrantless search—following vehicle crash—exclusionary rule—good faith exception—In defendant's second appeal from her conviction of various crimes, arising from drugs found during a warrantless search of a car in which she was a passenger, following a single-vehicle crash—after the Supreme Court assumed without deciding that probable cause existed, held the warrantless search violated the Fourth Amendment, and remanded the matter for the trial court to determine whether the exclusionary rule applied—the trial court properly determined that the drugs were admissible. Because the automobile exception to the warrant requirement may apply even to an immobile vehicle, like the crashed car here, and given the lower expectation of privacy for vehicles driven in public, the trooper objectively acted in good faith in searching the vehicle without a warrant. **State v. Julius, 653.**

Warrantless search—following vehicle crash—probable cause—In defendant's second appeal from her conviction of various crimes, arising from drugs found during a warrantless search of a car in which she was a passenger, following a single-vehicle crash—after the Supreme Court assumed without deciding that probable cause existed, held the warrantless search violated the Fourth Amendment, and remanded the matter for the trial court to determine whether the drugs discovered should have been excluded—the trial court's threshold determination that probable cause existed was affirmed. Bystanders at the crash scene told a state trooper that the driver, "Kyle," had fled the scene because he had outstanding arrest warrants (for unknown charges) and evidence also suggested that Kyle had committed a traffic crime; accordingly, the trooper had probable cause to search the vehicle for anything that could identify Kyle. **State v. Julius, 653.**

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.

ADVISOR LAW, LLC, Plaintiff
v.
MICHAEL C. HOLLAND, Defendant

No. COA24-1035

Filed 4 February 2026

1. Arbitration and Mediation—motion to compel arbitration—choice of law—specific performance not requested—arbitration clause inapplicable

In plaintiff's breach of contract action to recover unpaid fees from an investment advisor (defendant) who had hired plaintiff to expunge his notice of termination from publicly accessible databases, the trial court properly denied defendant's motion to compel arbitration because specific performance was not requested as a remedy and, therefore, the arbitration clause in the parties' contract did not apply. The appellate court also noted that North Carolina law rather than Colorado law controlled because: (1) defendant accepted plaintiff's offer and executed the contract in North Carolina, and (2) since the breach of contract claim did not fall within the scope of the arbitration clause, the contingent choice of law provision in the arbitration clause (under which Colorado law would govern) did not apply.

2. Contracts—breach of contract—arbitration clause inapplicable—discovery properly served—failure to respond constituted admission

In plaintiff's breach of contract action to recover unpaid fees from an investment advisor (defendant) who had hired plaintiff to expunge his notice of termination from publicly accessible databases, the trial court properly granted summary judgment in favor of plaintiff where there was no genuine issue of material fact regarding the elements of the claim. First, contrary to defendant's assertion, the dispute was not subject to arbitration because specific performance was not requested as a remedy; therefore, the narrow applicability of the arbitration clause in the parties' contract was not invoked. Second, since defendant was properly served with plaintiff's requests for admission, his failure to respond constituted an admission of the elements of breach of contract.

Judge TYSON dissenting.

Appeal by Defendant from orders entered 24 July 2024 by Judge Matthew B. Smith in Union County Superior Court. Heard in the Court of Appeals 14 August 2025.

Hamilton Stephens Steele + Martin, PLLC, by M. Aaron Lay, Robert J. Shelton, and Zachary M. Perhach, for Plaintiff-Appellee.

Cranfill Sumner, LLP, by Steven A. Bader, for Defendant-Appellant.

CARPENTER, Judge.

Michael C. Holland ("Defendant") appeals from the trial court's 24 July 2024 order (the "Arbitration Order") denying Defendant's motion to compel arbitration and 24 July 2024 order (the "Summary Judgment Order") granting the motion for summary judgment filed by AdvisorLaw, LLC ("Plaintiff"). On appeal, Defendant argues the trial court erred by: (1) denying Defendant's motion to compel arbitration; and (2) granting Plaintiff's motion for summary judgment. After careful review, we affirm.

I. Factual & Procedural Background

Under federal securities regulations, when an investment advisor registered with the Securities and Exchange Commission ("SEC") is terminated, the employing firm reports the termination through regulatory filings that appear in two publicly accessible databases: SEC's Investment Advisor Public Disclosure ("IAPD") and Financial Industry Regulatory Authority's BrokerCheck ("BrokerCheck"). In certain circumstances, investment advisors may seek to expunge their termination disclosures from IAPD and BrokerCheck.

Defendant is an investment advisor, registered with the SEC, who worked for Fifth Third Securities ("Fifth Third"). On 8 February 2019, Fifth Third terminated Defendant and reported the termination in regulatory filings, which were recorded in IAPD and BrokerCheck. Seeking to remove the termination disclosures, Defendant contacted Plaintiff, which provides termination disclosure expungement services.

On 4 September 2020, Defendant and Plaintiff entered into a contract (the "Contract") for the expungement of Fifth Third's notice of Defendant's termination from IAPD and BrokerCheck. The Contract required a $15,000 retainer and provided for billing at hourly rates ranging from $75 to $650, depending on the services. The Contract included an arbitration clause, providing:

> Any contractual disputes that include specific performance as the primary or non-primary claim arising from this agreement shall have the entire dispute settled finally and exclusively by arbitration in Denver, Colorado pursuant to the Colorado Uniform Arbitration Act and in accordance with Colorado Law.

Between September and November 2020, Defendant made three payments totaling $15,000 for the retainer fee. On 16 June 2021, Plaintiff issued an initial invoice to Defendant for $15,461.75. Pursuant to the Contract, Plaintiff applied the $15,000 retainer to the initial invoice, leaving a balance of $461.75. Thereafter, Plaintiff continued to send Defendant invoices for services rendered until 26 July 2022, at which time Plaintiff sent Defendant a demand letter seeking the total unpaid balance of $44,847.33.

In October 2022, Defendant requested arbitration through the Colorado Bar Association's Legal Fee Arbitration Committee ("COBAR"), but Plaintiff declined. On 8 March 2023, Plaintiff initiated arbitration through the Fairclaims forum, but Defendant declined. On 20 March 2023, Plaintiff again attempted to initiate arbitration, this time through COBAR. This arbitration did not occur because, according to Defendant, COBAR never contacted him following Plaintiff's request for arbitration.

On 15 December 2023, Plaintiff filed a breach of contract action against Defendant in Union County Superior Court, requesting: (1) damages plus interest; (2) reasonable attorney's fees; (3) action costs to be taxed against Defendant; (4) a jury trial on all issues; and (5) any other relief the court deemed proper. Plaintiff served Defendant with the complaint and summons at his home address. Defendant filed a *pro se* answer, denying liability and asserting several defenses. On 8 March 2024, Plaintiff served Defendant with discovery requests, including interrogatories, requests for production of documents, and requests for admissions. Despite being served at his home address, Defendant did not respond to Plaintiff's discovery requests and claimed he never received them.

On 23 May 2024, Defendant moved to compel arbitration. On 28 May 2024, Plaintiff moved for summary judgment. On 22 July 2024, the trial court conducted a hearing on both motions. Two days later, the trial court entered the Arbitration Order denying Defendant's motion to compel arbitration. In the Arbitration Order, the trial court found that the Contract only required arbitration "for actions seeking specific performance" and concluded that the arbitration clause was "not applicable to the claim sought by [Plaintiff] in this matter." That same day, the trial court granted summary judgment for Plaintiff. On 22 August 2024, Defendant filed written notice of appeal.

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) denying Defendant's motion to compel arbitration; and (2) granting Plaintiff's motion for summary judgment.

IV. Analysis

A. Arbitration

[1] First, Defendant argues the trial court erred by denying his motion to compel arbitration because, pursuant to the arbitration clause, Plaintiff's action was subject to arbitration. Defendant further asserts that because the arbitration clause applied, Colorado law governs the interpretation of the Contract.

"[W]e apply the *de novo* standard to the denial of a motion to compel arbitration and its underlying conclusions of law concerning issues of contract interpretation and whether the dispute is subject to arbitration." *Hager v. Smithfield E. Health Holdings, LLC*, 264 N.C. App. 350, 355, 826 S.E.2d 567, 571 (2019) (citing *Creed v. Smith*, 222 N.C. App. 330, 333, 732 S.E.2d 162, 164 (2012)). 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)).

As an initial matter, we address Defendant's contention that Colorado law governs the interpretation of the Contract. Generally, the law of the state where a contract is made governs the contract, but parties may agree otherwise. *See Tanglewood Land Co., Inc. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980); *see also Federated Fin. Corp. of Am. v. Jenkins*, 215 N.C. App. 330, 333, 719 S.E.2d 48, 51 (2011) ("[W]here parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect.") (cleaned up). "Although the language used may differ from one contract to another, one or more of three types of provisions (choice of law, consent to jurisdiction, and forum selection), which have very distinct purposes" may exist in a contract. *Wall v. Automoney, Inc.*, 284 N.C. App. 514, 524, 877 S.E.2d 37, 48 (2022) (internal quotation marks and citation omitted). A choice of law provision "names a particular state and provides that the substantive laws of that jurisdiction will be used to determine the validity and construction of the contract . . . ." *Id.* at 524, 877 S.E.2d at 48 (internal quotation marks and citation omitted). On the other hand, a "forum selection [clause] designates a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of the contract and their contractual relationship." *Johnston Cnty. v. R.N. Rouse & Co., Inc.*, 331 N.C. 88, 93, 414 S.E.2d 30, 33 (1992).

Here, Defendant accepted Plaintiff's offer and executed the Contract in North Carolina, meaning North Carolina law governs our interpretation unless otherwise provided by the Contract. *See Tanglewood Land Co., Inc.*, 299 N.C. at 262, 261 S.E.2d at 656. The Contract does not include an exclusive forum selection clause nor an exclusive choice of law clause. The Contract does, however, include a contingent choice of law provision that Colorado law will govern *if* the dispute is subject to arbitration—specifically, if the dispute "include[s] specific performance." As discussed below, this dispute is not subject to arbitration because Defendant's simple breach of contract claim does not fall within the scope of the arbitration clause. Therefore, the forum selection and choice of law provisions contained in the narrow arbitration clause do not apply, and North Carolina law, not Colorado law, dictates our interpretation of the Contract.

Defendant asserts that the arbitration clause should be read broadly to cover any claims arising under the Contract, including those for specific performance. Defendant additionally asserts that, even if the arbitration clause is not read broadly, it is ambiguous and must be construed against the drafter, Plaintiff. On the other hand, Plaintiff contends that the Contract is unambiguous and provides that a dispute arising under the Contract is not subject to arbitration unless a party seeks specific performance as a remedy. We agree with Plaintiff.

"Contract interpretation is a question of law . . . ." *GE Betz, Inc. v. Conrad*, 231 N.C. App. 214, 225, 752 S.E.2d 634, 644 (2013). "North Carolina law requires a court to interpret a contract by examining its language for indications of the parties' intent at the moment of execution." *Fairview Devs., Inc. v. Miller*, 187 N.C. App. 168, 171, 652 S.E.2d 365, 367 (2007). "If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996). "This intention is to be gathered from the entire instrument, viewing it from its four corners." *Jones v. Palace Realty Co.*, 226 N.C. 303, 305, 37 S.E.2d 906, 907 (1946). "When interpreting a contract, the Court should presume that the words of the agreement were deliberately selected and be given their plain meaning." *Value Health Sols., Inc. v. Pharm. Rsch. Assocs.*, 385 N.C. 250, 267, 891 S.E.2d 100, 114 (2023).

Our courts adhere to the central principle of contract interpretation that the various terms of a contract are to be harmoniously construed, and if possible, every word and every provision is to be given effect. *WakeMed v. Surgical Care Affiliates, LLC*, 243 N.C. App. 820, 824, 778 S.E.2d 308, 312 (2015); *see Emmanuel Afr. Methodist Episcopal Church v. Reynolds Constr. Co.*, 217 N.C. App. 176, 179–80, 718 S.E.2d 201, 203–04 (2011) (" 'This Court has long acknowledged that an interpretation which gives a reasonable meaning to all provisions of a contract will be preferred to one which leaves a portion of the writing useless or superfluous.' ") (quoting *International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 316, 385 S.E.2d 553, 555–56 (1989)). If "only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract . . . ." *Woods v. Nationwide Mutual Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978).

Again, the arbitration clause provides:

> Any contractual disputes that include specific performance as the primary or non-primary claim arising from this agreement shall have the entire dispute settled finally and exclusively by arbitration in Denver, Colorado pursuant to the Colorado Uniform Arbitration Act and in accordance with Colorado Law.

In our view, the scope of the arbitration clause is clear and unambiguous. The opening phrase, "any contractual disputes that include specific performance," acts as a qualifier, narrowing the scope of the arbitration clause to only those disputes where a party requests specific performance as a remedy. The next phrase, "primary or non-primary," functions as a modifier, clarifying that arbitration is required where specific performance is implicated by a "claim" in the dispute. The arbitration clause additionally requires that disputes involving specific performance be arbitrated in "Denver, Colorado pursuant to the Colorado Uniform Arbitration Act and in accordance with Colorado Law."

Reviewing the four corners of the Contract, the plain language of the arbitration clause narrows its binding effect to contractual disputes where specific performance is among the remedies sought. *See Jones*, 226 N.C. at 305, 37 S.E.2d at 907. The language is clear and only one reasonable interpretation exists, so we enforce the contract as written. *See Woods*, 295 N.C. at 506, 246 S.E.2d at 777. The interpretation urged by our dissenting colleague fails to give effect to the qualifying language of the arbitration clause, impermissibly broadening its scope. We read the terms of the arbitration clause harmoniously, rather than rendering the specific-performance language superfluous. *See WakeMed*, 243 N.C. App. at 824, 778 S.E.2d at 312; *Emmanuel Afr. Methodist Episcopal Church*, 217 N.C. App. at 179–80, 718 S.E.2d at 203–04. Because specific performance was not requested as a remedy, the arbitration clause does not apply.[1] Therefore, the trial court did not err by denying Defendant's motion to compel arbitration, and we affirm the Arbitration Order.

B. Summary Judgment

[2] Defendant next contends that because the dispute is subject to arbitration, this Court should vacate the Summary Judgment Order. We disagree.

"We review de novo an appeal of a summary judgment order." *Cullen v. Logan Developers, Inc.*, 386 N.C. 373, 377, 904 S.E.2d 730, 734 (2024) (internal quotation marks and citation omitted). "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Id.* at 377, 904 S.E.2d at 734 (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2023)). "The summary judgment standard requires the trial court to construe evidence in the light most favorable to the nonmoving party . . . ." *Id.* at 377, 904 S.E.2d at 734 (internal quotation marks and citation omitted).

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Lake Mary Ltd. P'ship v. Johnston*, 145 N.C. App. 525, 536, 551 S.E.2d 546,

---

1. The fact that specific performance is a disfavored remedy in personal service contract disputes does not undermine our interpretation of the arbitration clause. *See Williams v. Habul*, 219 N.C. App. 281, 289–91, 724 S.E.2d 104, 110–11 (2012) (citing approvingly, in *dicta*, the policy of the Restatement (Second) of Contracts § 367(1) (1981) against specific enforcement of personal service contracts while recognizing that the Restatement can serve as "persuasive, not binding authority" because " '[e]xcept as specifically adopted in this jurisdiction, the Restatement should not be viewed as determinative of North Carolina law.' " (quoting *Hedrick v. Rains*, 344 N.C. 729, 729, 477 S.E.2d 171, 172 (1996)).

554 (2001) (internal quotation marks and citation omitted). "A party may serve upon any other party a written request for the admission . . . of the truth of any matters . . . that relate to statements or opinions of fact or of the application of law to fact . . . ." N.C. Gen. Stat. § 1A-1, Rule 36(a) (2023). Service upon a party is proper by "mailing a copy to the party at the party's last known address . . . ." N.C. Gen. Stat. § 1A-1, Rule 5(b)(2)(b) (2023). Further, if a *pro se* defendant "provides a mailing address in a document filed in response to a complaint and serves a copy of that filing on opposing counsel," then opposing counsel is permitted to "rely on that address for service of all subsequent process and other communications until a new address is furnished." *J.M. Parker & Sons, Inc. v. William Barber, Inc.*, 208 N.C. App. 682, 686, 704 S.E.2d 64, 67 (2010) (internal quotation marks and citation omitted).

If a party served does not respond within thirty days, "the matter is admitted." N.C. Gen. Stat. § 1A-1, Rule 36(a). Admissions are "conclusively established unless the court on motion permits withdrawal or amendment." *Id.*, Rule 36(b). "Facts that are admitted under Rule 36(b) are sufficient to support a grant of summary judgment." *Kniep v. Templeton*, 185 N.C. App. 622, 629, 649 S.E.2d 425, 430 (1999) (internal quotation marks and citation omitted).

Defendant contends the trial court's consideration of Plaintiff's motion for summary judgment was procedurally improper. As outlined above, the trial court correctly concluded that the arbitration clause did not control this contractual dispute. Thus, it was procedurally proper for the trial court to reach and issue a ruling on Plaintiff's motion for summary judgment. Defendant makes no additional assertions in support of his argument that the trial court erred by granting summary judgment.

Here, Plaintiff mailed the requests for admission to Defendant's home address—the same address Defendant used throughout the action. Indeed, Defendant included his home address in his answer, his motion to compel arbitration, and in his correspondence with COBAR. Thus, Defendant was properly served. *See* N.C. Gen. Stat. § 1A-1, Rule 5(b)(2)(b). Plaintiff's request for admissions asked Defendant to admit that: (1) the parties entered into a valid agreement; (2) Defendant breached the Contract by failing to pay the $44,847.33 service fee; and (3) Plaintiff sustained damages as a result. By failing to respond to Plaintiff's requests for admission, Defendant admitted the elements of breach of contract. *See* N.C. Gen. Stat. § 1A-1, Rule 36(a); *Kniep*, 185 N.C. App. at 629, 649 S.E.2d at 430. Accordingly, the trial court did not err by granting Plaintiff's motion for summary judgment because the elements of breach of contract were admitted, leaving no genuine issue of material fact. *See Kniep*, 185 N.C. App. at 629, 649 S.E.2d at 430. Accordingly, we affirm the Summary Judgment Order.

V. Conclusion

The trial court did not err by denying Defendant's motion to compel arbitration or by granting Plaintiff's motion for summary judgment. Accordingly, we affirm.

AFFIRMED.

Chief Judge DILLON concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion improperly affirms the trial court's denial of Defendant's motion to compel arbitration and order granting Plaintiff's motion for summary judgment. Both orders are properly reversed. I respectfully dissent.

I. Arbitration Agreement

A. Standard of Review

We review *de novo* the agreement and whether the specific dispute is governed by the arbitration agreement. *Tohato, Inc. v. Pinewild Mgmt., Inc.*, 128 N.C. App. 386, 391, 496 S.E.2d 800, 804 (1998). When reviewing an arbitration agreement, this Court examines "(1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement." *Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004) (citations and internal quotation marks omitted).

"One of the most fundamental principles of contract interpretation is that ambiguities are to be construed against the party who prepared the writing." *Chavis v. S. Life Ins. Co.*, 318 N.C. 259, 262, 347 S.E.2d 425, 427 (1986) (citations omitted).

B. Contract Interpretation

The canons of contract interpretation are well established and clear. "If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996). "This intention is to be gathered from the entire instrument, viewing it from its four corners." *Jones v. Palace Realty Co.*, 226 N.C. 303, 305, 37 S.E.2d 906, 907 (1946). "When interpreting a contract, the Court should presume that the words of the agreement were deliberately selected and be given their plain meaning." *Value Health Sols., Inc. v. Pharm. Rsch. Assocs.*, 385 N.C. 250, 267, 891 S.E.2d 100, 114 (2023).

"The heart of a contract is the intention of the parties, which is ascertained by the subject matter of the contract, the language used, the purpose sought, and the situation of the parties at the time." *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 11, 161 S.E.2d 453, 462 (1968) (citations omitted). "It is a general rule of contract law that the intent of the parties, where not clear from the contract, may be inferred from their actions." *Branch Banking & Trust Co. v. Kenyon Inv. Corp.*, 76 N.C. App. 1, 9, 332 S.E.2d 186, 192 (1985), *appeal withdrawn*, 316 N.C. 192, 341 S.E.2d 587 (1986).

If "only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract . . . ." *Woods v. Nationwide Mutual Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978).

C. Analysis

The contract, drafted by Plaintiff, provides:

> Any contractual disputes that include specific performance as the primary or non-primary claim arising from this agreement shall have the entire dispute settled finally and exclusively by arbitration in Denver, Colorado pursuant to the Colorado Uniform Arbitration Act and in accordance with Colorado Law. (emphasis supplied).

Defendant correctly contends the arbitration clause should be read broadly to cover "Any contractual disputes," including but not exclusively those for specific performance, whether "the primary or non-primary claim," which "aris[e] from this agreement." Strong Federal and State public policy exists in favor of resolving disputes through arbitration where the parties have mutually agreed to use that alternative dispute remedy, and such provisions are to be constructed broadly in favor of arbitration. *See Goldstein v. Am. Steel Span, Inc.*, 181 N.C. App. 534, 536, 640 S.E.2d 740, 742 (2007).

The Federal Arbitration Act provides:

> A written provision in any . . . *contract evidencing a transaction involving commerce to settle by arbitration* a controversy thereafter arising out of such contract or transaction . . . *shall be valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the *revocation* of any contract.

9 U.S.C. § 2 (2024) (emphasis supplied).

The Supreme Court of the United States "described this provision as reflecting both a 'liberal federal policy favoring arbitration,' and the 'fundamental principle that arbitration is a matter of contract.' " *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 179 L. Ed. 2d 742, 751 (2011) (internal citations omitted). Justice Scalia, writing for the majority of the Court, held "courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Id.* (internal citations omitted).

The trial court prejudicially erred as a matter of law by concluding the arbitration clause "that include specific performance as the primary or non-primary claim arising from this agreement" limits "[a]ny contractual dispute" . . . "arising from this agreement," solely to claims only where specific performance and regardless of whether that remedy is sought "as the primary or non-primary claim." *Id.*

II. Conclusion

A long line of Federal and North Carolina precedents embrace a strong public policy to resolve disputes by arbitration where the partes have mutually agreed to do so. *Id.* North Carolina law also construes any ambiguity in contractual provisions against the drafter of the provision, here the Plaintiff. *Chavis*, 318 N.C. at 262, 347 S.E.2d at 427.

The provision clearly and unambiguously provides for arbitration as the alternative dispute resolution mechanism to resolve contractual disputes and for arbitration to take place in Denver Colorado and for the dispute to be decided according to Colorado Law. The trial court prejudicially erred by denying Defendant's motion to compel arbitration and by entering summary judgment on behalf of Plaintiff. I respectfully dissent.

HILLA ZIV COHEN, Plaintiff
v.
YOSEF HEFETZ, Defendant

No. COA25-39

Filed 4 February 2026

Child Custody and Support—primary physical custody with mother—relocation with child to foreign country—best interests of child—insufficiency of findings

In a child custody dispute, the trial court's order granting the mother primary physical custody of the parties' child and allowing her to relocate with the child to her homeland in Israel was vacated—and the case was remanded—where the court's findings of fact, though extensive, consisted of mere recitations of testimony which failed to resolve the primary disputes between the parties—including the safety of relocating to Israel during a time of war, the safety of the proposed neighborhood where the mother and child would live, and the impact this relocation would have on the child's relationship with the father—and did not adequately address how these disputed issues affected the child's welfare. Additionally, the court made insufficient findings regarding factors relevant to determining whether relocation to another country would be in the child's best interests.

Appeal by defendant from judgment entered 1 June 2024 by Judge Kathryn Whitaker Overby in Alamance County Superior Court. Heard in the Court of Appeals 14 January 2026.

Steven C. McRae, P.A., by Steven C. McRae, for the plaintiff-appellee.

Sandlin Family Law Group, by Deborah Sandlin, for the defendant-appellant.

TYSON, Judge.

Yosef Hefetz ("Father") appeals from the permanent child custody order entered 1 June 2024 awarding Hilla Ziv Cohen ("Mother") primary custody of their minor child, "Sam," and permitting Mother to relocate to Israel with the child. *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identity of minors). For the following reasons, we vacate the order and remand for further findings of fact and entry of a new custody order.

I. Background

Sam was born on 12 April 2020. Mother is a citizen and resident of North Carolina, but was born in Israel, where her family still lives. Father is a citizen and resident of North Carolina, but is also originally from Israel, where his mother and brother still live.

Mother filed for permanent custody on 10 June 2020. This matter came on for hearing 29 April 2024. The evidence and testimony presented at the hearing tended to show the following.

Mother and Father never married. Father had an extramarital affair while married to the mother of his two daughters, during which time Mother became pregnant with Sam.

While Mother was pregnant, she began experiencing abdominal pains and called Father to drive her to the emergency room. He indicated he was busy at a poker game. Mother drove herself to the emergency room. The mother of Mother, Ms. Hanny Cohen, traveled to North Carolina in March of 2020 to stay with Mother until approximately three months after Sam was born.

Before Sam was born, Mother approached Father about signing a parenting agreement to delineate custody and placement schedules. He did not sign an agreement. Mother asked Defendant if he would like to be listed on Sam's birth certificate, but he did not respond to her request. Father's name is not listed on Sam's birth certificate. Mother asked Father to relinquish his rights to the minor child. He indicated he would think about it, but he ultimately did not agree to relinquish his rights. Mother had an emergency cesarean section delivery on 12 April 2020. Father did not come to the hospital before or after Sam's birth.

The minor child was circumcised on the eighth day, consistent with Jewish tradition, in Durham, North Carolina. Ms. Hanny Cohen, the mother of Mother from Israel, was present for the ceremony. Father participated virtually *via* Zoom video call.

Father first saw Sam in person in April of 2020. During 2020, Father would visit occasionally with Sam while he was traveling for work. These visits usually lasted from between 15 to 20 minutes.

Mother requested of Father to agree for her to obtain a passport for Sam. Father agreed and the passport was issued. Mother traveled to Israel for approximately six weeks in the fall of 2020 for the holidays.

During this visit, Sam visited with his maternal relatives and with his paternal grandmother.

Within one week of her return to North Carolina, Mother filed a notice of hearing in order to establish visitation arrangements between Father and Sam. Father saw Sam only two times between late October 2020 and the end of 2020.

Father saw Sam very infrequently during 2021. Mother and Sam traveled to Israel in the spring of 2021 for Passover. Sam again visited with his maternal relatives and with his paternal grandmother.

Father requested a paternity test in 2021, which confirmed he is the biological father of Sam. Mother and Sam traveled to Israel in the fall of 2021 and again in 2022 for the holiday season. Both times, Sam visited with his maternal relatives and with his paternal grandmother.

By November of 2022, the parties agreed on a temporary parenting agreement. Father had six weeks of approximately two and one-half hours with Sam at a public place on alternating weekends. On the last Sunday visit, Father's visit with Sam was at his residence. For the next six weeks, Father had four hours of time with Sam on alternating Saturdays at Father's residence. Beginning on 3 June 2023, Father was to have twenty-four-hour overnight visits with Sam on an alternating weekend basis. For all of the visits between Father and Sam in December of 2022, Father brought along his daughters. Father was habitually late for his visits.

Mother and Sam visited Israel for Passover in March of 2023. Once again, Sam visited with his paternal grandmother and with his maternal relatives.

In April of 2023, Sam turned three years old. Mother's family participated in a hair-cutting ceremony with him, consistent with Jewish tradition. Mother invited Sam's paternal grandmother to this ceremony, but Mother did not invite Father.

In August of 2023 Father purchased a vacation home in Mexico and planned a trip there at the beginning of August 2023. He asked Mother to allow Sam to go on this trip. She did not think it was a good idea for Sam to go on a trip with Father for five days since the three-year-old had previously only spent one night at a time with the Father.

Mother and Sam traveled to Israel in October of 2023. While she was there, Hamas began the war. She stayed almost two weeks longer than she had planned due to the outbreak of the war and travel restrictions. During this time, Father called Mother almost daily.

Mother filed a motion to modify the temporary parenting agreement on 22 December 2023. In the motion, she expressed her desire to relocate to Israel permanently and her belief that she and her son would have a better life there.

The parties entered into a temporary consent order on 4 March 2024. Father received every other weekend from Friday at 6:00 p.m. until Monday drop off at daycare by 10:00 a.m. Father shared placement with Sam during the Passover holiday in April 2024.

On 12 April 2024, Father and one of his daughters came to the celebration of Sam's fourth birthday. Since that time, Father began to spend more time with Sam. They have a good time together. Mother indicated she has stopped asking Father for help with childcare for Sam because he has declined her requests multiple times in the past.

A. Mother's Assertions

The trial court entered a child custody order on 1 June 2024, finding, in relevant part, the following facts: Mother wishes to relocate to Israel for several reasons. First, she does not have a lot of friends or deep relationships in North Carolina; she avers her real support group is her family in Israel. Mother wishes to birth another child. She learned *in vitro* fertilization would be free under her health insurance in Israel. Mother wishes to raise Sam in Jewish traditions and religion. Though Israel has been at war since October of 2023, she testified she believes Israel is currently a safer place for Jews than is the United States. She is aware of the mandatory requirement that at age 18 Sam would have to participate in the Israeli Defense Force.

Mother plans to initially live in her mother's home, where there are bedrooms for Mother and Sam. She has an offer for temporary employment with the possibility of it becoming permanent after a three-month probationary period.

Sam understands both English and Hebrew. Mother has not yet researched schools in Israel because Sam was four years old at the hearing and school does not begin until a child is age six in Israel.

B. Father's Assertions

Father testified and expressed concerns about Sam relocating to Israel with Mother. First, he asserted the country is at war, meaning it could be dangerous to permanently send a child there. Second, Father believes his relationship with Sam will be negatively impacted if he lives there. In particular, he is concerned about the feasibility and costliness of traveling to Israel during the war. Moreover, communication between the parties had already become difficult by 2023. The court found: "There have been times when the parties communicated easily and effectively. By the beginning of 2023 the parties were not communicating well with each other and chose not to communicate a lot with each other. The parties now use Our Family Wizard to communicate with each other." Third, Father asserts the neighborhood where Mother plans to take Sam, her own mother's neighborhood, is not safe. He testified it is a "high crime neighborhood."

The trial court made over 100 "findings of fact," but only two conclusions of law: (1) jurisdiction was proper; and, (2) Mother and Father are both fit and proper persons to have joint custody of the minor child.

The trial court entered a permanent child custody order, granting joint legal custody to both of the parties, primary physical custody to Mother, and secondary physical custody to Father. The order also permitted Mother to relocate to Israel with Sam. The order arranged a visitation schedule for Father consisting of a few weeks during holidays or summer on select years. Father timely appealed the custody order on 28 June 2024.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2023).

III. Issues

The question presented is whether the trial court's findings of fact support its conclusions and decision to grant primary custody of Sam to Mother and to permit Mother to relocate to Israel with Sam.

IV. Standard of Review

"Whether . . . findings of fact support the trial court's conclusions of law is reviewable *de novo*." *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008).

> The findings of fact are conclusive on appeal if there is evidence to support them, even if evidence might sustain findings to the contrary. The evidence upon which the trial court relies must be substantial evidence and be such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Everette v. Collins, 176 N.C. App. 168, 170, 625 S.E.2d 796, 798 (2006) (internal citations omitted).

V. Analysis

Father argues the order's conclusions of law and findings of fact do not support a grant of primary physical custody to Mother, who is relocating to another jurisdiction. He also argues the trial court erred in making thirty-four out of the 101 findings of fact in the order because they are mere recitations of testimony and must be disregarded by this Court. Because we agree with his first argument, it is unnecessary to reach his second argument.

A. Conclusions of Law

We first address the issue of whether the order's findings of fact support its conclusions of law to grant primary physical custody to Mother. "Before awarding custody of a child to a particular party, the trial court must conclude as a matter of law that the award of custody to that particular party 'will best promote the interest and welfare of the child.' " *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978) (quoting N.C. Gen. Stat. § 50-13.2(a)). Here, the trial court failed to conclude a grant of primary physical custody to Mother with her relocation to Israel was in the "best interest" of the minor child.

The trial court "need not use 'magic words' in its findings of fact or conclusions of law, if the evidence and findings overall make the trial court's basis for its order clear." *In re B.C.T.*, 265 N.C. App. 176, 188, 828 S.E.2d 50, 58 (2019) (citing *Davis v. Davis*, 229 N.C. App. 494, 503, 748 S.E.2d 594, 601 (2013)); *see also Karger v. Wood*, 174 N.C. App. 703, 709, 622 S.E.2d 197, 202 (2005); *Carlton v. Carlton*, 145 N.C. App. 252, 263, 549 S.E.2d 916, 924 (Tyson, J., dissenting), *rev'd per curiam per dissent*, 354 N.C. 561 (2001) ("I decline to read the order appealed from so narrowly as to disregard the incorporated findings, or to constrain the trial court to use certain and specific 'buzz' words or phrases beyond that included in the order.").

A custody order will not fail simply because the trial court neglected to use the specific verbiage of "best interest of the child," as long as the order makes "detailed findings of fact from which an appellate court can determine that the order is in the best interest of the child[.]" *Carpenter v. Carpenter*, 225 N.C. App. 269, 273, 737 S.E.2d 783, 787 (2013) (quoting *Dixon v. Dixon*, 67 N.C. App. 73, 76-77, 312 S.E.2d 669, 672 (1984)). To that end, "[t]he quality, not the quantity, of findings is determinative." *Carpenter*, 225 N.C. App. at 273, 737 S.E.2d at 787.

B. Findings of Fact

Father argues the order cannot support a grant of primary physical custody to Mother for two reasons: (1) the findings of fact fail to resolve the primary disputes between the parties; and, (2) the order fails to make adequate findings of fact addressing the factors in *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 418 S.E.2d 675 (1992), relevant to determining custody upon relocation of a parent to a foreign jurisdiction.

1. Primary Disputes

If both parents are fit and proper to share custody, the trial court must by way of its findings "resolve the primary disputes between the parties and . . . explain *why* awarding custody of [the minor child] to [one parent or another] is in [the minor child's] best interest." *Carpenter*, 225 N.C. App. at 278-79, 737 S.E.2d at 790 (emphasis in original) (remanding for additional findings where trial court's order failed to explain why awarding primary custody of the minor child to the defendant was in best interest of the child); *In re Kowalzek*, 37 N.C. App. 364, 370, 246 S.E.2d 45, 48 (1978); *Dixon*, 67 N.C. App. at 78, 312 S.E.2d at 672. "[I]f the trial court does not find that there was sufficient credible evidence to resolve an issue, [the findings] should so state." *Carpenter*, 225 N.C. App. at 279, 737 S.E.2d at 790 (citing *Woncik v. Woncik*, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986)).

Here, the trial court made 101 findings of fact and concluded both parents were fit and proper persons to share custody of Sam. However, many of the findings were recitations of testimony, which "fail to resolve the primary issues raised by the evidence [bearing] directly upon the child's welfare." *See Carpenter*, 225 N.C. App. at 273, 737 S.E.2d at 787.

The primary disputed issues raised by the evidence regarding the child's welfare in this case were: (1) the relative safety of Sam relocating to Israel versus remaining in the United States; (2) the relative safety of the neighborhood Mother's mother lived in; and, (3) whether Sam's relationship with Father and Father's family would likely suffer if Sam were to relocate to Israel, and the impact of that possibility on Sam's welfare. The order makes recitations as "findings" regarding the evidence and contentions of the witnesses on these issues, but adjudicates and resolves few of them. *Carpenter*, 225 N.C. App. at 274, 737 S.E.2d at 787.

a. Safety in Israel

The trial court heard from Mother's and Father's mothers and brothers, who were all living and speaking from Israel *via* Webex video conference call, on the issue of Israel's safety in the midst of the Hamas war. The trial court made approximately ten findings addressing the issue:

> 70. The [c]ourt heard from [Mother and Father's] mothers and brothers, who were in Israel . . . . During multiple

hours of testimony, the Court never observed any air raid sounds or any evidence of bombing or war.

71. Israel has been at war since October 7, 2023.

* * *

73. [Mother's brother] indicated that he has no concerns about his or his family's safety in Israel. He took his daughter to a show the day before he testified in this case. . . . [He] lives approximately ninety minutes from Gaza and has never been there before.

* * *

80. [Father's brother] talked about the war and how they were surrounded by missiles, but also talked about his daughter going on a school field trip this week.

81. [Father's brother] indicated that i[t] i[s] not safe to raise children in Israel right now, but his own children are in Israel . . . .

* * *

84. [Father]'s mother . . . lives approximately sixty to ninety minutes south of [Mother]'s mother. . . .

* * *

86. [Father's mother] has lived in Israel for seventy years and has no plans of moving from Israel.

* * *

88. [Mother's] mother . . . . ha[s] a concrete safety bunker in her home.

* * *

92. [Mother's mother] . . . . has no plans to move from . . . Israel. She has lived in Israel since she was three months old.

* * *

94. [Father] has concerns about [Mother] moving to Israel now that Israel is at war. He did not have the same concerns before October 7, 2023 when the war started. . . .

These findings recognize a dispute, but do not resolve the issue of the extent to which the war in Israel presents a safety risk to the welfare of the minor child if he were to relocate there, and certainly not the more recent ceasefire. *See Carpenter*, 225 N.C. App at 276, 737 S.E.2d at 783. Most of the findings, excluding #70, 71, and 94, are merely recitations of testimony by various witnesses, are not adjudications of the conflicts in the testimony, and are not proper findings of fact. *Id.* There is sufficient evidence in the record to support adjudicated findings and conclusions on this issue and particularly in light of more recent events in the region.

b. Safety in Mother's Chosen Residential Area

On the issue of the relative safety risk the specific neighborhood Mother proposed to relocate with Sam, the trial court made the following findings:

> 60. [Mother] . . . has a plan to first live with her mother at her mother's home . . . .
>
> * * *
>
> 88. [Mother's] mother . . . is a retired police investigator. She does have a concrete safety bunker in her home.
>
> 89. [Father] testified that the neighborhood that [Mother's mother] lives in is a high crime neighborhood. [Mother's mother] testified that it used to be a bad neighborhood, but is much better now.
>
> * * *
>
> 92. [Mother's mother] has no safety concerns about living in [her neighborhood]. She has no plans to move . . .
>
> 93. [Mother's mother] thinks it would take sixty to eighty minutes to travel from [her neighborhood] to the Gaza Strip.

Again, these findings of fact recognize a dispute about safety, but do not adjudicate and resolve the issue. *Id.*

c. Father's Relationship with Sam

Finally, on the likelihood of Sam's relationship with Father suffering from Sam's move to Israel, Father identified at least two purported obstacles: (1) the feasibility of air travel to Israel during the war; and, (2) the poor quality of communication between the parties.

Father testified to both of these purported issues. On the issue of air travel, he testified a family trip to celebrate his mother's birthday had already been delayed because of restrictions caused by the Hamas attack. He continued:

> A. There's only a few airlines that fly to Israel and out of Israel, and prices are in the sky, and you never know when any situation will escalate. You can reserve now hotels in Italy, and if there is tomorrow escalation, you have to cancel all or lose your money, because there won't be any flights if you even get a flight.

On the issue of communication between the parties, he testified:

> A. We cannot communicate. We can communicate only by Our Family Wizard. And yeah, we can communicate. We can talk. Sometimes we can video call, but even this is not pleasant. . . . It's so hard to do a FaceTime with a kid. And there's so much noise, and again, family. . . . [H]e runs around with cousins and disappears and they have to go chase him with the phone.

The trial court found:

> 67. [Mother] facilitates phone and video calls between [Father] and the minor child. She would continue to do this if she moved to Israel.
>
> 68. [Mother] testified that she would facilitate visits between [Father] and the minor child during visits by [Father] in Israel. She would effectuate this intent if she moved to Israel.
>
> 74. . . . [Mother's brother] tries to be a mediator between the parties. [Mother's brother] and [Father] have discussed things, like [Father] paying for a Jewish daycare . . . . However, the parties have not discussed the same.
>
> 75. There have been times when the parties communicated easily and effectively. By the beginning of 2023 the parties were not communicating well with each other and chose not to communicate a lot with each other. The parties now use Our Family Wizard to communicate with each other.
>
> 94. [Father] has concerns about [Mother] moving to Israel . . . He believes that his relationship with the minor child will be impacted if the minor child lives in Israel.

> 95. [Father's mother] traveled from Israel to the United States in February 2024, during the war without problems.
>
> 96. [Father] testified about the costliness of traveling to Israel, but also indicated that he just shipped a Chevy Nova to Israel. [Father] bought a house in Mexico and drove a car there to have in Mexico. He just bought an $830,000 home in Chapel Hill. The Court finds that [Father] has the ability to pay for travel to Israel.
>
> 98. . . . [Father] indicated that his daughters are smitten with the minor child.
>
> 100. [Mother] is not seeking to move to Israel to hamper the relationship between [Father] and the minor child. She wants to move to be close to her family and her support group.
>
> 101. [Mother] has always included [Father's] family in visits with the minor child when she traveled to Israel. She intends on continuing with that pattern. [Mother] has already committed to allowing the minor child to travel with [Father] to Europe for [a] birthday celebration. She has indicated how visitations between the minor child and [Father] could work if she moves to Israel.

Unlike with the previous two primary disputes, the trial court's findings are more definitive. Regarding the issue of air travel for visitation, the trial court found and determined Father had an ability to pay for air travel, but did not determine how the unpredictability of it could impact Father's relationship with the minor child. Regarding the issue of communication, the trial court noted communication between the parties had been difficult, but determined and concluded Mother's desire to relocate to Israel was in good faith, and she had and would facilitate contact between Father, his family, and the minor child.

Ultimately, the findings of fact in the order fail to resolve the primary disputes raised and fail to show how the disputed issues factor into a best interest analysis. *Carpenter*, 225 N.C. App. at 278-79, 737 S.E.2d at 790. When the internal conflicts in the order are not adjudicated and resolved, the order must be vacated and remanded to the trial court for supported findings and conclusions in a new order. *Tuel v. Tuel*, 270 N.C. App. 629, 631, 840 S.E.2d 917, 920 (2020).

2. *Ramirez-Barker* Factors

Father also argues the trial court abused its discretion by allowing Mother to relocate to Israel despite failing to make adequate findings of fact addressing the factors in *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 418 S.E.2d 675 (1992) (*overruled on other grounds*). While we have already determined the order must be vacated on other grounds, we address this argument for the purpose of guiding the trial court upon remand.

> In exercising its discretion in determining the best interest of the child in a relocation case, factors appropriately considered by the trial court include but are not limited to: the advantages of the relocation in terms of its capacity to improve the life of the child; the motives of the custodial parent in seeking the move; the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the courts of North Carolina; the integrity of the noncustodial parent in resisting the relocation; and the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the non-custodial parent. Although most relocations will present both advantages and disadvantages for the child, when the disadvantages are outweighed by the advantages, as determined and weighed by the trial court, the trial court is well within its discretion to permit the relocation.

Ramirez-Barker, 107 N.C. App. at 79-80, 418 S.E.2d at 680 (internal citation omitted); *see also Evans v. Evans*, 138 N.C. App. 135, 142, 530 S.E.2d 576, 580 (2000) (quoting *id.*).

We disagree with Father insofar as he contends a relocation custody order is fatally deficient if the trial court fails to make explicit findings addressing each and every *Ramirez-Barker* factor. *Tuel*, 270 N.C. App. at 632, 840 S.E.2d at 920.

Although a trial court may appropriately consider these factors,

> the court's primary concern is the furtherance of the welfare and best interests of the child and its placement in the home environment that will be most conducive to the full development of its physical, mental and moral faculties. All other factors, including visit[ation] rights of the other applicant, will be deferred or subordinated to these

> considerations, and if the child's welfare and best interests will be better promoted by granting permission to remove the child from the State, the court should not hesitate to do so. Naturally, no hard and fast rule can be laid down for making this determination, but each case must be determined upon its own peculiar facts and circumstances.

Frey v. Best, 189 N.C. App. 622, 633-34, 659 S.E.2d 60, 69-70 (2008) (internal quotation marks, emphasis, and citations omitted). Nonetheless, the factors in *Ramirez-Barker* "will be highly relevant to the best interest of the child in nearly all of these situations." *Tuel*, 270 N.C. App. at 633, 840 S.E.2d at 921.

Here, the trial court made some supported findings touching on the *Ramirez-Barker* factors. Those findings are as follows:

> 68. [Mother] testified that she would facilitate visits between [Father] and the minor child during visits by [Father] in Israel. She would effectuate this intent if she moved to Israel.
>
> * * *
>
> 99. If [Mother] is allowed to move to Israel, the minor child will grow up with a lot of extended family, including grandparents, aunts, uncles and cousins of a similar age.
>
> 100. [Mother] is not seeking to move to Israel to hamper the relationship between [Father] and the minor child. She wants to move to be close to her family and her support group.
>
> 101. [Mother] has always included [Father's] family in visits with the minor child when she traveled to Israel. She intends on continuing with that pattern. [Mother] has already committed to allowing the minor child to travel with [Father] to Europe for [a] birthday celebration. She has indicated how visitations between the minor child and [Father] could work if she moves to Israel.

Finding #99 suggests, but does not explicitly state, an advantage in favor of Sam relocating to Israel would be the child would grow up with "a lot of extended family." This is the only explicit finding which conveys a weighing by the trial court of the advantages of relocating to Israel as they pertain to the best interest of the child. Finding #100 shows the trial court examined the motives of Mother in seeking the move and found them to be integrous and in good faith. Finding #68 and #101 relay Mother's habits and commitments regarding visitation between the minor child and Father but needs substantive analysis of the likelihood "that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent." *Ramirez-Barker*, 107 N.C. App. at 80, 418 S.E.2d at 680.

In *Tuel*, this Court reviewed a child custody order containing similar findings regarding the *Ramirez-Barker* factors. There, the trial court awarded primary physical custody of minor children to the mother and allowed her to relocate to Indiana with them. *Tuel*, 270 N.C. App. at 631, 840 S.E.2d at 919. In its custody order, the trial court made abundantly clear its main consideration in granting the mother primary custody and permitting her to move with the children was based on its finding:

> It would be in the best interest of the minor children for them to be able to locate with the plaintiff to Rushville, Indiana given the strong ties of the Plaintiff's family and other support systems that would assist the Plaintiff with the care of the minor children. . . . The plaintiff's parents, her mother in particular, are willing and able to provide the care for the minor children to alleviate the cost and need of outside childcare.

Id. at 633, 840 S.E.2d at 921.

Although the trial court in *Tuel* found both the mother and father would be fit and proper to share custody, it gave no explanation why primary custody with the mother would be in the children's best interests other than in reference to the mother's family support network in Indiana. *Id.* Beyond that consideration, the court did not engage in any comparison between Indiana and the father's home in North Carolina, or each area's relative potential to enrich the children's lives. *Id.*

The trial court barely analyzed any of the other *Ramirez-Barker* factors-reciting the factors as findings "without engaging in any substantive analysis of its conclusions or relating them to the best interests of the children." *Id.* at 634, 840 S.E.2d at 921. The order was vacated and remanded for failing to make adequate findings on the *Ramirez-Barker* factors relevant to the material issues raised by the evidence at the hearing. *Id.* at 631, 636-37, 840 S.E.2d at 920, 923.

Here, a large portion of the findings in the order pertain to the nature of the relationships between the parties, the conditions in and their extended families in Israel, and the minor child. Despite lacking necessary substantive analysis, the quantity and detail of findings on this topic convey the trial court's primary consideration in granting Mother primary custody and permitting her to move with the minor child was based upon the existence of a family support network in Israel. *See Tuel*, 270 N.C. App. at 633, 840 S.E.2d at 921. Without more, the findings of fact in the order do not support a conclusion that relocation to a foreign jurisdiction is in the best interests of the child. *Id.* at 634, 840 S.E.2d at 921-22; *see also Evans*, 138 N.C. App. at 142, 530 S.E.2d at 580 ("When the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence and the welfare of the child is subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact.") (internal quotation marks, alteration, and citation omitted); *Carpenter*, 225 N.C. App. at 273, 737 S.E.2d at 787 ("The quality, not the quantity, of findings is determinative.").

VI. Conclusion

The order is vacated and remanded to the trial court for further findings and supported conclusions as analyzed above and not inconsistent therewith. *It is so ordered.*

VACATED AND REMANDED.

Judges WOOD and FREEMAN concur.

KAREN LAVETTE CUNNINGHAM, Plaintiff
v.
GERALD WAYNE CUNNINGHAM, Defendant

No. COA25-276

Filed 4 February 2026

Divorce—equitable distribution—classification of property—post-separation passive appreciation of joint stock account

An equitable distribution order was vacated—and the matter was remanded for reconsideration—where, although the trial court properly classified a joint stock account as marital property, the court erred by failing to: classify the post-separation passive appreciation of the account as divisible property; enter factual findings regarding evidence presented by plaintiff-wife at the equitable distribution hearing, including a financial statement showing that the account had essentially tripled in value between the date of separation and the date of the hearing; and properly distribute the account's post-separation gain between the parties.

Appeal by plaintiff from order entered 15 August 2024 by Judge D. Brent Cloninger in Cabarrus County District Court. Heard in the Court of Appeals 29 October 2025.

Hartsell & Williams, P.A., by Emily J. Arnold, for plaintiff-appellant.

Arnold & Smith, PLLC, by Corey A. Noland, for defendant-appellee.

DILLON, Chief Judge.

This matter involves an equitable distribution order. The issue on appeal is whether the trial court erred in failing to classify post-separation passive appreciation of a marital stock account as divisible property. For the reasoning below, we vacate the trial court's order and remand for reconsideration.

I. Background

In October 1992 Plaintiff Karen L. Cunningham ("Wife") and Defendant Gerald W. Cunningham ("Husband") married. They separated in April 2021, after which Wife commenced this action seeking, in part, equitable distribution.

The matter was heard in March 2024. Relevant to Wife's appeal, the trial court heard testimony and received evidence regarding a certain Edward Jones stock account which Husband opened during the marriage. Wife and Husband had previously stipulated in a pretrial order that, as of the date of their April 2021 separation, the account value was $58,365.00 but failed to stipulate as to whether the property was marital or separate. Husband argued this account should be classified as his separate property. The trial court, though, classified this account as marital property.

However, between the April 2021 separation and shortly before the March 2024 hearing, the value of the account essentially tripled in value. As Husband was retaining the account, at the March 2024 hearing, Wife offered the January 2024 account statement showing the account had increased in value to $184,737.50. Wife offered said evidence desiring the trial court to classify the post-separation gain as divisible property to be equitably divided between the parties.

Ultimately, the trial court essentially classified the appreciation as divisible property by finding that it was passive but did not value—and therefore did not properly distribute—the account's post-separation gain.

Later in its findings, the trial court determined the net marital estate was valued at $1,443,566.89 and, in an attempt to achieve an equitable distribution, set a distributive award of $368,684.36 in favor of Wife, which was to include gains and losses that occurred post-separation and pre-distribution "[i]n order to account for divisible gains and losses." In its conclusions of law, the trial court ordered the marital estate to be distributed according to its findings of fact. Wife appealed.

II. Analysis

Wife concedes in her brief that the account properly belongs solely to Husband. On appeal, Wife argues the trial court erred in its handling of the account. Concerning the account, the trial court found as follows:

> [The account] is marital property bearing the names of both parties as a joint account. This account has a net value of $58,365.00 on the date of separation. Any appreciation since that date [of separation] is passive and is distributed to [Husband].

Wife agrees the trial court properly classified the value of the account *as of the date of separation* as marital property. And we conclude the trial court did not err in classifying the account value as of the date of separation as marital property, as there was evidence the account was opened during the marriage as a joint account.

Wife's sole issue on appeal is the trial court's handling of the *post-separation* change in the account. She essentially argues this increase (which she contends to be approximately $126,000.00) should have been classified as divisible property and, therefore, she was entitled to half of this increase.

We review equitable distribution orders to determine if "there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777 (1985). Additionally, "[w]here, as here, the trial court sits without a jury, the judge is required to 'find the facts specially and state separately its conclusions of law thereon and direct the entry of appropriate judgment.' " *Coble v. Coble*, 300 N.C. 708, 712 (1980). Accordingly, we review those findings to see whether they are supported by competent evidence; and we review the conclusions de novo to determine whether they are supported by the findings. *In re S.R.*, 384 N.C. 516, 520 (2023). *See also Coble*, 300 N.C. at 712; *Patton v. Patton* 318 N.C. 404, 406 (1986).

In an equitable distribution proceeding, the trial court is generally tasked with "conduct[ing] a three-step process: (1) classify[ing] property as being marital, divisible, or separate property; (2) calculat[ing] the net value of the marital and divisible property; and (3) distribut[ing] equitably the marital and divisible property." *Smith v. Smith*, 387 N.C. 255, 258 (2025) (citation omitted); *see also* N.C.G.S. § 50-20(a), (c) (2023).

Turning to the issue raised by Wife, we note "divisible property" is defined as:

> [A]ll appreciation and diminution in value of marital property and divisible property of the parties occurring *after* the date of separation and *prior to* the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.

Id. at (b)(4)(a) (emphasis added). We are to presume any increase or decrease in value of marital property between separation and distribution is divisible "*unless* the trial court finds that the change in value is attributable to the postseparation actions of one spouse." *Wirth v. Wirth*, 193 N.C. App. 657, 661 (2008) (emphasis in original).

In its order, the trial court found that "[a]ny [post-separation] appreciation . . . is passive[.]" This increase certainly falls within the definition of divisible property, subject to be split between the parties. However, it was the Wife's burden at the hearing to offer evidence concerning *the* *amount* of the increase which occurred between the date of separation and the hearing. *See Montague v. Montague*, 238 N.C. App. 61, 68–69 (2014). Accordingly, if Wife failed to meet this burden at the hearing, the trial court was under no obligation to distribute the post-separation increase as divisible property. *See id.* at 68.

At the hearing, Wife presented the January 2024 account statement, showing the value of the account approximately six weeks before the hearing. This statement showed the account had, indeed, increased by approximately $126,000.00 since the date of separation. The trial court, however, made no findings concerning this evidence.

A trial court is "required to ' resolve the material, disputed factual issues raised by the evidence.' " *Sunshine v. Sunshine*, 294 N.C. App. 289, 308 (2024). *See also Coble*, 300 N.C. at 712–13 ("The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine de novo the weight and credibility to be given to evidence disclosed by the record on appeal.").

Our Supreme Court has held that evidence of value from a date other than the relevant date may still be admissible if the "other" date is not too remote in time. *Northgate Shopping Ctr., Inc. v. State Highway Comm'n*, 265 N.C. 209, 211–12 (1965). And, we have held that evidence of value twenty-seven days prior to the date of separation was competent to show the value as of the date of separation. *Lund v. Lund*, 244 N.C. App. 279, 285 (2015).

We conclude the January 2024 statement offered by Wife was not too remote in time to render it incompetent to prove the value of the account as of the date of hearing. Therefore, we hold the trial court erred by failing to make any finding regarding Wife's evidence concerning the post-separation value of the account. Thus, we vacate the equitable distribution order and remand the matter to the trial court to consider Wife's evidence concerning the post-separation value of the account.

On remand, the trial court, in its discretion, may consider further evidence on the matter. Of course, the trial court as the factfinder can assign what weight it deems appropriate to Wife's evidence. If, on remand, the trial court does not deem Wife's otherwise competent evidence as credible, the trial court is not under any obligation to classify the post-separation increase. However, if the trial court finds the evidence credible, the trial court must classify the post-separation increase, value it, and distribute it.

VACATED AND REMANDED.

Judges HAMPSON and STADING concur.

FLORES v. GUTIERREZ

[302 N.C. App. 582 (2026)]

SANDRA FLORES, Plaintiff
v.
OSCAR GUTIERREZ, Defendant

No. COA25-457

Filed 4 February 2026

1. Child Custody and Support—support order—temporary—operation of time—removal from active docket

In a child support order, the trial court erred by treating an earlier child support order as a permanent order where the earlier order specifically noted its temporary nature, was entered without prejudice to either party, and stated a clear and specific reconvening time in the relatively near future. Although the matter was continued several times, it was apparent that the parties were trying to mediate the child support issue, and, moreover, at no point was the case inactive for more than six months. Nor did an order removing the matter from the trial docket of active cases—or the trial court's observation therein that it appeared that all issues had been resolved—have any legal effect on the parties or the case. Accordingly, the order on appeal was vacated and the matter was remanded for further findings of fact.

2. Child Custody and Support—permanent child support—effective date—deviation from Child Support Guidelines—required findings absent

In a child support proceeding, the trial court erred by awarding permanent child support from the effective end date of a temporary child support order, instead of from the date plaintiff filed her child support claim. The existence of a temporary child support order does not alter the presumption (set forth in N.C.G.S. § 50-13.4(c)) that permanent prospective support begins as of the date a complaint is filed (per the Child Support Guidelines), absent written findings addressing why a deviation is appropriate. The trial court made no finding that application of the Guidelines would be unjust or addressing why a deviation was appropriate. Accordingly, the order was vacated and the matter was remanded for the entry of an order consistent with the Guidelines or for further findings of fact.

3. Child Custody and Support—child support—defendant's income—business expenses—imputed

In a child support proceeding, the trial court properly imputed business expenses to defendant based on a past tax return rather than requiring current documentation where the Child Support Guidelines require courts to consider "current income," but expressly permit reliance on past income where appropriate. The trial court's findings of fact were supported by competent evidence and reflected a reasoned effort to determine defendant's actual income based on the best available evidence after defendant failed to provide updated business records despite court orders to do so.

Appeal by Plaintiff from order entered 22 January 2025 by Judge S. Katherine Burnette in Franklin County District Court. Heard in the Court of Appeals 13 January 2026.

Tickle Law Office PLLC, by Lawrence Edward Tickle, Jr., for Plaintiff-Appellant.

No brief for Defendant-Appellee.

COLLINS, Judge.

Plaintiff, Sandra Flores, appeals from an order establishing child support. Plaintiff argues that the trial court erred by (1) treating prior "closed" docket entries as indicative of a permanent child support order; (2) failing to relate the child support obligation back to the date of filing; and (3) imputing business expenses to Defendant, Oscar Gutierrez,[1] without sufficient evidentiary support. We vacate and remand in part and affirm in part.

I. Background

Plaintiff and Defendant married in 2013, separated in 2018, and share one minor child. Plaintiff filed a complaint for custody, child support, and equitable distribution on 6 January 2020.[2] Defendant filed an answer and counterclaims in October 2020.

Over the next year, Plaintiff noticed the case for hearing several times, and six continuances were entered for various reasons, including the parties' consent, inclement weather, and attorney unavailability. On 9 September 2021, the parties entered into a consent order for

1. The order on appeal misspells Defendant's name as "Guiterrez" instead of "Gutierrez," and we have corrected the error in the case caption on appeal.

2. The complaint was filed just prior to the start of the Covid pandemic.

temporary custody and to remove the child support and equitable distribution issues from the calendar for mediation. On 10 September 2021, the district court entered an Order of Removal, "find[ing] that the parties have agreed to remove this matter from the calendar" and removing the case from the trial docket of active cases.

On 28 March 2022, Plaintiff noticed her child support claim for hearing. She filed an amended notice on 31 May 2022. The matter was twice continued, once by agreement and once on Defendant's motion.

The parties entered into a memorandum of judgment on 27 July 2022, establishing "temporary child support" of $250 per month, "subject to a final worksheet being filled out and entered"; ordering Defendant to provide Plaintiff with certain financial documents from 2021 and 2022 by 1 September 2022; agreeing to schedule mediation by 1 September 2022; and continuing the matter to 31 August 2022. The memorandum of judgment was entered as a Temporary Child Support and Scheduling Order on 4 August 2022. By agreement of the parties on 31 August 2022, the matter was continued to 5 October 2022.

On 5 October 2022, the matter came on for hearing. The trial court entered an Order of Removal stating:

> THIS CAUSE coming on for hearing and it appearing to the Court that all issues have been resolved.
>
> IT IS, THEREFORE, ORDERED that the case be removed from the trial docket of active cases, and placed as an inactive file without prejudice to previous orders herein, and without prejudice to the entry of motions and orders in the future.

On 10 February 2023, Plaintiff noticed her child support claim for hearing on 15 March 2023. She amended the notice three days later for hearing on 26 April 2023. The matter was then continued numerous times over the next fifteen months for various reasons, including counsel unavailability and the parties' agreement.

The parties stipulated to the entry of a Temporary Child Support Order on 9 May 2024. The temporary order increased "[t]he prior temporary amount of $250[]" per month to $645 per month, effective 1 May 2024; continued the matter to 18 September 2024; ordered the parties to exchange certain financial documents from 2023 and 2024; and noted the order was "temporary and entered without prejudice to either Party." The matter was continued by agreement to December 2024.

Plaintiff filed a motion for contempt and order to show cause for Defendant's failure to exchange the required financial documents. Defendant was ordered to appear on 4 December 2024. On 4 December 2024, the matter was continued by agreement to 18 December 2024, and the parties submitted updated financial documents and proposed worksheets to the trial court via email. Plaintiff's submissions included Defendant's 2023 tax returns. Defendant's submissions consisted of a worksheet and an email asserting estimated income and business expenses but provided no supporting financial documents.

On 22 January 2025, based on the parties' email submissions with their consent, the trial court entered a child support order. The order found, among other things, that "[t]he case was closed on September 9, 2021" and "closed again in October 2022[,]" Plaintiff's worksheet did not account for Defendant's business expenses, and Defendant's income should be determined using his 2023 tax information. Defendant was ordered to pay $779 in monthly child support starting on 1 January 2025. Defendant was also ordered to pay $134 per month in arrears ($779-$645) for the period of 1 May 2024 to 1 January 2025. The trial court did not relate Defendant's child support obligation back to the date of Plaintiff's filing the complaint on 6 January 2020.

Plaintiff timely appealed.

II. Discussion

A. Temporary order

[1] By Plaintiff's first two arguments, she asserts that the trial court erred by finding the child support case had been "closed" and treating the 4 August 2022 temporary child support order as a permanent order.

"[W]hether an order is temporary or permanent in nature is a question of law, reviewed on appeal de novo." *Smith v. Barbour*, 195 N.C. App. 244, 249 (2009) (citation omitted). We have said in the child custody context that generally "an order is temporary if either (1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues." *Senner v. Senner*, 161 N.C. App. 78, 81 (2003) (citations omitted). "A trial court's designation of an order as 'temporary' or 'permanent' is neither dispositive nor binding on an appellate court." *Woodring v. Woodring*, 227 N.C. App. 638, 643 (2013) (citation omitted). "These rules logically apply to the child support context as well." *Sarno v. Sarno*, 235 N.C. App. 597, 600 (2014).

Here, the parties entered into two different support agreements prior to the 22 January 2025 entry of the child support order on appeal. First, the parties entered into a memorandum of judgment on 27 July 2022, establishing "temporary child support" of $250, "subject to a final worksheet being filled out and entered"; ordering the parties to exchange certain financial documents; agreeing to set a mediation date; and continuing the matter to 31 August 2022. The memorandum of judgment was entered as a Temporary Child Support and Scheduling Order on 4 August 2022.

The parties stipulated to the entry of a second Temporary Child Support Order on 9 May 2024. The temporary order increased "[t]he prior temporary amount of $250[]" per month to $645 per month, effective 1 May 2024; continued the matter; ordered the parties to exchange certain financial documents; and noted the order was "temporary and entered without prejudice to either Party."

Each order specifically noted its temporary nature, was entered without prejudice to either party, and stated a clear and specific reconvening time in the relatively near future. These orders were both temporary. *See Senner*, 161 N.C. App. at 81.

A temporary order may, however, become permanent by operation of time. *See Lawrence v. Lawrence*, 294 N.C. App. 355, 362 (2024).

> A temporary order may become permanent by operation of time, when neither party sets the matter for a hearing within a reasonable time. Thus, the focus is on whether a hearing was requested, rather than if it was heard, as a party should not lose the benefit of a temporary order if she is making every effort to have the case tried but cannot get it heard.

Id. at 362 (cleaned up). Whether the matter was set for hearing within a reasonable period of time is addressed on a case-by-case basis. *Id.*

In *LaValley v. LaValley*, a temporary order became permanent because twenty-three months was not a reasonable time to forgo seeking a hearing on permanent custody and no issues had been left unresolved. 151 N.C. App. 290, 292-93 (2002). In *Woodring*, a period of twelve months was reasonable because "the parties were before the court at least three times in the intervening period between the entry of the temporary order and the scheduled permanent custody hearing." 227 N.C. App. at 644. In *Senner*, a twenty-month delay was reasonable where the record contained evidence that the parties were negotiating a new custody arrangement during the relevant period. 161 N.C. App. at 81.

Here, both before and after the parties entered into the temporary child support agreements, Plaintiff consistently and timely calendared her claim for hearing. Numerous orders continuing the matter were entered for various reasons, most of which were by consent and many of which were to accommodate Defendant's counsel. Furthermore, it is apparent from various orders that the parties were trying to mediate the child support issue. At no point was the case inactive for more than six months. Unlike in *LaValley* and as in *Woodring* and *Senner*, the delay here was reasonable and the 4 August 2022 temporary child support order did not become permanent by operation of time.

The 4 August 2022 temporary child support order also did not become permanent as a result of the trial court's 5 October 2022 Order of Removal. First, the trial court's observation that it "appear[ed] to the Court that all issues have been resolved" is neither a finding of fact nor a conclusion of law – it thus has no legal effect on the parties or the case. Furthermore, removing the case "from the trial docket of active cases, and plac[ing] as an inactive file" does not permanently "close" the case.

"[T]he removal of a case from a court's 'active docket' is the functional equivalent of an administrative closing, which does not end a case on its merits or make further litigation improbable." *Penn-Am. Ins. Co. v. Mapp*, 521 F.3d 290, 295 (2008) (citation omitted). In *Greenshields, Inc. v. Travelers Prop. Cas. Co. of Am.*, we recognized that a superior court's " 'Order of Dismissal,' ordering 'that this case be removed from the trial docket of active cases and placed as a closed file without prejudice to previous orders herein, and without prejudice to the entry of motions and orders in the future,' " " 'did not dismiss the action but simply administratively closed the file and removed it from the trial court's active docket.' " 245 N.C. App. 25, 27, 34 (2016).

Here, while the trial court's Order of Removal "administratively closed the file and removed it from the trial court's active docket[,]" *id.*, it did not end the case on the merits and render the 4 August 2022 temporary child support order permanent.

For these reasons, the trial court erred by treating the 4 August 2022 temporary order as a permanent child support order.

B. Effective date of child support

[2] Plaintiff next argues that the trial court erred by awarding permanent child support from 1 May 2024, the effective end date of the 4 August 2022 temporary order, instead of 6 January 2020, the date she filed her child support claim.

"[F]or purposes of computing child support, the portion of the award representing that period from the time a complaint seeking child support is filed to the date of trial, is in the nature of prospective child support." *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 646-47 (1998) (quotation marks and citations omitted). As "prospective child support is to be awarded for the time period between the filing of a complaint for child support and the hearing date, Section 50-13.4(c) applies and requires application of the [Child Support] Guidelines with respect to that period." *Id.* at 647 (citations omitted). Furthermore, the existence of a temporary child support order does not alter the presumption that permanent prospective support begins at filing. *Cole v. Cole*, 149 N.C. App. 427, 433-34 (2002).

The Guidelines are presumptive for both the pre-order period and the ongoing award and can be deviated from only if the trial court finds, based on competent evidence, that application of the Guidelines would be "unjust or inappropriate." N.C. Gen. Stat. § 50-13.4(c) (2024). Any deviation—whether changing the amount owed between filing and hearing or altering the start date of the obligation—requires written findings addressing why deviation from the Guidelines is appropriate. *Sain v. Sain*, 134 N.C. App. 460, 466 (1999). Here, Plaintiff filed her child support claim on 6 January 2020. By order entered 22 January 2025, the trial court ordered Defendant to pay child support in the amount of $779 essentially starting on 1 May 2024, the effective end date of the 4 August 2022 temporary order, and not 6 January 2020, the date she filed her child support claim. Although the trial court deviated from the 6 January 2020 presumptive start date of the obligation, the trial court did not find that application of the Guidelines would be "unjust or inappropriate," N.C. Gen. Stat. § 50-13.4(c), and made no findings addressing why deviation from the Guidelines is appropriate. Accordingly, the trial court erred.

C. Defendant's business expenses

[3] Plaintiff next argues the trial court erred by imputing business expenses to Defendant based on his 2023 tax return rather than requiring current documentation. Plaintiff essentially argues that the trial court should have disregarded all business expenses because Defendant failed to produce current documentation.

The Guidelines require courts to consider "current income," but expressly permit reliance on past income where appropriate. *Simms v. Bolger*, 264 N.C. App. 442, 453 (2019). Courts may use prior-year tax returns when current documentation is incomplete or unreliable. *Id.* Child support orders are reviewed for abuse of discretion. *Leary v. Leary*, 152 N.C. App. 438, 441 (2002).

Here, Defendant submitted a worksheet and an email asserting estimated income and expenses. Defendant failed to provide updated business records despite court orders. The trial court therefore relied on Defendant's 2023 tax return—the most recent verified financial information available.

The trial court's reliance is consistent with *Simms*, which permits reliance on past income where current information is lacking or unreliable. 264 N.C. App. at 453. The trial court's findings of fact are supported by competent evidence and reflect a reasoned effort to determine Defendant's actual income based on the best available evidence. The trial court thus did not abuse its discretion.

III. Conclusion

The trial court erred by concluding that Defendant's child support obligation started on 1 May 2024 without further findings of fact to support this date. The trial Court did not err by imputing business expenses to Defendant. We vacate the order and remand the matter to the trial court to enter an order consistent with the Guidelines or for findings of fact to support a deviation from those Guidelines and an order consistent with those findings.

VACATED AND REMANDED IN PART; AFFIRMED IN PART.

Judges ZACHARY and CARPENTER concur.

MICHAEL EUGENE GRIFFIN, Plaintiff
v.
KENNETH R. BROWN, DDS; UNIVERSITY DENTAL ASSOCIATES; SCOTT F. TUCKER, DDS, MS, PA d/b/a UNIVERSITY DENTAL ASSOCIATES and/or UDA DENTAL and/or UDA and/or UDA-COMP REHAB, Defendants

No. COA25-524

Filed 4 February 2026

1. Medical Malpractice—standard of care—causation—speculation—improved chance of recovery

In a medical malpractice action brought against defendants (an oral surgeon and multiple medical practices) for negligence and other torts after plaintiff was diagnosed with naso-oropharyngeal cancer—where plaintiff argued that the oral surgeon's failure to order a biopsy of a mass on his lower jaw caused a delay in his cancer diagnosis—the trial court properly granted summary judgment for the oral surgeon on plaintiff's ordinary negligence claims. Plaintiff failed to forecast sufficient evidence to establish causation where, although his experts believed the oral surgeon violated the applicable standard of care, their speculation that an earlier diagnosis might have benefited plaintiff's outcome did not constitute proof of proximate cause, which, in a medical malpractice case, required more than showing that a different treatment would have improved the patient's chances of recovery.

2. Medical Malpractice—corporate negligence—negligent supervision—proximate cause—failure to forecast evidence of physician's negligence

In a medical malpractice action brought against defendants (an oral surgeon and multiple medical practices) for negligence and other torts after plaintiff was diagnosed with naso-oropharyngeal cancer—where plaintiff argued that the oral surgeon's failure to order a biopsy of a mass on his lower left jaw caused a delay in his cancer diagnosis—the trial court properly granted summary judgment for the corporate defendants on plaintiff's claims for corporate negligence and negligent supervision because plaintiff failed to forecast that the oral surgeon's negligence proximately caused his injuries.

Judge FREEMAN concurring in result only.

Appeal by plaintiff from judgment entered 15 October 2024 by Judge John O. Craig III in Forsyth County Superior Court. Heard in the Court of Appeals 14 January 2026.

Angela Gray Law, P.A., by Angela N. Gray, for the plaintiff-appellant.

Cranfill Sumner LLP, by Samuel H. Poole, Jr., Steven A. Bader, and Kelley M. Petcavich, for the defendants-appellees.

TYSON, Judge.

Michael Eugene Griffin ("Plaintiff") appeals from order of summary judgment dismissing all of Plaintiff's negligence claims with prejudice entered for all individual and corporate Defendants on 15 October 2024. We affirm.

I. Background

Plaintiff presented to least fourteen doctors' appointments with various Defendant physicians and facilities from June 2020 to May 2021.

A. Year of 2020

Plaintiff saw Dr. John Byers, an otolaryngologist, a specialist in ear, nose, and throat, for fluid build-up in his left ear on 2 June 2020. Dr. Byers examined Plaintiff's nasopharynx, which disclosed no tumor, lesions, or swelling. A tube was inserted to improve drainage. A subsequent Magnetic Resonance Image ("MRI") scan showed no tumor.

Plaintiff followed up with Dr. Byers on 13 July 2020. The doctor noted "[t]here was no finding of any tumor"; Plaintiff had no pain, no drainage, and was "doing great."

Eleven days later, on 24 July 2020, Plaintiff saw Dr. Ioana Pogacean, a dentist at University Dental Associates ("UDA"). Plaintiff reported he had been having trouble opening his mouth for about a month, and experienced pressure when he attempted to do so. While performing an examination Dr. Pogacean felt a 1.5 centimeter mass under Plaintiff's left lower jaw. Dr. Pogacean took an x-ray and noticed a dark spot. Dr. Pogacean referred Plaintiff to Dr. Kenneth T. Brown, ("Defendant' ") a specialist and oral surgeon, whom Plaintiff saw the same day.

Dr. Brown performed a visual and palpatory (touch) examination of Plaintiff's mouth, head, and neck to screen him for cancer. He noted no masses and no lesions and concluded no presence of cancer. Dr. Brown diagnosed Plaintiff with a temporomandibular joint disorder, or "TMJ."

In addressing Plaintiff's self-reported concern, Dr. Brown prescribed Flexeril, Mobic, and a soft diet for the next thirty days.

Plaintiff followed up with Defendant Dr. Brown on 28 August 2020. Plaintiff reported feeling better and being able to open his mouth wider. Dr. Brown performed the same oral cancer screening as he had performed earlier, and again observed no tumors, masses, or lesions in Plaintiff's mouth, throat, or neck.

Plaintiff visited his primary care provider at Oak Street Health three times during the latter half of 2020: October 21, November 18, and on December 22. The appointment records from these visits document Plaintiff had no lesions, masses, swelling, or tumors in his mouth or throat. Plaintiff did not report any complaints regarding these bodily regions.

B. Year of 2021

Plaintiff presented for a dental appointment on 29 January 2021. The appointment notes do not mention any complaints regarding Plaintiff's mouth, throat, jaw, or neck.

Plaintiff visited his primary care provider at Oak Street Health two more times on 16 February 2021 and 9 March 2021. The records from these visits do not document any complaints regarding Plaintiff's mouth, neck, or throat, and additionally, note "no gross masses or lesions" and "no deformity" in his neck area.

Plaintiff visited Dr. Mark Petrola, a dentist, and complained of swelling in his left cheek on 26 March 2021. Dr. Petrola performed a visual and palpatory examination and noted Plaintiff had a "hard mass" in his left cheek and the back of his left upper palate appeared to have a red and white lesion, which bled upon touch. Dr. Petrola referred Plaintiff to an oral and maxillofacial ("OMF") surgeon, Dr. Mark Shehan. In April of 2021, the OMF surgeon performed a biopsy on the lesion on Plaintiff's left palate.

About six weeks later, on 10 May 2021, Plaintiff had an initial consultation with two otolaryngologists at Wake Forest Baptist Medical Center ("WFBMC"). These specialists documented a nasopharyngeal (top of throat) mass that extended to Plaintiff's left hard and soft palate. They biopsied the mass and ordered diagnostic imaging.

Plaintiff's OMF surgeon received the results from the April biopsy on 12 May 2021. The biopsy results confirmed squamous cell carcinoma. The specialists at WFBMC later confirmed these results. Plaintiff's doctors at WFBMC diagnosed him with naso-oropharyngeal cancer at the back of he nasal cavity and top of throat. He began receiving cancer treatment from a radiation oncologist.

C. Lawsuit

On 13 July 2022, Plaintiff sent Dr. Brown and UDA ("Defendants") a pre-suit settlement demand. The demand included Plaintiff's medical records from: (1) Dr. Byers, the otolaryngologist Plaintiff initially saw June of 2020 when he complained of fluid build-up in his left ear; (2) UDA, starting in 2019 and going through March of 2021; (3) the OMF surgeon who performed the biopsy in April of 2021; (4) WFBMC, starting in May of 2021; and, (5) select records from Plaintiff's primary care provider at Oak Street Health.

On 8 December 2022, Plaintiff filed suit against Defendants for: (1) negligence; (2) corporate negligence; (3) negligent supervision; (4) negligent infliction of emotional distress; and (5) intentional infliction of emotional distress. He essentially argued Dr. Brown should have ordered a biopsy of the mass on his lower left jaw in July of 2020, and his failure caused a delayed cancer diagnosis.

Plaintiff identified Dr. William Benzing as his Rule 9(j) expert witness. Additionally, Plaintiff designated three experts to review and opine on causation: Dr. Benzing, Dr. Wayne Roccia, and Dr. Mike Armstrong, who did not provide an affidavit or deposition testimony.

On 12 August 2024, Dr. Brown and UDA filed and served their motion seeking summary judgment for all of Plaintiff's claims. The same filing also sought for the court to exclude the standard of care, causation, and damages opinions by Dr. Armstrong, and to exclude the causation and damages opinions of Dr. Benzing and Dr. Roccia.

Plaintiff voluntarily dismissed his claims for negligent infliction of emotional distress and intentional infliction of emotional distress on 24 September 2024, and Defendants withdrew their motion to exclude the testimony of Plaintiff's Rule 9(j) designated experts.

The superior court heard Defendants' motion for summary judgment the next day, granted the motion, and dismissed all of Plaintiff's remaining claims with prejudice by order on 15 October 2024. Plaintiff timely appealed on 12 November 2024.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issues

Plaintiff argues the trial court committed reversible error in granting summary judgment for Defendants on: (1) Plaintiff's negligence claims against Dr. Brown, where Plaintiff alleges his evidence tended to show Dr. Brown's treatment violated the accepted professional standard of care; (2) Plaintiff's claims against UDA on corporate negligence claim; and, (3) Plaintiff's claims against UDA on negligent supervision, hiring, training, and retention of Dr. Brown.

IV. Standard of Review

"[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Willis v. Town of Beaufort*, 143 N.C. App. 106, 108, 544 S.E.2d 600, 603 (2001) (citation omitted); N.C. Gen. Stat. § 1A-1, Rule 56(c) (2023). The moving party has the burden of establishing the lack of any triable issue of fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citation omitted).

A defendant may show entitlement to summary judgment by "(1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense." *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828 (1995) (citation omitted).

Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979) (citation omitted). "Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000).

To establish reversible error on the part of the trial court, Plaintiff must forecast evidence tending to show Defendants failed to exercise proper care in the performance of a legal duty which proximately caused and resulted in injury to him. "To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342 (1992).

V. Analysis

Plaintiff argues the trial court erred in granting summary judgment to Defendants on the claims of (1) ordinary negligence by Dr. Brown; (2) corporate negligence by UDA; and (3) negligent hiring and supervision by UDA. We address each argument in turn.

A. Ordinary Negligence in Medical Malpractice

Plaintiff argues a genuine issue of material fact exists of whether Dr. Brown's breach of the applicable standard of care proximately caused Plaintiff's injuries. Plaintiff also argues he sufficiently forecast evidence to establish causation to survive summary judgment.

1. Proximate Cause

[1] To prove medical negligence, a plaintiff must proffer evidence establishing the plaintiff's injuries were proximately caused by the defendant's breach of the applicable standard of care. *Cousart v. Charlotte-Mecklenburg Hosp. Auth.*, 209 N.C. App. 299, 303, 704 S.E.2d 540, 543 (2011). Proximate cause is

> a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Hawkins v. Emergency Med. Physicians of Craven Cnty., PLLC, 240 N.C. App. 337, 341–42, 770 S.E.2d 159, 162–63 (2015) (citation omitted).

A plaintiff in a medical malpractice case must rely upon expert testimony to establish proximate cause, if the purported negligence is not obvious or *per se* speaks for itself. *Id.* at 342, 770 S.E.2d at 163 (citation omitted). "[A]n expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000) (citation omitted). An expert's conclusory statement, without factual support, is insufficient to raise a genuine issue of material fact of proximate cause. *Liller v. Quick Stop Food Mart, Inc.*, 131 N.C. App. 619, 625, 507 S.E.2d 602, 606 (1998).

In response to Defendant's supported motion for summary judgment, plaintiffs must establish a *prima facie* case, "which includes articulating proximate cause with specific facts couched in terms of probabilities." *Hawkins*, 240 N.C. App. at 342, 770 S.E.2d at 163. "[E]vidence connecting medical negligence to injury . . . must be probable, not merely a remote possibility." *Cousart*, 209 N.C. at 302, 704 S.E.2d at 543. Prior decisions demonstrate:

> where a plaintiff alleges that he or she was injured due to a physician's negligent failure to diagnose or treat the plaintiff's medical condition sooner, the plaintiff must present at least some evidence of a causal connection between the defendant's failure to intervene and the plaintiff's inability to achieve a better ultimate medical outcome.

Lord v. Beerman, 191 N.C. App. 290, 294, 664 S.E.2d 331, 334 (2008); *see*, *e.g.*, *Lindsey v. Clinic for Women*, 40 N.C. App. 456, 253 S.E.2d 304 (1979); *Bridges v. Shelby Women's Clinic, P.A.*, 72 N.C. App. 15, 323 S.E.2d 372 (1984).

> Even where a plaintiff has introduced some evidence of a causal connection between the defendant's failure to diagnose or intervene sooner and the plaintiff's poor ultimate medical outcome, our Court has held that such evidence is insufficient if it merely speculates that a causal connection is possible.

Lord, 191 N.C. App. at 295, 664 S.E.2d at 335; *compare with Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706 (1989).

2. Argument

Plaintiff argues Dr. Brown's failure to perform the appropriate examination "led to a misdiagnosis of TMJ and delayed a diagnosis of cancer, which more likely than not caused "the morbidities associated with . . . Plaintiff's medical condition after July 24, 2020."

Plaintiff initially identified three expert witnesses to opine on standard of care, causation, and damages. Only two of those experts gave deposition testimony: Dr. Benzing and Dr. Roccia.

Dr. Benzing asserted several criticisms of Dr. Brown, in his deposition testimony. He criticized Dr. Brown as having violated the appropriate standard of care by failing to properly document his examination of Plaintiff to indicate what he observed and was not observed in Plaintiff's mouth, and by failing to conduct additional testing. He opined Dr. Brown missed an opportunity to diagnose Plaintiff's cancer in July of 2020 and the delay in Plaintiff's treatment more likely than not caused increased morbidity from his disease.

However, Dr. Benzing also testified the swelling in the lower left jaw Plaintiff presented with to Dr. Brown in July of 2020 was not necessarily the same cancer doctors later found in the back of the roof of Plaintiff's mouth in March of 2021, although it may have been a symptom.

> Q. Okay. Are you prepared to express any opinion that the left-sided submandibular mass noted by Dr. Pogacean in the referral slip was a cancerous tumor as of July 24th, 2020?
>
> A. No, I cannot say . . . . that was a cancerous tumor, no.

When asked if he was planning to express an opinion asserting the swelling in Plaintiff's lower left jaw *led* to the cancer Plaintiff was eventually diagnosed with, Dr. Benzing testified he could not express that opinion, only asserting the swelling was cause for concern, "likely a sign of something that's going on." Counsel for Defendants asked Dr. Benzing:

> Q. . . . Is it fair to say, Doctor, that even if you believe there's a greater chance of improvement if the cancer was identified sooner, you cannot quantify that chance? . . . You'd be speculating if you were to express an opinion at trial as to what the improvement degree might be?
>
> A. I guess I'd be speculating, but most people know that if you can get a cancer earlier when it's smaller, it's . . . much less morbid . . . .
>
> Q. But you can't quantify that, especially as to this particular cancer? . . .
>
> A. No. You'd have to have an oncologist or otolaryngologist who specializes in cancer treatment to do that.

Dr. Roccia opined when Plaintiff initially visited Defendant Dr. Brown complaining of difficulty opening his mouth, Dr. Brown had failed to perform the proper examination, failed to properly document the examination, and he incorrectly treated the patient, effectively violating the appropriate standard of care. However, Dr. Roccia also testified it was not his opinion Plaintiff had cancer in his lower left jaw at the time of Dr. Brown's examinations. Counsel for Defendants asked Dr. Roccia:

> Q. Are you going to be offering any opinions at trial as to when [Plaintiff] first developed cancer?
>
> A. No.

> . . . .
>
> Q. Are you going to be offering any opinions at trial as to how [Plaintiff's] cancer progressed?
>
> A. No.
>
> Q. Are you going to express any opinion at trial that the lesion or concern mentioned by Dr. Pogacean before the referral to Dr. Byers was cancerous?
>
> A. I don't know if it was cancerous or not.
>
> . . . .
>
> Q. Even if you believe there was a greater chance of improvement if the cancer was identified sooner, you'd be speculating if you were to express an opinion at trial as to what that improvement degree might be, right?
>
> A. I'm not an oncologist. Therefore, I'm not going to comment on the progression of any kind of cancerous lesion.
>
> . . . .
>
> Q. Is it fair to say that you cannot testify with any degree of reasonable medical certainty that the scan results would have been any different six months or three months sooner than the CT and PET scans performed in May of 2021?
>
> . . . .
>
> A. . . . I cannot state at this time whether those scans or the progression of any kind of lesion that was or was not there at that time would not have been smaller. Generally speaking, cancerous lesions grow, and based on what type of cancer, they grow at different rates. So if something was there, it should have been there at previous images, even several months beforehand . . . .

Plaintiff has not forecast sufficient evidence tending to show Dr. Brown's breach of his duty of care caused the injuries he suffered. Although Plaintiff's experts believed Dr. Brown violated his duty of care to Plaintiff, they could not opine Plaintiff's oropharyngeal cancer was directly related to the swelling present in Plaintiff's lower left jaw in July of 2020, or Plaintiff even had a cancer to diagnose when Dr. Brown had examined him.

Plaintiff's experts speculated the two were likely related, and if Plaintiff's cancer had been caught earlier, Plaintiff's injuries would not be as great. Neither witness testified to "specific facts couched in terms of probabilities" as to *how* much better Plaintiff's injuries would have been in 2021 when Plaintiff's oropharyngeal cancer was detected had Dr. Brown not purportedly violated the standard of care. *See Hawkins*, 240 N.C. App. at 342, 770 S.E.2d at 163. "Proof of proximate cause in a malpractice case requires more than a showing that a different treatment would have improved the patient's chances of recovery." *White v. Hunsinger*, 88 N.C. App. 382, 386, 363 S.E.2d 203, 206 (1988). Because Plaintiff cannot show proximate cause, we affirm summary judgment in favor of Dr. Brown on the issue of ordinary negligence.

B. Corporate Negligence and Negligent Supervision

[2] Plaintiff argues the trial court erred in granting summary judgment to Defendants on the claims of corporate negligence and negligent supervision. We disagree.

In order to survive a motion for summary judgment, a plaintiff asserting corporate negligence and negligent supervision must show proximate cause, defendant's alleged omission contributed to his injuries. *See Bost v. Riley*, 44 N.C. App. 638, 648, 262 S.E.2d 391, 397 (1980); *see also White*, 88 N.C. App. at 387, 363 S.E.2d at 206; *Gower v. Davidian*, 212 N.C. 172, 193 S.E.2d 28 (1937).

As held above, Plaintiff has failed to forecast Dr. Brown's negligence proximately caused his injuries, and Plaintiff cannot also prove his corporate negligence and negligent supervision claims. Plaintiff has not shown UDA's alleged omission caused his injuries, Plaintiff's claims fail and summary judgment was properly granted to Defendants.

VI. Conclusion

Defendants made a showing through competent evidence to rebut Plaintiff's claims and to show entitlement to summary judgment. Upon such showing, it became incumbent upon Plaintiff to produce a forecast of evidence showing he could at least establish a *prima facie* case at trial. *Gaunt*, 139 N.C. App. at 784-85, 534 S.E.2d at 664. This he failed to do. The trial court properly entered summary judgment on behalf of Defendants. The order appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judge WOOD concurs.

Judge FREEMAN concurs in result only.

MATTHEW JASON ROYBAL, Plaintiff
v.
CHRISTY ANNE RAULLI, Defendant

No. COA23-983

Filed 4 February 2026

1. Child Custody and Support—custody modification—motion to continue—Servicemembers Civil Relief Act—de novo standard of review

In a contentious custody and child support matter, in which the father filed a motion to continue because he was unavailable to attend a hearing on the mother's motion to modify custody due to his military service, the appellate court determined that the motion to continue was more appropriately treated as a motion to stay the custody proceedings under the Servicemembers Civil Relief Act (SCRA), and that the trial court's denial of the father's motion would be evaluated under a de novo standard of review.

2. Child Custody and Support—custody modification—motion to continue—Servicemembers Civil Relief Act—requirements—mandatory stay

In a contentious custody and child support matter, in which the father filed a motion to continue because he was unavailable to attend a hearing on the mother's motion to modify custody due to his military service, the father was entitled to a mandatory stay under the Servicemembers Civil Relief Act (SCRA). The father met the requirements of section 3932(b)(2) of the SCRA, including by submitting communication from his commanding officer regarding his mandatory training schedule in preparation for deployment. Therefore, the trial court erred by denying the father's motion to continue and by proceeding to hold the hearing on the mother's motion to modify custody in the father's absence.

3. Child Custody and Support—custody modification—motion to continue—denial—Servicemembers Civil Relief Act—prejudice shown

In a contentious custody and child support matter, in which the father filed a motion to continue because he was unavailable to attend a hearing on the mother's motion to modify custody due to his military service, where the father was entitled to a mandatory stay under the Servicemembers Civil Relief Act (SCRA) but the trial court erred by denying a continuance, the denial was prejudicial because the trial court proceeded with the custody proceedings in the father's absence. Since the father's right to a stay under the SCRA was violated and he was deprived of his right to appear and oppose the motion to modify custody, the trial court's order denying a continuance was reversed and its orders of modification were vacated, and the matter was remanded for a new hearing.

4. Appeal and Error—commitment order for civil contempt—release ordered—mootness—possibility of future commitment

In a contentious custody and child support matter, a father's appeal from an amended commitment order for civil contempt was not rendered moot by entry of the trial court's release order. Although the release order gave the father a temporary respite from the commitment order based on his military service, since the trial court found that the father continued to be in contempt following his release from confinement and had not satisfied the purge conditions that had been set forth in a prior contempt order, the father was subject to commitment again upon returning from deployment if he did not pay the purge amount.

5. Contempt—civil—purge conditions—present ability to pay—lack of findings—remand

In a contentious custody and child support matter, the trial court's amended commitment order for civil contempt—which found the father in civil contempt and ordered him to be immediately arrested, although the trial court subsequently entered a release order giving the father a temporary respite based on his military service—was reversed because the trial court did not hear evidence or make any findings regarding the father's present ability to pay the amount set forth as a purge condition in a prior contempt order. The matter was remanded for further proceedings on the contempt order, including consideration of the father's potential right to appointed counsel were he to be subject to incarceration.

Appeal by plaintiff from orders entered 29 March 2023, 25 April 2023, and 30 May 2023 by Judge Samantha H. Cabe in District Court, Orange County. Heard in the Court of Appeals 24 September 2024.

Browner Law, PLLC, by Jeremy Todd Browner, for plaintiff-appellant.

Ellis Family Law, P.L.L.C., by Autumn D. Osbourne, for defendant-appellee.

STROUD, Judge.

This opinion addresses four consolidated appeals by Plaintiff-Father of four orders entered by the trial court: (1) an order entered 29 March 2023 (Continuance Order) denying his "Motion and Order to Continue Motion to Continue" (Motion to Continue); (2) a "Memorandum of Order (Formal Order Pending)" (Memorandum of Order) entered 29 March 2023 granting Defendant-Mother's Motion to Modify Child Custody; (3) the subsequent Formal Modification of Child Custody Order (Formal Modification Order) entered 30 May 2023; and (4) an order entered 25 April 2023 titled "Amended Commitment Order for Civil Contempt," (Amended Commitment Order) committing Father to jail for civil contempt. The issues on appeal for the first three orders arise from the trial court's denial of Father's Motion to Continue the hearing of Mother's Motion to Modify Custody because he was unavailable to attend the hearing due to military service. Father's Motion to Continue complied with the Servicemembers Civil Relief Act and he was entitled to a mandatory stay under the SCRA of the hearing on Mother's Motion to Modify Custody. The trial court erred by denying Father's Motion to Continue. Because the child custody modification hearing should have been continued or stayed and Father was prejudiced by the failure of the trial court to continue the hearing to a date he would be available or to stay for at least 90 days, the trial court further erred by entering the Memorandum of Order granting Mother's Motion to Modify Custody and the Formal Modification Order based on the hearing held on the day Father was not present due to his military service. We reverse the Continuance Order denying Father's Motion to Continue and vacate the Memorandum of Order and Formal Modification Order.

Father's remaining issue on appeal arises from the trial court's Amended Commitment Order of 25 April 2023. We must reverse this Amended Commitment Order because the trial court did not hold an evidentiary hearing or make any findings of fact as to Father's present ability to pay the amount previously set as a purge condition by the December 2022 Contempt Order.

I. Factual and Procedural Background

This custody and child support case has had an exceptionally contentious and complex history. This is Father's second appeal. In both the first appeal, *Roybal v. Raulli*, 266 N.C. App. 318, 832 S.E.2d 202 (2019) (*Roybal I*), and this one, most of the issues arose from scheduling complications related to Father's military service. Both cases also address Father's arguments that the trial court did not follow the requirements of laws enacted to protect parents serving our country in the armed forces from adverse consequences in pending litigation when they are unavailable due to their military service.[1]

In *Roybal I*, we addressed an issue of first impression under North Carolina's Uniform Deployed Parents Custody and Visitation Act, N.C. Gen. Stat. § 50A-371, arising from Father's deployment "in support of OPERATION ENDURING FREEDOM-HORN OF AFRICA" beginning in August 2018. 266 N.C. App. at 325-326, 832 S.E.2d at 207 (internal quotation marks omitted). In *Roybal I*, Father's deployment for military service was the reason for the parties' visitation dispute. *Id.* at 352, 832 S.E.2d at 222 ("We affirm the trial court's order as to Elizabeth, but we remand for the trial court to add Stepmother as a party to this action 'until the grant of limited contact is terminated' under North Carolina General Statute [Section] 50A-375(b) and to enter an order granting limited contact with Jay to Stepmother, *unless* the trial court determines that Jay does not have a 'close and substantial relationship' with Stepmother or that limited contact would be contrary to his best interests.").

This appeal presents an entirely different issue, but also an issue of first impression in North Carolina under a federal statute, the Servicemembers Civil Relief Act of 2003, 50 U.S.C.A. §§ 3901-4043 (SCRA).

Although originally enacted as the "Soldiers' and Sailor's Civil Relief Act of 1940," (SSCRA), Pub.L. 108-189, § 1, Dec. 19, 2003, 117 Stat. 2835, and later amended and codified as the SCRA in 2003, *id.*, no reported case in North Carolina has addressed the issue of when a servicemember is entitled to a stay or continuance under Section 50-3932 of the SCRA.[2]

---

1. For example, in *Roybal I*, we noted that

> [d]espite Father's deployment date of 20 August 2018, the trial court set the hearing for 22 October 2018. Father filed a petition for a writ of mandamus with this Court to order the trial court to expedite the hearing as required under North Carolina General Statute Section 50A-371.5. On 24 September 2018, this Court granted Father's petition and ordered the trial court to hold a hearing by 8 October 2018. On 28 September 2018, the trial court held a hearing.

266 N.C. App. at 326, 832 S.E.2d at 207 (footnote omitted).

2. Only one unpublished case from this Court has addressed the SCRA, *Davidson v. Laws*, No. COA18-780, 269 N.C. App. 677, 837 S.E.2d 482 (2020) (unpublished). Neither party cited this case in their briefs and it has no precedential value, so we will not address it either. *See, e.g.*, *Zurosky v. Shaffer*, 236 N.C. App. 219, 234, 763 S.E.2d 755, 764 (2014) ("[A]n unpublished opinion may be used as persuasive authority at the appellate level if the case is properly submitted and discussed and there is no published case on point." (citations omitted)).

Mother and Father (Parties) never married but have two children together: Elizabeth, born in 2012 while the Parties were still living together; and Jay, born in 2016 after the Parties' relationship had ended.[3] We addressed the background of their custody and child support case up to 2018 in detail in *Roybal I*. *See* 266 N.C. App. at 318-26, 832 S.E.2d at 202-07. Relevant to this appeal, as of 2019, the Parties were operating under two custody orders: a consent order entered on 29 June 2016 regarding Elizabeth, and a consent order entered 11 July 2017 regarding Jay. *Id*. at 324-25, 832 S.E.2d at 206-07.

On 1 July 2019, Mother filed a motion to modify child custody and a motion in the cause.[4] The Parties reached an agreement to resolve this motion and the trial court entered a handwritten memorandum of order on 11 February 2020 which set the summer custody schedule for the two minor children and ordered Father to pay Mother $3,936.00 in "unreimbursed medical expenses." Father was to pay $36.00 per month to Mother until the total amount of $3,936.00 was paid in full. The Parties agreed to a consent order outlining these provisions in a formal order entered 28 May 2021. "The [2021] [c]onsent [o]rder did not fully supersede [Elizabeth]'s and [Jay]'s Custody Orders." So at that point, the parties had three separate orders governing child support, custody, and visitation.

On 11 August 2021, Mother filed a motion for contempt alleging Father "failed to abide by the terms" of the 2021 consent order, alleging that he was not making required child support payments, failed to pay arrearages, and did not reimburse Mother for medical and extracurricular expenditures for the children. On 22 December 2022, the trial court entered a Contempt Order (Contempt Order) finding Father in civil contempt. The Contempt Order set out a schedule for payment of the total $28,059.13 arrearages owed as follows:

> b. [Father] shall pay [Mother] $28,059.13 owed as follows:
>
> > i. [Father] shall pay $4,600.00 to [Mother] by January 31, 2023, and provide proof of the same at calendar call in Orange County on said date at 9:00 a.m. (or as soon thereafter as the case is called at calendar call). Should [Father] fail to pay said amount and/or appear

---

3. Pseudonyms are used to protect the identity of the minor children. *See* N.C. R. App. P. 42.

4. This motion is not in our record but it was identified in the memorandum of judgment/order entered on 11 February 2020.

> at calendar call with proof of the same, an [o]rder for his arrest shall be issued by this court at calendar call and [Father] shall surrender himself at said time and be incarcerated until such payment is made;
>
> ii. [Father] shall pay $4,600.00 to [Mother] by February 28, 2023, and provide proof of the same at calendar call in Orange County on said date at 9:00 a.m. (or as soon thereafter as the case is called at calendar call). Should [Father] fail to pay said amount and/or appear at calendar call with proof of the same, an [o]rder for his arrest shall be issued by this [c]ourt at calendar call and [Father] shall surrender himself at said time and be incarcerated until such payment is made[.]

The Contempt Order repeated the same provisions for Father to pay additional payments of $4,600.00 due on 28 March 2023, 25 April 2023, and 23 May 2023. The same provisions are repeated requiring Father to pay $5,059.13 by 27 June 2023. Father was also required to reimburse Mother's attorney fees of $11,320.00 to be paid in full directly to Mother no later than 5:00 p.m. on 30 June 2023.

On 31 January 2023, the first "calendar call" date set by the Contempt Order, the Parties appeared before the trial court. At the start of the hearing, the trial court noted that they were in court for a "check-in." Mother's counsel agreed, and stated, "it was my understanding that for the Raulli/Roybal matter, it was just a confirmation that . . . [Father] was paying what he was supposed to pay, and there wasn't actually a hearing to be heard. Am [I] misunderstanding?" The trial court responded "[n]o, I think you're right." The trial court received no evidence regarding Father's payment of child support or his ability to pay.[5] Counsel for both parties presented arguments regarding Father's compliance with various provisions of the Contempt Order, including some matters other than child support. Father had not paid the $4,600.00 due that day and he told the trial court he was in the process of selling a truck to make the payment. Father's counsel also informed the trial court that Father had

> received new military orders earlier this month, which include thirteen upcoming training events, plus one new

5. Both Parties testified very briefly regarding the names of some medical providers for the children, as there was some confusion about which providers Father needed to contact to arrange to be listed as guarantor for the children's medical bills.

> set of long-term orders with three more pending for a September deployment. Effectively he'll be working for the military full time starting in March. His first training is supposed to take place this weekend, Friday through Sunday.

Upon rendering its ruling, the trial court noted there was no need for additional findings since "this was essentially a continuance of the commitment pursuant to that [C]ontempt [O]rder to give him additional time to come up with the money. So I'll . . . have to do a commitment order and reference this order for contempt." The trial court denied Father's counsel's request to delay his commitment to allow him to attend his military training that weekend.[6]

The trial court entered a Commitment Order for Civil Contempt, using the form order AOC-CV-110, Rev. 8-17. The order did not include any "additional findings" other than the pre-printed text of the form. The trial court ordered Father to be "immediately . . . taken into custody" until he "purges himself[ ] of contempt" by paying $4,600.00 to Mother. The order also set a date for review on 10 February 2023, if Father was not sooner released. According to the transcript, Father was immediately taken into custody.

From 1 February through May 2023, there was a series of court dates resulting in the entry of the four orders on appeal: (1) the 29 March 2023 Continuance Order; (2) the 29 March 2023 handwritten Memorandum of Order granting Mother's Motion to Modify Custody; (3) the 25 April 2023 Amended Commitment Order; and (4) the 30 May 2023 Formal Modification Order based on the 29 March 2023 hearing. Instead of reviewing the procedural history of these court dates and orders here and then repeating much of it later, we will include the relevant portions of this information in the sections below addressing Father's appeals of the four orders.

II. Jurisdiction

We have appellate jurisdiction over Father's appeal for each of the four orders Father appealed. This Court previously consolidated the four appeals by order issued on 19 June 2023.

---

6. Later, in the memorandum from Father's commanding officer, Major Kirkpatrick, dated 11 May 2023, he confirmed that Father had

> already missed a battle assembly training from 3-5 February and our first annual training from 6-14 February, both of which were a vital training event for deployment preparation. . . . On the 24th of March I emailed and called [Father] ordering him to makeup his missed days on 28-29 March to make up his missed days from February.

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. 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.

Duval v. OM Hosp., LLC, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (quotation marks omitted) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950)). We will address appellate jurisdiction for each order on appeal in chronological order.

First, on 25 April 2023, Father timely filed a notice of appeal from the 29 March 2023 Continuance Order. Although the order was interlocutory and not immediately appealable, he timely filed notice of appeal. *See Watson v. Watson*, 288 N.C. App. 265, 267, 885 S.E.2d 858, 860 (2023) ("[W]hen a litigant elects to appeal an interlocutory judgment resolving a domestic claim while other claims are pending, the litigant still must comply with Rule 3 of our Rules of Appellate Procedure, requiring that the notice of appeal be filed 'within thirty days after entry of the judgment.' " (brackets omitted) (quoting N.C. R. App. P. 3(c)(1))).

Second, on 25 April 2023, Father filed a notice of appeal from the Memorandum of Order regarding modification of custody entered on 29 March 2023. He contends the Memorandum of Order was a final appealable order because it modified the previous custody orders and was not a temporary order, although it stated "Formal Order Pending." The Memorandum of Order also directed that "[a] formal judgment/order reflecting the above terms will be prepared by (sic) and submitted no later than 30 days for signature by a judge." If it was a final appealable order, Father contends the trial court lacked jurisdiction to enter the Formal Modification of Order since his notice of appeal had divested the trial court of jurisdiction.

Mother concedes that the Memorandum of Order is "a permanent order in that it memorialized the district court judge's ruling as it was given in [c]ourt on that date." But she argues that the Formal Modification "Order entered on [30 May 2023] contains no contradictory language to the Memorandum of Order . . . ; both are part and parcel of the same permanent order as intended by the district court and should be taken together." She cites no authority for the two orders to be "taken together" and essentially treated as one order, and we are not aware of any such authority. But under the unusual circumstances of this case, we need not determine whether the Memorandum of Order was interlocutory or an immediately appealable order such that Father's notice of appeal divested the trial court of jurisdiction to enter the Formal Modification Order. Either way, Father timely filed a notice of appeal from the Memorandum of Order, preserving his right to appeal either immediately or upon entry of a final order. Since we have determined that the trial court erred by denying Father's Motion to Continue the hearing on modification of custody, we are required to vacate both the Memorandum of Order and the Formal Modification Order for that reason.

The third order on appeal is the 25 April 2023 Amended Commitment Order. Father timely filed a notice of appeal from this order on 10 May 2023. Although Father was not subject to immediate commitment under the Amended Commitment Order, it was immediately appealable. *See Guerrier v. Guerrier*, 155 N.C. App. 154, 158, 574 S.E.2d 69, 71 (2002) ("The appeal of any contempt order, however, affects a substantial right and is therefore immediately appealable." (citing *Willis v. Power Co.*, 291 N.C. 19, 30, 229 S.E.2d 191, 198 (1976))).

The fourth order on appeal is the Formal Modification Order entered on 30 May 2023. Father timely filed a notice of appeal from the Formal Modification Order on 12 June 2023. We therefore have appellate jurisdiction to review all four orders.

III. Analysis

Resolution of Father's arguments regarding the Motion to Continue on Mother's Motion to Modify Custody will also resolve his arguments regarding the Memorandum of Order and the Formal Modification Order. His arguments regarding the Motion to Continue are based on SCRA Section 3932(b)(2)'s requirements.

A. Appeal of the Continuance Order

1. Procedural History Relevant to Motion to Continue

On 1 February 2023, Mother filed a notice of hearing for 29 March 2023 for her "Motion to Modify Child Custody filed [25 February 2022]" (Motion to Modify Custody). Based on the schedule of military training dates Father provided at the 31 January 2023 contempt hearing, Father was not originally scheduled to attend training on 29 March 2023. The parties had discussed this date to set the hearing on Mother's Motion to Modify Custody during the court appearance on 31 January 2023.

On 3 February 2023, Father (who was still in jail at this point) filed a *pro se* "Motion to Stay Contempt Comitment (sic) for Civil Contempt" (Motion to Stay Contempt Commitment) under 50 U.S.C.A Section 3934.

Father alleged that he "is in the military service of the United States for various training periods from now until October 2023 then deployed in the national interest from October 2023 to June 2024, as authorized by the [SCRA], [50 U.S.C.A. § 3901.]" Father requested

> [t]hat the Order of Commitment for Civil Contempt entered on [31 January 2023] be stayed and allowing [Father] to stay out of confinement until 90 day[s] after [he] returns from deployment in June 2024, or alternatively allowing [Father] release from confinement for his pre-deployment military training obligations as stated in his commander's memorandum and his deployment from October 2023 to June 2024.

Father's Motion to Stay Contempt Commitment included two exhibits. Exhibit A is a memorandum from Father's commanding officer, Major Matthew Kirkpatrick, with the "SUBJECT: Staff Sergeant Matthew Roybal Military *Obligation*." (Emphasis added.) The memorandum stated:

> 1. The purpose of this memorandum is to discuss the deployment and training status of [Father].
>
> 2. [Father] is scheduled for deployment to West Africa for the following dates, 6 October 2023 to June 2024. *He is also required to attend all training required leading up to this deployment starting 3 February 2023 (see enclosed training schedule)*. [Father] is a central member of this mission as a team Sergeant and subject matter expert in our mission's area of responsibility. His absence will adversely affect the readiness of the company and his team since he is a primary trainer for the unit. His presence is vital for unit preparedness and for the success of this mission in support of national interest.
>
> 3. *Under AR 135-91*, [*Father*] *is required to attend all scheduled training assembles and annual training periods*.[7] Missing these trainings will cause a negative impact on [Father's] military career, and the readiness of the unit, causing him to be labeled as Unsatisfactory Participation. If his absence continues it will result in adverse action, which could include discharge with an

7. Army Regulation 135-91, effective 14 April 2016, is entitled "Service Obligations, Methods of Fulfillment, Participation Requirements, and Enforcement Provisions."

> other than honorable characterization of discharge IAW AR 135-92, para 4-7b(2).[8]
>
> 4. [Father] is the most reliable Non-Commissioned officer in my unit, he displays an unmatched work ethic and his drive and knowledge play a key role in the accomplishment of the unit's mission. He[] selflessly sacrifices his time on countless occasions in order to ensure his peers and subordinates a[re] trained and ready.
>
> 5. By allowing him to attend his military training obligations it will provide him income needed to help satisfy his payments.
>
> 6. Thank you for your understanding and consideration. Please feel free to contact me at [phone number redacted] or via email at [email address redacted].

(Emphasis added.)

The training schedule attached to the memorandum included a table of training dates for "*mandatory* Company Battle Assemblies for Fiscal Year 2023" ranging from 7 January 2023 to Father's deployment date of 6 October 2023. (Emphasis added.) This schedule identified dates when Father would and would not be available to participate in trial court proceedings.[9] Mother's counsel and the trial court both referred to this schedule during each later hearing when Father's Motion to Continue was addressed.

A third party made Father's $4,600.00 purge payment on 6 February 2023. He was released from incarceration that day and filed a notice

---

8. IAW means "in accordance with." It appears 135-92 is a typographical error and this should refer to Army Regulation 135-91.4-7 (the same section cited at the start of paragraph 3) which is entitled "Unsatisfactory Participation as an individual mobilization augmentee." It provides that "[a]n IMA will be determined to be an unsatisfactory participant subject to the enforcement provisions of chapter 6, under the following conditions: . . . (2) If required to attend 48 IDT periods, Soldiers accrue nine or more unexcused absences in any 12 month period." Father is an IMA, or an Individual Mobilization Augmentee, a member of a category of reservists in the Individual Mobilization Augmentation Program, or, in civilian English, a member of the Army Reserve. *See* Army Regulation 140-145, *Individual Mobilization Augmentation Program*, 21 April 2022.

9. Exhibit B is a copy of 50 U.S.C.A. § 3934, a section of the SCRA addressing stays when a servicemember "is materially affected by reason of military service in complying with a court judgment or order." This section addresses the servicemember's ability to comply with a court order or judgment.

of withdrawal of his motion to stay the Order of Commitment on 9 February 2023.

On 28 February 2023, Father again appeared before the trial court as required by the Contempt Order regarding the February payment due. The trial court issued an order to continue the matter, finding "[Father] appeared on [28 February 2023] and indicated at the call of this matter that he had $3,000.00 to pay towards the $4,600.00 payment." This order required Father to pay the $3,000.00 by 2:00 p.m. on 29 February and to pay the "[t]he remaining $1,600.00 of the February purge payment" by 28 March 2023 and Father was to appear for calendar call on 28 March 2023 to provide proof of payment.[10] Father was ordered to "appear at the Orange County calendar call" 29 February 2023, at 2:00 p.m., to provide proof of payment or an order for arrest would be issued.

On 27 March 2023, Father, again acting *pro se*, filed his Motion to Continue on a form entitled "Motion and Order to Continue"[11] seeking to continue the hearing set for 29 March 2023 on Mother's Motion to Modify Custody. Father's Motion to Continue alleged that Mother had noticed these motions for hearing on 22 December 2022, although we note that the notice of hearing for 29 March 2023 for Mother's Motion to Modify Custody was actually filed on 1 February 2023.[12] Father alleged as the basis for the Motion to Continue as follows:

---

10. Father was also ordered to attend calendar call on 28 March 2023 by the Contempt Order.

11. The "Motion and Order to Continue" appears to be a form with spaces for the motion, and at the bottom, a space for the trial court's ruling. The first part of the motion included Father's allegations and motion to continue and it was filed at 3:25 p.m. on 27 March 2023. At the bottom of the form is a section for the trial court to rule on the motion by checking one of two boxes, either "denied" or "allowed and set for ________." Based on the transcript of the hearings on 29 March 2023, the trial court signed the order portion of the document denying the motion on 29 March 2023, but the "Order" portion of the motion was not separately clocked in with the Clerk of Superior Court as being filed on that date. Because an order is entered when it is written, signed, and filed, and the order portion was signed on 29 April 2023, it was entered on 29 April 2023. *See Stevens v. Guzman*, 140 N.C. App. 780, 782, 538 S.E.2d 590, 592 (2000) ("A judgment or order in a civil action is entered 'when it is reduced to writing, signed by the judge, and filed with the clerk of court.' " (citations omitted) (quoting N.C. Gen. Stat. § 1A-1, Rule 58 (1999))).

12. The hearing on contempt was held on 22 December 2022 and the Contempt Order was entered that same day, but our record does not indicate any notice of hearing filed on that date. The Parties did discuss possible hearing dates and determined 29 March 2023 was an available court date as Father was not scheduled to attend military training that day under the schedule available at that time.

> As was stated as a possible issue when the court date was picked the [Father]'s mandatory military duty days were extended for mandatory training for a pending deployment in September 2023. The original training date was [30 March 2023]. The report time was moved to midnight [27 March 2023]. Attached hereto is EXHIBIT A, a true correct copy of email communication from [Father's] Commander ordering him to report for military service prior and during the scheduled hearing date. Leave to attend the hearing is not authorized or allowed.
>
> This case has previously been continued 0 times.

Attached to his Motion to Continue, Father included an email exhibit entitled "Upcoming BA" from his commanding officer Major Kirkpatrick stating, "I need you to come in before next weeks BA to make up RST dates IOT help prepare the unit for April and [M]ay[']s upcoming training. 28 and 29 March leading into 30 Mar-2 April BA."[13] This email included Major Kirkpatrick's email address and phone number.

On 28 March 2023, Father was to appear for calendar call as directed by the 28 February continuance order and the Contempt Order regarding his purge payments under both orders. Mother and her counsel appeared for this calendar call by WebEx. Father did not appear. The trial court noted that it had received Father's Motion to Continue and asked Mother's counsel if she would prefer for the trial court to issue an order for his arrest immediately or wait to "address it tomorrow" since the custody modification motion was set for hearing then. Mother's counsel addressed Father's Motion to Continue and stated her belief that Father's service on March 28 and 29 was not "considered active military duty" under the SCRA. She acknowledged Father's training schedule as provided by Major Kirkpatrick with Father's previous motion to stay filed in February 2023 but argued that the 24 March 2023 email from Major Kirkpatrick was not sufficient to constitute an order requiring him to go to training on 28 March 2023. The trial court announced that Father's Motion to Continue was denied but did not mention any findings regarding the reasons for denial. The trial court also announced that an order for Father's arrest on the contempt for failure to pay the purge payments due under the Contempt Order would be issued immediately.

---

13. Military communications use many acronyms. BA means "battle assembly." RST means "rescheduled training." IOT can have several possible meanings in the military context, but in this email, it appears to mean "in order to."

The next day, on 29 March 2023, Mother's Motion to Modify Custody was called for hearing. Father was not present and he was not represented by counsel. At the start of the hearing, the trial court inquired again about the SCRA. Mother's counsel presented arguments regarding the SCRA and whether Father was entitled to a stay. She acknowledged that Father was a "member of the Army" but contended that he was not technically on "active duty." She acknowledged Father had presented an email from Major Kirkpatrick requiring him to report for duty on 27 March 2023, but stated that she had run a status report online and the report did not indicate Father was on "active duty" as of 28 March 2023. She presented the "Status Report Pursuant to Servicemembers Civil Relief Act" as of 28 March 2023 to the trial court, but she acknowledged she "did not do an affidavit" regarding Father's military status.[14]

The trial court announced it would sign the Continuance Order based on the hearing held on the day before. The Continuance Order did not include any findings, but in the hearing, the trial court stated that Father may be at "mandatory training" but not "active duty" and the email from his commanding officer did not "say anything was mandatory." The trial court also stated that "he had plenty of time to make" a request to reschedule the training. The trial court signed the bottom section of Father's Motion to Continue, checking the box indicating that "This Motion to Continue is: Denied."

The trial court then held the hearing on Mother's Motion to Modify Custody. During Mother's testimony, for the first six pages of the transcript, she testified about Father's military service and the difficulties they had had in scheduling visitation. One of the provisions of the prior custody order was that if Father's military duty would be less than 30 days, she and Father would "just have to figure [visitation] out" and if they did not agree on a schedule, they were to "work with the [parenting coordinator]." She also testified about his current military duty, as he could not pick up Jay from camp as he was "supposed to" on that very day, 29 March 2023, because "clearly he's in Virginia."

14. The North Carolina Administrative Office of the Courts has promulgated a "Servicemembers Civil Relief Act Affidavit" based on both the North Carolina Servicemembers Civil Relief Act, N.C. Gen. Stat. § 127B-24 to § 127B-25, and the SCRA, Form AOC-G-250, Rev. 5/20. The Status Report obtained from the SCRA Website "maintained by the Department of Defense" is to be attached to the affidavit, if the affiant has used the SCRA Website to determine the party's federal military status. *See* AOC-G-250, Rev. 5/20.

At the end of the hearing, the trial court entered a handwritten Memorandum of Order granting Mother's Motion to Modify Custody. The Memorandum of Order stated that a formal order was "to be prepared by [Mother's] counsel with findings of fact and additional decretal provisions." It also directed that a "formal judgment/order reflecting the above terms" would be "prepared by (sic) and submitted no later than 30 days for signature."

On 25 April 2023, Father filed a timely notice of appeal from the 29 March 2023 Continuance Order.[15] The next day, on 26 April 2023, Father filed another notice of appeal from the Memorandum of Order.

2. Standard of Review for Continuance Order Under Section 3932(b)

[1] We will first address Father's appeal of the trial court's Continuance Order. Father's *pro se* Motion to Continue to did not cite any specific statute or rule but included allegations and information from his commanding officer regarding his military service, referring to the information he had provided in February about his 2023 training schedule, and an email from his commanding officer directing him to report for training on 28 and 29 March 2023.

In his brief, Father notes that his *pro se* Motion to Continue the hearing set for 28 March 2023 could be construed as either a motion under Rule 40(b) of our North Carolina Rules of Civil Procedure or a motion under the SCRA. Under Rule 40(b),

> [a] continuance may be granted only for good cause shown and upon such terms and conditions as justice may require. Good cause for granting a continuance shall include those instances when a party to the proceeding, a witness, or counsel of record has an obligation of service to the State of North Carolina.

N.C. Gen. Stat. § 1A-1, Rule 40(b). Although it may be possible to construe the Motion to Continue as a motion under Rule 40(b), Father did not cite this rule in support of his Motion to Continue and neither Mother's counsel nor the trial court ever mentioned Rule 40(b) during

---

15. As noted above, the document was file-stamped on 27 March 2023, but the trial court signed the "Order" section of the document on 29 March 2023. An order is "entered" under Rule 58 of our North Carolina Rules of Civil Procedure after it has been signed *and* filed. N.C. Gen. Stat. § 1A-1, Rule 58 ("[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court[.]").

the hearings on Father's Motion to Continue.[16] Instead, even when Father was not present for the hearing to advocate for his position, both the trial court and Mother's counsel understood and addressed Father's Motion to Continue as falling under the SCRA.

We agree with Father that the Motion to Continue should be considered as a motion to stay the custody proceedings under the SCRA. The distinction between a motion to continue under Rule 40(b) and a motion to stay under the SCRA is important because the standards of review for motions under Rule 40 and under the SCRA may not be the same. Normally, a motion for continuance under Rule 40 is reviewed for an abuse of discretion.[17] *See Draughon v. Harnett Cnty. Bd. of Educ.*, 166 N.C. App. 464, 466, 602 S.E.2d 721, 723 (2004) ("It is within the trial court's discretion to grant or deny a motion for a continuance, and that ruling will not be overturned absent a showing of abuse of discretion. Generally, continuances are not favored . . . , and therefore, the trial court should only grant a continuance where the moving party demonstrates 'good cause and upon such terms and conditions as justice may require.' The burden of proof rests on the moving party to demonstrate sufficient grounds justifying the continuance. When ruling on a motion to continue the trial judge must consider not only the grounds given for the motion, but whether the moving party has acted with diligence and in good faith, and may consider facts of record as well as facts within his judicial knowledge.").

In *Boone v. Lightner*, the United States Supreme Court reviewed a trial court's denial of a servicemember's application to stay proceedings under the SSCRA for an abuse of discretion. *See* 319 U.S. 561, 568 (1943) ("The legislative history of its antecedent shows that this clause was deliberately chosen and that judicial discretion thereby conferred on the trial court instead of rigid and undiscriminating suspension of civil

---

16. The motion was addressed at both the hearing on the Motion to Continue on 28 March 2023 and on the day of the hearing on modification of custody on 29 March 2023.

17. We are referring to motions to continue under Rule 40 generally. No case has addressed the denial of a continuance under Rule 40 where a party has asserted that he had "good cause" for continuance because the party "has an obligation of service to the State of North Carolina." N.C. Gen. Stat. § 1A-1, Rule 40(b). And no case has addressed whether military service should be considered as an "obligation of service" under Rule 40(b), and we note that the rest of the rule states a "continuance requested to fulfill an *obligation of service* by carrying out any duties as a member of the General Assembly, or service on the Rules Review Commission or any other board, commission, or authority as an appointee of the Governor, the Lieutenant Governor, or the General Assembly, must be granted." *Id.* (emphasis added).

proceedings was the very heart of the policy of the Act." (footnote omitted)). But the SSCRA, a precursor to the SCRA, specifically provided that whether to stay proceedings was "in the discretion of the [trial] court." *Id.* at 564 (quotation marks omitted).

The current SCRA, as applicable to this case, was adopted in 2003. The purpose of the SCRA is:

> (1) to provide for, strengthen, and expedite the national defense through protection extended by this chapter to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and
>
> (2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.

50 U.S.C.A. § 3902 (2003).

When a servicemember requests a stay of court proceedings under Section 3932(b)(2), the current language does not grant the same scope of discretion as given to the trial court in the SSCRA. Instead, the SCRA uses mandatory language, stating that a stay "shall" be issued when an applicant has satisfied the "[c]onditions for stay" outlined in Section 3932(b)(2). 50 U.S.C.A. § 3932(b)(2).

North Carolina courts have never addressed the standard of review of denial of a motion for stay or continuance under the SCRA. The Kentucky and Maryland Courts of Appeals have interpreted the language of the SCRA as being "mandatory" and have reviewed denials of a proper motion to stay under the SCRA *de novo*.[18] *See Wood v. Woeste*, 461 S.W.3d 778, 782 (Ky. Ct. App. 2015) ("In interpreting Section [3932], our sister courts have held the SCRA 'leaves no room for judicial discretion.' If a service member complies with the requirements for a stay, it is required that the trial court grant a stay." (citation omitted)). In contrast, one court, the Alaska Supreme Court, has stated that denial of a motion to stay under the SCRA is reviewed for an abuse of discretion:

> A trial court's interpretation of the provisions of the [SCRA] is a matter of law, which we review de novo

---

18. Most cases from other states have addressed the issue under the 1940 SSCRA, not the current SCRA as adopted in 2003. Again, under the SSCRA, the trial court had discretion as to whether to grant a stay.

> using our independent judgment. We have not previously addressed the standard that governs the review of a trial court's decision whether to stay a proceeding under the [SCRA]. In *Boone v. Lightner*, the United States Supreme Court reviewed a trial court's decision not to continue a proceeding under the [SSCRA], the precursor to the [SCRA], for abuse of discretion. We have also recognized that the abuse of discretion standard governs the review of a trial court's decision whether to stay a proceeding in other contexts. We therefore conclude that a trial court's decision whether to grant a stay under the [SCRA] is reviewed under the abuse of discretion standard.

Childs v. Childs, 310 P.3d 955, 958 (Alaska Ct. App. 2013) (footnotes omitted).

In the *Childs* case, the Alaska Supreme Court relied on *Boone v. Lightner*, which was decided under the SSCRA, not the SCRA, and under the SSCRA granting a stay was clearly in the discretion of the trial court. *See id.*; *see also Boone*, 319 U.S. at 569 ("[W]e are unable to ignore or sterilize the [SSCRA] clause which plainly vests judicial discretion in the trial court."). In addition, in the *Childs* case, the Court noted that the servicemember-father did

> not argue on appeal that his ability to participate in the child support modification proceeding was materially affected by his military service. And the record does not include any evidence, such as a communication from [the servicemember-father]'s commanding officer, suggesting that his military duties prevented him from participating in the proceeding. In fact, [the servicemember-father] actually participated in the modification proceeding, filing an opposition in the superior court, raising legal arguments, and providing supporting documents including pay stubs, W-2s, and tax returns. [The servicemember-father] therefore was not entitled to invoke a stay under [the SCRA].

310 P.3d at 960 (footnote omitted). And since the servicemember-father in *Childs* did not file a motion under the SCRA with the proper documentation to invoke this protection, and did not argue that his ability to participate in his child support modification hearing was materially affected by military service, we consider the statement of the standard of review for a motion under the SCRA as dicta, which was not necessary for the ruling in *Childs*. *See Hayes v. City of Wilmington*, 243 N.C. 525,

536, 91 S.E.2d 673, 682 (1956) ("In every case what is actually decided is the law applicable to the particular facts; all other legal conclusions therein are but *obiter dicta*." (citation and quotation marks omitted)).

None of the cases from the other states are binding on this Court, but we find the Kentucky and Maryland cases to be more persuasive since they are based on the current provisions of the SCRA. *See State v. Williams*, 232 N.C. App. 152, 157, 754 S.E.2d 418, 422 (2014) ("While we recognize that decisions from other jurisdictions are, of course, not binding on the courts of this State, we are free to review such decisions for guidance." (citation and quotation marks omitted)). The Alaska case overlooks the differences between the statutory language of the SSCRA and the SCRA, and in the *Childs* case, the servicemember-father merely requested a stay under the SCRA without providing any information required by the SCRA. Based on the statutory language and the more persuasive cases interpreting the SCRA, we conclude the standard of review for the denial of a proper motion to stay under the SCRA is *de novo*.

Based on Father's Motion to Continue, the trial court proceedings, and Mother's counsel's arguments at the hearing, we have no reason to treat Father's Motion to Continue as anything but a motion to stay under the SCRA. Before the trial court, there was never any question that Father was requesting a continuance or stay under the SCRA because he was required to attend several training dates leading up to his October 2023 deployment. No one ever mentioned Rule 40. Mother has not challenged on appeal Father's qualification as an applicant "in military service" under the SCRA, 50 U.S.C.A. § 3932(a)(1), nor did she make this argument to the trial court. Instead, the transcript makes clear that both Mother and the trial court understood Father's Motion to Continue to be based on the SCRA and his need to attend training for the upcoming October 2023 deployment.

Even when Father was not present or represented for the hearing on his Motion to Continue, Mother's arguments against Father's Motion to Continue focused *entirely* on the SCRA. She began her argument noting that she had to pull up the SCRA "this morning because it's been a minute since I've looked at it in this case. And the key with this is that [Father] is not considered active military duty." She went on to discuss the schedule of training dates and the Memorandum from Major Kirkpatrick that Father had filed in February 2023. We therefore review the trial court's denial of the Motion to Continue *de novo*.

3. Conditions for Stay Under Section 3932(b)(2)

[2] We must now consider whether Father's Motion to Continue met the requirements of a motion to stay under the SCRA, as Mother contends Father did not provide the information required by the SCRA. Father argues that the information he provided to the trial court in his 27 March 2023 Motion to Continue, along with the other information he had filed with his previous motion, satisfied the "[c]onditions for stay" of Section 3932(b)(2) of the SCRA and he was entitled to a stay of the custody modification hearing.

In her brief on appeal, Mother contends that Father's motions did not "set forth the necessary facts" under Section 3932(b)(2) to trigger stay protections afforded under the SCRA. Her argument in her brief focuses only on Major Kirkpatrick's 24 March 2023 email, but before the trial court both Mother's counsel and the trial court discussed and relied on the email along with Major Kirkpatrick's previous memorandum and the training schedule he had provided with the memorandum. Mother's brief acknowledges the discussion of the dates of Father's military training at the hearing on 31 January 2023, but she contends these dates were simply "military training, please note not military duty or deployment." Mother's brief does not address any of the relevant definitions of "military service" or the actual language of 50 U.S.C.A. Section 3911. Most of her argument is based on the fact that the Status Report did not say Father was on "active duty" as of 28 March 2023, but as we will discuss below, neither the law nor the undisputed facts support Mother's argument.

Mother's brief also conflates the issue of continuance of the child custody modification hearing with issues related to Father's child support obligation. Father's Motion to Continue sought to continue or stay the hearing on Mother's *Motion to Modify Custody* set for 29 March 2023; this was the first time the Motion to Modify Custody had been set for hearing. Mother inexplicably argues that Father's "Motion to Continue was pursuing the goal of deferring his child support responsibilities; justice is the support of these minor children." The Contempt Order set 28 March 2023 as the date for Father to appear regarding the contempt purge payment. But *child support* was not set to be considered at the 29 March 2023 hearing, and it was not addressed at that hearing. Ultimately, Mother argues that the trial court did not abuse its discretion by denying the continuance

> simply on the basis that the party filing the motion was requested to be somewhere else at the same time as the

> hearing, because subscribing to that standard would defeat any semblance of judicial efficiency. Further, the [c]ourt made findings of fact surrounding the reasons for the denial of the Motion to Continue, which were also stated on record, in the [30 May 2023 Formal] Modification of Child Custody Order. [Father] had ample opportunity to be present in court to present his side of the custody argument. His failure to appear was the result of his choices.

The SCRA is a federal statute enacted to protect military servicemembers from "judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service." 50 U.S.C.A. § 3902. "This chapter applies to any judicial or administrative proceeding commenced in any court or agency in any jurisdiction subject to this chapter[,]" including state trial court proceedings. *Id.* § 3912. The courts that have addressed the SCRA (and its predecessor, the SSCRA) have consistently stated that it should not "be given [a] narrow interpretation, but should be construed liberally so as to achieve the broad purposes of Congress. All doubt should be resolved in favor of the soldier." *McEndy v. McEndy*, 318 Mass. 775, 777, 64 N.E.2d 435, 436 (1945) (citing *Blazejowski v. Stadnicki*, 317 Mass. 352, 354, 355, 58 N.E.2d 164 (1944); *Semler v. Oertwig*, 234 Iowa 233, 243, 12 N.W.2d 265 (1943); *Reynolds v. Haulcroft*, 205 Ark. 760, 763, 170 S.W.2d 675 (1943)).

Only one North Carolina case has discussed the importance of the SCRA, although this case did not address the SCRA directly. The Supreme Court of North Carolina in *In re Branch*, 367 N.C. 733, 734, 767 S.E.2d 47, 48 (2015), addressed whether a trial court denied the defendant-servicemember a fair trial in accordance with his rights under the SCRA.

Branch arose from an appeal of an order of public reprimand from the Judicial Standards Commission of a trial judge for failure to appropriately inquire into the rights of the absent defendant under the SCRA and "imprudently relying upon the counsel for the opposing party in the matter for a determination of the rights afforded" to the absent defendant. *Id.* at 734, 767 S.E.2d at 48. The Supreme Court noted that in *Foster v. Foster*, Halifax County File No. 12–CVD–733, a domestic case under North Carolina General Statutes Chapter 50, the trial court entered a default judgment against the defendant-servicemember. *Id.* at 737, 767 S.E.2d at 50. This led to the disciplinary action against the respondent-judge. *Id.* at 734, 767 S.E.2d at 48. After service of the complaint, the defendant-servicemember sent a letter to the trial court regarding his military service. *Id.* at 735, 767 S.E.2d at 48-49. He stated:

> "legal counsel informs me that federal law requires a stay of proceedings for a minimum of 90 days for service members on active duty" and cited the SCRA. Defendant received this advice from a Judge Adjutant General officer stationed in Daegu, Korea.
>
> [I]n a separate letter also dated 16 July 2012 and filed 26 July 2012, [d]efendant's commanding officer also wrote the court to verify that [d]efendant's military service would preclude his participation in court proceedings until at least 30 April 2013 and to also request a stay of proceedings until that time, personally ensuring that [d]efendant would be able to participate in the next scheduled proceeding after 30 April 2013. The commanding officer, in his letter, wrote that he was "advised by legal counsel that federal law allows a stay of proceedings for service members on active duty when their ability to defend themselves is materially affected by their material service" and cited the SCRA. The commanding officer's letter explained "Until this date 30 April 2013, SFC Jason Foster is needed by this unit because he is essential to the mission" and further explained "In this instance, SFC's critical role in the national security mission of this command precludes his participation in court proceedings until April 30th, 2013. He will be unable to present any defense at all due to his duties."

Id. at 735, 767 S.E.2d at 49 (internal quotation marks and brackets omitted).

Well before the end of April 2013—the date the commanding officer had identified as the ending date of the defendant-servicemember's assignment—in August 2012, the plaintiff's counsel in *Foster* asked the trial court to enter an order requiring the unrepresented defendant-servicemember to provide certain information regarding his military service, and the trial court entered an order giving him a deadline to "provide further justification for his request for a stay." *Id.* at 737, 767 S.E.2d at 50 (internal quotation marks omitted). However, the defendant-servicemember apparently did not have notice of this hearing, and he did not receive the resulting order until "less than one week before the deadline" stated in the order. *Id.* Later, the trial court entered default judgments against the defendant-servicemember. *Id.*

We appreciate that *Branch* addressed a different situation than this case, but no other case from the Supreme Court of North Carolina has addressed the current version of the SCRA,[19] so we find the description of the information provided to the trial court by the defendant-servicemember's commanding officer instructive for this case. Mother's counsel here argued to the trial court that Father's Motion to Continue the hearing on the Motion to Modify Custody should not be allowed because he was not technically on "active duty," despite the receipt of the commanding officer's memorandum stating Father's schedule of required training dates leading up to the deployment date and the email from his commanding officer about the revised dates. Here, the trial court noted (incorrectly)[20] that Father's commanding officer did not say the training was "mandatory"[21] but Section 3932(b)(2) does not require use of this word. The information Father and Father's commanding officer provided here is similar to the information noted in *Branch*. And in the *Foster* case, the defendant-servicemember apparently did not even file a formal motion for stay or continuance but instead provided the information required by the SCRA to the trial court in a letter from himself and from his commanding officer. *Id.* at 735, 767 S.E.2d at 49.

The provision of the SCRA controlling Father's Motion to Continue is Section 3932, entitled "Stay of proceedings when servicemember has notice." 50 U.S.C.A. § 3932. This section applies to

> any civil action or proceeding, including any child custody proceeding, in which the plaintiff or defendant at the time of filing an application under this section—
>
> (1) *is in military service or is within 90 days after termination of or release from military service*; and
>
> (2) has received notice of the action or proceeding.

---

19. *Boone v. Lightner*, 319 U.S. 561 (1943), which is one of very few cases from the United States Supreme Court addressing the 1940 SSCRA, arose from review of a North Carolina case.

20. The memorandum from Major Kirkpatrick described the training dates as a military "obligation," "mandatory," and "required."

21. In denying Father's Motion to Continue, the trial court stated during the hearing on 29 March 2023:

> Also the email from his – that was attached to his motion from the commanding officer, didn't say anything was mandatory, but just that he needed to be there early to make up for something he missed before. So – and I think that miss was due to his not complying with [the Contempt Order] and being incarcerated for a short period before.

Id. § 3932(a) (emphasis added). Subsection (b) sets out the details of the application for a stay of proceedings.

> (1) Authority for stay
>
> At any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, the court may on its own motion and *shall, upon application by the servicemember*, stay the action for a period of not less than 90 days, *if the conditions in paragraph (2) are met.*
>
> (2) Conditions for stay
>
> An application for a stay under paragraph (1) shall include the following:
>
> > (A) *A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.*
> >
> > (B) *A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.*

Id. § 3932(b) (emphasis added).

As to the first condition for protection by the SCRA, Mother does not dispute that Father is a "servicemember," defined for purposes of the SCRA as "a member of the uniformed services, as that term is defined in section 101(a)(5) of Title 10." *Id.* § 3911(1). It is undisputed that Father is a Staff Sargeant in the Army Reserves.[22]

> 22. A member of a reserve component who is ordered to report for military service is entitled to the rights and protections of this subchapter and subchapters II and III during the period beginning on the date of the member's receipt of the order and ending on the date on which the member reports for military service (or, if the order is revoked before the member so reports, or the date on which the order is revoked).

50 U.S.C.A. § 3917(a).

Next, the servicemember must be "in military service or is within 90 days after termination of or release from military service." *Id.* § 3932(a)(1). "Military service" is defined by Section 3911 as:

> (A) in the case of a servicemember who is a member of the Army, Navy, Air Force, Marine Corps, Space Force, or Coast Guard--
>
> > (i) active duty, as defined in section 101(d)(1) of Title 10[.]

Id. § 3911(2)(A)(i). "Active duty" is then defined by 10 U.S.C.A. Section 101(d)(1) as

> full-time duty in the active military service of the United States . . . . Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty.

10 U.S.C.A. § 101(d)(1).

"Active military service" is not further defined in Section 101 of Title 10, U.S. Code, but "active service" is defined as "service on active duty or full-time National Guard duty" in Section 101(d)(3). "Nothing in either the SCRA or the incorporated portions of 10 U.S.C. [Section] 101 suggests that a servicemember must be deployed or stationed abroad for the SCRA to apply." *Warta v. Porter, McGuire, & Kiakona, LLP*, 622 F. Supp. 3d 971, 982 (D. Haw. 2022).

Mother's primary argument is that Father did not meet the conditions for an application for stay as provided by Section 3932(b)(2). These conditions require that the servicemember must provide "a letter or other communication setting *forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear*" and "a letter or other communication from the servicemember's commanding officer stating *that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter*." 50 U.S.C.A. § 3932(b)(2) (emphasis added). The memorandum from Major Kirkpatrick, the training schedule, and Major Kirkpatrick's email fulfill these conditions.

Mother's brief characterizes Major Kirkpatrick's 24 March 2023 email as an "unclear communication" that "requires farfetched inference to conclude that will be in a required military training on [29 March 2023]." We disagree that the email is "unclear," especially when read along with Major Kirkpatrick's first memorandum and the training schedule. The transcript of the hearing shows that Mother's counsel and the trial court considered all this information. Nor does it require "farfetched inference" to conclude Father was attending required training on 29 March 2023. It is clear from the transcripts of both 28 March 2023 and 29 March 2023 that Mother, her counsel, and the trial court all knew Father was attending military training on 29 March 2023. Mother's main argument to the trial court was that he was not on "active duty," and her contention on appeal is that his attendance at training was not "required." But Major Kirkpatrick's memorandum, the training schedule, and his email all state the training dates listed on the 2023 training schedule were "mandatory," an "obligation," and "required." Major Kirkpatrick added the training dates for 28 and 29 March to make up for training Father missed when the trial court committed him for contempt and caused him to miss his required training dates of 3 through 5 February 2023.[23]

We understand that Mother and the trial court both had valid questions about Father's credibility on various matters, especially regarding Father's failure to pay his child support in a timely manner. But Mother never raised any question about the credibility or validity of the memorandum, training schedule, or email from Major Kirkpatrick, nor was there any question that Father was actually attending military training on 28 and 29 March 2023. The Motion to Modify Custody had originally been scheduled for 29 March 2023 based on Father's availability as shown on the training schedule as of January 2023. Those dates changed after Father was incarcerated for contempt during his battle assembly training dates of 3 through 5 February 2023, so he had to make up those training dates. The trial court made no findings of fact in the Continuance Order, but the findings the trial court did make in the Formal Modification Order show the trial court did not question the validity of the memorandum and training schedule from Major Kirkpatrick, regardless of Father's credibility or lack thereof.

Because the trial court made no findings in the Continuance Order, Mother notes that in the 30 May 2023 Formal Modification Order, the trial

23. Father had also requested, based on the SCRA, to delay his commitment for contempt on 3 February 2023, but the trial court denied his request, so Father missed his required training that weekend.

court included some findings relevant to the denial of Father's Motion to Continue, finding that "[p]ursuant to" Father's training schedule, he "was not scheduled to be required to attend battle assemblies and in the event he was, he could have requested to split the training as evidenced" by his training schedule. The trial court also found Father "had ample time to request leave from any training as indicated in the memorandum." We could ignore Mother's argument based on these findings in the Formal Modification Order for several reasons.

First, Mother's argument is circular. She is arguing that Father's Motion to Continue should have been denied not based on findings made at the hearing on the Motion to Continue or in the Continuance Order but on findings the trial court made at the custody modification hearing Father could not attend *because* his Motion to Continue was wrongfully denied. Because we must vacate the Formal Modification Order due to the trial court's failure to allow Father's Motion to Continue under the SCRA and Father was not present at the custody modification hearing, we cannot rely on any findings in this order. But even if we considered the findings, these findings simply confirm that the trial court was aware of and considered Father's training schedule for 2023. And the trial court's finding that Father could have requested leave and that he was not required to attend the training on 28 March 2023 is not supported by that same evidence.

The trial court is correct that Father's training schedule indicated he could "request to split training" if needed. However, the same documents also stated that any request for split training had to be submitted "*at least 30 days prior* to the scheduled battle assembly." (Emphasis added.) It would have been impossible for Father to make a timely request for split training for 29 March 2023 since he did not learn until he received the 24 March 2023 email that he would have to go to training on 29 March 2023. The trial court's findings did not mention this 30-day requirement or the additional email communication from Major Kirkpatrick dated 24 March 2023, directing Father to come in for training on 28 March 2023.

Father argues the materials he submitted, which were "available to the trial court" at the 28 March 2023 hearing—and were referenced by both Mother's counsel and the trial court during the hearing—satisfied the conditions of Section 3932(b)(2) and thus this Court should conclude he was entitled to the stay. As noted above, Father directs us to his Motion to Stay Contempt Commitment filed 3 February 2023 in addition to his Motion to Continue filed 27 March 2023.

Other courts have considered a combination of several filings by a servicemember to fulfill the requirements of the SCRA. *See Hernandez v. Hernandez*, 169 Md. App. 679, 690, 906 A.2d 429, 435 (2006) (vacating judgment entered after trial court's denial of the servicemember's motions to stay hearing, after considering the servicemember's "first motion to stay the proceedings" filed 11 August 2004 with information regarding his duties, his orders, and a letter from his commanding officer; his second motion for stay filed 25 August 2004 with the same information as the first but through counsel; and his "third motion for stay" filed the day "before the scheduled trial" with another letter from his commanding officer regarding his military duty on 8 September 2004, the trial date. Looking at all these filings, the Court stated that "[t]herefore, by the time [the] appellant filed his third motion, he had submitted everything that [Section 3932](b)(2) requires"). And here, the trial court and Mother both repeatedly referred to and relied on the information from Major Kirkpatrick with both motions so it is appropriate for this Court to rely on the same information in reviewing Father's argument.

According to the original training schedule issued in January 2023, Father was not required to attend any training sessions that would have interfered with his ability to attend the 29 March 2023 custody modification hearing. However, in the Motion to Continue filed on 27 March 2023, Father included as an exhibit an email communication from Major Kirkpatrick dated 24 March 2023, indicating he needed to "come in" early on "28 and 29 March leading into the 30 Mar[ch]-2 April" scheduled training.

At the hearing on 28 March 2023, Mother's counsel acknowledged that Father had presented an email from his commanding officer requiring him to report for duty on 27 March 2023, but stated that she had run a "Status Report" online and that the report did not indicate Father was on "active duty" as of 28 March 2023. The next day at the hearing, she also presented the "Status Report Pursuant to Servicemembers Civil Relief Act" as of 28 March 2023, but she acknowledged that she "did not do an affidavit" regarding Father's military status. The absence of an affidavit supporting the Status Report is telling, since there was never any dispute that Father was attending training that day, and both Mother and her counsel were aware that Father was not present because he was actually attending military training as directed by his commanding officer.

Mother is correct that the "Status Report Pursuant to Servicemembers Civil Relief Act" submitted to the trial court by Mother on 28 March 2023 does not identify any "active duty" service dates. But we must consider the entire document, not just the small portion Mother stresses. The second page of the Status Report notes the potential limitations of the Status Report and encourages users to "obtain further verification" if there is an assertion that the servicemember is "entitled to the protections of the SCRA":

> The Defense Manpower Data Center (DMDC) is an organization of the Department of Defense (DoD) that maintains the Defense Enrollment and Eligibility Reporting System (DEERS) database which is the official source of data on eligibility for military medical care and other eligibility systems.
>
> The DoD strongly supports the enforcement of the [SCRA] (formerly known as the [SCCRA]. DMDC has issued hundreds of thousands of "does not possess any information indicating that the individual is currently on active duty" responses, and has experienced only a small error rate. *In the event the individual referenced above, or any family member, friend, or representative asserts in any manner that the individual was on active duty for the active duty status date*<u>*, or is otherwise entitled to the protections of the SCRA,*</u> *you are strongly encouraged to obtain further verification of the person's status by contacting that person's Service.*[24] *Service contact information can be found on the SCRA website's FAQ page (Q35) via this URL: https://scra.dmdc.osd.mil/scra/#/faqs. If you have evidence the person was on active duty for the active duty status date and you fail to obtain this additional Service verification, punitive provisions of the SCRA may be invoked against you. See 50 USC App. § 3921(c).*
>
> This response reflects the following information: (1) The individual's Active Duty status on the Active Duty Status Date (2) Whether the individual left Active Duty status within 367 days preceding the Active Duty Status Date (3) Whether the individual or his/her unit received early notification to report for active duty on the Active Duty Status Date.

24. Father's commanding officer, Major Kirkpatrick, provided his contact information on several documents, including the email attached to Father's Motion to Continue. Mother's counsel and the trial court both referred to these documents, but there is no indication in the record that anyone ever sought to contact Major Kirkpatrick to "obtain further verification of the person's status" as recommended by the Status Report form.

More information on "Active Duty Status"

Active duty status as reported in this certificate is defined in accordance with 10 USC § 101(d) (1). Prior to 2010 only some of the active duty periods less than 30 consecutive days in length were available. In the case of a member of the National Guard, this includes service under a call to active service authorized by the President or the Secretary of Defense under 32 USC § 502(f) for purposes of responding to a national emergency declared by the President and supported by Federal funds. All Active Guard Reserve (AGR) members must be assigned against an authorized mobilization position in the unit they support. This includes Navy Training and Administration of the Reserves (TARs), Marine Corps Active Reserve (ARs) and Coast Guard Reserve Program Administrator (RPAs). Active Duty status also applies to a Uniformed Service member who is an active duty commissioned officer of the U.S. Public Health Service or the National Oceanic and Atmospheric Administration (NOAA Commissioned Corps).

Coverage Under the SCRA is Broader in Some Cases

Coverage under the SCRA is broader in some cases and includes some categories of persons on active duty for purposes of the SCRA who would not be reported as on Active Duty under this certificate. SCRA protections are for Title 10 and Title 14 active duty records for all the Uniformed Services periods. Title 32 periods of Active Duty are not covered by SCRA, as defined in accordance with 10 USC § 101(d)(1).

Many times orders are amended to extend the period of active duty, which would extend SCRA protections. Persons seeking to rely on this website certification should check to make sure the orders on which SCRA protections are based have not been amended to extend the inclusive dates of service. Furthermore, some protections of the SCRA may extend to persons who have received orders to report for active duty or to be inducted, but who have not actually begun active duty or actually reported for induction. The Last Date on Active Duty entry is important because a number of protections of the SCRA extend beyond the last dates of active duty.

> Those who could rely on this certificate are urged to seek qualified legal counsel to ensure that all rights guaranteed to Service members under the SCRA are protected
>
> WARNING: This certificate was provided based on a last name, SSN/date of birth, and active duty status date provided by the requester. Providing erroneous information will cause an erroneous certificate to be provided.

(Emphasis added.)

Mother's counsel informed the trial court that she did *not* file an affidavit with the Status Report she submitted to the trial court. We have addressed the Status Report in detail because Mother's brief stresses the importance of the Status Report: "This status report was presented by counsel for [Mother] at the March 28, 2023 calendar call and was referenced when Judge Cabe made her decision not to grant [Father]'s Motion to Continue . . . along with other evidenced (sic) as referenced in the court transcript." Mother's emphasis on the Status Report is disingenuous, as she conveniently did not file a sworn affidavit with the Status Report. Had she filed an affidavit it presumably would have included the same information Mother ultimately testified about the next day at the custody modification hearing—her knowledge that Father was actually not present for the hearing due to his military service.

The North Carolina Administrative Office of the Courts has promulgated a form entitled "Servicemembers Civil Relief Act Affidavit." AOC-G-250, Rev. 5/20. This affidavit requires the affiant to state "under the penalty of perjury" their "personal knowledge" of whether the party identified on the affidavit is or is not "in the military service;" whether they have "received a copy of a military order" from the party; whether they did or did not use the "Servicemembers Civil Relief Act Website" to determine the military service status, and if so, to attach the results of that search to the affidavit. *Id.* The affidavit also includes a blank section for the affiant to state any facts supporting the affiant's statement about the party's military service. The form includes detailed instructions noting the requirements of the SCRA.[25] Based on the transcripts, both

25. We note the information regarding SCRA affidavits on the back of the form addresses cases where the servicemember does not appear under 50 U.S.C.A Section 3931, proceedings where the service member "has not made an appearance." But the procedures under Section 3931 apply only where the servicemember has not received actual notice of the proceeding. Where the servicemember has received notice, as Father here did, Section 3932 applies.

Mother and her counsel were aware Father had reported for his military duty on 27 March 2023, as directed by Major Kirkpatrick's email, and they did inform the trial court. However, Mother's counsel still argues Father was not technically on "active duty" and he was not "required" to attend training so the protections of the SCRA would not apply to him. But Father complied with the requirements of Section 3932(b)(2).

There is no dispute that Father had submitted documentation from his commanding officer regarding the training dates for 2023 leading up to the October 2023 deployment. In addition, as the trial court noted, the trial court's previous commitment of Father on 3 February 2023 made him unable to attend his scheduled training on that date, necessitating the make-up dates on 28-29 March. Major Kirkpatrick stated Father had a vital role within his military unit and that his absence would "adversely affect" preparations for deployment. Father's attendance at training sessions would "materially affect" his ability to appear for the trial court hearing on 29 March 2023. 50 U.S.C.A. § 3932(b)(2)(A).

The SCRA also required that Father inform the trial court of when he would be available for court proceedings, and he did so. *See id*. The training schedule informed the trial court of dates Father would and would not be available to participate in proceedings. These training dates did not occupy all of Father's time leading up to his October 2023 deployment. In fact, he was unavailable only a few days of the year until his deployment to Africa in October. The trial court easily could have looked at Father's training schedule and found many other dates when he would be available to schedule the child custody hearing. Father satisfied the requirements of Section 3932(b)(2)(A) in providing a "communication" that both states how his military duty "materially affect[s]" his "ability to appear" for the 29 March 2023 hearing, as well "a date when [Father] w[ould] be available to appear." *Id*.

We also note that Father's Motion to Continue requested a continuance of the hearing set for 29 March 2023, not a "stay." Very few cases nationwide have addressed whether there is any relevant difference between asking for a "stay" and a continuance under the SSCRA or SCRA. Most cases address the 1940 SSCRA, and that statute did have important differences from the SCRA. Under the SSCRA, the trial court had discretion to grant a stay, but we agree with the Supreme Court of Alabama addressing motions to continue under the 1940 SSCRA: "We perceive of no sound reason to here draw nice distinctions between a continuance of the cause and a stay of the proceedings. For all practical purposes the results are the same." *Ex parte Taylor*, 247 Ala. 308, 311, 24 So. 2d 217, 219 (1945). Under the SCRA, an initial stay is for "not less than 90 days." 50 U.S.C.A. § 3932(b)(1).

As a practical matter, a 90-day stay may be more appropriate when a servicemember will be unavailable to attend to any action required in a court proceeding for an extended period, while a continuance may be more appropriate when the servicemember is unable to attend a hearing during a certain period but will be available soon after that date. Here, under Father's schedule of training as of 28 March 2023, he would have been available for a continued court date as soon as 7 April 2023. Or if the trial court granted a 90-day stay, until 27 June 2023, his training schedule showed he would be available on that date and he would be available for most days during the months of July, August, and September 2023.

On *de novo* review, because Father satisfied the elements of Section 3932(b)(2), he was entitled to a mandatory stay of the trial court's child custody proceedings under the SCRA. The trial court erred in denying his Motion to Continue and by holding the hearing on Mother's Motion to Modify Custody on 29 March 2023.

4. Denial of Father's Motion to Continue Under the SCRA was Prejudicial

[3] Father has also shown the trial court's denial of his Motion to Continue the hearing on modification of custody was prejudicial. As a general rule, to have the right to relief on appeal, an appellant must show prejudice from the denial of a motion to continue or to stay, whatever the legal basis of the motion:

> Regardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when defendant shows both that the denial was erroneous, and that he suffered prejudice as a result of the error.

In re L.A.J., 381 N.C. 147, 149, 871 S.E.2d 697, 699 (2022) (citation and quotation marks omitted).

In cases under the SCRA, the requirement to show prejudice from the denial of a motion to continue has been recognized by many courts which have addressed the SCRA. For example, the Virgina Supreme Court noted:

> In the only Supreme Court decision interpreting this statute, the Court upheld the denial of a stay to a serviceman who was assigned to a job in Washington, D.C., and who

> was a party to litigation in North Carolina. While not holding that stays were automatic, the Court stated that, upon a serviceman's application for a stay, a trial court cannot deny a stay unless "the court be of opinion that (a defendant's) ability to defend is not materially affected by military service."

Lackey v. Lackey, 222 Va. 49, 51, 278 S.E.2d 811, 812 (1981) (internal citations omitted). Although both *Boone* and *Lackey* were addressing the SSCRA, not the SCRA, the same rule applies under the SCRA. In the Formal Modification Order, the trial court made many findings of fact, without Father having an opportunity to be present for the hearing or to present his own evidence, and modified the custodial schedule for both children, granting Mother sole legal custody.

Although Kentucky's laws about child custody procedures and remedies differ from ours, in *Wood v. Woeste*, the Kentucky Court of Appeals described the prejudice to the father from the court's refusal to grant a stay under the SCRA and its entry of a temporary custody order:

> Likewise, [the] father's injuries are irreparable. While serving his country, [the] father was unable to appear and oppose [the] mother's motion. The purpose of the SCRA is to permit service members to "devote their entire energy to the defense needs of the Nation" by temporarily suspending judicial proceedings, including custody proceedings. 50 App. U.S.C. § 502[[26]] Holding a custody hearing in [the] father's absence after he properly filed a motion for an automatic stay directly contravenes the stated purpose of the SCRA. Even if [the] father will ultimately resume his role as residential custodian, the violation of the SCRA has already caused the harm sought to be prevented by its enactment which cannot be remedied on appeal.

Wood, 461 S.W.3d at 783. As in *Wood*, here, the trial court's "violation of the SCRA has already caused the harm sought to be prevented by its enactment which cannot be remedied on appeal." *Id.*

Following the denial of Father's Motion to Continue the hearing, the trial court proceeded with the child custody hearing on 29 March 2023 and entered a handwritten Memorandum of Order granting Mother's Motion to Modify Custody that same day. Then, on 30 May 2023, the

---

26. Same as current statute, now codified as Section 3902. 50 U.S.C.A. § 3902.

trial court entered its Formal Modification Order incorporating the same provisions as the Memorandum of Order but including findings of fact. Again, because Father was entitled to stay the child custody proceedings "for a period of not less than 90 days" due to his military service, the trial court erred in entering both the Memorandum of Order and the Formal Modification Order. The denial of Father's Motion to Continue under the SCRA violated the requirements of the SCRA and deprived Father of his right to appear and oppose Mother's Motion to Modify Custody, and the trial court's error was prejudicial. The only way to remedy this error is to vacate the Memorandum of Order and Formal Modification Order and remand for a new hearing.

B. Amended Commitment Order for Civil Contempt

The final order on appeal is the Amended Commitment Order of 25 April 2023. In this order, the trial court ordered that Father be "immediately . . . taken into custody by the sheriff of this county" and "remain in custody until he[] purges himself[] of contempt by" paying "$7,500 to the Orange County Clerk of Superior Court to be disbursed to [Mother.]"

Father argues the trial court erred by entering the Amended Commitment Order because it did not hear evidence, consider his ability to pay, or make any findings regarding his current ability to pay the purge payment set in December 2022 at the time of the entry of the Amended Commitment Order in April 2023. Mother's brief essentially concedes this point; she states that "the trial court may have erred in issuing the [25 April 2023] Amended Commitment Order, but the [22 December 2022] Contempt Order on which it was based was not erroneous."

On 24 May 2023, the trial court held a hearing on Father's Motion to Stay Contempt Commitment. No evidence regarding Father's ability to pay the purge payment was presented at this hearing, but Father was represented by counsel and counsel for both Parties presented arguments. That same day, the trial court entered a "Conditions of Release and Release Order" (Release Order). This order was captioned as "State Versus Matthew Jason Roybal," although this is not a criminal matter, and was on AOC-CR-200.[27] This order stated:

> To The Defendant Named Above, you are ORDERED to appear before the Court as provided above and at all

27. This form is intended for use in criminal cases. The statutory authority noted on the form is North Carolina General Statute Chapter 15A, Article 25, 26. These articles govern commitment of a criminal defendant to a detention facility pending trial and bail. Neither of these articles is applicable to a civil contempt proceeding.

> subsequent continued dates. If you fail to appear, you will be arrested and you may be charged with the crime of willful failure to appear. The defendant has been advised of charge(s) against him/her and his/her right to communicate with counsel, family and friends.
>
> Your release is authorized upon execution of your:
>
> WRITTEN PROMISE to appear.

AOC-CR-200, Rev. 10/24.

Under the section entitled "Additional Information," the trial court added: "[Father] was incarcerated for civil contempt. The commitment order is hereby stayed due to [Father]'s required military service. The contempt has not been purged."

Father filed a notice of appeal from the Amended Commitment Order only.

1. The Amended Commitment Order is not Moot

[4] Father first argues his appeal from the Amended Commitment Order is not moot, despite the Release Order, because "the trial court found that [Father] continues to be in contempt" following his release from confinement, "and assuming [Father] comes back from deployment with child support still unpaid, the same issue could arise again." Mother concedes this issue is not moot, and we agree. The Release Order gave Father a temporary respite from the Amended Commitment Order based on his military service but did not purge his contempt or change the effect of the Amended Commitment Order.[28]

The trial court's Release Order did not render Father's appeal from the Amended Commitment Order moot.[29] Because the trial court found Father continued to be in contempt and his contempt had not been purged, he was subject to commitment again upon his return from deployment and under the terms of the Amended Commitment Order, could be imprisoned if he did not pay as ordered.

---

28. We note that by 24 May 2023, the trial court correctly understood that Father's military service dates as listed on the training schedule were in fact "required" and Father was entitled to a stay of commitment under the SCRA.

29. Although we assume Father has returned from his deployment, we have not been informed by the Parties that this issue has been rendered moot by Father's compliance with the Amended Commitment Order or for any other reason.

2. Standard of Review

On appeal from contempt proceedings, this Court's review is

> limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment. However, if . . . the finding that the failure to pay was willful is not supported by the record, the decree committing [the] defendant to imprisonment for contempt must be set aside.

Tigani v. Tigani, 256 N.C. App. 154, 156, 805 S.E.2d 546, 548-49 (2017) (citations, quotation marks, and brackets omitted).

3. Ability to Pay

[5] Father argues the trial court erred in ordering his commitment because the trial court did not make findings as to Father's present "ability to pay" in the Amended Commitment Order. Father also notes that the Contempt Order is not a "show cause" order, which would provide "[Father] with an opportunity to be heard on the question of willfulness." Mother contends that

> [w]hile the [25 April 2023] Amended Commitment Order was not informed by literal contemporaneous findings of [Father]'s ability to pay, the Trial Court had substantially stratified the total outstanding amount in the Contempt Order such that [Father] would be able to make payments toward the total deficiency over a period of six (6) months after being in contempt of a previous order for more than two (2) years and after hearing evidence on the same.

Mother cites no law to support her argument that the trial court's finding of Father's ability to pay in December 2022 could somehow satisfy its obligation to find his ability to pay as of 25 April 2023 before ordering his commitment.

Under North Carolina General Statute Section 5A-21,

> [f]ailure to comply with an order of a court is a continuing civil contempt as long as:
>
> (1) The order remains in force;

> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) *The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.*

N.C. Gen. Stat. § 5A-21(a) (2023) (emphasis added). Further, North Carolina General Statute Section 5A-23 explains that a trial court must make findings as to an "ability to comply" under Section 5A-21(a):

> At the conclusion of the hearing, the judicial official must enter a finding for or against the alleged contemnor on each of the elements set out in G.S. 5A-21(a). If civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and specifying the action which the contemnor must take to purge himself or herself of the contempt.

N.C. Gen. Stat. § 5A-23(e) (2023). "[P]ursuant to [North Carolina General Statute Section] 5A-21, a trial court may not imprison a civil contemnor absent a finding of the contemnor's *present* ability to comply with the court order." *McBride v. McBride*, 334 N.C. 124, 131, 431 S.E.2d 14, 19 (1993) (emphasis added). In *Tigani v. Tigani*, this Court explained that:

> In order to find a party in civil contempt, the court must find that the party acted willfully in failing to comply with the order at issue. Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so. Therefore, in order to address the requirement of willfulness, the trial court must make findings as to the ability of the contemnor to comply with the court order during the period when in default. Second, once the trial court has found that the party had the means to comply with the prior order and deliberately refused to do so, the court may commit such party to jail. *At that point, however, the court must find that the party has the present ability to pay the total outstanding amount.*

256 N.C. App. at 157, 805 S.E.2d at 549 (emphasis added) (citations, quotation marks, brackets, and ellipses omitted).

The Contempt Order includes provisions which may be considered as a "springing" contempt order. "Springing" contempt orders have been described by the University of North Carolina School of Government as

> orders issued in child support enforcement proceedings to determine that a respondent is in civil contempt but stay incarceration and order the respondent to pay ongoing monthly payments until all arrears are satisfied. These orders often also provide that, if the respondent fails to make a monthly payment, the respondent is to be immediately arrested and incarcerated. The order for arrest and incarceration 'springs' into effect upon the respondent's future failure to comply with the monthly payment schedule.

Cheryl Howell, "*Contempt: NC Court of Appeals vacates a 'springing' order for arrest*," School of Gov't (10 July 2025), https://civil.sog.unc.edu/contempt-nc-court-of-appeals-vacates-a-springing-order-for-arrest/.

The Contempt Order required Father to appear for calendar call on several dates and show he had paid the amount due as of that date or be imprisoned. The Contempt Order did not allow for an evidentiary hearing as to Father's ability to pay. The Amended Commitment Order on appeal "sprang" into effect based on Father's failure to pay the "purge" payment set in December 2022 but due in April 2023. No matter the findings or provisions of the Contempt Order, the trial court must consider evidence and make findings as to Father's *present* ability to pay any purge payment before he can be committed for civil contempt.

> The trial court must find that the obligor has the ability to *fully comply* with any purge conditions imposed upon him. Indeed, a person in civil contempt holds the key to his own jail by virtue of his ability to comply with the court order. This Court has previously vacated a contempt order where the findings of fact did not support the conclusion of law that [the] defendant has the *present ability* to purge himself of the contempt. Ability to comply has been interpreted as not only the present means to comply, but also the ability to take reasonable measures to comply. A general finding of present ability to comply is sufficient when there is evidence in the record regarding the contemnor's assets.

Collins v. Holley, 299 N.C. App. 323, 334-35, 919 S.E.2d 24, 34 (2025) (emphasis in original) (citations, quotation marks, and brackets omitted); *see also Bennett v. Bennett*, 71 N.C. App. 424, 427, 322 S.E.2d 439, 441 (1984) ("In order to hold a defendant in civil contempt the [c]ourt must find that the defendant presently possesses the means to comply with the order." (citation omitted)); *see also Abernethy v. Abernethy*, 64 N.C. App. 386, 387, 307 S.E.2d 396, 396-97 (1983) ("The civil contempt statute, [North Carolina General Statute Section 5A-21], does require that 'the person to whom the order is directed be able to comply with the order or be able to take reasonable measures that would enable him to comply with the order.' Our Supreme Court has insisted that the trial court must find 'that the defendant presently possesses *the means* to comply." (quoting *Henderson v. Henderson*, 307 N.C. 401, 408, 298 S.E.2d 345, 350 (1983))).

In the Contempt Order, the trial court ordered Father to make payments to Mother during the months of January through June of 2023 and also appear for calendar calls each of these months to provide proof of payment. Notably, the Contempt Order did not state that Father could appear and present evidence of his *inability* to pay; the Contempt Order specifically required him to appear and pay the stated amount in full. If he failed to appear or to pay, he would be arrested and held until he purged contempt by paying the stated amount as established in December 2022. Father did not appeal the Contempt Order, so we cannot address the merits of the Contempt Order. We can, however, address the Amended Commitment Order on appeal.

Mother does not even attempt to argue that the trial court considered or made findings about Father's ability to pay as of 25 April 2023. Her brief admits "the trial court did not have contemporaneous evidence of [Father's] ability to pay on [25 April 2023,]" but focuses on the findings of fact in the Contempt Order. She argues that Father did not appeal the Contempt Order, which is true, but irrelevant to the issues raised in his appeal of the Amended Commitment Order.

In the Amended Commitment Order,[30] the trial court first states that "[t]his matter was heard before the undersigned Judicial Official *on an Order to Show Cause* why . . . [Father] should not be held in civil contempt for failure to comply with an order previously entered by the [c]ourt." (Emphasis added.) We first note that the matter was not heard on an order to show cause, as no order to show cause had been entered

30. The Amended Commitment Order was on Form AOC-CV-110, Rev. 8-17, Commitment Order for Civil Contempt.

before Father's court date set for 25 April 2023.[31] The Contempt Order is not a show cause order; it is a contempt order resolving Mother's "Motion for contempt filed August 11, 2021." As a contempt order, it sets forth the arrearages owed and sets dates for payments. But a contempt order cannot serve as an anticipatory automatic "show cause order" for future payments due because show cause orders can be issued only *after* the alleged contemnor has failed to comply with an order.

Under North Carolina General Statute Section 5A-23, a show cause order can be "issued on the motion and sworn statement or affidavit of one with an interest in enforcing the order, including a judge, and a finding by the judicial official of probable cause to believe there *is* civil contempt." N.C. Gen. Stat. § 5A-23(a) (emphasis added). Here, no motion or affidavit was filed after Father's failure to pay the payment due on 25 April 2023. At least "five days in advance of the hearing," *id.* § 5A-23(b), on 25 April 2023, there was no "finding by the judicial official of *probable cause* to believe there *is*[—present tense—]civil contempt." *Id.* § 5A-23(a) (emphasis added). The "civil contempt" or failure to comply with the Contempt Order could not happen until 25 April 2023, as this was the due date set by the Contempt Order. A show cause order could not be issued until after Father failed to pay as ordered.

Where a show cause order is issued, the burden of proof shifts to the alleged contemnor to show why he should not be held in contempt. *See Moss v. Moss*, 222 N.C. App. 75, 77, 730 S.E.2d 203, 204-05 (2012) (explaining that when civil contempt is initiated " 'by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt' . . . the burden of proof is on the alleged contemnor" (quoting N.C. Gen. Stat. § 5A-23(a)). If no show cause order is issued, the burden of proof remains on the aggrieved party: "A show cause order in a civil contempt proceeding which is based on a sworn affidavit and a finding of probable cause by a judicial official shifts the burden of proof to the defendant to show why he should not be held in contempt." *Tucker v. Tucker*, 197 N.C. App. 592, 594, 679 S.E.2d 141, 143 (2009) (citation and quotation marks omitted); *see also Moss*, 222 N.C. App. at 77, 730 S.E.2d at 205 ("However, when an aggrieved party rather than a judicial official initiates a proceeding for civil contempt, the burden of proof is on the aggrieved party, . . . because there has not been a judicial finding of probable cause." (citations omitted)).

---

31. The record before this Court does not include a show cause order for any contempt motion in this case.

Here, Father appeared as directed by the scheduled calendar call date set in the Contempt Order. If a show cause order had been entered, it would have shifted the burden of proof to the alleged contemnor, Father, and would have given him an opportunity to "show cause" why he should not be held in contempt. Here, no show cause order was issued and the burden of proof remained on Mother, as the party who originally moved to hold Father in contempt and to be committed for failure to pay child support. But there was no evidentiary hearing regarding Father's ability to pay and Mother presented no evidence.

We recognize the trial court in the Amended Commitment Order, as stated by the preprinted text of the form, also found that Father "has willfully failed and refused to comply with the order entered on 12/22/2022 (date), and that [he] has sufficient means and ability to comply or take reasonable measures to comply. [Father] is, therefore, found to be in civil contempt of this [c]ourt." But as Mother's brief acknowledges, and the transcript confirms, no evidence was presented at the hearing. Even if we assume the trial court made a finding of fact as to Father's ability to pay as of 25 April 2023, the finding is not supported by the evidence because no evidence was presented. *See Crews v. Paysour*, 261 N.C. App. 557, 562, 821 S.E.2d 469, 472-73 (2018) ("Evidence is always required to support findings of fact, unless the parties have stipulated to the fact or the finding is subject to judicial notice, neither of which is present here. Thus, we cannot review the order to determine if the findings of fact are supported by the evidence because there is no competent evidence for the time period covered by those findings of fact." (footnote omitted)).

In the Amended Commitment Order, under the "additional findings" section of the form, the trial court added findings regarding the chronology of Father's payments due under the Contempt Order and payments he had made or not made.[32] As part of this chronology, the trial court found that Father "did not appear in court on [28 March 2023], and did not pay the required purge of $6,200.00, so the court ordered that [Father] be arrested and held in custody until he purged his contempt. [Father] was out of state and the order for arrest voided." The trial court found that Father paid $3,300.00 toward the $4,600.00 he had been ordered to pay on 25 April 2023. "Based on [Father]'s non-payment of the $2,600.00 due on [28 March 2023] and his non-payment of the

32. These "findings" appear to have been based upon the previous orders and documents in the court file, since no evidentiary hearing was held on 25 April 2023.

$1,300.00 of the payment due on [25 April 2023], [Father] has failed to purge his contempt and must pay $7,500.00 in order to do so."

Notably, the Amended Commitment Order simply addressed the amounts Father had been ordered to pay in the Contempt Order and did not address Father's present ability to purge himself of the contempt conditions established within the Contempt Order. The trial court was required to consider Father's *present* ability to pay before ordering his commitment for failure to pay the $4,600.00 as directed in December 2022.[33]

As this Court explained in *Collins v. Holley*,

> for each alleged violation, a trial court must consider whether the contemnor indeed can comply with the order. Here, although [the p]laintiff testified to her income and some of her regular expenses, there is simply no way the trial court can project out and assume her income, expenses, or assets in the future; and our law requires a fact-specific inquiry for each alleged violation. Therefore, the trial court erred in ordering [the p]laintiff be automatically incarcerated if she fails to make any scheduled payment.

299 N.C. App. at 337, 919 S.E.2d at 36 (footnote omitted).

The trial court may designate certain dates for future actions of the parties but cannot automatically order commitment for civil contempt based on a party's failure to comply without also holding a hearing and considering the party's *present ability* to comply at the time of the commitment for civil contempt. The Contempt Order essentially established an ongoing and repeating requirement for Father to appear for calendar calls each month from January to July 2023 to show evidence of his payments made to Mother and for an arrest order to be issued if he failed to do so. But the Contempt Order was not a show cause order, since a show cause order cannot be issued before the date on which a party is to comply with the order.

---

33. We also note that before holding a hearing at which a contemnor may be incarcerated for failure to pay child support, the trial court must determine if he is indigent and whether he may qualify for court appointed counsel. *See McBride*, 334 N.C. at 132, 431 S.E.2d at 19 ("At the outset of a civil contempt proceeding for nonsupport, the trial court should assess the likelihood that the defendant may be incarcerated. If the court determines that the defendant may be incarcerated as a result of the proceeding, the trial court should, in the interest of judicial economy, inquire into the defendant's desire to be represented by counsel and into his ability to pay for legal representation. If such a defendant wishes representation but is unable due to his indigence to pay for such representation, the trial court must appoint counsel to represent him.").

There was never a show cause order issued in this case, nor was Father provided any notice of his opportunity to "show[] cause why he should not be held in contempt" during the calendar call hearing he was required to attend under the Contempt Order. N.C. Gen. Stat. § 5A-23(a). Since the Contempt Order is not on appeal, we cannot disturb it. But if the trial court enforces it as written, as it did in the Amended Commitment Order, without considering Father's present ability to pay any purge payment ordered at the time of commitment, that commitment order will be in error.

We understand the trial court's and Mother's frustration with Father's continuing failure to pay child support as ordered. Father had a long pattern of failure to pay child support beyond that reflected in this opinion. According to the Contempt Order, Mother had filed four motions for contempt before the one discussed in that order. But no matter how abysmal Father's record of paying his child support has been, each order for commitment for civil contempt must comply with Section 5A-23 and must take into account Father's present ability to pay when the commitment and purge payment is ordered.

Because the trial court did not consider Father's ability to pay as of 25 April 2023 and did not make findings as to Father's present ability to comply with the Contempt Order, we reverse the Amended Commitment Order.

IV. Conclusion

Because Father was entitled to a mandatory stay of the trial court's child custody proceedings under the SCRA due to his required military service on 29 March 2023, the trial court erred in denying Father's Motion to Continue on the Motion to Modify Custody. We reverse the Continuance Order. Because the Motion to Continue should have been allowed under the SCRA and Father was prejudiced by this error, the trial court erred by entering both the Memorandum of Order and subsequent Formal Modification Order. We vacate both the Memorandum of Order and the Formal Modification Order. We reverse the trial court's Amended Commitment Order because the trial court did not receive evidence or make findings about Father's present ability to pay the amount as set by the Contempt Order before ordering his commitment. We remand for a new hearing on Mother's Motion to Modify Custody and for further proceedings under the Contempt Order.

At any future commitment hearing based on the Contempt Order, the trial court should also consider Father's potential right to appointed counsel if he is subject to incarceration and should make appropriate findings regarding Father's present ability to pay any amounts ordered to purge his civil contempt.

REVERSED IN PART; VACATED AND REMANDED IN PART.

Judges ZACHARY and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
CHARLES BRANDON GIBBON, Defendant

No. COA25-415

Filed 4 February 2026

1. Jurisdiction—subject-matter—misdemeanor death by vehicle—presentment and indictment

The superior court had subject-matter jurisdiction to enter judgment upon defendant's conviction of misdemeanor death by vehicle (MDBV)—arising from defendant losing control of his vehicle while speeding on a winding mountain road, crashing into a tree and killing a passenger—where defendant was initially charged in the district court for violating the MDBV statute, but was actually tried in the superior court by way of a grand jury's return of a presentment and indictment. While a superior court lacks original jurisdiction to try a stand-alone misdemeanor initiated through an indictment, a presentment charging such a misdemeanor conveys jurisdiction to the superior court (N.C.G.S. § 7A-271(a)(2)). Further, the assistant district attorney discharged her statutory duty to investigate the background of every presentment returned and submit a bill of indictment only when appropriate (N.C.G.S. § 15A-641(c)). Accordingly, the trial court properly denied defendant's motion to dismiss the MDBV charge for lack of jurisdiction.

2. Indictment and Information—variance—misdemeanor death by vehicle—predicate offense of failure to maintain lane

Where defendant was convicted of misdemeanor death by vehicle (MDBV)—arising from defendant losing control of his vehicle while speeding on a winding mountain road, crashing into a tree and killing a passenger—there was no fatal variance between his indictment and the proof offered at trial. A person commits MDBV when he unintentionally causes the death of another person when engaged in the violation of any motor vehicle law or ordinance other than impaired driving, and the predicate offense here was failure to maintain a lane of travel. Even though defendant did not intentionally leave his lane of travel, his deliberate action of speeding culminated in him losing control over his vehicle, departing from his lane, colliding with a tree on the other side of the road, and killing his passenger.

Appeal by defendant from judgment entered 25 April 2024 by Judge Nathaniel J. Poovey in Buncombe County Superior Court. Heard in the Court of Appeals 15 October 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Steven C. Wilson, Jr., for the State.

Devereux & Banzhoff, PLLC, by Andrew B. Banzhoff, for defendant-appellant.

DILLON, Chief Judge.

Defendant Charles B. Gibbon challenges the judgment entered consistent with the jury's verdict convicting him of misdemeanor death by vehicle ("MDBV") arising from an accident in which he crashed his vehicle into a tree after failing to stay in his lane of travel resulting in the death of a passenger.

I. Background

At trial, the State's evidence tended to show Defendant drove his vehicle at a high rate of speed, well over the posted speed limit, on a winding mountain road. After navigating a curve, Defendant lost control of his vehicle. Defendant's vehicle left the proper lane of travel, rotated and skidded 146.7 feet before colliding with a tree, killing a passenger in Defendant's vehicle.

Defendant was initially charged *in District Court* for violating G.S. 20-141.4(a2), our MDBV statute, which makes it a misdemeanor to unintentionally cause the death of another while engaged in a non-alcohol related, moving violation proximately causing the death. However, Defendant was never tried in District Court for the misdemeanor. Rather, he was subsequently tried *in Superior Court* by way of a grand jury's return of a presentment and indictment.

At trial, Defendant moved to dismiss, arguing the State failed to show he intentionally violated the predicate offense for his MDBV charge, G.S. 20-146(a), our failure to maintain lane ("FTML") statute. A jury convicted Defendant. He appeals.

II. Analysis

Defendant raises two arguments on appeal, which we address in turn.

A. Subject-Matter Jurisdiction

[1] First, Defendant contends the Superior Court lacked jurisdiction to try him for a misdemeanor *in the first instance*, because the District Court has exclusive, original jurisdiction. Indeed, before trial, Defendant sought to dismiss the matter on this basis. For the reasoning below, we conclude the Superior Court properly exercised jurisdiction by means of a presentment returned by the grand jury.

We review issues relating to subject-matter jurisdiction de novo. *State v. Oates*, 366 N.C. 264, 266 (2012) (citation omitted).

We note Defendant was charged and tried *only* with a misdemeanor; he was not charged with any felony. Our District Courts have "exclusive, original jurisdiction" over misdemeanors *unless* provided otherwise in Article 22 of Chapter 7A. N.C.G.S. § 7A-272(a) (2023).

Common examples where Article 22 provides our Superior Courts with *original* jurisdiction to try a misdemeanor charge include where the misdemeanor is a lesser-included offense of a felony for which the grand jury has returned an indictment, *see* N.C.G.S. § 7A-271(a)(1), *or* where the misdemeanor has been properly consolidated for trial with a felony for which an indictment has been returned, *see* N.C.G.S. § 7A-271(a)(3).[1] However, neither apply to the present matter, as Defendant was not indicted for a felony.

Relevant to our analysis, there is nothing in Article 22 which allows a Superior Court to exercise *original* jurisdiction to try a stand-alone misdemeanor where the misdemeanor charge is *initiated* through an indictment. However, Article 22 does convey such jurisdiction "[w]hen the charge is initiated by a presentment." N.C.G.S. § 7A-271(a)(2). It is important in our analysis to briefly note the difference between an indictment and a presentment.

---

1. More typically, a stand-alone misdemeanor tried in Superior Court has arrived at the court only after the defendant has appealed a conviction of that misdemeanor from a District Court. N.C.G.S. § 7A-271(a)(5).

"[An] indictment is a written accusation by a grand jury . . . charging a person with the commission of one or more criminal offenses." N.C.G.S. § 15A-641(a). However, it is the prosecutor and *not* the grand jury who must start the indictment process. Specifically, it is the prosecutor who "submit[s] a bill of indictment [to the grand jury] charging [an] offense[.]" N.C.G.S. § 15A-627(b). And the grand jury *must* return the bill as a true bill if that body determines probable cause exists based on the prosecutor's evidence that the defendant committed the crime charged. N.C.G.S. § 15A-628(a)(1).

A presentment, like an indictment, also consists of "a written accusation by a grand jury" but, unlike an indictment, is *made on its own motion*[.]" N.C.G.S. § 15A-641(c) (emphasis added). Where the return by the grand jury of a true bill of indictment initiates criminal proceedings against a defendant, the return of a presentment by the grand jury does not. Rather, when a grand jury returns a presentment, it becomes the duty of the prosecutor "to investigate the factual background" of the presentment "and to submit bills of indictment [on the charge] when it is appropriate to do so." N.C.G.S. § 15A-641(c).

Further, at common law, a presentment was made *ex mero motu* by the grand jury "upon their own knowledge or observation, or upon information from others, without any bill of indictment having been [first] submitted to them by the [prosecutor.]" *State v. Thomas*, 236 N.C. 454, 457 (1952). However, under our statutory scheme, a presentment need not to be initiated by a grand jury *ex mero motu*, *see id.*, as our General Assembly has provided that "[a]n investigation may be initiated [by the grand jury] . . . upon *the request* of the . . . prosecutor[,]" N.C.G.S. § 15A-628(a)(4) (emphasis added).

Finally, in the presentment context, a grand jury has more discretion than in the indictment context as to whether a matter will be tried in the Superior Court. That is, in the context of an indictment, the grand jury is obligated to return the bill as a true bill or not as a true bill based on the evidence presented by the prosecutor. In the context of a presentment, however, the relevant statutory language states the grand jury "[*m*]*ay* investigate any offense as to which no bill of indictment has been submitted . . . by the prosecutor and issue a presentment . . . if [the grand jury] has found probable cause for the charges made." N.C.G.S. § 15A-628(a)(4) (emphasis added). The General Assembly's use of the word "may," rather than "must" or "shall," is telling. "The word 'may,' as used in statutes, in its ordinary sense, is permissive and not mandatory." *Wing v. Goldman Sachs*, 382 N.C. 288, 302 (2022) (quoting *Rector v. Rector*, 186 N.C. 618, 620 (1923)).

In the present matter, Defendant was only charged with a misdemeanor. Accordingly, the Superior Court would not have original jurisdiction to try Defendant if the prosecutor initially sought an indictment. The Superior Court would only have jurisdiction where the indictment was sought only after the grand jury returned a presentment. And the record shows the indictment was only sought and returned after the grand jury first returned a presentment.

Relatedly, a grand jury's ability to proceed with a case beyond their issuing of a presentment is constrained by the prosecutor, who acts as a safeguard. Beyond explaining what a presentment is, G.S. 15A-641(c) also places a statutory obligation on the prosecutor to "investigate the factual background of every presentment returned in his district and to submit bills of indictment . . . when it is appropriate to do so." N.C.G.S. § 15A-641(c). Prior to the enactment of G.S. 15A-641, our Supreme Court provided an explanation for the General Assembly's addition of this obligation during North Carolina's infancy:

> The great experience of early days proved the practice of trying criminal cases upon the presentments of grand jurors to be wholly impracticable. As a consequence, the General Assembly of 1797 outlawed the practice by a statute, which has been retained to this day in slightly changed phraseology, and which now appears in this provision of the General Statutes: ["]No person shall be arrested on a presentment of the grand jury, or put on trial before any court, but on indictment found by the grand jury, unless otherwise provided by law.["] Since the adoption of the act of 1797, a presentment is regarded as nothing more than an instruction by the grand jury to the public prosecuting attorney for framing a bill of indictment for submission to them.

Thomas, 236 N.C. at 458 (internal citations omitted). While we have had several opportunities to resolve related issues arising out of G.S. 15A-641(c), *see, e.g.*, *State v. Baker*, 263 N.C. App. 221, 228 (2018) (holding that the *simultaneous* submission of a presentment by the grand jury and an indictment to a grand jury rendered them "invalid as a matter of law"), we have yet to ascertain the meaning of the word "investigate" as intended by our General Assembly.

Defendant was initially charged with MDBV pursuant to G.S. 20-141.4(a2), premised on Defendant's failure to maintain his lane under G.S. 20-146(a), in District Court. Nearly a year later, on 28 August 2023, the grand jury returned a presentment which found probable cause for the same charges and requested an investigation of the facts to determine whether an indictment would be appropriate. Unlike in *Baker*, the assistant district attorney ("ADA") assigned this case did not simultaneously seek an indictment based on the presentment.

Rather, forty-one days later, a grand jury returned an indictment, and Defendant's case proceeded to trial. During those forty-one days, the ADA "reviewed the file to prepare the indictment but did not seek new evidence related to the case." The ADA reviewed the case, as opposed to seeking additional evidence, because "all essential investigatory steps had been completed[,]" "the physical evidence had been removed from the scene of the crash[,]" and "further investigation beyond that which had already been done was a practical impossibility." Defendant does not challenge these findings and thus they are binding on appeal. *See State v. Sparks*, 362 N.C. 181, 185 (2008) (explaining that unchallenged findings "are binding on [an] appellate court").

Defendant moved to dismiss the Superior Court case asserting the Superior Court lacked subject-matter jurisdiction. The trial court denied Defendant's motion.

On appeal, Defendant contends the word "investigate" requires the prosecutor, prior to presenting a bill of indictment, to engage in fact gathering in which it uncovers facts in addition to those contained in the presentment. If the State is incapable of discovering new facts, according to Defendant, the State is limited to bringing the case in District Court. We disagree with both of Defendant's contentions.

The General Assembly enacted G.S. 15A-641(c) as part of our Criminal Procedure Act of 1974. An Act to Amend the Laws Relating to Pretrial Criminal Procedure, ch. 1286, § 1, 1974 N.C. Sess. Laws 490, 522. "[This Court] presume[s] that when the legislature enacts a statute, it intentionally includes and gives meaning to every word therein." *Happel v. Guilford Cnty. Bd. of Educ.*, 387 N.C. 186, 207 (2025) (citations omitted). Thus, the principal question becomes, what did our General Assembly intend for "investigate" to mean as used in G.S. 15A-641(c)?

Generally speaking, we interpret a word in accord with its plain and ordinary meaning. *Id.* at 206, 208. *See also N.C. Farm Bureau Mut. Ins. Co., Inc. v. Hebert*, 385 N.C. 705, 711 (2024) ("The primary goal of statutory interpretation is to accomplish legislative intent, which, in the first instance, is discerned from the plain language of the enactment." (citation omitted)).

Around the time Section 15A-641(c) was enacted, "investigate" was defined as: "inquire into systematically[,] to subject to an official probe[,] to make a systematic examination[, or] to conduct an official inquiry." *Investigate*, Webster's Third New Int'l Dictionary 1189 (3rd ed. 1966). We hold that based on this definition, G.S. 15A-641(c)'s investigation requires a prosecutor to formally examine the facts of a case. While this *may* entail the gathering of any additional facts that is not required, despite Defendant's contentions.

Because purpose of the statute was to inject a safeguard into the presentment process to protect against overzealous grand juries, we see no reason to depart from the plain meaning of the text: Considering that (1) a prosecutor *can* initiate a presentment investigation under G.S. 15A-628(a)(4) and (2) the problem that G.S. 15A-641(c)'s investigation obligation was designed to cure was to stop "ambitious" grand juries, *see Thomas*, 236 N.C. at 458, it does not appear that the General Assembly intended to prevent a situation where a prosecutor properly investigates a potential misdemeanor, initiates and seeks out a presentment, reviews the file, and then secures an indictment. Thus, the interpretation we ascribe to the word "investigate" is sufficient to meet the longstanding statutory prophylaxis's requirement for prosecutorial supervision.

Here, the unchallenged and binding findings of fact state that the ADA "reviewed the file to prepare the indictment[.]" New evidence, however, was not sought because it would have been practically impossible—and potentially futile—to do so as all "essential investigatory steps" were completed and all "physical evidence had been removed[.]" Indeed, it appears there was nothing left to do besides examining and reviewing Defendant's file. Thus, by reviewing the file, the ADA discharged her statutory duty to investigate the factual background of the presentment. We, therefore, conclude the trial court did not err in denying Defendant's motion to dismiss with respect to the subject-matter jurisdiction issue.

B. Fatal Variance

[2] Second, Defendant argues there was a fatal variance between his indictment and the proof offered at trial, thereby requiring the trial court to grant Defendant's motion to dismiss. Again, we disagree.

"[W]e review the denial of a motion to dismiss de novo." *State v. Crockett*, 368 N.C. 717, 720 (2016). We review the evidence in a light most favorable to the State when determining whether "there is substantial evidence of (1) each essential element of the offense charged . . . and, (2) [the] defendant [is] the perpetrator of the offense." *State* *v. Powell*, 299 N.C. 95, 98–99 (1980). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Turnage*, 362 N.C. 491, 493 (2008) (citation omitted).

"[A] defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Jackson*, 218 N.C. 373, 376 (1940). "A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged." *State v. Barnett*, 368 N.C. 710, 713 (2016) (citation omitted). Only those variances which are (1) material, meaning that it "involve[s] an essential element of the crime charged," and (2) prejudicial warrant reversal. *State v. Juran*, 294 N.C. App. 81, 83 (2024) (citation omitted). *See also State v. Pickens*, 346 N.C. 628, 646 (1997) ("[T]he defendant must show a variance regarding an essential element of the offense.").

Defendant was charged with MDBV with the predicate offense being FTML. A person commits MDBV when "[t]he person unintentionally causes the death of another person, . . . was engaged in the violation of any [motor vehicle law or ordinance] other than impaired driving . . ., and . . . [the violation] is the proximate cause of the death." N.C.G.S. § 20-141.4(a2) (2023). A person violates G.S. 20-146(a) when the person fails to drive "upon the right half of the highway" subject to several exceptions not relevant here. N.C.G.S. § 20-146(a) (2023).[2]

Defendant seems to contend that the State was required to show that he *intentionally* left his lane of traffic in order for the State to use G.S. 20-146(a) as the predicate offense. We disagree. What is unclear from Defendant's arguments made in his brief and oral argument, is whether Defendant takes issue with the *mens rea* or *actus reus* component of the crime charged.

We note our Court has previously discussed and foreclosed Defendant's argument that to be convicted of G.S. 20-141.4(a2) a defendant must *intentionally*, referring to the defendant's mental state, violate a motor vehicle statute or ordinance. *See State v. Freeman*, 31 N.C. App. 93, 96–97 (1976) ("[T]he wrong committed by [the defendant . . . is most often an unintentional violation of a prohibitory statute or

2. While the indictment stated Defendant violated G.S. 20-146(a) as the predicate offense, the jury was given an instruction from G.S. 20-146(d)(1) ("A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."). Defendant did not object to that instruction, nor does he raise this specific issue on appeal.

ordinance . . . . Thus, it is apparent that the intention of the legislature . . . was to define a crime . . . wherein criminal responsibility . . . is not dependent upon the presence of culpable or criminal negligence."); *see also State v. Thompson*, 37 N.C. App. 444, 447 (1978) ("[T]he [S]tate is not required to prove any intentional or reckless conduct on the part of the defendant.").[3]

In any event, our Supreme Court has held that a driver violates G.S. 20-146 where he loses control of his vehicle while driving in an otherwise unsafe manner. *See*, *e.g.*, *Anderson v. Webb*, 267 N.C. 745, 748–49 (1966) (stating that crossing into the opposite lane, thereby violating G.S. 20-146, after the defendant was driving at an excess speed and lost control was negligence *per se*).

Our Court has held that in determining whether a defendant has violated G.S. 20-146, it is his negligent acts precipitating the loss of control which is the "crucial inquiry," not whether he intentionally left his lane. *See Sobczak v. Vorholt*, 181 N.C. App. 629, 637 (2007) (holding that it was error for the trial court not to give a negligence *per se* instruction where the evidence showed the defendant-driver rounded a curve, hit an ice patch, and lost control of his car striking the plaintiff's vehicle).

Defendant, though, argues that the MDBV statute requires the State show he was "engaged" in the violation of the predicate motor vehicle violation, thus requiring that he intentionally left his lane of travel. We disagree.

"Engaged," as a verb, means "[t]o employ or involve oneself [or] to take part in[.]" *Engage*, Black's Law Dictionary 474 (5th ed. 1979); *see also Engage*, Webster's Third New Int'l Dictionary 751 (3rd ed. 1966) ("[T]o employ or involve oneself[;] to take part[.]"). Although Defendant argues that he was not "engaged" in a violation of G.S. 20-146, we conclude that by speeding on a narrow, winding road, Defendant "involved himself" or "took part" in losing control of his vehicle, as his volitional actions played an integral role in the entire causal chain.

3. Both *Freeman* and *Thompson* were interpreting G.S. 20-141.4 prior to the General Assembly's enactment of the Safe Roads Act of 1983. *See* An Act to Provide Safe Roads by Requiring Mandatory Jail Terms for Grossly Aggravated Drunken Drivers, Providing an Effective Deterrent to Reduce the Incidence of Impaired Driving, and Clarifying the Statutes Related to Drinking and Driving, ch. 435, § 27, 1983 N.C. Sess. Laws 332, 354. The Safe Roads Act repealed the earlier version of G.S. 20-141.4, and enacted the current with minor changes, and added a prohibition on Double Jeopardy, not relevant to this appeal. *See generally State v. Davis*, 198 N.C. App. 443, 450–52 (2009).

Stated differently, his deliberate actions culminated in him losing control over his vehicle, departing from his lane, and colliding with a tree on the other side of the road. Therefore, the State presented sufficient evidence for a reasonable juror to conclude Defendant violated G.S. 20-141.4(a2). The trial court did not err in denying Defendant's motion to dismiss.

III. Conclusion

Defendant received a fair trial, free of reversible error.

NO ERROR.

Judges ARROWOOD and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
JOANNA KAYE JULIUS

No. COA25-277

Filed 4 February 2026

1. Search and Seizure—warrantless search—following vehicle crash—probable cause

In defendant's second appeal from her conviction of various crimes, arising from drugs found during a warrantless search of a car in which she was a passenger, following a single-vehicle crash—after the Supreme Court assumed without deciding that probable cause existed, held the warrantless search violated the Fourth Amendment, and remanded the matter for the trial court to determine whether the drugs discovered should have been excluded—the trial court's threshold determination that probable cause existed was affirmed. Bystanders at the crash scene told a state trooper that the driver, "Kyle," had fled the scene because he had outstanding arrest warrants (for unknown charges) and evidence also suggested that Kyle had committed a traffic crime; accordingly, the trooper had probable cause to search the vehicle for anything that could identify Kyle.

2. Search and Seizure—warrantless search—following vehicle crash—exclusionary rule—good faith exception

In defendant's second appeal from her conviction of various crimes, arising from drugs found during a warrantless search of a car in which she was a passenger, following a single-vehicle crash—after the Supreme Court assumed without deciding that probable cause existed, held the warrantless search violated the Fourth Amendment, and remanded the matter for the trial court to determine whether the exclusionary rule applied—the trial court properly determined that the drugs were admissible. Because the automobile exception to the warrant requirement may apply even to an immobile vehicle, like the crashed car here, and given the lower expectation of privacy for vehicles driven in public, the trooper objectively acted in good faith in searching the vehicle without a warrant.

Judge STROUD concurring in result only by separate opinion.

Judge TYSON dissenting.

Appeal by defendant from judgment entered 28 March 2024 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 18 November 2025.

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

Office of the Appellate Defender, by Glenn Gerding, and Assistant Appellate Defender John F. Carella, for the defendant-appellant.

DILLON, Chief Judge.

Defendant Joanna Kaye Julius was convicted of various drug crimes based on drugs found during a warrantless search of her parents' vehicle. This is the second appeal in this matter.

In the first appeal, our Supreme Court held the warrantless search violated the Fourth Amendment of the Constitution of the United States. *State v. Julius*, 385 N.C. 331 (2023). In its decision, the Court did not opine whether probable cause existed to justify the search; rather, the Court–assuming probable cause did exist–concluded the search was not subject to any warrant requirement exceptions. *Id.* at 340. The Court remanded the matter with instructions for the trial court to determine "whether the exclusionary rule is the proper remedy" for the Fourth Amendment violation. *Id.* at 341.

On remand, the trial court determined probable cause existed and that the "good faith" exception to the warrant requirement applied such that the evidence discovered during the search was not subject to the exclusionary rule.

Defendant brings this second appeal, challenging the trial court's order denying her motion to suppress. We affirm.[1]

I. Background

The unchallenged findings made by the trial court in denying Defendant's motion to suppress tend to show as follows:

On 20 May 2018, a trooper and deputy were dispatched to investigate a single vehicle wreck in McDowell County. When the officers arrived, they found a vehicle wrecked in a drainage ditch. The wreck caused damage to certain landscape as well as to other property near the crash site. Defendant had been a passenger in the vehicle. A man had been driving the vehicle, but he fled from the scene on foot before the responding officers arrived.

Defendant told the responding officers that the vehicle belonged to her parents, that a man named Kyle had been driving the vehicle, that she did not know Kyle's last name, and she did not know whether Kyle had left any identification in the vehicle before fleeing on foot.

Other witnesses on the scene told the officers Kyle indicated that he needed to flee because he had outstanding warrants.

Based on the location of the vehicle being in a drainage ditch, partially submerged in water, the vehicle could not be driven out of the ditch. Rather, the vehicle ultimately had to be towed out of the ditch.

In any event, the trooper searched the vehicle without first obtaining a warrant for the purpose of locating Kyle's identification. During the search, the trooper found illegal drugs and drug paraphernalia. Defendant was arrested. During a search of Defendant's backpack incident to her arrest, the trooper found more drugs, drug paraphernalia, and a large amount of cash. The trooper searched the vehicle

1. Though this opinion is published, the concurring judge disagrees on much of the analysis. Accordingly, this lead opinion's binding effect shall not extend beyond the holding and any part of the concurring opinion in agreement with this lead opinion.

without a warrant, discovering illegal drugs and drug paraphernalia inside the vehicle.

II. Analysis

Defendant was convicted of various drug crimes based on the items found during the search of the crashed vehicle. In the first appeal, our Supreme Court determined no exception–including the automobile exception–applied to the warrant requirement and that, therefore, the search violated the Fourth Amendment. For the reasoning below, we affirm the trial court's determination on remand that the exclusionary rule does not apply in this case, as the trooper had probable cause and acted in good faith in determining he did not need a warrant under the automobile exception. *See id.* at 339 ("Under the automobile exception, law enforcement may search a vehicle without a warrant '[w]hen the [ ] justifications for the automobile exception come into play' and law enforcement has 'probable cause to do so' " (citation omitted)).

In this present appeal, Defendant argues the trooper did not have probable cause to conduct the search of the vehicle and, alternatively, even if the trooper had probable cause, the trial court erred in concluding the "good faith" exception to the warrant requirement applied. These arguments are addressed each in turn.

A. Probable Cause

[1] The trial court determined the trooper had probable cause to search the vehicle for "Kyle's" identification. Indeed, if no probable cause existed to search the vehicle, then it would not matter whether the trooper acted in good faith in determining the automobile exception to the warrant requirement applied.

Here, the trooper came upon a crash scene where bystanders indicated the driver had fled the scene, the driver's name was "Kyle," and that Kyle fled the scene because he had outstanding arrest warrants (for unknown charges). There was also evidence that Kyle may have committed a traffic crime. The trooper needed to determine the identification of Kyle and determined he had probable cause to search the vehicle Kyle had been driving for anything which would identify Kyle.

Our Supreme Court has instructed "probable cause" requires only a "practical, nontechnical probability" and "does not demand any showing that such belief be correct or more likely true than false." *State v. Zuniga*, 312 N.C. 251, 260–62 (1984).

Here, based on the facts as known to the trooper at the time he came upon the crash scene, we agree with the trial court that the trooper had probable cause to search the vehicle for something which would further identify the driver who had crashed the vehicle, who had outstanding arrest warrants, and who was at large. The trooper's discovery of illegal drugs and drug paraphernalia gave the trooper additional probable cause to arrest Defendant and conduct further searches.

B. "Good faith" Exception

[2] Having determined the trooper had probable cause to conduct his search, the next issue to consider is that raised by Defendant's second argument, whether the trooper acted in good faith in determining he could conduct his search of the vehicle without first obtaining a warrant. Specific to the analysis, as our Supreme Court noted in its opinion during the prior appeal, the United States Supreme Court has determined an "automobile exception" exists to the warrant requirement, justifying a warrantless search of an automobile, in some situations. *Collins v. Virginia*, 584 U.S. 586 (2018).

In the first appeal of this matter, our Supreme Court reasoned that because the vehicle was "immobile"–that is, incapable of being driven out of the ditch–the automobile exception to the warrant requirement did not apply:

> In the present case, the testimony of the State's witnesses established that defendant's vehicle was immobile at the time of the search due to the accident, wholly negating the mobility requirement underlying the automobile exception. The vehicle was "down in a ditch" and partially submerged in water, and both Trooper Sanders and Deputy Hicks testified that the vehicle could not have been driven from the scene. In fact, Deputy Hicks testified that he called a tow truck to remove the vehicle from the ditch. Thus, *because the record demonstrates that the vehicle was immobile, an exigency did not exist, and the automobile exception does not apply*.

Julius, 385 N.C. 339–40 (emphasis added). Again, for purposes of this appeal, we are bound by this holding. The only issue remaining for us to determine is whether the trial court correctly concluded the "good faith" exception applied such that the exclusionary rule does not apply.

The exclusionary rule is a judicially created remedy designed to deter unlawful police conduct. *United States v. Leon*, 468 U.S. 897, 916 (1984). However, exclusion is not required where suppression would have "no deterrent effect." *Herring v. United States*, 555 U.S. 135, 141 n.4 (2009). Accordingly, the United States Supreme Court has created a "good faith" exception, whereby the exclusionary rule does not apply in cases where an officer has an objectively reasonable belief that he is acting within the bounds of the law. For instance, in 2011, the Court held that the "good faith" exception applies when officers act "in objectively reasonable reliance on binding precedent." *Davis v. United States*, 564 U.S. 229, 241 (2011).

Prior to our Supreme Court's 2023 decision in the first appeal of this matter, our Court considered a defendant's argument that the automobile exception to the warrant requirement should *not* apply where his car had caught fire, rendering it undrivable, and had to be towed away from the scene. *State v. Corpening*, 109 N.C. App. 586 (1993). We held, *in a published opinion*, that the defendant's argument lacked merit where the undrivable vehicle was otherwise in a public place:

> Defendant also argues that because his vehicle was not driveable [sic], and was going to be towed, there were no exigent circumstances, and Deputy Wolford could have obtained a search warrant. Our Supreme Court has specifically held that the fact that an officer has probable cause to secure a search warrant and adequate time to obtain one, but fails to do so, does not vitiate the rule of *Carroll*. *No exigent circumstances other than the motor vehicle itself are required in order to justify a warrantless search of a motor vehicle in a public place based on probable cause to believe that it contains the instrumentality of or pertains to a crime.*

Id. at 590–91 (citations omitted) (emphasis added). In other words, we held in *Corpening* a warrantless search of a vehicle in a public place is permissible even if the vehicle is not, at the time, drivable. And like the vehicle in *Corpening*, the vehicle in this case, though undrivable, was capable of being towed away.

The Supreme Court of the United States has held that, though ready mobility *may have been* the original sole justification for the automobile exception, that is no longer the case. In other words, the automobile exception to the warrant requirement may still apply in certain situations even where the vehicle is immobile because of the lower expectation of privacy people have in their automobiles driven in public:

> [A]lthough ready mobility alone was perhaps the original justification for the vehicle exception, our later cases have made clear that ready mobility is not the only basis for

> the exception. The reasons for the vehicle exception, we have said, are twofold. Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office.
>
> Even in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception [to the warrant requirement].

California v. Carney, 471 U.S. 386, 391 (1985) (internal citations and marks omitted). That Court had previously stated that a car being immobile is not the end of the inquiry:

> [T]he justification to conduct . . . a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant.

Michigan v. Thomas, 458 U.S. 259, 261 (1982) (citation and footnote omitted).

Though not binding on our Court, other courts have held that the automobile exception to the warrant requirement may apply in certain situations where the vehicle is otherwise incapable of being driven. For instance, the Eighth Circuit has explained in a case involving a vehicle stuck in a ditch:

> Here, although not readily mobile, the pickup truck did not appear to have lost its inherent mobility. It was merely stuck in a ditch. Inasmuch as there was no evidence of any permanent immobility, it was reasonable for the officers who conducted the search to conclude that all the truck needed was to be towed out of the ditch and then it could have been driven away.

United States v. Maggard, No. 00-1146, 2000 U.S. App. LEXIS 11756, at *3 (8th Cir. May 26, 2000). *See also United States v. Mercado*, 307 F.3d 1226, 1228–29 (10th Cir. 2002) (finding that "mere temporary immobility due to a readily repairable problem . . . does not remove the vehicle from the category of 'readily mobile' "); *United States v. Fields*, 456

F.3d 519, 524 (5th Cir. 2006) (exception applies to crashed vehicle with repairable issues).

The Sixth Circuit held that the automobile exception applied to a search of a vehicle which was "on a jack with one wheel removed for repair of a flat tire," as a vehicle could otherwise be easily moved:

> We do not think the automobile exception to the warrant requirement should turn on the condition of the vehicle or whether, as a practical matter, it could be spirited away from the police before a search could be completed. Considerations of factors of this nature would just add more uncertainty as to what is permitted and what is prohibited. We believe the Supreme Court has moved to where the key inquiry is probable cause and, if that is present, most, if not all, auto searches will not require a warrant. It appears that the fact that an automobile is involved has subsumed in most fact situations any requirement for separate and distinct exigent circumstances.

United States v. Rommann, 902 F.2d 1570 (6th Cir. 1990).

The Second Circuit has explained that the fact the automobile in question could be towed away was sufficient for the automobile exception to apply, similar to *Corpening*:

> Although Jones argues that the automobile exception could not apply under these factual circumstances because the rental car was "significantly damaged and undriveable," … , we find that argument unpersuasive. As the Supreme Court has emphasized, the reasoning behind the automobile exception "does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant." *Michigan v. Thomas*, 458 U.S. 259, 261 [ ] (1982) (per curiam). Thus, "[e]ven where there is little practical likelihood that the vehicle will be driven away, the exception applies at least when that possibility exists." *United States v. Howard*, 489 F.3d 484, 493 (2d Cir. 2007). Here, *the possibility that Jones's car could be towed from the scene, by itself, is sufficient for the automobile exception to apply even though the rental car may have been inoperable.*

United States v. Jones, 2024 U.S. App. LEXIS 25563 (2024) (emphasis added).

Our Court must be careful that the "good faith" exception not be applied in a way that swallows the exclusionary rule. However, based on our published opinion in *Corpening*, opinions from the Supreme Court of the United States that a car's temporary immobility is not fatal to the automobile exception being applied, and opinions from many federal circuits, we conclude the trooper in this case objectively acted in good faith in conducting the search of the vehicle without a warrant. Accordingly, the trial court did not err in denying Defendant's motion to suppress, based on the "good faith" exception.

NO ERROR.

Judge STROUD concurs in result only by separate opinion.

Judge TYSON dissents by separate opinion.

STROUD, Judge, concurring in result only.

The trial court rightly denied Defendant's motion to suppress because the good-faith exception to the exclusionary rule applies. The lead opinion reaches the same result, but its reasoning is wrong. It agrees with the trial court that Trooper Sanders "had probable cause to search the vehicle" and that *Davis v. United States*, 564 U.S. 229 (2011), applies. Neither conclusion is necessary: one has nothing to do with the good-faith exception; the other misapplies *Davis*.

Still, even if "the trial court's reasoning for denying [a] motion to suppress was incorrect, we are not required on this basis alone to determine that the ruling was erroneous." *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987) (citing *State v. Gardner*, 316 N.C. 605, 342 S.E.2d 872 (1986)). "The crucial inquiry for this Court is admissibility and whether the ultimate ruling was supported by the evidence." *Id.* That inquiry ends with the right answer here: the good-faith exception to the exclusionary rule applies, so the evidence comes in. I concur only in the result.

Any analysis of this case must begin with our Supreme Court's decision in the first appeal. It held that Trooper Sanders's (Sanders) warrantless "search for evidence violated the Fourth Amendment," and no exception to the warrant requirement applied. *State v. Julius*, 385 N.C. 331, 341, 892 S.E.2d 854, 863 (2023). In particular, the Court determined that the automobile exception didn't apply. That exception requires vehicle mobility as "a fundamental prerequisite"—the vehicle "must be in a condition in which ready use is possible." *Id.* at 339, 892 S.E.2d at 861. This vehicle, however, was immobile—stuck in a ditch, partially submerged, unable to be driven—so "an exigency did not exist." *Id.* at 340, 892 S.E.2d at 861.

The Court continued. The next question, it said, was "whether the exclusionary rule is the proper remedy for this particular violation." *Id.* at 341, 892 S.E.2d at 863. The trial court "never reached the issue of whether exclusion of the evidence was appropriate, and if so, whether any exceptions to the exclusionary rule would be applicable, because it concluded that a valid search occurred." *Id.* So the Supreme Court "reverse[d] . . . and remand[ed] to the trial court to determine if the evidence should be suppressed pursuant to the exclusionary rule." *Id.* With that remand instruction in mind, I turn to our standard of review.

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Heath*, 281 N.C. App. 465, 468, 868 S.E.2d 165, 167 (2022) (citation omitted). "Unchallenged findings are deemed supported by competent evidence and are binding on appeal." *State v. Fields*, 268 N.C. App. 561, 566, 836 S.E.2d 886, 890 (2019) (citation omitted). We review conclusions of law *de novo*—meaning we consider "the matter anew and freely substitute[ ] [our] own judgment for that of the lower tribunal." *Heath*, 281 N.C. App. at 468, 868 S.E.2d at 167 (citation omitted).

And even if the trial court's "reasoning for denying [the] defendant's motion to suppress was incorrect, we are not required on th[at] basis alone to determine that the ruling was erroneous." *Austin*, 320 N.C. at 290, 357 S.E.2d at 650 (citing *Gardner*, 316 N.C. at 605, 342 S.E.2d at 872). "The crucial inquiry for this Court is admissibility and whether the ultimate ruling was supported by the evidence." *Id.*

In my view, the trial court's ultimate ruling—denying Defendant's motion to suppress—was correct. But its analysis was largely misplaced. The trial court made several unchallenged findings about what Sanders faced and how he responded. Our job is to assess whether those findings support the court's legal conclusion. As I explain below, they do.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. It "contains no provision expressly precluding the use of evidence obtained in violation of its commands," *Arizona v. Evans*, 514 U.S. 1, 10 (1995), but the Supreme Court's "decisions establish an exclusionary rule that, when applicable, forbids the use of improperly obtained evidence at trial." *Herring v. United States*, 555 U.S. 135, 139 (2009) (citing *Weeks v. United States*, 232 U.S. 383, 398 (1914)). This "judicially created rule," at bottom, "is 'designed to safeguard Fourth Amendment rights generally through its deterrent effect.' " *Id.* at 139-40 (citation omitted).

We apply the exclusionary rule where it "result[s] in appreciable deterrence" and "the benefits of deterrence . . . outweigh the costs." *Id.* at 141 (quoting *United States v. Leon*, 468 U.S. 897, 909 (1984)). The rule "serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.* at 144. In thus deciding whether to apply the exclusionary rule, we focus "on the 'flagrancy of the police misconduct' at issue." *Davis*, 564 U.S. at 238 (quoting *Leon*, 468 U.S. at 909). Put another way, the "deterrence benefits of exclusion var[y] with the culpability of the law enforcement conduct." *Id.* (internal quotation marks and citation omitted). When officers "exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong." *Id.* But when officers "act with an objectively reasonable good-faith belief that their conduct is lawful," or their "conduct involves only simple, isolated negligence," the "deterrence rationale loses much of its force, and exclusion cannot pay its way." *Id.*

The unchallenged findings show that Sanders and Deputy Hicks arrived at a hit-and-run scene where the driver had fled after causing property damage. Bystanders said that the driver told them "he could not stay on the scene because he had warrants." Sanders asked Defendant whether the driver had identification in the vehicle. She said that she didn't know. Sanders then searched the vehicle "for any evidence of the driver's identity." In the front passenger floorboard, where Defendant had been sitting, he found a Nike bag. Defendant said it belonged to "Kyle." "Still searching for evidence of the driver's identity," Sanders opened the bag and found a black box "large enough to hold a driver's license." He opened it.

Nothing in this sequence reflects deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights. Sanders was investigating an automobile accident where the driver fled because he had outstanding warrants. He searched for identification—a legitimate investigative need. When Defendant identified the Nike bag as belonging to the fleeing driver, Sanders opened it looking for the driver's identity. When he found a box the right size to hold a driver's license, he opened that too.

As noted earlier, our Supreme Court held that Sanders's search violated the Fourth Amendment under the automobile exception because the vehicle's immobility eliminated the exigency. *Julius*, 385 N.C. at 340, 892 S.E.2d at 862. The Court's analysis seems to have assumed Sanders had probable cause to believe the vehicle contained evidence of the fleeing driver's identity. But even with probable cause, Sanders needed a warrant to search an immobile vehicle. U.S. Const. amend. IV. So Sanders's mistake wasn't lacking probable cause; it was misjudging whether exigency still existed given the vehicle's immobility. That distinction matters for culpability. Sanders had legitimate grounds to believe the vehicle contained evidence. His error was a judgment call about whether the fleeing driver created exigency sufficient to bypass the warrant requirement for an immobile vehicle. And that belief—given a fleeing driver with warrants—wasn't culpable. It was the type of "objectively reasonable good-faith belief" that doesn't warrant exclusion. *Davis*, 564 U.S. at 238 (quoting *Leon*, 468 U.S. at 909).

The balancing test confirms this. Exclusion works only when police conduct is "deliberate enough to yield 'meaningfu[l]' deterrence, and culpable enough to be 'worth the price paid by the justice system.' " *Id.* at 240 (quoting *Herring*, 555 U.S. at 144). Sanders didn't deliberately violate the Fourth Amendment. He made a judgment call about exigency while dealing with a wrecked car and a fleeing suspect. Suppressing this evidence would penalize a reasonable mistake at a high cost. The evidence includes methamphetamine, scales, two phones, a firearm, and $1,785 in cash. All of it would be barred from a prosecution for several drug offenses. As the trial court found, "exclusion [here] would do nothing to deter police misconduct and would come at a high cost to both the truth and public safety in reducing the flow of illegal, dangerous, and harmful drugs[,] which destroys so many lives and fosters so many other crimes."

The unchallenged findings support the trial court's legal conclusions. Sanders didn't act with the culpability that warrants exclusion, and suppressing this evidence wouldn't serve any deterrent purpose. This straightforward analysis should end the case. Both the trial court and lead opinion reached the right result. But their paths to get there are needlessly complicated and legally flawed.

The first legal flaw arises in the trial court's and lead opinion's probable cause analysis. The trial court concluded that "based on a totality of the circumstances[,] the officers wholly and completely acted objectively and reasonably with probable cause in all their actions." To aid "in determining the application of the [g]ood[-][f]aith exception to the [e]xclusionary [r]ule," the court imported the probable cause analysis from Justice Newby's separate opinion at the Supreme Court. *See Julius*, 385 N.C. at 342, 892 S.E.2d at 863 (Newby, C.J., concurring in part and dissenting in part). And the lead opinion "agrees with the trial court" that Sanders "had probable cause to search the vehicle for something that would further identify the driver who had crashed the vehicle."

But the trial court and lead opinion shouldn't be analyzing whether Sanders had probable cause at all. Probable cause is irrelevant to the good-faith exception. And analyzing it ignores the Supreme Court's remand instructions. The Court's final paragraph left no room for confusion: "Here, the search for evidence violated the Fourth Amendment." *Id.* at 341, 892 S.E.2d at 863. The next question was "whether the exclusionary rule is the proper remedy for this particular violation." *Id.* To answer it, the Court "remand[ed] to the trial court to determine if the evidence should be suppressed pursuant to the exclusionary rule." *Id.* So again, Sanders's search violated the Constitution; the only question left on remand was whether some exception to the exclusionary rule applied.

Whether an officer had probable cause doesn't answer that question. In fact, probable cause plays no role in the good-faith exception's analysis. And it mattered to Justice Newby's separate opinion only because he relied on the exigent circumstances exception to the *warrant requirement*. *See id.* at 345, 892 S.E.2d at 865 (Newby, C.J., concurring in part and dissenting in part) ("The Supreme Court of the United States and this Court . . . have recognized exceptions to the warrant requirement where there is probable cause and exigent circumstances."). Said another way, he didn't think that the Fourth Amendment had been violated, so the exclusionary rule's exceptions never came into play.

And even if probable cause existed, it's irrelevant. Warrantless searches "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). The Supreme Court held that none of those exceptions applied. Probable cause alone has never justified a warrantless search—otherwise, officers could simply bypass the warrant requirement whenever they had probable cause. And the exclusionary rule doesn't ask whether officers had probable cause. It asks whether the search violated the Fourth Amendment.

Turn now to the trial court and lead opinion's application of *Davis*. The trial court determined that Sanders "was objectively and reasonably acting pursuant to the precedent established in [*State v. Corpening*, 109 N.C. App. 586, 427 S.E.2d 892 (1993),] as well as other precedent reasonably relied upon by law enforcement." According to the trial court, *Corpening* held that "it was the motor vehicle itself that provided the exigencies for a warrantless search of a . . . vehicle not the mobility of the vehicle at the time," and in that case, this Court "applied the motor vehicle exception to an immobile vehicle." The trial court found that the Supreme Court "in *State v. Julius*, however, overrule[d] the *Corpening* precedent[,] now focusing on the actual mobility of the vehicle to determine the applicability of the motor vehicle exception to search warrants." So as in *Davis*, 564 U.S. at 229, "the [e]xclusionary [r]ule should not be appli[ed] to [the] evidence found" during Sanders's warrantless search "based on binding precedent" at "the time of his search."

The lead opinion agrees that *Davis* controls:

> [B]ased on our holding in *Corpening*, language from the Supreme Court of the United States['] opinions that a car's temporal immobility is not fatal to being covered by the automobile exception, and language from other federal cases, we conclude the trooper in this case objectively acted in good faith in conducting the search of the vehicle without a warrant.

Relying on several cases, including five different non-binding federal circuit court opinions, the lead opinion suggests that temporary immobility might not defeat the automobile exception. From this, it apparently concludes that Sanders's warrantless search was objectively reasonable and the good-faith exception applies.

This badly misreads *Davis*. There, the Supreme Court held that the exclusionary rule does not apply when officers objectively relied on "binding appellate precedent" that "specifically *authorize[d]*" their search. *Davis*, 564 U.S. at 241. When the search in *Davis* occurred, the Eleventh Circuit "had long read" the Supreme Court's decision in *New York v. Belton*, 453 U.S. 454 (1981), "to establish a bright-line rule authorizing substantially contemporaneous vehicle searches incident to arrests of recent occupants." *Id.* at 235 (citing *United States v. Gonzalez*, 71 F.3d 819, 822, 824-27 (11th Cir. 1996)). Years later, the Court modified that rule in *Arizona v. Gant*, 556 U.S. 332 (2009), holding that such searches are valid only if the arrestee remains within reaching distance of the passenger compartment. *Id.* at 234-35.

The officers in *Davis* had searched after removing the arrestee and placing him in a patrol car. *See id.* at 235. Their search was thus valid under *Belton* and Eleventh Circuit precedent but not under *Gant*. The Supreme Court concluded that the search violated the Fourth Amendment but declined to suppress the evidence: "Because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *Id.* at 232. So *Davis*'s rule is that evidence obtained from searches conducted in objectively reasonable reliance on "binding appellate precedent" that "specifically *authorizes*" the search is not subject to the exclusionary rule—even when that precedent is later overruled. *Id.* at 241.

This case is nothing like *Davis*. The lead opinion doesn't say our Supreme Court overruled *Corpening*, as the trial court concluded—indeed, it says *nothing* about that conclusion at all. Instead, it implies the law surrounding the automobile exception was unclear, making Sanders's actions covered by the good-faith exception.

But *Davis* doesn't protect searches based on unclear or conflicting authority. *Davis* applies when "binding appellate precedent specifically *authorizes* a particular police practice." *Id.* The precedent must be binding—not persuasive. And it must specifically authorize—not just make plausibly arguable—the officer's conduct. The lead opinion inverts this. It points to several non-binding decisions suggesting that "temporary immobility is not fatal to being covered by the automobile exception," then concludes the officers "objectively acted in good faith." But *Davis* doesn't apply whenever a lawyer can construct a colorable argument from some concoction of cases. It applies when officers follow clear, binding precedent that later changes.

Justice Sotomayor's concurrence made this distinction explicit. *Davis*, she wrote, "does not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled." *Id.* at 250 (Sotomayor, J., concurring in the judgment). When officers act "in the absence of case law (or other authority) specifically sanctioning such action, exclusion of the evidence obtained may deter Fourth Amendment violations." *Id.* So even if the law surrounding the automobile exception was unclear, that uncertainty undermines the trial court's and lead opinion's reasoning. The good-faith exception under *Davis* doesn't apply when officers act amid legal ambiguity. If officers are unsure whether the law permits a warrantless search, they know what to do: get a warrant.

Worse still, the law hasn't changed. The automobile exception has always required exigency—usually mobility—to justify bypassing the warrant requirement. In *Carroll v. United States*, for instance, the Supreme Court made clear that this exception applies "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." 267 U.S. 132, 153 (1925). Our Supreme Court adopted this mobility-based exigency requirement in *State v. Isleib*, 319 N.C. 634, 639, 356 S.E.2d 573, 577 (1987), holding that "the inherent mobility of the automobile is itself the exigency" while cautioning "this is not to say that every automobile case will involve exigent circumstances."

Corpening applied this rule. There, a vehicle's rear tire caught fire while the defendant was driving; he pulled into a public parking lot, found a water hose, and extinguished the fire. 109 N.C. App. at 588, 427 S.E.2d at 893-94. A deputy arrived, smelled illegal liquor, and searched without a warrant. *Id.* at 588, 427 S.E.2d at 894. The defendant argued that because the vehicle "was not driveable, and was going to be towed, there were no exigent circumstances." *Id.* at 590, 428 S.E.2d at 895. This Court disagreed, explaining that "no exigent circumstances other than the motor vehicle itself are required in order to justify a warrantless search of a motor vehicle in a public place based on probable cause." *Id.* at 591, 428 S.E.2d at 895.

The vehicle in *Corpening*, however, wasn't immobile—it was inoperable. It couldn't be driven at that moment. Yet it sat in a public parking lot, readily accessible, and could be quickly towed away or repaired. The exigency that *Isleib* and *Carroll* require—the risk that the vehicle could be removed—still existed. *Corpening*'s holding suggests that temporary mechanical failure doesn't eliminate mobility-based exigency when the vehicle remains readily accessible in a public place.

In *Julius*, our Supreme Court applied this same framework and reached a different result on different facts. And even if it is difficult to reconcile *Corpening* with *Julius* or other cases dealing with vehicles with varying degrees of immobility, in this case, the Supreme Court has already decided the issue—this Court need not justify that ruling. Again, the Court held that "because the record demonstrates that the vehicle was immobile, an exigency did not exist, and the automobile exception does not apply." *Id.* at 340, 892 S.E.2d at 861.

In short, the law before *Julius* required exigency, and the law after *Julius* requires exigency. What changed was not the legal rule; it was its application to a vehicle that was immobile, not just temporarily inoperable. *Davis* doesn't apply when the law stays the same, but the facts are different.

And in *Julius*, the Supreme Court made clear it wasn't changing the law. The Court had every opportunity to overrule *Corpening*. The parties extensively briefed it. The State discussed it in its principal brief. And Defendant devoted two pages to analyzing *Corpening*'s relationship to *Isleib*. If the Court had intended to overrule *Corpening*, it would have said so. Instead, the Court seemingly distinguished *Corpening* in footnote 3, noting that "there may be a distinction between immobile and inoperable." *Id.* at 339 n.3, 892 S.E.2d at 861 n.3. That distinction is crucial. An inoperable vehicle in a parking lot can be quickly towed, repaired, or moved. An immobile vehicle stuck in a ditch and partially submerged cannot. *Corpening* addressed the former. *Julius* addressed the latter.

In sum, the trial court misapprehended the legal question on remand but found the facts as directed and reached the right result. The good-faith exception applies because Sanders acted with an objectively reasonable belief that his search was lawful, not with the culpability warranting exclusion. Both the trial court and the lead opinion arrived at the right answer for the wrong reasons—revisiting probable cause after the Supreme Court held the search unconstitutional and misapplying *Davis* when the law never changed. I therefore concur only in the result.

TYSON, Judge, dissenting.

Our Supreme Court previously held in this case the evidence leading to Defendant's arrest was obtained by means of an illegal search of a vehicle without a warrant, which was not justified pursuant to either the automobile exception or a search incident to lawful arrest. *State v. Julius*, 385 N.C. 331, 892 S.E.2d 854 (2023).

The Supreme Court and this Court remanded this case to the trial court to determine whether the evidence obtained from the unlawful search of the immobile automobile should have been suppressed pursuant to the exclusionary rule or admitted based upon the "good faith" exception. *Id.*

Upon remand, the trial court failed to conduct a hearing and did not receive new evidence. The State failed to prove beyond a reasonable doubt the "good faith" exception to the constitutional requirement of a warrant applied and to avoid the application of the exclusionary rule. The order is properly vacated and the case remanded for dismissal of the charges based upon the illegally obtained evidence. I respectfully dissent.

I. Fourth Amendment

The Fourth Amendment was drafted and incorporated into the Bill of Rights as one of the absolute and enumerated predicates required by the People for Ratification of the Constitution of the United States. This Amendment *guarantees*: "The right of the people to be *secure in their persons*, houses, papers, *and effects*, *against unreasonable searches and seizures*, *shall not be violated*, and *no Warrants shall issue*, but upon *probable cause*, supported by Oath or affirmation, and *particularly describing* the place to be searched, and *the persons or things to be seized*." U.S. Const. amend. IV (emphasis supplied). Reviewed for both textualism and originalism, and including its express purpose, this Amendment mandate of "*shall not be violated*" "says what it says," and "it means what it means."

The Supreme Court of the United States held sixty years ago:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Schmerber v. California, 384 U.S. 757, 769–70, 16 L. Ed. 2d 908, 919 (1966).

Without probable cause and exigent circumstances, or another exception to the strict warrant requirement, a warrantless search violates the Fourth Amendment to the Constitution of the United States and Article One, Sections Nineteen and Twenty of the North Carolina Constitution. Any evidence illegally obtained thereby is subject to exclusion. *Id.* U.S. Const. amend. IV; N.C. Const. art. 1, §§ 19-20.

A. Exclusionary Rule

The exclusionary rule, as implemented and interpreted by the Supreme Court of the United States, bars the admission of evidence obtained in violation of the Fourth Amendment. *See Weeks v. United*

States, 232 U.S. 383, 58 L. Ed. 652 (1914); *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 2d 441 (1963). This rule to exclude illegally obtained evidence applies to and is binding upon the states by virtue of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081 (1961).

The exclusionary rule is a judicially-created remedy designed to protect individuals from illegal searches and seizures and to deter unlawful police conduct. *United States v. Leon*, 468 U.S. 897, 916, 82 L. Ed. 2d 677, 694 (1984). "The right to be free from the initial invasion of privacy and the right of exclusion are coordinate components of the central embracing right to be free from unreasonable searches and seizures." *Id.* at 935, 82 L. Ed. 2d at 706 (Brennan, J., dissenting); *see also Massachusetts v. Sheppard*, 468 U.S. 981, 82 L. Ed. 2d 737 (1984); *Herring v. United States*, 555 U.S. 135, 172 L. Ed. 2d 496 (2009); *Davis v. United States*, 564 U.S. 229, 180 L. Ed. 2d 285 (2011).

Pursuant to federal law, under certain narrow circumstances, the exclusion of results of illegal searches and seizures is not compelled where suppression would purportedly have "no deterrent effect." *Herring*, 555 U.S. at 141 n.4, 172 L. Ed. 2d at 507 n.4.

B. Exceptions from Exclusion

In this case prior to remand, our Supreme Court noted, law enforcement officers without a warrant may: (1) search the arrestee's person and the area within his or her immediate control upon lawful arrest; and, (2) search a vehicle incident to a recent occupant's arrest if: (a) the arrestee is within reaching distance of the passenger compartment at the time of the search; or, (b) it is reasonable to believe the vehicle contains evidence of criminal activity related to the arrest. *Julius*, 385 N.C. at 337–38, 892 S.E.2d at 859–60. Our Supreme Court determined neither of those justifications applied to the facts in this case since Kyle, the undisputed driver of the vehicle, had avoided an on-scene arrest by leaving the scene. *Id.* at 339, 892 S.E.2d at 861. The Court agreed that no on-scene search incident to an arrest of Kyle was possible. *Id.*

Our Supreme Court in *Julius* next considered whether the search of the admittedly immobile vehicle was justified under the "automobile exception." *Julius*, 385 N.C. at 339–340, 892 S.E.2d at 861. The Court held the automobile exception did not apply and remanded for the trial court to determine whether the "good faith exception" applied to allow admission of the illegally obtained evidence. *Julius*, 385 N.C. at 340–42, 892 S.E.2d at 861–63.

The “automobile exception” permits the warrantless search of a motor vehicle located in a public place when the exception’s two underlying justifications “come into play,” and provided the search is based upon probable cause. *Collins v. Virginia*, 584 U.S. 586, 591–92, 201 L. Ed. 2d 9, 17–18 (2018). This narrow automobile exception departs from “the general rule that officers may make a warrantless search *with probable cause only when* exigent circumstances exist.” Robert L. Farb, Christopher Tyner, & Jeffrey B. Welty, *Arrest, Search, and Investigation in North Carolina*, 267 (6th ed. 2021) (emphasis supplied).

The automobile exception is founded and allowed upon two judicially created justifications: the ready mobility of vehicles, and the purported reduced expectation of privacy a person has in a mobile motor vehicle versus other immoveable places. *California v. Carney*, 471 U.S. 386, 390–91, 85 L. Ed. 2d 406, 412–13 (1985); *Collins*, 584 U.S. at 591–92, 201 L. Ed. 2d at 17–18. The ready and inherent mobility of motor vehicles “served as the core justification for the automobile exception [to a warrant] for many years.” *Id.* at 591, 201 L. Ed. 2d at 18.

In this case prior to remand, our Supreme Court held, “the record demonstrates that the vehicle was immobile, an exigency did not exist, and the automobile exception does not apply.” *Julius*, 385 N.C. at 339–40, 892 S.E.2d at 861. The trial court and the majority’s opinion erroneously assert the officers had probable cause, to search Defendant without a warrant, even though correctly noting: “In the first appeal, our Supreme Court determined the automobile exception to the warrant requirement did not apply. We are bound by that determination in this present appeal.”

C. *State v. Carter*

In 1988, the Supreme Court of North Carolina pronounced Article I, Section 20 of the North Carolina Constitution contains an exclusionary rule. *State v. Carter*, 322 N.C. 709, 723-24, 370 S.E.2d 553, 561-62 (1988). The Court further held the exclusionary rule did not contain a good faith exception:

> This case presents us with the question of whether there is a good faith exception under article I, section 20 of the North Carolina Constitution to the exclusion of evidence obtained by unreasonable search and seizure. We hold that there is no good faith exception to the requirements of article I, section 20 as applied to the facts of this case and, accordingly, we grant defendant a new trial because

> evidence that should have been excluded under our state constitution was admitted in the trial of his case.

Id. at 710, 370 S.E.2d at 554.

The Supreme Court left the implementation of a "good faith exception" to the legislature: "If a good faith exception is to be applied to this public policy, let it be done by the legislature, the body politic responsible for the formation and expression of matters of public policy." *Id.* at 724, 370 S.E.2d at 562.

Judges on this Court later questioned whether the holding in *Carter* was founded on constitutional or solely on statutory grounds. *See State v. Gore*, 272 N.C. App. 98, 112–13, 846 S.E.2d 304 (2020) (Dillon, J., concurring in part) (opining "a closer reading of *Carter* reveals that our Supreme Court did not hold that the absence of a good faith exception under state law at that time (in 1988) was a *constitutional* matter which could only be changed by constitutional amendment.") (emphasis original); *see also State v. Foster*, 264 N.C. App. 135, 823 S.E.2d 169, 2019 WL 661571, *12–13 n.2 (2019) (unpublished) (positing the language in *Carter* detailing the good faith exception has been superseded by statute); Jonathan Holbrook, Resurrecting the Good Faith Exception in North Carolina?, North Carolina Criminal Law Blog (July 14, 2020) (examining these arguments).

D. Statutory Good Faith Exception

In 2011, the General Assembly enacted a statutory good faith exception to the exclusionary rule by amending N.C. Gen. Stat. § 15A-974 to provide illegally obtained evidence is not subject to automatic exclusion for a substantial violation of the state's Criminal Procedure Act, if the officer acted in an objectively reasonable good faith belief that his or her actions were lawful. N.C. Sess. L. 2011-6. The General Assembly also requested for the Supreme Court of North Carolina to "reconsider, and overrule, its holding in *State v. Carter* [concluding] the good faith exception to the exclusionary rule[,] which exists under federal law, does not apply under North Carolina State law." *Id.* at § 2. This statutory change apparently occurred in response to the Court's invitation for legislative change in *Carter*. *Carter*, 322 N.C. at 724, 370 S.E.2d at 562.

The "good faith" exception has barred the exclusionary rule's application and allowed illegally obtained evidence to be admitted in cases when officers have objectively and reasonably relied in good faith upon: (1) a warrant later determined to be deficient; *Leon*, 468 U.S. 897, 82 L. Ed. 2d 897; (2) on subsequently invalidated statutes; *Illinois v. Krull*, 480 U.S. 340, 94 L. Ed. 2d 364 (1987); (3) on erroneous arrest warrant information, *Herring v. United States*, 555 U.S. 135, 172 L. Ed. 2d 496 (2009); *Arizona v. Evans*, 514 U.S. 1, 131 L. Ed. 2d 34 (1995); and, (4) on binding appellate precedent, *Davis*, 564 U.S. 229, 180 L. Ed. 2d 285. None of these established and objective "good faith" exceptions, which are based upon defective warrants are applicable to the facts before us to overcome the constitutionally-required exclusion of illegally obtained evidence. *Schmerber*, 384 U.S. at 769–70, 16 L. Ed. 2d at 919.

The officers here neither sought nor obtained a warrant, whether valid or not. While *dicta* in *Julius* may prompt the majority's notion to readdress application of the exclusionary rule's principles, the facts in *Julius* and binding precedents provide no basis to apply the "good faith exception" in this case and for the State to use the evidence illegally obtained without a warrant. *Julius*, 385 N.C. at 339–40, 892 S.E.2d at 861.

The majority's and concurring opinions propose to expand the good faith exception to include situations where law enforcement officers neither sought a warrant nor obtained a defective warrant prior to the search. At no time during the events leading up to the search of the immobile vehicle or thereafter did either the deputy or the trooper seek a warrant or present any objective basis of "good faith." The scene and witnesses were secure, and one officer could have sought a search warrant, while the other remained to secure and preserve the scene. "[T]he Fourth Amendment protect[ions] forbid any such intrusions on the mere chance that desired evidence might be obtained." *Schmerber*, 384 U.S. at 769–70, 16 L. Ed. 2d at 919.

E. Good Faith Exception to the Exclusionary Rule

Defendant argues the trial court prejudicially erred by denying her motion to suppress and upon remand it misapplied the good faith exception to the exclusionary rule in this case. She asserts the trial court's order is prejudicial and contrary to the Supreme Court of North Carolina's mandate, longstanding Fourth Amendment and North Carolina Constitution precedents, and the State's burden of proof on remand. Defendant is correct in arguing the State failed to prove beyond a reasonable doubt on remand the good faith exception applies to these facts.

The Supreme Court held, without the lawful search of the vehicle, or otherwise, no probable cause allowed the arrest and search of Defendant and her effects. *Julius*, 385 N.C. at 338, 892 S.E.2d at 860–61. Furthermore, the evidence produced by searching Defendant's person and effects without a warrant did not *ipso facto* justify the vehicle search because Defendant's arrest was unlawful. *Id.* It is also undisputed Defendant was not inside of or near the car at the time of her arrest, and Defendant was neither the owner nor driver of the immobile vehicle. *Id.*

"When seeking to admit evidence discovered by way of warrantless search in a criminal prosecution, the State bears the burden of establishing that the search falls under an exception to the warrant requirement." *State v. Terrell*, 372 N.C. 657, 665, 831 S.E.2d 17, 22–23 (2019) (citing *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982)) (internal quotation marks omitted).

The State was tasked by the Supreme Court and this Court on remand to carry its burden to prove beyond a reasonable doubt the "good faith" exception to the constitutional requirement of a warrant applied to avoid the application of the exclusionary rule. Upon remand and without hearing or receiving additional evidence, the trial court denied Defendant's motion to suppress evidence obtained by the illegal search by invoking the good faith exception. The court reasoned the officers had objectively and reasonably relied upon the analysis contained in *State v. Corpening*, 109 N.C. App. 586, 427 S.E.2d 892 (1993).

The majority's opinion again correctly states, "The *only issue* remaining for us to determine is whether the trial court correctly concluded the 'good faith' exception applied such that the exclusionary rule does not apply." (emphasis supplied).

The Supreme Court of the United States, prior to *Collins*, had held a warrantless vehicle search may be conducted even after a vehicle and its contents have been seized, secured, and stored by law enforcement officers. *See United States v. Johns*, 469 U.S. 478, 83 L. Ed. 2d 890 (1985). Since there is no risk of such a vehicle being driven away, the reduced expectation of privacy in a vehicle standing alone as justification has purportedly emerged in federal cases as the primary justification for the exception. *See* Farb, Tyner, & Welty, *Arrest, Search, and Investigation in North Carolina*, 267 n.293 (6th ed. 2021) (asserting mobility "hardly has much force when the Court permits a warrantless search even after a vehicle and its contents have been immobilized"); *see also Michigan v. Thomas*, 458 U.S. 259, 261, 73 L. Ed. 2d 750, 753 (1982) (per curiam) ("[T]he justification to conduct . . . a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant.").

Reviewing the facts in: *United States v. Gastiaburo*, the U.S. Court of Appeals for the Fourth Circuit stated, "[u]nder the Supreme Court's precedents, the fact that impoundment may have made it virtually impossible for anyone to drive the car away or to tamper with its contents is irrelevant to the constitutionality of a warrantless search . . . ."). 16 F.3d 582, 586 (4th Cir. 1994).

We all agree the Federal and State's Constitutions require "[w]e must be careful that the 'good faith' exception not be applied in a way that swallows the exclusionary rule." Our Supreme Court prior to remand of this case did not apply the exclusionary rule and exclude the evidence as North Carolina's appellate courts have done after finding a Fourth Amendment violation, nor did it affirm the trial court's denial of Defendant's motion to suppress.

We also agree our task is limited and "[t]he only issue remaining for us to determine is whether the trial court correctly concluded the 'good faith' exception applied such that the exclusionary rule does not apply." The majority's opinion unnecessarily consults federal court of appeals decisions in five foreign circuits as persuasive authority to decide this issue. In *State v. Eagle*, 286 N.C. App. 80, 879 S.E.2d 377 (2022) and *State v. Reed*, 257 N.C. App. 524, 810 S.E.2d 245 (2018), this Court concluded, after finding Fourth Amendment violations, the trial court had erred in denying the defendants' motions to suppress to exclude. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E. 2d 30, 37 (1989).

In *State v. McKinney*, 361 N.C. 53, 637 S.E.2d 868 (2006) and *State v. Mullinax*, 282 N.C. App. 341, 870 S.E.2d 306 (2022), our appellate courts remanded those cases for, respectively: (1) a determination of whether *the warrant was validly based on probable cause* after disregarding the information in the warrant application gained in unlawful search, *McKinney*, 361 N.C. at 65, 637 S.E.2d at 876; and, (2) for additional findings about justification for extended seizure or whether an exception to the exclusionary rule applied, *Mullinax*, 282 N.C. App. at 350, 870 S.E.2d at 312. These cases were remanded to the trial court to determine whether exclusion of the evidence was appropriate and if exceptions to the exclusionary rule were applicable.

"Except for *Illinois v. Krull*, 480 U.S. [340], 94 L. Ed. 2d 364 (1987), the United States Supreme Court has applied a good faith exception to the exclusionary rule *only* in cases involving defective search warrants. *E.g.*, *Massachusetts v. Sheppard*, 468 U.S. 981, 82 L. Ed. 2d 737 (1984)." *Carter*, 322 N.C. at 722, 370 S.E.2d at 561 (emphasis supplied). Here, no warrant whatsoever was sought or issued prior to the searches and seizures or thereafter, even though the scene and witnesses were secure, and at least two officers were present on the scene.

Officers seeking or obtaining a warrant was clearly an important condition precedent to the Supreme Court of the United States in *Leon*. "[O]ur evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers *reasonably relying on a warrant issued by a detached and neutral magistrate* leads to the conclusion that such evidence should be admissible in the prosecution's case in chief." *Leon*, 468 U.S. at 913, 82 L. Ed. 2d at 692 (emphasis supplied).

These latter cases noted the Supreme Court of the United States' rejection of indiscriminate application of the exclusionary rule, asserting the suppression of evidence should be a "last resort" rather than a "first impulse." *Id.* at 341, 892 S.E.2d at 863 (citing *Hudson v. Michigan*, 547 U.S. 586, 591, 165 L. Ed. 2d 56, 64 (2006)).

In its remand of this case, the Supreme Court noted: "Ultimately, unless evidence was obtained by sufficiently deliberate and sufficiently culpable police misconduct, resort to the massive remedy of suppressing evidence of guilt is unjustified." *Julius*, 385 N.C. at 341, 892 S.E.2d at 862 (internal quotation marks omitted). This "good faith" determination is a fact-based inquiry the State was required to prove beyond a reasonable doubt upon remand. The trial court erroneously and prejudicially failed to conduct a hearing, receive new evidence, or to address these mandates. *Id.*

F. *State v. Rogers*

The Supreme Court of North Carolina more recently addressed the good faith exception to the exclusionary rule in *State v. Rogers*, 388 N.C. 453, 920 S.E.2d 775 (2025). In *Rogers*, after receiving a tip from a known confidential source about trafficking and distribution of cocaine in New Hanover County, *officers sought and received a court order* to seek information about the defendant, including cell-site location information ("CSLI"). *Id.* at 455–56, 920 S.E.2d at 779–80.

Law enforcement officers used CSLI to track Defendant on a trip to California and stopped him upon his arrival in New Hanover County. Law enforcement officers seized a trafficking quantity of cocaine. *Id.* at 457, 920 S.E.2d at 780. The trial court denied the defendant's motion to suppress and the defendant entered an *Alford* plea. *Id.* This Court determined the application was not supported by probable cause and ordered a new trial, concluding it was bound by *Carter*. *Id.* This Court noted "this case could present an additional opportunity for our Supreme

Court to formally adopt the legislature's proposed good-faith exception to the exclusionary rule under the North Carolina Constitution and [to] expressly overrule *Carter*." *Id.* The State appealed to the Supreme Court of North Carolina.

Chief Justice Newby, writing for the majority, provided a comprehensive history of the exclusionary rule and the good faith exception. The Supreme Court held the Constitution of the United States did not require the exclusion of the CSLI data, which had been *obtained by court order*. *Id.* at 455, 920 S.E.2d at 779.

The majority's opinion in *Rogers* then examined the applicability of the exclusion under North Carolina's Constitution. Prior to the Supreme Court of the United States' Fourth Amendment incorporation opinion in *Mapp*, illegally obtained evidence was generally admitted unless rendered inadmissible by a statute. *Id.* at 474, 920 S.E.2d at 782.

Our Supreme Court further examined the contradictory holdings in *Carter*, asserting the General Assembly is "the body politic responsible for the formation and expression of matters of public policy," *Carter*, 322 N.C. at 724, 370 S.E.2d at 562, and to be the appropriate branch to adopt a "good faith exception" to the purported constitutional rule the Court was instituting, *Rogers*, 388 N.C. at 476–77, 920 S.E.2d at 784 (citation omitted). The Supreme Court in *Rogers* expressly overruled *Carter* and adopted the Supreme Court of the United States' reasoning in *Leon*, holding:

> The State asks us to adopt a good faith exception in line with the federal good faith exception. While "we interpret the North Carolina Constitution independently of the United States Supreme Court's interpretation of the Federal Constitution," *Tirado*, 387 N.C. at 112, 911 S.E.2d at 59 (citing *Holmes v. Moore*, 384 N.C. 426, 437, 886 S.E.2d 120, 130 (2023)), we are persuaded by the reasoning articulated by the Supreme Court for *adopting a federal good faith exception in Leon*, 468 U.S. 897, 104 S. Ct. 3405. After all, when "[c]onsidering the precise wording of Article I, Section 20, we find no support . . . that the 'text' itself calls for 'broader' protection than that of the Fourth Amendment." *Garner*, 331 N.C. at 506, 417 S.E.2d at 510. Thus, we adopt the Supreme Court's reasoning in *Leon*, 468 U.S. 897, 104 S. Ct. 3405, to hold that there is a good faith exception to any exclusionary rule arising from Article I, Section 20 of our state constitution equivalent to

> the federal good faith exception to the exclusionary rule arising out of the Fourth Amendment.
>
> Finally, we apply our state good faith exception to the facts of this case. We have already determined that the federal good faith exception applies here. Therefore, our state good faith exception, being equivalent to the federal good faith exception, also applies. Accordingly, the exclusion of the CSLI is not "required by . . . the Constitution of the State of North Carolina," N.C.G.S. § 15A-974(a)(1) (2023), meaning subdivision 15A-974(a)(1) does not compel exclusion of the CSLI on that basis[.]

Id. at 478, 920 S.E.2d at 793 (emphasis supplied).

The Supreme Court held Article I, Section 20 of the North Carolina Constitution does not require exclusion of the CSLI and reversed this Court's opinion and mandate in *Rogers*, which awarded a new trial. *Id.*

G. *State v. Corpening*

On remand, the trial court relied upon this Court's decision of *State v. Corpening* to find and conclude the officers had objectively acted in reasonable reliance on existing law. 109 N.C. App. 586, 427 S.E.2d 892 (1993). In *Corpening*, this Court applied our Supreme Court's holding in *State v. Isleib* to a factual scenario involving a disabled vehicle temporarily located in a public parking lot. The Supreme Court in *Isleib*, as here in *Julius*, did not announce or extend any categorical rule automatically subjecting immobile vehicles to the automobile exception. *See id.* at 590–91, 427 S.E.2d at 895. In contrast, in *Isleib* and as here, our Supreme Court expressly held the "inherent mobility" of a vehicle under the automobile exception does not *per se* justify a warrantless search. 319 N.C. 634, 639, 356 S.E.2d 573, 576 (1987).

The Supreme Court of the United States likewise defines the exception by its ready mobility rationale, concluding, the vehicle's "capacity to be 'quickly moved' " is "clearly the basis of the holding in *Carroll* [*v. United States*, 267 U.S. 132, 153, 69 L. Ed. 2d at 551 (1925)]," and "our cases have consistently recognized ready mobility as one of the principal bases of the automobile exception" for a warrant. *Carney*, 471 U.S. at 390–91, 85 L. Ed. 2d at 412–13.

The automobile exception's ready mobility requirement long predated the search in this case, and neither *Corpening*, *Isleib*, nor our Supreme Court's 2023 decision in *Julius* resulted in a change in the law, contrary to the trial court's holding on remand. *Julius*, 385 N.C. 331, 892

S.E.2d 854; *Isleib*, 319 N.C. at 639, 356 S.E.2d at 577; *Corpening*, 109 N.C. App. at 590–91, 427 S.E.2d at 895; *see also Carney*, 471 U.S. at 390–91, 85 L. Ed. 2d at 412–13.

Corpening is not binding authority on these facts to justify a "good faith" exception for the trial court, without hearing or additional evidence, to admit warrantless and illegally obtained evidence. *Corpening* could not and never eliminated ready mobility as a prerequisite to support the automobile or good faith exception for a warrant. The record and order on remand, now before us contains no evidence of the officers' awareness of—much less any reliance upon—the questionable precedent in *Corpening* when they searched the immobile vehicle and later the Defendant's person and her belongings without a warrant. *Corpening*, 109 N.C. App. 586, 427 S.E.2d 892. *See*: *Leon*, 468 U.S. at 913, 82 L. Ed. 2d at 692. *Schmerber*, 384 U.S. at 769–70, 16 L. Ed. 2d at 919.

Both Trooper Sanders and Deputy Hicks testified their warrantless search of the vehicle was conducted solely to "find identification" of Kyle, the absent driver, and not pursuant to any other legal authority. The officers could not genuinely or objectively rely upon the reasoning in *Corpening* in any meaningful legal sense. *Id.* The trial court's premise of a "change in law" to *post hoc* re-affirm its denial of Defendant's motion to suppress on remand, and the majority opinion's affirmance thereof, is legally erroneous and prejudicial to Defendant. *Leon*, 468 U.S. at 913, 82 L. Ed. 2d at 692.

Absent proof by the State the officers had objectively acted "in reasonable reliance on binding precedent," the good faith exception in *Davis v. United States* is clearly inapplicable. *Davis*, 564 U.S. at 239–42, 180 L. Ed. 2d at 295–97. The Supreme Court of the United States emphasized in *Davis* the court-created exception from a constitutionally required warrant applies only when "binding appellate precedent specifically *authorizes* a particular police practice." *Id.* at 241, 180 L. Ed. 2d at 296–97 (emphasis original). *Leon*, 468 U.S. at 913, 82 L. Ed. 2d at 692.

Corpening is not binding precedent, the opinion clearly misinterpreted the holding in *Isleib*, 319 N.C. at 639, 356 S.E.2d at 576; and no evidence tends to show the officers were even aware of it. The trial court erred by concluding the officers' wholly warrantless conduct had satisfied *Davis'* "good faith" and their objective reliance on binding authority. *Davis*, 564 U.S. at 239–42, 180 L. Ed. 2d at 295–97. *Leon*, 468 U.S. at 913, 82 L. Ed. 2d at 692.

H. Judge Stroud's CIRO Opinion

Answering a report from the former occupants of the vehicle, Trooper Sanders and Deputy Hicks arrived at what the trial court and the concurring opinion labels as a purported "hit-and-run" where the driver had left the scene or "run" after driving off the road into a ditch. This single car reported accident resulted in only thing being "hit" was the ditch. The driver, "left the scene of the accident," a Class 1 misdemeanor, because he purportedly had outstanding warrants. We all agree even with probable cause, Sanders needed a warrant to search an immobile vehicle. U.S. Const. amend. IV.

Bystanders stated the driver had told them "he could not stay on the scene because he had warrants." Trooper Sanders asked whether the driver Kyle had left identification in the vehicle. The Bystanders did not know. Sanders then searched the vehicle without a warrant solely "for any evidence of the driver's identity." In the front passenger floorboard, where Defendant had purportedly been sitting, Saunders found a Nike bag. Defendant said it belonged to "Kyle." "Still searching for evidence of the driver's identity," Sanders opened the bag and found a black box "large enough to hold a driver's license." He opened it. The concurring opinion asserts: "So Sanders's mistake wasn't (sic) lacking probable cause; it was misjudging whether exigency still existed given the vehicle's immobility." Multiple officers were present, the scene was secure, no "exigency still existed" to excuse the warrant to search.

In the prior appeal our Supreme Court clearly held the automobile exception was inapplicable, because that exception requires vehicle mobility as "a fundamental prerequisite"—the vehicle "must be in a condition in which ready use is possible." *Julius*, 385 N.C. at 339, 892 S.E.2d at 861. The concurring opinion here correctly notes: "This vehicle, however, was immobile—stuck in a ditch, partially submerged, unable to be driven—so "an exigency did not exist." *Id.* at 340, 892 S.E.2d at 861. The concurring opinion also correctly notes: "The [lead opinion]'s analysis seems to have [pre]sumed Sanders had probable cause to believe the vehicle contained evidence of the fleeing driver's identity. But even with probable cause, Sanders needed a warrant to search an immobile vehicle. U.S. Const. amend. IV."

The concurring opinion further correctly notes: "Probable cause alone has never justified a warrantless search—otherwise, officers could simply bypass the warrant requirement whenever they had probable cause. And (sic) the exclusionary rule doesn't (sic) ask whether officers had probable cause. It asks whether the search violated the

Fourth Amendment." Probable cause is the express constitutional prerequisite for an officer to seek and for the magistrate or judge to issue the warrant. Otherwise, state actors would be free to detain, pillage, and rummage at whim. *See State v. Lewis*, 372 N.C. 576, 583, 831 S.E.2d 37, 43 (2019).

The Supreme Court of the United States' decision in *New York v. Belton*, 453 U.S. 454, 69 L. Ed. 2d 768 (1981), established a bright-line rule authorizing substantially contemporaneous vehicle searches incident to arrests of recent occupants. *Id.* at 235 (citing *United States v. Gonzalez*, 71 F.3d 819, 822, 824-27 (11th Cir. 1996)). Years later, the Supreme Court in *Arizona v. Gant*, 556 U.S. 332, 173 L. Ed. 2d 485 (2009), modified and limited that rule, holding such searches incident to arrest are valid only if the arrestee remains within reaching distance of the passenger compartment. *Davis*, 564 U.S. at 234-35, 180 L. Ed. 2d at 292. Here, the warrantless search of the vehicle *preceded* the arrest and search of Defendant and her effects. who was outside of and not inside or near the immobile vehicle, half submerged in a ditch.

The facts in and the majority's reliance upon *Davis* "does not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled." *Id.* at 250, 180 L. Ed. 2d at 303. When officers act "in the absence of case law (or other authority) specifically sanctioning such action, *exclusion of the evidence obtained may deter Fourth Amendment violations*." *Id.* (emphasis supplied). Judge Stroud agrees and notes: "So even if the law surrounding the automobile exception was unclear, that uncertainty undermines the trial court's and lead opinion's reasoning. The good-faith exception under *Davis* doesn't (sic) apply when officers act amid legal ambiguity. If officers are unsure whether the law permits a warrantless search, they know what to do: get a warrant[,]" as mandated by the Fourth Amendment. Our Supreme Court agreed and held prior to remand, "because the record demonstrates that the vehicle was immobile, an exigency did not exist and the automobile exception does not apply." *Julius*, 385 N.C. at 340, 892 S.E.2d at 861.

The concurring opinion and I also agree "the trial court misapprehended the legal question on remand. Whether "Trooper Sanders acted with an objectively reasonable belief that his search was lawful, and not with the culpability warranting exclusion" is a fact-intensive-based inquiry, where the State has the burden of proof beyond a reasonable doubt to overcome the constitutional violation. *State v. Scott*, 278 N.C. App. 354, 357, 861 S.E.2d 892, 894 (2021) (citing N.C. Gen. Stat. § 15A-1443(b) (2019)). On remand the trial court held no hearing, received no additional evidence, and prejudicially failed to find any legitimate basis to support a valid "good faith exception" to overcome the exclusionary rule and to deny Defendant's motion to suppress.

The trial court and both affirming opinions after remand also fail to recognize the good faith exception only applies where there was some demonstrated "good faith" action by the officers to seek or obtain judicial process, later held to be defective. *Leon*, 468 U.S. 897, 82 L. Ed. 2d 677. At least the lead opinion properly recognizes and demands "probable cause" to seek or support the issuance of a search warrant. U.S. Const. amend. IV.

The concurring opinion obliterates the Fourth Amendment altogether by requiring nothing more than a *post hoc* review of the officer's purported "objectively reasonable belief," whatever that gibberish means, on any given day by any given officer or reviewing judge. The protective mandate and demands of the Fourth Amendment and Article 1, Sections 19 and 20 of the North Carolina Constitution are neither so flimsy nor pliable to allow either basis to support the illegal search and to admit the evidence thereof without the judicial oversight of a warrant to protect the sanctity and hard-won rights of the individual in the Bill of Rights and our State's Constitution. U.S. Const. amend. IV. N.C. Const. art. 1, §§ 19-20; *Scott*, 278 N.C. App. at 357, 357, 861 S.E.2d at 894.

II. Conclusion

The majority's affirming opinions improperly expand the "good faith exception" to a factual scenario where illegally obtained evidence was admitted, where no warrant was sought or issued. Unlike in *Leon*, *Krull*, *Herring*, *Evans*, *Davis*, *Rogers*, and many other precedents, there was no deficient warrant sought or judicial process issued or change in precedent. The majority's opinions create an expanded exception, subsumes the Constitutional warrant requirement, and allows "the 'good faith' exception" to "swallow the exclusionary rule." *Id.* at 258, 180 L. Ed. 2d at 308.

"[O]ur constitution demands the exclusion of illegally seized evidence. The courts cannot condone or participate in the protection of those who violate the constitutional rights of others." *State v. Borders*, 236 N.C. App. 149, 163, 762 S.E.2d 490, 502 (2014) (citation omitted). It is not the role of the courts to excuse, slice, dice, parse, or diminish violations of fundamental constitutional rights by State actors. Our sworn oaths demand exactly the opposite. *See* N.C. Gen. Stat. § 11-11 (2023) ("I will administer justice without favoritism to anyone or the State[.]").

If not for the illegal search of the immobile vehicle involved in a voluntarily reported and single-car accident without physical injuries, would the Defendant have been arrested and would her person and effects have been searched? Is there an objective basis and binding precedent to validate the officers' illegal actions and to admit the illegally obtained evidence? The answer to both questions is clearly no.

Defendant's motion to suppress is properly allowed and her convictions based upon the illegally obtained evidence are properly vacated. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
CARMAINE DEVON PRIDE

No. COA25-367

Filed 4 February 2026

1. Firearms and Other Weapons—possession of firearm by a felon—identification of firearm—sufficiency of evidence

The State presented substantial evidence of each element of possession of a firearm by a felon to overcome defendant's motion to dismiss, including testimony from a witness who saw defendant holding something in his hand outside her home and who called 911 to report seeing someone at her door with a gun. Further, doorbell camera footage showed defendant outside the home of the witness, and the jury viewed the video twice during deliberations, including once in slow motion. Despite defendant's contention that the State needed to exclude the possibility that he had been holding an airsoft gun, the evidence and surrounding circumstances were sufficient to defeat defendant's motion.

2. Evidence—possession of firearm by a felon—airsoft gun excluded—relevance—no evidentiary link to defendant

In a prosecution for possession of a firearm by a felon, arising from an incident in which defendant banged on a woman's door while holding an object (which the woman told a 911 operator was a gun), the trial court did not abuse its discretion by excluding an airsoft gun from evidence where, because there was no evidentiary link between defendant and the airsoft gun, any probative value of introducing the gun would be substantially outweighed by the risk of confusing the issues put forth to the jury.

3. Constitutional Law—firearm law—possession of firearm by a felon—facial challenge—binding precedent

Defendant's constitutional challenge to N.C.G.S. § 14-415.1, which criminalizes possession of a firearm by a felon, was unavailing given binding precedent upholding the law as facially constitutional.

Appeal by Defendant from judgment entered 12 July 2024 by Judge Stephanie L. Reese in Guilford County Superior Court. Heard in the Court of Appeals 13 January 2026.

Attorney General Jeff Jackson, by Assistant Attorney General Phillip H. Liles, for the State-Appellee.

Lebedev Law Services, by Anton M. Lebedev, for Defendant-Appellant.

COLLINS, Judge.

Defendant Carmaine Devon Pride appeals from judgment entered upon a jury verdict of guilty of possession of a firearm by a felon and his subsequent guilty plea to having attained habitual-felon status. Defendant argues that the trial court erred by denying his motion to dismiss for insufficient evidence and excluding an airsoft gun from evidence. Defendant also argues that N.C. Gen. Stat. § 14-415.1 is facially unconstitutional. We find no error.

I. Background

The evidence at trial tended to show the following: In the early morning hours of 12 July 2023, Defendant returned to the home he shared with his girlfriend, Natasha Smith, and her children. An argument ensued outside the residence. Natasha's cousin, Tabitha, who lived two doors down, heard the commotion and saw Defendant striking Natasha. When Tabitha intervened, Defendant pushed her and smashed her cell phone.

After Defendant left in a burgundy Mazda, Tabitha returned home. Approximately ten minutes later, Defendant returned to Tabitha's residence and banged on her door. Tabitha saw Defendant through her screen door holding "something in his hand" while yelling at her to come outside. She called 911. When officers from the High Point Police Department arrived at the scene, including Officer R. Wardlaw, she told him she called 911 and said, "There's somebody at my door with a gun." Tabitha gave police Ring doorbell camera footage. Officer Wardlaw identified Defendant as the individual seen on the Ring camera footage at Tabitha's door.

No firearm was recovered. Natasha testified for the defense. She testified that her son owned an airsoft gun that was kept in her bedroom, but that she had never seen Defendant with it. The trial court excluded the airsoft gun from evidence when Defendant sought to introduce it.

The jury found Defendant guilty of possession of a firearm by a felon. Defendant admitted habitual-felon status. The trial court sentenced him to 130-168 months in prison. Defendant appealed.

II. Discussion

A. Sufficient evidence

[1] Defendant first argues that the trial court erred by denying his motion to dismiss the possession of a firearm charge for insufficient evidence.

On a motion to dismiss for insufficient evidence, the question is whether, viewed in the light most favorable to the State, there is substantial evidence of each element and of defendant as the perpetrator. *State v. Benson*, 331 N.C. 537, 544 (1992). Contradictions in testimony are for the jury, not the court, to resolve. *Id.* Circumstantial evidence may suffice even if it does not exclude every hypothesis of innocence. *State v. Stone*, 323 N.C. 447, 452 (1988). "[W]e review the denial of a motion to dismiss de novo." *State v. Golder*, 374 N.C. 238, 250 (2020) (citation omitted).

To survive a motion to dismiss a possession of a firearm by a felon charge, the State must present sufficient evidence of a prior felony conviction and possession of a firearm thereafter. N.C. Gen. Stat. § 14-415.1 (2023). Defendant stipulated to the prior felony.

Tabitha saw Defendant through her screen door holding "something in his hand" while yelling at her to come outside. She told Officer Wardlaw that she called 911 and said, "There's somebody at my door with a gun." Tabitha gave police Ring doorbell camera footage. Officer Wardlaw identified Defendant as the individual seen on the Ring camera footage at Tabitha's door. The jury viewed the video twice during deliberations, including once in slow motion. From Tabitha's statements, the video, and the surrounding circumstances, a reasonable juror could infer Defendant possessed a firearm.

Defendant argues that the State failed to exclude the possibility that he held an airsoft gun. But the State need not disprove every speculative alternative. *State v. Fritsch*, 351 N.C. 373, 379 (2000). Moreover, Natasha testified that Defendant left in his Mazda after the initial confrontation and did not return to the home before appearing at Tabitha's door. She also testified she had never seen Defendant possess the airsoft gun.

Viewed in the light most favorable to the State, the evidence was sufficient to support the possession of a firearm by a felon charge. The trial court properly denied the motion to dismiss.

B. Exclusion of evidence

[2] Defendant next argues that the trial court abused its discretion by excluding the airsoft gun from evidence.

We review relevancy determinations with deference, *State v. Triplett*, 368 N.C. 172, 175 (2015), and Rule 403 rulings for abuse of discretion, *State v. Whaley*, 362 N.C. 156, 160 (2008).

Evidence is relevant if it has "any tendency" to make a consequential fact more or less probable. N.C. Gen. Stat. § 8C-1, Rule 401 (2023). Relevant evidence is admissible unless rendered inadmissible by the Rules of Evidence. *Id.* § 8C-1, Rule 402 (2023). Rule 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* § 8C-1, Rule 403 (2023).

Natasha testified that the airsoft gun belonged to her son and was kept in her bedroom. She also testified that she had never seen Defendant possess it. There was no evidence Defendant returned to the home to retrieve that airsoft gun before appearing at Tabitha's door.

Given the absence of evidence connecting Defendant and the airsoft gun, the trial court could reasonably have concluded that the exhibit did not make any fact of consequence more or less probable and thus did not err by excluding it as irrelevant.

Furthermore, even if marginally relevant, the trial court could reasonably have concluded that its probative value was substantially outweighed by the risk of confusing the issues by inviting the jury to speculate about an object with no evidentiary link to Defendant. *See*

N.C. Gen. Stat. § 8C-1, Rule 403. Accordingly, the trial court did not abuse its discretion by excluding it.[1]

C. Constitutionality of N.C. Gen. Stat. § 14-415.1

[3] Finally, Defendant argues that N.C. Gen. Stat. § 14-415.1 is facially unconstitutional under the Second Amendment and Article I, Section 30 of the North Carolina Constitution.

We review constitutional questions de novo. *State v. Grady*, 372 N.C. 509, 521 (2019).

Our Court recently upheld section 14-415.1 as facially constitutional under *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), and *United States v. Rahimi*, 602 U.S. 680 (2024). *See State v. Nanes*, 297 N.C. App. 863, 866 (2025). We are bound by that decision, *see In re Civil Penalty*, 324 N.C. 373, 384 (1989), and continue to hold that section 14-415.1 is facially constitutional under both the United States and the North Carolina Constitutions.

III. Conclusion

The State presented sufficient evidence that Defendant possessed a firearm, and the trial court acted within its discretion in excluding the airsoft gun. Binding precedent forecloses Defendant's constitutional challenge. Accordingly, we find no error.

NO ERROR.

Judges ZACHARY and CARPENTER concur.

---

1. Defendant has moved this Court to examine the original airsoft gun. We deny Defendant's motion.

STATE OF NORTH CAROLINA
v.
ERVIN TOOMER, DEFENDANT

No. COA24-1102

Filed 4 February 2026

1. Evidence—impeachment—older prior convictions—Rule 609(b)—insufficient findings—misapprehension of the law—no prejudicial error

In a trial for charges including second-degree kidnapping, assault on a female, and assault with a deadly weapon, the trial court abused its discretion, but did not commit prejudicial error, in allowing the State to impeach defendant with his prior convictions for second-degree kidnapping and armed robbery—offenses committed more than ten years earlier—under Evidence Rule 609(b). First, the court failed to enter findings of fact demonstrating that the convictions' probative value substantially outweighed their prejudicial effect and explaining how the convictions bore on defendant's credibility. Second, acting under a misapprehension of the law, the court admitted the prior convictions into evidence to show that they involved the same plan, intent, or pattern seen in the charged offenses—a use permitted under Evidence Rule 404(b) but not under Rule 609(b). Nevertheless, because the court also admitted substantial evidence of defendant's untruthfulness apart from the convictions, and given the overwhelming evidence of defendant's guilt of the charged crimes, the court's error was not prejudicial.

2. Constitutional Law—North Carolina—right to twelve-person jury—alternate juror substituted after deliberations began

In a trial for charges including second-degree kidnapping, assault on a female, and assault with a deadly weapon, the trial court did not violate defendant's constitutional right to a twelve-person jury—under Article I, Section 24 of the North Carolina Constitution—by substituting an alternate juror after deliberations had already begun where, after doing so, the court properly instructed the jury to begin deliberations anew, as required under N.C.G.S. § 15A-1215(a), thereby eliminating the risk that thirteen people—the alternate juror, the juror whom the alternate replaced, and the remaining eleven jurors—would render the verdict.

Appeal by defendant from judgment entered 30 May 2024 by Judge Keith O. Gregory in Superior Court, Johnston County. Heard in the Court of Appeals 13 August 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Amanda J. Reeder, for the State.

W. Michael Spivey for defendant-appellant.

STROUD, Judge.

A jury found Defendant Ervin Toomer guilty of misdemeanor assault on a female and felonious restraint. He later pleaded guilty to attaining habitual felon status. On appeal, he raises two challenges. First, he argues that the trial court erred in allowing the State to impeach him with his 1996 convictions for second-degree kidnapping and robbery with a dangerous weapon under Rule 609(b) of the North Carolina Rules of Evidence. Second, he claims that the court violated his constitutional right to a twelve-person jury by substituting an alternate juror after deliberations began. We hold that Defendant received a fair trial, free of prejudicial error.

I. Background

The evidence presented to the jury tended to show the following. Defendant met Starnasia Shaw (Shaw) in 2021 when she began working at Smithfield's Chicken 'N Bar-B-Q. Shaw was sixteen and still in high school. Defendant was one of her supervisors. The two did not develop any relationship beyond coworkers until Shaw turned eighteen in February 2023.

After Shaw's eighteenth birthday, she and Defendant began spending time together—smoking marijuana on work breaks and occasionally engaging in some physical acts, but never sex. Shaw testified that their relationship was not "serious." Defendant, who was fifty-two, similarly characterized their connection as "nothing sexual" but rather "more [of] a smoke buddy type thing," though he admitted having "romantic" feelings for Shaw. Both agreed that Defendant often gave Shaw rides to and from work because she lacked a car.

In the summer of 2023, Shaw told Defendant that their relationship needed to change—she wanted to be just "friends for real." She had told her mother how old Defendant was, and her mother disapproved. Shaw testified that Defendant became upset. He disputed this, claiming that he was the one who wanted to end any close relationship because of Shaw's conduct during a trip to Florida.

In August 2023, Defendant and Shaw left Smithfield's to work at Taco Bell—located just a few minutes from Shaw's home. About a month later, on 21 September, Shaw asked Defendant to drive her to Taco Bell to retrieve a bag she had left there. When he picked her up, Shaw testified, Defendant was upset about the tight clothing she wore. He yelled at her and slapped her in the car. She said that he would not let her leave and drove her around for some time before eventually taking her home.

The next night, Shaw and Defendant worked the same shift at Taco Bell, which ended around 1:00 a.m. on 23 September. Shaw, Defendant, and another employee smoked marijuana together in Defendant's car during a break that evening. Shaw testified that Defendant apologized for his behavior the previous day but still seemed angry. Defendant countered that he was quiet but not angry. When their shift ended, Shaw left with Defendant.

What happened next was sharply contested at trial. According to Shaw, Defendant drove out of the Taco Bell lot "really fast" and headed across the street to a UNC Primary Care parking lot instead of taking her home. There, he began yelling at her, accusing her of talking to and sleeping with other men. He told her he was "going to show [her] something" and started punching, hitting, and slapping her. Shaw said that she didn't fight back given Defendant's size advantage; instead, she held her hands up to shield her face. She eventually "opened the [car] door" and "tried to run." But Defendant found her and dragged her back to the car by her hoodie. Shaw testified that he beat her again, then drove back to Taco Bell.

Defendant told a different story. He testified that they drove to the UNC parking lot to smoke marijuana together. An argument ensued when he asked Shaw about another male coworker who had driven her home the night before. Defendant said that he had decided to return Shaw to Taco Bell so the coworker—"John Burrito"—could take her home instead. He denied that Shaw ever tried to get out of the car during this time.

Their accounts diverged further over what happened when they returned to Taco Bell. Shaw testified that the beating continued in the parking lot—Defendant pulled her hair, punched her, bit her face, and twisted her limbs. She tried to leave but he prevented her from doing so, pulling out of the lot and driving her around.

Defendant testified that he told Shaw to get out at Taco Bell. In his version, the passenger seatbelt jammed while he was trying to help her exit. As he leaned over to jiggle it free, his elbow might have accidentally hit her mouth. He reached into the back seat to grab her bag. When he did, a pocketknife fell out—already open. He asked if she planned to stab him, which he said she denied. Defendant acknowledged Shaw had never attacked him before.

Shaw's hand was also cut that night. How it happened is, like everything else, contested. Defendant testified that the cut happened in the Taco Bell parking lot when Shaw tried to grab the knife from him, cutting herself in the process. He gave her a paper towel for the bleeding and placed the knife in his driver's side door handle.

But according to Shaw, Defendant did not see the knife until later, after he drove away from Taco Bell and stopped on a street near her neighborhood. At that point, he threatened to take her to the woods and strangle her. Shaw believed the threat—she feared that he would kill her. She escaped from the car three times and called 911 each time, but Defendant found her and dragged her back. He drove her around for about twenty minutes, hitting and yelling at her.

When they reached the street where Defendant eventually dropped her off, Shaw testified, he dumped out her bag looking for marijuana. That's when he saw her closed pocketknife and asked if she intended to "kill" him. Shaw explained: "[H]e picked up my knife, and opened it, and then he started threatening me with the knife. Like lunging it at me . . . and I had my hands up[.] So in the process of him doing that that's how I got my hand cut." She tried to get the knife from Defendant but could not.

Defendant's version placed the timing differently. He acknowledged driving Shaw toward his home in Archer Lodge for about ten minutes after leaving Taco Bell. He decided mid-route to take her home instead, dropping her off at her neighborhood's entrance. He conceded that it was possible she thought she was going into the woods during the drive. Defendant testified that he dropped her off in the rain and threw the knife at her through the car window before driving away. And he denied hitting Shaw or threatening her during this part of the drive, though he admitted being "somewhat" mad at her.

Deputy Donald Johnson responded to Shaw's 911 call after dispatch reported that a female caller had phoned multiple times but had been disconnected. When he arrived, Shaw was crying. Blood covered her right hand. She had a small cut and abrasion on her right cheek and a cut on the inside of her bottom lip. Deputy Johnson called Emergency Medical Services, whose personnel bandaged Shaw's hand.

Shaw testified that after the assault, she had swollen eyes, a cut lip, a bite mark on her face, a half-inch cut on her hand, and a sore body. The State admitted three photographs into evidence and published them to the jury—showing her swollen eyes, cut hand, and cut lip.

While Deputy Johnson was with Shaw, Defendant sent her text messages expressing unhappiness and stating that he no longer wished to have anything to do with her. Defendant later disputed that all the text messages in evidence were sent on 23 September, claiming that some were sent weeks earlier.

After interviewing Shaw, Deputy Johnson went to Defendant's home. Defendant denied being involved in any disturbance or assault. Shaw cut her own hand, he said, while trying to grab the knife from him. Deputy Johnson noticed blood inside Defendant's car and arrested him for assault on a female, assault with a deadly weapon, and communicating threats.

A Johnston County grand jury returned indictments on 27 November 2023, charging Defendant with felonious restraint, assault on a female, assault with a deadly weapon, communicating threats, and attaining habitual felon status. The grand jury later returned superseding indictments upgrading the felonious restraint charge to second-degree kidnapping and recharging Defendant as a habitual felon. The case was tried in Superior Court, Johnston County, in May 2024.[1]

On 23 May, outside the jury's presence, Defendant indicated that he would testify. The State moved under Rule 609(b) to cross-examine him about several prior convictions, including his 1996 Wake County convictions for second-degree kidnapping and armed robbery—offenses committed more than ten years earlier. *See* N.C. Gen. Stat. § 8C-1, Rule 609(b) (2023). Defendant objected.

The trial court ruled that the State could use the 1996 convictions to impeach Defendant. The underlying facts, in the court's view, were "similar" to the charged offenses: both involved using a weapon to control a victim and a vehicle.

---

1. At the outset, the State voluntarily dismissed the assault with a deadly weapon charge.

On cross-examination, the State questioned Defendant in detail about the 1996 offenses, including the victim's statement describing how Defendant had allegedly forced him into a vehicle at gunpoint and robbed him. Defendant confirmed that he pled guilty but disputed some factual details. The trial court later instructed the jury that it could consider the prior convictions only for assessing Defendant's truthfulness, not as evidence of guilt.

The trial court charged the jury on second-degree kidnapping, felonious restraint as a lesser-included offense, assault on a female, and communicating threats. The jury began deliberating that afternoon.

About an hour later, the jury returned to the courtroom. A sitting juror asked to be released because she had her great-grandson's graduation ceremony to attend the next morning. The court granted the request and substituted the alternate juror. Neither party objected. The court instructed the jury twice that they must start deliberations anew with the new juror.

The next morning, before deliberations resumed, Defendant's attorney requested that the court instruct the jury to elect a new foreperson. He wanted to make clear that they were starting fresh. The court gave the jury the option to elect a new foreperson and told them to disregard any prior notes and to "start all over again." The jury decided to retain the original foreperson and began deliberations anew.

On 24 May 2024, the jury found Defendant guilty of felonious restraint—a lesser-included offense of second-degree kidnapping—and assault on a female. After the verdicts, Defendant admitted his status as a habitual felon. The trial court consolidated all convictions for sentencing and imposed an active sentence of 88 to 118 months' imprisonment. Defendant gave oral notice of appeal in open court.

II. Analysis

Defendant makes two arguments on appeal. First, he argues that the trial court erred in allowing the State to use his 1996 convictions to impeach him under Rule 609(b). Second, he contends that the trial court's substitution of an alternate juror mid-deliberation violated his right to a twelve-person jury under Article I, Section 24 of the North Carolina Constitution. We address each argument in turn.

A. Rule 609

[1] Defendant claims that the trial court abused its discretion by failing to make the required findings under Rule 609(b). The court never determined whether the 1996 convictions were "substantially" more probative of his credibility than prejudicial. Rather, it permitted their use because they were factually similar to the charged offenses—a purpose Rule 609 does not allow.[2]

A trial court's decision to admit or exclude evidence under Rule 609 "is reversible only for a manifest abuse of discretion." *State v. Shelly*, 176 N.C. App. 575, 578, 627 S.E.2d 287, 292 (2006) (citing *State v. Ferguson*, 105 N.C. App. 692, 414 S.E.2d 769 (1992)). A manifest abuse of discretion occurs when a ruling is plainly "unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Roache*, 358 N.C. 243, 284, 595 S.E.2d 381, 408 (2004) (citation omitted).

Rule 609 governs when prior convictions can be admitted to attack a witness's credibility. *See* N.C. Gen. Stat. § 8C-1, Rule 609. Subsection (a) states the general rule: Evidence of a felony, Class A1, Class 1, or Class 2 misdemeanor conviction, "shall be admitted" to "attack[ ] the credibility of a witness"—that is, for impeachment purposes—"if elicited from the witness or established by public record during cross-examination or thereafter." *Id.* § 8C-1, Rule 609(a). Subsection (b) creates an exception for older convictions. It states that "[e]vidence of a conviction . . . is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date," unless two conditions are met. *Id.* § 8C-1, Rule 609(b). First, the proponent must give "sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest" its use. *Id.* And second, the court must "determine[ ], in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." *Id.*

Both subsections of Rule 609 allow the admission of prior convictions only "[f]or the purpose of attacking" a witness's "credibility." *Id.* § 8C-1, Rule 609(a). When a defendant takes the stand, he "place[s] his credibility at issue." *State v. Blankenship*, 89 N.C. App. 465, 467, 366 S.E.2d 509, 511 (1988) (citing *State v. Fisher*, 318 N.C. 512, 350 S.E.2d 334 (1986)). The theory behind Rule 609 is straightforward: "[P]eople

2. Defendant also claims that the State laid no foundation beyond the "bare fact of the convictions" themselves for the court to conduct the required balancing test. We need not address this argument. At trial, defense counsel objected to the admission of the 1996 convictions, arguing that Defendant had not received notice of the State's intent to use them, as required by Rule 609(b). But after reviewing his files, defense counsel conceded that he had received notice "electronically on or about November 30th." Other than the notice element, Defendant raised no objection to the State's foundation under Rule 609(b). This argument is thus waived. N.C. R. App. P. 10(a)(1).

who commit certain crimes may not be credible witnesses." *Id.* So our courts have said time and again that Rule 609's "only legitimate purpose" is to cast doubt on a witness's truthfulness. *State v. Carter*, 326 N.C. 243, 250, 388 S.E.2d 111, 116 (1990) (cleaned up). It cannot be used to suggest a defendant is more likely to have committed the charged crime because he's a "bad man of a violent, criminal nature." *Id.*

And for convictions over ten years old, Rule 609(b) imposes even stricter admissibility requirements. Rule 609(b) creates "a rebuttable presumption" that "convictions more than ten years old [are] more prejudicial to [a] defendant's defense than probative of [his] general character for credibility and, therefore, should not be admitted into evidence." *Blankenship*, 89 N.C. App. at 468, 366 S.E.2d at 511. Our courts have "repeatedly recognized" that exceptions to this presumption are "rare." *Shelly*, 176 N.C. App. at 581, 627 S.E.2d at 293 (citation omitted). So before admitting such a conviction, the trial court must "make findings of fact" demonstrating "that the [evidence's] probative value . . . outweighs its prejudicial nature"—and it must explain how the prior conviction bears on the witness's credibility. *Id.*

Conclusory findings won't do. The trial court must describe "specific facts and circumstances which demonstrate the probative value outweighs the prejudicial effect" of the earlier conviction. *State v. Muhammad*, 186 N.C. App. 355, 363, 651 S.E.2d 569, 575 (2007) (citation omitted). Simply stating "that the probative value of a prior conviction outweighs its prejudicial effect in the interests of justice is insufficient." *Shelly*, 176 N.C. App. at 581, 627 S.E.2d at 294 (citing *State v. Ross*, 329 N.C. 108, 405 S.E.2d 159 (1991)).

The main dispute here centers on the trial court's failure to conduct the proper balancing test under Rule 609(b). In discussing the 1996 convictions' admissibility, the trial court stated that "with cases or convictions that are outside the ten-year period, you have to establish a nexus as to why . . . that case [would] be relevant to the current case." The court was right that a nexus is required under Rule 609—but it looked for the wrong kind. The connection must run between the prior conviction and the witness's credibility, not between the earlier crime and the charged offenses. *See* N.C. Gen. Stat. § 8C-1, Rule 609.

The trial court treated Rule 609(b) as Rule 404(b).[3] Rather than focus on credibility, it asked whether Defendant used "the same method"

---

3. Rule 404(b) of the North Carolina Rules of Evidence provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity

in committing the prior crimes—whether both offenses involved "a vehicle," "a deadly weapon," and Defendant having "his hands on" that weapon. The court acknowledged this approach "sounds sort of like [Rule] 404(b) when you can say, well, plan, intent, preparation." Later, it repeated that "it sounds like [Rule] 404" and emphasized the "pattern" of Defendant being "in possession of a weapon in a vehicle where he's controlling the situation." The court ultimately concluded that "the circumstances are similar, substantially similar," making the 1996 convictions "ripe" for admission.

But Rule 609(b) is not a vehicle for admitting evidence of a witness's plan, intent, or pattern—those are Rule 404(b) purposes. By admitting the 1996 convictions because they showed that Defendant had used similar methods before, the court invited the jury to infer that Defendant acted in conformity with his prior conduct. It noted that it had "enough there to say that [the 1996 convictions were] not for the purpose of showing" that because Defendant "did it previously, that means he did it this time." But that assurance cannot overcome the substance of its ruling. Committing one crime is not proof of committing another. *See Carter*, 326 N.C. at 251, 388 S.E.2d at 116.

And the trial court's misunderstanding of Rule 609(b)'s purpose infected its findings. Rule 609(b) requires the court to "make findings of fact" demonstrating that the conviction's probative value substantially outweighs its prejudicial effect—and to explain how the conviction bears on the witness's credibility. *Shelly*, 176 N.C. App. at 581, 627 S.E.2d at 293. The court should address at least three factors: (1) "the impeachment value of the prior crime," (2) its "remoteness," and (3) "the centrality of the defendant's credibility" to the case. *Id.* at 582-83, 627 S.E.2d at 294 (citing *State v. Holston*, 134 N.C. App. 599, 606, 518 S.E.2d 216, 222 (1999)). Appropriate findings should also examine whether the prior conviction "involved [a] crime[ ] of dishonesty," "demonstrated a 'continuous pattern of behavior,' " and differed in type from the charged offense. *Id.* at 583, 627 S.E.2d at 295 (quoting *State v. Hensley*, 77 N.C. App. 192, 195, 334 S.E.2d 783, 785 (1985)).

Here, the trial court's findings fell short on every factor. We start with "the centrality of . . . [D]efendant's credibility" to the case. *Id.* at

---

> therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2023).

582-83, 627 S.E.2d at 294 (citing *Holston*, 134 N.C. App. at 606, 518 S.E.2d at 222). The court made no findings on this factor at all. Next, we consider the prior crime's "remoteness." *Id.* The court observed that this was one of the suggested findings for Rule 609(b) but made no findings about it. As for whether the prior conviction "involved [a] crime[ ] of dishonesty," the court stated that "the State is arguing that with the robbery with a dangerous weapon, that's a crime of moral turpitude, dishonesty, veracity" but made no finding of its own on whether these violent crimes actually involve dishonesty. *Id.* at 583, 627 S.E.2d at 295 (quoting *Hensley*, 77 N.C. App. at 195, 334 S.E.2d at 785).

The court also failed to analyze the "the impeachment value of the prior crime." *Id.* at 582-83, 627 S.E.2d at 294 (citing *Holston*, 134 N.C. App. at 606, 518 S.E.2d at 222). That factor asked the trial court to assess whether Defendant's 28-year-old convictions for second-degree kidnapping and robbery with a dangerous weapon bore on his truthfulness. The court never answered that question. Instead, it focused on the fact that Defendant was previously "in a vehicle," "ha[d] a weapon," and used it to control victims. Violent crimes, without more, do not speak to credibility. The trial court's failure to connect Defendant's 1996 convictions to his truthfulness—as opposed to his criminal character—left a legally significant gap in its analysis.

So too did the court's findings on whether the 1996 convictions "demonstrated a 'continuous pattern of behavior.' " *Id.* at 583, 627 S.E.2d at 295 (quoting *Hensley*, 77 N.C. App. at 195, 334 S.E.2d at 785). Again, the court focused on the prior convictions' factual similarity rather than their bearing on credibility: "[O]nce again, there's a vehicle involved. There is a victim that's in the vehicle. And at some point[, Defendant] us[ed] a weapon to control the situation." These findings suffered from the same flaw as the rest of the court's analysis—they emphasize Defendant's modus operandi, not his truthfulness.

Finally, the court considered whether the 1996 convictions "were of a different type [of crime] from that for which" Defendant "was being tried." *See id.* It noted that Defendant was on trial "for second-degree kidnapping, assault on a female, and assault with a deadly weapon," and that the 1996 convictions were for "robbery with a dangerous weapon" and "second-degree kidnapping." The court saw "a pattern" in the 1996 convictions' "intent, preparation, even identity, purpose, [and] plan." Yet it maintained that the convictions were not "coming in to show that" because Defendant "did it before, that means he did it again this time."

The trial court's approach created a risk the jury might use the past similar convictions as evidence of Defendant's guilt. It treated the convictions' similarities as a reason to *admit* the 1996 convictions. That inverted Rule 609(b)'s logic. Evidence that a defendant committed an "equally heinous" crime "predispose[s] the mind of the juror to believe [him] guilty" and "strip[s] him of the presumption of innocence." *Carter*, 326 N.C. at 251, 388 S.E.2d at 116. It forces him to defend against accusations the indictment never mentioned, confuses his defense, raises collateral issues, and diverts the jury from the charge at hand. *Id.* at 251, 388 S.E.2d at 117. So when a past conviction resembles the charged crime, the risk that jurors will reason from prior bad acts to guilt increases. *See* Robert P. Mosteller et al., *North Carolina Evidentiary Foundations*, Ch. 6 § 6-31 n. 42 (4th ed. 2022) ("If a criminal defendant is the witness to be impeached, prior convictions for crimes that resemble the currently charged crimes are particularly prejudicial.").

The court's conclusion that "the [convictions'] probative value outweighs any prejudicial effect" cannot salvage its findings. It outlined in detail why the 1996 convictions resembled the charged offenses. But it never explained why they bore on Defendant's credibility. *See, e.g.*, *State v. Artis*, 325 N.C. 278, 307, 384 S.E.2d 470, 486 (1989), *vacated and remanded on other grounds*, 494 U.S. 1023 (1990) (holding that the trial court erred by conclusorily finding that prior convictions had "sufficient connection, supported by facts and circumstances, to outweigh any prejudicial effect" without identifying specific facts showing how the convictions bore on credibility); *Ross*, 329 N.C. at 120, 405 S.E.2d at 165 (same).

Rule 609(b) requires more. Again, the trial court "must make findings as to the specific facts and circumstances which demonstrate the [prior convictions'] probative value outweighs the[ir] prejudicial effect." *Hensley*, 77 N.C. App. at 195, 334 S.E.2d at 785. Because it made no such findings, the court "act[ed] under a misapprehension of the law" and thus abused its discretion. *State v. Robinson*, 383 N.C. 512, 521, 881 S.E.2d 260 (2022).

But Defendant must still prove prejudice to obtain relief. He must show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached" at trial. N.C. Gen. Stat. § 15A-1443(a) (2023). Two questions guide that inquiry: (1) whether "there is substantial evidence of [the defendant's] untruthfulness or untrustworthiness apart from the prior offenses," and (2) whether "there is overwhelming evidence of the defendant's guilt." *Shelly*, 176 N.C. App. at 584, 627 S.E.2d at 295 (citing *Ross*, 329 N.C. at 108, 405 S.E.2d at 158). The answer to both questions is yes.

To begin, there is "substantial evidence"—*i.e.*, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)—of Defendant's "untruthfulness or untrustworthiness apart from the prior offenses," *Shelly*, 176 N.C. App. at 584, 627 S.E.2d at 295 (citing *Ross*, 329 N.C. at 108, 405 S.E.2d at 158). Defendant denied having any fight with Shaw and denied punching her at any time. He said only that his "elbow might have hit her in the mouth" when he was "jiggling [her] seat belt." This was, he claimed, "the only time [he] could think of because that's the only time [he] actually came in . . . some type of bodily contact with [Shaw]."

Shaw, on the other hand, testified to Defendant's repeated punching, slapping, hair-pulling, and biting. And Deputy Johnson observed injuries consistent with her account: "a small cut and abrasion on her right cheek," "a small cut on the inside of her bottom lip," and a cut hand. A reasonable juror could have viewed Defendant's insistence that one accidental elbow strike was "the only" contact as untruthful—given the visible injuries that could not have been caused by a single elbow bump and Shaw's detailed testimony about a sustained assault. *See Vause*, 328 N.C. at 236, 400 S.E.2d at 61.

Defendant's testimony denying he restrained Shaw also undermined his credibility. He admitted driving Shaw toward his home in Archer Lodge—a ten-to-fifteen-minute drive in the opposite direction from her house—without asking her permission or telling her where they were going. His reason? "[S]he didn't get out" of his car at Taco Bell. Shaw stated that during this time, Defendant told her "he was going to take [her] to the woods and strangle [her]." He was "hitting" her while also "yelling at [her]." She thought "he was going to kill [her]." When the prosecutor asked, "you didn't ask [Shaw] if she wanted to go, did you?", Defendant responded: "I normally don't." He conceded it was "possible" Shaw thought she was being driven into the woods.

These admissions contradicted Defendant's defense. His case rested on the claim that Shaw stayed with him voluntarily and was never restrained. But his own testimony showed he controlled where she went—driving her away from her home without permission, without telling her the destination, because she "didn't get out" at Taco Bell. A rational juror could find him untruthful when he denied restraining Shaw while also admitting he forced her to go where he chose. *See Vause*, 328 N.C. at 236, 400 S.E.2d at 61.

The evidence of Defendant's guilt was also "overwhelming." *Shelly*, 176 N.C. App. at 584, 627 S.E.2d at 295 (citing *Ross*, 329 N.C. at 108, 405

S.E.2d at 158). On felonious restraint, the State had to prove that (1) Defendant "intentionally and unlawfully restrained" Shaw, (2) she did not consent, and (3) he moved her "from the place of initial restraint by transporting [her] in a motor vehicle." Defendant's own admissions satisfied all three elements. He admitted driving Shaw around for about twenty minutes without her permission—conceding she might have thought she was being driven "into the woods"—and dropping her off in the rain. Shaw testified that Defendant prevented her from leaving multiple times, dragged her back into the car, and threatened to take her to the woods. And Deputy Johnson's observations corroborated her account: he responded to multiple 911 calls and saw her injuries and distress immediately after.

As for the assault on a female charge, the State had to prove that Defendant intentionally assaulted Shaw by "punching, slapping, and biting" her. Shaw testified to exactly that. Deputy Johnson observed injuries matching her account: cuts, abrasions, and swelling. And the physical evidence confirmed Shaw's testimony—the knife, blood in Defendant's vehicle, photographs of Shaw's injuries, and angry text messages Defendant sent during Deputy Johnson's interview with Shaw. Given this evidence, there is no "reasonable possibility that, had the error in question not been committed, a different result would have been reached." N.C. Gen. Stat. § 15A-1443(a).

Defendant counters that the 1996 convictions were particularly prejudicial because they resembled the charged offenses and invited the jury to convict based on his criminal character.[4] We agree the crimes' similarity increased the danger of prejudice. But the trial court gave limiting instructions—both during Defendant's testimony and in its final

4. Defendant points to *State v. Harris*, 149 N.C. App. 398, 562 S.E.2d 548 (2002), but that case doesn't help him. There, the defendant was on trial for first-degree murder. *Id.* at 400, 562 S.E.2d at 548. The trial court admitted his 1984 conviction for aggravated battery—committed with a bullwhip against his then-wife. *Id.* at 402-03, 562 S.E.2d at 549-50. We granted the defendant a new trial, holding that the 1984 conviction "shed no light on [the] defendant's veracity" and instead "characterize[d]" him "as a woman abuser and a violent person who would have been likely to" commit the charged murder. *Id.* at 403, 562 S.E.2d at 550. The Court found "a strong possibility" that the 1984 conviction "caused the jury to find defendant guilty of first-degree murder rather than a lesser crime." *Id.*

Harris turned on a risk not present here: that an inflammatory prior domestic violence conviction would push the jury to convict of a more serious offense. Here, the opposite occurred. The jury convicted Defendant of felonious restraint—a lesser-included offense of the charged second-degree kidnapping—and acquitted him entirely of communicating threats. These verdicts show that the jury carefully evaluated the evidence and reached measured conclusions. The brief discussion of the 1996 convictions in a four-day trial had no discernible impact. *Harris* is thus inapposite.

charge—telling the jury that the 1996 convictions were "not evidence of . . . [D]efendant's guilt in this case" and could be considered only as it related to Defendant's "truthfulness." We presume that juries follow such instructions. *State v. Best*, 342 N.C. 502, 516, 467 S.E.2d 45, 54 (1996). And the discussion about the 1996 convictions took up less than ten minutes in a four-day trial featuring "overwhelming evidence" of Defendant's "guilt." *Shelly*, 176 N.C. App. at 584, 627 S.E.2d at 295 (citing *Ross*, 329 N.C. at 108, 405 S.E.2d at 158). The brief mention of a decades-old conviction could not have changed the outcome.

B. Juror Substitution

[2] Defendant argues that the trial court violated his right under Article I, Section 24 of the North Carolina Constitution to "trial by a jury of twelve" when it substituted an alternate jury after deliberations began. North Carolina General Statute Section 15A-1215(a) "governs the substitution of alternate jurors before a verdict is rendered." *State v. Glenn*, No. COA23-1103, 301 N.C. App. 499, 502, 923 S.E.2d 850, 852 (2025). Under that provision:

> The judge may permit the seating of one or more alternate jurors. . . . If at any time prior to a verdict being rendered, any juror dies, becomes incapacitated or disqualified, or is discharged for any other reason, an alternate juror becomes a juror, in the order in which selected, and serves in all respects as those selected on the regular trial panel. If an alternate juror replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew. In no event shall more than 12 jurors participate in the jury's deliberations.

N.C. Gen. Stat. § 15A-1215(a) (2023). The trial court's unconstitutional application of this statute, Defendant maintains, requires a new trial.[5]

We review constitutional questions *de novo*. *State v. Ducker*, 298 N.C. App. 759, 762, 917 S.E.2d 266, 269 (2025). That means we "consider[ ] the matter anew" and "freely substitute[ ]" our "own judgment for that of

---

5. Defendant concedes that he "did not object to the substitution[ ] of an alternate juror after deliberations began" but also that the "constitutional right to a jury of twelve cannot be waived and is preserved for review despite the defendant's failure to object." The State does not dispute this. And in *State v. Chambers*, our Supreme Court held that "issues related to the structure of the jury that found [the] defendant guilty [a]re preserved notwithstanding [the] defendant's failure to object at trial." 387 N.C. 521, 524, 915 S.E.2d 96, 99 (2025). We thus assess the merits of Defendant's argument.

the lower court." *State v. Harris*, 276 N.C. App. 128, 131, 855 S.E.2d 510, 512 (2021) (citation omitted).

To determine whether the trial court's application of Section 15A-1215(a) violated the state constitution, we examine the constitution's "text," "the historical context in which the people of North Carolina adopted the applicable constitutional provision," and "our precedents." *N.C. State Conf. of NAACP v. Moore*, 382 N.C. 129, 146, 876 S.E.2d 513, 526 (2022) (citation omitted).

Article I, Section 24 of the North Carolina Constitution declares that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24. "At common law, a jury was comprised of twelve people, . . . and our precedent has long recognized that this common law requirement was engrafted into Article I, Section 24's right to a jury trial." *State v. Chambers*, 387 N.C. 521, 526, 915 S.E.2d 96, 99 (2025) (citation omitted).

In *State v. Chambers*, our Supreme Court upheld the constitutionality of Section 15A-1215(a). *Id.* In doing so, it ruled that the "defendant's constitutional right to a jury of twelve was not violated" when the trial court substituted an alternate juror and "gave the jury exactly the instruction required by statute." *Id.* at 527, 915 S.E.2d at 100. Section 15A-1215(a), the Court explained, contains "two critical safeguards" that keep the twelve-juror requirement "sacrosanct." *Id.* First, it provides that "*in no event* shall more than [twelve] jurors participate in the jury's deliberations." *Id.* at 526, 915 S.E.2d at 100 (cleaned up). And second, it requires trial courts to instruct juries to "begin . . . deliberations anew" if an alternate juror is substituted after deliberations have begun. *Id.*

That second safeguard "preserves the statute's constitutionality." *Id.* When a jury follows the instruction—as juries are presumed to do—and "restarts deliberations," no risk exists that thirteen people will render the verdict. *Id.* at 526-27, 915 S.E.2d at 100. The jury must disregard any discussion involving the excused juror, and "entirely new deliberations" begin with "the newly-constituted twelve: the original eleven jurors and the substituted alternate." *Id.* at 527, 915 S.E.2d at 100. The ultimate verdict thus comes from the constitutionally required jury of twelve. *Id.*

Here, the trial court instructed the jury to begin deliberations anew once it substituted the alternate juror. So the trial court, under *Chambers*, did not violate Defendant's right to a twelve-person jury under Article I, Section 24.

III. Conclusion

The trial court abused its discretion in admitting the 1996 convictions. It misapplied Rule 609(b)'s impeachment-only limitation and did not make the required findings—supported by specific facts and circumstances—that the convictions' probative value substantially outweighed their prejudicial effect. Even so, that error was not prejudicial. And the trial court did not violate Defendant's constitutional right to a twelve-person jury. It properly instructed the jury to begin deliberations anew after substituting the alternate juror, thus protecting that right. Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges FLOOD and FREEMAN concur.

VALLE CAY PROPERTY OWNERS ASSOCIATION, INC., Plaintiff
v.
SLOCUM MOUNTAIN REAL ESTATE, LLC, BENJAMIN SLOCUM, and KAREN SLOCUM, Defendants

No. COA25-532

Filed 4 February 2026

Real Property—restrictive covenants—breach of contract—real covenant to run with the land—privity—sufficiency of claim

In a breach of contract action brought by plaintiffs (a property development owners' association) alleging that a Farmhouse Tract—which, along with plaintiffs' property development, had been split off and sold from an initial 250-acre tract—was subject to a declaration of covenants (as set forth in a prior consent judgment and memorandum of settlement, which purported to bind all successors in interest), the trial court properly granted summary judgment in favor of two individually-named defendants who were not owners of the Farmhouse Tract and whose names did not appear on the Farmhouse Tract deed; therefore, plaintiffs could not enforce a real covenant against the individual defendants due to lack of privity. The trial court erred, however, in granting summary judgment in favor of defendant real estate company, since it owned the Farmhouse Tract and, viewing the relevant real estate documents in the light most favorable to plaintiffs, defendant real estate company was chargeable with notice of the covenants' existence.

Appeal by Plaintiff from order entered 4 March 2025 by Judge Daniel A. Kuehnert in Watauga County Superior Court. Heard in the Court of Appeals 29 October 2025.

Eggers, Eggers, Eggers, & Eggers, PLLC, by Joseph T. Petrack and Stacy C. Eggers, IV, for Plaintiff-Appellant.

Bell, Davis & Pitt, P.A., by R. Jeremy Sugg and Marc E. Gustafson, for Defendants-Appellees.

GRIFFIN, Judge.

Plaintiff Valle Cay Property Owners Association, Inc., appeals from the trial court's order dismissing Plaintiff's complaint for failing to state a claim upon which relief may be granted. Plaintiff contends the trial court erred in granting the motion to dismiss because Plaintiff alleges it sufficiently stated a breach of contract claim. We affirm the trial court's order for Defendants Benjamin Slocum and Karen Slocum. However, we reverse and remand the trial court's order for Defendant Slocum Mountain Real Estate, LLC.

I. Factual and Procedural Background

Defendant Slocum Mountain Real Estate, LLC owns a tract of land in Vilas, Watauga County, North Carolina (the "Farmhouse Tract"). Plaintiff is the property owners association for Valle Cay Development ("Valle Cay").

On 15 May 1987, Appster Properties acquired a 250.234-acre tract of land (the "Appster Property") by deed. Seven months later, Appster Properties imposed and recorded a "Declaration of Covenants, Conditions and Restrictions for Valle Cay" ("Covenants") with the Watauga County Register of Deeds. As a result of the Covenants, Plaintiff formed.

In years following, Appster Properties conveyed multiple tracts of the Appster Property. For example, Appster Properties deeded the Farmhouse Tract to the Loflin Family via multiple deeds for distinctive acres. Other tracts of the Appster Property became the Valle Cay.

In 2002, Plaintiff filed suit to identify which parcels of land from the initial Appster Property were subject to the Covenants. Plaintiff, Appster Properties, and the Loflins, along with additional parties, made such determinations in a Memorandum of Settlement and then adopted those identifications by filing a Consent Judgment in the Superior Court of Watauga County. In their settlement, the parties agreed while "[the

Farmhouse Tract] is a part of Valle Cay, it shall be released from and shall not be considered a part of Valle Cay Development subject to the [Covenants] . . . but only subject to the specific restrictions" of the Memorandum of Settlement. Further, the Consent Judgment stated the "terms of this Consent Judgment shall bind the parties hereto, their heirs, successors, and assigns."

On 1 October 2003, the Loflins conveyed the Farmhouse Tract to Frank and Gaye Lopez-Luaces. Per their agreement, the Loflins and Lopez-Luaces subjected the Farmhouse Tract to specific restrictions within the Consent Judgment. Almost twenty years later, Frank and Gaye Lopez-Luaces conveyed the Farmhouse Tract by deed to Defendant Slocum Mountain Real Estate, LLC. This deed states that this "conveyance is made subject to the terms and provisions of that certain Memorandum of Settlement." Further, the deed advises,

> By acceptance of this deed, [Defendant Slocum Mountain Real Estate, LLC], their heirs, successors and assigns, hereby acknowledge that Grantors are making no representations or warranties with respect to what proposed non-residential uses on the above-described property would be permitted or prohibited under the terms and provisions of said Memorandum of Settlement.

On 2 December 2024, Plaintiff filed a complaint against Defendants for breach of contract and injunctive relief in the use of the Farmhouse Tract. Plaintiff alleges Defendants managed an inn on the Farmhouse Tract in 2022, but later changed the property use to engage a vacation rental management company to manage short-term rentals there. Thus, Plaintiff argues, Defendants both failed to present Plaintiff with the new proposed use and to reside on the Farmhouse Tract at all, which were restriction terms within the Memorandum of Settlement. Therefore, Plaintiff claims Defendants breached the Memorandum of Settlement and Consent Judgment.

In response to Plaintiff's complaint, Defendants filed a Rule 12(b)(6) motion to dismiss for failure to state a claim. The trial court granted Defendants' 12(b)(6) motion to dismiss. Plaintiff timely appeals.

II. Analysis

Plaintiff alleges it sufficiently stated a claim upon which relief may be granted and the trial court erred in granting the motion to dismiss.

This Court reviews an order granting a motion to dismiss under Rule 12(b)(6) de novo. *Jessey Sports, LLC v. Intercollegiate Men's*

Lacrosse Coaches Ass'n, Inc., 289 N.C. App. 166, 169, 888 S.E.2d 677, 680 (2023) (citation omitted). We must determine whether the allegations within the complaint, when treated as true and in the light most favorable to the plaintiff, sufficiently state a claim upon which relief may be granted under the law. *Taylor v. Bank of Am., N.A.*, 382 N.C. 677, 679, 878 S.E.2d 798, 800 (2022) (citation omitted); *Ford v. McCain*, 192 N.C. App. 667, 674, 666 S.E.2d 153, 158 (2008) (citation omitted). Yet, North Carolina courts do not need to accept allegations as true when they are " 'merely conclusory, unwarranted deductions of fact, or unreasonable inferences.' " *Moch v. A.M. Pappas & Assocs., LLC*, 251 N.C. App. 198, 206, 794 S.E.2d 898, 903 (2016) (citation omitted). Dismissal under Rule 12(b)(6) is proper if (1) the complaint on its face reveals no law supports the claim, (2) the complaint on its face reveals a lack of facts sufficient to support a good claim, or (3) the complaint discloses a fact that defeats the claim. *Wilson v. SunTrust Bank*, 257 N.C. App. 237, 244, 809 S.E.2d 286, 292 (2017) (citation omitted).

Generally, North Carolina courts enforce restrictive covenants akin to a valid contractual relationship. *Bodine v. Harris Vill. Prop. Owners Ass'n, Inc.*, 207 N.C. App. 52, 60, 699 S.E.2d 129, 135 (2010) (citations omitted). The elements of a breach of contract claim are (1) existence of a valid contract and (2) breach of the contract's terms. *Martinez v. Univ. of North Carolina*, 223 N.C. App. 428, 432, 741 S.E.2d 330, 332 (2012) (citation omitted). A complaint alleging a general warranty deed and breach of such deed may sufficiently state a claim for breach of covenant against encumbrances. *See War Eagle, Inc. v. Belair*, 204 N.C. App. 548, 552–53, 694 S.E.2d 497, 500–01 (2010). " 'When documents are attached to and incorporated into a complaint, they become part of the complaint and may be considered in connection with a Rule 12(b)(6) motion without converting it into a motion for summary judgment.' " *Moch*, 251 N.C. App. at 206, 794 S.E.2d at 903 (citation omitted). Furthermore, when " 'reviewing pleadings with documentary attachments on a Rule 12(b)(6) motion, the actual content of the documents controls, not the allegations contained in the pleadings.' " *Id.*

Property use restrictions "may be classified as either personal covenants or real covenants that are said to run with the land." *Runyon v. Paley*, 331 N.C. 293, 299, 416 S.E.2d 177, 182 (1992) (citation omitted). A personal covenant creates a right only enforceable between the original covenanting parties. *Id.* Conversely, "a real covenant creates a servitude upon the land subject to the covenant ('the servient estate') for the benefit of another parcel of land ('the dominant estate')." *Id.* In other words, a dominant estate owner may enforce, at law or in equity, a real covenant against the servient estate owner, even if the owners are not the original covenanting parties or successors in interest. *Id.* at 299, 416 S.E.2d at 182–83.

A restrictive real covenant runs with the land when "(1) the subject of the covenant touches and concerns the land, (2) there is privity of estate between the party enforcing the covenant and the party against whom the covenant is being enforced, and (3) the original covenanting parties intended the benefits and the burdens of the covenant to run with the land." *Id.* at 299–300, 416 S.E.2d at 183 (citations omitted). Additionally, a restrictive covenant is not enforceable against a subsequent purchaser of a servient estate when an instrument in the chain of title lacks notice of such a covenant. *Id.* at 313, 416 S.E.2d at 191.

For a covenant to touch and concern the land, it must " 'affect the legal rights of the covenanting parties as landowners.' " *Prevette v. Elsner*, 298 N.C. App. 720, 725, 917 S.E.2d 275, 281 (2025) (citation omitted). For instance, a covenant touches and concerns the land when it impacts the use and enjoyment of the land such that it affects its value. *Id.* Yet, a covenant does not need to physically affect the land to touch and concern it. *Id.*

To satisfy the privity requirement for a real covenant that runs with the land, there must be both horizontal and vertical privity. *Cunningham v. City of Greensboro*, 212 N.C. App. 86, 97, 711 S.E.2d 477, 485 (2011) (citation omitted). Vertical privity is shown by a "succession in interest between the original covenanting parties and the current owners of the dominant and servient estates." *Runyon*, 331 N.C. at 302, 416 S.E.2d at 184. To demonstrate horizontal privity, the party wanting to enforce the covenant must show " 'some "connection of interest" between the original covenanting parties,' " such as a conveyance of an estate in land. *Cunningham*, 212 N.C. App. at 97, 711 S.E.2d at 485 (citation omitted). Being signatories to an original consent judgment or the signatories' successors in interest may satisfy horizontal privity. *Wein II, LLC v. Porter*, 198 N.C. App. 472, 486, 683 S.E.2d 707, 717 (2009).

In analyzing whether the original covenanting parties intended the benefits and the burdens of the covenant to run with the land, we apply principles of contract construction. *Runyon*, 331 N.C. at 305, 416 S.E.2d at 186. Thus, this Court ascertains intent from the deed or other instruments that created the restrictions. *Id.* (citation omitted).

In North Carolina, actual knowledge is insufficient to bind a purchaser with notice of a restrictive covenant's existence. *Id.* at 313, 416 S.E.2d at 191 (citation omitted). If a restrictive covenant is in a separate instrument from the deed in the chain of title *and* is not referred to in such deed, a purchaser does not have constructive notice of the restrictive covenant. *Id.* (citation omitted) (emphasis added); *Gouch v. Rotunno*, 291 N.C. App. 7, 11, 893 S.E.2d 551, 555 (2023) (citation omitted). However, " 'if a proper search of the public records would have revealed' " the existence of a restriction, a purchaser is chargeable with notice of the restriction as it is presumed he or she " 'examined each recorded deed or instrument in his line of title.' " *Gouch*, 291 N.C. App. at 11, 893 S.E.2d at 555 (citation omitted). Thus, "a purchaser 'has constructive notice of all duly recorded documents that a proper examination of the title should reveal.' " *Id.* (citation omitted).

Here, Defendants Benjamin and Karen Slocum are not owners of the Farmhouse Tract, and their names do not appear in the Farmhouse Tract deed. Thus, Plaintiff may not enforce a real covenant upon them as real covenants may only be enforced upon servient estate *owners*. Consequently, we affirm the trial court's granting of the Rule 12(b)(6) motion as to both Benjamin and Karen Slocum in their individual capacities.

Instead, Defendant Slocum Mountain Real Estate, LLC owns the Farmhouse Tract. Defendants argue that since the complaint failed to identify a dominant estate and describe how such estate was affected by the covenants, the covenants do not touch and concern the land. However, Defendants incorrectly assume such a pleading requirement. As North Carolina courts treat restrictive covenants like contracts, Plaintiff's complaint alleging the Slocum general warranty deed and breach of such deed may sufficiently state a claim for breach of the covenants against encumbrances. *War Eagle, Inc.*, 204 N.C. App. at 552–53, 694 S.E.2d at 500–01. Furthermore, since the actual content of documentary attachments to the complaint control, the attached deed, Memorandum of Settlement, and Consent Judgment may be considered in support of Plaintiff. Since the covenants impact the use of the Farmhouse Tract which may affect its value, such covenants may touch and concern the Farmhouse Tract, when viewed in the light most favorable to Plaintiff.

Defendants further contend the restrictive covenants are not enforceable because there is no horizontal privity between the covenanting parties. However, Plaintiff claims it has horizontal privity because Plaintiff and the Loflins were signatories to the Consent Judgment. *Wein II, LLC*, 198 N.C. App. at 486, 683 S.E.2d at 717. And Defendant Slocum Mountain Real Estate, LLC is the successor in interest to the Loflins, who were signatories. Therefore, in the light most favorable to it, Plaintiff may satisfy the horizontal privity requirement even if there was not a conveyance of estate in land.

Defendants assert the covenanting parties did not intend to bind subsequent purchasers. Despite instances where it could be viewed that the covenanting parties did not intend to bind subsequent purchasers, we must view the allegations in the light most favorable to Plaintiff. The Consent Judgment states the "terms of this Consent Judgment shall bind the parties hereto, their heirs, successors, and assigns." As ascertained from the instrument, such language supports that the covenanting parties intended to bind subsequent purchasers.

The Farmhouse Tract deed lacks reference to the Consent Judgment, but is explicitly subject to the Memorandum of Settlement restrictions. In other words, the Farmhouse Tract deed does refer to the Memorandum of Settlement, adopted by the Consent Judgment filing in the Superior Court of Watauga County. So, although the applicable covenants are within a separate instrument, they are still referenced in the deed. Additionally, in the light most favorable to Plaintiff, a proper search of public records would have likely revealed the existence of the covenants; therefore, Defendant Slocum Mountain Real Estate, LLC may be chargeable with notice.

Plaintiff sufficiently stated a claim upon which relief may be granted against Defendant Slocum Mountain Real Estate, LLC.

III. Conclusion

The trial court did not err in granting the motion to dismiss with respect to Defendants Benjamin and Karen Slocum. However, the trial court erred in dismissing Plaintiff's complaint against Defendant Slocum Mountain Real Estate, LLC.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges ARROWOOD and GORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 FEBRUARY 2026)

BETTIS v. WEISS No. 25-258	Craven (21CVS000294-240)	Affirmed in Part, Reversed in Part, and Remanded
HARRIS v. McLEOD No. 24-834	Wake (23CV010666-910)	Reversed and Remanded
IN RE A.G.S. No. 25-115	Rockingham (22JT000152-780) (22JT000153-780) (22JT000151-780)	Affirmed
PLYLER v. MEADE No. 25-441	Union (24CVS003084-890)	Affirmed
RAY v. TITLEMAX OF VA., INC. No. 25-378	Guilford (24CV011277-400)	Affirmed
STATE v. ANDERSON No. 25-215	Hoke (21CR050055-460) (21CR050056-460) (21CR050057-460) (23CR000052-460)	No Error
STATE v. CHANDLER No. 25-459	Rutherford (20CR000106-800) (20CR000109-800) (21CR000799-800)	No Error
STATE v. DUNCAN No. 25-218	Cumberland (22CR051118-250)	No Error
STATE v. HUBBARD No. 25-102	Wake (23CR015237-910) (22CR205465-910)	No Error
STATE v. JACKSON No. 25-67	Pasquotank (22CR333606-690) (22CR333610-690) (22CR333603-690)	Dismissed
STATE v. JOHNSON No. 24-831	New Hanover (16CR059007-640)	Affirmed
STATE v. KNIEST No. 24-669	Randolph (20CR053002-750) (20CR053003-750)	No Error

STATE v. REID No. 25-312	Mecklenburg (21CR206248-590) (21CR206249-590)	No Plain Error
STATE v. ROGERS No. 25-337	Avery (24CR000226-050)	Affirmed
STATE v. SWAIN No. 25-463	Guilford (20CR081384-400) (24CR028078-400)	NO PREJUDICIAL ERROR
STATE v. TRAN No. 24-775	Wake (07CR070256-910) (07CR070257-910) (07CR070258-910)	Affirmed
STATE v. WILLIAMS No. 25-568	Randolph (00CR000119-750) (00CR000120-750) (00CR000121-750)	No Error
WATTS v. WATTS No. 24-1090	Randolph (23CVD000965-750)	Vacated in Part and Remanded.

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