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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

DECEMBER 4, 2026

MAILING ADDRESS: The Judicial Department
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COURT OF APPEALS

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AGENCY

Student-athlete claims against university—student altercation—no principal-agency relationship—summary judgment proper—The trial court properly granted summary judgment in favor of a university on plaintiff's claims for battery, intentional infliction of emotional distress, and negligent infliction of emotional distress arising from a physical altercation between plaintiff, a member of the football team, and other student-athletes in a dormitory apartment. There was no genuine issue of material fact regarding plaintiff's claim that the university was liable to him based on an agency relationship; first, the students' status as members of the football team—for which they had signed a student-athlete code of conduct as well as participation agreements—did not make them agents of the university and, second, the university owed no duty of care to protect plaintiff from independent criminal acts. **Dales v. Gardner-Webb Univ., 191.**

APPEAL AND ERROR

Interlocutory order—medical malpractice action—discovery order—non-frivolous privileges asserted—substantial right—In a medical malpractice action, although the trial court's discovery order was interlocutory, where the privileges asserted by defendant physicians—under both federal and state law—were not frivolous or insubstantial, the discovery order affected a substantial right and was therefore immediately appealable. **McGehee v. Farber, 271.**

Preservation of issues—equitable distribution—validity of separation agreement—theory not raised at trial—In an equitable distribution proceeding, plaintiff did not preserve for appellate review his argument that the trial court was required to make a finding about the validity of the parties' alleged separation agreement—which he contended was an issue of ultimate fact since a separation agreement can bar an equitable distribution claim—because plaintiff never asserted that theory below. Plaintiff's pleadings did not mention the alleged agreement, much less raise it as a defense; his reply admitted key allegations in defendant's amended counterclaim, including that the parties' marital and divisible property was subject to equitable distribution; he did not contend that the alleged agreement barred defendant's equitable distribution claim; and he did not ask the trial court to rule on the issue. **Wheeler v. Wheeler, 377.**

Right to appeal—permanency planning order—elimination of reunification—termination petition pending—no right to direct appeal—certiorari denied—A mother had no statutory right to directly appeal amended permanency planning orders—entered on remand after a prior appeal—that eliminated reunification as a permanent plan for her three children where the department of social services had filed petitions to terminate parental rights within sixty-five days of each order's entry and service in accordance with N.C.G.S. § 7B-1001(a)(5). Although a permanency planning order eliminating reunification and a termination of parental rights order may be appealed together pursuant to subsection 7B-1001(a)(8), the trial court had not yet heard or granted the termination orders and, thus, respondent-mother had not lost her right to appeal under that subsection. The appellate court thus dismissed respondent's appeal and denied her conditional petition for a writ of certiorari. **In re Q.J.P., 248.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Adjudication—abuse and neglect—sufficiency of findings of fact—sufficiency of conclusions of law—In a juvenile proceeding where one of respondent-parents' children was brought to a hospital with multiple fractures six weeks after a difficult breech birth at home, the district court's unchallenged findings of fact—including that respondent-parents and the maternal grandmother were the infant's sole caretakers, the infant suffered unexplained non-accidental injuries, the injuries were in various stages of healing, and the infant did not suffer any injuries after a safety placement with her paternal grandparents—supported the court's conclusions of law, even assuming the challenged findings were not supported by competent evidence. As to the infant's older sibling, the infant's unexplained non-accidental injuries were found to be the result of abuse occurring while in the care of respondent-parents and the maternal grandmother, and the trial court found the older child lived, and would continue to live, in the environment which had permitted such abuse. Accordingly, the adjudications—of the younger child as abused and neglected, and the older child as neglected—were affirmed. **In re J.R.D.L.G., 211.**

Effective assistance of counsel—failure to move to suppress—prejudice analysis—In a proceeding where defendant was convicted of false imprisonment and assault inflicting serious bodily injury as a result of domestic violence against his girlfriend, defendant did not receive ineffective assistance when his counsel failed to move to suppress evidence discovered during a search conducted by a warrant that defendant contended issued from a facially insufficient indictment. Since the affidavit attached to the warrant application set out the underlying circumstances from which the issuing magistrate could find that probable cause existed to search defendant's home, even if defense counsel had moved to suppress the evidence obtained, the trial court would have properly denied the motion. Accordingly, defendant could not demonstrate prejudice. **State v. Mercer, 361.**

Effective assistance of counsel—failure to object to lay opinion testimony—prejudice analysis—In a case where defendant was convicted of assault with a deadly weapon inflicting serious injury and injury to personal property after he struck the victim with his pickup truck while the victim was riding an ATV, defendant did not receive ineffective assistance when his trial counsel failed to object to a state trooper's lay opinion testimony about how the collision occurred, including that it was intentional. There was no reasonable probability of a different outcome had defendant's counsel objected to the trooper's testimony where ample additional evidence showed that the collision was intentional, including eye-witness testimony and corroborative photographic evidence. **State v. Hunt, 347.**

Effective assistance of counsel—per se—alternatives presented in closing argument—no concession of defendant's guilt—In a proceeding where defendant was convicted of false imprisonment (a lesser-included offense of first-degree kidnapping, with which he had been indicted) and assault inflicting serious bodily injury as a result of domestic violence against his girlfriend, defendant's counsel was not per se ineffective when, during closing arguments, he told the jury that it "could find [defendant] guilty of false imprisonment, which is a misdemeanor . . . or not guilty." Defense counsel's statement neither foreclosed a not-guilty verdict nor instructed the jury that defendant was guilty of any offense; rather, counsel presented an alternative without conceding defendant's guilt to the lesser-included offense. **State v. Mercer, 361.**

North Carolina—equal protection—Confederate monument built outside courthouse—county's refusal to relocate—In an action for declaratory and injunctive relief seeking the removal of a Confederate monument located outside of a county courthouse, an order granting summary judgment in favor of the county was affirmed where plaintiffs failed to forecast evidence showing: (1) that the county's refusal to relocate the monument violated the Equal Protection Clause of the state constitution, since the Monument Protection Law forbade the county from removing the monument (absent specific circumstances, none of which applied here), thereby rendering any discriminatory intent on the county's part irrelevant; and (2) that the original construction and placement of the monument in 1912 violated equal protection rights where, although plaintiffs showed evidence of discriminatory intent, they failed to show a meaningful disparate impact along racial lines. Notably, plaintiffs' evidence regarding the negative feelings and psychological harm caused by the monument's presence was not enough to establish the disparate impact element of their claim, which required evidence that Black residents of the county were actually denied court access, received disparate results in judicial proceedings, or were otherwise barred from participating in the justice system because of the monument. **NAACP v. Gaston Cnty., 281.**

North Carolina—Open Courts Clause—county's refusal to remove Confederate monument from courthouse—In an action for declaratory and injunctive relief seeking the removal of a Confederate monument located outside of a county courthouse, an order granting summary judgment in favor of the county was affirmed where plaintiffs failed to forecast evidence showing that the monument's placement, regardless of any discriminatory intent behind it, violated the Open Courts Clause of the state constitution. Although plaintiffs produced evidence suggesting that the monument created a psychological barrier to court access (in that it conveyed a racist message that made Black residents question whether they would "receive justice within the courthouse"), none of plaintiffs' evidence showed that they were deprived of public access to functioning courts, participation in legal proceedings, speedy trials for criminal defendants, availability of legal remedies, or any other of the Open Courts Clause's guarantees by virtue of the monument's presence. **NAACP v. Gaston Cnty., 281.**

CRIMINAL LAW

Prosecutor's arguments—no objection made at trial—not grossly improper—In a case where defendant was convicted of assault with a deadly weapon inflicting serious injury and injury to personal property after he struck the victim with his pickup truck while the victim was riding an ATV, the trial court did not err by failing to intervene ex mero motu during the State's closing argument when the prosecutor stated that, after the initial collision, defendant got "back in the truck and he backs out over [the victim's] legs." The challenged remark, while a misstatement of the evidence, was not so grossly improper—when considered in context of the entire closing argument—as to warrant a new trial for defendant. **State v. Hunt, 347.**

Prosecutor's closing argument—lack of objection by defendant—not grossly improper—no prejudice shown—In a proceeding where defendant was convicted of false imprisonment and assault inflicting serious bodily injury as a result of domestic violence against his girlfriend, the trial court did not err in failing to intervene ex mero motu when, during closing arguments, the prosecutor told the jury that the victim "told the truth and that's all we can really ask of her." Given that the State's comment occurred in the context of a closing argument in which the State argued that the victim's testimony was credible after defendant contradicted her account in his own testimony, the State did not impermissibly vouch for the victim. Moreover, even if vouching had occurred, defendant failed to show prejudice that infected the trial with unfairness and rendered his conviction fundamentally unfair. **State v. Mercer, 361.**

Prosecutor's closing argument—seeming conflation of castle doctrine and complete self-defense—not grossly improper—In a voluntary manslaughter prosecution arising from an altercation between lifelong friends living in a Hare Krishna community, where defendant fatally shot the victim as the victim attempted to retrieve his lawn mower from defendant's yard, the trial court did not abuse its discretion in declining to intervene ex mero motu during the State's closing argument, when the prosecutor made statements which seemingly conflated the general concept of complete self-defense with the more specific castle doctrine defense. Ultimately, because the court instructed the jury on both complete self-defense and the castle doctrine, as requested by the State and by defendant, and because the prosecutor's closing argument related to both areas of law, the prosecutor's statements were not so grossly improper as to warrant the trial court's intervention. **State v. Barbour, 328.**

DAMAGES AND REMEDIES

Restitution—amount awarded—sufficiency of evidence—In a case where defendant was convicted of assault with a deadly weapon inflicting serious injury and injury to personal property after he struck the victim with his pickup truck while the victim was riding an ATV, although the evidence supported an award of restitution, it lacked the level of specificity and reliability required to sustain the amount of the award ($592,000); specifically, the victim's testimony was approximate, the State misstated the amount, and no party introduced medical bills or other records supporting the total amount. Accordingly, the restitution order was vacated and the matter was remanded for the trial court to determine the amount of damage proximately caused by defendant's conduct and to calculate the correct amount of restitution. **State v. Hunt, 347.**

DIVORCE

Equitable distribution—military retiree Survivor Benefit Plan coverage—matter of first impression—scant record—remanded—In an equitable distribution proceeding, the trial court's order that plaintiff maintain Survivor Benefit Plan (SBP) coverage (a federally administered benefit for military veterans) with defendant as the beneficiary implicated a matter of first impression for the state appellate courts—how the SBP should interact with the North Carolina equitable distribution scheme—that was not argued at trial, was barely referenced in the record, and received scant briefing. Accordingly, the matter was remanded to the trial court for a hearing where the parties could present arguments and evidence on the issue. **Wheeler v. Wheeler, 377.**

Equitable distribution—statutory distributional factors—catch-all—relation to economic condition of marriage required—In an equitable distribution proceeding, the trial court improperly considered matters related to marital fault and misconduct in ordering an unequal division of marital property in defendant's favor. While the final distributional factor listed in N.C.G.S. § 50-20(*c*) is a catch-all authorizing consideration of "[a]ny other factor that the court finds just and proper," marital fault or misconduct which is unrelated to the economic condition of the marriage—such as plaintiff's alcohol abuse, domestic violence, death threats, and taking of defendant's identity documents—is not germane to the division of marital property. Although the trial court made other findings of fact in determining that an unequal division in favor of defendant was equitable, the appellate court could not determine the weight assigned to each; accordingly, the equitable distribution order was vacated and the matter was remanded for the trial court to reassess its decision to order an unequal division. **Wheeler v. Wheeler, 377.**

DRUGS

Keeping a dwelling for the use, storage, or sale of a controlled substance—hotel room—sufficiency of evidence—The trial court erred in denying defendant's motion to dismiss a charge of keeping a dwelling for the use, storage, or sale of a controlled substance, arising from the discovery of fentanyl pills in a hotel room, where the evidence, viewed in the light most favorable to the State—the room had been reserved and paid for by another person; that person permitted defendant to "party" with a female guest there on one evening; defendant did not possess a key to the room; defendant was observed leaving the room only once; a police officer testified that defendant admitted staying in the room for "a while," but no follow-up testimony was elicited about how long that was; a digital scale and 37 pills, which

defendant was convicted of possessing, were found in the room; and defendant's wallet, containing cash, was discovered on a nightstand in the room—did not constitute substantial evidence sufficient to submit the charge to the jury. **State v. Hollis, 339.**

Trafficking in opioids by possession—amount of opioids—sufficiency of evidence—ultimate user exemption—irrelevant—In a prosecution for various drug-related crimes, the trial court did not err in denying defendant's motion to dismiss a charge of trafficking in opioids by possession where the State presented substantial evidence of each essential element of the offense, including the amount of opioids found in defendant's possession. Defendant's argument on appeal—that he had only admitted to giving "a few" of his late wife's prescription oxycodone pills to a few people and was authorized to possess the rest under the ultimate user exemption—was, even if preserved for appellate review, meritless because the State was not required to negate the ultimate user exemption at trial; rather, as the person claiming its benefit, defendant had the burden of proving that the exemption applied to his case (N.C.G.S. § 90-113.1(a)). **State v. Banks, 322.**

Trafficking in opioids by possession—ultimate user exemption—entitlement to jury instruction—no plain error—The trial court in a prosecution for various drug-related charges did not err—much less commit plain error—when it instructed the jury on defendant's charge of trafficking in opioids by possession without also instructing on the ultimate user exemption (N.C.G.S. § 90-101(c)(3)), which exculpates a person who lawfully possesses a controlled substance "for his own use or for the use of a member of his household." Defendant was not entitled to an instruction on the ultimate user exemption where the record showed that: law enforcement recovered forty-one oxycodone pills—stored in prescription bottles—from defendant's home; defendant admitted that the pills were not prescribed to him but to his late wife, who had died about two years before defendant's arrest; and defendant confessed to giving the pills to other individuals, including in exchange for sexual favors. **State v. Banks, 322.**

EMOTIONAL DISTRESS

Student-athlete claims against university—student altercation—no duty of care—summary judgment proper—The trial court properly granted summary judgment in favor of a university on plaintiff's claims for battery, intentional infliction of emotional distress, and negligent infliction of emotional distress arising from a physical altercation between plaintiff, a member of the football team, and other student-athletes, which resulted in plaintiff and the others receiving disciplinary sanctions. Despite plaintiff's assertion that the university owed him a duty of care based on its own disciplinary policies, plaintiff's injuries did not occur during a school-sponsored practice or event, but at night in a dormitory apartment. **Dales v. Gardner-Webb Univ., 191.**

EVIDENCE

Lay witness opinion testimony—three-part Reber plain error test—not satisfied—In a case where defendant was convicted of assault with a deadly weapon inflicting serious injury and injury to personal property after he struck the victim with his pickup truck while the victim was riding an ATV, the trial court did not plainly err in allowing a state trooper who responded to the incident to give lay opinion testimony about how the collision occurred and that it was intentional. On

remand from the North Carolina Supreme Court, and applying the three-part plain error test set forth in *State v. Reber*, 386 N.C. 153 (2024), the Court of Appeals determined that defendant failed to satisfy: (1) the fundamental error prong, because the trooper based his opinion on his contemporaneous rational observations and instantaneous conclusions at the scene; (2) the probable impact prong, in light of other evidence that defendant intentionally hit the victim's ATV; and (3) the exceptional case prong, given that defendant failed to argue how his case seriously affected the fairness, integrity, or public reputation of judicial proceedings. **State v. Hunt, 347.**

HOMICIDE

Voluntary manslaughter—jury instruction—castle doctrine—statutory factors rebutting presumption of fear—plain error analysis—In a voluntary manslaughter prosecution arising from an altercation between lifelong friends living in a Hare Krishna community, where defendant fatally shot the victim as the victim attempted to retrieve his lawn mower from defendant's yard, the trial court erred when instructing the jury on the castle doctrine defense by failing to recite the factors listed in N.C.G.S. § 14-51.2(c) and to explain that these factors were the only rebuttal to the castle doctrine's presumption of a homeowner's reasonable fear of death or bodily harm when confronted by an intruder on their property. However, the court's error did not amount to plain error where the State produced ample evidence rebutting the presumption of fear—particularly, evidence indicating that the victim entered defendant's yard neither forcefully nor unlawfully—and, therefore, defendant could not show that the court's error had a probable impact on the jury's verdict or that his was an exceptional case affecting the fairness, integrity, or public reputation of judicial proceedings. **State v. Barbour, 328.**

Voluntary manslaughter—motion to dismiss—sufficiency of evidence—rebutting castle doctrine defense—In a voluntary manslaughter prosecution arising from an altercation between lifelong friends living in a Hare Krishna community, where defendant fatally shot the victim as the victim attempted to retrieve his lawn mower from defendant's yard, the trial court properly denied defendant's motion to dismiss for insufficiency of the evidence, where the State produced sufficient evidence to contradict defendant's castle doctrine defense, including: that it was common for neighbors in the community to come onto each other's property; the friendship between defendant and the victim; and video footage of the incident, which showed the victim had casually walked toward defendant (contrary to defendant's claim that the victim was "bearing down" on him) and was not even looking in defendant's direction when defendant shot him. Further, given the existence of such contradictory evidence, the question of whether defendant was entitled to the castle doctrine's protections became one for the jury to determine. **State v. Barbour, 328.**

INDICTMENT AND INFORMATION

Habitual felon—fatally defective—conceded by State—remanded for resentencing—In a criminal case where the State conceded (and the appellate court agreed) that defendant's habitual-felon indictment was fatally defective because two of the predicate felonies were not sequential and non-overlapping as required by N.C.G.S. § 14-7.1, the matter was remanded for resentencing. **State v. Hunt, 347.**

JURY

Pattern instructions—deviation—evidentiary weight—agreed-upon wording—no probable impact on verdicts—In a case where defendant was convicted of assault with a deadly weapon inflicting serious injury and injury to personal property after he struck the victim with his pickup truck while the victim was riding an ATV, the trial court did not reversibly err by deviating from the pattern instructions on evidentiary weight and instructing the jury that it "must decide that certain evidence is believable"—instead of "if you decide that certain evidence is believable"—an iteration to which the parties had agreed at the charge conference, because the deviation did not have a probable impact on the jury's determination of defendant's guilt when read in context. **State v. Hunt, 347.**

LIBEL AND SLANDER

Defamation—criticism of police spokesperson—subjective opinion—no factual content—The trial court properly dismissed slander and libel claims asserted by plaintiff, the director of public affairs for a police department, against a fraternal police organization for critical comments it posted on social media regarding plaintiff's handling of an interview in the wake of an incident in which four police officers were killed. Dismissal was proper irrespective of plaintiff's status as a public or private figure because the online comments did not include any factual claims but expressed purely subjective opinions about plaintiff's job performance and, thus, were not defamatory. **Vastola v. Charlotte-Mecklenburg Lodge 9 of the Fraternal Ord. of Police, Inc., 372.**

MEDICAL MALPRACTICE

Discovery—medical review privilege—depositions of non-party physicians—scope of protection—In a medical malpractice action brought against three doctors (defendant physicians) arising from a patient's death, one day after being discharged from the hospital, from aortic aneurysm and aortic dissection—even though the patient had been diagnosed with aortic dissection during his stay—although the subpoenaed non-party physicians could be questioned in depositions about any matter related to decedent's care and their knowledge of other incidents involving defendant physicians, they could not be compelled to answer any inquiries where their testimony would provide information gained solely through medical review committee discussions that would be protected under the medical review privilege. The trial court's discovery order was partially vacated and the matter was remanded to the trial court to clarify this provision of its order in accordance with applicable law. **McGehee v. Farber, 271.**

Discovery—physician-patient privilege—spreadsheet of patient complaints not protected—In a medical malpractice action brought against three doctors arising from a patient's death, one day after being discharged from the hospital, from aortic aneurysm and aortic dissection—even though the patient had been diagnosed with aortic dissection during his stay—the trial court did not err by requiring UNC Health, a non-party to the suit, to disclose during discovery a spreadsheet of patient complaints mentioning the doctor who had conducted the patient's examination. The complaints had been submitted to UNC Health's patient-relations department and not to physicians for treatment purposes, and, further, the trial court had examined the spreadsheet in camera and properly determined that it did not contain privileged physician-patient information. As an additional safeguard, the trial court ordered UNC Health to redact any protected health information and to produce the spreadsheet subject to a protective order. **McGehee v. Farber, 271.**

MEDICAL MALPRACTICE—Continued

Discovery—statutory privilege—Patient Safety Act—patient safety work product—SAFE report not protected—In a medical malpractice action brought against three doctors arising from a patient's death, one day after being discharged from the hospital, from aortic aneurysm and aortic dissection—even though the patient had been diagnosed with aortic dissection during his stay—the trial court did not err by requiring UNC Health, a non-party to the suit, to produce a subpoenaed document called the Safety Awareness for Everyone (SAFE) report. Despite its argument that the document was protected from disclosure under the federal Patient Safety Act, UNC Health failed to carry its burden of showing that the document qualified as patient safety work product under the statute, since the document was not created for the purpose of reporting to a patient safety organization and did not include the deliberations or analysis of a patient safety evaluation system. **McGehee v. Farber, 271.**

PARTIES

Breach of contract dispute—necessary parties—dismissal of parties prior to trial—In a business dispute involving three jointly owned limited liability companies, the trial court's order granting specific performance—after a jury rendered verdicts finding that the parties had entered into a contract and that defendant had breached that contract with regard to plaintiff's ownership interest in two of the companies—was affirmed. Although a prior order entered by a different judge had granted summary judgment in favor of two parties to the lawsuit, thereby resolving those parties' claims and dismissing them from the suit prior to trial, the dismissed parties were not necessary to the adjudication of whether plaintiff was entitled to a percentage of the beneficial economic interest under the contract; the specific performance order only affected defendant's interests and not those of the third parties. **Paez v. Pettis, 310.**

PUBLIC RECORDS

Confidential personnel record—report of town's internal investigation of an employee—trial court's authority to order disclosure—limited—In a dispute between a town and a local media company seeking disclosure of records tied to the town's internal investigation of a police officer accused of misconduct, the trial court erred by ordering the town "to release" portions of a report summarizing the findings of the investigation. Under N.C.G.S. § 160A-168(c)(4), the trial court's authority to order disclosure of the report—a city employee's confidential personnel record under N.C.G.S. § 160A-168(a) and, therefore, not considered a public record absent a statutory exception—was limited to allowing any person to "examine" a relevant "portion" of the report, not to allow the "release" of the entire file to a media group for potential general publication. Additionally, the court improperly relied on section 160A-168(c1)(2), which allows municipalities to withhold records about a possible criminal investigation of an employee; this section cannot be invoked by a court to compel disclosure of such records, and moreover, the report at issue in this case did not concern a criminal investigation. **Gray Media Grp., Inc. v. Town of Matthews, 199.**

Email regarding town's internal investigation of an employee—names of other town employees—improperly redacted—In a dispute between a town and a local media company seeking disclosure of records tied to the town's internal investigation of a police officer accused of using excessive force during an arrest,

where the town disclosed an email between the town's human resources director and its counsel but redacted the names of four law enforcement officers who were present during the alleged incident, the trial court did not err in ordering the town to release an unredacted version of the email. Although a city employee's confidential personnel files are generally protected from disclosure under N.C.G.S. § 160A-168(c), the plain language of subsection (b)(1) makes every city employee's name a matter of public record for purposes of the Public Records Act; thus, disclosing one employee's name in another employee's personnel file would not necessarily reveal information that the legislature intended to protect under the statute. **Gray Media Grp., Inc. v. Town of Matthews, 199.**

SPECIFIC PERFORMANCE

Breach of contract—beneficial economic interest—no conflict with prior summary judgment order—In a business dispute involving three jointly owned limited liability companies, the trial court's order granting specific performance—after a jury rendered verdicts finding that the parties had entered into a contract and that defendant had breached that contract with regard to plaintiff's ownership interest in two of the companies—did not constitute an improper overruling of a prior summary judgment order that had been entered by a different superior court judge. The prior order had not determined the specific ownership percentages of the parties in one of the companies and, further, the order granting specific performance recognized and enforced plaintiff's forty percent ownership in the beneficial economic interest in the disputed company, leaving the ownership interests (divided between defendant and a third party) undisturbed. **Paez v. Pettis, 310.**

Breach of contract—inadequacy of other remedies—beneficial economic interest—abuse of discretion analysis—In a business dispute involving three jointly owned limited liability companies established to run a commercial kitchen space, the trial court did not abuse its discretion by entering an order of specific performance after a jury rendered verdicts finding that the parties had entered into a contract and that defendant had breached that contract with regard to plaintiff's ownership interest in two of the companies. Based on the record, the trial court clearly considered the inadequacy of other remedies to provide plaintiff the full benefits of the parties' contract, since the court took into account the complexities of the case, including: the real property and substantial investment expended, structure of the businesses, and involvement of third parties. Further, the trial court's determination that plaintiff was the owner of forty percent of the beneficial economic interest in one of the companies was supported by the trial court's findings of fact which were, in turn, supported by evidence produced at trial. **Paez v. Pettis, 310.**

TERMINATION OF PARENTAL RIGHTS

Findings of fact—weighing of evidence—best interest determination—no misapprehension of law—In a termination of parental rights proceeding where the juvenile had been removed from her home and adjudicated neglected and dependent due to a history of domestic violence between her mother and father (which included a shooting of the mother by the father), the mother's argument that the court misapprehended the law—and thus erroneously found that permanence might be achieved for the child only through adoption—was without merit. The challenged findings of fact reflected the court's weighing of the statutory factors as applied to the evidence presented, not a misunderstanding of the law regarding permanent plans.

Because the court applied the correct legal framework and was not required to make written findings regarding dispositional alternatives, the termination order was affirmed. **In re T.M., 254.**

Grounds for termination—incarcerated parent—alternative child-care arrangement—sufficiency of evidence and findings—The trial court's order terminating respondent-father's parental rights in his daughter on multiple grounds (neglect, failure to make reasonable progress, and lack of proper care and supervision) was vacated and the matter was remanded for further proceedings and entry of a new order. Three of the trial court's findings of fact—regarding whether respondent had failed to: (1) sign a case plan, (2) complete a substance abuse and mental health assessment, and (3) complete substance abuse classes—were disregarded as being unsupported by the evidence. Further, the trial court largely, and improperly, based its decision to terminate on respondent's incarceration. Finally, although some evidence and certain findings supported the ground that respondent was incapable of providing for the proper care and supervision of his daughter (N.C.G.S. § 7B-1111(a)(6)), the trial court did not make the necessary findings regarding the availability of alternative child care arrangements at the time of the termination hearing. The decision of whether to receive additional evidence on remand was left to the trial court's discretion. **In re L.B., 237.**

WORKERS' COMPENSATION

Death benefits—injury-by-accident claim—issues raised in Form 44—no findings of fact—opinion and award vacated and remanded—In a case brought by the wife and son (plaintiffs) of a deceased police sergeant who was employed by the City of Winston-Salem (defendant) and who died of complications related to COVID-19, which he and a number of other officers contracted after working at a local fair during the COVID-19 pandemic, the Full Commission's opinion and award denying plaintiffs' claim for death benefits was vacated and the matter was remanded. The Full Commission failed to address certain issues listed on plaintiffs' Form 44 application for review of the deputy commissioner's opinion and award denying their death benefits claim, including plaintiffs' injury-by-accident claim and multiple evidentiary issues, most of which pertained to plaintiffs' motions to compel discovery of records containing the identities of the other officers who had contracted the virus. The failure to address these issues and to enter specific findings of fact and conclusions of law regarding each one violated N.C.G.S. § 97-85, which governs the Full Commission's review of a deputy commissioner's opinion and award. **McDonald v. City of Winston-Salem, 260.**

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.

BOBBY DALES, JR., PLAINTIFF
v.
GARDNER-WEBB UNIVERSITY, DEFENDANT

No. COA25-699

Filed 4 March 2026

1. Emotional Distress—student-athlete claims against university—student altercation—no duty of care—summary judgment proper

The trial court properly granted summary judgment in favor of a university on plaintiff's claims for battery, intentional infliction of emotional distress, and negligent infliction of emotional distress arising from a physical altercation between plaintiff, a member of the football team, and other student-athletes, which resulted in plaintiff and the others receiving disciplinary sanctions. Despite plaintiff's assertion that the university owed him a duty of care based on its own disciplinary policies, plaintiff's injuries did not occur during a school-sponsored practice or event, but at night in a dormitory apartment.

2. Agency—student-athlete claims against university—student altercation—no principal-agency relationship—summary judgment proper

The trial court properly granted summary judgment in favor of a university on plaintiff's claims for battery, intentional infliction of emotional distress, and negligent infliction of emotional distress arising from a physical altercation between plaintiff, a member of the football team, and other student-athletes in a dormitory apartment. There was no genuine issue of material fact regarding plaintiff's claim that the university was liable to him based on an agency relationship; first, the students' status as members of the football team—for which they had signed a student-athlete code of conduct as well as participation agreements—did not make them agents of the university and, second, the university owed no duty of care to protect plaintiff from independent criminal acts.

Judge HAMPSON concurring in part and dissenting in part.

Appeal by defendant from judgment entered 14 July 2022 by Judge John M. Dunlow in Edgecombe County Superior Court. Heard in the Court of Appeals 10 February 2026.

Kennedy, Kennedy, Kennedy & Kennedy, L.L.P., by Harvey L. Kennedy, and Harold L. Kennedy, III, for the plaintiff-appellant.

Cranfill Sumner LLP, by Patrick H. Flanagan, Joseph R. Holguin, and Steven A. Bader, for the defendant-appellee.

TYSON, Judge.

Bobby Dales, Jr. ("Plaintiff") appeals from order entered granting summary judgment to Gardner-Webb University ("Defendant"). We affirm.

I. Background

Plaintiff attended Defendant from 2017 until he graduated in May 2021. He was a member of the varsity football team along with Quinton Jones, Keegan Smith, Ricardo Johnson, and James Ellis. Plaintiff's girlfriend at the time, Ashadan Forbes, shared an on-campus, female-only apartment at University Commons with Ashley Robinson, Jones' girlfriend, Ciara Ashworth, Smith's girlfriend, and another female student. Robinson was a Resident Advisor (RA) at University Commons.

During the 2020-2021 winter break, Robinson left campus and gave her RA key to Jones, who stayed in the apartment over the break. Upon returning from break and finding Jones inside the apartment, Forbes contacted Robinson to voice her concerns about Jones' presence inside the female-only apartment. This led to a confrontation between Forbes, Robinson, and Jones on the afternoon of 15 January 2021, after Forbes had returned to the apartment. Forbes called Plaintiff to share what happened. Plaintiff then called Jones to resolve the issues.

That night, when Plaintiff and Forbes were eating dinner in Forbes' room, Robinson asked Forbes to attend a "roommate meeting" in the living room of the apartment. After approximately ten minutes, Robinson called Plaintiff into the living room, and after he indicated his intent to stay out of the meeting, Robinson then called Jones.

Jones entered the apartment shortly thereafter with a red cup in his hand, and in an aggressive manner asked, "what the problem is?" Because of Jones' behavior, Plaintiff put himself between Jones and Forbes. At this point, Jones physically attacked Plaintiff. Ashworth then called Smith, who arrived with Johnson and Ellis. The three men purportedly joined Jones in physically attacking Plaintiff. At one point during the fight, Jones put Plaintiff into a chokehold. The fight continued until Jamari Brown, another football player, showed up and pulled Plaintiff's assailants off of him.

Forbes called Defendant's campus police, but the assailants had fled the scene before the officers arrived. While Officer J.E. Bluff took statements from Plaintiff and Forbes, Jessika Raduly, Defendant's Student Housing Manager, and James Parker, Defendant's Assistant Director of Student Conduct & Residence Education, also arrived at the apartment.

Plaintiff was bleeding from his lip but declined medical attention after Officer Bluff offered. Officer Bluff informed Plaintiff he could not remain at the apartment building for the rest of the night. Officer Bluff accompanied Raduly and Parker to the apartment where Plaintiff's assailants were to inform them they could not return to University Commons or another building for the rest of the night. After Officer Bluff left, Plaintiff sought medical treatment at the Atrium Health Cleveland Medical Center where he received stitches and a shot. Plaintiff and Forbes then spent the night at a nearby hotel.

An incident report was filed, and Parker, as the Chief Hearing Officer for student conduct, reviewed the report, Officer Bluff's report, witness statements, and a phone video of the altercation. On 20 January 2021, Plaintiff received an email from Parker describing purported violations of Defendant's Code of Conduct with which he was being charged. Parker also informed Plaintiff of a meeting scheduled for the following day to discuss the incident. After the meeting, Parker found Plaintiff was responsible for assault as defined by Gardner-Webb's Code of Conduct. Plaintiff's disciplinary sanctions included a $300 fine and placement on disciplinary probation. Three of the other students involved in the incident were also disciplined.

Plaintiff appealed the initial decision and had an appeal hearing on 1 February 2021 with Lesley Villarose, the Vice President of Student Development and Dean of Students, at Gardner-Webb. Villarose upheld the discipline imposed by Parker, based upon her review of the incident and documentation. She issued a written outcome to Plaintiff on 4 February 2021. Plaintiff did not appeal or further challenge Villarose's decision. Plaintiff graduated from Defendant Gardner-Webb University in May 2021.

Plaintiff instituted this action in the Edgecombe County Superior Court on 14 July 2022 alleging battery, intentional infliction of emotional distress, and negligent infliction of emotional distress. Plaintiff amended his complaint on 17 March 2023. Defendant filed a motion for summary judgment on 5 March 2025 and an amended motion for summary judgment on 18 April 2025. The trial court heard arguments on the motion on 28 April 2025.

The trial court granted Defendant's motion for summary judgment on 5 May 2025 for all claims. Plaintiff timely filed a notice of appeal on 8 May 2025.

II. Jurisdiction

This Court has jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2025).

III. Standard of Review

North Carolina Rule of Civil Procedure 56(c) allows a moving party to obtain summary judgment upon demonstrating "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" show "there is no genuine issue as to any material fact," and they are "entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2025). "An issue is genuine if it can be supported by substantial evidence." *Baer v. Baer*, 294 N.C. App. 551, 558, 904 S.E.2d 815, 820 (2024) (quoting *Cox v. Cox*, 75 N.C. App. 354, 355, 330 S.E.2d 506, 507 (1985)).

"Summary judgment is a drastic measure and is rarely appropriate in negligence cases." *Rouse v. Pitt County Memorial Hospital*, 343 N.C. 186, 191, 470 S.E.2d 44, 47 (1996) (citation and internal quotation marks 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).

"The party moving for summary judgment bears the burden of establishing . . . there is no triable issue of material fact." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citation omitted). "This burden may be met by proving . . . an essential element of the opposing party's claim is non-extant, or by showing through discovery . . . the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense[,] which would bar the claim." *Id.* (citation and internal quotation marks omitted).

A defendant may show entitlement to summary judgment by: "(1) proving that an essential element of the plaintiff's case is nonexistent; (2) showing through discovery . . . plaintiff cannot produce evidence to support an essential element of his or her claim; or (3) showing . . . plaintiff cannot surmount an affirmative defense." *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828 (1995) (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). "A plaintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, summary judgment is proper." *Asher v. Honeycutt*, 284 N.C. App. 583, 589, 876 S.E.2d 660, 666 (2022) (citation and internal quotation marks omitted).

An order granting summary judgment is reviewed *de novo* on appeal. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

IV. Defendant's Legal Duty to Plaintiff

[1] Plaintiff argues the trial court erred in granting Defendant's motion for summary judgment. Plaintiff relies upon *Davidson v. Univ. of N.C. at Chapel Hill*, 142 N.C. App. 544, 552, 543 S.E.2d 920, 925 (2001) and two persuasive authorities from foreign jurisdictions, *Kleinknecht v. Gettysburg College*, 989 F.2d 1360 (3d Cir. 1993) and *Pinson v. State*, 1995 WL 739820 (Tenn. App. 1995), to support his argument defendant owed him a duty of care based on a special relationship between himself and Defendant-Gardner-Webb University.

"Whether a defendant owes a plaintiff a duty of care is a question of law." *Davidson*, 142 N.C. App. at 552, 543 S.E.2d at 925 (citing *Pinnix v. Toomey*, 242 N.C. 358, 362, 87 S.E.2d 893, 897 (1955)).

Plaintiff's reliance on these cases is misplaced. Each court, including this one, in *Davidson*, relied upon the fact the alleged negligent conduct occurred during the plaintiff's participation in either a school-sponsored practice or event to establish a duty derived from a special relationship that existed. In *Davidson*, where the plaintiff was injured during a cheerleading stunt, this Court specified the holding was "based on the fact that plaintiff was injured *while practicing as part of a school-sponsored, intercollegiate team*." *Id.* at 556, 543 S.E.2d at 928 (emphasis supplied).

While Plaintiff and the other team involved were student-athletes at Defendant, he was not injured while participating in a school or team-sponsored event. He was injured after hours inside a dormitory apartment. Plaintiff's factual circumstances are markedly different from these cases upon which he relies. In *Davidson*, this Court clearly stated,

"that a university should not generally be the insurer of its students' safety, and . . . the student-university relationship, standing alone, does not constitute a special relationship giving rise to a duty of care." *Id.*

Plaintiff argues Defendant owed him a duty of care it created by Defendant's own disciplinary policies. This assertion is contrary to our prior holding in *Davidson*. *Id.* Plaintiff further asserts he alleged sufficient facts based on ordinary principles of negligence. As in *Davidson*, "[a]ctionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law." *Id.* at 553, 543 S.E.2d at 926 (quoting *Pinnix*, 242 N.C. at 362, 87 S.E.2d at 897).

Nothing in either *Davidson*, *Kleinknecht* or *Pinson* compels a contrary outcome. Under *de novo* review, Defendant did not owe Plaintiff a legal duty to preclude summary judgment. Plaintiff's arguments are overruled.

V. Agency-Principal Relationship

[2] Plaintiff argues Defendant is liable to him based upon an agency relationship. Plaintiff asserts Defendant was the principal to the assailants by virtue of their status as members of the football team, who had signed a Student-Athlete Code of Conduct and Athletics Grant-in-Aid/Participation Agreements. Plaintiff's arguments are misplaced.

A principal-agent relationship arises upon two essential elements: "(1) authority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent." *Harrold v. Dowd*, 149 N.C. App. 777, 785, 561 S.E.2d 914, 920 (2002) (citation omitted). While Defendant's Code of Conduct imposed potential sanctions and punishments for violations, Defendant did not direct, acquiesce, or have any authority over their actions. Plaintiff does not point to any language in either document which provides any authority and control. *Id.*

Plaintiff asserts Defendant ratified their conduct by not punishing a player for the attack on him to enable their claims for battery and intentional infliction of emotional distress. Ratification occurs when "the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." *Espinosa v. Martin*, 135 N.C. App. 305, 308, 520 S.E.2d 108, 111 (1999) (citations and quotation marks omitted). Plaintiff points to the purported lack of punishment to a player to signify ratification. This action or inaction is not an act "done or professedly done" on Defendants' account. *Id.*

"[R]atification requires: (1) that at the time of the act relied upon, the principal had full knowledge of all material facts relative to the unauthorized transaction, and (2) that the principal had signified his assent or his intent to ratify by word or by conduct which was inconsistent with an intent not to ratify." *Hendrix v. Town of W. Jefferson*, 273 N.C. App. 27, 35, 847 S.E.2d 903, 909 (2020) (citation omitted).

The individuals involved in the assault were not agents of Defendant and their conducts were investigated and acted upon. A different or lack of punishment alone does not arise to show ratification. Nowhere does any purported violation of National Collegiate Athletic Association or Defendant's own internal policies create an actionable breach of the duty of care. *Davidson*, 142 N.C. App. at 556, 543 S.E.2d at 928. We all agree Defendant did not owe a duty to protect Plaintiff from independent criminal acts. As such, a duty to Plaintiff to enact, in Plaintiff's opinion, an adequate punishment on others does not exist. If there is no duty owed, no genuine issue of material fact exists. Plaintiff's arguments are overruled. *Id.*

VI. Conclusion

Under *de novo* review, Defendant did not owe Plaintiff a legal duty to preclude summary judgment for purported intentional or negligent acts or omissions. Plaintiff also failed to forecast Defendant's potential liability based upon an agency relationship. Plaintiff's forecast of evidence fails to establish a genuine issue of material facts exists. The trial court properly granted summary judgment for Defendant on all claims. The order of the trial court is affirmed.

AFFIRMED.

Judge ZACHARY concurs.

Judge HAMPSON concurring in part, dissenting in part, by separate opinion.

HAMPSON, Judge, concurring in part, dissenting in part.

I fully concur in the Opinion of the Court that Summary Judgment in favor of Defendant was properly granted on the intentional torts of Intentional Infliction of Emotional Distress and Battery. The remaining

negligence claim—Negligent Infliction of Emotional Distress (NIED)—however, requires separate analysis.

Plaintiff's NIED claim arises both from allegations Defendant: (1) had a "special relationship" with Plaintiff and failed to prevent the altercation; and (2) committed alleged failures and violations of policies in the subsequent investigation of the altercation. To the extent Plaintiff's NIED claim arises out of a claim of a "special relationship" imposing a duty on Defendant to prevent the altercation, here too Summary Judgment was properly granted for Defendant. *See generally Mynhardt v. Elon Univ.*, 220 N.C. App. 368, 376, 725 S.E.2d 632, 637 (2012). I concur in the Opinion of the Court in that regard, too.

However, in my view, there is a genuine question of fact remaining on the material issue of whether Defendant breached any duty owed to Plaintiff arising from its investigation and discipline of Plaintiff and that the resulting discipline imposed on Plaintiff foreseeably resulted in severe emotional distress. Plaintiff alleges and forecasts evidence Defendant violated various NCAA and University policies in its handling of the investigation into the altercation thereby breaching a duty owed to Plaintiff. On the other hand, Defendant has forecast evidence it acted appropriately and within the bounds of the standard of care in conducting its investigation. As such, Summary Judgment was not proper on the NIED claim. *See Foster v. Crandell*, 181 N.C. App. 152, 169-70, 638 S.E.2d 526, 537-38 (2007).

GRAY MEDIA GROUP, INC., D/B/A WBTV, PLAINTIFF
v.
TOWN OF MATTHEWS, DEFENDANT

No. COA25-332

Filed 4 March 2026

1. Public Records—confidential personnel record—report of town's internal investigation of an employee—trial court's authority to order disclosure—limited

In a dispute between a town and a local media company seeking disclosure of records tied to the town's internal investigation of a police officer accused of misconduct, the trial court erred by ordering the town "to release" portions of a report summarizing the findings of the investigation. Under N.C.G.S. § 160A-168(c)(4), the trial court's authority to order disclosure of the report—a city employee's confidential personnel record under N.C.G.S. § 160A-168(a) and, therefore, not considered a public record absent a statutory exception—was limited to allowing any person to "examine" a relevant "portion" of the report, not to allow the "release" of the entire file to a media group for potential general publication. Additionally, the court improperly relied on section 160A-168(c1)(2), which allows municipalities to withhold records about a possible criminal investigation of an employee; this section cannot be invoked by a court to compel disclosure of such records, and moreover, the report at issue in this case did not concern a criminal investigation.

2. Public Records—email regarding town's internal investigation of an employee—names of other town employees—improperly redacted

In a dispute between a town and a local media company seeking disclosure of records tied to the town's internal investigation of a police officer accused of using excessive force during an arrest, where the town disclosed an email between the town's human resources director and its counsel but redacted the names of four law enforcement officers who were present during the alleged incident, the trial court did not err in ordering the town to release an unredacted version of the email. Although a city employee's confidential personnel files are generally protected from disclosure under N.C.G.S. § 160A-168(c), the plain language of subsection (b)(1) makes every city employee's name a matter of public record for purposes of the Public Records Act; thus, disclosing one employee's

name in another employee's personnel file would not necessarily reveal information that the legislature intended to protect under the statute.

Appeal by defendant from order entered 13 September 2024 by Judge Donald R. Cureton Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 October 2025.

Parker Poe Adams & Bernstein LLP, by Daniel E. Peterson, for defendant-appellant.

Ballard Spahr LLP, by Lauren P. Russell, for plaintiff-appellee.

FLOOD, Judge.

Defendant, the Town of Matthews (the "Town"), appeals from an order granting in part and denying in part Plaintiff's, Gray Media Group, Inc. d/b/a/ WBTV ("Gray Media"), Motion for Judgment on the Pleadings. On appeal, the Town contends the trial court erred by: first, ordering the Town to release confidential personnel records to a party not otherwise entitled to disclosure under N.C.G.S. § 160A-168(c), and second, ordering the Town to release an e-mail with redactions lifted such to disclose the name of the employee subject to an internal affairs investigation and the names of three other Town employees. After careful review, we affirm the trial court's order in part, vacate the trial court's order in part, and remand for entry of an order consistent with this opinion.

I. Factual and Procedural Background

In April of 2022, Rebecca Hawke, the Town's manager, launched an employee misconduct investigation to determine whether an officer (the "Officer") of the Town's Police Department used excessive force during an arrest that occurred on 11 January 2021. As part of this investigation, the Town retained US ISS Agency, LLC ("ISS"), to conduct "an independent administrative investigation" of the allegations against the Officer. In furtherance of the investigation, the Town also filed a petition (the "Petition") in accordance with N.C.G.S. § 132-1.4A(g) seeking release of law enforcement bodycam recordings (the "Bodycam Recordings") from four law enforcement officers who were present the night the Officer allegedly used excessive force. On 11 October 2022, the Mecklenburg County Superior Court issued an order granting release of the Bodycam Recordings to Hawke; two ISS employees; and the Town's Human Resources Director, Tonya McGovern.

After ISS finished the internal personnel investigation, ISS issued a report to the Town summarizing its findings (the "ISS Report"). Due to several reasons listed in the ISS Report, the Town sent a letter to the Officer on 9 December 2022, stating that his employment was terminated. The termination letter specifically quoted several portions of the ISS Report as reasons for terminating the Officer's employment.

On 10 August 2023, Nick Ochsner, an employee of Gray Media, submitted a public records request for, *inter alia*, the Bodycam Recordings, copies of certain communication records between the Town and the Town's counsel, copies of any contracts between the Town and ISS, and copies of the ISS Report. The Town produced several of the requested documents, including a partially redacted email (the "Email") between McGovern and the Town's counsel. The Town explained that it had redacted certain information—notably, the names of the four law enforcement officers depicted in the Bodycam Recordings—"to protect the privacy of employee personnel records pursuant to [N.C.G.S.] § 160A-168." The Town also declined to release the Bodycam Recordings, asserting the videos were not public records, and the ISS Report, contending the Town was prohibited from releasing the ISS Report because it is a personnel file under N.C.G.S. § 160A-168.

In response, counsel for Gray Media sent the Town a letter arguing the Town could not redact the four names in the Email for two reasons: first, because the law enforcement officer's names were included in the Petition for the Bodycam Recordings, which is a matter of public record, and second, because N.C.G.S. § 160A-168(b) explicitly provides that city employee names are a matter of public record. Gray Media also asserted that the Town was obligated to release the ISS Report because it was not considered a confidential employee personnel record under N.C.G.S. § 160A-168.

The parties could not agree as to whether the Town had to release an unredacted version of the Email and the ISS Report; thus, on 20 October 2023, Gray Media initiated the present action to compel disclosure of the Bodycam Recordings, the ISS Report, and the Email. Gray Media moved for judgment on the pleadings, attaching a news article, a copy of the Officer's termination letter, and a copy of the Email to its motion. On 14 June 2024, the Town filed a motion for summary judgment and a motion for the trial court to conduct an *in camera* review[1] of the ISS Report and

1. To review a document *in camera* means the trial court reviewed the document "in private, without revealing the contents in open court[.]" *Times News Pub. Co. v. Alamance-Burlington Bd. of Educ.*, 242 N.C. App. 375, 380 (2015).

the Email. The Town attached to its motion for summary judgment the Petition, the 11 October 2022 Order, and an affidavit of Hawke.

The parties' cross-motions and the Town's motion for *in camera* review came on for hearing on 26 June 2024. After the hearing, the trial court granted the Town's motion for *in camera* review but reserved ruling on the parties' cross-motions.

After reviewing the Email and the ISS Report *in camera*, the trial court entered an order granting in part and denying in part the parties' cross-motions. In its order, the trial court noted that, since the trial court considered matters outside the pleadings, it had converted Gray Media's motion for judgment on the pleadings to a motion for summary judgment. The trial court concluded there were "no genuine issues of material fact" and ordered the parties to do the following: with respect to the Bodycam Recordings, Gray Media must file a petition pursuant to N.C.G.S. § 132-1.4A(g); with respect to the Email, the Town must "release to [Gray Media] a version of the Email without redacting the names of the Town employees"; and, with respect to the ISS Report, the Town must "release portions of the confidential ISS Report to [Gray Media]. Portions of the [ISS R]eport that shall remain redacted pertain to any interviews with, and statements made by, officers other than [the Officer]."

The Town filed a timely notice of appeal. Gray Media does not appeal.

II. Jurisdiction

This Court has jurisdiction to review an appeal from a final judgment of a superior court pursuant to N.C.G.S. § 7A-27(b) (2023).

III. Standard of Review

The Town appeals from the trial court's order granting in part and denying in part Gray Media's Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. When a trial court considers matters outside of the pleadings, a "motion for judgment on the pleadings should be treated as a motion for summary judgment and disposed of in the manner and under the conditions set forth in Rule 56 of the North Carolina Rules of Civil Procedure." *Helms v. Holland*, 124 N.C. App. 629, 633 (1996).

Here, the trial court noted that it considered matters outside of the pleadings and converted Gray Media's Motion for Judgment on the Pleadings to a Motion for Summary Judgment. As such, "the motion for

judgment on the pleadings will be treated as motion for summary judgment on appeal." *Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 427 (2007).

"The standard of review in an appeal from an order granting a motion for summary judgment and denying a partial cross-motion for summary judgment is de novo." *Stevens v. Heller*, 268 N.C. App. 654, 658 (2019) (citing *Forbis v. Neal*, 361 N.C. 519, 523–24 (2007)). "Under a de novo standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Horne v. Town of Blowing Rock*, 223 N.C. App. 26, 32 (2012) (citation omitted). When this Court reviews an order granting a motion for summary judgment, "the question on appeal is whether there is a genuine issue as to a material fact and whether [the movant is] entitled to judgment as a matter of law." *Helms*, 124 N.C. App. at 633. "All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Owen v. Haywood Cnty.*, 205 N.C. App. 456, 458 (2010) (citation omitted).

"The same de novo standard applies to questions of statutory interpretation." *Schroeder v. City of Wilmington*, 282 N.C. App. 558, 565 (2022). "The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute. In seeking to discover this intent, the court should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Stevenson v. City of Durham*, 281 N.C. 300, 303 (1972). "[W]hen the language of a statute is clear and unambiguous, there is no room for judicial construction, and courts must give the statute its plain meaning." *Gray Media Grp., Inc. v. City of Charlotte through City Council*, 290 N.C. App. 384, 394 (2023).

IV. Analysis

On appeal, the Town argues the trial court erred by (A) ordering the Town to release confidential personnel records to a party not otherwise entitled to disclosure under N.C.G.S. § 160A-168(c), and (B) ordering the Town to release an unredacted version of the Email where the redactions were required to protect the privacy of the Town's employees. We address each argument in turn.

A. ISS Report

[1] The Town first argues the trial court erred by ordering the Town to release portions of the ISS Report to Gray Media because the ISS Report was a confidential record that could not be disclosed under N.C.G.S.

§ 160A-168. Specifically, the Town argues the trial court (1) abused its discretion by ordering a general release of the ISS Report pursuant to N.C.G.S. § 160A-168(c)(4); and (2) misapplied N.C.G.S. § 160A-168(c1)(2).

1. N.C.G.S. § 160A-168(c)(4)

"Access to public records in North Carolina is governed generally by our Public Records Act, codified as Chapter 132 of the North Carolina General Statutes." *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 462 (1999). Under the Public Records Act, "[t]he public records and public information compiled by the agencies of [the] North Carolina government or its subdivisions are the property of the people[,]" N.C.G.S. § 132-1(b) (2023), and "the public generally has liberal access to public records[,]" *Knight Pub. Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C. App. 486, 489 (2005). "Absent clear statutory exemption or exception, documents falling within the definition of 'public records' in the Public Records Law must be made available for public inspection." *Virmani*, 350 N.C. at 462 (citation and internal quotation marks omitted). The procedure to request inspection and disclosure of "public records" is governed by N.C.G.S. § 132-6. *See* N.C.G.S. § 132-6(a) (2023).

One statutory exception to the Public Records Law is the inspection and disclosure of "personnel files of employees, former employees, or applicants for employment maintained by a city[.]" N.C.G.S. § 160A-168(a) (2023); *see also Elkin Trib., Inc. v. Yadkin Cnty. Bd. of Cnty. Comm'rs*, 331 N.C. 735, 736, (1992) (holding that if a document falls under N.C.G.S. § 153A-98, which governs the inspection and disclosure of personnel files for county employees, it is not "governed by N.C.G.S. § 132-6 of the Public Records Act because N.C.G.S. § 153A-98 provides such inspection and disclosure may only be done as provided by that section"). As described by N.C.G.S. § 160A-168(a), a "personnel file consists of any information in any form gathered by the city with respect to that employee" and includes, but is not limited to, information "relating to his application, selection or nonselection, performance, promotions, demotions, transfers, suspension and other disciplinary actions, evaluation forms, leave, salary, and termination of employment." N.C.G.S. § 160A-168(a). "All information contained in a city employee's personnel file" is considered confidential so long as it is not subject to one of the exceptions rendering personnel information public in N.C.G.S. § 160A-168(b). N.C.G.S. § 160A-168(c) (2023); *see also* N.C.G.S. § 160A-168(b) (2023) (identifying twelve pieces of information, including name, age, salary, that are considered a matter of public record despite being contained within personnel files).

If the information is not considered a matter of public record under subsection (b), the information is, therefore, confidential and "shall be open to inspection only" in one of seven statutory exceptions enumerated in N.C.G.S. § 160A-168(c), including that, "[b]y order of a court of competent jurisdiction, any person may examine such portion of an employee's personnel file as may be ordered by the court." N.C.G.S. § 160A-168(c)(4) (2023).

As previously determined by this Court, the legislative intent behind N.C.G.S. § 160A-168 is to keep confidential information in city employee personnel files confidential, except under limited circumstances. *In re Brooks*, 143 N.C. App. 601, 606 (2001). In *Brooks*, we ascertained the legislative intent behind N.C.G.S. § 160A-168 by examining the plain language of the statute. *Id.*; *see also Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144 (1992) ("Statutory interpretation properly begins with an examination of the plain words of the statute." (citation omitted)). Cognizant of the fact that the plain language of N.C.G.S. § 160A-168 "does not provide for procedures allowing or directing the court to" use its inherent power under subsection (c)(4), we explained that the trial court "must utilize its inherent power and implement and follow procedures which effectively and practically effectuate the [legislative] intent of [N.C.G.S. §] 160A-168, that an officer's files remain confidential." *Brooks*, 143 N.C. App. at 611 (citation modified). We subsequently provided general guidelines for when the trial court utilizes its authority under N.C.G.S. § 160A-168(c)(4):

> The [s]uperior [c]ourt should make an independent determination that the interests of justice require disclosure of the confidential employment information. It is further within the [s]uperior [c]ourt's inherent power and discretion to implement other procedures as may be required to effectuate the legislature's intent that the information remain somewhat confidential. The court could, for example, limit that dissemination and use of disclosed materials to certain individuals, order an *in camera* inspection, or redact certain information

Id.

Although *Brooks* set forth the general guidelines, this Court did not address the scope of the trial court's authority under N.C.G.S. § 160A-168(c)(4) until *Release of Silk Plant Forest Citizen Rev. Comm.'s Rep. & Appendices v. Barker*, 216 N.C. App. 268 (2011). The specific issue this Court addressed in *Barker* was "whether the legislature

intended to grant to the trial court the authority to release portions of a city employee's confidential personnel file *to the general public*[.]" *Id.* at 271 (emphasis added). In addressing this issue, we examined the plain language of the statute, specifically focusing on the language the legislature chose to use "as a limiting mechanism." *Id.* at 272. We determined the legislature sought to keep the personnel files confidential by limiting examination of the file to "any person" as opposed to the "general public," and by granting the trial court the authority to permit the person to examine, rather than copy or mass produce, the confidential information. *Id.* Simply put, "the legislature chose to grant the trial court *limited authority* to allow 'any person' to 'examine' a relevant 'portion' of the file." *Id.* Relying on this Court's analysis of the legislative intent in *Brooks*, we held that the trial court did not have the authority to release of any portion of a city employee's confidential personnel file to the general public because, "even when justice requires disclosure of this information, the disclosure should be narrowly tailored in order to adhere to the legislative intent." *Id.* at 274. We then noted, in a footnote, that a trial court's determination under N.C.G.S. § 160A-168(c)(4) would likely be reviewed for an abuse of discretion because the trial court was given the " 'inherent power and discretion' to tailor the method of disclosure[.]" *Id.* at 274 n.8 (quoting *Brooks*, 143 N.C. App. at 611).

Here, the Town argued before the trial court, and the trial court concluded, that "the ISS Report is a confidential personnel record under" N.C.G.S. § 160A-168. Gray Media does not appeal the trial court's conclusion, and thus, for the purposes of appeal, we presume that the ISS Report is a confidential personnel record. *See Barker*, 216 N.C. App. at 271 (reasoning that, where the city argued the transcripts were a part of the officers' personnel files and did not contend otherwise on appeal, this Court may assume that the transcripts were confidential and protected under N.C.G.S. § 160A-168(c)). As a confidential personnel record, the ISS Report is protected under N.C.G.S. § 160A-168 and may not be disclosed absent a statutory exception. *See* N.C.G.S. § 160A-168(c).

When the trial court ordered the Town to release certain portions of the ISS Report, the trial court relied on the statutory exception that, "[b]y order of a court of competent jurisdiction, any person may examine such portion of an employee's personnel file as may be ordered by the court." *See* N.C.G.S. § 160A-168(c)(4). The Town, however, argues the trial court abused its discretion by ordering the Town to release portions of the ISS Report under N.C.G.S. § 160A-168(c)(4).

We are unable to determine whether the trial court abused its discretion because the Record on appeal does not contain a copy of the

ISS Report that the trial court reviewed *in camera*. We note that portions of the ISS Report are part of the Record because, as the Town concedes, the Town heavily quoted the ISS Report in the Officer's termination letter. Although the information in the ISS Report is considered confidential personnel information, certain portions of the ISS Report became subject to disclosure under the Public Records Act when the Town quoted the ISS Report in the Officer's termination letter. *See News & Observer Pub. Co. v. Poole*, 330 N.C. 465, 474 (1992) (concluding records that were once exempt from the Public Records Act became subject to disclosure under the Public Records Act when the records were placed in the public domain). Without a copy of the ISS Report that the trial court reviewed *in camera*, however, this Court can only speculate as to what the unquoted portions say. For example, the parts of the ISS Report that were not quoted in the Officer's employment termination letter may be exactly what the trial court ordered to remain redacted. On the other hand, the parts of the ISS Report that were not quoted in the Officer's employment termination letter, but were ordered to be released to Gray Media, could reveal information identifying the residence of a sworn law enforcement officer, thereby possibly violating N.C.G.S. § 160A-168(c4)(1). *See* N.C.G.S. § 160A-168(c4)(1) (2023). Without the ISS Report, however, we cannot readily determine what the ISS Report says, and we are "not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." *Pharr v. Worley*, 125 N.C. App. 136, 139 (1997) (citation omitted).

While we are unable to determine what the ISS Report says, we hold the trial court exceeded its authority under N.C.G.S. § 160A-168(c)(4) by ordering the Town "to release" portions of the ISS Report to Gray Media. As mentioned, this Court has stated that "the legislature chose to grant the trial court limited authority to allow 'any person' to '*examine*' a relevant 'portion' of the file." *Barker*, 216 N.C. App. at 271 (emphasis added); *see* N.C.G.S. § 160A-168(c)(4) ("By order of a court of competent jurisdiction, any person may *examine* such portion of an employee's personnel file as may be ordered by the court." (emphasis added)). We emphasize the word "examine" because "[t]he use of the word 'examine,' as opposed to 'copy' or another word pertaining to mass publication, indicates the legislature's intent to limit the exposure of these personnel files." *Id.* at 273. Although there may be "circumstances when justice requires that an individual . . . be permitted to examine a relevant portion of a city employee's personnel file, . . . a wholesale publication of even a portion of the file would be contrary to the legislative intent behind N.C.[G.S.] § 160A-168(c)(4)." *Id.* at 272. Where, as here, the trial

court ordered the "release" of confidential personnel information to Gray Media—doing business as WBTV—the threat of mass publication is greater. Thus, because the trial court does not have the authority under N.C.G.S. § 160A-168(c)(4) to order the release of any portion of a city employee's confidential personnel file, *see* N.C.G.S. § 160A-168(c)(4), the trial court erred by ordering the Town "to release" portions of the ISS Report to Gray Media. Accordingly, we vacate the trial court's order regarding the release of certain portions of the ISS Report and remand for entry of an order consistent with this opinion.

2. N.C.G.S. § 160A-168(c1)(2)

The Town also argues the trial court erred by utilizing subsection (c1)(2) as a "basis for the exercise of its discretion under N.C.G.S. § 160A-168(c)(4)." Specifically, the Town argues the trial court erred by analyzing subsection (c1)(2) because the ISS Report does not concern a criminal investigation and, even if it did, subsection (c1)(2) "provides the municipality with the option to not disclose the investigatory records to the investigated employee while the investigation is active."

As mentioned, confidential information in a city employee's personnel file "shall be open to inspection only" in one of seven statutory exceptions enumerated in N.C.G.S. § 160A-168(c). N.C.G.S. § 160A-168(c). Subsection (c1), however, provides the following four exceptions to N.C.G.S. § 160A-168(c):

> Even if considered part of an employee's personnel file, the following information need not be disclosed to an employee nor to any other person:
>
> (1) Testing or examination material used solely to determine individual qualifications for appointment, employment, or promotion in the city's service, when disclosure would compromise the objectivity or the fairness of the testing or examination process.
>
> (2) Investigative reports or memoranda and other information concerning the investigation of possible criminal actions of an employee, until the investigation is completed and no criminal action taken, or until the criminal action is concluded.
>
> (3) Information that might identify an undercover law enforcement officer or a law enforcement informer.
>
> (4) Notes, preliminary drafts and internal communications concerning an employee. In the event such

> materials are used for any official personnel decision, then the employee or his duly authorized agent shall have a right to inspect such materials.

N.C.G.S. § 160A-168(c1) (2023). Ordinarily, the city invokes one of the exceptions under subsection (c1) as a means to claim an exemption from the disclosure requirements under N.C.G.S. § 160A-168(c). *See Wind v. City of Gastonia*, 226 N.C. App. 180, 185, *aff'd*, 367 N.C. 184 (2013) ("It is under this exception enumerated in subsection (c1)(4) that [the city] asserts *its authority* to deny [the] plaintiff's request to inspect the documents at issue." (emphasis added)).

Here, in addition to utilizing its inherent authority under N.C.G.S. § 160A-168(c)(4), the trial court also relied on N.C.G.S. § 160A-168(c1)(2) in determining whether the Town should release the ISS Report to Gray Media. The Town, however, did not assert its authority under subsection (c1)(2) as a way to deny Gray Media's request to review the ISS Report. *See id.* Further, neither of the parties point to evidence indicating the ISS Report contained "information concerning the investigation of possible criminal actions of an employee[.]" *See* N.C.G.S. § 160A-168(c1)(2). As such, because subsection (c1) provides exceptions to the disclosure requirements under subsection (c), the trial court erred in using subsection (c1)(2) as a means to order disclosure of the ISS Report. The trial court's error in using subsection (c1)(2), however, does not affect our disposition because, as discussed, the trial court's order regarding the release of certain portions of the ISS Report must be vacated.

B. Email

[2] Next, the Town argues the trial court erred by ordering the Town to release an unredacted version of the Email. Specifically, the Town argues that it was obligated to redact the officers' names in the Email because "disclosing the identity of employees whose body-worn camera footage was needed for the investigation is confidential personnel information under [N.C.]G.S. § 160A-168." Further, the Town argues that "requestors are entitled to the name of every municipal employee, [but] not every document with a municipal employee's name on it notwithstanding any other statutory privilege."

Section 160A-168(b), provides:

> (b) The following *information* with respect to *each* city employee is a matter of public record:
>
> (1) Name.
>
> (2) Age.

> (3) Date of original employment or appointment to the service.
>
> (4) The terms of any contract by which the employee is employed whether written or oral, past and current, to the extent that the city has the written contract or a record of the oral contract in its possession.
>
> (5) Current position.
>
> (6) Title.
>
> (7) Current salary.
>
> (8) Date and amount of each increase or decrease in salary with that municipality.
>
> (9) Date and type of each promotion, demotion, transfer, suspension, separation, or other change in position classification with that municipality.
>
> (10) Date and general description of the reasons for each promotion with that municipality.
>
> (11) Date and type of each dismissal, suspension, or demotion for disciplinary reasons taken by the municipality. If the disciplinary action was a dismissal, a copy of the written notice of the final decision of the municipality setting forth the specific acts or omissions that are the basis of the dismissal.
>
> (12) The office to which the employee is currently assigned.

N.C.G.S. § 160A-168(b) (emphasis added). The statute further provides, "[a]ll information contained in a city employee's personnel file, other than the information *made public* by subsection (b) of this section, is confidential . . . ." N.C.G.S. § 160A-168(c) (emphasis added). As mentioned, this Court has already recognized that, according to the plain language of the statute, *see Gray Media Grp., Inc.*, 290 N.C. App. at 394, the legislative intent behind N.C.G.S. § 160A-168 is "to keep a city employee's personnel file confidential except under limited circumstances." *Barker*, 216 N.C. App. at 274.

Nonetheless, the release of a city employee's name located in another city employee's personnel file, does not necessarily reveal any confidential personnel information that the legislature intended to keep confidential; rather it releases only information that is already, by the plain

terms of the statute, "a matter of public record[.]" N.C.G.S. § 160A-168(b); *see Gray Media Grp., Inc.*, 290 N.C. App. at 394. Thus, according to the plain language of the statute, each city employee's name that is made public by subsection (b) is a matter of public record subject to disclosure under the Public Records Act. N.C.G.S. § 160A-168(b)(1). Accordingly, we affirm the trial court's order directing the Town to release a version of the Email without redacting the city employees' names.

V. Conclusion

For the reasons discussed, we hold the trial court did not err by ordering the Town to release a version of the Email without redacting the city employees' names; however, the trial court did err by ordering the Town to release portions of the ISS Report to Gray Media, where the trial court has the limited authority under N.C.G.S. § 160A-168(c)(4) to permit a person to *examine* a relevant portion of the file. We therefore affirm the trial court's order in part, vacate the trial court's order regarding the release of certain portions of the ISS Report, and remand for entry of an order consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Chief Judge DILLON and Judge GRIFFIN concur.

IN THE MATTER OF J.R.D.L.G. & S.L.K.D.L.G.

No. COA25-565

Filed 4 March 2026

Child Abuse, Dependency, and Neglect—adjudication—abuse and neglect—sufficiency of findings of fact—sufficiency of conclusions of law

In a juvenile proceeding where one of respondent-parents' children was brought to a hospital with multiple fractures six weeks after a difficult breech birth at home, the district court's unchallenged findings of fact—including that respondent-parents and the maternal grandmother were the infant's sole caretakers, the infant suffered unexplained non-accidental injuries, the injuries were in various stages of healing, and the infant did not suffer any injuries after a safety placement with her paternal grandparents—supported the court's conclusions of law, even assuming the

challenged findings were not supported by competent evidence. As to the infant's older sibling, the infant's unexplained non-accidental injuries were found to be the result of abuse occurring while in the care of respondent-parents and the maternal grandmother, and the trial court found the older child lived, and would continue to live, in the environment which had permitted such abuse. Accordingly, the adjudications—of the younger child as abused and neglected, and the older child as neglected—were affirmed.

Judge TYSON dissenting.

Appeal by respondents from judgments entered 23 January 2025 and 22 February 2025 by Judge Nathaniel M. Knust in Cabarrus County District Court. Heard in the Court of Appeals 28 January 2026.

Robinson & Lawing, LLP, by Christopher M. Watford, for the respondent-appellant-father.

Reece & Reece, by Mary McCullers Reece, for the respondent-appellant-mother.

Administrative Office of the Courts, by NC GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

Hartsell & Williams, P.A., by Kimberly B. Kisner, for the petitioner-appellee.

DILLON, Chief Judge.

Respondent-Mother and Respondent-Father appeal from initial adjudication and disposition orders entered 23 January 2025 and 22 February 2025, which adjudicated their youngest minor child as abused and neglected and their older child as neglected. We affirm the trial court's orders.

I. Background

Respondents are the natural parents of J.D.L.G. ("Joseph") and S.D.L.G. ("Sarah").[1]

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

The children lived with Respondents and their maternal grandmother. Mother delivered Sarah at her home with two midwives and a doula present. Mother labored for thirty-five hours, and Sarah was born in a frank breech position. Sarah presented through the birth canal folded in half, buttocks first.

Later Respondents noticed Sarah, who was generally a "calm" baby, was "fussier than normal." When Mother gently lifted Sarah's right leg, she cried. Respondents then took Sarah to the Emergency Department at Atrium Health-Cabarrus County.

Sarah underwent ultrasound and x-rays. Atrium diagnosed Sarah with fractures of both clavicles, several ribs, corner fractures of the proximal and distal tibia, bilateral corner fractures of the distal femurs, and a non-displaced fracture of the right mid-femur. The fractures were in various stages of healing and Sarah was transferred to Levine Children's Hospital in Charlotte.

Dr. Nicole Barrett, M.D., was the attending physician on the child protection team at Levine Children's Hospital and one of the medical providers who treated Sarah. Dr. Barrett met with Respondents and examined Sarah. Dr. Barrett noticed Sarah's right leg was in a "flexed and externally rotated position." Dr. Barrett ruled out brittle bone, rickets, and *osteogenesis imperfeta*. She could not diagnose Sarah with Ehlers-Danlos Syndrome nor rule it out because she opined diagnostic protocol for the syndrome begins at age five. Laboratory and genetic testing did not reveal any bone disorder or other natural causes for Sarah's injuries. Dr. Barrett noted Sarah had a subconjunctival hemorrhage on her eye and a blue and purple bruise on her right leg. Mother told Dr. Barrett she thought the bruise on Sarah's right leg was the result of a bug bite.

Dr. Barrett believed Sarah's clavicle fractures at six weeks could be attributed to birth trauma. Dr. Barrett observed Sarah had multiple fractures on both sides of her body in at least three different stages of healing and opined, "the types of fractures that she has are highly specific or inflicted injury." Dr. Barrett testified corner fractures are from either a pulling, twisting, or shaking and concluded they have a "high specificity for abuse or inflicted injury[.]" Dr. Barrett opined the rib fractures occurred from blunt force trauma to the rib cage or anterior or posterior compression of the spine. Dr. Barrett concluded the rib fractures would not occur through the routine handling of an infant or from a simple fall. Dr. Barrett further concluded Sarah's spiral pattern femur fracture with a twisting motion was caused by a pulling or torquing of the bone and was not consistent with an accidental injury in an infant her age.

Dr. Barrett, in her opinion, did not believe Sarah's injuries, other than the clavicle fractures, had resulted from the forces exerted at her delivery and birth. Dr. Barrett based her opinion on Sarah's birth purportedly being "non-traumatic" because it did not involve extraction of Sarah from the birth canal with forceps or by using a vacuum. Dr. Barrett's opinion concluded Sarah's six-week injuries, other than the clavicle fractures, were "consistent with inflicted trauma."

Respondents acknowledged they and Grandmother were Sarah's only parental and familial caregivers and custodians in her first six weeks after birth until she went to the Levine Children's Hospital. Respondents and Grandmother denied intentionally or negligently hurting Sarah, but, other than the at-home delivery and her frank breech position at birth, they could not explain Sarah's injuries except through treating physicians and expert testimony.

The children were temporarily placed in a safety placement with their paternal grandparents upon Sarah's discharge from Levine Children's Hospital. Respondents were allowed to move into the home with the paternal grandparents, however, their presence with the children was to be supervised at all times.

On 18 January 2024, Cabarrus County Department of Health and Human Services ("CCDHS") filed juvenile petitions alleging Sarah was abused and neglected and Joseph was neglected. Respondents' counsel tendered and had admitted Dr. Michael Holick, M.D., Ph.D., as a board-certified medical expert without objection. Dr. Holick testified and opined Respondents had Ehlers-Danlos Syndrome, a genetic disorder, and Sarah had a 75% likelihood of having Ehlers-Danlos Syndrome based upon her genetics alone. The trial court, however, found Dr. Holick's testimony uncredible, and also expressly found "no credible evidence showing any of [Sarah]'s injuries were caused or connected to any known or possible medical condition."

The district court adjudicated Sarah to be abused and neglected and Joseph neglected on 22 January 2025. Respondents appeal.

II. Standard of Review

"An appellate court reviews a trial court's adjudication to determine whether the findings are supported by clear . . . and convincing evidence and the findings support the conclusions of law." *In re G.C.*, 384 N.C. 62, 65 (2023) (citation omitted).

It is well settled that findings, if supported by clear and convincing evidence, "are deemed conclusive, even where some evidence supports

contrary findings." *In re J.A.M.*, 370 N.C. 464, 464 (2018) (citations omitted). Unchallenged findings of fact are presumed to be supported by sufficient evidence and are binding on appeal. *In re J.M.*, 384 N.C. 584, 591 (2023). We review the trial court's conclusions of law de novo. *In re G.C.*, 384 N.C. at 66 (citations omitted).

III. Adjudication of Sarah

An "[a]bused" juvenile is one "whose parent, guardian, custodian, or caretaker" either "[i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means." N.C.G.S. § 7B-101(1)(a). A "[n]eglected" juvenile is one "whose parent, guardian, custodian, or caretaker" engages in certain statutorily defined criteria, including failing to "provide proper care, supervision, or discipline" or "[c]reat[ing] or allow[ing] to be created a living environment that is injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15)(a), (e). "The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved [by the petitioner] by clear and convincing evidence." N.C. Gen. Stat. § 7B-805.

Mother and Father independently argue several of the district court's findings and conclusions are not supported by clear and convincing evidence or by supported findings of fact. We disagree.

While Respondents challenge several findings of fact, we believe the unchallenged findings support the trial court's conclusions of law, even assuming the challenged findings were not supported by competent evidence.[2] In addition to the trial court's unchallenged findings regarding Sarah's medical examinations and the results thereof, we find relevant the following unchallenged, *and thus binding*, findings of fact:

> 25. *[Sarah] was in the sole care and control of her parents in October 2023 per the testimony of the mother*, [ ], and on October 31, 2023, [Sarah] was taken to the Atrium Cabarrus ER due to signs of pain when [Sarah]'s leg was touched and/or manipulated. [Sarah] had X-Rays taken

2. Finding of Fact 21 provides: "Upon information and belief mother, father and maternal grandmother inflicted the injuries or allowed them to be inflicted on [Sarah] by unexplained non-accidental trauma." This finding, however, cannot serve as an affirmative finding to support the trial court's conclusions. *See In re J.C.M.J.C.*, 268 N.C. App. 47, 58 (2019) (explaining that findings based "[u]pon information and belief" "do not constitute affirmative findings of fact that would support a conclusion that the children are neglected").

> at the ER and it was determined based on those X-Rays that [Sarah] had numerous fractures in different stages of healing. On November 1, 2023, [Sarah] was then sent to Atrium Levine's Children's Hospital due to her injuries *being highly suspicious for non-accidental trauma* and for further examination. . . . [Sarah]'s bone density tests came back as normal bone mineralization, all her labs were normal, her additional radiographs were normal and *there were no other indicators that [Sarah] had any other disease or disorder that could have caused the fractures.* . . . [Sarah] did see multiple pediatric doctors during this time, and *it was determined that [Sarah] did not have any genetic issues which would cause her to have her bones broken more easily*.
>
> . . . .
>
> 29. Since the children were placed with a temporary safety provider, the paternal grandparents, on October 31, 2023, until the date the petition was filed on January 18, 2024, there were no findings of any further fractures or injuries . . . . *Since the paternal grandparents have been caring for [Sarah], she has not suffered any further breaks or fractures*. . . .
>
> . . . .
>
> 31. Dr. Barrett's testimony as an expert and her opinion supports the findings that [Sarah]'s injuries were consistent with non-accidental trauma and that *the Court finds that [Sarah] was exposed to physical abuse while in the care and control of her parents up until [Sarah] was admitted to the hospital. As a result [Sarah] suffered 16 fractures that are consistent with non-accidental trauma and has unexplained non-accidental injuries that are consistent with abuse resulting from being in the care of the mother, father, and/or caretaker.*

(Emphasis added).

These findings prompted the trial court to enter the following conclusion of law and ultimate finding:

> 34. The allegations contained in the petition support a finding that [Sarah] is abused and neglected. The status of the juvenile has been determined to be abused and

> neglected in that the juvenile's parent, guardian, custodian or caretaker has inflicted or allowed to be inflicted on the juvenile serious physical injury by other than accidental means, the juvenile's parent, guardian, custodian or caretaker has created or allowed to be created a substantial risk of serious physical injury to the juvenile by other than accidental means, the juvenile's parent, guardian, custodian, or caretaker does not provide proper care, supervision or discipline, the juvenile's parent, guardian, custodian, or caretaker has not provided or arranged for the provision of necessary medical care, and the juvenile's parent, guardian, custodian or caretaker creates or allows to be created in a living environment that is injurious to the juvenile's welfare.[3]

"This Court has previously upheld abuse adjudications where a child sustains unexplained, non-accidental injuries[,]" even in the absence of "a pattern of abuse or the presence of risk factors." *In re L.Z.A.*, 249 N.C. App. 628, 637 (2016). Based on the evidence offered at the hearing, the trial court determined that Sarah's injuries were unexplained, non-accidental, and occurred in Respondents' or Grandmother's care. Therefore, the trial court's findings (evidentiary and ultimate) support the trial court's conclusion that Sarah was abused.

Respondents rely on *In re K.L.*, 272 N.C. App. 30 (2020). There, this Court reversed an adjudication of abuse and neglect of a three-month old where:

> The trial court was rightly concerned that [the respondents] were unable to explain [the juvenile]'s fractures. But, that alone, as a matter of law, cannot support the trial court's conclusion that [the respondents] were responsible for [the juvenile]'s injuries. There is nothing to bridge the evidentiary gap between the unexplained injuries here and the conclusion that [the respondents] inflicted them, and, in fact, much of the evidence is in tension with that conclusion.

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3. Father contends this finding is a conclusion of law because this Court has held that "[w]hether a child is abused or neglected is a conclusion of law." *See In re Ellis*, 135 N.C. App. 338, 340 (1999). We agree that the first sentence of "Finding" 34 is a conclusion of law but conclude that the second sentence is properly characterized as an ultimate finding of fact. *See In re G.C.*, 384 N.C. at 67 (concluding that findings reciting the statutory language of G.S. 7B-101(15) are "properly characterized as ultimate findings").

In re K.L., 272 N.C. App. at 46-47 (footnote omitted). Accordingly, there must be a bridge between Sarah's unexplained injuries and the conclusion that Respondents inflicted the injury on Sarah. *See id.* at 40 ("[T]hough the exact cause of the child's injury was unclear, the trial court's findings of fact—or other evidence in the record—supported the inference that the respondent-parents were responsible for the unexplained injury.").

The unchallenged findings establish Respondents and Grandmother were Sarah's sole caretaker and that Sarah suffered "unexplained non-accidental injuries." Moreover, when examined, Sarah's injuries were in various stages of healing and Sarah did not show any signs of injuries after being placed in a safety placement with her paternal grandparents. Thus, contrary to Respondents' suggestion, these findings provide the necessary bridge between Sarah's injuries and the trial court's conclusion.

These same findings also support the trial court's conclusion of law that Sarah was neglected. *See In re L.Z.A.*, 249 N.C. App. at 638 ("Here, the evidence supporting the abuse adjudication also supports the neglect adjudication.").

IV. Adjudication of Joseph

Next, Respondents argue the district court erred by concluding Joseph was a neglected juvenile based upon his newborn sister's unexplained fractures.

Relevant here, the trial court found:

> 23. [Joseph] would live in a home where another juvenile has been abused or neglected.
>
> 30. [Joseph] lives in a home where another juvenile has been abused or neglected.

Respondent argues these findings are partially conclusions of law, but held above, Sarah was adjudicated as abused and neglected and thus the conclusions are supported. Additionally, Father concedes the factual component of these quasi-findings, that Joseph lived and would live with Sarah.

The trial court went on to conclude that Joseph was neglected and provided the ultimate finding that Respondents and Grandmother "[do] not provide proper care, supervision or discipline and . . . create[ ] or allow[ ] to be create a living environment that is injurious to [Joseph's] welfare."

Our Supreme Court recently examined the adjudication of a sibling of an infant with unexplained fractures in *In re E.H.*:

> In these cases, we reaffirmed longstanding precedent holding that a "court may not adjudicate a juvenile neglected *solely* based upon previous Department of Social Services involvement relating to other children," and that there must be "the presence of other factors to suggest the neglect or abuse will be repeated." But we also recognized that those "other factors" can be circumstances surrounding the abuse itself that indicate other children in the home could face similar harm.

388 N.C. 100, 105 (2025) (emphasis in original) (citations omitted). The Court further held:

> When a child is severely abused in the parents' care, and the parents cannot provide any plausible explanation for how those injuries occurred or assure social workers that the abuse will not happen again, the trial court properly can find that there is an unacceptable risk of similar abuse to other children in that same home in the future.

Id. at 107 (citations and footnote omitted).

Respondents assert they did not know how or why Sarah's sixteen fractures came about in the six weeks in their exclusive care as reflected by the trial court's findings of fact which characterize the injuries as "unexplained." Additionally, Sarah's injuries were found to be the result of abuse occurring while in Respondents' and Grandmother's care and the trial court found Joseph lived and would continue to live in the environment which permitted such abuse. Thus, "there is an unacceptable risk of similar abuse to [Joseph] in that same home in the future." *See id.* In light of the trial court's evidentiary findings as well as its ultimate findings, the trial court's conclusion that Joseph is neglected is properly supported.

V. Conclusion

The trial court's unchallenged findings of fact support the trial court's conclusions of law. Accordingly, we affirm the trial court's orders.

AFFIRMED.

Judge CARPENTER concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion incorrectly affirms the district court's order concluding Sarah was abused and neglected and Joseph was neglected. I vote to remand for adjudication and reconciliation and further supported findings of facts and conclusions. I respectfully dissent.

I. Background

Respondents are the natural parents of J.D.L.G. ("Joseph") and S.D.L.G. ("Sarah") (collectively the "Children"). *See* N.C. R. App. P. 42(b) (pseudonym used to protect the identity of minors). Sarah was born 14 September 2023. Her brother, Joseph, was born 20 September 2020.

The Children lived with Respondents and their Maternal Grandmother. Grandmother moved in with Respondents and Joseph prior to Sarah's birth to "assist with [Joseph]'s needs and prepare for [Sarah]'s birth." Respondent-Mother delivered Sarah at her home with two midwives and a doula present. Respondent-Mother labored for thirty-five hours and Sarah was born in a frank breech position. Sarah presented through the birth canal folded in half, buttocks first.

Respondents kept all medical appointments and took Sarah to her pediatrician three times, to the two midwives twice, the doula once, and a lactation consultant twice after birth. Respondent-Mother took Sarah to the chiropractor six weeks after birth on 30 October 2023. Sarah was described as "fussy" during the visit with the chiropractor. The chiropractor ended the appointment early and recommended for Respondent-Mother to continue breast feeding and for more "skin to skin" time to soothe Sarah.

The next morning, 31 October 2023, Maternal Grandmother took Joseph to school. Respondents noticed Sarah, who was generally a "calm" baby, was "fussier than normal." Respondents noticed redness and swelling on her right leg. When Respondent-Mother gently lifted Sarah's right leg, she cried. Respondents immediately took Sarah to the Emergency Department at Atrium Health-Cabarrus County around 12:30 p.m., "just to double check."

Sarah underwent ultrasound and x-rays. Sarah was diagnosed with fractures of both clavicles, several ribs, corner fracturs of the proximal and distal fibula, bilateral corner fractures of the distal femurs, and a non-displaced fracture of the right mid-femur. The fractures were in various stages of healing, and Sarah was transferred to Levine Children's Hospital in Charlotte.

Dr. Nicole Barrett, M.D. was the attending physician on the child protection team at Levine Children's Hospital and one of the medical providers who treated Sarah. Dr. Barrett is board certified in general pediatrics, board eligible in child abuse pediatrics, and a faculty member at the Wake Forest School of Medicine. She has evaluated hundreds of cases involving purported child mistreatment and child abuse. She was tendered and accepted as an expert in child abuse pediatrics at the Children's adjudication hearings without objection. Dr. Barrett is not a board-certified endocrinologist and was not admitted to testify or offer an opinion on matters within that specialty.

Dr. Barrett met with Respondents and examined Sarah. Dr. Barrett noticed Sarah's right leg was in a "flexed and externally rotated position." Dr. Barrett ruled out brittle bone, rickets, and *osteogenesis imperfeta*. She could not diagnose Sarah with Ehlers-Danlos Syndrome, nor rule it out, because she opined diagnostic protocol for the syndrome begins at age five. Laboratory and genetic testing did not reveal any bone disorder or other natural causes for Sarah's injuries. Dr. Barrett noted Sarah had a subconjunctival hemorrhage on her eye and a blue and purple bruise on her right leg. Respondent-Mother told Dr. Barrett she thought the bruise on Sarah's right leg was the result of a bug bite.

Dr. Barrett believed Sarah's clavicle fractures at six weeks could be attributed to birth trauma. Dr. Barrett observed Sarah had multiple fractures on both sides of her body in at least three different stages of healing and opined, "the types of fractures that she has are highly specific or inflicted injury." Dr. Barrett testified corner fractures are from either a pulling, twisting, or shaking and concluded they have a "high specificity for abuse or inflicted injury[.]" Dr. Barrett opined the rib fractures occurred from blunt force trauma to the rib cage or anterior or posterior compression of the spine. Dr. Barrett concluded the rib fractures would not occur through the routine handling of an infant or from a simple fall. Dr. Barrett further concluded Sarah spiral pattern femur fracture with a twisting motion was caused by a pulling or torquing the bone and was not consistent with an accidental injury in an infant her age.

Dr. Barrett opined she did not believe Sarah's injuries, other than the clavicle fractures, had resulted from the forces exerted at her delivery and birth. Dr. Barrett based her opinion on Sarah's birth purportedly being "non-traumatic" because it did not involve extraction of Sarah from the birth canal with forceps or by using a vacuum. Dr. Barrett's opinion concluded Sarah's six-week injuries, other than the clavicle fractures, were "consistent with inflicted trauma."

Respondents acknowledged they and Maternal Grandmother were Sarah's only parental and familial caregivers and custodians, other than their twelve or more visits to medical providers and staff in her first six weeks after birth until she went to the Levine Children's Hospital. Respondents and Maternal Grandmother vehemently denied intentionally or negligently hurting Sarah, but other than the difficult and prolonged delivery and her frank breech position at birth, could not explain Sarah's injuries, except through treating physicians and expert testimony. Respondents frequently received guests in their home; took Sarah on errands; took Sarah to medical providers and staff including those at Levine Children's Hospital; and, proudly showed her off with friends, coworkers, and extended family. Their actions and voluntarily seeking treatments, advice and follow-ups are entirely consistent with fit and good parenting and were in Sarah's best interests.

Cabarrus County Department of Health and Services ("CCDHS") and the Cabarrus County Sheriff's Office investigated. CCDHS instituted a safety plan, which Respondents completely followed. At the time of the hearing, no law enforcement agency had made accusations or filed charges against either Respondents, her Maternal Grandmother, or any medical providers or others who had come into contact with Sarah.

The Children were temporally placed in a safety placement with their parental grandparents upon Sarah's discharge from Levine Children's Hospital. Respondents were allowed to move into the home with the paternal grandparents on 30 November 2025, however, their presence with Sarah was to be supervised at all times.

Respondents fully cooperated with the CCDHS' requests to make Sarah's doctor's appointments. Respondents arranged for Sarah to visit Dr. Deanna Adkins, a pediatric endocrinologist, with the Duke University Health System in January 2024. Dr. Adkins noted:

> several concerning points. [Respondent] was pregnant during the winter and not on a vitamin D supplement during the majority of her pregnancy. The infant was also not on vitamin D and was on breast milk which has lower levels of vitamin D depending on the mother's levels. The attempt at turning the baby from the breech position and the and the (sic) vaginal breech delivery with prolonged labor over 30 hours put the baby at risk for fractures at two separate times.

Dr. Adkins recommended further evaluation of the infant's liver due to elevated enzymes ALT and AST. Dr. Adkins ruled out rickets from

the x-rays. Dr. Adkins noted elevated alkaline phosphatase and mildly elevated urinary creatine. Dr Adkins found no conclusive evidence of metabolic bone disease. Dr. Adkins referred Sarah to "genetics and have further testing including a whole exome sequence as there are a number of other genetic causes for fragile bones other than the osteogenesis imperfecta[.]"

CCDHS filed juvenile petitions alleging Sarah was abused and neglected and Joseph was neglected on 18 January 2024. Counsel for Respondents clearly and properly put CCDHS to its burden on proof. In addition, counsel called Sarah's treating pediatrician since birth, Wendy Talley, M.D., who testified at the hearing. Dr. Talley concluded she "fe[lt] strongly that [Sarah's] fractures were the result of a medical condition and not non-accidental trauma." Dr. Talley is a fact witness with actual knowledge and was not tendered as an expert. Her credentials, knowledge, and treatments were not challenged nor impeached by the State.

Respondents' counsel also tendered and had admitted, Dr. Michael Holick, M.D., Ph.D., as a board-certified medical expert without objection. Dr. Holick is a board-certified endocrinologist at Boston University School of Medicine. Dr. Holick testified he disagrees with Dr. Barrett and other current medical consensus opining Ehlers-Danlos Syndrome cannot be diagnosed in children under the age of five. Dr. Holick testified and opined Respondents had Ehlers-Danlos Syndrome, a genetic disorder, and Sarah had a 75% likelihood of having Ehlers-Danlos Syndrome based upon her genetics alone.

Dr. Holick testified Ehlers-Danlos syndrome is a group of inherited disorders, which affect connective tissues, primarily skin, joints and blood vessel walls. He stated connective tissue is a complex mixture of proteins and other substances, which provide strength and elasticity to the underlying structures in a body. Sufferers who have Ehlers-Danlos syndrome usually exhibit overly flexible joints and stretchy, fragile skin. If a wound requires sutures or stitches, the skin of a person with the syndrome often is not strong enough to hold them.

A more severe form, vascular Ehlers-Danlos syndrome, can cause the walls of blood vessels, intestines or uterus to rupture. Because vascular Ehlers-Danlos syndrome presents serious potential complications in pregnancy, seeking a genetic counselor prior to starting a family is advised.

Dr. Holick testified the most common signs of the symptom include: (1) Overly flexible joints. The connective tissue holding joints together is looser, allowing joints to move far past the normal range of motion;

(2) Joint pain and dislocations are common; (3) Stretchy skin; (4) Weakened connective tissue allows skin to stretch to a greater degree than normal. A provider can pull a pinch of skin up away from flesh, but it will snap right back into place when let go. The skin might also feel exceptionally soft and velvety to touch; and, (5) Fragile skin. Damaged skin often does not heal well. Stitches used to close a wound often will tear out and leave a gaping scar. These scars may look thin and crinkly.

Based upon the diagnosis of Respondents suffering from the genetic symptom, Dr. Holick opined Sarah had Ehlers-Danlos Syndrome because she also exhibited these typical characteristics of the Syndrome: blue sclera, joint hypermobility, and doughy-textured skin. Dr. Holick testified a child with Ehlers-Danlos Syndrome can fracture through normal handling and a frank breech birth delivery could exacerbate bone fractures in a child with Ehlers-Danlos Syndrome. This supported testimony and diagnosis is consistent with Dr Barrett's opinion the fractures of both clavicles could be attributed to the breech delivery at Sarah's birth.

Without adjudicating the conflicts in the properly admitted medical evidence and raised between the various physicians' testimonies and opinions and other witnesses, the district court deemed Dr. Holick's admitted expert testimony as "noncredible" and wholly disregarded it, Dr. Adkins', and Dr. Tally's testimonies and opinions. The district court concluded Sarah to be abused and neglected and Joseph neglected on 22 January 2025 and Respondents as responsible. Respondents appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(3) (2025).

III. Issues

Respondents argue the district court prejudicially erred by concluding Sarah was abused or that Sarah or Joseph were neglected.

IV. Standard of Review

"The standard for appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings of fact support its conclusions of law." *In re D.R.B.*, 182 N.C. App. 733, 735, 643 S.E.2d 77, 79 (2007). "The burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence." N.C. Gen. Stat. § 7B-1109(f) (2025). "The State then has the burden, at the adjudicatory state, to prove neglect and dependency by clear and

convincing evidence." *In re Evans*, 81 N.C. App. 449, 452, 344 S.E.2d 325, 327 (1986) (citation omitted).

In reviewing an adjudication order, this Court must determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations and internal quotation marks omitted).

The "clear and convincing" burden of proof and standard of review "is greater than the preponderance of the evidence standard required in most civil cases." *In re Smith*, 146 N.C. App. 302, 304, 552 S.E.2d 184, 186 (2001) (citation and quotation marks omitted). Petitioners meeting the clear and convincing evidence burden of proof must tender and admit competent evidence beyond a preponderance, of evidence, more likely than not, and "shall be proved" by "evidence which should fully convince." *Id.* (citation and quotation marks omitted). *See* N.C. Gen. Stat. § 7B-805 (2023); *In re J.N.*, 381 N.C. 131, 136, 871 S.E.2d 495, 599 (2022). "The clear and convincing standard requires evidence that 'should fully convince.' " *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 721, 693 S.E.2d 640, 643 (2009) (citation omitted). This burden is more exacting than the "preponderance of the evidence" standard generally applied in civil cases, but less than the "beyond a reasonable doubt" standard applied in criminal matters. *In re Will of McCauley*, 356 N.C. 91, 101, 565 S.E.2d 88, 95 (2002) (quoting *Williams v. Blue Ridge Bldg. & Loan Ass'n*, 207 N.C. 362, 363-64, 177 S.E. 176, 177 (1934)).

We "review the evidence in order to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (citation omitted). The Court reviews the trial court's conclusions of law *de novo*. *See In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019).

V. Abuse Adjudication of Sarah

An "[a]bused" juvenile is one "whose parent, guardian, or caretaker" either "[i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means." N.C. Gen. Stat. § 7B-101(1)(a) (2025). The statutes are mandatory on the State and, "[t]he allegations in a petition alleging that a juvenile is abused, neglected, or dependent *shall be proved* [by the petitioner] by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2025) (emphasis supplied).

Respondent Parents are presumed to be fit, to act consistently with their parental rights, and to act in the best interests of their children.

Pierce v. Society of Sisters, 268 U.S. 510, 535, 69 L. Ed. 1070, 1078 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); *Stanley v. Illinois*, 405 U.S. 645, 651, 31 L. Ed. 2d 551, 558 (1972) (Court affirmed the fundamental rights of parents "in the companionship, care, custody, and management" of their children.); *Wisconsin v. Yoder*, 406 U.S. 205, 232, 32 L. Ed. 2d 15, 35 (1972) ("This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Washington v. Glucksberg*, 521 U.S. 702, 720, 138 L. Ed. 2d 772, 787 (1997) (that the Constitution, and specifically the Due Process Clause of the Fourteenth Amendment, protects the fundamental right of parents to direct the care, upbringing, and education of their children.); *Troxel v. Granville*, 530 U.S. 57, 68-69, 147 L. Ed. 2d 49, 58 (2000) (Court again unequivocally affirmed the fundamental right of parents to direct the care, custody, and control of their children.).

A. Challenged Findings of Fact

Multiple precedents have long held:

> In a nonjury trial, it is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony. If different inferences may be drawn from the evidence, the trial judge must determine which inferences shall be drawn and which shall be rejected. Where there is directly conflicting evidence on key evidence, it is especially crucial that the trial court make its own determination as to what pertinent facts are actually established by the evidence, rather than merely reciting what the evidence may tend to show.

In re Gleisner, 141 N.C. App. at 480, 539 S.E.2d at 365-66 (citations omitted). Respondent-Mother and Respondent-Father independently argue several of the district court's findings and conclusions of "serious physical injury by other than accidental means" are not supported "by clear and convincing evidence," or its conclusions are not by supported findings of fact. N.C. Gen. Stat. §§ 7B-805; 7B-101(1)(a) (2025). I address each argument in turn.

1. Finding of Fact 19

Respondent-Mother and Respondent-Father argue the district court's Finding of Fact 19 was unsupported. Finding of Fact 19 provides:

> 19. [Sarah] is not capable of generating the force to create the injuries, breaks or fractures she sustained on or before October 31, 2023. [Sarah] was in the exclusive care of the mother, father, and/or maternal grandmother when she sustained the injuries, breaks or fractures.

While the first sentence is a truism and undisputed for any six-week-old child, the second sentence is unsupported. While district court heard testimony Sarah was in exclusive "custody" of Respondents, it is undisputed many other individuals came into possession of and were in contact with Sarah during and immediately after her long and difficult delivery and birth. and who provided her "care" in the absence of Respondents' physical presence.

No competent evidence tends to show either Respondent, or the Maternal grandmother, had exhibited any prior behaviors, taken any actions. or lack thereof, nor did anything inconsistent with their parental rights or fitness to inflict or allow harm to Sarah. All evidence tends to show Respondents are fit and caring parents of both their children, who sought competent and professional medical care for their newborn child on multiple occasions. Respondents cannot be presumed to be guilty of parental misconduct nor be compelled to admit to child abuse as a condition to preserving their parental rights to their children.

Finding of Fact 25 found Sarah "was in the sole care and control of her parents in October 2023 per the testimony of the mother." This finding does not account for, reconcile, or adjudicate undisputed evidence of the twelve or more voluntarily-attended medical appointments for Sarah by Respondents in the six weeks since her birth, including the, taking her to the Atrium Health-Cabarrus County Hospital, her exposure to outsiders, and including the providers and staff at Levine Children's Hospital, or by her treating pediatrician, her diagnosed medical condition, or by an admitted testimony of multiple expert medical providers. Respondents followed every recommendation and willingly and immediately took her to each provider, including Levine Children's Hospital. *Gleisner*, 141 N.C. App. at 480, 539 S.E.2d at 365-66.

2. Finding of Fact 20

Respondent-Mother and Respondent-Father argue the district court's Finding of Fact 20 was unsupported. Finding of Fact 20 provides:

> 20. As a result of mother's, father's and or maternal grandmother's failure to provide proper care and supervision, [Sarah] was injured. [Sarah] suffered many unexplained

> injuries, breaks and fractures including but not limited to eye hemorrhage; bruising to the infant's eye; as well as 14 to 15 fractures with many being acute.

The first sentence presupposes the second "unexplained injuries" which were "explained" as a potentially diagnosed genetic medical condition by board certified endocrinologists at Boston University School of Medicine and Duke University Medical Center. This competent and admitted evidence offers a medical explanation for the injuries, which is also supported by Sarah's treating pediatrician, Dr. Wendy Talley, M.D.

Dr. Talley is Sarah's treating and a practicing pediatrician located in Cornelius, N.C., and she has over 33 years of experience in this medical field. She graduated from Brody School of Medicine, East Carolina University in 1993. She is affiliated with Novant Health Huntersville Medical Center.

The district court heard testimony from Dr. Barrett, who could not rule out Sarah suffered from Ehlers-Danlos Syndrome, but she only opined it could not be diagnosed in children under five years old, and she simply disagreed with Dr. Holick's and Dr. Adkins' admitted expert testimony and diagnosis. This dispute in the competent admitted evidence must be adjudicated and reconciled with supported finding of facts to support lawful conclusions. *Id.*

Finding of Fact 25 finds Sarah had several unexplained injuries "in different stages of healing." The unadjudicated and contradicted testimony of Dr. Barrett could support the finding "her injuries being highly suspicious for non-accidental trauma[.]" Even if true, this finding does not *ipso facto* clearly and convincingly show Respondents or the Maternal grandmother allowed or were the source or cause of the injuries. That statutory burden of proof remains on Petitioner, CCDHS. *Id.*; N.C. Gen. Stat. §§ 7B-805; 7B-101(1)(a) (2025).

3. Finding of Fact 21

Respondent-Mother and Respondent-Father argue the district court's Finding of Fact 21 was unsupported. Finding of Fact 21 provides:

> 21. Upon information and belief mother, father and maternal grandmother inflicted the injuries or allowed them to be inflicted on [Sarah] by unexplained non- accidental trauma.

Respondent-Father and Respondent-Mother argue the district court's statement "upon information and belief" is not a finding and such assertion is not supported by clear and convincing evidence.

Respondent-Mother cites *In re N.X.A.*, 254 N.C. App. 670, 673-74, 803 S.E.2d 244, 247 (2017), wherein this Court examined the requirement of an affidavit to establish jurisdiction in a juvenile proceeding. Contrary to the respondent's argument in *In re N.X.A.*, where the Court noted were not subject to personal knowledge, the petitioner "was not subject to Rule 11(b), governing verification of pleadings by a party, or Rule 11(c), governing verification by agent or attorney, but rather was subject to Rule 11(d), governing verification by the State." *Id.*

"Upon information and belief" is not a clear and convincing ultimate finding ro support a conclusion Respondents or the Maternal grandmother were the source or cause of the injuries. The statute mandates the burden of proof remains on Petitioner, CCDHS to the mandated standard. N.C. Gen. Stat. § 7B-805 (2025). Contrary to Respondents' assertions, the trial court in *In re E.N.S.* found the findings of fact "by clear and convincing evidence," this Court held the district court's order satisfied N.C. Gen. Stat. § 7B-807(a) by finding and stating in the order "by clear and convincing evidence." *In re E.N.S.*, 164 N.C. App. 146, 152, 595 S.E.2d 167, 171 (2004). The challenged "upon information and belief" finding is unsupported and is inconsistent with the mandates of the statute. *Id.*

4. Finding of Fact 22

Respondent-Mother and Respondent-Father argue the district court's Finding of Fact 22 was unsupported. Finding of Fact 22 provides:

> Mother, father and maternal grandmother did not provide proper care or supervision of [Sarah]; failed to provide [Sarah] the necessary medical care for the unexplained non-accidental injuries she sustained and that mother, father and maternal grandmother created an environment injurious to the (sic) [Sarah]'s health, welfare, safety and well-being.

This "finding" is unsupported and farcical. Undisputed evidence shows Respondents took Sarah to her pediatrician three times in six weeks, to the two midwives twice, the doula once, to a lactation consultant twice, in the six weeks since her birth.

Respondent-Mother also took Sarah to a chiropractor on 30 October 2023. The following day on 31 October 2023, Respondents voluntarily took and presented Sarah to the Emergency Department at Atrium Health-Cabarrus County around 12:30 p.m. to "double check" her swollen leg and due to the child being "fussy." This undisputed and unrefuted

evidence directly contradicts the trial court's "finding" Respondents had "failed to provide [Sarah] the necessary medical care for the unexplained non-accidental injuries she sustained" and is properly disregarded and stricken.

Dr. Barrett testified, and the district court in Finding of Fact 25 found Sarah had "numerous fractures in different stages of healing"; which were "highly suspicious for non-accidental trauma[.]" The district court also found in Finding of Fact 29, since Sarah had been placed with a relative temporary safety provider *i.e.*, her paternal grandparents with Respondents present, Sarah had not suffered additional injuries and was growing well. These findings have no bearing on how, when, and who, if anyone, caused these injuries or if some or all were the result of Sarah's prolonged delivery and rotations, as Dr. Barrett also agreed and testified, and her diagnosed medical condition by two board certified endocrinologists and her treating pediatrician.

5. Finding of Fact 26

Respondent-Mother and Respondent-Father argue the district court's Finding of Fact 26 was unsupported. Finding of Fact 26 provides:

> 26. [Sarah] was examined by Dr. Nicole Barrett, who specializes in non-accidental trauma with Levine's (sic) Children's Hospital. After hearing Dr. Barrett's testimony, the Court finds that Dr. Barrett is an expert in non-accidental trauma. The fractures that [Sarah] sustained were found to be from twisting and pulling of the extremities or shaking the extremities per Dr. Barrett's report and examination. [Sarah] was 6 weeks old at the time and a 6-week-old infant could not cause these injuries and that these injuries were not sustained at birth but have happened over a period of time as demonstrated by [Sarah]'s fractured bones being in varying stages of healing on or about October 21, 2023 and November 1, 2023.

As noted earlier, the repetitive assertion "[Sarah] was 6 weeks old at the time and a 6-week-old infant could not cause these injuries" is a truism and undisputed. Dr. Barrett testified:

> CMLs [Classic Metaphyseal Lesion or corner fracture], in general, have a high specificity for abuse or inflicted injury because of the mechanism that I described. They are not commonly seen in accidental or iatragenic mechanisms. SO iatrogenic would mean, like, we did something

> to a child, and – and by that, specifically I'm talking about birth-related fractures in an infant. There are CMLs that can be caused by birth; however, typically, that is with a difficult extraction where an extremity is, again, pulled and twisted in order to get the baby out.
>
> And so the literature supports a high specificity for inflicted injury for those reasons.

This finding of fact is supported by competent evidence, but does not implicate any conduct, actions, fault, or complicity by Respondent of unfitness or conduct inconsistent with their parental rights or any improper action by the material grandmother. Taken as true, the source or who or what caused these injuries remains in conflict and cannot support a conclusion Respondents or her maternal grandmother abused or neglected Sarah or they had neglected Joseph.

6. Finding of Fact 34

Respondent-Father argues the district court's Finding of Fact 34 was unsupported. Finding of Fact 34 provides:

> 34. The allegations contained in the petition support a finding that [Sarah] is abused and neglected. The status of the juvenile has been determined to be abused and neglected in that the juvenile's parent, guardian custodian or caretaker has inflicted or allowed to be inflicted on the juvenile a serious physical injury by other than accidental means, the juvenile's parent, guardian, custodian, or caretaker has created or allowed to be created a substantial risk of serious physical injury to the juvenile by other than accidental means, the juvenile's parent, guardian, custodian, or caretaker does not provide proper care, supervision or discipline, the juvenile's parent, guardian, or caretaker has not provided or arranged for the provision of necessary medical care, and the juvenile's parent, guardian, custodian or caretaker creates or allowed to be created a living environment that is injurious to the juvenile's welfare.

This "Finding" is properly classified as a conclusion of law and is reviewed *de novo*. *See In re C.B.C.*, 373 N.C. at 19, 832 S.E.2d at 695.

B. Analysis

Respondents argue the evidence and findings do not support the district court's inference they were responsible for her injuries.

Respondents cite *In re K.L.*, 272 N.C. App. 30, 845 S.E.2d 182 (2020), wherein this Court reversed an adjudication of abuse and neglect of a three-month old where:

> The trial court was rightly concerned that [the respondents] were unable to explain [the juvenile]'s fractures. But, that alone, as a matter of law, cannot support the trial court's conclusion that [the respondents] were responsible for [the juvenile]'s injuries. There is nothing to bridge the evidentiary gap between the unexplained injuries here and the conclusion that [the respondents] inflicted them, and, in fact, much of the evidence is in tension with that conclusion

Id. at 46-47, 845 S.E.2d at 194-95.

Unlike in *In re K.L.*, Sarah's injuries were in various stages of healing and Sarah did not show any signs of injuries after being placed in a safety placement with her paternal grandparents and Respondents. The trial court made findings about the non-accidental nature of Sarah's injuries, and Respondents and Maternal Grandmother being the parental and family caretakers.

Respondents provided multiple medically-supported explanations of what may have caused or explained Sarah's injuries, the existence of bruising and other signs of injury, and "[t]here is nothing to bridge the evidentiary gap between the unexplained injuries here and the conclusion that [the respondents] inflicted them, and, in fact, much of the evidence is in tension with that conclusion." *Id.*

Like in *In re K.L.*, the evidence does not prove Sarah was in the Respondents' exclusive "care" when the injuries may have occurred. While CCDHS "was not required to rule out every remote possibility; nor was it required to prove abuse beyond a reasonable doubt." *In re L.Z.A.*, 249 N.C. App. 628, 638, 792 S.E.2d 160, 168 (2016). It must meet its statutory mandate to carry its burden of proof to overcome the statutory and constitutional presumptions of fit and proper conduct by the parents. The order, as drafted, does not support a conclusion and adjudication of abuse of Sarah by Respondents or her maternal grandmother. *In re K.L.*, 272 N.C. App. at 46, 845 S.E.2d at 194-95. 'There is nothing to bridge the evidentiary gap between the unexplained injuries here and the conclusion" to hold Respondents were responsible. *Id.*

VI. Neglect Adjudication of Sarah

A "[n]eglected" juvenile is one "whose parent, guardian, custodian, or caretaker" engages in certain statutorily-defined criteria, including

failing to "provide proper care, supervision, or discipline" or "[c]reat[ing] or allow[ing] to be created a living environment that is injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15)(a), (e) (2025).

Respondents argue competent evidence in the record is insufficient for CCDHS to carry its burden to clearly and convincedly show the home environment or purported supervision deficits to support an independent basis upon which neglect can be found. This Court examined this issue in *In re L.Z.A.*:

> Here, the evidence supporting the abuse adjudication also supports the neglect adjudication. [The juvenile]'s unexplained, non-accidental injuries while in Parents' custody establish that: (1) she either failed to receive proper care, supervision, or discipline from [the p]arents or lived in an environment injurious to her welfare; and (2) she was physically impaired as a result. We therefore hold that the trial court's neglect adjudication is supported by clear and convincing competent evidence.

In re L.Z.A., 249 N.C. App. at 638, 792 S.E.2d at 169 (internal citation omitted).

Here, Respondents presented multiple supported medical explanations to show accidental injuries before and during the birth or congenital issues with undisputed follow-up care where no further injuries were noted by the treating medical providers. *Id.* While the trial court determines the weight and credibility of the admitted competent evidence, unlike in *In re L.Z.A.*, Respondents offered multiple explanations for Sarah's injuries and medical condition, to which CCDHS' medical witness partially agreed and did not refute, and Respondents promptly and voluntarily sought repeated treatments and care for her. *Id.* Upon *de novo* review, the trial court's conclusion of neglect of Sarah is unsupported.

VII. Neglect Adjudication of Joseph

Respondents argue the district court erred by concluding Joseph was a neglected juvenile, based solely upon his newborn sister had partially unexplained fractures.

A. Challenged Findings of Fact

Respondent-Father challenges three findings of fact related to Joseph's adjudication. Respondent-Father asserts they are not supported by clear and convincing evidence.

1. Finding of Fact 23

Respondent-Father argues the district court's Findings of Fact 23 and 30 were unsupported. Findings of Fact 23 and 30 provide:

> 23. [Joseph] would live in a home where another juvenile has been abused or neglected.
>
> 30. [Joseph] lives in a home where another juvenile has been abused or neglected.

As noted above, whether his sister, Sarah, was lawfully adjudicated as abused and neglected is not fully supported and resolved and these findings concerning Joseph are not supported.

2. Finding of Fact 33

> 33. The allegations contained in the petition support a finding that [Joseph] is neglected. The status of the juvenile has been determined to be neglected in that the juvenile's parent, guardian, custodian or caretaker creates or allows to be created a living environment that is injurious to the juvenile's welfare.

This finding of fact is properly classified as a conclusion of law, which is reviewed *de novo*. *See In re C.B.C.*, 373 N.C. at 19, 832 S.E.2d at 695.

B. Analysis

Respondents argue the findings do not support and the district court erred by concluding Joseph was a neglected juvenile based solely upon Sarah's partially unexplained fractures. Our Supreme Court recently examined the adjudication of a sibling of an infant with unexplained fractures in *In re E.H.*:

> In these cases, we reaffirmed longstanding precedent holding that a "court may not adjudicate a juvenile neglected *solely* based upon previous Department of Social Services involvement relating to other children," and that there must be "the presence of other factors to suggest the neglect or abuse will be repeated." *In re J.A.M.*, 372 N.C. at 9-10 (emphasis added). But we also recognized that those "other factors" can be circumstances surrounding the abuse itself that indicate other children in the home could face similar harm. *In re A.J.L.H.*, 384 N.C. at 55.
>
> Thus, when another child in the same home has suffered some abuse or injury, the trial court should assess how

> and why that harm occurred, whether other children in the home could be subject to that same harm, and whether the parents display a willingness to "remedy the injurious environment" that caused the harm so that it cannot occur again. *Id.* at 56; *In re A.W.*, 377 N.C. at 249. Facts that can demonstrate a parent's unwillingness to remedy the injurious environment include offering an "implausible explanation" for the abuse of another child, "failing to acknowledge" another child's abuse, or "insisting that the parent did nothing wrong when the facts show the parent is responsible for the abuse." *In re A.J.L.H.*, 384 N.C. at 56; *see also In re A.W.*, 377 N.C. at 248-49.

In re E.H., 388 N.C. 100, 105-06, 919 S.E.2d 233, 237 (2025). The Supreme Court further held:

> When a child is severely abused in the parents' care, and the parents cannot provide any plausible explanation for how those injuries occurred or assure social workers that the abuse will not happen again, the trial court properly can find that there is an unacceptable risk of similar abuse to other children in that same home in the future. *In re D.W.P.*, 373 N.C. at 339-40; *In re A.W.*, 377 N.C. at 248-49; *In re A.J.L.H.*, 384 N.C. at 55-56.

Id. at 107, 919 S.E.2d at 238.

Sarah's brother, Joseph, was born 20 September 2020. The district court found Joseph could be subject to the same harm on 22 February 2025. For over five years no evidence tends to show and CCDHS did not present nor did the district court find a scintilla of evidence or facts, which demonstrate Respondents had provided an unsafe home or environment or any unwillingness to remedy any purported injurious environment for him, but is otherwise culpable for neglecting Joseph for offering a purported and partial "implausible explanation" for portions of six weeks of and "*solely*" based upon Sarah's injuries. *Id.* at 105, 919 S.E.2d at 237.

Respondents, like the respondents in *In re E.H.*, assert they did not know how or why Sarah's sixteen fractures came about in the six weeks in their non-exclusive "care." Respondents attempted to pinpoint multiple medically-based explanations for Sarah's injuries and offered unimpeached evidence from Sarah's medical providers. Given the more than twelve medical visits in the six weeks after Sarah's birth, as is noted above, Finding of Fact 22 is categorically unsupported:

> Mother, father and maternal grandmother did not provide proper care or supervision of [Sarah]; failed to provide [Sarah] the necessary medical care for the unexplained non-accidental injuries she sustained and that mother, father and maternal grandmother created an environment injurious to the (sic) [Sarah]'s health, welfare, safety and well-being.

In light of the undisputed evidence to the contrary, this "finding" is farcical.

VIII. Conclusion

> In a nonjury trial, it is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony. If different inferences may be drawn from the evidence, the trial judge must determine which inferences shall be drawn and which shall be rejected. *Where there is directly conflicting evidence on key evidence, it is especially crucial that the trial court make its own determination as to what pertinent facts are actually established by the evidence, rather than merely reciting what the evidence may tend to show.*

In re Gleisner, 141 N.C. App. at 480, 539 S.E.2d at 365-66 (emphasis supplied).

"When a trial court is required to make findings of fact, it must find the facts specially." *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (internal citations and quotations omitted). "Thus, the trial court must, through 'processes of logical reasoning,' based on the evidentiary facts before it, 'find the ultimate facts essential to support the conclusions of law.' " *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (quoting *Harton*, 156 N.C. App. at 660, 577 S.E.2d at 337). The findings "must be the 'specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence.' " *In re Anderson*, 151 N.C. App. 91, 97, 564 S.E.2d 599, 602 (2002) (citation omitted).

Remand for reconciliation, adjudication, and supported findings and conclusions on the evidence is not an appellate usurpation of the trial court's role to make credibility determinations of conflicting witnesses, testimony, and evidence. Rather, it is a recognition of the duty of the fact finder to adjudicate and reconcile those conflicts with findings,

which "must be the 'specific ultimate facts . . . sufficient for the appellate court to determine the judgment is adequately supported by competent evidence,' " when the conclusions are reviewed *de novo*. *Id.*

The district court's adjudication order is properly remanded for supported findings, reconciliation of conflicts, and adjudication. Subsequent events and actions and current status of the parties should be received in order for the court to render complete and supported conclusions and judgment to enable appellate review. I respectfully dissent.

IN THE MATTER OF L.B.

No. COA25-664

Filed 4 March 2026

Termination of Parental Rights—grounds for termination—incarcerated parent—alternative child-care arrangement—sufficiency of evidence and findings

The trial court's order terminating respondent-father's parental rights in his daughter on multiple grounds (neglect, failure to make reasonable progress, and lack of proper care and supervision) was vacated and the matter was remanded for further proceedings and entry of a new order. Three of the trial court's findings of fact—regarding whether respondent had failed to: (1) sign a case plan, (2) complete a substance abuse and mental health assessment, and (3) complete substance abuse classes—were disregarded as being unsupported by the evidence. Further, the trial court largely, and improperly, based its decision to terminate on respondent's incarceration. Finally, although some evidence and certain findings supported the ground that respondent was incapable of providing for the proper care and supervision of his daughter (N.C.G.S. § 7B-1111(a)(6)), the trial court did not make the necessary findings regarding the availability of alternative child care arrangements at the time of the termination hearing. The decision of whether to receive additional evidence on remand was left to the trial court's discretion.

Appeal by Respondent-Father from Order entered 10 February 2025 by Judge William A. Anthony in Gaston County District Court. Heard in the Court of Appeals 10 February 2026.

Parent Defender Annick Lenoir-Peek, by Assistant Parent Defender Benjamin J. Kull, for Respondent-Appellant Father.

J. Edward Yeager, Jr., for Petitioner-Appellee Gaston County Department of Health and Human Services.

Matthew D. Wunsche for Guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

Respondent-Father appeals from an Order terminating his parental rights in Lanya.[1] The Record before us tends to reflect the following:

Shortly after her birth in June 2018, Gaston County Department of Health and Human Services (DHHS) received a report that Lanya had tested positive for multiple substances, including marijuana and Xanax. DHHS provided the minor child's Mother with an assessment and Mother began receiving substance abuse treatment shortly thereafter; the case was subsequently closed.[2]

On 8 April 2019, an altercation occurred between Respondent-Father and the minor child's half-sibling while the family was at the Gaston County Courthouse. DHHS filed a petition alleging Lanya was a neglected and dependent juvenile the next day.

At the time the petition was filed, the minor child had been living with her Paternal Grandmother. Paternal Grandmother had charges pending for driving while intoxicated, driving while license revoked, and failing to secure passenger under age 16. Mother's whereabouts were unknown.

DHHS asked Respondent-Father to come up with a safety plan and to provide DHHS with potential alternative caregivers for the juvenile. Respondent-Father provided three potential caregivers: (1) a paternal great aunt and uncle, (2) a maternal uncle, and (3) a family friend. The paternal great aunt and uncle could not care for the minor child, and the maternal uncle was not approved for placement by DHHS. The minor child was placed with the family friend, but she was removed from his

1. Pseudonym agreed upon by the parties.

2. Mother is not party to this appeal. Her parental rights in the minor child were terminated in a separate case on 14 January 2022.

care after the family friend allowed Respondent-Father to be alone with the child in violation of the safety plan.

On 2 July 2019, the trial court adjudicated Lanya a neglected and dependent juvenile. At the time of the disposition hearing on 9 July 2019, Respondent-Father was in federal custody. The trial court ordered Respondent-Father to comply with a fifteen-part case plan created by DHHS. In the resulting order, the trial court noted Paternal Grandmother had undergone a home study, which had been denied.

In the Initial Permanency Planning Order entered 19 April 2023, the trial court found Respondent-Father had been sentenced on federal drug charges to thirty-three years of incarceration. The trial court also found Respondent-Father had not entered into a case plan with DHHS, provided any support or care for the juvenile, nor responded to DHHS' attempts to contact him. Respondent-Father had not been able to see the juvenile since May 2019 because of his incarceration. Additionally, the trial court found Paternal Grandmother had undergone a second home study, which also had been denied. The trial court found Respondent-Father had not "made significant progress[ ]" and ordered the primary plan for the juvenile to be adoption, with secondary plans of reunification and guardianship.

On 21 April 2023, DHHS filed a Petition alleging grounds existed to terminate Respondent-Father's parental rights in the juvenile under N.C. Gen. Stat. § 7B-1111(a)(1), (a)(2), (a)(6), and (a)(7). The termination hearing was held on 6 January 2025. Respondent-Father attended by telephone because of his incarceration.

At the hearing, DHHS social worker Kristine Costa (SW Costa) testified Respondent-Father had been arrested shortly after DHHS filed the juvenile petition in April 2019. She testified Respondent-Father had access to parenting and substance abuse classes while in jail, but those services were limited because of the COVID-19 pandemic. She did not know what services were available to Respondent-Father after he was transferred to federal prison. Additionally, Respondent-Father was not allowed to meet with DHHS because he had a federal hold; however, SW Costa sent Respondent-Father letters and case plans in the mail, to which he did not respond. SW Costa's involvement with the case ceased in April 2022.

DHHS social worker Weesue Tubman (SW Tubman) assumed the case in October 2022, after Respondent-Father had been transferred to federal custody. SW Tubman testified she had never sent Respondent-Father copies of the case plan herself but had asked

Respondent-Father to provide her with updates on his progress monthly, which he did. She testified he provided her with proof of completion of parenting and anger management courses but not mental health or substance abuse courses; however, she knew by October 2024 that Respondent-Father had "taken drug education classes." She acknowledged Respondent-Father could not make much progress on the housing, employment, or visitation aspects of his case plan because of his incarceration but still he regularly communicated with SW Tubman, sent letters to the minor child, had consented to the minor child receiving certain recommended medical treatment, and would receive updates on the minor child from Paternal Grandmother.

On 10 February 2025, the trial court entered an Order terminating Respondent-Father's parental rights in Lanya. The trial court concluded grounds existed to terminate Respondent-Father's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1), (a)(2), and (a)(6). Respondent-Father timely filed Notice of Appeal.

Issue

The issue on appeal is whether the trial court's Findings of Fact are sufficient to support its Conclusion grounds existed to terminate Respondent-Father's parental rights in the juvenile under N.C. Gen. Stat. § 7B-1111(a)(1), (a)(2), and (a)(6).

Analysis

"A proceeding to terminate parental rights is a two step process with an adjudicatory stage and a dispositional stage. A different standard of review applies to each stage." *In re D.R.B.*, 182 N.C. App. 733, 735, 643 S.E.2d 77, 79 (2007). "In the adjudicatory stage, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that one of the grounds for termination of parental rights set forth in N.C. Gen. Stat. § 7B-1111(a) exists." *Id.* "The standard for appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings of fact support its conclusions of law." *Id.* Unchallenged findings of fact are binding on review. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted).

"If the petitioner meets its burden of proving at least one ground for termination of parental rights exists under N.C. Gen. Stat. § 7B-1111(a), the court proceeds to the dispositional phase and determines whether termination of parental rights is in the best interests of the child." *In re C.C.*, 173 N.C. App. 375, 380, 618 S.E.2d 813, 817 (2005). "The standard

of review of the dispositional stage is whether the trial court abused its discretion in terminating parental rights." *Id.* at 380-81, 618 S.E.2d at 817 (citation omitted). "An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015) (citation, quotation marks, and brackets omitted).

Respondent-Father challenges the trial court's Findings of Fact 25, 26, and 27, which provide:

> 25. Respondent/father failed to sign a case plan; however, he was mailed copies of a case plan and has failed to complete said case plan.
>
> 26. Respondent/father has failed to complete a substance abuse and mental health assessment.
>
> 27. Respondent/father has participated in some substance abuse classes while incarcerated; however, [he] has not provided proof of completion to [DHHS]. Respondent/father testified that said substance abuse classes that he participated in discussed the effect that substance abuse usage has on the family, but did not provide any information on what if any treatment component was involved. Substance use was one of the reasons that the juvenile came into the custody of [DHHS].

Respondent-Father argues there is no evidence he failed to sign a case plan or that he failed to complete said case plan, and there is no evidence a mental health assessment was available to him. He also argues there is competent evidence he completed a substance abuse program.

Our review of the Record shows SW Tubman testified Respondent-Father had not completed substance abuse or mental health courses; however, she did not testify that Respondent-Father "failed to sign a case plan[.]"[3] Further, she knew Respondent-Father had taken a drug education course and the Record contains his certificate of completion.

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3. The assertion that Respondent-Father failed to sign a case plan appears to come from the testimony of SW Costa, who testified she mailed Respondent-Father correspondence regarding his case plan and never received any response. Notably, SW Costa was assigned to the case between April 2019 and April 2022. Accordingly, SW Costa could not have testified as to whether Respondent-Father had signed or made progress on his case plan at the time of the termination hearing in January 2025.

And as to Respondent-Father's alleged failure to take a "mental health assessment," there is simply no Record evidence as to whether Respondent-Father had the ability to receive such an assessment in light of his incarceration. Rather, the Record shows Respondent-Father was limited in the components of his case plan he could work on while incarcerated. Thus, after careful review of the Record, we agree with Respondent-Father that the above Findings are not supported by clear, cogent, and convincing evidence and disregard them in the rest of our inquiry.[4]

Based on its Findings, the trial court concluded Respondent-Father's parental rights in Lanya were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (a)(2), and (a)(6). A trial court may terminate a party's parental rights under these sections upon a finding

> (a)(1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.
>
> (a)(2) The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.
>
> . . . .
>
> (a)(6) That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future.

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4. Respondent-Father also challenges Findings of Fact 40 and 41. These are Ultimate Findings which state Respondent-Father "failed to demonstrate the ability to meet the juvenile's basic needs" and "failed to demonstrate the ability to parent and protect the juvenile." *See In re G.C.*, 384 N.C. 62, 65 n.3, 884 S.E.2d 658, 661 n.3 (2023) ("[A]n ultimate finding is a finding supported by other evidentiary facts reached by natural reasoning."). Because of our ultimate disposition in this case, we need not reach the merits of these Findings.

> Incapability under this subdivision may be the result of substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-1111(a)(1)-(2), (a)(6) (2023). "[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 53 (2019) (citations omitted).

In support of its Conclusion grounds existed to terminate Respondent-Father's parental rights, the trial court made the following unchallenged Findings:

> 23. The Court has regularly reviewed Respondent/Father's progress toward regaining custody of the juvenile, and the Court has never concluded at any hearing that Respondent/Father has made reasonable progress to warrant returning custody to Respondent/Father.
>
> 24. Respondent/Father has failed to correct the conditions that led to the removal of the juvenile from his custody, such that neglect would continue if the juvenile were returned to Respondent/Father's care. The neglect has continued through the date of the filing of the petition and is not due to the poverty of the Respondent/Father.
>
> . . . .
>
> 28. Respondent/father has completed parenting classes while incarcerated.
>
> 29. Respondent/father has completed anger management while incarcerated.
>
> 30. Respondent/father is currently incarcerated for drug related charges.
>
> 31. Respondent/father has maintained regular contact with [DHHS].
>
> 32. Respondent/father has failed to obtain and maintain a safe, clean, and stable housing situation appropriate for the juvenile due to his incarceration.

> 33. Respondent/father has failed to maintain employment or sufficient financial resources to support the juvenile due to his incarceration.
>
> 34. Respondent/father has failed to attend visitations with the juvenile due to his incarceration. Respondent/father has never been ordered unsupervised visitation and was arrested shortly after the juvenile was placed in [DHHS] custody.
>
> 35. Respondent/father has failed to refrain from criminal activity. Respondent/father pled guilty to federal charges of conspiracy to distribute methamphetamine, possession with intent to distribute methamphetamine, and possession of a firearm by felon. Respondent/father was sentenced to thirty-three (33) years in prison.
>
> 36. Respondent/father testified that he currently has appealed his sentence, however, even if his sentence is reduced, he still would serve 10-11 years. The juvenile is entitled to permanence now and not 10-11 years later.
>
> 37. Respondent/father sends the juvenile birthday cards and letters at least monthly, if not more, and has done so for the past two (2) years.
>
> . . . .
>
> 39. For a significant portion of this case, Respondent/father was held in the Gaston County Jail with a federal hold, awaiting disposition of federal charges. He was limited in what services he could access while incarcerated at the Gaston County Jail. Respondent/father has utilized services available to him since sentencing and being [placed] at FCI-Edgefield.

Respondent-Father contends the trial court erred in concluding grounds existed to terminate his parental rights under Sections 7B-1111(a)(1) and (a)(2) because it inappropriately relied on his incarceration to terminate his parental rights in the minor child despite doing "everything he could to stay involved in his daughter's life and to work with [DHHS]." This Court has consistently affirmed that " '[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights.' " *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005) (quoting *In re Yocum*, 158 N.C. App. 198, 207-08, 580 S.E.2d 399, 405 (2003)). Likewise, "[w]here a respondent has been and continues

to be incarcerated, our courts have prohibited termination of parental rights solely on that factor." *In re D.R.B.*, 182 N.C. App. at 738, 643 S.E.2d at 81 (citations omitted).

We agree the above Findings tend to suggest the trial court based its decision to terminate Respondent-Father's parental rights almost entirely on Respondent-Father's incarceration. Indeed, the trial court found Respondent-Father had failed to support or provide for the minor child expressly "due to his incarceration." Similarly, the trial court acknowledged Respondent-Father has been "limited in what services he could access while incarcerated at Gaston County Jail . . . [f]or a significant portion of this case[.]"

Moreover, the trial court also found Respondent-Father has maintained contact with DHHS; completed parenting and anger management classes as ordered in his case plan; and, although he could not visit with the minor child, he sends her "birthday cards and letters at least monthly, if not more, and has done so for the past two (2) years." These Findings reflect Respondent-Father's continued involvement with the minor child notwithstanding his incarceration. Likewise, SW Tubman's testimony tended to affirm that since his transfer to federal prison, Respondent-Father has made increased progress on his case plan.

Thus, the trial court's Findings are insufficient to demonstrate he neglected the juvenile under Section 7B-1111(a)(1) or "willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile[ ]" under Section 7B-1111(a)(2) because they impermissibly indicate Respondent-Father has neglected the juvenile solely "due to his incarceration."

However, the Findings tend to support a determination that Respondent-Father is incapable of providing for the proper care and supervision of the juvenile and that there is a reasonable probability the incapability will continue for the foreseeable future. *See* N.C. Gen. Stat. § 7B-1111(a)(6) (2023). In *In re K.B.C.*, the respondent-parent argued the trial court erroneously terminated his parental rights under Section 7B-1111(a)(6) based entirely on his incarceration. 295 N.C. App. 619, 906 S.E.2d 840 (2024). This Court disagreed, noting "the trial court considered, beyond the fact of Respondent-Father's incarceration, the substantial length of Respondent-Father's sentence, its effect upon the minor children, the minor children's physical and emotional well-being, and Respondent-Father's lack of appropriate alternative placements for

the children." *Id.* at 630, 906 S.E.2d at 847. We held that consideration of a parent's incarceration in this way is consistent with our precedent. *Id.* at 630, 906 S.E.2d at 848. In reaching this conclusion, we considered our Supreme Court's holding in *In re A.L.S.*, 375 N.C. 708, 851 S.E.2d 22 (2020). There, the respondent-parent was incarcerated during the proceedings and faced twenty-two to forty-two additional months of imprisonment. *Id.* at 714, 851 S.E.2d at 27. The Court explained:

> The fact that respondent-mother faces an extended period of incarceration . . . provides ample support for the trial court's determination that she was incapable of providing for the proper care and supervision of the children and that there was a reasonable probability that her incapability would continue for the foreseeable future.

Id. (citations omitted). "Likewise, this Court has also found extended periods of incarceration can render a parent incapable of providing sufficient care and supervision of a minor child." *In re K.B.C.*, 295 N.C. App. at 630, 906 S.E.2d at 848 (citing *In re L.R.S.*, 237 N.C. App. 16, 21, 764 S.E.2d 908, 911 (2014); *In re N.T.U.*, 234 N.C. App. 722, 735, 760 S.E.2d 49, 58 (2014)).

Here, the trial court found Respondent-Father faces a minimum of ten years of incarceration, if not longer. Thus, under our precedent, the trial court's Findings support the determination Respondent-Father is incapable of providing for the proper care and supervision of the juvenile and that there is a reasonable probability the incapability will continue for the foreseeable future. *See In re A.L.S.*, 375 N.C. at 714, 851 S.E.2d at 27 (citations omitted).

However, because the trial court did not make the necessary findings about Respondent-Father's alternative child care arrangements for the juvenile, we must remand the case to the trial court for such a determination. "[T]he trial court's findings regarding [termination under Section 7B-1111(a)(6)] 'must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements.' " *In re K.R.C.*, 374 N.C. 849, 859, 845 S.E.2d 56, 63 (2020) (quoting *In re L.R.S.*, 237 N.C. App. at 19, 764 S.E.2d at 910). Importantly, the findings must address these two elements *at the time of the termination hearing*. *See In re Z.G.J.*, 378 N.C. 500, 511, 862 S.E.2d 180, 189 (2021) ("[A]n adjudication of dependency as a ground for termination under Section (a)(6) must be based on an examination of the parent's ability to care for and supervise their child at the time of the adjudication hearing." (citing *In re C.L.H.*, 376 N.C. 614, 619-20, 853 S.E.2d 434, 439 (2021))).

Here, the trial court made the Ultimate Finding that Respondent-Father lacked an appropriate alternative child care arrangement but did not find any evidentiary facts in support of this determination. Although the trial court's Order incorporates the findings and conclusions from the 2019 juvenile adjudication and disposition orders, those determinations were approximately six years old and do not necessarily reflect Respondent-Father's circumstances at the time of the termination hearing. Thus, the trial court's Findings are insufficient to support its Conclusion that grounds existed to terminate Respondent-Father's parental rights in Lanya under N.C. Gen. Stat. § 7B-1111(a)(1), (a)(2), and (a)(6). Therefore, the trial court erred by concluding grounds existed to terminate Respondent-Father's parental rights.

Respondent-Father argues we should remand this matter to the trial court to dismiss the Petition. However, based on our review of the Record, we cannot say "the evidentiary record is so lacking that it cannot support any appropriate findings on remand." *In re A.J.*, 386 N.C. 409, 412, 904 S.E.2d 707, 712 (2024) (citation omitted). Consequently, we remand this matter to the trial court for further proceedings.

Conclusion

Accordingly, for the foregoing reasons, we vacate the trial court's Order terminating Respondent-Father's parental rights in Lanya and remand for further proceedings, including the entry of a new order containing findings of fact addressing whether Respondent-Father has an appropriate alternative child care arrangement for the juvenile. "The trial court may, in the exercise of its discretion, receive additional evidence on remand if it elects to do so." *In re C.L.H.*, 376 N.C. at 625, 853 S.E.2d at 442 (citation omitted).

VACATED AND REMANDED.

Judges TYSON and ZACHARY concur.

IN RE Q.J.P.

[303 N.C. App. 248 (2026)]

IN THE MATTER OF Q.J.P., M.P., K.L.

No. COA25-634

Filed 4 March 2026

Appeal and Error—right to appeal—permanency planning order—elimination of reunification—termination petition pending—no right to direct appeal—certiorari denied

A mother had no statutory right to directly appeal amended permanency planning orders—entered on remand after a prior appeal—that eliminated reunification as a permanent plan for her three children where the department of social services had filed petitions to terminate parental rights within sixty-five days of each order's entry and service in accordance with N.C.G.S. § 7B-1001(a)(5). Although a permanency planning order eliminating reunification and a termination of parental rights order may be appealed together pursuant to subsection 7B-1001(a)(8), the trial court had not yet heard or granted the termination orders and, thus, respondent-mother had not lost her right to appeal under that subsection. The appellate court thus dismissed respondent's appeal and denied her conditional petition for a writ of certiorari.

Appeal by respondent-mother from orders entered 18 March 2025 and 25 April 2025 by Judge Susan M. Dotson-Smith in District Court, Buncombe County. Heard in the Court of Appeals 12 February 2026.

Jack Densmore for petitioner-appellee Buncombe County Department of Health and Human Services.

Jackson M. Pitts for guardian ad litem.

Robinson & Lawing, LLP, by Christopher M. Watford, for respondent-appellant mother.

STROUD, Judge.

This is Respondent Mother's second appeal. *See In re Q.J.P.*, 296 N.C. App. 175, 907 S.E.2d 442 (2024) (*Q.J.P. I*). She challenges three amended permanency planning orders, entered on remand, that eliminate reunification as a permanent plan for her three minor children. The Buncombe County Department of Health and Human Services (DHHS)

moved to dismiss the appeal. It argues that Mother cannot appeal under North Carolina General Statute Section 7B-1001(a)(5) because DHHS filed petitions to terminate her parental rights as to each child within 65 days of the remand orders' entry and service. *See* N.C. Gen. Stat. § 7B-1001(a)(5) (2023). Mother disagrees. She contends these orders are part of her *Q.J.P. I* appeal, not new orders requiring her to satisfy Section 7B-1001(a)(5) anew. And if that is wrong, she conditionally petitions for a writ of certiorari.

Section 7B-1001(a)(5) allows a parent to appeal directly to this Court from "an order . . . eliminating reunification . . . as a permanent plan"—but only if certain conditions are met. *Id.* Most important here: a "termination of parental rights petition" (TPR petition) must not have "been filed within 65 days of entry and service of the order." N.C. Gen. Stat. § 7B-1001(a)(5)(a)(2). DHHS filed such petitions within 65 days of the remand orders' entry and service. So Mother cannot appeal now. We dismiss her appeal and deny her conditional petition for a writ of certiorari.

I. Background[1]

Mother has three children—Quincy, Mary, and Keith[2]—born in 2017, 2019, and 2020. Each child has a different father; none is a party to this appeal. DHHS became involved with the family in early 2020 after reports of domestic violence between Mother and Keith's father. That November, DHHS filed juvenile petitions alleging that Quincy, Mary, and Keith were neglected.

On 20 August 2021, the district court entered an order adjudicating all three children as neglected, based in part on Mother's stipulations, and entered dispositions in each matter. After ten days of hearings between December 2021 and August 2022, the court entered initial permanency planning orders for each child in February 2023. The court ordered that Quincy and Mary remain in DHHS's custody with guardianship as their primary plan and reunification with their fathers as secondary. As for Keith, the court determined that reunification with either Mother or his father would threaten Keith's health and safety, so it set adoption as his primary plan and guardianship as his secondary plan.

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1. Our prior opinion provides a fuller account of the facts. *See In re Q.J.P.*, 296 N.C. App. 175, 176-78, 907 S.E.2d 442, 444-45 (2024) (*Q.J.P. I*). We include here only what is necessary to resolve this appeal.

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

Mother filed a notice to preserve her right of appeal on 9 March 2023. Later, she timely filed a notice of appeal. On appeal, Mother argued that the district court "violated statutory mandates set forth in the Juvenile Code by failing to make the necessary written findings in support of the concurrent plans" eliminating each child's reunification with Mother. *Q.J.P. I*, 296 N.C. App. at 176, 907 S.E.2d at 444. This Court published a decision vacating and remanding several portions of the court's orders on 15 October 2024. *Id.*

We first concluded that Mother's appeal of Quincy's and Mary's permanency planning orders was properly before the Court under Section 7B-1001(a)(5). *Id.* at 179, 907 S.E.2d at 445. We then held that the district court had omitted three required findings in those two orders: (1) a finding that "reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile[s'] health or safety," N.C. Gen. Stat. § 7B-906.2(b)(2023); (2) a finding about "Mother's availability to the court, DHHS, and the GAL," N.C. Gen. Stat. § 7B-906.2(d)(3) (2023); and (3) a finding about whether Mother was "acting in a manner inconsistent with" Quincy and Mary's "health or safety," N.C. Gen. Stat. § 7B-906.2(d)(4). *Q.J.P. I*, 296 N.C. App. at 182, 907 S.E.2d at 447-48. As a result, we vacated and remanded Quincy's and Mary's orders for the court to make the required findings. *Id.* at 182, 907 S.E.2d at 448.

Keith's permanency planning order differed from his half-siblings'. *Id.* The district court had found "that reunification at this time would be inconsistent with the minor child's health and safety and need for a safe, permanent home within a reasonable period of time." *Id.* (quoting N.C. Gen. Stat. § 7B-906.2(b)). But the court made no finding about Mother's availability "to the court, the department, and the guardian ad litem for the juvenile." *Id.* at 183, 907 S.E.2d at 448 (quoting N.C. Gen. Stat. § 7B-906.2(d)(3)). So we remanded Keith's order for the court to enter a finding under Section 7B-906.2(d)(3). *Id.* at 184, 907 S.E.2d at 449.[3]

After *Q.J.P. I*, DHHS filed a petition to terminate Mother's parental rights as to all three children in February 2025. One month later, on 18 March 2025, the district court entered orders on remand for Quincy and Keith. Mother filed a notice of appeal from these orders on 16 April 2025, relying on Section 7B-1001(a)(5). The court then entered an order

3. The Court also noted "contradictory findings of fact regarding Mary's permanent plan." *Q.J.P. I*, 296 N.C. App. at 177, 907 S.E.2d at 445. We therefore remanded for the district court to "reconcile the contradictory findings" and "clearly identify the appropriate primary and secondary plans." *Id.* at 184, 907 S.E.2d at 449.

on remand for Mary on 25 April 2025. Mother filed a notice of appeal on 21 May 2025, again citing Section 7B-1001(a)(5). DHHS moved to dismiss Mother's appeal.

II. Discussion

Mother makes two arguments on appeal. First, the district court "committed reversible error by eliminating reunification" with her as a permanent plan for Quincy, Mary, and Keith. Second, the court's conclusion that DHHS "made reasonable efforts to reunify" the children with Mother "was not supported by the evidence and must be reversed."

DHHS argues we should dismiss Mother's appeal. It claims that Mother failed to comply with Section 7B-1001(a)(5)'s requirements because DHHS filed TPR petitions for each child within sixty-five days of the remand orders' entry and service. *See* N.C. Gen. Stat. § 7B-1001(a)(5)(a)(2) (allowing a direct appeal to this Court only if, among other things, "a termination of parental rights petition or motion has not been filed within 65 days of entry and service of the order"). Because DHHS filed such petitions, Mother no longer has a "mechanism to pursue a direct appeal." "Mother's appeal is not ripe until the TPR is heard and granted."[4] We agree.

"The right to appeal in juvenile actions arising under Chapter 7B is governed by [Section] 7B-1001(a)." *In re P.S.*, 242 N.C. App. 430, 432, 775 S.E.2d 370, 371 (2015). This statute provides that "[i]n a juvenile matter under this Subchapter, only the following final orders may be appealed directly to the Court of Appeals." N.C. Gen. Stat. § 7B-1001(a). The statute then lists various orders from which a direct appeal may be taken, including a permanency planning order that "eliminat[es] reunification. . . as a permanent plan." N.C. Gen. Stat. § 7B-1001(a)(5). A "parent who is a party" may appeal directly to this Court if:

> 1. [The parent h]as preserved the right to appeal the order in writing within 30 days after entry and service of the order[;]
>
> 2. A termination of parental rights petition or motion has not been filed within 65 days of entry and service of the order[; and]

4. DHHS also argues that because TPR petitions "have been filed, [Mother's] notices filed on [16 April] and [21 May] 2025 should be treated as a [n]otice to [p]reserve the [r]ight to [a]ppeal, under [Section] 7B-1001(b)."

> 3. A notice of appeal of the order eliminating reunification is filed within 30 days after the expiration of the 65 days.

N.C. Gen. Stat. § 7B-1001(a)(5)(a).

Mother's appeal fails the second requirement. DHHS filed TPR petitions for each child in February 2025. The district court entered the orders on remand for Quincy and Keith on 18 March 2025 and for Mary on 25 April 2025. DHHS's TPR petitions were thus filed within sixty-five days of each remanded order's entry and service. *See* N.C. Gen. Stat. § 7B-1001(a)(5)(a)(2). So Mother cannot directly appeal under Section 7B-1001(a)(5).

The proper route is Section 7B-1001(a)(8). Under that provision, "[a]n order eliminating reunification as a permanent plan" may be appealed "if all of the following conditions are satisfied":

> a. The right to appeal the order eliminating reunification has been preserved in writing within 30 days of entry and service of the order.
>
> b. A motion or petition to terminate the parent's rights is filed within 65 days of entry and service of the order eliminating reunification and both of the following occur:
>
> 1. The motion or petition to terminate rights is heard and granted.
>
> 2. The order terminating parental rights is appealed in a proper and timely manner.
>
> c. A separate notice of appeal of the order eliminating reunification is filed within 30 days after entry and service of a termination of parental rights order.

N.C. Gen. Stat. § 7B-1001(a)(8). This provision allows a permanency planning order "eliminating reunification" and a TPR order to be appealed together. *See* N.C. Gen. Stat. § 7B-1001(a2) ("In an appeal filed pursuant to subdivision (a)(8) of this section, the Court of Appeals shall review the order eliminating reunification together with an appeal of the order terminating parental rights."). Here, the district court has not "heard [or] granted" the TPR petitions, so Mother cannot yet appeal under Section 7B-1001(a)(8). *See* N.C. Gen. Stat. § 7B-1001(a)(8)(b)(1).

Mother does not dispute this analysis. Instead, she reframes DHHS's argument, characterizing it as "essentially" asking us to "[d]ismiss this appeal as interlocutory" because she did not file "another [n]otice to

[p]reserve the [r]ight to [a]ppeal" before filing a notice of appeal from the orders on remand. According to Mother, the remanded orders are extensions of her 2023 appeal, not new orders requiring fresh compliance with Section 7B-1001(a)(5). She preserved her right to appeal the original orders in 2023. This Court then vacated and remanded Quincy's and Mary's orders and remanded Keith's. On remand, the district court entered orders "purporting to comply with [our] mandate" and without "review[ing] any additional evidence." So, Mother maintains, "the present appeal is not from a new order eliminating reunification as a plan, but rather a supplemental appeal for which this [n]otice has already been given."

This is incorrect. We are aware of no North Carolina case or statute recognizing "supplemental appeals." And more fundamentally, an appellate court's remand for a district court to make additional findings does not change how the orders entered on remand must be appealed. The appeals process remains "governed by [Section] 7B-1001(a)." *In re P.S.*, 242 N.C. App. at 432, 775 S.E.2d at 371. An order entered on remand is a new order. The remand orders here are new permanency planning orders eliminating reunification, so they must satisfy Section 7B-1001(a)(5)'s requirements.

As explained above, they do not. We therefore allow DHHS's motion to dismiss.

Mother also conditionally petitioned for a writ of certiorari. She points to DHHS's "core" argument—that her "failure to file a second [n]otice to [p]reserve [her] [r]ight to [a]ppeal renders the present appeal interlocutory." Because the appeal is interlocutory, she asserts, we have "authority to issue a writ of certiorari." Mother contends we should grant certiorari because (1) her appeal "has merit," (2) the district court erred in "finding [she] acted in a manner inconsistent with the children's health and safety" without evidentiary support, and (3) "[e]xtraordinary circumstances . . . justify issuing the [w]rit." We disagree.

"[A] writ of certiorari should issue only if there are 'extraordinary circumstances' to justify it." *Cryan v. Nat'l Council of YMCA*, 384 N.C. 569, 572-73, 887 S.E.2d 848, 851 (2023) (quoting *Moore v. Moody*, 304 N.C. 719, 720, 285 S.E.2d 811 (1982)). "There is no fixed list of 'extraordinary circumstances' that warrant certiorari review, but this factor generally requires a showing of substantial harm, considerable waste of judicial resources, or 'wide-reaching issues of justice and liberty at stake.' " *Id.* at 573, 887 S.E.2d at 851 (citation omitted).

No such circumstances exist here. Mother has not lost her ability to appeal the orders entered on remand; her appeal is merely delayed

until after the trial court hears and rules on DHHS's TPR petitions. We agree with DHHS that her notices of appeal "filed on [16 April] and [21 May] 2025" would properly "be treated as a [n]otice to [p]reserve the [r]ight to [a]ppeal, under [Section] 7B-1001(b)." If the trial court orders termination of parental rights, Mother will have a right to appeal the remanded orders and TPR orders together under Section 7B-1001(a)(8).[5] Accordingly, we deny Mother's conditional petition for a writ of certiorari.

III. Conclusion

We allow DHHS's motion to dismiss Mother's appeal, and we deny Mother's conditional petition for a writ of certiorari.

DISMISSED.

Judges GRIFFIN and MURRY concur.

IN THE MATTER OF T.M.

No. COA25-534

Filed 4 March 2026

Termination of Parental Rights—findings of fact—weighing of evidence—best interest determination—no misapprehension of law

In a termination of parental rights proceeding where the juvenile had been removed from her home and adjudicated neglected and dependent due to a history of domestic violence between her mother and father (which included a shooting of the mother by the father), the mother's argument that the court misapprehended the law—and thus erroneously found that permanence might be achieved for the child only through adoption—was without merit.

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5. We note that Section 7B-1001(a)(8)(b)(1) requires a TPR petition be "heard and granted" before an order eliminating reunification can be appealed under that provision. N.C. Gen. Stat. § 7B-1001(a)(8)(b)(1) (2023). The statute is thus silent on the right to appeal a permanency planning order eliminating reunification when a TPR petition is filed within the sixty-five-day period but then *denied*. One legal scholar has suggested that a party seeking to appeal in that scenario "may need to petition for a writ of certiorari." Sara Depasquale, *Abuse, Neglect, Dependency, and Termination of Parental Rights Proceedings in North Carolina* § 12.31 (7th ed. 2023). Because that issue is not before us, we express no view on it.

The challenged findings of fact reflected the court's weighing of the statutory factors as applied to the evidence presented, not a misunderstanding of the law regarding permanent plans. Because the court applied the correct legal framework and was not required to make written findings regarding dispositional alternatives, the termination order was affirmed.

Appeal by Respondent-Mother from order entered 7 March 2025 by Judge Angela G. Hoyle in Gaston County District Court. Heard in the Court of Appeals 11 February 2026.

J. Thomas Diepenbrock for Respondent-Appellant Mother.

J. Edward Yeager, Jr., for Petitioner-Appellee Gaston County Department of Health and Human Services.

Shannon Phillips for Guardian ad Litem.

COLLINS, Judge.

Respondent-Mother appeals from the trial court's order terminating her parental rights to her child. Mother argues that the court's findings of fact and best interest determination are based upon a misapprehension of law. We affirm.

I. Background

Mother and Father are the biological parents of Tisha.[1] The Gaston County Department of Health and Human Services ("DHHS") filed a petition on 20 September 2019, alleging that Tisha was neglected and dependent due to a history of domestic violence between Mother and Father. The petition alleged, in relevant part:

> On or about 9/30/18, an altercation took place between Respondent/mother and Respondent/father [] while the juveniles were present within Respondent/mother's home. Respondent/mother was seen bleeding from her face and told [her son[2]] to take care of his sister if something

1. We use a pseudonym to protect the identity of the minor child.

2. Mother's son has a different biological father than Tisha. Although he was a juvenile at the time of these incidents, he has since aged out of foster care.

> happens to Respondent/mother and that she loved them. It was then reported that Respondent/father [] kidnapped Respondent/mother for approximately two hours and law enforcement was contacted by [Mother's son]. After this incident took place, and for a short period of time, Respondent/father [] did not live in the home. However, eventually he did return to the home to reside with Respondent/mother and the juveniles.
>
> . . . .
>
> On or about 4/3/2019, the Department received a report that Respondent/father [] had shot Respondent/mother in the foot with a Smith & Wesson MMP AR-15 Rifle. Respondent/father [] stated it was an accidental shooting, though after Respondent/father shot Respondent/mother, he went outside and shot twice into the air. [Tisha] was present during this incident. . . .
>
> . . . .
>
> On 9/2/19 at 7:48 AM, [Mother's son] contacted 911 and reported that Respondent/mother and Respondent/father [] were "fighting" and it was undetermined if there were weapons at the home. [Mother's son] further reported that "his mother was causing problems." . . . .

DHHS obtained non-secure custody of Tisha that same day.

Following a hearing, the court entered an order on 18 February 2020 adjudicating Tisha neglected. The court ordered Mother to follow DHHS's recommended case plan, which required her to: obtain safe, stable housing and employment; contribute financially to support Tisha; complete parenting classes; not violate any federal, state, or local laws; maintain weekly contact with DHHS; complete a mental health assessment and any recommended treatment; and complete domestic violence classes and any recommended treatment. The court initially adopted a primary permanent plan of reunification and a secondary permanent plan of adoption.

On 13 September 2020, Mother was charged with the First-Degree Murder of Father. The court entered an order on 17 March 2021 adopting a primary plan of adoption and a secondary plan of guardianship. Mother identified Tisha's maternal grandmother in Massachusetts as a potential guardian. Mother was convicted of Second-Degree Murder on 28 November 2023 and sentenced to 240 to 300 months' imprisonment.

DHHS filed a Petition for Termination of Parental Rights on 9 January 2025. Following a hearing, the court entered an order on 7 March 2025 terminating Mother's parental rights based upon (1) neglect, (2) willfully leaving the juvenile in foster care for more than twelve months without showing reasonable progress in correcting the conditions which led to the removal, and (3) dependency. Mother appealed.

II. Discussion

Mother argues that the trial court misapprehended the law in making its findings of fact and best interest determination. Mother specifically argues that the court erroneously found that permanence may be achieved for Tisha only through adoption.

"Termination of parental rights involves a two-stage process." *In re A.W.*, 288 N.C. App. 123, 125 (2023) (quotation marks and citation omitted). "At the adjudication stage, the petitioner has the burden of proving by clear, cogent and convincing evidence that at least one statutory ground for termination exists." *In re T.C.B.*, 166 N.C. App. 482, 484 (2004) (citations omitted). If one or more grounds exist, the court then proceeds to the disposition stage where it determines whether termination of parental rights is in the best interest of the child. N.C. Gen. Stat. § 7B-1110(a) (2025). The court must consider the following factors and make written findings regarding those that are relevant:

> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

Id. However, the court is not required to make written findings regarding any dispositional alternatives it considered. *In re M.S.E.*, 378 N.C. 40, 63 (2021). Our Supreme Court

> has rejected arguments that the trial court commits error at the dispositional stage of a termination of parental rights proceeding by failing to explicitly consider

> non-termination-related dispositional alternatives, such as awarding custody of or guardianship over the child to the foster family, by reiterating that the paramount consideration must always be the best interests of the child.

In re N.K., 375 N.C. 805, 820 (2020) (quotation marks and citations omitted).

We review the trial court's findings of fact at the disposition stage to determine whether they are supported by sufficient evidence. *In re J.C.J.*, 381 N.C. 783, 788 (2022). We review a trial court's determination that termination of parental rights is in the best interest of the child for an abuse of discretion. *In re K.H.*, 281 N.C. App. 259, 270 (2022) (citation omitted). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (quotation marks and citation omitted).

Here, Mother challenges the following findings of fact:

> 8. A permanent plan of care can only be accomplished by the severing of the relationship between the juvenile and the Respondent/mother by termination of parental rights of the Respondent/mother.
>
> . . . .
>
> 17. The Court finds that although guardianship is the secondary permanent plan for the juvenile, guardianship is not in the best interest of the juvenile in that guardianship would still be placing the juvenile in a holding pattern. Guardianship would not provide the juvenile with a permanent home in a reasonable amount of time.
>
> 18. The juvenile's best interests are more paramount than maintaining the biological family's integrity. The goal of achieving permanence for the juvenile outweighs the goal of maintaining the biological family connection.
>
> . . . .
>
> 21. The juvenile deserves safety, security, emotional support and a permanent home.

Mother's argument that the court misapprehended the law is without merit. The challenged findings reflect the court's weighing of the statutory factors and evidence presented, not a misunderstanding of the law regarding permanent plans.

Finding of Fact 8 reflects the court's determination that the primary permanent plan for Tisha could be accomplished only through termination of Mother's parental rights, not that adoption is the only permanent plan as a matter of law. The court expressly acknowledged that guardianship was the secondary permanent plan but found that guardianship was not in Tisha's best interest because it would place her in a holding pattern, as the terms of guardianship may be modified pursuant to N.C. Gen. Stat. § 7B-1000. This finding reflects that the court evaluated guardianship as a potential permanent plan and determined that it was not in Tisha's best interest.

The court recognized in Finding of Fact 18 that Tisha's need for permanence outweighed the goal of maintaining the biological family connection, consistent with the well-established principle that the paramount consideration must always be the best interest of the child. *In re N.K.*, 375 N.C. at 820.

Finding of Fact 21 likewise demonstrates that the court considered Tisha's need for safety, security, emotional support, and a permanent home. By referring to a permanent home, the court recognized that guardianship lacks the same degree of permanence as adoption because guardianship remains subject to modification under N.C. Gen. Stat. § 7B-1000.

Because the court applied the correct legal framework and was not required to make written findings regarding dispositional alternatives, it did not misapprehend the law in making its findings of fact or best interest determination. Accordingly, the court did not abuse its discretion by determining that terminating Mother's parental rights was in Tisha's best interest.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order terminating Mother's parental rights to Tisha.

AFFIRMED.

Judges WOOD and STADING concur.

CHERYL McDONALD, Widow, and LOGAN McDONALD, Minor Child
(By and Through His Guardian ad Litem, HEATHER LOWE) of MICHAEL McDONALD,
Deceased Employee, Plaintiffs
v.
CITY OF WINSTON-SALEM, Employer, Self-Insured, Defendant

No. COA25-582

Filed 4 March 2026

Workers' Compensation—death benefits—injury-by-accident claim—issues raised in Form 44—no findings of fact—opinion and award vacated and remanded

In a case brought by the wife and son (plaintiffs) of a deceased police sergeant who was employed by the City of Winston-Salem (defendant) and who died of complications related to COVID-19, which he and a number of other officers contracted after working at a local fair during the COVID-19 pandemic, the Full Commission's opinion and award denying plaintiffs' claim for death benefits was vacated and the matter was remanded. The Full Commission failed to address certain issues listed on plaintiffs' Form 44 application for review of the deputy commissioner's opinion and award denying their death benefits claim, including plaintiffs' injury-by-accident claim and multiple evidentiary issues, most of which pertained to plaintiffs' motions to compel discovery of records containing the identities of the other officers who had contracted the virus. The failure to address these issues and to enter specific findings of fact and conclusions of law regarding each one violated N.C.G.S. § 97-85, which governs the Full Commission's review of a deputy commissioner's opinion and award.

Appeal by Plaintiffs from opinion and award entered 31 January 2025 by the Full Commission in the North Carolina Industrial Commission. Heard in the Court of Appeals 18 November 2025.

Daggett Shuler, by Benjamin P. Winikoff, for Plaintiffs-Appellants.

Orbock Ruark & Dillard, PC, by Barbara E. Ruark and Tyler Younts, for Defendant-Appellee.

COLLINS, Judge.

Plaintiffs Cheryl McDonald and Logan McDonald, through his guardian ad litem, appeal from an opinion and award entered by the North

Carolina Industrial Commission that denied Plaintiffs' claim for death benefits.[1] Plaintiffs argue that the Full Commission erred in numerous ways, including by failing to address Plaintiffs' injury-by-accident claim and certain evidentiary issues listed on Plaintiffs' Form 44 Application for Review. After careful review, we vacate and remand the opinion and award to the Full Commission.

I. Background

Decedent Michael McDonald was employed by the City of Winston-Salem Police Department from 1996 until his death on 22 October 2021, from complications of COVID-19 ("Covid"). At the time of his death, he was married to Cheryl McDonald and was the father of Logan McDonald, a minor child with whom he shared custody with Heather Lowe. Decedent served as a sergeant supervising the Department's DWI Task Force, a multi-agency unit focused on impaired driving enforcement. His duties included conducting routine traffic stops, administering sobriety tests, investigating incidents, making arrests, booking suspects into jail, and responding to emergency 911 calls.

In the month before his death, September 2021, Decedent worked at least seventeen ten-hour shifts on the DWI Task Force and conducted numerous traffic stops, arrests, and alcohol sensor tests. Decedent's body camera footage shows that he typically wore a mask in city buildings and when transporting suspects in his patrol vehicle; the footage also shows that Decedent frequently did not wear a mask during traffic stops when in close proximity to and speaking with members of the public who were also frequently unmasked. During the month of September 2021, Decedent's work included extensive traffic activity and public interaction, including more than fifty vehicle stops, eight alcohol sensor tests and full field sobriety tests, six arrests, and participation in an accident investigation.

From 1 October 2021 through 5 October 2021, Decedent was assigned to operate the mobile command vehicle ("MCV") at the 2021 Carolina Classic Fair, a large public event organized by the City of Winston-Salem and held for the first time since the onset of the Covid pandemic. Some city leaders, along with the Chief of Police, objected to holding the Fair because of the stress that Covid placed on the Department, but the majority of city leaders voted to hold the Fair and to increase police

1. The case caption has been amended to remove the double use of the word "employer."

officer pay for those officers working the Fair. Working at the Fair was not a typical duty for the DWI Task Force, and Decedent had not worked in the MCV before the Fair in 2021. On 1 October 2021, Decedent was assigned as the manager and communications operator in the MCV for the first time because of staffing shortages. The MCV housed up to ten officers at a time, many of whom were often unmasked inside the MCV while eating and talking.

Prior to and during the Fair, Decedent interacted with several colleagues. Lieutenant Hamilton met with Decedent in his office while unmasked a few days before the Fair and then again inside the MCV on 1 and 2 October 2021; Lieutenant Hamilton began experiencing Covid symptoms on 3 October and tested positive for Covid on 4 October. That same day, another officer[2] reported testing positive for Covid with symptoms starting on 3 October. On 5 October, Officer Saintsing met with Decedent and Captain Doby inside the MCV for approximately thirty minutes, during which none wore masks. Decedent reported a headache that evening to Officer Saintsing and tested positive for Covid on 6 October. Decedent texted Lieutenant Hamilton that he had tested positive for Covid and that "the fair is not a safe place"; Lieutenant Hamilton agreed. Decedent emailed the Department, detailing his work at the Fair since 1 October, stating that his cough started on 3 October and his fever on 6 October, and noting close proximity to another officer who tested positive for Covid. That same evening, he texted a friend that he "got the Rona from working the fair." On 14 October, a city employee confirmed Decedent's absence from work would be coded as "Q" time because Decedent "was exposed at work" to Covid.

Over the course of September 2021 and the first ten days of October 2021, fifteen officers tested positive for Covid. The Chief of Police testified that seven of the officers who tested positive in the first ten days of October 2021 worked at the Fair, and Lieutenant Hamilton testified that at least two other officers who contracted Covid worked at the Fair. Officer King testified that officers generally discussed the rising number of sick officers working the Fair.

In his personal time, Decedent lived full-time with his wife and parents, and his son, Logan, lived with him part-time during the week; Logan lived with his mother, Heather Lowe, for the remainder of the week. Decedent and his family generally avoided large gatherings and

2. The identity of the officer was known to Defendant but is redacted from the exhibits.

consistently wore masks in public, but he attended one public funeral on 2 October 2021 where Covid precautions were in effect; Decedent did not sit with the general public at the funeral but instead sat with fellow officers and then sat alone at a lunch following the funeral. None of the funeral's attendees were known to test positive for Covid. Decedent's wife, son, and parents tested negative for Covid in October 2021, and Heather Lowe and her husband also tested negative for Covid in September and October 2021. Credit card statements from Decedent and his wife's accounts show transactions at approximately twenty businesses in the three weeks leading up to his Covid illness, including at least one restaurant visit. Other than the restaurant visit, there was no evidence presented as to whether Decedent visited the businesses in person or what he did or purchased at the businesses.

After testing positive for Covid, Decedent's condition deteriorated; he was hospitalized on 18 October, placed on a ventilator on 21 October, and died on 22 October 2021 from cardiac arrest and respiratory failure caused by Covid pneumonia.

On 4 February 2022, Plaintiffs Cheryl McDonald and Logan McDonald, through his guardian ad litem, filed a Form 18 with the North Carolina Industrial Commission, alleging that Decedent's death was compensable under the Workers' Compensation Act as either an occupational disease or an injury by accident. Defendant City of Winston-Salem denied the claim on 18 February 2022. During the course of proceedings before the Commission, Plaintiffs filed multiple motions to compel discovery, specifically seeking information regarding the identities of the officers who had contracted Covid during the months of September and October 2021. A deputy commissioner granted in part and denied in part Plaintiffs' first motion to compel, ordering Defendant to produce any logs or lists of reported Covid cases in officers within the Department and ordering Defendant to redact all names and personal identifying information.

Defendant then filed a motion to reconsider the deputy commissioner's order, arguing in part that Defendant "has no way to track close contact of a positive Covid individual with [Decedent]." The deputy commissioner issued an amended order, allowing Defendant's motion to reconsider and stating that "Defendant is entitled to rely upon the information provided to the Medical Department" and "is not required to question all City employees . . . regarding their health or positive Covid status[.]" The order further provided that Defendant was "not required to disclose interviews, notes, reports, or statements taken or prepared by counsel for Defendant" that pertained to Decedent's death. Plaintiffs

filed a second motion to compel and, alternatively, a motion for sanctions for spoliation; the deputy commissioner denied Plaintiffs' second motion to compel and motion for sanctions for spoliation.

Plaintiffs presented testimony from Dr. Blair Brown, Decedent's treating physician, and Dr. Julie Swann, an expert in industrial engineering and public health. Both opined that Decedent's employment placed him at greater risk of contracting Covid than the general public, and that his illness was more likely than not work related. Defendant presented testimony from Dr. Steven Koehler, a forensic epidemiologist, and Dr. Allan Morrison, an infectious disease physician and epidemiologist. Both testified that Covid was widespread in the community by October 2021, that Decedent's risk of exposure was no greater at work than elsewhere, and that his symptoms beginning 3 October 2021 were inconsistent with exposure at the Fair. They concluded that the source of his infection could not be determined and was not shown to be occupational.

On 23 January 2024, the deputy commissioner issued an opinion and award denying Plaintiffs' claim for death benefits. Plaintiffs appealed to the Full Commission and filed a Form 44 Application for Review, listing numerous alleged errors for the Full Commission's review, including that the deputy commissioner erred by not finding that Decedent's death from Covid was a compensable injury by accident and by making certain evidentiary errors. During the pendency of the appeal, Plaintiffs filed a motion to supplement the record and for judicial notice, which the Full Commission granted in part and denied in part. On 31 January 2025, the Full Commission entered its opinion and award denying Plaintiffs' claim for death benefits. Plaintiffs timely filed a notice of appeal to this Court.

II. Discussion

Plaintiffs first argue that the Full Commission erred by failing to address Plaintiffs' injury-by-accident claim and numerous evidentiary issues listed on their Form 44 Application for Review.[3]

N.C. Gen. Stat. § 97-85 provides for the Full Commission's review of a deputy commissioner's opinion and award. When a matter is appealed to the Full Commission pursuant to this statute, "it is the duty

3. Plaintiffs' issue 1 ("The Industrial Commission erred by making no findings of fact or conclusions of law on crucial facts necessary to determine the plaintiffs' right to compensation.") and issue 2 ("The Industrial Commission erred by denying plaintiffs' motions to compel and, alternatively, for sanctions.") are intertwined, and we review them together in our Sections A and B.

and responsibility of the [F]ull Commission to decide all of the matters in controversy between the parties." *Vieregge v. N.C. State Univ.*, 105 N.C. App. 633, 638 (1992) (citation omitted). Accordingly, the Full Commission must "respond to the questions directly raised" on appellant's Form 44 Application for Review. *Id.* at 639.

Furthermore, the Full Commission must make "detailed findings of fact and conclusions of law with respect to every aspect of the case before it." *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482 (1988). The findings of fact "must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them." *Thomason v. Red Bird Cab Co.*, 235 N.C. 602, 605-06 (1952). "It is likewise plain that th[is] [C]ourt cannot decide whether the conclusions of law and the decision of the [Full] [C]ommission rightly recognize and effectively enforce the rights of the parties . . . if the [Full] [C]ommission fails to make specific findings as to each material fact upon which those rights depend." *Id.* at 606.

Where the Full Commission fails to address all the issues specifically raised on the appellant's Form 44 and fails to make sufficient findings of fact and conclusions of law, the matter must be vacated and remanded for further review. *Vieregge*, 105 N.C. App. at 641-42; *see Lewis v. N.C. Dep't of Corr.*, 138 N.C. App. 526, 529 (2000).

A. Injury by accident

Here, Plaintiffs raised the claim that Decedent's death was the result of an "injury by accident" on their Form 18 and during oral argument, and they alleged the deputy's commissioner's denial of that claim was error on their Form 44. The Full Commission failed to address Plaintiffs' claim of injury by accident. The Full Commission found that "[Plaintiffs] filed a claim for compensation and death benefits under the North Carolina Workers' Compensation Act. The claim was denied, and scheduled for hearing for an opinion as to whether Decedent's contraction of COVID-19 was a compensable occupational disease." This finding fails to acknowledge Plaintiffs' claims for both an occupational disease *and* an injury by accident, and it fails to acknowledge that the deputy commissioner denied the injury-by-accident claim. Additionally, this finding contradicts the Full Commission's Stipulation 8, which states that Plaintiffs' Form 18 claimed both occupational disease and injury by accident.

Because the Full Commission failed to address Plaintiffs' injury-by-accident claim raised on their Form 44, the Full Commission violated N.C. Gen. Stat. § 97-85. *See Vieregge*, 105 N.C. App. at 641-42.

B. Evidentiary appeals

Plaintiffs further argue that the Full Commission failed to address evidentiary issues five through twelve raised on their Form 44.

1. Issue 5

Issue 5 on Plaintiffs' Form 44 states:

> The Deputy Commissioner erred in denying plaintiffs' Motion to Compel dated February 10, 2023 and permitting defendant to not obtain information that shows the identity of the other officers who contracted COVID at the fair. (Ex 2564). Defendants are only entitled to refuse the production of relevant employment records if those records are privileged. 11 NCAC 23A .0605; *Willis v. Duke Power*, 291 N.C. 19, 34, 229 S.E.2d 191, 200 (1976). No such privilege exists for the records sought in this case, and if it did, the records could have been produced pursuant to a protective order. The identities of other police officers who had COVID at the same time as Sgt. McDonald are relevant to this case.

Issue 5 pertains to Plaintiffs' first motion to compel, which the Full Commission failed to address in its opinion and award. The Full Commission made no findings of fact or conclusions of law as to the first motion to compel–specifically, whether the records containing the identities of the officers who contracted Covid at the Fair were privileged and whether the records could have been produced pursuant to a protective order. Because the Full Commission failed to address Plaintiffs' Issue 5, the Full Commission violated N.C. Gen. Stat. § 97-85. *See Vieregge*, 105 N.C. App. at 641-42.

2. Issue 6

Issue 6 on Plaintiffs' Form 44 states:

> The Deputy Commissioner erred in granting Defendant's motion for reconsideration dated February 27, 2023 (Ex 2619, 2628) and permitting defendant to not obtain information that shows the identity of the other officers who contracted COVID at the fair. (Ex 2564). Defendants are only entitled to refuse the production of relevant employment records if those records are privileged. 11 NCAC 23A .0605; *Willis v. Duke Power*, 291 N.C. 19, 34, 229 S.E.2d 191, 200 (1976)[.] No such privilege exists for the records

> sought in this case, and if it did, the records could have been produced pursuant to a protective order. The identities of other police officers who had COVID at the same time as Sgt. McDonald are relevant to this case.

The Full Commission failed to address whether the deputy commissioner erred by granting Defendant's motion for reconsideration and permitting Defendant to withhold records containing the identities of the officers who contracted Covid at the Fair. Because the Full Commission failed to address Plaintiffs' Issue 6, the Full Commission violated N.C. Gen. Stat. § 97-85. *See Vieregge*, 105 N.C. App. at 641-42.

3. Issue 7

Issue 7 on Plaintiffs' Form 44 states:

> The Deputy Commissioner erred in denying Plaintiffs motion for judicial notice of statistical evidence dated April 5, 2023. (Ex 104). *See Lea Co v. N.C. Bd. of Transp.*, 304 N.C. 603, 615, 304 S.E.2d 164, 173-174 (1983) (citing statistical evidence to distinguish between "Acts of God" and "reasonably foreseeable events"); *Hutchens v. Hankins*, 63 N.C. App. 1, 24, 303 S.E.2d 584, 598 (1983) ("[t]his reasonable foreseeability of harm is evidenced by the statistics of auto accidents and carnage on our highways") . . . . The mortality statistics and the public laws referenced in the motion are data showing increased risk for law enforcement.

The Full Commission addressed Plaintiffs' motion for judicial notice, Defendant's response, and the deputy commissioner's order denying Plaintiffs' motion at length in the "evidentiary rulings" section of the opinion and award. Further, the Full Commission's finding of fact 34 states, "At Plaintiffs' request, the Commission takes judicial notice that the Officer Down Memorial website states that in the United States there were 697 line-of-duty deaths in 2021, among all law enforcement officers and, of these 490 were caused by COVID-19[.]" The finding further states, "[I]n North Carolina, there were 25 line-of-duty deaths in 2021, of these 19 were caused by COVID-19. The Commission assigns the information on this website little weight as this is not a government-maintained website and the statistics are not common knowledge or subject to ready and accurate determination." Because the Full Commission addressed Plaintiffs' Issue 7, the Full Commission did not violate N.C. Gen. Stat. § 97-85 with respect to Issue 7.

4. Issue 8

Issue 8 on Plaintiffs' Form 44 states: "The Deputy Commissioner erred in prohibiting testimony on the identities of other Officers who tested positive for COVID."

The Full Commission did not address whether the deputy commissioner erred by prohibiting testimony on the identities of other officers who tested positive for Covid. Because the Full Commission failed to address Plaintiffs' Issue 8, the Full Commission violated N.C. Gen. Stat. § 97-85. *See Vieregge*, 105 N.C. App. at 641-42.

5. Issue 9

Issue 9 on Plaintiffs' Form 44 states:

> The Deputy Commissioner erred in denying Plaintiff's post-hearing motion to compel and motion for spoliation finding. (Exhibits C-E To Plaintiff's motion to supplement the record). Defendants are only entitled to refuse the production of relevant employment records if those records are privileged. 11 NCAC 23A .0605; *Willis v. Duke Power*, 291 N.C. 19, 34, 229 S.E.2d 191, 200 (1976). No such privilege exists for the records sought in this case. The defendant had this information and lost it despite having knowledge that Sgt. McDonald's family was pursuing a death claim. Plaintiffs met their burden in showing that the opposing party had notice of the potential for future litigation, and that the lost evidence was relevant and potentially supportive of the requesting party's claim. . . .

In the "evidentiary rulings" section of the opinion and award, the Full Commission described Plaintiffs' post-hearing motion to compel and motion for sanctions for spoliation and quoted portions of Defendant's responses to the motions. Without making findings of fact or conclusions of law, the Full Commission simply "denie[d] Plaintiffs' motion to compel and motion for sanctions." As the Full Commission failed to make findings of fact and conclusions of law to support its disposition, *Joyner*, 92 N.C. App. at 482, it failed to adequately address Plaintiffs' Issue 9, violating N.C. Gen. Stat. § 97-85. *See Vieregge*, 105 N.C. App. at 641-42.

6. Issue 10

Issue 10 on Plaintiffs' Form 44 states:

> The Deputy Commissioner erred in sustaining the objection at the sidebar and subsequent question (T 84-85) to

> prohibit witnesses from disclosing the identities of the other officers who tested positive for COVID-19 when under Rule 803(3) as Then Existing Mental, Emotional, or Physical Condition.– A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) makes such statements admissible.

The Full Commission failed to address whether the deputy commissioner erred by sustaining Defendant's objection at the sidebar and subsequent request to prohibit witnesses from disclosing the identities of the officers who tested positive for Covid. Further, the Full Commission's opinion and award is silent on Rule 803 and whether it applies to the prohibited testimony. Because the Full Commission failed to address Plaintiffs' Issue 10, the Full Commission violated N.C. Gen. Stat. § 97-85. *See Vieregge*, 105 N.C. App. at 641-42.

7. Issue 11

Issue 11 on Plaintiffs' Form 44 states:

> The Deputy Commissioner erred in sustaining the objection as to whether COVID-19 was being spread among WSPD Officers at the Carolina Classic Fair (T 89-92) and that other officers were out with COVID-19, under Rule 803(3) as Then Existing Mental, Emotional, or Physical Condition.– A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health). There is no requirement that an individual present a copy of their covid test result for the statements to be admissible.

The Full Commission failed to address whether the deputy commissioner erred by sustaining Defendant's objection to evidence concerning whether Covid was being spread amongst officers at the Fair and whether officers were out sick before and during the Fair. Further, the Full Commission's opinion and award is silent on Rule 803 and whether it applies to the prohibited evidence. Because the Full Commission failed to address Plaintiffs' Issue 11, the Full Commission violated N.C. Gen. Stat. § 97-85. *See Vieregge*, 105 N.C. App. at 641-42.

8. Issue 12

Issue 12 on Plaintiffs' Form 44 states:

> The Deputy Commissioner erred in sustaining the objection as to the identities of the other officers Lt. Hamilton was told had COVID (T 199) when the defendant opened the door to the testimony by asking the witnesses if other officers, Doby or Pritchard, had tested positive for COVID-19 (T 182). *State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993) (observing that when party "opens the door" to issue, opposing party may elicit evidence that would otherwise be incompetent or irrelevant to "dispel favorable inferences arising" from party's evidence).

The Full Commission failed to address whether the deputy commissioner erred by sustaining Defendant's objection to testimony about the identities of the other officers whom Lieutenant Hamilton was told had Covid. Further, the Full Commission failed to address whether Defendant opened the door to the testimony. Because the Full Commission failed to address Plaintiffs' Issue 12, the Full Commission violated N.C. Gen. Stat. § 97-85. *See Vieregge*, 105 N.C. App. at 641-42.

C. Summary

In summary, while Plaintiffs expressly challenged the denial of their injury-by-accident claim and numerous evidentiary rulings related to discovery, the Full Commission failed to address any of the issues raised except Plaintiffs' Issue 7. These omissions were not a matter of evidentiary weight; they were failures to exercise the Full Commission's statutory duty. Without findings and conclusions on the injury-by-accident claim or the evidentiary issues raised on Plaintiffs' Form 44, this Court cannot conduct meaningful appellate review of the opinion and award. *Thomason*, 235 N.C. at 606; *Perry v. CKE Res., Inc.*, 187 N.C. App. 759, 763 (2007). In light of this conclusion, we do not reach Plaintiffs' remaining arguments that the Full Commission misapprehended the law by determining that (1) Decedent's job did not place him at an increased risk of contracting Covid and (2) Plaintiffs did not prove causation through circumstantial evidence, and that it erred by relying on expert opinions based on assumptions and speculation.

III. Conclusion

For the foregoing reasons, we vacate and remand the opinion and award to the Full Commission "for further review, findings[,] and entry of an appropriate order[.]" *Vieregge*, 105 N.C. App. at 641.

VACATED AND REMANDED.

Judges ARROWOOD and HAMPSON concur.

McGEHEE v. FARBER

[303 N.C. App. 271 (2026)]

PAULA M. McGEHEE, Executrix of the
ESTATE OF TONY MILLER McGEHEE, Plaintiff
v.
MARK ADAM FARBER, M.D., Individually; FERNANDO MOTTA, M.D.,
Individually; and PAUL BRIAN TESSMANN, M.D., Individually, Defendants

No. COA25-589

Filed 4 March 2026

1. Appeal and Error—interlocutory order—medical malpractice action—discovery order—non-frivolous privileges asserted—substantial right

In a medical malpractice action, although the trial court's discovery order was interlocutory, where the privileges asserted by defendant physicians—under both federal and state law—were not frivolous or insubstantial, the discovery order affected a substantial right and was therefore immediately appealable.

2. Medical Malpractice—discovery—statutory privilege—Patient Safety Act—patient safety work product—SAFE report not protected

In a medical malpractice action brought against three doctors arising from a patient's death, one day after being discharged from the hospital, from aortic aneurysm and aortic dissection—even though the patient had been diagnosed with aortic dissection during his stay—the trial court did not err by requiring UNC Health, a non-party to the suit, to produce a subpoenaed document called the Safety Awareness for Everyone (SAFE) report. Despite its argument that the document was protected from disclosure under the federal Patient Safety Act, UNC Health failed to carry its burden of showing that the document qualified as patient safety work product under the statute, since the document was not created for the purpose of reporting to a patient safety organization and did not include the deliberations or analysis of a patient safety evaluation system.

3. Medical Malpractice—discovery—medical review privilege—depositions of non-party physicians—scope of protection

In a medical malpractice action brought against three doctors (defendant physicians) arising from a patient's death, one day after being discharged from the hospital, from aortic aneurysm and aortic dissection—even though the patient had been diagnosed with aortic dissection during his stay—although the subpoenaed non-party physicians could be questioned in depositions about any

matter related to decedent's care and their knowledge of other incidents involving defendant physicians, they could not be compelled to answer any inquiries where their testimony would provide information gained solely through medical review committee discussions that would be protected under the medical review privilege. The trial court's discovery order was partially vacated and the matter was remanded to the trial court to clarify this provision of its order in accordance with applicable law.

4. Medical Malpractice—discovery—physician-patient privilege —spreadsheet of patient complaints not protected

In a medical malpractice action brought against three doctors arising from a patient's death, one day after being discharged from the hospital, from aortic aneurysm and aortic dissection—even though the patient had been diagnosed with aortic dissection during his stay—the trial court did not err by requiring UNC Health, a non-party to the suit, to disclose during discovery a spreadsheet of patient complaints mentioning the doctor who had conducted the patient's examination. The complaints had been submitted to UNC Health's patient-relations department and not to physicians for treatment purposes, and, further, the trial court had examined the spreadsheet in camera and properly determined that it did not contain privileged physician-patient information. As an additional safeguard, the trial court ordered UNC Health to redact any protected health information and to produce the spreadsheet subject to a protective order.

Appeal by Defendants Mark Adam Farber, M.D.; Fernando Motta, M.D.; and Paul Brian Tessmann, M.D.; and Non-Parties UNC Health; Melina R. Kibbe, M.D.; Harvey L. Lineberry II, Ph.D.; David Gerber, M.D.; Ron Falk, M.D.; Elise Maggioncalda, M.D.; Austin Flick, M.D.; Justin Myers, D.O.; and Abhi Mehrotra, M.D. from order entered 28 February 2025 by Judge Thomas H. Lock in Harnett County Superior Court. Heard in the Court of Appeals 13 January 2026.

Robinson, Bradshaw & Hinson, P.A., by Matthew W. Sawchak, Erik R. Zimmerman, and Clara Nieman, for all Appellants.

Cranfill Sumner, LLP, by Ryan Shuirman and Kelley M. Petcavich, for Non-Parties UNC Health; Melina R. Kibbe, M.D.; Harvey L. Lineberry, II, Ph.D.; David Gerber, M.D.; Ron Falk, M.D.; Elise Maggioncalda, M.D.; Austin Flick, M.D.; Justin Myers, D.O.; and Abhi Mehrotra, M.D.

Walker Allen, LLP, by Barry Cobb, for Defendants-Appellants Mark Adam Farber, M.D.; and Fernando Motta, M.D.

Ellis & Winters, LLP, by Alex J. Hagan, for Defendant-Appellant Paul Brian Tessmann, M.D.

The Melvin Law Firm, P.A., by R. Bailey Melvin, for Plaintiff-Appellee Paula M. McGehee, Executrix of the Estate of Tony Miller McGehee.

COLLINS, Judge.

This appeal arises from a discovery dispute in a medical malpractice action and involves three privileges: The Patient Safety and Quality Improvement Act, the medical review-committee privilege, and the physician-patient privilege. Appellants are three UNC Health physicians, Defendants Mark Adam Farber, M.D.; Fernando Motta, M.D.; and Paul Brian Tessmann, M.D.; non-party UNC Health; and eight non-party UNC physicians, Melina R. Kibbe, M.D.; Harvey L. Lineberry II, Ph.D.; David Gerber, M.D.; Ron Falk, M.D.; Elise Maggioncalda, M.D.; Austin Flick, M.D.; Justin Myers, D.O.; and Abhi Mehrotra, M.D. Appellee is Plaintiff Paula M. McGehee in her capacity as Executrix of her deceased husband's estate.

Appellants appeal from an order entered 28 February 2025 directing UNC Health to produce certain documents subject to a protective order and allowing Plaintiff to depose the subpoenaed non-party physicians regarding past incidents involving Dr. Farber. For the reasons discussed herein, we affirm in part, vacate in part, and remand to the trial court.

I. FACTUAL AND PROCEDURAL BACKGROUND

Decedent Tony Miller McGehee was seen on 8 August 2021 at UNC Medical Center for right flank pain that radiated to his groin. Decedent had been transferred to UNC Medical Center from the Central Carolina Hospital Emergency Department after a CT scan of his abdomen and pelvis was concerning for aortic dissection, and a subsequent CT scan of his chest revealed findings consistent with a Stanford Type B aortic dissection.

Upon his arrival at UNC Medical Center, a UNC radiologist interpreted the CT scan from Central Carolina Hospital and reported findings consistent with a Stanford Type A aortic dissection. Dr. Motta ordered a CT scan of Decedent's chest, abdomen, and pelvis. A UNC radiologist

interpreted the scan and reported findings consistent with a Stanford Type A aortic dissection.

Dr. Tessmann admitted Decedent to the ICU to perform a cardiac-gated CT scan to evaluate for a retrograde intramural hematoma. Cardiac-gated CT scans were performed on 11 August 2021 and 13 August 2021; both revealed findings consistent with a Stanford Type A aortic dissection. Defendants discharged Decedent from UNC Medical Center on 13 August 2021 with instructions to follow up in a month. The next morning, Decedent went into cardiac arrest and was transferred to Cape Fear Valley Medical Center where he died of an aortic aneurysm and aortic dissection.

Decedent's wife, as Executrix of his estate, filed suit against Defendants alleging, in relevant part, that Defendants were negligent in treating Decedent. Defendants answered Plaintiff's complaint, denying the substantive allegations.

Plaintiff subpoenaed Drs. Kibbe, Lineberry, Gerber, and Falk to appear and testify at a deposition and to produce:

> 1. Any incident reports filed that is in any way related to the care given to [Decedent]
>
> . . . .
>
> 3. Any complaints filed against Dr. Mark Adam Farber by residents, staff, other UNC employees or patients
>
> 4. Any and all documents regarding any training, punishment or discipline Dr. Mark Adam Farber has received while employed by UNC.

Plaintiff also subpoenaed Drs. Maggioncalda, Flick, and Myers to appear and testify at a deposition. All subpoenaed physicians filed motions to quash or, in the alternative, for a protective order on the grounds that the subpoenas seek privileged peer review information and documents that constitute patient safety work product protected by the Patient Safety and Quality Improvement Act of 2005 ("Patient Safety Act").

Plaintiff also subpoenaed UNC Health to produce these same documents. UNC Health filed a motion to quash or, in the alternative, for a protective order on the grounds that the subpoena seeks privileged peer review information, documents that constitute patient safety work product protected by the Patient Safety Act, and documents that implicate the Protected Health Information ("PHI") of non-party patients under the Health Insurance Portability and Accountability Act ("HIPAA") and

North Carolina law. In support of its motion, UNC Health submitted as exhibits copies of its procedures for creating hospital peer review committees, the bylaws of its medical staff and accompanying medical staff organization manual, a membership agreement with The Quality Center Patient Safety Organization ("Patient Safety Organization"), its Patient Safety Event Reporting policy, a privilege log containing an entry for a Safety Awareness for Everyone ("SAFE") report regarding Decedent's care, and an affidavit of Dr. David Zvara, Chief Medical Officer of UNC Hospitals.

After a hearing on 21 January 2025, the trial court entered an order denying UNC Health's motion to quash and allowing its motion for a protective order, ordering it to produce the subpoenaed documents and ruling that Plaintiff's counsel may question the subpoenaed physicians about "any manner related to the care given to [Decedent] and their knowledge of any other incidents involving Dr. Farber where his care or his interactions with patients, staff and employees may have been called into question." Defendants and the Non-Parties appealed.

II. DISCUSSION

A. Appellate Jurisdiction

[1] As a threshold issue, we must determine whether we have jurisdiction to review this appeal from an interlocutory discovery order.

"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." *Veazey v. Durham*, 231 N.C. 357, 362 (1950) (citation omitted). Immediate appeal from an interlocutory order may be allowed in several instances, including where "the trial court's decision deprives the appellant of a substantial right" that will be lost absent immediate review pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)(a). *Woody v. Vickrey*, 276 N.C. App. 427, 433 (2021) (citation omitted).

"An interlocutory order affects a substantial right if the order deprives the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered." *Cape Homeowners Ass'n, Inc. v. S. Destiny, LLC*, 292 N.C. App. 374, 378 (2024) (quotation marks and citation omitted). When "a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right . . . ." *Sharpe v. Worland*, 351 N.C. 159, 166 (1999).

Here, Appellants argue that the trial court's order affects a substantial right because UNC Health asserted "the federal privilege under the Safety Act" for the SAFE report regarding Decedent's care; "North Carolina's privilege for the proceedings of medical-review committees" under N.C. Gen. Stat. § 131E-95(b); and "the doctor-patient privilege in N.C. Gen. Stat. § 8-53." As the assertion of these privileges is not otherwise frivolous or insubstantial, we hold that the challenged order affects a substantial right. *Id.* Accordingly, we have jurisdiction to review this appeal.

B. Standard of Review

Although discovery orders are ordinarily reviewed for abuse of discretion, *Midgett v. Crystal Dawn Corp.*, 58 N.C. App. 734, 737 (1982), an order compelling the disclosure of information claimed to be statutorily privileged presents a legal question, and our review is therefore de novo. *See Hammond v. Saini*, 367 N.C. 607, 609-10 (2014).

A party asserting a statutory privilege must demonstrate that the privilege applies and may not rely on "mere conclusory assertions." *Id.* at 610. Instead, the party must provide sufficient evidence establishing that the disputed material falls within the scope of the privilege as defined by statute. *Brown v. Am. Partners Fed. Credit Union*, 183 N.C. App. 529, 534 (2007). A party may attempt to meet this burden by submitting affidavits setting forth facts sufficient to establish the applicability of the privilege to the particular documents being withheld or by submitting the allegedly privileged materials for an in camera review. *Id.* at 534-35.

C. Patient Safety Act

[2] Appellants first argue that the trial court erred by ordering UNC Health to disclose the SAFE report because it is privileged patient safety work product under the Patient Safety Act.

The Patient Safety Act, 42 U.S.C. §§ 299b-21 *et seq.*, establishes a federal privilege and confidentiality provisions for patient safety work product, subject to statutory exceptions. 42 U.S.C. §§ 299b-22(a)-(c). Patient safety work product is defined in three ways: (1) "data, reports, records, memoranda, analysis . . . or written or oral statements . . . assembled or developed by a provider for reporting to a patient safety organization and are reported to a patient safety organization," *id.* § 299b-21(7)(A)(i)(I); (2) such things developed by a patient safety organization, *id.* § 299b-21(7)(A)(i)(II); and (3) such things that "identify or constitute the deliberations or analysis of, or identify the fact of reporting pursuant to, a patient safety evaluation system," *id.* § 299b-21(7)(A)(ii).

The definition of patient safety work product excludes "information that is collected, maintained, or developed separately, or exists separately, from a patient safety evaluation system[,]" and such "separate information or a copy thereof reported to a patient safety organization shall not by reason of its reporting be considered patient safety work product." *Id.* § 299b-21(7)(B).

The first definition protects documents that "are assembled or developed by a provider *for reporting* to a patient safety organization and are reported to a patient safety organization[.]" *Id.* § 299b-21(7)(A)(i)(I) (emphasis added). The critical inquiry is the purpose for creating the information; thus, "the information will only be considering patient safety work product if it is created '*for the purpose of* reporting' to a patient safety organization." *Daley v. Teruel*, 107 N.E.3d 1028, 1037 (Ill. App. Ct. 2018) (citation omitted).

Here, UNC Health has not met its burden of demonstrating that the SAFE report is protected by the Patient Safety Act. The UNC Health Patient Safety Event Reporting policy governing SAFE reports indicates that UNC Health uses SAFE reports for multiple internal purposes, including routine quality improvement purposes and operational review: "Within a culture of safety, there is continuous reporting of patient safety concerns or events in order for these occurrences to be analyzed and processes changed or systems improvements made." Dr. Zvara acknowledged these additional uses in his affidavit:

> 11. UNC Hospitals' Patient Safety Evaluation System (PSES) exists anywhere UNC Hospitals conduct patient safety activity and extends anywhere the use of Patient Safety Work Product ("PSWP") may result in quality improvement. PSWP is considered "collected" when the information is entered into the SAFE event reporting system. Submission of PSWP into the PSES is performed with the intention of *ultimately* reporting PSWP to the [Patient Safety Organization]. PSWP that is derived from analysis and deliberations shall be marked "PSWP – Analysis within the PSES" or "Confidential."

(emphasis added). Although UNC Health ultimately submitted the SAFE report to the Patient Safety Organization, UNC Health may not shield otherwise discoverable internal documents from disclosure merely by routing them through their patient safety evaluation system. UNC Health has not met its burden of demonstrating that the SAFE report was created *for* reporting to a patient safety organization. The court

thus did not err by concluding that Appellants failed to show that the SAFE report was created for reporting to a patient safety organization within the meaning of 42 U.S.C. § 299b-21(7)(A)(i)(I).

Appellants cite *In re BayCare Med. Grp., Inc.*, for the proposition that the Patient Safety Act may protect from disclosure documents created, used, or maintained for multiple purposes under the first definition, so long as the documents constitute patient safety work product under the statute. 101 F.4th 1287, 1291 (11th Cir. 2024). But *BayCare* is neither binding nor persuasive, as it addressed the third definition of patient safety work product, not the first.

The SAFE report likewise does not "identify or constitute the deliberations or analysis of . . . a patient safety evaluation system" because, as UNC Health concedes, it created the SAFE report which "analyzes Mr. McGehee's condition and treatment." As the SAFE report does not include the deliberations or analysis of a patient safety evaluation system, it does not satisfy the third definition of patient safety work product under 42 U.S.C. § 299b-21(7)(A)(ii).

For the reasons stated above, the SAFE report does not constitute patient safety work product, and the court did not err by ordering UNC Health to disclose the report.

D. Medical Review Privilege

[3] Appellants next argue that the trial court erred by ordering the subpoenaed non-party physicians to testify in depositions about "privileged discussions of medical-review committees."

The medical review privilege, less commonly referred to as the medical review-committee privilege, provides that "[t]he proceedings of a medical review committee, the records and materials it produces[,] and the materials it considers" are confidential and not considered public records. N.C. Gen. Stat. § 131E-95(b) (2025). These records and materials are not discoverable or admissible in any civil action against a hospital or a provider of professional health services "which results from matters which are the subject of evaluation and review by the committee." *Id.* No person who attends a medical review committee meeting "shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or its members." *Id.* Although a committee member or a person who testifies before the committee may testify in a civil action, that individual cannot be questioned regarding testimony

given before the committee or any opinions formed as a result of the committee hearings. *Id.* The medical review privilege does not, however, extend to "information, documents, or records otherwise available[.]" *Id.*

The purpose of N.C. Gen. Stat. § 131E-95(b) is to promote medical staff candor and medical review committee objectivity. *Shelton v. Morehead Memorial Hospital*, 318 N.C. 76, 83 (1986). The privilege does not extend to "information . . . available[] from original sources other than the medical review committee . . . merely because it was presented during medical review committee proceedings[,]" and the statute's purpose is not violated by allowing materials otherwise available to "be discovered and used in evidence even though they were considered by [a] medical review committee." *Id.* at 83-84; *see also Armstrong v. Barnes*, 171 N.C. App. 287, 294 (2005) (holding that a doctor was not shielded from answering deposition questions about his drug abuse because he was "an original source . . . [of] the information sought because he created and kn[ew] the details of his drug abuse outside the privileged proceedings of the [medical review] committee and the records it produced").

Here, the court ruled that Plaintiff's counsel may question the subpoenaed non-party physicians "about any matter related to the care given to [Decedent] and their knowledge of any other incidents involving Dr. Farber where his care or his interactions with patients, staff[,] and employees may have been called into question." At oral argument, the parties did not dispute the applicable law and essentially agreed that the court's order on this issue was overbroad. Plaintiff conceded that if a subpoenaed physician "solely learned" of information about Dr. Farber "only in a medical review committee hearing, then they wouldn't be required to testify about that."

The court correctly ordered that "Plaintiff's Counsel can *inquire* of these employees about any matter related to the care given to [Decedent] and their knowledge of any other incidents involving Dr. Farber where his care or his interactions with patients, staff[,] and employees may have been called into question." (emphasis added). We add, however, that the subpoenaed non-party physicians may not be *compelled to answer* such inquiries where their testimony would provide information gained solely through medical-review committee proceedings that is protected by the medical review privilege under N.C. Gen. Stat. § 131E-95. We thus vacate this portion of the order and remand to the trial court for clarification of this provision consistent with the law.

E. Physician-Patient Privilege

[4] Appellants finally argue that the trial court erred by ordering UNC Health to produce a spreadsheet containing patient complaints that mention Dr. Farber because the spreadsheet is protected by the physician-patient privilege under N.C. Gen. Stat. § 8-53.

Under the physician-patient privilege, a physician may not be required to disclose any information "acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." N.C. Gen. Stat. § 8-53 (2025). Confidential information contained in medical records may be furnished only if authorized by the patient, or if deceased, by certain representatives. *Id.* The physician-patient privilege extends to oral communications and to information obtained by a physician through observation or examination during treatment. *Cates v. Wilson*, 321 N.C. 1, 14 (1987). "The physician-patient privilege is strictly construed and the patient bears the burden of establishing the existence of the privilege and objecting to the introduction of evidence covered by the privilege." *Mosteller v. Stiltner*, 221 N.C. App. 486, 487 (2012) (quotation marks and citations omitted).

Here, the spreadsheet contains complaints submitted to UNC Health's patient-relations department, not to treating physicians. Appellants offered no evidence that the information was communicated to a physician for treatment or derived from a physician's examination. Dr. Zvara's affidavit merely asserted that the spreadsheet "implicates the Protected Health Information ('PHI') of patients other than the Plaintiff," but HIPAA's definition of PHI is broader than § 8-53 and does not establish a physician-patient privilege. *Compare* 45 C.F.R. § 160.103 (defining protected health information broadly to include individually identifiable health information transmitted or maintained in any form or medium) *with* N.C. Gen. Stat. § 8-53 (limiting physician-patient privilege to information acquired in attending a patient and necessary to enable medical treatment).

The court reviewed the spreadsheet in camera and found no basis to conclude that it contained privileged information. Upon our review, we conclude the same. Furthermore, the court ordered UNC Health to redact any protected health information and to produce the spreadsheet subject to a protective order.

Because the spreadsheet does not contain privileged physician-patient information under section 8-53, the court did not err by ordering UNC Health to produce it.

III. CONCLUSION

In sum, the trial court did not err by ordering UNC Health to disclose the SAFE report, as it does not constitute patient safety work product under 42 U.S.C. § 299b-21(7)(A)(i) or (ii) and is therefore not privileged. The court erred to the extent it ordered UNC Health and its employees to produce documents or provide testimony regarding information that is protected by the medical review privilege under N.C. Gen. Stat. § 131E-95. The court did not err by ordering UNC Health to disclose redacted patient complaints against Dr. Farber because these are not protected by the physician-patient privilege under N.C. Gen. Stat. § 8-53. Accordingly, we affirm in part, vacate in part, and remand to the trial court to clarify in its order that UNC Health and its employees are not required to testify to information that is protected by the medical review privilege.

AFFIRMED IN PART; VACATED IN PART; AND REMANDED.

Judges ZACHARY and CARPENTER concur.

NAACP (NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE) GASTON COUNTY BRANCH; NABVETS (NATIONAL ASSOCIATION FOR BLACK VETERANS, INC.) GASTON COUNTY CHAPTER; ETA MU LAMBDA CHAPTER OF ALPHA PHI ALPHA FRATERNITY, INC.; KAREN BRINGLE; GRACIE MOORE; AND JOSE TROCHE, PLAINTIFFS
v.
GASTON COUNTY, DEFENDANT

No. COA24-818

Filed 4 March 2026

1. Constitutional Law—North Carolina—Open Courts Clause—county's refusal to remove Confederate monument from courthouse

In an action for declaratory and injunctive relief seeking the removal of a Confederate monument located outside of a county courthouse, an order granting summary judgment in favor of the county was affirmed where plaintiffs failed to forecast evidence showing that the monument's placement, regardless of any discriminatory intent behind it, violated the Open Courts Clause of the state constitution. Although plaintiffs produced evidence suggesting that the monument created a psychological barrier to court access (in

that it conveyed a racist message that made Black residents question whether they would "receive justice within the courthouse"), none of plaintiffs' evidence showed that they were deprived of public access to functioning courts, participation in legal proceedings, speedy trials for criminal defendants, availability of legal remedies, or any other of the Open Courts Clause's guarantees by virtue of the monument's presence.

2. Constitutional Law—North Carolina—equal protection—Confederate monument built outside courthouse—county's refusal to relocate

In an action for declaratory and injunctive relief seeking the removal of a Confederate monument located outside of a county courthouse, an order granting summary judgment in favor of the county was affirmed where plaintiffs failed to forecast evidence showing: (1) that the county's refusal to relocate the monument violated the Equal Protection Clause of the state constitution, since the Monument Protection Law forbade the county from removing the monument (absent specific circumstances, none of which applied here), thereby rendering any discriminatory intent on the county's part irrelevant; and (2) that the original construction and placement of the monument in 1912 violated equal protection rights where, although plaintiffs showed evidence of discriminatory intent, they failed to show a meaningful disparate impact along racial lines. Notably, plaintiffs' evidence regarding the negative feelings and psychological harm caused by the monument's presence was not enough to establish the disparate impact element of their claim, which required evidence that Black residents of the county were actually denied court access, received disparate results in judicial proceedings, or were otherwise barred from participating in the justice system because of the monument.

Appeal by plaintiffs from order entered 5 January 2024 by Judge Robert C. Ervin in Superior Court, Gaston County. Heard in the Court of Appeals 20 May 2025.

Tin, Fulton, Walker & Owen, PLLC, by Gagan Gupta and Abraham Rubert-Schewel and the Paynter Law Firm, PLLC, by Stuart M. Paynter and Cheryl D. Comer, for plaintiffs-appellants.

Parker Poe Adams & Bernstein LLP, by Bradley K. Overcash and Emily L. Poe, for defendant-appellee.

STROUD, Judge.

In 2020, Plaintiffs filed suit for declaratory and injunctive relief to force Gaston County to remove a Confederate monument. The County erected the monument in 1912 outside its courthouse in downtown Gastonia. In 1998, the County moved the monument to its new courthouse, where it stands today. Plaintiffs alleged that the monument's continued presence violates several provisions of the North Carolina Constitution, including the Open Courts Clause and Equal Protection Clause.[1]

Gaston County moved for summary judgment and sought a declaratory judgment that the Monument Protection Law, N.C. Gen. Stat. § 100-2.1 (2023), prohibits the County from removing the monument.[2] That law provides that "[a]n object of remembrance located on public property may not be permanently removed" but may be "relocated"—"whether temporarily or permanently"—under limited circumstances. *Id.* § 100-2.1(b). The trial court granted summary judgment for the County. It determined that there were no genuine issues of material fact. And it ruled that the Monument Protection Law allows removal only under specific statutory conditions—none of which existed here—and that Plaintiffs failed to show any constitutional violation.

As explained below, Plaintiffs' open courts claim is foreclosed by *North Carolina State Conference of NAACP v. Alamance County*, 293 N.C. App. 107, 900 S.E.2d 224 (2024). There, we held that "the Open Courts Clause does not prohibit the placement of an object of historical

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1. Plaintiffs also brought claims under the state constitution's public purpose provisions, N.C. Const. art. V, §§ 2(1), 2(7); secession and allegiance clauses, N.C. Const. art. I, §§ 4, 5; and Due Process (Law of the Land) Clause, N.C. Const. art. I, § 19. They agreed to "drop" their secession and allegiance claim at the summary judgment hearing. They also failed to challenge the trial court's rulings on the public purpose and due process claims, thus abandoning them on appeal. N.C. R. App. P. 28(a).

2. In their pleadings and briefs, the parties disputed what to call the Monument Protection Law. Plaintiffs called it the "Patriotism Act," arguing that the term "Monuments Law" was "misleading because of the dearth of textual evidence that the Act applies to courthouse Confederate monuments or to monuments on county property." "[B]y its own terms," Plaintiffs added, "the Patriotism Act 'does not apply' to monuments posing a threat to public safety." Gaston County called it the "Monuments Law," noting that the statute's official title is "Protection of monuments, memorials, and works of art" and Chapter 100 is entitled "Monuments, Memorials and Parks." In *North Carolina State Conference of NAACP v. Alamance County*, this Court referred to the statute as the Monument Protection Law, so we use that term here. 293 N.C. App. 107, 110, 900 S.E.2d 224, 228 (2024) ("[T]he [m]onument was of the type intended to be covered by the General Assembly when it enacted the Monument Protection Law.").

remembrance in or around a courthouse." *Id.* at 115, 900 S.E.2d at 230. That holding controls here.

The equal protection claim fails too. Plaintiffs advance two theories: first, that Gaston County's refusal to relocate the monument violates the state Equal Protection Clause; second, that the monument's original construction and placement in 1912 also violates that Clause. The first theory fails under *Alamance County*, which held that a county's intent in declining to move a monument is "irrelevant" when the Monument Protection Law forbids removal. *Id.* at 113, 900 S.E.2d at 229.

Plaintiffs' second theory fails because under our state Equal Protection Clause, a plaintiff must prove both discriminatory intent and "a meaningful disparate impact along racial lines." *Holmes v. Moore*, 384 N.C. 426, 440, 886 S.E.2d 120, 132 (2023). Plaintiffs offered survey data showing that Black residents tend to have more negative feelings about Confederate monuments than White residents. They also submitted expert testimony about potential psychological harm from the monument. But they didn't show that the monument has caused disparate results in judicial outcomes. At the hearing below, Plaintiffs admitted they weren't claiming that "the judges or any [c]ourt officials [we]re acting differently or treating Black residents differently." Plaintiffs' claims rest on negative feelings about historical symbols—feelings that, however deeply felt, cannot support a legal remedy without evidence of "a meaningful disparate impact along racial lines" on how the judicial system operates. *Id.* We therefore affirm.

I. Background[3]

Plaintiffs filed a second amended complaint (complaint) and petitioned for declaratory and injunctive relief in the Superior Court, Gaston County, on 13 October 2021.[4] The complaint detailed the monument's history and alleged multiple state constitutional violations. We recount both below.

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3. Because we are reviewing a summary judgment order, our background section comes from the "pleadings," "affidavits," and any other "discovery materials available." *McLennan v. Josey*, 234 N.C. App. 45, 47, 758 S.E.2d 888, 890 (2014) (citation omitted). We view such evidence "in the light most favorable to the non-moving party"—*i.e.*, in Plaintiffs' favor. *Id.*

4. Plaintiffs filed their initial complaint and petition on 12 November 2020 and an amended complaint and petition on 2 March 2021. At the outset, Plaintiffs named the Gaston County Board of Commissioners and several individual commissioners in their official capacities as Defendants. But at the summary judgment hearing, Plaintiffs voluntarily dismissed the individual commissioners, leaving Gaston County as the lone Defendant.

A. Plaintiffs' Allegations

Plaintiffs are three organizations—the Gaston County branch of the National Association for the Advancement of Colored People (NAACP), the Gaston County chapter of the National Association for Black Veterans (NABVETS), the Eta Mu Lambda Chapter of Alpha Phi Alpha Fraternity—and three individuals, all Gaston County residents and taxpayers. The complaint specifically alleges that one individual Plaintiff is White, one is Black, and one is Hispanic.[5]

Plaintiffs alleged that the monument at issue—"a multi-story structure guarding the main entrance to the Gaston County courthouse"—"valorizes an era of slavery, secession, and white supremacy." In 1912, Gaston County erected the monument outside its "historic courthouse in downtown Gastonia." It stayed there until 1998, when county officials moved it to the new courthouse's entrance on Dr. Martin Luther King Way, near the Gaston County Board of Commissioners' (Board) meeting place, the Social Services Division, the Battered Women's Residence and Resource Center, and the Sheriff's office.

The monument displays a "bas-relief of the Confederate flag, waving from a broken pole"; the initials "CSA"; and a thirty-five-foot armed Confederate soldier "as he went forth to battle." It also includes inscribed plaques that read "CONFEDERATE HEROES" and "THE NOBLE SERVICE OF THE SONS OF GASTON COUNTY IS OUR PERPETUAL HERITAGE." At the monument's 1912 dedication ceremony, the keynote speaker "praise[d] white supremacy," "criticize[d] the right of Black men to vote," and declared that North Carolina held "the purest Anglo-Saxon blood to be found on American shores." According to the complaint, Gaston County officials appreciate this history: the director of the Gaston County Museum of Art & History stated that "the belief in white supremacy is interwoven into the history of this monument, from its conception. It cannot be separated and can only be acknowledged."

Plaintiffs' complaint traced the development of our State's "[p]ost-Civil War Constitution." After the Civil War ended, North Carolina adopted a constitution in 1868 that outlawed slavery, declared "all men are created equal," and "offer[ed] absolute and permanent fealty to the re-united Nation." The current state constitution, "effective as of 1971," added a provision "explicitly guaranteeing equal protection as a matter of law":

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5. According to the complaint, approximately 18% of Gaston County residents are Black. The complaint doesn't identify the remaining 82%'s racial composition.

"No person shall be denied the equal protection of the laws; nor shall any be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const. art. I, § 19. "Despite these guarantees," Plaintiffs alleged, Gaston County erected the monument "as a symbol of white supremacy and a glorification of the secessionist South."

Plaintiffs asserted that the monument inflicts ongoing harm. Citing community statements "reported by media outlets," they described the monument as continuing "to cause [r]acialized [p]ain [t]oday." One "activist" said that it sends the message "we're still in control here." A Black Army veteran stated: "These [monuments] send a message and it's not a message of justice." The Gaston County NAACP President called it "a symbol of hate" with "no place on the courthouse grounds, where individuals go looking to seek equal, fair justice."

Plaintiffs further maintained that the monument posed a public safety threat.[6] It has "been the catalyst for protests and counter protests," requiring Gaston County to spend over $50,000 on fencing and security. County Commissioner Ronnie Worley said that the County was "not even defending a lawsuit—it [wa]s defending a statue, protecting people, and putting its officers in continual harm's way." Commissioner Bob Hovis stated that if the County was spending money to protect the monument, "fear and concern for the monument's safety already exists."

These concerns came to a head in August 2020, about six months before Plaintiffs filed their initial complaint. Plaintiffs alleged that, "[i]n the aftermath of the killing of George Floyd," the Board voted six-to-one to transfer the monument to the Sons of Confederate Veterans for relocation to private property. The Board entered a resolution documenting its decision; the resolution cited North Carolina General Statute Section 160A-279, which authorizes counties to "convey by private sale" to "any public or private entity which carries out a public purpose . . . any real or personal property which it owns[,]" despite "any other provision of law." N.C. Gen. Stat. § 160A-279(a), (b) (2023). Three weeks later, the Board reversed course after the Sons of Confederate Veterans "refused to sign the deed, thereby refusing to accept legal ownership of the [m]onument, effectively [and] rendering" the transfer resolution "moot." The Board's rescission resolution, Plaintiffs noted, said nothing about a state law prohibiting the monument's removal.

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6. The complaint includes photos of the monument and groups of people near it; several photos are credited to people on Facebook. The complaint doesn't describe what many of the photos depict or when they were taken.

Plaintiffs' complaint also pointed to other North Carolina counties' actions. They alleged that other counties—including Anson, Buncombe, Davidson, Pitt, Nash, and Vance County—had removed Confederate monuments "consistent with the directive of North Carolina Governor Roy Cooper." They cited statutes supporting the monument's removal, including Section 160A-279 and North Carolina General Statute Section 153A-140, which grants counties "authority" to "remove, abate, or remedy everything that is dangerous or prejudicial to the public health or safety." And they invoked the Monument Protection Law's public safety exception. *See* N.C. Gen. Stat. § 100-2.1(c)(3) (stating that "this section does not apply" to monuments "for which a building inspector . . . has determined poses a threat to public safety because of an unsafe or dangerous condition"). Plaintiffs quoted an advisory letter from Chief Deputy Attorney General Alexander Peters saying that the statute "does not purport to specify or limit what conditions may be considered 'unsafe or dangerous.' "

Finally, the complaint includes several "causes of action." Counts one and two, which were "[b]rought by [the] Black Plaintiffs [a]gainst [a]ll Defendants," alleged that the monument violated the North Carolina Constitution's Equal Protection Clause and Anti-Race Discrimination Provision.[7] N.C. Const. art. I, § 19. Counts two through six, which were "[b]rought by [a]ll Plaintiffs [a]gainst [a]ll Defendants," alleged that the monument violated various other state constitution provisions: (1) the prohibition against misuse of taxpayer money for unconstitutional purposes, N.C. Const. art. V, § 2; (2) the anti-secession and allegiance-to-the-United-States provisions, N.C. Const. art. I, §§ 4, 5; (3) the Law of the Land Clause, N.C. Const. art. I, § 19; and (4) the Open Courts Clause, N.C. Const. art. I, § 18. Plaintiffs also sought a declaratory judgment that Gaston County was "estopped" from arguing that the monument's removal "violate[d] state law" and that any state law, "as applied to prevent the removal of [this] . . . monument," was unconstitutional.

Plaintiffs requested that the court enter an order declaring that: (1) "the monument violates one or more provisions of the North Carolina Constitution," (2) Gaston County is "estopped (or quasi[-]estopped) from maintaining that the [Monument Protection Law] prohibits the [monument's] removal," and (3) the Monument Protection Law "as

7. The complaint identifies only one individual Plaintiff as Black. Its reference to "Black Plaintiffs" (plural) appears to include the organizational Plaintiffs' Black members. The complaint alleged: "All individual Plaintiffs and many members of the organizational Plaintiffs suffer personal and direct effects from the statue. . . . The Black Plaintiffs are particularly vulnerable to harms caused by white supremacists attracted to the monument."

applied to the [monument] is unconstitutional to the extent it could be found to preclude removal." They also asked the court to enter an order holding that "the monument violates one or more provisions of the North Carolina Constitution . . . and granting injunctive relief requiring" Gaston County to "remove the monument and prohibiting its placement on any other public property."

B. Proceedings Below

On 17 November 2021, Gaston County moved to dismiss, or alternatively, to transfer the case to a three-judge panel. It argued that it lacked authority to remove the monument under the Monument Protection Law and that Plaintiffs' claims amounted to a facial challenge to that statute.[8] As noted earlier, the Monument Protection Law states that "[a]n object of remembrance located on public property may not be permanently removed" but may be "relocated"—"whether temporarily or permanently"—under limited circumstances. N.C. Gen. Stat. § 100-2.1(b). The law has a "public safety" exception: It "does not apply" when "a building inspector or similar official has determined [the monument] poses a threat to public safety because of an unsafe or dangerous condition." *Id.* § 100-2.1(c)(3). The trial court denied the motion to dismiss and stated that the "motion to transfer [wa]s rendered moot and therefore denied."

Gaston County later filed an answer, denying most of Plaintiffs' allegations. It also requested injunctive relief and a declaratory judgment that it had "complied with any and all" laws and that the monument could not be "removed, relocated, [or] altered in any way" under the Monument Protection Law. On 13 October 2023, Gaston County moved for summary judgment, again claiming that the Monument Protection Law prevented the monument's removal. In doing so, the County relied on "the pleadings, the written discovery, depositions, and other matters of record in this action, including [its] brief and materials." Plaintiffs, in

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8. To support transfer to a three-judge panel, Gaston County relied on North Carolina General Statute Sections 1-267.1(a1) and 1-81.1(a1). Section 1-267.1(a1), at that time, stated that "any facial challenge to the validity of an act of the General Assembly shall be transferred . . . to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County." N.C. Gen. Stat. § 1-267.1(a1) (2023). That provision has since been repealed. *See* An Act to Make Base Budget Appropriations for Current Operations of State Agencies, Departments, and Institutions, S.L. 2023-134, § 16.21(a1), 2023 N.C. Sess. Laws 760, 1168-69. Section 1-81.1(a1) provides that "[v]enue lies exclusively with the Wake County Superior Court" for "any claim seeking an order or judgment of a court . . . to restrain the enforcement, operation, or execution of an act of the General Assembly, in whole or in part, based upon an allegation that the act . . . is facially invalid" for "violat[ing] the North Carolina Constitution or federal law." N.C. Gen. Stat. § 1-81.1(a1) (2023).

response, submitted a brief, a study, affidavits, declarations, news articles, and other information in opposition to the motion; Gaston County submitted no additional evidence in rebuttal.

After a hearing at the Gaston County Courthouse, the trial court granted summary judgment for Gaston County on 5 January 2024. It did not, however, grant the declaratory relief the County had requested. The court rejected Gaston County's claim that Section 100-2.1 wholly prevented removal; the statute has exceptions—"at least[ ] four" permitting relocation and "two" allowing removal.[9] In the court's view, several exceptions were "potentially applicable" to the monument "pending further developments." So to declare that Section 100-2.1 wholly "preclude[d]" the monument's removal would have required the court "to act as an ostrich and bury its head in the sand to pretend that" the statute's exceptions "d[id] not exist."

The court then addressed and rejected Plaintiffs' constitutional claims. On appeal, Plaintiffs challenge the court's ruling on two provisions: the Open Courts Clause and Equal Protection Clause.

On the open courts claim, the trial court explained that the provision serves two functions: guaranteeing those who suffer injury the right to seek redress, and protecting "the institutional integrity of our state courts by constitutionally guaranteeing that justice is administered openly in public," *DTH Pub. Corp. v. U.N.C. at Chapel Hill*, 128 N.C. App. 534, 496 S.E.2d 8 (1998). The monument violated neither function. Plaintiffs had "an opportunity to pursue their claims" despite the monument's presence. And the hearing was "held in open court" with proceedings "open to the public and the media."

As for the equal protection claim, the trial court applied *Holmes v. Moore*, 384 N.C. at 426, 886 S.E.2d at 120. Under *Holmes*, a plaintiff bringing an equal protection challenge under our state constitution must show both "discriminatory intent" and that the government action "actually produces a meaningful disparate impact along racial lines." *Id.* at 440, 886 S.E.2d at 132. The court found that Plaintiffs had "offer[ed] abundant evidence" that the monument reflects Gaston County's "discriminatory purpose." But Plaintiffs failed to show a meaningful disparate impact from the County's maintenance of the monument. So the trial court concluded that the monument's presence did not violate the state Equal Protection Clause.

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9. The court later opined that the Monument Protection Law contains "at least eight exceptions" to the "prohibition o[n] removal or relocation."

Plaintiffs timely appealed.[10]

II. Analysis

Plaintiffs argue that the trial court erred in granting summary judgment for two reasons. First, the trial court "failed to consider" their evidence that the monument's presence "create[s] the appearance of racial bias," thus violating the Open Courts Clause. Second, the trial court failed to evaluate whether the monument violates our state Equal Protection Clause by causing "significant adverse impacts to Gaston County's Black residents, but not . . . its White residents."

Gaston County responds that the trial court properly granted summary judgment. In its view, Plaintiffs "failed to present sufficient evidence" of an Open Courts Clause violation. And the trial court could not have found that Gaston County violated our state Equal Protection Clause by "not removing or relocating the [m]onument" because the Monument Protection Law "prohibit[s]" such action.

A. Standard of Review

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2023). The movant bears "the burden of clearly establishing" that no "triable issue of fact" exists. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (citation and quotation marks omitted). We "carefully scrutinize[ ]" the movant's papers, while "indulgently regard[ing]" those of the nonmovant. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citation omitted). "All facts asserted by the" nonmovant "are taken as true," and "their inferences must be viewed in the light most favorable to that party." *Id.* And "even if the trial court's rationale . . . was wrong," we affirm summary judgment if it "can be sustained on any grounds." *Hindman v. Appalachian State Univ.*, 219 N.C. App. 527, 529, 723 S.E.2d 579, 580 (2012).

This Court reviews a trial court's summary judgment order *de novo*—that means we consider the matter "anew" and "freely substitute[ ]" our "own judgment for that of the lower courts." *Moseley v. Hendricks*, 388 N.C. 128, 135, 918 S.E.2d 843, 848 (2025) (citation

10. Although part of the trial court's order denied Gaston County's request seeking a declaratory judgment that it was prohibited from moving the monument, Gaston County did not cross-appeal that ruling.

omitted). Constitutional questions also receive *de novo* review. *State v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016).

Before turning to the merits, we make two preliminary observations. First, the trial court's order includes 136 numbered paragraphs described as "undisputed findings of fact" and "conclusions of law." As the order correctly notes, "findings of fact and conclusions of law are not necessary in an order determining a motion for summary judgment." *See White v. Town of Emerald Isle*, 82 N.C. App. 392, 398, 346 S.E.2d 176, 179 (1986) ("A trial judge is not required to make finding[s] of fact and conclusions of law in determining a motion for summary judgment, and if he does . . . they are disregarded on appeal." (citations omitted)). And when such an order does include findings of fact, "they are disregarded on appeal." *Id.* The court understood as much, stating that any facts recited in its order were "not at issue." And at the summary judgment hearing, both parties agreed that no genuine issues of material fact existed.

On appeal, though, Plaintiffs assert that "facts matter and ignoring the facts does not make them go away." In their view, the case should be remanded for trial to determine the facts. At the same time, they claim no genuine issues of material fact exist because Gaston County offered no evidence to rebut their affidavits. Plaintiffs' brief never addresses the court's "findings of fact" or disputes the court's characterization of them as merely reciting facts "not at issue." Still, because we disregard the court's findings and review the summary judgment order *de novo* anyway, Plaintiffs' omission is consistent with our standard of review.

Second, the evidentiary record is one-sided, but this does not affect our review. We must accept the non-moving party's forecast of evidence as true when reviewing a summary judgment order. *See Dobson*, 352 N.C. at 83, 530 S.E.2d at 835. Gaston County didn't cross-appeal the trial court's denial of its request for a ruling that the Monument Protection Law prohibits relocation. Nor did it argue on appeal that any of the trial court's findings were incorrect. And although the County prevailed below, it offered no evidence directly addressing Plaintiffs' showing of discriminatory intent. At the summary judgment hearing, Gaston County *argued* that the monument serves valid historical purposes—"commemorat[ing] an event that was part of North Carolina's history" and "honor[ing] . . . Gaston County's history." But arguments are not evidence. *See State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996) ("[I]t is axiomatic that the arguments of counsel are not evidence.").

Despite this one-sided record, Plaintiffs insist on appeal that the trial court "entirely failed to engage with [their] evidence" showing that the monument's placement "conveys a racially disparaging message" that makes Black residents "question whether Black people, and other people of color, will receive justice" in the courthouse. But the trial court did engage with Plaintiffs' evidence about the monument's intent and effect. The court summarized it extensively—sometimes in Plaintiffs' own words—and made findings including:

> 133. Gaston County has inscribed the words "In God We Trust" into the stone over the entrance to its courthouse to communicate a message concerning its values.
>
> 134. [Plaintiffs] perceived that Gaston County and its Board . . . have implicitly and effectively inscribed the words "In White Supremacy We Trust" into the stonework over the entrance by refusing to remove the Confederate Heroes [monument] from the entrance to that same courthouse.

It's unclear what this "fail[ure] to engage" means. In any event, both parties argue that the court's ruling was either correct or incorrect as a matter of law. So we address their legal arguments, taking Plaintiffs' evidence as true and disregarding the court's findings of fact. *See White*, 82 N.C. App. at 398, 346 S.E.2d at 179.

B. Open Courts Clause

[1] Plaintiffs argue that the trial court erred in rejecting their open courts claim by requiring proof of a physical barrier to courthouse access. The monument, they contend, creates a psychological barrier that achieves the same result and violates the same constitutional right. And according to Plaintiffs, North Carolina law recognizes that "the *appearance* of fair proceedings" matters just as much "as the fact of fair proceedings." *See State v. Mettrick*, 305 N.C. 383, 385, 289 S.E.2d 354, 356 (1982). The judicial system must not only operate evenhandedly but also "be perceived to" do so. *State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987) (*Cofield I*). Plaintiffs presented "evidence showing that the . . . [m]onument's placement 'conveys a racially disparaging message' " and "makes Black Gaston County residents 'question whether Black people, and other people of color, will receive justice' " in the courthouse. That evidence, they say, demonstrates the monument "interferes with the public's right to access the courts and for justice to 'be administered without favor, denial, or delay.' " N.C. Const. art. I, § 18. We disagree.

The North Carolina Constitution declares that "[a]ll courts shall be open; . . . and right and justice shall be administered without favor,

denial, or delay." *Id.*[11] Although added to our state constitution in 1868, N.C. Const. of 1868, art. I, § 35, this provision "traces its pedigree" to the Magna Carta—to King John's "promise to his rebellious barons" that "[t]o no one will we sell, to no one will we deny or delay right or justice." John V. Orth and Paul Martin Newby, *The North Carolina State Constitution* 65 (2d ed. 2013) [State Constitution]; *see also Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 603, 853 S.E.2d 698, 730 (2021) ("[Article I, Section 18] "has ancient roots in English and American law.").

An "open" court, as originally understood, meant "not that the judges would sit round-the-clock or that every spectator would always be welcome" but that "legal remedies would not be withheld." *State Constitution* at 65-66. "Justice would be available to all who were injured" through "a system of courts, staffed by professional judges." *Id.* at 65. Simply put, "the core meaning of ["open" in] this section [wa]s that properly qualified courts shall be regularly in session." *Id.* at 66.

Our precedents have expanded that core meaning—but only so far. The Supreme Court, for example, has held that Article I, Section 18 "guarantees a criminal defendant a speedy trial, an impartial tribunal, and access to the court to apply for redress of injury." *Simeon v. Hardin*, 339 N.C. 358, 378, 451 S.E.2d 858, 871 (1994). It has declared that, under the Open Courts Clause, "[t]he trial and disposition of criminal cases is the public's business and ought to be conducted in public in open court." *In re Edens*, 290 N.C. 299, 306, 226 S.E.2d 5, 9 (1976). And it has explained that the provision "guarantees a qualified constitutional right on the part of the public to attend civil court proceedings." *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 476, 515 S.E.2d 675, 693 (1999).

All these cases concern access to or observation of judicial proceedings themselves—whether criminal defendants can obtain speedy trials, whether parties can seek redress for injuries, whether the public can attend and observe hearings. None extends the Open Courts Clause to governmental action (or inaction) outside those proceedings—and here, literally outside the court building itself—that might affect how people perceive the judicial system.

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11. Article I, Section 18 also guarantees that "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18. But that right is not at issue here.

We recently applied this understanding of the Open Courts Clause in a nearly identical case. *See Alamance Cnty.*, 293 N.C. App. at 107, 900 S.E.2d at 224. In *Alamance County*, civil rights organizations challenged a Confederate monument's placement outside the Alamance County Courthouse. 293 N.C. App. at 109, 900 S.E.2d at 227. The plaintiffs argued that the monument's presence violated the Open Courts Clause because it conveyed "the appearance of judicial prejudice" and "broadcast[ed] officially sanctioned racial degradation." *Id.* at 114-15, 900 S.E.2d at 230.

This Court rejected that argument. The Open Courts Clause, we said, "does not prohibit the placement of an object of historical remembrance in or around a courthouse." *Id.* at 115, 900 S.E.2d at 230. The plaintiffs had "failed to show they [we]re denied the Clause's guarantees": They did not assert that the courthouse was "not regularly in session or that legal remedies are being withheld," nor did they contend that "trials [we] re closed to the public or that criminal defendants [we]re [being] denied speedy trials." *Id.* Without such a showing, the county had not violated the Open Courts Clause. *Id.*

Our decision in *Alamance County* controls here. There, as here, the plaintiffs argued that a Confederate monument owned and maintained by the county and standing outside a county courthouse conveyed a "racially disparaging message" that made Black residents question whether they would "receive justice within the courthouse." *See id.* at 114, 900 S.E.2d at 230. There, as here, the plaintiffs claimed that the monument "cast doubt on the legitimacy of the court system in the eyes of Black citizens." *See id.* And there, as here, the plaintiffs could not show that the courthouse failed to remain regularly in session, legal remedies were being withheld, trials were closed to the public, or criminal defendants were denied speedy trials. *See id.* at 115, 900 S.E.2d at 230. *Alamance County* forecloses Plaintiffs' open courts claim.

But Plaintiffs offer two reasons why that decision should not resolve this case.

First, they argue that *Alamance County* did not address cases "recognizing the importance of public perception of the judiciary and the necessity that citizens believe the judicial system functions openly and fairly." They cite *Mettrick*, 305 N.C. at 383, 289 S.E.2d at 354, and *Cofield I*, 320 N.C. at 297, 357 S.E.2d at 622. But these cases don't support their open courts claim. Both address different constitutional rights in distinct factual situations. And neither mentions the Open Courts Clause.

From *Mettrick*, Plaintiffs cite the Court's statement that "the appearance of a fair trial before an impartial jury is as important as the fact of

such a trial." *Mettrick*, 305 N.C. at 385, 289 S.E.2d at 356. This statement is true, but Plaintiffs wrench it from its context.

In *Mettrick*, the defendants were on trial for transporting "5,000 to 10,000 pounds of marijuana." *Id.* at 384, 289 S.E.2d at 355. The court had ordered "that a special venire of jurors be drawn from another county." *Id.* So on the first day of trial, a sheriff and one of his deputies "transported the prospective jurors in two activity buses" from their home county to the courthouse. *Id.* The deputy "also transported the jurors to lunch" and back home. *Id.* Jury selection finished that day. *Id.* On the second day, the sheriff transported eleven of the fourteen selected jurors and alternates to the courthouse. *Id.* At that point, the court "learned for the first time" that these two State witnesses—the sheriff and deputy—"had been transporting the jury." *Id.* The defendants moved for a mistrial, which the court denied. *Id.* During trial, the sheriff testified five times and the deputy testified three times. *Id.*

Our Supreme Court held that the trial court erred in denying the motion:

> [W]here a witness for the State acts as a custodian or officer in charge of the jury in a criminal case, prejudice is conclusively presumed. . . . In such cases the appearance of a fair trial before an impartial jury is as important as the fact of such a trial. The integrity of our system of trial by jury is at stake. No matter how circumspect officers who are to be witnesses for the State may be when they act as custodians or officers in charge of the jury in a criminal case, cynical minds often will leap to the conclusion that the jury has been prejudiced or tampered with in some way. If allowed to go unabated, such suspicion would seriously erode confidence in our jury system.

Id. at 385, 289 S.E.2d at 356 (internal citations omitted).

Mettrick thus concerned the right to an impartial jury, not the Open Courts Clause. *Id.* And it involved an issue specific to the defendants' trial: State witnesses transporting and supervising jurors during trial. *Id.* The Court applied an appearance-of-fairness principle because allowing State witnesses to supervise jurors would "seriously erode confidence in our jury system"—even if no actual tampering occurred. *Id.*

From *Cofield*, Plaintiffs rely on the Court's statement that the judicial system "must operate evenhandedly" and "must also be *perceived* to operate evenhandedly." *Cofield I*, 320 N.C. at 302, 357 S.E.2d at 625. Also true—but Plaintiffs (again) strip this statement from its context.

In *Cofield*, the defendant brought an equal protection challenge against Northampton County's "racially discriminatory process [for] selecting grand jury foremen." *Id.* at 300, 357 S.E.2d at 624. His evidence showed that although roughly 61% of the county's population was Black, "only one [B]lack person had served as grand jury foreman" between 1960 and 1984. *Id.* at 299, 357 S.E.2d at 624. The Court held that discriminatory selection of a grand jury foreman violates Article I, Sections 19 and 26 of the North Carolina Constitution. *Id.* at 301, 357 S.E.2d at 625. Section 26 bars exclusion from "jury service on account of sex, race, color, religion, or national origin." N.C. Const. art. I, § 26. But that provision, the Court observed, "does more than protect individuals from unequal treatment"—it declares that North Carolina "will not tolerate the corruption of [its] juries by racism, sexism and similar forms of irrational prejudice." *Cofield I*, 320 N.C. at 302, 357 S.E.2d at 625.

From there, the Court articulated its appearance-of-fairness principle: "[T]he judicial system of a democratic society must operate evenhandedly if it is to command the respect and support of those subject to its jurisdiction. It must also be *perceived* to operate evenhandedly." *Id.* Perception matters, the Court reasoned, because "[r]acial discrimination in the selection of grand and petit jurors" robs "both an aggrieved defendant and other members of his race of the perception that he has received equal treatment at the bar of justice," thereby "undermin[ing] the judicial process." *Id.* The Court remanded to let the State "rebut [the] defendant's prima facie showing" of discrimination. *Id.* at 309, 357 S.E.2d at 629. When the case returned, the Court in *Cofield II* found "not the slightest hint of racial motivation" in the trial judge's selection of the grand jury foreman but concluded "the selection process . . . was not racially neutral because it excluded from consideration as foreman all of the [B]lack grand jury members." *State v. Cofield*, 324 N.C. 452, 459-60, 379 S.E.2d 834, 839 (1989) (*Cofield II*).

Cofield I likewise addressed a different constitutional right—the prohibition on racial discrimination in jury selection, not the Open Courts Clause. *Cofield I*, 320 N.C. at 302, 357 S.E.2d at 625. And it too involved an issue specific to the defendant's case: discriminatory selection of the grand jury foreman for his indictment. *Id.* The Court applied an appearance-of-fairness principle because discriminatory jury selection "undermines the judicial process" by depriving defendants and their racial communities "of the perception" of equal treatment. *Id.*

In short, both cases applied appearance-of-fairness principles to jury proceedings—and only to problems within the defendants' own cases. In jury proceedings, appearance matters because jurors decide guilt or

innocence. When the decision-makers themselves might be biased, the entire verdict is suspect. Here, Plaintiffs have not shown how a monument—even one offensive to many people—outside a courthouse has affected any decision-maker, judge or jury, deciding cases inside.

The Open Courts Clause guarantees access to functioning courts through verifiable, objective conditions: Are courts in session? Are trials public? Are criminal defendants receiving speedy trials? Are remedies available? *See Alamance Cnty.*, 293 N.C. App. at 115, 900 S.E.2d at 230. These questions turn on observable facts—not subjective feelings or perceptions. *Mettrick* and *Cofield I*'s reasoning doesn't extend to this context.

Next, Plaintiffs believe this case differs from *Alamance County* because the trial court found that the monument "was built and placed in front of the courthouse" to "intimidat[e] Black residents and deter[ ] them" from enjoying their constitutional rights.[12] They cite the court's finding that "[P]laintiffs offer[ed] abundant evidence in support of their effort to show that the presence of the [monument] evidences a discriminatory purpose" on Gaston County's part.

Again, we disregard those findings on appeal from summary judgment. *See White*, 82 N.C. App. at 398, 346 S.E.2d at 179 (citations omitted). And taking Plaintiffs' forecasted evidence as true, we assume the monument "was built and placed in front of the courthouse" to "intimidat[e] Black residents and deter[ ] them" from enjoying their constitutional rights. Even so, Plaintiffs have not established an Open Courts Clause violation.

Open courts violations turn on whether courts remain accessible and functioning—not on discriminatory intent by someone outside the judicial system. Plaintiffs presented no evidence that the County's intent in 1912 (or its 1998 relocation decision), however reprehensible, has affected the courthouse's accessibility or operations today. As the trial court noted, the hearing in this very case took place in that courthouse. Gaston County's discriminatory intent behind the monument's placement doesn't create an open courts violation.

Plaintiffs also maintain that psychological barriers to courthouse access deserve the same treatment as physical ones. The monument, they say, creates a barrier as real as a locked door—signaling to Black

12. As noted earlier, the trial court explained: "[T]o the extent that this order finds or recites facts, it is the [c]ourt's determination that these facts are not at issue."

residents the courts are not truly "open" to them. We don't doubt that some people may experience real "psychological barriers" related to many places or activities for many reasons. But physical and psychological barriers are not the same under the Open Courts Clause. Again, that provision protects against actual denial of access to functioning courts, not subjective beliefs or feelings that might discourage some hypothetical person's entry. Plaintiffs' theory would expand the Open Courts Clause from a guarantee of operational access into a mandate over government speech, facilities, and their potential psychological effects on how residents perceive the judiciary. Nothing in our state's constitution's text, history, or precedent supports that expansion.

At the summary judgment hearing, Plaintiffs acknowledged that they were asking for "a bit of an extension of the current law." But this would not be "a bit of an extension"—it's a major one with no basis in law. Under *Alamance County*, the monument's presence outside the courthouse doesn't violate the Open Courts Clause, no matter how deplorable the intent behind it.

C. Equal Protection Clause

[2] Plaintiffs argue that the trial court erred in rejecting their equal protection claim by focusing on the wrong actor's intent.[13] The court found that Plaintiffs' evidence showed that the monument's "presence . . . evidences a discriminatory purpose on the part of Gaston County." But the court then asked whether Plaintiffs had shown that the *state court system* acted with discriminatory intent in "building and preserving" the monument. Plaintiffs contend the trial court should have focused on whether *Gaston County*'s "construction and placement" of the monument and "refus[al] to relocate" it violate their equal protection rights under the state constitution. They also claim that the court needed to "evaluate whether Plaintiffs . . . showed that Gaston County's actions resulted in a meaningful disparate impact along racial lines."

We agree with Plaintiffs that responsibility for operating our courts cannot be neatly assigned entirely to the State or the County. Gaston

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13. Plaintiffs claim that the trial court erred in granting summary judgment "given the existence of genuine disputes of fact." They ask us to remand so the trial court can "weigh . . . the competing evidence regarding whether Black citizens experience disproportionately negative impacts" from the monument's location. But Plaintiffs never identify any genuinely disputed facts—much less material ones. Beyond two passing references, they devote their brief to challenging the trial court's equal protection analysis. So again, we address only whether the trial court correctly concluded that Gaston County was "entitled to [summary] judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2023).

County owns and maintains the monument, but it also has an obligation to provide and maintain court facilities. N.C. Gen. Stat. § 7A-302 (2023). And the State, through the Administrative Office of the Courts, administers the court proceedings conducted inside the county-owned courthouses. *See* N.C. Gen. Stat. § 7A-343 (2023). Judges, clerks, prosecutors, public defenders, and many others cannot do their work without a court facility. And a county's failure to fulfill its obligation to provide and maintain court facilities could potentially impair the court system's operations. Given this intertwined responsibility, the trial court reasonably examined whether the monument impaired court operations specifically.

And that focus was appropriate given Plaintiffs' submissions in opposition to the summary judgment motion. In their complaint, Plaintiffs asserted that the monument affected more than the courts—including "[o]ther key government services" like "the Social Services Division, the County's Battered Women's Residence and Resource Center, and the Sheriff's office." Yet in the affidavits and other information submitted to oppose summary judgment, Plaintiffs focused only on adverse impacts related to the courthouse and court proceedings. For example, Dr. Blackshear's affidavit discusses the psychological harm caused by the monument and connects this to its potential effect on Black people's access to the courts. He concluded:

> Based on my experience in clinical psychology, and my understanding that individuals often avoid spaces in which they know they are likely to experience psychological harm, it is my opinion that potential Black American court participants may attempt to avoid participation in court (such as jury service) rather than remain in a courthouse committed to honoring Jim Crow era values of racism and white supremacy, as evidenced by the imposing Confederate monument at the entrance.

He did not mention whether Black people may also be deterred from accessing other buildings or services near the monument that were alleged in the complaint. So again, the trial court's focus on how the monument affects court operations was appropriate based on Plaintiffs' complaint and the evidence they submitted in opposition to summary judgment.[14] We now turn to the merits.

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14. The only specific mention in Plaintiffs' evidence submitted in opposition to summary judgment of "the area around the [m]onument" comes from Chris Thomason's declaration. He stated that the area

The North Carolina Constitution provides that "[n]o person shall be denied the equal protection of the laws." N.C. Const. art. I, § 19. That clause "requires that all persons similarly situated be treated alike." *Richardson v. N.C. Dep't of Correction*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). "Unlike most other provisions in Article I, which 'may be traced back through this [S]tate's 1868 constitution to its Revolutionary Constitution of 1776,' the Equal Protection Clause . . . did not become part of our fundamental law until 1971, when the current state constitution went into effect." *Cmty. Success Initiative v. Moore*, 384 N.C. 194, 214, 886 S.E.2d 16, 33 (2023) (quoting *State Constitution* at 45). The drafters "based their work on the [Fourteenth Amendment's] Equal Protection Clause." *Id.* (citation omitted). So our courts have "generally follow[ed]" the United States Supreme Court's analysis "in interpreting the corresponding federal clause." *Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759, 762 (2009).

Our Supreme Court has held—like the United States Supreme Court—that constitutional "protection against unreasonable discrimination under color of law is not limited to the enactment of legislation." *S. S. Kresge Co. v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971). That protection extends to "the administration and the execution of laws valid on their face" and to other neutral government action. *Id.* at 660, 178 S.E.2d at 385-86 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). The government must not act "so as invidiously to discriminate on the basis of race." *Holmes*, 384 N.C. at 438, 886 S.E.2d at 130 (quoting *Washington v. Davis*, 426 U.S. 229, 241 (1976)). Or as our Supreme Court recently put it: Even "apparently race-neutral" government action "can violate equal protection if" taken with "a racially discriminatory purpose." *Moore*, 384 N.C. at 215, 886 S.E.2d at 34 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)).

> is well-trafficked and serves as an important center of civic life because it houses the [c]ourthouse, jailhouse, and the Gaston County Department of Social Services. In addition to litigation, a variety of activities and civil business occur in or near the Courthouse (e.g., requesting a birth certificate, applying for government assistance, completing a background check, etc.). No one can enter any building in this area without confronting the [m]onument.

Although the monument made him feel disappointed, hopeless, and helpless and caused him pain and anger, he did not say that these negative feelings prevented him from attending events in or near the courthouse.

But neutral government action that results in "unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." *Davis*, 277 N.C. at 662, 178 S.E.2d at 386 (quoting *Snowden v. Hughe*s, 321 U.S. 1, 8 (1944)). Discriminatory intent, however, is not enough. Plaintiffs "must also demonstrate that the challenged law actually 'produces disproportionate effects along racial lines.' " *Holmes*, 384 N.C. at 453, 886 S.E.2d at 140 (citation omitted).

Plaintiffs challenge two distinct government actions: Gaston County's "refus[al] to relocate" the monument and its "construction and placement" of the monument in 1912. We address each in turn.

We begin with Plaintiffs' claim that Gaston County's refusal to move the monument violates their "rights to equal protection." In *Alamance County*, the plaintiffs argued—as Plaintiffs do here—that the county's "discriminatory intent behind [its] decision not to move the [m]onument" violated our state constitution's Equal Protection Clause. *Alamance Cnty.*, 293 N.C. App. at 113, 900 S.E.2d at 229. This Court disagreed. The county's "intent in not relocating the [m]onument," we said, was "irrelevant." *Id.* The Monument Protection Law "forb[ade] [the county] *from moving the [m]onument*." *Id.* That statute, not the county's intent, was "the reason that the [m]onument ha[d] remained in front of the courthouse." *Id.* Because counties "can only act within the boundaries set forth by the General Assembly," the county's "hands [we]re tied." *Id.*

So too here. The Monument Protection Law bars Gaston County from removing the monument except under certain conditions, none of which are present here. Plaintiffs' refusal-to-relocate claim thus fails under *Alamance County.*

And Plaintiffs' second claim—that the monument's "construction and placement" in 1912 violates equal protection—fares no better. Even assuming, as we must at summary judgment, that Plaintiffs provided "abundant evidence" proving the monument's presence "evidences a discriminatory purpose on the part of Gaston County," we hold that the County did not violate our state constitution's Equal Protection Clause. Proving discriminatory intent alone is not enough. Plaintiffs must also show the County's erection of the monument had "disproportionate effects along racial lines." *Moore*, 384 N.C. at 453, 886 S.E.2d at 140 (citation omitted); *United States v. Armstrong*, 517 U.S. 456, 465 (1996) ("The claimant must demonstrate that the federal prosecutorial policy had a discriminatory effect *and* that it was motivated by a discriminatory purpose." (emphasis added) (cleaned up)). They have not done so.

Plaintiffs point to three categories of evidence they say demonstrate the monument's "placement . . . has result[ed] in significant adverse impacts to Gaston County's Black residents." But before we address that evidence, we must identify what "impact" Plaintiffs rely on as the basis for their claim. Cases addressing a "disparate impact" or "adverse impacts" from racial discrimination all involve some legal wrong beyond racial discrimination alone.

Consider a few examples:

- In *Yick Wo v. Hopkins*, two Chinese launderers alleged that they and about 200 other Chinese launderers were denied the ability to operate their laundries, while 80 non-chinese launderers were permitted to do so. 118 U.S. at 373-74.
- In *Castaneda v. Partida*, the defendant's evidence showed that although roughly 79% of the county's population was Spanish-surnamed, only 39% of grand jurors were Spanish-surnamed from 1962 to 1972. 430 U.S. 482, 486-87 (1977).
- In *Hunter v. Underwood*, a provision in the 1901 Alabama Constitution disenfranchised persons convicted of crimes involving "moral turpitude." 471 U.S. 222, 227 (1985). By 1903, the provision "had disfranchised approximately ten times as many blacks as whites." *Id.* And "the disparate effect . . . persist[ed]." *Id.* In some counties, Black Alabamians were "at least 1.7 times as likely as whites" to be disenfranchised under the state constitution for committing "non-prison offenses." *Id.*

In each case, discriminatory conduct caused concrete, identifiable harm: denial of business licenses, exclusion from jury service, loss of voting rights. The "impact" was not merely how people felt about the discrimination but what it prevented them from doing or obtaining.

The meaning of "impact" reinforces this point. As a noun, it means "the force or impression of one thing on another[;] a significant or major effect." *Impact*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003). As a verb, it means "to have a direct effect or impact on." *Id.* Either way, "impact" carries an element of causation. In this context, then, Plaintiffs must show that Gaston County's discrimination in installing and maintaining the monument has caused some significant negative effect—

one that amounts to a legal wrong against Plaintiffs or Black Gaston County residents.

With these definitions in mind, we turn to Plaintiffs' evidence, taking it as true. First, they presented a study by Dr. Lucy Britt, an Assistant Professor in the Department of Politics at Bates College. Plaintiffs assert that the study contains "extensive statistical evidence" showing the monument's "statistically-significant negative impact on Black citizens," with "no such impact on White citizens." Based on her "training, expertise, and review of the scholarly materials," Dr. Britt concluded, in relevant part:

> • Today, Black Southerners are much more likely than white Southerners to see Confederate symbols as representative of racial hate and injustice. . . .
>
> • There are important racial differences in the impact of Confederate symbols—they negatively impact Black Southerners and often have no impact on white Southerners.
>
> • Members of racial minority groups, including Black Americans, tend to have more negative baseline attitudes towards the courts and the judicial system's legitimacy, fairness, and openness than white Americans.

At the summary judgment hearing, Plaintiffs' counsel stated this case was "not simply about the individual feelings or reactions of our individual [P]laintiffs." Dr. Britt's study, counsel said, shows that "the monument makes [B]lack residents feel less welcome," "more likely to avoid entering the courthouse," "more likely to fear for their safety," and "significantly less likely to feel" the court "will treat them fairly." According to Plaintiffs, the study addresses "the disparate impact" on "[B]lack residents in Gaston County."

But, as we explain below, Dr. Britt's study doesn't purport to address "[B]lack residents in Gaston County." We must review Plaintiffs' evidence "indulgently" for summary judgment, but we must also engage with the actual evidence—as Plaintiffs contend the trial court failed to do. *Caldwell*, 288 N.C. at 378, 218 S.E.2d at 381 (citation omitted).

So we start with what the study actually covers. Dr. Britt conducted it "in connection with a lawsuit in Alamance County, North Carolina" and "sampled residents of North Carolina," including "783 Black and 902 White respondents." She intentionally excluded people of all races other than White and Black because "Black North Carolinians are the

group most likely to be directly adversely impacted by the presence of Confederate statues on courthouse grounds."

The study's respondents "were asked to read a brief news report coming out of North Carolina" and then "answer a few questions about the courthouse they just read about." Respondents "were randomized to receive one of three possible" reports—call them Report A, Report B, and Report C. Each report "included an image and statement about an anniversary of a nearby county courthouse in North Carolina."[15] Report A was the study's "control[led] condition." It contained "an image of a courthouse" and stated that "this year marks the 100th anniversary of the courthouse's construction." Report B used the same image but also "included [a] Confederate statue . . . situated in front of the [courthouse]" and stated that "this year marks the 100th anniversary of the erection of the Confederate statue in front of the courthouse." Report C included the same image and statement as Report B but added: "Local county officials have defended the placement of the monument in recent years." The study measured respondents' answers to questions about "comfort entering, feeling welcome at, [and] safety at" courthouses, as well as their "perceptions of courthouses, the court, and the criminal justice system."

Dr. Britt's study doesn't help Plaintiffs for three reasons. First, it doesn't assess Gaston County's population. Plaintiffs must prove that *this* monument at *this* courthouse in *this* County disproportionately harms the County's Black residents. Yet the study may not include a single Gaston County resident. *See State v. Green*, 329 N.C. 686, 689, 406 S.E.2d 852, 854 (1991) (holding that the defendant "failed to make a prima facie showing" that the State violated his equal protection rights under Article I, Section 19 where he offered "statistical studies" that didn't "relate specifically to North Carolina or to the district in which [he] was tried"). Second, the study measures only self-reported feelings about a hypothetical courthouse, not anyone's actual experiences at any real courthouse. Third, Dr. Britt excluded residents of other races from her sample even though Gaston County has such residents—indeed, one individual Plaintiff alleges that he is "Hispanic."[16]

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15. The images feature a courthouse and Confederate monument located in Cartersville, Georgia.

16. We accept this allegation as true, though we note that neither the complaint nor any other evidence submitted by Plaintiffs clarifies the exact meaning of "Hispanic" for this Plaintiff. Because Dr. Britt's study uses U.S. Census data, we assume the term has the same definition used by the U.S. Office of Management and Budget. That definition describes a "Hispanic or Latino" person as one

Given these limitations, Dr. Britt's findings are correspondingly narrow. At bottom, her study shows that a sample of Black and White North Carolina residents (who may or may not reside in Gaston County) had more negative feelings about a picture of a generic courthouse with a monument when told it was a Confederate monument and that local county officials had "defended the placement of the monument in recent years." Black respondents were more likely to have negative feelings than White respondents. And unsurprisingly, the respondents Dr. Britt pre-identified as "most likely to be directly adversely impacted" reported that they were adversely impacted—if we define "impact" as negative feelings. That's the extent of her findings: subjective feelings or perceptions about a hypothetical courthouse.

But hypothetical feelings about a generic courthouse are not evidence of actual harm at the Gaston County Courthouse. The study says nothing about anything that has happened at any court proceedings there. Although respondents stated they would *feel* unwelcome at such a courthouse with a Confederate monument, Plaintiffs presented no evidence that anyone has actually been deterred from accessing the Gaston County Courthouse.

Next, Plaintiffs offered an affidavit from Dr. Blackshear—a licensed clinical psychologist, the Associate Vice President for Student Affairs & Dean of Students, and the Associate Vice Provost for the Office of Undergraduate Education at Duke University. Plaintiffs' attorneys asked Dr. Blackshear "to provide them with an opinion about the *potential psychological impact* of the Confederate monument located at the entrance of the Gaston County Courthouse," particularly "how the presence of the monument might influence the participation of Black and [W]hite North Carolinians in the court system." (Emphasis added.)

> of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race. These standards generally reflect a social definition of race and ethnicity recognized in this country . . . .
>
> People who identify with the terms "Hispanic" or "Latino" are those who classify themselves in one of the specific Hispanic or Latino categories listed on the decennial census questionnaire and various Census Bureau survey questionnaires—"Mexican, Mexican Am., Chicano" or "Puerto Rican" or "Cuban"—as well as those who indicate that they are "another Hispanic, Latino, or Spanish origin."

U.S. Census Bureau, *What is Hispanic Origin*?, https:// www.census.gov/quickfacts/fact/note/US/RHI625223 (last visited Jan. 23, 2026).

Plaintiffs claim this affidavit "bolster[s] Dr. Britt's statistical analysis" by showing the monument causes "harmful psychological effects on Black citizens by causing insecurity, fear, and a sense of exclusion." This evidence, they contend, supports Plaintiffs' claim of a "significant adverse effect" on Gaston County's Black residents. But again, we must consider the actual evidence, not just Plaintiffs' conclusory descriptions of it.

Dr. Blackshear's affidavit provided a brief history of the Civil War and Reconstruction. He explained that Black Americans initially "made some progress" after the War, gaining "civic engagement, education, and property ownership" that led to "voting rights and representation in government." But "[s]upporters of the Confederacy . . . systematically engaged in tactics to reverse these gains," and usher in the Jim Crow Era—a period marked by "funding the raising of Confederate monuments." He concluded: "[B]ecause of this history, which marks an emotional and psychological trauma on the community of Gaston County, the monument in front of the Gaston County Courthouse perpetuates harmful psychological effects on Black citizens."

No one disputes this history. And Gaston County doesn't dispute that the monument may cause some Black Gaston County residents "psychological" harm. But that's not the question. The question is whether the monument's "construction and placement" has actually caused "a meaningful disparate impact along racial lines." *Holmes*, 384 N.C. at 440, 886 S.E.2d at 132. Dr. Blackshear's affidavit does not answer it.

He identifies no instance of psychological harm or actual deterrence from courthouse access. He does not point to a single Black resident who was psychologically harmed by the monument, was prevented from accessing the courthouse, or whose case was adversely affected by the monument's presence. Instead, he made general conclusions based on layers of assumptions.

Dr. Blackshear stated that "[f]or many Black Americans, seeing the Confederate monument at the gateway to the court will be psychologically harmful and dispiriting." Black residents, according to Dr. Blackshear, "may attempt to avoid participation in court (such as jury service) rather than remain in a courthouse committed to honoring Jim Crow era values of racism and [W]hite supremacy." Dr. Blackshear also observed that "many [W]hite individuals" committed "to equity and justice . . . will [be] intimidated or discouraged from full participation in the judicial system if they interpret the . . . monument as signifying that their commitment to fairness, equity, and justice under the law is not supported or tolerated." So "some [W]hite citizens who hold more

egalitarian views" will also be discouraged "from full participation in the jury and other aspects of the judicial process.

Despite Dr. Blackshear's opinion that the monument may make people—Black or White—feel "intimidated or discouraged from full participation in the judicial system," he provides no evidence of actual impairment to anyone's participation. And his affidavit has another problem: It describes equal harm, not disparate impact. By his own account, the monument discourages participation by *both* Black and White citizens "committed to equity and justice." So Dr. Blackshear's affidavit may show a disparate impact along ideological lines—between people of all races "committed to equity and justice" and others not "committed" to these values—but it does not show a "disparate impact along racial lines." *Id.*

Other evidence supports this point. The Board's meeting's minutes and public comments show that negative feelings about the monument were not limited to people identifying as Black. Comments from the public and news articles supporting the monument's removal and expressing distress about its presence came from people of various races.

"[A] meaningful disparate impact along racial lines" requires something different. *Id.* In *Hunter v. Underwood*, the Supreme Court analyzed a provision in the 1901 Alabama Constitution that disenfranchised persons convicted of crimes involving "moral turpitude." 471 U.S. at 229. The provision's discriminatory impact—its "disparate effect"—was the actual disenfranchisement of a disproportionate number of Black people. *Id.* at 227.

> The registrars' expert estimated that by January 1903 [the provision] had disfranchised approximately ten times as many blacks as whites. This disparate effect persists today. In Jefferson and Montgomery Counties blacks are by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under [the state constitution] for the commission of nonprison offenses.

Id. (citation omitted). The Supreme Court did not disturb this finding on appeal. *Id.*

Unlike in *Underwood*, we have no evidence the monument affects Black residents at rates substantially higher than White residents. Dr. Blackshear's affidavit described psychological harm to both Black and White citizens but identified no racial disparity in that harm's distribution or severity. Without such evidence, Plaintiffs cannot establish the

"disproportionate effects along racial lines" required to prove an equal protection violation. *Id.*

Finally, Plaintiffs submitted what they describe as "firsthand testimony describing precisely how the [monument] harms them and other [Gaston County] Black citizens . . . on an on-going basis." This testimony includes two declarations.

The first came from Chris Thomason—President of the NAACP Gaston County Branch and a Gaston County resident for over 50 years. He described feeling "disappointment, helplessness, pain, and anger" when "forced to see the [m]onument in front of the Courthouse." His "[f]riends, relatives, colleagues, and other community members," he said, "share those feelings." Because of the monument, he "do[es] not believe that [he], or other Black residents, have equal and fair access to justice in Gaston County." Every courthouse visit makes him feel he "will not be treated the same way by jurors or officers of the court as White people." He must "stand out and be the exception to preconceived, prejudiced notions about Black people in America" to get "even a glimpse of justice." He stated that "in recent years, [he] ha[s] attended several events, including protests and vigils, taking place in the area in front of the Courthouse and around the [m]onument."

The second declaration came from Guy Flemming—Activities Coordinator for the Gaston County chapter of the NABVETS and a Gaston County resident. In his declaration, he noted that he views the monument as a "symbol of intimidation, oppression, and injustice" that "conveys a racially disparaging message" and makes him "fear for the safety of Black people in Gaston County." It forces him to "question whether Black people will be treated fairly by the Court and its officers and whether justice will truly be served." "[O]ther Black residents," he maintained, have told him they believe the monument doesn't "represent[ ] them, their history, their values, or their beliefs." Flemming concluded that the monument "signifies that people of color will not be treated the same way by jurors or officers of the court as White people."

These declarations fall short. We accept as true Mr. Thomason's and Mr. Flemming's statements about their feelings, but Plaintiffs must show more than that some Black residents have negative feelings about the monument, even if their feelings are entirely understandable. They must prove that the monument's presence has some effect on courthouse operations and that this harm falls disproportionately on Black residents. And despite Mr. Thomason's strong negative feelings about the

monument, he did not claim that he was actually deterred from accessing the courts—indeed, he participated as a Plaintiff in this very case.[17]

In the end, Plaintiffs presented no evidence of any specific "impact" beyond negative feelings about the monument. Before the trial court, Plaintiffs' counsel acknowledged as much. In response to the trial court's question about the monument's "disparate effect," he stated:

> [T]he disparate impact that I identified is not a disparate impact—*it is not a claim that the judges or any Court officials are acting differently for treating black residents differently*. The impact is on the black residents themselves, [y]our [h]onor. The impact is just against—statistically shown that they *may not even feel comfortable getting to the courthouse door* because of the impact of this monument.
>
> *Your [h]onor is correct that there is nothing in our claims that is showing that there is an actual disparate result in the judicial outcome*. Now, I am not saying that there is or isn't, but *we have not made that evidentiary showing*. That would be very complicated. . . . [O]ur showing is a showing of a direct disparate impact on black residents in the way that they *perceive* access to justice in their ability—in the way they will access the courtroom in their belief that they are getting a fair shake.

(Emphasis added.) Without "that evidentiary showing," Plaintiffs cannot show the required disproportionate racial impact for an equal protection claim.

III. Conclusion

Plaintiffs produced no evidence creating a genuine issue of material fact on either claim. The trial court properly concluded that Gaston County violated neither the Open Courts Clause nor the state Equal Protection Clause. We therefore affirm.

AFFIRMED.

Judges CARPENTER and WOOD concur.

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17. To be clear, we do not suggest that Plaintiffs' concerns described in these declarations are anything but genuine—we merely hold that they do not establish the requisite disproportionate impact for purposes of an equal protection claim.

PAEZ v. PETTIS

[303 N.C. App. 310 (2026)]

SADYE PAEZ, PLAINTIFF
v.
WILLIAM PETTIS, DEFENDANT

No. COA25-168

Filed 4 March 2026

1. Specific Performance—breach of contract—inadequacy of other remedies—beneficial economic interest—abuse of discretion analysis

In a business dispute involving three jointly owned limited liability companies established to run a commercial kitchen space, the trial court did not abuse its discretion by entering an order of specific performance after a jury rendered verdicts finding that the parties had entered into a contract and that defendant had breached that contract with regard to plaintiff's ownership interest in two of the companies. Based on the record, the trial court clearly considered the inadequacy of other remedies to provide plaintiff the full benefits of the parties' contract, since the court took into account the complexities of the case, including: the real property and substantial investment expended, structure of the businesses, and involvement of third parties. Further, the trial court's determination that plaintiff was the owner of forty percent of the beneficial economic interest in one of the companies was supported by the trial court's findings of fact which were, in turn, supported by evidence produced at trial.

2. Specific Performance—breach of contract—beneficial economic interest—no conflict with prior summary judgment order

In a business dispute involving three jointly owned limited liability companies, the trial court's order granting specific performance—after a jury rendered verdicts finding that the parties had entered into a contract and that defendant had breached that contract with regard to plaintiff's ownership interest in two of the companies—did not constitute an improper overruling of a prior summary judgment order that had been entered by a different superior court judge. The prior order had not determined the specific ownership percentages of the parties in one of the companies and, further, the order granting specific performance recognized and enforced plaintiff's forty percent ownership in the beneficial economic interest in the disputed company, leaving the ownership interests (divided between defendant and a third party) undisturbed.

3. Parties—breach of contract dispute—necessary parties—dismissal of parties prior to trial

In a business dispute involving three jointly owned limited liability companies, the trial court's order granting specific performance—after a jury rendered verdicts finding that the parties had entered into a contract and that defendant had breached that contract with regard to plaintiff's ownership interest in two of the companies—was affirmed. Although a prior order entered by a different judge had granted summary judgment in favor of two parties to the lawsuit, thereby resolving those parties' claims and dismissing them from the suit prior to trial, the dismissed parties were not necessary to the adjudication of whether plaintiff was entitled to a percentage of the beneficial economic interest under the contract; the specific performance order only affected defendant's interests and not those of the third parties.

Appeal by defendant from order entered 19 September 2024 by Judge John W. Smith in Wake County Superior Court. Heard in the Court of Appeals 19 November 2025.

Q Byrd Law, by Quintin D. Byrd, for plaintiff-appellee.

Parry Law, PLLC, by Edward Eldred and Jonah A. Garson, for defendant-appellant.

WOOD, Judge.

William Pettis ("Defendant") appeals the trial court's order granting specific performance entered on 19 September 2024. The trial court entered this order following a jury verdict finding: a contract existed between Sadye Paez ("Plaintiff") and Defendant; Defendant breached the contract; Plaintiff suffered actual compensatory damages in the amount of $19,000.00; and Plaintiff owns an interest in Four Paez LLC ("Four Paez"), PPKS LLC ("PPKS"), and The Raleigh Kitchen Space LLC ("RKS"). Defendant makes two arguments. First, Defendant argues the trial court abused its discretion by entering its order for specific performance. Second, Defendant argues the trial court's judgment cannot be upheld because it overruled a prior order and necessary parties had been released from the action and were no longer subject to the trial court's jurisdiction. After careful review of the record and applicable law, we affirm the trial court's judgment and order granting specific performance.

I. Factual and Procedural Background

Plaintiff and Defendant met and began dating in 2017 while Plaintiff was living and working in Durham. Plaintiff and Defendant ended their dating relationship after Plaintiff moved to New York. The parties reconnected in 2021 and resumed "an on again, off again" long distance relationship until approximately January 2023. During this time, they talked about their future together and discussed Plaintiff moving back to North Carolina. Additionally, they began a professional relationship by forming three limited liability companies to purchase property and to start a commercial kitchen space business together. Plaintiff never moved back to North Carolina.

Four Paez was formed first to purchase the property located at 3805 South Wilmington Street in Raleigh and renovate it into a multi-vendor commercial kitchen space. The Four Paez operating agreement indicates Plaintiff, Defendant, James Stilson ("James"), and Katherine Stilson ("Katherine") are each members and have equal ownership interests. James and Katherine are Defendant's godparents and joined this business venture as guarantors to help Plaintiff and Defendant secure funding to purchase the property.

RKS was formed next to rent the property from Four Paez and run the business by leasing the individual commercial kitchen spaces out to tenants. The RKS operating agreement states Defendant and James are the only members, with Defendant owning an 80% interest and James owning the remaining 20%. PPKS was created last as a holding company for Defendant's 80% ownership interest in RKS. The PPKS operating agreement names Defendant and James as managers, while naming Defendant and Plaintiff as members. The PPKS operating agreement takes Defendant's 80% ownership interest in RKS and divides it equally among Plaintiff and Defendant. The operating agreement for PPKS states the initial ownership interests of its members are as follows:

Member	Ownership Interest
[Defendant]	40%
[Plaintiff]	40%
TOTAL:	80% (the [RKS])

Throughout the loan application process to purchase 3805 South Wilmington Street, Plaintiff alleged Defendant had represented to her that she would be a 40% owner of RKS but that Defendant emailed the lender stating he would own 80% of RKS and James would own the

other 20%.[1] Defendant assured Plaintiff via text message that his assertion in the email was just for the loan paperwork and she would be an owner of RKS. Plaintiff alleged each party was to contribute $50,000.00 as an initial investment toward the down payment to purchase and renovate 3805 South Wilmington Street; however, Plaintiff, in addition to her share, also contributed $10,000.00 towards Defendant's expected initial contribution.

On 23 November 2022, Four Paez officially purchased the 3805 South Wilmington Street property. In an undated text message from Defendant to Plaintiff, Defendant stated "[i]m gonna wire you 25 k plus 10 k next week. [James] moved the money." Plaintiff purports this text message to be from December 2022. Plaintiff testified that after closing on the property, James made the decision to reimburse part of her initial investment with a personal loan he took out. Plaintiff claims she was initially wired $25,000.00 and then later was sent an additional $10,000.00 upon her request. However, "as things continued to sour" after Plaintiff and Defendant's personal relationship ended, James asked for the money to be returned to him. Plaintiff did not return the money. As time went on Plaintiff claims Defendant was not communicating with her, making her role managing the social media and marketing for RKS difficult. Plaintiff claims that Defendant also blocked her access to the bank accounts associated with the businesses.

On 26 May 2023, Plaintiff filed a complaint against Defendant, James, and Katherine. The complaint asserted four causes of action: (1) breach of contract, (2) fraud, (3) misrepresentation, and (4) civil conspiracy, in addition to a claim for attorney fees. Further, the complaint requested specific performance of the contract terms Plaintiff alleged existed and were enforceable. On the same day, Plaintiff filed a motion for a preliminary injunction and temporary restraining order specifically requesting: (1) Defendant, James, and Katherine return the remaining funds from her initial investment to the original account or provide to her information for the new account into which the funds in question had been transferred; (2) the status quo of Plaintiff's ownership interest in PPKS, RKS, and Four Paez be maintained; (3) no bank accounts, passwords, or other pertinent information relating to RKS be changed; and (4) no

1. In September 2022, Defendant sent an email to the lender reflecting he would own 70% of RKS and James would own the other 30%. At trial, Defendant testified he and James originally agreed to a 70/30 ownership split, but later changed the ownership to reflect that Defendant would own 80% and James would own the other 20%. Regardless, Defendant represented to the lender that he and James were the only owners of RKS.

monies or property from RKS be transferred. On 3 July 2023, Defendant, James, and Katherine filed a combined answer asserting that the operating agreements for the businesses at issue bar Plaintiff's claims. Further, Defendant, James, and Katherine asserted that all of Plaintiff's causes of action except for breach of contract should be dismissed pursuant to Rule 12(b)(6). The trial court entered an order denying Plaintiff's motion for a preliminary injunction and temporary restraining order on 22 November 2023.

On 20 December 2023, Plaintiff filed a second motion for a preliminary injunction and temporary restraining order asking the trial court to order Defendant, James, and Katherine to: (1) return her remaining initial investment funds to the original account or provide to her information for the new account into which the funds in question had been transferred; (2) maintain the status quo for Four Paez; (3) prohibit other members from voting to remove Plaintiff while the action was pending; and (4) provide Plaintiff access to all financial and business information regarding Four Paez. On 8 February 2024, the trial court ordered Defendant, James, and Katherine to provide Plaintiff with financial information regarding Four Paez and to continue duties and tasks for the Four Paez business as usual. The trial court further ordered Plaintiff to return the $35,000.00 James previously sent as reimbursement for her initial investment in the property.

On 30 May 2024, James and Katherine filed a motion for summary judgment pursuant to Rule 56 on the grounds that there were no genuine issues of material fact. The motion asserted:

> James and Katherine Stilson, and [Defendant], contend that all of the evidence and Plaintiff's admissions and action establish that (i) [Plaintiff] owns 25% of Four Paez, LLC, (ii) James Stilson owns 25% of Four Paez, LLC, (iii) Katherine Stilson owns 25% of Four Paez, LLC, (iv) [Defendant] owns 25% of Four Paez, LLC, (v) [Plaintiff] owes 25% of the costs for the build out and monthly expenses, and (vi) [James] Stilson and [Defendant] are the only two owners of The Raleigh Kitchen Space, LLC.

Plaintiff objected to the motion for summary judgment asserting there were genuine issues of material fact. The trial court conducted a hearing on the motion for summary judgment on 8 July 2024; Defendant was not present nor represented at the hearing.[2] On 15 July 2024, the trial court

2. A transcript for this hearing was not included in the record on appeal.

entered its order granting the motion for summary judgment without making written findings of fact or conclusions of law.

Plaintiff's remaining claims against Defendant went to trial on 9 September 2024. Plaintiff and Defendant were the only witnesses to testify; text messages, emails, and business documents were admitted as evidence. Following the close of evidence, Defendant made a motion to dismiss Plaintiff's claims. The trial court dismissed all claims except breach of contract.

On 13 September 2024, the jury returned the following verdicts and special verdicts: (1) Yes, to whether Plaintiff and Defendant entered into a contract; (2) Yes, to whether Defendant breached the contract; (3) $19,000.00 as the amount Plaintiff is entitled to recover from Defendant for the breach of contract; (4a) Plaintiff and Defendant each have a 40% ownership interest in RKS; (4b) Plaintiff and Defendant each have a 25% ownership interest in Four Paez; (4c) Plaintiff and Defendant each have a 50% ownership interest in PPKS.[3]

The hearing for entry of final judgment could not be completed within the same session, so the trial court ordered the matter to be "recessed and continued day to day, session to session" until 19 September 2024. On 19 September 2024, James and Katherine appeared and were represented by counsel. The trial court indicated it had advised the parties to come to a resolution on their own, but they had reached impasse. The trial court heard arguments from each party on how they believed the final order should be entered. The trial court made its determination and then allowed the parties to interrupt, ask questions, and point out any errors as it read its order for specific performance. The trial court entered final judgment upon the jury verdict and entered an order for specific performance. On 8 October 2024, Defendant filed notice of appeal.

II. Analysis

Defendant asserts two issues on appeal. First, Defendant argues the trial court abused its discretion by entering its order for specific performance. Second, Defendant argues the trial court's judgment cannot be upheld because it effectively overrules a prior order of another superior

3. Questions (1), (2), and (3) are general verdicts "by which the jury pronounces generally upon all or any of the issues, either in favor of the plaintiff or defendant." N.C. Gen. Stat. § 1A-1, Rule 49(a). Questions (4a), (4b), and (4c) are special verdicts. "A special verdict is that by which the jury finds the facts only." *Id*.

court judge and because necessary parties had been released from the action and not subject to the trial court's jurisdiction. We disagree.

A. Specific Performance

[1] Defendant argues the trial court abused its discretion by granting specific performance because its conclusion that "no remedy other than specific performance will provide to plaintiff the full benefits of the contract" is unsupported because Plaintiff "made no attempt" to prove the impossibility or difficulty in valuing an ownership interest in RKS. Defendant further argues even if Plaintiff had proven inadequacy or difficulty in valuing an ownership interest in RKS, the trial court's decree "goes far beyond any reasonable construction of any agreement" because the terms of the contract are not clear and the terms of the contract the trial court "appears" to have found are unsupported by the evidence presented. Additionally, despite the jury's verdict finding the existence of a contract between Plaintiff and Defendant, Defendant argues a valid contract did not exist because there was no consideration from Plaintiff.

First, we note that while Defendant attempts to contest the jury's verdicts, whether there is error regarding the jury's verdicts is not an issue before us on appeal. Defendant has appealed only the issues of whether the trial court has abused its discretion in ordering specific performance in the manner that it did, whether the trial court overruled the prior summary judgment order dismissing the claims against James and Katherine, and whether James and Katherine were necessary parties and should have been parties the entirety of the trial. Defendant has not appealed the trial court's denial of his motion to dismiss the claim for breach of contract. Further, Defendant has not appealed the trial court's denial of his motion for a directed verdict nor his motion for a judgment notwithstanding the verdict. Thus, the jury's verdicts finding the existence of a valid contract between Plaintiff and Defendant and that Defendant breached that contract stand and we shall not address this issue on the merits.

"The remedy of specific performance rests in the sound discretion of the trial court and is conclusive on appeal absent a showing of a palpable abuse of discretion." *Diener v. Brown*, 290 N.C. App. 273, 277, 892 S.E.2d 212, 215 (2023) (cleaned up). "A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Kassel v. Rienth*, 289 N.C. App. 173, 184, 888 S.E.2d 682, 693 (2023) (quoting *Greenshields, Inc. v. Travelers Prop. Cas. Co. of Am.*, 245 N.C. App.

25, 31, 781 S.E.2d 840, 844 (2016)). When reviewing a trial court's findings of fact, we are limited to determining whether the findings of fact are supported by competent evidence and then whether those findings of fact support the conclusions of law. *Kassel*, 289 N.C. App. at 184, 888 S.E.2d at 693. "A trial court's unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Cherry Cmty. Org. v. Sellars*, 381 N.C. 239, 246, 871 S.E.2d 706, 714 (2022) (quoting *Cape Fear River Watch v. N.C. Env't Mgmt. Comm'n*, 368 N.C. 92, 99, 772 S.E.2d 445, 451 (2015)). Conclusions of law are reviewed *de novo* on appeal. *Curran v. Barefoot*, 183 N.C. App. 331, 335, 645 S.E.2d 187, 190 (2007).

Our Supreme Court has stated:

> The remedy of specific performance is available to compel a party to do precisely what he ought to have done without being coerced by the court. The party claiming the right to specific performance must show the existence of a valid contract, its terms, and either full performance on his part *or that he is ready, willing and able to perform.*

Id. (quoting *Munchak Corp. v. Caldwell*, 301 N.C. 689, 694, 273 S.E.2d 281, 285 (1981)). "The remedy of specific performance will be granted or withheld by the court according to the equities of the situation as disclosed by a just consideration of all the circumstances of the particular case." *Williams v. Habul*, 219 N.C. App. 281, 290, 724 S.E.2d 104, 110 (2012) (cleaned up) (quoting *Byrd v. Freeman*, 252 N.C. 724, 730, 114 S.E.2d 715, 720 (1960)).

Prior to the trial court's entry of its order for specific performance, the jury returned general verdicts finding Plaintiff and Defendant entered into a contract and Defendant breached the contract regarding Plaintiff's ownership interest in RKS and PPKS. Further, the jury returned special verdicts finding Plaintiff and Defendant each have a 40% ownership interest in RKS and Plaintiff and Defendant each have a 50% ownership interest in PPKS.

While Defendant is correct Plaintiff did not make explicit arguments at trial regarding the inadequacy of monetary damages in lieu of specific performance, the record is clear the trial court considered the inadequacy of other remedies before concluding that "no other remedy other than specific performance will provide to plaintiff the full benefits of the contract between parties." The trial court's consideration of this is clear when reading the entirety of the paragraph from which the challenged conclusion is taken:

> 12. Plaintiff is entitled to have and secure her benefits of the contract as found by the jury and the exercise of the court's discretionary powers to assure the specific performance by the defendant of the terms of the contract is necessary and appropriate. The court specifically concludes that *no remedy other than specific performance will provide to plaintiff the full benefits of the contract between parties*. The major asset of the contract is a building in South Raleigh purchased for $1.2 million now worth over $4 million due to improvements made by plaintiff and defendant jointly; but the court finds that third parties hold a mortgage on that building together with an innocent third party membership interests in the LLC holding title and from which mortgage payments are made. Because third parties have a membership interest in the operating agreements of the relevant LLC organized as a part of the contract between the plaintiff and defendant, the court has limited authority to affect the fundamental structure of the companies themselves without prejudicing the rights of the third parties, which the court should not do even assuming the court had the jurisdiction to do so, which is questionable. However, the defendant has the ability to fully comply with the promises and material terms of his contract with the plaintiff, and he should be required to do so.

It is clear from the record the trial court considered the unique complexities of this case, such as the real property involved and substantial investment that has gone into it, third parties involved, structure of the businesses, and necessity of an award that would not disrupt the third parties' interests in the businesses. "The remedy of specific performance will be granted or withheld by the court according to the equities of the situation as disclosed by a just consideration of all the circumstances of the particular case." *Williams*, 219 N.C. App. at 290, 724 S.E.2d at 110 (cleaned up) (quoting *Byrd*, 252 N.C. at 730, 114 S.E.2d at 720). Thus, the trial court's conclusion that "no remedy other than specific performance will provide to plaintiff the full benefits of the contract between parties" is adequately supported by its findings when considering the circumstances of the particular case and difficulties of other remedies. The trial court did not abuse its discretion ordering specific performance for this reason.

Next, we consider Defendant's argument regarding the terms of the contract enforced by the order for specific performance. Specifically,

Defendant takes issue with the trial court's adjudication that Plaintiff "be the immediate owner of 40% of the beneficial economic interest in" RKS because there was no evidence Defendant agreed to give Plaintiff a beneficial ownership interest. The trial court supported its adjudication of Plaintiff as a beneficial economic interest owner by concluding Plaintiff is an economic interest holder under N.C. Gen. Stat. § 57D-1-03(11), which is defined as, "[a] person who owns an economic interest but is not a member." N.C. Gen. Stat. § 57D-1-03(11) (2024). This conclusion is supported by the trial court's finding:

> 7. Although defendant owns 80% of [RKS] according to the operating agreement, the jury has determined that plaintiff is entitled to half of defendant's interest under the contract that defendant breached. Defendant's godfather James Stilson currently owns a 20% interest in [RKS] and was not a party to the agreement between plaintiff and defendant; and therefore, the court has no jurisdiction over [James'] interest and rights in [RKS].

At trial, Plaintiff provided operating agreements showing members and ownership interests for each LLC and text message and email correspondence from Defendant explaining his intent behind the division of ownership interests and creation of each LLC. Specifically, the operating agreement for PPKS states the initial ownership interests of its members are as follows:

Member	Ownership Interest
[Defendant]	40%
[Plaintiff]	40%
TOTAL:	80% (the [RKS])

This evidence supports the trial court's findings and resulting conclusion that Plaintiff is entitled to half of Defendant's interest in RKS "under the contract" as the terms of the contract include 50% ownership interest each in PPKS, which holds Defendant's 80% interest in RKS. Thus, the trial court did not abuse its discretion in adjudicating Plaintiff as a beneficial economic interest holder of RKS and ordering that Defendant act accordingly.

Thus, we cannot conclude the trial court's order granting specific performance is so manifestly unsupported by reason to warrant a finding of an abuse of discretion. *See Kassel*, 289 N.C. App. at 184, 888 S.E.2d at 693. Defendant's argument is overruled.

B. Prior Judgment

[2] Defendant argues the trial court violated the rule prohibiting a superior court judge from overruling the decision of another superior court judge and the entry of judgment was improper because necessary persons did not appear as parties. Specifically, Defendant argues the order granting summary judgment "necessarily determined" James and Defendant were the only members of RKS and each had a 50% ownership interest, thus the order granting specific performance overruled the summary judgment order when it adjudicated Plaintiff to be a 40% beneficial economic interest owner. Defendant argues the order granting specific performance "effectively removes Defendant as one of the two members of [RKS] and replaces him with Plaintiff, because the judgment enjoins Defendant from casting any vote affecting Plaintiff's 'beneficial interest' in [RKS] without Plaintiff's affirmative consent." We disagree.

While Defendant is correct that:

> The well established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.

Calloway v. Ford Motor Co., 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). This is not what happened in the case *sub judice*.

Prior to trial, James and Katherine filed a motion for summary judgment in which they asserted that James and Defendant were the sole owners of RKS. The trial court granted summary judgment in favor of James and Katherine, leaving Defendant as the only remaining defendant at trial. While the *motion* for summary judgment made claims regarding the ownership of the LLCs, including that James and Defendant "are the only two owners of [RKS]," the trial court's order granting summary judgment did not find that James and Defendant each had a *50% ownership interest* in RKS. The record is clear Defendant has an 80% ownership interest and James has a 20% ownership interest in RKS.

We acknowledge the special verdict sheet completed by the jury reads "[a]s between the parties to this action, what percentage, if any, of the *ownership interest* in [RKS] is *owned* by each of the parties to this action," however, the trial court specified in its order that it was recognizing and enforcing Plaintiff's "40% ownership of the *beneficial economic interest* . . . which is one-half of the beneficial economic interest of [Defendant]" in RKS, not *ownership interest*.

The trial court's order explicitly states Plaintiff's ownership of the beneficial economic interest in RKS makes her an "economic interest owner" under N.C. Gen. Stat § 57D-1-03(11). An economic interest owner is defined as "[a] person who owns an economic interest but *is not a member*." N.C. Gen. Stat. § 57D-1-03(11) (emphasis added) (2024). Further, economic interest is defined as "[t]he proprietary interest of an interest owner in the capital, income, losses, credits, and other economic rights and interests of a limited liability company, including the right of the owner of the interest to receive distributions from the limited liability company." N.C. Gen. Stat. § 57D-1-03(10). Thus, the trial court did not transfer half of Defendant's ownership interest in RKS to Plaintiff; the trial court is recognizing and enforcing Plaintiff's entitlement to half of the *beneficial economic interest* of Defendant's total *economic interest* in RKS.[4] Defendant's 80% ownership interest and James' 20% ownership interest in RKS remain undisturbed. The trial court's judgment following the jury verdict and order of specific performance did not overrule the prior order granting summary judgment in favor of James and Katherine.

[3] Finally, Defendant argues the trial court's judgment is null and void because James and Katherine were necessary parties but were not parties at trial. A necessary party is "all persons *who have or claim material interests in the subject matter* of a controversy, which interests will be directly affected by an adjudication of the controversy." *DeRossett v. Duke Energy Carolinas, LLC*, 206 N.C. App. 647, 660, 698 S.E.2d 455, 464 (2010) (emphasis added) (quoting *Durham Cnty. v. Graham*, 191 N.C. App. 600, 603, 663 S.E.2d 467, 469 (2008)). Necessary parties must be joined in an action. *DeRossett*, 206 N.C. App. at 660, 698 S.E.2d at 464. Here, James and Katherine were initially parties to the lawsuit but all claims against them were dismissed upon the trial court granting their motion for summary judgment. Defendant argues "Indisputably, Defendant and James [] held fifty percent ownership interests in [RKS]" and by the trial court adjudicating Plaintiff as a beneficial economic interest owner it has given "Plaintiff the power of Defendant's vote, necessarily affecting James [] rights." As discussed *supra*, the record is clear that Defendant holds an 80% ownership interest in RKS and James holds 20%. Defendant's argument that he and James each hold 50% ownership is without merit. The trial court's order only affected Defendant's

4. The PPKS operating agreement splits Defendant's 80% ownership interest in RKS equally between Plaintiff and Defendant. The trial court's order is enforcing this by essentially giving Plaintiff one half of Defendant's beneficial interest in RKS, or the equivalent of 40% of the total beneficial interest in RKS. James' 20% ownership interest is undisturbed by this action.

interests. Neither James nor Katherine had a material interest in the subject matter of the controversy that would be directly affected by an adjudication of the controversy. Thus, it was not error for the trial court to adjudicate this matter without James and Katherine being parties.

III. Conclusion

For the foregoing reasons, the trial court did not err by entering its judgment following the jury verdict and order granting specific performance. The trial court's judgment and order is affirmed.

AFFIRMED.

Judges CARPENTER and GORE concur.

STATE OF NORTH CAROLINA
v.
DAVID BROWN BANKS

No. COA25-432

Filed 4 March 2026

1. Drugs—trafficking in opioids by possession—ultimate user exemption—entitlement to jury instruction—no plain error

The trial court in a prosecution for various drug-related charges did not err—much less commit plain error—when it instructed the jury on defendant's charge of trafficking in opioids by possession without also instructing on the ultimate user exemption (N.C.G.S. § 90-101(c)(3)), which exculpates a person who lawfully possesses a controlled substance "for his own use or for the use of a member of his household." Defendant was not entitled to an instruction on the ultimate user exemption where the record showed that: law enforcement recovered forty-one oxycodone pills—stored in prescription bottles—from defendant's home; defendant admitted that the pills were not prescribed to him but to his late wife, who had died about two years before defendant's arrest; and defendant confessed to giving the pills to other individuals, including in exchange for sexual favors.

2. Drugs—trafficking in opioids by possession—amount of opioids—sufficiency of evidence—ultimate user exemption—irrelevant

In a prosecution for various drug-related crimes, the trial court did not err in denying defendant's motion to dismiss a charge of trafficking in opioids by possession where the State presented substantial evidence of each essential element of the offense, including the amount of opioids found in defendant's possession. Defendant's argument on appeal—that he had only admitted to giving "a few" of his late wife's prescription oxycodone pills to a few people and was authorized to possess the rest under the ultimate user exemption—was, even if preserved for appellate review, meritless because the State was not required to negate the ultimate user exemption at trial; rather, as the person claiming its benefit, defendant had the burden of proving that the exemption applied to his case (N.C.G.S. § 90-113.1(a)).

Appeal by Defendant from judgment entered 17 September 2024 by Judge Gary M. Gavenus in Yancey County Superior Court. Heard in the Court of Appeals 11 February 2026.

Attorney General Jeff Jackson, by Assistant Attorney General Nathan D. Childs, for the State-Appellee.

Blau & Hynson, PLLC, by Daniel M. Blau, for Defendant-Appellant.

COLLINS, Judge.

Defendant, David Brown Banks, appeals from judgments entered upon jury verdicts of guilty of trafficking in opioids by possession; possession with intent to sell or deliver a schedule II controlled substance; and maintaining a dwelling for keeping or selling controlled substances. Defendant argues that the trial court plainly erred by failing to give a jury instruction on the "ultimate user" exemption to the trafficking charge or, in the alternative, that counsel's assistance was ineffective because he failed to request such instruction. Additionally, Defendant argues that the court erred by denying his motion to dismiss the trafficking charge for insufficient evidence. We find no error, much less plain error.

I. Background

Defendant was indicted on one count of trafficking in opioids; one count of possession with intent to sell or deliver a schedule II controlled substance; and one count of maintaining a dwelling for keeping

or selling controlled substances.[1] The evidence at trial tended to show the following:

In September 2023, the Yancey County Sherriff's Office received information from an informant that Defendant was soliciting women for sexual favors in exchange for money and prescription pills. Defendant was a long-time employee of the Sheriff's Office in the Yancey County jail. The Sherriff's office sent the informant to Defendant's home as part of its investigation. The informant obtained one lorazepam pill, a schedule IV controlled substance, from Defendant's home.

Sherriff's Office detectives contacted Defendant, and Defendant voluntarily appeared and gave a videotaped interview in October 2023. During the interview, Defendant confessed that he had paid cash to the informant and another female for sexual favors approximately twenty times in the last year, and he had attempted to trade medication for sexual favors approximately three or four times. Defendant also stated that "if somebody said they had a headache and I had a pill that could help with their headache, I'd let them have it." Defendant specifically stated that he had given pills to people for their headaches "maybe three or four" times. When asked what kind of pills, Defendant answered, "Percocet," which is a mixture of acetaminophen and the schedule II controlled substance oxycodone. *See* N.C. Gen. Stat. § 90-90(1)(a)(14) (2024). When asked where he obtained Percocet, Defendant admitted that it had not been prescribed to him but stated that he had leftover pills from his late wife's illness. Defendant's wife passed away in December 2021, approximately two years before the detectives interviewed him.

Following the interview, detectives accompanied Defendant to his home. They found two prescription pill bottles containing acetaminophen/oxycodone pills, the generic equivalent of Percocet, on Defendant's kitchen counter and six prescription pill bottles containing the oxycodone mixture in a kitchen cabinet. Each bottle had a label indicating it was prescribed to Defendant's late wife, contained oxycodone, and was filled between August 2019 and December 2021. Detectives recovered sixty-five pills in total from Defendant's home.

At trial, a forensic scientist testified that she conducted the standard procedure for determining whether the pills recovered from Defendant's home contained opioids. She confirmed that forty-one of the recovered pills contained oxycodone, an opioid, and that those pills' net weight was 14.99 grams, plus or minus 0.03 grams.

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1. Defendant was indicted on other charges which were subsequently dismissed.

Defendant moved to dismiss all charges at the close of the State's evidence, which the trial court denied. Defendant did not present evidence and renewed his motion to dismiss, which the trial court denied. Defendant did not object to the jury instructions or request an instruction on the ultimate user exemption for the trafficking charge. The jury found Defendant guilty on all three counts, and the court entered judgment on each conviction.

Defendant gave timely oral notice of appeal.

II. Discussion

Defendant challenges only his conviction for trafficking in opioids. He argues that the trial court erred by failing to instruct the jury on the ultimate user exemption to the charge or, in the alternative, that Defendant received ineffective assistance of counsel for counsel's failure to request such an instruction. Additionally, Defendant argues that the trial court erred by denying his motion to dismiss the charge for insufficient evidence.

A. Trafficking in Opioids

Any person who "sells, manufactures, delivers, transports, or possesses" more than fourteen but less than twenty-eight grams of "opium, opiate, or opioid," can be found guilty of trafficking that substance by possession. N.C. Gen. Stat. § 90-95(h)(4)(b) (2024). Oxycodone, an opioid, is a schedule II controlled substance. *Id.* § 90-90(1)(a)(14) (2024). A defendant unlawfully possesses an opioid "if he or she knowingly possesses it with both the power and intent to control the disposition or use of that substance." *State v. Bice*, 261 N.C. App. 664, 674 (2018) (citation omitted).

A person may, however, lawfully possess a controlled substance if that person is "[a]n ultimate user or a person in possession of any controlled substance pursuant to a lawful order of a practitioner[.]" N.C. Gen. Stat. § 90-101(c)(3) (2024). An "ultimate user" is "a person who lawfully possesses a controlled substance for his own use, or for the use of a member of his household . . . ." *Id.* § 90-87(27) (2024).

In a prosecution under N.C. Gen. Stat. § 90-95, proof of an exemption must be provided by the defendant. *State v. McNeil*, 47 N.C. App. 30, 38 (1980). The State is not required to "negate any exemption or exception . . . in any trial, hearing, or other proceeding under [the North Carolina Controlled Substances Act], and the burden of proof of any such exemption . . . shall be upon the person claiming its benefit." N.C. Gen. Stat. § 90-113.1(a) (2024).

B. Jury Instruction

[1] Defendant first argues that the trial court plainly erred by failing to instruct the jury on the ultimate user exemption to his trafficking in opioids by possession charge, pursuant to N.C. Gen. Stat. § 90-101(c)(3).

Plain error arises when an error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660 (1983) (citation omitted). To establish plain error, "a defendant must establish prejudice – that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518 (2012) (citations omitted).

"[I]t is the duty of the trial court to instruct the jury on all of the substantive features of a case." *Bice*, 261 N.C. App. at 673 (citation omitted). "All defenses arising from the evidence presented during the trial constitute substantive features of a case and therefore warrant the trial court's instruction thereon." *Id.* (citation omitted).

"For a jury instruction to be required on a particular defense, there must be substantial evidence of each element of the defense when the evidence is viewed in the light most favorable to the defendant." *Id.* at 673 (citation omitted). "Substantial evidence is evidence that a reasonable person would find sufficient to support a conclusion." *Id.* at 673-74 (citation omitted). "Whether the evidence presented constitutes substantial evidence is a question of law." *Id.* at 674 (citation omitted).

The record evidence in the light most favorable to Defendant shows the following: Forty-one pills weighing approximately 14.99 grams and containing oxycodone were recovered from Defendant's home. The pills were located in prescription bottles with labels indicating they were prescribed to Defendant's late wife. Defendant's late wife had passed away approximately two years prior to Defendant's arrest. Defendant admitted that the pills were not prescribed to him. Defendant confessed to providing oxycodone pills prescribed to his late wife to other individuals and attempting to exchange prescription medication for sexual favors on multiple occasions. Because the record does not contain evidence that a reasonable person would find sufficient to support a conclusion that Defendant lawfully possessed the oxycodone pills "for his own use, or for the use of a member of his household," N.C. Gen. Stat. § 90-87(27), Defendant was not entitled to an ultimate user exemption instruction under Section 90-101(c)(3). Thus, Defendant cannot show error, much less plain error, by the trial court's failure to sua sponte instruct the jury on the ultimate user exemption.

In light of this conclusion, Defendant's argument that he received ineffective assistance of counsel because his counsel failed to request a jury instruction on the ultimate user exemption lacks merit.

C. Motion to Dismiss

[2] Defendant next argues that the trial court erred by denying his motion to dismiss the trafficking in opioids charge because the State failed to present sufficient evidence that he possessed a trafficking amount of oxycodone. Defendant argues that he only "admitted that he had given a few of his wife's old [o]xycodone pills to people who asked for something for a headache" and was authorized to possess the remaining pills as an ultimate user under N.C. Gen. Stat. §§ 90-101(c) and 90-87(27). Even assuming Defendant preserved his argument under the ultimate user exemption for appellate review, it lacks merit.

"When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98 (2009). "Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *Id.* (citations omitted). "The trial court must decide only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *Id.* (citation omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 99 (citation omitted).

Defendant concedes that the evidence presented at trial was sufficient to show he possessed the pills and that the pills contained oxycodone. That is the end of the analysis. The State was not required to negate the ultimate user exemption in this case, *see* N.C. Gen. Stat. § 90-113.1(a); the State was only required to present substantial evidence of each essential element of the offense charged and of Defendant being the perpetrator of the offense. *See Miller*, 363 N.C. at 98. The trial court thus did not err by denying Defendant's motion to dismiss.

III. Conclusion

For the reasons stated above, Defendant received a fair trial free of error.

NO ERROR.

Judges WOOD and STADING concur.

STATE OF NORTH CAROLINA
v.
DHRUVA MAHARAJA-DAS BARBOUR, DEFENDANT

No. COA24-664

Filed 4 March 2026

1. Homicide—voluntary manslaughter—motion to dismiss—sufficiency of evidence—rebutting castle doctrine defense

In a voluntary manslaughter prosecution arising from an altercation between lifelong friends living in a Hare Krishna community, where defendant fatally shot the victim as the victim attempted to retrieve his lawn mower from defendant's yard, the trial court properly denied defendant's motion to dismiss for insufficiency of the evidence, where the State produced sufficient evidence to contradict defendant's castle doctrine defense, including: that it was common for neighbors in the community to come onto each other's property; the friendship between defendant and the victim; and video footage of the incident, which showed the victim had casually walked toward defendant (contrary to defendant's claim that the victim was "bearing down" on him) and was not even looking in defendant's direction when defendant shot him. Further, given the existence of such contradictory evidence, the question of whether defendant was entitled to the castle doctrine's protections became one for the jury to determine.

2. Homicide—voluntary manslaughter—jury instruction—castle doctrine—statutory factors rebutting presumption of fear — plain error analysis

In a voluntary manslaughter prosecution arising from an altercation between lifelong friends living in a Hare Krishna community, where defendant fatally shot the victim as the victim attempted to retrieve his lawn mower from defendant's yard, the trial court erred when instructing the jury on the castle doctrine defense by failing to recite the factors listed in N.C.G.S. § 14-51.2(c) and to explain that these factors were the only rebuttal to the castle doctrine's presumption of a homeowner's reasonable fear of death or bodily harm when confronted by an intruder on their property. However, the court's error did not amount to plain error where the State produced ample evidence rebutting the presumption of fear—particularly, evidence indicating that the victim entered defendant's yard neither forcefully nor unlawfully—and, therefore, defendant could

not show that the court's error had a probable impact on the jury's verdict or that his was an exceptional case affecting the fairness, integrity, or public reputation of judicial proceedings.

3. Criminal Law—prosecutor's closing argument—seeming conflation of castle doctrine and complete self-defense—not grossly improper

In a voluntary manslaughter prosecution arising from an altercation between lifelong friends living in a Hare Krishna community, where defendant fatally shot the victim as the victim attempted to retrieve his lawn mower from defendant's yard, the trial court did not abuse its discretion in declining to intervene ex mero motu during the State's closing argument, when the prosecutor made statements which seemingly conflated the general concept of complete self-defense with the more specific castle doctrine defense. Ultimately, because the court instructed the jury on both complete self-defense and the castle doctrine, as requested by the State and by defendant, and because the prosecutor's closing argument related to both areas of law, the prosecutor's statements were not so grossly improper as to warrant the trial court's intervention.

Appeal by defendant from judgment entered 16 November 2023 by Judge Angela B. Puckett in Stokes County Superior Court. Heard in the Court of Appeals 12 August 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Michael T. Henry, for the State.

Reece & Reece, by Mary McCullers Reece, for defendant-appellant.

GORE, Judge.

Defendant Dhruva Maharaja-Das Barbour appeals his judgment for voluntary manslaughter. Defendant was sentenced to 73 to 100 months' imprisonment. Defendant seeks review of the denial of his motion to dismiss, plain error review of the castle doctrine jury instruction, and for *ex mero motu* review of a portion of the State's closing argument. Upon review of the briefs and the record, we discern no error, no plain error.

I.

Defendant lived in a small Hare Krishna community alongside Lawrence Anderson ("Lawrence"). The people in this community ate

together and participated in multiple practices of the Krishna religion, which is a sect of Hinduism, on a weekly basis. On a daily basis, people from the community would spontaneously visit Lawrence to talk and eat together; his house was seen as a "local hangout." Defendant also visited with Lawrence on multiple occasions. Defendant and Lawrence were known as lifelong friends.

It was common for the members of the community to walk across each other's properties for shortcuts to get to the temple, and to help each other with various home projects. Lawrence had a reputation for helping members of the community with various tasks, such as cleaning, changing water filters, mowing lawns, and bagging leaves. Shortly before the altercation between Lawrence and defendant that is the subject of this case, Lawrence bought a zero-turn lawn mower that he was very excited about because it would make mowing his lawn and others easier.

On 30 April 2021, video footage evidence from defendant's surveillance camera showed Lawrence mowing defendant's lawn. Lawrence's lawn mower became stuck in a ditch on defendant's property and Lawrence left the lawn mower. The next day, defendant found the lawn mower in his yard and called the Sheriff's Department to report an unidentified lawn mower in his yard. Defendant stated he did not know whose lawn mower it was and that he reviewed the security footage but did not see anything in the footage to indicate who the owner was. Defendant requested the lawn mower be towed from his property and it was.

Later, on 1 May 2021, video footage from defendant's security camera showed Lawrence park his car near defendant's driveway and walk towards defendant's property with a tow strap. The video footage shows Lawrence gesturing towards the woods and defendant shaking his head in the negative. Lawrence began walking toward the wooded area and defendant went into his house and retrieved his shotgun. Lawrence returned from the woods and pointed again towards the woods while talking with defendant. Defendant made gestures and Lawrence walked away while defendant reentered his home.

Soon after, Lawrence reentered the yard from the driveway and defendant again appeared with his shotgun and appeared to shake his head negatively in response to Lawrence. Lawrence crossed the driveway and passed in front of defendant as defendant shot Lawrence in the head. Defendant looked at the camera, shrugged his shoulders and reentered the home. Lawrence died at the scene from the shotgun wound to his head. There was no alcohol in his system.

Defendant alleged Lawrence was warned by him to get off his property after telling Lawrence the lawn mower was not there. Defendant threatened Lawrence that if he did not get off defendant's property, defendant would shoot him in the face. Defendant alleged he repeated his threat but Lawrence "sped his pace and aggressively" came toward him and said "No, you're not." Defendant also told officers that Lawrence was drunk.

Defendant was indicted for voluntary manslaughter. At trial, defendant moved to dismiss on the grounds of defense of habitation, but the motion was denied. During the charge conference, defendant argued the language regarding excessive force should be removed from the defense of habitation instruction, also known as the castle doctrine. Defendant did not seek inclusion of the five statutory circumstances to rebut the presumption of reasonable fear under the castle doctrine statute. Defendant's suggested language for this portion of the jury instructions was that the "presumption applies absent evidence to the contrary." The trial court and the parties agreed language regarding excessive force was relevant for the self-defense instructions.

During the State's closing argument, the State emphasized defendant had no reason to fear based upon Lawrence's reputation and knowing he was only trying to retrieve his lawn mower. The State also discussed excessive force and communicated the presumption of reasonable fear when a person is lawfully in their own home. It argued that it must "prove defendant had no reason to be afraid" to overcome this presumption.

The defense argued that under the castle doctrine when a homeowner is confronted by "an intruder on the property" there is a "presumption that the homeowner is in reasonable fear of his life or serious bodily harm unless the State proves to you beyond a reasonable doubt otherwise." Further, the defense argued the presumption was in place and that defendant was "in fact in fear for his life or safety unless the State proves to you by evidence that he did not so fear and thus did not act in self-defense." And again, the defense stated, "He is on his property. He has a right to use deadly force unless, unless again, the state proves to you beyond a reasonable doubt that he was actually not in fear."

The jury returned a guilty verdict for voluntary manslaughter. The trial court entered judgment for voluntary manslaughter and sentenced defendant to 73 months to 100 months' imprisonment. Defendant timely appealed.

II.

Defendant appeals of right pursuant to N.C.G.S. §§ 7A-27(b)(1) and 15A-1444(a). Defendant seeks review of the following: (1) whether the trial court erred by denying his motion to dismiss on the grounds he was immune under the castle doctrine; (2) whether the trial court plainly erred by failing to state the factors in N.C.G.S. § 14-51.2(c) and to explain these factors are the only rebuttal to the castle doctrine's presumption of fear; and (3) whether the trial court abused its discretion by failing to intervene *ex mero motu* during the State's closing argument.

A. Motion to Dismiss

[1] Defendant argues the trial court erred by denying his motion to dismiss because the State allegedly failed to present evidence to overcome the protections afforded within the castle doctrine pursuant to N.C.G.S. § 14-51.2. According to defendant, the State's evidence did not overcome his castle doctrine defense. We disagree.

"[W]e review the denial of a motion to dismiss de novo." *State v. Corbett*, 269 N.C. App. 509, 525 (2020). The State must present substantial evidence of each "essential element of the crime and that the defendant is the perpetrator" to overcome a motion to dismiss. *State v. Chekanow*, 370 N.C. 488, 492 (2018). Further, the trial court must consider the evidence "in the light most favorable to the State" and give it "the benefit of every reasonable inference," including resolving any evidentiary contradictions in the State's favor. *Id.* "Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, it is for the jury to decide whether the facts, satisfy it beyond a reasonable doubt that the defendant is actually guilty." *State v. Fritsch*, 351 N.C. 373, 379 (2000) (cleaned up).

A defendant may raise a complete self-defense claim to refute the charges brought against him. Our Supreme Court acknowledged that "when the State's evidence and that of the defendant is to the same effect, and tend only to exculpate the defendant, his motion to dismiss should be allowed." *State v. Carter*, 254 N.C. 475, 479 (1961) (cleaned up). "When a defendant raises a self-defense claim on a motion to dismiss, the State must present sufficient substantial evidence which, when taken in the light most favorable to the State, is sufficient to convince a rational trier of fact that the defendant did not act in self-defense." *Corbett*, 269 N.C. App. at 526. However, as stated in *Corbett*, "[t]his Court has repeatedly distinguished self-defense cases from *Carter* where there is circumstantial or physical evidence contradicting exculpatory evidence." *Id.* at 527.

In the present case, defendant argues the State failed to present evidence to overcome the presumption pursuant to section 14-51.2(c) and therefore, the trial court should have granted the motion to dismiss. However, this argument bypasses significant steps within the framework of the castle doctrine. Such an argument relies upon the assumption defendant has demonstrated through uncontradicted evidence that he qualifies for the castle doctrine's statutory presumption. Defendant's reliance upon *Carter* is misplaced. In *Carter*, as articulated by *Corbett*, the evidence for both the State and the defendant was the same. *Corbett*, 269 N.C. App. at 527. The only evidence available, and upon which both parties relied, was the defendant's testimony of her self-defense. *Id.* Because there was no contradictory evidence and the only evidence presented pointed to the defendant's self-defense, our Supreme Court reversed the lower court's denial of the motion to dismiss. *Id.*

Similar to *Corbett*, and unlike *Carter*, the State presented contradictory evidence that could suggest defendant did not qualify for the castle doctrine protection. *See Corbett*, 269 N.C. App. at 528 (discussing how the State presented substantial contradictory evidence to the defendants' evidence that would allow a rational jury to determine they "did not act in self-defense"). In the present case, the trial court considered the evidence in the light most favorable to the State and gave the State the benefit of all reasonable inferences. Such contradictory evidence included: evidence it was common for neighbors to come onto each other's property; the long and friendly relationship between Lawrence and defendant; evidence Lawrence was searching for his lawn mower; video footage of the entire incident; video footage Lawrence was casually walking near defendant, rather than "bearing down on defendant"; and video footage Lawrence was not even looking in defendant's direction when defendant shot him. This evidence is sufficient to contradict defendant's castle doctrine defense claim and overcome the motion to dismiss. Accordingly, the trial court did not err by denying defendant's motion to dismiss.

Further, as it relates to the castle doctrine, once there is contradictory evidence, it is for the jury to determine whether the defendant is afforded the castle doctrine protection pursuant to section 14-51.2(b). Our Supreme Court recently articulated this interplay between the castle doctrine and the jury. The Court stated,

> When a defendant asserts the castle doctrine defense at trial, the jury must first determine whether the defendant is entitled to the presumption as set forth in section 14-51.2(b). If the jury finds that the defendant

> is not entitled to the presumption, the castle doctrine statute does not apply and the jury must determine the defendant's culpability under section 14-51.3, the general self-defense statute.

State v. Phillips, 386 N.C. 513, 525 (2024). As expressly stated, a defendant may only obtain the protection of the castle doctrine once a factual determination is made based upon section 14-51.2(b). Specifically, the jury must determine whether the decedent entered the home, including the curtilage, unlawfully, and whether the unlawful entry was forceful.

Only upon this determination does a defendant acquire the reasonable presumption as articulated in section 14-51.2(b). Section 14-51.2(b) states,

> (b) The lawful occupant of a home . . . is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself . . . when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:
>
> (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace.
>
> (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

N.C.G.S. § 14-51.2(b) (2020) (cleaned up). These legal steps are prerequisites to the State's necessity to rebut the presumption of reasonable fear through the factors listed in section 14-51.2(c). *See Phillips*, 386 N.C. at 524–25. We take time to lay out this legal framework because defendant's argument suggests an interpretation of the castle doctrine that is too liberal. Misconstruing this legal process, as articulated by the *Phillips* Court, could unnecessarily embolden the public to believe it has a "license to kill." *Id.* at 524 (cleaned up) ("The expansive protections afforded to lawful occupants of a home does not mean the castle doctrine is a license to kill or that the statute allows for open season on Girl Scouts and trick-or-treaters."). This is an inaccurate understanding of the law.

B. Jury Instructions

[2] Next, defendant seeks plain error review of the castle doctrine jury instructions. Specifically, defendant argues the trial court committed plain error by instructing the jury the presumption in section 14-51.2(b) could be rebutted "without regard to the statutory factors listed in section 14-51.2(c)." Also, defendant argues none of the listed factors existed and therefore, this instruction allowed the jury to determine the presumption was rebutted on other grounds, and that was a fundamental error. We disagree.

Defendant's failure to object to the jury instructions limits appellate review to plain error. Plain error is available in "extraordinary cases." *State v. Reber*, 386 N.C. 153, 158 (2024). Defendant has the burden of showing (1) "a fundamental error occurred at trial"; (2) that the error "had a probable impact on the outcome"; and (3) "that the error is an exceptional case that seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (cleaned up). Importantly, the second prong of this test requires a "showing that a jury probably would have reached a different result"; the term "probably" is synonymous with the word "doubtless." *Id.* at 159.

As recently stated in *State v. Gillard*,

> This exacting standard demands that even if error exists under step one, a defendant must still demonstrate that a jury probably would have reached a different result, which requires a showing that the outcome is significantly more likely than not. Even then, defendant must show that this is the exceptional case in which plain error review is warranted because the purported error affects the fairness, integrity or public reputation of judicial proceedings.

386 N.C. 797, 820 (2024) (cleaned up).

In the present case, defendant challenges the portion of the instruction that states the following:

> In addition, absent evidence to the contrary, the lawful occupants of a home or place of residence is presumed to have held a reasonable fear of imminent death or serious bodily injury to himself or another when using defensive force and is intended or likely to cause death or serious bodily injury to another if both of the following

> circumstances occur: That is, a person against whom the defensive force was used was in the process of unlawfully and forcibly entering or had unlawfully and forcibly entered a home or place of residence or that person had removed or was attempting to remove another against that person's will from the home and the person who uses defensive force knew or had reason to believe that the unlawful and forcible entry or unlawful enforceable act was occurring or had occurred.

Our Supreme Court made clear that the trial court must instruct the jury on the factors listed in section 14-51.2(c) and in so doing, "recite the law as defined by the legislature." *Phillips*, 386 N.C. at 525, 528. This is required because "the castle doctrine's statutory presumption of reasonable fear may only be rebutted by the circumstances contained in section 14-51.2(c)." *Id.* at 525.

In the present case, the trial court's failure to recite the factors in the jury instructions was error. However, on appeal, our review is limited to whether the trial court plainly erred by failing to instruct on the specific circumstances listed in section 14-51.2(c). This Court recently published a decision that concluded the trial court's erroneous castle doctrine jury instructions amounted to plain error. *State v. Thomas*, 921 S.E.2d 847, 862 (N.C. Ct. App. 2025). In *Thomas*, the jury instructions for the castle doctrine were substantially the same as in the present case. *Id.* at 854. We determine that *Thomas* is distinguishable.

In the present case, after reviewing the record, we determine the trial court did not plainly err. The evidence in this case regarding whether Lawrence's entry was forceful or unlawful distinguishes it from *Thomas*. Such evidence includes: the relationship between Lawrence and defendant, the frequency by which the community accessed each other's property, and the video footage showing the interaction between Lawrence and defendant leading up to and including the shooting. Such video footage showed Lawrence searching for his lawn mower, being ordered off the property by defendant, and Lawrence returning to defendant's property. The video footage contradicted defendant's claim Lawrence was "nearly upon him when [defendant] fired his only shot." The defendant carries a heavy burden under plain error review to "demonstrate that a jury probably would have reached a different result, which requires a showing that the outcome is significantly more likely than not." *Gillard*, 386 N.C. at 820 (cleaned up).

On the facts of this case, as opposed to *Thomas*, we do not believe defendant proved the jury's verdict probably would have differed with

proper instructions. Accordingly, it was not probable that the jury's determination would have differed with the additional instructions. Nor was this an exceptional case that seriously affected the integrity, fairness, or "public reputation of judicial proceedings." *Reber*, 386 N.C. at 158. The trial court did not commit plain error by failing to include the circumstances listed in section 14-51.2(c) in the jury instructions.

C. The State's Closing Argument

[3] Defendant also argues the trial court committed reversible error by failing to intervene *ex mero motu* during the State's closing argument. We disagree.

We review this type of challenge to determine "whether the argument was so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Trull*, 349 N.C. 428, 451 (1998) (cleaned up). This standard is an "exceedingly high bar." *Reber*, 386 N.C. at 163. The statements must have gone "so far beyond the parameters of propriety that the trial court was forced to intervene to protect the rights of the parties and the sanctity of the proceedings." *Id.* "In order to determine whether defendant was prejudiced by the prosecutor's language in closing argument, we assess the likely impact of any improper argument in the context of the entire closing." *State v. Copley*, 374 N.C. 224, 230 (2020).

Defendant takes issue with the following statements by the State during its closing argument:

> When a trespasser or unwelcome visitor invades the premises of another, the latter has the right to remove him. And if he resists, he may use sufficient force to remove him taking care, however, to use no more force than is necessary to accomplish that object. . . . So in this situation we have a homeowner who wants to remove a trespasser. The homeowner is not removing a killer or an assailant; he is removing a trespasser. So he is entitled to the force but not more force, not excessive force, not more force than necessary to accomplish that object. It would have been within his rights to put his hands on Lawrence if that's what it would have taken. But you can't use deadly force unless deadly force is being used against you.
>
> There is a presumption to someone who is lawfully in their own home and in a situation where someone else unlawfully enters or attempts to enter that home. And you will hear that there is a presumption that the homeowner in that situation is in fear of the intruder killing or causing

> serious bodily harm. And we don't doubt that's the law. We can't doubt that. That's absolutely true. There's a presumption there. . . . But as soon as we prove that he had no reason to be afraid, that presumption goes away. Just like his presumption of innocence goes away as soon as we prove that he is guilty. So don't misunderstand the presumption or don't let it be misunderstood. That presumption does not lock you folks into anything, it doesn't commit you to any decision. We've said all throughout, the decision is yours. You must decide, regardless of what the law says you may consider, you must decide whether the defendant reasonably feared for his life.

The State's closing does appear to conflate the complete self-defense law with the castle doctrine. However, what is unclear contextually and does not meet the high threshold of gross impropriety, is whether the State was jumping back and forth in its description between the law of self-defense and the castle doctrine. The trial court also instructed on complete self-defense because, as previously noted, if a defendant does not meet the requirements for a presumption under the castle doctrine, the defendant is limited to a self-defense argument. Excessive force and reasonable fear are legal questions to resolve in the context of the self-defense doctrine. *See Corbett*, 269 N.C. App. at 526 (stating the four elements of self-defense including "the defendant's belief was reasonable" and "the defendant did not use excessive force").

The trial court has the duty to instruct the jury on the law and specifically instruct the jury to apply the law as given by the court and no other way. *See State v. Holloman*, 369 N.C. 615, 625–26 (2017). The jury was instructed on both the castle doctrine and the self-defense doctrine as requested by the State and defendant. Because the State's closing argument related to both areas of law, it was not grossly improper, nor did it go outside the bounds of propriety. Therefore, defendant's final argument is overruled.

III.

For the foregoing reasons, the trial court properly denied defendant's motion to dismiss. The jury instructions did not amount to plain error, nor did the State's closing argument require the trial court to intervene *ex mero motu*.

NO PLAIN ERROR, NO PREJUDICIAL ERROR.

Judges GRIFFIN and STADING concur.

STATE v. HOLLIS

[303 N.C. App. 339 (2026)]

STATE OF NORTH CAROLINA
v.
TRONIE LEMAR HOLLIS

No. COA25-239

Filed 4 March 2026

Drugs—keeping a dwelling for the use, storage, or sale of a controlled substance—hotel room—sufficiency of evidence

The trial court erred in denying defendant's motion to dismiss a charge of keeping a dwelling for the use, storage, or sale of a controlled substance, arising from the discovery of fentanyl pills in a hotel room, where the evidence, viewed in the light most favorable to the State—the room had been reserved and paid for by another person; that person permitted defendant to "party" with a female guest there on one evening; defendant did not possess a key to the room; defendant was observed leaving the room only once; a police officer testified that defendant admitted staying in the room for "a while," but no follow-up testimony was elicited about how long that was; a digital scale and 37 pills, which defendant was convicted of possessing, were found in the room; and defendant's wallet, containing cash, was discovered on a nightstand in the room—did not constitute substantial evidence sufficient to submit the charge to the jury.

Appeal by defendant from judgment entered 6 April 2023 by Judge J. Thomas Davis in Rutherford County Superior Court. Heard in the Court of Appeals 10 February 2026.

Attorney General Jeff Jackson, by Special Deputy Attorney General Phillip T. Reynolds, for the State.

Blackrose Law, by Gina Balamucki, for the defendant-appellant.

TYSON, Judge.

Tronie Lemar Hollis, "Defendant," appeals from judgment entered upon his conviction for knowingly keeping or maintaining a vehicle or dwelling for the use, storage, or sale of a controlled substance. We reverse the conviction.

I. Background

Defendant lived with his girlfriend. On the evening of 12 October 2021, he wanted to spend time with another woman without his girlfriend's knowledge. Defendant's family member, Justin Logan, had been renting a hotel room at the Baymont Inn in Forest City for over a week. Defendant testified he gave Logan twenty dollars in exchange for Logan's permission to allow Defendant to bring the other woman to the hotel room.

Defendant, the woman, and Logan "partied" in the room. Defendant testified "it was [Logan's] room for me to bring somebody over . . . I got, you know . . . maybe $20, and I buy the beer and stuff." He further testified that he "wasn't staying there, living there." The hotel room was reserved under Logan's name from 3 October 2021 until 13 October 2021.

The following day, 13 October 2021, Defendant testified he returned to the hotel room to retrieve the shoebox for his tennis shoes. Defendant did not have a key to the room and asked the hotel's housekeeper to let him into the room. The housekeeper obtained permission from the hotel's manager and opened the door to allow Defendant to enter the room. Defendant retrieved his shoebox from the room and left the hotel in his car.

Unbeknownst to Defendant, Forest City police officers were conducting surveillance on the hotel. They observed Defendant leave the room and drive away. The officers followed Defendant's vehicle and conducted a traffic stop. While the traffic stop and a search of Defendant's vehicle was underway, another officer obtained a search warrant for Room 208 at the Baymont Inn.

The officers informed Defendant he was not under arrest and transported him back to the Baymont Inn to be served with the search warrant. An officer obtained the key card for the room from a hotel employee and opened the door to Room 208 prior to Defendant's arrival.

The search of the room uncovered a wallet on the nightstand which contained Defendant's identification, a debit or credit card with his name on it, and $481.00 in cash. No other person's identifying documents were discovered in the room. The officers discovered thirty-seven small yellow pills in a container, which they believed to contain fentanyl. They also found a digital scale. The room contained multiple pairs of men's shoes, containers from fast food restaurants, and a cord used to charge a cellphone.

Detective Radford testified Defendant told the officers he had been staying in the room "for a while." Defendant also told them on that day he had gone into the hotel room, smoked a cigarette and laid his wallet down. Detective Radford further testified Defendant "[m]ade a statement as to the pills that were found being from or for his girlfriend and they had gotten him [sic] from her baby daddy." Defendant testified at trial he believed officers had planted his wallet in the room because they had taken it from him at the traffic stop.

The pills were analyzed at the North Carolina State Crime Lab and determined to contain fentanyl. On 6 April 2023, the jury returned verdicts finding Defendant guilty of trafficking in opium or heroin, a Class F felony, and knowingly keeping or maintaining a dwelling for controlled substances, a Class 1 misdemeanor. The trial court sentenced Defendant to an active term of seventy to ninety-three months in prison on the trafficking conviction and ninety days in prison on the misdemeanor charge to run concurrently. Defendant appeals only the conviction for the misdemeanor keeping or maintaining a dwelling for controlled substances.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) (2025) and 15A-1444(a) (2025).

III. Keeping a Dwelling for Controlled Substances

Defendant argues the trial court erred by denying his motion to dismiss the charge of keeping a dwelling for a controlled substance. We agree.

A. Standard of Review

"The standard of review of a motion to dismiss for insufficient evidence is whether the State presented substantial evidence of each element of the offense and 'defendant's being the perpetrator.' " *State v. Hernandez*, 188 N.C. App. 193, 196, 655 S.E.2d 426, 429 (2008) (quoting *State v. Nettles*, 170 N.C. App. 100, 102-03, 612 S.E.2d 172, 174 (2005)). "Evidence is substantial if it is relevant and is sufficient to persuade a rational juror to accept a particular conclusion." *State v. Goblet*, 173 N.C. App. 112, 118, 618 S.E.2d 257, 262 (2005).

"[W]e must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citing *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992)). "Once the court decides that a reasonable inference of defendant's guilt may be drawn

from the circumstances, then 'it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.' " *Id.* at 75-76, 430 S.E.2d at 919 (alteration in original) (emphasis omitted) (quoting *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978)).

B. Analysis

1. N.C. Gen. Stat. § 90-108(a)(7)

N.C. Gen. Stat. § 90-108(a)(7) provides it shall be unlawful for any person

> [t]o knowingly *keep* or maintain any store, shop, warehouse, *dwelling house*, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article.

N.C. Gen. Stat. § 90-108(a)(7) (2025) (emphasis supplied). The offense is a Class 1 misdemeanor. N.C. Gen. Stat. § 90-108(b)(1) (2025). It is elevated to a Class I felony if the offender acts with the intent to impede the entry of law enforcement officers. *Id.*

The trial court considered Defendant's motion to dismiss the charge and analyzed the distinction between "keep" or "maintain" under the statute. The trial court stated:

> There was information that he was the only one – that came out, there was no other individuals in it. It showed personal possessions, including money and wallet in the room. So as a result, there is evidence that he was keeping that room and stayed there . . . [T]he jury instructions say it doesn't matter whether he owned it as long as he's keeping it. I agree there is no evidence he maintained. It's either keeping or maintained. So I think it's the keeping.

"The determination of whether a building or other place is used for keeping or selling a controlled substance 'will depend on the totality of the circumstances.' " *State v. Frazier*, 142 N.C. App. 361, 366, 542 S.E.2d 682, 686 (2001) (quoting *State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d 24, 30 (1994)). Our Court has set forth several factors to determine whether a person "keeps or maintains" a place within the meaning of N.C. Gen. Stat. § 90-108(a)(7), none of which are dispositive. *Frazier*, 142 N.C. App. at 365, 542 S.E.2d at 686.

Those factors include: "occupancy of the property; payment of rent; possession over a duration of time; possession of a key used to enter or exit the property; and payment of utility or repair expenses." *Id.* A "pivotal" question under this statute "is whether there is evidence that defendant owned, leased, maintained, or was otherwise responsible for the premises." *State v. Boyd*, 177 N.C. App. 165, 174, 628 S.E.2d 796, 804 (2006). Other factors our Court has considered include: the presence of a large amount of cash on the premises, the defendant's admission to selling controlled substances, and the existence of drug paraphernalia. *Id.*

The trial court determined the State presented insufficient evidence tending to show Defendant "maintained" a dwelling for controlled substances, but it had produced sufficient evidence he had "kept" such dwelling under the statute for the charge to be submitted to the jury. The factors set forth in *Frazier* apply to both "maintaining" and "keeping" a dwelling under N.C. Gen. Stat. § 90-108(a)(7). *Id.*

Applying all these factors to this case, the evidence, in the light most favorable to the State, tends to show the room had been reserved and paid for by Logan for over a week. Logan permitted Defendant to occupy the room with a female guest and to "party" with him there. Defendant was not registered and did not possess a key to the room. Law enforcement officers observed Defendant leave the room on only one occasion. One of the officers testified Defendant stated he had been staying in the room for "a while," but no follow up testimony was elicited regarding how long "a while" was.

Defendant's wallet in the room was the only evidence for which the State established Defendant's purported ownership. The cash was found inside of the wallet and not hidden in the room. One item of drug paraphernalia, a digital scale, and the thirty-seven pills were found in the room, for which Defendant was convicted of possessing.

2. *State v. Toney*

We are persuaded by several precedents. In *State v. Toney*, 187 N.C. App. 465, 467, 653 S.E.2d 187, 189 (2007), police officers discovered the defendant's wife lying on the ground outside of a hotel room. She told them she was staying in the hotel room with her husband, they had been using drugs in the room the night before, and there might still be drugs present in the room. *Id.* Inside the room, officers saw digital scales and plastic baggies, items typically used to package narcotics for distribution. *Id.* The defendant's wife gave officers permission to search the room, and they found several pills, a small amount of marijuana in the bed sheets, and a duffel bag containing both men's and women's

clothing. *Id.* at 467-68, 653 S.E.2d at 189. The officers searched the defendant's car and found three to four pounds of marijuana. *Id.* at 468, 653 S.E.2d at 189.

This Court reversed the defendant's conviction for the misdemeanor charge of knowingly maintaining a place for the purpose of keeping or selling controlled substances. *Id.* at 471, 653 S.E.2d at 191. The Court stated: "The State's evidence shows [the] defendant occupied the room one night and was present during the search. There is no evidence that he paid for the room or was even a registered guest in the room. It would be mere speculation [the] defendant, as opposed to his wife, maintained or kept the room." *Id.*

The Court in *Toney* relied heavily upon the fact the defendant had not paid for the hotel room. *Id.* at 471-72, 653 S.E.2d at 192. Here, the unrefuted evidence showed the room was registered to and paid for by Logan. Evidence of a defendant's financial responsibility for the hotel room is not dispositive on the issue of whether he "kept" or "maintained" the room. However, when the unrefuted evidence shows Defendant was not financially responsible for the room or have direct access, the statute is not satisfied when the evidence limits his physical presence in the room to "partying" there the night before, returning to retrieve a shoebox from the room the following day, and not possessing a key to the room. Although one of the officers testified he stayed in the room "a while," no follow up questions were asked. "A while" could refer to any length of time, even Defendant's presence in the room the night before.

The Court in *Toney* based its holding on our decision in *State v. Kraus*, 147 N.C. App. 766, 557 S.E.2d 144 (2001). In that case, police officers obtained consent from the registered guest of a hotel room to search the room and found drugs and drug paraphernalia inside the room. *Id.* at 767, 557 S.E.2d at 146. The State's evidence tended to show the defendant had access to a key and spent the previous night in the hotel room, but no evidence was presented the defendant "rent[ed] the room or otherwise finance[d] its upkeep." *Id.* at 769, 557 S.E.2d at 147. This Court held the State had presented insufficient evidence that the defendant "maintained" the hotel room to uphold a conviction under N.C. Gen. Stat. § 90-108(a)(7). *Id.*

3. *State v. Harris*

In *State v. Harris*, 157 N.C. App. 647, 580 S.E.2d 63 (2003), this Court also cited *Kraus* in holding the evidence insufficient to convict the defendant under N.C. Gen. Stat. § 90-108(a)(7). In that case, the State presented evidence the defendant was seen at the house several times

over a period of two months, an officer had spoken to the defendant at the house twice during that time, and some of the defendant's personal property was found in one of the bedrooms. *Id.* at 652, 580 S.E.2d at 66. This Court held: "At most, this evidence supports a finding [the] defendant occupied the property from time to time although none of [the] defendant's personal papers listed the duplex as [the] defendant's address. The State offered no evidence [the] defendant owned the property, bore any expense of renting or maintaining the property, or took any other responsibility for the property." *Id.* at 653, 580 S.E.2d at 66-67. *See also State v. Bowens*, 140 N.C. App. 217, 222, 535 S.E.2d 870, 873 (2000), *disc. review denied*, 353 N.C. 383, 547 S.E.2d 417 (2001) (holding insufficient evidence was presented of "keeping or maintaining" when "there [was] no evidence [the] [d]efendant was the owner or the lessee of the dwelling, or that he had any responsibility for the payment of the utilities or the general upkeep of the dwelling").

4. *State v. Rogers*

Because the trial court distinguished "maintain" from "keep" as it applied to the evidence in this case, we specifically address the meaning of "keep" under the statute. In *State v. Rogers*, our Supreme Court specifically addressed this language:

> The meaning of the term "keep," as it is used in referring to a person who "keep[s]" a vehicle, building, or other place, is clear from the context in which it appears. When you "keep" a "shop," for instance – that is, when you are a shopkeeper – you have possession of the shop for a designated purpose or use (usually to sell goods). You generally will have possessed that shop for at least a short period of time, but in some instances, you may be said to be "keep[ing]" a shop even when you have just opened it, if the circumstances indicate that you intend to retain the shop for continued use in the future. *Cf. The New Oxford American Dictionary* 952 (3d ed. 2010) (defining "keep" as "have or retain possession of" or "retain or reserve for use in the future"). This possession must have occurred for at least a short period of time, or the circumstances must indicate an intent to retain that property in the future (and in many cases, both may be evident). Thus, the word "keep," in the "keep or maintain" language of subsection 90-108(a)(7), refers to possessing something for at least a short period of time – or intending to retain possession of something in the future – for a certain use.

371 N.C. 397, 402, 817 S.E.2d 150, 154 (2018).

In *Rogers*, the defendant was found to be storing crack cocaine inside the gas-cap compartment of a Cadillac automobile. Evidence was presented tending to show the defendant had possessed the car for at least two months. Our Supreme Court held the State presented sufficient evidence the defendant "kept" the Cadillac under the meaning of N.C. Gen. Stat. § 90-108(a)(7). *Id.* at 403, 817 S.E.2d at 154-55.

The Court's holding in *Rogers* relies upon the defendant's *possession* of the Cadillac. *Id.* at 402-03, 817 S.E.2d at 154. The distinction between this case and *Rogers* is that the State presented no evidence that Defendant "possessed" or exercised dominion or control over the hotel room. He was permitted to "party" there with a female acquaintance by the occupant but did not have a key to the room or any financial responsibility for it.

5. *State v. Frazier*

The State argues the facts of *Frazier* are more applicable to this case. In *Frazier*, the State presented evidence the defendant had lived in the hotel room where the drugs were found for six or seven weeks, "sometimes" paid rent for the room, and was present in the room during daytime hours. *Frazier*, 142 N.C. App. at 365-66, 542 S.E.2d at 686. This Court held this evidence was sufficient to prove the defendant "kept or maintained" the hotel room. *Id.* at 366, 542 S.E.2d at 686.

We find the facts of this case more akin to those facts before us in *Toney*, *Kraus*, *Harris*, and *Bowens*. Under those precedents, the evidence was insufficient to support Defendant's conviction under N.C. Gen. Stat. § 90-108(a)(7). The trial court relied upon Defendant's presence in the room and the discovery of his wallet and cash on the nightstand to submit the charge to the jury. These precedents require us to hold this evidence was not sufficient to support the conviction. The trial court erred by denying Defendant's motion to dismiss the charge of keeping a dwelling for the sale or use of controlled substances.

IV. Conclusion

The State did not present substantial evidence to support Defendant's conviction of knowingly keeping or maintaining a place for using, keeping, or selling controlled substances under N.C. Gen. Stat. § 90-108(a)(7) (2025). Judgment on this conviction was entered separately from and ordered to run concurrently with the felony trafficking conviction. It is unnecessary to remand this matter to the trial court for resentencing. We reverse the conviction, and vacate the judgment entered thereon. *It is so ordered.*

REVERSED.

Judges ZACHARY and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
GRANT LEE HUNT, DEFENDANT

No. COA23-890-2

Filed 4 March 2026

1. Evidence—lay witness opinion testimony—three-part Reber plain error test—not satisfied

In a case where defendant was convicted of assault with a deadly weapon inflicting serious injury and injury to personal property after he struck the victim with his pickup truck while the victim was riding an ATV, the trial court did not plainly err in allowing a state trooper who responded to the incident to give lay opinion testimony about how the collision occurred and that it was intentional. On remand from the North Carolina Supreme Court, and applying the three-part plain error test set forth in *State v. Reber*, 386 N.C. 153 (2024), the Court of Appeals determined that defendant failed to satisfy: (1) the fundamental error prong, because the trooper based his opinion on his contemporaneous rational observations and instantaneous conclusions at the scene; (2) the probable impact prong, in light of other evidence that defendant intentionally hit the victim's ATV; and (3) the exceptional case prong, given that defendant failed to argue how his case seriously affected the fairness, integrity, or public reputation of judicial proceedings.

2. Constitutional Law—effective assistance of counsel—failure to object to lay opinion testimony—prejudice analysis

In a case where defendant was convicted of assault with a deadly weapon inflicting serious injury and injury to personal property after he struck the victim with his pickup truck while the victim was riding an ATV, defendant did not receive ineffective assistance when his trial counsel failed to object to a state trooper's lay opinion testimony about how the collision occurred, including that it was intentional. There was no reasonable probability of a different outcome had defendant's counsel objected to the trooper's testimony where ample additional evidence showed that the collision

was intentional, including eye-witness testimony and corroborative photographic evidence.

3. Criminal Law—prosecutor's arguments—no objection made at trial—not grossly improper

In a case where defendant was convicted of assault with a deadly weapon inflicting serious injury and injury to personal property after he struck the victim with his pickup truck while the victim was riding an ATV, the trial court did not err by failing to intervene ex mero motu during the State's closing argument when the prosecutor stated that, after the initial collision, defendant got "back in the truck and he backs out over [the victim's] legs." The challenged remark, while a misstatement of the evidence, was not so grossly improper—when considered in context of the entire closing argument—as to warrant a new trial for defendant.

4. Jury—pattern instructions—deviation—evidentiary weight—agreed-upon wording—no probable impact on verdicts

In a case where defendant was convicted of assault with a deadly weapon inflicting serious injury and injury to personal property after he struck the victim with his pickup truck while the victim was riding an ATV, the trial court did not reversibly err by deviating from the pattern instructions on evidentiary weight and instructing the jury that it "must decide that certain evidence is believable"—instead of "if you decide that certain evidence is believable"—an iteration to which the parties had agreed at the charge conference, because the deviation did not have a probable impact on the jury's determination of defendant's guilt when read in context.

5. Indictment and Information—habitual felon—fatally defective—conceded by State—remanded for resentencing

In a criminal case where the State conceded (and the appellate court agreed) that defendant's habitual-felon indictment was fatally defective because two of the predicate felonies were not sequential and non-overlapping as required by N.C.G.S. § 14-7.1, the matter was remanded for resentencing.

6. Damages and Remedies—restitution—amount awarded—sufficiency of evidence

In a case where defendant was convicted of assault with a deadly weapon inflicting serious injury and injury to personal property after he struck the victim with his pickup truck while the victim was riding an ATV, although the evidence supported an award of restitution, it lacked the level of specificity and reliability required to

sustain the amount of the award ($592,000); specifically, the victim's testimony was approximate, the State misstated the amount, and no party introduced medical bills or other records supporting the total amount. Accordingly, the restitution order was vacated and the matter was remanded for the trial court to determine the amount of damage proximately caused by defendant's conduct and to calculate the correct amount of restitution.

Appeal by Defendant from judgments entered 24 March 2023 by Judge James G. Bell in Robeson County Superior Court. Heard in the Court of Appeals 14 August 2024, decision filed 15 October 2024. Vacated and remanded by the Supreme Court on 23 May 2025 in light of *State v. Reber*, 386 N.C. 153 (2024).

Attorney General Jeff Jackson, by Special Deputy Attorney General Thomas J. Campbell, for the State.

Attorney Daniel M. Blau, for Defendant-Appellant.

MURRY, Judge.

On remand by order of the North Carolina Supreme Court on 23 May 2025 in *State v. Hunt*, 296 N.C. App. 245 (2024), vacating and remanding this Court's decision filed 15 October 2024. Grant L. Hunt (Defendant) appeals from a judgment entered upon a jury verdict finding him guilty of assault with a deadly weapon inflicting serious injury (AWDWISI) and injury to personal property. For the reasons below, this Court holds that the trial court (1) did not plainly err by allowing Trooper Covington's lay-opinion testimony; (2) did not err by permitting the State to complete its closing argument without an *ex mero motu* intervention; (3) did not plainly err by deviating from pattern jury instructions on evidentiary weight; (4) did err by incorporating the defective habitual-felon indictment into Defendant's total sentence; and (5) did err by relying on insufficiently supportive evidence to reach its restitution award for the victim. This Court also holds that Defendant did not receive ineffective-assistance-of-counsel (IAC) due to his counsel's failure to object to Trooper Covington's testimony.

As a result of these holdings, this Court vacates and remands the trial court's sentencing and restitution orders for further proceedings not inconsistent with this opinion. We recite only the facts and procedural posture relevant to this issue on remand, noting that *State v. Hunt*, 296 N.C. App. 245 (2024), *vacated and remanded per curiam*, 387 N.C. 537 (2025), summarizes additional underlying facts.

I. Background

On 25 January 2019, Defendant veered off the road and struck Timothy Todd (the victim) with his Ford F-250 truck while the victim was riding an ATV in his driveway, causing multiple injuries and leaving the victim unconscious for six weeks. On 6 July 2020, a Robeson County grand jury indicted Defendant for assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) and injury to personal property. On 3 January 2023, the grand jury also indicted him for attaining habitual-felon status based on the following prior-felony convictions: (1) forgery and uttering on 10 September 1996; (2) AWDWISI on 31 May 1994; and (3) breaking and entering on 5 January 1994. This matter came on for trial on 22 March 2023 in Robeson County Superior Court.

At trial, the victim's neighbor, Quinten Oxendine, testified to witnessing the following events while riding ATVs with the victim:

> OXENDINE: I was on my ATV. The victim was on his ATV in front of me. We were about to leave out of the driveway. That's when that—the white truck comes by, crossed the double yellow lines. Hits the ATV. It ends up in the ditch.
>
> STATE: Did you hear any noise as Defendant approached?
>
> OXENDINE: I heard the truck rev up.
>
> . . . .
>
> OXENDINE: So I jumped off my ATV and I heard Defendant say, "Where's that motherf***er at?"

(Quotation modified.) Oxendine testified to hearing Defendant yell after the collision, "Y'all motherf[***]ers w[ere] in my yard." He did not hear or see Defendant check on the victim's wellbeing after the collision.

North Carolina State Trooper Kyle Covington responded to the scene. He testified that, upon arrival, he observed an ATV off the roadway in a yard and a pickup truck partially in the roadway. Trooper Covington opined the collision was "intentional" as follows:

> STATE: Okay. And based upon your observations, did you form an opinion whether this was an accidental or intentional act?
>
> TROOPER COVINGTON: My opinion is it was an intentional act.
>
> STATE: Why is that, sir?

> TROOPER COVINGTON: Just the markings on the roadway. The—what Defendant said he was doing and why he was doing it. Where he placed the ATV. And . . . just that was not possible in itself. There was also a video that showed Defendant's actions prior to and it didn't match his story either. And everything on scene depicted it that it was an intentional act.

(Brackets omitted.) Defendant did not object to Trooper Covington's testimony. The State introduced photographs depicting damage consistent with a high-force collision, including: (1) Defendant's tire marks leaving the road, (2) Defendant's truck angled towards the victim's ATV, (3) an absence of brake marks in Defendant's tire path, and (4) the damage to both vehicles.

Additionally, the victim testified to incurring approximately $525,000 and $42,000 in medical and air-flight bills, respectively. No party offered additional evidence to corroborate the victim's accounting of these bills. During closing arguments, the State argued:

> There's no debris in the roadway. No skid marks in the roadway. What do we hear from [Defendant]? I told my wife I just hit [the victim]. Then he says about getting out of the truck and going to check on [the victim]. And seeing his torso sticking out from underneath the truck. And then he gets back in the truck and he backs out over his legs? Did you hear any testimony that anybody moved [the victim]? Did he get one last shot at him? Okay. I got you now, bro. You're not gonna walk. You're not gonna ride that [ATV]. You're never gonna bother me again if you're still alive. You're not gonna get on a[n ATV].

Defendant did not object to these arguments at any point.

At the charge conference, the parties agreed that the trial court would instruct the jury on weighing the evidence as follows: "You are the sole judges of the weight to be given any evidence. *If you decide that certain evidence is believable*[,] you must then determine the importance of that evidence in light of all other believable evidence in the case." N.C.P.I.—Crim. 101.20 (emphasis added). During the actual jury charge, the trial court deviated from the pattern jury instruction as follows: "You are the sole judges of the weight to be given any evidence—to any evidence. *You must decide that certain evidence is believable.* You must then determine the importance of that evidence in light of all the

other believable evidence in the case." (Emphasis added). Defendant objected to neither of these instruction iterations.

On 24 March 2023, the jury convicted Defendant of the lesser-included charge of AWDWISI and injury to personal property. The trial court sentenced Defendant as a habitual felon to 120–156 months' imprisonment with recommended work release. At the sentencing hearing, the State quantified the victim's medical bills as "over half a million dollars in medical bills and $40,000 life flight." It then remarked "that there was $550,000 in medical bills and $42,000 in life flight," and asked for a restitution award of $592,000. The trial court then entered a civil judgment for $592,000. Defendant timely appealed.

II. Jurisdiction

The North Carolina Supreme Court remanded Defendant's appeal for further consideration in light of *State v. Reber*, 386 N.C. 153 (2024), to this Court, which has jurisdiction over Defendant's appeal of a final judgment of the trial court under N.C.G.S. §§ 7A-27, 15A-1444. *See* N.C.G.S. § 7A-27(b)(1) (2025) (final judgment of trial court); *id.* § 15A-1444(a) (pleaded not guilty but found guilty). IAC claims generally "should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553 (2001). But because "the cold record reveals that no further investigation is required," this Court also has jurisdiction to determine Defendant's IAC claim on direct review. *State v. Fair*, 354 N.C. 131, 166 (2001).

III. Analysis

In addition to the issue on remand, Defendant asserts several challenges not addressed in this Court's prior majority opinion in *State v. Hunt*. Defendant contends that: (1) he received IAC due to his counsel's failure to object to Trooper Covington's testimony; (2) the trial court erred by failing to intervene *ex mero motu* during the State's closing argument; (3) the trial court erred by misstating the jury instructions during the jury charge; (4) his habitual-felon indictment was fatally defective; (5) the trial court erred by sentencing him as a habitual felon; (6) he received IAC due to his counsel's failure to challenge his habitual-felon indictment; and (7) the trial court erred by entering a restitution order unsupported by the evidence. For the reasons below, we hold that Defendant did not receive IAC and that the trial court reversibly erred only in entering its sentencing and restitution orders. We thus vacate only those two orders and remand them for further proceedings not inconsistent with this opinion.

A. Lay-Witness Testimony

[1] On remand, Defendant argues that the trial court plainly erred by allowing lay witness Trooper Covington to give "an expert opinion about how the accident happened[,] and that [Defendant] intentionally hit the victim." For the following reasons, we disagree and hold that the trial court did not plainly err.

1. Post-Reber *Plain Error*

As a threshold matter, we note Defendant's failure to preserve his argument for appellate review by not objecting during Trooper Covington's opinion testimony. *See* N.C. R. App. P. 10(a)(1). But we may "review unpreserved issues for plain error when they involve (1) errors in the judge's instructions to the jury[ ] or (2) rulings on the admissibility of evidence," *State v. Gregory*, 342 N.C. 580, 584 (1996), provided that the appellant also "specifically and distinctly" argues plain error to this Court, *see State v. Frye*, 341 N.C. 470, 496 (1995); N.C. R. App. P. 10(a)(4). Accordingly, we review the challenged portion of Trooper Covington's testimony for plain error.

Our Supreme Court recently clarified the plain-error rule in *State v. Reber*, 386 N.C. 153, 158 (2024), under which a defendant must satisfy a three-part test. *First*, he must establish the trial court's "fundamental error." *Id. Second*, he must demonstrate "that the error had a 'probable impact' on the outcome, meaning that 'absent the error, the jury probably would have returned a different verdict.' " *Id.* (quoting *State v. Lawrence*, 365 N.C. 506, 518–19 (2012)). This "probable impact" standard requires the possibility of a different verdict to be "significantly more likely than not," *i.e.*, "almost certain[ ]" or "doubtless." *Id.* at 159 (first quoting *Probably*, *New Oxford American Dictionary* (3d ed. 2010); and then quoting *Probably*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2007)). *Third*, he must show "that the error is an 'exceptional case' that warrants plain[-]error review, typically by showing that the error seriously affects 'the fairness, integrity or public reputation of judicial proceedings.' " *Id.* (quoting *Lawrence*, 365 N.C. at 518); *see State v. Odom*, 307 N.C. 655, 660 (1983) (plain-error review should be "applied cautiously and only in the exceptional case" where "grave error" "amounts to a denial of a fundamental right of the accused," resulting "in a miscarriage of justice").

a. "Fundamental Error" Prong

Defendant attempts to distinguish this case from *Reber* by focusing on the "probable impact" prong and characterizing Trooper Covington's

testimony as "the State's strongest evidence on the central questions before the jury." Applying *Reber*'s plain-error test, we first consider whether Defendant demonstrated a "fundamental error" at trial. *Reber*, 286 N.C. at 158. Generally, a lay witness may not opine on a defendant's state of mind or intent because that testimony requires him to draw inferences and conclusions based upon perceived facts. *State v. Sanders*, 295 N.C. 361, 369 (1978). But the North Carolina Rules of Evidence allow a lay witness to opine on a matter "rationally based on [his] perception" which is "helpful to a clear understanding of his testimony or the determination of a fact [at] issue." N.C. R. Evid. 701 [hereinafter Rule]. This latter testimony includes "[c]ommon inferences derived from the appearance, condition, or mental or physical state of persons," *State v. Hedgepeth*, 350 N.C. 776, 791 (1999), of which the witness has "personal knowledge," *State v. Givens*, 95 N.C. App. 72, 79 (1989). And under Rule 704, "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C. R. Evid. 704.

In full context, Trooper Covington testified to his personal knowledge of the scene where he observed the victim's ATV in a ditch, tire marks departing the roadway, a lack of brake marks, and Defendant's damaged truck. This Court has held similar testimony admissible where the lay witness bases his testimony on "rational" knowledge and observations. *See*, *e.g.*, *State v. Howard*, 215 N.C. App. 318, 325 (2011) (holding police officer's lay-opinion testimony admissible as "based on . . . [his] rational observation" that "represented nothing more than an instantaneous conclusion . . . reached after observing" scene); *State v. McVay*, 174 N.C. App. 335, 339 (2005) (holding police officer's lay-opinion testimony that defendant "tried to kill" the victim admissible because it "amounted to nothing more than shorthand statements of fact based on their knowledge and observations"). Likewise, Trooper Covington based his opinion of the collision's intentionality on his contemporaneous "rational" observations and "instantaneous conclusion[s]" at the scene. *Howard*, 215 N.C. App. at 325. Thus, Defendant fails to satisfy *Reber*'s first prong by showing a "fundamental error." *Reber*, 386 N.C. 158.

b. "Probable Impact" Prong

Defendant also fails to satisfy *Reber*'s second prong by showing a "probable impact" on the verdict in light of the State's other evidence tending to show that Defendant intentionally collided with the victim's ATV. Had the trial court excluded Trooper Covington's testimony, the jury would still have heard Oxendine's testimony that he saw Defendant's truck accelerate, rev its engine, cross the yellow centerline,

and swerve toward the victim's ATV. The jury would have also seen photographic evidence showing Defendant's truck departing the roadway, leaving no brake marks, and veering towards the victim's ATV. *See State v. Buie*, 194 N.C. App. 725, 734 (2009) (holding police officer's testimony was harmless error—*not the higher plain-error standard*—since "sufficient evidence . . . support[ed] the jury's decision, independent from the testimony").

To accept Defendant's version, the jury would have had to believe that a Ford F-250 truck struck an ATV, turned into the point of impact, and pushed it across the opposite lane into the ditch without leaving debris or tire marks on Defendant's side of the road. Thus, Defendant fails to satisfy *Reber*'s second prong by demonstrating that, without Trooper Covington's testimony, the jury "*probably would have* returned a different verdict." *Reber*, 386 N.C. at 158 (emphasis added).

c. "Exceptional Case" Prong

Finally, Defendant fails to satisfy *Reber*'s third prong by showing that this is an "exceptional case . . . seriously affect[ing] the fairness, integrity[,] or public reputation of judicial proceedings." *Id.* at 158. On appeal, a defendant must offer support for each element of plain error, including the "necessary reasons or arguments as to why the alleged error . . . is an exceptional case or why this will seriously affect the fairness, integrity, or public reputation of judicial proceedings." *State v. Patterson*, 269 N.C. App. 640, 645 (2020). Because Defendant fails to argue how this case "seriously affects the fairness, integrity or public reputation of judicial proceedings," *Reber*, 386 N.C. at 158, "we cannot impart any meaningful review for plain error," *Patterson*, 269 N.C. at 645. Thus, Defendant fails to satisfy *Reber*'s third prong by establishing this case's exceptionality. *See Reber*, 386 N.C. at 162.

Defendant cannot demonstrate plain error. *See id.* at 158. Considering the ample evidence supporting the State's theory that Defendant intentionally caused the collision, we conclude that any error in admitting Trooper Covington's testimony would be nonprejudicial at worst. *See State v. Harshaw*, 138 N.C. App. 657, 662 (2000) (holding improper testimony nonprejudicial where other evidence supported State's theory of premeditation and deliberation). Therefore, the trial court did not plainly err.

2. Ineffective Assistance of Counsel

[2] Defendant also claims that he received IAC because his counsel failed to object to Trooper Covington's testimony. To successfully bring

an IAC claim, Defendant must show both that (1) his counsel's deficient performance "fell below an objective standard of reasonableness" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *accord State v. Braswell*, 312 N.C. 553, 562–63 (1985) (lockstepping N.C.'s constitutional standard for IAC claims with *Strickland* test). We review IAC claims *de novo*. *See State v. Wilson*, 236 N.C. App. 472, 475 (2014). For the following reasons, we disagree and hold that Defendant did not receive ineffective assistance.

Notably, "while an analysis of plain error may inform an analysis of prejudice under the ineffective assistance of counsel test, it should not be determinative." *State v. Lane*, 271 N.C. App. 307, 313–314 (2020) (recognizing that while "both the ineffective assistance of counsel test and the plain error standard require a showing of prejudice," the tests "are not so similar that a finding of no error always precludes a finding of ineffective assistance of counsel"). To satisfy IAC's prejudice requirement, a defendant "must show . . . a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Allen*, 360 N.C. 297, 316 (2006) (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is that which is "sufficient to undermine confidence in the outcome," *Strickland*, 466 U.S. at 694, for which "a different result must be substantial, not just conceivable," *Lane*, 271 N.C. App. at 313–14 (quotation omitted). Thus, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice," this Court need not decide whether counsel's performance was deficient. *Strickland*, 466 U.S. at 697.

Here, Defendant fails to show a "reasonable probability" of a different outcome had his counsel objected to Trooper Covington's testimony. *Allen*, 360 N.C. at 316. As discussed above, even without Trooper Covington's testimony, the State offered ample additional evidence through Oxendine's eye-witness testimony that he saw Defendant's truck accelerate towards the victim's ATV and photographic evidence corroborating his testimony. Therefore, any failure by defense counsel to object to Trooper Covington's testimony would not have "undermine[d] confidence" in the jury's verdict, *Strickland*, 466 U.S. at 694, or created "a reasonable probability" of a different result, *Allen*, 360 N.C. at 316. Thus, Defendant has failed to show prejudice. Accordingly, we hold that he did not receive IAC on this point.

B. Closing Arguments

[3] Next, Defendant claims that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument when it stated

that Defendant got "back in the truck and he backs out over [the victim's] legs." We disagree.

As noted above, a defendant's failure to object to an alleged error at trial ordinarily prevents our review. N.C. R. App. P. 10(a)(1). A defendant cannot "sit back in silence during closing arguments but then claim error whenever a trial court fails to address or otherwise correct a misstatement of the evidence." *State v. Parker*, 377 N.C. 466, 474 (2021). That is, absent timely objection, a "trial court is not required to intervene *ex mero motu* unless the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial." *Id.* (quotation omitted). Because Defendant did not object, our "review is limited to an examination of whether the argument was so grossly improper that the trial [court] abused [its] discretion in failing to intervene *ex mero motu*." *State v. Smith*, 357 N.C. 604, 614 (2003) (alterations in original; quotation omitted).

To show gross impropriety, a defendant must demonstrate "comments so infected . . . with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23 (1998). Gross impropriety is an "exceedingly high bar," surmountable only when the State's remarks go "so far beyond the parameters of propriety" that the trial court *must* "intervene to protect the rights of the parties and the sanctity of the proceedings." *Reber*, 386 N.C. at 163. Even if the State's remarks were improper, we must still determine whether they were prejudicial by considering "the likely impact of any improper argument in the context of the entire closing." *State v. Copley*, 374 N.C. 224, 230 (2020) (citation modified).

Here, the State either misstated or overstated the evidence by arguing Defendant had intentionally backed over the victim's legs. *See Parker*, 377 N.C. at 474. We caution the State to avoid such conduct, which may trigger a mistrial or result in a new trial. Nonetheless, these statements—measured against the argument's entirety—were not so grossly improper as to prejudicially warrant Defendant a new trial. *See id.* Thus, we hold that the trial court did not err by declining to intervene *ex mero motu*.

C. Jury Instructions

[4] Next, Defendant argues that the trial court erred by deviating from the pattern instructions on evidentiary weight by stating that the jury "must decide that certain evidence is believable" instead of "if you decide that certain evidence is believable"—an iteration to which the parties had agreed at the charge conference. We disagree.

Where "a trial court agrees to give a requested pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further" objection. *State v. Lee*, 370 N.C. 671, 676 (2018). A party's "request for an instruction at the charge conference . . . sufficient[ly] compli[es] with" Appellate Rule 10(b)(2) to merit review if it "is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions." *State v. Ross*, 322 N.C. 261, 265 (1988). Because the trial court agreed to instruct the jury in accordance with N.C.P.I.—Crim. 101.20 by saying, "if you decide that certain evidence is believable," but instead said, "you must decide that certain evidence is believable," this issue is preserved for our review. *See* N.C.G.S. § 15A-1443(a).

This deviation prejudicially "requires a new trial *only* if there is a reasonable possibility that," but for "the error in question, "a different result would have been reached at trial." *State v. Castaneda*, 196 N.C. App. 109, 116 (2009) (citation modified; emphasis added). If the instructions construed as a whole clearly show "no reasonable cause to believe that the jury was misled or misinformed," we "will not sustain[ ]" "any exception even though the instruction could have been more aptly worded." *State v. Williams*, 362 N.C. 628, 652 (2008) (ellipses omitted). "Isolated expressions of the trial court, standing alone, will not warrant reversal when the charge as a whole is correct." *State v. Graham*, 287 N.C. App. 477, 486–87 (2023).

Here, although the trial court's error deviated from the agreed-upon jury instructions, it did not have a probable impact on Defendant's guilt when read in context. *Accord State v. Williams*, 315 N.C. 310, 327–28 (1986). In other words, the trial court's variance was not so fundamental that the jury would have reached a different result. *See Lawrence*, 365 N.C. at 518. The trial court quickly followed the isolated phrasing with the correct language instructing the jury to evaluate which evidence it found believable and to weigh that evidence against the rest. It did not direct jurors to believe any particular witness or class of evidence. Therefore, this Court holds that the trial court did not commit plain error resulting in a *probable impact* on the jury's finding of guilt. *See Reber*, 386 N.C. at 186.

D. Habitual-Felon Indictment

[5] Next, Defendant argues that his habitual-felon indictment was fatally defective since two of the referenced convictions do not meet the statutory definition in N.C.G.S. § 14-7.1. The State concedes error on this point. For the following reasons, we agree and remand for resentencing.

Felony pleadings must state all essential elements of the crime. *See* N.C.G.S. § 15A-924(a)(5); *State v. Palmer*, 293 N.C. 633, 639 (1977) (both indictments and warrants must "allege lucidly and accurately all the essential elements of the offense endeavored to be charged"). Section 14-7.1 allows the trial court to charge a defendant as a habitual felon if he "has been convicted of or pled guilty to three felony offenses." *State v. Blakney*, 233 N.C. App. 516, 521 (2014) (quotation omitted); *see* N.C.G.S. § 14-7.1. Our Supreme Court has long required that the three predicate felonies be sequential and non-overlapping, *i.e.*, each subsequent felony must be committed after conviction of the preceding felony. *See State v. Allen*, 292 N.C. 431, 433 (1977).

This Court has similarly invalidated indictments where the convictions alleged fall outside the statute. *E.g.*, *State v. Jester*, 249 N.C. App. 101, 107–08 (2016) (defective acceptance of defendant's stipulation to habitual-felon status absent full colloquy under § 15A-1022); *State v. LePage*, 204 N.C. App. 37, 54 (2010) (defective indictment including controlled substances outside actual Schedule IV); *State v. Barnett*, 223 N.C. App. 65, 71 (2012) (defective indictment that failed to allege defendant was required to register as sex offender).

Here, Defendant's habitual-felon indictment shows all three of his prior felony charges and convictions overlapping with one another. The indictment's dates charge that Defendant committed the March and April 1993 offenses before his conviction for the September 1992 offense. Indeed, all three convictions arose from proceedings that overlapped with rather than succeeded one another. Because the indictment itself shows the predicate felonies overlapped, it fails to allege the essential element of sequential, non-overlapping convictions required by N.C.G.S. § 14-7.1. As a result, the habitual-felon indictment is fatally defective. Thus, we vacate the habitual-felon judgment and remand for resentencing without the habitual-felon enhancement. Because Defendant's habitual-felon indictment is fatally defective, we need and do not consider whether sentencing occurred without a plea or jury verdict on that status or Defendant's IAC claim premised on counsel's failure to challenge the habitual-felon status.

E. Restitution Award

[6] Finally, Defendant argues the evidence does not support the trial court's $592,000 restitution award. The trial court must base its restitution award on sufficient evidence. *State v. Mumford*, 364 N.C. 394, 403 (2010). Although "the quantum of evidence needed to support a restitution award is not high," it must nevertheless be competent, specific, and

reliable. *State v. Moore*, 365 N.C. 283, 285 (2011). Whether the evidence supports the trial court's restitution order is a question of law reviewed *de novo* on appeal. *State v. Wright*, 212 N.C. App. 640, 645 (2011). For the following reasons, we agree with Defendant on this point and remand for a new hearing.

At trial, the victim testified to medical bills of approximately $525,000 and that he "thought" his medical-flight bill was $42,000. But at the sentencing hearing, the State misstated the total to be $550,000. Even crediting the victim's approximate testimony, the record supports a maximum award of only $567,000. Neither did the State offer any evidence supporting any amount of medical costs, much less in the amount of $592,000. This Court has held that approximate or generalized testimony, without supporting documentation, cannot sustain a restitution order. *See State v. Buchanan*, 260 N.C. App. 616, 623–24 (2018) (vacating award where victim testified only to "about $10,000" in bills without corroborating evidence).

Here, while there was at least some evidence supporting an award of restitution, the evidence lacks the level of "specific[ity] and reliab[ility]" required to sustain the $592,000 figure. *State v. Clagon*, 279 N.C. App. 425, 435 (2021). Rather, the victim's testimony was approximate, the State misstated the amount, and no party introduced medical bills or other corroborating records supporting the final amount. Because the only evidence was either estimated or misstated, and uncorroborated, it falls short of the "specificity" necessary to support a restitution order. *See id.* Accordingly, we vacate the restitution order and remand for a new hearing to determine the amount of damage proximately caused by Defendant's conduct and to calculate the correct amount of restitution.

IV. Conclusion

For the reasons discussed above, this Court holds that (1) the trial court did not plainly err by allowing Trooper Covington's testimony; (2) that Defendant did not receive ineffective assistance of counsel; and (3) that the trial court did not plainly err in its jury instructions. But this Court does hold that the trial court in rendering its sentencing and restitution orders and thus vacates and remands them for further proceedings not inconsistent with this opinion.

NO ERROR IN PART; NO PLAIN ERROR IN PART; ERROR IN PART; VACATED IN PART AND REMANDED.

Judges TYSON and STADING concur.

STATE OF NORTH CAROLINA
v.
TRAVIS RAY MERCER, DEFENDANT

No. COA25-646

Filed 4 March 2026

1. Constitutional Law—effective assistance of counsel—per se—alternatives presented in closing argument—no concession of defendant's guilt

In a proceeding where defendant was convicted of false imprisonment (a lesser-included offense of first-degree kidnapping, with which he had been indicted) and assault inflicting serious bodily injury as a result of domestic violence against his girlfriend, defendant's counsel was not per se ineffective when, during closing arguments, he told the jury that it "could find [defendant] guilty of false imprisonment, which is a misdemeanor . . . or not guilty." Defense counsel's statement neither foreclosed a not-guilty verdict nor instructed the jury that defendant was guilty of any offense; rather, counsel presented an alternative without conceding defendant's guilt to the lesser-included offense.

2. Constitutional Law—effective assistance of counsel—failure to move to suppress—prejudice analysis

In a proceeding where defendant was convicted of false imprisonment and assault inflicting serious bodily injury as a result of domestic violence against his girlfriend, defendant did not receive ineffective assistance when his counsel failed to move to suppress evidence discovered during a search conducted by a warrant that defendant contended issued from a facially insufficient indictment. Since the affidavit attached to the warrant application set out the underlying circumstances from which the issuing magistrate could find that probable cause existed to search defendant's home, even if defense counsel had moved to suppress the evidence obtained, the trial court would have properly denied the motion. Accordingly, defendant could not demonstrate prejudice.

3. Criminal Law—prosecutor's closing argument—lack of objection by defendant—not grossly improper—no prejudice shown

In a proceeding where defendant was convicted of false imprisonment and assault inflicting serious bodily injury as a result of domestic violence against his girlfriend, the trial court did not err in failing to intervene ex mero motu when, during closing arguments,

the prosecutor told the jury that the victim "told the truth and that's all we can really ask of her." Given that the State's comment occurred in the context of a closing argument in which the State argued that the victim's testimony was credible after defendant contradicted her account in his own testimony, the State did not impermissibly vouch for the victim. Moreover, even if vouching had occurred, defendant failed to show prejudice that infected the trial with unfairness and rendered his conviction fundamentally unfair.

Appeal by Defendant from judgment entered 15 January 2025 by Judge John M. Dunlow in Wilson County Superior Court. Heard in the Court of Appeals 15 January 2026.

Attorney General Jeff Jackson, by Assistant Attorney General Ashley C. Council, for the State.

Attorney Joseph E. Gerber for Defendant-Appellant.

MURRY, Judge.

Travis R. Mercer (Defendant) appeals from judgments entered upon guilty verdicts for false imprisonment and assault inflicting serious bodily injury. On appeal, Defendant contends that his counsel was per se ineffective because he "conceded [Defendant's] guilt to a lesser-included offense without his consent" and prejudicially ineffective because he "failed to move to suppress the fruits of a search conducted by a warrant issued from a facially insufficient indictment." Defendant further contends that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument. For the following reasons, this Court holds that Defendant did not receive any ineffective assistance of counsel (IAC) and that the trial court did not err by declining to intervene during the State's closing argument.

I. Background

This matter arises out of an incident between Defendant and Glenda Lucas Randolph that resulted in injury to her shoulder. As of July 2023, Defendant and Randolph had known each other for eight years, of which they had spent at least four years in what Randolph described as a "boyfriend/girlfriend fiancé crazy rollercoaster" relationship. On the morning of 30 July 2023, Officer Luis Quesada of the Wilson County Police Department responded to a 911 call from a local gas station to find Randolph distraught and complaining of shoulder pain. Medical

personnel transported Randolph to Wilson Medical Center, where doctors diagnosed and treated a closed right humeral fracture. Detective Taja S. Frails noted facial bruising and a sling on Randolph's right arm when she interviewed her at the hospital.

That same day, officers applied for a search warrant for Defendant's residence at 113 Garner Street in Wilson. The search warrant listed Detective "U.E. Johnson" and Detective "T. Frails" as co-applicants. The accompanying affidavit listed Detective Johnson as the applicant but bore Detective Frails's signature in the section for "signature of applicant." Magistrate T.M. Harris issued the search warrant, and the officers executed it that same day. Upon entering Defendant's residence, they found Defendant hiding behind a couch in the living room. While searching Defendant's bedroom, the officers seized Randolph's feces-covered shoes and underwear as evidence. They also observed feces throughout the bedroom and a "[b]ody size hole that looked like someone slammed against the wall." Officer A.J. Burns logged an inventory of the recovered items.

On 6 November 2023, a grand jury indicted Defendant for first-degree kidnapping and assault inflicting serious bodily injury. At trial on 13 January 2025, the parties presented conflicting evidence. Detective Frails testified to finding Randolph's clothes and feces in Defendant's home, which the State accompanied by introducing Detective Frails's body-camera footage and photographs from the search.

As the prosecuting witness for the State, Randolph's testimony tended to show the following: On 29 July 2023, Randolph arrived home after a sobriety meeting when Defendant told her to come to his home and clean his room, which she did under protest. At some point, Defendant became agitated and threw her against the wall. Then, on 30 July 2023, when Randolph was sleeping in Defendant's bed, he pulled her off of the bed by her leg, causing her to fall and fracture her right shoulder. Defendant then stomped on her broken shoulder approximately three times and on her stomach, causing her to lose control of her bowels and defecate. When she requested medical treatment, he refused and ordered her to clean the room and her feces. After Defendant went back to sleep, Randolph, still covered in feces, donned Defendant's boxers and escaped to a gas station across the street.

Testifying in his own defense later at trial, Defendant offered a conflicting sequence of events and ultimately denied assaulting Randolph. He testified that they had both been using drugs and alcohol over multiple days, and that, when he had tried to get Randolph to stop smoking crack, she became belligerent, headbutted him, fell off of his bed, and

landed on her shoulder. He stated that he did not know what caused Randolph to defecate but that she had a history of incontinence.

During closing arguments, defense counsel argued that the State had not met its evidentiary burden for first-degree kidnapping because "kidnapping . . . doesn't fit the circumstances of this case." He urged the jury to consider the lesser-included offenses as follows:

> Your choices would be guilty of first-degree kidnapping, guilty of second-degree kidnapping, guilty of felonious restraint, guilty of false imprisonment, or not guilty. I would suggest to you that you have two choices. You can find Defendant guilty of false imprisonment, which is a misdemeanor. Or you can get a not guilty in this case.

(Quotation modified.) In contrast, the State's closing argument emphasized to the jury that Randolph "told the truth and that's really all we can ask of her. She told you what happened. She told you what he did to her . . . . She told the truth." Defendant did not object to the State's remarks at trial.

On 15 January 2025, the jury found Defendant guilty of assault inflicting serious bodily injury and the lesser-included offense of false imprisonment. Finding Defendant to have a felony prior record level (PRL) V and a misdemeanor PRL III, the trial court consolidated the judgments and sentenced Defendant to 23–37 months' imprisonment with 135 days' credit. Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction over Defendant's appeal from the trial court's final judgment under N.C.G.S. §§ 7A-27, 15A-1444. *See* N.C.G.S. § 7A-27(b) (2025) (final judgment of a trial court); *id.* § 15A-1444(a) (pleaded not guilty but found guilty). IAC claims generally "should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553 (2001). But because "the cold record reveals that no further investigation is required," this Court also has jurisdiction to determine Defendant's IAC claim on direct review. *State v. Fair*, 354 N.C. 131, 166 (2001).

III. Analysis

Defendant argues that his counsel was per se ineffective because he "conceded his guilt to a lesser-included offense without his consent" and prejudicially ineffective because he did not "move to suppress the fruits of a search conducted by a warrant issued from a facially insufficient indictment." Defendant also argues that the trial court erred by failing

to intervene *ex mero motu* during the State's closing argument. For the following reasons, we hold that Defendant did not receive IAC and that the trial court did not err by failing to intervene during the State's closing argument.

A. Ineffective Assistance of Counsel

[1] Defendant asserts two Sixth Amendment right-to-counsel claims on both per se and prejudicially ineffective grounds. For the following reasons, we disagree on both counts and hold that Defendant did not receive IAC on either ground.

The Federal Sixth Amendment guarantees a criminal defendant's right to effective assistance of counsel. *See* U.S. Const. amend. VI. A defense counsel violates his client's right by committing an error "so serious" as to "not function[ ] as the 'counsel' guaranteed by the Sixth Amendment," thus depriving the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To bring a successful IAC claim on appeal, a defendant must establish both that (1) his counsel's deficient performance "fell below an objective standard of reasonableness" and (2) "the deficient performance prejudiced the defense." *Id.* To establish prejudice, Defendant "must show . . . a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Allen*, 360 N.C. 297, 316 (2006) (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is that which is "sufficient to undermine confidence in the outcome," *Strickland*, 466 U.S. at 694, for which "a different result must be substantial, not just conceivable." *State v. Lane*, 271 N.C. App. 307, 313–14 (2020) (quotation omitted); *see State v. Phillips*, 365 N.C. 103, 121 (2011) (assessing prejudice by "looking at the totality of the evidence"). "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *State v. Braswell*, 312 N.C. 553, 563 (1985) (quoting *Strickland*, 466 U.S. at 694).

1. Per Se Ineffective Assistance of Counsel

We first address Defendant's per se IAC claim.[1] Defendant contends that defense counsel improperly conceded his guilt by telling the jury that it "could find [Defendant] guilty of false imprisonment, which is

1. Defendant expressly limits this claim to defense counsel's comments regarding his first-degree kidnapping charge and subsequent false-imprisonment conviction. We limit our review accordingly.

a misdemeanor." He argues that "a full reading of [defense counsel's] closing argument shows that it was a plea to the jury to compromise by finding [Defendant] guilty of lesser-included misdemeanors within each charged felony." While we review prejudicial IAC claims under the *Strickland* standard, we review per se IAC claims under a *de novo* standard. *See State v. Moore*, 286 N.C. App. 341, 345 (2022); *Strickland*, 466 U.S. at 687. For the following reasons, we disagree and hold that Defendant did not receive per se IAC.

Despite its creation of a two-part test, *Strickland* left open the possibility of an error so egregious as to presume prejudice on appeal. *See Strickland*, 466 U.S. at 692. Our Supreme Court similarly recognized that some circumstances may be "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *State v. Harbison*, 315 N.C. 175, 180 (1985) (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)) (holding that defense counsel's admission of guilt to lesser-charged offense without prior consent is so likely to prejudice defendant that it is reversible error per se). As a result, the *Harbison* Court established "ineffective assistance of counsel, per se in violation of the Sixth Amendment, . . . in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Id.*

On appeal, we consider defense counsel's challenged statement contextually "to determine whether the statement was, in fact, a concession of defendant's guilt of a crime." *State v. Mills*, 205 N.C. App. 577, 587 (2010). Although a *Harbison* claim is generally based on an explicit admission of the defendant's guilt, "an implied admission of guilt . . . [may] constitute *Harbison* error" where the "statements to the jury cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense." *State v. McAllister*, 375 N.C. 455, 475 (2020). But defense counsel *may* "remind the jury that it can find the defendant guilty of a lesser-included offense if it does not find [the] defendant guilty of the charged offense." *State v. Parker*, 290 N.C. App. 650, 654 (2023).

In assessing Defendant's claim, we find *State v. Parker* particularly instructive. In *Parker*, this Court held that the defense counsel did not concede the defendant's guilt by stating to the jury that it "decide[s] whether the use of force is excessive. But if it was excessive, that is voluntary manslaughter. That is not first[-]degree murder. That is not second[-]degree murder. That is voluntary manslaughter." *Id.* at 655. The Court in *Parker* noted that, because the defendant "was charged with first-degree murder, and the transcript reveals his counsel advocating

for the jury to find [him] either not guilty, or" the lesser-included offense of "guilty of voluntary manslaughter," his defense counsel "neither stated nor implied" the defendant's guilt. *Id.* Rather, he argued that the most serious crime of which the defendant could be convicted was a lesser-included offense. *Id.*; *see State v. Campbell*, 359 N.C. 644, 696 (2005) (holding that defense counsel did not concede guilt when explaining that, without evidence of specific intent, the most serious possible conviction was second-degree murder).

Here, defense counsel's statement that the jury "could find [Defendant] guilty of false imprisonment, which is a misdemeanor . . . or not guilty" is much more similar to the defense counsel's comments in *Parker* than those in *Harbison*. *See Parker*, 290 N.C. App. at 655. The record reveals that Defendant was charged with first-degree kidnapping and that defense counsel asked the jury to find him either guilty of false imprisonment or not guilty altogether. As in *Parker*, defense counsel's statements neither foreclosed a not-guilty verdict nor instructed the jury that Defendant was guilty of any offense; rather, they presented an alternative without implicitly or explicitly conceding Defendant's guilt to the lesser-included offense. Read in proper context, defense counsel's closing argument challenged the State's proof and preserved a not-guilty verdict as an available option by alternatively asking the jury to consider lesser-included offenses. Accordingly, because we hold that defense counsel neither stated nor implied Defendant's guilt, we need not address whether he obtained Defendant's prior consent. *See Harbison*, 315 N.C. at 180. Therefore, Defendant did not receive per se IAC.[2]

2. Prejudicially Ineffective Assistance of Counsel

[2] We next address Defendant's prejudicial IAC claim. He contends his counsel's failure to move to "suppress the fruits of a search conducted by a warrant issued from a facially insufficient indictment" rendered defense counsel prejudicially ineffective. Because "the affidavit supporting the application for the search warrant is the only information in the record on which basis the magistrate could have lawfully issued

2. We typically examine a defendant's claim under the "normal ineffectiveness standard set forth in *Strickland v. Washington*" upon determining that he did not receive per se IAC. *State v. McDowell*, 329 N.C. 363, 387 (1991). We do not do so here because Defendant argued *only* that defense counsel's conduct amounted to per se IAC and does not argue prejudice to the extent that his counsel's comments alternatively amounted to prejudicial IAC. *See* N.C. R. App. P. 28(b)(6); *State v. Bowman*, 274 N.C. App. 214, 220 (2020) (declining to reach *Strickland* analysis on same basis).

the search warrant," he argues that "the warrant should have never been issued." But Defendant's second claim fares no better than his first. For the following reasons, we disagree and hold that Defendant did not receive prejudicial IAC.

As discussed above, we analyze claims of prejudicial IAC under *Strickland*'s two-pronged test. *Strickland*, 466 U.S. at 687. Under this test, a reviewing court need not assess counsel's performance if "dispos[ing] of an ineffectiveness claim on the ground of . . . [in]sufficient prejudice" would be easier. *Id.* at 697. This Court has similarly held that an attorney's "failure to file a motion to suppress is not . . . [IAC] where the search or stop that led to the discovery of the evidence was lawful." *State v. Canty*, 224 N.C. App. 514, 517 (2012); *see State v. Hernandez*, 293 N.C. App. 283, 300 (2024) (no prejudicial IAC where, "had the defendant's trial counsel objected to the search warrant, the result of the proceeding would have been the same." (citation modified)). Accordingly, we must first assess the warrant's lawfulness to assess whether defense counsel then ineffectively failed to challenge it through a motion to suppress.

The Federal Fourth Amendment protects "[t]he right of the people to be secure against unreasonable searches and seizures" by requiring "[w]arrants issue[d] upon probable cause" that "particularly describe[ ] the place to be searched[ ] and the things to be seized," U.S. Const. amend. IV (ellipses omitted), which the Federal Fourth Amendment's Due Process Clause incorporates against the States. *See Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating Search and Seizure Clause); *Aguilar v. Texas*, 378 U.S. 108 (1964) (incorporating Warrants and Particular Description Clauses), *abrogated on other grounds by Illinois v. Gates*, 462 U.S. 213 (1983). "Probable cause . . . means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender." *State v. Campbell*, 282 N.C. 125, 128–29 (1972).

A search-warrant application must include (1) a statement of probable cause and (2) "one or more affidavits particularly setting forth the facts and circumstances establishing probable cause." N.C.G.S. § 15A-244(2)–(3) (2025). Any affidavit "must establish a nexus between the objects sought and the place to be searched," *State v. Eddings*, 280 N.C. App. 204, 210 (2021), which must show that either "criminal activity actually occurred at the location to be searched or that the fruits of a crime that occurred elsewhere are observed at a certain place," *State v. Oates*, 224 N.C. App. 634, 644 (2012). "[I]nformation relayed from one

officer to another" may supply the necessary "[p]robable cause for an affidavit . . . if that information was reported while the officer performed his or her duties." *State v. Rayfield*, 231 N.C. App. 632, 643 (2014).

In reviewing a warrant application, a magistrate must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238. In doing so, the magistrate may consider "the totality of the circumstances" by drawing "reasonable inferences" from the affidavit's facts, *Eddings*, 280 N.C. App. at 210 (quoting *State v. Arrington*, 311 N.C. 633, 638 (1972)), to determine "whether the evidence as a whole provides a substantial basis for concluding that probable cause exists," *State v. Beam*, 325 N.C. 217, 221 (1989).

Because "[p]robable cause does not mean actual and positive cause, nor does it import absolute certainty," *Campbell*, 282 N.C. at 129 (quotation omitted), our Supreme Court has cautioned against a "grudging or negative attitude by reviewing courts toward warrants" as "inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant," *State v. Riggs*, 328 N.C. 213, 222 (1991) (quoting *Gates*, 462 U.S. at 236). Accordingly, "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Id.* (alterations in original) (quoting *Gates*, 462 U.S. at 236). We instead afford "great deference" to "a magistrate's determination of probable cause," *State v. Brody*, 251 N.C. App. 812, 820–21 (2017) (quotation omitted), and must only "ensur[e] that the issuing magistrate had a 'substantial basis for . . . conclud[ing] that probable cause existed,' " *State v. McKinney*, 368 N.C. 161, 164 (2015) (second and third alterations in original) (quoting *Gates*, 462 U.S. 238 (1983)). Additionally, any officer acting within his territorial jurisdiction may execute a search warrant, regardless of whether he applied for it but "must, without unnecessary delay, return to the clerk of the issuing court the warrant together with a written inventory of the items seized." N.C.G.S. § 15A-257 (2025). "The inventory, if any, and return must be signed and sworn to by the officer who executed the warrant." *Id. But see State v. Tessnear*, 265 N.C. 319, 325 (1965) (officer on affidavit need not be same officer to execute warrant).

Here, considering the totality of the circumstances, the affidavit attached to the warrant application set out the underlying circumstances from which the issuing magistrate could find that probable cause existed to search Defendant's home. The affidavit also properly established a

connection linking Defendant's home address to Randolph's injury by explaining that Randolph "advised she was assaulted by [Defendant] at his residence for hours," stating that the clothing she wore during this assault "should still be located" inside Defendant's home. Given the "all the circumstances set forth in the affidavit," the magistrate reasonably concluded that "a fair probability" existed that an officer would find "contraband or evidence" of Randolph's assault at Defendant's residence. *Gates*, 462 U.S. at 238. Thus, the magistrate properly issued and the officers properly executed the warrant under N.C.G.S. § 15A-257.

Having determined that probable cause supported the issuance of the search warrant, we conclude that, "[h]ad Defendant's trial counsel objected to the [search warrant], the result of the proceeding would have been the same." *Hernandez*, 293 N.C. App. at 283. Even if defense counsel had moved to suppress the evidence obtained from the search warrant, the trial court would have properly denied the motion because the warrant was sufficient to establish probable cause. *See Strickland*, 466 U.S. at 688. For these reasons, Defendant cannot show a "reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different." *Braswell*, 312 N.C. at 563. Therefore, Defendant did not receive prejudicial IAC.

B. Closing Argument

[3] Finally, Defendant argues that the trial court erred by not intervening *ex mero motu* during the State's closing argument that the prosecuting witness "told the truth and that's all we can really ask of her." We disagree and hold that the trial court did not so err.

Although a defendant's failure to object to an alleged error at trial ordinarily prevents him from raising the same issue on appeal, we recognize a "narrow exception . . . for statements during closing argument so grossly improper" that the trial court abuses its discretion per se by not intervening on its own initiative. *State v. Tart*, 372 N.C. 73, 81 (2019). We instead review these remarks for whether they "were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*," *State v. Jones*, 355 N.C. 117, 133 (2002), and thus grant relief only upon finding both gross impropriety *and* resulting prejudice, *see State v. Huey*, 370 N.C. 174, 179 (2017).

We recognize that prosecutors "owe honesty and fervor to the State and fairness to the defendant in the performance of their duties." *State v. Locklear*, 294 N.C. 210, 217 (1978). In closing arguments, "an attorney may not become abusive, inject his personal experiences, express

his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record." N.C.G.S. § 15A-1230 (2025). But within these parameters, attorneys have "wide latitude in their closing arguments to the jury, with the State being entitled to argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom," *State v. Fletcher*, 370 N.C. 313, 319 (2017) (quotation omitted), including the ability to "argue that the State's witnesses are credible" in order to "giv[e] the jury reasons to believe the State's evidence," *State v. Augustine*, 359 N.C. 709, 725 (2005); *see State v. Arrington*, 299 N.C. App. 211, 215 (2025) (comments that witness "never lied" and "told you all the truth" were not improper when "made in the context of the prosecutor's arguments to the jury that [the witness's] testimony was credible because specific portions of his testimony matched the physical evidence presented").

Gross impropriety is an "exceedingly high bar" surmountable "only when the prosecutor's statements went so far beyond the parameters of propriety that the trial court" *must* "intervene to protect the rights of the parties and the sanctity of the proceedings." *State v. Reber*, 386 N.C. 153, 163 (2024). To show gross impropriety, a defendant must demonstrate that the "comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23 (1998). We consider the State's closing argument "in the context in which the remarks were made and the overall factual circumstances to which they referred." *State v. Jaynes*, 353 N.C. 534, 559 (2001) (quotation omitted).

Here, the State's comments that Randolph "told the truth" occurred in the context of a closing argument in which the State argued that Randolph's testimony was credible after Defendant contradicted her account in his own testimony. As in *Wiley* and *Arrington*, the State did not impermissibly "vouch[ ]" for Randolph but instead "merely g[ave] the jury reasons to believe the State's witness" by advocating for her truthfulness in light of Defendant's testimony. *See Arrington*, N.C. App. at 215. Even assuming *arguendo* the impropriety of the State's comments, Defendant has failed to show how they would prejudice him by "infect[ing] the trial with unfairness and thus render[ing] the conviction fundamentally unfair." *State v. Carroll*, 356 N.C. 526, 537 (2002) (quotation omitted). Therefore, we hold that the trial court did not prejudicially err by declining to intervene *ex mero motu* in response to the State's challenged remarks.

IV. Conclusion

For the above reasons, this Court holds that Defendant did not receive per se or prejudicially ineffective assistance of counsel and that the trial court did not err by declining to intervene during the State's closing argument.

NO ERROR.

Chief Judge DILLON and Judge HAMPSON concur.

SANDRA D'ELOSUA VASTOLA, PLAINTIFF
v.
CHARLOTTE-MECKLENBURG LODGE 9 OF THE FRATERNAL ORDER OF POLICE, INC. AND DANIEL REDFORD, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS PRESIDENT, DEFENDANTS

No. COA25-761

Filed 4 March 2026

Libel and Slander—defamation—criticism of police spokesperson—subjective opinion—no factual content

The trial court properly dismissed slander and libel claims asserted by plaintiff, the director of public affairs for a police department, against a fraternal police organization for critical comments it posted on social media regarding plaintiff's handling of an interview in the wake of an incident in which four police officers were killed. Dismissal was proper irrespective of plaintiff's status as a public or private figure because the online comments did not include any factual claims but expressed purely subjective opinions about plaintiff's job performance and, thus, were not defamatory.

Appeal by plaintiff from order entered 4 April 2025 by Judge Matt Osman in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 February 2026.

Hairston Lane, PA, by James E. Hairston, Jr., for plaintiff-appellant.

McAngus Goudelock & Courie, PLLC, by Jeffrey B. Kuykendal and Heather G. Connor, for defendants-appellees.

FLOOD, Judge.

Plaintiff Sandra D'elosua Vastola appeals from an order granting a motion to dismiss her claims for slander and libel by Defendants Charlotte-Mecklenburg Lodge 9 of the Fraternal Order of Police, Inc. and Daniel Redford. On appeal, Plaintiff argues the trial court incorrectly designated her a limited public figure for purposes of its defamation analysis and, in the alternative, erred in dismissing her claims because she met the heightened pleading standard applicable to public figures. Because we conclude the statements forming the basis for her slander and libel claims were not defamatory as a matter of law, we do not address whether Plaintiff was a public figure, limited or otherwise. Accordingly, we affirm.

I. Factual and Procedural Background

This appeal concerns the sufficiency of Plaintiff's amended complaint, filed 14 January 2025, to state a claim upon which relief could be granted. The amended complaint alleged that Defendants had made statements about Plaintiff amounting to libel and slander. Specifically, Plaintiff claimed that, in the wake of an incident in April of 2024 in which four law enforcement officers were killed, a local news station questioned Plaintiff—the Director of Public Affairs at the Charlotte-Mecklenburg Police Department—about certain officers of the department "who logged off and did not show up during the incident." Plaintiff declined to respond to many of the questions based on the belief that they constituted private personnel records under N.C.G.S. § 160A-168, and described the story as "a slam job that would damage the very men and women who are still recovering from this heinous incident." When the story was run, it characterized the Charlotte-Mecklenburg Police Department as lacking in transparency.

The amended complaint further alleged that, after the story ran, Defendants published, or caused to be published, a number of Facebook posts commenting on her character and professionalism:

> [T]he mouth piece of [the] department resorts to petty nastiness whenever she doesn't like the questions being asked.
>
> . . . .
>
> [T]he men and women who actually do the work at CMPD PIO[1] are great; however, I've heard the opposite about

1. Presumptively an acronym for "public information officer."

> their so-called "leader", I believe this is the perfect example of her failures as a person with power.
>
> . . . It seems she has taken a page out of the playbook of Karine Jean-Pierre, pretending things aren't actually as they seem even when it's quite obvious.
>
> . . . [H]ow does it look when a reporter asks a governmental agency, especially a police department, a question and their PIO Director snaps back with insults.

(Internal quotation marks omitted.) It also alleged that Defendants verbally disparaged her character and professionalism in an interview:

> [T]he department's dismissive response prompted the FOP to take a public stand against the spokesperson's handling of this situation.
>
> . . . [G]arbage response given by CMPD's PIO office.
>
> This is a break in trust between the department and citizens who depend on the truth.
>
> A level of professionalism should always be present and simply answering any questions truthfully is always the easiest way to show your transparency. This was clearly not done on this topic and from what we have heard this type of behavior is commonplace within the PIO's office.
>
> The hard-working men and women at CMPD should not have to suffer from the poor decisions of those representing the department.

(Internal quotation marks omitted.) The complaint alleged that these statements damaged Plaintiff's reputation and "were malicious."

Defendants moved to dismiss, arguing Plaintiff's complaint failed to state a claim upon which relief could be granted because "(1) Plaintiff is a public figure and has failed to plead actual malice; and (2) Plaintiff has not included any factual allegations tending to show Defendants' statements are actionable defamation." On 4 April 2025, the trial court entered a one-page order granting Defendants' motion to dismiss. Plaintiff timely appealed.

II. Jurisdiction

This Court has jurisdiction to hear Plaintiff's appeal pursuant to N.C.G.S. § 7A-27(b) (2023).

III. Standard of Review

> On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Craven v. Cope, 188 N.C. App. 814, 816 (2008) (emphasis and citation omitted). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Id.* (citation omitted).

IV. Analysis

On appeal, Plaintiff argues the trial court erred in dismissing her appeal because, first, she was not a public figure and therefore not subject to the heightened pleading standards applicable to public figures in defamation[2] cases, and second, her pleadings were sufficient to survive a motion to dismiss even if she were a public figure. Meanwhile, Defendants, in addition to disputing both bases for Plaintiff's appeal, contend the statements did not contain defamatory content. For the reasons explained below, we agree with Defendants that the statements made in this case were not defamatory and therefore could not create liability for a defamation claim irrespective of whether Plaintiff was a public figure.

"In order to recover for defamation, a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29 (2002) (citation omitted), *disc. rev. denied*, 357 N.C. 163 (2003). "To be actionable, a defamatory statement must be false and must be communicated to a person or persons other than the person defamed." *Andrews*

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2. While Plaintiff separately alleged slander and libel in her complaint, the relevant legal principles in this case are applicable to defamation generally; thus, we will discuss them in tandem as "defamation" throughout this analysis. *See Gaunt v. Pittaway*, 135 N.C. App. 442, 447 (1999) ("There are two separate torts encompassed by the term 'defamation,' being libel and slander. Generally, libel is written while slander is oral." (citation and internal quotation marks omitted)).

v. Elliot, 109 N.C. App. 271, 274 (1993) (citation omitted). Moreover, implicit in the idea that a statement must be false to be defamatory is that the statement must be *falsifiable*; therefore, "[i]f a statement cannot reasonably be interpreted as stating actual facts about an individual, it cannot be the subject of a defamation suit." *Craven*, 188 N.C. App. at 817 (citing *Daniels v. Metro Magazine Holding Co., L.L.C.*, 179 N.C. App. 533, 539 (2006)). Thus, the pure expression of opinion cannot form the basis for a defamation action; and, even where appearing to make a factual assertion, rhetorical hyperbole enjoys similarly protected status if "a reasonable reader or listener would not construe that assertion seriously" as a factual statement. *Daniels*, 179 N.C. App. at 539.

The United States Supreme Court has said that "debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials[,]" *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); accordingly, "public figures bear the burden of proving that alleged defamatory statements against them were published with actual malice in order to recover damages." *Gaunt*, 135 N.C. App. at 448. This heightened pleading standard does not, however, affect the foundational question of which statements may form the basis for defamation liability in the first instance. Thus, regardless of whether a plaintiff is a public figure, public figure for a limited purpose, or private person, an allegedly defamatory statement still must contain serious factual content to form the basis for an actionable claim. *See Boyce*, 153 N.C. App. at 29; *Craven*, 188 N.C. App. at 817; *Daniels*, 179 N.C. App. at 540.

Here, none of the statements that Plaintiff identifies in her complaint can be seriously understood as containing factual content. While perhaps deeply unflattering, accusing Plaintiff of "nastiness," opining that her actions constitute "failures as a person with power[,]" characterizing her statements as "dismissive" or "snap[ping] back with insults[,]" or expressing that she made "poor decisions" or a "[g]arbage response" are all decidedly subjective opinions offered to *characterize* her behavior, not factual claims regarding the *contents* of her behavior. *See Daniels*, 179 N.C. App. at 540 ("[W]hether or not [the] plaintiff spoke in a 'sinister' or 'Gestapo' voice is a matter of [the defendant]'s opinion, incapable of being proven or disproved. Indeed, it is unclear what [the defendant] means by a 'Gestapo' voice or what such a voice would sound like."). Thus, even assuming *arguendo* that Plaintiff is not a public figure and that these statements publicly disparaged her to her material harm, they contain no factual content and therefore cannot, as a matter of law, be understood as defamatory.

IV. Conclusion

A statement expressing a purely subjective opinion about a person—regardless of whether that person is a public figure, whether the statement was made publicly, or whether the statement caused harm—is not defamatory. As the statements here expressed purely subjective opinions, the trial court correctly dismissed Plaintiff's slander and libel claims.

AFFIRMED.

Chief Judge DILLON and Judge FREEMAN concur.

CRAWFORD WHEELER, PLAINTIFF
v.
KIYOKA WHEELER, DEFENDANT

No. COA25-376

Filed 4 March 2026

1. Appeal and Error—preservation of issues—equitable distribution—validity of separation agreement—theory not raised at trial

In an equitable distribution proceeding, plaintiff did not preserve for appellate review his argument that the trial court was required to make a finding about the validity of the parties' alleged separation agreement—which he contended was an issue of ultimate fact since a separation agreement can bar an equitable distribution claim—because plaintiff never asserted that theory below. Plaintiff's pleadings did not mention the alleged agreement, much less raise it as a defense; his reply admitted key allegations in defendant's amended counterclaim, including that the parties' marital and divisible property was subject to equitable distribution; he did not contend that the alleged agreement barred defendant's equitable distribution claim; and he did not ask the trial court to rule on the issue.

2. Divorce—equitable distribution—statutory distributional factors—catch-all—relation to economic condition of marriage required

In an equitable distribution proceeding, the trial court improperly considered matters related to marital fault and misconduct in ordering an unequal division of marital property in defendant's favor.

While the final distributional factor listed in N.C.G.S. § 50-20(c) is a catch-all authorizing consideration of "[a]ny other factor that the court finds just and proper," marital fault or misconduct which is unrelated to the economic condition of the marriage—such as plaintiff's alcohol abuse, domestic violence, death threats, and taking of defendant's identity documents—is not germane to the division of marital property. Although the trial court made other findings of fact in determining that an unequal division in favor of defendant was equitable, the appellate court could not determine the weight assigned to each; accordingly, the equitable distribution order was vacated and the matter was remanded for the trial court to reassess its decision to order an unequal division.

3. Divorce—equitable distribution—military retiree Survivor Benefit Plan coverage—matter of first impression—scant record—remanded

In an equitable distribution proceeding, the trial court's order that plaintiff maintain Survivor Benefit Plan (SBP) coverage (a federally administered benefit for military veterans) with defendant as the beneficiary implicated a matter of first impression for the state appellate courts—how the SBP should interact with the North Carolina equitable distribution scheme—that was not argued at trial, was barely referenced in the record, and received scant briefing. Accordingly, the matter was remanded to the trial court for a hearing where the parties could present arguments and evidence on the issue.

Appeal by Plaintiff from Order entered 16 August 2024 by Judge William P. Shanahan, III, in Onslow County District Court. Heard in the Court of Appeals 16 October 2025.

Hayes Law Offices, PLLC, by Mark L. Hayes, for Plaintiff-Appellant.

No brief filed by Defendant-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

Crawford Wheeler (Plaintiff) appeals from an Equitable Distribution Order awarding an unequal division of marital property to his ex-wife Kiyoka Wheeler (Defendant). The Record before us tends to reflect the following:

Plaintiff had a thirty-year career in the military. Defendant is from Japan. The parties met in Japan, married there in February 2005, and later moved to North Carolina. Plaintiff retired from the military in 2009.

The parties separated in July 2014. Plaintiff filed a Complaint for Absolute Divorce on 29 June 2021. Defendant filed an Answer and Counterclaim on 1 September 2021. In the Counterclaim, Defendant stated, "on June 13, 2015[,] the parties entered into a Separation Agreement[.]" She attached a copy of the Separation Agreement as an exhibit. Among other provisions, the Separation Agreement required Plaintiff to pay Defendant $1,000 per month in spousal support. Defendant requested the Separation Agreement be incorporated into the divorce judgment.

Defendant filed an Amended Counterclaim on 16 September 2021. In this pleading, Defendant described the action as one for "absolute divorce, post separation support, alimony[, and] equitable distribution of the marital property[.]" Defendant sought an unequal division of the marital estate, with "a greater majority of the assets" going to her. Defendant's Amended Counterclaim departed from her first responsive pleading in two pertinent ways: it did not reference the Separation Agreement or attach it as an exhibit.

Plaintiff made a motion to sever the issue of Absolute Divorce, which the trial court allowed. The trial court entered a Judgment of Absolute Divorce on 27 September 2021; the Judgment clarified that "all other matters pending in this action shall remain open for a court to determine at a separate date."

On 29 March 2023, the trial court entered an order requiring Plaintiff to pay Defendant $614 per month in spousal support and the "marital share" of his monthly military retirement pay. The issue of spousal support and military retirement pay arrears was held open for future orders.

The trial court held a bench trial on the Equitable Distribution and Alimony claims on 25 April 2024. Plaintiff introduced the Separation Agreement into evidence without objection. Plaintiff acknowledged the document was missing a notarized page containing Defendant's signature, as is required by statute.[1] Plaintiff testified there once "was [a] second page" containing Defendant's notarized signature. Plaintiff asserted the document was "still a valid contract" even without the missing page.

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1. To be "legal, valid, and binding," a separation agreement "must be in writing and acknowledged by both parties before a certifying officer[.]" N.C. Gen. Stat. § 52-10.1 (2025). Notaries public are qualified certifying officers. *Id.* § 52-10(b).

In an opening argument, defense counsel referred to the Separation Agreement as "void because of the fact it was not notarized." During cross-examination, defense counsel asked Plaintiff if the Separation Agreement had required him to "pay [Defendant] $1,000 per month" in spousal support, which Plaintiff confirmed. At closing, defense counsel asked the trial court to "consider the fact that [the parties] did have [a separation] agreement[,]" but asserted it "wasn't . . . binding."[2]

Defendant testified Plaintiff abused alcohol in the years leading up to their separation, had been verbally and physically abusive, and had made threats to kill her. Plaintiff disputed Defendant's testimony alleging alcohol abuse, testifying he drank alcohol "minimally." Plaintiff also denied being abusive to Defendant during their marriage and stated he had never threatened to kill her.

The trial court entered its Order on Equitable Distribution and Alimony on 16 August 2024. The trial court made Findings of Fact regarding the assets and debts the parties had "jointly identified . . . as property for equitable distribution[.]" It did not make a Finding addressing the validity of the parties' alleged Separation Agreement.

After tallying the assets, the trial court found: (1) $252,018 of the marital estate was in Plaintiff's possession; (2) $31,410 of the marital estate was in Defendant's possession; and thus (3) "a cash distributive award of $110,304 from Plaintiff to Defendant would result in an equal distribution of marital property."

However, the trial court found "[a]n unequal distribution in favor of Defendant is equitable based on the following factors:"

> a. N.C.G.S. 50-20(c)(1): The income, property, and liabilities of each party at the time the division of property is to become effective.
>
> i. [Defendant] lost her Social Security benefits in her home country of Japan.

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2. Defense counsel also claimed at closing that the Separation Agreement's non-binding status had "already been determined." This appears to have been a suggestion that a prior trial court had determined the Separation Agreement was non-binding. However, at this trial, no evidence was introduced of any prior trial court finding the Separation Agreement invalid. Nor is there any such evidence in the Record. Additionally, "it is axiomatic that the arguments of counsel are not evidence." *Blue v. Bhiro*, 381 N.C. 1, 6, 871 S.E.2d 691, 695 (2022) (citation and quotation marks omitted). Thus, we do not consider defense counsel's assertions about the Separation Agreement during opening or closing arguments as evidence.

ii. [Plaintiff] has income from Veteran's Affairs Disability, Social Security, and rental income from his home in California.

iii. Plaintiff's rental income from the California home is artificially low given the lack of increases over such a long period of time.

iv. Plaintiff has a large separate property estate value because of his ownership of the California home.

b. N.C.G.S. 50-20(c)(3): The duration of the marriage and the age and physical and mental health of both parties.

i. The parties had a 9-year marriage. Plaintiff had health problems throughout the marriage that have worsened since the date of separation and said health problems are in part due to excessive alcohol use.

c. N.C.G.S. 50-20(c)(7): Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse.

i. [Defendant's] role in the marriage caused her to forgo developing job skills and work history, which limits her earning potential moving forward.

d. N.C.G.S. 50-20(c)(12): Any other factor which the court finds to be just and proper.

i. Plaintiff's excessive alcohol use and Domestic Violence, including taking [Defendant's] cards, ID, and passport as well as [Plaintiff's] threat to kill [Defendant] during the marriage.

The trial court concluded, as a matter of law, "an unequal distribution in the Defendant's favor . . . is equitable." It then ordered Plaintiff to pay Defendant a "cash distributive award" of $250,000 within thirty days.[3]

Additionally, in a section of the Decree titled "Retirement Benefits," the trial court stated Defendant received military retirement pay. In a

3. The trial court also resolved Defendant's alimony claim by ordering Plaintiff to pay $21,632 in spousal support arrears within thirty days and provided that once this payment was made, Plaintiff's "post separation support payments" would be terminated. The trial court also ordered Plaintiff to pay Defendant's attorney fees. The alimony and attorney fees issues are not before us in this appeal.

pertinent part of this section, the trial court ordered: "Plaintiff shall maintain Survivor Benefit Plan Coverage with Defendant as the beneficiary of said coverage."

Plaintiff provided written Notice of Appeal on 6 September 2024.

Issues

The issues on appeal are whether the trial court: (I) erred by failing to make a Finding of Fact regarding the validity of the alleged Separation Agreement; (II) erred in its consideration of statutory distributional factors in determining an unequal division of marital property was equitable; and (III) erred by ordering Plaintiff to maintain Survivor Benefit Plan Coverage with Defendant as the beneficiary.

Analysis

I. Finding on Separation Agreement

[1] Plaintiff first argues the trial court erred by failing to make a finding about the validity of the parties' alleged Separation Agreement. Plaintiff contends the alleged Separation Agreement raised an issue of ultimate fact on which the trial court was required to make a finding, because if the document were found to be valid, it would be "a bar to [Defendant's] equitable distribution claim." We disagree.

Under our Rules of Appellate Procedure, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2025). "It is well-established that a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court." *Smallwood v. Smallwood*, 227 N.C. App. 319, 331, 742 S.E.2d 814, 822 (2013) (citation and quotation marks omitted). The purpose of Rule 10(a)(1) "is to require a party to call the [trial] court's attention to a matter upon which [the party] wants a ruling before [the party] can assign error to the matter on appeal." *Kaylor v. Kaylor*, 296 N.C. App. 80, 88, 907 S.E.2d 758, 765 (2024) (citation and quotation marks omitted). Our Supreme Court "has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount in the [appellate courts].' " *State v. Sharpe*, 344 N.C. 190, 194-95, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)) (other citations omitted).

Additionally, where, as here, a trial court sits without a jury, it must "find the facts specially and state separately its conclusions of law[.]" N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2025). "There are two kinds of facts: . . . . Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts." *Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951) (citations omitted).

> Rule 52(a)(1) does not require the trial court to recite all of the evidentiary facts; it is required only to find the ultimate facts, i.e., those specific material facts which are determinative of the questions involved in the action and from which an appellate court can determine whether the findings are supported by the evidence and, in turn, support the conclusions of law reached by the trial court.

Mann Contractors, Inc. v. Flair with Goldsmith Consultants-II, Inc., 135 N.C. App. 772, 774, 522 S.E.2d 118, 120-21 (1999) (citing *Farmers Bank v. Brown Distribs., Inc.*, 307 N.C. 342, 298 S.E.2d 357 (1983)).

In the instant case, Plaintiff argues the trial court was required to make a finding on the validity of the alleged Separation Agreement because it raised an issue of ultimate fact. Plaintiff accurately states a valid separation agreement can serve as a bar to an equitable distribution claim. *Hagler v. Hagler*, 319 N.C. 287, 295, 354 S.E.2d 228, 234-35 (1987). But in the proceeding below, Plaintiff never asserted a theory that the alleged Separation Agreement barred Defendant's equitable distribution claim. Plaintiff's pleadings did not mention the alleged Separation Agreement, much less raise it as a defense.[4] To the contrary, Plaintiff's

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4. In a related argument, Plaintiff contends "[g]enerally, the invocation of a separation agreement to defeat an equitable distribution claim is an affirmative defense which must be pled," but even when the defense is not pled, it may be tried by express or implied consent. However, Plaintiff cites no authorities that support this assertion.

The cases Plaintiff cites to suggest the issue may have been tried by consent are inapposite. *See Miller v. Talton*, 112 N.C. App. 484, 487, 435 S.E.2d 793, 796-97 (1993) (affirmative defense of statute of limitations tried by consent). Indeed, in *Howell v. Landry*, this Court held unpled affirmative defenses of duress and undue influence were tried by consent where the trial court determined those issues as part of its ruling without objection. 96 N.C. App. 516, 526, 386 S.E.2d 610, 616 (1989). On the other hand, the Court held the affirmative defenses of unconscionability, fraud, and inadequate disclosure were neither pled nor litigated, and thus were not properly raised on appeal. *Id.* (citation omitted). Here, no party sought affirmative relief under the Separation Agreement, and the trial court did not make any determination on the validity of the Separation Agreement.

Reply admitted key allegations in Defendant's Amended Counterclaim concerning equitable distribution. Namely, Plaintiff admitted: (1) the parties acquired during the marriage marital and divisible property subject to equitable distribution under N.C. Gen. Stat. § 50-20(b); and (2) "the circumstances of this case and the respective parties . . . warrant that an unequal division of marital property is equitable." Furthermore, at trial, Plaintiff did not contend the alleged Separation Agreement barred Defendant's equitable distribution claim. Nor did Plaintiff ask the trial court to rule on this issue. In fact, Plaintiff acknowledged the Separation Agreement exhibit he introduced was missing a notarized page containing Defendant's signature. Plaintiff confirmed he understood the absence of this page meant the document "didn't meet the statutory definition of a separation agreement[.]"

Thus, because Plaintiff did not raise the alleged Separation Agreement as a defense to Defendant's equitable distribution claim in his pleadings or his arguments and evidence at trial, the document did not raise an issue of ultimate fact "required to establish [his] defense" about which the trial court was required to make a finding. *See Woodard*, 234 N.C. at 470, 67 S.E.2d at 644. Therefore, because Plaintiff did not request a ruling from the trial court on this issue pursuant to N.C. R. App. P. 10(a)(1), this argument is not preserved for our review. Consequently, this argument is dismissed.

II. Equitable Distribution

[2] Plaintiff next argues the trial court erred in its application of the statutory distributional factors in determining an unequal division of marital property in favor of Defendant was equitable.

N.C. Gen. Stat. § 50-20 governs the distribution of marital and divisible property upon divorce. "Equitable distribution is a three-step process requiring the trial court to (1) determine what is marital [and divisible] property; (2) find the net value of the property; and (3) make an equitable distribution of that property." *Kaylor*, 296 N.C. App. at 82-83, 907 S.E.2d at 761 (citations and quotation marks omitted).

"An equal division of marital property is equitable unless, after considering the factors listed in [N.C.G.S.] § 50-20(c) that were raised by the evidence, the trial court finds that an equal division of marital property would not be equitable under the circumstances." *Id.* at 83, 907 S.E.2d at 761 (citing *Truesdale v. Truesdale*, 89 N.C. App. 445, 450, 366 S.E.2d 512, 516 (1988)).

> If the trial court so finds that an equal division is not equitable, it must make specific findings of fact setting forth

> the reasons for an unequal division. The trial court need not make exhaustive findings of the evidentiary facts, but must include the ultimate facts considered. The trial court has discretion in determining how much weight to accord to each factor, and a single factor may be sufficient to support an unequal distribution[.]

Id. at 83, 907 S.E.2d at 761-62 (citations and quotation marks omitted).

Here, Plaintiff argues the trial court improperly considered factors related to marital fault and misconduct in deciding to order an unequal division of marital property in Defendant's favor. We agree.

In determining whether an unequal division of marital property is equitable, the trial court "shall consider"[5] the twelve distributional factors listed in N.C. Gen. Stat. § 50-20(c)(1)-(12). The twelfth factor authorizes consideration of "[a]ny other factor that the [trial] court finds just and proper." N.C. Gen. Stat. § 50-20(c)(12) (2025).

In *Smith v. Smith*, our Supreme Court interpreted the Section 50-20(c)(12) catch-all factor through the lens of the statute's eleven enumerated factors, all of which "concern the economy of the marriage, i.e., the source, availability, and use by a wife and husband of economic resources during the course of their marriage." 314 N.C. 80, 86, 332 S.E.2d 682, 686 (1985) (footnote omitted); *see*, *e.g.*, N.C. Gen. Stat. § 50-20(c)(1) (2025) (the trial court shall consider "[t]he income, property, and liabilities of each party at the time the division of property is to become effective."). In keeping with the economic focus of the enumerated factors, the Court concluded that "under [Section] 50-20(c)(12), the only other considerations which are 'just and proper' . . . are those which are relevant to the marital economy." *Smith*, 314 N.C. at 87, 332 S.E.2d at 687. Therefore, the Court "h[e]ld that marital fault or misconduct of the parties which is not related to the economic condition of the marriage is not germane to a division of marital property under [Section] 50-20(c) and should not be considered" by the trial court. *Id.* (citations omitted). In other words, "[m]arital fault, without economic consequences, is not properly considered as a distributional factor." *Fountain v. Fountain*, 148 N.C. App. 329, 341, 559 S.E.2d 25, 34 (2002) (citing *Smith*, 314 N.C. at 87, 331 S.E.2d at 687).

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5. While Section 50-20(c) requires consideration of all twelve distributional factors, the trial court "must only make findings concerning those factors for which evidence was presented." *Tucker v. Miller*, 113 N.C. App. 785, 789, 440 S.E.2d 315, 318 (1994) (citation omitted).

In the case *sub judice*, the trial court, expressly citing Section 50-20(c)(12), stated the following in Finding 21(d): "Plaintiff's excessive alcohol use and Domestic Violence, including taking [Defendant's] cards, ID, and passport as well as [Plaintiff's] threat to kill [Defendant] during the marriage." Finding 21(d) is clearly improper under *Smith v. Smith*; alcohol abuse, domestic violence, death threats, and taking a spouse's identity documents are examples of marital misconduct that are "not related to the economic condition of the marriage." 314 N.C. at 87, 332 S.E.2d at 687. Therefore, because this information is "not germane" to the division of marital property under Section 50-20(c), the trial court erred by considering it. *See id.*

The trial court made three other Findings[6] in determining "an unequal division in favor of Defendant is equitable[.]" However, on appellate review, "we cannot determine the weight assigned by the trial court . . . [to the] inappropriate distributional factors" stated in Finding 21(d). *Fountain*, 148 N.C. App. at 342, 559 S.E.2d at 35 (citation omitted). Therefore, we must vacate the Order and remand this case to the trial court "for a reassessment of its decision to order an unequal division without considering the improper factors." *Id.* (citing *Becker v. Becker*, 127 N.C. App. 409, 412, 489 S.E.2d 909, 912 (1997)).

III. Survivor Benefit Plan

[3] In his final argument, Plaintiff asserts the trial court erred by ordering him to "maintain Survivor Benefit Plan Coverage with Defendant as the beneficiary of said coverage."

This Court has described the Survivor Benefit Plan (SBP) as

> a plan, managed by the [Department of] Defense Finance and Accounting Service ("DFAS"), available to eligible military retirees whereby some retirement pay is withheld monthly to participate in a plan to provide a surviving spouse, former spouse, or other designate, with monthly benefits upon the death of the participating serviceperson.

Ellison v. Ellison, 242 N.C. App. 386, 387, 776 S.E.2d 522, 523-24 (2015). *See also* 10 U.S.C. §§ 1448-1455 (statutory provisions related to SBP).

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6. Plaintiff also challenges portions of Findings 21(a), 21(b), and 21(c). Plaintiff argues these Findings are not supported by competent evidence. We disagree. Upon careful review of the Record, we conclude the challenged Findings are supported by competent evidence. Therefore, we do not address Plaintiff's challenges to Findings 21(a), 21(b), and 21(c).

Plaintiff first contends no evidence about SBP was introduced at trial, and therefore the trial court had "no evidentiary basis" on which to classify SBP as marital property or order Plaintiff to maintain SBP with Defendant as the beneficiary. We disagree. There is evidence in the Record on Appeal supporting the existence of SBP coverage as part of Plaintiff's overall military retirement benefits.

The Record contains a copy of Plaintiff's military "Retiree Account Statement," which lists an effective date of 23 January 2023 (Retirement Statement). The Retirement Statement references "SURVIVOR BENEFIT PLAN (SBP) COVERAGE" and indicates the coverage type as "SPOUSE ONLY." A sum of $63.49 for "SBP COSTS" appears to have been deducted from Plaintiff's gross retirement pay. In a separate box, labeled "ARREARS OF PAY BENEFICIARY INFORMATION," the Retirement Statement lists "WHEELER, KIYOKA" (Defendant) as the sole beneficiary, and Defendant's relationship to Plaintiff as "WIFE." Further, the Retirement Statement was introduced by defense counsel as "Defendant's Exhibit 17."[7] Defense counsel cross-examined Plaintiff about Exhibit 17, though he was not questioned about its references to SBP, and gave no testimony about SBP. Thus, the Record tends to show that as of January 2023, Plaintiff paid for SBP coverage and Defendant was the beneficiary. Therefore, we cannot agree with Plaintiff's claim that the Record "is devoid of any reference" to SBP.

Next, we consider whether the trial court erred by classifying and distributing SBP to Defendant as marital property. "Equitable distribution is a three-step process requiring the trial court to (1) determine what is marital [and divisible] property; (2) find the net value of the property; and (3) make an equitable distribution of that property." *Kaylor*, 296 N.C. App. at 83, 907 S.E.2d at 761 (citations and quotation marks omitted). As relevant here, the duty to classify requires the trial court to "ascertain upon appropriate findings of fact, what is marital property[.]" *Willis v. Willis*, 86 N.C. App. 546, 550, 358 S.E.2d 571, 573 (1987) (citation omitted). Parties may stipulate to the classification of property. *Zurofsky v. Shaffer*, 236 N.C. App. 219, 236, 763 S.E.2d 755, 765 (2014) (citation omitted).

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7. Defense counsel later moved to introduce "Defendant's Exhibits 1 through 19," which would include the Retirement Statement as Exhibit 17. Plaintiff's counsel objected on the basis he had "not read all of [Defendant's exhibits]" and asked the trial court to "keep[ ] it to what the evidence was presented today." The trial court stated "[i]t's admitted in terms of the documents supporting the testimony today." Because Exhibit 17 supported testimony at trial, we consider it as having been admitted into evidence.

Here, the trial court's Order stated the parties had stipulated that a "marital portion" of Plaintiff's "military pension or retired pay . . . is subject to marital property division." The trial court therefore found "Defendant is entitled to a share of Plaintiff's military retirement benefits, as set out in the Decree below." In its Decree, the trial court stated "Plaintiff's military retired pay constitutes marital property to the extent it coincided with the marriage and shall be divided as follows: . . . . Plaintiff shall maintain Survivor Benefit Plan Coverage with Defendant as the beneficiary of said coverage."

At trial, neither party specifically raised the status of SBP for the purpose of classification. In particular, we observe that Plaintiff did not even mention SBP at trial—much less challenge its status as distributable marital property, as he now does on appeal. Absent specific arguments by the parties, the trial court appears to have analyzed SBP using the only evidence it had: Plaintiff's Retirement Statement. The Retirement Statement indicates that as of January 2023, money was being deducted from Plaintiff's gross military retirement pay to cover the cost of "Spouse Only" SBP coverage. The trial court, following the parties' stipulation to classifying Plaintiff's military retirement benefits as marital property, found "Defendant is entitled to a share of Plaintiff's military retirement benefits[.]" Finally, in its Decree, the trial court ordered Plaintiff to maintain SBP coverage with Defendant as the beneficiary. Thus, we cannot say the trial court, based on the stipulations and evidence before it, exceeded its authority by classifying SBP as marital property and ordering Plaintiff to maintain it with Defendant as the beneficiary.

The remaining question is whether this Court should reach the issue of how SBP—a federally administered benefit for military veterans—should interact with the North Carolina equitable distribution statute. Our appellate courts have not yet addressed this issue. In his brief, Plaintiff points us to *Ellison v. Ellison*, where this Court observed, "[i]t is unclear that SBP benefits are allocated pursuant to equitable distribution[.]" 242 N.C. App. at 390, 776 S.E.2d at 525. To be clear, this sentence is dicta. As the *Ellison* Court "[did] not recognize the present action as one for equitable distribution," it did not analyze the question of SBP in the context of equitable distribution. *Id.* Plaintiff next claims "no subsequent decision [after *Ellison*] has definitively resolved [the] issue" of SBP's status vis-a-vis equitable distribution. Our research does not reveal such a case either. But, contrary to Plaintiff's argument, it does not follow that this Court should now weigh in on an issue not argued at trial and barely referenced in the Record with scant briefing.

We therefore decline Plaintiff's request to conclude the trial court "erred in ordering [Plaintiff] to obtain SBP for [Defendant]."[8]

Instead, on remand, we instruct the trial court to hold a hearing wherein the parties may present arguments and evidence on the SBP issue. This hearing should permit arguments regarding the appropriate methods of classification, valuation, and distribution of SBP, including, but not limited to, the subject of whether SBP should be considered a component of Plaintiff's military retirement benefits or as a distinct asset subject to independent distribution. In its discretion, the trial court may reconsider whether Plaintiff may be required to "maintain" SBP as part of an equitable distribution order.

Conclusion

Thus, the trial court erroneously considered improper non-economic factors in determining an unequal distribution was equitable in this case. Therefore, the trial court erred in awarding an unequal distribution based on those factors. Consequently, the trial court's Order is vacated. Accordingly, for the foregoing reasons, we vacate the Order and remand this case to the trial court for further proceedings to reconsider its equitable distribution. In addition, the trial court may also reconsider the classification, valuation, and distribution of SBP based on argument and evidence presented by the parties.

VACATED AND REMANDED.

Judges CARPENTER and FREEMAN concur.

8. We note this assertion in Plaintiff's brief misstates the contents of the Order. The trial court ordered Plaintiff to "maintain" SBP, not to "obtain" it.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 MARCH 2026)

COOK v. MONTGOMERY No. 25-484	Caldwell (24CVD000991-130)	Vacated and Remanded.
CUMMINGS v. N.C. STATE BD. OF ELECTIONS No. 25-833	Wake (24CV002019-910)	Affirmed
FLETCHER HOSP., INC. v. N.C. DEP'T OF HEALTH & HUM. SERVS. No. 25-658	Office of Admin. Hearings (22DHR02385)	Affirmed
IN RE A.C-M.J. No. 25-641	Caldwell (23JT000027-130)	Affirmed
IN RE A.H. No. 25-471	Durham (20JA000163-310)	Affirmed
IN RE B.E. No. 25-103	Mecklenburg (21JA000537-590)	Affirmed
IN RE C.C. No. 25-526	Dare (22JA000049-270)	Affirmed
IN RE D.J. No. 24-680	Chatham (23JB000086-180)	Dismissed
IN RE E.J.S. No. 25-529	New Hanover (20JT000051-640) (20JT000163-640)	Affirmed
IN RE I.C.P. No. 25-443	Davidson (23JT000050-280) (23JT000051--280) (23JT000052-280)	Affirmed
IN RE K.C.G. No. 25-942	Cabarrus (24JB010031-120)	Vacated and Remanded
IN RE K.S. No. 25-400	Cabarrus (22JT000155-120)	Affirmed
IN RE L.M.C. No. 25-692	Haywood (24JA000059-430)	Affirmed
ISRAEL v. ZACHARY No. 25-493	Alamance (20CVS001146-000)	Affirmed in Part, Vacated in Part, and Remanded

MARTINEZ-MARTINEZ v. LOPEZ No. 24-843	Guilford (23CVS006387-400)	Dismissed
STATE v. ALLMAN No. 25-118	Cabarrus (23CR000177-120)	Vacated and Remanded.
STATE v. CURIEL-PEREZ No. 25-328	Rowan (21CR053892-790)	No Error
STATE v. GREENE No. 25-351	Wayne (22CR000245-950) (22CR050290-950)	No Error
STATE v. HINTON No. 25-401	Edgecombe (23CR345068-320) (23CR345070-320)	No Error
STATE v. NEWMONES No. 24-966	Beaufort (17CR052374-060) (17CR05237-6-060) (18CR050011-060)	No Error
STATE v. SHUPING No. 25-450	Randolph (23CR375500-750)	No Error
STATE v. STEPHENS No. 25-685	Sampson (20CR515554-810) (20CR051553-810)	NO ERROR IN PART, NO PREJUDICIAL ERROR IN PART NO PLAIN ERROR IN PART

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