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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JUNE 22, 2021

MAILING ADDRESS: The Judicial Department
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COURT OF APPEALS

CASES REPORTED

FILED 18 AUGUST 2020

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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SCHEDULE FOR HEARING APPEALS DURING 2021

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 11 and 25

February 8 and 22

March 8 and 22

April 12 and 26

May 10 and 24

June 7

August 9 and 23

September 6 and 20

October 4 and 18

November 1, 15, and 29

December 13

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

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

THE BROAD STREET CLINIC FOUNDATION, PLAINTIFF
v.
ORIN H. WEEKS, JR., INDIVIDUALLY AND AS TRUSTEE OF THE ORIN H. WEEKS, JR. REVOCABLE LIVING TRUST, PLANTATION VENTURE, LLC, IZORAH, LLC, EDWARD HILL, LLC, ROBERT H., LLC, AND CARTERET-CRAVEN ELECTRIC MEMBERSHIP CORPORATION, DEFENDANTS

No. COA19-1033

Filed 18 August 2020

Real Property—transfer fee covenant—subsequent owner—unavailability of equitable relief

Where the individual defendant purchased property for significantly less than its value and agreed to include in the deed a provision that plaintiff-clinic would receive 25% of the proceeds of the first conveyance of the property, the trial court properly granted defendants' motion to dismiss plaintiff's claim for payment in accordance with the 25% provision because the provision was a fee or charge upon the transfer of property and, therefore, constituted an unenforceable transfer covenant under N.C.G.S. Chapter 39A. Although defendant was a covenanting party to the deed, he was also a subsequent purchaser against whom the covenant could not be enforced, and equitable relief was unavailable because Chapter 39A provides that transfer fee covenants are not enforceable in law or equity.

Appeal by plaintiff from order entered 20 May 2019 by Judge George F. Jones in Carteret County Superior Court. Heard in the Court of Appeals 10 June 2020.

Harvell and Collins, P.A., by Wesley A. Collins and Samuel K. Morris-Bloom, for plaintiff-appellant.

Ward and Smith, P.A., by Michael J. Parrish and Alex C. Dale, for defendants-appellees Orin H. Weeks, Jr., individually and as Trustee of The Orin H. Weeks, Jr. Revocable Living Trust, Izorah, LLC, Edward Hill, LLC, and Robert H., LLC.

White & Allen, P.A., by John P. Marshall, and Womble Bond Dickinson (US) LLP, by Michael Montecalvo, for defendant-appellee Plantation Venture, LLC.

Blanco Tackabery & Matamoros, P.A., by Chad A. Archer and Ashley S. Rusher, for defendant-appellee Carteret-Craven Electric Membership Corporation.

ZACHARY, Judge.

Plaintiff The Broad Street Clinic Foundation appeals from the trial court's order granting Defendants' motions to dismiss its claims, asserting that the provision of a deed that Plaintiff seeks to enforce is not an unenforceable transfer fee covenant. After careful review, we affirm.

Background

The relevant factual allegations of Plaintiff The Broad Street Clinic Foundation's (the "Clinic's") complaint, which for purposes of this appeal are taken as true, are as follows: Among other assets, John R. Jones owned three valuable tracts of land, consisting of approximately 60 acres in Carteret County, North Carolina (the "Property"). Upon his death on 23 April 2015, Mr. Jones's 88-year-old wife, Lois B. Jones, inherited the Property.

Shortly after Mr. Jones's death, Mrs. Jones and Orin H. Weeks, Jr., negotiated the sale of the Property to Weeks. Although the Property's tax value exceeded $800,000, Weeks offered Mrs. Jones approximately $200,000; however, he suggested that the deed contain a provision obligating Weeks to give 25% of the proceeds of the first conveyance of the Property to the charitable organization of her choice. Mr. Jones was a dedicated supporter of the Clinic, a non-profit, free health clinic that provides medical care to underserved individuals in Carteret County and the surrounding areas. Accordingly, Mrs. Jones designated the Clinic as the charitable organization to benefit from Weeks's first conveyance of the Property.

Mrs. Jones agreed to accept Weeks's offer of $200,000 for the Property, with the proviso that she retain a life estate in the Property, and that the deed provide that the Clinic would receive 25% of the proceeds of the first conveyance of the Property.

On 21 May 2015, Mrs. Jones conveyed the Property to Weeks, and retained a life estate. On 22 May 2015, the deed was recorded at Book 1509, Page 191, Carteret County Register of Deeds (the "Jones Deed"). The deed, which the Clinic contends was prepared by Weeks's attorneys, also contained the agreed-upon "25% Provision."

> And the party of the second part, [Weeks,] for itself and its successors and assigns, hereby covenants and agrees with the parties of the first part[, Mrs. Jones,] that *upon the first conveyance of the Property from* [*Weeks*] *or its successors or assigns to a party other than Orin H. Weeks, Jr. or an heir or devisee of Orin H. Weeks, Jr.*, [*Weeks*] *or its successor or assign, as the case may be, will pay twenty-five percent (25%) of the gross proceeds less all customary costs (excluding any debt repayment) to be received by* [*Weeks*] *to The Broad Street Clinic Foundation*, or if The Broad Street Clinic Foundation does not then exist, then to Carteret County General Hospital Foundation Corporation, or if Carteret County General Hospital Foundation Corporation does not then exist, then to a similar non-profit organization serving Carteret County and Eastern North Carolina chosen by [Weeks].

(Emphasis added).

Mrs. Jones died later that year. The Clinic alleges that, following Mrs. Jones' death, Weeks "or a presently unknown associate" formed four limited liability companies: Defendant Plantation Venture, LLC; Defendant Izorah, LLC; Defendant Robert H., LLC; and Defendant Edward Hill, LLC.

On 17 August 2017, Weeks recorded a gift deed conveying title to a portion of the Property to Plantation Venture, LLC. On 24 January 2018, Weeks conveyed approximately 10.35 acres of the Property by special warranty deed to Defendant Robert H., LLC; approximately 10.33 acres of the Property by special warranty deed to Defendant Izorah, LLC; and approximately 10.44 acres of the Property by special warranty deed to Defendant Edward Hill, LLC. The revenue stamps on the Robert H., LLC deed, the Izorah, LLC deed, and the Edward Hill, LLC deed indicate that the land was conveyed for no consideration. On 22 February 2018,

Plantation Venture, LLC, used 4.588 acres of the land as collateral for a $750,000 loan from Defendant Carteret-Craven Electric Membership Corporation, and executed a deed of trust and security agreement securing the loan.

The Clinic eventually learned about Weeks's conveyance to Plantation Venture, LLC and, by letter dated 14 June 2018, demanded payment in accordance with the 25% Provision. By letter dated 18 June 2018, Weeks informed the Clinic's counsel that no proceeds had been generated by the conveyance, and that therefore the Clinic was "not entitled to anything."

On 6 November 2018, the Clinic filed its complaint against Defendants and its notice of *lis pendens*. On 16 November 2018, the Clinic filed an amended complaint, adding Defendant Carteret-Craven Electric Membership Corporation as a named party. The amended complaint included two requests for declaratory judgment, as well as a claim to void transfers of trust property, and claims for breach of contract/covenant (Weeks only); breach of fiduciary duty (Weeks only); constructive fraud (Weeks only); interference with prospective advantage (Plantation Venture, LLC; Izorah, LLC; Edward Hill, LLC; and Robert H., LLC only); fraud (excluding Carteret-Craven Electric Membership Corporation); unjust enrichment (excluding Carteret-Craven Electric Membership Corporation); civil conspiracy (excluding Carteret-Craven Electric Membership Corporation); punitive damages (excluding Carteret-Craven Electric Membership Corporation); unfair and deceptive trade practices (excluding Carteret-Craven Electric Membership Corporation); and piercing the limited liability shield (excluding Carteret-Craven Electric Membership Corporation).

On 21 December 2018, Weeks, individually and as Trustee of the Orin H. Weeks, Jr., Revocable Living Trust; Izorah, LLC; Edward Hill, LLC; and Robert H., LLC moved to dismiss the Clinic's claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, and filed their answer to the Clinic's amended complaint. In their answer, these defendants asserted, *inter alia*, that the Clinic "has no right to bring any claim against" them because, "[t]o the extent that the Jones Deed required the payment of any amount of proceeds to the Clinic upon the sale of any portion of the [Property], such a requirement is void, invalid, and/or unenforceable as a matter of North Carolina law and public policy," in that "[a]ny such requirement is a transfer fee covenant which is specifically prohibited by, and deemed void under, N.C. Gen. Stat. § 39A-1 *et seq*." That same day, Plantation Venture, LLC also moved to

dismiss the Clinic's claims pursuant to Rule 12(b)(6), asserting that the 25% Provision "is an unenforceable 'transfer fee covenant' prohibited by N.C. Gen. Stat. § 39A." Plantation Venture, LLC filed its answer to the Clinic's amended complaint as well. Lastly, on 27 December 2018, Carteret-Craven Electric Membership Corporation moved to dismiss the Clinic's claims pursuant to Rule 12(b)(1) and (6), and moved for attorneys' fees.

On 7 January 2019, Defendants' motions came on for hearing in Carteret County Superior Court before the Honorable George F. Jones. On 20 May 2019, the trial court entered an order granting Defendants' motions to dismiss. The Clinic entered timely notice of appeal.

Discussion

Each of the Clinic's claims is predicated on the enforceability of the 25% Provision. Accordingly, the determinative issue at bar is whether the 25% Provision in the Jones Deed is an unenforceable transfer fee covenant.

I. Standard of Review

A party may move for the dismissal of a claim or claims based on the complaint's "[f]ailure to state a claim upon which relief can be granted[.]" N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2019). "The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citation omitted). "In ruling on the motion[,] the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Id.* (citation omitted). "[T]he well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not[.]" *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (citation omitted).

Dismissal of a claim under Rule 12(b)(6) is proper "(1) when the complaint on its face reveals that no law supports [the] plaintiff's claim; (2) when the complaint reveals on its face the absence of facts sufficient to make a claim; [or] (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Intersal, Inc. v. Hamilton*, 373 N.C. 89, 98, 834 S.E.2d 404, 411 (2019) (citation omitted). "However, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of a claim which would entitle the plaintiff to relief." *Id.* (citation and internal quotation marks omitted).

Upon review of a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, this Court must determine "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief could be granted under some legal theory." *McGuire v. Dixon*, 207 N.C. App. 330, 336, 700 S.E.2d 71, 75 (2010) (citation omitted). In doing so, "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." *Wilson v. Pershing*, 253 N.C. App. 643, 651, 801 S.E.2d 150, 157 (2017) (citation and internal quotation marks omitted).

II. Analysis

On appeal, the Clinic argues that the trial court erred by granting Defendants' motions to dismiss because the 25% Provision is not a transfer fee covenant under Chapter 39A, and if it were, it is nonetheless enforceable.

Transfer fee covenants are prohibited under Chapter 39A of the North Carolina General Statutes. North Carolina's "public policy . . . favors the marketability of real property and the transferability of interests in real property free from title defects, unreasonable restraints on alienation, and covenants or servitudes that do not touch and concern the property." N.C. Gen. Stat. § 39A-1(a). "A transfer fee covenant violates this public policy by impairing the marketability of title to the affected real property and constitutes an unreasonable restraint on alienation and transferability of property, regardless of the duration of the covenant or the amount of the transfer fee set forth in the covenant." *Id.* § 39A-1(b).

In accordance with the public policy enunciated by our General Assembly in Chapter 39A, transfer fee covenants are unenforceable.

> Any transfer fee covenant or any lien that is filed to enforce a transfer fee covenant or purports to secure payment of a transfer fee, *shall not run with the title to real property* and *is not binding on or enforceable at law or in equity* against any subsequent owner, purchaser, or mortgagee of any interest in real property as an equitable servitude or otherwise.

Id. § 39A-3(a) (emphases added).

Whether the 25% Provision of the Jones Deed constitutes an unenforceable transfer fee covenant under Chapter 39A is a matter of statutory

interpretation. "Statutory interpretation properly begins with an examination of the plain words of a statute. When a statute is clear and unambiguous, the Court will give effect to the plain meaning of the words without resorting to judicial construction." *McGuire*, 207 N.C. App. at 337, 700 S.E.2d at 75 (citations and internal quotation marks omitted).

A. Transfer Fee Covenant

A transfer fee covenant as defined in Chapter 39A is "a declaration or covenant purporting to affect real property that requires or purports to require the payment of a transfer fee to the declarant or other person specified in the declaration or covenant or to their successors or assigns, upon a subsequent transfer of an interest in real property." N.C. Gen. Stat. § 39A-2(3). Chapter 39A defines a transfer fee, in pertinent part, as:

> a fee or charge payable upon the transfer of an interest in real property or payable for the right to make or accept such transfer, regardless of whether the fee or charge is a fixed amount or is determined as a percentage of the value of the property, the purchase price, or other consideration given for the transfer.

Id. § 39A-2(2).

The Clinic contends that the 25% Provision is not a fee or charge as defined by *Black's Law Dictionary*, which defines the term "fee" as "[a] charge or payment for labor or services, esp[ecially] professional services," and the term "charge" as "[p]rice, cost, or expense[.]" *Black's Law Dictionary* (10th ed. 2014). In the Clinic's view, the right to a percentage of the proceeds of the first conveyance of the Property is materially different from a fee or charge. A thorough appraisal of Chapter 39A does not support the narrow reading propounded by the Clinic. Upon review of the plain language of the statute, to which this Court must give effect, a charge of 25% of the gross proceeds of the first conveyance, less customary costs, is manifestly "a fee or charge payable upon the transfer of an interest in real property . . . as a percentage of . . . the purchase price, . . . given for the transfer." N.C. Gen. Stat. § 39A-2(2).

In addition, the Clinic asserts that the 25% Provision is not a fee or charge upon transfer under Chapter 39A, but is rather the payment of subsequent additional consideration for the Property. N.C. Gen. Stat. § 39A-2(2)(a)-(j) sets forth several types of fees that "shall not be considered a 'transfer fee' " within the purview of Chapter 39A. *Id.* Subsection (a) exempts from the definition of transfer fee

> [a]ny consideration payable by the grantee to the grantor for the interest in real property being transferred, including any *subsequent additional consideration for the property* payable by the grantee based upon any subsequent appreciation, development, or sale of the property that, once paid, shall not bind successors in title to the property.

Id. § 39A-2(2)(a) (emphasis added).

Weeks's obligation to pay a percentage of the proceeds to the Clinic upon sale of the Property seems consonant with the statutory definition of additional consideration, given the low price Weeks paid for the Property. However, the statute plainly provides that the additional consideration must be payable "by the grantee to the grantor." *Id.* "This language is clear and unambiguous, and we are not at liberty to divine a different meaning through other methods of judicial construction." *Haarhuis v. Cheek*, 261 N.C. App. 358, 366, 820 S.E.2d 844, 851 (2018) (citation and internal quotation marks omitted), *disc. review denied*, 372 N.C. 298, 826 S.E.2d 708 (2019).

In the instant case, the 25% Provision calls for payment by the grantee, Weeks, *to a third party*, the Clinic, rather than to the grantor. Thus, the 25% Provision is not exempt from the definition of a transfer fee, and is instead a fee or charge upon transfer of the Property, as defined in Chapter 39A.

B. Enforceability of a Transfer Fee Covenant

The Clinic also argues that even if the 25% Provision were a transfer fee covenant, it is enforceable against Weeks because Weeks is a covenanting party to the deed rather than a subsequent owner or purchaser of the Property, and against the successor LLCs because they exist merely as the alter ego of Weeks. This argument also lacks merit.

N.C. Gen. Stat. § 39A-3(a) provides that transfer fee covenants are "not binding on or enforceable at law or in equity against any subsequent owner, purchaser, or mortgagee of any interest in property." The Clinic correctly states that Weeks was a party to the transfer fee covenant, and that Chapter 39A does not include covenanting parties in the list of those against whom a transfer fee covenant may not be enforced. Nevertheless, Weeks is also a subsequent owner of the Property, taking his interest from Mrs. Jones. Chapter 39A does not exclude subsequent owners who are also covenanting parties from the prohibition on enforcement.

Here, the parties interpret the meaning and significance of the provisions of Chapter 39A differently; that does not, however, render

it ambiguous. Ambiguity exists where the language is "reasonably susceptible" to different interpretations. *See Simmons v. Waddell*, 241 N.C. App. 512, 520, 775 S.E.2d 661, 671 (citation omitted), *disc. review denied*, 368 N.C. 355, 776 S.E.2d 684 (2015). However, "[p]arties can differ as to the interpretation of language without its being ambiguous[.]" *Walton v. City of Raleigh*, 342 N.C. 879, 881-82, 467 S.E.2d 410, 412 (1996).

When Chapter 39A is read and interpreted as a whole, it is evident that the 25% Provision is a transfer fee covenant, and that Weeks is a subsequent owner against whom a transfer fee covenant cannot be enforced. Our legislature has provided that transfer fee covenants "shall not run with the title to real property and [are] not binding on or enforceable at law or in equity against any subsequent owner, purchaser, or mortgagee of any interest in real property as an equitable servitude or otherwise." N.C. Gen. Stat. § 39A-3(a). Thus, the Clinic cannot enforce the 25% Provision.

C. Equitable Relief

Finally, the Clinic contends that Defendants are estopped from asserting that the 25% Provision is an unenforceable transfer fee covenant, reminding this Court that "[e]quity serves to moderate the unjust results that would follow from the unbending application of common law rules and statutes." *Brooks v. Hackney*, 329 N.C. 166, 173, 404 S.E.2d 854, 859 (1991).

Yet Chapter 39A specifically provides that transfer fee covenants are not "enforceable at law or *in equity*," N.C. Gen. Stat. § 39A-3 (emphasis added), and therefore, this Court is not empowered to achieve an equitable result in this matter. As Weeks concedes, he proposed a purchase price of approximately one quarter of the property's tax value, and he "suggested that 25% of any future sales proceeds be given to a charity." Yet, at Weeks's request, his attorneys prepared a deed with an unenforceable transfer fee covenant. Nevertheless, Weeks correctly maintains that our courts have declined to enforce a promise that is in violation of public policy. *See, e.g.*, *Thompson v. Thompson*, 313 N.C. 313, 314-15, 328 S.E.2d 288, 290 (1985) (noting that an attorney's contingency fee agreement in a domestic matter was unenforceable because it was void as against public policy); *Glover v. Insurance Co.*, 228 N.C. 195, 198, 45 S.E.2d 45, 47 (1947) (holding that an insurer could not enforce exclusion in fire insurance policy, which deviated from the requisite standard form, as void as against public policy); *Lee v. Oates*, 171 N.C. 717, 721, 88 S.E. 889, 891 (1916) (holding that a provision in a deed prohibiting a life tenant from selling her life estate was void as against public policy).

Lacking the authority to effectuate another outcome, we must agree with Weeks's assertion that "[w]hether to honor [his] promise is a decision that is personal to [him], but is not one that the law may compel[.]"

Conclusion

Accordingly, in that the facts alleged in the Clinic's complaint necessarily defeat its claims, we affirm the trial court's order granting Defendants' motions to dismiss. Because the dispositive issue is whether the 25% Provision constitutes an unenforceable transfer fee covenant, and we have held that it does, we decline to address additional arguments.

AFFIRMED.

Judges BERGER and BROOK concur.

JANE DOE AND JOHN DOE, PLAINTIFFS
v.
CITY OF CHARLOTTE AND G.M. SMITH, OFFICIALLY AND INDIVIDUALLY, DEFENDANTS

No. COA19-497

Filed 18 August 2020

1. Civil Procedure—reconsideration of pretrial order—Rule 59—not appropriate method

In a case involving multiple claims against a police officer and a city including false imprisonment and malicious prosecution, plaintiffs' "Motion to Reconsider" invoking Rule 59 did not toll the time to appeal from an order granting partial summary judgment for defendants, because Rule 59 is not an appropriate method of requesting reconsideration of an interlocutory, pre-trial order. Since plaintiffs did not include the order denying their motion to reconsider in their notice of appeal, their appeal of the summary judgment order—more than thirty days after it was entered—was untimely.

2. Appeal and Error—interlocutory order—Rule 54(b) certification—language not contained in judgment—insufficient to confer appellate jurisdiction

In a case involving multiple claims against a police officer and city including false imprisonment and malicious prosecution, plaintiffs' request for certification, pursuant to Rule 54(b) of the Rules of

Civil Procedure, of the trial court's order granting partial summary judgment to defendants was insufficient to invoke the appellate court's jurisdiction where the certification language was not contained in the body of the order being appealed.

3. Appeal and Error—interlocutory order—grounds for substantial rights—inconsistent verdicts—more than mere assertion required

In a case involving multiple claims against a police officer and city including false imprisonment and malicious prosecution, plaintiffs' attempt to assert that a substantial right was affected by the trial court's entry of summary judgment for defendants was ineffective where plaintiffs merely stated there was a risk of inconsistent verdicts without providing any explanation of how, in this particular case, different fact-finders might reach results that could not be reconciled with each other.

4. Appeal and Error—jurisdictional defects—writ of certiorari—requirement of filing a petition—issuance by court on own motion

In a case involving multiple claims against a police officer and city including false imprisonment and malicious prosecution, despite numerous jurisdictional errors by plaintiffs to invoke appellate jurisdiction (of an order granting partial summary judgment to defendants) and despite plaintiffs' failure to file a petition for writ of certiorari, the Court of Appeals opted, in its discretion, to issue a writ of certiorari, since the case presented important issues of justice and liberty, and plaintiffs' issues on appeal were meritorious.

5. Immunity—law enforcement officer—malicious conduct—genuine issue of material fact

In a case involving multiple claims against a police officer and city including false imprisonment and malicious prosecution, where plaintiffs' evidence raised a genuine issue of material fact regarding whether the officer acted with malice when causing the issuance of a citation for misdemeanor child abuse—despite lack of evidence and eyewitness observations from two other officers who informed the late-arriving officer the conduct was not actionable—the trial court erred by granting summary judgment for defendants based on the public immunity doctrine.

Appeal by plaintiffs from order entered 15 January 2019 by Judge Daniel A. Kuehnert in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 November 2019.

Tin, Fulton, Walker & Owen, PLLC, by S. Luke Largess, for plaintiffs-appellants.

Parker Poe Adams & Bernstein LLP, by Daniel E. Peterson, for defendant-appellee City of Charlotte.

Law Offices of Lori Keeton, by Lori R. Keeton, for defendant-appellee G.M. Smith.

DIETZ, Judge.

Plaintiff Jane Doe got lost while driving her children to a birthday party. She stopped in a parking lot, hopped out of her car, and asked someone nearby for directions. Witnesses said Doe was gone from her car somewhere between one and two minutes.

During that time, Captain G.M. Smith, a law enforcement officer, arrived. According to Doe's evidence, Captain Smith was inexplicably angry and hostile towards Doe for leaving her children in an unattended car. Captain Smith ignored other officers who said Doe had done nothing wrong and ultimately charged Doe with misdemeanor child abuse.

After the State dropped the charges and the police department reprimanded Captain Smith, Doe and her husband sued Smith and his employer, the City of Charlotte. The trial court dismissed a number of their claims based on public official immunity, finding that there was insufficient evidence that Captain Smith acted with malice.

A central issue in this appeal is our authority to hear it at all. As explained below, Plaintiffs made a series of avoidable mistakes that deprived this Court of jurisdiction to hear the case—their appeal was untimely; their Rule 54(b) certification was defective; their statement of the grounds for appellate review is inadequate; and instead of petitioning for a writ of certiorari, they requested that this Court "treat this appeal as writ for certiorari." Nevertheless, because this case raises important issues and Plaintiffs have a meritorious argument, we exercise our discretion to issue a writ of certiorari and address the merits of this appeal.

Reaching the merits, we reverse. Plaintiffs' evidence, viewed in their favor, is sufficient to create a genuine issue of material fact on the issue of malice. We acknowledge that Defendants have their own evidence indicating that Captain Smith acted properly and without malice. But this Court cannot choose between that competing evidence—a jury must do that. Accordingly, we reverse the trial court's grant of summary judgment and remand for further proceedings.

Facts and Procedural History

The following recitation of facts represents Plaintiffs' version of events, viewed in the light most favorable to them. As the non-movants at the summary judgment stage, Plaintiffs are entitled to have disputed facts resolved in their favor during our appellate review. *See Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). We note that Defendants have their own evidence and witness testimony disputing many of these facts. Under the applicable standard of review, we must ignore Defendants' competing evidence at this stage in the case. *Id.*

Plaintiff Jane Doe[1] got lost while driving her young children to a birthday party inside a large nature preserve in Mecklenburg County. Realizing that she must have missed a turn, Doe pulled into a parking area, hopped out of her car, and asked a nearby park employee for directions. Two Charlotte-Mecklenburg Police Department officers, Aaron Deroba and David Gathings, were on patrol duty in the park and saw Doe drive up, exit her car, and walk toward a wooden fence to ask a park employee for directions.

Doe left her children unattended in her car while she asked for directions. According to a park employee who witnessed these events, it took about sixty seconds for Doe to walk to the fence, get directions, and jog back to her car.

As Doe returned to her car, another Charlotte-Mecklenburg Police Department officer, Captain G.M. Smith,[2] drove into the parking area in his patrol car and saw Doe's children unattended in her car. He then signaled for Officers Deroba and Gathings to come to him. According to Officer Gathings, no more than two minutes passed from the time they saw Doe leave her car to ask for directions and the time they responded to Captain Smith.

As Doe approached her car, Captain Smith ordered her to stop. Captain Smith was visibly angry and confronted Doe for leaving her children unattended in a car with the windows rolled up. Doe explained that she had only been gone for a moment and opened the driver's door to demonstrate that the car was still cool. Captain Smith briefly stuck his arm inside the car and responded, "No, it's not."

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1. We assume that the names of Jane Doe and her husband John Doe are pseudonyms used without objection by Defendants. Jane Doe's real name is redacted in some portions of the record on appeal but appears unredacted in various other portions of the record.

2. The parties' briefing and the record on appeal use varying departmental ranks when referring to Smith. For consistency, we use Captain Smith.

Captain Smith then informed Doe that he was charging her with child abuse. Both Officer Gathings and Officer Deroba told Captain Smith that they had observed Doe and that she had not left her children in the car for a dangerous amount of time. Captain Smith responded, "That doesn't matter." Captain Smith was "angry" and "aggressive" and he "bullied" the other officers on the scene throughout the encounter.

According to an internal police department investigation, Officers Gathings and Deroba spoke outside Captain Smith's presence and agreed that there was no probable cause to arrest Doe. Doe also asked the officers "why Captain Smith was being so mean to her" and Officer Deroba responded that "he did not know why."

Ultimately, Captain Smith instructed Officer Gathings to issue Doe a citation for misdemeanor child abuse. Both Officer Deroba and Officer Gathings believed that Doe had not done anything wrong and told Captain Smith that they did not think there was probable cause to issue a citation. The officers later reported to departmental investigators that "Captain Smith overreacted and wasn't being objective or listening to what we observed." Officer Deroba told investigators, "It didn't seem like Captain Smith wanted to listen to anything I had to say." Because Officer Gathings felt bound to obey a superior officer, he issued Doe the citation for misdemeanor child abuse.

In December 2014, the State dismissed the criminal case against Doe. In 2015, following an investigation, Captain Smith received a written reprimand from the Charlotte-Mecklenburg Police Department for making an arrest that Smith knew, or should have known, was not in accordance with the law or department procedure.

In 2017, Jane Doe and her husband John Doe filed a complaint against Captain Smith in his individual and official capacities and against the City of Charlotte, his employer, alleging claims for negligence, loss of consortium, false imprisonment, malicious prosecution, and claims under 42 U.S.C. § 1983.

Defendants later moved for summary judgment. On 15 January 2019, the trial court entered partial summary judgment, dismissing all claims in the complaint except the Section 1983 claim against Smith.

Plaintiffs then filed a "Motion to Reconsider," citing Rule 59 of the Rules of Civil Procedure. On 4 February 2019, the trial court denied the motion. Several weeks after the trial court denied Plaintiffs' motion to reconsider, Plaintiffs moved to certify the original summary judgment order for immediate appeal pursuant to Rule 54(b) of the Rules of Civil Procedure.

On 1 March 2019, the trial court entered a stand-alone order granting Plaintiffs' motion and stating that the trial court "hereby certifies that its Summary Judgment Order is a final judgment as to all claims against the City of Charlotte and as to the state law claims against Defendant Smith, and that there is no just reason for delay in entering that final judgment."

That same day, 1 March 2019, Plaintiffs appealed the trial court's 15 January 2019 summary judgment order, based on the newly entered Rule 54(b) certification. Plaintiffs' notice of appeal states that it is an appeal from "that Order granting partial Summary Judgment as to less than all claims and less than all parties in this action." The notice of appeal does not mention the 4 February 2019 denial of the motion to reconsider.

Analysis

I. Appellate Jurisdiction

We begin our analysis by addressing Defendants' challenge to this Court's jurisdiction. As explained below, Plaintiffs made a series of avoidable mistakes that deprived this Court of jurisdiction to reach the merits of the appeal. Although this Court frequently excuses ordinary, non-jurisdictional rules violations by litigants, jurisdictional defects are different. This Court cannot excuse a jurisdictional mistake; that mistake "precludes the appellate court from acting in any manner other than to dismiss the appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008). Because jurisdictional defects compel such severe consequences, we discuss the mistakes that occurred here for the benefit of the parties in this case and for future litigants.

A. Improper use of Rule 59(e) motion to alter or amend a judgment

[1] We begin with Defendants' argument that this appeal is untimely. "A timely notice of appeal is required to confer jurisdiction upon this Court." *Raymond v. Raymond*, 257 N.C. App. 700, 703, 811 S.E.2d 168, 170 (2018). Plaintiffs concede that they did not file their notice of appeal from the summary judgment order within thirty days of entry of that order, the time period that ordinarily applies to appeals from civil rulings. N.C. R. App. P. 3. But they argue that the time to appeal was tolled because they filed what is often called a "post-trial" motion under Rule 59 of the Rules of Civil Procedure and, by doing so, tolled the time to appeal until the trial court ruled on that motion. *See* N.C. R. App. P. 3(c)(3).

Rule 59 cannot be used in this way; under settled precedent from this Court, Rule 59 is not an appropriate means of seeking reconsideration of interlocutory, pre-trial rulings of trial courts. *See*, *e.g.*, *Tetra*

Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC, 250 N.C. App. 791, 796, 794 S.E.2d 535, 538 (2016). We could end our analysis with this statement of settled law but, because Plaintiffs' mistake stems from continuing confusion among litigants about the effect of so-called "motions to reconsider," we will explain why Rule 59 is an inappropriate vehicle for seeking reconsideration of a pre-trial ruling by a trial court.

As an initial matter, this confusion likely results from there being no mention of a "motion to reconsider" in the North Carolina Rules of Civil Procedure. Thus, litigants seeking to have the trial court reconsider a ruling often search for wording in our procedural rules that permits their motion.

They might rely on Rule 7, which authorizes the use of "motions" as a means to apply "to the court for an order" on some subject, but does not enumerate, or expressly limit, the types of motions that may be made. N.C. R. Civ. P. 7(b).

Or they might rely on Rule 54(b), which states that "any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." N.C. R. Civ. P. 54(b). This implies that a litigant may ask the trial court to revise any decision in the case until the entry of a final judgment on all claims as to all parties.

But sometimes, litigants searching for the procedural mechanism for a "motion to reconsider" come across Rule 59(e), which it titled "Motion to alter or amend a judgment" and states that "a motion to alter or amend the judgment under section (a) of this rule shall be served not later than 10 days after entry of the judgment." N.C. R. Civ. P. 59(e).

This seems a relatively close fit—after all, most motions to reconsider are, in essence, asking the court to "alter or amend" some ruling by the court. And, importantly, Rule 59 offers a convenient, additional benefit. Ordinarily, when a litigant makes a motion to reconsider, the clock is still ticking on the 30-day deadline to appeal the underlying ruling. N.C. R. App. P. 3(c)(1), (2). But Rule 3 of the Rules of Appellate Procedure states that when a litigant makes a timely motion under Rule 59, "the thirty-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion." N.C. R. App. P. 3(c)(3).

The problem with using Rule 59 to seek reconsideration of a pre-trial order is the wording of the rule itself. For ease of reference, we include the relevant portions of Rule 59 below:

Rule 59. New trials; amendment of judgments.

(a) Grounds.—A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:

(1) Any irregularity by which any party was prevented from having a fair trial;

(2) Misconduct of the jury or prevailing party;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at trial;

(5) Manifest disregard by the jury of the instructions of the court;

(6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

(7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;

(8) Error in law occurring at the trial and objected to by the party making the motion; or

(9) Any other reason heretofore recognized as grounds for a new trial.

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

. . .

(e) Motion to alter or amend a judgment.—A motion to alter or amend the judgment under section (a) of this rule shall be served not later than 10 days after entry of the judgment.

N.C. R. Civ. P. 59.

Everything about Rule 59(a), from its introduction governing "new trials," to the nine enumerated grounds, to the concluding text addressing "an action tried without a jury," indicates that this rule applies only after a trial on the merits. And Rule 59(e) expressly states that it applies only to issues for which Rule 59(a) would apply, but for which the moving party seeks to alter or amend the judgment, not to obtain a new trial.

Relying on the plain text of Rule 59, several decisions of this Court have held that Rule 59 does not apply to pre-trial rulings. *See Sfreddo v. Hicks*, __ N.C. App. __, __, 831 S.E.2d 353, 356 (2019); *Tetra Tech Tesoro*, 250 N.C. App. at 796, 794 S.E.2d at 538; *Bodie Island Beach Club Ass'n, Inc. v. Wray*, 215 N.C. App. 283, 294, 716 S.E.2d 67, 76 (2011).

This interpretation of Rule 59(e) is strengthened by contrasting it with the similarly worded provision in Rule 59(e) of the Federal Rules of Civil Procedure. As we have observed, Rule 59(e) of the Federal Rules of Civil Procedure is "broader than our State's counterpart: it permits a motion to 'alter or amend a judgment' generally, unlike the State rule, which limits its application to a 'motion to alter or amend the judgment under section (a) of this rule.' " *Tetra Tech Tesoro*, 250 N.C. App. at 798, 794 S.E.2d at 539.

The North Carolina Rules of Civil Procedure "are modeled after the federal rules." *Sutton v. Duke*, 277 N.C. 94, 99, 176 S.E.2d 161, 164 (1970). For this reason, when our rules depart from the corresponding language of the federal rules, we must be particularly mindful of that differing language and the intent behind it. *Id.* Here, the drafters of our State's version of Rule 59(e) chose to limit the grounds for a motion to alter or amend a judgment to those listed in Rule 59(a), and we must give meaning to that deliberate choice of language.

Moreover, there are strong policy reasons for interpreting Rule 59 according to its plain text. As we previously have observed, the Rules of Civil Procedure "are enacted by our General Assembly, often following careful review by experts in the Bar. It undermines the purpose of the rules if the appellate courts expand their meaning beyond the written text, forcing litigants to research case law or consult treatises to fully understand the procedures that apply in civil actions." *Tetra Tech Tesoro*, 250 N.C. App. at 799, 794 S.E.2d at 539–40. A plain reading of the grounds listed in Rule 59(a) unambiguously demonstrates that those grounds apply only after trial.

Finally, we note that this interpretation does not leave litigants without a procedural vehicle to seek reconsideration of most pre-trial orders. Rule 54 draws a distinction between final judgments and interlocutory

rulings: "A judgment is either interlocutory or the final determination of the rights of the parties." N.C. R. Civ. P. 54(a). The Rule further provides that "in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." N.C. R. Civ. P. 54(b). Thus, in a case like this one involving partial summary judgment, the party seeking reconsideration can move for that relief under Rule 54(b).

Accordingly, we hold that litigants cannot bring a motion under Rule 59(e) to seek reconsideration of a pre-trial ruling by the trial court. Rule 59(e) is available only on the grounds enumerated in Rule 59(a) and they apply only after a trial on the merits. As a result, even if a litigant cites Rule 59 in making a "motion to reconsider" a pre-trial order, that motion will not toll the time to appeal under Rule 3 of the Rules of Appellate Procedure. Applying this holding here, Plaintiffs' time to appeal was not tolled by their mistaken Rule 59 motion and the appeal of the underlying summary judgment order was not timely.[3]

B. The flawed "stand-alone" Rule 54(b) certification

[2] Plaintiffs' mistaken reliance on Rule 59(e) is not the only jurisdictional error they made in this case. Plaintiffs also made a series of mistakes in their attempt to confer appellate jurisdiction over the admittedly interlocutory appeal.

In appeals from final judgments, the appealing party confers jurisdiction on this Court by timely filing a notice of appeal. *Dogwood Dev. & Mgmt. Co., LLC*, 362 N.C. at 197, 657 S.E.2d at 365. But the jurisdictional rules are different when litigants appeal from non-final, interlocutory orders because "[a]s a general rule, there is no right of appeal from an interlocutory order." *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 76, 772 S.E.2d 93, 95 (2015). "The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Id.*

As a result, interlocutory rulings are subject to a much stricter rule of appealability. In most cases, an interlocutory ruling is immediately appealable "in only two circumstances: (1) if the trial court has certified

3. Plaintiffs could have timely appealed the denial of the motion to reconsider by simply including that order among those listed in the notice of appeal. But, for whatever reason, Plaintiffs chose to appeal only the underlying partial summary judgment order, further limiting the scope of this Court's review.

the case for appeal under Rule 54(b) of the Rules of Civil Procedure; and (2) when the challenged order affects a substantial right of the appellant that would be lost without immediate review." *Campbell v. Campbell*, 237 N.C. App. 1, 3, 764 S.E.2d 630, 632 (2014).

We begin with Plaintiffs' attempt to appeal based on a certification under Rule 54(b). Rule 54(b) provides that "[w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim . . . the court may enter a final judgment as to one or more but fewer than all of the claims . . . if there is no just reason for delay *and it is so determined in the judgment*." N.C. R. Civ. P. 54(b) (emphasis added). An order that meets these criteria, and includes the necessary language, is then immediately appealable despite being non-final in nature. *Branch Banking & Trust Co. v. Peacock Farm, Inc.*, 241 N.C. App. 213, 217, 772 S.E.2d 495, 499, *aff'd per curiam*, 368 N.C. 478, 780 S.E.2d 553 (2015).

Importantly, in *Peacock Farm* this Court (and, through a one-word *per curiam* affirmance, our Supreme Court) rejected the notion that a trial court could go back and "certify" a previously entered order as immediately appealable under Rule 54(b). Because the plain text of Rule 54(b) includes the phrase "and it is so determined in the judgment," this Court reasoned that "Rule 54(b) cannot be used to create appellate jurisdiction based on certification language that is not contained in the body of the judgment itself from which appeal is being sought." *Id.* Thus, a "stand-alone" Rule 54(b) certification included in an order that "did not set out the substantive basis" for the underlying ruling is insufficient to permit an interlocutory appeal. *Id.*

Later cases applying *Peacock Farm* have observed that there is an easy work-around in this situation. As noted above, Rule 54 permits trial courts to change their interlocutory orders at any time before entry of final judgment. N.C. R. Civ. P. 54(b). So, in a case like this one involving partial summary judgment, the trial court simply could "amend the initial order" by entering a new order with the same substantive language as the initial order but with the additional Rule 54(b) certification language added. *See, e.g.*, *Martin v. Landfall Council of Ass'ns, Inc.*, 263 N.C. App. 410, 821 S.E.2d 894, 2018 WL 6613724, at *4 (2018) (unpublished). Then, the aggrieved party can appeal that new order. *Id.*

Unfortunately, Plaintiffs did not follow this guidance from our precedent; instead, they did the one thing that our precedent repeatedly has held will subject the appeal to dismissal. Accordingly, the stand-alone Rule 54(b) certification in this case is ineffective and does not confer appellate jurisdiction over the challenged summary judgment order.

C. Inadequate explanation of the grounds for substantial rights

[3] Plaintiffs also contend that the Rule 54(b) certification was unnecessary because the challenged order affects a substantial right. *See* N.C. Gen. Stat. §§ 7A-27, 1-277. To confer appellate jurisdiction based on a substantial right, "the appellant must include in its opening brief, in the statement of the grounds for appellate review, sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019).

Here, Plaintiffs contend that there is a risk of "inconsistent verdicts" sufficient to satisfy the substantial rights doctrine. "The inconsistent verdicts doctrine is a subset of the substantial rights doctrine and one that is often misunderstood. In general, there is no right to have all related claims decided in one proceeding." *Shearon Farms Townhome Owners Ass'n II, Inc. v. Shearon Farms Dev., LLC*, __ N.C. App. __, __, __ S.E.2d __, __ (2020). "Thus, the risk that a litigant may be forced to endure two trials, rather than one, does not by itself implicate a substantial right, even if those separate trials involve related issues or stem from the same underlying event." *Id.*

But things are different when there is a risk of "inconsistent verdicts," meaning "a risk that different fact-finders would reach *irreconcilable* results when examining the same factual issues a second time." *Denney*, 264 N.C. App. at 19, 824 S.E.2d at 439 (emphasis added). Importantly, "[t]he mere fact that claims arise from a single event, transaction, or occurrence does not, without more, necessitate a conclusion that inconsistent verdicts may occur." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 80–81, 711 S.E.2d 185, 190–91 (2011). As a result, the appellant cannot meet its burden under the inconsistent verdicts doctrine simply by asserting that "the facts involved in the claims remaining before the trial court may overlap with the facts involved in the claims that have been dismissed." *Id.* Instead, the appellant must explain to the Court how, in a second trial on the challenged claims, a second fact-finder might reach a result that cannot be reconciled with the outcome of the first trial. *Denney*, 264 N.C. App. at 18, 824 S.E.2d at 439.

Plaintiffs did not do so here. They asserted, categorically and in a single sentence, that all the claims in this case involve the "same facts and legal questions" concerning probable cause, without explaining how or why a jury's consideration of those facts in the various state and federal claims in this case could lead to irreconcilable results. In effect, Plaintiffs asked this Court to comb through the record to understand the

facts, research the elements of the various state and federal claims, and then come up with a legal theory that links these separate claims (all with distinct legal elements) to an underlying, determinative question of probable cause. That is not our role; we cannot "construct arguments for or find support for appellant's right to appeal from an interlocutory order." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). The burden is on the appellant to do so, and Plaintiffs did not carry that burden here.

A final observation: Plaintiffs' failure to adequately assert how the challenged order affects a substantial right may be partly explained by Plaintiffs' fixation on a published case that they believed to be controlling. This is a mistake our Court has warned against for years. Whether a particular ruling "affects a substantial right must be determined on a case-by-case basis." *Hamilton*, 212 N.C. App. at 78, 711 S.E.2d at 189. Consequently, outside of a few exceptions such as sovereign immunity, the appellant cannot rely on citation to precedent to show that an order affects a substantial right. Instead, the appellant "must explain, in the statement of the grounds for appellate review, why the facts of that particular case demonstrate that the challenged order affects a substantial right." *Denney*, 264 N.C. App. at 18, 824 S.E.2d at 438. Accordingly, Plaintiffs' statement of the grounds for appellate review is insufficient to establish that the challenged order affects a substantial right.

II. Issuance of a writ of certiorari

[4] As the above analysis demonstrates, this Court lacks appellate jurisdiction to reach the merits of this case for multiple reasons: the appeal is untimely; the Rule 54(b) certification is ineffective; and the statement of grounds for appellate jurisdiction is inadequate. That means there is only one way for us to reach the merits of this case—we would need to issue a writ of certiorari in aid of our jurisdiction. *See* N.C. Gen. Stat. § 7A-32; N.C. R. App. P. 21.

Allowing a petition for a writ of certiorari would be simpler had Plaintiffs actually *filed* a petition for a writ of certiorari. But even in asking this Court to forgive their other mistakes that deprived us of jurisdiction, Plaintiffs made more mistakes. After Defendants moved to dismiss this appeal (putting Plaintiffs on notice of the jurisdictional issues), Plaintiffs did not petition for a writ of certiorari and acknowledge those potential jurisdictional defects. Instead, they opposed the motion to dismiss and filed a separate motion with the Court that asked, in a single sentence, for this Court to "treat this appeal as writ for certiorari if it finds that the appeal was untimely."

The Rules of Appellate Procedure provide a vehicle for requesting that this Court issue a writ of certiorari—that vehicle is a *petition* for a writ of certiorari. *See* N.C. R. App. P. 21. The petition has specific content requirements designed to ensure that the requesting party provides the Court with the facts and argument necessary to assess, in the Court's discretion, whether issuing the writ is appropriate.

To be sure, in the interests of justice this Court has—on rare occasions—construed some other appellate filing such as a brief or motion as a petition for a writ of certiorari and then allowed the petition. *Sood v. Sood*, 222 N.C. App. 807, 813, 732 S.E.2d 603, 608 (2012). But this is truly rare and something that this Court chooses to do on its own initiative; it is not something that a litigant should request. *Id.*; *see also Campbell*, 237 N.C. App. at 7, 764 S.E.2d at 634. Instead, a litigant who seeks issuance of a writ of certiorari should petition for one in the manner described in the Rules of Appellate Procedure. As our Supreme Court has observed, "procedure is essential to the application of principle in courts of justice, and it cannot be dispensed with." *Dogwood Dev. & Mgmt. Co., LLC*, 362 N.C. at 193, 657 S.E.2d at 362.

Having said all that, we will nevertheless exercise our discretion to issue a writ of certiorari in this case, ignoring Plaintiffs' failure to petition for one. We do so reluctantly and only because this case falls squarely into the category of exceptional cases suitable for certiorari review for two reasons. First, there are wide-reaching issues of justice and liberty at stake in this case. *State v. Hamrick*, 110 N.C. App. 60, 63, 428 S.E.2d 830, 832 (1993). Specifically, the lawsuit alleges serious misconduct and abuse of power by the government in violation of both the U.S. Constitution and our State's common law. Second, as explained below, Plaintiffs' issues on appeal are meritorious. *See State v. Rawlinson*, 262 N.C. App. 374, 820 S.E.2d 132, 2018 WL 5796276, at *1 (2018) (unpublished).

Given the seriousness of the issues in this case, and the merit in Plaintiffs' arguments, we are unwilling to dismiss this appeal for what is, essentially, a pattern of bad lawyering. But this opinion should serve as a warning to future litigants. As our Supreme Court has emphasized, "a jurisdictional default brings a purported appeal to an end before it ever begins." *Dogwood Dev. & Mgmt. Co., LLC*, 362 N.C. at 198, 657 S.E.2d at 365. Plaintiffs escaped that fate here, but future litigants may not be so lucky.

III. Appeal of the trial court's partial summary judgment order

[5] Having issued a writ of certiorari, we turn to the merits of Plaintiffs' appeal. The trial court entered summary judgment on a number of Plaintiffs' claims after determining that Captain Smith was entitled to public official immunity. That determination, in turn, was based on the trial court's determination that there was insufficient evidence to create a genuine issue of material fact on the question of malice.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). "When ruling on a motion for summary judgment, the court must consider the evidence in the light most favorable to the nonmovant, and the slightest doubt as to the facts entitles him to a trial." *Atl. Coast Properties, Inc. v. Saunders*, 243 N.C. App. 211, 214, 777 S.E.2d 292, 295 (2015), *aff'd*, 368 N.C. 776, 783 S.E.2d 733 (2016). Summary judgment should be granted "with caution and only where the movant has established the nonexistence of any genuine issue of fact." *Id.* This Court reviews a grant of summary judgment *de novo*. *Id.*

The trial court's summary judgment rulings were based on the doctrine of public official immunity. That doctrine "is well established in North Carolina: As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability." *Thompson v. Town of Dallas*, 142 N.C. App. 651, 655, 543 S.E.2d 901, 904 (2001). Public official immunity "serves to protect officials from individual liability for mere negligence, but not for malicious or corrupt conduct, in the performance of their official duties." *Id.*

"A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Id.* at 656, 543 S.E.2d at 905. The law presumes "that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law." *Strickland v. Hedrick*, 194 N.C. App. 1, 10, 669 S.E.2d 61, 68 (2008). Accordingly, evidence to overcome this presumption and establish malice "must be sufficient by virtue of its reasonableness, not by mere supposition. It must be factual, not hypothetical; supported by fact, not by surmise." *Id.*

Applying this standard here, Plaintiffs presented sufficient evidence to create a genuine issue of material fact on the issue of malice. Their evidence (although admittedly disputed) shows that there was no probable cause for Captain Smith to charge Jane Doe with child abuse; that Captain Smith knew there was no probable cause to do so; that Captain Smith's decision to charge Doe was driven by anger and hostility toward her, not by evidence of a crime; and that this anger and hostility stemmed at least in part from racial or socioeconomic biases.

Importantly, Defendants do not assert that the evidence described above is insufficient to establish malice. Instead, Defendants make a series of claims that more closely resemble jury arguments than defenses of a summary judgment ruling. For example, Plaintiffs argue that they presented evidence that, during Captain Smith's encounter with Jane Doe, Smith became angry and hostile toward Doe, began yelling, and acted aggressively without any reasonable basis for doing so. Defendants challenge this argument by repeatedly contending that "in reality" something else occurred, citing other, competing evidence. But this competing evidence only underscores that there is a genuine issue of fact here. Notably, Defendants do not argue that, as a matter of law, evidence that a law enforcement officer is inexplicably angry, hostile, or aggressive is not a factor that could support a finding of malice. They instead argue that their own facts rebutting Plaintiffs' claims are more persuasive. That argument is not one for this Court. *Lopp v. Anderson*, 251 N.C. App. 161, 174–76, 795 S.E.2d 770, 779–81 (2016). If there are competing facts on a potentially determinative issue, the jury must resolve those facts. *Id.*

Likewise, Plaintiffs argue that they presented evidence Captain Smith's actions stemmed at least in part from personal biases about Jane Doe's race or socioeconomic status. This evidence comes largely from Captain Smith's own statements during the internal police department investigation. Again, Defendants respond by asserting that those statements were "after the fact in the Internal Affairs' investigation" and are only relevant "in that context" because Captain Smith was explaining why he acted more aggressively because he believed his fellow officers were "intimidated" by Doe. But as with Defendants' previous arguments, this is not a summary judgment argument—it is a jury one. Defendants do not argue that, as a matter of law, evidence of an officer's bias or prejudice toward an accused cannot support a finding of malice. And as for whether Captain Smith's statements about Doe's race or socioeconomic status were signs of malicious intent or instead were simply observations about other officers, this is, again, a fact question for the jury.

Finally, Plaintiffs presented evidence that Captain Smith ignored other officers who believed there was no probable cause to charge Doe with a crime. Defendants respond by asserting that Plaintiffs "cannot point to a single case where an officer is found to have acted with malice because he chose to act on his own investigation as opposed to relying on the word of other witnesses who did not have all relevant facts."

But again, this argument turns the summary judgment standard on its head by relying solely on the facts favorable to Defendants. *See id.* Plaintiffs' evidence is that two other officers were present and observing the scene before Captain Smith arrived—meaning those officers were the ones who had "all relevant facts." Plaintiffs' evidence further indicates that Captain Smith saw those officers as he arrived and waved them over, that those officers told Captain Smith that Jane Doe had not committed any crime, and that Captain Smith ignored those officers because of some personal anger and hostility toward Jane Doe.

In sum, Plaintiffs presented evidence at the summary judgment stage that (1) there was no probable cause for Captain Smith to arrest Jane Doe; (2) other officers whom Captain Smith knew had more information about the underlying events informed Captain Smith that Jane Doe had done nothing wrong; (3) Captain Smith ignored the views of those other officers; (4) Captain Smith was angry, aggressive, and hostile toward Jane Doe; and (5) that Captain Smith's anger and hostility stemmed from racial or socioeconomic biases. That evidence is sufficient to create a genuine issue of material fact on the question of malice. Accordingly, the trial court erred by granting summary judgment on the ground that there was insufficient evidence of malice to overcome public official immunity.

The parties acknowledge on appeal that the lack of malice was the sole basis for entry of summary judgment on the individual-capacity claims against Captain Smith. Moreover, the parties acknowledge that the entry of summary judgment on the remaining claims challenged in this appeal stemmed from the dismissal of those individual-capacity claims. We therefore reverse the trial court's entry of summary judgment on all claims challenged in this appeal and remand for further proceedings.

Conclusion

After issuing a writ of certiorari to review the merits of this defective appeal, we reverse the trial court's entry of summary judgment and remand for further proceedings.

REVERSED AND REMANDED.

Judges DILLON and ARROWOOD concur.

HENDRIX v. TOWN OF W. JEFFERSON

[273 N.C. App. 27 (2020)]

JAMES H. HENDRIX, PLAINTIFF
v.
TOWN OF WEST JEFFERSON; C/O BRANTLEY PRICE, TOWN MANAGER; MAYOR DALE BALDWIN (IN HIS OFFICIAL CAPACITY); ALDERMEN (IN THEIR OFFICIAL CAPACITIES) BRETT SUMMEY, STEPHEN SHOEMAKER, JOHN REEVES, JERRY MCMILLIAN, CALVIN GREENE, DEFENDANTS

No. COA19-948

Filed 18 August 2020

Libel and Slander—vicarious liability—course and scope of employment—ratification—failure to state a claim

After a newspaper published private text messages in which a town's chief of police suggested that plaintiff lost his job as a police officer years ago for stealing and "smoking" evidence, the trial court properly dismissed plaintiff's lawsuit against the town and its officials (defendants) for failure to state a defamation claim based on vicarious liability. Plaintiff's allegations showed that the chief of police made the defamatory statement during a private conversation and not within the course and scope of his employment, and the law would not hold defendants liable for an employee's statement regarding plaintiff's termination from employment made years after that termination occurred. Further, defendants' failure to investigate or correct the chief of police's statement after its publication did not signal an intent to ratify the statement.

Appeal by Plaintiff from Order entered 17 June 2019 by Judge Edwin Wilson, Jr. in Ashe County Superior Court. Heard in the Court of Appeals 17 March 2020.

James H. Hendrix, plaintiff-appellant, pro se.

Cranfill Sumner & Hartzog LLP, by Ryan D. Bolick, for defendants-appellees.

HAMPSON, Judge.

Factual and Procedural Background

James H. Hendrix (Plaintiff) appeals from an Order entered on 17 June 2019, dismissing with prejudice, under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, Plaintiff's Defamation Claim against the Town of West Jefferson (Town); Brantley Price, Town Manager of

West Jefferson, in his official capacity; Dale Baldwin, Mayor of West Jefferson, in his official capacity; and Aldermen Brett Summey, Stephen Shoemaker, John Reeves, Jerry McMillian, and Calvin Greene, in their official capacities (collectively, Defendants). The Record before us—including the allegations in Plaintiff's Complaint, which we take as true for purposes of reviewing an order on a motion to dismiss pursuant to Rule 12(b)(6), *see State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 442, 666 S.E.2d 107, 114 (2008) (citation omitted)—tends to show the following:

From 1993 to 1997, Plaintiff was employed by the Town as a police officer for the West Jefferson Police Department (WJPD). After leaving WJPD, and through the filing of his Complaint, Plaintiff was employed in leadership roles in both the law enforcement and security fields.

In November of 2016, the Ashe County Sheriff resigned, requiring the Ashe County Board of Commissioners (County Board) to appoint another person to serve out the rest of the resigning-Sheriff's term. At the time, the Chief of Police for WJPD was Jeffery Rose (Chief Rose). Chief Rose also served as a County Commissioner on the County Board. Gary Roark (Roark) was another County Commissioner on the County Board.

After learning of the then-Sheriff's resignation, Plaintiff expressed interest in being considered for the County Sheriff position to Roark, who conveyed this information to Chief Rose. On 30 December 2016, Chief Rose and another candidate for the County Sheriff position, allegedly Terry Buchanan (Buchanan), engaged in the following text-message exchange:

> Person 1: "It's unfortunate to see [Plaintiff] supporting Bucky and the status quo. I believe he knows if I'm appointed he won't have a shot in two years."
>
> Chief Rose: "That is true. I don't think he would anyway. Because I could not vote for him."
>
> Person 1: "He has never had anything good to say about them so why he felt the need them [sic] is strange to say the least."
>
> Person 1: "I would just like to see conservatives support each."
>
> Chief Rose: "Me too and yes he talks about how screwed up they are. I think just trying to play politics."

> Chief Rose: "[Roark] said [Plaintiff] asked him about being selected. I told [Roark] no way is he getting my vote."
>
> Chief Rose: "[Plaintiff is in] the crowd that got gone from [WJPD], For the evidence being used and smoked."

The County Board eventually appointed Buchanan as Sheriff of Ashe County. In April of 2017, a television station in Charlotte filed a public-records request with the County Board, seeking all written communications, including text messages and emails, between the Commissioners of the County Board and Buchanan. Subsequently, on 13 December 2017, the text-message exchange above was published in the *Ashe Post and Times* and again republished on 17 December 2017.

On 14 December 2018, Plaintiff filed his Complaint in the current action, asserting a Defamation Claim against Defendants.[1] Plaintiff alleged Chief Rose's text—"[Plaintiff is in] the crowd that got gone from [WJPD], For the evidence being used and smoked"—was defamatory and caused Plaintiff to "suffer personal humiliation, mental anguish and suffering." In Paragraphs 24 through 28 of his Complaint, Plaintiff alleged Defendants were liable for Chief Rose's defamatory statement for the following reasons:

> 24. The Defendant(s) have employed Chief Rose as the Chief of Police for the Town of West Jefferson. Chief Rose is responsible for the day to day operations of the Police Department as well as being the spokesman for the WJPD when matters of law enforcement issues arise. His statements carry significant weight as he is the top law enforcement officer in his jurisdiction. As such, statements that he makes would lead a reasonable person to conclude that the statements are true and that they have been condoned and approved for release by the Defendant(s).
>
> 25. The Defendant(s) knew or should have known that about the statements Chief Rose made about the Plaintiff in the December 17, 2017 Ashe Post and Times article. A quick search of the Plaintiff's record by the Defendant(s) would have shown the statement to be patently false.

1. Chief Rose is not a party to this action; rather, Plaintiff alleged he served Chief Rose with a separate action for defamation on 2 October 2018.

26. The Defendant(s) had a fiduciary responsibility to the Plaintiff to ensure matters concerning his prior employment for the Defendant(s) be kept private, confidential and factual.

27. The Defendant(s), upon discovery of the libelous and defamatory statements, had a duty to immediately correct the false statement by releasing a statement correcting the record and then requesting their Police Chief, Chief Rose to issue a retraction concerning the false statement. The Defendant(s) failed to do so, even though the statements pertained directly to the Plaintiff's employment with the WJPD.

28. The Plaintiff is not a public official or figure and therefore the Defendant(s) is strictly liable for the Defamation Per Se that has resulted in the impairment of the Plaintiff's reputation and standing in the community, and caused him to suffer personal humiliation, mental anguish and suffering.

On 19 February 2019, Defendants filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, seeking dismissal of Plaintiff's Complaint because "Plaintiff fails to allege facts that support claims for defamation against these Defendants and failed to file the complaint within the applicable statute of limitations." The trial court held a hearing on Defendants' Motion to Dismiss on 10 June 2019. At this hearing, Defendants argued dismissal of the Complaint was warranted because Plaintiff did not allege any of the Defendants had themselves made a defamatory statement against Plaintiff and, more to the point, Plaintiff had failed to sufficiently allege facts to state a defamation cause of action against Defendants under a theory of respondeat superior. Specifically, Defendants contended Plaintiff's allegations were insufficient to establish respondeat superior liability because there was no allegation: (a) Chief Rose made the statement with Defendants' express authorization; (b) Chief Rose was acting in the course and scope of his employment with WJPD when he made the statement; or (c) Defendants had otherwise ratified the statement. Defendants also briefly asserted Plaintiff's Complaint was barred by the applicable statute of limitations.

For his part, Plaintiff acknowledged his Complaint did not expressly allege Chief Rose was acting in the course and scope of his employment. Instead, Plaintiff argued he had "tried to spell out Chief Rose's chief duties while attempting to equate that to his course and scope of employment."

The trial court orally granted Defendants' Motion to Dismiss, and on 17 June 2019, the trial court entered its Order granting Defendants' Motion to Dismiss under Rule 12(b)(6). In its Order, the trial court concluded Plaintiff's Complaint failed to state a claim upon which relief may be granted. On 19 June 2019, Plaintiff filed timely Notice of Appeal from the trial court's Order.

Issue

The dispositive issue on appeal is whether the allegations in Plaintiff's Complaint are legally sufficient to state a claim for defamation against Defendants to survive a dismissal under Rule 12(b)(6) under the theories Chief Rose made the allegedly defamatory statement in the course and scope of his employment or, alternatively, Defendants ratified Chief Rose's statement.

Analysis

I. Standard of Review

On appeal of a Rule 12(b)(6) motion to dismiss, this Court conducts "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." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673-74 (2003); *see also Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) ("Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." (citation and quotation marks omitted)). This Court views the allegations in the complaint in the light most favorable to the non-moving party. *Donovan v. Fiumara*, 114 N.C. App. 524, 526, 442 S.E.2d 572, 574 (1994) (citation omitted). Further, this Court considers "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[.]" *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citation omitted).

"In order to withstand such a motion, the complaint must provide sufficient notice of the events and circumstances from which the claim arises and must state sufficient allegations to satisfy the substantive elements of at least some recognized claim." *Sanders v. State Personnel Comm'n*, 197 N.C. App. 314, 319, 677 S.E.2d 182, 186 (2009) (citation omitted). "[D]espite the liberal nature of the concept of notice pleading, [however,] a complaint must nonetheless state enough to give the substantive elements of at least some legally recognized claim or it is

subject to dismissal under Rule 12(b)(6)." *Stanback v. Stanback*, 297 N.C. 181, 204, 254 S.E.2d 611, 626 (1979) (citation omitted); *see also Leasing Corp. v. Miller*, 45 N.C. App. 400, 405, 263 S.E.2d 313, 317 (1980) ("A claim for relief must still satisfy the requirements of the substantive laws which gave rise to the pleadings, and no amount of liberalization should seduce the pleader into failing to state enough to give the substantive elements of his claim." (citation omitted)).

II. Plaintiff's Defamation Claim

"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." *Craven v. SEIU Cope*, 188 N.C. App. 814, 816, 656 S.E.2d 729, 732 (2008) (citation and quotation marks omitted). Furthermore, as Plaintiff correctly points out, our Courts have long recognized circumstances under which an employer may be held vicariously liable for defamatory statements made by an employee. *See Gillis v. Tea Co.*, 223 N.C. 470, 474-75, 27 S.E.2d 283, 286 (1943) ("The principle that the employer is to be held liable for the torts of his employee when done by his authority, express or implied, or when they are within the course and scope of the employee's authority, is equally applicable to actions for slander." (citations omitted)).

In his Complaint, Plaintiff alleged the text message by Chief Rose, which was published in the *Ashe Post and Times*, was a false, defamatory statement about Plaintiff because it falsely accused him of stealing and smoking evidence while working for WJPD and this statement injured him by impairing his reputation and causing him to suffer personal humiliation and mental anguish. Presuming Plaintiff's allegations are sufficient to allege a defamatory statement by Chief Rose—again, not a party to this action—the question becomes whether Plaintiff's allegations are sufficient to state a claim against Defendants arising from the Town's employment of Chief Rose.[2]

"Generally, employers are liable for torts committed by their employees who are acting within the scope of their employment under the theory of respondeat superior." *Matthews v. Food Lion, LLC*, 205 N.C. App. 279, 281, 695 S.E.2d 828, 830 (2010) (citation omitted). "As a general rule, liability of a principal for the torts of its agent may arise in three situations: (1) when the agent's act is expressly authorized by the

2. No party raises the issue of government immunity, and we therefore do not address this issue.

principal; (2) when the agent's act is committed within the scope of his employment and in furtherance of the principal's business[;] or (3) when the agent's act is ratified by the principal." *Id.* at 281-82, 695 S.E.2d at 830 (citation omitted).[3] In this case, Plaintiff does not contend Defendants expressly authorized Chief Rose's allegedly defamatory statement; rather, he argues his Complaint should be read to state a claim against Defendants on the basis Chief Rose was acting within the course and scope of his employment or, alternatively, on the basis Defendants ratified Chief Rose's statement.

First, however, as Plaintiff conceded in the trial court, his Complaint does not contain any allegation Chief Rose was acting in the course and scope of his employment when Chief Rose made the allegedly defamatory statement. *See Matthews*, 205 N.C. App. at 281, 695 S.E.2d at 830 ("Generally, employers are liable for torts committed by their employees who are acting *within the scope of their employment* under the theory of respondeat superior." (emphasis added) (citation omitted)); *see also Sanders*, 197 N.C. App. at 319, 677 S.E.2d at 186 (holding to withstand a motion to dismiss, the complaint "must state sufficient allegations to satisfy the substantive elements of at least some recognized claim" (citation omitted)).

Second, our Court has explained: "To be within the scope of employment, an employee, at the time of the incident, must be acting in furtherance of the principal's business and for the purpose of accomplishing the duties of his employment." *Troxler v. Charter Mandala Center*, 89 N.C. App. 268, 271, 365 S.E.2d 665, 668 (1988) (citation omitted). "If an employee departs from that purpose to accomplish a purpose of his own, the principal is not [vicariously] liable." *Id.* (citation omitted); *see also BDM Invest. v. Lenhil, Inc.*, ___ N.C. App. ___, ___, 826 S.E.2d 746, 764 (2019) (explaining "liability is not imposed on an employer when an employee engaged in some private matter of his own or outside the legitimate scope of his employment" (citation and quotation marks omitted)).

Here, Plaintiff's allegations establish Chief Rose made the statement regarding the circumstances under which Plaintiff's employment with WJPD ended not in the context of Town or WJPD business but rather

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3. A more technical formulation of employer liability limits application of the term "respondeat superior" only to those situations in which an employee is acting within the course and scope of employment. Under this more technical formulation, ratification and authorization still may give rise to employee liability but are simply deemed to arise from traditional agency principles. *See Creel v. N.C. Dep't of Health & Human Servs.*, 152 N.C. App. 200, 202-03, 566 S.E.2d 832, 833 (2002) (citations omitted). For our purposes, however, this distinction is not determinative here, and so, we apply a broader brushstroke.

in the context of his support of a candidate for the appointment of a new County Sheriff by the County Board, on which Chief Rose served. As such, on its face, Plaintiff's Complaint shows Chief Rose's allegedly defamatory text message was not "within the scope of his employment" because he was "engaged in some private matter of his own [and] outside the legitimate scope of his employment[.]" *BDM Invest.*, ___ N.C. App. at ___, 826 S.E.2d at 764 (alteration in original) (citations and quotation marks omitted). Therefore, where the purpose of Chief Rose's defamatory statement was "to accomplish a purpose of his own, the [Defendants are] not [vicariously] liable." *Troxler*, 89 N.C. App. at 271, 365 S.E.2d at 668 (citation omitted).

Moreover, our courts have previously held statements made by an employee regarding a plaintiff's discharge from employment after the plaintiff has been discharged are not made within the course and scope of the employment and are not attributable to the employer. Indeed, close to a century ago and relying on even earlier cases, our Supreme Court in *Strickland v. Kress* explained, "owing to the facility and thoughtless way that such words are not infrequently used by employees, they should not, perhaps, be imported to the company as readily as in more deliberate circumstances; that is, they should not be so readily considered as being within the scope of the agent's employment." 183 N.C. 534, 537, 112 S.E. 30, 31 (1922). In that case, after a store manager fired the plaintiff, the plaintiff's husband asked the manager for an explanation, leading to the manager's defamatory statements, which were overheard by other employees. *Id.* at 538, 112 S.E. at 31. The Supreme Court characterized the incident: "This was clearly a conversation between the two individuals as to an event that had passed, and, as stated, could in no sense be considered as within the course and scope of [the manager's] employment, or as an utterance by authority of the company, either express or implied." *Id.* at 538, 112 S.E. at 31-32.

More recently, our Court has recognized the same principle on at least two occasions. In *Stutts v. Power Co.*, after the plaintiff's discharge, a Duke Power employee made statements the plaintiff was terminated from Duke Power for dishonesty, including falsifying records. 47 N.C. App. 76, 80, 266 S.E.2d 861, 864 (1980). The plaintiff argued the issue of Duke Power's liability for its employee's defamation should be submitted to the jury. *Id.* at 81, 266 S.E.2d at 865. Our Court relied on *Strickland* to hold: "any remarks made by [the employee] in the months after [the] plaintiff's discharge, were, as a matter of law, not made within [the employee's] scope of employment and, consequently, not attributable to Duke Power." *Id.* Then, in *Gibson v. Mutual Life Insurance Co. of New York,* our Court again concluded statements made about a plaintiff

after the plaintiff's termination could not be imputed to the corporate defendant. 121 N.C. App. 284, 288, 465 S.E.2d 56, 59 (1996) ("[A]ll of the statements were made after [the] plaintiff was terminated and therefore, the alleged defamation cannot be imputed to [the corporate defendant]." (citation omitted)). Consequently, in light of this prior precedent, in this case, Plaintiff's allegations of Chief Rose's allegedly defamatory statement made years after Plaintiff's separation from employment with WJPD cannot serve as a basis for the vicarious liability of Defendants because, as a matter of law, this statement was not made in the course and scope of Chief Rose's employment by the Town.

Likewise, Plaintiff's argument he should be permitted to proceed against Defendants on the theory Defendants allegedly ratified Chief Rose's statement also fails. Ratification is "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). Again, Plaintiff's Complaint does not expressly invoke ratification but rather appears to rest on his allegations Defendants owed him a "fiduciary responsibility," including the duty to investigate the truth of Chief Rose's statement and to require a correction or retraction of this statement addressing Chief Rose's opposition to Plaintiff's candidacy for County Sheriff. Plaintiff, however, offers no authority to support the existence of such a duty. Further, the earlier precedent set by *Strickland*, *Stutts*, and *Gibson*, *supra*, runs counter to the existence of such a duty. *See*, *e.g.*, *Strickland*, 183 N.C. at 538, 112 S.E. at 32 (holding statement "could in no sense be considered . . . as an utterance by authority of the company, either express or implied"). Thus, Plaintiff has not alleged any act by Chief Rose "done or professedly done" on Defendants' account. *Espinoza*, 135 N.C. App. at 308, 520 S.E.2d at 111 (citations and quotation marks omitted).

Additionally, ratification 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." *Equipment Co. v. Anders*, 265 N.C. 393, 400-01, 144 S.E.2d 252, 258 (1965) (citations omitted). A failure to act or investigate may provide evidence of an employer's ratification of an employee's wrongful act. *See Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 437, 378 S.E.2d 232, 236 (1989) (recognizing "an omission to act" in some circumstances may constitute a "course of conduct on the part of the principal which reasonably tends to show an

intention on his part to ratify the agent's unauthorized acts" (citation and quotation marks omitted)). However, here, in light of our prior caselaw holding statements similar to the one made by Chief Rose outside the course and scope of his employment are not attributable to an employer, and absent any independent duty to investigate or correct the statement, it follows the employer's failure to investigate or correct those statements is not conduct inconsistent with an intent not to ratify. As such, Plaintiff's Complaint is legally insufficient to allege Defendants should be held liable on the basis of ratification.

Thus, Plaintiff's Complaint fails to state a claim against Defendants for defamation based on Chief Rose's statement either under a theory Chief Rose was acting in the course and scope of his employment or that Defendants ratified Chief Rose's statement. Consequently, the trial court did not err in granting Defendants' Motion to Dismiss under Rule 12(b)(6).

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Order granting Defendants' Motion to Dismiss.

AFFIRMED.

Judges STROUD and DIETZ concur.

IN RE I.K.

[273 N.C. App. 37 (2020)]

IN THE MATTER OF I.K.

No. COA19-619

Filed 18 August 2020

1. **Child Abuse, Dependency, and Neglect—permanency planning order—constitutionally protected status as parent—findings and conclusion**

   In a permanency planning review matter, the trial court's conclusion that respondent-parents' actions were inconsistent with their constitutionally protected right to parent the minor child was supported by the court's findings of fact, which were in turn supported by clear and convincing evidence, including of the parents' lack of suitable and safe housing, continued substance abuse, and, regarding respondent-father, unresolved domestic violence issues.

2. **Child Abuse, Dependency, and Neglect—permanency planning order—guardianship granted to grandparent—sufficiency of evidence**

   In a permanency planning review matter, the trial court's decision to grant guardianship of the minor child to her grandmother was supported by sufficient evidence and findings of fact regarding the parents' unresolved issues of inadequate housing, substance abuse, and domestic violence. The court's choice of permanent plan, pursuant to N.C.G.S. § 7B-906.1, which took into account the child's best interest, was not manifestly unsupported by reason and was therefore not an abuse of discretion.

3. **Child Visitation—permanency planning order—mother's visitation—supervised only—evidentiary support**

   In a permanency planning review matter in which the trial court granted guardianship of the minor child to the child's grandmother, the trial court did not abuse its discretion under N.C.G.S. § 7B-905(c) by limiting respondent-mother's visitation with the child to supervised visitation only, based on evidence of respondent's prior behavior during visits as well as recommendations from the child's guardian ad litem and therapist.

4. **Child Visitation—permanency planning order—notice of right to file motion to review visitation—adequacy of notice**

   In a permanency planning review matter in which the trial court granted guardianship of the minor child to the child's grandmother, the trial court did not violate N.C.G.S. § 7B-905.1(d) by failing to

inform respondent-father of his right to file a motion to review the visitation plan, where the court made the parties aware in open court of its ongoing jurisdiction over the matter and that the matter could be brought before the court at any time by filing a motion for review. To the extent the lack of an explicit reference to the statutory right constituted error, respondent failed to show he lost any right or was prejudiced by the lack of notice.

Judge MURPHY concurring in part and dissenting in part.

Appeal by respondents from order entered 22 March 2019 by Judge Samantha Cabe in Orange County District Court. Heard in the Court of Appeals 27 May 2020.

Stephenson & Fleming, LLP, by Deana K. Fleming, for petitioner-appellee Orange County Department of Social Services.

Batch, Poore & Williams, PC, by Sydney Batch, for respondent-appellant mother.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for respondent-appellant father.

Parker Poe Adams & Bernstein L.L.P., by R. Bruce Thompson II, for Guardian ad Litem.

ARROWOOD, Judge.

Respondent parents appeal from the trial court's Permanency Planning Order establishing a permanent plan of placement for their daughter. For the following reasons, we affirm.

I. Background

This appeal comes after multiple prior proceedings: a 7 November 2017 Permanency Planning Order regarding minor children I.K. ("Iliana") and K.M. ("Kevin"),[1] which ceased reunification efforts between the children and respondents—respondent-mother ("Patty") and respondent-father ("Isaac") (together "respondents")—and awarded guardianship of both children to their maternal grandmother; a 7 August 2018 opinion

1. Pseudonyms are used throughout this opinion to protect the identity of juveniles and for the ease of reading.

from this Court vacating the 7 November 2017 Permanency Planning Order and remanding for further findings to address Respondents' fitness, whether they acted inconsistently with their constitutionally protected status, and why reunification efforts should cease as to Iliana and Kevin; and a 22 March 2019 Permanency Planning Order ("the Order"). Respondents timely appeal the Order as to Iliana.

The background of this case is partially incorporated from the text of our 7 August 2018 opinion, which vacated the 7 November 2017 Permanency Planning Order.

> Iliana was born to Respondents in December 2012. On 10 November 2014, the Rockingham County Department of Social Services received a report that Respondents lived in a "hoarder home" that was unsafe, Respondents sold their food stamps, Kevin was small for his age, there was fighting in the home, and Respondents were smoking marijuana and snorting Percocet. The Rockingham County Department of Social Services investigated this report, but no services were recommended at the time.
>
> In 2015, the Orange County Department of Social Services ("DSS") received two reports alleging that Patty had snorted pills while Kevin was in the home, and that Patty and her brother were involved in a domestic dispute that resulted in the brother shaking and hitting Kevin. At that point, Respondents were provided in-home services to address concerns of substance use, mental health, and domestic violence. On 8 January 2016, Patty was sentenced to 45 days in jail for shoplifting and violating her probation. Patty received another 45 day[s in jail] in April 2016 after [she tested positive for cocaine during her probation]. At that time, Respondents placed Iliana with the maternal grandmother[,] . . . [with whom] Kevin had been residing [for the previous five years]. On 5 August 2016, Patty informed a DSS employee that [she and Isaac] were being evicted from their home and were homeless.
>
> Due to concerns regarding Respondents' unstable housing, substance abuse, and lack of engagement in substance abuse treatment services, DSS filed juvenile petitions on 10 August 2016 alleging that Kevin and Iliana were neglected and dependent juveniles. DSS obtained nonsecure custody that same day. Following a 15 September 2016 hearing, the

> trial court entered an order on 13 October 2016 adjudicating the juveniles dependent, keeping temporary legal and physical custody with the maternal grandmother. The order required Respondents to submit to random drug screens, seek substance abuse treatment services, and follow any treatment recommendations. After a permanency planning hearing on 2 March 2017, the trial court entered an order on 27 March 2017 establishing a primary permanent plan of guardianship with the maternal grandmother and a secondary plan of reunification with Respondents. Following a 5 October 2017 permanency planning hearing, the trial court entered a 7 November 2017 order ceasing reunification efforts and awarding guardianship of the children to the maternal grandmother. Respondents timely appealed the 7 November 2017 order.

In re I.K., *K.M.*, 260 N.C. App. 547, 548-49, 818 S.E.2d 359, 361 (2018). Our 7 August 2018 opinion vacated and remanded the trial court's 7 November 2017 Order for the reasons stated therein and required the trial court to "make the required finding that Respondents were unfit or had acted inconsistently with their constitutionally protected status as parents . . . in [order to apply] the best interest of the child test to determine that guardianship with the maternal grandmother was in the children's best interests." *Id.* at 555, 818 S.E.2d at 365.

On 2 November 2018, the trial court again awarded guardianship of Kevin to the maternal grandmother, and respondents did not appeal. That same day, the trial court continued the permanency planning hearing as to Iliana. The trial court conducted a permanency planning hearing on 3 January 2019 and 18 January 2019, in which it heard further testimony from DSS employees, the maternal grandmother, and respondents. On 22 March 2019, the trial court entered the present order finding respondents had acted inconsistently with their constitutionally protected right to parent Iliana, and again awarding guardianship of Iliana to her maternal grandmother.

II. Discussion

Respondents argue that the trial court erred in the Order by: (a) finding that respondents acted inconsistently with their constitutionally protected right to parent Iliana, where such a finding was not supported by clear and convincing evidence; (b) making various findings and conclusions of law required by statute that were not supported by competent evidence; (c) making erroneous findings and conclusions of

law that did not support its award of guardianship to Iliana's maternal grandmother under N.C. Gen. Stat. §§ 7B-906.1, -906.2 (2019); and (d) failing to provide respondents with notice of their right to file a motion to review the visitation plan with the trial court pursuant to N.C. Gen. Stat. § 7B-905.1(d) (2019). For the following reasons, we find no merit to respondents' arguments and affirm the Order.

A. Conduct Inconsistent with Constitutionally Protected Parental Status

[1] Respondents argue that clear and convincing evidence did not support the trial court's relevant findings and conclusion of law that they had acted inconsistently with their constitutionally protected right to parent Iliana, and the trial court accordingly erred by proceeding to place Iliana's best interest at the forefront of its decision. We disagree.

Respondents correctly note that a higher evidentiary standard applies to the present circumstances where the trial court has ordered custody with someone other than a child's natural parent as the permanent plan and concluded concurrent planning involving reunification with the child's parents. *In re B.G.*, 197 N.C. App. 570, 574-75, 677 S.E.2d 549, 552-53 (2009).

> A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent would offend the Due Process Clause. However, conduct inconsistent with the parent's protected status, which need not rise to the statutory level warranting termination of parental rights, would result in application of the "best interest of the child" test without offending the Due Process Clause. Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct, which must be viewed on a case-by-case basis,

> can also rise to this level so as to be inconsistent with the protected status of natural parents. Where such conduct is properly found by the trier of fact, based on evidence in the record, custody should be determined by the "best interest of the child" test mandated by statute.

Price v. Howard, 346 N.C. 68, 79, 484 S.E.2d 528, 534-35 (1997) (internal citations omitted).

"There is no bright line beyond which a parent's conduct amounts to action inconsistent with the parent's constitutionally protected paramount status. Our Supreme Court has emphasized the fact-sensitive nature of the inquiry, as well as the need to examine each parent's circumstances on a case-by-case basis. The court must consider both the legal parent's conduct and his or her intentions *vis-à-vis* the child." *In re A.C.*, 247 N.C. App. 528, 536, 786 S.E.2d 728, 735 (2016) (alterations, internal quotations marks and citations omitted).

Analyzing the totality of the circumstances noted in the Order's findings of fact, for the following reasons we hold that the trial court did not err in determining that respondents acted inconsistently with their constitutionally protected status as Iliana's parents.

1. Findings of Fact

In our review of a trial court's findings relevant to its determination that a parent has acted inconsistently with his constitutionally protected status, "[t]he Due Process Clause . . . requires that [such findings] must be supported by clear and convincing evidence." *Id.* at 533, 786 S.E.2d at 733 (footnote and citation omitted). "The clear and convincing standard requires evidence that should fully convince. 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. Our inquiry as a reviewing court is whether the evidence presented is such that a fact-finder applying that evidentiary standard could reasonably find the fact in question." *Id.* at 533, 786 S.E.2d at 734 (alterations, internal quotation marks, and citations omitted).

In their separate briefs, respondents argue that numerous findings of fact in the Order are not supported by clear and convincing evidence. These findings relate to the court's belief that respondents' historic issues with unsuitable housing, domestic violence, and substance abuse which caused Iliana to be placed with her maternal grandmother still persisted and impeded Iliana's ability to safely return to their parental care.

For example, the trial court found that "[b]oth [respondents] have acted inconsistently with their constitutionally-protected right to parent the minor child." In support of this finding, the trial court made specific findings regarding the respondents' voluntary placement of Iliana with her maternal grandmother due to "[Patty]'s impending incarceration and [Isaac]'s lack of suitable housing and work schedule," the remaining absence of "safe and stable housing appropriate for [Iliana] in the three (3) years the juvenile has been out of their custody," and the respondents' continued acts of domestic violence and illegal drug use. Our analysis focuses on whether clear and convincing evidence was presented to the trial court on the issues of housing, domestic violence, and drug use.

a. Housing

Respondents challenge the trial court's findings to the effect that respondents failed to rectify their housing situation to an extent that Iliana could return to live with them. In particular, the trial court found the following: "the home in which [respondents] were living . . . was deemed not suitable for [Iliana] when RCDSS visited the home in the spring of 2018 and again on 12/12/2018"; "the issues of . . . safe . . . housing are still present"; "[respondents] continue to reside with their infant daughter and [Iliana's] paternal grandmother . . . in a two-bedroom single wide trailer that has holes in the floor that were recently covered with plywood . . . and that has not otherwise been maintained"; "the housing conditions of [respondents] . . . was not safe and appropriate for [Iliana]. Any improvements made between the beginning of th[e] hearing and its conclusion are not indicative of the day-to-day condition of the home"; "[respondents] continue to reside . . . [in a] home [that] is not appropriate at this time for placement of [Iliana]"; and "[respondents] are not making adequate progress [and] . . . have not resolved the issues of . . . instable housing that led to removal of custody."

Ample evidence supported the trial court's findings that the cluttered, crowded, dilapidated single-wide trailer in which respondents resided with their newborn and Isaac's mother was an unsafe and unsuitable place for Iliana to dwell. Jordan Houchins ("Mr. Houchins"), an investigator with Rockingham County Child Protective Services, testified that in the spring of 2018 he visited the trailer and observed clutter "piled up literally to the ceiling", and opined "that [he] would consider [this] a hoarding situation[.]" Mr. Houchins also observed structural issues with the floors of the small trailer. When Mr. Houchins visited the trailer again in December 2018, the same issues remained. Isaac's mother told Mr. Houchins a child could sleep on the pull-out couch in the living room if Iliana lived in the trailer, as a child already lived in the

trailer with respondents and Isaac's mother. Mr. Houchins testified, consistent with the Adjudication Court Report, that he had concern about young children living in a small trailer in that condition. Mr. Houchins noted that a child currently resided at the trailer, but expressed concern with another child coming to live at the trailer, in light of the trailer's size, clutter, condition of the floors, and Isaac's mother's health and mobility difficulties.

Citing only photographs taken during the proceedings on 3 January 2019 showing a slight improvement in the clutter and reinforced plywood flooring, respondents would have us contravene the trial court's finding that "the day-to-day condition of the home" was presently unsafe. Such a contravention would be an improper usurpation of the trial court's credibility judgment between conflicting evidence. These pictures alone, taken after initiation of the instant proceedings once it became apparent that unsafe housing was an area of concern for the trial court, are insufficient to override the court's credibility assessment of the evidence before it concerning the safety and suitability of respondents' current housing situation. The trial court expressly found the reports and testimony presented by the guardian *ad litem* and social workers assigned to the case more credible than respondents' representations as to recent improvements in the condition of the trailer.

"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." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365-66 (2000) (internal citations omitted). A trial court's credibility assessments are no basis for relief on appeal in child protection proceedings or otherwise. *See In re A.C.*, 247 N.C. App. at 550 n.8, 786 S.E.2d at 743 n.8 (citation omitted). Here, the trial court acted within its discretion in finding the testimony and reports of the guardian *ad litem* and social workers who had visited the home more credible on the issue of the trailer's current condition than a few photographs taken during the proceedings.

While we may presume that respondents will not remove the reinforced plywood flooring at the termination of these proceedings, the trial court possessed clear and convincing evidence that the remaining issues identified with the trailer related to clutter, living space, and other structural issues remained impediments to Iliana's safe placement within the dwelling. When coupled with the trial court's uncontested finding that "[r]espondent parents indicate they plan to reside with [the

paternal grandmother] in the future despite the ongoing concerns about the safety and appropriateness of the condition of the home[,]" the trial court appropriately found that respondents' failure to furnish safe and suitable housing for Iliana bore upon whether their conduct was inconsistent with their constitutionally protected parental rights.

b. Domestic Violence

Respondents also challenge the Order's findings to the effect that respondents have failed to rectify their issues with domestic violence to an extent that Iliana could return to live with them. In particular, the trial court found the following: "[respondents] continue to engage in domestic violence . . . despite their completion of treatment and classes"; "the issues of . . . domestic violence . . . are still present despite numerous services that have been offered to the family"; "[t]here has not been another identified domestic violence incident between Respondent parents, however there has been domestic violence in the home between [Isaac] and his mother"; "[t]he issues that led to removal of custody, to wit, . . . domestic violence, . . . have not been resolved."

These findings of fact are erroneous as to Patty. The trial court considered evidence that she regularly participated in counseling regarding domestic violence and had not been involved in a domestic violence incident with Isaac since October of 2016. There was no other evidence indicating Patty's past issues with domestic violence persisted.

However, these findings of fact are supported by clear and convincing evidence as to Isaac. The trial court's remaining unchallenged findings of fact establishing respondents' extensive history of domestic violence issues, when coupled with evidence of the most recent domestic disturbance Isaac had with his mother in the same trailer in which he wishes Iliana to reside, support its ultimate finding that he has not resolved his issues with domestic violence to an extent necessary to safely place Iliana in his custody.

Emily Wise ("Ms. Wise"), the DSS "assigned social worker for [Iliana]," testified concerning the respondents' extensive history of domestic violence, which she also detailed in the Adjudication Court Report. In particular, Isaac was convicted of misdemeanor assault on a female as a result of an incident between Patty and him in October 2016.

The Order mischaracterizes the most recent domestic incident as one involving actual physical violence. In fact, the evidence shows that police were called to the residence on 23 August 2018 to respond to reports of a loud verbal disagreement. However, the OCDSS report

characterizes the incident as more than just a simple argument. Rather, Isaac was reportedly being "verbally aggressive . . . and was 'tearing up' the [trailer]." This evidence certainly does not refute the court's continuing concern.

While a trial court may not solely "rely on prior events to find [facts relevant to the current state of matters in issue at a permanency planning hearing], it may certainly consider facts at issue in light of prior events." *In re A.C.*, 247 N.C. App. at 535, 786 S.E.2d at 735 (citing *Cantrell v. Wishon*, 141 N.C. App. 340, 344, 540 S.E.2d 804, 806-807 (2000) ("[T]he trial court erroneously placed *no* emphasis on the mother's past behavior, however inconsistent with her rights and responsibilities as a parent[;] . . . failed to consider the long-term relationship between the mother and her children; . . . and failed to make findings on the mother's role in building the relationship between her children and the [nonparent custodians]."). In light of the trial court's detailed, unchallenged findings establishing Isaac's extensive history of domestic violence and reluctance to complete perpetrator programs except as mandated by the court, the trial court acted within its discretion in characterizing his most recent outburst as an indication that his issues with domestic violence have not been resolved to the extent necessary to place Iliana in his care.

c. Substance Abuse

Finally, respondents challenge the trial court's findings to the effect that respondents have failed to rectify their issues with substance abuse to an extent that Iliana could return to live with them. In particular, the trial court found the following: "[respondents] continue to engage in . . . illegal drug use despite their completion of treatment and classes"; "the issues of substance use . . . and safe, substance-free housing are still present despite numerous services that have been offered to the family"; "[respondents] continue to use marijuana despite substance abuse treatment. [Patty] has sought prescription painkillers from her mother on more than one occasion while [Iliana] has been placed out of the home"; and "[respondents] are not making adequate progress . . . [and] have not resolved the issue[] of substance abuse . . . that led to removal of custody."

Clear and convincing evidence supported these findings of fact as to both respondents. The trial court considered evidence that respondents completed substance abuse treatment on 16 March 2018. Respondents provided hair follicles for a drug screen, and the screen of both respondents on 4 September 2018 indicated marijuana use. The trial court was

also presented with evidence of Patty's continued drug seeking behavior after the 7 November 2017 Permanency Planning Order.

Ms. Wise testified that Patty had engaged in drug seeking behavior after the appeal and remand of the 7 November 2017 Order. Specifically, Patty texted "her mother . . . requesting pain medications on several occasions," including a text message asking "Do you have a couple of pills I can get?" on 10 June 2018, as well as a text message on 10 August 2018 requesting pain medication. Patty's drug seeking behavior is supportive of the trial court's findings of Patty's continued drug use.

The trial court heard evidence that Isaac completed his substance abuse treatment program in March of 2018 and has since tested positive for marijuana on the same day as Patty and exchanged text messages with her seeking to purchase marijuana. Therefore the court had clear and convincing evidence before it that, viewed in light of Isaac's extensive history of substance abuse recognized by the majority, there was legitimate cause to question whether he had overcome this problem such that Iliana could be safely placed within his home. The trial court also found that he intended to continue residing indefinitely with Patty, who continues to exhibit drug-seeking behavior, in the very trailer where they were previously known to snort pills and consume other impairing substances together in front of their children. We therefore uphold the trial court's findings of fact to the effect that respondents have not overcome their substance abuse issues to its satisfaction in deciding whether placement of Iliana in their home would be appropriate.

2. Conclusion of Law

The order's aforementioned findings of fact support the trial court's conclusion of law that respondents' conduct was inconsistent with their constitutionally protected right to parent Iliana. Clear and convincing evidence supported the Order's findings that recent incidents raised serious concerns about their progress in resolving their chronic issues related to unsafe housing, domestic violence, and substance abuse that had precipitated the circumstances in which Iliana was adjudicated dependent and placed with her maternal grandmother in 2014. When considered in light of the order's undisputed findings establishing respondents' extensive history as to each of these chronic issues and their detrimental effect on Iliana, we uphold the trial court's determination that the totality of circumstances relevant to their conduct was inconsistent with their constitutionally protected status as Iliana's parents. Having overcome this constitutional threshold, the trial court appropriately placed Iliana's best interest at the forefront of its decision to grant guardianship to her grandmother as the permanent plan.

B. Analysis Under the Statutory Standard for Permanency Planning

[2] Respondents make the same evidentiary challenges to the trial court's findings of fact in arguing that they fail to satisfy the statutory requirements applicable to an order granting guardianship to a nonparent as the permanent plan over a parent's objections. In essence, they contend that competent evidence does not support the trial court's findings that they have failed to resolve the issues of domestic violence, substance abuse, and instable housing that lead to Iliana's placement with her grandmother three years prior. Having already determined that these findings of fact clear the higher constitutional bar imposed by the Due Process Clause, we hold that the trial court heard competent evidence to support these findings.

In turn, these findings support the statutorily required ultimate findings of fact and the order's conclusions of law with which respondents take issue. "In choosing an appropriate permanent plan under N.C. Gen. Stat. § 7B-906.1 (2013), the juvenile's best interests are paramount. We review a trial court's determination as to the best interest of the child for an abuse of discretion." *In re A.C.*, 247 N.C. App. at 532-33, 786 S.E.2d at 733 (citation omitted). "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.H.*, __ N.C. App. __, __, 832 S.E.2d 162, 164 (2019) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

Pursuant to N.C. Gen. Stat. § 7B-906.1(d), the trial court held that efforts to reunite Iliana with her parents would be unsuccessful or inconsistent with her health, safety, and need for a safe and permanent home within a reasonable period of time.[2] This conclusion rested upon its determination that "[t]he issues that lead to removal of custody . . . have not been resolved." Per N.C. Gen. Stat. § 7B-906.1(e), the trial court also held that it was not possible to place Iliana with her parents within the next six months and doing so was not in her best interest. This conclusion was based upon its continuing concerns with the issues leading to State involvement and respondents' plan to continue residing in the trailer deemed inappropriate for Iliana's placement. For the same reasons, the trial court held that respondents demonstrated a lack of success by not making adequate progress under the secondary plan

2. The trial court made findings of fact speaking to all the requisite criteria in N.C. Gen. Stat. §§ 7B-906.1, -906.2. We address only those challenged by respondents.

of reunification and acting in a manner inconsistent with the health or safety of Iliana, pursuant to N.C. Gen. Stat. § 7B-906.2(d).

The trial court's ultimate findings on each of these matters find ample support in its findings of fact discussed *supra* regarding the trial court's continuing concerns with respondents' domestic violence, substance abuse, and inadequate housing. These ultimate findings in turn support its conclusion that "[t]he best plan of care to achieve a safe, permanent home for [Iliana] within a reasonable period of time is implementation of the primary plan of guardianship to . . . [her] maternal grandmother[,]" and that such placement would be in her best interest. The court's decision is not manifestly unsupported by reason. Therefore, the trial court did not abuse its discretion in its permanency planning order granting guardianship of Iliana to her grandmother.

C. Visitation Plan

Respondents respectively challenge the visitation plan within the Order on separate grounds. We find no merit in either argument.

1. Parameters of Visitation Plan

[3] Patty challenges the trial court's visitation order, which limited her to "a minimum of one hour per week of supervised visitation [with Iliana]." "This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion." *In re C.S.L.B.*, 254 N.C. App. 395, 399, 829 S.E.2d 492, 495 (2017) (internal quotation marks and citation omitted). Patty's arguments center on whether visitation should be unsupervised, and she contends the trial court lacked competent evidence to order visitation supervised by Iliana's maternal grandmother.

According to N.C. Gen. Stat. § 7B-905.1(c) (2019),

> If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised. The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

The trial court ordered that "Respondent[s] shall have a minimum of one hour per week of supervised visitation. The guardian has the authority and discretion to allow additional visitation." The trial court's order complied with N.C. Gen. Stat. § 7B-905(c). The trial court also heard testimony that respondents' unsupervised visitation had previously been

rescinded due to separate instances of visitation where respondents "appeared to be under the influence." Iliana's guardian ad litem recommended supervised visitation. Iliana's therapist's letter also described concerns with changing the juvenile's routine, and that current treatment involved "the use of structure and predictability" to increase Iliana's ability to "accept care and feel settled and soothed by an adult caregiver as well as increasing [Iliana's] trust in adults to take care of her needs." The trial court's order for supervised visitation as to Patty is not manifestly unsupported by reason, and the trial court did not abuse its discretion.

2. Notice of Right to File Motion to Review Visitation Plan

[4] Finally, Isaac argues that the trial court failed to provide him with notice of his right to file a motion with the court to review the visitation plan established in the Order, as required by N.C. Gen. Stat. § 7B-905.1(d). We find no merit in this argument and otherwise deem any purported error harmless.

"If the court retains jurisdiction" in its dispositional order in a permanency planning case, "all parties shall be informed of the right to file a motion for review of any visitation plan entered pursuant to this section." N.C. Gen. Stat. § 7B-905.1(d). Here, in open court the trial court made the parties aware in a general sense that it would retain continuing jurisdiction and could review any aspect of its permanency planning order upon its own motion or that of a party: "[B]ecause [Iliana] has been placed with her grandmother . . . if something changes at some point, the motions can be made back to this Court if changes need to be made." Furthermore, in its written order the court noted that "[a]ll parties are aware that the matter may be brought before the Court for review at any time by the filing of a motion for review or on the Court's own motion" and "Juvenile Court jurisdiction shall continue."

Assuming *arguendo* Isaac's position that the trial court was required to explicitly reference the parties' right of review under N.C. Gen. Stat. § 7B-905.1(d), any such error was harmless. Isaac has not pointed to any right lost or prejudiced by the trial court's failure to timely provide such notice. Moreover, Isaac's mere assignment of error on this issue indicates that he has since become aware of his right of review under N.C. Gen. Stat. § 7B-905.1(d). We otherwise find no merit in his argument that any purported inadequacy of the notice provided amounts to reversible error.

II. Conclusion

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

AFFIRMED.

Judge INMAN concurs.

Judge Murphy concurs in part and dissents in part in separate opinion.

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

The Majority determined that clear and convincing evidence supported the findings relevant to the trial court's determination that Patty and Isaac acted inconsistently with their constitutionally protected right to parent Iliana. Specifically, the Majority held that clear and convincing evidence supported the trial court's findings that Patty and Isaac had failed to resolve issues with housing, domestic violence, and drug abuse to an extent they could reunite with Iliana. I agree that competent evidence supported the trial court's finding that Patty had not resolved *one* of those issues—drug abuse—and so would affirm the Order's finding and conclusion concerning Patty acting inconsistently with her constitutionally protected right to parent Iliana. I also agree with the Majority that "the trial court's order for supervised visitation as to Patty is not manifestly unsupported by reason, and the trial court did not abuse its discretion." However, no competent evidence was presented to the trial court as to Isaac on the issues of housing, domestic violence, and drug abuse, and I would accordingly reverse as to Isaac. I respectfully dissent.

ANALYSIS

A. Challenged Findings in the 22 March 2019 Permanency Planning Order

In their separate briefs, Patty and Isaac challenged the following Findings of Fact in the Order:

> 26. Both [Patty] and [Isaac] have acted inconsistently with their constitutionally-protected right to parent [Iliana]. Specifically, this court finds as follows:
>
> a. [Patty and Isaac] voluntarily placed [Iliana] with her maternal grandmother on [26] April []

2016 because of [Patty]'s impending incarceration and [Isaac]'s lack of suitable housing and work schedule.

b. [Patty and Isaac] have not obtained safe and stable housing appropriate for [Iliana] in the three (3) years [Iliana] has been out of their custody. Though the home in which they were living was found to have met minimum standards by RCDSS on two visits between [2] March [] 2017 and [5] October [] 2017, the home was deemed not suitable for [Iliana] when RCDSS visited the home in the spring of 2018 and again on [12 December 2018].

c. [Patty and Isaac] continue to engage in domestic violence and illegal drug use despite their completion of treatment and classes.

27. When this hearing began on [3] January [] 2019, [Patty and Isaac] were still residing with [Isaac]'s mother in a home that Rockingham County DSS deemed unsuitable for the children as late as [12] December [] 2018.

28. [Patty and Isaac] have made some limited progress to remedy conditions that led to [Iliana] being removed from their home. However, the issues of substance use, domestic violence, and safe, substance-free housing are still present despite numerous services that have been offered to the family since the issues were first identified in 2014.

. . .

30. [Patty] concluded a domestic violence support group at the Compass Center in May 2017. [Isaac] completed a domestic violence perpetrator program at Alamance County DV Prevention in February 2018. There has not been another identified domestic violence incident between [Patty and Isaac], however there has been domestic violence in the home between [Isaac] and his mother[.]

. . .

34. Despite [Isaac] earning a gross income of $46,349.00 per year in a job he has maintained for l0 years and

[Isaac's mother] paying a portion of the household expenses, [Patty and Isaac] continue to reside with their infant daughter and [Isaac's mother] with whom they moved after eviction in 2016 in a two-bedroom single wide trailer that has holes in the floor that were recently covered with plywood at the request of RCDSS, and that has not otherwise been maintained.

. . .

37. At the continuation of this hearing on [18] January [] 2019, [Patty and Isaac] provided photographs of the home that showed somewhat improved conditions from the conditions reflected in the photographs and testimony presented on [3] January [] 2019. [Patty] testified that the new photos were taken after the [3] January [] 2019 beginning of the hearing. The court finds the testimony and documentation of Rockingham County DSS to be credible, and that the housing conditions of [Patty and Isaac] as of [12] December [] 2018 was not safe and appropriate for the minor child. Any improvements made between the beginning of this hearing and its conclusion are not indicative of the day-to-day condition of the home.

. . .

40. The following are relevant pursuant to N.C.G.S. § 7B-906.1(d): . . .
    c. Efforts to reunite [Iliana] with either [Patty or Isaac] would be unsuccessful or inconsistent with [Iliana's] health or safety and need for a safe, permanent home within a reasonable period of time. The issues that led to removal of custody, to wit, substance abuse, domestic violence, and housing, have not been resolved. [Iliana] has resided with her maternal grandmother for over half of her life.

41. The Court finds, pursuant to N.C.G.S. § 7B-906.1(e), it is not possible for [Iliana] to be returned home or placed with Respondent[s] within the next six months. Placement with Respondent[s] is not in [Iliana's] best

interest. In support of this ultimate finding of fact, the court specifically finds the following[1]:

. . .

b. [Patty and Isaac] have been involved with the Department since October 2015 due to concerns about substance use, domestic violence, and unstable housing, and had involvement with Rockingham County DSS in 2014 regarding the same issues that remain unresolved in 2019.

c. [Patty and Isaac] continue to use marijuana despite substance abuse treatment. [Patty] has sought prescription painkillers from her mother on more than one occasion while [Iliana] has been placed out of the home.

d. [Patty and Isaac] continue to reside with [Isaac's mother]. This home is not appropriate at this time for placement of [Iliana].

b. Placement with [Patty] or [Isaac] is unlikely within six months, and:

i. Legal guardianship or custody with a relative should be established. [Patty and Isaac] should retain the right of visitation and the responsibility of providing financial support to [Iliana] by paying regular child support.

ii. Adoption should not be pursued.

iii. [Iliana] should remain in the current placement because it is meeting her needs and in her best interests.

iv. Due to the history of the case and relationship between [respondents] and [the maternal grandmother], the guardian ad litem recommends guardianship to [the maternal grandmother] in [Iliana's] best interest.

c. Since the initial permanency planning hearing, OCDSS has made reasonable efforts to finalize [Iliana's] permanent plans as laid out below.

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1. The tabbing and inclusion of the first "b.," "c.," and "d." before the second "b.", etc., appears in the Order in the Record.

. . .

43. Pursuant to N.C.G.S. § 7B-906.2(d), the following demonstrate a lack of success:

    a. [Patty and Isaac] are not making adequate progress within a reasonable period of time under the secondary plan of reunification. They have not resolved the issues of substance abuse and instable housing that led to removal of custody.

    b. [Patty and Isaac] have partially participated in or cooperated with the plan, the department, and [Iliana's] Guardian ad Litem.

. . .

    d. [Patty and Isaac] have acted in a manner inconsistent with the health or safety of [Iliana] as set forth herein.

44. The best plan of care to achieve a safe, permanent home for [Iliana] within a reasonable period of time is implementation of the primary plan of guardianship to a relative, specifically to [the maternal grandmother].

. . .

57. The Court finds pursuant to N.C.G.S. § 7B-906.1(n): . . .

    b. The placement is stable, and continuation of the placement is in her best interest.

In their separate briefs, Patty and Isaac challenged the following Conclusions of Law in the Order:

2. It is in the best interest of [Iliana] that guardianship be granted to [the maternal grandmother].

. . .

4. Implementation of guardianship as a permanent plan for [Iliana] is made within the time prescribed by law, is appropriate and is in [Iliana's] best interest.

. . .

6. [Patty and Isaac] have acted inconsistently with their protected status.

7. [The maternal grandmother] is a fit and proper person to have guardianship of [Iliana] and that it is in the best interest of [Iliana] that guardianship be granted to and continued with [Iliana's maternal grandmother].

8. It is in the best interest of [Iliana] to have supervised visitation with [Patty and Isaac] once per week pursuant to the schedule that [Patty and Isaac] and caretaker have been following for the last several months.

B. Standard of Review

"Appellate review of a permanency planning order is limited to whether there is competent evidence in the [R]ecord to support the findings and [whether] the findings support the conclusions of law." *In re S.J.M.*, 184 N.C. App. 42, 47, 645 S.E.2d 798, 801 (2007), *aff'd*, 362 N.C. 230, 657 S.E.2d 354 (2008). Further, "[t]he findings of fact by the trial court in a nonjury trial have the force and effect of a jury verdict and are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings." *In re Norris*, 65 N.C. App. 269, 275, 310 S.E.2d 25, 29 (1983). "When the trial court is the trier of fact, the court is empowered to assign weight to the evidence presented at the trial as it deems appropriate. In this situation, the trial judge acts as both judge and jury, thus resolving any conflicts in the evidence." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996) (internal citations omitted).

"[T]he . . . right of parents to make decisions concerning the care, custody, and control of their children[]" is fundamental. *Troxel v. Granville*, 530 U.S. 57, 66, 147 L.Ed.2d 49, 57 (2000). "A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child." *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (citations omitted). "[A] natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his . . . constitutionally protected status." *In re D.M.*, 211 N.C. App. 382, 385, 712 S.E.2d 355, 357 (2011) (quoting *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005)).

We review "the trial court's conclusions that [a parent] has acted in a manner inconsistent with her constitutionally protected paramount status . . . *de novo*." *In re A.C.*, 247 N.C. App. 528, 535, 786 S.E.2d 728,

735 (2016) (internal marks omitted). "[A] trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001). "There is no bright line beyond which a parent's conduct amounts to action inconsistent with the parent's constitutionally protected paramount status. Our Supreme Court has emphasized the fact-sensitive nature of the inquiry, as well as the need to examine each parent's circumstances on a case-by-case basis." *In re A.C.*, 247 N.C. App. at 536, 786 S.E.2d at 735 (internal marks and citations omitted).

"[T]o apply the best interest of the child test in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is unfit or that his or her conduct is inconsistent with a parent's constitutionally protected status." *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009) (citations omitted). Upon a *proper* finding of unfitness or actions inconsistent with the parent's constitutionally protected status, the trial court determines the best interest of the child. *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994). When determining the appropriate permanent plan according to N.C.G.S. § 7B-906.1, "the trial court should consider the parents' right to maintain their family unit, but if the interest of the parent conflicts with the welfare of the child, the latter should prevail. Thus, in this context, the child's best interests are paramount, not the rights of the parent." *In re T.K.*, 171 N.C. App. 35, 39, 613, S.E.2d 739, 741, *aff'd per curiam*, 360 N.C. 163, 622 S.E.2d 494 (2005) (citations and quotations omitted). "The court's determination of the juvenile's best interest will not be disturbed absent a showing of an abuse of discretion." *In re T.H.*, 832 S.E.2d 162, 164 (N.C. Ct. App. 2019) (quoting *In re E.M.*, 202 N.C. App. 761, 764, 692 S.E.2d 629, 630 (2010)); *see also In re D.S.A.*, 181 N.C. App. 715, 720, 641 S.E.2d 18, 22 (2007). "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.H.*, 832 S.E.2d at 164 (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

C. Findings of Inconsistent Action with Constitutionally Protected Status on Remand

We vacated the 7 November 2017 Permanency Planning Order because the trial court failed to make the required finding that respondents were unfit or had acted inconsistently with their constitutionally protected status as parents. *See In re I.K.*, 260 N.C. App. 547, 550, 818 S.E.2d 359, 362 (2018). We held that, absent such a finding, the trial court erred in reaching a best interest of the child analysis to determine that

guardianship with the maternal grandmother was in the best interest of Iliana and Kevin. *Id.* Our opinion focused on the absence of a necessary *finding*, *Id.* at 550, 555, 818 S.E.2d at 362, 365, and accordingly the bulk of my analysis in this Dissent focuses on the trial court's findings, and whether they were supported by competent evidence. Patty and Isaac only appeal the Order as to Iliana, not as to Kevin, and I examine the trial court's findings and conclusions of law as to Iliana only.

The Order made the findings required by our opinion remanding the 7 November 2017 Permanency Planning Order. In particular, the trial court included Finding of Fact 26 in the Order, finding that "[b]oth [Patty and Isaac] have acted inconsistently with their constitutionally-protected right to parent the minor child." In support of Finding of Fact 26, the trial court made specific findings regarding respondents' voluntary placement of Iliana with her maternal grandmother due to "[Patty]'s impending incarceration and [Isaac]'s lack of suitable housing and work schedule," the remaining absence of "safe and stable housing appropriate for [Iliana] in the three (3) years [Iliana] has been out of [respondents'] custody," and the respondents' continued acts of domestic violence and illegal drug use. My analysis focuses on whether competent evidence was presented to the trial court on the issues of housing, domestic violence, and drug use. The Order also concluded as a matter of law that "[respondents] have acted inconsistently with their protected status."

The Order classifies its findings to comply with the requirements stated in our 7 August 2018 Order remanding the 7 November 2017 Permanency Planning Order for further findings of unfitness or inconsistent action with respondents' constitutionally protected status as parents. However, I note that several findings categorized as findings of fact were, at least partially, conclusions of law. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (internal citations and alterations omitted) (holding that "any determination requiring the exercise of judgment, or the application of legal principles is more properly classified a conclusion of law"); *see also Plott v. Plott*, 313 N.C. 63, 73-74, 326 S.E.2d 863, 869-70 (1985). The trial court's classification of its own determination as a finding or conclusion does not govern this court's analysis. *See State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009); *State v. Burns*, 287 N.C. 102, 110, 214 S.E.2d 56, 61-62 (1975).

Specifically, the trial court's Findings of Fact 40(c), 41(b), and 43 in the Order actually amount to conclusions of law, inasmuch as they declare the following: whether "[e]fforts to reunite [Iliana] with either [Patty or Isaac] would be unsuccessful or inconsistent with [Iliana's] health or safety and need for a safe, permanent home within a reasonable period

of time" under N.C.G.S. § 7B-906.1(d); that "[p]lacement with [respondents] is unlikely within six months" under N.C.G.S. § 7B-906.1(e); and the inadequacy of respondents' progress, participation, and cooperation in the reunification plan, including actions regarding "the health or safety of [Iliana]," under N.C.G.S. § 7B-906.2(d).

While the trial court made findings on remand to comply with the requirements of our 7 August 2018 opinion, I treat the portions of Findings 40(c), 41(b), and 43 requiring exercise of judgment or application of legal principles as conclusions of law and apply the appropriate de novo standard of review. *See Icard*, 363 N.C. at 308, 677 S.E.2d at 826 ("While we give appropriate deference to the portions of [the relevant findings] that are findings of fact, we review de novo the portions of those findings that are conclusions of law.").

The trial court made findings regarding respondents' issues with housing, domestic violence, and drug abuse, and used those findings to support its finding that they acted inconsistently with their constitutionally protected right to parent Iliana. The Majority addressed the issues of housing, domestic violence, and drug abuse in that order. Accordingly, I analyze each of those issues as they relate to respondents in the same order as the Majority.

D. Challenged Findings of Fact

1. Housing

On appeal, respondents challenge the trial court's Findings of Fact 26(b), 27, 28, 34, 37, 40(c), 41(d), 43(a), and 44, which find that respondents failed to rectify their housing situation to an extent that Iliana could return to live with them. In particular, the trial court found the following: "the home in which [respondents] were living . . . was deemed not suitable for [Iliana]"; the home was "deemed unsuitable for the children"; "the issues of . . . safe . . . housing are still present"; "[respondents] continue to reside . . . in a two-bedroom single wide trailer that has holes in the floor that were recently covered with plywood . . . and that has not otherwise been maintained"; "the housing conditions of [respondents] . . . was not safe and appropriate for [Iliana]. Any improvements made between the beginning of this hearing and its conclusion are not indicative of the day-to-day condition of the home[]"; "[t]he issues that led to removal of custody, to wit, . . . housing, have not been resolved[]"; "[respondents] continue to reside . . . [in a] home [that] is not appropriate at this time for placement of [Iliana]"; "[respondents] are not making adequate progress [and] . . . have not resolved the issues of . . . instable housing that led to removal of custody[]"; and "[t]he best plan of care to

achieve a safe, permanent home for [Iliana] within a reasonable period of time is . . . to [place Iliana with] maternal grandmother."

Jordan Houchins ("Houchins"), an investigator with Rockingham County Child Protective Services, testified that, in the spring of 2018, he visited Isaac's mother's home, where respondents lived, and observed clutter "piled up literally to the ceiling." Houchins also observed structural issues with the floors of the small trailer. When Houchins visited the trailer again in December 2018, the same issues remained. Isaac's mother told Houchins a child could sleep on the pull-out couch in the living room if Iliana lived in the trailer, as a child already lived in the trailer with her, Patty, and Isaac. Houchins testified, consistent with the Adjudication Court Report, that he had concern about young children living in a small trailer in that condition. Houchins noted that a child currently resided at the trailer, but expressed concern with another child coming to live at the trailer, in light of the trailer's size, clutter, condition of the floors, and Isaac's mother's health and mobility difficulties.

However, competent evidence did not support the findings of fact concerning respondents' *current* housing situation. I disagree with the Majority's analysis of this issue, particularly its view that we would usurp the trial court's role in making a credibility determination between conflicting evidence by contravening the finding of unsafe day-to-day housing conditions in light of the photographs provided by respondents showing their housing situation had clearly changed. The trial court did not merely consider evidence that, in October 2017, respondents' housing situation had somewhat stabilized, or that "Rockingham County DSS [] visited [Isaac's mother's] home . . . and determined that it [met] minimum standards." Importantly, respondents provided pictures of floor reinforcements to that home at the 18 January 2019 hearing. Specifically, pictures 2, 7, 8, 10, 11, and 12 show sheets of plywood on the floor and are evidence that respondents improved the floors of the residence to improve the flooring problems described by Houchins. Pictures 1-9 show two bedrooms, a dining room, and a kitchen; each space is small and cluttered, but space is visible on the floors, beds, dresser, counter tops, table, and stove. These pictures contradicted the trial court's finding concerning "the day-to-day condition of the home," particularly that respondents resided in "housing conditions . . . not safe and appropriate for [Iliana]," as well as the conclusions that the "extremely cluttered . . . ho[a]rding" observed in the spring of 2018 and on 12 December 2018 and lack of space in the trailer continued. The pictures respondents provided of floor reinforcements at the 18 January 2019 hearing contradicted

the trial court's finding that "the day-to-day condition of the home" *continued* to be unsafe, as the pictures did not show the holes in the floor, the hoarding observed in the spring of 2018 and 12 December 2018, or the continuation of a lack of space in the trailer. These pictures provided objective proof of a change in circumstance as to respondents' housing, making the trial court's finding of fact incorrect. Instead of a credibility determination weighing the believability of contradictory evidence, the trial court's finding regarding respondents' housing situation disregarded objective facts established by photographic evidence.

Competent evidence did not support the trial court's findings that respondents' housing situation continued to be unsafe and too small for Iliana, which the trial court used to support its finding that respondents acted inconsistently with their constitutionally protected status as parents. In light of that lack of competent evidence to support the trial court's findings regarding respondents' housing, I would set aside Findings of Fact 26(b), 27, 28, 34, 37, 40(c), 41(d), 43(a), and 44 to the extent they find respondents had failed to rectify their housing situation to an extent that Iliana could not return to live with them.

2. Domestic Violence

On appeal, respondents challenge the trial court's Findings of Fact 26(c), 28, 30, 40, 41(b), and 44, which find that respondents had failed to rectify their issues with domestic violence to an extent that Iliana could return to live with them. In particular, the trial court found the following: "[respondents] continue to engage in domestic violence . . . despite their completion of treatment and classes[]"; "the issues of . . . domestic violence . . . are still present [with respondents] despite numerous services that have been offered to the family[]"; "[t]here has not been another identified domestic violence incident between [respondents], however there has been domestic violence in the home between [Isaac] and his mother"; "[t]he issues that led to removal of custody, to wit, . . . domestic violence, . . . have not been resolved[]"; "[respondents] have been involved with the Department since October 2015 due to concerns about . . . domestic violence, . . . and . . . the same issues . . . remain unresolved in 2019[]"; and "[t]he best plan of care to achieve a safe, permanent home for [Iliana] within a reasonable period of time is . . . to [place Iliana with] maternal grandmother."

Emily Wise ("Wise"), the DSS "assigned social worker for [Iliana,]" testified concerning respondents' history of domestic violence, which she also detailed in the Adjudication Court Report. In particular, Isaac was convicted of misdemeanor assault on a female as a result of an

incident between Patty and him in October 2016. Wise also testified, to her knowledge, no additional domestic violence incidents had occurred between respondents since October 2016. She testified that police had been called to a domestic disturbance at Isaac's mother's house on 23 August 2018. Isaac testified that he was yelling at his mother during the incident, and Isaac's mother "reported it had been a family disagreement." "There were no criminal charges related to" the 23 August 2018 incident.

Competent evidence did not support the trial court's findings of fact concerning respondents' issues with domestic violence listed above. *No* known additional domestic violence incidents have occurred between respondents since October 2016. While the trial court found that domestic violence has occurred between Isaac and his mother in the home respondents live in, the evidence in the Record does not support that violence actually occurred. In fact, the only evidence before the court described the incident as an argument, not as a violent or physical confrontation. I would not speculate about the hyperbolic statements in a 911 call log that Isaac was " 'tearing up' the [trailer]" during this argument, particularly when no charges arose from the incident. Further, the trial court considered evidence that Patty regularly participated in counseling regarding domestic violence, and Isaac engaged in a perpetrator-related domestic violence program.

The evidence does not support the trial court's Findings of Fact that "[respondents] continue to engage in domestic violence," "the issues of . . . domestic violence . . . are still present [with respondents]," "there has been domestic violence in the home between [Isaac] and his mother" since 2017, or that respondents' issues with domestic violence remain unresolved. I agree with the Majority that the trial court's findings regarding Patty and domestic violence were erroneous, but disagree with its characterization of the evidence regarding Isaac and domestic violence. Competent evidence did not support the trial court's findings that respondents have not resolved their issues with domestic violence, which the trial court used to support Finding of Fact 26 that respondents acted inconsistently with their constitutionally protected status as parents. In light of that lack of competent evidence to support the trial court's findings regarding respondents and domestic violence, I would set aside Findings of Fact 26(c), 28, 30, 40, 41(b), and 44 to the extent they find respondents had failed to rectify their issues with domestic violence to an extent that Iliana could not return to live with them.

3. Drug Abuse

On appeal, respondents challenge the trial court's Findings of Fact 26(c), 28, 40(c), 41(b), 41(c), 43(a), and 44, which find that Patty and Isaac had failed to rectify their issues with drug abuse to an extent that Iliana could return to live with them. In particular, the trial court found the following: "[Patty and Isaac] continue to engage in . . . illegal drug use despite their completion of treatment and classes[]"; "the issues of substance use . . . and safe, substance-free housing are still present despite numerous services that have been offered to the family"; "[t]he issues that led to removal of custody, to wit, substance abuse . . . have not been resolved[]"; "[Patty and Isaac] have been involved with the Department since October 2015 due to concerns about substance use, . . . and . . . the same issues [] remain unresolved in 2019[]"; "[Patty and Isaac] continue to use marijuana despite substance abuse treatment. [Patty] has sought prescription painkillers from her mother on more than one occasion while [Iliana] has been placed out of the home[]"; "[Patty and Isaac] are not making adequate progress . . . [and] have not resolved the issue[] of substance abuse . . . that led to removal of custody[]"; and "[t]he best plan of care to achieve a safe, permanent home for [Iliana] within a reasonable period of time is . . . to [place Iliana with] maternal grandmother."

The trial court considered evidence that respondents completed substance abuse treatment on 16 March 2018. Wise testified that respondents provided hair follicles for a drug screen, and the screen of both respondents on 4 September 2018 indicated marijuana use. The trial court was also presented with evidence of Patty's continued drug seeking behavior after the 7 November 2017 Permanency Planning Order.

Wise testified that Patty had engaged in drug seeking behavior after the appeal and remand of the 7 November 2017 Order; specifically, Patty texted "her mother[] requesting pain medications on several occasions," including a text message asking "Do you have a couple of pills I can get?" on 10 June 2018, as well as a text message on 10 August 2018 requesting pain medication. Patty's drug seeking behavior is supportive of the trial court's findings of Patty's continued drug use. Since competent evidence supported the trial court's findings that Patty continued to abuse drugs, I agree with the Majority and would not set aside the challenged findings concerning Patty's issues with drug abuse.

However, the Record does not contain such evidence of continued drug seeking behavior as related to Isaac. Unlike evidence of Patty's continued drug seeking behavior after the appeal and remand of the

7 November 2017 Order, the only evidence since February 2017 of Isaac participating in drug use is a hair follicle sample from 4 September 2018 indicating marijuana use. The Majority also mentions a text message exchange *between respondents* about marijuana on 4 April 2018, which did not constitute the same drug seeking behavior as Patty in her text messages to other individuals asking for drugs. The trial court was not presented with any other evidence showing Isaac's participation in drugs, or drug abuse, since February 2017, other than the 4 September 2018 test. Competent evidence did not support the trial court's findings that Isaac *continued* to abuse drugs, which the trial court used to support its finding that Isaac acted inconsistently with his constitutionally protected status as Iliana's parent. In light of that lack of competent evidence to support the trial court's findings regarding Isaac and continued drug abuse, I would set aside findings 26(c), 28, 40(c), 41(b), 41(c), 43(a), and 44 to the extent they find Isaac had failed to rectify his issues with drug abuse to an extent that Iliana could not return to live with him. Additionally, to the extent Finding of Fact 26 relied on findings that Isaac had failed to rectify his issues with housing, domestic violence, and drug abuse, I would set aside that Finding of Fact that Isaac had acted inconsistently with his constitutionally protected right to parent Iliana.

E. Challenged Conclusion of Law 6

The trial court relied on the unsupported portions of Findings of Fact 26(b), 26(c), 27, 28, 30, 34, 37, 40, 41(b), 41(c), 41(d), 43(a), and 44 regarding respondents' housing, domestic violence, and drug abuse to support its Conclusion of Law 6 that respondents acted inconsistently with their constitutionally protected right to parent Iliana. *See In re A.C.*, 247 N.C. App. at 535, 786 S.E.2d at 735. Specifically, I would review whether the remaining findings of fact support Conclusion of Law 6 in light of my previous analysis that competent evidence only supported the trial court's findings that *Patty* continued to abuse drugs. *See In re A.A.S.*, 258 N.C. App. 422, 429, 812 S.E.2d 875, 881 (2018); *see also In re A.B.*, 239 N.C. App. 157, 160, 768 S.E.2d 573, 575 (2015).

Clear and convincing evidence of Patty's continued drug seeking behavior supported the trial court's Conclusion of Law 6 that Patty acted inconsistently with her constitutionally protected right to parent Iliana. Patty's text messages to her mother seeking drugs were clear and convincing evidence that supported Conclusion of Law 6. However, the same conclusion does not necessarily follow for Isaac. Unlike evidence in the Record of Patty's continued drug seeking behavior when she texted her mother seeking drugs, the Record only contains evidence of one instance since February 2017 linking Isaac to participating in

marijuana use, aside from his text message exchange about marijuana with Patty.

Evidence that respondents participated in efforts to correct the issues that led to Iliana's removal from their home regarding domestic violence, sobriety, and housing stability, and maintained involvement with Iliana, does not support the trial court's Conclusion of Law 6. Competent evidence did not support findings that Isaac "continue[s] to engage in . . . illegal drug use," particularly since a marked lack of evidence exists in the Record concerning continued drug seeking behavior by Isaac. Limited marijuana usage, without more, is not conduct inconsistent with one's constitutionally protected parental rights. Since "[t]he clear and convincing standard requires evidence that should fully convince," *In re A.C.*, 247 N.C. App. at 533, 786 S.E.2d at 734, and the Record lacks evidence that fully convinces or supports Conclusion of Law 6, the trial court erred in concluding that Isaac acted inconsistently with his parental rights. Finding of Fact 26 that Isaac acted inconsistently with his parental rights is not supported by competent evidence, should be set aside, and does not support the trial court's Conclusion of Law 6 that Isaac acted inconsistently with his parental rights.

Competent evidence of Patty's continued drug seeking behavior supported the trial court's findings regarding Patty's drug abuse, including Finding of Fact 26 that Patty acted inconsistently with her constitutionally protected right to parent Iliana. These findings supported Conclusion of Law 6 that Patty acted inconsistently with her constitutionally protected right to parent Iliana. Accordingly, I concur with the Majority that we should affirm the trial court's ruling as to Patty.

However, the Record does not contain competent evidence supporting the trial court's findings that Isaac's housing situation, domestic violence, or drug abuse prevented Iliana from returning to live with him. In particular, Finding of Fact 26 that Isaac acted inconsistently with his constitutionally protected right to parent Iliana was unsupported by competent evidence, and the findings did not support Conclusion of Law 6. I acknowledge that further findings would be necessary on remand concerning Iliana's placement with Isaac, as Patty resides with Isaac and continues to exhibit drug seeking behavior.

CONCLUSION

The trial court's Finding of Fact 26 and Conclusion of Law 6 concerning Patty acting inconsistently with her constitutionally protected right to parent the minor child were not erroneous, as the Record contained

competent evidence of Patty's continued drug use, and the findings concerning continued drug use supported Conclusion of Law 6.

However, the trial court's Finding of Fact 26 and Conclusion of Law 6 concerning Isaac acting inconsistently with his constitutionally protected right to parent the minor child were erroneous, as the Record did not contain competent evidence of Isaac's continued drug use to the extent inconsistent with his constitutional rights to parent his child, domestic violence, or unsafe housing conditions, and the findings did not support Conclusion of Law 6.

The trial court did not abuse its discretion in its visitation order concerning Patty, as the Order complied with the requirements of N.C.G.S. § 7B-905.1(c).

Unlike the Majority, I would remand this matter for further findings concerning Iliana's placement with Isaac without placing her with Patty. Accordingly, I respectfully dissent.

IN THE MATTER OF J.T.C.

No. COA19-252

Filed 18 August 2020

Termination of Parental Rights—grounds for termination—willful abandonment—best interests—sufficiency of evidence

Although the trial court did not distinguish between its adjudicatory and dispositional findings of fact or between its findings of fact and conclusions of law, the court properly terminated respondent-father's parental rights to his son on the basis of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where the evidence established that, for longer than the six-month dispositive period, respondent had no contact with his child, made no attempts to communicate with him, and paid no support of any kind. Further, the trial court did not abuse its discretion by concluding that termination of respondent's parental rights was in the child's best interest after appropriate consideration of the factors contained in N.C.G.S. § 7B-1110(a).

Judge MURPHY concurring in the result in part and dissenting in part.

IN RE J.T.C.

[273 N.C. App. 66 (2020)]

Appeal by Respondent from order entered 4 September 2018[1] by Judge John M. Britt in Nash County District Court. Heard in the Court of Appeals 27 May 2020.

Mark L. Hayes for petitioner-appellee.

Leslie Rawls for respondent-appellant.

ARROWOOD, Judge.

Respondent-father, father of "Jeffrey,"[2] appeals from the trial court's order granting the petition filed by Jeffrey's mother ("Petitioner") for the termination of his parental rights. For the following reasons, we affirm.

I. Background

Jeffrey was born in Nash County, North Carolina, in November 2010. Petitioner and Respondent-father never married but lived together with Jeffrey for a period after his birth.

On 8 June 2011, Petitioner obtained a domestic violence protective order ("DVPO") against Respondent-father after he threatened her and choked her until she lost consciousness. The trial court found Jeffrey had been exposed to the violence and granted Petitioner temporary custody for the duration of the DVPO, which expired on 7 June 2012.

Petitioner and Respondent-father temporarily reunited. Respondent-father was subsequently incarcerated. Following his release from prison in November 2014, Respondent-father engaged in additional domestic violence against Petitioner resulting in the entry of a second DVPO on 6 January 2015. The DVPO granted Petitioner temporary custody of Jeffrey until 7 April 2015 and expired on 7 July 2015. Petitioner and Respondent-father did not resume their relationship thereafter. Petitioner arranged any visits between Respondent-father and Jeffrey after the expiration of that DVPO. At Petitioner's invitation, Respondent-father came to Jeffrey's birthday party in November 2015, visited Jeffrey

1. The record contains two versions of the trial court's order, both file-stamped on 31 August 2018. The first order was signed on the trial judge's behalf by an assistant clerk of court on 31 August 2018; the second was signed by the judge on 4 September 2018, four days after the purported filing date. Because N.C. Gen. Stat. § 1A-1, Rule 58 (2019) provides that "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court[,]" we deem the order entered on the date that all three requirements were satisfied. We also note Respondent-father's amended notice of appeal is timely given the 7 September 2018 date of service of the termination order.

2. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

around Christmas at Wal-Mart in December 2015, and attended a birthday party in April 2016 for one of Jeffrey's friends for approximately three hours.

On 12 December 2016, Petitioner filed a petition in Nash County District Court to terminate Respondent-father's parental rights pursuant to Article 11 of Chapter 7B of the North Carolina General Statutes. After a hearing on 12 April 2018, the trial court adjudicated grounds for termination existed based on Respondent-father's neglect and willful abandonment of Jeffrey under N.C. Gen. Stat. § 7B-1111(a)(1) and (7) (2019). The court held a dispositional hearing on 2 August 2018 and further determined that terminating Respondent-father's parental rights was in Jeffrey's best interest. Respondent-father gave timely notice of appeal from the termination of parental rights order ("the termination order").

II. Discussion

A. Standard of Appellate Review

We employ a familiar two-part framework on appeal from an order terminating parental rights. "We review a trial court's adjudication under N.C. [Gen. Stat.] § 7B-1111 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *Matter of E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). "We review *de novo* whether a trial court's findings support its conclusions." *Matter of Z.D.*, 258 N.C. App. 441, 443, 812 S.E.2d 668, 671 (2018). With regard to disposition, " '[w]e review the trial court's conclusion that a termination of parental rights would be in the best interest of the child on an abuse of discretion standard.' " *Matter of A.H.*, 250 N.C. App. 546, 565, 794 S.E.2d 866, 879 (2016) (quoting *In re R.B.B.*, 187 N.C. App. 639, 648, 654 S.E.2d 514, 521 (2007)). The trial court's dispositional findings under N.C. Gen. Stat. § 7B-1110(a) need only be supported by competent evidence. *See id.* at 565, 794 S.E.2d at 879-80; *see also In re Eckard*, 144 N.C. App. 187, 197, 547 S.E.2d 835, 841, *remanded for reconsideration on other grounds*, 354 N.C. 362, 556 S.E.2d 299 (2001).

For purposes of appellate review, findings of fact to which no exception is taken are binding. *In re H.S.F.*, 182 N.C. App. 739, 742, 645 S.E.2d 383, 384 (2007) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). Furthermore, "erroneous findings unnecessary to the determination do not constitute reversible error" where the trial court's remaining findings independently support its conclusions of law. *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006).

B. Respondent-father's Arguments on Appeal

1. Findings of Fact

Respondent-father challenges the following two findings of fact as not supported by the evidence:

> 21. Respondent[-father] has not shown adequate interest with regard to raising and supporting the minor child.
>
> 22. Respondent[-father] has not declared or shown love for the minor child throughout this proceeding.

He contends the hearing "transcript directly contradicts and undermines these findings."

Initially, we note the trial court's order does not divide or otherwise distinguish its adjudicatory findings from its dispositional findings. Moreover, the court purports to make all of its findings "based on clear, cogent, and convincing evidence[.]"

From our examination of the order, it appears the trial court arranged its findings of fact sequentially. Findings 1-8 establish the basis for the trial court's jurisdiction in the cause. Findings 9-12 are adjudicatory in nature, addressing Petitioner's asserted grounds for termination under N.C. Gen. Stat. § 7B-1111(a)(1) and (7). Findings 13-25 are dispositional, addressing the statutory criteria in N.C. Gen. Stat. § 7B-1110(a)(1)-(6) as a basis for determining Jeffrey's best interest. It thus appears the trial court did not rely on Findings 21 and 22 to support its adjudications, only its disposition.

Regardless of whether the contested findings are adjudicatory or dispositional, we find ample evidence to support Finding 21. At the adjudicatory hearing,[3] Petitioner testified Respondent-father had paid nothing toward Jeffrey's support in the preceding three years and had no contact with Jeffrey since attending an event at a skating rink at Petitioner's invitation in April 2016.

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3. Findings made in support of an adjudication under N.C. Gen. Stat. § 7B-1111(a) must be based on evidence adduced at the adjudicatory stage of the proceeding. *See* N.C. Gen. Stat. § 7B-1109(e) (2019). Dispositional findings under N.C. Gen. Stat. § 7B-1110 may be based on evidence presented at either the adjudicatory or dispositional stage of the hearing. *See In re Blackburn*, 142 N.C. App. 607, 613, 543 S.E.2d 906, 910 (2001) ("Evidence heard or introduced throughout the adjudicatory stage, as well as any additional evidence, may be considered by the court during the dispositional stage."); *see also In re R.B.B.*, 187 N.C. App. at 643-44, 654 S.E.2d at 518 (noting "a trial court may combine the N.C. [Gen. Stat.] § 7B-1109 adjudicatory stage and the N.C. [Gen. Stat.] § 7B-1110 dispositional stage into one hearing, so long as the trial court applies the correct evidentiary standard at each stage").

Petitioner described Respondent-father's conduct while they lived together with Jeffrey as follows:

> There was a lot of domestic violence. [Respondent-father] had a lot of drug issues. He was always using. He was never really home. I cannot really say that he supported his child. Even though we did stay in the same house. He was there (inaudible). He was not a good father figure to his child.

Petitioner also testified that although the initial DVPO issued in 2011 provided Respondent-father with the right to visit Jeffrey, Respondent-father did not exercise his visitation rights. Likewise, after the second DVPO expired on 7 July 2015, Respondent-father made no attempt to contact Petitioner to see Jeffrey or to provide support for the child. Respondent-father saw Jeffrey on just three occasions after 7 July 2015: at Jeffrey's birthday party in November 2015, on Christmas of 2015, and at the skating rink in April 2016. On each occasion, it was Petitioner who reached out to Respondent-father and invited him to see his son. Respondent-father did not bring any gifts for Jeffrey to these events or pay any amount toward the scheduled activities.

Petitioner affirmed Respondent-father had not seen Jeffrey or made any attempt to contact or provide support for the child in the eight months that preceded her filing of the petition in this cause on 12 December 2016. Although Respondent-father's relatives contacted Petitioner asking to see Jeffrey after she filed her petition, they did not mention Respondent-father. Respondent-father's wife also attempted to contact Petitioner on Facebook, saying she and Respondent-father wanted to see Jeffrey, but did so only "a full seven months" after the petition was filed.

Respondent-father, his wife, and his aunt testified at the adjudicatory hearing and disputed aspects of Petitioner's testimony. It is well-established, however, that "[c]redibility, contradictions, and discrepancies in the evidence are matters to be resolved by the trier of fact, here the trial judge, and the trier of fact may accept or reject the testimony of any witness." *Smith v. Smith*, 89 N.C. App. 232, 235, 365 S.E.2d 688, 691 (1988) (citation omitted).

Moreover, Respondent-father acknowledged not having seen Jeffrey since April 2016 at the skating rink and having neither provided support for, nor "filed for custody" of, Jeffrey. Respondent-father's explanations for his inaction were belied by his own testimony and that of his witnesses. When asked why he had never sought custody of

Jeffrey, for example, Respondent-father claimed he had no money for an attorney "[b]ecause at the time [he] didn't have a job." He later testified that he had been employed in his current full-time job for "[a]bout two years"—well before Petitioner filed to terminate his parental rights. Respondent-father also claimed he had been unable to contact Petitioner about Jeffrey because he did not know where she lived, and because she frequently changed her phone number. He then testified that his "cousin actually stays two doors down from [Petitioner]." Respondent-father's wife subsequently described making "numerous" phone calls to Petitioner despite her changing phone number, as follows:

> Q. . . . [H]ow can you talk to her numerous times but you can't reach her because her phone number always changes?
>
> A. There is -- because when we would get the new number I would call. And no, she didn't really want to talk to me but you know, (*inaudible*) and wanted to be in his children's life -- and that -- so you know what, I'm going to call it. I'm going to ask to see [Jeffrey]. She did not particularly like the call but she was going to get it.

Respondent-father's exception to Finding 21 is overruled.

Respondent-father also challenges Finding 22, which states he "has not declared or shown love for the minor child through this proceeding." The hearing transcript shows Respondent-father expressly testified in reference to Jeffrey, "I love my son." While we construe the term "this proceeding" in Finding 22 as referencing the entire period since Petitioner filed her petition on 12 December 2016, we agree with Respondent-father that the trial court's finding is erroneous in light of his testimony. Nevertheless, because the trial court's remaining findings independently support its conclusions of law, we find no reversible error and disregard this finding for purposes of our review. *See In re T.M.*, 180 N.C. App. at 547, 638 S.E.2d at 240.

2. Adjudication under N.C. Gen. Stat. § 7B-1111(a)(7)

Respondent-father claims the evidence and the trial court's findings of fact do not support its adjudication of grounds to terminate his parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), which authorizes termination when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition[.]" N.C. Gen. Stat. § 7B-1111(a)(7). Our Supreme Court has provided the following guidance for applying this provision:

> We have held that [a]bandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.

Matter of E.H.P., 372 N.C. at 393, 831 S.E.2d at 52 (first alteration in original) (internal citations and quotation marks omitted).

The dispositive six-month period in this case is 12 June 2016 to 12 December 2016. The trial court made the following findings relevant to its adjudication under N.C. Gen. Stat. § 7B-1111(a)(7):[4]

> 10. Petitioner has proven through clear, cogent, and convincing evidence that, pursuant to [N.C. Gen. Stat.] §[ ]7B-1111(a)(7), the Respondent[-father] has willfully neglected and abandoned the minor child for at least six (6) consecutive months immediately preceding the filing of the Petition.
>
> 11. Respondent[-father] has had no contact with the minor child since an April 9, 2016 birthday party at Sky-Vue Skateland in Rocky Mount and has not provided any form of support whether in cash or in kind, medical, or otherwise for the child since at least December 26, 2015.
>
> 12. In the six months immediately preceding the filing of the Petition, the Respondent[-father] did [not] have any contact or communication with the minor child nor did he directly attempt to contact the minor child or provide the minor child any care, supervision, support, discipline, gift, card, or letter; Respondent[-father] has not met any need of the minor child and

4. Respondent-father asserts that "Findings of fact ## 18, 19, 20, 21, and 22 are . . . insufficient to support an adjudication of abandonment." As previously discussed, we believe these findings were made for dispositional purposes under N.C. Gen. Stat. § 7B-1110(a) in assessing whether terminating Respondent-father's parental rights is in Jeffrey's best interest. Therefore, we do not consider them in reviewing the court's adjudication under N.C. Gen. Stat. § 7B-1111(a)(7). *Cf. Matter of A.R.A.*, 373 N.C. 190, 195, 835 S.E.2d 417, 421 (2019) ("[W]e limit our review of challenged findings to those that are necessary to support the district court's determination that this ground [for termination] existed . . . .").

> has been absent from the minor child's life since on or about December 26, 2015.

To the extent Respondent-father does not except to the trial court's findings of fact, specifically Findings 11 and 12, they are binding on appeal. *In re H.S.F.*, 182 N.C. App. at 742, 645 S.E.2d at 384.

We agree with Respondent-father that Finding 10 amounts to a conclusion of law, inasmuch as it declares Petitioner's success in establishing the statutory ground for termination in N.C. Gen. Stat. § 7B-1111(a)(7) under the applicable burden of proof in N.C. Gen. Stat. § 7B-1109(f). *See Matter of Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675-76 (1997) (reasoning that a "determination of neglect requires the application of the [relevant] legal principles . . . and is therefore a conclusion of law."); *see also In re S.Z.H.*, 247 N.C. App. 254, 261-62, 785 S.E.2d 341, 347 (2016) (characterizing adjudication of abandonment under (a)(7) as a conclusion of law). The trial court's classification of its own determination as a finding or conclusion does not govern our analysis. *See State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009) (treating as conclusions of law those findings of fact which resolved a question of law). We treat Finding 10 as a conclusion of law and apply the appropriate *de novo* standard of review. *See id.* ("While we give appropriate deference to the portions of Findings No. 37 and 39 that are findings of fact, we review de novo the portions of those findings that are conclusions of law.").

Based on its findings of fact, the court reached the following conclusions of law:

> 3. The Respondent[-father] . . . through testimony and evidence presented at this proceeding, is determined to have willfully abandoned the minor child, [Jeffrey], for at least six consecutive months immediately preceding the filing of the petition pursuant to N.C. [Gen. Stat.] § 7B-1111(a)(7).
>
> 4. Respondent[-father]'s conduct manifests a willful determination to forego all parental duties and obligations toward said minor child.
>
> 5. There is sufficient, clear, cogent and convincing evidence to terminate the parental rights of [Respondent-father] to [Jeffrey] pursuant to N.C. [Gen. Stat.] § 7B-1111.

As with ostensible Finding 10, we view Conclusion 4 as more in the nature of a finding of fact. Our courts have held the willfulness of

parent's conduct to be a question of fact rather than law. *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). Conclusion 4 thus amounts to an ultimate finding by the trial court, based on inferences drawn from the evidence and Respondent-father's objective behavior toward Jeffrey. Because Respondent-father has challenged Conclusion 4 on appeal, we review it under the appropriate standard. *See State v. Burns*, 287 N.C. 102, 110, 214 S.E.2d 56, 61-62 (1975).

Respondent-father takes no exception to the trial court's statements in Findings 11 and 12 that he had no contact with Jeffrey after 9 April 2016; that he provided no support of any kind for Jeffrey "since at least December 26, 2015"; and that he did not "directly attempt to contact [Jeffrey] or provide the minor child any care, supervision, support, discipline, gift, card, or letter . . . and has been absent from the minor child's life since on or about December 26, 2015." We find the evidence, as reflected in these findings, further supports the trial court's ultimate finding in Conclusion 4 that Respondent-father's conduct during the critical six months evinces a "willful determination to forego all parental duties and obligations toward [Jeffrey]." Taken together, these findings in turn support the trial court's conclusion of law that Respondent-father "willfully abandoned the minor child, [Jeffrey], for at least six consecutive months immediately preceding the filing of the petition pursuant to N.C. [Gen. Stat.] §[ ]7B-1111(a)(7)." *See Matter of E.H.P.*, 372 N.C. at 394, 831 S.E.2d at 53 (upholding adjudication of willful abandonment where, "[b]y his own admission, respondent had no contact with his children during the statutorily prescribed time period . . . [and] made no effort to have any form of involvement with the children for several consecutive years following the entry of the Temporary Custody Judgment" awarding custody to the petitioner).

Unlike the cases cited by Respondent-father, the evidence shows no effort by Respondent-father during the relevant six-month period to have any form of contact or communication with Jeffrey, or to provide for his support in any manner. In *In re S.Z.H.*, "respondent called Sally during roughly half of the relevant six-month period . . . and asked petitioner if he could attend Sally's birthday party[.]" 247 N.C. App. at 261, 785 S.E.2d at 346. "[E]ven during the last half of the six-month period, the evidence tended to show that respondent attempted to communicate with Sally but petitioner stopped allowing him to contact her." *Id.* at 261, 785 S.E.2d at 346-47. Similarly in *Matter of D.M.O.*, the trial court's findings were held insufficient to support an adjudication of abandonment because they failed to resolve conflicts in the evidence about "whether and to what extent respondent-mother called, texted, and mailed letters during the relevant period; whether and to what extent

respondent-mother was able to participate in exercising parental duties on account of her periodic incarceration at multiple jails; and whether and to what extent petitioner-father hindered respondent-mother from communicating with [the juvenile] or exercising visitation[.]" 250 N.C. App. 570, 580, 794 S.E.2d 858, 866 (2016). The facts *sub judice* show no similar efforts by Respondent-father toward Jeffrey and no hindrance to Respondent-father akin to the respondent-parent's incarceration in *Matter of D.M.O.* during the six months at issue.

We are not persuaded by Respondent-father's suggestion that the efforts made by his wife and relatives to contact Petitioner foreclose an adjudication of willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7). Where, as here, a parent has the means to undertake personal efforts toward maintaining a relationship with his child, he will not be absolved of his parental responsibilities by the efforts of third parties. The evidence shows Respondent-father had the ability to contact Petitioner directly about Jeffrey but made no effort to do so. Respondent-father also provided no financial support for Jeffrey despite having full-time employment throughout the six-month period from 12 June 2016 to 12 December 2016. Accordingly, we hold the trial court properly adjudicated grounds for terminating Respondent-father's parental rights based on willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7).

Because we affirm the trial court's adjudication under N.C. Gen. Stat. § 7B-1111(a)(7), we need not review the second ground for termination found by the court under N.C. Gen. Stat. § 7B-1111(a)(1). *Matter of E.H.P.*, 372 N.C. at 395, 831 S.E.2d at 53.

C. Disposition under N.C. Gen. Stat. § 7B-1110(a)

Respondent-father also claims the trial court abused its discretion at the dispositional stage of the proceeding by concluding that termination of his parental rights is in Jeffrey's best interest. " 'A ruling committed to a trial court's discretion . . . will be upset only upon a showing that it was so *arbitrary* that it could not have been the result of a reasoned decision.' " *In re S.C.R.*, 198 N.C. App. 525, 536, 679 S.E.2d 905, 911-12 (2009) (emphasis in original) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

"Once a trial court has concluded during the adjudication phase that grounds exist for termination of parental rights, it must decide in the disposition phase whether termination is in the best interests of the child." *In re D.R.F.*, 204 N.C. App. 138, 141, 693 S.E.2d 235, 238 (2010) (citing *In re Mills*, 152 N.C. App. 1, 7, 567 S.E.2d 166, 169-70 (2002)). Under N.C. Gen. Stat. § 7B-1110(a),

> The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following 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.

N.C. Gen. Stat. § 7B-1110(a) (2019). Although the court must consider each of these factors, written findings are required only "if there is 'conflicting evidence concerning' the factor, such that it is 'placed in issue by virtue of the evidence presented before the trial court[.]' " *In re H.D.*, 239 N.C. App. 318, 327, 768 S.E.2d 860, 866 (2015) (quoting *In re D.H.*, 232 N.C. App. 217, 221 n.3, 753 S.E.2d 732, 735 n.3 (2014)).

The trial court made the following findings under N.C. Gen. Stat. § 7B-1110(a)(1)-(6):

> 13. The minor child is seven (7) years old . . . .
>
> 14. The likelihood that the minor child will be adopted is good; Petitioner's husband's testimony indicates his desire to adopt the minor child and the minor child indicated that he wished to be adopted by Petitioner's husband.
>
> 15. That the termination of parental rights will aid in the accomplishment of the permanent plan for the minor child; the adoption of the minor child by Petitioner's husband will provide needed emotional and financial stability and ensure the juvenile's continued positive growth and development that has been fostered in the juvenile's current home setting with Petitioner and her husband.

16. That the bond between the minor child and the Respondent[-father] is poor, with the minor child having very little recollection of Respondent[-father].

17. The quality of the relationship between the minor child and the proposed adoptive parent is good; the minor child and the proposed adoptive parent have a strong familial bond, enjoy similar activities, and spend a great deal of time together; the proposed adoptive parent has provided the minor child with continued emotional and financial support in a parental role over approximately the last two (2) years.

18. The Respondent[-father] has a lengthy history of assaultive behavior against the Petitioner Mother.

19. The Respondent[-father] has been involved in criminal activity for the majority of the minor child's life and has a lengthy criminal record including current pending criminal charges.

20. Both Respondent[-father] and his wife have numerous current positive references to alcohol and drugs in their social media postings.

21. Respondent[-father] has not shown adequate interest with regard to raising and supporting the minor child.

22. Respondent[-father] has not declared or shown love for the minor child throughout this proceeding.

23. It is in the best interest of [Jeffrey] that the parental rights of [Respondent-father] for said minor child, be terminated based on the foregoing findings of fact.

Having previously addressed Respondent-father's challenges to Findings 21 and 22, we disregard Finding 22 to the extent it fails to account for Respondent-father's testimony that he loves Jeffrey. There is ample support in the trial court's remaining findings to support its conclusions of law, such that the trial court's ruling was not "*so arbitrary* that it could not have been the result of a reasoned decision." *In re S.C.R.*, 198 N.C. App. at 536, 679 S.E.2d at 911-12 (emphasis in original) (citation and internal quotation marks omitted). Accordingly, the trial court did not abuse its discretion. We further note Finding 23 is actually a conclusion of law, and review it accordingly. *See Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675 (internal citations omitted) ("any determination requiring

the exercise of judgment or the application of legal principles is more properly classified a conclusion of law.").

Respondent-father does not dispute the evidentiary support for Findings 13-20, which address each of the factors in N.C. Gen. Stat. § 7B-1110(a). He contends a portion of Finding 15 is erroneous because it refers to Jeffrey's "permanent plan"—a feature only of proceedings initiated by a county director of social services under Article 4 of Chapter 7B. *See* N.C. Gen. Stat. §§ 7B-401.1, -906.1, -906.2 (2019). We agree that Jeffrey has no "permanent plan" as that term is defined in N.C. Gen. Stat. § 7B-906.2, and that portion of Finding 15 is thus erroneous. Nevertheless, we do not believe this amounts to an abuse of discretion.

In viewing the trial court's order as a whole, it becomes clear that the one-time mention of a permanent plan appears to simply be an oversight. Other than in Finding 15, the trial court makes no reference to the existence of a permanent plan or the involvement of DSS. In addition, while Finding 15 begins with a brief mention of a permanent plan, the bulk of it is devoted to a discussion of the benefits of adoption of the minor child by petitioner's husband, which the trial court is allowed to consider as "any relevant consideration" in determining the best interests of the minor child. See N.C. Gen. Stat. § 7B-1110(a)(6). This Court has said that "erroneous findings unnecessary to the determination do not constitute reversible error" where the trial court's remaining findings independently support its conclusions of law. *In re T.M.*, 180 N.C. App. at 547, 638 S.E.2d at 240. *See also In re B.W.*, 190 N.C. App. 328, 333, 665 S.E.2d 462, 465 (2008) (disregarding the trial court's erroneous finding because "we d[id] not believe that the court's unsupported finding on this issue was necessary to its disposition."). As with Finding 22, in light of the ample support in the trial court's remaining findings which support its conclusions of law, we find no abuse of discretion.

Finally, Respondent-father's assertion that Findings 18-20 do not support the trial court's adjudication of neglect or abandonment under N.C. Gen. Stat. § 7B-1111(a) has no bearing on our review of the court's dispositional determination under N.C. Gen. Stat. § 7B-1110(a). We are satisfied Respondent-father's history of domestic violence toward Jeffrey's mother, his lengthy criminal record and pending charges, and his ongoing use of impairing substances with his current wife constitute "relevant consideration[s]" for purposes of N.C. Gen. Stat. § 7B-1111(a)(6).

III. Conclusion

We thus find no abuse of discretion by the trial court in concluding Jeffrey's best interests will be served by termination of

Respondent-father's parental rights. The trial court's findings show its consideration of the statutory factors in N.C. Gen. Stat. § 7B-1110(a) and provide sound reasons for its ultimate decision. Although Respondent-father attested to his desire to establish a relationship with Jeffrey, a reasonable fact-finder could conclude Jeffrey's well-being is better served by freeing him to be adopted by his stepfather. Accordingly, we affirm the order of the trial court.

AFFIRMED.

Judge INMAN concurs.

Judge MURPHY concurs in the result in part and dissents in part by separate opinion.

MURPHY, Judge, concurring in the result in part and dissenting in part.

Respondent-father appeals from the trial court's order granting the petition for termination of his parental rights. As a result of an erroneous finding of fact and a misapprehension of law, we should vacate the trial court's order and remand for further dispositional proceedings consistent with that holding.

BACKGROUND

Jeffrey was born in Wilson County in 2010. Petitioner and Respondent-father never married but lived together with Jeffrey for a period after his birth.

On 8 June 2011, Petitioner obtained a domestic violence protective order ("DVPO") against Respondent-father after he threatened her and choked her until she lost consciousness. The DVPO found Jeffrey had been exposed to the violence and granted Petitioner temporary custody for the duration of the DVPO, which expired on 7 June 2012.

Petitioner and Respondent-father temporarily reunited. Respondent-father was subsequently incarcerated. On 6 January 2015, following Respondent-father's release from prison in November 2014, a second DVPO was entered based on an additional incident of domestic violence against Petitioner. The DVPO granted Petitioner temporary custody of Jeffrey until 7 April 2015 and expired on 7 July 2015. Petitioner and Respondent-father did not resume their relationship thereafter. Petitioner arranged any visits between Respondent-father and Jeffrey

after the expiration of that DVPO. At Petitioner's invitation, Respondent-father came to Jeffrey's birthday party in November 2015, visited Jeffrey at a Christmas visit at Wal-Mart in December 2015, and attended a birthday party in April 2016 for one of Jeffrey's friends for approximately three hours.

On 12 December 2016, Petitioner filed in Nash County District Court to terminate Respondent-father's parental rights pursuant to Article 11 of Chapter 7B of the North Carolina General Statutes. *See, e.g.*, N.C.G.S. §§ 7B-1100-1104 (2017). After a hearing on 12 April 2018, the trial court adjudicated grounds for termination based on Respondent-father's neglect and willful abandonment of Jeffrey under N.C.G.S. § 7B-1111(a)(1)and (a)(7). The trial court held a dispositional hearing on 2 August 2018 and determined that terminating Respondent-father's parental rights was in Jeffrey's best interest. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent-father gave timely notice of appeal from the termination of parental rights order ("the termination order").

ANALYSIS

A. Standard of Review

"A termination of parental rights proceeding consists of two phases. In the adjudicatory stage, the petitioner has the burden of establishing by clear and convincing evidence that at least one of the statutory grounds listed in N.C.[G.S.] § 7B-1111 exists." *In re J.W.*, 173 N.C. App. 450, 470-71, 619 S.E.2d 534, 548 (2005) (quoting *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002)), *aff'd*, 360 N.C. 361, 625 S.E.2d 780 (2006). "Upon determining that one or more of the grounds for terminating parental rights exist, the court moves to the disposition stage to determine whether it is in the best interests of the child to terminate the parental rights." *Id.* at 471, 619 S.E.2d at 548 (quoting *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 615 (1997)). "We review whether the trial court"s findings of fact are supported by clear and convincing evidence and whether the findings of fact support the conclusions of law." *Id.* (quoting *Anderson*, 151 N.C. App. at 97, 564 S.E.2d at 602). "We review *de novo* whether a trial court's findings support its conclusions." *In re Z.D.*, 258 N.C. App. 441, 443-44, 812 S.E.2d 668, 671 (2018).

With regard to disposition, "[w]e review the trial court's conclusion that a termination of parental rights would be in the best interest of the child on an abuse of discretion standard." *In re A.H.*, 250 N.C. App. 546, 565, 794 S.E.2d 866, 879 (2016) (quoting *In re R.B.B.*, 187 N.C. App. 639, 648, 654 S.E.2d 514, 521 (2007)). "All dispositional orders of the trial court in abuse, neglect and dependency hearings must contain findings

of fact based upon the credible evidence presented at the hearing. If the trial court's findings of fact are supported by competent evidence, they are conclusive on appeal." *In re Eckard*, 144 N.C. App. 187, 197, 547 S.E.2d 835, 841, *remanded for reconsideration on other grounds*, 354 N.C. 362, 556 S.E.2d 299 (2001) (internal citation omitted).

For purposes of appellate review, findings of fact to which no exception are taken are binding. *In re H.S.F.*, 182 N.C. App. 739, 742, 645 S.E.2d 383, 384 (2007); *see also In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 54 (2019) (holding that when "Respondent [did] not challenge[certain] findings, . . . they are therefore binding on appeal"). However, "we are not at liberty to speculate as to the precise weight the trial court gave to [erroneous findings of fact]." *In re L.C.*, 253 N.C. App. 67, 79, 800 S.E.2d 82, 91 (2017) (internal marks and citations omitted). Further, "our inability to determine the weight that the trial court assigned to . . . erroneous findings of facts" may require reversal and remand when considering the trial court's "use of these [erroneous] findings to support the apparent conclusions of law[.]" *Id.* (quoting *Alvarez v. Alvarez*, 134 N.C. App. 321, 327, 517 S.E.2d 420, 424 (1999)).

B. Respondent-father's Arguments on Appeal

1. Findings of Fact

I agree with the Majority that, as an initial matter, the termination order does not divide or otherwise distinguish its adjudicatory findings from its dispositional findings. Moreover, the trial court purports to make all of its findings "based on clear, cogent, and convincing evidence[.]"

As the Majority notes, after examining the termination order, the trial court arranged its findings of fact sequentially. I agree with the Majority that Findings of Fact 1 through 8 establish the basis for the trial court's jurisdiction in the cause and that Findings of Fact 9 through 12 are adjudicatory in nature, addressing Petitioner's asserted grounds for termination under N.C.G.S. § 7B-1111(a)(1) and (a)(7). Findings of Fact 13 through 22 are dispositional, addressing the statutory criteria in N.C.G.S. § 7B-1110(a)(1)-(6) as a basis for determining Jeffrey's best interest.

However, I disagree with the Majority's characterization of Findings of Fact 21, 24, and 25. In its initial characterization of the findings, the Majority does not characterize Finding of Fact 23 as a conclusion of law, which it is, but does so in its analysis of the trial court's disposition. Unlike the Majority's categorization of Finding of Fact 21 as only dispositional in nature, Finding of Fact 21 was also adjudicatory in nature,

again addressing Petitioner's asserted grounds for termination under N.C.G.S. § 7B-1111(a)(1) and (a)(7). Further examination of the termination order shows the trial court relied on Finding of Fact 21 to support its adjudication, as well as its disposition. I address Findings of Fact 23 to 25, which actually amount to Conclusions of Law, later in my analysis.

In addition to other challenges addressed throughout this opinion, Respondent-father challenges the following two Findings of Fact as not supported by clear and convincing evidence:

> 21. [Respondent-father] has not shown adequate interest with regard to raising and supporting [Jeffrey].
>
> 22. [Respondent-father] has not declared or shown love for [Jeffrey] throughout this proceeding.

He contends the hearing "transcript directly contradicts and undermines these findings."

Regardless of whether the contested findings are adjudicatory or dispositional, I agree with the Majority that there is ample evidence to support Finding of Fact 21. At the adjudicatory hearing,[1] Petitioner testified Respondent-father had paid nothing toward Jeffrey's support in the preceding three years and had no contact with Jeffrey since attending an event at a skating rink at Petitioner's invitation in April 2016.

Petitioner described Respondent-father's conduct while they lived together from 2010 to 2015 with Jeffrey as follows:

> There was a lot of domestic violence. [Respondent-father] had a lot of drug issues. He was always using. He was never really home. I cannot really say that he supported his child. Even though we did stay in the same house. He was there (inaudible). He was not a good father figure to his child.

While this testimony provided some evidence concerning whether Respondent-father "neglected the juvenile" as to adjudication under

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1. As the Majority correctly states, findings made in support of an adjudication under N.C.G.S. § 7B-1111(a) must be based on evidence adduced at the adjudicatory stage of the proceeding. *See* N.C.G.S. § 7B-1109 (2019). Dispositional findings under N.C.G.S. § 7B-1110 may be based on evidence presented at either the adjudicatory or dispositional stage of the hearing. *See In re Blackburn*, 142 N.C. App. 607, 613, 543 S.E.2d 906, 910 (2001); *see also In re R.B.B.*, 187 N.C. App. 639, 643-44, 654 S.E.2d 514, 518 (2007) (noting "a trial court may combine the N.C.G.S. § 7B-1109 adjudicatory stage and the N.C.G.S. § 7B-1110 dispositional stage into one hearing, so long as the trial court applies the correct evidentiary standard at each stage").

N.C.G.S. § 7B-1111(a)(1), the time period discussed in the testimony did not fall into the applicable date range to determine whether Respondent-father "willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion" under N.C.G.S. § 7B-1111(a)(7). N.C.G.S. § 7B-1111(a)(7) (2019).

The trial court reviewed conflicting evidence concerning Respondent-father's attempts to see Jeffrey during the applicable time period before the petition in this cause on 12 December 2016. Petitioner testified that, although the initial DVPO, issued in 2011, provided Respondent-father with the right to visit Jeffrey, Respondent-father did not exercise his visitation rights, and made no attempt to contact Petitioner to see Jeffrey or to provide for his support after the second DVPO expired on 7 July 2015. However, Respondent-father testified to attempting to contact Petitioner through his family members to avoid conflict. Respondent-father also testified that Petitioner's invitations to visit with Jeffrey came with very short notice, and that "every time [Petitioner] invited me and I could be there I was there." At Petitioner's invitation, Respondent-father saw Jeffrey on three occasions after 7 July 2015: at Jeffrey's birthday party in November 2015, during Christmas of 2015, and at the skating rink in April 2016.

The testimony of Petitioner evidenced that Respondent-father had not seen Jeffrey or made any attempt to contact or provide support for the child in the eight months that preceded her filing of the petition in this cause on 12 December 2016. However, Respondent-father testified that, prior to the filing of that petition, he attempted to contact Petitioner to set up a visit with Jeffrey in the months prior to 12 December 2016. Petitioner acknowledged that Respondent-father's relatives contacted her asking to see Jeffrey, but that they did not mention Respondent-father. Respondent-father's wife also attempted to contact Petitioner on Facebook, saying she and Respondent-father wanted to see Jeffrey, but did so after the petition was filed.

Respondent-father, his wife, and his aunt testified at the adjudicatory hearing and disputed aspects of Petitioner's testimony. Despite the dispute, "[c]redibility, contradictions, and discrepancies in the evidence are matters to be resolved by the trier of fact, here the trial judge, and the trier of fact may accept or reject the testimony of any witness." *Smith v. Smith*, 89 N.C. App. 232, 235, 365 S.E.2d 688, 691 (1988).

Further, Respondent-father acknowledged both not having seen Jeffrey since April 2016 at the skating rink and not having provided support for Jeffrey. Respondent-father's explanations for his inaction

were at times contradicted by his own testimony and that of his witnesses. When asked why he had never sought custody of Jeffrey, for example, Respondent-father claimed he had no money for an attorney "[b]ecause at the time [he] didn't have a job." At the hearing on 12 April 2018, Respondent-father testified that he had been employed in his current full-time job for "[a]bout two years"—well before Petitioner filed to terminate his parental rights on 12 December 2016. Respondent-father also claimed he had experienced difficulty contacting Petitioner about Jeffrey because he did not know where she lived, and because she frequently changed her phone number. He also testified that "if I tried to get in touch with her every time I do talk to her she threatens to call the law on me or tries to put me in jail." He then testified that his "cousin actually stays two doors down from [Petitioner]," but that he didn't "know where she lives . . . [b]ecause . . . I ain't never been to his house." On cross examination, Respondent-father's wife subsequently described making "numerous" phone calls to Petitioner despite her changing phone number, as follows:

> [Petitioner's Attorney:] . . . [H]ow can you talk to her numerous times but you can't reach her because her phone number always changes?
>
> [Respondent-father's wife:] There is -- because when we would get the new number I would call. And no, she didn't really want to talk to me but you know, (inaudible) and wanted to be in his children's life -- and that -- so you know what, I'm going to call it. I'm going to ask to see [Jeffrey]. She did not particularly like the call but she was going to get it.

Finding of Fact 21 is based on competent evidence.

Since I treat Finding of Fact 22 as dispositional in nature, I address Finding of Fact 22 in my analysis of the trial court's disposition under N.C.G.S. § 7B-1110(a).

2. Adjudication of Neglect

Instead of conducting an analysis of the trial court's adjudication of abandonment under N.C.G.S. § 7B-1111(a)(7), as the Majority did, I would conduct an analysis of Respondent-father's neglect of Jeffrey under N.C.G.S. § 7B-1111(a)(1). Respondent-father claims the evidence and the trial court's findings of fact do not support its adjudication of grounds to terminate his parental rights pursuant to N.C.G.S. § 7B-1111(a)(1), which authorizes termination when "[t]he parent has . . . neglected the juvenile . . . within the meaning of [N.C.]G.S. [§] 7B-101." N.C.G.S

§ 7B-1111(a)(1) (2019). N.C.G.S. § 7B-101(15) defines a neglected juvenile as "[a]ny juvenile less than 18 years of age . . . whose parent . . . does not provide proper care, supervision, or discipline[,] or who has been abandoned[.]" N.C.G.S. § 7B-101(15) (2019).

The trial court made the following findings relevant to its adjudication under N.C.G.S. § 7B-1111(a)(1):[2]

> 9. Petitioner has proven through clear [] and convincing evidence that, pursuant to [N.C.]G.S. [§]7B-1111(a)(1), [Respondent-father] has neglected [Jeffrey] in accordance with [N.C.]G.S. [§]7b-101 inasmuch as, [Respondent-father] has not provided any care, supervision, support, or discipline for [Jeffrey] since on or about [26 December 2015.]
>
> 11. [Respondent-father] has had no contact with [Jeffrey] since an [9 April 2016] birthday party at Sky-Vue Skateland in Rocky Mount and has not provided any form of support whether in cash or in kind, medical, or otherwise for [Jeffrey] since at least [26 December 2015].
>
> 12. In the six consecutive months immediately preceding the filing of the Petition, [Respondent-father] did [not] have any contact or communication with [Jeffrey] nor did he directly attempt to contact [Jeffrey] or provide [Jeffrey] any care, supervision, support, discipline, gift, card, or letter; [Respondent-father] has not met any need of [Jeffrey] and has been absent from [Jeffrey's] life since on or about [26 December 2015].

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2. Respondent-father asserts that "Findings of [Fact] 18, 19, 20, 21, and 22 are . . . insufficient to support an adjudication of abandonment," as well as neglect. Finding of Fact 18 stated "[Respondent-father] has a lengthy history of assaultive behavior against [Petitioner]." Finding of Fact 19 stated "[Respondent-father] has been involved in criminal activity for the majority of [Jeffrey's] life and has a lengthy criminal record including current pending criminal charges." Finding of Fact 20 stated "Both [Respondent-father] and his wife have numerous current positive references to alcohol and drugs in their social media postings." Findings of Fact 21 and 22 are listed above. As per my previous analysis above, Findings of Fact 18, 19, 20, and 22 were made for dispositional purposes under N.C.G.S. § 7B-1110(a) in assessing whether terminating Respondent-father's parental rights is in Jeffrey's best interest. Therefore, I do not consider them in reviewing the court's adjudication under N.C.G.S. § 7B-1111(a)(1) or (a)(7). *Cf. In re A.R.A.*, 373 N.C. 190, 195, 835 S.E.2d 417, 421 (2019) (holding that "we limit our review of challenged findings to those that are necessary to support the [D]istrict [C]ourt's determination that this ground [for termination] existed"). However, Finding of Fact 21 was made for both adjudicatory and dispositional purposes, and I consider it in reviewing the court's adjudication under N.C.G.S. § 7B-1111(a)(1).

Respondent-father claims that Finding of Fact 9 was actually a conclusion of law. I agree that Finding of Fact 9 is, at least partially, a conclusion of law. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (internal citations and alterations omitted) (holding that "any determination requiring the exercise of judgment, or the application of legal principles is more properly classified a conclusion of law"); *see also Plott v. Plott*, 313 N.C. 63, 73-74, 326 S.E.2d 863, 869-70 (1985). The trial court's classification of its own determination as a finding or conclusion does not govern this court's analysis on appeal. *See State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009); *State v. Burns*, 287 N.C. 102, 110, 214 S.E.2d 56, 61-62 (1975).

However, the classification of Finding of Fact 9 as, at least partially, a conclusion of law does not affect my review of whether clear and convincing evidence supported the trial court's adjudication of neglect under N.C.G.S. § 7B-1111(a)(1). To the extent Respondent-father does not except to the trial court's findings of fact, specifically Findings of Fact 11 and 12, they are binding on appeal. *In re H.S.F.*, 182 N.C. App. at 742, 645 S.E.2d at 384; *see also In re E.H.P.*, 372 N.C. at 395, 831 S.E.2d at 54 (holding that when "Respondent [did] not challenge[certain] findings, . . . they are therefore binding on appeal."). Findings of Fact 11 and 12 establish Respondent-father's lack of contact with, support of, communication with, and provision for Jeffrey.

Additionally, Finding of Fact 21 was supported by competent evidence, as discussed above. Finding of Fact 21 found that "Respondent-father has not shown adequate interest with regard to raising and supporting [Jeffrey]."

Based on its findings of fact, the trial court reached the following conclusions of law:

> 2. [Respondent-father], through testimony and evidence presented at this proceeding, is determined to have neglected [Jeffrey] within the meaning of N.C.G.S. § 7B-101(b) and pursuant to N.C.G.S. § 7B-1111(a)(1).
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> . . .
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> 5. There is sufficient, clear [] and convincing evidence to terminate the parental rights of [Respondent-father] to [Jeffrey] pursuant to N.C.G.S. §7B-1111.

Findings of Fact 11 and 12 are binding on appeal, and Finding of Fact 21 is supported by competent evidence. Findings of Fact 11, 12, and 21 support the trial court's Conclusions of Law 2 and 5. The trial court's

adjudication under N.C.G.S. § 7B-1111(a)(1) that Respondent-father neglected Jeffrey, and that Respondent-father's parental rights to Jeffrey should be terminated, was supported by clear and convincing evidence.

3. Adjudication of Abandonment

Respondent-father claims the evidence and the trial court's findings of fact do not support its adjudication of grounds to terminate his parental rights pursuant to N.C.G.S. § 7B-1111(a)(7), which authorizes termination when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition." N.C.G.S § 7B-1111(a)(7) (2019). However, because I would affirm the trial court's adjudication under N.C.G.S. § 7B-1111(a)(1), there is no need to review the second ground for termination found by the trial court, and affirmed by the Majority, under N.C.G.S. § 7B-1111(a)(7). *In re E.H.P.*, 372 N.C. at 395, 831 S.E.2d at 53-54.

4. Disposition

Respondent-father also claims the trial court abused its discretion at the dispositional stage of the proceeding by concluding that termination of his parental rights is in Jeffrey's best interest. "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

"Once a trial court has concluded during the adjudication phase that grounds exist for termination of parental rights, it must decide in the disposition phase whether termination is in the best interests of the child." *In re D.R.F.*, 204 N.C. App. 138, 141, 693 S.E.2d 235, 238 (2010). Under N.C.G.S. § 7B-1110(a),

> [t]he court may consider any evidence, including hearsay evidence as defined in [N.C.]G.S. [§] 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following 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.

N.C.G.S. § 7B-1110(a) (2019); *see also In re D.R.F.*, 204 N.C. App. at 141-42, 693 S.E.2d at 238-39. While the statute seems to require findings concerning the relevant six listed factors, we have read the statute differently in past decisions. According to these decisions, although a court must consider each of these factors, written findings are required only "if there is 'conflicting evidence concerning' the factor, such that it is 'placed in issue by virtue of the evidence presented before the trial court[.]' " *In re H.D.*, 239 N.C. App. 318, 327, 768 S.E.2d 860, 866 (2015) (quoting *In re D.H.*, 232 N.C. App. 217, 222 n.3, 753 S.E.2d 732, 735 n.3 (2014)).

I do not share the Majority's confidence that the trial court's ruling did not constitute an abuse of discretion. Even under our past reading of the statutory requirements, it appears the trial court did not make the necessary findings and abused its discretion in this matter—Finding of Fact 22 is unsupported by the evidence, and the findings are deficient under N.C.G.S. § 7B-1110(a)(1)-(6).

The trial court made the following findings of fact under N.C.G.S. § 7B-1110(a)(1)-(6):

13. [Jeffrey] is seven (7) years old . . . .

14. The likelihood that [Jeffrey] will be adopted is good; Petitioner's husband's testimony indicates his desire to adopt [Jeffrey] and [Jeffrey] indicated that he wished to be adopted by Petitioner's husband.

15. That the termination of parental rights will aid in the *accomplishment of the permanent plan* for [Jeffrey]; the adoption of [Jeffrey] by Petitioner's husband will provide needed emotional and financial stability and ensure [Jeffrey's] continued positive growth and development that has been fostered in [Jeffrey's] current home setting with Petitioner and her husband.

16. That the bond between [Jeffrey] and [Respondent-father]is poor, with [Jeffrey] having very little recollection of [Respondent-father].

17. The quality of the relationship between [Jeffrey] and the proposed adoptive parent is good; [Jeffrey] and the proposed adoptive parent have a strong familial bond, enjoy similar activities, and spend a great deal of time together; the proposed adoptive parent has provided [Jeffrey] with continued emotional and financial support in a parental role over approximately the last two (2) years.

18. [Respondent-father] has a lengthy history of assaultive behavior against [Petitioner].

19. [Respondent-father] has been involved in criminal activity for the majority of [Jeffrey's] life and has a lengthy criminal record including current pending criminal charges.

20. Both [Respondent-father] and his wife have numerous current positive references to alcohol and drugs in their social media postings.

21. [Respondent-father] has not shown adequate interest with regard to raising and supporting [Jeffrey].

22. [Respondent-father] has not declared or shown love for [Jeffrey] throughout this proceeding.

23. It is in the best interest of [Jeffrey] that the parental rights of [Respondent-father] for [Jeffrey] be terminated based on the foregoing findings of fact.

24. It is in the best interest of [Jeffrey] that the parental rights of [Respondent-father] for [Jeffrey] be terminated as Petitioner's husband has a current, loving, fatherly bond with [Jeffrey] whom he wishes to adopt.

25. It is in the best interest of [Jeffrey] that the parental rights of [Respondent-father] for [Jeffrey] be terminated as [Jeffrey] deserves the opportunity to have a normal life and an opportunity for someone else to father him and to stand in for [Respondent-father], who has exhibited inadequate interest in participating in the life of or the support of [Jeffrey].

(Emphasis added).

The trial court also included Conclusion of Law 6 concerning Jeffrey's best interest:

> 6. It is in the best interest of [Jeffrey] that the parental rights of [Respondent-father] be terminated, and that [Jeffrey's] custody remain exclusively with the Petitioner.

Findings of Fact 13 to 22, though inadequately, track with the required findings under N.C.G.S. § 7B-1110(a)(1)-(6).

I agree with the Majority that Finding of Fact 23 is actually a conclusion of law, but would also include Findings of Fact 24 and 25 in that category. Findings of Fact 23 through 25, each of which begin "It is in the best interest of [Jeffrey] that the parental rights of [Respondent-father] for [Jeffrey] . . . be terminated . . ." actually amount to conclusions of law, inasmuch as they declare Petitioner's success in establishing the statutory ground for termination in N.C.G.S. § 7B-1111(a)(1) or (a)(7) under the applicable burden of proof in N.C.G.S. § 7B-1109(f). *See In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675 (internal citations and alterations omitted) (holding that "any determination requiring the exercise of judgment, or the application of legal principles is more properly classified a conclusion of law"); *see also In re S.Z.H.*, 247 N.C. App. 254, 261-62, 785 S.E.2d 341, 347 (2016) (characterizing finding of fact under (a)(7) as a conclusion of law). The trial court's classification of its own determination as a finding or conclusion does not govern our analysis. *See State v. Icard*, 363 N.C. at 308, 677 S.E.2d at 826; *State v. Burns*, 287 N.C. at 110, 214 S.E.2d at 61-62. In addition to Finding of Fact 23, I would treat Findings of Fact 24 and 25 as conclusions of law and apply the appropriate de novo standard of review. *See Icard*, 363 N.C. at 308, 677 S.E.2d at 826 ("While we give appropriate deference to the portions of [the relevant findings] that are findings of fact, we review de novo the portions of those findings that are conclusions of law.").

a. Impact of Erroneous Finding of Fact 22

Respondent-father challenges Finding of Fact 22, which states he "has not declared or shown love for [Jeffrey] throughout this proceeding." I agree with the Majority that the term "this proceeding" in Finding of Fact 22 referenced the entire period since Petitioner filed her petition on 12 December 2016, but I would also construe "this proceeding" to include the six-month period prior to the filing of the petition examined under N.C.G.S § 7B-1111(a)(7). I examine whether the trial court was presented with evidence that Respondent-father declared or demonstrated his love for Jeffrey.

The hearing transcript shows Respondent-father expressly testified that he loved his son, Jeffrey. Respondent-father testified as follows:

[Respondent-father's Attorney:]	But you wanted to see your son more?
[Respondent-father:]	Yeah. I wanted to see my son.
. . .	
[Respondent-father's Attorney:]	Now are you bonded? Are you close? Does he seem to have a bond?
[Respondent-father:]	Yes, sir. *I love my son.*

(Emphasis added). The trial court was presented with Respondent-father's express testimony that he loved Jeffrey, and that he wanted to see Jeffrey more, during the proceeding referred to in Finding of Fact 22.

Further, Petitioner admitted that she knew Respondent-father wanted to spend time with Jeffrey. In her testimony, Petitioner admitted that Respondent-father's wife sent her a message that "[Respondent-father] . . . would really like to see [Jeffrey.]" This message came after Petitioner filed her petition. In light of Petitioner's admission that she received a message that Respondent-father wanted to spend time with Jeffrey, the trial court was presented with evidence that Respondent-father demonstrated his love for Jeffrey during this proceeding.

The trial court's Finding of Fact 22 is erroneous in light of testimony from Respondent-father and Petitioner. "A district court . . . necessarily abuse[s] its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 L. Ed. 2d 359, 382 (1990). I agree with Respondent-father that Finding of Fact 22 was clearly erroneous, as the trial court was presented with evidence that Respondent-father declared and showed love for Jeffrey during the proceeding. Finding of Fact 22 failed to account for Respondent-father's testimony that he loves Jeffrey, or Petitioner's testimony that she was aware Respondent-father wanted to spend time with Jeffrey. Finding of Fact 22 not only lacks evidentiary support, but rather is overtly false.

In light of Respondent-father's express testimony that he loved Jeffrey, made before the trial court, Finding of Fact 22 constitutes arbitrariness to the point of an abuse of discretion. *See White*, 312 N.C. at 777, 324 S.E.2d at 833. I would not merely disregard Finding of Fact 22, as the Majority does in reviewing the trial court's disposition. Instead, I would consider an overtly false finding, which characterized Respondent-father

as failing to state or show love to Jeffrey when the evidence established the contrary, as a clear example of arbitrariness. I am concerned that the trial court's erroneous Finding of Fact 22 affected the reasoning underlying its conclusions of law in Findings of Fact 23 to 25 and Conclusion of Law 6—that termination of Respondent-father's parental rights was in Jeffrey's best interest. The trial court based its Findings of Fact 23 to 25 and Conclusion of Law 6 on dispositional Findings of Fact 13 to 22 tracking the required findings under N.C.G.S. § 7B-1110(a)(1)-(6). The required dispositional findings under N.C.G.S. § 7B-1110(a)(1)-(6) included the erroneous Finding of Fact 22 that "[Respondent-father] has not declared or shown love for [Jeffrey] throughout this proceeding." The trial court based its decision that terminating Respondent-father's parental rights was in Jeffrey's best interest, at least in part, "on a clearly erroneous assessment of the evidence," which constitutes an abuse of discretion. *Cooter & Gell*, 496 U.S. at 405, 110 L. Ed. 2d at 382.

b. Deficient Dispositional Findings—Finding of Fact 15

Respondent-father does not dispute the evidentiary support for Findings of Fact 13-20, which address each of the factors in N.C.G.S. § 7B-1110(a), at least in part. However, he contends a portion of Finding of Fact 15 is erroneous because it refers to Jeffrey's "permanent plan"—a feature only of proceedings initiated by a *county director* of social services under Article 4 of Chapter 7B. See N.C.G.S. §§ 7B-404.1, -906.1, -906.2 (2019). I agree that Jeffrey has no "permanent plan" as that term is considered in N.C.G.S. §§ 7B-404.1, 906.1, and 906.2. The trial court acknowledged "read[ing] the petition" filed by *Petitioner* at the outset of the trial. As the Majority mentions, and I also discussed above, Finding of Fact 15 was part of the trial court's order that followed the required findings in N.C.G.S. § 7B-1110(a)—specifically, N.C.G.S. § 7B-1110(a)(3). While the Majority categorizes the reference to a permanent plan as an oversight, the trial court's erroneous finding concerning a permanent plan that did not exist constituted a misapprehension of the law and was an abuse of discretion. *See, e.g.*, *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 523, 398 S.E.2d 586, 603 (1990). "A trial court by definition abuses its discretion when it makes an error of law." *In re A.F.*, 231 N.C. App. 348, 352, 752 S.E.2d 245, 248 (2013). When a "judge below has ruled upon [a] matter before him upon a misapprehension of the law, the cause will be remanded . . . for further hearing in the true legal light." *State v. Grundler*, 249 N.C. 399, 402, 106 S.E.2d 488, 490 (1959). The trial court's consideration of this case as one involving a permanent plan, when Petitioner initiated the proceeding and no permanent plan existed, meant the trial court did not consider the case in its true legal

light. *Id.* I would remand for another hearing where this case is considered in its true legal light. *Id.*

CONCLUSION

The trial court based its disposition on two erroneous findings—Findings of Fact 22 and 15. Finding of Fact 22 found that Respondent-father did not declare or show love to Jeffrey throughout this proceeding, which was clearly erroneous in light of testimonial evidence. Finding of Fact 15, which tracked N.C.G.S. § 7B-1110(a)(3), found that a permanent plan existed even though Petitioner initiated the proceedings, which was a misapprehension of law. The trial court's erroneous finding and misapprehension of law constituted an abuse of discretion in concluding Jeffrey's best interest will be served by termination of Respondent-father's parental rights. Accordingly, we should vacate the trial court's order and remand for further dispositional proceedings not inconsistent with this holding. I respectfully dissent.

SRINIVAS JONNA, PLANTIFF
v.
SUDHA YARAMADA, DEFENDANT

No. COA18-1046

Filed 18 August 2020

1. Child Custody and Support—child support—calculation—retroactive—Child Support Guidelines

The trial court did not err in a child custody dispute by using the Child Support Guidelines Worksheet to calculate the retroactive child support owed by the father, because the Guidelines specifically authorize the practice.

2. Child Custody and Support—child support—calculation—retroactive—findings—health insurance

Because the trial court's finding of fact regarding the father's past expenses for his child's health insurance coverage was not supported by competent evidence, the child support order was remanded for appropriate findings and recalculation of the father's retroactive child support obligation.

3. Child Custody and Support—child support—calculation—retroactive—childcare expenses—Child Support Guidelines

The Court of Appeals rejected a father's argument that daycare expenses incurred by the mother should not have been included in calculating the father's retroactive child support obligation (because, the father argued, his parents were willing to care for the child free of charge) where both parents were employed, the mother incurred the daycare cost due to her employment, and the father did not request that the the trial court deviate from the Child Support Guidelines. The trial court was not required to find that the costs were reasonably necessary because the support obligation was calculated in accordance with the Guidelines.

4. Child Custody and Support—child support—trial court's authority—parties to share W-2s

The trial court did not exceed its authority by ordering the parents in a child custody and support dispute to exchange their W-2s every year.

5. Civil Procedure—Rule 59(a) motion—irregularity—allegedly inadmissible evidence—no prejudice

The Court of Appeals rejected a father's argument that there was an irregularity in his child custody case warranting a new trial pursuant to Civil Procedure Rule 59(a). The police reports that were allegedly improperly admitted were not prejudicial where they were used to corroborate the mother's testimony about domestic violence (to which the father did not object).

6. Civil Procedure—Rule 59(a) motion—accident or surprise—child custody—opposing party's request for primary custody

The Court of Appeals rejected a father's argument that there was a surprise in his child custody case warranting a new trial pursuant to Civil Procedure Rule 59(a). The mother's request for sole custody was not a surprise where the mother's answer and counterclaim stated that she sought "primary physical and legal care, custody and control" of the child. Further, the mother's agreement to share custody temporarily until a full hearing was not a waiver of her claim for primary custody.

7. Civil Procedure—Rule 59(a) motion—newly discovered evidence—accessible—due diligence

The Court of Appeals rejected a father's argument that newly discovered evidence warranted a new trial pursuant to Civil Procedure Rule 59(a). A recording stored on the father's computer

and "drop-off" records from his child's daycare were both known to exist and accessible before trial—the father merely failed to exercise due diligence to obtain them.

8. Child Custody and Support—sanctions—post-hearing motions—sufficient factual and legal bases—no improper purpose

The trial court erred in a child custody dispute by imposing Rule 11 sanctions against a father for filing three post-hearing motions for relief (a pro se motion, a Rule 59 motion by a new attorney, and an amended Rule 59 motion by the new attorney) where there existed sufficient factual and legal bases for the motions (the father did not misrepresent the facts to his new attorney, and he acted upon the attorney's advice) and there was no improper purpose in filing the motions (the father wanted to present more evidence to the court and obtain equally shared custody).

9. Appeal and Error—timeliness of appeal—after Rule 59 motion—tolling of 30-day period

The Court of Appeals had jurisdiction to review a child custody order where the father's Rule 59 motion, which was ultimately unsuccessful, tolled the 30-day period for filing his appeal and the father timely filed his appeal after the trial court's ruling on the Rule 59 motion.

10. Child Custody and Support—child custody—findings of fact—challenged on appeal—weight of evidence and credibility

The trial court's findings of fact in a child custody order—related to the father's behavior, travel to India, and the minor child's care—were supported by competent evidence, and the Court of Appeals rejected the father's arguments on appeal, which went to the weight of the evidence and credibility determinations.

11. Child Custody and Support—child support—calculation—Worksheet B—extended international travel

To determine whether the use of Worksheet B was proper for calculating the father's prospective child support obligations, the child support order was vacated and remanded for additional findings on whether five-week trips to India were extended visitation or whether the custodial arrangement involved a true sharing of expenses.

Appeal by plaintiff from orders entered 31 March 2017, 20 November 2017, and 8 December 2017 by Judge Lori Christian in Wake County

District Court. Appeal by defendant by writ of certiorari from order entered 20 November 2017 by Judge Lori Christian in Wake County District Court. Heard in the Court of Appeals 6 February 2020.

Plaintiff-appellant Srinivas Jonna, pro se.

Blanco Tackabery & Matamoros, P.A., by Chad A. Archer, for defendant-appellee.

Young Moore and Henderson, P.A., by Angela Farag Craddock, court-appointed amicus curiae.

Zachary, Judge.

Plaintiff-Appellant Srinivas Jonna ("Plaintiff-Father") appeals from several orders entered in the parties' domestic matter. He argues that the trial court erred by (1) incorrectly calculating his child support obligation; (2) denying his motions for a new trial; (3) sanctioning him under Rule 11 of the North Carolina Rules of Civil Procedure; and (4) granting Defendant-Mother primary physical custody of their minor child. Defendant-Appellee Sudha Yaramada ("Defendant-Mother") petitions this Court to issue a writ of certiorari so that we may review whether the trial court correctly applied the North Carolina Child Support Guidelines (the "Guidelines").

For the reasons that follow, we vacate the 20 November 2017 child support order and remand for further proceedings. We reverse that part of the trial court's 8 December 2017 order imposing sanctions on Plaintiff-Father. The 31 March 2017 custody order and that part of the 8 December 2017 order denying Plaintiff-Father's Rule 59 motions are affirmed.

I. Background

The parties are Indian citizens and residents of Wake County, and the parents of one child, who was born in 2013. They were married in 2009, and separated in December 2015.

On 10 December 2015, Plaintiff-Father filed an "*Ex Parte* Complaint/Motion for Temporary Custody and Injunctive Relief." In support of his request for an *ex parte* order for custody, he alleged that

> Plaintiff[-Father] and Defendant[-Mother] agreed to separate for several days after [Defendant-Mother] attempted to strike [Plaintiff-Father] . . . . That [Defendant-Mother]

> has over the last year of the marriage exhibited irrational behavior to include; an attempted suicide, threats to "kill" [Plaintiff-Father], [Defendant-Mother] has force[ ] fed the minor child to the point of vomiting, continues to display bouts of anger and has threatened to leave the country and return to India with the minor child against [Plaintiff-Father's] wishes and in direct derogation of his parental rights.

Plaintiff-Father sought "an immediate Protective Order granting [him] the temporary exclusive care, custody and control of the minor child," together with an injunction prohibiting Defendant-Mother from having any contact with him or the child. That day, the trial court entered a protective order, but declined to grant Plaintiff-Father the relief he sought, instead restraining both parties from removing the child from the State of North Carolina.

On 16 December 2015, the parties executed a Memorandum of Judgment/Order, which the trial court entered. The order provided, *inter alia*, that Defendant-Mother would have primary physical custody of the minor child, Plaintiff-Father would have secondary physical custody, and the parties would share legal custody, pending a full hearing on the matter. The parties agreed to alternate actual physical custody of the minor child on a weekly basis.

On 16 February 2016, Defendant-Mother filed an answer and counterclaim seeking temporary and permanent legal and physical custody of the parties' minor child. On 1 September 2016, the trial court entered a consent order executed by the parties, allowing Plaintiff-Father to care for the minor child while Defendant-Mother traveled to India, and providing that Defendant-Mother could exercise "make up" time with the child upon her return, with the regular custodial arrangement then resuming.

On 26 January 2017, the custody case came on for hearing. Both the parties were represented by counsel and presented evidence.

Defendant-Mother testified that Plaintiff-Father's allegations in his *ex parte* complaint/motion for temporary custody and injunctive relief concerning her mental instability and other issues were baseless. She also testified that she lives in a three-bedroom apartment with a roommate and that the minor child had his own room when he stayed with her, whereas Plaintiff-Father's home was not suitable for the minor child. In addition, Defendant-Mother offered into evidence police reports of an incident of domestic violence and photographs of the injuries she sustained when Plaintiff-Father assaulted Defendant-Mother. According to

Defendant-Mother, Plaintiff-Father would become aggressive at times, and "punch the walls and doors" when he lost his temper, as well as assault her.

Defendant-Mother also testified that Plaintiff-Father has a "controlling attitude." For example, in 2015, Defendant-Mother and the minor child visited India, and the child was scheduled to visit India with Plaintiff-Father immediately afterward. Because each flight from the United States to India takes 22 to 30 hours, and the minor child was an infant, Defendant-Mother tried to arrange for the minor child to stay in India for three days with his paternal grandparents until Plaintiff-Father arrived. Plaintiff-Father refused, insisting that the minor child return to the United States with Defendant-Mother, only to return to India with him 72 hours later. Defendant-Mother explained that Plaintiff-Father "wants to have his way or no way."

The parties also disagreed on whether to have the minor child attend daycare. Defendant-Mother thought it was in the child's best interest; Plaintiff-Father wanted the child to be cared for by his parents, who live with him in his home.

Despite his allegations, Plaintiff-Father repeatedly stated at trial that the current shared custody arrangement was working well. He testified that his parents care for the minor child while he works, as well as when he plays cricket. Plaintiff-Father also testified about an ongoing legal issue in India between him and Defendant-Mother, in which he did not want the minor child involved, but said that he did not have any objection to either parent traveling with the minor child. When asked what action he wanted the trial court to take with regard to custody of the minor child, Plaintiff-Father stated, "I think the current arrangement [alternating weeks] is working very well, and we both communicate well about the child."

At the conclusion of the hearing, the trial court announced that "physical custody primarily is going to be with [Defendant-Mother]. [Plaintiff-Father] is going to have the child every other week from Thursday night to Monday night." In addition, the trial court stated that the child would continue to attend daycare.

Although Plaintiff-Father was represented by counsel, on 6 February 2017, he filed a *pro se* "Motion to Open Evidence" prior to the trial court's entry of the child custody order. In response, on 15 February 2017, Defendant-Mother filed a "Motion for Rule 11 Sanctions." On 22 March 2017, counsel for Plaintiff-Father withdrew from the case.

By order entered 31 March 2017, the trial court concluded that it would be in the best interest of the child for the parties to share legal custody, with Defendant-Mother having primary physical custody and Plaintiff-Father having secondary physical custody. As relevant to this appeal, the order provided that: (1) "[t]he minor child shall stay in daycare until he starts school for at least a half day, each weekday"; (2) "either parent may take the minor child to India for up to five consecutive weeks each year until he is in school"; (3) after the child starts school, "either parent may take the minor child to India for up to five consecutive weeks each year during summer break . . . or up to two consecutive weeks at any time during the year"; and (4) "[i]f a parent cho[o]ses not to travel to India with the child, he or she shall have two uninterrupted weeks' vacation within the United States" with the minor child.

On 11 April 2017, Defendant-Mother filed a motion for prospective and retroactive "child support consistent with the North Carolina Child Support Guidelines."

Through new counsel,[1] Plaintiff-Father filed a Rule 59 motion, and on 22 May 2017, Plaintiff-Father filed his "Amended Motion in the Cause" pursuant to Rule 59, seeking a new trial on the grounds of irregularity at trial, fraud, surprise, and newly discovered evidence. On 9 June 2017, Defendant-Mother responded to Plaintiff-Father's amended Rule 59 motion with her motion for Rule 11 sanctions and a motion to dismiss.

A hearing was held on 13 June 2017, at which the trial court addressed Plaintiff-Father's amended Rule 59 motion for a new trial and Defendant-Mother's motion for sanctions. After hearing the arguments of counsel, the trial court stated, "I don't find any grounds under Rule 59; quite frankly, I find that this is frivolous, and I am going to find that pursuant to Rule 11, [Plaintiff-Father] is going to pay the attorney's fees for [Defendant-Mother]."

On 25 July 2017, the trial court held the child support hearing. Plaintiff-Father proceeded *pro se*, and Defendant-Mother was represented by counsel. On 20 November 2017, the trial court entered its child support order, requiring, *inter alia*, that Plaintiff-Father (1) contribute $680.39 per month to the support of the parties' minor child beginning 1 August 2015; (2) pay arrearages of $5,539.18 to Defendant-Mother at the rate of $230.80 per month; and (3) pay 45% of the minor child's uninsured health care expenses. The trial court also ordered that

1. It is unclear from the record when Plaintiff-Father retained another attorney in the matter.

the parties exchange copies of their W-2s and other evidence of their income annually.

By order entered 8 December 2017, the trial court denied Plaintiff-Father's motion for a new trial and imposed sanctions on him. The trial court found that Plaintiff-Father "ha[d] not forecast[ ] evidence that would change" its prior custody ruling, and that "[t]here [wa]s no basis for the Rule 59 motion filed by Plaintiff[-Father]."

On 15 December 2017, Plaintiff-Father filed notice of appeal to this Court. On appeal, Plaintiff-Father challenges certain aspects of the child support order, the order denying his motion for a new trial and imposing sanctions, and the child custody order. On 25 November 2019, Defendant-Mother petitioned this Court to issue a writ of certiorari, in order to review the child support order. We address each issue in turn.

II. Child Support Order

A. Standard of Review

"Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Mason v. Erwin*, 157 N.C. App. 284, 287, 579 S.E.2d 120, 122 (2003) (citation omitted). "Under this standard of review, the trial court's ruling will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Biggs v. Greer*, 136 N.C. App. 294, 296-97, 524 S.E.2d 577, 581 (2000) (citation omitted). "Where a party asserts an error of law occurred, we apply a de novo standard of review." *State ex rel. Lively v. Berry*, 187 N.C. App. 459, 462, 653 S.E.2d 192, 194 (2007) (italics omitted).

B. Child Support Obligation

Plaintiff-Father first argues that the trial court erred in calculating his retroactive child support obligation, and in ordering the parties to exchange financial information annually.

1. Use of Guidelines

[1] Plaintiff-Father contends that the "[t]rial court erred as a matter of law by using the Child Support Guidelines Worksheet to calculate the Retroactive Child support from December 2015 to April 11, 2017." We disagree.

Child support awarded for that period of time prior to the date on which a party files a complaint or motion for child support "is properly

classified as retroactive child support." *Respess v. Respess*, 232 N.C. App. 611, 628, 754 S.E.2d 691, 702 (2014) (citation omitted). Effective 1 January 2015, the Guidelines specifically authorize trial courts to use the Guidelines for calculating a retroactive child support obligation:

> In a direct response to *Respess v. Respess*, 232 N.C. App. 611, 754 S.E.2d 691 (2014), the 2014 General Assembly amended G.S. 50-13.4(c1) to provide that the Conference of Chief District Judges shall prescribe uniform statewide presumptive guidelines for the computation of child support obligations, *including retroactive support obligations*[.]
>
> In cases involving a parent's obligation to support his or her child for a period before a child support action was filed (i.e., cases involving claims for "retroactive child support" or "prior maintenance"), a court may determine the amount of the parent's obligation (a) by determining the amount of support that would have been required had the guidelines been applied at the beginning of the time period for which support is being sought, or (b) based on the parent's fair share of actual expenditures for the child's care.

Guidelines, Ann. R. 2 (emphasis added) (revised 1 January 2015 and left unchanged as of 2019); *see also* N.C. Gen. Stat. § 50-13.4(c1) ("Effective July 1, 1990, the Conference of Chief District Judges shall prescribe uniform statewide presumptive guidelines for the computation of child support obligations, *including retroactive support obligations*, of each parent as provided in Chapter 50 or elsewhere in the General Statutes . . . ." (emphasis added)).

Thus, Plaintiff-Father's assertion that the trial court erred by utilizing the Guidelines to calculate his retroactive child support obligation is meritless.

2. Finding of Fact 9: Health Insurance Expense

[2] Plaintiff-Father also specifically challenges finding of fact 9, which provides, in pertinent part: "For the period December[ ] 2015 to January 2017 . . . [Plaintiff-Father] incurred an average of $156 per month for [health insurance coverage] expense[ ] for the minor child." Plaintiff-Father argues that "[t]here is no competent evidence to support [the] [t]rial court's finding," and that "there is uncontroverted evidence" in the record that he paid $220 per month in 2015, and $231 per month in 2016, and $156 per month in 2017 to maintain health insurance coverage for the minor child. We agree.

At the child support hearing, Plaintiff-Father testified as follows:

> THE COURT: How much are you paying for your child's day -- healthcare?
>
> [Plaintiff-Father]: In the last three years, it's been fluctuating, Your Honor, so I request that average be considered. So in 2015, I was paying $231; in 2016, I was paying $220; and this year I've been paying $156.
>
> THE COURT: It's going down?
>
> [Plaintiff-Father]: It's strange, it actually went down this -- and that's why I said it's fluctuating; it may go up next year, I don't know.
>
> THE COURT: It's 156 a month --
>
> [Plaintiff-Father]: $156 --
>
> THE COURT: -- or per pay period?
>
> . . . .
>
> [Plaintiff-Father]: I think it's per month. And that's why I'm pretty sure it will go up next year.

In addition, Plaintiff-Father presented the trial court with written verification of the 2015 and 2016 cost of maintaining health insurance coverage for the minor child. Thus, the trial court's finding in this regard was not supported by competent evidence.

Accordingly, we remand the child support order to the trial court for appropriate findings of fact and a recalculation of Plaintiff-Father's retroactive child support obligation, in which he is given proper credit for the expense of providing health insurance coverage for the minor child.

3. Work-Related Child Care Costs

[3] Plaintiff-Father next maintains that it was not "reasonably necessary" for Defendant-Mother to send the child to daycare during the period prior to February 2017, and that the trial court erred by including this expense in the calculation of his retroactive child support obligation. We disagree.

The Guidelines provide that "[r]easonable child care costs that are . . . paid by a parent due to employment . . . are added to the basic child support obligation and prorated between the parents based on their respective incomes." *Guidelines*, Ann. R. 4. Moreover, "[w]hen the

court does not deviate from the Guidelines, an order for child support in an amount determined pursuant to the Guidelines is conclusively presumed to meet the reasonable needs of a child . . . and specific findings regarding a child's reasonable needs . . . are therefore not required." *Guidelines*, Ann. R. 1.

Here, the minor child's attendance at daycare was a point of contention at trial. Defendant-Mother asserted that the child benefited from attendance, while Plaintiff-Father claimed that the expense was unnecessary when his parents were willing and able to care for the child free of charge. However, it was undisputed that both parents were employed and that Defendant-Mother incurred the child care cost due to her employment, and Plaintiff-Father did not request that the trial court deviate from the Guidelines.

The trial court found in its child support order that since the date of separation, both parents have been employed, and that "[f]or the period December[ ] 2015 to January 2017 . . . the parties shared equal custodial time. Furthermore, during this period . . . Defendant[-Mother] incurred an average of $700 per month for work-related day care expenses for the minor child[.]" Father has not raised any challenge to these findings of fact on appeal.

Having found that Defendant-Mother incurred child care costs due to her employment, the trial court properly included this work-related child care expense in the calculation of Plaintiff-Father's child support obligation. As explicitly provided in the Guidelines, when the child support obligation is calculated in accordance with the Guidelines, "specific findings regarding a child's reasonable needs . . . are . . . not required." *Guidelines*, Ann. R. 1. Thus, in light of the trial court's other findings, it was not required to make a specific finding of fact that the work-related child care expense was necessary.

Accordingly, the trial court did not abuse its discretion by including Defendant-Mother's work-related child care expense in its retroactive child support calculation. This argument is overruled.

C. Exchange of W-2 Forms

[4] Lastly, Plaintiff-Father maintains that the trial court "exceeded its authority in ordering the [p]arties to exchange their W[-]2s every year." This argument is without merit.

First, Plaintiff-Father fails to furnish this Court with a legitimate argument as to why this portion of the order exceeded the trial court's authority. Nor does he set forth any argument as to why this constitutes

an abuse of the trial court's discretion. It was Plaintiff-Father's duty "to challenge findings and conclusions, and make corresponding arguments on appeal. It is not the job of this Court to create an appeal for Plaintiff-[Father], [or] to supplement an appellant's brief with legal authority or arguments not contained therein." *Lasecki v. Lasecki*, 257 N.C. App. 24, 47, 809 S.E.2d 296, 312 (2017) (citations and internal quotation marks omitted). Thus, this argument is abandoned.

In addition, ordering the parties to a child support action to exchange financial information annually is well within the inherent authority of the court to administer justice. The Guidelines "are based on the 'income shares' model[.]" *Guidelines*, Ann. R. 2. "The income shares model is based on the concept that child support is a shared parental obligation and that a child should receive the same proportion of parental income he or she would have received if the child's parents lived together." *Guidelines*, Ann. R. 2. Because it is necessary to have the parties' financial information in order to determine the parental support obligation, it is not uncommon for North Carolina courts to order that parties periodically exchange financial information. Plaintiff-Father's argument lacks merit.

D. Summary

The trial court erred in calculating Plaintiff-Father's retroactive child support obligation. Accordingly, we vacate the 20 November 2017 child support order, and remand to the trial court for additional findings of fact regarding the cost of health insurance coverage for the minor child, and a recalculation of Plaintiff-Father's retroactive child support obligation.

III. Rule 59(a) Motion

In the present case, Plaintiff-Father moved the trial court for a new trial pursuant to Rule 59(a)(1), (2), (3), and (4). On appeal, he argues that the trial court erred in denying his motion for a new trial under Rule 59(a)(1), (3), and (4), asserting that (1) there was an "irregularity" at trial because "[i]nadmissible and prejudicial hearsay evidence" was used by the trial court in reaching its conclusions of law; (2) he "and his attorney were 'surprised' and 'shocked' to hear [Defendant-Mother] completely contradicting her statement in the Consent Order . . . and asking for sole custody and making various false allegations" at trial; and (3) he is now in possession of evidence to which he did not have access prior to trial. After careful review, we conclude that the trial court's denial of Plaintiff-Father's Rule 59(a) motion does not "amount[ ] to a substantial

miscarriage of justice." *Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982).

A. Standard of Review

A party may move the trial court for a new trial, or to alter or amend a judgment, under one or more of the nine grounds found in Rule 59(a). N.C. Gen. Stat. § 1A-1, Rule 59(a). For motions brought under Rule 59(a)(1)-(6) and (9), "a motion for new trial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed absent a manifest abuse of that discretion." *N.C. Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 371, 649 S.E.2d 14, 25 (2007) (citation omitted). A trial court's discretion regarding a motion under Rule 59 is "practically unlimited." *Pearce v. Fletcher*, 74 N.C. App. 543, 544, 328 S.E.2d 889, 890 (1985) (citation omitted). "Consequently, an appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605.

B. Irregularity at Trial

[5] Plaintiff-Father argues that the admission into evidence of what he describes as inadmissible and prejudicial hearsay amounted to an irregularity depriving him of a fair trial.

Rule 59(a)(1) states that a new trial may be granted for "[a]ny irregularity by which any party was prevented from having a fair trial[.]" N.C. Gen. Stat. § 1A-1, Rule 59(a)(1). Although the language of Rule 59(a)(1) is broad, "[n]ew trials are not awarded because of technical errors. The error must be prejudicial." *Sisk v. Sisk*, 221 N.C. App. 631, 635, 729 S.E.2d 68, 71 (2012) (citation omitted), *disc. review denied*, 366 N.C. 571, 738 S.E.2d 368 (2013). Moreover, "[t]he party asserting the error must demonstrate that he has been prejudiced thereby." *Id.* (citation omitted).

Here, Plaintiff-Father fails to demonstrate an error by which he was prejudiced. Plaintiff-Father argues on appeal that he "was prejudiced from having a fair trial by admitting these hearsay [police] reports into evidence, which misled the [t]rial [c]ourt[.]" However, Plaintiff-Father also maintains that the "[p]olice reports were produced to corroborate the purported domestic violence." His contention makes the point that because Defendant-Mother testified without objection to the domestic violence, as well as the injuries she suffered, the admission of the police reports cannot have prejudiced his case to the point where he could not have a fair trial. Assuming, *arguendo*, that the police reports were

improperly admitted, Defendant-Mother's testimony was itself ample substantive evidence of the acts, and thus, would not constitute an irregularity warranting a new trial.

In addition, Plaintiff-Father makes no argument that he was prejudiced by the admission of the photographs. "It is not the duty of this Court to peruse . . . the record, constructing an argument for appellant." *Id.* at 635, 729 S.E.2d at 72 (citation omitted).

This argument therefore lacks merit.

C. Accident or Surprise

[6] Plaintiff-Father also claims that he is entitled to a new trial on the basis of Rule 59(a)(3), which provides that a new trial may be granted for "[a]ccident or surprise which ordinary prudence could not have guarded against[.]" N.C. Gen. Stat. § 1A-1, Rule 59(a)(3). He asserts that he was not prepared for the evidence introduced by Defendant-Mother at trial in support of her efforts to gain primary physical custody, as he was under the impression that the parties agreed to share joint legal and physical custody of the parties' child. He argues that he and "his attorney were 'surprised' and 'shocked' to hear . . . Defendant[-Mother] completely contradicting her statement in the Consent Order . . . and asking for sole custody and making various false allegations."

We note, however, that in her answer and counterclaim for child custody, Defendant-Mother specifically alleged that it was "in the best interest of said minor child that his care, custody and control be placed" with her, and she sought the "primary physical and legal care, custody and control of the said minor child." She also testified at trial that she wanted primary legal and physical custody of the parties' child because she "ha[d] been the primary caregiver of the child ever since he was born." Defendant-Mother's agreement to share custody on a temporary basis, pending a full hearing on custody, did not constitute a waiver of her express claim for primary custody.

That Defendant-Mother sought primary legal and physical custody of the parties' minor child at the custody trial was not "surprise which ordinary prudence could not have guarded against[.]" *Id.* Plaintiff-Father is not entitled to relief on the basis of this argument.

D. Newly Discovered Evidence

[7] Finally, Plaintiff-Father argues that a new trial is warranted under Rule 59(a)(4), because he has "[e]vidence that could not be procured prior to trial."

Rule 59(a)(4) provides that a new trial may be granted on the grounds of "[n]ewly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial[.]" *Id.* § 1A-1, Rule 59(a)(4). Plaintiff-Father concedes that the evidence to which he refers was not newly discovered after trial, but asserts that it was inaccessible prior to trial. He maintains that it therefore "satisfie[s] the requirements of Rule 59(a)(4) for [n]ew trial."

The first item addressed by Plaintiff-Father is a recording that was stored on his computer hard drive, which he alleges would tend to show that Defendant-Mother threatened him and the child, and that she was abusive. Plaintiff-Father does not dispute Defendant-Mother's contention that he knew that the information was on his computer, and simply waited until after trial to hire an expert to access that information. Hence, the recording was not newly discovered evidence, nor was it inaccessible.

The second item of evidence at issue was daycare "drop off" records, which Plaintiff-Father alleges on appeal would tend to show that he dropped the child off at daycare 74% of the time.[2] Plaintiff-Father asserts that he requested the daycare records, but that Defendant-Mother would not allow the daycare to release the information to him until after trial.

Although Defendant-Mother may have told the daycare not to respond to Plaintiff-Father's requests for information, he does not address the fact that the information he sought from the child's daycare could have been obtained by subpoena prior to trial. The daycare records were not newly discovered and were not inaccessible, and Plaintiff-Father's failure to subpoena the daycare records evidences a lack of due diligence.

It is undisputed that the evidence was not newly discovered; it is also evident that it was not inaccessible prior to trial. *See Ar-Con Constr. Co. v. Anderson*, 5 N.C. App. 12, 20, 168 S.E.2d 18, 23 (1969) ("There was no showing that appellant did not have full knowledge of the facts referred to in its motion at the time of the hearing on the plea in bar, and no showing as to why, in the exercise of due diligence, appellant had failed to present evidence concerning such facts at the time of that hearing.").

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2. He alleged in his amended Rule 59 motion that the daycare records would show that Defendant-Mother did not have the child in daycare full-time starting in mid-December 2016.

Plaintiff-Father has failed to demonstrate the existence of newly discovered material evidence that he could not have discovered and produced at the custody hearing.

Thus, the trial court properly denied a new trial on this ground as well.

E. Summary

Plaintiff-Father failed to establish that the trial court abused its discretion in denying his Rule 59(a) motion. Accordingly, we affirm that part of the trial court's 8 December 2017 order denying Plaintiff-Father's Rule 59(a) motion.

IV. Rule 11 Sanctions

[8] Plaintiff-Father next contends that the trial court erred in imposing Rule 11 sanctions against him for filing three post-hearing motions that he maintains were a proper attempt to obtain appropriate post-trial relief from the custody order pursuant to Rule 59. After careful consideration, we conclude that the trial court erred in sanctioning Plaintiff-Father for filing these motions.

A. Standard of Review

Our standard of review for Rule 11 sanctions is well established: "The trial court's decision to impose or not to impose mandatory sanctions under . . . Rule 11(a) is reviewable de novo as a legal issue." *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989) (italics omitted). "[A]n appellate court must determine whether the findings of fact of the trial court are supported by sufficient evidence, whether the conclusions of law are supported by the findings of fact, and whether the conclusions of law support the judgment." *Johns v. Johns*, 195 N.C. App. 201, 206, 672 S.E.2d 34, 38 (2009) (citation omitted). "If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under . . . Rule 11(a)." *Turner*, 325 N.C. at 165, 381 S.E.2d at 714.

> In reviewing a trial judge's findings of fact, we are "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting

> *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); *see also Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (" '[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.' " (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))).

Auto. Grp., LLC v. A-1 Auto Charlotte, LLC, 230 N.C. App. 443, 447, 750 S.E.2d 562, 566 (2013).

B. Analysis

Rule 11 of the North Carolina Rules of Civil Procedure provides, in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record . . . . A party who is not represented by an attorney shall sign his pleading, motion, or other paper . . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction[.]

N.C. Gen. Stat. § 1A-1, Rule 11(a).

Appellate review "of sanctions under Rule 11 consists of a three-pronged analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose." *Auto. Grp.*, 230 N.C. App. at 447, 750 S.E.2d at 566 (citation and internal quotation marks omitted). "A violation of any one of these prongs requires the imposition of sanctions." *Id.* For each prong, the trial court must make findings of fact and conclusions of law. *McClerin v. R-M Indus., Inc.*, 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995).

To assess the sufficiency of the factual basis of a pleading, this Court must determine "(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact." *In re Thompson*, 232 N.C. App. 224, 230, 754 S.E.2d 168, 173 (2014) (citation omitted). An appraisal of the legal sufficiency of a pleading requires that we look "first to the facial plausibility of the pleading and only then, if the pleading is implausible under existing law, to the issue of whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by the existing law." *Bryson v. Sullivan*, 330 N.C. 644, 661, 412 S.E.2d 327, 336 (1992) (citation and internal quotation marks omitted). Lastly, to evaluate the improper purpose prong, we must review the evidence to ascertain whether the pleading was filed for "any purpose other than one to vindicate rights . . . or to put claims of right to a proper test." *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992) (citation and internal quotation marks omitted).

It must be noted, however, that "just because a plaintiff is eventually unsuccessful in [his] claim, does not mean the claim was inappropriate or unreasonable." *Grover v. Norris*, 137 N.C. App. 487, 495, 529 S.E.2d 231, 235 (2000).

In the instant case, after the trial court announced its decision to grant Defendant-Mother primary physical custody of the parties' child, Plaintiff-Father filed a *pro se* motion to "open evidence." Defendant-Mother responded with a motion for sanctions. The trial court allowed Plaintiff-Father's trial attorney to withdraw, and Plaintiff-Father hired second counsel who promptly filed a Rule 59 motion, and soon thereafter, an amended Rule 59 motion, on essentially the same grounds as alleged by Plaintiff-Father in his *pro se* motion. Plaintiff-Father then took a dismissal of his *pro se* motion. Defendant-Mother responded to the amended Rule 59 motion by filing a second motion for sanctions, asserting that Plaintiff-Father was improperly seeking to introduce evidence that he never provided in discovery or during trial, and that his motions were not well grounded in fact, were not filed in good faith, and were interposed for an improper purpose. Defendant-Mother alleged that Plaintiff-Father was "merely upset with the [trial c]ourt's decision."

The trial court agreed with Defendant-Mother, finding that Plaintiff-Father's three motions were "not supported by the facts or the law," and "were filed in bad faith." Concluding that "[t]his is a frivolous action under the meaning of Rule 11 of the North Carolina Rules of Civil

Procedure," the trial court assessed Plaintiff-Father $3,131.00 in attorney's fees, payable to Defendant-Mother.

On appeal, Plaintiff-Father maintains that he acted in good faith with regard to all three motions, and through counsel with regard to the Rule 59 and amended Rule 59 motions. Plaintiff-Father asserts that he was properly attempting to obtain relief from the trial court's custody order in each motion by (1) convincing the trial court that it erred in the admission of evidence over his objection, to his prejudice, (2) exposing Defendant-Mother's misrepresentations to the trial court, and (3) bringing newly discovered evidence to the trial court's attention.

1. Sufficiency of the Factual and Legal Bases

The evidence does not support the trial court's assessment of sanctions against Plaintiff-Father on the ground that his post-trial motions had no basis in fact or law.

Plaintiff-Father first filed his *pro se* motion to open evidence, which Defendant-Mother's counsel describes as essentially asserting the same facts as in the Rule 59 and amended Rule 59 motions filed by his second attorney. There is no dispute that Plaintiff-Father sought the same relief in his *pro se* motion as in the Rule 59 motions. At the Rule 59 hearing, Plaintiff-Father's second attorney told the trial court that Plaintiff-Father came to her and asked that she help him. She then "spoke to him . . . at length," went "through all the evidence," and took "a bit of time on this and . . . looked at the order." Presumably, Plaintiff-Father's second attorney considered those facts, determined that the facts were sufficient to warrant a legally sound motion under Rule 59, and then drafted, signed, and filed the Rule 59 and amended Rule 59 motions. Thereafter, Plaintiff-Father dismissed his *pro se* motion. There are no allegations that Plaintiff-Father misled his attorney regarding the facts or circumstances of his case.

In light of the substantial similarity of Plaintiff-Father's dismissed *pro se* motion, the Rule 59 motion, and the amended Rule 59 motion, we will focus our analysis on the Rule 59 motions.

It is well established that "a represented party may rely on his attorney's advice as to the legal sufficiency of his claims[.]" *Bryson*, 330 N.C. at 663, 412 S.E.2d at 337. Where Plaintiff-Father did not misrepresent the facts to his counsel, it was not unreasonable for Plaintiff-Father to believe, on the basis of his attorney's superior knowledge and skill, together with her willingness to undertake the pursuit of the Rule 59 motion on his behalf, that his motions were well grounded in fact and in law.

This Court addressed a similar issue in *Grubbs v. Grubbs*, 252 N.C. App. 265, 796 S.E.2d 822, 2017 WL 892564 (2017) (unpublished). In *Grubbs*, the defendant sought Rule 11 sanctions for allegedly improper motions interposed in a domestic matter. *Grubbs*, 2017 WL 892564, at *7. The trial court concluded that the verified motions were "not well grounded in fact, and not warranted by existing law and [were interposed] for an improper purpose," and imposed Rule 11 sanctions against the plaintiff as well as her attorney. *Id.* at *11. We determined that, absent an improper motive, Rule 11 sanctions should not be assessed against a client who relies in good faith on the advice of counsel:

> It is the rare client who understands the strategy and tactics of domestic litigation, as it is practiced in District Court. The [d]efendant asks us to impute the knowledge of the effects of these motions to [the attorney's] client, [the p]laintiff. It is more likely [the attorney] prepared the affidavit for his client and she signed it on advice of counsel. . . . . Without a specific finding from the court which shows [the p]laintiff had knowledge of the effect of signing the motion would have on court proceedings and took this action to gain some temporary tactical advantage, we are unpersuaded that a signature alone would support Rule 11 sanctions against a client acting on an attorney's advice.

Id. at *15.

Grubbs is an unpublished opinion and is not, therefore, binding legal authority. *See* N.C.R. App. P. 30(e)(3). Nevertheless, we find its reasoning persuasive, and we hereby adopt it.

In that Plaintiff-Father acted on the advice of counsel, and there is no evidence that he misled counsel as to the relevant facts or posture of the case, the assessment of sanctions against him on the grounds that his motions were not well grounded in fact or were not warranted by existing law is not merited. Therefore, in the present case, the trial court's findings do not support the imposition of Rule 11 sanctions on these bases against Plaintiff-Father.

2. Improper Purpose

Nonetheless, a violation of any one of the three prongs under a Rule 11 analysis will support the imposition of sanctions. *Williams*, 127 N.C. App. at 423, 490 S.E.2d at 240-41. Thus, we now review the improper purpose prong of the Rule 11 analysis.

An improper purpose is "any purpose other than one to vindicate rights or to put claims of right to a proper test." *Persis Nova Constr. Inc. v. Edwards*, 195 N.C. App. 55, 63, 671 S.E.2d 23, 28 (2009) (citation omitted). Our Supreme Court has determined that "[p]arties, as well as attorneys, may be subject to sanctions for violations of the improper purpose prong of Rule 11." *Bryson*, 330 N.C. at 656, 412 S.E.2d at 333. "[A] represented party . . . will be held responsible if his evident purpose is to harass, persecute, otherwise vex his opponents, or cause them unnecessary cost or delay." *Id.* at 663, 412 S.E.2d at 337.

The existence of an improper purpose is determined from the totality of the circumstances. *See Mack*, 107 N.C. App. at 93-94, 418 S.E.2d at 689. "[T]he relevant inquiry is whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior." *Id.* at 93, 685 S.E.2d at 689. The burden is on the movant to prove, by a preponderance of the evidence, that the pleading has been interposed for an improper purpose. *Auto. Grp.*, 230 N.C. App. at 447-48, 750 S.E.2d at 566-67.

In the present case, Defendant-Mother asserted that Plaintiff-Father filed the *pro se* motion, and later the Rule 59 and amended Rule 59 motions, because he was "merely upset with the [trial c]ourt's decision[.]" This is usually the case in the wake of a custody trial and, standing alone, does not constitute an improper purpose. Indeed, it is likely that at least one party in any custody trial, if not both, will be unhappy with the trial court's decision. It is not uncommon for counsel to then file a Rule 59 motion seeking to present additional evidence. *See*, *e.g.*, *Faulkenberry v. Faulkenberry*, 169 N.C. App. 428, 431-32, 610 S.E.2d 237, 239-40 (2005); *Senner v. Senner*, 161 N.C. App. 78, 84-85, 587 S.E.2d 675, 679 (2003). Here, Defendant-Mother offered no evidence to the trial court that Plaintiff-Father interposed his motions "to gain some temporary tactical advantage," to cause unnecessary expense or delay, or to advance some other improper motive. *Grubbs*, 2017 WL 892564 at *15. As the parties seem to agree, Plaintiff-Father's purpose was to get more evidence before the trial court and obtain equally shared physical custody of the parties' minor child, rather than to personally or financially injure Defendant-Mother or to delay the proceedings.

Defendant-Mother had the burden of proving that the motions were filed for an improper purpose in violation of Rule 11, which she failed to satisfy. Therefore, the evidence does not support the finding of fact that Plaintiff-Father filed the motions in bad faith.

Accordingly, that part of the trial court's 8 December 2017 order imposing sanctions is reversed.

V. Child Custody Order

Plaintiff-Father next argues that "[t]he trial court erred as a matter of law in awarding primary custody of the child to . . . Defendant[-Mother]," and challenges several of the trial court's findings of fact. Specifically, he asserts that findings of fact 9, 10, 15, 17, 18, 19, 20, 21, 24, and 27 are not supported by competent evidence.

A. Appellate Jurisdiction

[9] As a threshold matter, we must determine whether this Court has jurisdiction to review the child custody order. Although the child custody order was entered on 31 March 2017, Plaintiff-Father filed notice of appeal to this Court on 15 December 2017—well beyond the ordinary period within which an appeal may be timely filed. *See* N.C.R. App. P. 3(c)(1). However, for the following reasons, the appeal is properly before this Court.

"Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action . . . may take appeal by filing notice of appeal with the clerk of superior court[.]" N.C.R. App. P. 3(a). The notice of appeal must be filed "within thirty days after entry of judgment." N.C.R. App. P. 3(c)(1). "Failure to give timely notice of appeal . . . is jurisdictional, and an untimely attempt to appeal must be dismissed." *Booth v. Utica Mutual Ins.*, 308 N.C. 187, 189, 301 S.E.2d 98, 99-100 (1983) (per curiam).

Nevertheless, where a party files a timely Rule 59 motion requesting a new trial, "the thirty-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order[.]" N.C.R. App. P. 3(c)(3). A motion for a new trial pursuant to Rule 59 "shall be served not later than 10 days after entry of the judgment." N.C. Gen. Stat. § 1A-1, Rule 59(b).

Entry and service of judgments are governed by Rule 58. "[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court[.]" *Id.* § 1A-1, Rule 58. After entry, a copy of the judgment shall be served "upon all other parties within three days." *Id.* § 1A-1, Rule 58. The trial judge may designate one of the parties to "serve a copy of the judgment upon all other parties within three days after the judgment is entered." *Id.* Moreover, "[a]ll time periods within which a party may further act pursuant to . . . Rule 59 *shall be tolled for the duration of any period of noncompliance with*

this service requirement," provided, however, that "no time period under . . . Rule 59 shall be tolled longer than 90 days from the date the judgment is entered." *Id.* (emphasis added). Service and proof of service must comply with Rule 5 of the North Carolina Rules of Civil Procedure. *Id.*

In the present case, the trial court tasked Defendant-Mother's attorney with drafting the order at the conclusion of the custody hearing. Between the date of the hearing and the date on which the order was entered, the trial court permitted Plaintiff-Father's attorney to withdraw from the case. Thus, Defendant-Mother should have served the custody order on Plaintiff-Father, as he was not represented by counsel when the order was entered. *See* N.C. Gen. Stat. § 1A-1, Rule 5(b) (providing that "all pleadings subsequent to the original complaint and other papers required or permitted to be served[ ]" shall be served on the party "[i]f the party has no attorney of record"). However, on 31 March 2017, Defendant-Mother's counsel served a copy of the order on Plaintiff-Father's former counsel. Plaintiff-Father received notice of the judgment on 10 April 2017, by first class mail from his former counsel.

Defendant-Mother failed to abide by the service requirements of Rule 58 by serving the custody order on Plaintiff-Father's former attorney rather than on Plaintiff-Father. Because "[a]ll time periods within which a party may further act pursuant to . . . Rule 59 shall be tolled for the duration of any period of noncompliance with this service requirement," the deadline for Plaintiff-Father to serve his motion for a new trial on Defendant-Mother's counsel was tolled until ten days after Plaintiff-Father's receipt of the custody order on 10 April 2017, rather than ten days after entry of the custody order. *D.G. II, LLC v. Nix*, 213 N.C. App. 220, 225, 713 S.E.2d 140, 145 (2011) (citation omitted) (concluding that, after defendants' failure to serve the plaintiff with the judgment, the ten-day period within which the plaintiff could serve its motion for new trial was not triggered until ten days after the plaintiff's receipt of the judgment from the county courthouse, plus three days for service by mail).

In the case at bar, Plaintiff-Father served his Rule 59 motion for a new trial on 12 April 2017, two days after receiving a copy of the order. Thus, his motion was timely served. Moreover, we conclude that although Plaintiff-Father's motion was ultimately unsuccessful, it was nevertheless sufficient to toll the thirty-day period for noticing an appeal. Because the trial court entered its order on Plaintiff-Father's Rule 59 motion and sanctions on 8 December 2017, his appeal to this Court on 15 December 2017 was timely.

B. Standard of Review

On review of a child custody matter,

> the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Unchallenged findings of fact are binding on appeal. The trial court's conclusions of law must be supported by adequate findings of fact. Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal.

Carpenter v. Carpenter, 225 N.C. App. 269, 270, 737 S.E.2d 783, 785 (2013) (citation omitted).

"Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record[.]" *Huml v. Huml*, ___ N.C. App. ___, ___, 826 S.E.2d 532, 541 (2019) (citation omitted).

C. Child Custody Order

[10] In the instant case, Plaintiff-Father contends that the following findings of fact are not supported by competent evidence: 9, 10, 15, 17, 18, 19, 20, 21, 24, and 27.

> 9. Plaintiff[-Father] filed a complaint seeking emergency custody in this case in 2015 with an allegation that Defendant[-Mother] threatened to kill herself and other allegations against her. However, he took the stand during this hearing and testified there were no problems and that the parties should share joint custody. The court finds this troubling and that if the allegations in the complaint were of a real concern to Plaintiff[-Father], he would have testified as such and attempted to convince the court that Defendant[-Mother] is a problem. Therefore, the [c]ourt finds that Plaintiff[-Father's] claims in the complaint about Defendant[-Mother are] not credible.
>
> 10. Plaintiff[-Father] committed acts of domestic violence against Defendant[-Mother], including one incident where he left a scar on her forearm. He also punched holes in the wall.

. . . .

15. . . . Plaintiff[-Father] spends significant time playing cricket. The [c]ourt has no issue with Plaintiff[-Father] enjoying himself and blowing off steam; however, if he is going to be out seven or eight hours playing cricket or some other activity, the child should be with his mother if she is available to provide care.

. . . .

17. Defendant[-Mother] was the primary caretaker of the child prior to the parties' separation.

18. Since the separation, . . . Defendant[-Mother] has taken care of the child while in her care and it is unclear to the [c]ourt whether Plaintiff[-Father] or his parents have been the primary caretaker while in his care.

19. The court is concerned about . . . Plaintiff[-Father's] request for emergency custody. The [c]ourt signed an ex-parte emergency custody order primarily to address the alleged threat that Defendant[-Mother] would remove the child from the country. Plaintiff[-Father] alleged that Defendant[-Mother] could telecommute from India, which was untrue and the [c]ourt also finds that . . . Plaintiff[-Father] continued with his façade in the Emergency complaint that he is spending or wants to spend as much time with the child as possible. There is also no credible evidence presented at the trial of this matter that Defendant[-Mother] was a flight risk with the minor child. In fact, Defendant[-Mother] traveled to India with the child in 2015 and brought him back to North Carolina.

20. Plaintiff[-Father] alleged family tensions and a property dispute in India as the reasons the minor child should not be allowed to be taken to India. The [c]ourt does not find this concern to be credible. They both traveled to India separately with the child in 2015. They both have family in India. Plaintiff[-Father] did not allege during the trial that he had any concern that Defendant[-Mother] would attempt to keep the minor child in India and not return [the child] to the United States.

21. The [c]ourt is concerned that Plaintiff[-Father's] mother and father may be a source of tension in . . .

> Plaintiff[-Father's] home. The [c]ourt finds Defendant[-Mother's] contention credible that the child's paternal grandparents are more hostile than the maternal grandparents.
>
> . . . .
>
> 24. In Plaintiff[-Father's] home, the minor child has either been sleeping on the floor in [the] hallway or with Plaintiff[-Father's] parents in their bed. Plaintiff[-Father's] arrangement in his home is not suitable for a continued fifty-fifty physical custody schedule.
>
> . . . .
>
> 27. While there is this litigious issue going on in India over real property there, the court does not find that there is any weight to the concern expressed by Plaintiff[-Father] . . . of this child being exposed to that. In fact, the [c]ourt believes that the child cannot be any more exposed to it than he already is living with the paternal grandparents in Plaintiff[-Father's] home. There should be no restrictions on either parent's ability to travel to India with their minor child.

A review of the record and trial transcript reveals that each of these findings is supported by competent evidence. We group the challenged findings by their underlying subject-matter.

1. Findings Related to Plaintiff-Father's Behavior

Findings of fact 9, 10, 15, and 19 focus on Plaintiff-Father's behavior, and each was supported by competent evidence at trial.

Plaintiff-Father challenges findings of fact 9 and 19, regarding the veracity and sincerity of Plaintiff-Father's allegations in support of his request for emergency custody. These findings were amply supported by competent evidence at trial. Plaintiff-Father's fear that Defendant-Mother was suicidal, along with the other very troubling allegations of his complaint, was not consonant with his testimony that he was seeking "50-50 custody[ ] moving forward," or his failure to testify regarding those allegations at trial.

In addition, Plaintiff-Father's concern that Defendant-Mother would flee to India with the child and telecommute was not supported by the evidence at trial. Plaintiff-Father did not dispute Defendant-Mother's testimony that she could not telecommute from India. Indeed, in

Plaintiff-Father's opening statement, his counsel affirmatively explained that Plaintiff-Father's "concern, at least as he set out in his discovery responses, was not that [Defendant-Mother] would keep the child in India. That's not the concern. It's not a flight issue."

The trial court's finding of fact 10, that Plaintiff-Father had committed acts of domestic violence, was also supported by competent evidence. Plaintiff-Father contends that this finding was based on erroneously admitted police reports. Assuming, *arguendo*, that the police reports were admitted into evidence in error, this finding was supported by ample other evidence at trial. Defendant-Mother testified that Plaintiff-Father punched the wall and hit her on a number of occasions, and that at least one of those acts of domestic violence occurred in the minor child's presence. Plaintiff-Father did not testify to the contrary.

Plaintiff-Father also challenges finding of fact 15, in which the trial court found that he "spends significant time playing cricket," during which time Defendant-Mother should be permitted to care for the child rather than a third party. The parties both provided competent evidence to support this finding. Although he argues on appeal that "he spent less than 1% of his Custodial time in playing Cricket," Plaintiff-Father testified that cricket matches can last anywhere from three to seven hours. Defendant-Mother and another witness also testified to the substantial amount of time that Plaintiff-Father spends playing cricket.

In short, each of these challenged findings was supported by competent evidence.

2. Findings Related to Travel to India

Findings of fact 20 and 27 address Plaintiff-Father's concerns about "family tensions and a property dispute in India as the reasons the minor child should not be allowed to be taken to India." Each finding was supported by competent evidence at trial.

On appeal, Plaintiff-Father argues that, in not finding his concerns to be credible, the "[t]rial court's reasoning here is defective," because the trial court improperly judged "the credibility of [his] concern" and did not afford the affidavits he submitted from the tenants in India the weight to which he thinks they were entitled. However, while the tenants attested to the maternal grandmother's verbal abuse of them in the presence of the child, Plaintiff-Father testified that *he was not concerned* about Defendant-Mother traveling with the child to India.

"Although a party may disagree with the trial court's credibility and weight determinations, those determinations are solely within the

province of the trial court." *Kabasan v. Kabasan*, 257 N.C. App. 436, 471, 810 S.E.2d 691, 713 (2018) (citation omitted). Accordingly, both of these findings are supported by competent evidence.

3. Findings Related to the Minor Child's Care

Findings of fact 17, 18, 21, and 24 deal with the child's care and living situation, and each finding was supported by competent evidence at trial.

The trial court found that Defendant-Mother cares for the child when he is in her physical custody, but that it was unclear whether Plaintiff-Father or his parents care for the child when he is in Plaintiff-Father's physical custody. Defendant-Mother testified at trial that Plaintiff-Father's parents were caring for the minor child more than Plaintiff-Father was admitting: Plaintiff-Father is not "taking care of the baby by himself. Even now, he is depending on his parents. So I doubt if he can put that extra effort as a single parent to take care of [the child] because he didn't do it on his own . . . for about a year now," since his parents moved to the United States. Finding of fact 18 is supported by competent evidence.

Defendant-Mother's testimony also supports finding of fact 21, that the paternal grandparents "may be a source of the tension in [Plaintiff-Father's] home." The trial court explicitly stated that it found Defendant-Mother's "contention credible that the child's paternal grandparents are more hostile than the maternal grandparents." This is the trial court's prerogative. *See id.* at 440, 810 S.E.2d at 696. Thus, this finding is supported by competent evidence.

Plaintiff-Father also challenges finding of fact 24, regarding the minor child's sleeping arrangements while in the physical custody of Plaintiff-Father. He and his parents live in a 1,000 square foot, one-bedroom apartment, and his parents sleep in the bedroom. When questioned about the minor child's sleeping arrangements, Plaintiff-Father testified that "we sleep in the bedroom, and sometimes we sleep in the hall." He explained that he would make a separate bed for the minor child if they were to sleep in the hall, but that most of the time the child stays in the bedroom and shares the bed with Plaintiff-Father's parents. Plaintiff-Father asserted in his Rule 59 motion—as well as on appeal—that "hall" in Indian culture actually refers to a living room. However, he failed to correct his testimony at the hearing, or to explain why that was materially different than sleeping in the hall. Hence, this finding is supported by competent evidence.

Finally, although Plaintiff-Father's challenge to finding of fact 17, that Defendant-Mother has been the primary caretaker for the child, appears

to have been abandoned, it was supported by Defendant-Mother's testimony that she "ha[d] been the primary caregiver of the child ever since he was born." This finding is supported by competent evidence.

4. Summary of Challenged Findings

Each of the challenged findings of fact is supported by competent evidence. Indeed, many of the findings are based directly on Plaintiff-Father's testimony. In sum, Plaintiff-Father generally contends that the trial court erred by overlooking evidence that he presented at trial, or by making a credibility determination with which he disagrees. These arguments go to the weight to be given to the evidence, and to evaluations of credibility which are within the discretion of the trial court. "[W]here the trial court's findings of fact are supported by competent evidence, and the findings of fact, in turn, support the trial court's conclusions of law, the decision of the trial court will be affirmed. *This Court will not reweigh the evidence*." *Id.* (citation omitted) (emphasis added). Plaintiff-Father's challenges to these findings of fact must therefore fail.

VI. Child Support Guidelines

Lastly, we return to the child support order, in which the trial court found it "reasonable to use 125 overnights for [Plaintiff-Father] and 240 overnights for [Defendant-Mother] for purposes of calculations under the child support guidelines." Defendant-Mother asserts that the trial court erred in using Worksheet B to calculate Plaintiff-Father's prospective child support obligation. More specifically, she argues that "there was no evidence presented from which the trial court could find that 125 overnights [with Plaintiff-Father] was a reasonable number of overnights to use" in determining Plaintiff-Father's child support obligation.

A. Appellate Jurisdiction

This matter is properly addressed by cross-appeal, in that Defendant-Mother "seek[s] affirmative relief in the appellate division[,]" *Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 739, 407 S.E.2d 819, 826 (1991), from a child support order that she contends was entered in error. *See Harllee v. Harllee*, 151 N.C. App. 40, 51, 565 S.E.2d 678, 684 (2002) ("[T]he proper procedure for presenting alleged errors that purport to show that the judgment was erroneously entered and that an altogether different kind of judgment should have been entered is a cross-appeal.").

Although Defendant-Mother failed to timely cross-appeal from the child support order, this Court has the discretion to issue a writ of certiorari "in appropriate circumstances . . . to permit review of the judgments

and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action," N.C.R. App. P. 21(a)(1), including review of the merits of a cross-appeal. *See Ehrenhaus v. Baker*, 243 N.C. App. 17, 32, 776 S.E.2d 699, 709 (2015). Defendant-Mother petitioned for writ of certiorari, and has shown good and sufficient cause for this Court to issue the writ. Accordingly, in our discretion, we allow the writ.

B. Standard of Review

A trial court's child support order is "accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion. To support a reversal, an appellant must show that the trial court's actions were manifestly unsupported by reason." *Head v. Mosier*, 197 N.C. App. 328, 332, 677 S.E.2d 191, 195 (2009) (internal quotation marks and citations omitted). "Failure to follow the [Child Support G]uidelines constitutes reversible error." *Rose v. Rose*, 108 N.C. App. 90, 93, 422 S.E.2d 446, 447 (1992).

C. Child Support Guidelines

[11] It is well settled that "[t]he court shall determine the amount of child support payments by applying the presumptive guidelines. The Guidelines apply as a rebuttable presumption in all legal proceedings involving the child support obligation of a parent." *Hart v. Hart*, ___ N.C. App. ___, ___, 836 S.E.2d 244, 251 (2019) (citations and internal quotation marks omitted). The Guidelines provide that Worksheet A is to be used "when one parent . . . has primary physical custody of all of the children for whom support is being determined. A parent (or third party) has primary physical custody of a child if the child lives with that parent (or custodian) for 243 nights or more during the year"; the use of Worksheet B is appropriate when both "[p]arents share custody of a child if the child lives with each parent for at least 123 nights during the year and each parent assumes financial responsibility for the child's expenses during the time the child lives with that parent." *Guidelines*, Ann. R. 5.

Here, Defendant-Mother contends that the trial court erred in using Worksheet B to calculate Plaintiff-Father's prospective child support obligation. She challenges finding of fact 10 as not being supported by competent evidence at trial:

> 10. For the period February 2017 to July 2017 based upon the custody order entered by the [c]ourt, the court finds it reasonable to use 125 over nights for the [Plaintiff-Father]

> and 240 overnights for the [Defendant-Mother] for purposes of calculations under the child support guidelines.

Defendant Mother argues that "the evidence presented suggested that the correct number of overnights was 261 for [Defendant-Mother] and 104 for [Plaintiff Father]."

The child custody order served as the basis for the trial court's use of Worksheet B in calculating the prospective child support obligation. To accommodate the parties' commitment to regularly travel to India with the minor child, the order permits each parent to have physical custody of the child for five weeks of uninterrupted international travel per year. Plaintiff-Father argued at the child support hearing that the use of Worksheet B to calculate his child support obligation was proper because of the annual five-week extended visitation period. Including the five-week extended visitation, Plaintiff-Father calculated that he had 128 days in 2017, 129 days in 2018, and 124 days in 2019. However, the parties' extensive travel plans do not necessarily justify the use of Worksheet B.

It is not appropriate to use Worksheet B in cases involving extended visitation. The explicit instructions set forth on Worksheet B[3] address the issue of extended visitation: "Worksheet B should be used only if both parents have custody of the child(ren) for at least one-third of the year *and the situation involves a true sharing of expenses*, *rather than extended visitation* with one parent that exceeds 122 overnights." Form AOC-CV-628, Side Two, Rev. 1/15 (emphases added).[4] If the trips to India are extended visitation, rather than a "situation involv[ing] a true sharing of expenses" as contemplated by the instructions for Worksheet B, that travel time should not be included in determining the number of overnights the child would stay with each parent.

Accordingly, we vacate the child support order, and remand for the trial court to make additional findings as to whether the number of overnights that the minor child has with Plaintiff-Father exceeds 122 overnights, and if so, whether that is the result of extended visitation or whether the custodial arrangement is a "situation involv[ing] a true sharing of expenses." Whether additional evidence or a hearing is necessary,

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3. This Court has previously referenced the instructions on Worksheet B in determining whether its use was appropriate. *See*, *e.g.*, *Scotland Cty. Dep't of Soc. Servs. v. Powell*, 155 N.C. App. 531, 539, 573 S.E.2d 694, 699 (2002).

4. The identical language remains in the January 2019 iteration of Worksheet B.

or whether the case may be decided based on the existing record, is in the discretion of the trial court.

Conclusion

For the reasons stated herein, we vacate the 20 November 2017 child support order and remand for further proceedings consistent with this opinion. We also reverse that part of the 8 December 2017 order imposing Rule 11 sanctions. The remainder of the 8 December 2017 order and the 31 March 2017 custody order are affirmed.

AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART AND REMANDED.

Judges ARROWOOD and HAMPSON concur.

MARVIN N. McFADYEN, Plaintiff

v.

NEW HANOVER COUNTY; NEW HANOVER COUNTY BOARD OF ELECTIONS; NORTH CAROLINA STATE BOARD OF ELECTIONS; JOSHUA B. HOWARD, in his official capacity; RHONDA K. AMOROSO, in her official capacity; JOSHUA D. MALCOLM, in his official capacity; PAUL J. FOLEY, in his official capacity; and MAJA KRICKER, in her official capacity, Defendants

No. COA18-840

Filed 18 August 2020

Elections—State Board of Elections—termination of county director of elections—judicial review—jurisdiction

A county superior court lacked jurisdiction to consider a county director of elections' appeal of his purported termination where, pursuant to statute (N.C.G.S. § 163-22(l)), only the Superior Court of Wake County had jurisdiction to review the termination decision made by the State Board of Elections.

Judge DIETZ concurring with separate opinion.

Appeal by Plaintiff from order entered 29 March 2018 by Judge Charles H. Henry and from orders entered 12 April 2018 and 26 April 2018 by Judge Joshua W. Willey, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 14 March 2019.

Shipman & Wright, L.L.P., by W. Cory Reiss, for plaintiff-appellant.

Sumrell Sugg, P.A., by Scott C. Hart, for defendant-appellee New Hanover County.

Knott and Boyle, PLLC, by W. Ellis Boyle, for defendant-appellee New Hanover County Board of Elections.

Attorney General Joshua H. Stein, by Deputy Solicitor General Ryan Y. Park, Special Deputy Attorney General James Bernier, Jr., and Solicitor General Fellow Matt Burke, for the State defendants-appellees.

MURPHY, Judge.

N.C.G.S. § 163-22(l) requires that any appeal from the State Board of Elections ("SBE") be filed in the Superior Court of Wake County. Failure to comply with this statutory requirement deprives any other court of jurisdiction to hear the dispute. Where a court lacks jurisdiction over a case, any action made by the court related to that case is void ab initio and a nullity, leaving any appeal based on the court's void actions moot. Here, Marvin McFadyen ("McFadyen"), appealed his purported termination as a county director of elections ("county director") by the SBE in the Superior Court of New Hanover County, in contravention of N.C.G.S. § 163-22(l). As a result, the Superior Court of New Hanover County was without jurisdiction, and all of its actions related to the case are void and vacated, rendering McFadyen's appeal moot. We dismiss without prejudice to Defendant's ability to refile in the Superior Court of Wake County.

BACKGROUND

Plaintiff, McFadyen, was nominated and appointed as County Director of the New Hanover County Board of Elections ("NHCBE") in 2011. The procedures for appointing a county director were established under N.C.G.S. § 163-35 (2014).[1] The General Assembly created a three-step process across three entities for appointing and supervising a county director. First, the county board of elections nominates an eligible individual for the county director position and submits that

1. For all relevant times described herein, the statute was N.C.G.S. § 163-35. N.C.G.S. § 163-35 has since been updated and recodified at N.C.G.S. §§ 163A-774-775.

nomination to the Executive Director of the SBE. Second, the Executive Director issues a letter of appointment. Third, once the new county director is appointed, the county board of elections determines the county director's responsibilities and delegated authority. The county director is then compensated by the county through its Board of County Commissioners. *Id.*

The origins of McFadyen's purported termination began "[i]n the wake of a political shift that occurred in the 2012 elections . . . ." A new governor appointed new members to the SBE who then appointed John Ferrante ("Ferrante") as Chairman of NHCBE in July 2013. McFadyen claims that Ferrante "immediately expressed his personal dislike for" McFadyen and was "openly critical of and condescending toward" him, "including in front of employees whom . . . McFadyen was to oversee and direct . . . ." As a result, McFadyen further alleges that, despite not having received performance evaluations from NHCBE, as was "past practice," NHCBE conducted closed-door interviews with other employees to discuss him and evaluate his performance.

Further, unless marked "confidential," New Hanover County had a policy of automatically making emails to and from county department heads available to the public. During the November 2014 election, military ballots and voter registration applications that were emailed to McFadyen's NHCBE email address were released to the public. These emails should not have been released. McFadyen claims he was unaware "that the county followed an unwritten or informal policy making all inbound emails to department heads available to the public without a public records request unless they were labeled 'confidential' or otherwise marked for non-dissemination."

After this incident, NHCBE held a closed session regarding McFadyen's employment. Ferrante gave McFadyen the option of resigning and advised him that, if he refused, then NHCBE would begin formal termination proceedings.

To terminate a county director, "the county board of elections may, by petition signed by a majority of the board, recommend to the Executive Director of the [SBE] the termination of the employment of the [county director]." N.C.G.S. §163-35(b) (2014). After receiving the petition, the Executive Director forwards a copy of the petition to the county director facing termination, who may then reply to the petition. *Id.* Finally, upon receiving the county director's reply or the expiration of a set time period,

> the State Executive Director [of the SBE] shall render a decision as to the termination or retention of the [county director]. The decision of the Executive Director of the [SBE] shall be final unless the decision is, within 20 days from the official date on which it was made, deferred by the [SBE]. If the [SBE] defers the decision, then the [SBE] shall make a final decision on the termination after giving the [county director] an opportunity to be heard and to present witnesses and information to the [SBE], and then notify the Executive Director of its decision in writing.

Id. As a link in this termination chain, the State Executive Director of the SBE[2] has the initial decision of whether to fire the county director. *Id.* This statute did not contemplate what to do if this link is broken, such as when the Executive Director recuses herself due to a conflict of interest and fails to "render a decision as to the termination or retention of the [county director]." *Id.*

This termination process began after McFadyen declined Ferrante's ultimatum. The NHCBE voted 2-1 to submit a petition to the SBE recommending that McFadyen be terminated from his position as County Director of the NHCBE. In its petition, NHCBE alleged cause for termination based on various reasons including that McFadyen's employment "create[d] substantial and unacceptable risk of liability" for "Employment Practices Liability, the area of law dealing with, sexual harassment; retaliation; discrimination based on sex, race/color or disability; abuse and intimidation, and infliction of emotional distress"; that McFadyen "knowingly failed to meet his duty to safeguard and protect . . . Confidential Voter Information"; and that McFadyen "intended either to deflect responsibility or to mislead the [NHCBE]" about how the Confidential Voter Information was released to the public.

At the time the SBE received the petition recommending termination, Kimberly Strach ("Strach") was the Executive Director of the SBE. She informed the SBE Chairman that she had a conflict of interest that prevented her from acting on the petition. The SBE Chairman sanctioned Strach's recusal, but the statute did not address how to proceed with a

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2. "[T]he [SBE] shall appoint an Executive Director [of the SBE] for a term of four years . . . [who] shall serve, unless removed for cause, until his successor is appointed. Such Executive Director shall be responsible for staffing, administration, execution of the [SBE]'s decisions and orders and shall perform such other responsibilities as may be assigned by the [SBE]. In the event of a vacancy, the vacancy shall be filled for the remainder of the term." N.C.G.S. § 163-27 (2014).

termination petition when the Executive Director recuses. In response to this situation and purportedly "to preserve the procedural approach set out by statute," the SBE Chairman appointed the Deputy Director of the SBE, Amy Strange ("Strange"),[3] to act in place of the Executive Director to address the petition for McFadyen's termination.

Strange moved to the next link in the termination chain. Strange sent McFadyen a copy of the petition for termination. McFadyen replied to the petition and denied its allegations. Strange reviewed the petition and McFadyen's responses and purported to issue a decision concluding that there were two grounds for termination. Strange first concluded that McFadyen "fail[ed] to follow State and federal laws and county policies" when he failed "to protect confidential voter information, including voted ballots, from being displayed for public view constitut[ing] an inexcusable breach of public trust and lead[ing] to a lack of confidence in the elections process." She stated that the "County's policies and procedures [timeframe] for safeguarding e-mails with confidential content is at least a decade old, and was in place from the first day that Mr. McFadyen was employed as Elections Director" and that "[i]t would clearly be the responsibility of Mr. McFadyen to appropriately flag items in his own email folders." Second, Strange concluded that McFadyen "provid[ed] false or misleading information regarding a serious breach of State and federal laws . . . ." Acting as though she was the Executive Director of the SBE under the statute, Strange purported to grant the petition on 4 February 2015.

In accordance with his rights under the statute, McFadyen wrote the SBE to challenge Strange's purported decision. He argued that "the delegation of duties to Amy Strange[,]" as a hired employee rather than an appointed member of the SBE, "does not seem to be within the statutory authority of [N.C.G.S. §] 163-35." Over two weeks later, the SBE informed McFadyen that "no deferral will be had and that [McFadyen] can move forward with whatever subsequent legal action [he and his counsel] might find appropriate." The SBE did not have the votes to defer Strange's decision and McFadyen's purported termination was effectively final.

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3. Strange had been "hired by the [Executive Director]," Strach, to be Deputy Director for Campaign Finance and Operations. She applied for the job via an advertised position through the State Office of Human Resources. Strach hired Strange after she interviewed and accepted an offer. Strange's job included reviewing accounting transactions for compliance with state laws, approving financial transactions on behalf of the agency, ensuring compliance with internal review and internal controls for the SBE, supervising campaign finance staff and operations staff, and serving as a liaison between various state offices.

McFadyen began legal action in New Hanover County Superior Court. Asserting claims under both state and federal law, McFadyen sued NHCBE, New Hanover County, and the SBE and its individual members. Defendants jointly filed a notice of removal to the U.S. District Court for the Eastern District of North Carolina on the basis of federal question jurisdiction given McFadyen's claim against the SBE under 42 U.S.C. § 1983. In that claim, McFadyen alleged that the SBE violated his constitutional right to due process during termination proceedings and sought injunctive relief and attorney fees under 42 U.S.C. § 1988. McFadyen's federal claims were dismissed,[4] and the District Court declined to exercise supplemental jurisdiction over remaining state law claims.

Upon return to the New Hanover County Superior Court, the trial court dismissed McFadyen's claims against New Hanover County for unjust enrichment and conversion. The remaining claims against each respective Defendant were disposed of at summary judgment. The trial court entered orders granting summary judgment in favor of Defendants on all claims. On appeal, McFadyen challenges the trial court's orders dismissing and granting summary judgment in favor of Defendants.

ANALYSIS

Although McFadyen was a county employee, the county had no legal power to terminate him; that decision rested solely with the SBE. *See* N.C.G.S. § 163-35(b) (2014). There is a statutory procedure for that termination and it expressly identifies when the SBE's action becomes a final agency decision. *Id.* Decisions of the SBE related to the performance of its duties are subject to judicial review exclusively in the Superior Court of Wake County. *See* N.C.G.S. § 163-22(l) (2014) ("Notwithstanding any other provision of law, in order to obtain judicial review of any decision of the [SBE] rendered in the performance of its duties or in the exercise of its powers under this Chapter, the person seeking review must file his petition in the Superior Court of Wake County."). McFadyen seeks judicial review of a decision "rendered in the performance of [SBE's] duties . . . under [Chapter 163]" as this controversy arises out of the purported termination of McFadyen as a county director. *See* N.C.G.S.

4. The U.S. District Court held: "Because [McFadyen] has not pleaded facts demonstrating that the SBE [D]efendants can be held responsible for the publication of false charges that allegedly stigmatized his reputation, [McFadyen's] § 1983 claim, the second claim, fails to state a claim upon which relief can be granted. [[McFadyen's] sixth claim for attorney fees under § 1988 is tied to [[McFadyen's] § 1983 claim, and cannot stand alone. Accordingly, it too must be dismissed." *McFadyen v. New Hanover County*, No. 7:15-CV-132-FL, 2016 WL 183486, at *6 (E.D.N.C. Jan. 14, 2016).

§ 163-35(b) (2014) ("The county board of elections may, by petition signed by a majority of the board, recommend to the Executive Director of the [SBE] the termination of the employment of the county board's director of elections. . . . [T]he State Executive Director shall render a decision as to the termination or retention of the county director of elections.").

McFadyen could have challenged the SBE's action by appealing to the Superior Court of Wake County according to the judicial review process established by law, but he instead filed his *Complaint* in New Hanover County. The failure to exhaust the administrative and judicial review process bars a later collateral attack on the SBE's decision. *Frazier v. N.C. Cent. Univ., ex rel. Univ. of N.C.*, 244 N.C. App. 37, 44, 779 S.E.2d 515, 520 (2015). The law does not permit litigants to challenge a state agency decision by bypassing judicial review and suing the administrative agency and third parties whose actions "happen to stem from decisions of an administrative agency." *Vanwijk v. Prof'l Nursing Servs., Inc.*, 213 N.C. App. 407, 410, 713 S.E.2d 766, 768 (2011). McFadyen's failure to properly appeal through the judicial review process established by statute means the Superior Court of New Hanover County lacked jurisdiction to hear the matter.

McFadyen argues that, under *Nanny's Korner Day Care Ctr., Inc. v. N.C. DHHS*, 264 N.C. App. 71, 825 S.E.2d 34, *app. dism., rev. denied*, 831 S.E.2d 89 (2019) (*Nanny's Korner II*), he was not required to exhaust administrative remedies before filing this action. We disagree.

"When the General Assembly provides an effective administrative remedy by statute, that remedy is exclusive and the party must pursue and exhaust it before resorting to the courts." *Jackson ex rel. v. N.C. Dept. of Human Res. Div. of Mental Health, Developmental Disabilities, & Substance Abuse Servs.*, 131 N.C. App. 179, 186, 505 S.E.2d 899, 903-04 (1998). "Nevertheless, the exhaustion of administrative remedies doctrine is inapplicable when the remedies sought are not considered in the administrative proceeding." *Nanny's Korner II*, 264 N.C. App. at 78, 825 S.E.2d at 40. "Under those circumstances, 'the administrative remedy will not bar a claimant from pursuing an adequate remedy in civil court.' " *Id.* (quoting *Johnson v. First Union Corp.*, 128 N.C. App. 450, 456, 496 S.E.2d 1, 5 (1998).

In *Nanny's Korner Care Ctr. v. N.C. DHHS - Div. of Child Dev.*, 234 N.C. App. 51, 758 S.E.2d 423 (2014) (*Nanny's Korner I*), the petitioner appealed a superior court order affirming the final agency decision of the respondent North Carolina Department of Health and Human Services

("DHHS"), in which DHHS issued a written warning to the petitioner's child care center and prohibited the petitioner's husband from being on the child care center's premises while children were on site. The petitioner contended that the superior court erred in concluding that DHHS could rely on a substantiation of abuse made by a local Department of Social Services ("DSS"), instead of conducting its own independent investigation, to invoke its disciplinary authority under N.C.G.S. § 110-105.2(b). *Id.* at 57, 758 S.E.2d at 427. We vacated the trial court's order and remanded the matter to the trial court for further remand to DHHS with instructions to conduct an independent investigation to determine whether there was substantial evidence of abuse and for any needed additional administrative action in accordance with the statute. *Id.* at 64-65, 758 S.E.2d at 431.

The childcare center then filed an action in superior court, alleging a violation of its due process rights under Article 1, Section 19 of the North Carolina Constitution, and seeking monetary damages. *Nanny's Korner II*, 264 N.C. App. at 75, 825 S.E.2d at 38. The action was dismissed because it fell outside the three-year statute of limitations for constitutional claims. *Id.* at 76, 825 S.E.2d at 38-39. On appeal, the plaintiff contended the exhaustion of administrative remedies doctrine required the plaintiff to exhaust its remedies through the claim under the NCAPA before the plaintiff's right to bring a constitutional claim arose. *Id.* at 78, 825 S.E.2d at 40. We disagreed, holding the statute of limitations was not tolled while the petitioner pursued administrative remedies in *Nanny's Korner I* because monetary damages were not a remedy available through the NCAPA in that action. *Id.* at 79, 825 S.E.2d at 40.

Here, McFadyen alleges he "has suffered damages stemming from his loss of employment, lost wages, lost opportunities, and stigmatized reputation." Unlike in *Nanny's Korner I*, remedies for those damages–including a hearing, reinstatement to his position, and back pay–are available in an administrative proceeding under the NCAPA in this case. McFadyen's argument thus lacks merit.

"An order is void *ab initio* only when it is issued by a court that does not have jurisdiction. Such an order is a nullity and may be attacked either directly or collaterally, or may simply be ignored." *State v. Sams*, 317 N.C. 230, 235, 345 S.E.2d 179, 182 (1986). "[A] void judgment 'is in legal effect no judgment,' as '[i]t neither binds nor bars any one, and all proceedings founded upon it are worthless.' " *Boseman v. Jarrell*, 364 N.C. 537, 557, 704 S.E.2d 494, 507 (2010) (quoting *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956)). The trial court's orders in this case were issued without jurisdiction

where under N.C.G.S. § 163-22(l) only the Superior Court of Wake County had jurisdiction to hear the matter; therefore, the orders are void and without legal effect.

> If there be a defect, e. g., a total want of jurisdiction apparent upon the face of the proceedings, the court will of its own motion, stay, quash, or dismiss the suit. This is necessary to prevent the court from being forced into an act of usurpation, and compelled to give a void judgment . . . so, (out of necessity) the court may, on plea, suggestion, motion, or *ex mero motu*, where the defect of jurisdiction is apparent, stop the proceedings.

Stroupe v. Stroupe, 301 N.C. 656, 661, 273 S.E.2d 434, 438 (1981) (citing *Lewis v. Harris*, 238 N.C. 642, 646, 78 S.E.2d 715, 717-18 (1953)) (internal marks omitted). We vacate the orders of the trial court due to the trial court lacking jurisdiction over this dispute. Since the underlying orders are vacated, we dismiss this appeal.

CONCLUSION

N.C.G.S. § 163-22(l) requires any appeal taken from a decision of the SBE to be filed in the Superior Court of Wake County. McFadyen's failure to comply with this statutory requirement means the Superior Court of New Hanover County, where McFadyen filed his appeal, was without jurisdiction. The trial court's orders were void ab initio because the trial court did not have jurisdiction over the dispute; therefore, we vacate the trial court's orders in this case and dismiss this appeal.

VACATED AND DISMISSED.

Judge COLLINS concurs.

Judge DIETZ concurring with separate opinion.

DIETZ, Judge, concurring.

There is a lot going on in this case, all of which can be traced back to the General Assembly's failure to anticipate a conflict of interest by the director of the State Board of Elections. The legislature later amended the statute and inserted a fix. But that fix does not answer all the messy questions about whether the State Board, in this case, complied with the statute that existed at the time. One thing is certain, however—these are questions of statutory law, not contract law.

McFadyen was terminated by the State Board of Elections through a statutory termination process. That decision unquestionably was a "dispute between an agency and another person that involves the person's rights, duties, or privileges" and thus is subject to the Administrative Procedure Act. N.C. Gen. Stat. § 150B-22(a). The General Assembly can exempt agency decisions from APA review and, indeed, it has done so with some decisions of the State Board of Elections. *See id.* § 150B-1(c)(6) (repealed 2018).

But not this one. Moreover, the statute governing termination of a county director carefully identifies when, in the various possible outcomes, the decision of the State Board becomes a "final" agency decision. *Id.* § 163-35(b). That language has special meaning in the APA context and the General Assembly's use of that particular language reinforces that our legislature intended for these decisions to be subject to APA review. Likewise, the General Assembly provided that "judicial review" of any decision by the State Board must occur in Wake County Superior Court. *Id.* § 163-22(l). As with the reference to a "final" agency decision, the use of the term "judicial review," which has a special meaning in the administrative context, suggests that the General Assembly believed decisions of the State Board were subject to settled principles of administrative and judicial review.

McFadyen's assertion that he can bypass this judicial review process through a civil breach-of-contract action would throw the State Board's termination procedure into chaos by removing the finality that the General Assembly created in the process. Under McFadyen's reasoning, if aggrieved county employees subject to this statutory termination process are unhappy with the agency decision, they need not address the issue immediately through judicial review. They can wait years—as long as the statute of limitations for their contract claims provides—and then sue both the State and the county to litigate the State's (not the county's) actions. This sort of litigation, as this case demonstrates, can stretch on for long after that. The General Assembly required timely administrative and judicial review of these impactful termination decisions precisely because they are too important to delay for years, while scheduled elections continue to take place.

And there is yet another wrinkle. With statutory law, one cannot argue "no harm, no foul." Here, for example, McFadyen reasons that, as a matter of statutory law, the deputy director of the State Board could not conduct the statutory review process because the statute says only the director can do it. Thus, he argues, his termination was improper because the State Board failed to precisely follow the requirements of the statute.

But that is not how contract law works. In contract law, you are not always entitled to *exactly* what the contract provides. You are entitled to the benefit of the bargain. *First Union Nat. Bank of N. Carolina v. Naylor*, 102 N.C. App. 719, 725, 404 S.E.2d 161, 164 (1991). That is why contract law examines questions such as whether there has been a *material* breach, whether there was *substantial* performance of the contract's terms, and so on. *See, e.g.*, *Cator v. Cator*, 70 N.C. App. 719, 722, 321 S.E.2d 36, 38 (1984).

In other words, the failure of the State to follow the precise letter of the law might not equate to a breach of the contract by the county. Here, for example, the director of the State Board had an obvious conflict of interest—she was once in a dating relationship with McFadyen that ended badly and there was evidence that McFadyen threatened to kill her. The deputy director stepped in to eliminate this conflict.

What the State Board did is certainly closer to the spirit of the parties' bargain than having an official whom McFadyen allegedly harassed and threatened handle the matter instead. And from there, all the impartial layers of review created by statute still were present. The members of the State Board had the opportunity to review the deputy director's decision, and McFadyen had the opportunity to challenge the Board's final decision through further administrative and judicial review. In short, even if McFadyen had a common law contract right to be terminated only through the statutory review process, a violation of that statute would not necessarily mean there was a breach of contract.

All of these complications underscore why this isn't a contract case. The statutory procedures that govern termination of state employees are complex and often exceedingly bureaucratic. Our General Assembly created these administrative procedures and layers of judicial review precisely because that statutory process does not lend itself to review under traditional, civil breach-of-contract principles in a separate lawsuit years later.

Thus, the issues raised in this case should have been pursued through the APA and ultimately brought before the Wake County Superior Court as a challenge to the State Board's final agency decision—not as a civil breach-of-contract case in New Hanover County Superior Court. Accordingly, the trial court properly dismissed the contract claims because they are an impermissible attempt to bypass mandatory judicial review required by statute. That judicial review process also afforded McFadyen ample due process and an opportunity to rebut the allegations contained in the petition from the county board of elections. Thus, the trial court properly dismissed the accompanying due process claims asserted in this action as well.

LUON NAY, EMPLOYEE, PLAINTIFF
v.
CORNERSTONE STAFFING SOLUTIONS, EMPLOYER, AND STARNET INSURANCE COMPANY, CARRIER (KEY RISK MANAGEMENT SERVICES, ADMINISTRATOR), DEFENDANTS

No. COA19-262

Filed 18 August 2020

Workers' Compensation—average weekly wages—employment at staffing agency—no definite end date—Method 3

The Industrial Commission erred in a workers' compensation case by applying Method 5 to calculate plaintiff's average weekly wages where plaintiff was employed by an employment staffing agency and was injured while on a work placement that had no definite, specific end date with a landscaping company. Even if Method 5 may have been more fair, Method 3 was fair and therefore was the correct method to use.

Judge ARROWOOD concurring in the result only.

Appeal by Plaintiff from an Opinion and Award filed 22 February 2019 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 2 October 2019.

Kathleen G. Sumner, David P. Stewart, and Jay A. Gervasi, Jr. for plaintiff-appellant.

Joy H. Brewer for defendants-appellees.

Lennon, Camak & Bertics, PLLC, by Michael W. Bertics, and Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson, for North Carolina Advocates for Justice, amicus curiae.

MURPHY, Judge.

Where the application of Method 3 of N.C.G.S. § 97-2(5) to calculate a plaintiff's average weekly wages would produce fair results for both an employee and an employer, the Full Commission errs in applying Method 5 to calculate a plaintiff's average weekly wages.

BACKGROUND

Plaintiff Luon Nay ("Nay") worked as an employee of Defendant Cornerstone Staffing Solutions ("Cornerstone"), which is an

employment staffing agency. A significant percentage of Cornerstone's employees seek work placement with companies that offer the possibility of "full-time, long-term employment with the idea of going permanent at that client company." In the staffing industry, these positions are called "temp-to-perm." Thomas Chandler, the owner, founder, and CEO of Cornerstone, estimated at least 95% of the positions filled by Cornerstone are temp-to-perm positions.

Nay began working for Cornerstone on 25 August 2015. On 24 November 2015, Nay injured his back while performing work in a placement with FieldBuilders as an employee of Cornerstone. After the 24 November 2015 injury, Nay returned to work and obtained a placement with another company for approximately three weeks in June and July of 2016 as an employee of Cornerstone. On 21 July 2017, Nay filed a Form 33 hearing request, alleging disagreement over the unilateral modification of Nay's Temporary Total Disability ("TTD") benefits by Cornerstone and Starnet Insurance Company, Carrier (Key Risk Management Services, Administrator) (collectively "Defendants"). Defendants filed a Form 33R, contending Nay had been provided with all benefits to which he was due under the Workers' Compensation Act. Nay earned $5,805.25 from Cornerstone during his time as Cornerstone's employee prior to his injury. Following a hearing, the Deputy Commissioner filed an Opinion and Award on 7 June 2018. In relevant part, the Deputy Commissioner concluded Nay's average weekly wages should be calculated pursuant to Method 5 of N.C.G.S. § 97-2(5) by dividing Nay's gross wages from Cornerstone of $5,805.25 by 52 weeks, yielding average weekly wages of $111.64 and a compensation rate of $74.43.

N.C.G.S. § 97-2(5) calculates an injured worker's average weekly wages according to the following 5 method hierarchical approach:

> [Method 1:] 'Average weekly wages' shall mean the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, . . . divided by 52;
>
> [Method 2:] [I]f the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted.

> [Method 3:] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained.
>
> [Method 4:] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.
>
> [Method 5:] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C.G.S. § 97-2(5) (2019) (paragraph spacing added for ease of reading).

Nay appealed to the Full Commission ("the Commission") and argued that his average weekly wages should be calculated according to Method 3, not Method 5. The parties stipulated to the following in the Commission's 22 February 2019 Opinion and Award:

> 1. The parties are properly before the Industrial Commission, and that the Industrial Commission has jurisdiction over this matter.
>
> 2. That all parties have been correctly designated, and there are no questions as to misjoinder or non-misjoinder of parties.
>
> 3. [Cornerstone] employs greater than three full time employees and is therefore subject to the Act.
>
> 4. An employment relationship existed between [Nay] and [Cornerstone] at the time of [Nay's] injury.
>
> 5. Insurance coverage existed on [the] date of injury.

6. [Nay] sustained a compensable injury to his low back on [24 November 2015] while loading equipment and filed a Form 18 on [8 March 2016].

7. Defendants filed a Form 63 on [25 March 2016] and began directing medical care and paying temporary total disability benefits to [Nay].

8. [Nay] contends his average weekly wage is $419.20, yielding a compensation rate of $279.48.

9. Defendants contend [Nay's] average weekly wage is $111.64, yielding a compensation rate of $74.43.

10. [Nay] was paid compensation consisting of $258.03 in weekly TTD benefits from [1 December 2015] to [5 July 2016].

11. Defendants filed a Form 62 on [19 December 2016] and [7 July 2017] modifying [Nay's] average weekly wage to $111.64, yielding a compensation rate of $74.43.

12. [Nay] has received compensation consisting of $74.43 in weekly TTD benefits beginning [21 June 2017] to the present and ongoing.

The following findings of fact are unchallenged on appeal:

1. This matter arises out of an admittedly compensable [24 November 2015] injury by accident resulting in injury to [Nay's] lower back.

2. [Nay] began working for [Cornerstone], a staffing agency, on [25 August 2015].

3. At the time of his compensable [24 November 2015] injury by accident, [Nay] was working on assignment performing landscaping work with FieldBuilders. [Nay's] assignment with FieldBuilders involved cutting grass, patch/repair work, and general landscaping tasks. He generally worked from 7:00 a.m. through 4:00 p.m. for a total of eight hours per day. However, he also would occasionally work as few as 6 hours and as many as 9-10 hours in a given day. [Nay] worked 4-5 days per week, on average, and earned $11.00 per hour.

. . .

> 5. On [21 June 2017, Nay] was written out of work due to his compensable back injury. [Nay] has remained out of work since [21 June 2017] and continues to receive [TTD] benefits.
>
> 6. In controversy is the correct calculation of [Nay's] average weekly wage. [Nay] contends his average weekly wage is $419.70, yielding a weekly compensation rate of $279.48. Defendants contend [Nay's] average weekly wage is $111.64, yielding a weekly compensation rate of $74.63.
>
> 7. Defendants initially paid [Nay] a compensation rate of $258.03, based upon an average weekly wage of $387.02. Defendants based [Nay's] initial average weekly wage on a Form 22 *Statement of Days Worked and Earnings of Employee* which reflected [Nay's] earnings of $5,805.25 over 15 weeks between [25 August 2015] through [7 December 2015]. On [19 December 2016] and [7 July 2017], Defendants filed a Form 62 *Notice of Reinstatement of Modification of Compensation* modifying [Nay's] average weekly wage from $387.02 to $111.64 and modified [Nay's] weekly [TTD] payments to $74.43 on [21 June 2017].

"Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Allred v. Exceptional Landscapes, Inc.*, 227 N.C. App. 229, 232, 743 S.E.2d 48, 51 (2013) (citing *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003)).

On 22 February 2019, the Commission filed its Opinion and Award concluding: Nay's average weekly wages cannot be calculated via Method 1 or Method 2 of N.C.G.S. § 97-2(5); calculation of Nay's average weekly wages via Method 3 does not yield results that are fair and just to both parties; Nay's average weekly wages cannot be calculated pursuant to Method 4; exceptional reasons exist in this case, so Nay's average weekly wages should be calculated based upon Method 5, concluding this is the only method which would accurately reflect Nay's expected earnings but for his work injury; using Method 5 produces results that are fair and just to both parties; and Nay's average weekly wages should be calculated pursuant to Method 5 by dividing Nay's gross wages of $5,805.25 by 52 weeks, which yields average weekly wages of $111.64 and a compensation rate of $74.43.

Nay filed Notice of Appeal to this Court on 27 February 2019.

ANALYSIS

The sole disputed issue on appeal is whether the Commission erred in calculating the average weekly wages according to Method 5, or whether Method 3 should have been used in calculating Nay's average weekly wages pursuant to N.C.G.S. § 97-2(5). *See* N.C. R. App. P. 28(b)(6) (2019).

On appeal, Nay challenges Findings of Fact 4 and 8 through 17. For the purposes of this appeal, we focus on two relevant challenged findings of fact—Findings of Fact 13 and 15.

> 13. Use of [Method 3] in this claim would produce an inflated *average weekly wage that is not fair* to Defendants because [Nay] was employed in a temporary capacity with no guarantee of permanent employment, length of a particular assignment, or specific wage rate, and he was assigned to a client account whose work was seasonal. Thus, [Method 3] would not take into account that [Nay] was on a temporary assignment that in all likelihood would not have approached 52 weeks in duration.
>
> . . .
>
> 15. The [Commission] finds that exceptional reasons exist, and [Nay's] average weekly wage should be calculated pursuant to [Method 5]. . . . Thus, [Nay's] total earnings of $5,805.25 should be divided by 52 weeks, which yields an average weekly wage of $111.64 and compensation rate of $74.43. The figure of $111.64 is an *average weekly wage that is fair* and just to both sides in this claim. It takes into account that [Nay] was working a temporary assignment that most likely would have ended once he worked 520 hours, and it annualizes the total wages that [Nay] likely could have expected to earn in the assignment.

(Emphasis added).

Nay also challenges Conclusions of Law 3 through 7. For the purposes of this appeal, we focus on two relevant challenged conclusions of law—Conclusions of Law 3 and 5. In Conclusion of Law 3, the Commission concluded that "[f]or the reasons stated above, calculation of [Nay's] average weekly wage via [Method 3] *does not yield results that are fair* and just to both parties."[1] (Emphasis added). In the conclusion

1. The Commission's Opinion and Award included two Conclusions of Law 3. The Conclusion of Law 3 quoted above is the first Conclusion of Law 3 to appear in the Opinion

of law named Conclusion of Law 5, the Commission concluded that "[u]sing [Method 5] of calculating [Nay's] average weekly wage pursuant to N.C.[G.S.] § 97-2(5) *produces results that are fair* and just to both parties." (Emphasis added).

Methods 3 and 5 are the two methods under N.C.G.S. § 97-2(5) applicable to this case.

> . . .
>
> [Method 3] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained.
>
> . . .
>
> [Method 5] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C.G.S. § 97-2(5) (2019). On appeal, both parties stipulate that Methods 1, 2, and 4 are inapplicable. Although Nay's brief challenges Finding of Fact 13, which addresses the application of Methods 1, 2, and 3, Finding of Fact 14, which addresses Method 4, and Finding of Fact 15, which addresses Method 5, we only address his challenge to those findings of fact relating to Methods 3 and 5 in light of the stipulation that Methods 1, 2, and 4 were inapplicable in this matter.

A. Standard of Review

"The determination of [a] plaintiff's average weekly wages requires application of the definition set forth in the Workers' Compensation Act, and the case law construing that statute[,] and thus raises an issue of law, not fact." *Boney v. Winn Dixie, Inc.*, 163 N.C. App. 330, 331-32, 593 S.E.2d 93, 95 (2004) (internal marks and citation omitted). "We therefore review the Commission's calculation of [Nay's] average weekly wages

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and Award. The second Conclusion of Law 3 states, "[d]ue to the lack of sufficient evidence of similarly situated employees, [Nay's] average weekly wage cannot be calculated pursuant to [Method 4] of [N.C.G.S. § 97-2(5).]"

de novo." *Tedder v. A & K Enterprises*, 238 N.C. App. 169, 173, 767 S.E.2d 98, 102 (2014). Additionally,

> [o]ur review of a decision of the Industrial Commission is limited to determining whether there is any competent evidence to support the findings of fact, and *whether the findings of fact justify the conclusions of law*. . . .
>
> Average weekly wages are determined by calculating the amount the injured worker would be earning but for his injury. The calculation is governed by N.C.G.S. § 97-2(5), which sets out five distinct methods for calculating an injured employee's average weekly wages. The five methods are ranked in order of preference, and each subsequent method can be applied *only if* the previous methods are inappropriate.

Id. at 173-74, 767 S.E.2d at 101-02 (emphasis added) (internal citations omitted) (internal marks omitted).

"[T]he calculation of an injured employee's average weekly wages is governed by N.C.[G.S.] § 97-2(5)." *Conyers v. New Hanover Cnty. Sch.*, 188 N.C. App. 253, 255, 654 S.E.2d 745, 748 (2008). "The dominant intent of [N.C.G.S. § 97-2(5)] is to obtain results that are fair and just to both employer and employee." *Id.* at 256, 654 S.E.2d at 748. In making this calculation, N.C.G.S. § 97-2(5) does "not allow the inclusion of wages or income earned in employment or work other than that in which the employee was injured." *McAninch v. Buncombe Cnty. Sch.*, 347 N.C. 126, 134, 489 S.E.2d 375, 380 (1997).

The Commission's Findings of Fact 13 and 15 are actually conclusions of law to the extent that they declared a particular method of calculating Nay's average weekly wages to be fair or unfair. The Commission's classification of its own determination as a finding or conclusion does not govern our analysis. *See Watts v. Borg Warner Auto., Inc.*, 171 N.C. App. 1, 14, 613 S.E.2d 715, 724, *aff'd per curiam*, 360 N.C. 169, 622 S.E.2d 492 (2005). Accordingly, we review de novo the Commission's declaration that a Method 3 calculation of Nay's average weekly wages under N.C.G.S. § 97-2(5) was unfair in Finding of Fact 13, and that a Method 5 calculation of Nay's average weekly wages under N.C.G.S. § 97-2(5) was fair in Finding of Fact 15. *See Tedder*, 238 N.C. App. at 173, 767 S.E.2d at 102.

B. Fairness

"Results fair and just, within the meaning of [N.C.G.S. § 97-2(5)], consist of such average weekly wages as will most nearly approximate

the amount which the injured employee *would be earning* were it not for the injury, in the employment in which he was working at the time of his injury." *Liles v. Faulkner Neon & Elec. Co.*, 244 N.C. 653, 660, 94 S.E.2d 790, 796 (1956) (internal marks omitted). We turn first to determine whether Method 3 was fair as applied in calculating Nay's average weekly wages. If we determine Method 3 to be fair, we need not consider Method 5.[2] *See Tedder*, 238 N.C. App. at 174, 767 S.E.2d at 102.

To be consistent with the rule for determining fairness as to average weekly wages from *Liles*, we must consider "the amount which [Nay] *would be earning* were it not for the injury, in the employment [of Cornerstone] in which he was working at the time of his injury." *Id.* Nay was earning $11.00 per hour at the time of his compensable back injury and would have continued earning $11.00 per hour but for the compensable back injury he suffered. *See id.* Nay was in the employ of Cornerstone at the time of his compensable back injury, and whether he would have later transitioned to FieldBuilders or another employer is irrelevant.

In considering whether a Method 3 calculation of Nay's average weekly wages would be fair, the lack of a definite employment end date for Nay with Cornerstone is important. Although the goal was for Nay to obtain full-time employment with FieldBuilders, this was not guaranteed, and did not occur. Calculating Nay's average weekly wages according to what he earned from Cornerstone over the number of weeks he worked for the staffing agency fairly approximates what he would have earned but for the injury. The fact that a calculation of Nay's average weekly wages according to Method 3 produces wages to Nay that exceed Cornerstone's typical long-term payments to employees does not make Method 3 unfair, despite Cornerstone's arguments to the contrary. Nay continued his relationship with Cornerstone after his injury and could have continued to earn money from Cornerstone indefinitely. Whether Method 5 could create a calculation of Nay's average weekly wages that is *more fair* than Method 3, such as by calculating Nay's chances of obtaining full-time employment with FieldBuilders or another client of Cornerstone, does not determine whether Method 3 is fair. Calculating Nay's average weekly wages according to Method 3 is fair under our caselaw, as Cornerstone was Nay's employer at the time of the injury, and Method 3 averages Nay's earnings over the course of his employment at

2. *See Wilkins v. Buckner*, ___ N.C. App. ___, ___ S.E.2d ___ (2020) (COA19-567) (unpublished). Although *Wilkins* "is an unpublished opinion and is not controlling legal authority, N.C. R. App. P. 30(e)(3), we find its reasoning persuasive and we hereby adopt it." *State v. Gardner*, 227 N.C. App. 364, 368, 742 S.E.2d 352, 355 (2013).

Cornerstone, not a hypothetical 52 week period. Regardless of whether Method 5 could be *more fair* than Method 3, Nay's average weekly wages calculated under Method 3 are fair.

This case is not like *Tedder*, where we determined a Method 3, and even a Method 5, calculation of the plaintiff's average weekly wages according to the amount earned divided by the number of weeks worked was unfair. *Tedder*, 238 N.C. App. at 175, 767 S.E.2d at 103. In *Tedder*, the plaintiff was hired "to fill in for one of its full-time delivery drivers who was scheduled to undergo surgery . . . [and] would be absent for seven weeks on medical leave." *Id.* at 172, 767 S.E.2d at 100. After one week on the job earning $625.00 per week, the plaintiff suffered a compensable injury. *Id.* at 172, 767 S.E.2d at 101. In determining that a Method 3 calculation was unfair, we emphasized that the plaintiff "would have earned that $625[.00] wage for no more than seven weeks, until his temporary job ended." *Id.* at 175, 767 S.E.2d at 103. Here, however, Nay's employment relationship with Cornerstone, like most at-will employment in this State, did not have a definite, specified end date, whereas the plaintiff's employment period in *Tedder* was definite in light of being hired to work for the defendant temporarily for a specified, limited period of seven weeks. *See id.* at 172, 767 S.E.2d at 101. Regardless of whether Nay or Cornerstone anticipated Nay would be hired by FieldBuilders, such a hire was not definite or guaranteed.

CONCLUSION

In our de novo review of the Record, we determine that a calculation of Nay's average weekly wages under Method 3 of N.C.G.S. § 97-2(5) would be fair and just—appropriate under *Tedder* and the definitions from our caselaw. Accordingly, the Commission erred in Conclusions of Law 3 and 5 in concluding that Method 3 was unfair and reaching Method 5 to calculate Nay's average weekly wages. "We therefore reverse the [22 February 2019 Opinion and Award] of the Full Commission and remand for entry of an Award in accordance with this opinion." *Conyers*, 188 N.C. App. at 261, 654 S.E.2d at 752.

REVERSED AND REMANDED.

Judge ZACHARY concurs.

Judge ARROWOOD concurs in the result only.

STATE v. JENKINS

[273 N.C. App. 145 (2020)]

STATE OF NORTH CAROLINA
v.
TABITHA RENEE JENKINS, DEFENDANT

No. COA19-944

Filed 18 August 2020

1. Appeal and Error—nonjurisdictional defect—substantial or gross—notice of appeal—no proof of service

Defendant's appeal from an order revoking her probation was not dismissed, where her failure to include proof of service upon the State in her notice of appeal—in violation of Appellate Rule 4(a)(2)—did not deprive the Court of Appeals of jurisdiction to review the merits, did not frustrate the adversarial process (the State was informed of defendant's appeal and was able to timely respond), and was neither substantial nor gross under Appellate Rules 25 and 34.

2. Constitutional Law—right to counsel—knowing, intelligent, and voluntary waiver—statutory inquiry

At a probation revocation hearing, defendant's waiver of counsel was knowing, intelligent, and voluntary where the trial court adequately conducted the inquiry required under N.C.G.S. § 15A-1242 and defendant subsequently executed a written waiver of counsel form. Notably, defendant's waiver was upheld on appeal where the trial court's inquiry strongly resembled the inquiry given in another case that satisfied the statutory mandate in section 15A-1242.

Appeal by Defendant from judgment entered 13 May 2019 by Judge Walter H. Godwin, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 3 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Rana M. Badwan, for the State.

Edward Eldred for defendant-appellant.

MURPHY, Judge.

Even when objected to, a defendant's failure to indicate service on the State in violation of N.C. R. App. P. 4(a)(2) does not require dismissal of the appeal as it does not deprive the court of jurisdiction. Despite Defendant's failure to indicate service on the State with notice of appeal, we have jurisdiction and may reach the merits.

A defendant's waiver of counsel must comply with N.C.G.S. § 15A-1242 and be knowing, intelligent, and voluntary. Where a trial court informs a defendant of the right of assistance of counsel and ensures the defendant understands the consequences of a decision to proceed pro se, with a supporting written waiver of counsel, the waiver of counsel is considered knowing, intelligent, and voluntary. Where a trial court's inquiry into a defendant's waiver of counsel is substantially similar to the inquiry in *Whitfield*, we must uphold the waiver. *State v. Whitfield*, 170 N.C. App. 618, 621, 613 S.E.2d 289, 291 (2005). Here, we find the trial court's inquiry to be substantially similar to the inquiry in *Whitfield*, and therefore it satisfies the statutory mandate. We affirm.

BACKGROUND

On 21 February 2017, Defendant, Tabitha Jenkins, pleaded guilty to second-degree kidnapping and simple assault. The trial court entered a consolidated judgment imposing a suspended sentence of 23 to 40 months and placing Defendant on supervised probation for 36 months. On 15 March 2019, a probation officer filed a violation report alleging Defendant absconded "by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer."

On 13 May 2019, Defendant appeared for her probation revocation hearing at which time she had the following exchange with the trial court:

> [STATE]: Tabitha Jenkins. She needs to be advised, Your Honor.
>
> THE COURT: All right, Miss Jenkins, you can come around please, ma'am.
>
> Miss Jenkins, you're up here for an alleged probation violation. If it's found that your violation is a willful one, you could be required to serve the suspended sentence that was heretofore given to you which is not less than 23, no more than 40 months in the Department of Corrections. You got the right to remain silent. Anything you say can and will be used against you. You got the right to represent yourself, hire an attorney of your own choosing and if you feel you cannot hire an attorney, I'll

review an affidavit to determine if you so qualify.

What's your desire about a lawyer?

DEFENDANT: I guess I can for myself.

THE COURT: All right. Sign the waiver please, ma'am.

(Defendant executed waiver.)

Defendant executed a written waiver of counsel form, AOC-CR-227, and the trial court then heard testimony regarding the probation violation. Defendant admitted violating her probation and explained that she was unable to make appointments with the probation officer because of "problems going on at home . . . ." The trial court found Defendant had violated the conditions of her probation willfully and without valid excuse. The trial court revoked Defendant's probation and activated her underlying sentence on the basis that she absconded supervision.

Defendant, pro se, timely filed a handwritten note indicating a desire to appeal, which did not include proof of service upon the State. The State argues the appeal is subject to dismissal for failure to comply with the requirements for written notice of appeal under Rule 4(a)(2). N.C. R. App. P. 4 (2019). Defendant argues a violation of "[Rule 4(a)(2)] does not deprive the Court of jurisdiction," and does not warrant dismissal of the appeal. N.C. R. App. P. 4(a)(2) (2019).

As to the merits, Defendant argues that her exchange with the trial court was insufficient to constitute a knowing, voluntary, intelligent waiver of her right to counsel and asserts that she did not understand or appreciate the consequences of waiving counsel or the nature of the charges and proceedings, as required by N.C.G.S. § 15A-1242. The State argues the exchange was sufficient and notes the similarity to *State v. Whitfield* where we found a similar exchange to be sufficient under N.C.G.S. § 15A-1242. *Whitfield*, 170 N.C. App. at 622, 613 S.E.2d at 292.

ANALYSIS

A. Jurisdiction

[1] " '[R]ules of procedure are necessary . . . in order to enable the courts properly to discharge their dut[y]' of resolving disputes." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 193, 657 S.E.2d 361, 362 (2008) (quoting *Pruitt v. Wood*, 199 N.C. 788, 790, 156 S.E. 126, 127 (1930)). "Compliance with the rules, therefore, is mandatory." *Id.* at 194, 657 S.E.2d at 362. However, "noncompliance with the appellate

rules does not, ipso facto, mandate dismissal of an appeal. Whether and how a court may excuse noncompliance with the rules depends on the nature of the default." *Id.* at 194, 657 S.E.2d at 363 (internal citation omitted). "[D]efault under the appellate rules arises primarily from the existence of one or more of the following circumstances: (1) waiver occurring in the trial court; (2) defects in appellate jurisdiction; and (3) violation of *nonjurisdictional requirements*." *Id.* (emphasis added).

"[A] party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Id.* at 198-99, 657 S.E.2d at 365-66; *see, e.g.*, *Hicks v. Kenan*, 139 N.C. 337, 338, 51 S.E. 941, 941 (1905) (observing our Supreme Court's preference to hear merits of the appeal rather than dismiss for noncompliance with the rules). Only in the most egregious instances of nonjurisdictional default will dismissal of the appeal be appropriate, as "every violation of the rules does not require dismissal of the appeal or the issue." *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007).

> In determining whether a party's noncompliance with the appellate rules rises to the level of a substantial failure or gross violation, the court may consider, among other factors, whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would frustrate the adversarial process. . . . [W]hen a party fails to comply with one or more nonjurisdictional appellate rules, the court should first determine whether the noncompliance is substantial or gross under Rules 25 and 34. If it so concludes, it should then determine which, if any, sanction under Rule 34(b) should be imposed. Finally, if the court concludes that dismissal is the appropriate sanction, it may then consider whether the circumstances of the case justify invoking Rule 2 to reach the merits of the appeal.

Dogwood, 362 N.C. at 200-01, 657 S.E.2d at 366-67.

> To prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2 (2019).

The State contends that "Defendant's handwritten note does [sic] comply with the requirements for written notice of appeal under Rule 4. The appeal is subject to dismissal on this basis." The State relies on *State v. McCoy*, which dismissed "[the] defendant's appeal for failure to give notice of appeal within fourteen days from the entry of the order holding him in contempt as required by Rule 4(a)(2)[.]" 171 N.C. App. 636, 637, 615 S.E.2d 319, 320 (2005). Here, unlike *McCoy*, Defendant's notice of appeal was timely, but failed to include proof of service.

Defendant relies on *State v. Golder* to assert that lack of service on the State, while in violation of Rule 4(a)(2), does not deprive us of jurisdiction. In *Golder*, we held that "the State waived the required service of [the d]efendant's notice by participating in [the] appeal *without objection*." *State v. Golder*, 257 N.C. App. 803, 806, 809 S.E.2d 502, 505 (2018) (emphasis added), *aff'd as modified by* 374 N.C. 238, 839 S.E.2d 782 (2020). Here, the State objected and requests dismissal. However, "[i]t is the *filing* of the notice of appeal that confers jurisdiction upon this Court, not the *service* of the notice of appeal." *Id.* at 804, 809 S.E.2d at 504 (citing *Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 100, 693 S.E.2d 684, 688 (2010)).

In *Lee v. Winget Rd., LLC*, we addressed a Rule 3[1] violation where appellees argued for dismissal of the appeal because appellants failed to serve the non-appealing plaintiffs and the previously dismissed defendants.

> As plaintiff-appellants have failed to comply with Rule 3, we must now consider whether the appeal must be dismissed pursuant to [*Dogwood*]. If the failure to comply with Rule 3 created a jurisdictional default[,] we would be required to dismiss the appeal. In fact, *Dogwood* noted lack of notice of appeal in the record or failure to give timely notice of appeal as examples of jurisdictional defects. However, *Dogwood* did not address the situation we have here, where a notice of appeal is properly and timely filed, but not served upon all parties. Pursuant to *Hale* . . . we find that this violation of Rule 3 is a nonjurisdictional defect.
>
> *Dogwood* states that a nonjurisdictional failure to comply with appellate rules normally should not lead to

1. Rule 3 is the civil equivalent to Rule 4, and the rationale in *Lee* is applicable to our criminal jurisprudence as well. *See Golder*, 257 N.C. App. at 804, 809 S.E.2d at 504 (applying *Lee* to a Rule 4 situation); *see also* N.C. R. App. P. 3 (2019); N.C. R. App. P. 4 (2019).

> dismissal of the appeal. Neither dismissal nor other sanctions under North Carolina Rules of Appellate Procedure 25 or 34 should be considered unless the noncompliance is a substantial failure to comply with the Rules or a gross violation of the Rules. This Court is required to make a fact-specific inquiry into the particular circumstances of each case mindful of the need to enforce the rules as uniformly as possible. Dismissal is appropriate only for the most egregious instances of nonjurisdictional default. To determine the severity of the rule violation, this Court is to consider: (1) whether and to what extent the noncompliance impairs the court's task of review, (2) whether and to what extent review on the merits would frustrate the adversarial process, and (3) the court may also consider the number of rules violated.

Lee v. Winget Rd., LLC, 204 N.C. App. 96, 102, 693 S.E.2d 684, 689-90 (2010) (emphasis omitted) (citations omitted) (internal marks omitted) (internal alterations omitted). In *Lee*, the noncompliance with Rule 3 impaired our review, and we held "review on the merits would frustrate the adversarial process[,] . . .[b]ecause two of the parties to [that] case were never informed of the fact that there was an appeal which affect[ed] their interests, [and we] ha[d] no way of knowing the positions [those] parties would have taken in [that] appeal." *Id.* at 102-03, 693 S.E.2d at 690.

Applying *Lee* and *Golder*, Defendant's failure to indicate service on the State with notice of appeal is a nonjurisdictional defect in violation of Rule 4(a)(2). Unlike in *Lee*, our review is not impaired by Defendant's noncompliance with Rule 4(a)(2). "A notice of appeal is intended to let all parties to a case know that an appeal has been filed by at least one party." *Lee*, 204 N.C. App. at 102-03, 693 S.E.2d at 690. Here, the State was informed of the appeal and was able to timely respond. We know the position of both parties on appeal, and Defendant's violation of Rule 4(a)(2) has not frustrated the adversarial process.

Defendant's failure to indicate service of notice of appeal on the State is a nonjurisdictional defect, and it is neither substantial nor gross under Rules 25 and 34. We proceed to the merits.

B. Waiver of Counsel

[2] "Prior cases addressing waiver of counsel under N.C.[G.S.] § 15A-1242 have not clearly stated a standard of review, but they do, as a practical matter, review the issue *de novo*." *State v. Watlington*, 216 N.C. App. 388, 393-94, 716 S.E.2d 671, 675 (2011).

A defendant "is entitled to be represented by counsel" during a probation revocation hearing. N.C.G.S. § 15A-1345(e) (2019). "Implicit in [a] defendant's constitutional right to counsel is the right to refuse the assistance of counsel" and proceed pro se. *State v. Gerald*, 304 N.C. 511, 516, 284 S.E.2d 312, 316 (1981).

> A defendant may be permitted . . . to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant: (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled; (2) Understands and appreciates the consequences of this decision; and (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C.G.S. § 15A-1242 (2019). "The provisions of N.C.[G.S.] § 15A-1242 are mandatory where the defendant requests to proceed *pro se*." *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002). Before a defendant in a probation revocation hearing is allowed to represent herself, the trial court must comply with the requirements of N.C.G.S. § 15A-1242. *See id.* at 316, 569 S.E.2d at 675 (holding the trial court failed to determine whether the defendant's waiver of counsel was knowing, intelligent, and voluntary by omitting the second and third inquiries required by N.C.G.S. § 15A-1242 at a probation revocation hearing).

A written waiver is important evidence to show a defendant wishes to act as her own attorney. "When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates otherwise." *State v. Warren*, 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986). However, "[a] written waiver is something in addition to the requirements of N.C.[G.S.] § 15A-1242, not an alternative to it." *Evans*, 153 N.C. App. at 315, 569 S.E.2d at 675 (internal marks omitted).

Defendant argues it was not clear her waiver was "intelligent" and the trial court's inquiry "did not ensure that [she] understood and appreciated 'the consequences' of a decision to proceed pro se." Defendant further argues "[n]o part of the trial court's inquiry is aimed at the inquiry's second prong." Finally, Defendant argues she did not understand the nature of the proceedings.

The State argues *Whitfield* is controlling, where the defendant argued the trial court failed to comply with N.C.G.S. § 15A-1242 regarding

whether the waiver of counsel was knowing, intelligent, and voluntary. *Whitfield*, 170 N.C. App. at 621, 613 S.E.2d at 291. In *Whitfield*, we found the following inquiry sufficient:

> THE COURT: All right. Ms. Whitfield, do you understand that you have possibly 11 to 15 months hanging over your head?
>
> DEFENDANT: Yes, ma'am.
>
> THE COURT: You understand that?
>
> DEFENDANT: Yes, ma'am.
>
> THE COURT: If your probation is revoked, you may very well have your sentence activated, have to serve that time. You're entitled to have an attorney to represent you. Are you going to hire an attorney to represent you, represent yourself, or ask for a court appointed attorney[?] Of those three choices, which choice do you make?
>
> DEFENDANT: Represent myself.
>
> THE COURT: Put your left hand on the Bible and raise your right hand.
>
> (The Defendant was sworn by the Court)
>
> THE COURT: That is what you want to do, so help you God?
>
> DEFENDANT: Yes, ma'am.

Id. We held the trial court, and the preceding inquiry, satisfied all three requirements as set forth in N.C.G.S. § 15A-1242.

> [The trial court] informed [the] defendant of the right of assistance of counsel, including the right to a court-appointed attorney if [the] defendant was entitled to one. The trial [court] also made sure that [the] defendant understood that her probation could be revoked, that her sentences could be activated, and that she could serve eleven to fifteen months in prison. Cognizant of these facts, [the] defendant verbally gave a knowing, intelligent, and voluntary waiver of her right to counsel. Later, [the]

> defendant signed a document indicating that she waived her right to counsel and wanted to appear on her own behalf. Therefore, we have no doubt that [the] defendant intended to and did in fact waive her right to counsel.

Id.

Based on our prior holding in *Whitfield*, where we found a similar inquiry adequate under N.C.G.S § 15A-1242, here we hold the inquiry of Defendant to satisfy the statutory mandate.

First, the trial court informed Defendant of her right to assistance of counsel, including the right to a court-appointed attorney if entitled to one by stating, "[y]ou got the right to represent yourself, hire an attorney of your own choosing and if you feel you cannot hire an attorney, I'll review an affidavit to determine if you so qualify." The trial court in *Whitfield* informed the defendant, "[y]ou're entitled to have an attorney to represent you. Are you going to hire an attorney to represent you, represent yourself, or ask for a court appointed attorney[?] Of those three choices, which choice do you make?" *Whitfield*, 170 N.C. App. at 621, 613 S.E.2d at 291. Here, the content of the trial court's statement is substantially similar to the trial court's statement in *Whitfield* and is therefore sufficient to meet the first requirement of N.C.G.S. § 15A-1242.

Second, the trial court ensured Defendant understood her probation could be revoked, her sentence could be activated, and she could serve an active sentence. The trial court stated, "you're up here for an alleged probation violation. If it's found that your violation is a willful one, you could be required to serve the suspended sentence that was heretofore given to you which is not less than 23, no more than 40 months in the Department of Corrections." The trial court in *Whitfield* stated, "[a]ll right, Ms. Whitfield, do you understand that you have possibly 11 to 15 months hanging over your head? . . . You understand that?" *Id.* The defendant responded, "[y]es ma'am" to each question. *Id.* This inquiry was sufficient to ensure that the defendant understood the consequences of her decision. *Id.* The inquiry conducted here is just as clear as the inquiry in *Whitfield*. The trial court clearly stated why Defendant was in court, and the possible sentence length if it was found that Defendant had in fact violated her probation. Not only did Defendant choose to represent herself after hearing the range of her potential sentence should the probation be revoked, Defendant also completed the written waiver of counsel form.

Finally, we hold that Defendant comprehended the nature of the charges, proceedings, and the range of permissible punishments. The

trial court in *Whitfield* held that, "[c]ognizant of [the] facts, [the] defendant verbally gave a knowing, intelligent, and voluntary waiver of her right to counsel." *Id*. On appeal, Whitfield argued that "she was confused about her right to counsel," as she raised questions "[w]hen the prosecutor asked [her] to admit or deny the charges." *Id*. However, the court found that since "[the] defendant's statement came *after* she waived her right to counsel verbally[] . . . [the] defendant was aware of the consequences of representing herself and made her decision without hesitation." *Id*. at 622, 613 S.E.2d at 291-92.

Here, when presented with the information about her sentence and the potential length of that sentence, as well as her right to counsel, Defendant was asked, "[w]hat's your desire about a lawyer?" Defendant responded, "I guess I can for myself[,]" and executed the written waiver of counsel form. Defendant answered all of the trial court's questions clearly and without hesitation, even though she had been informed that she had "the right to remain silent." Defendant was aware of the charges, proceedings, and the range of permissible punishments, just like the defendant in *Whitfield*. Defendant then verbally gave a knowing, intelligent, and voluntary waiver of her right to counsel. Defendant expressed her comprehension of the nature of the charges, proceedings, and the range of permissible punishments when she chose to waive her right to counsel. The trial court conducted an adequate inquiry and Defendant's waiver of counsel was knowing, intelligent, and voluntary under N.C.G.S. § 15A-1242.

CONCLUSION

Defendant's waiver of counsel was knowing, intelligent, and voluntary, and the trial court did not err by allowing Defendant to proceed pro se.

NO ERROR.

Judges BRYANT and STROUD concur.

STATE v. LEMUS

[273 N.C. App. 155 (2020)]

STATE OF NORTH CAROLINA
v.
DAVID LEMUS, DEFENDANT, AND 1ST ATLANTIC SURETY COMPANY, SURETY

No. COA19-876

Filed 18 August 2020

Bail and Pretrial Release—bond forfeiture—"release" as statutory precondition—undocumented immigrant—detained and deported after posting bond

After the trial court conditioned the pretrial release of an undocumented immigrant (defendant) charged with a felony on the execution of a $100,000 secured bond, the court erred by entering a bond forfeiture and later declining to set it aside where, although defendant and his surety posted the bond, the State continued to detain him under an agreement with federal immigration authorities until federal agents took custody of him and deported him, causing him to miss his state criminal trial. The bond forfeiture statutes, by their plain terms, apply only to a "defendant who was released" from the State's custody, and therefore the court had no statutory authority to enter a forfeiture in defendant's case.

Appeal by surety from order entered 11 June 2019 by Judge Becky Holt in Granville County Superior Court. Heard in the Court of Appeals 17 March 2020.

Tharrington Smith, LLP, by Stephen G. Rawson and Colin Shive, for appellee Granville County Board of Education.

Ragsdale Liggett, PLLC, by Amie C. Sivon, Mary M. Webb, and Kimberly N. Dixon; and Hill Law, PLLC, by M. Brad Hill, for surety-appellant.

DIETZ, Judge.

In 2018, David Lemus was charged with a felony and jailed pending trial. The trial court conditioned Lemus's pretrial release on the execution of a $100,000 secured bond. Two weeks later, Lemus and his surety, 1st Atlantic Surety Company, executed and filed a $100,000 bond, at which point the law required the State to immediately "effect the release" of Lemus.

That did not happen. Instead, the State continued to detain Lemus under an agreement with federal immigration authorities until the federal government arrived, took custody of Lemus, and ultimately deported him to Mexico.

After Lemus failed to appear at his state criminal trial (because the State chose to hand him over the federal government, which then deported him), the trial court forfeited Lemus's $100,000 bond. Lemus's surety moved for relief from the forfeiture judgment, arguing that the bond forfeiture statutes apply only if the "defendant was released" and Lemus was never released. The trial court rejected that petition for relief.

We reverse. As explained below, under the plain language of the bail statutes, the trial court cannot enter a bond forfeiture unless, once the defendant has satisfied the conditions placed upon his release and there is no other basis in state law to retain custody of the defendant, the State sets the defendant free. This plain reading of the statute also enables the bond forfeiture laws to serve their intended purpose—to ensure that defendants report to court for their scheduled criminal proceedings.

Here, the State knew Lemus would not be at his criminal trial because the State handed him over for deportation. The federal government even offered to coordinate with the State so that Lemus could be returned for trial, but the State declined.

Interpreting the bail statutes to permit forfeiture in these circumstances conflicts with those statutes' plain language, does nothing to serve their statutory purpose, and ultimately harms undocumented immigrants and their families—some of the poorest, most vulnerable people in our society—for absolutely no reason.

Accordingly, we hold that Lemus was never "released" as that term is used in the bail statutes, and the trial court had no statutory authority to enter a forfeiture. The trial court therefore abused its discretion when it declined to grant relief from that forfeiture. We reverse the trial court's order and remand with instructions to grant relief from the final forfeiture judgment.

Facts and Procedural History

In April 2018, law enforcement officers arrested David Lemus for a felony assault charge. On 14 April 2018, the trial court conditioned Lemus's pretrial release upon execution of a $100,000 secured bond. On 25 April 2018, Lemus and his surety, 1st Atlantic Surety Company, posted a $100,000 secured bond.

After learning that Lemus satisfied the conditions for release by posting that secured bond, the State chose not to release him. Instead, the State held Lemus for around twenty-four hours, until agents from U.S. Immigration and Customs Enforcement arrived and deputies from the Granville County Sheriff's Office handed over Lemus directly into ICE custody. On 18 May 2018, ICE sent a letter to the Granville County Clerk of Superior Court, informing the State that ICE intended to enforce an order of removal against Lemus and deport him from the country. The letter provided contact information so that, if the State still has an interest in prosecuting Lemus for state crimes, "appropriate arrangements can be made for him or her to be returned to your jurisdiction." The State did not request that Lemus be returned to North Carolina for trial.

Lemus remained in federal custody for a month until, on 26 May 2018, the federal government deported Lemus to his home country of Mexico. As a result, Lemus failed to appear in Granville County Superior Court on 23 July 2018 for his scheduled criminal trial.

The day after Lemus missed his court date, the trial court entered a bond forfeiture order in favor of the State and against Lemus and his surety. In some early procedural maneuvering, Lemus's surety moved to set aside that forfeiture. The State did not appear in that proceeding, but the Granville County Board of Education, represented by a private law firm, entered an appearance and opposed the surety's motion.

The surety later sought to withdraw that motion, and the school board moved for sanctions against the surety. The trial court permitted the surety to withdraw its motion and denied the school board's motion for sanctions. The school board appealed the denial of its sanctions motion to this Court, but the Court rejected the board's arguments and affirmed the trial court's order. *State v. Lemus*, __ N.C. App. __, 838 S.E.2d 204 (2020) (unpublished).

Then, on 15 March 2019, Lemus's surety filed a petition for remission of forfeiture after judgment under N.C. Gen. Stat. § 15A-544.8(b)(2), arguing that Lemus was never released but instead handed over directly to federal immigration agents. Therefore, the surety asserted, there were "extraordinary circumstances" warranting relief from the bond forfeiture. The school board once again appeared and opposed the petition and also moved for sanctions. The trial court denied the surety's petition, and the surety timely appealed.

Analysis

The surety asserts a number of arguments in this case but we need only address the statutory argument, which can be summarized as this: The bond forfeiture statutes apply only to "a defendant who was released" under those statutes. Lemus was never released. Therefore, the trial court had no authority to conduct a forfeiture proceeding and should have granted the petition to set aside the forfeiture for that reason.

We agree. The statutory provisions governing this issue all are codified in the same section of our General Statutes, in an article titled "Bail." *See* N.C. Gen. Stat. § 15A-531 *et seq*. These provisions are further subdivided into two parts, with the titles "General Provisions" and "Bail Bond Forfeiture."

The first part governs when and under what conditions a defendant charged with a crime and in State custody may be given "pretrial release." *See*, *e.g.*, N.C. Gen. Stat. §§ 15A-533, 15A-534. For defendants like Lemus, having conditions of pretrial release determined is mandatory, not optional: "A defendant charged with a noncapital offense *must* have conditions of pretrial release determined." *Id.* § 15A-533(b) (emphasis added). Similarly, once the conditions of this release are satisfied, the State must immediately release the defendant. This is, again, mandatory, not optional:

> [A]ny judicial official *must* effect the release of that person upon satisfying himself that the conditions of release have been met. In the absence of a judicial official, any law-enforcement officer or custodial official having the person in custody *must* effect the release upon satisfying himself that the conditions of release have been met . . . . Satisfying oneself whether conditions of release are met includes determining if sureties are sufficiently solvent to meet the bond obligation . . . .

Id. § 15A-537(a) (emphasis added).

Unlike this first part of the bail statutes, which addresses many different means by which a defendant can be released before trial, the second part of these statutes deals exclusively with release under a bail bond and the forfeiture of that bond. *See id.* § 15A-544.1 *et seq*. It contains a series of procedural requirements to forfeit a bail bond, to request that a bond forfeiture be set aside, to enter a final judgment of forfeiture, and to obtain relief from a final judgment of forfeiture. *Id.* But, importantly, all of these forfeiture provisions turn on an initial precondition established in the statute:

> (a) If a defendant *who was released* under Part 1 of this Article upon execution of a bail bond fails on any occasion to appear before the court as required, the court shall enter a forfeiture for the amount of that bail bond in favor of the State against the defendant and against each surety on the bail bond.

Id. § 15A-544.3(a) (emphasis added).

This case thus presents us with a straightforward but critical question of statutory interpretation: what is the meaning of the term "released" in the bail statutes? Our task in statutory construction is to "determine the meaning that the legislature intended upon the statute's enactment." *State v. Rankin*, 371 N.C. 885, 889, 821 S.E.2d 787, 792 (2018). "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *Id.* But, if the statutory language is "clear and unambiguous," then the statutory analysis ends and the court gives the words in the statute "their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005).

We therefore begin with the plain language of the bail statutes and, in particular, the meaning of the words "release" and "released" as they appear throughout these statutes. There is a definitional section at the beginning of this series of statutes, but it does not contain a definition of either "release" or "released." N.C. Gen. Stat. § 15A-531. Those words therefore "must be given their common and ordinary meaning." *State v. Rieger*, __ N.C. App. __, __, 833 S.E.2d 699, 701 (2019).

The word "release" is defined as "[t]o set free from confinement, restraint, or bondage" or "[a]n authoritative discharge, as from an obligation or from prison." *Release*, *Webster's II New College Dictionary* (1995). Similarly, the term bail itself is understood as meaning a security given for the appearance of the accused to obtain his release from confinement. 8A Am. Jur. 2d *Bail & Recognizance* § 1 (1997). Thus, the ordinary understanding of the word release in this context is to be physically set free from custody and confinement.

Although this case presents a question of first impression, this plain-language interpretation implicitly has been adopted in cases from this Court and our Supreme Court that addressed the responsibilities of bail agents. Those cases emphasize that release occurs when the State hands over custody of the defendant to the bail agent and that, upon posting the bond, the physical custody of the defendant transfers from the State to the bail agent. *See, e.g.*, *State v. Mathis*, 349 N.C. 503, 509, 509 S.E.2d

155, 159 (1998); *State v. Vikre*, 86 N.C. App. 196, 199–200, 356 S.E.2d 802, 805 (1987).

In addition, this plain-language interpretation explicitly has been adopted by courts in other jurisdictions confronted with the issue raised in this case. For example, the Colorado Court of Appeals held that a bond forfeiture was invalid because "the defendant was not released into the legal custody of his surety. The record shows that he was transferred directly from the Adams County Sheriff's Department into the custody of the INS [the U.S. Immigration and Naturalization Service]." *People v. Gonzales*, 745 P.2d 263, 264 (Colo. App. 1987). Thus, the court reasoned, "because defendant was not released into the custody of his sureties, he was not released within the meaning of § 16-4-109(2)," the Colorado statute governing the pretrial "release" of a defendant who posts a bond. *Id.* at 264–65.

We agree with the Colorado Court of Appeals' reasoning and interpretation of the word "release." Here, when Lemus and his surety satisfied the conditions placed upon his release, and there was no other basis for the State to retain custody of Lemus, the State was required to immediately effect his release. N.C. Gen. Stat. §§ 15A-534, 15A-537. That didn't happen. Instead, despite Lemus having posted the required bond, the State continued to detain him, under an agreement with federal immigration authorities, until federal agents could arrive. At that point, the State transferred Lemus directly from State custody to federal custody. At no point was Lemus set free, and thus, he was never "released" from the State's custody.

The school board responds to this argument in two ways: with procedural arguments and with policy ones. First, the school board argues that Section 15A-544.5 of the bail forfeiture statutes provides that there "shall be no relief from a forfeiture except as provided in this section" and then lists a series of enumerated grounds for relief. *Id.* § 15A-544.5(a)–(b). Similarly, the school board argues that Section 15A-544.8, which governs relief from a final judgment of forfeiture, contains an even narrower list of enumerated grounds for relief. *Id.* § 15A-544.8(a)–(b). Thus, the school board argues, the trial court properly denied the surety's request for relief because none of the enumerated grounds for relief under either statute apply in this case.

We reject this argument. All of the enumerated grounds for either setting aside a forfeiture or granting relief from a forfeiture judgment—such as the underlying charges being dropped, or the defendant being arrested and jailed somewhere else, or the surety never receiving notice

of the forfeiture—presuppose that the trial court had statutory authority to enter a valid forfeiture to begin with. *Id.* §§ 15A-544.5(b)(1)–(7), 15A-544.8(b). Here, the trial court did not have that authority. The statutory authority to forfeit a bail bond exists only for a defendant "who was released" and, as explained above, Lemus was never released. *Id.* § 15A-544.3(a). Thus, the surety properly could move the trial court for relief from the forfeiture judgment on the ground that the court had no legal authority to enter it at the outset.

The school board also makes a series of policy arguments against this interpretation. But in doing so, the board inadvertently underscores why its arguments fail: although the school board indeed makes "policy" arguments, those arguments have nothing to do with the policy underlying bail bond forfeiture, which furthers the State's interest in ensuring that criminal defendants released on bond appear at their criminal trials.

For example, much of the school board's policy arguments focus on framing Lemus's surety as a bad actor, asserting that "the burden should not be on the State to assist the surety in its own commercial enterprise." But this argument is a giant non sequitur. The surety's actions have nothing to do with whether the State complied with the necessary precondition of a bond forfeiture—the obligation to release the defendant.

The school board also contends that this Court's interpretation of the word "release" would make it difficult, or impossible, for the State to cooperate with other law enforcement agencies or governments seeking custody of a defendant. This is simply wrong. Nothing prevents the State from alerting federal agencies, or law enforcement in other states, or anyone else, of the time and place at which the State will release a defendant who has satisfied the conditions of release. Even if a defendant released on bond walks out of a county jail and is immediately taken into custody by federal immigration authorities, that defendant was "released" under our State's bail statutes because he was set free from State custody.

But in this scenario, many other people can be waiting outside that county jail as well—most importantly, the defendant's family or the bail agent. This, in turn, permits the bail statutes to function as intended. The defendant's family or bail agent will know that some other government or agency detained the defendant for some other reason. The family or bail agent then can take various steps established in the statutes to keep track of the defendant's whereabouts and status and, if necessary, seek to change the conditions of pretrial release or terminate the bond obligation altogether. *See generally* N.C. Gen. Stat. §§ 15A-534, 15A-538,

15A-544.5. The State deprived Lemus, his family, and the surety of this opportunity by continuing to detain Lemus after he posted the bond and then handing him over to federal agents without first releasing him.

The school board next argues that this Court's interpretation of the statute would make it harder for undocumented immigrants to be released on bond. Again, this is simply wrong. The State is required by law to set reasonable conditions of pretrial release for every criminal defendant. *Id.* § 15A-533. If those conditions are satisfied, the State must release the defendant. Our opinion has no impact on this mandatory statutory process.

Finally, we note that our interpretation is fully consistent with the actual policy underlying our bond statutes—to protect the State's interest in releasing criminal defendants before trial while ensuring that those defendants return to court for their criminal proceedings. *Vikre*, 86 N.C. App. at 199, 356 S.E.2d at 804; *State v. Robinson*, 145 N.C. App. 658, 661, 551 S.E.2d 460, 462 (2001). Here, the State had no interest in Lemus appearing at his criminal trial in North Carolina anymore. We know this because it was *the State* that chose to hand Lemus over to federal immigration authorities so that he could be permanently deported from the United States, making it impossible for him to appear at a state criminal trial. And, even after those federal authorities offered the State an opportunity to bring Lemus back to North Carolina for trial, the State declined to take it.

Simply put, this was never a case in which the $100,000 secured bond served any purpose other than to exploit Lemus and his family. After all, as the parties acknowledged at oral argument, these bail bonds require a large up-front premium by the defendant (or, frequently, the defendant's family). These bail bonds also often require that the defendant or family members offer up other property as collateral or agree to be liable for the bond amount if it is forfeited. So in a case like this one, where the State turned the defendant over to the federal government for deportation with no intention of actually trying the defendant for the alleged crimes, the bail bond functions only as a tax on undocumented immigrants and their families—often among the poorest and most vulnerable people in our State. It is exceedingly rare for this Court to ignore a statute's plain language, even if we felt it would produce a better outcome. We certainly will not do so here, where departure from the plain language victimizes some of the most marginalized people of our State.

In sum, we hold that the bond forfeiture statutes, by their plain terms, apply only to "a defendant who was released." N.C. Gen. Stat § 15A-544.3. Lemus satisfied the conditions set by the trial court for his

release, but he was not released. Instead, the State continued to detain him, despite the bond he posted, until he could be transferred to the custody of federal immigration authorities for deportation. Because the State never released Lemus, the trial court erred by entering a bond forfeiture and further erred by declining to set that forfeiture aside. We therefore reverse the trial court's order.

Conclusion

For the reasons stated above, we reverse the trial court's order and remand with instructions to grant relief from the final forfeiture judgment.

REVERSED AND REMANDED.

Judges STROUD and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
JOHNNY LINDQUIST

No. COA19-368

Filed 18 August 2020

Satellite-Based Monitoring—lifetime—efficacy—basis of trial court's order—unclear

An order subjecting defendant to lifetime satellite-based monitoring was vacated and remanded for clarification where it was unclear which of two "California studies" the trial court relied upon in determining the efficacy of satellite-based monitoring (one "California study" was admitted into evidence and a different one was referenced in the order).

Appeal by defendant from order entered 8 November 2018 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 3 December 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

ZACHARY, Judge.

Defendant Johnny Lindquist appeals from the order subjecting him to lifetime satellite-based monitoring upon his release from imprisonment. After careful review, we vacate the satellite-based monitoring order and remand to the trial court.

Background

In 2014, Defendant was convicted of taking indecent liberties with a child. While on parole for that offense, on 1 November 2018, Defendant pleaded guilty to second-degree forcible rape and second-degree forcible sex offense before the Honorable Claire V. Hill in Cumberland County Superior Court.

After entering judgment upon Defendant's guilty plea, the trial court held a satellite-based monitoring hearing. The trial court considered as evidence the factual basis of Defendant's plea and the evidence presented by the State at the satellite-based monitoring hearing. The State presented the testimony of Scott Payne and three exhibits: (1) a study concerning the effectiveness of GPS monitoring of sex offenders, referred to as "the California Study"; (2) a certified copy of Defendant's plea transcript, indicating that in 2014 he pleaded guilty to the charge of taking indecent liberties with a child; and (3) Defendant's STATIC-99 assessment. On 8 November 2018, after considering the evidence presented and the arguments of counsel, the trial court entered its order subjecting Defendant to lifetime satellite-based monitoring upon his release from prison. Defendant timely filed written notice of appeal from the satellite-based monitoring order.

Discussion

Our General Statutes provide for a " 'sex offender monitoring program that uses a continuous satellite-based monitoring system designed to monitor' the locations of individuals who have been convicted of certain sex offenses." *State v. Gordon* ("*Gordon II*"), __ N.C. App. __, __, 840 S.E.2d 907, 909, *temp. stay allowed*, 374 N.C. 430, 839 S.E.2d 351 (2020) (quoting N.C. Gen. Stat. § 14-208.40(a) (2019)). "The present satellite-based monitoring program provides 'time-correlated and continuous tracking of the geographic location of the subject using a global positioning system based on satellite and other location tracking technology.' " *Id.* (quoting N.C. Gen. Stat. § 14-208.40(c)(1)).

"The United States Supreme Court has determined that the monitoring of an individual under North Carolina's [satellite-based monitoring]

program constitutes a continuous warrantless search of that individual." *State v. Gambrell*, __ N.C. App. __, __, 828 S.E.2d 749, 750 (2019) (citing *Grady v. North Carolina* ("*Grady I*"), 575 U.S. 306, 310, 191 L. Ed. 2d 459, 462 (2015)). As a warrantless search, any order subjecting an individual to satellite-based monitoring is subject to analysis under the Fourth Amendment to the United States Constitution. "[T]he trial court must conduct a hearing in order to determine the constitutionality of ordering the targeted individual to enroll in the satellite-based monitoring program." *Gordon II*, __ N.C. App. at __, 840 S.E.2d at 909 (citing *Grady I*, 575 U.S. at 310, 191 L. Ed. 2d at 462).

In *State v. Grady* ("*Grady III*"), 372 N.C. 509, 831 S.E.2d 542 (2019), our Supreme Court conducted the balancing test prescribed by the United States Supreme Court:

> The balancing analysis that we are called upon to conduct here requires us to weigh the extent of the intrusion upon legitimate Fourth Amendment interests against the extent to which the [satellite-based monitoring] program sufficiently promotes legitimate governmental interests to justify the search, thus rendering it reasonable under the Fourth Amendment. In this aspect of the balancing test, we consider the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it.

Grady III, 372 N.C. at 538, 831 S.E.2d at 564 (internal citation and quotation marks omitted) (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53, 660, 132 L. Ed. 2d 564, 574, 579 (1995)).

In *State v. Griffin* ("*Griffin II*"), __ N.C. App. __, 840 S.E.2d 267, *temp. stay allowed*, 374 N.C. 267, 838 S.E.2d 460 (2020), this Court applied the *Grady III* analysis, listing the three factors to be balanced in determining the constitutionality of the search, under the totality of the circumstances:

> (1) the nature of the defendant's legitimate privacy interests in light of his status as a registered sex offender[;] (2) the intrusive qualities of [satellite-based monitoring] into the defendant's privacy interests[;] and (3) the State's legitimate interests in conducting [satellite-based] monitoring and the effectiveness of [satellite-based monitoring] in addressing those interests[.]

Griffin II, __ N.C. App. at __, 840 S.E.2d at 271 (citations omitted).

We also highlighted the emphasis in *Grady III* on efficacy when conducting such an analysis, noting that our Supreme Court "wrote that a problem justifying the need for a warrantless search cannot simply be assumed; instead, the existence of the problem and the *efficacy of the solution* need to be demonstrated by the government." *Id.* at __, 840 S.E.2d at 272 (emphasis added) (citation and internal quotation marks omitted). Although evidence that satellite-based monitoring is effective is merely one factor to be considered, "[t]he State's inability to produce evidence of the efficacy of the lifetime [satellite-based monitoring] program in advancing any of its asserted legitimate State interests *weighs heavily against* a conclusion of reasonableness[.]" *Id.* at __, 840 S.E.2d at 273 (citation omitted).

Here, we are unable to determine the basis of the trial court's decision to subject Defendant to lifetime satellite-based monitoring, particularly with regard to the efficacy of satellite-based monitoring, because of a discrepancy between the study admitted into evidence as State's Exhibit #1 and the study referenced in the trial court's order as State's Exhibit #1.

During the satellite-based monitoring hearing, the State called Scott Payne, an employee of the Department of Public Safety Sex Offender Management Office, as a witness. In addition to testifying to his work in the field of sex offender management, Payne testified concerning a 2015 study titled "Does GPS Improve Recidivism among High Risk Sex Offenders? Outcomes for California's GPS Pilot for High Risk Sex Offender Parolees," which addressed the efficacy of satellite-based monitoring of sex offenders. The parties and the trial court continued to reference "the California Study" for the remainder of the hearing, and a copy of the California Study was admitted into evidence without objection as State's Exhibit #1.

In fact, there are two California studies at issue in the case at bar: "Monitoring High-Risk Sex Offenders With GPS Technology: An Evaluation of the California Supervision Program Final Report" (the "2012 California Study"), and "Does GPS Improve Recidivism among High Risk Sex Offenders? Outcomes for California's GPS Pilot for High Risk Sex Offender Parolees" (the "2015 California Study"). At the satellite-based monitoring hearing, the 2012 California Study was not discussed; however, the 2015 California Study was discussed at length, and a copy of the study was admitted into evidence as State's Exhibit #1:

> [THE STATE]: . . . Your Honor, if I could mark what we commonly refer to as the California study as State's Exhibit 1. May I approach?

> THE COURT: Yes. Any objection?
>
> [DEFENSE COUNSEL]: No, Your Honor.
>
> THE COURT: All right. It is admitted. State's Exhibit 1 as being the California study -- it's titled --
>
> (Whereupon State's Exhibit 1 was marked into evidence.)
>
> [THE STATE]: "*Does GPS improve recidivism among high-risk offenders, outcomes for California's GPS pilot for high-risk sex offenders/parolees*." May I approach again?
>
> THE COURT: Yes. It is admitted without objection.

(Emphasis added).

The trial court's satellite-based monitoring order, however, refers to the 2012 California Study as State's Exhibit #1:

> In ruling on this motion the [c]ourt considered the following evidence and testimony: *State's Exhibit 1 – Monitoring High-Risk Sex Offenders With GPS Technology: An Evaluation[ ]of the California Supervision Program Final Report (2012)*.

(Emphasis added).

It is manifest that the trial court relied on "the California Study's" findings regarding the efficacy of satellite-based monitoring in making its determination that Defendant should be subject to lifetime satellite-based monitoring. Three of the trial court's findings of fact specifically refer to the study:

> 1. In ruling on this motion the [c]ourt considered the following evidence and testimony: *State's Exhibit 1 – Monitoring High-Risk Sex Offenders With GPS Technology: An Evaluation[ ]of the California Supervision Program Final Report (2012)*. State's Exhibit 2 – Certified Copy of Defendant's Conviction of Taking Indecent Liberties With a Child case no. 13CRS 52182 in Sampson County. State's Exhibit 3 – The Static 99 the Static 99 [sic] risk reporting statement of the Defendant Lindquist. Also the testimony of Scott Payne from the Sex Offender Management Office of Department of Public Safety.
>
> . . . .

> 6. The [c]ourt has also considered *The California Study*, *which has been admitted as State's Exhibit 1*. In the conclusions for *The California Study*, it was found that the GPS parolees were overall: 1. Less likely to receive a violation for a new crime; 2. The subjects in the GPS group had better outcomes in terms of sex-related violations and new arrests; 3. Reduced absconding and registration failures with the use of GPS is an important finding in that the whereabouts of sex offenders is a critical component of effectively monitoring them in the community; 4. Finding that the comparison group parolees were more likely to be guilty of a parole violation for a criminal offense, may indicate that the GPS deterred criminal behavior among sex offenders who would have otherwise committed a new offense.
>
> 7. *The California Study* found that the GPS monitoring of sex offenders has demonstrated benefits. That study found that offenders monitored by GPS "demonstrate significantly better outcomes for both compliance and recidivism."

(Emphases added). It is unclear, however, on which "California Study" the trial court relied in reaching its ultimate decision in this case.

In light of the uncertainty surrounding a material basis of the trial court's decision and the significant Fourth Amendment interests at stake, we decline to review this matter without resolution of the question of upon which "California Study" the trial court relied.

Conclusion

Accordingly, we vacate the satellite-based monitoring order and remand this matter to the trial court for the limited purpose of amending the order to clarify upon which study the trial court relied in making its determination that Defendant should be subject to lifetime satellite-based monitoring.

VACATED AND REMANDED.

Chief Judge McGEE and Judge DIETZ concur.

STATE OF NORTH CAROLINA
v.
KIMBERLY RENEE PALMER, DEFENDANT

No. COA19-970

Filed 18 August 2020

Drugs—possession of controlled substance on jail premises—jury instructions—unlawful possession

In a case involving possession of a controlled substance on jail premises, the trial court properly denied defendant's request for a jury instruction that required the State to prove illegal possession of the substance and that defined "illegal possession" as not having a valid prescription for the controlled substance. The crime of possession of a controlled substance on jail premises does not include an element requiring the State to prove unlawful possession and lawful possession is a defense that must be raised and proven by the defendant.

Appeal by Defendant from judgment entered 13 February 2019 by Judge William R. Bell in Haywood County Superior Court. Heard in the Court of Appeals 14 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Rory Agan, for the State.

Stephen G. Driggers for defendant-appellant.

MURPHY, Judge.

Defendant, Kimberly Renee Palmer, was convicted of violating N.C.G.S. § 90-95(e)(9), felony possession of a controlled substance on jail premises. At trial, she requested the jury be provided a special instruction requiring the State to prove lawful possession of a controlled substance as an element of N.C.G.S. § 90-95(e)(9). Our plain reading of Chapter 90 reveals lawful possession of a controlled substance is not an element of the statute but rather an exception, per N.C.G.S. § 90-113.1(a). Defendant requested lawful possession be instructed as an element rather than an exception, which would have erroneously shifted the burden of proof from herself to the State. The trial court did not err in denying Defendant's requested jury instruction.

BACKGROUND

Defendant was indicted for felony possession of a controlled substance on jail premises, misdemeanor possession of a Schedule II controlled substance, misdemeanor possession of drug paraphernalia, and for attaining habitual felon status. These charges arose out of an incident that began as a domestic dispute with Defendant later being found to have Oxycodone on her person during her intake following arrest. At trial, in lieu of N.C.P.I.–Crim. 260.12, Defendant requested the following jury instruction:

> The Defendant has been charged with *illegally possessing* oxycodone, a controlled substance, on the premises of a local confinement facility. For you to find the defendant guilty of this offense, the state must prove two things beyond a reasonable doubt: First, that the defendant knowingly and illegally possessed oxycodone. Oxycodone is a controlled substance. A person knowingly possesses a controlled substance when a person is aware of its presence, and has both the power and intent to control the disposition or use of that substance. *Illegal possession of a controlled substance is possession of that substance when a person does not have a valid prescription for that controlled substance.* And Second, that the defendant was on the premises of a local confinement facility at the time of the defendant's knowing and illegal possession of the controlled substance. If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant knowingly and illegally possessed oxycodone and that the defendant was on the premises of a local confinement facility at that time, it would be your duty to return a verdict of guilty. If you do not find or have a reasonable doubt as to one or both of these things, it would be your duty to return a verdict of not guilty. (Emphasis added).

The trial court denied this request. At no point during trial did Defendant request an instruction on the defense of lawful possession.[1] Defendant

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1. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." N.C. R. App. P. 10(a)(1) (2019). "In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed

was found guilty on all charges and sentenced to 103 to 136 months in prison. She gave notice of appeal on 11 February 2019.

ANALYSIS

On appeal, Defendant contends the trial court erred in failing to give her requested instruction to the jury defining illegal possession of a controlled substance as possession without a prescription. We disagree.

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "[W]hen a request is made for a specific instruction which is correct in itself and supported by evidence, the trial judge, while not required to parrot the instructions . . . must charge the jury in substantial conformity to the prayer." *State v. Clark*, 324 N.C. 146, 160-161, 377 S.E.2d 54, 63 (1989) (internal quotations omitted). "Whether evidence is sufficient to warrant an instruction is a question of law." *State v. Smith*, 263 N.C. App. 550, 558, 823 S.E.2d 678, 684 (2019) (alterations omitted). "[W]here the request for a specific instruction raises a question of law, the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Edwards*, 239 N.C. App. 391, 393, 768 S.E.2d 619, 621 (2015) (internal quotations omitted).

"[I]t is unlawful for any person . . . [t]o possess a controlled substance." N.C.G.S. § 90-95(a)(3) (2019). Oxycodone is a Schedule II controlled substance. N.C.G.S. § 90-90(1)(a)(14) (2019). Further, "[a]ny person who violates [N.C.]G.S. [§] 90-95(a)(3) on the premises of a penal institution or local confinement facility shall be guilty of a Class H felony." N.C.G.S. § 90-95(e)(9) (2019). "The State must prove beyond a reasonable doubt every essential element of the crime charged, and it is incumbent upon the trial judge to so instruct the jury." *State v. Logner*, 269 N.C. 550, 553, 554, 153 S.E. 2d 63, 66 (1967). However,

> [i]t shall not be necessary for the State to negate any exemption or exception set forth in this Article in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this Article, and the burden of proof of any such exemption or exception shall be upon the person claiming its benefit.

N.C.G.S. § 90-113.1(a) (2019).

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preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4) (2019). At no point on appeal does Defendant argue it was plain error for the trial court to exclude an instruction on the defense of lawful possession. Thus, any such consideration is not a part of this appeal.

After denying Defendant's requested instruction, the trial court instead provided N.C.P.I.--Crim. 260.12:

> [Defendant] has been charged with possessing Oxycodone, a controlled substance, on the premise [sic] of a local confinement facility. For you to find [Defendant] guilty of this offense, the State must prove two things beyond a reasonable doubt: First, that [Defendant] knowingly possessed Oxycodone. Oxycodone is a controlled substance. A person possesses Oxycodone when a person is aware of its presence and has both the power and intent to control its disposition or use. And second, that [Defendant] was on the premises of a local confinement facility at the time of [Defendant's] possession of the Oxycodone.

N.C.P.I.–Crim. 260.12 (2019).

On appeal, Defendant argues N.C.G.S. § 90-101(c)(3), in conjunction with N.C.G.S. § 90-95(a)(3) and N.C.G.S. § 90-95(e)(9), provide an element of the offense of possession of a controlled substance on jail premises and should therefore have been part of the jury instruction. N.C.G.S. § 90-101(c)(3) (2019) ("The following persons shall not be required to register and may lawfully possess controlled substances under the provisions of this Article . . . [a]n ultimate user or person in possession of any controlled substance pursuant to a lawful order of a practitioner."). We disagree.

A plain reading of the statute in question does not require the State to prove unlawful possession of a controlled substance as an element which the State bears the burden of proving. N.C.G.S. § 90-95(e)(9) (2019) ("Any person who violates [N.C.]G.S. [§] 90-95(a)(3) on the premises of a penal institution or local confinement facility shall be guilty of a Class H felony."). Moreover, N.C.G.S. § 90-113.1(a) clearly states that where an exemption or exception is requested, the burden of proof shall be upon the party claiming such exception, in this case Defendant. N.C.G.S. § 90-113.1(a) (2019). Defendant argues on appeal, like she did at trial, that lawful possession is an element of N.C.G.S. § 90-95(e)(9), not a defense. She contends that "[t]he proposed instruction incorporated into the elements of the offense the exception for prescription holders under [N.C.G.S.] § 90-101(c)(3) rather than presenting the exception as a separate defense instruction, as suggested by the State." By Defendant's own words, the proposed instruction constituted an "exception," clearly addressed by N.C.G.S. § 90-113.1(a), for which the burden of proof would have fallen on Defendant, not the State. As lawful possession of a controlled substance is

an exception, rather than an element, the trial court did not err in denying Defendant's request for a special jury instruction.

Defendant also argues, in the alternative, that if not an element, the question of lawful possession is a subordinate issue. "[I]nstructions as to the significance of evidence which do not relate to the elements of the crime itself or [D]efendant's criminal responsibility" are considered subordinate issues. *State v. Hunt*, 283 N.C. 617, 624, 197 S.E.2d 513, 518 (1973). "In the absence of a special request the trial judge is not required to instruct the jury on subordinate features of a case." *State v. Lester*, 289 N.C. 239, 243, 221 S.E.2d 268, 271 (1976). However, upon receiving such a request, "when the request is correct in law and supported by the evidence in the case, the court must give the instruction in substance." *State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976).

We hold Defendant's requested instruction was not correct in law, as it mischaracterized an exception as an element of N.C.G.S. § 90-95(e)(9), in contravention of N.C.G.S. § 90-113.1(a). Therefore, we need not consider whether the request was supported by evidence and find that even if the instruction were deemed a subordinate issue, the trial court nevertheless did not err in denying Defendant's request for the special jury instruction.

CONCLUSION

The trial court did not err in denying Defendant's request for a special jury instruction on lawful possession of a controlled substance where the requested instruction improperly characterized an exception as an element.

NO ERROR.

Chief Judge McGEE and Judge BROOK concur.

STATE OF NORTH CAROLINA
v.
MITCHELL ANDREW TUCKER, DEFENDANT

No. COA19-715

Filed 18 August 2020

1. Domestic Violence—violation of protective order—knowledge of order—sufficiency of the evidence

Where defendant was aware of a prior domestic violence order that expired the day before he broke into the victim's apartment and had been served a notice of hearing to determine whether a second DVPO would be issued, but defendant did not attend the hearing and did not receive notice of the issuance of the second DVPO because notice was served at the county jail—his last known address and he was no longer incarcerated—the trial court erred in denying defendant's motion to dismiss the charge of violating a domestic violence protective order while in possession of a deadly weapon. The evidence was insufficient to show a willful violation of the DVPO because there was no direct evidence that defendant had knowledge of the second DVPO and the circumstantial evidence of his knowledge of the order was tenuous at best.

2. Burglary and Unlawful Breaking or Entering—domestic violence protective order—insufficient evidence of knowledge of order—felony breaking or entering—jury instructions—plain error

Where there was insufficient evidence that defendant had knowledge of the issuance of a domestic violence protective order, the trial court committed plain error by instructing the jury it could find defendant guilty of felonious breaking or entering, if defendant did so in violation of a valid domestic violence protective order, and defendant's conviction for felony breaking or entering was reversed.

Judge MURPHY concurring in part and dissenting in part.

Appeal by defendant from judgments entered 30 May 2018 by Judge Jesse B. Caldwell III in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Bethany A. Burgon, for the State.

Guy J. Loranger for defendant-appellant.

YOUNG, Judge.

Where the evidence, taken in the light most favorable to the State, did not permit the jury to infer that defendant knew of the terms of the protective order, the trial court erred in denying defendant's motion to dismiss. Where the evidence did not permit the jury to find that defendant knew of a protective order, it did not permit the jury to find defendant guilty of breaking and entering in violation of a protective order, and the trial court committed plain error in instructing the jury on that theory of guilt. We reverse.

I. Factual and Procedural Background

Mitchell Andrew Tucker (defendant), a 61-year-old homeless man, met Deanna Pasquarella (Pasquarella), also homeless, in August of 2016. They stayed together in a tent for some time, but in October of 2016, defendant assaulted Pasquarella and threatened her with a knife, after which she moved out of his tent. This incident went unreported. By June of 2017, Pasquarella had turned her life around and was living in an apartment and working at a job. Pasquarella still saw defendant occasionally, and he would periodically spend the night.

In August of 2017, however, defendant again assaulted Pasquarella. This time, police were involved, and defendant was arrested. Pasquarella also filed for and received an *ex parte* domestic violence protective order (the first DVPO) against defendant. This order expired on 6 September 2017. Defendant was served with the first DVPO on 28 August 2017, while defendant was in jail. Defendant was also served with a notice of hearing to be held on 6 September 2017, at which time it would be determined if another DVPO would be entered. Defendant failed to attend the hearing, and on 6 September 2017, a year-long domestic violence protective order (the second DVPO) was entered against defendant. Notice of the second DVPO was placed in the mail on 7 September 2017 and sent to defendant's known address, the Mecklenburg County Jail. Defendant was not residing at the jail when notice was mailed there.

On the morning of 7 September 2017, defendant went to Pasquarella's home. Pasquarella, on seeing defendant through the peephole, fled to a closet and called police. While on the phone, Pasquarella heard defendant break into her apartment. Defendant dragged Pasquarella through the apartment and threatened her with a knife. At this point,

police officers entered the apartment and heard defendant exclaim "I'm going to kill you." Officers separated defendant from Pasquarella and restrained defendant.

The Mecklenburg County Grand Jury indicted defendant for violating a civil DVPO while in possession of a deadly weapon, felonious breaking or entering, assault with a deadly weapon, and assault on a female. The Grand Jury subsequently also indicted defendant for attaining the status of an habitual breaking and entering felon. At trial, at the close of the State's evidence and again at the close of all the evidence, defendant moved to dismiss the charges against him. In addition to general motions to dismiss, defendant specifically alleged that the State had failed to prove that defendant had knowledge of the second DVPO. The trial court denied these motions.

The jury returned verdicts finding defendant guilty of violating a protective order while in possession of a deadly weapon, felonious breaking or entering in violation of the second DVPO, assault with a deadly weapon, and assault on a female. Defendant pleaded guilty to the habitual felon charge. The trial court entered findings in aggravation and mitigation, and found that the latter outweighed the former. The court then consolidated the felony charges of breaking and entering, violating a protective order with a deadly weapon, and habitual felon, and sentenced defendant to a minimum of 95 months and a maximum of 126 months in the custody of the North Carolina Department of Adult Correction. The court separately sentenced defendant to 60 days for assault with a deadly weapon, and 30 days for assault on a female, also to be served in the custody of the North Carolina Department of Adult Correction. These sentences were to run consecutively.

Defendant appeals.

II. Motion to Dismiss

[1] In his first argument, defendant contends that the trial court erred in denying his motions to dismiss. We agree.

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451,

455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

B. Analysis

At trial, defendant moved to dismiss the charges against him, alleging, *inter alia*, that he had no notice of the second DVPO, and therefore that he could not be found to have willfully violated it. The trial court denied these motions, and on appeal, defendant contends that this was error. Defendant limits his argument to the charge of violating a domestic violence protective order while in possession of a deadly weapon, and accordingly, we will likewise limit our analysis.

Our General Statutes provide that "any person who, while in possession of a deadly weapon on or about his or her person or within close proximity to his or her person, knowingly violates a valid protective order . . . shall be guilty of a Class H felony." N.C. Gen. Stat. § 50B-4.1(g) (2019). The indictment on this charge specifically states, in relevant part, that defendant "did unlawfully, willfully, and feloniously violate a valid protective order . . . issued on September 6, 2017[.]" However, defendant contends that there was no evidence that he knew of the second DVPO, and therefore no evidence that his violation thereof was knowing.

Our Supreme Court has held that knowledge may be proved "by circumstantial evidence from which an inference of knowledge might reasonably be drawn." *State v. Boone*, 310 N.C. 284, 295, 311 S.E.2d 552, 559 (1984), *superseded on other grounds*, *State v. Oates*, 366 N.C. 264, 267, 732 S.E.2d 571, 574 (2012). In support of its case, the State noted that, although defendant was not present for the hearing that resulted in the second DVPO and did not receive notice of the entry of the second DVPO, defendant did receive a summons and notice of the 6 September 2017 hearing. The summons provided that "[i]f you fail to answer the complaint, the plaintiff will apply to the Court for relief demanded in the complaint." The State also presented the testimony of officer James McCarty (Officer McCarty), who responded to Pasquarella's call. The State played a recording for the jury, taken from Officer McCarty's body camera. On the recording, as Officer McCarty pulled defendant and Pasquarella apart, Pasquarella commented, "That's why I got a court

order," and defendant replied, "I know, I know." This evidence is somewhat tenuous, but the State nonetheless contends that, taken together, this evidence shows that (1) a hearing would be held on 6 September 2017 to determine whether Pasquarella was entitled to a protective order, (2) if defendant failed to attend that hearing, a protective order would indeed be entered, and (3) by his comment "I know, I know," defendant was aware of the entry of the second DVPO.

Defendant argued at trial, and argues on appeal, that his statement, "I know, I know," could refer to the first DVPO, which expired on 6 September 2017, the day before he broke into Pasquarella's apartment. He further argues that although the summons provided that "plaintiff will apply to the Court for relief demanded in the complaint," there was no guarantee that the second DVPO would in fact be granted, or what its terms would entail. As such, defendant contends that any purported evidence of his knowledge of the second DVPO was insufficient.

Considering the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference, the evidence shows that defendant was aware of the first DVPO. The record demonstrates that a sheriff's deputy read the *ex parte* order to defendant while defendant was in jail, and "left the service copy with the defendant." This evidence supports a finding that defendant was aware of the terms of the first DVPO, including the requirement to stay away from Pasquarella. However, the State presented no evidence that defendant received notice or was otherwise aware of the second DVPO.

The State argued at trial that the second DVPO was a continuation of the first, and does so likewise on appeal. Indeed, this Court has held that, where a DVPO was continuously in effect for a period of time and a defendant made statements suggesting his awareness thereof, the fact that the defendant may have failed to attend a hearing to renew it does not preclude a jury from inferring that the defendant possessed knowledge of the order. For example, in *State v. Hairston*, 227 N.C. App. 226, 741 S.E.2d 928 (2013) (unpublished), a DVPO had been entered and renewed twice, although the defendant argued that he was not present at the renewal hearing. The defendant, when confronted by an officer, made comments suggesting his awareness of a court order. This Court held that this evidence, taken in the light most favorable to the State, "constituted substantial circumstantial evidence from which the jury could infer that defendant knowingly violated the DVPO." *Id.* *Hairston* is not the only case of this nature. *See*, *e.g.*, *State v. Elder*, 206 N.C. App. 763, 699 S.E.2d 141 (2010) (unpublished) (DVPO had been continuously in place for several years, and evidence showed that defendant had been

told an order was in place). However, it is worth noting that in both of these cases, this Court recognized that there was also evidence that each defendant was present for their respective renewal hearings.

These cases, however, are unpublished, and thus not binding upon this Court. And while it is true that defendant, in the instant case, received notice of the 6 September 2017 hearing, there is no evidence that he was aware that the second DVPO was issued as a result of that hearing prior to his conduct. Nor is there any evidence, unlike in *Hairston* and *Elder*, that defendant was present for the renewal hearing.

The State also notes defendant's statement, while attacking Pasquarella, that he was aware of a court order. And while the State argues that defendant's statement could have been a reference to the second DVPO, this evidence is simply too tenuous to form a basis for a reasonable inference by the jury.

Because there was no direct evidence that defendant had knowledge, constructively or in fact, of the second DVPO, and because any circumstantial evidence of his knowledge was tenuous at best, we hold that the State failed to show knowledge of the DVPO, an essential element of the charge against him. We therefore hold that trial court erred in denying defendant's motion to dismiss.

III. Jury Instructions

[2] In his second argument, defendant contends that the trial court committed plain error in its instructions to the jury. We agree.

A. Standard of Review

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (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, 467 S.E.2d 28, 31 (1996).

"Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably

would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. Analysis

At trial, the trial court instructed the jury that it could find defendant guilty of felonious breaking or entering if it found that defendant did so in violation of the second DVPO. Defendant now contends that this instruction was in error. Because defendant did not object to this instruction at trial, we review this argument for plain error.

Defendant contends that the jury was instructed in the disjunctive, that defendant could be found guilty of felony breaking and entering either because he possessed the intent to violate the second DVPO while in possession of a deadly weapon, or because he possessed the intent to commit assault with a deadly weapon with intent to kill. He contends further that where a jury is instructed on alternative theories of guilt, one of which is unsupported by the evidence, and it cannot be discerned from the record which theory or theories the jury relied on to reach its verdict, a defendant is entitled to a new trial.

However, it is patently obvious which theory the jury relied upon to arrive at its verdict. The jury, in its verdict sheet, specifically found defendant "guilty of felonious breaking or entering in violation of a valid domestic violence protective order issued September 6, 2017[.]" It is plain and unambiguous that the jury found defendant guilty on the basis of intent to violate the second DVPO.

As we held above, the State did not present sufficient evidence of defendant's knowledge of the second DVPO. Accordingly, it was error for the trial court to permit the jury to convict on that basis. It is clear that, had the trial court not instructed the jury that it could find defendant guilty based on knowing violation of the second DVPO, the jury would not have found him guilty on that basis. As the jury probably would have reached a different result, defendant has shown that this instruction constituted plain error. Accordingly, we must reverse defendant's conviction for felonious breaking or entering.

IV. Conclusion

The trial court erred in denying defendant's motions to dismiss the charge of violation of a protective order while in possession of a deadly weapon, as the State failed to present sufficient evidence of defendant's knowledge of the second DVPO. Additionally, the trial court committed plain error in instructing the jury that it could find defendant guilty of felonious breaking or entering on the basis of violation of a valid

protective order. The remaining two charges, assault with a deadly weapon and assault on a female, are unaffected by these errors. We therefore reverse defendant's convictions for violation of a valid protective order while in possession of a deadly weapon and felonious breaking or entering. Because these charges formed the basis for defendant's habitual felon plea, we must vacate that plea.

REVERSED IN PART, VACATED IN PART.

Judge COLLINS concurs.

Judge MURPHY concurs in part and dissents in part in separate opinion.

MURPHY, Judge, concurring in part, dissenting in part, and concurring in the judgment.

When the State presents only speculative evidence that a defendant knew of the existence of a protective order, a trial court commits error when it denies a motion to dismiss charges of knowingly violating that protective order. Additionally, a trial court commits plain error when it issues a disjunctive jury instruction that includes an alternative theory unsupported by the evidence, and the Record does not contain information allowing a reviewing court to discern which theory or theories the jury relied on in arriving at its verdict. While I disagree with the Majority's reliance on two unpublished opinions in its analysis, and would also sanction the State for misleading comments in its brief, I concur in part, including in the judgment.

BACKGROUND

In the present case, the victim obtained a domestic violence protective order ("DVPO") on 28 August 2017, after an *ex parte* hearing in the District Court, and the Mecklenburg County Sheriff's Office served the 28 August 2017 order on Defendant at the Mecklenburg County jail. The *Notice of Hearing on Domestic Violence Protective Order* stated that

> the attached Ex Parte Order has been issued against you. If you violate the Order, you are subject to being held in contempt or being charged with the crime of violating this Ex Parte Order. A hearing will be held before a district court judge at the date, time and location indicated below. At that hearing it will be determined *whether* the Order will be continued.

(Emphasis added). The *Civil Summons Domestic Violence* form stated that "[i]f [Defendant] fail[s] to answer the complaint, the [P]laintiff will *apply* to the Court for the relief demanded in the complaint." (Emphasis added).

The 28 August 2017 DVPO expired on 6 September 2017, the same day an afternoon hearing was scheduled. Defendant did not appear at the 6 September 2017 hearing. Additionally, the 6 September 2017 order was a separate order from, and not a continuation of, the 28 August 2017 order. *See Hensey v. Hennessy*, 201 N.C. App 56, 66, 685 S.E.2d 541, 548 (2009) (holding that the "defendant [was] incorrect in his argument that the [one-year] DVPO [was] dependent upon a valid ex parte DVPO. The two orders are independent of one another, and in some situations, a DVPO . . . is entered properly even though an ex parte order may have been denied or was never requested").

The 6 September 2017 order was mailed to Defendant's last known address, the Mecklenburg County jail. The District Court entered the 6 September 2017 order in the afternoon, and, according to its daily "mailing process," the clerk's office did not mail the order until the next day, 7 September 2017. Regardless, Defendant no longer resided at the jail, and did not receive the mailed order.

Defendant went to the victim's apartment the morning of 7 September 2017. The victim testified that Defendant knocked on her door right after she awoke, while she "was getting ready for work." She called 911 at 8:18 a.m. and ran to her closet, locking herself inside. Defendant broke the victim's living room window, climbed inside the apartment, and opened the door to the victim's closet. Defendant pulled the victim into the living room, produced a knife from his backpack, and threatened her.

When the responding officer arrived at the victim's apartment, he overheard the victim tell Defendant, "[t]hat's why I got *a* court order." (Emphasis added). Defendant responded to the victim's reference to *a* court order with "I know, I know." The observing officer did not know to which order Defendant or the victim referred.

At the close of the State's evidence, Defendant moved to dismiss charges because they required evidence beyond speculation that Defendant knew the 6 September 2017 DVPO existed. The trial court denied Defendant's motion to dismiss. Defendant renewed his motion to dismiss at the close of all evidence on the same ground. The trial court denied Defendant's renewed motion to dismiss.

Further, at trial, Defendant did not object to the trial court's disjunctive instruction that included the following theories for the jury to find

Defendant guilty of felonious breaking or entering: (1) that Defendant possessed the intent to violate the 6 September 2017 DVPO while in possession of a deadly weapon, or (2) that Defendant possessed the intent to commit assault with a deadly weapon with intent to kill.

The jury found Defendant "guilty of felonious breaking or entering in violation of a valid domestic violence protective order issued [6] September [] 2017." The jury made no specific finding concerning whether Defendant intended to kill the victim at the time of the alleged felonious breaking or entering, or whether he knew of the existence of the 6 September 2017 DVPO.

ANALYSIS

A. Motion to Dismiss

1. Standard of Review

We review the "trial court's denial of [Defendant's] motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "[W]e must view the evidence in the light most favorable to the [S]tate and allow the [S]tate every *reasonable* inference that may arise upon the evidence, regardless of whether it is circumstantial, direct, or both." *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925, *aff'd*, 301 N.C. 374, 271 S.E.2d 277 (1980) (emphasis added). "Contradictions and discrepancies are for the jury to resolve[.]" *Cummings*, 46 N.C. App. at 683, 265 S.E.2d at 925.

> Although circumstantial evidence may be sufficient to prove a crime, pure speculation is not[.] . . . When the essential fact in controversy in the trial of a criminal action can be established only by an inference from other facts, there must be evidence tending to establish these facts. Evidence which leaves the facts from which the inference as to the essential fact must be made a matter of conjecture and speculation, is not sufficient, and should not be submitted to the jury.

State v. Angram, 839 S.E.2d 865, 868 (N.C. Ct. App. 2020) (alterations and quotations omitted). The trial court should grant a motion to dismiss when evidence "only . . . raise[s] a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of" the offense; such evidence is insufficient to survive a motion to dismiss. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002).

2. Insufficient Evidence

A proper conviction for the offense of violating a DVPO while in possession of a deadly weapon requires the State to present sufficient evidence that the defendant "*knowingly* violate[d] a valid protective order[.]" N.C.G.S. § 50B-4.1(g) (2019). Only the knowing violation element is at issue in this case.

We have held that " 'knowingly' . . . means that [the] defendant knew what he was about to do, and, with such knowledge, proceeded to do the act charged." *State v. Williams*, 226 N.C. App. 393, 399, 741 S.E.2d 9, 14 (2013) (quoting *State v. Aguilar-Ocampo*, 219 N.C. App. 417, 428, 724 S.E.2d 117, 125 (2012)). Knowledge can be inferred from circumstantial evidence, but the inference *must be reasonable*. *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989); *see also State v. Boone*, 310 N.C. 284, 294-95, 311 S.E.2d 552, 559 (1984), *superseded by statute on other grounds as stated in State v. Oates*, 366 N.C. 264, 732 S.E.2d 571 (2012).

In this case, even in the light most favorable to it, the State did not provide evidence demonstrating that Defendant knew of the 6 September 2017 DVPO. Accepting that Defendant received notice that the 6 September 2017 *hearing* would occur, no evidence in the Record demonstrates Defendant knew the 6 September 2017 protective *order* existed. The *Notice of Hearing on Domestic Violence Protective Order* and *Civil Summons Domestic Violence* did not include language threatening Defendant with arrest if he did not appear at the 6 September 2017 hearing; in fact, the *Civil Summons Domestic Violence* did not even contain the date of the hearing. Further, the entrance of the 6 September 2017 DVPO was not a foregone conclusion, even if Defendant did not appear at the hearing. The clerk's office mailed a copy of the 6 September 2017 DVPO on 7 September 2017 to a place where Defendant no longer resided, the same morning Defendant arrived at the victim's apartment.

The Majority cites two unpublished opinions to advance its analysis regarding inferring knowledge to a defendant, but I do not find either to be persuasive. *State v. Hairston*, 227 N.C. App. 226, 741 S.E.2d 928 (2013) (unpublished); *State v. Elder*, 206 N.C. App. 763, 699 S.E.2d 141 (2010) (unpublished), *supra* at 9. *See generally* Hon. Donna S. Stroud, *The Bottom of the Iceberg: Unpublished Opinions*, 37 Campbell L. Rev. 333, 352-54, 356 (2015).

As per *Williams*, the State needed to present evidence of Defendant's knowledge of the 6 September 2017 DVPO's existence; without evidence of Defendant's knowledge of such a fact, the State could not show a knowing violation. *Williams*, 226 N.C. App. at 399, 741 S.E.2d at 14.

However, the State did not provide evidence of Defendant's knowledge of the 6 September 2017 DVPO beyond conjecture and speculation. As a result of the lack of actual evidence showing Defendant's knowledge of the 6 September 2017 DVPO, the only reasonable inference from Defendant saying "I know, I know" in response to the victim's reference to a DVPO's existence would be that it constituted further evidence of Defendant's knowledge of the then expired 28 August 2017 DVPO's existence. Without any evidence to the contrary, it is not reasonable to infer that Defendant knew what he was about to do, namely act in violation of the existing 6 September 2017 DVPO at issue; without such knowledge, he could not knowingly proceed to violate the DVPO. *Id.* at 399, 741 S.E.2d at 14. The lack of evidence of a knowing violation of the 6 September 2017 DVPO required the trial court to grant Defendant's motion to dismiss. The trial court's denial of Defendant's motion to dismiss must be reversed. However, that is not the end of our inquiry in this matter.

B. Plain Error

Defendant argues that the trial court's disjunctive instruction was plain error, because one of the theories of guilt—that Defendant possessed the intent to violate the 6 September 2017 DVPO while in possession of a deadly weapon—was unsupported by the evidence, and the Record does "not indicate which theory the jury relied on[.]"

1. Standard of Review

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding" of the defendant's guilt. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quotations omitted). We "apply the plain error standard of review to unpreserved instructional and evidentiary errors in criminal cases." *State v. Maddux*, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018) (reaffirming the plain error standard from *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334); N.C. R. App. P. 10(a)(4). Plain error review is typically limited to "either (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, 467 S.E.2d 28, 31 (1996). One element of plain error is the alleged error "must seriously affect the fairness, integrity or public reputation of judicial proceedings." *State v. Thompson*, 254 N.C. App. 220, 224, 801 S.E.2d 689, 693 (2017) (internal citation omitted). "[P]lain error is to be applied cautiously and only in the exceptional case." *Maddux*, 371 N.C. at 564, 819 S.E.2d at 371 (quoting *Lawrence*,

365 N.C. at 518, 723 S.E.2d at 334). Although Defendant did not object to the trial court's disjunctive instruction at trial, Defendant argues on appeal that the disjunctive instruction included a theory unsupported by the evidence and amounted to plain error. We review for plain error.

2. Alternative Theory of Guilt

A trial court's instruction containing alternative theories of guilt is plain error when one of the alternative theories "is not supported by the evidence . . . and . . . it cannot be discerned from the [R]ecord upon which theory or theories the jury relied in arriving at its verdict." *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990). A defendant is entitled to a new trial when such error occurs and has a "probable impact on the jury's verdict." *State v. Martinez*, 253 N.C. App. 574, 582, 801 S.E.2d 356, 361 (2017) (emphasis omitted).

In this case, the trial court's instruction to the jury was disjunctive and included one theory not supported by the evidence, namely the theory that Defendant "intended to commit the felony of violation of a domestic violence protective order entered on [6] September [] 2017, while in possession of a deadly weapon." Such a theory required the jury to find Defendant knowingly violated a domestic violence DVPO, specifically the 6 September 2017 DVPO, and the State presented insufficient evidence to support that theory. As discussed in Section A above, this was erroneous.

In addition to the erroneous instruction, the jury returned a guilty verdict that did not specify which theory it relied on in convicting Defendant. In examining the trial court's instruction to the jury, the trial court spent twice as long instructing the jury concerning knowing violation of the 6 September 2017 DVPO (4 paragraphs), with multiple reiterations, as it did instructing the jury regarding assault with a deadly weapon with intent to kill (2 paragraphs). Further, the only applicable verdict sheet included in the Record contained "Guilty of Felonious Breaking or Entering in Violation of a Valid Domestic Violence Protective Order," but did not include any reference to the alternative theory of assault with a deadly weapon with intent to kill referenced by the trial court in its instructions. After examining the Record, and noting the error that allowed the jury to speculate concerning Defendant's knowledge of the 6 September 2017 DVPO, the trial court's disjunctive jury instruction containing one theory unsupported by the evidence was plain error.

C. Sanctions Against the State

In an attempt to bolster its argument concerning Defendant's alleged knowledge of the 6 September 2017 DVPO, the State's brief incorrectly

claims through a false reference to the Record that "the notice also indicated that if Defendant failed to appear that judgment *would be entered* for a Domestic Violence Protective Order ("DVPO") against Defendant as requested by [the victim]" and that the " 'relief demanded by the complaint' *would be granted*." (Emphasis added).

However, the documents accompanying the 28 August 2017 DVPO, and even the 28 August 2017 DVPO itself, did not include language of such certitude communicating that a second, 6 September 2017 DVPO would be entered if Defendant did not attend the 6 September 2017 hearing. The *Civil Summons Domestic Violence* accompanying the 28 August 2017 DVPO included language regarding what Plaintiff would do in the event Defendant did not attend the hearing—"[i]f [Defendant] fail[s] to answer the complaint, the [P]laintiff will *apply* to the Court for the relief demanded in the complaint." (Emphasis added). The *Notice of Hearing on Domestic Violence Protective Order* included language describing the 28 August 2017 DVPO provisions, that a future hearing would occur, and what that future hearing would decide—

> The attached Ex Parte Order has been issued against you. If you violate the Order, you are subject to being held in contempt or being charged with the crime of violating this Ex Parte Order. A hearing will be held before a district court judge at the date, time and location indicated below. At that hearing it will be determined *whether* the Order will be continued.

(Emphasis added). Even the *Notice to Parties* at the bottom of the 28 August 2017 DVPO only included information regarding weapon possession, storage, and return to Defendant, as well as provisions for what Plaintiff could do with the DVPO—make copies; could not change the terms of the DVPO, as only the trial court could change the terms; and contact law enforcement and the Clerk of Court if Defendant violated the DVPO.

The comments quoted above from the State's brief are misleading, and I would sanction the State by imposing triple costs. N.C. R. App. P. 34(a)(3) (2020).

CONCLUSION

The trial court erred when it denied Defendant's motion to dismiss all charges related to the violation of a valid domestic violence protective order issued 6 September 2017. The trial court committed plain error when it gave the disjunctive jury instruction that included a theory

of guilt predicated on Defendant's knowledge of the 6 September 2017 DVPO, which was not supported by the evidence. I concur in part, and in the judgment, but would sanction the State for misleading comments in its brief, and would not rely on or bother to distinguish the two unpublished and nonbinding opinions cited by the Majority.

STATE OF NORTH CAROLINA
v.
MICHAEL EUGENE WRIGHT, DEFENDANT

No. COA19-863

Filed 18 August 2020

1. Larceny—felonious larceny—felonious possession of stolen goods—sufficiency of evidence—value of goods

In a prosecution for felonious larceny and felonious possession of stolen goods, in which defendant was charged with stealing a propane tank, the trial court properly denied defendant's motion to dismiss both charges where the State presented sufficient evidence of the tank's fair market value to send the issue to the jury and place the jury's determination of the tank's value "beyond speculation." Whether excluding the costs of fuel and regulators for the tank (which defendant was not indicted for stealing and, when included, would give the tank a value of $1,300) placed the tank's value below the statutory threshold of $1,000 was a question best left to the jury.

2. Larceny—felonious—jury instruction—stolen property not specified—plain error analysis

In a prosecution for felonious larceny, where defendant was specifically charged with stealing a "propane tank" and where the State presented evidence that the tank, its two regulators, and the propane itself would have a total value of $1,300, the trial court did not commit plain error by instructing the jury—pursuant to the North Carolina Pattern Jury Instructions—to find defendant guilty if it found defendant took and carried away another person's "property" worth more than $1,000. Defendant could not show that the trial court's failure to specify the property stolen prejudiced him because there was sufficient evidence for the jury to find the tank alone was worth over $1,000, and nothing in the record indicated that the jury considered the other items when reaching its verdict.

3. Larceny—sentencing—simultaneous conviction for possession of stolen goods—based on same property

The trial court erred in sentencing defendant for both larceny and possession of stolen goods where both charges involved the same stolen property. Because the trial court consolidated the two charges for judgment, the judgment was vacated and remanded with instructions to arrest the possession of stolen goods charge and enter judgment only upon the larceny charge.

Judge COLLINS concurring in separate opinion.

Judge MURPHY concurring in part and dissenting in part.

Appeal by defendant from judgment entered 26 April 2019 by Judge Carla Archie in Cleveland County Superior Court. Heard in the Court of Appeals 1 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly Randolph, for the State.

Mary McCullers Reece for defendant-appellant.

YOUNG, Judge.

Where the State presented sufficient evidence to permit the jury to determine the value of stolen goods, the trial court did not err in denying defendant's motion to dismiss. Where the jury did not consider alternative theories of guilt not permitted by the indictment, defendant cannot show prejudice, and the trial court did not commit plain error in its jury instruction. Where the trial court sentenced defendant on both the charges of felonious larceny and felonious possession of the goods stolen during the larceny, the trial court erred. We vacate the judgment and remand for arrest of one conviction and resentencing.

I. Factual and Procedural Background

In December of 2017, Jeff Crotts, owner of Knob Creek Orchards, discovered that a 120-gallon propane tank was missing from his property, and reported it to the sheriff's office. On 25 January 2018, Amy Lail, a sergeant with the Cleveland County Sheriff's Office (Sgt. Lail), received information that the missing tank was located on the property of Peggy Hudson Canipe (Canipe), fiancée of Michael Wright (defendant), and that defendant was a suspect in the theft. Shortly after Sgt.

Lail arrived on Canipe's property, defendant himself arrived. Sgt. Lail informed defendant that the tank was stolen, and defendant responded that he had purchased it "many miles" away, and claimed he was able to load the tank into the back of his Chevy Blazer, which Sgt. Lail found "absurd." Sgt. Lail also noted that the tank had been spray-painted, and that the same paint color had been used "in other locations around the house[.]" Nelson Speagle (Speagle), a propane manager with Carolina Energies who serviced the propane tanks at Knob Creek Orchards, was able to identify this tank as the stolen tank by its serial number, and testified that it was valued at "roughly $1,330[.]"

The Cleveland County Grand Jury indicted defendant for felonious larceny and felonious possession of stolen goods, namely a "240lb propane tank" worth $2,000. At the close of the State's evidence, the State moved to amend the indictment to remove the size of the propane tank, and indicate that the value of the propane tank was in excess of $1,000. Defendant did not object, and the trial court allowed the motion. At the close of all the evidence, defendant moved to dismiss based upon insufficient evidence. The trial court denied this motion.

The jury returned verdicts finding defendant guilty of felonious larceny and felonious possession of stolen goods. The trial court consolidated the charges for judgment, and sentenced defendant to a minimum of 20 months and a maximum of 36 months in the custody of the North Carolina Department of Adult Correction.

Defendant appeals.

II. Motion to Dismiss

[1] In his first argument, defendant contends that the trial court erred in denying his motion to dismiss. We disagree.

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most

favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

B. Analysis

The charges of both felonious larceny and felonious possession of stolen goods require, as an essential element of the charge, that the value of the stolen property exceed $1,000. N.C. Gen. Stat. § 14-72(a) (2019). On appeal, however, defendant contends that there was insufficient evidence before the trial court that the stolen tank was worth more than $1,000.

In support of his argument, defendant notes that, when asked to value the tank, Speagle stated that enough propane to fill the tank would be worth $300, and that the two regulators that accompany the tank would be worth $90 each. Combining the costs of the regulators, the fuel, and the tank, Speagle determined that the total value was "probably at $1,300, 1,330-something." However, defendant further notes that, when asked how much fuel was left in the tank, Speagle responded that he didn't "have a clue how much." Moreover, defendant was indicted for stealing a propane tank, not for stealing a propane tank and two regulators. Defendant argues that, removing the $300 for the cost of fuel, plus $180 for the two regulators, Speagle's valuation of roughly $1,300 drops below the $1,000 threshold necessary for a felony charge. As a result, defendant contends that this testimony was insufficient to support convictions for either felonious larceny or felonious possession of stolen goods.

However, the State "is not required to produce 'direct evidence of ... value' to support the conclusion that the stolen property was worth over $1,000.00, provided that the jury is not left to 'speculate as to the value' of the item." *State v. Davis*, 198 N.C. App. 146, 151-52, 678 S.E.2d 709, 714 (2009) (quoting *State v. Holland*, 318 N.C. 602, 610, 350 S.E.2d 56, 61 (1986), *overruled on other grounds*, *State v. Childress*, 321 N.C. 226,, 362 S.E.2d 263 (1987)). Rather, the State is merely required to present some competent evidence of the fair market value of the stolen property, which the jury may then consider.

In *Davis*, the State presented evidence that a stolen Panasonic DVD player had been purchased for over $1,300, that it was in substantially the same condition as when purchased, and that the only Panasonic dealer in the area marketed the same DVD player for over $1,300. This Court held that, viewed in the light most favorable to the State, the reasonable selling price of the DVD player, at the time and place of the

theft and in the condition in which it was when stolen – the measure of fair market value – was over $1,300. *Id.* at 152, 678 S.E.2d at 714. The defendant argued that the DVD player could not be worth over $1,000 because it was not functional without its electronic brain, but this Court held that argument failed, noting that "[t]he State did not have to prove that a DVD player without its brain was worth over $1,000.00, as long as the State provided some evidentiary basis that placed the jury's determination of its value beyond 'speculat[ion].' " *Davis*, 198 N.C. App. at 152, 678 S.E.2d at 714 (quoting *Holland*, 318 N.C. at 610, 350 S.E.2d at 61). We held that the issue of whether the DVD player, without its brain module, was nonetheless worth $1,000 was "properly before the jury for resolution." *Id.* at 153, 678 S.E.2d at 714; *see also State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992) (holding that "[a]ny contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal").

In the instant case, the State presented evidence, namely the testimony of Speagle, that the stolen propane tank was worth $1,300, more than the requisite $1,000 threshold. Whether the absence of fuel or regulators put that valuation below the $1,000 threshold was a question "properly before the jury for resolution," and did not warrant dismissal. In viewing the evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference, the State presented sufficient evidence of the value of the propane tank to take the issue beyond "speculation" and permit its consideration by the jury. Accordingly, we hold that the trial court did not err in denying defendant's motion to dismiss.

III. Jury Instruction

[2] In his second argument, defendant contends that the trial court committed plain error in its jury instructions. We disagree.

A. Standard of Review

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

"Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably

would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. Analysis

The trial court, in its jury instructions, informed the jury that it could find defendant guilty of felonious larceny if it found that defendant "took and carried away another person's property[,]" and that said property "was worth more than $1,000[.]" This instruction was lifted verbatim from the North Carolina Pattern Jury Instructions, N.C.P.I.-Crim 216.10, with the consent of the parties. On appeal, defendant contends that this instruction improperly permitted the jury to find defendant guilty under an alternate theory not charged in the indictment. Because defendant failed to object to this instruction at trial, we review this argument for plain error.

Defendant was initially indicted for the theft and possession of "a 240lb propane tank." Subsequently, the State moved to amend the indictment to remove the size of the propane tank, and the trial court allowed the motion. However, defendant notes that he was not charged with taking any other property aside from the tank itself, and contends that the trial court's overly broad instruction – that defendant carried away "another person's property" instead of "a propane tank" – permitted the jury to find him guilty of felonious larceny based on the value of additional items not included in the indictment. Indeed, our Supreme Court has held that, where instructions permit the jury to convict on grounds other than those charged in the indictment, those instructions are error, and also plain error. *State v. Tucker*, 317 N.C. 532, 536, 346 S.E.2d 417, 420 (1986).

Notwithstanding this rule, however, defendant fails to show that he was in fact prejudiced by this instruction, in that the jury would otherwise have reached a different result. Defendant contends that, had the jury been "specifically instructed to consider the value of the propane tank, they would not have found that the tank alone was worth more than $1,000," and that absent the over-broad instruction, the jury could not have found defendant guilty of felonious larceny. However, as we have held above, this assertion is inaccurate. There was sufficient evidence for the jury to find the value of the propane tank to be in excess of $1,000. Defendant's mere assertion that there was not sufficient evidence of value does not, therefore, establish prejudice. Nor does defendant suggest that he was in fact found guilty of the theft of any property aside from the tank itself; he merely alleges that the tank did not possess the requisite value. Indeed, in reviewing the evidence before the trial

court, we cannot find any reason to assume that the jury based its verdict on any consideration other than the value of the tank alone.

Accordingly, while we recognize that the better practice may have been to designate the specific property taken, we do not agree that defendant has shown that the jury considered, or was permitted to consider, an improper theory based on the instruction given. We therefore hold that the trial court did not err in instructing the jury, pursuant to the Pattern Jury Instructions, that defendant could be found guilty of stealing "property" as opposed to some more specific term.

IV. Sentencing

[3] In his third argument, defendant contends that the trial court erred in sentencing him for both larceny and possession of stolen property. We agree.

A. Standard of Review

"Whether multiple punishments were imposed contrary to legislative intent presents a question of law, reviewed *de novo* by this Court." *State v. Hendricksen*, 257 N.C. App. 345, 809 S.E.2d 391, 393, *review denied*, 371 N.C. 114, 812 S.E.2d 856 (2018).

B. Analysis

Defendant contends, and the State concedes, that it is a violation of legislative intent to convict a defendant of both stealing property and possessing that same property. Indeed, our Supreme Court has held that, while "[l]arceny and possession of property stolen in the larceny are separate crimes[,]" it is inappropriate for the trial court to punish an individual for both when the same property is involved. *State v. Perry*, 305 N.C. 225, 234, 287 S.E.2d 810, 815 (1982), *overruled on other grounds by State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010). Specifically, the Court held that "the Legislature did not intend to punish an individual for larceny of property and the possession of the same property which he stole." *Id.* at 235, 287 S.E.2d at 816. When the trial court enters judgment on both larceny and the possession of property stolen in the larceny, our remedy is to vacate the conviction for the latter. *See State v. Stroud*, 252 N.C. App. 200, 797 S.E.2d 34 (2017). Because the trial court consolidated the two charges for judgment, we therefore vacate the judgment entirely, and remand this matter to the trial court, with instructions to arrest the charge of possession of stolen property and enter judgment only upon the charge of larceny, and to resentence defendant accordingly.

NO ERROR IN PART, NO PLAIN ERROR IN PART, VACATED AND REMANDED IN PART.

Judge COLLINS concurs in separate opinion.

Judge MURPHY concurs in part and dissents in part in separate opinion.

COLLINS, Judge, concurring.

I concur in the majority opinion. I write separately to add additional analysis to the discussion of the second issue involving the jury instruction.

The trial court, in its jury instructions, informed the jury that it could find defendant guilty of felonious larceny if it found that defendant "took and carried away another person's property[,]" and that said property "was worth more than $1,000[.]" On appeal, defendant contends that this instruction was plainly erroneous as it improperly permitted the jury to find defendant guilty under an alternate theory not charged in the indictment.

"It is the rule in this State that the trial court should not give instructions which present to the jury possible theories of conviction which are . . . not charged in the bill of indictment, and that where the indictment for a crime alleges a theory of the crime, the State is held to proof of that theory and the jury is only allowed to convict on that theory." *State v. Litchford*, 78 N.C. App. 722, 727, 338 S.E.2d 575, 578 (1986) (internal quotation marks and citation omitted).

Here, Defendant was initially indicted for the theft and possession of "[a] 240LB propane tank." Subsequently, the State moved to amend the indictment to remove the size of the propane tank, and the trial court allowed the motion. The evidence presented a trial shows that Speagle, a propane manager with Carolina Energies, identified the propane tank by its serial number. Speagle testified that the propane tank "had been sprayed over, camouflaged a little bit" and he called his office to confirm that the propane tank's serial number matched the "serial number connected to" the propane tank stolen from Crotts' labor camp. Speagle then explained how he recovered and removed the tank from the property and that "the value of the tank" was approximately $1330. Through Speagle's testimony, the State established that the propane tank stolen from Crotts was the exact propane tank recovered from the Canipe's

property. The State provided no evidence of any other property that Defendant was alleged to have taken.

While "[t]echnically, it would have been better for the trial court to have charged the jury that it had to find" that Defendant took and carried away a propane tank, "[s]uch a misstatement by the trial court . . . does not amount to submitting to the jury a possible theory of conviction which is neither supported by the evidence nor the indictment." *Id.* at 728, 338 S.E.2d at 579. There is no fatal variance here where both the indictment and the evidence show that Defendant stole a propane tank, the trial court charged the jury that it could find Defendant guilty if he "took and carried away another person's property," and there is no evidence from which the jury could determine that Defendant had stolen property other than a propane tank. *See State v. Pringle*, 204 N.C. App. 562, 567, 694 S.E.2d 505, 508 (2010) (determining "no error, much less plain error," where "the trial court's instruction was in accord with the material allegations in the indictment and the evidence presented at trial"). We discern no plain error in the trial court's instructions on felonious larceny because it cannot be said that the instructional mistake "had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983) (citation omitted).

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

While I concur fully with the improper sentencing under both larceny and possession of stolen property issue, I concur in outcome only as to the jury instruction issue. However, I respectfully dissent as to the Defendant's motion to dismiss. According to the language of the indictment, the jury should only have considered the value of the propane tank in determining if Defendant stole property worth more than $1,000.00, elevating the larceny from a misdemeanor to a felony. Therefore, the evidence of the propane tank's value presented by the State was insufficient to support a conviction of felonious larceny because there was no testimony as to the value of the propane tank alone and the only testimony on value was in reference to the combined value of the propane tank, an unknown amount of propane gas within the tank, the regulator attached to it, and the regulator attached to the building. Further, any determination by the jury as to the value of the propane tank alone would be speculative due to the impossibility of subtracting the value of an unknown amount of propane gas from the combined value to deduce the value of the propane tank.

BACKGROUND

The indictment states, "[t]he jurors for the State upon their oath present that on or about the date of offense shown and in the county named above [Defendant] named above unlawfully, willfully, and feloniously did steal, take and carry away A 240LB PROPANE TANK[.]" The indictment was later properly amended to "a propane tank with a value in excess of a thousand dollars."

At trial, the value of the propane tank was described in many different ways, each time by Nelson Speagle ("Speagle"). Speagle worked as a propane manager for Carolina Energies with almost 19 years of experience at the time of his testimony. Speagle, on behalf of Carolina Energies, had provided propane gas, regulators, and propane tanks to the victim in this case. Speagle estimated the value of the tanks three times, in the following ways:

> [State:] Are you familiar with how much these tanks are worth?
>
> [Speagle:] Right – With the tank *and the gas and regulators*, it's roughly $1,330, somewhere in that ballpark.
>
> [State:] Are you talking about the tanks pertaining to [the victim]?
>
> [Speagle:] Yes.
>
> . . .
>
> [State:] And based on your training and experience and your job duties, were you able to give -- or were you able to come up with a fair market value of how much this tank was?
>
> [Speagle:] Just the tank?
>
> [State:] No. *Total. Everything in it.*
>
> [Speagle:] Total? You're probably at $1,300, 1,330 something.
>
> [State:] And that's *including the regulators* that are on the tank?
>
> [Speagle:] That's the tank, *the regulators*, *and the fuel*.
>
> . . .

> [State:] So just to be clear, it's your opinion that on the date of January 25th the value of the tank that you received was approximately $1,330?
>
> [Speagle:] Yeah.

(Emphasis added). Regarding the regulators and their value, Speagle testified:

> [State:] Okay. And when you noticed this tank, did you notice that the regulators were with it?
>
> [Speagle:] One was and the other wasn't. It was laying, I think, in the yard or on the ground there.
>
> [State:] And normally are these regulators attached to the propane tank?
>
> [Speagle:] We've got one that the regulator attaches to the tank and one regulator that attaches to the house or structure, wherever we put the tank.
>
> [State:] And how much would a regulator cost?
>
> [Speagle:] Roughly $90.

Speagle also testified that he did not know how much propane gas was in the propane tank at the time he retrieved it, and the last time he checked the tank, at an unknown date, it was full. In terms of the value of the propane gas, he testified

> [State:] So would you say that the gas was about $500 worth of gas in this particular tank, or are you just saying that's –
>
> [Speagle:] The gas that was in it fits 96 gallons. You're looking at roughly $300 for gas.

At the close of all evidence, Defendant moved to dismiss all charges, and the trial court denied the motion. Defendant was found guilty of felonious larceny and felonious possession of stolen goods. This Dissent focuses on Defendant's argument that "[t]he trial court erred in failing to dismiss the charges where the evidence of value was insufficient to support convictions for felonious larceny and felonious possession of stolen goods."

ANALYSIS

Although this Dissent focuses only on the issue of whether the State presented sufficient evidence to support a value of more than $1,000.00

justifying a charge of felonious larceny,[1] it is important to clarify that Defendant's indictment includes only the "propane tank." The evidence at trial discussed the combined value of the propane tank, propane gas, and regulators, the value of the regulators, and what the value of the propane gas could be. However, no evidence at trial ever valued the propane tank alone, nor can that value be deduced from the evidence presented at trial.

A. Larceny Indictments

"Generally, the same degree of certainty must be used to describe the goods in indictments for obtaining property by false pretenses as in indictments for larceny." *State v. Ricks*, 244 N.C. App. 742, 752, 781 S.E.2d 637, 643 (2016) (citing *State v. Reese*, 83 N.C. 637, 639 (1880)). "The principle that the item obtained in a false pretense crime and the thing stolen in larceny must be described with the same degree of certainty was reaffirmed in 1915. . . . The item must be described with 'reasonable certainty' and 'by the name or term usually employed to describe it.' " *Id.* at 752, 781 S.E.2d at 644 (quoting *State v. Gibson*, 169 N.C. 318, 85 S.E. 7, 8 (1915)). This principle was once more reaffirmed in 2014 when our Supreme Court stated "[a]dditionally, 'it is the general rule that the thing obtained by the false pretense must be described with reasonable certainty, and by the name or term usually employed to describe it.' " *State v. Jones*, 367 N.C. 299, 307, 758 S.E.2d 345, 351 (2014) (quoting *Gibson*, 169 N.C. at 320, 85 S.E. at 8) (internal alterations omitted).

Applying the same indictment rules regarding the description of goods to larceny and obtaining property by false pretenses, I conclude that when describing the stolen item in indictments for larceny, the item "must be described with reasonable certainty and by the name or term usually employed to describe it." *Ricks*, 244 N.C. App. at 752, 781 S.E.2d at 644 (internal marks and citations omitted). In this case, the indictment only stated "a propane tank." According to our precedent, "propane tank" must refer only to the object that it names or usually describes. *Id.* Obviously, this includes the propane tank in this case. However, nothing in the indictment describes with reasonable certainty the regulators, or the propane gas within the propane tank. Indeed, the term that would normally refer to these items is not "propane tank." In fact, the only terms ever used by the State, the victim in this case, Jeff

1. While Defendant was also found guilty of felonious possession of stolen goods, I will focus on the conviction of felonious larceny because the analysis applies with equal force to both charges because both charges were based on the same evidence and I agree with the parties and the Majority that it was improper to sentence Defendant to both possession of stolen goods and larceny.

Crotts ("Crotts"), Sergeant Amy Lail, and an expert in the field, Speagle, to refer to the regulators were "regulator," or "regulators." The only terms used by the State, Crotts, Speagle, and Defense Counsel to refer to the propane gas were "gas," "fuel," and "propane." Also, throughout the Record there are distinctions made between the tank, the regulators, and the propane gas. The usage of these words throughout the trial demonstrates the usual terms that describe regulators and propane gas are "regulator," and "propane," "gas," or "fuel" respectively.

As a result, the indictment did not charge Defendant with larceny of the two regulators attached to the propane tank or the propane gas within the tank. Instead, it simply charged Defendant with larceny of the propane tank.[2] Based on the indictment, the jury should only have considered the value of the propane tank in determining if the value of the stolen property exceeded $1,000.00, making Defendant guilty of felonious larceny. N.C.G.S. § 14-72(a) (2019). Based on the evidence presented at trial, if we were to calculate the value of the propane tank alone, then we would subtract the value of the two regulators, worth $90.00 each, and the value of the propane gas, worth somewhere between $0.01 and $300.00, from the combined value testified to by Speagle, $1,330.00. This is the same as subtracting somewhere between $0.01 and $300.00 from $1,150.00, which would leave us with a value for the propane tank alone being somewhere between $850.00 and $1,149.99. However, this is not the end of the inquiry as to the validity of Defendant's convictions.

B. The Motion to Dismiss

1. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

2. General Principles

Defendant argues that the trial court erred in not granting his motion to dismiss for insufficient evidence. Specifically, he argues the State

2. Making legal distinctions between an object and an item attached to it is not novel. Our Supreme Court similarly distinguished between an item and its attachment in *State v. Greene*, 289 N.C. 578, 223 S.E.2d 365, (1976). In *Greene*, our Supreme Court held that, although the defendant was found in possession of a set of disk boggs that had been attached to a tractor, the doctrine of recent possession did not extend to the tractor that the disk boggs had been attached to in part because of its ability to be removed from the tractor. *Id.* at 581-583, 223 S.E.2d at 367-369. Although the issue before us is not governed by the doctrine of recent possession, *Greene* supports making a legal distinction between an attachment and the item it was attached to. The logic underlying this distinction is equally applicable to an object and its contents when those contents are typically removed and replaced.

failed to present sufficient evidence to establish the propane tank had a value exceeding $1,000.00 as required in charges of felonious larceny and felonious possession of stolen goods. N.C.G.S. § 14-72(a) (2019). No other element of the crime is challenged.

> Upon [D]efendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [D]efendant's being the perpetrator of such offense. If so, the motion is properly denied. . . .
>
> *If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense* or the identity of the defendant as the perpetrator of it, *the motion should be allowed.* . . . This is true even though the suspicion so aroused by the evidence is strong. . . .
>
> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion. . . .
>
> The test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both. . . . When the motion calls into question the sufficiency of circumstantial evidence, the question for the Court is whether a reasonable inference of [D]efendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.

State v. Powell, 299 N.C. 95, 98-99, 261 S.E.2d 114, 117 (1980) (internal citations and marks omitted) (emphasis added).

Here, the only relevant essential element of felonious larceny relates to the value of the property stolen. "Larceny of goods of the value of more than one thousand dollars ($1,000[.00]) is a Class H felony." N.C.G.S. § 14-72(a) (2019).

3. *State v. Davis* and *State v. Parker*

Relying on *State v. Davis*, the Majority holds that the State presented sufficient evidence of value to withstand Defendant's motion to dismiss. *State v. Davis*, 198 N.C. App. 146, 678 S.E.2d 709 (2009). The Majority relies on *Davis* to reach the conclusion that Defendant's motion to dismiss was properly denied because "the State presented evidence, namely the testimony of Speagle, that the stolen propane tank was worth $1,300[.00], more than the requisite $1,000[.00] threshold. Whether the absence of fuel or regulators put that valuation below the $1,000[.00] threshold was a question 'properly before the jury for resolution,' and did not warrant dismissal." *Supra* at 6. The Majority bases this conclusion on the proposition from *Davis* that the State "is not required to produce 'direct evidence of . . . value,' provided that the jury is not left to 'speculate as to the value' of the item." *Id.* at 151-52, 678 S.E.2d at 714 (quoting *State v. Holland*, 318 N.C. 602, 610, 350 S.E.2d 56, 61 (1986) *overruled on other grounds*, *State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987))). The Majority's reliance on *Davis* is misplaced.[3]

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3. Our Supreme Court will not be bound by *Davis*. *State v. Alonzo*, 373 N.C. 437, 440, 838 S.E.2d 354, 356 (2020) ("We are not bound by the Court of Appeals' decision in *Lark*"). Therefore, while not critical to the proper outcome, I include this observation of *Davis* insofar as it misapplied *Holland* and our prior decision in *Parker*. In *Davis*, we held "the jury could have reasonably concluded that the value of the DVD player deck [the] defendant possessed was worth over $1,000.00 based on [the vendor's] testimony that the entire system retails in his store for over $1,300.00." *Davis*, 198 N.C. App. at 152, 675 S.E.2d at 714. We even went on to say "the jury could have reasonably concluded that the DVD player was worth $1,300.00 and was merely missing a necessary component, similar to a car missing its engine or a watch missing its batteries." *Id.* at 153, 678 S.E.2d at 715. It is unclear to me how a jury could do anything other than speculate as to the value of a used, non-functional half of a two-part system if the only information it had before it regarding value was that a new, fully-functional complete system was worth $1,300.00. Additionally, it is unclear how it could ever be reasonable for a jury to find that the fair market value of a non-functioning item without its other essential component could remain the same as the fully-functional item with both components. *Davis* is even more clearly illogical when it is applied to what we claimed was similar to the facts of *Davis*—a car missing its engine. *Id.* The *Davis* holding would suggest that it is reasonable for a jury to conclude that a new car worth $25,000.00 was worth the same as a car in "like-new condition" that is "merely . . . missing its engine." *Id.* at 152-153, 678 S.E.2d at 714-715.

Additionally, *Davis* holds that "[t]he State is not required to produce 'direct evidence of . . . value' to support the conclusion that the stolen property was worth over $[]1,000.00, provided that the jury is not left to 'speculate as to the value' of the item." *Id.* at 151-152, 678 S.E.2d at 714, (quoting *Holland*, 318 N.C. at 610, 350 S.E.2d at 61). This paraphrasing of *Holland* was not an accurate representation of the cited language's meaning. In context, the full language referred to is:

> Although the State offered *no direct evidence of the Cordoba's value*, there is in the record evidence tending to show that the victim owned two automobiles and that the 1975 Chrysler Cordoba was his favorite

The Majority's reliance on *Davis* is misplaced because the proposition cited to support its conclusion that the State presented sufficient evidence, by its own terms, does not apply here. That proposition is only appropriately applied when "the jury is not left to 'speculate as to the value' of the item." *Id.* (quoting *Holland*, 318 N.C. at 610, 350 S.E.2d at 61). This is precisely the situation we have here. To determine the value of the propane tank, the jury would have to determine the value of the propane gas within the propane tank when it was picked up by Speagle, and then subtract it and the value of the regulators from $1,330.00. Since the regulators were worth $180.00 and there was no evidence presented of how much propane gas was in the propane tank, the jury necessarily had to speculate as to whether the propane tank had a value as low as $850.00 or as high as $1,149.99. This is particularly significant because to be convicted of felonious larceny the required value of the stolen property must be greater than $1,000.00. The jury was asked to blindly guess how much gas was in the tank to determine the value of the propane tank.

Davis also inaccurately describes *State v. Parker*. *Davis* states that in *Parker* "the State produced no evidence at all of the value of the stolen property." *Id.* at 152, 678 S.E.2d at 714. Upon further reading of *Parker*, the State presented evidence about the value of all of the victims' stolen items, including those that were alleged to be stolen by the defendant and some that were not, the resale value of some of the items

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> one of which he took especially good care, always keeping it parked under a shed, and that a picture of this automobile was exhibited to the jury for the purpose of establishing the location of the automobile when discovered after its theft. The State contends that this evidence is sufficient to support the jury's finding that the automobile's value at the time of the theft exceeded four hundred dollars. We are not convinced and find that the substantiality of the evidence is insufficient for presentation of the issue of value to the jury. *The jury may not speculate as to the value.* Although the trial court properly instructed the jury as to the difference between misdemeanor and felony possession, the evidence was not such as would justify the jury in finding that the value of the Cordoba exceeded four hundred dollars.

Holland, 318 N.C. at 610, 350 S.E.2d at 61 (emphasis added). In context, it is clear that our Supreme Court in *Holland* was not holding "[t]he State is not required to produce 'direct evidence of . . . value' to support the conclusion that the stolen property was worth over $[]1,000.00," but was instead simply rejecting the State's argument that the indirect evidence presented was sufficient evidence of value to justify submitting the issue to the jury. *Davis*, 198 N.C. App. at 151-152, 678 S.E.2d at 714. In fact, the first time such a reading of *Holland* occurred was in *Davis*. I would encourage our Supreme Court to overrule *Davis*. *Routten v. Routten*, 843 S.E.2d 154, 158-159 (N.C. 2020) ("However, the *Moore* court misapplied our decision in *Petersen*. . . . We also expressly overrule *Moore v. Moore*").

alleged to be stolen by the defendant, and the amount of money loaned to the defendant when he traded stolen items with a pawn store. *State v. Parker*, 146 N.C. App. 715, 716, 555 S.E.2d 609, 610 (2001). In *Parker*, when discussing *Holland* and applying it to the facts of the case, we said:

> [O]ur Supreme Court vacated the defendant's conviction for felonious possession of stolen property where the State failed to present direct evidence of the value of the stolen vehicle. There, the State presented evidence tending to show that the vehicle was a 1975 Chrysler Cordoba; it was the owner's favorite vehicle and he took especially good care of it; and the owner always parked the vehicle under a shed. [Citing *Holland*]. The State also introduced a photograph of the vehicle.
>
> The State maintained that such evidence was sufficient to establish the value of the vehicle exceeded $400.00, the statutory minimum applicable at that time. *Id.* The Supreme Court rejected the argument, stating that "the substantiality of the evidence is insufficient for presentation of the issue of value to the jury. *The jury may not speculate as to the value*." *Id.* It concluded that such evidence "was not such as would justify the jury in finding that the value of the Cordoba exceeded four hundred dollars." *Id.* The court therefore vacated the defendant's conviction for felonious possession of stolen property and remanded for pronouncement of a judgment of guilty of misdemeanor possession of stolen property and for resentencing. *Id.*
>
> In this case, the State likewise failed to introduce sufficient evidence of the value of the stolen goods in [the] defendant's possession. The trial court instructed the jury that [the] defendant's charge was based upon his possession of "a Magnavox VCR, cameras, and photography equipment." Although Goodman testified that the total estimated value of all stolen items was $5,000.00, there is simply no evidence regarding the total value of the items contained in the trial court's charge. The only evidence relating to these items was Hayes' testimony that she loaned [the] defendant $40.00 for a Magnavox VCR based on her estimate that she could resell it for $80.00, and Mitchell's testimony that she loaned [the] defendant $80.00 for two cameras and some photography equipment. Such evidence is not

> sufficient evidence from which a jury could determine to any certainty the value of the VCR, cameras, and photography equipment. The jury must not be left to speculate about the value of these items. *See Holland*, 318 N.C. at 610, 350 S.E.2d at 61. We therefore vacate [the] defendant's conviction for felonious possession of stolen property in 99CRS011124. We remand that matter to the trial court for entry of a judgment of guilty of misdemeanor possession of stolen property, and for re-sentencing accordingly.

Id. at 717-718, 555 S.E.2d at 610-611 (emphasis added).

Parker is controlling here, and, based on *Parker*, the trial court should have granted Defendant's motion to dismiss. In *Parker*, "[the d]efendant was charged with [and convicted of] felonious possession of stolen property . . . [b]ased on his pawning of [some of] the stolen goods." *Id.* at 716, 555 S.E.2d at 610. The defendant challenged the conviction for felonious possession of stolen goods and "argue[d] the State failed to present evidence from which the jury could conclude the value of the items stolen by [the] defendant was over $1,000.00." *Id.* at 717, 555 S.E.2d at 610. At trial in *Parker*, the State introduced evidence regarding the value of all items stolen from the property owners; however, the defendant was only charged with having stolen some of the missing property and "there [was] simply no evidence regarding the total value of the items contained in the trial court's charge." *Id.* at 718, 555 S.E.2d at 611. Although there was some testimony as to the value of the items the defendant was charged with stealing, "[t]he only evidence relating to these items was [a witness's] testimony that she loaned [the] defendant $40.00 for a Magnavox VCR based on her estimate that she could resell it for $80.00, and [another witness's] testimony that she loaned [the] defendant $80.00 for two cameras and some photography equipment." *Id.* Relying on *Holland*, we held that "[s]uch evidence [was] not sufficient evidence from which a jury could determine to any certainty the value of the [property the defendant was charged with stealing]. The jury must not be left to speculate about the value of these items." *Id.* (citing *Holland*, 318 N.C. at 610, 350 S.E.2d at 61). We then "vacate[d the] defendant's conviction for felonious possession of stolen property . . . [and] remand[ed] . . . for entry of a judgment of guilty of misdemeanor possession of stolen property, and for re-sentencing accordingly." *Id.* (citing *Holland*, 318 N.C. at 610, 350 S.E.2d at 61).

4. Application to These Facts

Applying the general principles controlling motions to dismiss, and applying *Parker* to this case, there was insufficient evidence of value to

submit the issue to the jury. I would vacate Defendant's conviction for felonious larceny and felonious possession of stolen goods, and remand for entry of judgment of misdemeanor larceny or possession of stolen goods and resentencing accordingly.

a. The Combined Value of the Propane Tank, Propane Gas, and Two Regulators

In the light most favorable to the State, the value of the propane tank, the two regulators, and any propane gas within the tank was $1,330.00. Speagle provided an estimate of the value of these items three times. Although Speagle provided a range of values from $1,300.00-$1,330.00 the second time he estimated the combined value of these three items, his initial and ultimate valuations were that these items together were worth $1,330.00. Viewing this evidence in the light most favorable to the State, we must take the higher values given as opposed to the lower values, leaving us with $1,330.00 as the combined value of the propane tank, any propane gas within the tank, and the two regulators.[4]

Although the combined value of the propane tank, the propane gas within it, and the regulators is $1,330.00, as stated above, Defendant was only charged with larceny of the propane tank. The only value the trial court could have properly considered to determine the motion to dismiss as to the felony enhancement of larceny was the value of the propane tank alone. To find the value of the propane tank, we must subtract Speagle's estimated value of the two regulators and propane gas from his testimony of their $1,330.00 combined value.

b. The Value of the Propane Tank without the Regulators and Propane Gas

According to Speagle's testimony, the value of each regulator was $90.00. One regulator was attached to the propane tank while another was attached to the building, meaning the total value of the regulators was $180.00. Additionally, it is clear that Speagle's valuation of $1,330.00 included both regulators, as he twice stated "regulators" when he described what he was including in his valuation. When the value of the two regulators ($180.00) is removed from the value provided by Speagle for everything ($1,330.00), we find that the value of the propane tank and any propane gas within the tank was $1,150.00.

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4. I come to this conclusion based only on logical reasoning and application of our general jurisprudence as my exhaustive research has discovered no applicable case-law regarding the issue of how the light most favorable standard interacts with ranges of values.

At the time the propane tank was stolen, there was up to $300.00 worth of propane gas in the tank. However, we cannot assume that Speagle was approximating the value of the propane tank absent any propane gas. Speagle consistently included the "gas" or "fuel" when he described what he was including in calculating his value of $1,330.00. Speagle's estimate included the value of an unclear amount of gas, with a maximum value of $300.00. There was no evidence presented as to how much gas Speagle was including in his estimate of the combined value of the propane tank, propane gas, and regulators. Although he was basing his valuation on the assumption there was gas within the propane tank when he identified it at and removed it from Defendant's residence, he explicitly stated "I don't have a clue how much [fuel was in the propane tank]." Any decision as to how much gas there was in the tank and its corresponding value is entirely speculative, and the jury could not have properly decided this value in calculating the value of the tank without the fuel.

That being said, to recreate the jury's only legally acceptable path to deducing the value of the propane tank, we are faced with the impossible task of determining the value of an unknown amount of gas, ranging from $0.01-$300.00. The amount of propane gas that the jury determined to be within the propane tank was dispositive of whether Defendant was convicted of felonious or misdemeanor larceny because after removing the value of the regulators the value of the propane tank and the propane gas within it was $1,150.00. If the jury were to determine the propane gas was worth anywhere between $0.01-$149.99, then when it would have removed this value it would have been left with a value exceeding $1,000.00 for the propane tank, satisfying the requirement of felonious larceny; however, if the jury were to determine the propane gas was worth anywhere between $150.00-$300.00, then when it would have removed this value it would have been left with a value of $1,000.00 or less for the propane tank satisfying only the requirement of misdemeanor larceny. This impossible task is the exact hurdle required of the jury in this case if it was to properly determine the value of the tank alone from the testimony presented at trial, and it is the type of speculation that the law prohibits.

Like in *Parker*, in this case there is an estimate of multiple items of stolen property—a propane tank, the regulators, and the propane gas within it—not all of which Defendant was charged with stealing, but "there is simply no evidence regarding the . . . value of the" item Defendant was charged with stealing, the propane tank. *Parker*, 146 N.C. App. at 718, 555 S.E.2d at 611. Although there is testimony on the value

of the regulators, and the maximum potential value of the propane gas, it is impossible to extrapolate the value of the propane tank from this testimony because there is nothing in the Record to suggest how much propane gas was being included in Speagle's combined estimate of the propane tank, the propane gas, and the regulators. This evidence "is sufficient only to raise a suspicion or conjecture as to . . . the commission of" felonious larceny because any determination of how much propane gas was in the tank for the purposes of the estimate would be conjecture, and thus any corresponding determination of the value of the propane tank would also be conjecture. *Powell*, 299 N.C. at 98, 261 S.E.2d at 117. Here, like in *Parker*, there was no evidence for the jury to determine "to any certainty the value of the" propane tank that Defendant was charged with stealing, and allowing the jury to speculate about the value of the propane tank was improper. *Parker*, 146 N.C. App. at 718, 555 S.E.2d at 611. The trial court should have granted Defendant's motion to dismiss as to the charge of felonious larceny and felonious possession of stolen goods. I would vacate the conviction for felonious larceny and felonious possession of stolen goods and remand for entry of judgment for misdemeanor larceny or misdemeanor possession of stolen goods and resentencing accordingly.

CONCLUSION

The indictment here only refers to the "propane tank," so only the value of the propane tank is considered to determine if Defendant should have been convicted of felonious or misdemeanor larceny. The State presented evidence that required the jury to speculate as to the value of the propane tank. It was impossible to determine, and therefore impossible to remove without speculation, the value of the propane gas included in the combined estimate of the propane tank, any propane gas within the tank, and the regulators attached to the tank and the building. When the evidence requires the jury to speculate as to the value of stolen property, a motion to dismiss should be granted. Therefore, the trial court erred in not granting Defendant's motion to dismiss as to felonious larceny and felonious possession of stolen goods, and we should vacate Defendant's felonious larceny charge and remand for entry of judgment for misdemeanor larceny or misdemeanor possession of stolen goods and resentencing accordingly.

Were we to vacate the conviction for felonious larceny and remand for entry of judgment for misdemeanor larceny or misdemeanor possession of stolen goods and resentencing, the second issue raised by Defendant would be moot, as any error in failing to instruct the jury that the propane tank must have been shown to be worth more than

$1,000.00 for the purposes of felonious larceny would have no effect. Finally, as to the erroneous sentencing under both larceny and possession of stolen goods, I concur with the Majority.

KEITH WILLIAMS, CEO/DIRECTOR, SOUTHEASTERN PUBLIC SAFETY GROUP, INC., PLAINTIFF

v.

NORTH CAROLINA DEPARTMENT OF JUSTICE, CRIMINAL STANDARDS DIVISION, DEFENDANT

No. COA19-1031

Filed 18 August 2020

Tort Claims Act—negligent interference with contract—failure to state a claim

Plaintiff's claim for negligent interference with a contract was properly dismissed by the Industrial Commission for a failure to state a claim—not for lack of subject matter jurisdiction—because negligent interference with a contract is not a tort recognized in North Carolina. Because the dismissal of plaintiff's claim was upheld on appeal, plaintiff's argument that the Commission relied too heavily on plaintiff's Form T-1 affidavit became moot.

Appeal by Plaintiff from an Order filed 18 June 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 April 2020.

Ian Morris for plaintiff-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Kenzie M. Rakes, for defendant-appellee.

MURPHY, Judge.

The State Tort Claims Act authorizes the Industrial Commission to hear claims arising as a result of the negligence of any agent of the State within the scope of their employment. Where the Industrial Commission does not dismiss a claim for lack of subject matter jurisdiction, but instead for failure to state a claim upon which relief may be granted, we affirm when the claim is not a recognized form of negligence.

There is neither a statute nor caselaw in North Carolina which would support Plaintiff's claim for negligent interference with a contract. In 1914, our Supreme Court held a party to a contract who is injured by the negligence of a third party cannot recover damages from that third party. North Carolina caselaw does not support Plaintiff's request that we recognize the tort of negligent interference with a contract. Further, since we are an error-correcting court, it is not our role to expand the law. The claim for negligent interference with a contract was properly dismissed for failure to state a claim upon which relief may be granted. We affirm.

BACKGROUND

Southeastern Public Safety Group, Inc. ("Southeastern") is a North Carolina corporation and certified company police agency. On 31 March 2015, Southeastern became certified to provide law enforcement services to the North Carolina Department of Transportation. On 19 July 2016, Southeastern won a bid to provide law enforcement services for traffic control to Sugar Creek Construction ("SCC"). The contract required traffic control by a law enforcement agency in an active work zone.

On 7 April 2017, Southeastern's Chief Executive, Keith Williams ("Williams"), was contacted by Morgan Powell of the Federal Highway Administration. Powell was in contact with Randy Munn ("Munn"), an official representative of the North Carolina Department of Justice ("the NCDOJ"). Powell contacted Williams by forwarding a message from Munn, where Munn requested information on Williams's "certification as a company police agency." Williams complied. Munn later forwarded Williams an email from the Assistant Attorney General, informing Williams that his work for SCC was in violation of N.C.G.S. § 74E ("the Company Police Act") and Southeastern must stop work on the contract immediately.

On 18 December 2017, Williams, in his official capacity and on behalf of Southeastern, filed a North Carolina Industrial Commission ("NCIC") Form T-1[1] ("T-1 Affidavit")for a claim of damages under the Tort Claims Act. Williams made claims of work stoppage attributed to the NCDOJ in its failure to administrate the Company Police Act. The T-1 Affidavit further alleged the administrative stoppage prevented the business from providing police services as contracted and caused severe economic loss.

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1. The T-1 Affidavit is a form the NCIC requires a claimant to file in order to enter the case onto its hearing docket.

The NCDOJ filed a Motion to Dismiss on 21 February 2018, pursuant to Rule 12(b)(6) for failure to state a claim and Rule 12(b)(1), (2), and (6) for lack of subject matter jurisdiction over intentional tort and/or constitutional rights violations. Williams moved to amend the complaint on 6 March 2018 to include additional causes of action based on "negligent infliction of economic loss" due to breaches of duty to investigate and duty to inform.

On 30 May 2018, the Deputy Commissioner entered an order ("the 30 May 2018 Order") dismissing Williams's claims with prejudice under Rule 12(b)(1) due to lack of subject matter jurisdiction of the NCIC to handle claims of alleged intentional tort or constitutional rights violations and breach of contract actions. A notice of appeal and application for review to the Full Commission was submitted by Williams on 14 June 2018. Williams argued "[t]he claim was and still is that [the NCDOJ] negligently inflicted economic harm to Southeastern by failing to thoroughly administer, supervise, investigate, inform and protect Southeastern." Further, Williams argued "[w]hile some of the alleged actions of . . . Munn were intentional actions, they could just as easily be attributed to misfeasance, inaction, poor supervision, or outright incompetence."

The Full Commission's order ("the Order") affirmed the 30 May 2018 Order. The Full Commission held "[Williams's] Affidavit and *Motion to Amend Complaint* include allegations of constitutional violations, breach of contract claims, and intentional torts, including tortious interference with a contract. Said claims are outside of the [NCIC]'s jurisdiction and, as such, are subject to dismissal." The Order further concluded that "[t]o the extent [Williams] has remaining purported negligence claims, including negligent tortious interference with a contract, they are not recognized claims under which relief can be granted under North Carolina law and are subject to dismissal under Rule 12(b)(6)." Williams timely appealed on 17 July 2019.

ANALYSIS

A. Standard of Review

> The standard of review for an appeal from the Full Commission's decision under the Tort Claims Act 'shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them.'

Simmons ex rel Simmons v. Columbus Cnty. Bd. of Educ., 171 N.C. App. 725, 727-28, 615 S.E.2d 69, 72 (2005) (quoting N.C.G.S. § 143-293 (2003)).

"Under the Tort Claims Act, when considering an appeal from the [Full] Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the [Full] Commission's findings of fact, and (2) whether the [Full] Commission's findings of fact justify its conclusions of law and decision." *Fennell v. N.C. Dep't of Crime Control & Pub. Safety*, 145 N.C. App. 584, 589, 551 S.E.2d 486, 490 (2001).

"[T]he North Carolina Rules of Civil Procedure apply in tort claims before the Commission, to the extent that such rules are not inconsistent with the Tort Claims Act, in which case the Tort Claims Act controls." *Pate v. N.C. Dep't of Transp.*, 176 N.C. App. 530, 533, 626 S.E.2d 661, 664 (2006); N.C.G.S. § 143-300 (2019).

1. Dismissal for Lack of Subject Matter Jurisdiction

The NCIC is "a court for the purpose of hearing and passing upon tort claims against . . . institutions and agencies of the State." N.C.G.S. § 143-291 (2019).

> The [NCIC] shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

Id. "It is well-settled that the Tort Claims Act does not permit recovery for intentional injuries. Only claims for negligence are covered." *Fennell*, 145 N.C. App. at 592, 551 S.E.2d at 492 (internal citations omitted); N.C.G.S. § 143-291 (2019).

"Every defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter." N.C.G.S. § 1A-1, Rule 12(b)(1) (2019). "Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). "The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85-86 (1986).

"It is a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would

otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver, or estoppel." *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

"When the record shows a lack of jurisdiction in the lower court, the appropriate action . . . is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981). "When the record is silent and the appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed." *Id.*

2. Dismissal for Failure to State a Claim

"Every defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (6) Failure to state a claim upon which relief can be granted." N.C.G.S. § 1A-1, Rule 12(b)(6) (2019).

> The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

Henderson v. Charlotte-Mecklenburg Bd. of Educ., 253 N.C. App. 416, 419, 801 S.E.2d 145, 148 (2017).

Dismissal is proper when one of the following three conditions is satisfied: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). "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." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

B. Subject Matter Jurisdiction

The Order dismissed Williams's negligence claims, "including negligent tortious interference with [a] contract," under Rule 12(b)(6). The

non-negligence claims were dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction.

Williams argues the Full Commission erred in finding that his complaint was based on some intentional tort and not the negligent supervision, administration, and investigation of Southeastern by Munn and the NCDOJ. Williams argues the Full Commission has jurisdiction over claims that arise from the negligence of any agent of the State while acting within the scope of his employment. Williams argues the NCDOJ ordered it to cease work on its contract with SCC, and as a result it "suffered personal, economic injury." Further, Williams argues Munn was not intentionally injuring Williams, but rather this injury was the result of Munn's negligence. Williams asks us to conclude the Full Commission does have subject matter jurisdiction.

"The State Tort Claims Act authorizes the [NCIC] to entertain claims arising as a result of a negligent act of any officer, employee, involuntary servant, or agent of the State while acting within the scope of his office, employment, service, agency, or authority[.]" *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 536, 299 S.E.2d 618, 626 (1983); N.C.G.S. § 143-291 (2019). "Waiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity . . . must be strictly construed." *Guthrie*, 307 N.C. at 537-38, 299 S.E.2d at 627.

> Suits against the State, its agencies and its officers for alleged tortious acts can be maintained only to the extent authorized by the Tort Claims Act, . . . and that Act authorizes recovery only for negligent torts. Intentional torts . . . are not compensable under the Tort Claims Act.

Wojsko v. State, 47 N.C. App. 605, 610, 267 S.E.2d 708, 711 (1980); *see also* N.C.G.S. § 143-291 (2019).

The Order dismissed the claim of "negligent tortious interference with a contract" under Rule 12(b)(6). The Full Commission acknowledged the motion to dismiss under Rules 12(b)(1) and 12(b)(6), but chose to dismiss the negligence claim under Rule 12(b)(6). The Full Commission did not dismiss the negligence claim for lack of subject matter jurisdiction, but instead for failure to state a claim upon which relief may be granted. Therefore, this claim was properly dismissed. While the Full Commission dismissed the non-negligence claims under Rule 12(b)(1), it did not order that it lacked jurisdiction to decide a negligence claim.

The Full Commission did not err in dismissing Williams's claim of negligent interference with a contract because the claim was dismissed

for failure to state a claim upon which relief may be granted, not for lack of subject matter jurisdiction.

C. Failure to State a Claim

Williams next argues the Full Commission erred in finding no claim was alleged because Williams established the NCDOJ had a duty to administer, supervise, investigate, and inform company police agencies and failed to do so. Williams argues the claim was and still is that the NCDOJ negligently stopped it from working in contract with SCC, thus the NCDOJ breached their duty under the Company Police Act. Further, Williams argues the NCDOJ was not seeking to intentionally injure the contract, but the NCDOJ was the actual and proximate cause of Williams's injury and inability to complete the contract.

"A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint by presenting 'the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some [recognized] legal theory.' " *Forsyth Mem'l Hosp., Inc. v. Armstrong World Indus. Inc.*, 336 N.C. 438, 442, 444 S.E.2d 423, 425-26 (1994) (quoting *Lynn v. Overlook Dev.*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991)). Dismissal is proper under Rule 12(b)(6) when "the complaint on its face reveals that no law supports the plaintiff's claim." *Wood*, 355 N.C. at 166, 558 S.E.2d at 494.

This appeal is bound by the jurisdictional requirements of the Tort Claims Act, and therefore any claim must be based in negligence. "Under the Tort Claims Act, jurisdiction is vested in the [NCIC] to hear claims against the State of North Carolina for personal injuries sustained by any person as a result of the negligence of a State employee while acting within the scope of his employment." *Guthrie*, 307 N.C. at 536, 299 S.E.2d at 626.

There is neither a statute nor any caselaw supporting Williams's claim for negligent interference with a contract. North Carolina recognizes a claim for tortious interference with a contract. *See Beck v. City of Durham*, 154 N.C. App. 221, 231-232, 573 S.E.2d 183, 191 (2002). However, our Supreme Court has declined to recognize negligent interference with a contract. *See generally Thompson v. Seaboard Air Line Ry.*, 165 N.C. 377, 81 S.E. 315 (1914).

In *Thompson v. Seaboard Air Line Ry.*, a lumber company contracted with the plaintiff to cut and saw timber. *Thompson*, 165 N.C. at 378, 81 S.E. at 316. The plaintiff brought an action against a railway company after a fire ignited by sparks from a train engine destroyed a

portion of a timber lot where the plaintiff was working. *Id.* Evidence showed that the fire destroyed groceries, provisions, and shacks owned by the plaintiff. *Id.* The Supreme Court noted that "no recovery can be had for an indirect, unintended injury to one arising from a tort to another." *Id.* at 379, 81 S.E. at 316.

> Where, however, by the willful tort of a third person, one of two contracting parties is disabled from performing his contract, the wrong having been committed with *intent* to injure the other, it has been held that the latter may recover from the tort feasor in damages. But *unless the wrong is done with a willful intent to injure the complaining party, the latter cannot recover.*

Id. (emphasis added) (internal alterations omitted). While *Thompson* is not an express rejection of a negligent interference with a contract cause of action, it is an implicit rejection. Presented with the opportunity to recognize such a cause of action, our Supreme Court demurred and instead cited approvingly authority holding the injury too attenuated from the wrongdoing to merit recognition of a claim based on inability to perform a contract due to a third party's negligence. *Id.* at 380, 81 S.E. at 316 (citing *Byrd v. English*, 117 Ga. 191, 43 S.E. 419 (1903)).

In *Thompson*, our Supreme Court cited *Byrd v. English* to support the application of the principle that "unless the wrong is done with a willful intent to injure the complaining party, the latter cannot recover." *Thompson*, 165 N.C. at 379-380, 81 S.E. at 316. *Byrd* is a case from the Supreme Court of Georgia that is analogous to the present situation where Williams is claiming negligent interference with a contract, and given our Supreme Court's reliance on the same, we consider it here.

> According to this petition, the damage done by them was to the property of the Georgia Electric Light Company, who were under contract to the plaintiff to furnish him with electric power, and the resulting damage done to the plaintiff was that it was rendered impossible for that company to comply with its contract. If the plaintiff can recover of these defendants upon this cause of action, then a customer of his, who was injured by the delay occasioned by the stopping of his work, could also recover from them, and one who had been damaged through his delay could in turn hold them liable, and so on without limit to the number of persons who might recover on account of the injury done to the property of the company owning the conduits. To state such a proposition is to demonstrate its absurdity.

Byrd v. English, 117 Ga. 191, 193-94, 43 S.E. 419, 420 (1903). *Byrd* held a party to a contract, who is injured by reason of the failure of the other party to comply with its terms, cannot recover damages of a third person, a wrongdoer, whose negligence rendered the performance of the contract impossible. *See id.*

Here, Williams's claim is analogous to the situation in *Byrd*. Williams argues the NDDOJ negligently stopped Southeastern from working in contract with SCC, breaching its duty under the Company Police Act. Further, Williams argues the NCDOJ was the actual and proximate cause of Southeastern's injury and inability to complete the contract with SCC. Therefore, Williams is arguing the NCDOJ, a third party, was negligent and rendered the performance of the contract impossible. However, the courts in *Byrd* and *Thompson* held a party to a contract who is injured by the negligence of a third party cannot recover damages from that third party. As a result, North Carolina caselaw does not support Williams's request that we recognize the tort of negligent interference with a contract.

Even if negligent interference with a contract was an issue of first impression as Williams states, and it has not been barred from recognition by our Supreme Court, it would not be our role to expand the law in a way to create such a cause of action. "This Court is an error-correcting court, not a law-making court." *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 219 N.C. App. 117, 127, 723 S.E.2d 352, 358 (2012). We are "not in the position to expand the law. Rather, such considerations must be presented to our Supreme Court or our Legislature, who have the power to rectify any inequities . . . ." *Id.* at 126, 723 S.E.2d at 358. It would be the role of the General Assembly or our Supreme Court to expand the law to create a cause of action for negligent interference with a contract.

"[T]he Tort Claims Act . . . waive[s] the sovereign immunity of the State in those instances in which injury is caused by the negligence of a State employee and the injured person is not guilty of contributory negligence, giving the injured party the same right to sue as any other litigant." *Guthrie*, 307 N.C. at 535, 299 S.E.2d at 625. Since the Tort Claims Act is in derogation of sovereign immunity it must be strictly construed, and its terms must be strictly adhered to. *Etheridge v. Graham*, 14 N.C. App. 551, 554, 188 S.E.2d 551, 553 (1972); *Watson v. N.C. Dep't of Corr.*, 47 N.C. App. 718, 722, 268 S.E.2d 546, 549 (1980). As a result, even if it were in our power to expand the law, we would not expand the Tort Claims Act to include an unrecognized claim when sovereign immunity has not been waived with the knowledge of the creation of a new tort.

Williams failed to state a claim for which relief can be granted because negligent interference with a contract is not a tort recognized in North Carolina. The Full Commission did not err in dismissing this claim under Rule 12(b)(6).

D. Full Commission's Consideration of Prior Filings

Williams argues the Full Commission relied too heavily on the T-1 Affidavit and not the proposed *Amended Complaint*. Specifically, Williams argues the Full Commission relied on the "emotional and colloquial language" of the T-1 Affidavit, and not the allegations of negligent behavior from the proposed *Amended Complaint*.

"[A]s a general rule this Court will not hear an appeal when the subject matter of the litigation has been settled between the parties or has ceased to exist." *Kendrick v. Cain*, 272 N.C. 719, 722, 159 S.E.2d 33, 35 (1968). "If the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action." *130 of Chatham, LLC v. Rutherford Elec. Membership Corp.*, 241 N.C. App. 1, 8, 771 S.E.2d 920, 925 (2015). Having addressed the dismissal of the negligent interference with a contract claim as proper, Williams's argument that the Full Commission erred in its judgment basing the dismissal on the T-1 Affidavit rather than the proposed *Amended Complaint* is now moot. Dismissal of this third issue is proper.

CONCLUSION

Williams's claim of negligent interference with a contract was properly dismissed for failure to state a claim upon which relief may be granted, not for lack of subject matter jurisdiction. Further, negligent interference with a contract is not a tort recognized in North Carolina, and thus Williams failed to state a claim for which relief can be granted. The Full Commission did not err dismissing this claim.

Williams's claim that the Full Commission relied on the T-1 Affidavit rather than the proposed *Amended Complaint* is deemed moot because the negligent interference with a contract claim was properly dismissed.

AFFIRMED IN PART; DISMISSED IN PART.

Chief Judge McGEE and Judge BROOK concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 AUGUST 2020)

HARRINGTON v. HARRINGTON No. 19-961	Beaufort (17CVD609)	Dismissed and remanded.
IN RE A.K. No. 19-630	Johnston (18JA140-142)	Vacated and Remanded
IN RE A.M. No. 19-965	Johnston (18JA193)	DISMISSED IN PART; VACATED IN PART; AND REMANDED
STATE v. FRANKLIN No. 19-873	Rutherford (16CRS53926)	No Error
STATE v. HELMS No. 19-955	Cabarrus (17CRS53000-01)	No Plain Error in Part; No Error in Part; Reversed in Part
STATE v. LAMM-SMITH No. 19-1041	Wilson (17CRS50354) (17CRS50358)	Affirmed
STATE v. McNEILL No. 19-1081	Robeson (16CRS50969)	No Error
STATE v. ROBERSON No. 19-905	Craven (16CRS50713-14) (17CRS103)	NO ERROR IN PART; DISMISSED IN PART.
STATE v. SWEET No. 19-857	Forsyth (17CRS57244-45)	No Error
STATE v. TREADWAY No. 20-22	Haywood (18CRS328)	No Prejudicial Error
STATE v. WHITAKER No. 18-1220	Forsyth (15CRS61754)	Affirmed in part; no error in part.

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