273 N.C. App.—No. 3 Pages 408-496

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JULY 13, 2021

MAILING ADDRESS: The Judicial Department
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[1]Retired 31 December 2020. [2]Appointed Chief Judge 30 December 2020 and sworn in 1 January 2021. [3]Retired 31 December 2020.
[4]Resigned 31 December 2020. [5]Term ended 31 December 2020. [6]Term ended 31 December 2020. [7]Sworn in 1 January 2021.
[8]Sworn in 1 January 2021. [9]Sworn in 1 January 2021. [10]Sworn in 1 January 2021. [11]Appointed 30 December 2020 and sworn in 6 January 2021.

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[12]Resigned 7 January 2021. [13]Appointed 8 January 2021.

COURT OF APPEALS

CASES REPORTED

FILED 15 SEPTEMBER 2020

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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Petition for certiorari—no written notice of appeal—civil contempt—Where respondent did not file written notice of appeal from the trial court's order holding him in civil contempt for failure to produce a video he filmed in his former workplace, the Court of Appeals in its discretion denied respondent's petition for certiorari to review his claim that the trial court's order violated his right against self-incrimination since the relevant criminal charge had been resolved prior to the hearing on the motion to compel and he had been granted several continuances over the six-month period preceding the hearing due to his concern for his Fifth Amendment rights. **MetLife Grp., Inc. v. Scholten, 443.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Permanency planning—ceasing reunification efforts—sufficiency of findings and conclusions—In a permanency planning matter involving five children alleged to be neglected, abused, and dependent, the trial court's order ceasing reunification efforts with respondent-mother was supported by sufficient evidence and findings of fact that addressed the substance of the requirements contained in N.C.G.S. § 7B-906.2(b). Any contradictions in the evidence regarding respondent's progress on her case plan were for the court to resolve. **In re C.M., 427.**

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notes was not accepted according to the terms set forth in the agreement detailing the offer, no contract was formed. Further, defendant's actions purporting to accept the offer were ineffective because defendant delivered a different type of stock than that specified in the agreement. **Brown v. Between Dandelions, Inc., 408.**

Promissory note—satisfaction of debt—N.C.G.S. § 25-3-602—method of payment not listed in note—In an action for breach of promissory note and breach of contract to collect amounts owed on two promissory notes, defendant's purported delivery of shares to plaintiffs (unbeknownst to plaintiffs and of a different type than what plaintiffs requested in their offer to purchase stock in exchange for cancelling the notes) did not constitute satisfaction of its debt pursuant to N.C.G.S. § 25-3-602 because the language of the promissory notes required payment of money, not shares of stock. **Brown v. Between Dandelions, Inc., 408.**

DECLARATORY JUDGMENTS

Investment account—joint tenancy with right of survivorship—motion to dismiss—failure to state a claim—Where the decedent and defendant had opened an investment account and had selected the option on the account authorization form to hold the account as "Joint Tenancy WROS", the estate administrator's complaint for a declaratory judgment to establish the account as a single person account owned by the estate was properly dismissed by the trial court for failure to state a claim upon which relief could be granted. Although the complaint alleged the account form failed to meet the requirements of N.C.G.S. § 41-2.1(a) in order to establish a right of survivorship, that statute applied to deposits made to banking institutions. Because the account was deposited with a broker-dealer, it was governed by N.C.G.S. § 41-2.2 and the account form was sufficient to create a joint tenancy with right of survivorship under that statute. **McLean v. Spaulding, 434.**

Motion to dismiss—failure to state a claim—statute of limitations—Where the decedent and defendant opened a joint investment account on 13 March 2013, decedent died 13 September 2018, and the estate administrator filed the original complaint on 23 October 2018 seeking a declaratory judgment to establish the account as a single person account owned by the estate, the trial court properly granted defendant's motion to dismiss for failure to state a claim because the claim was barred by the applicable statute of limitations. Since the statute of limitations for a declaratory judgment is based on the underlying claim, and the underlying claim here was based on liability arising out of a contract, the action had to be commenced within three years from the time the action arose—when the account with the right of survivorship was executed. **McLean v. Spaulding, 434.**

HUSBAND AND WIFE

Prenuptial agreement—Dead Man's Statute—alleged failure to make financial disclosures—Where decedent's wife challenged the validity of their prenuptial agreement—arguing that decedent failed to provide her with financial disclosures and that decedent revoked the agreement—her testimony regarding oral communications with decedent was barred by the Dead Man's Statute (Evidence Rule 601(c)) because she would benefit financially from those alleged communications. **Crosland v. Patrick, 417.**

Prenuptial agreement—enforceability—revocation—A thirty-seven-year-old prenuptial agreement challenged after decedent-husband's death was enforceable,

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.

BRIAN KENT BROWN AND BROWN BROTHERS FARMS, PLAINTIFFS
v.
BETWEEN DANDELIONS, INC., F/K/A REMODEL AUCTION, INC., DEFENDANT

No. COA19-1074

Filed 15 September 2020

1. Contracts—promissory note—offer to exchange notes for shares of stock—terms of acceptance—terms not met

In an action for breach of promissory note and breach of contract to collect amounts owed on two promissory notes, where plaintiffs' offer to purchase shares of stock in exchange for cancelling the promissory notes was not accepted according to the terms set forth in the agreement detailing the offer, no contract was formed. Further, defendant's actions purporting to accept the offer were ineffective because defendant delivered a different type of stock than that specified in the agreement.

2. Contracts—promissory note—discharge by intentional act—N.C.G.S. § 25-3-604(a)—offer of cancellation not accepted

In an action for breach of promissory note and breach of contract to collect amounts owed on two promissory notes, plaintiffs' offer to purchase shares of stock in exchange for cancelling the promissory notes did not constitute an "intentional voluntary act" pursuant to N.C.G.S. § 25-3-604(a), so as to discharge defendant's debt, because defendant did not accept plaintiffs' offer according to the terms of the written agreement containing the offer. An unaccepted offer to cancel a promissory note does not equate to a complete agreement of cancellation.

3. Contracts—promissory note—satisfaction of debt—N.C.G.S. § 25-3-602—method of payment not listed in note

In an action for breach of promissory note and breach of contract to collect amounts owed on two promissory notes, defendant's purported delivery of shares to plaintiffs (unbeknownst to plaintiffs and of a different type than what plaintiffs requested in their offer to purchase stock in exchange for cancelling the notes) did not constitute satisfaction of its debt pursuant to N.C.G.S. § 25-3-602 because the language of the promissory notes required payment of money, not shares of stock.

Appeal by Plaintiffs from order entered 19 September 2019 by Judge R. Greg Horne in Watauga County Superior Court. Heard in the Court of Appeals 10 August 2020.

Miller & Johnson, PLLC, by Nathan A. Miller, for the Plaintiff-Appellant.

Moffatt & Moffatt, PLLC, by Tyler R. Moffatt, for the Defendant-Appellee.

BROOK, Judge.

Brian Kent Brown ("Kent Brown") and Brown Brothers Farms (collectively, "Plaintiffs") appeal the trial court's order granting summary judgment in favor of Between Dandelions, Inc. ("Defendant") and denying Plaintiffs' motion for summary judgment. We hold that the trial court erred in denying Plaintiffs' motion for summary judgment and granting summary judgment in favor of Defendant. Based on the parties' stipulation that there is no genuine issue of material fact with respect to Plaintiffs' claims, we reverse the order of the trial court.

I. Background

In October of 2007, Plaintiffs accepted two promissory notes from a predecessor entity of Defendant, Remodel Auction, Inc. ("Remodel Auction"). The promissory note accepted by Plaintiff Kent Brown was for $10,000, and the promissory note accepted by Mr. Brown on behalf of Brown Brothers Farms was for $20,000.

In February of 2008, Plaintiffs executed portions of two Subscription Agreements. The Subscription Agreements contemplated that Remodel Auction would be a party to them; however, Remodel Auction never executed its portions of the Subscription Agreements. Under the terms of the Subscription Agreements, the obligations owing under the notes to Plaintiffs were offered in exchange for common stock in Remodel Auction. Mr. Brown offered to purchase 100,000 shares in exchange for discharge of his $10,000 note, and Brown Brothers Farms offered to purchase 200,000 shares in exchange for discharge of its $20,000 note. Plaintiffs thereafter were issued 12,000 shares of Series "B" Preferred Stock in Remodel Auction, receiving two certificates reflecting ownership of these shares.

Between October 2007 and July 2018 when Plaintiffs initiated the present action, Defendant underwent a number of corporate changes, including several name changes, none of which are relevant to this dispute.

On 22 July 2018, Plaintiffs initiated this action to collect the amounts owing under the notes, alleging causes of action for breach of promissory note and breach of contract. Defendant answered on 2 November 2018.

On 19 June 2019, Defendant moved to substitute the defendant named in Plaintiffs' complaint, Appalachian Mountain Brewery, Inc., with Defendant. Plaintiffs chose not to oppose this motion, joining a 1 July 2019 consent order substituting Appalachian Mountain Brewery, Inc. with Defendant.

On 19 June 2019 Defendant also moved for summary judgment, filing an affidavit in support of the motion by the former chief executive officer and majority shareholder of Defendant's predecessor entity, Remodel Auction, as well as a transcript of Mr. Brown's deposition. Plaintiffs filed a cross-motion for summary judgment on 6 September 2019, along with an affidavit in support by Mr. Brown.

The motions came on for hearing before the Honorable R. Greg Horne in Watauga County Superior Court on 16 September 2019. Judge Horne granted Defendant's motion and denied Plaintiffs' cross-motion by an order entered 19 September 2019. In its order, the trial court concluded that Plaintiffs' offer to purchase the shares in Remodel Auction constituted a cancellation of their notes under N.C. Gen. Stat. § 25-3-604(a) and a discharge of the obligations owed under the notes.

Plaintiffs timely appealed.

II. Standard of Review

Issues of contract interpretation present questions of law, which we review de novo. *D.W.H. Painting Co., Inc. v. D.W. Ward Const. Co., Inc.*, 174 N.C. App. 327, 330, 620 S.E.2d 887, 890 (2005). The issue of whether a valid contract exists also presents a question of law, which we review de novo. *See M Series Rebuild v. Town of Mount Pleasant*, 222 N.C. App. 59, 67-68, 730 S.E.2d 254, 260 (2012).

III. Analysis

[1] In their sole argument on appeal, Plaintiffs contend that their execution of the Subscription Agreements constituted an offer to exchange their promissory notes for stock in Remodel Auction—an offer Remodel Auction never accepted. Because the offer was not accepted by Remodel Auction and the shares in Remodel Auction received by Plaintiffs were not the shares Plaintiffs offered to purchase, Plaintiffs argue there was no contract to exchange the notes for the shares of stock and that the amounts owing under the notes are due and payable. We agree.

> In the formation of a contract an offer and an acceptance are essential elements; they constitute the agreement of the parties. The offer must be communicated, must be complete, and must be accepted in its exact terms. Mutuality of agreement is indispensable; the parties must assent to the same thing in the same sense, idem re et sensu, and their minds must meet as to all the terms.

Dodds v. St. Louis Union Tr. Co., 205 N.C. 153, 156, 170 S.E. 652, 653 (1933) (internal citations omitted). An acceptance is not effective unless it is "(a) absolute and unconditional; (b) identical with the terms of the offer; (c) in the mode, at the place, and within the time . . . required by the offer." *Morrison v. Parks*, 164 N.C. 197, 197, 80 S.E. 85, 85 (1913) (citation and internal marks omitted). The offeror is thus said to be "master of his offer." *MacEachern v. Rockwell Int'l Corp.*, 41 N.C. App. 73, 76, 254 S.E.2d 263, 265 (1979). As such, the offeror may "require acceptance in precise conformity with his offer[,]" and also may by the terms of the offer permit acceptance "by performing a specific act rather than by making a return promise." *Id.*, 254 S.E.2d at 265-66.

The Subscription Agreements executed by Plaintiffs both state as follows:

> This Subscription Agreement sets forth the terms under which the undersigned ("Investor") will invest in Remodel Auction, Inc., a Delaware corporation, ("Corporation"). This Subscription is one of a limited number of subscriptions for up to a maximum of 2,435,000 shares of common stock in the Corporation (the "Shares") in an aggregate amount of up to $243,500 offered on behalf of the Corporation to a limited number of Investors holding promissory notes issued by the Corporation (the "Notes"). Each Share is payable $0.10 by an agreement by the Investor by execution of this Subscription Agreement to cancel all amounts due under the Notes, including principal and all accrued and unpaid interest, upon execution of this Subscription Agreement. *Execution of this Subscription Agreement by the Investor shall constitute an offer by the Investor to subscribe for the Shares set forth in this Agreement on the terms and conditions specified herein. The Corporation reserves the right to reject such subscription offer, or, by executing a copy of this Subscription Agreement, to accept such offer. If the Investor's offer is accepted, the Corporation will execute*

> *this Subscription Agreement and return an executed copy of the Subscription Agreement to the Investor.*

(Emphasis added.)

The Subscription Agreement executed by Plaintiff Kent Brown goes on to state:

> Investor hereby subscribes for 100,000 (Number) of Shares for a total purchase price of $10,000 (Number of Shares x $0.10) and hereby submits a Note with the principal and accrued interest amount of $10,000 (Number of Shares x $0.10 per Share) to Remodel Auction, Inc. for full cancellation and satisfaction of said Note.

The Subscription Agreement executed by Mr. Brown individually additionally provides:

> THE NAME OF THE OWNER OF THE SHARE(S) SHOULD BE MADE OUT ON THE CERTIFICATE IN THE FOLLOWING MANNER (PLEASE PRINT):
>
> Kent Brown

The Subscription Agreement executed by Mr. Brown on behalf of Brown Brothers Farms likewise states:

> Investor hereby subscribes for 200,000 (Number of Shares for a total purchase price of $20,000 (Number of Shares x $0.10) and hereby submits a Note with the principal and accrued interest amount of $20,000 (Number of Shares x $0.10 per Share) to Remodel Auction, Inc. for full cancellation and satisfaction of said Note.

The Subscription Agreement executed by Brown Brothers Farms additionally provides:

> THE NAME OF THE OWNER OF THE SHARE(S) SHOULD BE MADE OUT ON THE CERTIFICATE IN THE FOLLOWING MANNER (PLEASE PRINT):
>
> Brown Bros. Farms

Nobody signed either of the Subscription Agreements on behalf of Remodel Auction, and Mr. Brown testified at deposition that he never received the 300,000 shares referenced in the Subscription Agreements, nor did he ever receive copies of the agreements executed by anyone on behalf of Remodel Auction.

The former Chief Executive Officer and majority shareholder of Remodel Auction, Clinton F. Walker, averred in the affidavit filed in support of Defendant's motion for summary judgment that the 300,000 shares referenced in the Subscription Agreements were "delivered" to Plaintiffs by recording their ownership of the shares in the books maintained by the company, which existed in an Excel spreadsheet. Mr. Walker averred further that following a re-organization of Remodel Auction, Plaintiffs were issued 12,000 shares of Series "B" Preferred Stock in addition to the 300,000 shares of common stock previously "delivered" to them by recording their ownership in the company's books. At deposition Kent Brown testified that while he never received the 300,000 shares of common stock he offered to purchase, he did receive two share certificates representing 12,000 series "B" preferred shares in Remodel Auction; however, these shares were not the shares he offered to purchase, and he was unable to reach Mr. Walker to resolve the discrepancy between the 300,000 shares of common stock he offered to purchase and the 12,000 series "B" preferred shares for which received certificates, despite repeated attempts to do so.

Under the terms of the Subscription Agreements, the execution of each by Mr. Brown "constitute[d] an offer . . . to subscribe for the Shares set forth in [the] Agreement[s] on the terms and conditions specified [therein]." Those terms included that the subject matter of the offer was

> a limited number of subscriptions for up to a maximum of 2,435,000 shares of *common stock* in the Corporation (the "Shares") in an aggregate amount of up to $243,500 offered on behalf of the Corporation to a limited number of Investors holding promissory notes issued by the Corporation (the "Notes").

(Emphasis added.) No part of the offers by Mr. Brown and Brown Brothers Farms were to purchase 12,000 series "B" preferred shares in Defendant's predecessor entity; instead, as previously noted, Mr. Brown offered to purchase 100,000 shares of common stock in exchange for cancellation of $10,000 in promissory notes owed to him individually and Brown Brothers Farms offered to purchase 200,000 shares of common stock in exchange for cancellation of $20,000 in promissory notes owed to it. The terms of the Subscription Agreements also contemplated that the shares of common stock Plaintiffs were offering to purchase in exchange for cancellation of their notes were certificated securities, requiring Plaintiffs to indicate the manner in which "the name of the owner of the share(s) should be made out on the certificate[.]" (Capitalization removed.)

Defendant offers Mr. Walker's sworn statement that the ownership interests in Remodel Auction the Plaintiffs offered to purchase through execution of the Subscription Agreements were uncertificated securities as Delaware law defines that term to support the idea that Mr. Walker's "delivery" of the 300,000 shares of common stock to Plaintiffs by recording their ownership in the company's books was an acceptance of Plaintiffs' offer by performance. Setting aside the absence of evidence that this acceptance was ever communicated to Plaintiffs prior to the filing of Mr. Walker's affidavit, and Mr. Brown's testimony that in essence he had no knowledge of this purported acceptance by performance, Mr. Walker's sworn statement that the subject matter of the Agreements were uncertificated securities is at best an admission that Remodel Auction was unable to accept Plaintiffs' offer or unable to perform the contract contemplated by the Subscription Agreements.[1] We hold that no valid contract existed to purchase the shares in Remodel Auction because there was no acceptance of Plaintiffs' offer to purchase the shares through execution of the Subscription Agreements by Remodel Auction; any attempted acceptance of Plaintiffs' offers by Remodel Auction by performance varied materially from the terms of Plaintiffs' offers and was therefore ineffective.

[2] Defendant argues that Plaintiffs' offer to cancel their notes in exchange for stock is sufficient to constitute a cancellation or discharge under N.C. Gen. Stat. § 25-3-604(a). Under N.C. Gen. Stat. § 25-3-604(a),

> [a] person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed writing.

N.C. Gen. Stat. § 25-3-604(a) (2019). The trial court concluded that Plaintiffs' offer to cancel their notes through execution of the

1. Were it true that the ownership interests in Defendant's predecessor at the time qualified as uncertificated securities under Delaware law, as Mr. Walker has averred, this would not have provided any justification or excuse for accepting Plaintiffs' offer in a manner other than that contemplated by its terms. *See, e.g.*, *Beauford Cty. Lumber Co. v. Cottingham*, 173 N.C. 323, 329, 92 S.E. 9, 12 (1917) ("The acceptance . . . should have been in the terms of the offer, and, if it was not so, the plaintiff had the right to treat the offer as rejected[.]").

Subscription Agreements constituted a cancellation of the notes, drawing an equivalence between Plaintiffs' execution of the Subscription Agreements and full execution of the Subscription Agreements on the one hand—execution by Remodel Auction having never occurred—and between an offer to cancel a promissory note and an agreement to cancel a promissory note, on the other.

We hold that Plaintiffs' offer to cancel the notes in exchange for stock did not qualify as the "intentional voluntary act" required by N.C. Gen. Stat. § 25-3-604(a). Had Plaintiffs' offer to cancel the notes been accepted by Remodel Auction either through Remodel Auction's execution of the Subscription Agreements or performance according to the terms of Plaintiffs' offer, we would reach a different conclusion. N.C. Gen. Stat. § 25-3-604(a) does not by its terms limit the voluntary act requirement to the acts it lists but the listed acts are all of a final and permanent character we believe differs fundamentally from an unaccepted offer. *See*, *e.g.*, N.C. Gen. Stat. § 25-3-604(a) (2019) (listing voluntary acts of "surrender," "destruction," "mutilation," "striking out," and "renouncing"). We hold that conflating an unaccepted offer to cancel the notes and a complete agreement to cancel the notes was error.

[3] Defendant argues in the alternative that the obligations under the notes have been satisfied by payment under N.C. Gen. Stat. § 25-3-602, which provides that "an instrument is paid to the extent payment is made (i) by or on behalf of a party obliged to pay the instrument, and (ii) to a person entitled to enforce the instrument." N.C. Gen. Stat. § 25-3-602 (2019). According to Defendant, the "delivery" of the 300,000 shares by recording Plaintiffs' ownership in the books of Remodel Auction constituted a payment under N.C. Gen. Stat. § 25-3-602. The language of the promissory notes, however, does not provide for payment in shares of stock. The notes specify that payment is to be made to Plaintiffs in the quarterly amounts of $300 and $600 respectively, plus three percent interest until the obligations are satisfied. We therefore hold that the delivery of the 300,000 shares by recording Plaintiffs' ownership of them in the company's books did not constitute payment of the notes under N.C. Gen. Stat. § 25-3-602.

Defendant argues in the alternative that the doctrine of laches should apply as a bar to Plaintiffs' recovery on the notes because of Plaintiffs' delay in filing suit.

> To establish the affirmative defense of laches, our case law recognizes that 1) the doctrine applies where a delay of time has resulted in some change in the condition of the property or in the relations of the parties; 2) the delay

> necessary to constitute laches depends upon the facts and circumstances of each case; however, the mere passage of time is insufficient to support a finding of laches; 3) the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches; and 4) the defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim.

MMR Holdings, LLC v. City of Charlotte, 148 N.C. App. 208, 209-10, 558 S.E.2d 197, 198 (2001). Despite Plaintiffs' delay in filing suit, we decline Defendant's invitation to apply the equitable doctrine of laches to Plaintiffs' claims. We do not believe Plaintiffs' delay was unreasonable. Furthermore, Defendant has not argued and we discern no particular prejudice this delay has caused Defendant.

IV. Conclusion

We reverse the order of the trial court because Plaintiffs' offer to cancel their notes and discharge Defendant's obligations under the notes was never accepted and the amounts outstanding under the notes are due and payable, with interest.

REVERSED.

Judges BRYANT and STROUD concur.

CROSLAND v. PATRICK

[273 N.C. App. 417 (2020)]

JUDITH E. CROSLAND, PETITIONER
v.
BAILEY PATRICK, JR., AS EXECUTOR OF THE ESTATE OF JOHN CROSLAND, JR., RESPONDENT

No. COA19-713

Filed 15 September 2020

1. Husband and Wife—prenuptial agreement—Dead Man's Statute—alleged failure to make financial disclosures

Where decedent's wife challenged the validity of their prenuptial agreement—arguing that decedent failed to provide her with financial disclosures and that decedent revoked the agreement—her testimony regarding oral communications with decedent was barred by the Dead Man's Statute (Evidence Rule 601(c)) because she would benefit financially from those alleged communications.

2. Husband and Wife—prenuptial agreement—enforceability—revocation

A thirty-seven-year-old prenuptial agreement challenged after decedent-husband's death was enforceable, and the wife's argument that the husband had revoked the agreement was meritless because one spouse may not unilaterally cancel a prenuptial agreement.

3. Husband and Wife—prenuptial agreement—enforceability—statute of limitations

A thirty-seven-year-old prenuptial agreement challenged after decedent-husband's death on the basis that it was signed under duress, was procured without financial disclosure, or was unconscionable was barred by the statute of limitations, which was three years for each of the claims. The claims accrued at the time of the alleged wrongs (when the agreement was entered), and the Uniform Premarital Act did not apply because the agreement was entered before the Act's effective date.

Appeal by Defendant from order entered 24 May 2019 by Judge Louis A. Trosch in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 January 2020.

Shumaker, Loop & Kendrick, LLP, by Lynn R. Chandler and Lucas D. Garber, for petitioner-appellant.

Alexander Ricks PLLC, by Roy H. Michaux, Jr., for respondent-appellee.

Essex Richards, P.A., by Jonathan E. Buchan, Jr., for intervenor.

MURPHY, Judge.

Where specific allegations, which could establish the presence of a genuine factual dispute are barred by the Dead Man's Statute, no genuine issues of material fact exist and summary judgment is proper. Additionally, where the statute of limitations for a contract and fraud claim is three years, the statute of limitations bars any claim of fraud, duress, or undue influence after three years. Here, the prenuptial agreement was signed and executed thirty-seven years prior to this *Petition for Elective Share*, and the statute of limitation bars any challenge. Moreover, the alleged unilateral revocation of the prenuptial agreement argued in the pleadings has no legal significance. The trial court properly granted Respondent's motion for summary judgement.

BACKGROUND

John Crosland, Jr. ("Husband") died testate on 2 August 2015. His *Last Will and Testament* was executed on 7 August 2013 and admitted to probate 13 August 2015. Judith E. Crosland ("Wife"), as the surviving spouse, filed a *Petition for Elective Share* on 15 October 2015. She requested the trial court determine if the value of property passing to her under Husband's estate plan was less than fifty percent of his estate as provided by N.C.G.S. § 30-3.1.

On 5 November 2015, Respondent, Bailey Patrick, Jr. ("Executor"), as Executor of Husband's estate, filed a notice of transfer to Superior Court to determine all issues relating to or arising out of the *Petition for Elective Share*, and seeking a declaratory judgment that the prenuptial agreement dated and signed on 3 February 1978 ("the Agreement") was in all respects valid and enforceable. Executor argued the Agreement, if valid, would bar any claim for an elective share sought by Wife. Executor also sought a stay pending a determination as to whether the Agreement barred Wife's right to pursue an elective share.

Wife claims Husband first presented the Agreement to her on 3 February 1978, the night before their wedding. In her deposition, Wife testified she did not feel she had a choice regarding whether to sign the Agreement because she believed the wedding would not go forward unless she signed it. Both Husband and Wife signed the Agreement on 3 February 1978; their signatures were acknowledged before a Notary Public that same day.

Wife filed a reply to Executor's counterclaim for declaratory judgment ("the Reply") on 8 December 2015, which asserted the Agreement was invalid and unenforceable based upon allegations it was signed under duress, it was procured without adequate disclosure of material financial information, and it had been "revoked" by Husband during his lifetime. The Reply included the following:

> [Executor's] Counterclaim is barred in whole or in part because the document entitled "[Prenuptial] Agreement" was revoked by [Husband] during his lifetime.
>
> [Executor's] Counterclaim is barred in whole or in part by waiver, as [Husband] evidenced his intent to revoke and did revoke the document entitled "[Prenuptial] Agreement" during his lifetime.
>
> [Executor's] Counterclaim is barred in whole or in part by estoppel, as [Husband] evidenced his intent to revoke and did revoke the document entitled "[Prenuptial] Agreement" during his lifetime.

Wife died 16 October 2018. On 11 January 2019, Branch Banking & Trust Company ("BB&T"), as Executor for Wife's estate, was substituted as Petitioner.

On 27 March 2019, Executor moved for summary judgment pursuant to Rules 7 and 56 of the North Carolina Rules of Civil Procedure and for dismissal of the *Petition for Elective Share* under N.C.G.S. § 30-3.1. On 23 April 2019, Wife filed a cross-motion for summary judgment declaring the Agreement void (or alternatively voidable) and unenforceable.

An order was entered 24 May 2019 granting Executor's *Motion for Summary Judgment* and denying Wife's cross-motion for summary judgment. Wife appealed.

ANALYSIS

A. Standard of Review

> Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the [R]ecord shows 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. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.

> If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial.

In re Will of Jones, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (internal citations and quotation marks omitted).

Our standard of review for decisions regarding N.C.G.S. § 8C-1, Rule 601(c), commonly known as the Dead Man's Statute, is also *de novo*. *In re Will of Baitschora*, 207 N.C. App. 174, 181, 700 S.E.2d 50, 55-56 (2010).

> [T]he function of Rule 601(c) is to exclude proffered testimony when it is shown (1) that such witness is a party, or interested in the event, (2) that his testimony relates to a personal transaction or communication with the deceased person, (3) that the action is against the personal representative of the deceased or a person deriving title or interest from, through or under the deceased, and (4) that the witness is testifying in his own behalf or interest.

Id. at 180, 700 S.E.2d at 55 (quoting *In re Will of Lamparter*, 348 N.C. 45, 51, 497 S.E.2d 692, 695 (1998) (internal quotation marks omitted). There is

> nothing in the language of Rule 601(c) [to] suggest[ ] that the implementation of the Dead Man's Statute involves the making of a discretionary determination, although the fact that its application may, under some circumstances, involve what amounts to a relevance determination does suggest that a degree of deference should be given to the trial court's decision.

Id. at 180-81, 700 S.E.2d at 55. Accordingly,

> the standard of review for use in [reviewing a ruling under Rule 601(c)] is one that involves a *de novo* examination of the trial court's ruling, with considerable deference to be given to the decision made by the trial court in light of the relevance-based inquiries that are inherent in the resolution of certain issues involving application of Rule 601(c).

Id. at 181, 700 S.E.2d at 55-56.

B. Dead Man's Statute

[1] "The North Carolina 'Dead Man's Statute,' formerly N.C.G.S. § 8-51 and now codified in Rule 601(c) of the Rules of Evidence, N.C.G.S.

§ 8C-1, Rule 601(c), has traditionally prohibited testimony involving both 'transactions' and 'communications' by individuals who would potentially benefit from the alleged statements of a deceased individual." *In re Will of Lamparter*, 348 N.C. 45, 49, 497 S.E.2d 692, 694 (1998). The Dead Man's Statute, as now codified, is "applicable only to oral communications between the party interested in the event and the deceased." *Id.*

> Although a person interested in the event of the action is disqualified, his interest must be a direct legal or pecuniary interest in the outcome of the litigation. The key word in this phrase is legal, the cases as a whole showing that the ultimate test [in determining an interested party] is whether the *legal rights* of the witness will be affected one way or the other by the judgment in the case.

Rape v. Lyerly, 287 N.C. 601, 622, 215 S.E.2d 737, 750 (1975) (internal quotation marks omitted). "The purpose of [the Dead Man's Statute] is to exclude evidence of statements made by deceased persons, since those persons are not available to respond." *Estate of Redden ex rel. Morley v. Redden*, 194 N.C. App. 806, 808, 670 S.E.2d 586, 588 (2009) (internal quotation marks omitted).

The crux of this case rests upon whether or not the Agreement is valid and enforceable, and accordingly, whether Executor's motion for summary judgment was properly granted. On appeal, Wife argues the Agreement was void *ab initio* and unenforceable as a matter of law because Husband, allegedly, failed to provide her with financial disclosure and because the Agreement was, allegedly, revoked and destroyed.

To support her claim that the Agreement was void *ab initio*, Wife argues Husband failed to disclose his financial status as is mandated in *Tiryakian*. *Tiryakian v. Tiryakian*, 91 N.C. App. 128, 370 S.E.2d 852 (1988). There are circumstances where "absent any voluntary waiver, especially considering the confidential relationship between prospective spouses, the failure to fully disclose one's financial status is grounds for invalidating [a prenuptial] agreement." *Id.* at 133, 370 S.E.2d at 855. Here, however, the evidence presented by Wife regarding Husband's lack of financial status disclosure was inadmissible under the Dead Man's Statute.

Wife is a "person interested in the event"; she has a "direct legal or pecuniary interest" in the outcome of the litigation. *Rape*, 287 N.C. at 622, 215 S.E.2d at 750. To agree with Wife's argument that the Agreement is void *ab initio* and is thereby unenforceable would require the Agreement to be set aside. Wife's *Petition for Elective Share* would be

granted, and Wife would inherit 50% of the total net assets of Husband's estate. *See generally* N.C.G.S. § 30-3.1(a)(4) (2019).

The only evidence we have regarding the Agreement comes from Wife's testimony during her deposition:

> [Wife's Attorney]: Were you expecting to be handed a prenuptial agreement the night before your wedding?
>
> [Wife]: No.
>
> [Wife's Attorney]: Did [Husband] – without going into anything he said to you, did he provide you any financial information when he presented you with that prenuptial?
>
> [Wife]: No.
>
> [Wife's Attorney]: Had he ever presented you with financial information prior to that?
>
> [Wife]: No.

In order to understand any financial status disclosure Husband provided to Wife, as alluded to in her deposition testimony, Wife would have to testify to oral communications between her and Husband, who was already deceased at the time Wife filed suit. Such testimony is barred by the Dead Man's Statute. *See* N.C.G.S. § 8C-1, Rule 601(c) (2019).

Additionally, if such testimony was not inadmissible and barred by the Dead Man's Statute and was allowed, additional problems could arise. For example, we find instructive the cautions raised in *Kornegay v. Robinson*, 176 N.C. App. 19, 625 S.E.2d 805 (Tyson, J. dissenting), *rev'd for reasons stated in dissent*, *Kornegay v. Robinson*, 360 N.C. 640, 637 S.E.2d 516 (2006). In *Kornegay*, a husband and wife signed a prenuptial agreement;[1] when the husband passed away, the wife believed the decedent-husband had executed a will with substantial provisions in her favor, but no such provisions were found in the will. *Kornegay*, 176 N.C. App. at 21, 625 S.E.2d at 806. The prenuptial agreement signed by the decedent and the wife included a provision waiving all the wife's rights as a spouse, including the right to claim a spousal share of the decedent's estate. *Id*. The wife brought an action for a declaratory judgment against the decedent's estate to invalidate the prenuptial agreement; the

1. *See Prenuptial Agreement*, Black's Law Dictionary (11th ed. 2019) ("An agreement made before marriage [usually] to resolve issues of support and property division if the marriage ends in divorce or by the death of a spouse. –Also termed *antenuptial agreement; antenuptial contract; premarital agreement* . . . .").

trial court granted summary judgment dismissing the wife's action. *Id.* at 21, 625 S.E.2d at 807. On appeal to this Court, the Majority reversed the trial court's grant of summary judgment and held "material issues of fact exist[ed] as to whether [the wife] entered the [prenuptial] agreement voluntarily." *Id.* at 27, 625 S.E.2d at 810. Judge Tyson, concurring in part and dissenting in part, would have affirmed the trial court's grant of summary judgment in light of the husband being deceased at the initiation of the lawsuit and the lack of evidence that the wife entered the agreement involuntarily. *Id.* at 31-32, 625 S.E.2d at 812-13. Our Supreme Court, in a *per curiam* opinion, adopted Judge Tyson's Dissent. *See Kornegay v. Robinson*, 360 N.C. 640, 637 S.E.2d 516 (2006).

Although the Dead Man's Statute was not directly mentioned in *Kornegay*, there are factual similarities that implicate the same concerns the Dead Man's Statute exists to protect against: "to exclude evidence of statements made by deceased persons, since those persons are not available to respond." *Estate of Redden ex rel. Morley*, 194 N.C. App. at 808, 670 S.E.2d at 588. In *Kornegay*, the wife contested the validity of a prenuptial agreement over fifteen years after it was signed, and only after the husband had passed away, making it impossible for him to respond. *Kornegay*, 176 N.C. App. at 31-32, 625 S.E.2d at 812.

Here, similar to the wife in *Kornegay*, Wife contested the validity of the Agreement signed thirty-seven years prior to the initiation of this lawsuit in 2015 and only brought suit after Husband had passed away. In order to support her argument that the Agreement is void *ab initio* and unenforceable, Wife would be required to testify to oral communications she had with Husband. Such oral communications, however, are barred by the Dead Man's Statute because Wife is an interested party and Husband is no longer able to respond. N.C.G.S. § 8C-1, Rule 601(c) (2019).

Moreover, as noted above, Wife's principal argument is the Agreement is not valid and enforceable due to Husband's alleged failure to disclose his financial status prior to the execution of the Agreement. In support of this argument, Wife relies on *Tiryakian*. *Tiryakian*, however, was distinguished in Judge Tyson's Dissent in *Kornegay*, and *Tiryakian* is also distinguishable here.

As stated in *Kornegay*, and unlike the facts before us, "*Tiryakian* addressed a prenuptial agreement within the context of an equitable distribution[,] [b]oth parties to the agreement were alive at the time of trial and [were able to testify] to the circumstances surrounding the execution of the premarital agreement[, and] was not before this Court

on a ruling" for summary judgment. *Kornegay*, 176 N.C. App. at 31, 625 S.E.2d at 812 (Tyson, J., dissenting).

Like the spouses in *Kornegay*, Husband and Wife were both previously married and had children by those marriages. There is no evidence of inequality in education or business experience between Husband and Wife. Unlike the husband and wife in *Tiryakian*, and similar to the husband and wife in *Kornegay*, Husband passed away before Wife challenged the Agreement. Unlike the lack of an evidentiary bar in *Tiryakian*, here the only evidence Wife presented to demonstrate the alleged invalidity of the Agreement is barred by the Dead Man's Statute.

C. Enforceability

[2] Moreover, in terms of the validity of the Agreement, "[i]t is well-settled in this jurisdiction that a man and woman contemplating marriage may enter into a valid contract with respect to the property and property rights of each after the marriage, and such contracts will be enforced as written." *In re Estate of Tucci*, 94 N.C. App. 428, 432-33, 380 S.E.2d 782, 784-85 (1989) (quoting *In re Estate of Loftin*, 285 N.C. 717, 720-21, 208 S.E.2d 670, 673-74 (1974)); *see* N.C.G.S. § 52-10(a) (2019). "[Prenuptial] agreements are not against public policy, and if freely and intelligently and justly made, are considered in many circumstances as conducive to marital tranquility and the avoidance of . . . disputes concerning property." *Turner v. Turner*, 242 N.C. 533, 538, 89 S.E.2d 245, 248 (1955).

If we were to rule the Agreement unenforceable, we would "disregard . . . the sanctity of a solemn written agreement, probated before a notary public, promptly recorded in the public land records of the county, and unchallenged for over [thirty-seven] years"; it would be a "wholesale disregard of the bargained for and settled expectations of parties of equal bargaining power in preference to wholly unsupported parol averments in direct contradiction to the terms of the written agreement." *Kornegay*, 176 N.C. App. at 32, 625 S.E.2d at 813 (Tyson, J., dissenting). As Judge Tyson notes in the *Kornegay* Dissent, "[n]o regard [would be] shown for [Husband and Wife's] clearly stated bargain, long after [Husband] is no longer able to explain or defend the circumstances surrounding the execution of the agreement." *Id.* Holding the Agreement unenforceable would "only cause great uncertainty into the finality and enforceability of an . . . agreement entered into lawfully." *Id.* Accordingly, here Executor's motion for summary judgment was properly granted.

Wife further argues that Executor's motion for summary judgment was not properly granted because the Agreement was "revoked" during Husband's lifetime:

> [Executor's] Counterclaim is barred in whole or in part because the document entitled "[Prenuptial] Agreement" was revoked by [Husband] during his lifetime.
>
> [Executor's] Counterclaim is barred in whole or in part by waiver, as [Husband] evidenced his intent to revoke and did revoke the document entitled "[Prenuptial] Agreement" during his lifetime.
>
> [Executor's] Counterclaim is barred in whole or in part by estoppel, as [Husband] evidenced his intent to revoke and did revoke the document entitled "[Prenuptial] Agreement" during his lifetime.

Wife is the only party who claims, in her pleadings, that the Agreement was revoked. Wife's son, from her first marriage, provided an affidavit to support Wife's pleading that the Agreement was revoked. Presuming, *arguendo*, that Wife's son's affidavit is admissible, it is irrelevant because Wife merely claimed the Agreement was revoked by Husband. One spouse "may not unilaterally cancel a valid marital contract[.]" *In re Estate of Tucci*, 94 N.C. App. at 433, 380 S.E.2d at 785. Wife's argument that the Agreement was revoked is of no legal significance.

D. Statute of Limitations

[3] Wife argues the Agreement is unenforceable on grounds it was signed under duress, was procured without financial disclosure, or is unconscionable. Absent admissible evidence the Agreement was void *ab initio*, the statute of limitations for each of these claims is three years. *See* N.C.G.S. § 1-52(1), (9) (2019). "The statutes of limitations contain no exception in favor of [one spouse] against [the other spouse]. . . . [The] statutes of limitation run as well between spouses as between strangers." *Fulp v. Fulp*, 264 N.C. 20, 26, 140 S.E.2d 708, 713 (1965) (internal quotation marks omitted). The Agreement was signed before a notary in 1978. The enforceability and validity of the Agreement was not brought into question until 2015, thirty-seven years after it was entered into and after any "alleged fraud" was discovered. *See Swartzberg v. Reserve Life Insurance Co.*, 252 N.C. 150, 156, 113 S.E.2d 270, 276-77 (1960) (holding that the statute of limitations in N.C.G.S. § 1-52(9) "appl[ies] to all actions, both legal and equitable, where fraud is an element, and to all forms of fraud, including deception, imposition, duress, and undue influence").

Wife argues "the statute of limitations [did not begin] to run, if at all, [until] [Husband] died and [Wife] discovered that [Executor] sought

to enforce the [Prenuptial] Agreement against her." However, we have held the "cause of action accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed." *Dawbarn v. Dawbarn*, 175 N.C. App. 712, 717, 625 S.E.2d 186, 190 (2006) (quoting *Davis v. Wrenn*, 121 N.C. App. 156, 158-59, 464 S.E.2d 708, 710 (1995)); *see also Baars v. Campbell Univ., Inc.*, 148 N.C. App. 408, 415-16, 558 S.E.2d 871, 876 (2002) (holding that the claim of undue influence accrued at the time the deed was executed and filed, which was four years and one month beyond the statute of limitations and was, therefore, time-barred). Thus, the claim in this case accrued at the time Husband and Wife signed and implemented the Agreement, which was thirty-seven years prior to the initiation of this lawsuit in 2015. Wife's argument that the Agreement is unenforceable and voidable is, accordingly, time-barred.

Both parties acknowledge the Agreement is not controlled by the Uniform Premarital Agreement Act ("UPAA"), N.C.G.S. §§ 52B-1-11. The UPAA "became effective on 1 July 1987 and is applicable to premarital agreements executed *on* or *after that date*." *Huntley v. Huntley*, 140 N.C. App. 749, 752, 538 S.E.2d 239, 241 (2000) (citing 1987 N.C. Sess. Laws ch. 473, § 3) (emphasis added). Here, the Agreement was signed in 1978 and therefore is not controlled by the UPAA. Accordingly, N.C.G.S. § 52B-9, which states "[a]ny statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement" is not applicable. N.C.G.S. § 52B-9 (2019). The statute of limitations is not tolled in this case. We hold the three-year statute of limitations applies and Executor's *Motion for Summary Judgment* was properly granted.

CONCLUSION

Executor's *Motion for Summary Judgment* was properly granted and Wife's cross-motion for summary judgment was properly denied. The order and judgment appealed from is affirmed.

AFFIRMED.

Judges DILLON and TYSON concur.

IN RE C.M., K.S., J.S., M.A.S., AND K.S.

No. COA19-966

Filed 15 September 2020

1. Child Abuse, Dependency, and Neglect—permanency planning—ceasing reunification efforts—sufficiency of findings and conclusions

In a permanency planning matter involving five children alleged to be neglected, abused, and dependent, the trial court's order ceasing reunification efforts with respondent-mother was supported by sufficient evidence and findings of fact that addressed the substance of the requirements contained in N.C.G.S. § 7B-906.2(b). Any contradictions in the evidence regarding respondent's progress on her case plan were for the court to resolve.

2. Child Abuse, Dependency, and Neglect—permanency planning—termination of mother's visitation—abuse of discretion analysis

In a permanency planning matter involving five children alleged to be neglected, abused, and dependent, the trial court did not abuse its discretion by terminating respondent-mother's visitation, based on sufficient competent evidence regarding respondent's lack of progress on her case plan and inability to adequately parent her children, which supported a finding that visitation was not in the children's best interests.

Judge ARROWOOD dissenting.

Appeal by respondent from order entered 13 May 2019 by Judge Wayne Michael in Davie County District Court. Heard in the Court of Appeals 10 June 2020.

Holly M. Groce for petitioner-appellee Davie County Department of Social Services.

Garron T. Michael, Esq., for respondent-appellant mother.

Matthew D. Wunsche for appellee guardian ad litem.

YOUNG, Judge.

Where the trial court's findings were supported by competent evidence, they are conclusive on appeal, notwithstanding contradictory evidence in the record. Where a portion of a finding was not supported by evidence, but did not impact the ultimate determination of the court, it was not error. Where the trial court's findings addressed the substance of statutory requirements, they complied with statute and were not erroneous. Where the unchallenged findings showed that mother had not made adequate progress with her DSS plan and was unable to provide supervision during visits, the trial court did not abuse its discretion in terminating visitation. We affirm.

I. Factual and Procedural Background

On 28 September 2017, the Davie County Department of Social Services (DSS) filed petitions with respect to five juveniles (the juveniles), C.M., K.S., J.S., M.A.S., and K.S.,[1] alleging that they were abused, neglected, and dependent. Specifically, DSS attached an exhibit outlining various bruises or descriptions of assault with regard to each child. The exhibit further noted that the mother of the juveniles has other children who were removed from her care by the state of Pennsylvania, that her live-in boyfriend has other children but does not have custody of them, that C.M.'s father's location is unknown but he is believed to be homeless in South Carolina, that the father of the remaining four children is also homeless in South Carolina, and that since 2017 the family has had eight open child protective services cases in three states. On 28 September 2017, the trial court entered an order for nonsecure custody of the juveniles.

The matter proceeded for two years and through multiple permanency planning hearings. On 13 May 2019, the trial court entered the latest order on review and permanency planning in this case. As a preliminary matter, the trial court noted that visitation with the three oldest of the juveniles had ceased as well, and that visitation only continued with the two youngest children, M.A.S. and K.S. The court found that mother expressed a desire to reunify only with the two youngest children, as the needs of the three older children were more than she could provide; the court declined to entertain this suggestion. The court further found that mother made only limited progress since the prior court hearing, that a parenting assessment found that she could not be a primary caregiver without intensive assistance, that mother often appeared overwhelmed or stressed, and that she lacked family or other caregiving

1. Pseudonyms are used for ease of reading and to protect the privacy of the juveniles. Likewise, the mother of the juveniles will be referred to simply as "mother."

supports. The court ultimately concluded that while DSS had exercised reasonable efforts towards reunification, reunification was not in the best interests of the juveniles, and returning the juveniles home within a reasonable period of time was not possible. The court therefore ordered that the juveniles would remain in DSS custody, that the permanent plan would be a primary plan of adoption with a secondary plan of guardianship, and that DSS was relieved of all reunification efforts. The court further ordered that mother would have one last visit with K.S., M.A.S., and K.S., but that visits with the other two children would remain ceased.

Mother appeals.

II. Cessation of Reunification

[1] In her first argument, mother contends that the trial court erred in ceasing reunification efforts. We disagree.

A. Standard of Review

"This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007).

B. Analysis

Mother correctly notes that the trial court ceased all reunification efforts with her and ordered adoption as the primary plan and guardianship for the secondary plan for the juveniles. She also correctly notes that, should a trial court order an end to attempts at reunification, it must make findings that reunification efforts would be clearly unsuccessful or inconsistent with a juvenile's health or safety. N.C. Gen. Stat. § 7B-906.2(b) (2019). Mother contends, however, that neither the evidence nor the findings of fact support such a determination.

First, mother contends that the order contains multiple findings unsupported by the evidence. In support of this position, she notes the existence of contradictory evidence. For example, with regard to finding of fact 7, in which the trial court found that mother "made limited progress" in her case plan, mother argues that she "completed significant portions of her case plan, including making progress with parenting her youngest two children[.]" Likewise, she challenges finding of fact 12, in which the trial court found that mother "has not demonstrated appreciable progress in demonstrating her ability to parent the children[,]" and

which she claims is contradicted by other evidence; and finding of fact 26, in which the trial court found that it "is not possible for the children to be returned home within a reasonable period of time[,]" and which she claims does not apply to all of the juveniles.

However, there is a difference between arguing that there is *no evidence* to support a finding by the trial court, and arguing that there is evidence which *contradicts* that finding. In a nonjury proceeding such as this, the findings of fact "are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings." *Matter of Norris*, 65 N.C. App. 269, 275, 310 S.E.2d 25, 29 (1983). These three findings – findings of fact 7, 12, and 26 – are supported by evidence in the record. Kim Brown (Brown), social worker assigned to the instant case, specifically testified that mother "attempted but has not been able to show that she can obtain and maintain information or parent these children in a safe environment." Because these findings are supported by evidence in the record, notwithstanding any evidence to the contrary, we hold that the trial court did not abuse its discretion in entering them.

Mother also takes issue with finding of fact 8, in which the trial court found that "DSS did not have a release to track her progress [in therapy] and is unable to determine if Respondent Mother began to make progress in this area." Mother correctly notes that Brown testified that DSS did, in fact, receive releases to examine mother's mental health records. This portion of finding of fact 8 is therefore in error. However, even setting this finding aside, there were still ample unchallenged findings to support the trial court's conclusion. These unchallenged findings are presumed supported by competent evidence, and binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Accordingly, even though a portion of finding of fact 8 is erroneous, it does not impact the trial court's ultimate determination.

Having challenged the evidentiary bases for the trial court's findings, mother next argues that the trial court failed to make the requisite findings pursuant to N.C. Gen. Stat. § 7B-906.2(b). That statute specifically requires that, in ceasing reunification, a trial court must make findings pursuant to N.C. Gen. Stat. § 7B-901(c) (2019), concerning findings to be made at an initial dispositional hearing; findings pursuant to N.C. Gen. Stat. § 7B-906.1(d)(3) (2019), concerning hearings to be made at every permanency planning hearing; or findings "that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b).

The trial court did conclude, although such conclusion is more accurately an ultimate finding of fact, that returning to mother's home "is not in the best interest of the minor children at this time, and is contrary to the health, safety, and welfare of the children." This would appear to be a finding that reunification would be inconsistent with the juveniles' health and safety.

However, even assuming *arguendo* that the trial court did not use the precise language of the statute, this is not fatal. Our Supreme Court has held that "[t]he trial court's written findings must address the statute's concerns, but need not quote its exact language." *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013). Rather, we need only consider "whether the trial court's findings of fact address the substance of the statutory requirements." *Id.* at 166, 752 S.E.2d 454.

Here, there are abundant findings to support this ultimate determination. In addition to the trial court's specific finding that return to mother's home "is contrary to the health, safety, and welfare of the children[,]" the trial court found that mother sporadically attended her therapy sessions, that visits with the children are chaotic and the children do not listen, that an expert opined that mother could not be primary caregiver without intensive assistance, that mother lacks support systems to aid her in caregiving, that mother has been unable to provide necessary supervision and direction during visits, that one of the juveniles has admitted in therapy the neglect she suffered while living with mother, and that multiple juveniles suffer developmental or academic delays. These findings or portions of findings are unchallenged by mother, and binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. Taken together, these findings "address the substance of the statutory requirements" by showing the neglect the juveniles suffered while in mother's care, along with its ongoing impact, and mother's inability to remedy those conditions, including her inability to supervise during visits and her failure to consistently attend therapies. This evidence therefore shows that reunification would be inconsistent with the juveniles' health or safety, even if it is not explicitly stated as such. Because the trial court's findings "address the substance of the statutory requirements," we hold that the court's failure to use the precise language of statute was not fatal, and that the court did not err in making its ultimate finding.

III. Visitation

[2] In her second argument, mother contends that the trial court erred in terminating visitation. We disagree.

A. Standard of Review

"This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion." *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] 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).

B. Analysis

Mother argues that the trial court, in terminating visitation, failed to consider whether continued visits with the juveniles would be in their best interest. Rather, she claims, the trial court "erroneously overlooked" progress mother had allegedly made in visitation with the two youngest children, and argues that the termination of visitation was therefore an abuse of discretion.

Once more, mother attempts to offer contradictory evidence to suggest that the trial court's findings are unsupported. As we have held above, however, there is competent evidence in the record to support those findings, notwithstanding evidence to the contrary, and they are therefore conclusive on appeal.

Moreover, notwithstanding mother's arguments, the trial court's actions were in compliance with statutory mandate and case law. For example, this Court has held that, where a parent showed a lack of progress with DSS in parenting a minor child, the termination of visitation "is supported by the findings and the evidence, and the ruling is the result of a reasoned decision." *C.M.*, 183 N.C. App. at 215, 644 S.E.2d at 595. In the instant case, as in *C.M.*, there were ample findings that mother had not completed adequate progress in her case plan, and was continuing to have difficulty parenting the juveniles. The court specifically found that mother's visits with the remaining two children are "chaotic and the children do not listen[,]" that mother "has difficulty putting rules into place during visits and maintaining order[,]" and that mother "has not been able to provide [a necessary] level of supervision during visits." These findings or portions of findings are unchallenged by mother, and binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. Taken together, they support a finding that visitation is not in the juveniles' best interests. Accordingly, we hold that the trial court did not abuse its discretion in terminating visitation.

AFFIRMED.

Judge DILLON concurs.

Judge ARROWOOD dissents in separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent. In pertinent part, N.C. Gen Stat. § 7B-906.2(b) (2019) provides that, "At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and the secondary plan. Reunification shall be a primary or secondary plan *unless . . . the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety*." N.C. Gen Stat. § 7B-906.2(b) (emphasis added). While it is true that a permanency planning order need not contain a verbatim recitation of this language, it must be apparent from the order itself that the court considered whether reunification would be futile or inconsistent with the juvenile's health safety and need for a permanent home. *In re L.M.T.*, 367 N.C. 165, 167-68, 752 S.E.2d 453, 455 (2013) (interpreting similar language of mandate in N.C. Gen. Stat. § 7B-507(b) (2019)).

In the present case, the trial court's permanency planning order does not contain a single reference to N.C. Gen. Stat. § 7B-906.2(b), the controlling statute. In addition, a review of the order's conclusions of law 2, 5, and 6 makes clear that the trial court based its ultimate decision to end all reunification efforts on its determination that it was not in the best interest of the children to be returned to the mother at the present time. I see no conclusion of law in the order from which I can deduce that the trial court conducted the appropriate analysis required by N.C. Gen. Stat. § 7B-906.2(b). Thus, I would vacate the order and remand to the trial court for further proceedings.

WANDA CAMPBELL McLEAN, AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPHINE SMITH, PLAINTIFF

v.

KATIE SPAULDING, DEFENDANT

No. COA20-36

Filed 15 September 2020

1. Declaratory Judgments—investment account—joint tenancy with right of survivorship—motion to dismiss—failure to state a claim

Where the decedent and defendant had opened an investment account and had selected the option on the account authorization form to hold the account as "Joint Tenancy WROS", the estate administrator's complaint for a declaratory judgment to establish the account as a single person account owned by the estate was properly dismissed by the trial court for failure to state a claim upon which relief could be granted. Although the complaint alleged the account form failed to meet the requirements of N.C.G.S. § 41-2.1(a) in order to establish a right of survivorship, that statute applied to deposits made to banking institutions. Because the account was deposited with a broker-dealer, it was governed by N.C.G.S. § 41-2.2 and the account form was sufficient to create a joint tenancy with right of survivorship under that statute.

2. Declaratory Judgments—motion to dismiss—failure to state a claim—statute of limitations

Where the decedent and defendant opened a joint investment account on 13 March 2013, decedent died 13 September 2018, and the estate administrator filed the original complaint on 23 October 2018 seeking a declaratory judgment to establish the account as a single person account owned by the estate, the trial court properly granted defendant's motion to dismiss for failure to state a claim because the claim was barred by the applicable statute of limitations. Since the statute of limitations for a declaratory judgment is based on the underlying claim, and the underlying claim here was based on liability arising out of a contract, the action had to be commenced within three years from the time the action arose—when the account with the right of survivorship was executed.

Appeal by plaintiff from order entered 1 October 2019 by Judge Mary Ann Talley in Bladen County Superior Court. Heard in the Court of Appeals 26 August 2020.

Coy E. Brewer, Jr. for plaintiff-appellant.

Hutchens Law Firm LLP, by Natasha M. Barone, J. Scott Flowers, Damón Gray II, for defendant-appellee.

TYSON, Judge.

Wanda Campbell McLean, as Administrator of the Estate of Josephine Smith ("Plaintiff"), appeals from an order entered on 1 October 2019 granting Katie Spaulding's ("Defendant") motion to dismiss. The trial court's order is affirmed.

I. Background

On 18 March 2013, Josephine Smith ("Smith") and Defendant opened the investment account number 446-13688-1-3 (the "Account"), as joint owners, with Edward D. Jones & Co., Limited Partnership d/b/a Edward Jones ("Edward Jones"). Smith and Defendant executed an Edward Jones' form entitled Account Authorization and Agreement Form ("Account Form"), which contained the following language under the "Joint Accounts Only" section:

> Joint owners must select one form of ownership. If you have questions regarding which form of ownership is appropriate for you, please contact your attorney. Edward Jones will not, nor is any employee authorized to, advise you with this choice.

Underneath the above language, the following seven choices were available:

1) Joint Tenancy WROS (Not available in LA)
2) Tenants in Common
3) Tenants by the Entireties
4) Community Property (Community Property States only)
5) Community Property WROS (CA, NV & AZ only)
6) Survivorship Martial Property (WI only)
7) Marital Property (WI only)

Smith and Defendant selected the first choice that the account would be held as "Joint Tenancy WROS." Section II of the Account Agreement specified the investment account "is for broker-dealer services in a non-discretionary account."

Smith died on 13 September 2018. At the time of Smith's death, the investment account had a value of $267,486.24. Plaintiff initially filed a complaint against Defendant and Edward Jones on 23 October 2018, in Bladen County. This complaint sought a declaratory judgment declaring the account is a single person account owned by Smith's estate. Edward Jones filed a motion to dismiss on 29 November 2018. The trial court entered an order dismissing the complaint against Edward Jones. Plaintiff then voluntarily dismissed the complaint against Defendant on 28 May 2019.

Plaintiff initiated this action by filing a second complaint in Bladen County. The second complaint asserted claims only against Defendant, not Edward Jones. Plaintiff alleged "the statutory requirements of N.C. Gen. Stat. § 41-2.1(a) requiring Right of Survivorship must be expressly provided for in the agreement, was not completed with any of the Edward Jones documents." As with the original complaint, Plaintiff sought a declaratory judgment establishing the Account "is a single person account owned by the Plaintiff Estate of Josephine Smith."

On 18 July 2019, Defendant filed motions to dismiss pursuant to N.C. R. Civ. P. 12(b)(1), 12(b)(6), and 12(b)(7), answer, and affirmative defenses in response to the second complaint. Defendant's motions to dismiss were heard by the trial court on 14 August 2019.

On 1 October 2019, the trial court entered an order dismissing the second complaint because the "[c]omplaint fails to state a claim upon which relief can be granted and to present a justiciable controversy because Plaintiff's claims against Defendant are barred by the statute of limitations." Plaintiff appeals.

II. Jurisdiction

Plaintiff appeals the trial court's order as of right pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2019).

III. Issues

Plaintiff argues the trial court erred when it granted Defendant's Rule 12(b)(6) motion. She asserts her second complaint filed on 29 May 2019 states a claim upon which relief may be granted and the statute of limitations has not yet expired.

IV. 12(b)(6) Motion to Dismiss

A. Standard of Review

"On appeal from a motion to dismiss under Rule 12(b)(6), this Court reviews *de novo* 'whether, as a matter of law, the allegations of

the complaint . . . are sufficient to state a claim upon which relief may be granted.' " *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)), *disc. review denied*, 363 N.C. 372, 678 S.E.2d 234 (2009). In ruling on a motion to dismiss pursuant to Rule 12(b)(6), "the well-pleaded material allegations of the complaint are taken as true; but conclusions of law or unwarranted deductions of facts are not admitted." *Azure Dolphin, LLC. v. Barton*, 371 N.C. 579, 599, 821 S.E.2d 711, 725 (2018) (citation omitted).

This Court has held: "A statute of limitations defense is properly asserted in a motion to dismiss under Rule 12(b)(6), and is proper grounds for the trial court to find a complaint is without merit." *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 38, 587 S.E.2d 470, 473 (2003) (quotation marks and citation omitted), *disc. review denied*, 358 N.C. 235, 595 S.E.2d 152 (2004).

B. Declaratory Judgment Act

"The purpose of the Declaratory Judgment Act is to settle and afford relief from uncertainty concerning rights, status and other legal relations, and although the Act is to be liberally construed, its provisions are not without limitation." *Consumers Power v. Power Co.*, 285 N.C. 434, 446, 206 S.E.2d 178, 186 (1974). Courts possess jurisdiction to render declaratory judgments when the pleadings disclose the existence of an actual controversy between the parties having adverse interest in the matter in dispute. *Gaston Bd. Of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984). When asserting a claim for declaratory judgment, the claimant "must set forth in his pleading all facts necessary to disclose the existence of an actual controversy between the parties . . . with regard to their respective rights and duties in the premises." *Lide v. Mears*, 231 N.C. 111, 118, 56 S.E.2d 404, 409 (1949).

Plaintiff's request for declaratory judgment is supported by two allegations/claims for relief: (1) the Account Form failed to comply with applicable statutory law, N.C. Gen. Stat. § 41-2.1(a), in order to establish a right of survivorship; and, (2) the right of survivorship was acquired by fraud. Although the second complaint contained one sentence alleging that the documents creating the Account were forged, Plaintiff failed to specifically allege the elements of fraud, include any argument, or to even mention any forgery in Plaintiff's principal brief or reply brief. Plaintiff has waived her right to challenge the court's dismissal of her forgery claim. N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

C. N.C. Gen. Stat. § 41-2.1

[1] Plaintiff argues the Account Form failed to create a joint account with right of survivorship under N.C. Gen. Stat. § 41-2.1(1). Although Plaintiff references several other statutes in her brief, these additional statutes, N.C. Gen Stat. §§ 53C-6-6(f), 54B-129, 54-109.58, 53C-6-7 and 54C-165 (2019), were not argued before the trial court and were not referenced in the second complaint.

Plaintiff alleges the statutory requirement of N.C. Gen. Stat. § 41-2.1(a) requiring the right of survivorship must be expressly provided for in the agreement was not complied with by any of the documents that created the Account. Our review of the requirements and definitions set forth in N.C. Gen. Stat. § 41-2.1 reveals this statute is not applicable to the Account at issue.

N.C. Gen. Stat. § 41-2.1(a) provides:

> A deposit account may be established with a banking institution in the names of two or more persons, payable to either or the survivor or survivors . . . when both or all parties have signed a written agreement . . . expressly providing for the right of survivorship.

N.C. Gen. Stat. § 41-2.1(a) (2019).

While N.C. Gen. Stat. § 41-2.1(e)(2) defines a "deposit account" as:

> Both time and demand deposits in commercial banks and industrial banks, installment shares, optional shares and fully paid share certificates in building and loan associations and savings and loan associations, and deposits and shares in credit unions.

N.C. Gen. Stat. § 41-2.1(e)(2) (2019).

N.C. Gen. Stat. § 41-2.1(e)(1) defines "banking institution" as "commercial banks, industrial banks, building and loan associations, and credit unions." N.C. Gen. Stat. § 41-2.1(e)(1) (2019).

D. Broker-Dealer

Edwards Jones is a registered broker-dealer and investment advisor. Plaintiff's original complaint acknowledged "Edward Jones is dually registered with the SEC as a broker-dealer and an investment advisor." Edward Jones is not a "commercial bank, industrial bank, building and loan association, savings and loan association, or a credit union."

Since Edward Jones' activities or services are neither within the definition of "banking institution," nor does the Account at issue fall within the definition of "deposit account" under N.C. Gen. Stat. § 41-2.1, those statutory requirements are not applicable either to Edward Jones or to the Account. In the first action, the trial court dismissed Plaintiff's complaint because Edward Jones is not a banking institution as is defined by the statute, but instead is a broker-dealer.

Plaintiff cites *O'Brien v. Reece*, 45 N.C. App. 610, 613-15, 263 S.E.2d 817, 819-20 (1980), wherein this Court examined parties' signature card for their deposit account with Central Bank & Trust Company to determine whether the language used therein was sufficient to comply with N.C. Gen. Stat. § 41-2.1 to create a joint account with a right of survivorship

O'Brien is not analogous to this case. Those facts deal with "deposit accounts" and "banking institutions," whereas this appeal involves an investment account with a registered broker-dealer and investment advisor. *Id.* Plaintiff's claim fails to satisfy the requirements of N.C. Gen. Stat. § 41-2.1 and fails to state a claim for relief.

E. N.C. Gen. Stat. § 41-2.2

This account is governed by N.C. Gen Stat. § 41-2.2 (2019). The General Assembly enacted N.C. Gen. Stat. § 41-2.2, for joint ownership of securities. A "security account" is defined as:

> reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to the account before the owner's death.

N.C. Gen. Stat. § 41-40(10) (2019).

The Account Form signed by both parties established the account for "broker-dealer services in a non-discretionary account." The Account falls within the definition of a "security account" as set forth in N.C. Gen. Stat. § 41-40(10). Under N.C. Gen. Stat. § 41-2.2(a), parties can choose to own a security account "as joint tenants with rights of survivorship, and not as tenants in common." A broker-dealer holds a security account for its owners as joint tenants with right of survivorship only when:

> *by book entry or otherwise indicates* (i) that the securities are owned with the right of survivorship, or (ii) otherwise

> clearly indicates that upon the death of either party, the interest of the decedent shall pass to the surviving party.

N.C. Gen. Stat. § 41-2.2(b)(2) (emphasis supplied). Based upon the plain language of the statute, no further specific language is required for a joint investment account to be established or held with right of survivorship.

F. Construing the Contract

The Account and the Account Form are contracts between Smith, Defendant, and Edward Jones. " 'The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.' " *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 624 (1973) (quoting *Electric Co. v. Ins. Co.*, 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948)). The court looks to "the plain meaning of the written terms" in order to "determine the intent of the parties." *RL REGI N.C., LLC v. Lighthouse Cove, LLC*, 367 N.C. 425, 428, 762 S.E.2d 188, 190 (2014) (citing *Powers v. Travelers Ins. Co.*, 186 N.C. 336, 338, 119 S.E. 481, 482 (1923)). The meaning of a contract is " 'gathered from its four corners.' " *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 335, 777 S.E.2d 272, 279 (2015) (quoting *Carolina Power & Light Co. v. Bowman*, 229 N.C. 682, 693-94, 51 S.E.2d 191, 199 (1949) (Stacy, C.J., *dissenting*)).

When interpreting a contract, the court must "construe them as a whole." *Id.*, 777 S.E.2d at 279 (citation omitted). "Each clause and word is considered with reference to each other and is given effect by reasonable construction." *Id.* at 336, 777 S.E.2d at 279 (citing *Sec. Nat'l Bank v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 93, 143 S.E.2d 270, 275 (1965)).

When the account was established, the parties were required to "select one form of ownership" with a default position on the Account Form under the "Joint Accounts Only" section. This section provides the seven options stated above. The Form Agreement specifies the account will be "deemed to be held jointly as tenants in common, unless we specify in the opening or registration otherwise." Both Smith and Defendant selected the "Joint tenancy WROS" option.

The Account Form satisfies the requirements of N.C. Gen. Stat. § 41-2.2 by being a "book entry" or writing which "otherwise" indicates "the securities are [jointly] owned with the right of survivorship." N.C. Gen. Stat. § 41-2.2. Smith and Defendant could have selected the box labeled "Tenants in Common" or not chosen by default. Instead, both signors specifically selected the box labeled "Joint Tenancy WROS."

The abbreviation or acronym "WROS" is commonly used to mean "with the right of survivorship" in North Carolina. NC Estate

Administration Manual § IX.II.6.C (2014). While the Account Form could have spelled out WROS to be clearer, the contract is free of any ambiguities. A distinguishing feature of a joint tenancy as opposed to a tenancy in common is the right of survivorship. *See Davis v. Bass*, 188 N.C. 200, 203, 124 S.E. 566, 569 (1924) (citation omitted). It is clear from the four corners of the Account Form that the parties intended and specifically chose to create the Account as a joint tenancy with right of survivorship.

In her reply brief, Plaintiff recognizes the Account is actually governed by N.C. Gen. Stat. § 41-2.2(a), and not by N.C. Gen. Stat. § 41-2.1. Plaintiff pivots her argument to assert both *O'Brien* and N.C Gen. Stat. § 41-2.1 articulates a public policy requiring the creation of a survivorship account should be done clearly and unambiguously. She posits the provisions of N.C. Gen. Stat. § 41-2.2 and the language of the Account Form should require a similar level of clarity.

Under Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, where a party fails to assert a claim in its principal brief, it abandons that issue and cannot revive the issue *via* reply brief. *See Beckles-Palomares v. Logan*, 202 N.C. App. 235, 246, 688 S.E.2d 758, 765 (2010) (holding appellant abandoned its statute of limitations argument "by its failure to advance the issue in its principal brief").

In both Plaintiff's second complaint and principal brief, Plaintiff argues the account at issue and Account Form fail to comply with N.C. Gen. Stat. § 41-2.1 and the account should be deemed "a single person account owned by the Plaintiff Estate of Josephine Smith." Not until Plaintiff's reply brief, does she mention N.C. Gen. Stat. § 41-2.2 for the first-time during litigation.

Since Plaintiff never asserted her public policy argument under N.C. Gen. Stat. § 41-2.2 in either the second complaint or in her principal brief, she has abandoned the issue and cannot revive the issue *via* her reply brief. *See id.*

More importantly, this public policy argument is properly presented to the General Assembly, as opposed for the first time in a reply brief to an error correcting court. *Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer*, 261 N.C. App. 325, 344, 821 S.E.2d 196, 210 (2018) (holding this Court is not the proper entity to address public policy considerations). This argument is abandoned and dismissed.

G. Statute of Limitations

[2] Plaintiff argues if the Account Form was insufficient to create a joint account with right of survivorship, then the statute of limitations did not

begin to run until Smith's death when Edward Jones "for the first time designated the account as a joint account with Right of Survivorship." We disagree.

Plaintiff's second complaint is a request for declaratory judgment. The statute of limitations for declaratory relief is based upon the underlying claims. *Asheville Lakeview Props., LLC v. Lake View Park Comm'n, Inc.*, 254 N.C. App. 348, 353, 803 S.E.2d 6323, 636 (2017) (citation omitted).

Plaintiff's underlying claim for declaratory judgement arises out of an "obligation or liability arising out of a contract." The claim is governed by N.C. Gen. Stat. § 1-52(1) (2019). Under N.C. Gen. Stat. § 1-52(1) "a plaintiff must commence any action based on a contract within three years from the time the cause of action accrues, absent the existence of circumstances which would toll the running of the statute of limitations." *Pearce v. N.C. State Highway Patrol Voluntary Pledge Comm.*, 310 N.C. 445, 448, 312 S.E.2d 421, 424 (1984).

The language of the Account Form was sufficient for the parties to create a joint account with right of survivorship. *See* N.C. Gen. Stat. § 41-2.2(a). No allegations in the second complaint, her principal brief, or her reply brief asserts the statute of limitations was tolled, nor did Plaintiff plead any facts tolling the three-year statute of limitations.

The statute of limitations commenced on 13 March 2013, the date on which the Account with the right of survivorship designation was executed. The three-year statute of limitations expired on 13 March 2016. Since Plaintiff has not shown why the statute of limitations should be tolled, her claim for declaratory judgment elapsed and is barred.

V. Conclusion

Plaintiff's second complaint failed to state a claim upon which relief may be granted. The statute of limitations has expired on Plaintiff's underlying contract claim. The trial court's dismissal of Plaintiff's second complaint is affirmed. *It is so ordered.*

AFFIRMED.

Judges HAMPSON and BROOK concur.

METLIFE GROUP, INC. O/B/O EMPLOYEES, PETITIONER
v.
DANIEL LEE SCHOLTEN, RESPONDENT

No. COA20-128

Filed 15 September 2020

1. Appeal and Error—petition for certiorari—no written notice of appeal—civil contempt

Where respondent did not file written notice of appeal from the trial court's order holding him in civil contempt for failure to produce a video he filmed in his former workplace, the Court of Appeals in its discretion denied respondent's petition for certiorari to review his claim that the trial court's order violated his right against self-incrimination since the relevant criminal charge had been resolved prior to the hearing on the motion to compel and he had been granted several continuances over the six-month period preceding the hearing due to his concern for his Fifth Amendment rights.

2. Contempt—civil contempt—Workplace Violence Prevention Act—court's authority to enter order compelling production of discoverable material

In a case involving a petition for a no-contact order where respondent was held in civil contempt for failing to produce a video he filmed when he returned to the offices of the petitioner (his former employer) after he was fired, the trial court's order holding respondent in civil contempt was affirmed. Under the Workplace Violence Prevention Act, the court had authority pursuant to N.C.G.S. § 95-264(b)(6) to enter a no-contact order which compelled the production of the video if necessary and appropriate. Therefore, the court also had authority to hold respondent in contempt for willfully refusing to produce the video, even in the absence of a pending discovery request.

Appeal by Respondent from order entered 27 June 2019 by Judge Margaret P. Eagles in Wake County District Court. Heard in the Court of Appeals 26 August 2020.

Parker Poe Adams & Bernstein LLP, by Melanie Black Dubis and Nana Asante-Smith, for the Petitioner-Appellee.

Mary McCullers Reece for the Respondent-Appellant.

BROOK, Judge.

Daniel Lee Scholten ("Respondent") appeals from an order finding him in civil contempt. We affirm the order of the trial court.

I. Background

Respondent is a former employee of MetLife Group, Inc. ("Petitioner"). In May of 2017, Respondent sent an e-mail to some of his professional colleagues in which he compared himself to Adam Lanza, the perpetrator of the Sandy Hook Elementary massacre. Like Mr. Lanza, Respondent experiences autism. Petitioner terminated Respondent's employment shortly after he sent the e-mail comparing himself to Mr. Lanza.

Respondent is also the author of a blog. Substantial portions of the blog are devoted to Respondent's thoughts and feelings about his former workplace and his experience of the circumstances surrounding the termination of his employment, as well as the kinship he feels with Mr. Lanza. The content of the blog includes numerous references that reasonably could be interpreted to suggest Respondent may be a danger to his former colleagues and Petitioner's other employees.

Over a year after his employment by Petitioner was terminated, on 14 June 2018 Respondent entered his former workplace with a GoPro video camera strapped to his chest and confronted several of his former colleagues. During the episode Respondent threatened to publicly disclose the video he was recording as well as his colleagues' personal information. The following day he was arrested for breaking and entering. Shortly afterward, he characterized the event in his blog as his "MetLife Shooting Rampage" and suggested that he might repeat the event at some future date.

On 26 June 2018, Petitioner sought an order prohibiting Respondent from contacting its employees or returning to the workplace and requiring Respondent to turn over a copy of the video he recorded on 14 June 2018, amongst other things. The trial court entered a temporary *ex parte* order granting Petitioner the requested relief on 27 June 2018. The court entered another order on 3 July 2018, making the provisions of the temporary order permanent, for one year.

On 2 July 2018, Petitioner filed a motion for Respondent to show cause why he should not be held in contempt of the court's 27 June 2018 order based on Respondent's failure to turn over the video. Rather than produce the video, Respondent had provided counsel with a

password-protected link that he represented would allow access to the video but refused to provide counsel with the password. Later, he delivered a blank thumb drive to counsel's office that he claimed contained the video but did not. On 12 July 2018, the trial court ordered Respondent to show cause why he should not be held in contempt for his failure comply with the 27 June 2018 order.

Petitioner filed a second motion for Respondent to show cause why he should not be held in contempt on 26 July 2018, this time for failing to comply with the 3 July 2018 order, again for failing to produce the video. Since the filing of the first show cause motion several weeks earlier, Respondent had provided counsel with another thumb drive that he claimed contained the video but this thumb drive was encrypted and password-protected, and Respondent refused to provide the password. On 1 August 2018, the trial court again ordered Respondent to show cause why he should not be held in contempt, and set a second show cause hearing.

On 7 and 10 August 2018, the trial court entered orders continuing the show cause hearings because Respondent's criminal charge for breaking and entering was still pending and Respondent was invoking his Fifth Amendment right against self-incrimination in refusing to produce the video. Petitioner opposed the continuances. The first show cause hearing was continued again on 7 September 2018 despite Petitioner's continued opposition. On 13 September 2018, the trial court entered an order continuing the second show second cause hearing to 25 October 2018 based on an agreement of the parties.[1]

The matter came on for hearing on 25 October 2018 before the Honorable Christine M. Walczyk in Wake County District Court. In an order entered the same day, Judge Walczyk found Respondent in civil contempt of the 3 July 2018 order and ordered him to be taken into custody until he produced the video. Judge Walczyk included an alternative purge provision in her order, allowing Respondent to produce an unencrypted, non-password protected copy of the video *without* audio to purge his contempt. Petitioner took a voluntary dismissal with prejudice of the first show cause hearing on 25 October 2018 and the court entered a dismissal the same day.

Respondent spent almost two weeks in jail in late October and early November of 2018 for his contempt of the 3 July 2018 order before

1. On 13 November 2018, Respondent entered a deferred prosecution agreement with the Wake County District Attorney's office, agreeing to plead guilty to the breaking and entering charge.

authorizing his counsel on 7 November 2018 to provide Petitioner with a copy of the video without audio under the alternative purge provision of Judge Walczyk's order.

On 14 January 2019, Petitioner filed a motion to compel the production of the video with the audio included, as had been required by the June and July 2018 orders.[2] Petitioner re-filed the motion on 12 February 2019. The matter came on for hearing before the Honorable Ned W. Mangum in Wake County District Court on 14 February 2019. In an order entered the same day, Judge Mangum granted the motion to compel.

On 19 March 2019, Petitioner once again moved the court for an order to show cause why Respondent should not be held in contempt of the 14 February 2019 order for failing to produce the video with audio. On 28 March 2019, the trial court once again ordered Respondent to show cause why he should not be held in contempt. On 17 June 2019, Respondent moved to set aside and dismiss the 14 February 2019 order.

Both matters came on for hearing before the Honorable Margaret P. Eagles in Wake County District Court on 27 June 2019. Judge Eagles denied Respondent's motion to set aside and dismiss in open court and found Respondent in contempt in a written order entered the same day. Under Judge Eagles's 27 June 2019 order, Respondent could only purge his contempt by providing a copy of the video with audio or providing the password that would enable Petitioner to access the password-protected thumb drive he had produced. Respondent was taken into custody at the conclusion of the 27 June 2019 hearing.

Respondent entered written notice of appeal from the 27 June 2019 order on 2 July 2019. The trial court stayed enforcement of the order on 17 July 2019, pending the outcome of the appeal.

On 3 March 2020, Respondent filed a "conditional petition for certiorari," requesting review of the 14 February 2019 order. Petitioner responded in opposition to Respondent's conditional petition on 26 March 2020.

II. Petition for Certiorari

[1] Respondent petitions our Court for certiorari to review the issue of whether his Fifth Amendment right against self-incrimination was violated by the 14 February 2019 order. Respondent's petition is conditional insofar as we do not consider him to have properly noticed his appeal. We first determine Respondent did not provide notice of appeal and then, in our discretion, deny his petition.

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2. As noted above, the provisions of the July 2018 order were in effect through 3 July 2019.

Respondent suggests that he noticed his appeal during the 14 February 2019 hearing on the motion to compel. The following colloquy transpired during that hearing:

> MR. SCHOLTEN: One question, if I may?
>
> THE COURT: Go ahead.
>
> MR. SCHOLTEN: So let's say you decide to grant the motion, I assume I will have an opportunity to appeal?
>
> THE COURT: I'm not sure that would be interlocutory, meaning you can't appeal it immediately to the Court of Appeals, but I haven't thought through it enough to even be able to answer that question.
>
> MR. SCHOLTEN: Okay, all right.

This question did not constitute notice of appeal from the 14 February 2019 order.

Unlike in a criminal case, in which entry of notice of appeal in open court is allowed under Rule 4(a)(1) of the North Carolina Rules of Appellate Procedure, in a civil case, notice of appeal must be in writing. *See* N.C. R. App. P 3(a) ("Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by *filing* notice of appeal with the clerk of superior court[.]") (emphasis added). Respondent concedes that he did not enter timely written notice of appeal from the 14 February 2019 order.

"Certiorari is a discretionary writ, to be issued only for good or sufficient cause shown, and it is not one to which the moving party is entitled as a matter of right." *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579, 140 S.E. 230, 231 (1927). In our discretion, we deny Respondent's petition for certiorari. We note that Respondent's criminal charge for breaking and entering was resolved several months prior to the February 2019 hearing on the motion to compel and that Respondent had been granted three continuances out of concern for his Fifth Amendment rights over the course of the six month period preceding the hearing on the motion to compel.

III. Merits Analysis

[2] Respondent argues that he cannot be held in contempt for violation of an order the trial court lacked the authority to enter. His appeal thus presents the question of whether a trial court exceeds its authority when

it enters a no-contact order under the Workplace Violence Prevention Act compelling the production of discoverable material, such as video, and then holds a party in contempt for willfully refusing to produce the material, even in the absence of a pending discovery request. We hold that it does not.

A. Standard of Review

> Review in civil contempt proceedings is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment.

Tucker v. Tucker, 197 N.C. App. 592, 594, 679 S.E.2d 141, 142 (2009) (internal marks and citation omitted). "[H]owever, our standard of review is de novo [] where a party presents a question of statutory interpretation . . . [or] where the trial court's subject matter jurisdiction to hear an issue is questioned[.]" *Smith v. Smith*, 247 N.C. App. 166, 169, 785 S.E.2d 434, 437 (2016) (internal marks and citations omitted).

B. The Workplace Violence Prevention Act

North Carolina's Workplace Violence Prevention Act authorizes "[a]n action for a civil no-contact order . . . by an employer on behalf of an employee who has suffered unlawful conduct from any individual that can reasonably be construed to be carried out, or to have been carried out, at the employee's workplace." N.C. Gen. Stat. § 95-261 (2019). The action may be brought by "filing a verified complaint . . . or by filing a motion in any existing civil action." *Id.* § 95-262(a). "Upon a finding that the employee has suffered unlawful conduct committed by the respondent [to the action], the court may issue a temporary or permanent civil no-contact order." *Id.* § 95-264(a).

North Carolina General Statute § 95-264(b) confers broad authority on trial courts to award appropriate relief in no-contact orders, including the following:

> (1) Order the respondent not to visit, assault, molest, or otherwise interfere with the employer or the employer's employee at the employer's workplace, or otherwise interfere with the employer's operations.

> (2) Order the respondent to cease stalking the employer's employee at the employer's workplace.
>
> (3) Order the respondent to cease harassment of the employer or the employer's employee at the employer's workplace.
>
> (4) Order the respondent not to abuse or injure the employer, including the employer's property, or the employer's employee at the employer's workplace.
>
> (5) Order the respondent not to contact by telephone, written communication, or electronic means the employer or the employer's employee at the employer's workplace.
>
> (6) *Order other relief deemed necessary and appropriate by the court.*

Id. § 95-264(b) (emphasis added).

In the present case, the trial court's 27 June 2018 no-contact order found that Respondent had committed the requisite unlawful conduct and awarded all five forms of relief N.C. Gen. Stat. § 95-264(b) specifies, as well as the following, other relief:

> The Respondent not contact by telephone, written communication, or electronic means any employees of MetLife Group, Inc. ("MetLife").
>
> That Respondent not be on or around the MetLife premises located at 101 MetLife Way in Cary, North Carolina.
>
> That Respondent not come within 200 feet of James Frederick Schenck, Robert Seton Harris, Francine McAllister, and Geoff Lang.
>
> That Respondent not disclose any portion of the video he recorded at MetLife on June 14, 2018.
>
> That Respondent provide to MetLife's counsel in this action a copy of the video he recorded at MetLife on June 14, 2018 within 48 hours of service of this Order.

The 3 July 2018 order also required Respondent to "provide a copy of the video [to counsel] . . . within 10 days of the entry of this Order."

The 14 February 2019 order compelling the production of the video with audio additionally provides:

> the Respondent shall provide a complete copy of all audio and video taken by the [R]espondent on June 14, 2018 at the MetLife campus to Petitioner's counsel within five (5) days of the date of this Order. The copy of [sic] shall not be encrypted, password-protected, or otherwise unavailable to be viewed and heard in full. The Respondent shall use a device that is free of any computer virus to deliver the recording to the [Petitioner].

As noted previously, although Respondent turned over a copy of the video he recorded on 14 June 2018, the video did not include audio.

C. The Trial Court's Authority to Enter the 14 February 2019 order

Our Supreme Court has held that "[t]he trial court possesses 'inherent authority' to compel discovery in certain instances in the interest of justice." *State v. Warren*, 347 N.C. 309, 325, 492 S.E.2d 609, 617 (1997). Inherent authority has been described as "essential to the existence of the court and the orderly and efficient exercise of the administration of justice." *Beard v. North Carolina State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987). It empowers courts to do "those things which are reasonably necessary for the administration of justice within the scope of their jurisdiction[,]" *Matter of Transp. of Juveniles*, 102 N.C. App. 806, 808, 403 S.E.2d 557, 559 (1991) (citation omitted), and it extends to enforcing compliance with court orders, *see generally Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 674, 360 S.E.2d 772, 776 (1987) ("The power of the trial court to sanction parties for failure to comply with court orders is essential to the prompt and efficient administration of justice."). Civil contempt is, of course, an order entered "to preserve the rights of private parties and to compel obedience to orders and decrees[.]" *Bishop v. Bishop*, 90 N.C. App. 499, 503, 369 S.E.2d 106, 108 (1988) (citation omitted).

Respondent argues that he cannot be held in contempt of the 14 February 2019 order compelling production of the video with audio because the trial court exceeded its authority when it ordered him to produce the video with audio given that no discovery request or claim for relief remained pending in the case. This argument does not account for the fact that N.C. Gen. Stat. § 95-264(b)(6), allowing for an award of "other relief deemed necessary and appropriate by the court[,]" authorized the trial court to order Respondent to produce the video in the first instance. N.C. Gen. Stat. § 95-264(b)(6) (2019). Further, the provisions of the 3 July 2018 order, including that requiring production of the video to Petitioner's counsel, remained in effect when the subsequent

14 February 2019 order was entered, and Respondent had not complied. Petitioner was thus not required to serve a request for production on Respondent pursuant to Rule 37 of the North Carolina Rules of Civil Procedure prior to moving the court to compel Respondent to produce the video. Nor did Respondent's pre-existing obligation to produce the video excuse him from complying with the court's third order requiring production of the video, which removed any doubt whether it was to be produced "encrypted, password-protected, or otherwise unavailable to be viewed *and heard* in full." (Emphasis added.)

D. The Trial Court's Unchallenged Findings

In the 27 June 2019 order finding Respondent in civil contempt the trial court found in relevant part as follows:

> 4. Contemnor is willfully violating the Court Order by: [Respondent] was ordered to provide a copy of the full video recording he made on June 14, 2018 with any accompanying audio to [Petitioner's] counsel on or before February 14, 2019 (within five days of the entry of the Order). [Respondent] did not and has not provided the video with accompanying audio to [Petitioner's] counsel. [Respondent] was present at the hearing on February 14, 2019, and the Court heard his objections to the Order to produce the video and audio. [Respondent] testified during the Show Cause hearing that he understood that Judge Mangum had ordered him to provide the video with the accompanying audio. On March 4, 2019, [Respondent] sent [Petitioner's] counsel an email, in which he made statements that he had expected to have received a Motion and Order to Show Cause for not complying with Judge Mangum's February 14, 2019 Order, and provided information about how [Petitioner] could serve him. [Respondent's] criminal charge of Misdemeanor Breaking and Entering the Met Life Campus on June 14, 2018 has been resolved through [Respondent's] entry into a deferral agreement on November 13, 2018 in which [Respondent] acknowledged his guilt to the criminal charge and entered a plea of guilty. During the February 14, 2019 hearing, Judge Mangum heard from both parties regarding [Respondent's] concerns regarding potential self-incrimination from the audio recording, and determined that the resolution of the criminal case through entry of a plea of guilty and deferral agreement, negated those concerns. Pursuant to a prior

> Show Cause Order, [Respondent] has provided a thumb drive, which allegedly had the audio and video vile made by Defendant on June 14, 2018. However, that thumb drive was password protected and [Respondent's] refusal to provide the password resulted in a prior Order for Civil Contempt, entered on October 25, 2018. During this hearing, [Respondent] acknowledged that he still knew that password, as did his attorney, but refused to provide it to avoid being held in Civil Contempt.

We are bound by these findings because they are not challenged on appeal. *Tucker*, 197 N.C. App. at 594, 679 S.E.2d at 142-43.

IV. Conclusion

Informed by the trial court's unchallenged findings above, we hold that the trial court's order compelling the production of the video was not outside the trial court's authority. We therefore affirm the order finding Respondent in civil contempt.

AFFIRMED.

Judges TYSON and HAMPSON concur.

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND CLEAN AIR CAROLINA, PLAINTIFFS

v.

TIM MOORE, IN HIS OFFICIAL CAPACITY, AND PHILIP BERGER, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. COA19-384

Filed 15 September 2020

Legislature—authority to propose constitutional amendments—illegally gerrymandered districts

After a federal court had declared that some members of the North Carolina General Assembly were elected from illegally gerrymandered districts (due to too many majority-minority districts), the trial court erred by declaring that two amendments to the state constitution (an income tax cap amendment and a voter identification amendment), which were proposed by the illegally gerrymandered

General Assembly and then ratified by popular vote, were void ab initio. There was no legal support for the trial court's conclusions, and the General Assembly retained its authority to exercise all its powers granted by the state constitution.

Judge STROUD concurring, writing separately.

Judge YOUNG dissenting.

Appeal by Defendants from order entered 22 February 2019 by Judge G. Bryan Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 31 October 2019.

Southern Environmental Law Center, by Kimberley Hunter and David Neal, and Forward Justice, by Irving Joyner and Daryl V. Atkinson, for Plaintiffs.

Nelson Mullins Riley & Scarborough LLP, by D. Martin Warf and Noah H. Huffstetler, III, for Defendants.

DILLON, Judge.

The people reserved for themselves the sole right to amend our state constitution, N.C. CONST. art. I, § 3, but granted to our General Assembly the authority to pass bills proposing amendments for the people's consideration, N.C. CONST. art. XIII, § 4.

Plaintiff[1] commenced this action, seeking an order to void two of the four amendments ratified by the people during the November 2018 election. These amendments were proposed by our General Assembly during its 2017-18 Session. Plaintiff argues that the people should never have been allowed to vote on the amendments based on a 2017 decision in a federal case which declared that 28 members of our 170-member General Assembly had been elected from districts that were illegally gerrymandered based on race. *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd per curiam*, 137 S. Ct. 2211 (2017).

1. When the complaint was filed, Clean Air Carolina was also a plaintiff, and there were twelve defendants. Prior to the summary judgment hearing and the trial court's order, there was a determination that Clean Air Carolina did not have standing to bring this claim, and other claims, and defendants were voluntarily dismissed after the 2018 election. Thus, this appeal includes the only parties remaining in the case.

The superior court agreed and granted Plaintiff's motion for summary judgment, declaring the two challenged amendments ratified by the people void *ab initio*.[2] In its order, the superior court concluded that our "General Assembly lost its claim to popular sovereignty," did "not represent the people of North Carolina," and therefore was "not empowered to pass legislation that would [propose, for the people's consideration, amendments to] the state's constitution." The superior court, though, did not declare that our General Assembly was totally powerless to exercise powers granted by our state constitution to the legislative branch, but only the power to pass bills proposing amendments to the people.

On appeal, Defendant argues that the superior court erred. We agree and reverse the order of the superior court.

I. Background

During the 2017-18 Session, our General Assembly passed a number of bills, including six bills proposing various amendments to our state constitution. Two of those six bills proposed (1) an "income tax cap amendment," lowering the maximum income tax rate that could be imposed by our General Assembly from 10% to 7% and (2) a "voter ID amendment," which would allow our General Assembly to enact legislation requiring voters to present a valid photo ID in order to vote, but which would also allow our General Assembly to create exceptions to this requirement.

All six proposals were placed on the November 2018 ballot for the people's consideration. Over $9 million was raised by groups opposing all six proposed amendments, approximately $675,000 was raised to support the voter ID amendment, and no money was raised to support the income tax cap amendment.[3]

On 6 November 2018, the people ratified the income tax cap amendment by a margin of approximately 538,000 votes, with 57.35% voting in favor and 42.65% voting against. And the people ratified the voter ID amendment by a margin of approximately 405,000 votes, with 55.5%

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2. Plaintiff did not challenge nor did the superior court make any determination regarding the two other amendments ratified by the people that same day or any other bill passed by our General Assembly during the 2017-18 Session.

3. *Campaign Finance Report Search*, N.C. State Bd. of Elections & Ethics Enf't, https://www.ncsbe.gov/campaign-finance/search-campaign-funding-and-spending-reports-and-penalties (last visited Sept. 1, 2020).

voting in favor and 44.5% voting against. The people also ratified two of the other four proposals.[4]

Plaintiff commenced this present action challenging the income tax cap amendment and the voter ID amendment based on *Covington*. The issue before the superior court and which is now before us is not whether our General Assembly engaged in illegal gerrymandering. That issue was resolved in *Covington*. Rather, the issue here is whether, based on *Covington*, our General Assembly immediately lost its authority to exercise the power granted by our state constitution to our legislative branch to propose amendments to the people. However, a proper understanding of the issue before us requires an understanding of the gerrymandering issue resolved by *Covington*, which we now address.

Gerrymandering is the process by which the political party in control draws districts for some advantage.[5] The two main forms of gerrymandering practiced in our history are *partisan* gerrymandering and *racial* gerrymandering.

Partisan gerrymandering occurs when the majority party draws districts for the purpose of increasing a party's *political* advantage in the legislature; for example, where districts are drawn to allow that party's candidates to win a supermajority (over 60%) of the seats even though their candidates in the aggregate statewide receive a bare majority of votes.

The United States Supreme Court recently declared that partisan gerrymandering is legal, holding that the issue presents a "political question beyond the reach of the [judicial branch]." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019).[6] In companion cases, the high Court

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4. The two other proposals ratified by the people dealt with gun rights and hunting and fishing rights. The two proposals rejected by the people would have transferred appointment power from our Governor to our General Assembly.

5. The term was first used in 1812 by the *Boston Gazette*, a paper which supported the Federalist Party, to describe oddly shaped state senate districts. One of the districts was shaped like a salamander, designed to ensure the election of the political allies of Democratic-Republican governor Elbridge Gerry; hence the word "gerrymander." *See Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004) (plurality opinion). Though Federalists won a comfortable majority in the overall statewide vote that year, the Democratic-Republicans remained in control of the Massachusetts State Senate due to the gerrymandering scheme.

6. Of course, any redistricting plan, whether involving partisan gerrymandering or not, where there are significant *population* differences among the districts is justiciable, as such a plan would violate the concept of "one person, one vote." *Baker v. Carr*, 369 U.S. 186 (1962).

upheld maps designed by our General Assembly to reduce Democratic Party influence and maps designed by Maryland's legislature to reduce Republican Party influence. The high Court reasoned that "courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so." *Id.* at 2506.[7]

Racial gerrymandering, however, occurs when a "legislature's *predominant* motive for the design of [certain] district[s]" is *race*, rather than to achieve a partisan advantage. *Bethune-Hill v. Virginia*, 137 S. Ct. 788, 800 (2017) (emphasis added).

Racial gerrymandering is *generally* illegal. For example, a generation ago, the United States Supreme Court struck down maps designed by our General Assembly to *reduce* African American influence. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

But the high Court held that racial gerrymandering may be legal *if* the legislature can demonstrate that its "districting legislation is narrowly tailored to achieve a compelling interest." *Bethune-Hill*, 137 S. Ct. at 801 (citation and quotation marks omitted). But absent a compelling interest, racial gerrymandering is illegal even if designed *to favor* a minority race. This is because "[r]acial classifications *of any sort* pose the risk of lasting harm to our society [as they] reinforce the belief [] that individuals should be judged by the color of their skin." *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (emphasis added).

One "compelling interest" justifying racial gerrymandering is drawing districts to comply with Section 2 of the Voting Rights Act of 1965 ("VRA"), which prohibits districts that prevent a large group of minority voters living near each other from casting sufficient votes to elect a candidate of their choice. Accordingly, the VRA may require some "majority-minority" districts, where minority voters living near each

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7. What some consider "unfair" does not always equate to being "unconstitutional."

For instance, it may seem "unfair" to some that the allocation of United States Senators violates the "one-person, one-vote" principle; *e.g.*, Wyoming and California are allocated the same number. But such allocation is "constitutional," as the federal constitution expressly allocates two senators to each state. U.S. Const. art. I, § 3, clause 1.

And it may seem "unfair" that a political party is not entitled to a share of seats in our General Assembly in proportion to the number of votes its candidates receive statewide in the aggregate. But such allocation is constitutional, as our state constitution does not provide for such proportional representation, but expressly empowers our General Assembly discretion to draw districts. N.C. Const. art. II, §§ 3, 5.

other make up a majority in that district. *See Thornburg*, 478 U.S. at 50-51. But the VRA does not generally require a legislature *to maximize* the number of majority-minority districts that are possible when developing maps. *Johnson v. DeGrandy*, 512 U.S. 997, 1016-22 (1994). And a plan which maximizes majority-minority districts is unconstitutional if the VRA can be complied with by creating fewer such districts, especially where minority voters in an area have the opportunity to elect a candidate of their choice through some compromise with other voters (where a minority group does not quite make up a majority of voters in the district).

> [Though] society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect the candidate of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute [(the VRA)] meant to hasten the waning of racism in American politics.

Id. at 1019-20.

Our General Assembly has a robust history of gerrymandering – both political and racial. Democrats engaged in gerrymandering when they controlled our General Assembly.[8] And Republicans have engaged in gerrymandering since regaining control in 2011.[9] Indeed, gerrymandering designed to protect incumbents has resulted in fewer truly competitive races: in every election since 1996, over 90% of state legislative races have been decided by greater than 5% of the vote.[10]

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8. *Stephenson v. Bartlett*, 355 N.C. 354, 375, 562 S.E.2d 377, 392 (2002) (recognizing that "many North Carolina legislative districts have been increasingly gerrymandered to a degree inviting widespread contempt and ridicule").

9. *Rucho*, 139 S. Ct. at 2491 (quoting a legislator confessing, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." (citation omitted)).

10. *Electoral Competitiveness in North Carolina*, BALLOTPEDIA.

Until 1968, no African Americans had served in our General Assembly in the 20th century.[11] However, with the passage of the VRA in 1965, more African Americans began voting. As a result, in 1968, Henry E. Frye (later our Chief Justice) became the first African American elected to our General Assembly in the 20th century. But no more than six (6) African Americans (or 4% of the General Assembly) served at any one time over the next 15 years. This underrepresentation was due in large part to illegal racial gerrymandering designed to suppress minority influence, a scheme which continued into the 1980s. *Thornburg*, 478 U.S. at 80. Specifically, our General Assembly divided concentrations of black voters into separate districts or lumped them with a larger contingent of white voters in multi-member districts. *Id*. at 38. The few African American members serving during this period fought against these schemes.[12]

In the 1980s the situation improved: our General Assembly drew maps which included several majority-minority districts. As a result, the number of African Americans elected quadrupled. By 1990, seventeen (17) African Americans were serving, making up 10% of our General Assembly.

Between 1991 and 2010, the General Assembly continued incorporating majority-minority districts in their maps, with seventeen (17) such districts in 1991. By 2009, this number decreased to nine (9), as African Americans were having greater success in electing candidates of their choice in districts where their voting population did not quite comprise a majority. *Covington v. North Carolina*, 316 F.R.D. at 125-26. This phenomenon allowed African American voters to be spread across more districts. During the 2009 Session, the number of African Americans serving in our General Assembly stood at 27, making up 16% of that body.

In the 2010 election, the Democratic Party lost control of the General Assembly for the first time since 1898. The number of African Americans elected that year decreased slightly from 27 to 24 members.

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11. During Reconstruction (1868-1898), 111 African Americans served in our General Assembly. *See* S.J. Res. 133, 151st Leg., (N.C. 2013) (titled "A Joint Resolution Honoring the Life and Memory [of a number of past African American members of the General Assembly], In Observance of African American History Month" and passing in both houses unanimously).

12. Milton C. Jordan, *Black Legislators: From Political Novelty to Political Force*, N.C. Cent. for Pub. Pol'y Rsch.. n. 6 (Dec. 1989) https://nccppr.org/wp-content/uploads/2017/02/Black_Legislators-From_Political_Novelty_to_Political_Force.pdf (noting that Rep. Kenneth "Spaulding and others fought against legislative redistricting plans preserving multi-member districts, which passed the legislature [during the 1981 Session.]").

Upon taking control, the new Republican majority set out to draw new districts (based on the 2010 census) with the predominant motivation of protecting and increasing their new-found *partisan* advantage; that is, they sought to engage in partisan gerrymandering. *Rucho*, 139 S. Ct. at 2491. However, the new majority recognized that, though it is not illegal to engage in partisan gerrymandering, *per se*, any new map would be illegal if it violated the VRA. Therefore, the new majority *increased* the number of majority-minority districts from nine (9) to thirty-two (32). As recognized in *Covington*, the "compelling purpose" of the new Republican majority in increasing majority-minority districts was to ensure that their maps would not run afoul of the VRA. *Covington v. North Carolina*, 316 F.R.D. at 125. Indeed, these new maps were ultimately approved ("pre-cleared") by the Department of Justice in 2011.

In the 2012 election, the first held under the new maps, Republicans were successful in their *partisan* gerrymandering efforts, achieving a "veto-proof" majority (over 60%) in each house.[13] At the same time, because of the increase in majority-minority districts, the number of African Americans serving in the General Assembly increased from 24 to 32 members, all Democrats.

Covington, upon which the superior court's order in this present case is based, commenced in 2015, where the plaintiffs sought a judicial order to break the gerrymandering efforts of the Republican majority. Specifically, a few dozen voters filed suit in federal court challenging 28 of the 32 majority-minority districts created by the Republican majority. *Covington v. North Carolina*, 316 F.R.D. at 128.

In 2016, a federal panel assigned to the case declared that our General Assembly had engaged in illegal racial gerrymandering when it maximized the number of majority-minority districts, when maximization was not required by the VRA. *Covington v. North Carolina*, 316 F.R.D. 117. Judge James A. Wynn, Jr., writing for the panel, suggested that the maps might have been sustained had the Republican majority drawn *fewer* majority-minority districts. *Id.* at 178 ("Nor do we suggest that majority-black districts could not be drawn – lawfully and constitutionally – in some of the same locations as the [28] districts challenged in this case.").

13. These maps contained relatively few districts where Republican voters comprised a majority. Indeed, during this period, Republicans made up only about 30% of all voters statewide, compared to 40% being registered Democrat, and the remaining 30% registered as unaffiliated. However, Republicans drew the maps in such a way to give Republicans a greater chance of winning many districts where they could nominate a candidate more likely to appeal to unaffiliated and conservative Democratic voters.

In a second order, entered just after the November 2016 election, the federal panel fashioned a remedy for the illegal gerrymandering. Specifically, the panel ordered (1) that the terms of the 170 legislators elected in November 2016 be shortened to one year and (2) that special elections be held in 2017 based on *new*, legal maps to be drawn by the General Assembly. *Covington v. North Carolina*, No. 1:15-CV-399, 2016 WL 7667298 (M.D.N.C. Nov. 29, 2016).

The United States Supreme Court affirmed *per curiam* the panel's first order, finding the Republican maps illegally contained too many majority-minority districts. *North Carolina v. Covington*, 137 S. Ct. 2211 (2017).

However, the high Court vacated the panel's remedial order, concluding that the panel did not consider all relevant factors in ordering a new election, and remanded the matter for further consideration. *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017). On remand, the federal panel entered a new remedial order, directing new maps to be drawn, but determining that there was not enough time to order a special election prior to the regular 2018 election, thus allowing the members elected in 2016 under the illegal maps to complete their two-year terms. *Covington v. North Carolina*, 270 F. Supp. 3d 881, 899-902 (M.D.N.C. 2017).

II. Appellate Jurisdiction

All parties concede that we have appellate jurisdiction. We agree. The superior court's order granting Plaintiff's Motion for Partial Summary Judgment is a final order. The order granted Plaintiff the relief it sought. Although the Plaintiff's Amended Complaint included other claims regarding the wording of the ballot questions, Plaintiff voluntarily dismissed some claims and parties, and the other relief requested in the complaint is now moot. Accordingly, the trial court's order granted the declaratory judgment as requested by Plaintiff and is a final order.[14]

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14. We note that this appeal, as it relates to the voter ID amendment, was not mooted by our Court's opinion in *Holmes v. Moore*, 270 N.C. App. 7, 840 S.E.2d 244 (2020). That decision preliminarily enjoined the enforcement of the statute enacted by our General Assembly to give effect to the voter ID amendment previously ratified.

That is, the voter ID amendment authorized our General Assembly to implement the photo ID requirement and to provide exceptions. In response, our General Assembly passed a bi-partisan bill sponsored by three legislators. This statute provides (1) ten acceptable forms of identification for voting (*e.g.*, driver's license, passport, certain student IDs, veteran IDs, tribal enrollment cards, etc.), (2) a means by which a voter without an ID could obtain a state-issued ID for free, and (3) a means by which a voter could still

III. Analysis

Though our General Assembly has the power to enact laws, it has long been recognized that our judicial branch has the power to declare *a law* enacted by our General Assembly unconstitutional, *Bayard v. Singleton*, 1 N.C. 5 (1787), including a law which establishes unconstitutional legislative districts. *Stephenson v. Bartlett*, 355 N.C. 354, 362, 562 S.E.2d 377, 384 (2002). But it has never been recognized that our judicial branch has the power to deprive the General Assembly of authority to pass bills which are otherwise constitutional or any other authority granted that body by our state constitution, as it has never been recognized that our General Assembly has the power to pass a law depriving our branch of a power expressly granted to us by our state constitution. Indeed, the overwhelming, if not universal, authority compels our conclusion that the superior court here erred in declaring that the members of our General Assembly duly elected in 2016 lacked authority to pass bills proposing amendments for the people's consideration, a power expressly granted to our legislative branch by our state constitution.

For instance, when setting up our state government, the people declared that "legislative [] and judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art I, § 6. Our Supreme Court recently reiterated that "the separation of powers clause requires that, as the three branches of government carry out their duties, *one branch will not prevent another branch from performing its core functions*." *Cooper v. Berger*, 370 N.C. 392, 410, 809 S.E.2d 98, 108 (2018) (emphasis added) (citations and quotation marks omitted).

More to the point, our Supreme Court has expressly addressed and rejected the argument accepted by the superior court. Specifically, our high Court recognized that "judicial power" does not extend to the power to declare retroactively that our General Assembly lacked the authority to pass bills simply because some legislators were elected from unconstitutionally-designed districts, stating, "[q]uite a devastating argument, if sound." *Leonard v. Maxwell*, 216 N.C. 89, 99, 3 S.E.2d

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vote without an ID by filling out an affidavit. *Holmes* enjoined the enforcement of this implementing statute, holding that its challengers had demonstrated that they were likely to succeed in showing that it was passed with the purpose of discriminating against African American voters. The injunction, though, was not permanent in nature and otherwise did not address the amendment itself.

316, 324 (1939). The Court characterized the question as "a political one, and there is nothing courts can do about it" and that "the authorities are against" it. *Id.* at 99, 3 S.E.2d at 324 (stating that courts "do not cruise in nonjusticiable waters").

Since *Leonard*, our Supreme Court has declared laws creating legislative districts to be unconstitutional based on illegal gerrymandering, but that Court has never suggested that our General Assembly could not otherwise continue exercising the powers granted to our state's legislative branch by our state constitution. For instance, in *Pender County v. Bartlett*, the Court declared a district to be illegally gerrymandered based on race, holding that the VRA did not require the district to be drawn as a majority-minority district. 361 N.C. 491, 649 S.E.2d 364 (2007). But the Court did not enjoin our General Assembly, nor the representative elected from the illegally-drawn district, from exercising legislative authority. In fact, the Court allowed *another election* (in November 2008) to occur under the unconstitutional maps, not requiring elections under new maps until 2010. *Id.* at 510, 649 S.E.2d at 376. *See also Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (declaring certain districts to be illegally gerrymandered but not ordering a special election nor enjoining the General Assembly from exercising legislative powers).

The federal panel in *Covington* did not believe that the 2017-18 Session of our General Assembly lost legitimacy, ordering the body it declared to be illegally gerrymandered to redraw the districts. *Covington*, 267 F. Supp. 3d at 665. The *Covington* plaintiffs apparently did not believe so either, as they actually sought an order directing the General Assembly which they had successfully argued to be illegally gerrymandered to draw new districts. *Id.* And the United States Supreme Court apparently did not believe so, as it *vacated* the lower court's order to shorten the terms of those elected to the 2017-18 Session. *Covington*, 137 S. Ct. at 1625-26.

Covington is consistent with other United States Supreme Court jurisprudence, which recognizes that "a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act[.]" *Baker v. Carr*, 369 U.S. 186, 250 n. 5 (1962) (Douglas, J. concurring) (citation omitted).[15] For instance, in *Connors v. Williams*,

15. Justice Douglas' footnote was cited with approval by the Court in *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). *See also Ryder v. United States*, 515 U.S. 177, 183 (1995) (stating that acts passed by a malapportioned legislature are not void); *Buckley v. Valeo*, 424 U.S. 1, 142 (1976) (stating that "legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment plan" still have

the Court held that elections held under an apportionment plan which violates the Fourteenth Amendment do not need to be invalidated. 404 U.S. 549, 550-551 (1972). In so holding, the Court cited an opinion which held that an unconstitutionally apportioned legislature "should not be restrained from considering and passing such legislation as it considers necessary or proper in the public interest [until new legislators are seated]." *Mann v. Davis*, 238 F. Supp. 458 (E.D. Va. 1964), *aff'd sub nom*, *Hughes v. WMCA*, 379 U.S. 694 (1965).

Plaintiff, though, argues that the members of our 2017-18 General Assembly were "usurpers" based on the *Covington* decision. However, we are compelled to conclude that those serving were not usurpers. Rather, they were *de jure* officers, or at worst *de facto* officers, as they each had "at least a fair color of right or title to the [] office[.]" *In re Wingler*, 231 N.C. 560, 563, 58 S.E.2d 372, 374 (1950). The offices they purportedly held (state Representatives and Senators) are clearly established under our state constitution. All were elected and received their commissions. No one else held any *de jure* claim to the seats, no election was held to replace them prior to November 2018, and no order was entered removing any of them.

Even if they were serving merely as *de facto* officers, these legislators had the authority to exercise all the power that may be exercised by a *de jure* officer under the *de facto* doctrine consistently applied by our Supreme Court:

> The de facto doctrine is indispensable to the prompt and proper dispatch of governmental affairs. . . . An intolerable burden would be placed upon the incumbent of a public office if he were compelled to prove his title to his office to all those having occasion to deal with him in his official capacity. [For example, the] administration of justice would be an impossible task if every litigant were privileged to question the lawful authority of a judge engaged in the full exercise of the functions of his judicial office.

Id. at 565-66, 58 S.E.2d at 376.

Our Supreme Court has routinely applied the *de facto* doctrine to uphold the acts of government officials, including judicial officers, even

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"de facto validity"); *Maryland Committee v. Tawes*, 377 U.S. 656, 675-76 (1964) (allowing a malapportioned Maryland legislature to continue functioning and to draw new districts for the *next* election).

though performed by those statutorily ineligible to hold office. *See e.g.*, *People ex rel. Duncan v. Beach*, 294 N.C. 713, 242 S.E.2d 796 (1978) (judge serving well past the statutory mandatory retirement age); *State v. Lewis*, 107 N.C. 967, 972, 12 S.E. 457, 458 (1890) (sustaining a criminal conviction where the judge presiding was constitutionally ineligible to his office). That Court has also applied the doctrine to uphold acts of town councils whose members were elected under unconstitutionally void schemes, which allowed only landowners to vote. *Wrenn v. Kure Beach*, 235 N.C. 292, 295, 69 S.E.2d 492, 494 (1952); *Smith v. Carolina Beach*, 206 N.C. 834, 175 S.E. 313 (1934).

The superior court, here, essentially established a rule that our General Assembly only retains the authority to exercise constitutional powers which the judiciary determines are necessary to "avoid chaos and confusion" after it has been judicially determined that certain members of that body were elected from illegally gerrymandered districts. Nothing in our jurisprudence suggests that the judiciary can unilaterally strip the legislative branch of *some* of its constitutional powers. We cannot pick and choose which laws (otherwise constitutional) we prefer, or which laws are necessary to avoid chaos and confusion. Either our General Assembly has the authority to act as our state's legislature, or it does not. Certainly, our legislative branch cannot enact a law which deprives our Supreme Court of certain powers expressly granted by the state constitution or enact a law which deprives the Governor of certain constitutional powers granted to the executive branch.

We do not agree that our "General Assembly lost its claim to popular sovereignty" based on the reasoning that "under the illegal racial gerrymandering, a large swath of North Carolina citizens lack a constitutionally adequate voice in the State's legislature." If there was a loss of popular sovereignty by our General Assembly, then *all* the laws passed by that body would be subject to attack, thus creating chaos and confusion. One might argue that our current state constitution, adopted in 1971, was void, as it was proposed by a General Assembly that had only one African American member due to the impact of gerrymandering and voter suppression measures. We do not condone the creation of more majority-minority districts than that required by the VRA as it reduces the ability of minority voters to have more influence in other districts. We note, though, notwithstanding the harm created by the illegal gerrymandering, that the maps created in 2011 resulted in more African Americans being elected to the General Assembly than ever before.

We disagree with the superior court's reasoning that "[t]he requirements for amending the state Constitution are unique and distinct from the requirements to enact other legislation" and, as such, our General Assembly can exercise the authority to propose amendments "only insofar as it has been bestowed with popular sovereignty." Rather, *each* power granted to our General Assembly is "unique and distinct." We see nothing in the language of our state constitution empowering our branch to "blue pencil" the powers of our legislative branch. Indeed, our state constitution empowers our General Assembly to pass many types of bills: bills which become law as part of our General Statutes, pursuant to Article II, § 22(1); bills which become law as part of our state constitution pursuant to Article II, § 22(2); and bills which become law as part of our federal constitution, pursuant to Article II, § 22(3).

If we had such power to engage in "blue penciling" the legislative powers contained in Article II, it might make more sense that we blue pencil our General Assembly's power to pass regular bills. The risk of a bill becoming law is much greater, as those can become law without the consent of anyone else, through veto-override. A bill proposing an amendment, however, cannot become law without the approval of the people, the source of popular sovereignty.

IV. Conclusion

We conclude that the superior court erred in holding that our General Assembly lost its power granted by our state constitution, while retaining other powers, simply because a federal court had determined that the maps contained too many majority-minority districts, such that some members elected to that body were from districts that were illegally gerrymandered based on race. It is simply beyond our power to thwart the otherwise lawful exercise of constitutional power by our legislative branch to pass bills proposing amendments. Accordingly, we reverse the order of the superior court and declare the challenged constitutional amendments duly ratified by the people to be valid.

REVERSED.

Judge STROUD concurring, writing separately.

Judge YOUNG dissenting, writing separately.

STROUD, Judge, concurring.

I concur in the result reached by majority opinion but write separately because I would reach the same result on a more limited basis. This Court is "an error-correcting body, not a policy-making or law-making one." *Connette v. Charlotte-Mecklenburg Hospital Authority*, 272 N.C. App. 1, 6, 845 S.E.2d 168, 172 (2020) (citation and quotation marks omitted). Our role is to review the trial court's order to determine if the ruling is supported by existing precedential law as stated in North Carolina's Constitution, caselaw, or statutes. *See generally id.* Neither this Court nor the trial court has the authority to declare new law which suits our own policy preferences. *See generally id*. In our role as an error-correcting court, this Court has no power to affirm the trial court's order because it is not based upon law. *See generally id*.

As noted by the majority, "[t]he superior court's rationale in declaring our General Assembly illegitimate" was based almost exclusively upon *Covington* which was affirmed by a memorandum decision from the United States Supreme Court, "in which that Court determined that 28 members of the 170-member General Assembly were elected from districts" illegally and racially gerrymandered. *See Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211, 198 L. Ed. 2d 655 (2017). Although *Covington* is not directly related to the plaintiff's claim in this case, also as noted by the majority, it was the legal basis for plaintiff's contention and the trial court's determination that the General Assembly "ceased to be a legislature with any *de jure* or *de facto* lawful authority, and assumed usurper status[,]" thus rendering the challenged constitutional amendments void. *See generally id*. But *Covington* does not support that trial court's conclusion that the General Assembly elected in that case had no *de jure* or *de facto* authority to act to pass a bill proposing a constitutional amendment or any other legislation. *See generally id*. To the contrary, *Covington* ultimately declined to conclude that the members of the General Assembly elected in unconstitutionally gerrymandered districts are usurpers but instead ordered the same exact General Assembly the trial court deemed without *de jure* or *de facto* authority to create new districts with no limitations on the General Assembly's authority to act. *See id.* at 176-78. There is no North Carolina law to support the trial court's legal conclusions.

Standard of Review

The summary judgment order on appeal grants a declaratory judgment. Where there is no dispute regarding the material facts, "[s]ummary judgment is an appropriate procedure in a declaratory judgment action.

Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E.2d 697 (1980)." *Pine Knoll Association v. Cardon*, 126 N.C. App. 155, 158, 484 S.E.2d 446, 448 (1997). This Court's standard of review is *de novo*. *See Craig ex rel. Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009). The legal issues presented are constitutional questions, which we also review *de novo*, but "[i]n exercising de novo review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond reasonable doubt." *Cooper v. Berger*, 256 N.C. App. 190, 193, 807 S.E.2d 176, 178 (2017), *aff'd*, 371 N.C. 799, 822 S.E.2d 286 (2018); *see also Hinton v. Lacy*, 193 N.C. 496, 499-500, 137 S.E. 669, 671-72 (1927) (" 'While the courts have the power, and it is their duty, in proper cases to declare an act of the Legislature unconstitutional it is a well-recognized principle that the courts will not declare that this co-ordinate branch of the government has exceeded the powers vested in it unless it is plainly and clearly the case. *If there is any reasonable doubt it will be resolved in favor of the lawful exercise of their powers by the representatives of the people*. It cannot be said that this act is plainly and clearly unconstitutional. The doubt, if any, must be resolved in favor of the General Assembly.' Every presumption is in favor of the constitutionality of an act of the Legislature, and, without the clearest showing to the contrary, it should be sustained. It is to be presumed that the law-making body were mindful of their oaths, and acted with integrity and honest purpose to keep within the constitutional limitations and restrictions. The breach of the Constitution must be so manifest as to leave no room for reasonable doubt." (emphasis in original) (citations omitted)).

Legal Basis of the Trial Court Order

A general outline of the trial court's order and a review of its conclusions of law demonstrate that *Covington* was essentially the *only* legal basis for the trial court's decree. The order's section on "Findings of Fact" includes a sub-section entitled, "2018 Constitutional Amendment Proposals[.]" The first several paragraphs of the findings recite the claims, history, and court rulings of the *Covington* case. Thereafter, many findings of fact recite the chronology of the adoption of the proposed constitutional amendments, the filing of the complaint in this case, the procedural history of this case, and a description of plaintiff and its interest in challenging the amendments.[1]

1. The trial court order notes that a three-judge panel had previously determined plaintiff CAC did not have standing in the case.

The trial court's order then makes several conclusions of law; the following are pertinent to the issues raised on appeal:

> 3. Whether an unconstitutionally racially-gerrymandered General Assembly can place constitutional amendments onto the ballot for public ratification is an unsettled question of state law and a question of first impression for North Carolina courts.
>
> . . . .
>
> 5. N.C. Const art I sec. 3 states that the people of North Carolina "have the inherent, sole, and exclusive right of regulating the internal government and . . . of altering . . . their Constitution and form of government whenever it may be necessary to their safety and happiness" *Id.* § 3 (emphasis added). N.C. Const art XIII mandates that this may be accomplished only when a three-fifths supermajority of both chambers of the General Assembly-vote to submit a constitutional amendment for public ratification, and the public then ratifies the amendment. The requirements for amending the state Constitution are unique and distinct from the requirements to enact other legislation. The General Assembly has the authority to submit proposed amendments to the Constitution only insofar as it has been bestowed with popular sovereignty.
>
> 6. On June 5, 2017, it was adjudged and declared by the United States Supreme Court that the General Assembly was an illegally gerrymandered body. At that time, following "the widespread, serious, and longstanding . . . constitutional violation–among the largest racial gerrymanders ever encountered by a federal court—" the General Assembly lost its claim to popular sovereignty. *Covington*, 270 F. Supp. 3d at 884. The three-judge panel in Covington ruled that, under the illegal racial gerrymander, "a large swath of North Carolina citizens . . . lack a constitutionally adequate voice in the State's legislature . . . ." *Covington v. North Carolina*, 1: 15CV399, 2017 WL 44840 (M.D.N.C. Jan. 4, 2017) (order for special elections vacated and remanded, *North Carolina v. Covington*, 137 S. Ct. 1624 (June 5, 2017)).

7. Curing this widespread and sweeping racial gerrymander required that over two-thirds of the North Carolina House and Senate districts be redrawn. Thus, the unconstitutional racial gerrymander tainted the three-fifths majorities required by the state Constitution before an amendment proposal can be submitted to the people for a vote, breaking the requisite chain of popular sovereignty between North Carolina citizens and their representatives.

8. Accordingly; the constitutional amendments placed on the ballot on November 6, 2018 were approved by a General Assembly that did not represent the people of North Carolina. Indeed, "[b]y unjustifiably relying on race to distort dozens of legislative district lines, and thereby potentially distort the outcome of elections and the composition and responsiveness of the legislature, the districting plans [under which that General Assembly had been elected] interfered with the very mechanism by which the people confer their sovereignty on the General Assembly and hold the General Assembly accountable." 270 F. Supp. 3d at 897. The November 2018 general elections under remedial legislative maps were "needed to return the people of North Carolina to their sovereignty." *Id.*

9. Defendants argue that, even following the C*ovington* decision, the General Assembly maintained authority to enact legislation so as to avoid "chaos and confusion." *See Dawson v. Bomar*, 322 F.2d 445 (6th Cir. 1963). It will not cause chaos and confusion to declare that Session laws 2018-119 and 2018-128 and their corresponding amendments to the constitution are void *ab initio*.

10. An illegally constituted General Assembly does not represent the people of North Carolina and is therefore not empowered to pass legislation that would amend the state's Constitution.

11. N.C. Session Laws 2018-119 and 2018-128, and the ensuing constitutional amendments, are therefore void *ab initio*.

Thus, the trial court relied upon *Covington* to support its conclusions of law, although the order also noted some provisions of the North Carolina Constitution. I will first address why *Covington* does not support the trial court's order.

Covington recognized the absence of state law to support Plaintiff's usurper argument.

Plaintiff's complaint here requested a declaratory judgment, specifically "a declaration that following the U.S. Supreme Court's mandate in *Covington v. North Carolina*, the N.C.G.A. ceased to be a legislature with any *de jure* or *de facto* lawful authority and assumed usurper status." The U.S. Supreme Court's mandate affirming the *Covington* lower court's opinion was issued on 5 June 2017, *see Covington*, 137 S. Ct. 2211, 198 L. Ed. 2d 655, but the unconstitutionally gerrymandered districts were created in 2011. *Covington*, 316 F.R.D. at 124. Thus, the logical conclusion of plaintiff's theory of usurper status would be that North Carolina has not had a General Assembly with any authority to act since at least 2011 as North Carolina held elections based upon the 2011 districts addressed in *Covington*, some of which were determined to have been unconstitutionally racially gerrymandered. *See generally id.*, 316 F.R.D. 117. Although only 28 districts were challenged in *Covington*, redrawing the districts would also affect other districts, so over half of the House and Senate districts would have to be redrawn. *See Covington v. North Carolina*, 270 F. Supp. 3d 881, 888 (M.D.N.C. 2017) ("In particular, although this Court's order focused on the boundaries of the twenty-eight majority-minority districts, the parties agree that the inevitable effect of any remedial plan on the lines of districts adjoining the twenty-eight districts—coupled with the North Carolina Constitution's requirement that district lines not traverse county lines, unless such a traversal is required by federal law, see Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377, 396–98 (2002)—means that the well over half of the state House and Senate districts must be redrawn.").

The primary problem with plaintiff's reliance upon *Covington* for its contention that North Carolina, as of August 2016, effectively had no General Assembly, is that neither the lower federal court nor the United States Supreme Court considered the General Assembly, even as elected under the rejected districting plan to be usurpers with no *de jure* or *de facto* legal authority; this is true even though the *Covington* plaintiffs made this same argument in *Covington* for limitation of the General Assembly's authority. *See Covingto*n, 316 F.R.D. 117; *see also Covington*, 137 S. Ct. 2211, 198 L. Ed. 2d 655. Further, the plaintiff in *this* case, as

amicus curiae in *Covington*, made the same arguments in support of the request for special elections so a new General Assembly could be elected in new districts to take additional action. *See Covington v. North Carolina*, 270 F. Supp. 3d 881, 901 (M.D.N.C. 2017). But the federal court ultimately rejected the request for special elections because it would "unduly harm North Carolina voters" due to "insufficient time to enact and review remedial redistricting plans[], . . . voter confusion and, likely, poor voter turnout." *Id.*

The trial court noted in its conclusions of law this case presented an issue of first impression: "Whether an unconstitutionally racially-gerrymandered General Assembly can place constitutional amendments onto the ballot for public ratification is an unsettled question of state law and a question of first impression for North Carolina courts." The trial court then relied upon *Covington* to support its ruling, and the relevant conclusions of law stated:

> 6. On June 5, 2017, it was adjudged and declared by the United States Supreme Court that the General Assembly was an illegally gerrymandered body. At that time, following "the widespread, serious, and longstanding . . . constitutional violation–among the largest racial gerrymanders ever encountered by a federal court—" the General Assembly lost its claim to popular sovereignty. Covington, 270 F. Supp. 3d at 884. The three-judge panel in Covington ruled that, under the illegal racial gerrymander, "a large swath of North Carolina citizens . . . lack a constitutionally adequate voice in the State's legislature . . . ." Covington v. North Carolina, 1: 15CV399, 2017 WL 44840 (M.D.N.C. Jan. 4, 2017) (order for special elections vacated and remanded, North Carolina v. Covington, 137 S. Ct. 1624 (June 5, 2017)).
>
> 7. Curing this widespread and sweeping racial gerrymander required that over two-thirds of the North Carolina House and Senate districts be redrawn. Thus, the unconstitutional racial gerrymander tainted the three-fifths majorities required by the state Constitution before an amendment proposal can be submitted to the people for a vote, breaking the requisite chain of popular sovereignty between North Carolina citizens and their representatives.

> 8. *Accordingly*, the constitutional amendments placed on the ballot on November 6, 2018 were approved by a General Assembly that did not represent the people of North Carolina. Indeed, "[b]y unjustifiably relying on race to distort dozens of legislative district lines, and thereby potentially distort the outcome of elections and the composition and responsiveness of the legislature, the districting plans [under which that General Assembly had been elected] interfered with the very mechanism by which the people confer their sovereignty on the General Assembly and hold the General Assembly accountable." 270 F. Supp. 3d at 897. The November 2018 general elections under remedial legislative maps were "needed to return the people of North Carolina to their sovereignty." *Id.*

(Emphasis added.)

And although the trial court relied almost solely upon *Covington* for its conclusion that "[a]n illegally constituted General Assembly does not represent the people of North Carolina and is therefore not empowered to pass legislation that would amend the state's Constitution" the fact remains that *Covington* explicitly declined to address this "unsettled question of state law[,]" and thus did not create any state law for the trial court, or this Court, to follow:

> Plaintiffs and the NAACP, as amicus curiae, nonetheless argue that the potential for disruption factor weighs in favor of ordering a special election because the Supreme Court's summary affirmance of this Court's decision calls into question, as a matter of state law, the authority of legislators elected in unconstitutional districts to legislate. Pls.' Suppl. Br. on Remedies at 5. In particular, according to Plaintiffs, "officers elected pursuant to an unconstitutional law are 'usurpers' and their acts are absolutely void." Id. (quoting In re Pittman, 151 N.C. App. 112, 564 S.E.2d 899, 901 (2002)).[2] Plaintiffs maintain that because nearly 70% of the districts must

2. *In re Pittman* does not support plaintiff's argument; it discusses the difference between *de facto* and *de jur*e authority when a former district court judge signed an order after the expiration of her term and another judge had already been sworn into the same seat. *See generally In re Pittman*, 151 N.C. App. 112, 564 S.E.2d 899 (2002).

> be redrawn to remedy the unconstitutional districting plans, the state Senate and House, as currently composed, lack the power to act. See id. at 5–8.
>
> We agree with Plaintiffs that the absence of a legislature legally empowered to act would pose a grave disruption to the ordinary processes of state government. But *Plaintiffs cite no authority from state courts definitively holding that a legislator elected in an unconstitutionally drawn district is a usurper, nor have we found any. On the contrary, Plaintiffs concede that whether the General Assembly, as currently composed, is empowered to act is an unsettled question of state law*. See id. at 7. Given that this argument implicates an unsettled question of state law, Plaintiffs and Amici's argument is more appropriately directed to North Carolina courts, the final arbiters of state law.

Id. (Emphasis added). Further, there simply is no state law to support the proposition that the legislators of North Carolina are usurpers. The trial court thus undertook to create some new state law, purportedly based upon *Covington*. But North Carolina does have law regarding *de facto* and *de jure* authority of elected officers, as discussed by the majority opinion, and that law does not support the trial court's conclusions.

Covington ordered the General Assembly to create new districts and did not limit its legislative authority.

A further problem with both plaintiff's and the trial court's reliance on *Covington* for its contention that North Carolina effectively had no General Assembly at the time the amendments were ratified by the people of North Carolina, is that neither the lower federal court nor the United States Supreme Court considered the General Assembly, even as elected under the illegally gerrymandered plans, to have assumed "usurper status" with no *de jure* or *de facto* legal authority. *See Covington*, 316 F.R.D. 117; *see also Covington*, 137 S. Ct. 2211, 198 L. Ed. 2d 655.

First, in *Covington*, while the federal court acknowledged that "Plaintiffs have asked for an immediate injunction blocking the use of the unconstitutional districts in any future elections" so that the illegally constituted General Assembly would not be allowed to continue to exist and legislate any longer than absolutely necessary, the court denied this request "despite the[] unconstitutionality" of the plans:

> Based on the schedules put forth by the parties in their post-trial briefing, we regrettably conclude that due to the mechanics of state and federal election requirements, there is insufficient time, at this late date, for: the General Assembly to draw and enact remedial districts; this Court to review the remedial plan; the state to hold candidate filing and primaries for the remedial districts; absentee ballots to be generated as required by statute; and for general elections to still take place as scheduled in November 2016.
>
> When necessity so requires, the Supreme Court has authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to constitutional requirements. After careful consideration, and with much reluctance, we conclude that necessity demands such a result today. We decline to order injunctive relief to require the state of North Carolina to postpone its 2016 general elections, as such a remedy would cause significant and undue disruption to North Carolina's election process and create considerable confusion, inconvenience, and uncertainty among voters, candidates, and election officials. Instead, like other courts confronted with similarly difficult circumstances, we will allow the November 2016 elections to proceed as scheduled under the challenged plans, despite their unconstitutionality.

Id. at 177–78 (citations, quotation marks, ellipses, and brackets omitted).

Second, the federal court acknowledged the authority of the unconstitutionally formed General Assembly as it ordered this very Assembly to take legislative action and redraw the plans:

> Nonetheless, Plaintiffs, and thousands of other North Carolina citizens, have suffered severe constitutional harms stemming from Defendants' creation of twenty-eight districts racially gerrymandered in violation of the Equal Protection Clause. These citizens are entitled to swift injunctive relief.
>
> Therefore, *we hereby order the North Carolina General Assembly to draw remedial districts in their next legislative session to correct the constitutional deficiencies in the Enacted Plans*. By separate order, we

> will direct the parties to file supplemental briefs on an appropriate deadline for such action by the legislature, on whether additional or other relief would be appropriate before the regularly scheduled elections in 2018, and, if so, the nature and schedule of that relief.

Id. at 177–78 (emphasis added). Thus, in summary, the federal court acknowledged the unconstitutionality of North Carolina's illegally gerrymandered districts and simultaneously ordered the Assembly elected from those districts to take legislative action to correct the issue rather than ordering a new election or limiting its authority to take further legislative actions. *See generally id.*

Acceptance of plaintiff's argument would create chaos.

Understandably, plaintiff limits its argument as to the General Assembly's lack of legal authority to the two constitutional amendments they oppose; they recognize the logical conclusion of the argument if it is not limited.[3] But there is no law to support this argument and no logical way to limit the effect of the electoral defects noted in *Covington* to one, and only one, type of legislative action, and more specifically to just these two particular amendments which plaintiff opposes. To the extent a rational argument could be made to support a theory that only one type of legislative action is without authority, such an argument would be most likely to fail regarding constitutional amendments as this is a specific type of legislative action that must be and was approved by a majority of the *voters* in North Carolina in a statewide election. The popular vote provides an additional layer of protection.

The majority opinion has addressed the General Assembly's *de facto* or *de jure* authority to pass laws, but I would note that neither plaintiff nor our dissenting colleague has cited any applicable legal authority holding a legislative body can lack *de facto* or *de jure* authority for one purpose only but retain authority for all other purposes such as regular bills and budgets, *unless* a court has so directed. For example, in *Butterworth v. Dempsey*, a federal court enjoined the Connecticut General Assembly

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3. Plaintiffs' amended complaint states their claim as follows: "Plaintiffs seek a declaratory judgment that, pursuant to the U.S. Supreme Court's June 30, 2017, mandate in Covington, the N.C.G.A. ceased to be a legislature with any de facto lawful authority and assumed usurper status. To the extent that they had any power to act, it was limited to those acts necessary to avoid chaos and confusion, such as acts necessary to conduct the day-to-day business of the state, but the usurper N.C.G.A. may not take steps to modify the N.C. Constitution. Art I § 2, 3, 35 and Art XIII § 4."

"from doing any act or taking any steps in furtherance of nominating or holding elections of senators or representatives to the Senate or House of Representatives of the State of Connecticut," and taking other delineated legislative actions, although the injunction was stayed so long as the General Assembly complied with the specific timeline and steps set out by the court for redistricting for elections. *See Butterworth*, 237 F. Supp. 302, 310-11 (1964). The federal court in *Covington* could have adopted this same sort of procedure used in *Butterworth* and limited the General Assembly's authority until the new districts were adopted or new elections held, *see generally id.*, but instead the *Covington* court simply directed the General Assembly to redraw the districts and did not limit the General Assembly's authority. *Covington*, 316 F.R.D. at 177-78.

The trial court also sought to limit its own ruling to specifically the two challenged amendments by rejecting in one sentence the defendants' argument as to the logical ramifications of its ruling:

> 9. Defendants argue that, even following the *Covington* decision, the General Assembly maintained authority to enact legislation so as to avoid "chaos and confusion." *See Dawson v. Bomar*, 322 F.2d 445 (6th Cir. 1963). It will not cause chaos and confusion to declare that Session laws 2018-119 and 2018-128 and their corresponding amendments to the constitution are void *ab initio*.

The trial court did not attempt to explain *why* it rejected defendants' argument of "chaos and confusion" from a ruling declaring legislative actions void, perhaps because there is no law to support this conclusion, as recognized in *Dawson v. Bomar*, 322 F.2d 445, 447–48 (6th Cir. 1963) ("As indicated by the petitioner's failure to cite authority in support of his contention, the courts have uniformly held that otherwise valid enactments of legislatures will not be set aside as unconstitutional by reason of their passage by a malapportioned legislature.").

Neither this Court nor the trial court can limit the effect of its ruling to these two amendments. Just saying the ruling is limited does not make it so. Now that the order has been appealed, its effect cannot be contained to this one case, and the precedential effect of this Court upholding the trial court's order would lead to the "chaos and confusion" the trial court was attempting to avoid. (Quotation marks omitted). If this Court were to uphold the trial court order and conclude the General Assembly was a usurper with no authority to act as to the

two constitutional amendments plaintiff opposes, this opinion would provide authority to support legal challenges to every single legislative action taken by the General Assembly as elected based upon the 2011 districts. Our ruling could also support claims challenging other laws adopted before 2011, since 2011 was far from the first time districts in North Carolina were illegally and unconstitutionally gerrymandered.

The Tenth Circuit Court of Appeals described the potential chaos and confusion from a ruling holding that a legislature elected in illegal districts has no authority in *Ryan v. Tinsley*, 316 F.2d 430 (10th Cir. 1963). The "chaos" noted by the circuit court would *not* result from granting relief to the single petitioner in that case but from the effect such a ruling would have on other disputes. *See generally id.* The circuit court rejected an argument of the legislature's lack of authority based upon unconstitutional districts when a petitioner made a habeas corpus claim based upon the premise that the apportionment of the Colorado legislature violated both the state and federal constitutions, and thus it had no authority to convict him under the Colorado Habitual Criminal Act:

> The sole issue is one of law — whether statutes passed by an unconstitutionally apportioned legislature are constitutional. If they are, all the contentions of the petitioner fall by the wayside.
>
> . . . .
>
> *An acceptance of the contentions of the petitioner would produce chaos.* A presently unascertainable number of Colorado statutes would be nullified. Property rights would be jeopardized. The marital status of many individuals would be questionable. Tax statutes would be unenforceable. The prison gates would be thrown open. The maintenance of law and order would be imperilled. Government would exist in name only. A recognition of the consequences compels rejection of the arguments.

Id. at 431-32 (Emphasis added).

Covington acknowledges the judiciary's struggle with correcting the effects of unconstitutional gerrymandering, and there are no easy fixes, as outlined by the majority opinion. *See generally Covington*, 316 F.R.D. 117. But in this instance, acceptance of the plaintiff's contentions *would* produce chaos. In *Covington*, the federal court and the United States Supreme Court ordered corrective action but *declined* the request of

the plaintiff to direct corrective action by some means other than action by the duly elected General Assembly, despite its unconstitutionally gerrymandered districts; *Covington* does not support the trial court's order but instead supports the opposite result. *See Covington*, 316 F.R.D. 117; *see also Covington*, 137 S. Ct. 2211, 198 L. Ed. 2d 655.

The North Carolina Constitution does not support the trial court's conclusions.

The trial court's order also cited some provisions of the North Carolina Constitution in support of its conclusions. The trial court noted the following constitutional provisions in its "findings of fact":

> 5. N.C. Const art I sec. 3 states that the people of North Carolina "have the inherent, sole, and exclusive right of regulating the internal government and . . . of altering . . . their Constitution and form of government whenever it may be necessary to their safety and happiness" *Id.* § 3 (emphasis added). N.C. Const art XIII mandates that this may be accomplished only when a three-fifths supermajority of both chambers of the General Assembly-vote to submit a constitutional amendment for public ratification, and the public then ratifies the amendment. The requirements for amending the state Constitution are unique and distinct from the requirements to enact other legislation. The General Assembly has the authority to submit proposed amendments to the Constitution only insofar as it has been bestowed with popular sovereignty.

The provisions cited by the trial court's order do not support its conclusion that an illegally gerrymandered General Assembly lacks either *de facto* or *de jure* authority to approve a bill for submission of constitutional amendments to popular vote but it still has full authority to pass any other kind of legislation. As noted in *Covington*, there is *no* North Carolina law interpreting the North Carolina Constitution in a way that could support the trial court's conclusion. *See Covington*, 270 F. Supp. 3d at 901. The sections of the North Carolina Constitution cited simply address the method of adopting a constitutional amendment. True, the process for a constitutional amendment differs from the adoption of a bill or a budget, but if the General Assembly lacked authority to pass a bill for submission of a constitutional amendment to the voters, it surely lacks authority to pass other bills as well. Since passing a constitutional amendment requires a majority of the voters of North Carolina in a statewide election unaffected by illegal districts, plaintiff's argument is

actually weaker for a constitutional amendment than for other ordinary legislation without these additional protections. Ironically, despite the approval of the challenged amendments by large majorities of "the people of North Carolina," the trial court held the amendments to be invalid because the General Assembly "does not represent *the people of North Carolina* and is therefore not empowered to pass legislation that would amend the state's Constitution." If the General Assembly lacked *de jure* and *de facto* authority to pass a bill proposing a constitutional amendment for approval by popular vote, the General Assembly also lacks authority to pass any legislation or budget which must be approved only by a majority vote and which is not subject to popular vote. Thus, the North Carolina Constitution does not support the trial court's holding.

I therefore concur in the result reached by the majority based on the rationale of this concurring opinion.

YOUNG, Judge, dissenting.

For the following reasons, I must respectfully dissent.

This case presents a compelling issue of first impression before this Court, one which, due to its subject matter, demands the utmost attention and scrutiny. At issue is a narrow question, but one vital to our democracy: Can a legislature, which has been held to be unconstitutionally formed due to unlawful gerrymandering, act to amend the North Carolina Constitution?

The ramifications of such an act are clear. If an unlawfully-formed legislature could indeed amend the Constitution, it could do so to grant itself the veneer of legitimacy. It could seek, by offering amendments for public approval, to ratify and make lawful its own unlawful existence. Such an act would necessarily be abhorrent to all principles of democracy.

Indeed, I find little merit to the arguments of the defendant-appellants. They contend, for example, that this matter is a political question, forever out of the reach of the judiciary. While this was once held to be true, that is no longer the case. In 1962, the United States Supreme Court held that challenges to the apportionment of a state legislature under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution were justiciable, and therefore that the courts had a role in determining such issues. *Baker v. Carr*, 369 U.S. 186, 201, 7 L. Ed. 2d. 663, 676 (1962) (holding that "[a]n unbroken line of our precedents

sustains the federal courts' jurisdiction of the subject matter of federal constitutional claims of this nature"). The courts of this State have since followed the example set in *Baker*. *See*, *e.g.*, *Woodard v. Carteret Cnty.*, 270 N.C. 55, 153 S.E.2d 809 (1967). Indeed, the case underlying many of the legal issues before us, *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *summarily aff'd*, 581 U.S. ___, 198 L. Ed. 2d 655 (2017) (*Covington I*), involved judicial review of the apportionment of the legislature. It cannot reasonably be said that the apportionment of the legislature remains a political question when it is clear that the courts have a role to play in the oversight of such decisions.

Likewise, with regard to the argument by defendant-appellants that the trial court erred in "determining that the General Assembly was a body of usurpers incapable of passing laws," I find these contentions unconvincing. Somewhat ironically, defendant-appellants rely upon the "chaos and confusion" argument of *Dawson v. Bomar*, 322 F.2d 445 (6th Cir. 1963). However, the trial court relied upon this very same argument in limiting its order, noting that "[i]t will not cause chaos and confusion to declare that Session laws 2018-119 and 2018-128 and their corresponding amendments to the constitution are void *ab initio*."

Indeed, to uphold the determination of the trial court, our holding need not be a broad one. As plaintiff-appellees recognize, the trial court's order would not impact any legislative action taken prior to the Supreme Court's determination in *Covington I* that the General Assembly was unconstitutionally formed upon unlawful gerrymandering. Those laws enacted prior to that determination would go unchallenged.

Moreover, per the "chaos and confusion" rule, we need not hold that *all* legislative acts since that determination are unlawful and void. Certainly, those actions taken in the ordinary course of legislative business must be permitted to stand, as to allow otherwise would create anarchy. For defendant-appellants to suggest that this Court's ruling would permit that is without merit.

Rather, the only relief required here – the very relief granted by the trial court – is that we must hold void only those actions taken by the legislature *which sought to amend our Constitution*. Those actions, and only those, strike the heart of our democracy. Only a legislature formed by the will of the people, representing our population in truth and fact, may commence those actions necessary to amend or alter the central document of this State's laws. For an unlawfully-formed legislature, crafted from unconstitutional gerrymandering, to attempt to do so

is an affront to the principles of democracy which elevate our State and our nation. As such, defendant-appellants' contention that the action of the trial court is an "extreme overreach" ignores the reality of the court's order, and substitutes fear-mongering rhetoric for reasoned argument.[1]

Nor is the reliance of defendant-appellants upon federal case law convincing. While such law may form a persuasive argument, it is not binding upon the courts of this State. It is true that the trial court considered federal law in its order. However, that does not require this Court, or any other court of this State, to hold those cases as sacrosanct; they are persuasive authority, nothing more.

Nor does *Covington II* stand for the principle, as defendant-appellants contend, that by not ordering a special election, the *Covington II* court approved of the legislature. *See Covington v. North Carolina*, 267 F. Supp. 3d 664 (2017) (*Covington II*). A special election, as found in *Covington II*, is a special intrusion into the ordinary proceedings of the legislature and the state. The fact that *Covington II* did not see a need to preclude the General Assembly from taking *any* legislative action by ordering an immediate special election does not mean that the General Assembly's demonstrably unlawful existence was thereafter approved. To the contrary, the court in *Covington II* criticized the General Assembly's failure to act in the wake of prior decisions. I find it doubtful that the *Covington II* court, having once more reminded the General Assembly of its tenuous position, anticipated that the General Assembly would take its words as *encouragement* to enact constitutional reform in its present state. The decision not to order a special election was one intended to prevent disruption to ordinary legislative activity; it does not follow that extraordinary legislative activity, such as constitutional amendments, would likewise be protected from scrutiny.

Finally, it bears recognizing that the act of placing these amendments on the ballot does not cure them of their unlawful origins. In his oft-quoted Gettysburg Address, President Abraham Lincoln emphasized "that government of the people, by the people, for the people, shall not perish from the earth." That it is the people, and not those they elect, who wield ultimate democratic power in this country is a principle which stems all the way back to the United States Constitution itself,

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1. I find particularly disturbing the contradiction of defendant-appellants' position. To wit: One of the amendments proposed by the General Assembly was a Voter ID law, designed to prevent citizens from unlawfully voting in our elections. And yet, this amendment was proposed by a General Assembly which was, itself, unlawfully formed.

the first words of which are "We the People[.]" Not We the Legislators, or We the Elected Officials. It is the people of our country, and of this State, who can and must determine how government power is wielded. That is precisely why it is necessary for the voters to approve any amendment to the North Carolina Constitution proposed by the General Assembly. N.C. Const. Art. XIII, § 4.

However, the people of this State cannot, by popular vote, approve an unlawful act of the General Assembly. The very provision of our Constitution which mandates review by the voting populace requires, before such a vote can take place, action by "three-fifths of all the members of each house" of the General Assembly. In other words, the popular vote as to whether to approve an amendment to the Constitution is predicated upon a preceding lawful action by the General Assembly. By necessity, once the legislature became aware that it was unconstitutionally formed, any actions taken to alter our State Constitution were void *ab initio*; the public vote could not cure that deficiency any more than it could cure any other unlawful action by the General Assembly.

The North Carolina Constitution, as the foundational document of law in this State, is more than a mere piece of legislation. It is "the rudder to keep the ship of state from off the rocks and reefs." *Hinton v. Lacy*, 193 N.C. 496, 509, 137 S.E. 669, 676 (1927). It is the fulcrum which permits the lever of our State's justice to move mountains. Altering that document is an act by the General Assembly that strikes deep into the heart of our democracy – it can change the role of government, it can alter how laws are made, it can disrupt the flow of justice, it can even change what any of those words mean in the eyes of the law. Such action is to be taken with great care and caution. Once it was determined that our General Assembly was acting in violation of the Constitution, without the proper support of the electorate, it lost the authority to alter that document. To hold otherwise would be to permit total usurpation of our democracy and our system of laws by the very body that has been admonished by our nation's highest court for having previously done so.

To be clear, I do not believe that this Court should have found the General Assembly unable to pass any laws whatsoever. Our precedent on that point is clear: The General Assembly must be permitted to engage in the ordinary business of drafting and passing legislation, regardless of any issues of gerrymandering, as to require otherwise would create "chaos and confusion." However, the amendment of our Constitution is not an ordinary matter – it is a most extraordinary matter, and one which goes beyond the day-to-day affairs of the General Assembly. That

is why such amendments are put to the public on a ballot. And I believe that our laws provide that a Constitutional amendment may only be put to the public when it is drafted by a legislature formed in conformity with the Constitution itself. This is the extent of my position – only that the General Assembly, found to be unconstitutionally formed based on unlawful gerrymandering, could not attempt to amend our Constitution without first comporting itself to the requirements thereof.

Defendant-appellants, and the majority, embrace the notion that the choice is a binary one: Either the General Assembly can perform all actions that it normally could, or none. They maintain that, because the latter is not a choice at all, the General Assembly must logically be able to undertake any action it could have had it been lawfully composed. I believe, however, that the choice is not binary – it is a spectrum, illuminated with shades of grey between "everything" and "nothing" – and that a narrow ruling that the General Assembly, being unconstitutionally formed, cannot amend the Constitution, is a reasonable interpretation of our laws.

I therefore respectfully dissent from my colleagues, and would affirm the decision of the trial court.

STATE OF NORTH CAROLINA
v.
BRIAN ROBERT GLEASON

No. COA20-80

Filed 15 September 2020

Constitutional Law—effective assistance of counsel—direct appeal—capable of being resolved on cold record—sentencing—failure to object to lack of notice of aggravating factor

Where defendant, after conviction for felony perjury, claimed on appeal that he received ineffective assistance of counsel due to his counsel's failure to object to the lack of proper notice of the aggravating factor argued by the State at sentencing, no further investigation was required and the Court of Appeals determined that defendant received ineffective assistance of counsel because the aggravating factor alleged—that defendant was on supervised probation at the time of the offense under the catchall provision of N.C.G.S. § 15A-1340.16(d)(20)—was not included in the indictment

as required by N.C.G.S. § 15A-924. Because defendant would not have received an aggravated sentence if his counsel had objected to the lack of proper notice, he was prejudiced by the failure to object and the trial court's judgment was vacated and remanded for resentencing.

Judge TYSON concurring in the result by separate opinion.

Appeal by Defendant from judgments entered 29 July 2019 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 August 2020.

Joshua H. Stein, by Assistant Attorney General Brenda Eaddy, for State-Appellee.

North Carolina Prisoner Legal Services, Inc., by Christopher J. Heaney, for Defendant-Appellant.

COLLINS, Judge.

Defendant Brian Robert Gleason appeals from judgments entered upon jury verdicts of guilty of perjury and violating a civil domestic violence protection order. Defendant contends the trial court erred by sentencing him in the aggravated range for his felony perjury conviction. We reverse judgment entered upon his conviction for perjury and remand for resentencing.

I. Background

On 30 April 2018, Defendant was indicted for stalking, making a false report to a law enforcement officer or agency, and violating a civil domestic violence protective order ("DVPO"). On 22 September 2018, the State filed a Notice of Intent to Prove Aggravating Factors or Prior Record Level Point. The notice indicated that the State intended to present evidence of the following two aggravating factors: (1) "[t]he offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws[,]" which corresponds to N.C. Gen. Stat. § 15A-1340.16(d)(5) (2019); and (2) "[t]he Defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense[,]" which corresponds to N.C. Gen. Stat. § 15A-1340.16(d)(15) (2019). The notice also indicated that the State intended "to prove the existence of an additional prior record level point under N.C.G.S. § 15A-1340 (b)(7), specifically, that the offense was

committed while the Defendant . . . [w]as on supervised or unsupervised probation, parole, or post-release supervision[.]"

The State obtained superseding indictments on 22 October 2018 for stalking, making a false report to a law enforcement officer or agency, and two counts of perjury. The State obtained a superseding indictment on 22 October 2018 for violating a DVPO. The State obtained a superseding indictment on 8 July 2019 for obstruction of justice and two counts of perjury. At the 22 July 2019 trial, the State moved to join the charges for stalking, perjury, and violating a DVPO, and dismissed the first and third counts of obstruction of justice and perjury. The jury found Defendant guilty of perjury and violating a DVPO. The jury could not reach a verdict on stalking; the trial court declared a mistrial.

During sentencing proceedings, the State informed the trial court that "[t]he State has previously filed notice of an aggravating factor" and stated that "the aggravating factor would be that the Defendant was on supervised probation during the commission of this offense." The State then said to the trial court, "if [defense counsel] still plans to admit to the aggravating factor, that would be, of course, a necessary step. Otherwise, we'll prove to the Court beyond a reasonable doubt that the Defendant was on probation at the time of the offense." Defense counsel then stated, "Yeah. We do admit to that, Your Honor. . . . [W]e do admit that he was on probation."

On form AOC-CR-605, felony judgment findings of aggravating and mitigating factors, the trial court marked the check box next to aggravating factor 20, "Additional written findings of factors in aggravation: DEFENDANT WAS ON PROBATION AT THE TIME OF THE OFFENSE."

The trial court "ma[de] no findings of any mitigating factors" and found that "the factors in aggravation outweigh the factors in mitigation and that an aggravated sentence is justified." The trial court determined Defendant to be a Prior Record Level II for felony sentencing purposes, with 2 prior record level points, and sentenced Defendant to an aggravated sentence of 21 to 35 months' imprisonment for perjury. The trial court also determined Defendant to be a Prior Record Level II for misdemeanor sentencing purposes, with 2 prior record level points, and sentenced Defendant to a consecutive term of 75 days' imprisonment for violating a DVPO. Defendant gave oral notice of appeal.

II. Discussion

Defendant argues that he received ineffective assistance of counsel because his counsel failed to object to a lack of notice of the aggravating

factor argued by the State at sentencing and, as a result of this failure, his sentence was increased.

On appeal, this Court reviews de novo whether a defendant was denied effective assistance of counsel. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014).

In general, "claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). However, an ineffective assistance of counsel claim brought on direct review "will be decided on the merits when the cold record reveals that no further investigation is required." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). Here, the cold record reveals that no further investigation is required; therefore, we will decide the merits of the claim.

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 248 (1985). To meet this burden, the defendant must satisfy the following two-pronged test: First, the defendant must show that "counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Second, the defendant "must show that the deficient performance . . . [was] so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Thus, the "fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

As to the first prong, Defendant argues that his counsel's performance was deficient because counsel failed to object to the lack of notice of the aggravating factor argued by the State at sentencing. We agree.

Subsection (d) of N.C. Gen. Stat. § 15A-1340.16 enumerates 28 specific aggravating factors that, if proven beyond a reasonable doubt, can be considered by a trial court in determining whether to impose an aggravated sentence. N.C. Gen. Stat. § 15A-1340.16(a), (d) (2019). Additionally, N.C. Gen. Stat. § 15A-1340.16(d)(20) includes a catchall

provision for "[a]ny other aggravating factor reasonably related to the purposes of sentencing." N.C. Gen. Stat. § 15A-1340.16(d)(20).

Aggravating factors specifically enumerated in subsection (d) of N.C. Gen. Stat. § 15A-1340.16 "need not be included in an indictment or other charging instrument." N.C. Gen. Stat. § 15A-1340.16(a4) (2019). Under N.C. Gen. Stat. § 15A-1340.16(a6),

> [t]he State must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section or a prior record level point under [N.C. Gen. Stat. §] 15A-1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.

Id. at § 15A-1340.16(a6) (2019).

However, any aggravating factor alleged under the catchall provision in subsection (d)(20) of N.C. Gen. Stat. § 15A-1340.16 "shall be included in an indictment or other charging instrument, as specified in [N.C. Gen. Stat. §] 15A-924." *Id.* at § 15A-1340.16(a4). Specifically under N.C. Gen. Stat. § 15A-924, "[a] criminal pleading must contain . . . [a] statement that the State intends to use one or more aggravating factors under G.S. 15A-1340.16(d)(20), with a plain and concise factual statement indicating the factor or factors it intends to use under the authority of that subdivision." N.C. Gen. Stat. § 15A-924(a)(7) (2019).

In *State v. Ross*, 216 N.C. App. 337, 720 S.E.2d 403 (2011), *disc. review denied*, 366 N.C. 400, 735 S.E.2d 174 (2012), this Court reversed defendant's judgment and remanded it for resentencing where the State "simply served defendant with notice of its intent to prove the existence of" non-statutory aggravating factors but did not include them in an indictment. *Id.* at 350, 720 S.E.2d at 412.

Similarly, in *State v. Ortiz*, 238 N.C. App. 508, 768 S.E.2d 322 (2014), this Court explained and held as follows:

> The plain language of N.C. Gen. Stat. § 15A-1340.16(a4) requires the non-statutory aggravating factor to be included in the indictment and the State's failure to do so rendered it unusable by the State in its prosecution. Considering the plain language of N.C. Gen. Stat. § 15A-1340.16(a4), this Court's holding in *Ross*, and in the absence of authority to the contrary, we conclude that

> simply providing notice in compliance with N.C. Gen. Stat. § 15A-1340.16(a6) was insufficient to allow the State to proceed on the non-statutory aggravating factor and it was error for the trial court to so allow.

Id. at 514, 768 S.E.2d at 326.

In this case, the State presented to the trial court at sentencing that "the aggravating factor would be that the Defendant was on supervised probation during the commission of this offense." In its judgment, the trial court marked the check box next to aggravating factor 20 – which corresponds to the catchall provision in N.C. Gen. Stat. § 15A-1340.16(d)(20) – "Additional written findings of factors in aggravation: DEFENDANT WAS ON PROBATION AT THE TIME OF THE OFFENSE." Being on probation at the time of the offense is not one of the factors specifically enumerated in subsection (d) of N.C. Gen. Stat. § 15A-1340.16. Thus, the plain language of N.C. Gen. Stat. § 15A-1340.16(a4) requires this alleged aggravating factor to be included in an indictment or other charging instrument. N.C. Gen. Stat. § 15A-1340.16(a4).

The State obtained a superseding indictment for the felony perjury offense for which Defendant was found guilty. Nowhere in the indictment is it alleged that Defendant was on probation at the time of the offense. Accordingly, as in *Ross* and *Ortiz*, the State's failure to so allege rendered that aggravating factor unusable by the State in its prosecution. *Ortiz*, 238 N.C. App. at 514, 768 S.E.2d at 326.

We note that the State notified Defendant in accordance with N.C. Gen. Stat. § 15A-1340.16(a6) that the State intended to prove the existence of the aggravating factors specifically enumerated in N.C. Gen. Stat. § 1340.16(d)(5) and (d)(15). However, the State did not proceed at sentencing on either of these factors. Moreover, even had the State included the aggravating factor "Defendant was on supervised probation during the commission of this offense" in this notice, "simply providing notice in compliance with N.C. Gen. Stat. § 15A-1340.16(a6) [would have been] insufficient to allow the State to proceed on the non-statutory aggravating factor and it [would have been] error for the trial court to so allow." *Ortiz*, 238 N.C. App. at 514, 768 S.E.2d at 326.

Although the State notified Defendant that the State intended "to prove the existence of an additional prior record point" based on the fact that Defendant "[wa]s on supervised or unsupervised probation, parole, or post-release supervision" at the time he committed the offenses, the State did not seek to add a record level point at sentencing. Moreover,

the addition of one record-level point to Defendant's prior record level[1] would not have changed his prior record level and, thus, could not have resulted in an enhanced sentence. *See* N.C. Gen. Stat. § 15A-1340.14(b)(7) (2019). Accordingly, Defense counsel erred by failing to object to the lack of notice of the aggravating factor the State sought to prove at sentencing.

As to prong two, Defendant contends that his counsel's failure to object to the lack of notice prejudiced him because he would not have received an aggravated sentence had the objection been made. We agree.

Had Defendant's counsel objected to the lack of notice, the State could not have proceeded on that aggravating factor and Defendant could not have received an aggravated sentence. *Ortiz*, 238 N.C. App. at 514, 768 S.E.2d at 326; *Ross*, 216 N.C. App. at 350, 720 S.E.2d at 412. Accordingly, we vacate the trial court's judgment and remand the matter for resentencing. *Id.*

III. Conclusion

For the reasons stated above, we conclude that Defendant received ineffective assistance of counsel. We vacate Defendant's sentence and remand to the trial court for resentencing.

VACATED AND REMANDED FOR RESENTENCING.

Chief Judge McGEE concurs.

Judge TYSON concurs in the result by separate opinion.

TYSON, Judge, concurring in the result.

I concur in the result reached by the majority's opinion. The "catch all" aggravating factor the State proceeded upon at sentencing, and to which his counsel stipulated, was not alleged in an indictment nor found by the jury. N.C. Gen. Stat. § 15A-1340.16(d20) (2019). The enhanced sentence entered beyond the presumptive range constitutes prejudicial error to vacate Defendant's sentence. Defendant argues, and has shown, he received ineffective assistance of counsel ("IAC"). I concur with the

1. Defendant had one prior felony class H or I conviction, giving him 2 points, which puts him at prior conviction level II. If he had received an additional point for committing an offense while on probation, he would have 3 points, which still puts him at prior conviction level II.

majority's analysis of the requisite factors to show IAC. I also vote to vacate the sentence and remand for resentencing for the reasons below.

I. N.C. Gen. Stat. § 15A-1022.1

The Due Process Clause of the Fifth Amendment and the notice and jury trial protections of the Sixth Amendment guarantee "[a]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476, 147 L. Ed. 2d 435, 446 (2000) (citations omitted).

These protections are codified under N.C. Gen. Stat. § 15A-1340.16 (2019). The State provided prior notice of intent to show Defendant was under probation supervision when the underlying crime occurred to enhance his prior record level points and introduced that fact as an aggravating factor post-conviction, but prior to sentencing. During the guilt-innocence phase the jury did not find any aggravating factors and was dismissed after a guilty verdict on the underlying offense. After the State offered to prove the aggravating factor beyond a reasonable doubt, Defendant's counsel conceded to Defendant's probationary status when the underlying crime was committed.

The trial court properly found this fact could serve as a "catch-all" aggravating factor. N.C. Gen. Stat. § 15A-1340.16(d20) ("Any other aggravating factor reasonably related to the purposes of sentencing"); *see State v. Moore*, 188 N.C. App. 416, 429, 656 S.E.2d 287, 295 (2008). Absent Defendant's counsel's concession or putting the State to its proof, Defendant would not be subject to an enhanced sentence from this aggravating factor at sentencing.

The Supreme Court of the United States in *Blakely v. Washington* applied *Apprendi's* requirements to the sentencing phase following a guilty plea. 542 U.S. 296, 305, 159 L. Ed. 403, 414 (2004). Our statutes codify *Blakely's* protections in N.C. Gen. Stat. § 15A-1022.1 (a)-(e), which provide:

> (a) Before accepting a plea of guilty or no contest to a felony, the court shall determine whether the State intends to seek a sentence in the aggravated range. If the State does intend to seek an aggravated sentence, the court shall determine which factors the State seeks to establish. The court shall determine whether the State seeks a finding that a prior record level point should be found under G.S. 15A-1340.14(b)(7). *The court shall also determine* whether the State has provided the notice to the

> defendant required by G.S. 15A-1340.16(a6) or *whether the defendant has waived his or her right to such notice.*
>
> (b) *In all cases* in which a defendant admits to the existence of an aggravating factor or to a finding that a prior record level point should be found under G.S. 15A-1340.14(b)(7), *the court shall comply* with the provisions of G.S. 15A-1022(a). *In addition, the court shall address the defendant personally and advise the defendant that*:
>
> > (1) He or she is entitled to have a jury determine the existence of any aggravating factors or points under G.S. 15A-1340.14(b)(7); and
> >
> > (2) He or she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.
>
> (c) Before accepting an admission to the existence of an aggravating factor or a prior record level point under G.S. 15A-1340.14(b)(7), *the court shall determine* that there is a factual basis for the admission, and that the admission is the result of an informed choice by the defendant. The court may base its determination on the factors specified in G.S. 15A-1022(c), as well as any other appropriate information.
>
> (d) *A defendant may admit to the existence of an aggravating factor* or to the existence of a prior record level point under G.S. 15A-1340.14(b)(7) *before or after the trial of the underlying felony.*
>
> (e) *The procedures* specified in this Article for the handling of pleas of guilty *are applicable to the handling of admissions to aggravating factors* and prior record points under G.S. 15A-1340.14(b)(7), unless the context clearly indicates that they are inappropriate.

N.C. Gen. Stat. § 15A-1022.1 (a)-(e) (2019) (emphasis supplied).

Our General Assembly provided additional protections above those established in *Blakely* by extending its protections to the admission of aggravating factors or prior record level points even in the absence of an underlying guilty plea. *See id.* The transcript shows the trial court failed to address Defendant personally.

This Court has interpreted N.C. Gen. Stat. § 15A-1022.1 to "require[] a trial court to inform a defendant of his or her right to have a jury

determine the existence of an aggravating factor, and the right to prove the existence of any mitigating factor." *State v. Wilson-Angeles*, 251 N.C. App. 886, 902, 795 S.E.2d 657, 669 (2017) (citation omitted).

Unlike the requirements of N.C. Gen. Stat. § 15A-1340.16(a4) cited by the majority's opinion, the trial court's failure to inquire into a knowing and voluntarily waiver of Defendant's rights appear to have prejudiced Defendant. Under subsections (c) and (d), we must reconcile the express language that: "A defendant may admit to the existence of an aggravating factor . . . *before or after the trial of the underlying felony*" with "Before accepting an admission to the existence of an aggravating factor . . . , the court shall determine that there is a factual basis for the admission, and that the admission is the result of an informed choice by the defendant." N.C. Gen. Stat. § 15A-1022.1 (c), (d) (emphasis supplied).

A. Canons of Construction

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citation omitted). "The best indicia of that intent are the [plain meanings of the] language of the statute . . ., the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted).

"When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself." *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010). "Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible." *Taylor v. Robinson*, 131 N.C. App. 337, 338, 508 S.E.2d 289, 291 (1998) (citation, internal quotation marks, and ellipses omitted).

" '[S]tatutes *in pari materia* must be read in context with each other.' " *Publishing v. Hospital System, Inc.*, 55 N.C. App. 1, 7, 284 S.E.2d 542, 546 (1981) (quoting *Cedar Creek Enters. Inc. v. Dep't of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976)). " '*In pari materia*' is defined as '[u]pon the same matter or subject.' " *Id.* at 7-8, 284 S.E.2d at 546 (quoting Black's Law Dictionary 898 (4th ed. 1968)).

My review of relevant case and statutory authority fails to disclose any authority interpreting N.C. Gen. Stat. § 15A-1022.1(d) as writing out a defendant's admission under N.C. Gen. Stat. § 15A-1022.1(c). Reconciling both subsections with *Blakely* and *Apprendi*, a defendant can admit an aggravating factor or prior record level both before and

after the guilt-innocence phase after being provided the applicable protections of N.C. Gen. Stat. § 15A-1022.1(a)-(c), *Blakely*, and *Apprendi*. These protections are: "that there is a factual basis for the admission, and that the admission is the result of an informed choice by the defendant." N.C. Gen. Stat. § 15A-1022.1(c). Generally, these protections must be addressed to and waived by the defendant, not by defendant's counsel.

B. Cases Distinguished

The State presents several cases to support their argument of a lack of error and prejudice. In *State v. Edmonds*, this Court found a trial court's failure to personally address a defendant to be harmless error, because the defendant had failed to put on mitigating evidence contesting the sole aggravating factor. 236 N.C. App. 588, 600, 763 S.E.2d 552, 560 (2014). Here, Defendant's counsel presented six mitigating factors, all of which were rejected by the trial court prior to sentencing.

This Court's decision in *State v. Marlow*, 229 N.C. App. 593, 747 S.E.2d 741 (2013), is also not controlling to the outcome here. While this Court found the lack of a personal colloquy with defendant was missing when the defendant's counsel stipulated to the prior record level, defendant was personally asked by the court about his prior convictions. *Id.* at 602, 747 S.E.2d at 748.

This Court held no error occurred. "Defense counsel had the opportunity to inform defendant of the repercussions of conceding certain prior offenses and defendant had the opportunity to interject had he not known such repercussions. Yet, even after being informed, defendant neither objected to nor hesitated when asked about such convictions." *Id.*

The transcript shows Defendant was neither informed of these rights nor gave a knowing and voluntary waiver. The trial court did not personally address Defendant on any matter regarding the aggravating factor nor was there any collateral examination as in *Marlow*. Unlike *Edmonds*, Defendant did not concede the mitigating evidence to the aggravating factor.

II. Conclusion

The indictment failed to allege, the State never proved, and the jury never found the aggravating factor to exist, as is required by *Apprendi*, *Blakely*, and N.C. Gen. Stat. § 15A-1340.16(a1). Even if counsel's waiver of the State's prior notice to use the aggravating factor was invited error by the stipulation, counsel's post-trial concession and the trial court's failure to address Defendant personally was error. Upon remand, N.C.

Gen. Stat. § 15A-1022.1(a)-(e) sets out the procedures for the disposition for resentencing, not N.C. Gen. Stat. § 15A-1340.16(a4).

This stipulation and error by counsel allowed the court to impose the maximum aggravated sentence, constitutes prejudice and shows ineffective assistance of counsel. The sentence is properly vacated. I concur in the result to remand to the trial court for resentencing.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 SEPTEMBER 2020)

HUBERT CONSTR. & REAL EST. SERVS., LLC v. MYERS No. 19-753	Mecklenburg (18CVS17224)	Vacated and Remanded
L. OFFS. OF MATTHEW K. ROGERS, PLLC v. FISHER No. 19-475	Catawba (17CVS2534)	Affirmed
ROTHFUSS v. LINEBERRY No. 19-773	Forsyth (16CVD4374)	Affirmed
SAUNDERS v. HULL PROP. GRP., LLC No. 19-728	Henderson (16CVS1001)	No Error
SNELL v. SNELL No. 19-946	Wake (17CVD2677)	Reversed
STATE v. BARROW No. 20-220	Pitt (19CRS57656)	Affirmed
STATE v. BATTS No. 19-1100	Johnston (17CRS57623)	No Plain Error
STATE v. CAIN No. 19-1095	Onslow (17CRS51315-16)	No Error
STATE v. DAVIS No. 19-546	Onslow (15CRS54715) (18CRS1315)	NO PREJUDICIAL ERROR
STATE v. JIMMISON No. 19-982	Cumberland (16CRS57973)	Dismissed
STATE v. McHENRY No. 19-628	Brunswick (17CRS50667) (17CRS50718) (17CRS707)	No Error
STATE v. MWANGI No. 19-798	Granville (17CRS52002)	Reversed and Remanded
STATE v. O'DELL No. 20-126	Mecklenburg (16CRS226716-17)	Affirmed
STATE v. OWNBY No. 19-1139	Currituck (18CRS117-118)	No Error

STATE v. REID No. 19-1113	Davidson (17CRS1955) (17CRS54524)	Vacated and Remanded
STATE v. RIVERA No. 19-592	Wake (17CRS217859)	No Error
STATE v. SIKORSKI No. 19-1098	Mecklenburg (16CRS204676)	No Error
STATE v. STOKELY No. 19-1111	Perquimans (17CRS50221) (18CRS50275)	Dismissed
STATE v. SUAREZ No. 19-1029	Randolph (18CRS051178)	Vacated and Remanded

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