275 N.C. App.—No. 3 Pages 423-698

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

SEPTEMBER 14, 2021

MAILING ADDRESS: The Judicial Department
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OF

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COURT OF APPEALS

CASES REPORTED

FILED 31 DECEMBER 2020

HEADNOTE INDEX

ADMINISTRATIVE LAW

Final agency decision—interpretation of N.C.G.S. § 116B-78(d)—appealed to superior court—reasonable basis—The superior court properly affirmed the declaratory ruling issued by the North Carolina Department of State Treasurer, in which the agency interpreted N.C.G.S. § 116B-78(d) as prohibiting petitioner, a property finder that helped residents collect escheated funds pursuant to the Unclaimed Property Act (Chapter 116B), from depositing into its trust account checks that it collected from the agency on behalf of its clients, even if it held a valid power of attorney to act on behalf of a client. The agency's interpretation was reasonable in light of the statute's plain language and legislative history. **Fund Holder Reps., LLC v. N.C. Dep't of State Treasurer, 470.**

APPEAL AND ERROR

Court-appointed amicus curiae—Appellate Rule 28(i)—scope of amicus arguments—limited to issues raised by the record—In an as-applied constitutional challenge to N.C.G.S. § 50B-1(b)(6) in which defendant did not file an appellate brief and the State's amicus brief did not defend the statute's constitutionality, where the Court of Appeals on its own motion appointed amicus curiae to brief a response to plaintiff's arguments on appeal, issues raised by amicus on appeal that were outside the record on appeal were not properly before the appellate court. Amicus curiae was without standing to file a motion to dismiss and motion to amend the record on appeal, made according to its argument that jurisdictional defects prevented appellate review. Since the trial court's jurisdiction was never challenged and no jurisdictional defect appeared on the record, the motions were dismissed as a nullity. **M.E. v. T.J., 528.**

Preservation of issues—issue raised in motion and at hearing—issue not abandoned—In an action alleging that plaintiff's termination from the University of North Carolina was retaliatory in violation of the Whistleblower Act, where defendants specifically raised N.C.G.S. § 1-77 in their motion to dismiss and at the hearing before the trial court, plaintiff's contention that defendants waived their argument regarding section 1-77 was meritless. **Semelka v. Univ. of N. Carolina, 683.**

regarding the extraordinary expenses, which was not a deviation from the guidelines. **Madar v. Madar, 600.**

Child support—calculation—unreimbursed and uninsured medical expenses—In determining child support obligations, the trial court did not abuse its discretion by ordering defendant father to pay all of the minor child's unreimbursed/uninsured medical expenses given evidence of the large disparity between the parties' respective incomes, which supported the court's determination that defendant had the ability to pay for those expenses. **Madar v. Madar, 600.**

Child support—increase in parent's income—outside of Child Support Guidelines—The trial court did not abuse its discretion by increasing plaintiff father's child support obligation where the father's income had increased significantly since the previous order and where the court properly considered the parties' estates, earnings, conditions, and the accustomed standard of living of the child and the parties pursuant to N.C.G.S. § 50-13.4(c). The fact that the order awarded almost 110% of the child's total reasonable needs was not fatal; because the case fell outside the Child Support Guidelines, the trial court was not required to use a specific formula to set the amount of support. **Bishop v. Bishop, 457.**

Child support—reimbursement of expenses—not addressed by trial court—remanded for additional findings—In a child support action, the trial court's order was reversed and remanded for additional findings on defendant father's contention that plaintiff mother should reimburse him for forty percent of the cost of enrolling the parties' youngest son in a residential treatment program. Although the court had determined that the parties should both contribute to the program's costs, there was no indication in the record that the court addressed defendant's claim despite submission of evidence that defendant paid the full cost of enrollment. **Madar v. Madar, 600.**

CONSTITUTIONAL LAW

42 U.S.C. § 1983 claim—proximate cause—JNOV—In a 42 U.S.C. § 1983 action, sufficient evidence was presented from which a jury could conclude that defendants were the proximate cause of plaintiff's injury—stemming from defendants' use of the U.S. Virgin Islands' Small Claims Court to deprive plaintiff of his constitutional right to due process, equal protection, and trial by jury, which caused plaintiff to incur attorney fees and costs in subsequent litigation. Where defendants failed to show that any of the intervening causes they cited as breaking the causal chain superseded their actions, the trial court properly denied their motion for judgment notwithstanding the verdict. **Hailey v. Tropic Leisure Corp., 485.**

42 U.S.C. § 1983—under color of law—state action—small claims court—active engagement with magistrates—In a 42 U.S.C. § 1983 action, in which plaintiff alleged defendants deprived him of his constitutional right to due process, equal protection, and trial by jury by availing themselves of the U.S. Virgin Islands' Small Claims Court, which did not allow plaintiff to be represented by counsel, the trial court properly granted summary judgment to plaintiff where evidence established that defendants operated under color of law when they deprived plaintiff of his constitutional rights. The small claims' court magistrates' active coaching of defendants through the filing and default judgment process conferred upon defendants the status of a state actor. **Hailey v. Tropic Leisure Corp., 485.**

As-applied challenge—domestic violence statute—rational basis review—intermediate scrutiny—In an as-applied constitutional challenge to N.C.G.S. § 50B-1(b)(6), under which plaintiff was denied a domestic violence protective order against her same-sex partner, although the Court of Appeals determined strict scrutiny was the appropriate level of review, the court also held that the statute's application to plaintiff and to others similarly situated could not withstand rational basis review, much less intermediate scrutiny, because there was no government interest to support the statute's distinction between opposite-sex and same-sex couples. **M.E. v. T.J., 528.**

Eighth Amendment—juvenile offender—consecutive life sentences with parole—constitutionally permissible—The trial court's imposition of two consecutive life sentences with the possibility of parole on defendant—who was 17 years old when he committed two murders—did not violate defendant's rights under the Eighth Amendment to the U.S. Constitution or Art. I, sec. 27 of the North Carolina Constitution. Although defendant would not be eligible for parole for fifty years, the sentences did not constitute a de facto life sentence without parole because they did not exceed his expected lifespan. **State v. Anderson, 689.**

Fourteenth Amendment—due process—as-applied challenge—domestic violence statute—protection denied to same-sex partners—fundamental rights violated—Adopting the reasoning in *United States v. Windsor*, 570 U.S. 744 (2013), the Court of Appeals held that the application of N.C.G.S. § 50B-1(b)(6) to plaintiff, who was denied a domestic violence protective order because her same-sex relationship did not meet the statutory definition of "personal relationship," violated plaintiff's fundamental liberty rights to personal security, dignity, and autonomy, and therefore violated plaintiff's due process rights under the Fourteenth Amendment of the U.S. Constitution. **M.E. v. T.J., 528.**

Fourteenth Amendment—equal protection—as-applied challenge—domestic violence statute—protection denied to same-sex partners—strict scrutiny—In an as-applied constitutional challenge to N.C.G.S. § 50B-1(b)(6), the statute's application to plaintiff, which served to prevent her from obtaining a domestic violence protective order against her same-sex partner, could not survive strict scrutiny—the heightened standard of review appropriate given the fundamental liberty at stake—where the denial was based on plaintiff's LGBTQ+ status. Plaintiff's right to equal protection under the Fourteenth Amendment of the U.S. Constitution was violated where the statute's protection of opposite-sex couples only was based on an arbitrary classification that bore no reasonable relation to the statute's purpose. **M.E. v. T.J., 528.**

Fourteenth Amendment—equal protection—discrimination based on LGBTQ+ status also based on sex or gender—In an as-applied constitutional challenge to N.C.G.S. § 50B-1(b)(6), under which plaintiff was denied a domestic violence protective order against her same-sex partner, the Court of Appeals determined that the U.S. Supreme Court's definition of "sex" or gender in *Bostock v. Clayton County*, 590 U.S. __ (2020), was relevant to the Fourteenth Amendment equal protection issue of whether section 50B-1(b)(6) discriminated against plaintiff based on her LGBTQ+ status. Where the statute's distinction between opposite-sex and same-sex couples constituted discrimination based on sex, the statute could not survive intermediate scrutiny. **M.E. v. T.J., 528.**

Alimony—amount of award—discretionary decision—In an alimony action, the specific amount of alimony awarded to plaintiff wife was not an abuse of discretion where the trial court considered all of the relevant factors, including both parties' earning capacity, needs, expenses, and accustomed standard of living during the marriage—as well as defendant husband's ability to pay the amount awarded. **Madar v. Madar, 600.**

Alimony—dependency—findings of fact—In an alimony action, the trial court's findings of fact supported its conclusion that plaintiff wife was a dependent spouse as defined by N.C.G.S. § 50-16.1A(2) where its findings established that plaintiff's reasonable monthly expenses exceeded her income and that her periods of unemployment were not due to bad faith. The findings were supported by record evidence, along with a narrative provided by defendant describing a portion of plaintiff's testimony that was missing from the verbatim transcript and that appeared to support the challenged findings. **Madar v. Madar, 600.**

Alimony—supporting spouse—In an alimony action, the trial court's findings of fact supported its conclusion that defendant husband was a supporting spouse as defined in N.C.G.S. § 50-16.3A(5) where the findings established that defendant's monthly income exceeded his monthly expenses. Although defendant provided an affidavit detailing higher expenses, those included expenses related to the couple's youngest son, and absent those expenses, the evidence supported the court's findings. **Madar v. Madar, 600.**

Premarital agreement—real estate—findings—In a dispute over real property acquired during marriage, where the parties' premarital agreement generally provided that property acquired during the marriage with the husband's separate property would remain his separate property but that the husband could make gifts to the wife and to the marital estate, the trial court properly exercised jurisdiction over assets in Peru acquired during the marriage. However, because it was unclear from the findings how the properties were titled, the matter was remanded for further findings and determination of ownership of those properties. **Poythress v. Poythress, 651.**

Premarital agreements—real estate—marital presumption—In a dispute over real property acquired during marriage, where the parties' premarital agreement generally provided that property acquired during the marriage with the husband's separate property would remain his separate property but that the husband could make gifts to the wife and to the marital estate, a holding company for investment real estate and its six properties were joint property because the record evidence failed to rebut the marital presumption. The husband's testimony indicated that he intended the holding company and its properties to be joint assets—among other things, the husband testified that he had wanted the wife to be involved in their real estate investing, the wife was in fact involved, they intended to acquire ten rental properties so that they could give two to each of their children (from different marriages) one day, and several of the properties were acquired using both the husband's and the wife's personal guarantees on the loans. **Poythress v. Poythress, 651.**

Premarital agreements—real estate—marital presumption—In a dispute over real property acquired during marriage, where the parties' premarital agreement generally provided that property acquired during the marriage with the husband's separate property would remain his separate property but that the husband could make gifts to the wife and to the marital estate, on the issue of a beach house that

seeking refunds for fees they paid to defendant county for water and sewer services "to be furnished" to their future real estate development, the trial court did not abuse its discretion by taking judicial notice of two interlocal agreements (from 1984 and 1998) concerning the operation and administration of the county's water and sewer systems in the court's consideration of a Civil Procedure Rule 12(c) motion on the pleadings. The two agreements were public contracts between government entities, not subject to reasonable dispute, and germane to the resolution of the case. **Anderson Creek Partners, L.P. v. Cnty. of Harnett, 423.**

Water and sewer services—fees for future services—mandatory condition of approval for permits—unconstitutional conditions doctrine—Where plaintiff developers filed suit seeking refunds for fees they paid to defendant county for water and sewer services "to be furnished" to their future real estate development, the developers' pleadings failed to present a constitutional takings claim under the unconstitutional conditions doctrine as a matter of law where the fees were predetermined, set out in an ordinance, and uniformly applied. **Anderson Creek Partners, L.P. v. Cnty. of Harnett, 423.**

SENTENCING

Two life sentences—concurrent versus consecutive—trial court did not exercise discretion—remanded for resentencing—The trial court erroneously determined it lacked discretion to have defendant's two sentences for murder run concurrently, rather than consecutively, at defendant's new sentencing hearing (held after defendant's motion for appropriate relief was granted). Where the trial court resentenced defendant from two consecutive sentences of life without parole to two consecutive sentences of life with the possibility of parole, but indicated it might have chosen a different option if allowed to do so, the matter was remanded for resentencing. There was nothing in the statutes to suggest that N.C.G.S. § 15A-1354(a) (giving trial courts discretion to have multiple sentences run concurrently or consecutively) did not apply to new sentencing hearings under N.C.G.S. § 15A-1340.19B. **State v. Anderson, 689.**

VENUE

Action against UNC—all parties in Orange County—transferred to Orange County—In an action alleging that plaintiff's termination from the University of North Carolina (UNC) was retaliatory in violation of the Whistleblower Act, the Court of Appeals agreed with defendants that venue in Wake County was improper and held that N.C.G.S. § 1-82 was the controlling statute, pursuant to which the case should be tried in Orange County because plaintiff and defendants resided there (in addition to UNC being located there) at all times relevant to the case. **Semelka v. Univ. of N. Carolina, 683.**

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.

ANDERSON CREEK PARTNERS, L.P. v. CNTY. OF HARNETT

[275 N.C. App. 423 (2020)]

ANDERSON CREEK PARTNERS, L.P.; ANDERSON CREEK INN, LLC; ANDERSON CREEK DEVELOPERS, LLC; FAIRWAY POINT, LLC; STONE CROSS, LLC D/B/A STONE CROSS ESTATES, LLC; RALPH HUFF HOLDINGS, LLC; WOODSHIRE PARTNERS, LLC; CRESTVIEW DEVELOPMENT, LLC; OAKMONT DEVELOPMENT PARTNERS, LLC; WELLCO CONTRACTORS, INC.; NORTH SOUTH PROPERTIES, LLC; W.S. WELLONS CORPORATION; ROLLING SPRINGS WATER COMPANY, INC.; AND STAFFORD LAND COMPANY, INC., PLAINTIFFS

v.

COUNTY OF HARNETT, DEFENDANT

PF DEVELOPMENT GROUP, LLC, PLAINTIFF

v.

COUNTY OF HARNETT, DEFENDANT

No. COA19-533

Filed 31 December 2020

1. **Public Works—water and sewer services—fees for future services—mandatory condition of approval for permits—judicial notice**

Where plaintiff developers filed suit seeking refunds for fees they paid to defendant county for water and sewer services "to be furnished" to their future real estate development, the trial court did not abuse its discretion by taking judicial notice of two interlocal agreements (from 1984 and 1998) concerning the operation and administration of the county's water and sewer systems in the court's consideration of a Civil Procedure Rule 12(c) motion on the pleadings. The two agreements were public contracts between government entities, not subject to reasonable dispute, and germane to the resolution of the case.

2. **Public Works—water and sewer services—fees for future services—county's authority to collect—exercise of water and sewer districts' authority**

Where plaintiff developers filed suit seeking refunds for fees they paid to defendant county for water and sewer services "to be furnished" to their future real estate development, even though the county had no statutory authority to collect prospective fees, a 1998 interlocal agreement between the county and its water and sewer districts granted the county the ability to exercise the districts' prospective fee-collecting authority. Therefore, the pleadings failed to present a material issue of fact regarding the county's authority to collect prospective fees.

3. Public Works—water and sewer services—fees for future services—mandatory condition of approval for permits—unconstitutional conditions doctrine

Where plaintiff developers filed suit seeking refunds for fees they paid to defendant county for water and sewer services "to be furnished" to their future real estate development, the developers' pleadings failed to present a constitutional takings claim under the unconstitutional conditions doctrine as a matter of law where the fees were predetermined, set out in an ordinance, and uniformly applied.

Consolidated appeal by Plaintiffs from order entered 26 November 2018 by Judge Michael J. O'Foghludha in Superior Court, Harnett County. Heard in the Court of Appeals 6 February 2020.

Ferguson, Hayes, Hawkins & DeMay, PLLC, by James R. DeMay, and Scarbrough & Scarbrough, PLLC, by James E. Scarbrough, Madeline J. Trilling, and John F. Scarbrough, for Plaintiffs-Appellants.

Fox Rothschild LLP, by Kip David Nelson, Bradley M. Risinger, and Troy D. Shelton, and Christopher Appel, for Defendant-Appellee.

McGEE, Chief Judge.

Plaintiffs Anderson Creek Partners, L.P., et al. ("Anderson Creek"), and PF Development Group, LLC ("PF Development") (together, the "Developers"), each brought suit seeking refunds for fees paid to Defendant Harnett County (the "County") for water and sewer services "to be furnished" to their future real estate developments. Each of the two cases was designated to be an exceptional civil case and the two cases were consolidated for a single decision in the trial court, as well as consolidated for appeal to this Court.

The Developers appeal from the 26 November 2018 order of the trial court granting the County's motion for judgment on the pleadings. The Developers contend that (1) the trial court erred by taking judicial notice of an interlocal agreement between the County and its water and sewer districts; (2) the pleadings presented material issues of fact with respect to whether the County was authorized to charge fees for services "to be furnished;" and (3) the pleadings presented a viable unconstitutional conditions claim.

We hold (1) that the trial court did not err in taking judicial notice of the interlocal agreements because the agreements are public documents;

(2) there were no issues of material fact in the pleadings with respect to whether the County had authority to charge prospective fees; and (3) the capacity use fees collected by the County are not subject to review under the unconstitutional conditions doctrine. We affirm the trial court's order.

I. Factual and Procedural Background

A. *Interlocal Agreements and Assessment of Fees*

The Harnett County Board of Commissioners created a water and sewer district in Buies Creek (the "Buies Creek District") to collect wastewater within the district. The County and the Buies Creek District entered into an interlocal agreement in 1984 (the "1984 Buies Creek Agreement"), whereby the County agreed to operate the Buies Creek District's water and sewer system. The 1984 Buies Creek Agreement was the subject of the North Carolina Supreme Court decision in *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990). In *McNeill*, the North Carolina Supreme Court held that counties could lawfully enter into and act upon an interlocal agreement to operate a water and sewer system on behalf of a water and sewer district, and could exercise the water and sewer district's "rights, powers, and functions" in carrying out those operations. *Id.* at 559–60, 398 S.E.2d at 479.

By 1998, the County created eight water and sewer districts (the "Districts") to manage wastewater across its entire jurisdiction. The County and the Districts then entered into a joint interlocal agreement in May 1998 (the "1998 Agreement"), whereby the County agreed to administer the Districts' water and sewer systems. Per the 1998 Agreement, the County and the Districts agreed that the County would lease the Districts' property; the Districts would transfer their intangible assets to the County; the County would assume most of the Districts' liabilities; and the County would "administer all operations and maintenance" of the Districts' water and sewer systems.

The County then incorporated its duties under the 1998 Agreement into the Harnett County Water and Sewer Ordinance (the "Ordinance"). *See* Harnett County, N.C., Water and Sewer Ordinance (July 1, 2016) [hereinafter, Ordinance]. Pursuant to section 28(h) of the Ordinance, the County charges landowners "capacity use" fees (the "Fees") for future water or sewer service as a mandatory condition prior to the County issuing approvals and/or permits for developments to real property. Ordinance § 28(h). The Fees for a single-family residential lot are a one-time, non-negotiable payment of $1,000 for water and $1,200 for sewer. Ordinance § 28(h).

B. *Anderson Creek's Case*

The Developers each sought to build a number of residences in the County in or around 2017. Cumulatively, the County required the Developers to pay over $25,000 in Fees prior to issuing its approval for the Developers' proposed plans.

Anderson Creek filed a complaint against the County on 1 March 2017. The complaint initially alleged six claims for relief, requesting:

> (1) a declaration that the Ordinance and Fees were unlawful because the County exceeded its authority under N.C. Gen. Stat. § 153-277 in adopting and enforcing the Ordinance and Fees, and/or because the Fees lacked an "essential nexus" and "rough proportionality" to the impact of the proposed developments on the County's water and sewer systems;
>
> (2) a declaration that the Ordinance and Fees violated the Developers' rights to equal protection and substantive due process under Article I, Section 19 of the North Carolina Constitution;
>
> (3) a refund to the Developers of all fees exacted by the County, together with interest at the rate of 6% per annum pursuant to N.C. Gen. Stat. § 153A-324;
>
> (4) an award of costs, expenses, and attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.7 and/or other applicable law;
>
> (5) an accounting of all fees exacted by the County from the Developers; and
>
> (6) an order allowing any future Fees required to be paid into escrow pending the litigation resolution.

The County filed an amended[1] answer, counterclaims, and motion for sanctions in response to Anderson Creek's complaint on 19 May 2017. Anderson Creek then filed a motion to amend its complaint on 23 August 2017. The trial court granted the motion, and Anderson Creek filed an amendment to its complaint asserting a seventh and eighth claim for relief:

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1. The County's original answer, counterclaims, and motion for sanctions is not included in the record on appeal.

(7) alleging that the County breached the terms of a 4 April 2018 agreement with Anderson Creek, specifically; and

(8) requesting a declaration regarding the severability of a provision of the agreement with Anderson Creek relating to the payment of fees from Anderson Creek's development properties.

The Anderson Creek case was designated an exceptional civil case under Rule 2.1 of the General Rules of Practice for the Superior and District Courts on 27 September 2017 and was reassigned to another Superior Court Judge in Chatham County.

The County filed an answer and counterclaim in response to Anderson Creek's amended complaint on 1 February 2018.[2] The County's counterclaim requested a declaration that the 1998 Agreement gave the County authority to collect fees through the Ordinance.

On 12 February 2018, the County filed a Rule 12(c) motion for judgment on the pleadings as to claims 1 through 6 and 8 of Anderson Creek's amended complaint, and filed a motion to join necessary parties or, in the alternative, motion for permissive joinder of parties. The County attached to its motions the 1984 Buies Creek Agreement at issue in *McNeill*, as well as the subsequent 1998 Agreement. The motions were heard at the 6 August 2018 civil session of Chatham County, Superior Court.

C. *PF Development's Case*

PF Development's complaint was filed against the County on 19 July 2017. Six claims for relief were alleged in PF Development's complaint. These claims were identical to the claims raised in Anderson's Creek initial complaint. The County filed an answer denying the material allegations of the complaint and a counterclaim for declaratory relief on 9 October 2017. PF Development filed a reply to the counterclaim on 9 November 2017.

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2. The record indicates that the trial court did not grant Anderson Creek's motion to amend its complaint until 22 February 2018 and that Anderson Creek's amended complaint was not filed until 16 March 2018. According to these filing dates, the County filed its answer, counterclaims, and motion for judgment on the pleadings in response to Anderson Creek's amended complaint over one week before the trial court granted the motion to amend and over a month before the amended complaint was filed. Nevertheless, the County's answer, counterclaims, and motions evidence its receipt of the amended complaint and the parties do not bring any arguments regarding the timeliness or authenticity of the amended complaint.

The County filed a Rule 12(c) motion for judgment on the pleadings as to all six of PF Development's claims, and a motion to join necessary parties or, in the alternative, motion for permissive joinder of parties on 12 February 2018. The PF Development case was designated an exceptional civil case on 4 October 2018 and also reassigned to the same Superior Court Judge in Chatham County.

D. *Consolidation for Decision and Appeal*

The Developers initially filed a motion to consolidate their cases before the trial court on 30 January 2018. After consideration of the pleadings, arguments of counsel at the 6 August 2018 hearing in Anderson Creek's case, and materials submitted to the trial court, the trial court informed the Developers that the County's Rule 12(c) motion would be partially allowed in Anderson Creek's case. The Developers again filed a joint consent motion to consolidate their cases with the trial court on 5 October 2018. The trial court entered an order granting the consent motion to consolidate on 26 November 2018. The parties to the PF Development case elected to accept the result of the Anderson Creek case and did not request additional oral argument for PF Development's case.

On 26 November 2018, the trial court entered an order (the "Consolidated Order") resolving each case, granting: (1) in the Anderson Creek case, the County's motion for judgment on the pleadings on claims 1 through 6 and 8 and dismissing each with prejudice; and (2) in the PF Development case, the County's motion for judgment on the pleadings on all claims and dismissing all with prejudice. The Consolidated Order noted that the court had "taken judicial notice of public documents appended to [the County's] Rule 12(c) Motion [] which are May 1998 and July 1984 Agreements entered into among and between [the County] and other North Carolina governmental units that are relevant to the matters involved in this action." The Consolidated Order also stated that the County's motions to join necessary parties or, in the alternative, motions for permissive joinder of parties in each of the Developers' cases were moot based on its decision. The Developers filed a consolidated notice of appeal on 21 December 2018.

II. Analysis

A. *Judicial Notice of Public Contracts*

[1] We first address the Developers' argument that the trial court erred by (1) taking judicial notice of the 1984 Buies Creek Agreement and the 1998 Agreement, each of which the County attached to its motion for judgment on the pleadings, and (2) considering the documents

in the determination of its Consent Order. The Developers contend that the Consent Order is, "in essence, a motion for summary judgment by ambush" because they were not "afford[ed] an opportunity to reasonably confront these documents." Essentially, the Developers claim that they were unduly surprised by the County's presentation of the agreements, and placed in the "untenable position" of having to "defend matters external to the allegations of their Complaint[.]" We disagree.

The Developers are correct that "[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[.]" N.C. Gen. Stat. § 1A-1, Rule 12 (2017). However, in deciding a Rule 12(c) motion for judgment on the pleadings, our Court has held that "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, *and matters of which a court may take judicial notice*." *QUB Studios, LLC, v. Marsh*, 262 N.C. App. 251, 260, 822 S.E.2d 113, 120–21 (2018) (emphasis added) (adopting the United States Supreme Court's language in *Tellabs, Inc., v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 168 L. Ed. 2d 179, 193 (2007)). To be clear, a court may take judicial notice of matters outside the pleadings, where appropriate, without causing the proceeding to convert from a Rule 12(c) motion to one for summary judgment under Rule 56. *Id.*

Judicial notice is appropriate where a fact is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201 (2017). North Carolina Courts have long held that "important public documents will be judicially noticed." *State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.*, 289 N.C. 286, 287, 221 S.E.2d 322, 323 (1976) (citing *Staton v. Atl. Coast Line Rail Co.*, 144 N.C. 135, 145, 56 S.E. 794, 797 (1907)). "Important public documents" in this context have been held to include, among other things, a Utilities Commission order modifying a joint venture agreement, *Town of Midland v. Morris*, 209 N.C. App. 208, 214, 704 S.E.2d 329, 335 (2011); a vehicle insurance classification scheme composed by the North Carolina Rate Bureau, *State ex rel. Com'r of Ins. v. N.C. Auto. Rate Admin. Office*, 293 N.C. 365, 381, 239 S.E.2d 48, 58 (1977); and contractual agreements between a Native American tribe and both the state government and private entities, *Hatcher v. Harrah's N.C. Casino Co., LLC*, 169 N.C. App. 151, 154, 610 S.E.2d 210, 212 (2005). "[A] trial court's

decision concerning judicial notice will not be overturned absent an abuse of discretion." *Muteff v. Invacare Corp.*, 218 N.C. App. 558, 568, 721 S.E.2d 379, 386 (2012) (citation omitted).

The 1984 Buies Creek Agreement and the 1998 Agreement are public contracts between government entities, Harnett County and its municipal water and sewer districts. *See* N.C. Gen. Stat. § 132-1 (2017) (defining documents created by municipalities, counties, and special districts "in connection with the transaction of public business" to be public records). These documents are subject to public review, N.C. Gen. Stat. § 132-1, and their existence is therefore "not subject to reasonable dispute." The agreements are important public documents germane to the resolution of this case; indeed, some of the Developers reference—or even incorporate—the 1998 Agreement in their pleadings. The Developers' position was far from "untenable." The trial court took judicial notice of the existence of the agreements and of the language therein, then interpreted that language as a matter of law. It was, therefore, not an abuse of discretion for the trial court to take judicial notice of the 1984 Buies Creek Agreement and the 1998 Agreement and to consider the documents in its review of the parties' pleadings.

B. *Preemptive Collection of Fees*

[2] The Developers primarily contend that the trial court erred in granting the County's motion for judgment on the pleadings because the pleadings presented material issues of fact with respect to whether the County had authorization to prospectively collect fees for water and sewer services "to be furnished" in the future. We hold that the County had authority to collect prospective fees by virtue of the 1998 Agreement.

i. *Standard of Review*

"We review de novo a trial court's order granting a motion for judgment on the pleadings under Rule of Civil Procedure 12(c)." *Tully v. City of Wilmington*, 370 N.C. 527, 532, 810 S.E.2d 208, 213 (2018) (citation omitted). The moving party must show that, after considering all well-pleaded factual allegations in the nonmoving party's pleadings as true, "no material issue of fact exists and that he is entitled to judgment as a matter of law." *Id.* A defendant moving for judgment on the pleadings must prove, essentially, that the plaintiff's pleadings "fail[] to allege facts sufficient to state a cause of action or admit[] facts which constitute a complete legal bar to a cause of action." *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51–52, 790 S.E.2d 657, 659–60 (2016) (citations and quotation marks omitted).

This case also requires our review of two interlocal agreements between the parties. "Generally, 'the purport of a written instrument is to be gathered from its four corners, and the four corners are to be ascertained from the language used in the instrument.' " *China Grove 152, LLC, v. Town of China Grove*, 242 N.C. App. 1, 9, 773 S.E.2d 566, 572 (2015) (citation omitted).

ii. *Authorization to Collect Prospective Fees*

A clear understanding of the question before us first requires discussion of the statutes and seminal cases which comprise the relevant fee-collecting authority of the municipal entities involved. Municipalities are entities born purely from "legislative will" and have no authority or powers apart from those given to them by the General Assembly. *Lutterloh v. City of Fayetteville*, 149 N.C. 65, 69, 62 S.E. 758, 760 (1908) (citations omitted). The General Assembly allows for the creation of municipalities and expressly delegates powers and authorities to them via enabling statutes. N.C. Const. art. VII, § 1; *Lanvale Props., LLC v. County of Cabarrus*, 366 N.C. 142, 150, 731 S.E.2d 800, 807 (2012) (citations omitted). Acts taken by a municipality that extend beyond the scope of the powers and authorities statutorily granted to it are void. *City of Asheville v. Herbert*, 190 N.C. 732, 735, 130 S.E. 861, 863 (1925) (citations omitted).

When the Developers sought development permits in early 2017, the County had the statutory authority only to collect fees for past and present "services furnished." The governing statute then stated:

> A county may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or *the services furnished* by a public enterprise.

N.C. Gen. Stat. § 153A-277(a) (2015) (emphasis added).

The North Carolina Supreme Court held that a nearly identical statute regarding the fee-collecting authorities of cities did not authorize the collection of prospective impact fees in its 2016 decision in *Quality Built Homes Inc. v. Town of Carthage*, 369 N.C. 15, 789 S.E.2d 454 (2016). In *Quality Built Homes*, the town of Carthage required developers to pay a progressively scaling fee prior to final approval of the developers' plats and building permits. *Id.* at 17, 789 S.E.2d at 456. Carthage claimed authority to charge these prospective fees under N.C. Gen. Stat. § 160A-314, which then read:

> A city may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or *the services furnished* by a public enterprise.

N.C. Gen. Stat. § 160A-314 (2015) (emphasis added). Our Supreme Court held the plain language of N.C. Gen. Stat. § 160A-314 "clearly and unambiguously empower[ed] Carthage to charge for the contemporaneous use of water and sewer services—*not* to collect fees for future [] spending." *Id.* at 20, 789 S.E.2d at 458 (emphasis added) (citation omitted). The statute's provisions were "operative in the present tense." *Id.*

Our Court addressed similar language enabling a utilities commission to collect fees in *Kidd Construction Group, LLC, v. Greenville Utilities Commission*, 271 N.C. App. 392, 845 S.E.2d 797 (2020). In *Kidd*, the Greenville Utilities Commission (the "GUC"), a local government entity created by our General Assembly to provide water and sewer services to Pitt County, collected prospective capacity fees "as a precondition to development approval, to the issuance of building permits, and to receiving service." *Id.* at 395, 845 S.E.2d at 799. The charter establishing creation of the GUC and outlining its powers authorized the GUC to "fix uniform rates for *all services rendered*[.]" *Id.* at 398, 845 S.E.2d at 801. This Court held that the operative language in GUC's charter was "functionally equivalent" and "nearly identical" to the enabling language at issue in *Quality Built Homes*, and "also fail[ed] to confer prospective charging authority by lacking the critical 'to be' language." *Id.* ("Just as the 'services furnished' language did not empower Carthage to impose impact fees prior to any service being provided, so too does 'services rendered' fail to empower GUC to impose impact fees on builders and developers as a condition of final development approval." (citation omitted)).

The only difference between the text of N.C. Gen. Stat. § 160A-314 reviewed in *Quality Built Homes* and the text of N.C. Gen. Stat. § 153A-277(a) subject to our review in this case is the substitution of the word "city" for "county." We interpret the nearly identical, plain language of N.C. Gen. Stat. § 153A-277(a) in the same manner. N.C. Gen. Stat. § 153A-277(a) authorized the County only to assess fees for the "contemporaneous use" of its water and sewer systems, and otherwise "clearly and unambiguously fail[ed] to give [the County] the essential prospective charging power necessary to assess [the Fees]." *Quality Built Homes*, 369 N.C. at 22, 789 S.E.2d at 459.

In response to the *Quality Built Homes* decision, our General Assembly modified both N.C. Gen. Stat. § 153A-277(a) and N.C. Gen. Stat. § 160A-314 to authorize counties and cities to collect fees for

"services furnished or to be furnished by any public enterprise." N.C. Gen. Stat. § 153A-277(a) (2019); N.C. Gen. Stat. § 160A-314 (2019). The General Assembly thus amended each statute to permit the prospective fee-collecting acts complained of here. The amended language of N.C. Gen. Stat. § 153A-277(a) became effective 1 October 2017; however, the General Assembly specified that "[n]othing in th[e] act provides retroactive authority for any system development fee, or any similar fee for water or sewer services to be furnished, collected by a local governmental unit prior to October 1, 2017." PUBLIC WATER AND SEWER SYSTEM DEVELOPMENT FEE ACT, 2017 North Carolina Laws S.L. 2017-138 (H.B. 436).

The Districts, on the other hand, were authorized to collect prospective fees in 2016. Each of the Districts involved in this case are water and sewer districts created under chapter 162A of the North Carolina General Statutes and governed by the Harnett County Board of Commissioners. Water and sewer districts are bodies corporate and politic which are and were, at all times relevant to this case, authorized to "contract and be contracted with" and to "establish, revise and collect rates, fees or other charges and penalties for the use of or the services furnished or *to be furnished*[.]" N.C. Gen. Stat. § 162A-88 (2015) (emphasis added). Unlike the versions of N.C. Gen. Stat. §§ 153A-277 and 160A-314 in effect when the Developers were required to pay the Fees, N.C. Gen. Stat. § 162A-88 "included the language 'services furnished and to be furnished' and thus 'plainly allowed the charge for prospective services[.]' " *Kidd*, 271 N.C. App. at 397-98, 845 S.E.2d at 800 (quoting *Quality Built Homes*, 369 N.C. at 20, 789 S.E.2d at 458) (distinguishing N.C. Gen. Stat. § 160A-314 (2015) and N.C. Gen. Stat. § 162A-88 (2015)).

Additionally, local government entities may generally cooperate through interlocal agreements to carry out their purposes. *See* N.C. Gen. Stat. §§ 153A-275, 153A-278 (2015). Our Supreme Court has made it clear that a county may contract with another local government entity to enable the county to exercise authority given to that entity. Specifically, this issue has been addressed with respect to the County and its water and sewer districts. In *McNeill v. Harnett County*, our Supreme Court held that the 1984 Buies Creek Agreement—the prior interlocal agreement between the County and the Buies Creek District, one of the Districts in this case—properly enabled the County to exercise all "rights, powers, and functions granted to water and sewer districts as found in N.C.G.S. § 162A-88[.]" *McNeill*, 327 N.C. at 559, 398 S.E.2d at 479.

At all times relevant to this action, counties did not have the authority to collect prospective fees themselves. However, the Districts each

had the authority to collect prospective fees and were free to contract with the County to enable the County to collect prospective fees by exercising the statutory authority of the Districts. Therefore, the only way the County could have had the authority to charge any prospective fees would be pursuant to an interlocal agreement through which the County could exercise authority held by the Districts.[3]

iii. *Issues of Fact*

Having explained that the County may only collect fees for services "to be furnished" by virtue of an interlocal agreement granting such rights, the question before this Court is whether the 1998 Agreement did grant the County the Districts' authority to collect prospective fees under N.C. Gen. Stat. § 162A-88.

In *McNeill*, our Supreme Court held that the County could lawfully enter into and act under an interlocal agreement to operate a water and sewer system on behalf of its water and sewer districts:

> [P]ursuant to an interlocal cooperative agreement and pursuant to authority granted in article 15 of chapter 153A, a county may, among other things, operate a water and/or sewer system for and on behalf of another unit of local government, such as a water and sewer district, and in conjunction therewith may exercise those rights, powers, and functions granted to water and sewer districts as found in N.C.G.S. § 162A-88 and those rights, powers, and functions granted to counties in N.C.G.S. ch. 153A, art. 15.

McNeill, 327 N.C. at 559, 398 S.E.2d at 479. The *McNeill* Court recognized that the County and the Buies Creek District had entered into the 1984 Buies Creek Agreement "on 23 July 1984 wherein it was agreed that the [Buies Creek District's] sewer system, which had been completed that year, would be operated by Harnett County through its Department of Public Utilities." *Id.* The *McNeill* Court held that, pursuant to the 1984

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3. We note that the impact fees charged in *Quality Built Homes* were assessed on a progressively scaling basis, whereas the Fees charged by the County in the present case are flat and non-negotiable charges which the County deems "capacity use" fees. This difference is not material to our consideration of the County's prospective fee-collecting authority. The Fees charged by the County here are "not assessed at the time of actual use, but are payable in full at the time of final subdivision plat approval—a time when water, sewer, or other infrastructure might not have been built and only a recorded plat exists" and "requir[e] [the County] to invoke prospective charging power" for future services. *Quality Built Homes*, 369 N.C. at 21, 789 S.E.2d at 458–59 (quotation marks and brackets omitted).

Buies Creek Agreement, the County was "clothed" with "those powers granted to the [Buies Creek District] in N.C.G.S. § 162A-88[,]" as well as "those powers set forth in chapter 153A, article 15 of the General Statutes[.]" *Id*. Therefore, the 1984 Buies Creek Agreement granted the County the power, among other things, to "establish, revise and collect rates, fees or other charges and penalties for the use of or the services furnished or *to be furnished* by any sanitary sewer system, water system or sanitary sewer and water system" and to "exercise those powers[.]" N.C. Gen. Stat. § 162A-88 (emphasis added); *McNeill*, 327 N.C. at 559, 398 S.E.2d at 479.

The terms of the 1984 Buies Creek Agreement stated, in relevant part, that the County and the Buies Creek District "agreed to enter into [the] contract for . . . the operation of the wastewater collection system as a County operated sewer and wastewater collection system[.]" The contract provided that a newly constructed "wastewater treatment plant owned by the County" would be operated by the County to serve the sewer and wastewater needs of the Buies Creek District. In so doing, the County was "entitled to fund or cause to be funded the construction of any sewer line to be connected to the [Buies Creek District's] system as an extension . . . for the purpose of serving needy users with wastewater utility services[.]" Notably, the 1984 Buies Creek Agreement made no direct reference to N.C. Gen. Stat. § 162A-88.

The 1998 Agreement provides the County with substantially the same rights as it was granted in the 1984 Buies Creek Agreement and more clearly incorporates the Districts' prospective fee-collecting authority. The 1998 Agreement opens by acknowledging that it exists pursuant to statutory authority, which includes a number of statutes "[w]ithout limitation." The enumerated statutory authorities include the authority of "two or more . . . units of local government [to] cooperate" in the "joint provision of enterprisory services" as granted by N.C. Gen. Stat. § 153A-278. The 1998 Agreement then expressly recognizes that the Districts have the ability to assess fees for "services furnished or to be furnished" pursuant to N.C. Gen. Stat. § 162A-88. In a section labeled "Purpose of the Agreement," the 1998 Agreement states that its purpose is to "provide a cost efficient method for the administration, operation, maintenance and expansion of water and . . . wastewater services to each of the Districts through [the County's] Department of Public Utilities." Like the 1984 Buies Creek Agreement, the 1998 Agreement does not make a specific reference to the County's receipt of the Districts' authority to collect prospective fees, but does wholly acknowledge an intent between the parties to have the County step into the Districts' shoes to

efficiently provide water and sewer services throughout each District. We therefore hold that the 1998 Agreement granted the County the ability to exercise the Districts' prospective fee-collecting authority, and that the pleadings failed to present a material issue of fact regarding the County's authority to collect prospective fees.

The Developers' argue that this case turns, instead, on a different issue: whether the pleadings show a material issue of fact regarding how the County assessed the Fees, either by managing the Districts' infrastructure or by operating its own county infrastructure. In the Developers' view, this case presents a "complex puzzle regarding the Ordinance, the Fees, and the true relationship of the County and the Districts in the provision of water and sewer service." The Developers contend the County had no authority to collect the Fees because "[t]he clear inference from the [1998 Agreement] is that the County is operating its own, countywide water and sewer system—not the systems of the Districts."

We disagree with the Developers' statement of the issue in this case. The pleadings may show an issue of fact with respect to whose infrastructure the County used to assess the Fees, and whether the District even maintained any water and sewer system of its own, but these issues are not material to the resolution of this case. Regardless of whether the County is operating its own physical water and sewer infrastructure, the Districts' infrastructure, infrastructure it acquired from the Districts, or a combination thereof, the issue is whether the County had the authority to use any means to assess prospective fees for water and sewer services to be furnished in the future.[4] Indeed, the *McNeill* Court found that the County had this authority where the 1984 Buies

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4. After hearing arguments from counsel regarding the County's motion for judgment on the pleadings, the trial court properly understood the issue in this case to be the same:

> Legally, it doesn't matter how they do it; legally, it matters can they legally do it? But, how they do it doesn't matter. Isn't that kind of irrelevant?
>
> . . . .
>
> They have to have the authority, but, as long as they continue to have the authority, that's—that's the legal threshold issue.
>
> . . . .
>
> [T]he threshold issue for me to decide in this case is whether the [1998 Agreement] is legally—legally different than the [1984 Buies Creek Agreement] and *whether the [1998 Agreement] is not done pursuant to [N.C. Gen. Stat. § 162A*].

(Emphasis added).

Creek Agreement specified that the County would operate a "wastewater treatment plant owned by the County" and a "wastewater treatment facility owned by the County[,]" which were located within the boundaries of the Buies Creek District and thereafter referred to as "the [Buies Creek District's] wastewater collection system" and "the [Buies Creek District's] wastewater treatment facility[.]" It was immaterial to the holding of *McNeill* that the County owned the infrastructure used. We hold that the 1998 Agreement gave the County the rights to exercise the Districts' fee-collecting authority—by any legal means—and therefore affirm the Consolidated Order.

C. *Unconstitutional Conditions Doctrine*

[3] Lastly, the Developers argue that the pleadings presented a material issue of fact of whether assessment of the Fees constituted an unconstitutional condition under the United States Supreme Court's decision in *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 186 L. Ed. 2d 697 (2013). The Developers' pleadings claim that, assuming the County had the authority to assess the Fees, the Fees were nonetheless an unconstitutional condition on the exercise of their property rights. Thus, this Court is asked to determine whether a generally applicable fee assessed as a condition precedent to approval of a land-use permit warrants review under the "unconstitutional conditions doctrine." For the reasons below, we hold that it does not and further affirm the Consolidated Order.

The "unconstitutional conditions doctrine" rests on the principle that "the government may not deny a benefit to a person because he exercises a constitutional right," *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545, 76 L. Ed. 2d 129, 136–37 (1983) (citation omitted), and works to "vindicate[] the Constitution's enumerated rights by preventing the government from coercing people into giving them up[,]" *Koontz*, 570 U.S. at 604, 186 L. Ed. 2d at 708. The United States Supreme Court has held that the unconstitutional conditions doctrine is particularly relevant in the context of the land-use permitting process, as landowners are especially vulnerable to the government's broad discretion in imposing potentially "[e]xtortionate demands" on the grant of land-use permits. *Koontz*, 570 U.S. at 605, 186 L. Ed. 2d at 708. Government conditions that request the landowner deed land as an easement or designate a portion of his or her land for a particular use "can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation." *Id.*; U.S. Const. amend. V. However, where a landowner's proposed use of real

property "threaten[s] to impose costs on the public" the government may constitutionally require the landowner to "internalize the negative externalities of their conduct" and make contributions of real property or finances to mitigate the public costs imposed. *Id.*

The Supreme Court recognized these competing realities in *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L. Ed. 2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 129 L. Ed. 2d 304 (1994). In *Nollan* and *Dolan*, the Court ruled that the government is allowed to condition approval of land-use permits by requiring the landowner to mitigate the impact of his or her proposed use. *Dolan*, 512 U.S. at 391, 129 L. Ed. 2d at 320; *Nollan*, 438 U.S. at 837, 97 L. Ed. 2d at 689. The government may require that the landowner agree to a particular public use of the landowner's real property, as long as there is an "essential nexus" and "rough proportionality" between the public impact of the landowner's proposed developments and the government's requirements. *Dolan*, 512 U.S. at 391, 129 L. Ed. 2d at 320; *Nollan*, 438 U.S. at 837, 97 L. Ed. 2d at 689.

In *Koontz*, the Court extended the application of *Nollan/Dolan*'s "essential nexus" and "rough proportionality" requirements to government demands for monetary contributions where there is a "direct link between the government's demand and a specific parcel of real property." *Koontz*, 570 U.S. at 614, 186 L. Ed. 2d at 714 (footnote omitted). The plaintiff in *Koontz* was required to obtain a Wetlands Resource Management Permit before he could make improvements to his property which would, among other impacts, raise the elevation of the improved property. *Id.* at 599–602, 186 L. Ed. 2d at 704–06. The plaintiff offered to deed a portion of his property as a conservation easement to the water district to mitigate the environmental impact of his proposed improvements. *Id.* The water district considered the plaintiff's offer inadequate, and refused to grant the plaintiff's permit unless he either (1) agreed to increase the amount of property encumbered by the proposed conservation easement, or, in the alternative, (2) to deed the conservation easement as offered and to also pay for environmental improvements to district-owned real property several miles away. *Id.* The *Koontz* Court held that the district's second condition also warranted *Nollan/Dolan* review because such demands for money operated, essentially, "in lieu of" relinquishments of real property rights, were therefore "functionally equivalent to other types of land use exactions[,]" and accomplished the same diminution in the landowner's property rights: the landowner could comply with the request, or be denied the right to use his or real property in the desired way. *Id.* at 612, 186 L. Ed. 2d at 713.

In the case before us, the County assessed the Fees as a condition precedent to its approval of the Developers' building permits; if the Developers declined to pay the Fees, the County would have denied the Developers' permission to begin their desired construction projects. The Fees in this case were categorized as impact fees and referred to as "capacity use fees," despite the County's requirement that the fees be paid prior to approval of a developer's permits.

The *Koontz* Court stressed that taxes and fees do not trigger review under the unconstitutional conditions doctrine, and stated: "It is beyond dispute that '[t]axes and user fees . . . are not "takings." ' " *Id.* at 615, 186 L. Ed. 2d at 715 (citation omitted). The *Koontz* Court explained that its holding did "not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on landowners." *Id.* But the *Koontz* Court otherwise provided little guidance on how courts should tread the fine line between unconstitutional exactions and constitutional, routine taxes and fees. *See* Michael B. Kent, Jr., *Viewing the Supreme Court's Exactions Cases Through the Prism of Anti-Evasion*, 87 U. Colo. L. Rev. 827, 871 (2016); Adam Lovelady, The *Koontz* Decision and Implications for Development Exactions, Coates' Canons: N.C. Local Government Law Blog (Dec. 17, 2020), https://canons.sog.unc.edu/the-koontz-decision-and-implications-for-development-exactions/ (opining that the majority opinion in *Koontz* did not provide a clear test for distinguishing permissible taxes and fees from potentially unconstitutional exactions). Indeed, the dissenting justices in *Koontz* warned that the majority's decision extended the "notoriously 'difficult' and 'perplexing' standards" of the Fifth Amendment Takings Clause "into the very heart of local land-use regulation and service delivery[,]" including the levy of fees to "cover the direct costs of providing services like sewage or water to [a] development." *Koontz*, 570 U.S. at 626, 186 L. Ed. 2d at 722 (Kagan, J., dissenting) (citations omitted). The dissenting justices concluded that these fees—such as the Fees at issue in the present case—"now must meet *Nollan* and *Dolan*'s nexus and proportionality tests." *Id.* at 627, 186 L. Ed. 2d at 722.

Neither party in this case briefed any North Carolina precedent, and our own review has found no precedent, which speaks directly to the application of the unconstitutional conditions doctrine to monetary exactions in North Carolina. *Cf. Homebuilders Ass'n of Charlotte, Inc., v. City of Charlotte*, 336 N.C. 37, 46, 442 S.E.2d 45, 51 (1994) (assessing the legality of the city's user fees without reviewing their constitutionality); *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 120–22,

388 S.E.2d 538, 550–51 (1990) (applying *Nollan* and holding no constitutional taking occurred where the city required a dedication of real property as condition precedent to permit approval, but the plaintiff's permit was denied for other valid reasons). At a minimum, this is the first time North Carolina appellate courts have been asked to address this issue since the United States Supreme Court decided *Koontz* in 2013.

This Court most closely addressed the constitutionality of government exactions in any form as takings in its 1989 decision in *Franklin Road Properties v. City of Raleigh*, 94 N.C. App. 731, 381 S.E.2d 487 (1989). In *Franklin Road*, the city of Raleigh refused to issue building permits for a subdivision requested by the plaintiff because the plaintiff would not comply with city ordinances which required the plaintiff to "dedicate and pave a portion of its property as part of [a] right-of-way" prior to approval of a building permit. *Franklin Rd.*, 94 N.C. App. at 734, 381 S.E.2d at 489. The plaintiff sued seeking a declaratory judgment of its rights with respect to the city ordinances, and the trial court granted summary judgment to the defendant city of Raleigh. *Id.* This Court reviewed the constitutionality of the city ordinance's requirement that the plaintiff dedicate a portion of its land as a public right-of-way. *Id.*

The *Franklin Road* Court concluded that the city ordinance was an "exaction" which required constitutional scrutiny under North Carolina's "rational nexus" test, adopted only six months earlier in the 1989 opinion of *Batch v. Town of Chapel Hill*, 92 N.C. App. 601, 376 S.E.2d 22 (1989), *rev'd*, 326 N.C. 1, 387 S.E.2d 655 (1990). *Id.* at 737, 381 S.E.2d at 491. The *Franklin Road* Court explained:

> In [a] portion of our opinion in *Batch* we concluded that the town's requirement that plaintiff dedicate a portion of her property as a right-of-way for the proposed [parkway] was an "exaction." In defining "exaction" we stated:
>
> [A]n exaction is a condition of development permission that requires a public facility or improvement to be provided at the developer's expense. Most exactions fall into one of four categories: (1) requirements that land be dedicated for street rights-of-way, parks, or utility easements and the like; (2) requirements that improvements be constructed or installed on land so dedicated; (3) requirements that fees be paid *in lieu* of compliance with dedication or improvement provisions; and (4) *requirements that developers pay "impact" or "facility" fees reflecting their respective prorated shares of the cost of providing new*

> *roads, utility systems, parks, and similar facilities serving the entire area.*
>
> We further stated that "Not all exactions are constitutional takings." To aid a trial court in determining whether an exaction is an unconstitutional taking, we adopted the following rational nexus test:
>
> To determine whether an exaction amounts to an unconstitutional taking, the court shall: (1) identify the condition imposed; (2) identify the regulation which caused the condition to be imposed; (3) determine whether the regulation substantially advances a legitimate state interest. If the regulation substantially advances a legitimate state interest, the court shall then determine (4) whether the condition imposed advances that interest; and (5) whether the condition imposed is proportionally related to the impact of the development.

Id. at 736, 381 S.E.2d at 490 (emphasis added) (citing *Batch*, 92 N.C. App. at 613–14, 621, 376 S.E.2d at 30, 34).

Notably, though, the North Carolina Supreme Court reversed *Batch* a year later, holding that the Town of Chapel Hill properly denied the plaintiff's request for a subdivision building permit because the permit failed to comply with town ordinances requiring permits to contemplate coordination with the town's transportation plans. *Batch v. Town of Chapel Hill*, 326 N.C. 1, 13, 387 S.E.2d 655, 663 (1990). Based on this holding, the Court declined to address any other reason why the permit was or may have been denied, and, particularly, did "not find it necessary to review or decide any of [the] plaintiff's constitutional claims or other issues arising upon her complaint." *Id.* at 13, 14, 387 S.E.2d at 663.

As a result, North Carolina law in regard to exactions as takings is without foundation and has not been updated following *Dolan* and *Koontz*. The definition of "exaction" and the "rational nexus" test presented in *Franklin Road* (and derived from the Court of Appeals decision in *Batch*) were developed after the United States Supreme Court decided *Nollan*, but prior to its decisions in *Dolan* and *Koontz*. Nonetheless, *Franklin Road* addressed potentially unconstitutional exactions in North Carolina by employing a "rational nexus" test which in many ways mirrors the "essential nexus" and "rough proportionality" requirements of *Nollan/Dolan*, and which also preemptively addressed *Koontz*'s later extension of those requirements to monetary exactions

"in lieu of" physical takings of land or as recompensation for the impact of a proposed development.

The Developers cite to decisions from other states that have issued rulings regarding the thin line between unconstitutional exactions and constitutional user fees. However, we find most of these cases unpersuasive because they involve these courts' attempts to apply the real property-focused decisions in *Nollan/Dolan* alone to exactions and fees, prior to the United States Supreme Court's decision in *Koontz*. *See Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 356 (Ohio 2000); *Trimen Dev. Co. v. King Cty.*, 877 P.2d 187, 194 (Wash. 1994); *N. Ill. Home Builders Ass'n, Inc. v. Cty. of Du Page*, 621 N.E.2d 1012, 1020 (Ill. App. Ct. 1993), *aff'd in part*, *rev'd in part*, 649 N.E.2d 384 (Ill. 1995). These cases were part of the pre-*Koontz* division of authority over whether a demand for money could give rise to an unconstitutional conditions claim under *Nollan/Dolan*—a division which *Koontz* settled in the affirmative. *See Koontz*, 570 U.S. at 603, 186 L. Ed. 2d at 707.

The most persuasive case cited by the parties is the 2018 decision of Maryland's highest court in *Dabbs v. Anne Arundel County*, 182 A.3d 798 (Md. 2018), which cites to *Koontz* in holding that a generally applicable fee does not invoke the unconstitutional conditions doctrine. In *Dabbs*, the plaintiffs sought refunds for impact fees paid to their county in connection with real estate developments; the fees were collected to facilitate future improvements to transportation and education infrastructure within the county. *Id.* at 801–02. The impact fees at issue were "legislatively-imposed[,] predetermined, based on a specific monetary schedule, and applie[d] to any person wishing to develop property in the district." *Id.* at 811. The plaintiffs argued that the impact fees were takings subject to the "essential nexus" and "rough proportionality" requirements of *Nollan/Dolan*. *Id.* at 807–08. The *Dabbs* Court acknowledged that *Koontz* extended the protections of *Nollan/Dolan* to instances where there is a " '*direct link* between the *government's demand* and *a specific parcel of real property*[,]' " but noted *Koontz*'s insistence that " 'taxes [and] user fees . . . that may impose financial burdens on [land]owners' " are not takings under *Nollan/Dolan*. *Id.* at 809–10 (citing *Koontz*, 570 U.S. at 614, 615, 186 L. Ed. 2d at 714, 715).

The *Dabbs* Court held that the impact fees were not subject to scrutiny under *Nollan/Dolan* because, "[u]nlike *Koontz*, the Ordinance [did] not direct a [land]owner to make a conditional monetary payment to obtain approval of an application for a permit of any particular kind, nor [did] it impose the condition on a particularized or discretionary

basis." *Id.* at 811 (citation omitted). Instead, the ordinance at issue in *Dabbs* "applied on a generalized district-wide basis, making no determination as to whether an actual permit will issue to a payor individual with a property interest." *Id.* (citing *Koontz*, 570 U.S. at 628, 186 L. Ed. 2d at 723 (Kagan, J., dissenting) (commenting that the majority's holding should apply "only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable")). The *Dabbs* Court further based its decision on its understanding that *Dolan* recognized that impact fees "imposed on a generally applicable basis are not subject to a rough proportionality or nexus analysis." *Id.* (citing *Dolan*, 512 U.S. at 385, 129 L. Ed. 2d at 316).

We find the holding of *Dabbs* persuasive and find it in harmony with both the United States Supreme Court's decision in *Koontz* and the definition of "exaction" employed by this Court in *Franklin Road*. In *Franklin Road*, this Court defined "exaction" to include fees assessed "in lieu of compliance with dedication or improvement provisions" or fees "reflecting [developers'] respective prorated shares of the cost of providing new [infrastructure.]" *Franklin Rd.*, 94 N.C. App. at 736, 381 S.E.2d at 490. This definition did not include fees assessed on a generally applicable basis in a static quantity indifferent to the particular developers' prorated share of any resulting impact. We hold that impact and user fees which are imposed by a municipality to mitigate the impact of a developer's use of property, which are generally imposed upon all developers of real property located within that municipality's geographic jurisdiction, and which are consistently imposed in a uniform, predetermined amount without regard to the actual impact of the developers' project do not invoke scrutiny as an unconstitutional condition under *Nollan/Dolan* nor under North Carolina precedent.

The Fees assessed in the present case are similar to those assessed in *Dabbs*. The parties agree that, under Section 28(h) of the Ordinance, any landowner who wishes to develop a single-family residential lot in the County must pay one-time fees of $1,000 for water and $1,200 for sewer. Ordinance § 28(h). The Fees are predetermined, set out in the Ordinance, and non-negotiable; the Fees are not assessed on an *ad hoc* basis or dependent upon the landowner's particular project. Ordinance § 28(h). The Fees are assessed in conjunction with the landowner's intent to make use of real property located within the County's jurisdiction, but, unlike the conditions imposed in *Koontz*, the County does not view a landowner's proposed project and then make a demand based upon that specific parcel of real property. *Koontz*, 570 U.S. at 613, 186 L. Ed. 2d at 714 (holding *Nollan/Dolan* scrutiny applied where there is a

"direct link between the government's demand and a specific parcel of real property").

We recognize that *Dabbs* is distinguishable from the present case in that the Fees here were assessed *prior to* the County's grant of building permits, thus making them a condition of approval. The *Dabbs* Court expressly based its holding, in part, on the fact that the fees at issue were *not* "a conditional monetary payment to obtain approval of an application for a permit of any particular kind[.]" *Dabbs*, 182 A.3d at 811. This distinction speaks directly to the types of coercive harms that the United States Supreme Court sought to prevent in *Koontz*: the unconstitutional conditions doctrine seeks to prevent the government from leveraging its legitimate interest in mitigating harms by imposing "[e]xtortionate demands" which may "pressure a[] [land]owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation." *Koontz*, 570 U.S. at 605–06, 186 L. Ed. 2d at ___; *but see id.* at 607, 186 L. Ed. 2d at 709 ("Our unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent." (citation omitted)). Nonetheless, we do not find the distinction material in this case. Regardless of whether the Fees were to be paid prior to or after the Developers began their projects, the fees were predetermined and are uniformly applied—not levied against the Developers on an *ad hoc* basis—and thus do not suggest any intent by the County to bend the will or twist the arm of the Developers.

Therefore, we hold that the Developers' pleadings failed to present a constitutional takings claim under current federal and state unconstitutional conditions jurisprudence as a matter of law. The trial court had no duty to apply the unconstitutional conditions doctrine to the Fees; rather, the court needed only ensure that, if the County "[did] have the authority to assess user fees to defray the costs of [future services to be rendered,] such fees [were not] upheld if they [were] unreasonable." *Homebuilders Ass'n of Charlotte*, 336 N.C. at 46, 442 S.E.2d at 51 (citation omitted).

III. Conclusion

We hold that the trial court did not abuse its discretion in taking judicial notice of the 1984 Buies Creek Agreement and the 1998 Agreement. Further, we hold that the 1998 Agreement granted the County the contractual right to exercise the Districts' prospective fee-collecting authority, and the County properly exercised that authority in collecting the Fees. We further hold that the Developers failed to present a viable constitutional claim because generally applicable impact and user fees,

such as the Fees in this case, are not subject to the unconstitutional conditions doctrine. We affirm the trial court's Consolidated Order.

AFFIRMED.

Judges STROUD and BROOK concur.

WILLIAM E. BENSON, III, AND WIFE, MONIQUE L. RIBANDO, PLAINTIFFS
v.
R. LEE PREVOST, AND WIFE SCHARME S. PREVOST,
DEFENDANTS AND THIRD-PARTY PLAINTIFFS
v.
MICHAEL S. BURNHAM, DANIEL SMITH, AND WIFE, DENISE B. SMITH,
THIRD-PARTY DEFENDANTS

No. COA19-962

Filed 31 December 2020

1. Easements—driveway—ambiguous in scope—parking cars

In a dispute between next-door neighbors who purchased their lots from a common owner, an easement labeled "Proposed Driveway Easement" in the recorded map—with no clear language defining the easement's scope—was determined, in light of the map as a whole, to generally allow the defendants, who owned the dominant estate, to park cars on the driveway easement and to allow plaintiffs, who owned the servient estate, to use the land in any manner that does not interfere with defendants' enjoyment of the easement, which may at times include the right for plaintiffs to drive on the easement.

2. Deeds—recording—pure race—deed first registered—evidence of mistake

In a dispute between next-door neighbors who purchased their lots from a common owner, where the previous owner contracted to sell boat slip A to defendants but actually deeded boat slip C to defendants instead and subsequently deeded boat slip A to plaintiffs, plaintiffs' interest in boat slip A was superior to defendants' claimed interest and the trial court erred by ordering the deeds to be reformed.

3. Attorney Fees—prevailing party—reversal on appeal—attorney fees award vacated

An award of attorney fees in favor of defendants in a property dispute was vacated where defendants were no longer the prevailing party after the same opinion reversed the trial court's order granting summary judgment in favor of defendants.

Appeal by Plaintiffs from order entered 25 April 2019, order entered 23 May 2019, and order entered 29 May 2019 by Judge Paul M. Quinn in New Hanover County Superior Court. Heard in the Court of Appeals 25 August 2020.

Fox Rothschild LLP, by Robert H. Edmunds, Jr., and Elizabeth Brooks Scherer for Plaintiff.

Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., and Jennifer L. Carpenter, for Plaintiff.

Shipman & Wright, LLP, by Gary K. Shipman for Defendants.

Block, Crouch, Keeter, Behm, & Sayed, LLP, by Auley M. Crouch, III, for Third-Party Defendants.

DILLON, Judge.

I. Background

This matter concerns a real property dispute between next-door neighbors who purchased their lots from Third-Party Defendants (the "Developers"). Developers originally owned the two lots and a third waterfront lots (Lots 1-3) at Wrightsville Beach, and adjacent dock with three boat slips (Slips A-C).

In 2015, Defendants R. Lee Prevost and Scharme S. Prevost purchased Lot 2 from the Developers. The conveyance also included exclusive use of a specific boat slip, Slip C, and the use of a driveway easement located on Lot 1 next door.

The following year, in 2016, Plaintiffs William E. Benson and Monique L. Ribando purchased Lot 1 from an affiliate of Developers,[1] the lot which was burdened by the driveway easement. The conveyance also included exclusive use of Slip A.

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1. In September 2015, a month after selling Lot 2/Slip C to Defendants, the Developers conveyed Lot 1/Slip A to an affiliate entity in anticipation of building the home on Lot 1. This affiliate entity conveyed Lot 1/Slip A to Plaintiffs. However, for ease of reading, the "Developers" refers either to the Developer or its affiliate, depending on the context.

A dispute subsequently arose between the parties regarding Defendants' parking of vehicles within the driveway easement. Also, a dispute arose regarding which party owned which boat slip.

Plaintiffs brought this action against Defendants to resolve their two disputes. After a hearing on the matter, the trial court entered summary judgment in favor of Defendants on both issues and awarded Defendants attorney's fees. Plaintiffs appeal.

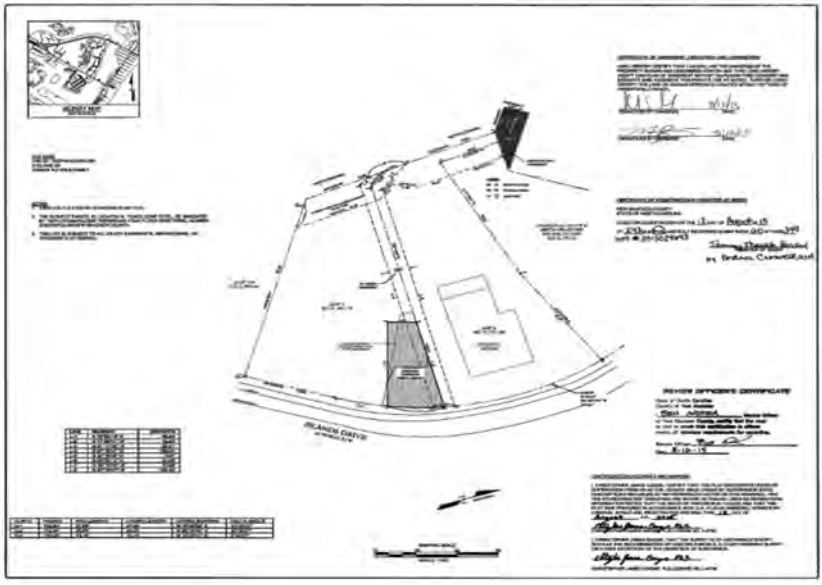
II. Analysis

Summary judgment is appropriate when there is no genuine issue of material fact; and we review a summary judgment order *de novo*. *Daughtridge v. Tanager Land, LLC*, 373 N.C. 182, 186, 835 S.E.2d 411, 415 (2019); N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). We address the two property issues and the attorney's fee issue in turn.

A. Driveway Easement

[1] The parties dispute the "scope" of the parties' rights to use the driveway easement (the "Easement") located on Lot 1.

In 2015, just prior to conveying any of the lots, the Developers recorded the Map below, which depicts the driveway easement shaded on Lot 1.



The recording of this Map did not actually convey anything, as both the dominant estate (Lot 2) and the servient estate (Lot 1) were still held by the same owner.

On 28 August 2015, shortly after Developers recorded the Map, they conveyed Lot 2 (with an existing home as depicted on the Map) to Defendants. The deed contained the following language, which also granted Defendants rights to the Easement depicted on the recorded Map:

> Together with and subject to a Driveway Easement, shown as "Proposed Driveway Easement Area = 1050 S.F." [as recorded on the Map].

At the time Defendants purchased Lot 2, Lot 1 had not yet been developed. The garage area of the existing home on Lot 2 faced (and continues to face) the Easement, as shown in the photographs below. (These photos were offered as exhibits at the summary judgment hearing and were taken years later, after Lot 1 had been developed. The area depicted as the "Driveway Easement" in these photos do not appear to match the Easement as depicted on the Map.)

In 2016, the Developers constructed a home on Lot 1 and sold it to Plaintiffs. The photos show that Lot 1, as developed, contains a privacy wall adjacent to the part of the Easement that is now paved, a "back gate" which leads into Lot 1's back yard, and a "side gate" which accesses the home on Lot 1. The Developers built the home on Lot 1 with the garage on the side of the home opposite the Easement and is accessed by a different driveway (unrelated to the dispute), also on Lot 1.

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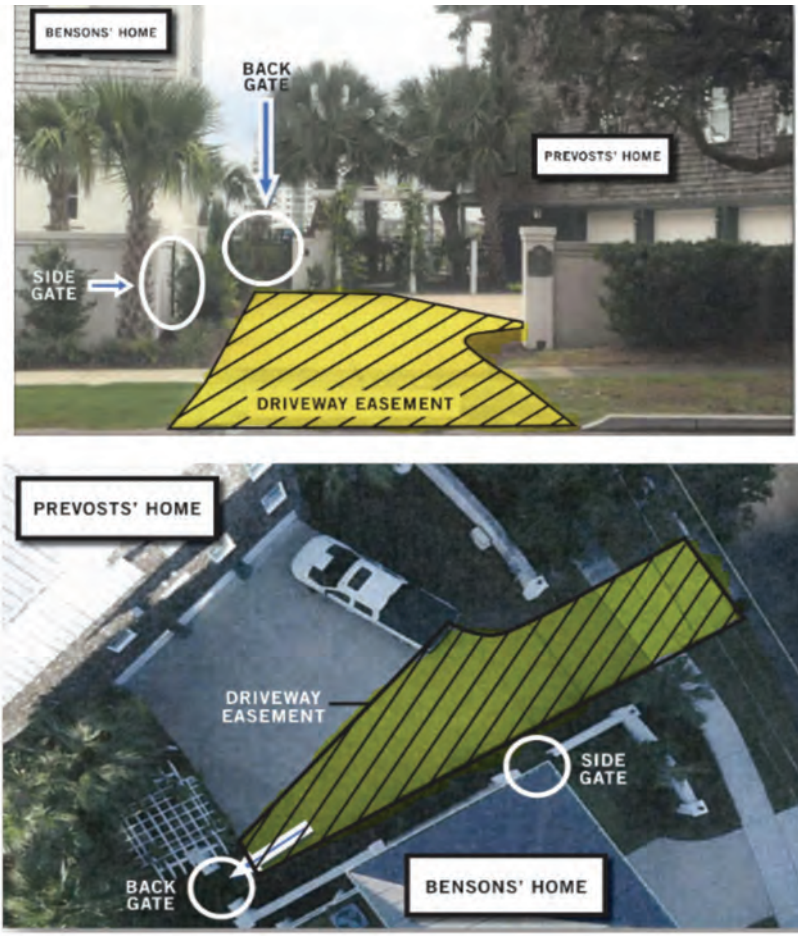

Since purchasing Lot 2 in 2015, Defendants have made use of the Easement to access their garages and parking pad on Lot 2. They have also occasionally parked cars on the Easement. Sometime after purchasing Lot 1, Plaintiffs began protesting Defendants' parking of vehicles within the Easement, contending it blocks their ability to access their back gate. For their part, Defendants contend that Plaintiffs have no right to drive vehicles on the Easement to access the back gate, as this use would interfere with Defendants' Easement rights.

The trial court entered summary judgment in favor of Defendants on this issue. The court determined that Defendants and their successors "are

entitled to make reasonable use of the [ ] Easement [as recorded on the Map]" and that the parking of vehicles is a reasonable use. Further, the trial court determined that Plaintiffs and their successors could only use the Easement to access their side and back gates by foot and not by a vehicle. For the below reasoning, we affirm as modified herein.

An easement is an interest in land and is subject to the statute of frauds. *See* N.C. Gen. Stat. § 22-2 (2015). An easement, like any other conveyance, "is to be construed in such a way as to effectuate the intention of the parties *as gathered from the entire instrument*" and not from detached portions. *Higdon v. Davis*, 315 N.C. 208, 215-16, 337 S.E.2d 543, 547 (1985) (emphasis added).

Here, the instrument defining the Easement is the recorded Map, referenced in the recorded deed to Defendants. *See Collins v. Land Co.*, 128 N.C. 563, 565, 39 S.E. 21, 22 (1901) ("[A] map or plat, referred to in a deed, becomes a part of the deed, as if it were written therein[.]"). When Plaintiffs purchased Lot 1, they took title subject to Defendants' Easement rights as recorded. *Borders v. Yarbrough*, 237 N.C. 540, 542, 75 S.E.2d 541, 543 (1953) ("Grantees take title to lands subject to duly recorded easements which have been granted by their predecessors in title.").

The Map referenced in the Developers deed to Defendants unambiguously marks *the specific location* of the Easement. The Easement is depicted as the shaded area on Lot 1, adjacent to its shared property line with Lot 2. The Map describes the shaded area to be "Area 1,060 S.F.", which appears to be accurate: the area forms a trapezoid, with the average length from the street being a slightly over fifty (50) feet and the average width being a slightly over twenty (20) feet. Neither party makes any argument that the location of the Easement is not as described on the Map or has been relocated. *See Cooke v. Wake Electric*, 245 N.C. 453, 458, 96 S.E.2d 351, 354 (1957). Therefore, the location of the Easement is as described in the Map.

There is no clear language, however, defining *the scope* of Defendants' rights to use the Easement beyond the language labeling the shaded area on the Map as a "Proposed Driveway Easement" and the reference in the deed Defendants conveying the Easement rights as a "Driveway Easement."

Our task is to determine whether the intent of the parties regarding the Easement's scope – specifically whether Defendants can park vehicles in the Easement – can be gleaned from these recorded instruments. We note that our Court has instructed that if the language in an easement is ambiguous as to its scope:

> [T]he scope may be determined by reference to the attendant circumstances, the situation of the parties, and by the acts of the parties in the use of the easement immediately following the grant [but that] if the conveyance is silent as to the scope of the easement, extrinsic evidence is inadmissible as to the scope or extent of the easement. However, in the latter situation, a reasonable use is implied.

Swaim v. Simpson, 120 N.C. App. 863, 864, 463 S.E.2d 785, 786 (1995). Also, our Supreme Court has instructed that an easement extends to all "uses directly or incidentally conducive to the advancement of the purpose for which the right of way was acquired, and the owner retains merely the title in fee, carrying the right to make such use as in no way interferes with the full and free exercise of the easement." *Light Co. v. Bowman*, 229 N.C. 682, 688, 51 S.E.2d 191, 195 (1949) (citation omitted).

It is unambiguous that the purpose of the easement is to allow Defendants to use the Easement as a "driveway." What is less clear is whether "driveway" use includes the right to park vehicles in the Easement or simply the right to use the driveway for ingress and egress between the road and Lot 2. There is no express language which restricts the use of the driveway easement for "ingress and egress." We note that many driveways are used also to park cars, while others are used generally only for just ingress and egress based on their width.

Looking at the Map *as a whole*, we conclude that the trial court correctly determined that the scope of Defendants' rights includes the right to park vehicles in parts of the Easement area. We are persuaded in large part by the fact that the Easement, as defined in the Map, is on average over twenty (20) feet wide. We are also persuaded by the fact that the Easement is short and immediately adjacent (close to) Defendants' home, as shown on the Map. A narrower driveway easement would suggest an intent by the grantor that it be used only for ingress and egress. But the creation of a driveway easement that is approximately twenty (20) feet wide to be used by the owner of a vacation home, especially where the easement is close to the home, suggests an intent that the "driveway" use also includes the right to park cars, at least on occasion. This right, though, does not extend to the parking of cars in a way which obstructs the entire width of the Easement *as shown on the Map*, as such use would prevent the owner of the servient estate an opportunity to make reasonable use of that part of their property.

There is plenty of room within the Easement as shown on the Map for Defendants to park vehicles and still leave room for Plaintiffs to use the Easement for their ingress and egress to the back part of

Lot 1. We note, however, that it *appears* from the photos that *after* conveying Easement rights to Defendants, the Developers placed permanent obstructions in the Easement when they developed the house on Lot 1. That is, the easement area as depicted in the photos *appears* smaller than the Easement depicted on the Map. For instance, the boundary at the end of the Easement is depicted on the Map as being approximately fourteen (14) feet long. That boundary as depicted on the aerial photo, though, appears much shorter (comparing it to the width of the truck in the photo). It *appears* from the photos that after conveying Easement rights to Defendant, the Developers built the privacy wall within the Easement, an area the owner of Lot 1 could have used for ingress and egress.

We affirm the trial court's determination that the parking of cars by Defendants in the Easement is generally allowed. Our Supreme Court instructs, though, that "[t]he reasonable use and enjoyment of an easement is to be determined in the light of the situation of the property and the surrounding circumstances [and] what is a reasonable use is a question of fact [for a jury]." *Shingleton v. State*, 260 N.C. 451, 457, 133 S.E.2d 183, 187 (1963). Therefore, the parking of cars by Defendants in the Easement must be reasonable. And it may be that a jury, for instance, may deem the parking of cars by Defendant in the Easement, while leaving the parking pad and garages on Lot 2 vacant, is an unreasonable use. (The trial court made no ruling regarding the extent that Defendants may utilize the Easement for parking, as such questions *might* be for a jury to resolve, based on specific facts.)

We modify the trial court's determination regarding Plaintiffs' rights to use the Easement, striking the portion that Plaintiffs may *never* drive a vehicle over the Easement to access the back of their property, but only may use the Easement for pedestrian traffic. To be sure, Plaintiffs may not use the Easement in a way that interferes with the rights of Defendants to use the Easement for ingress and egress and to park vehicles. However, Plaintiffs, as the owner of the servient estate, "may [still] use the land in any manner and for any purpose which does not interfere with the full and free use of the easement[.]" *Harris v. Southern Railway Co.*, 100 N.C. App. 373, 378, 396 S.E.2d 623, 626 (1990). There may be instances where using the Easement for vehicle ingress and egress to access the back or side gate of Lot 1 would not interfere with Defendants' enjoyment of their Easement rights. For instance, such use may be reasonable during times when Defendants do not need to park cars in the Easement area.[2] Accordingly, we reverse

2. We note that, assuming the privacy fence is actually within the Easement, Defendants have made no argument or claim that the use by Plaintiffs' predecessor in title of Easement to construct the fence interferes with their ability to use the Easement.

that portion of the order and hold that Plaintiffs may use the land in any manner which does not interfere with Defendants' enjoyment of the Easement, which *may* include at times, the right to drive vehicles on the Easement to access their back and side gates.

B. Boat Slips

[2] The second issue involves a dispute between Plaintiffs and Defendants as to the ownership of Slip A and Slip C. Though Slip C was deeded to Defendants by the Developers, Defendants claim that this was a mistake, a mistake which Plaintiffs knew about when they purchased Lot 1/Slip A from the Developers.

The timeline relevant to this dispute is as follows:

At the beginning of the summer of 2015, the Developers owned three adjacent waterfront lots, Lots 1-3. Appurtenant to the entire waterfront of the property is a dock and three boat slips, Slips A-C. Slip A was the most desirable slip as it had a lift already installed.

In July 2015, Defendants entered into a written contract to purchase Lot 2, with exclusive rights to Slip A, the one with the boat lift.

On 25 August 2015, before closing on the sale of Lot 2 with Defendants, the Developers recorded covenants which stated, "Boat Slip A has been made appurtenant to and runs with the land of Lot 1 . . . Boat Slip C has been made appurtenant to and runs with the land of Lot 2." This recorded instrument conflicts with the July purchase contract.

On 28 August 2015, Defendants closed their purchase of Lot 2 from the Developers. The deed of conveyance provided that Defendants were receiving Lot 2 "[t]ogether with Boat Slip C[,]" which was consistent with the covenants recorded days before, but which conflicted with Defendants' purchase contract. Defendants, though, began using Slip A, the boat slip with a lift.

In 2016, the Developers sold Lot 1 to Plaintiffs. There is evidence that before closing Plaintiffs believed that they were getting Slip C, the inferior slip. However, they came to learn about the supposed error in the conveyance of Slip C to Defendants. But Plaintiffs told the Developers at closing that they wanted to "keep the deed [conveying Slip A to them] as it was." Accordingly, the deed conveyed Lot 1 to Plaintiffs, together with "the exclusive use of Slip A[.]"

There is evidence that after closing, Plaintiffs made use of the inferior Slip C, as Defendants were already making use of Slip A. However,

when Defendants refused to stop parking cars in the Easement, Plaintiffs began protesting that Defendants were using the wrong boat slip.

Plaintiffs brought this action, not only to determine the parties' rights with respect to the Easement, but also for an order declaring them to be the owners of Slip A. The trial court, though, granted summary judgment in favor of Defendants on this issue. For the reasons stated below, we reverse the trial court on this issue.

With the passage of the Connor Act, our General Assembly made North Carolina a pure race state. N.C. Gen. Stat. § 47-18(a) (2015). Under our pure race recording statute, "[a]s between two purchasers for value of the same interest in land, the one whose deed is first registered acquires title." *Bourne v. Lay & Co.*, 264 N.C. 33, 35, 140 S.E.2d 769, 771 (1965).

While land *under* navigable waters in North Carolina belong to the State of North Carolina, *see Miller v. Coppage*, 261 N.C. 430, 435, 135 S.E.2d 1, 5 (1964), an interest in land that abuts navigable water includes certain littoral or riparian rights to that navigable water, *see Jones v. Turlington*, 243 N.C. 681, 683, 92 S.E.2d 75, 77 (1956). These rights may include the right to construct docks, piers, and the like to access the water:

> A littoral proprietor and a riparian owner, as universally conceded, has a *qualified property* in the water-frontage belonging, by nature, to their land, the chief advantage growing out of the appurtenant estate in the submerged land being *the right of access* over an extension of their water fronts to natural water, and the right to construct wharves, piers, or landings, subject to such general rules and regulations as the Legislature, in the exercise of its powers, may prescribe for the protection of public rights in rivers or navigable waters.

Capune v. Robbins, 273 N.C. 581, 588, 160 S.E.2d 881, 886 (1968) (citations and quotation marks omitted). We hold that access to boat slips is a littoral or riparian right and is therefore an interest in land.

It may be that as Plaintiffs were closing their purchase of Lot 1 in 2016, they were aware that the Developers had intended to convey Slip A to Defendant. But there was no deed in the Developers chain of title to indicate that they had yet parted with Slip A. And Defendants had not filed any litigation to reform their deed from the Developers. *Hill*

v. Pinelawn Memorial Park, Inc., 304 N.C. 159, 163, 165, 282 S.E.2d 779, 782, 783 (1981) (finding "[i]f [a purchaser] finds no record of [a prior conveyance], even if he knows there has been a prior conveyance, he may record his deed with the assurance that his title will prevail" and "[w]hile actual notice of another unrecorded conveyance does not preclude the status of innocent purchaser for value, actual notice of pending litigation affecting title to the property does preclude such status.").

Additionally, Defendants contend that Plaintiffs did not purchase the rights to Slip A for value and thus are not protected by the Connor Act. However, the record shows that Plaintiffs paid $1.9 million dollars for Lot 2, including use of Slip A. For instance, the deed from Developers shows revenue stamps reflecting that this price was paid. The parties conceded this point, and there is nothing to indicate that Slip A was given to them. At the very least, Plaintiffs gave up their "right" to receive Slip C at closing (that they had originally been promised) to receive Slip A, and Slip C has significant value. *King v. McRacken*, 168 N.C. 621, 624, 84 S.E. 1027, 1029 (1915) ("The party assuming to be a purchaser for valuable consideration must prove a fair consideration, not up to the full price, but a price paid which would not cause surprise or make any one exclaim, 'He got the land for nothing!' ").

We are unpersuaded by the Developers' argument concerning their evidence that Plaintiffs orally promised that they would trade boat slips after their closing, to correct the mistake made when Developers conveyed the wrong slip to Defendants the year before. The evidence is conflicting, and there is nothing in writing which states that they made any such promise. Defendants could have protected themselves by filing an action against the Developers, and then giving notice to the public of this action by recording a notice of *lis pendens* anytime prior to Plaintiffs' purchase of Lot 1/Slip A, ten (10) months later. But they did not.

Developers could have done the same before closing with Plaintiffs, but they did not. They could have required Plaintiffs to enter some express agreement to make the transfer. But they did not.

C. Attorney's Fees

[3] Finally, Plaintiffs appeal the award of attorney's fees to Defendants and the Developers. As we have reversed the trial court's order granting summary judgment in favor of Defendants and Developers on the issue of the boat slips, we must vacate the trial court's order granting these parties attorney's fees as they are no longer a prevailing party.

III. Conclusion

This matter concerns a recorded easement and conveyances of boat slips between next door neighbors who never entered into a contract with each other, but who purchased their lots from a common owner. There is conflicting evidence about what might have been said at various times regarding these instruments, but we must remember:

> There is no other stake for which men will play so desperately. In men and nations there is an insatiable appetite for lands, for the defence or acquisition of which money and even blood sometimes are poured out like water. The evidence of land-title ought to be as sure as human ingenuity can make it. But if left in parol, nothing is more uncertain, whilst the temptations to perjury are proportioned to the magnitude of the interest.
>
> The infirmity of memory . . . the honest mistakes of witnesses, and the mis-understanding of parties, these are all elements of confusion and discord which ought to be excluded[.]

Moore v. Small, 19 Pa. 461, 465 (1852).

Here, regarding the Easement, we affirm in part and reverse in part. Defendants may make reasonable use of the Easement, which may include the parking of cars within the Easement area. Plaintiffs may make use of the Easement which does not interfere with Defendants' rights to the Easement. This use may include, at times, the right to use the Easement for ingress and egress by vehicles.

Regarding the boat slips, we reverse, specifically the portion of the order directing that the deeds conveying Slip A to Plaintiffs and Slip C be reformed. We conclude that Plaintiffs' interest in Slip A is superior to Defendants' claim.

Regarding the attorney's fees, we reverse. Defendants are not the prevailing party, such that they are entitled to attorney's fees.

AFFIRMED IN PART, REVERSED IN PART, MODIFIED IN PART.

Chief Judge McGEE and Judge MURPHY concur.

BISHOP v. BISHOP

[275 N.C. App. 457 (2020)]

JOHN EDWARD BISHOP, III, PLAINTIFF
v.
SARA ELIZABETH BISHOP, DEFENDANT

No. COA19-600

Filed 31 December 2020

Child Custody and Support—child support—increase in parent's income—outside of Child Support Guidelines

The trial court did not abuse its discretion by increasing plaintiff father's child support obligation where the father's income had increased significantly since the previous order and where the court properly considered the parties' estates, earnings, conditions, and the accustomed standard of living of the child and the parties pursuant to N.C.G.S. § 50-13.4(c). The fact that the order awarded almost 110% of the child's total reasonable needs was not fatal; because the case fell outside the Child Support Guidelines, the trial court was not required to use a specific formula to set the amount of support.

Judge BERGER dissenting.

Appeal by plaintiff from orders entered 30 April and 27 November 2018 by Judge Anna Worley in District Court, Wake County. Heard in the Court of Appeals 4 February 2020.

Jonathan McGirt, for plaintiff-appellant.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendant-appellee.

STROUD, Judge.

Father appeals from an order increasing his child support obligation. Because the trial court did not abuse its discretion in its consideration of "the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case," N.C. Gen. Stat. § 50-13.4(c) (2019), we affirm the trial court's order.

I. Background

The parties married in 1998 and separated in 2007. They had one child during the marriage, Sarah.[1] An initial child custody and child

1. A pseudonym is used to protect the privacy of the child.

support order was entered on 31 December 2012 in District Court, Wake County ("2012 Order"). The 2012 Order provided for joint legal and physical custody for Sarah and required Father to pay $2,064.00 per month in child support and to pay 93% unreimbursed medical expenses. After entry of the 2012 Order, the parties filed several motions which did not result in a change in child support or custody but did result in the appointment of a parenting coordinator.

In February 2017, Mother filed a motion to modify child support, and the trial court held a hearing on this motion on 13 June 2017. On 30 April 2018, the trial court entered an order ("2018 Order") increasing Father's child support to $3,289.00 per month and changing the parties' respective percentages of the responsibility for unreimbursed medical expenses "with [Father] bearing 83% of such cost, and [Mother] bearing 17% of such cost." Father moved for a new trial and other relief from the April 2018 Order. The trial court denied Father's motions, and Father appealed from both the 2018 Order and the order denying the post-trial motions.

II. Standard of Review

> On appeal, "[c]hild support orders entered by a trial court are accorded substantial deference . . . and our review is limited to a determination of whether there was a clear abuse of discretion." Under this standard of review, the trial court's order will be upheld unless its "actions were manifestly unsupported by reason."

Hart v. Hart, 268 N.C. App. 172, 179, 836 S.E.2d 244, 250 (2019) (alterations in original) (citations omitted).

III. Child Support

Father argues, "[t]he trial court erred as a matter of law in modifying the prior child support order and abused its discretion in determining the amount of child support." (Original in all caps.) Except for a portion of one finding, Father does not challenge the trial court's findings of fact as unsupported by the evidence, but he contends these findings demonstrate mathematical errors in the calculation of the child support. Father does challenge Finding No. 62, "Plaintiff has had a significant increase in his income from the time of the 2012 Order . . . ." Father argues his income had actually decreased. But Father's primary argument is that the trial court ordered him to pay child support in excess of the reasonable needs of the minor child, based upon the trial court's findings.

Father does not dispute the most important findings of fact, namely: (1) Father's income was $44,846.29 per month; (2) Mother's income was

$7,542.00 per month; and (3) The child's total reasonable needs were $7,926.23 per month, of which Father then incurred $5,431.18 per month, and Mother then incurred $2,495.05 per month. Father argues that the percentages of responsibility assigned to each party do not appear to coincide with the findings of the parties' incomes and the child's reasonable needs. In short, he contends the trial court's math is wrong.

A. Father's Income

Father's primary argument focuses on the child's needs, but he does contend the trial court erred in finding his income had significantly increased since the 2012 Order. The hearing in 2012 was held in May, so the evidence addressed the income up to that point in the year. In the 2012 Order, the trial court made findings regarding Father's income each year from 2007 until 2011. Over these years, his gross income increased substantially from $162,517.00 in 2007 to $775,586 in 2011, when he began his employment with Cisco. Father's adjusted gross income for 2011 was $653,278, which would be approximately $54,440 per month. Father was a "founder and officer" of Inlet Technologies, Inc., where he worked from 2007 until 2011, when Cisco Systems Inc. purchased Inlet. Due to the buyout of Inlet, Father received additional payments including a "cash retention bonus" of $150,000 payable over two years, half in 2012 and half in 2013. In 2012, his base salary at Cisco was $200,000 and he was eligible for performance bonuses of an additional 35% of his annual gross salary.

Father argues that although the trial court made detailed findings in 2012 regarding his income, "[u]nfortunately, the trial court did not synthesize this cascade of data into an actual figure for [Father's] monthly income." Father proposes that we should "reverse-engineer" the 2012 Order to determine Father's monthly income in 2012, and based upon the order's assignment of 93% of the responsibility for uninsured medical expenses to the amount of child support ordered, he contends the trial court tacitly found his income to be $60,888.43 per month. Father is correct that the trial court did not "synthesize the cascade of data" in the 2012 Order, and Father's mathematical argument is quite interesting. But the 2012 Order was not appealed. And the trial court did make a finding regarding the monthly income it used "*for the purposes of child support*." (Emphasis added.) The trial court found in the 2012 Order that Father's "gross monthly income, including base salary and bonuses, for the purposes of child support currently exceeds $30,000 per month." Thus, for our purposes also, Father's income in 2012, for purposes of child support, was in excess of $30,000 per month.

In the order on appeal, after quoting the findings from the 2012 Order regarding Father's income as of 2012, the trial court found Father "has had a significant increase in his income" and determined his "current ongoing monthly income to be $44,846.29 per month." The trial court made detailed findings regarding Father's employment history since 2012. He changed employers to Akamai Technologies and had a gross income in 2015 of $837,165. His gross income in 2016 was $607,622. As of the time of trial in 2017, in mid-May, Father had "earned salary and bonus totaling $246,500" and was not expecting any more bonuses for the year. His base salary was $13,281 every two weeks, and the trial court extrapolated this to a "total salary and bonus" for the year 2017 of $432,500, or $36,041.66 per month. The trial court also made findings noting that Father had "historically received restricted stock shares from his employer," which "show up in his compensation and paystubs separate from his salary and bonus." In 2017, he had received about $233,000 in restricted stock shares, but he did not intend to redeem any shares at that time.

Thus, Father's income stream was complex and included elements of base salary, bonuses, and stock. His income varied over the years, but the overall trajectory was upward. In 2012, the trial court determined Father's income "for the purposes of child support" was in excess of $30,000 per month. In 2017, the trial court found Father's income "total salary and bonus" for the year 2017 to be $432,500, or $36,041.66 per month. The trial court did not err in finding Father "has had a significant increase in his income" since 2012.

B. Reasonable Needs of Minor Child

Father contends the trial court erred in its calculation of the child's reasonable needs. He argues that the amount of child support is greater than the child's total needs based upon his mathematical analysis of the order. In the 2012 Order, the trial court made this finding regarding the child's needs:

> 74. Defendant's current reasonable monthly needs for her regular recurring expenses benefitting the minor child and for the minor child together, are $2,345, including before and after school care. The reasonable monthly expenses of the minor child, alone, including before and after school care, are $1,595.

Father argues that in the 2012 Order, "The trial court provided no explanation of the methodology used to derive its award of the oddly specific monthly child support award of $2,064 per month." Father proposes

another complex mathematical analysis to determine exactly how the trial court may have calculated this amount in the 2012 Order, but again, the 2012 Order is not on appeal.

In the 2018 Order, the trial court found:

> 23. The Court has determined the child's total reasonable needs between the parties to be $7,926.23 per month. Out of the child's reasonable needs, the Plaintiff currently incurs needs of $5,431.18 per month, and the Defendant currently incurs needs of $2,495.05 per month. The disparity in the parties' respective reasonable needs for the minor child is directly related to the amount of respective discretionary income the parties have available for the minor child.

Father contends that the order on appeal did not "break out the child's expenses into the categories of, for example, 'the child's portion of total recurring expenses at Plaintiff's/Defendant's household' versus 'the child's individual monthly needs[,]' " making a direct comparison of the changes in the child's needs or expenses difficult.

Mother responds that Father did not challenge the trial court's findings of fact and notes the trial court made extensive findings regarding both parties' lifestyles, assets, and debts and set child support based upon all of these factors. Father responds that he is "utterly mystified as to why Defendant's supplemental 'Statement of Facts,' should venture off into a wide-ranging review of Plaintiff's income, assets, and lifestyle. Defendant's diversionary hand-waving here is completely irrelevant to the arguments addressed in Plaintiff-Appellant's Brief." (Citation and emphasis omitted.) According to Father, it's all about the math, and the math is wrong.

Math is important, but it is not the only thing the trial court may consider. North Carolina General Statute § 50-13.4 provides the standard for child support, and Mother's discussion of the trial court's findings regarding "Plaintiff's income, assets, and lifestyle" is not "diversionary hand-waving." These are some of the factors the trial court *should* consider in calculating child support. *See* N.C. Gen. Stat. § 50-13.4.

Father's argument overlooks the trial court's determination that the child's needs are *greater* than the expenses stated on Mother's financial affidavit. The trial court explained this when rendering its ruling denying Father's post-trial motions,

> The fact that [Father] is in fact paying a certain amount that was attributed specifically to the child in his

> household—I know where you're getting your math, Mr. Sokol. In a pure mathematical calculation it makes sense. As a matter of equity in dividing up what the child herself should get, it doesn't make sense. . . .
>
> . . . .
>
> And therefore, the child should be entitled to have similar opportunities in both households, and the only way to do that is to divide the child's needs rather than trying to do this mathematical calculation of what I do actually provide for in my household.

Our cases have long recognized that the reasonable needs of a child are determined based upon the ability of the parents to provide:

> In addition to the actual needs of the child, a father has a legal duty to give his children those advantages which are reasonable considering his financial condition and his position in society.
>
> In *Hecht v. Hecht*, 189 Pa.Super. 276, 283, 150 A.2d 139, 143, Woodside, J., observed:
>
> > "Children of wealthy parents are entitled to the educational advantages of travel, private lessons in music, drama, swimming, horseback riding, and other activities in which they show interest and ability. * * * It is possible that a child with nothing more than a house to shelter him, a coat to keep him warm and sufficient food to keep him healthy will be happier and more successful than a child who has all the 'advantages,' but most parents strive and sacrifice to give their children 'advantages' which cost money. * * * Much of the special education and training which will be of value to people throughout life must be given them when they are young, or be forever lost to them."
>
> What amount is reasonable for a child's support is to be determined with reference to the special circumstances of the particular parties. Things which might properly be deemed necessaries by the family of a man of large income would not be so regarded in the family of a man whose earnings were small and who had not been able to accumulate any savings. In determining that

> amount which is reasonable, the trial judge has a wide discretion with which this court will not interfere in the absence of a manifest abuse.

Williams v. Williams, 261 N.C. 48, 57-58, 134 S.E.2d 227, 234 (1964) (citations omitted).

The trial court gave substantial consideration to the disparity in the parties' lifestyles and the parties' accustomed standards of living. Even if Father's income had decreased since the 2012 Order, as Father contends, the change in *his* income was not the relevant change. Whether Father's income is $44,846.00 per month (2018 Order) or over $30,000 per month (2012 Order), it is more than sufficient to cover Father's individual expenses, the child's expenses, and the amount of child support ordered. The issue is not Father's ability to pay; it is the reasonable needs of the child. The change alleged in the motion to modify child support was the increase in the child's needs. Father does not challenge the trial court's determination that the child's needs have increased since 2012, so modification is appropriate. This is a discretionary determination, and in an above-the-guidelines case, the trial court is not required to use a particular formula. *See* N.C. Child Support Guidelines, AOC-A-162, at 2 (2015).

For cases falling within the N.C. Child Support Guidelines, calculation of child support and review of orders is normally straightforward. Once the trial court has determined the numbers to put into the formula, math provides the answer. But in cases above the child support guidelines, the trial court must make a discretionary determination based upon the factors set out in North Carolina General Statute § 50-13.4(c):

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c) (2019).

The judge's consideration of the interplay of these factors is not dictated by a "magic formula." *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 867 (1985).

> To comply with G.S. 50–13.4(c), the order for child support must be premised upon the interplay of the trial

> court's conclusions of law as to the amount of support necessary "to meet the reasonable needs of the child" and the relative ability of the parties to provide that amount. To support these conclusions of law, the court must also make specific findings of fact so that an appellate court can ascertain whether the judge below gave "due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." Such findings are necessary to an appellate court's determination of whether the judge's order is sufficiently supported by competent evidence. If the record discloses sufficient evidence to support the findings, it is not this Court's task to determine *de novo* the weight and credibility to be given the evidence contained in the record on appeal.
>
> The judge's consideration of the above factors contained in G.S. 50–13.4(c) is not guided by any magic formula. Computing the amount of child support is normally an exercise of sound judicial discretion, requiring the judge to review all of the evidence before him. Absent a clear abuse of discretion, a judge's determination of what is a proper amount of support will not be disturbed on appeal.

Id. at 68-69, 326 S.E.2d at 867-68 (citations omitted).

Even in a case falling outside the child support guidelines, the trial court may consider using a formula to guide its determination of child support, and if the court uses a formula, the calculations should be mathematically correct. *See id.* at 79, 326 S.E.2d at 873 ("Although the use of such a formula does serve as a convenient guideline in assisting the trial judge in fairly calculating child support awards, the formula used cannot be applied without some degree of mathematical accuracy."). Father contends the trial court used a "formula," of sorts, but did not do the math accurately. He argues the 2018 Order is "incoherent" and "that a child support award that is almost 110% of the child's total reasonable needs is demonstrably unsupportable." *If* the trial court were required to use a precise mathematical formula to establish child support, Father may be right. But the trial court's findings demonstrate that instead of using a formula to set the exact amount of support, it considered the parties' incomes and expenses but also gave "due regard to the estates, earnings, conditions, accustomed standard of living of

the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." N.C. Gen. Stat. § 50-13.4(c); *see also* N.C. Child Support Guidelines, at 2. The trial court's findings emphasized its consideration of the parties "estates, earnings, conditions, [and] accustomed standard of living of the child and the parties." N.C. Gen. Stat. § 50-13.4(c).

Here, the trial court found

> 19. [Mother's] expenses for herself and the minor child are skewed by a number of factors. For example, [Mother] currently drives a vehicle which is 10 years old and which has over 172,000 miles on it. It is not reasonable to assume that [Mother] will be able to continue to drive this vehicle without purchasing a new vehicle in the near future. [Mother] previously owned a 2014 Toyota Highlander she purchased new which had monthly payments of $570. [Mother] sold this vehicle after owning it for several years to alleviate herself of the car expense in order to fit her budget. [Father] on the other hand currently lists two automobile expense payments between himself and his wife in the amount of over $1,500 per month. The Plaintiff's vehicles were purchased within the last several years.
>
> 20. In a similar fashion [Mother's] vacation expenses are a fraction of what [Father] spends for vacations. For example, [Mother] last year incurred an expense of approximately $4,000 for her and the minor child to visit Costa Rica. This was an atypical vacation for the Defendant and the minor child. Typically [Mother] and [Sarah] go to the North Carolina oceanfront for vacation and incur an expense which is a fraction of the Costa Rica expense. [Father] by comparison within the past year or so has taken the minor child on a ski trip to Utah, a Disney Cruise, a trip to Disney World and a trip to New York City. All of these trips had attendant expenses for air fare, meals, shows, etc. where the vacation expenses for [Father] and the minor child totaled thousands of dollars.
>
> 21. [Mother] had debts for multiple credit cards listed upon her affidavit in 2012. These debts did not appear on her affidavit filed in 2016. [Mother] used a portion of her settlement from the parties' divorce to

> pay these debts off. [Mother] has approximately $9,000 remaining from the divorce settlement. [Mother] also saves for retirement through a 401(k) plan through her employer. She has no significant equity in stocks, brokerage accounts, etc. like [Father] has.
>
> 22. [Mother's] expenses for herself and [Sarah] are a fraction of what [Father] incurs, because [Mother] budgets her funds and only pays for the expenses that she is able to incur for [Sarah]. The standard of living [Mother] is currently maintaining for herself and [Sarah] is significantly less than what the parties and the minor child enjoyed at the time of the parties' separation and what [Father] has historically and currently enjoys after separation. She would incur greater expenses for [Sarah] if she had the means to do so. These increased expenses if incurred would still only be a percentage of the expenses [Father] incurs with respect to [Sarah] each month.
>
> 23. The Court has determined the child's total reasonable needs between the parties to be $7,926.23 per month. Out of the child's reasonable needs, [Father] currently incurs needs of $5,431.18 per month, and [Mother] currently incurs needs of $2,495.05 per month. *The disparity in the parties respective reasonable needs for the minor child is directly related to the amount of respective discretionary income the parties have available for the minor child.*

(Emphasis added.)

These findings are not challenged as unsupported by the evidence, so they are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal."). The trial court's findings focus on the disparity in the parties' estates:

> 9. [Father] also has a brokerage account with Charles Schwab which had an end of year value in 2016 of $655,071. By the end of April, 2017, the value of the brokerage account had grown to $821,606. The growth in [Father's] brokerage account reflects in part the deposit of the RSUs referenced in Finding of Fact #8 above. This growth had occurred despite cash withdrawals that

[Father] occasionally makes from the account to maintain his standard of living.

10. [Father] has been married for several years. His wife does not work outside of the home and does not earn a salary. The Plaintiff and his wife within the past two years purchased a home in Raleigh with an approximate purchase price of $1.2 million.

11. [Father] has no ongoing indebtedness other than the mortgage on his home, the mortgage on another residence he owns in Lee County, and obligations for vehicle purchases. [Father] runs his ongoing expenses primarily through his Citi Advantage credit card. [Father] incurs charges on this credit card anywhere from between $15,000 - $35,000 per month and pays the card off each month. [Father] through the time period from October, 2016 through May, 2017 averaged purchases for wine, trips to vineyards, etc. in the approximate amount of $6,400 per month. He also purchased a birthday present for his wife in the amount of $8,000 and a piece of fine art in the amount of $3,105 during this time period.

. . . .

16. Since the entry of this Court's 2012 Order, [Mother] has purchased a home in the amount of $262,000. [Mother] used a portion of her settlement from the parties' divorce to fund the down purchase for this house.

. . . .

21. [Mother] had debts for multiple credit cards listed upon her affidavit in 2012. These debts did not appear on her affidavit filed in 2016. [Mother] used a portion of her settlement from the parties' divorce to pay these debts off. [Mother] has approximately $9,000 remaining from the divorce settlement. [Mother] also saves for retirement through a 401(k) plan through her employer. She has no significant equity in stocks, brokerage accounts, etc. like [Father] has.

22. [Mother's] expenses for herself and [Sarah] are a fraction of what [Father] incurs, because [Mother] budgets her funds and only pays for the expenses that she is able to incur for [Sarah]. The standard of living [Mother]

> is currently maintaining for herself and [Sarah] is significantly less than what the parties and the minor child enjoyed at the time of the parties' separation and what [Father] has historically and currently enjoys after separation. She would incur greater expenses for [Sarah] if she had the means to do so. These increased expenses if incurred would still only be a percentage of the expenses [Father] incurs with respect to [Sarah] each month.

The weight assigned to each factor mentioned in North Carolina General Statute § 50-13.4(c) is in the trial court's discretion. *Plott v. Plott*, 313 N.C. at 69, 326 S.E.2d at 867-68. The trial court set forth specific findings and gave due regard to the factors required by North Carolina General Statute § 50-13.4(c). *Kleoudis v. Kleoudis*, 271 N.C. App. 35, 42, 843 S.E.2d 277, 283 (2020) ("Giving 'due regard' to the estates of the parties does not require detailed findings as to the value of each individual asset but requires only that the trial court consider the evidence and make sufficient findings addressing its determination regarding the estates to allow appellate review."). Based upon those findings, we discern no abuse of discretion.

IV. Post-trial Motions

Because we have concluded the trial court did not err in modifying Father's child support obligation, we also conclude the trial court did not err by denying Father's post-trial motions. This argument is overruled.

V. Conclusion

We affirm the trial court's 2018 Order and the order denying the posttrial motions.

AFFIRMED.

Judge COLLINS concurs.

Judge BERGER dissents with separate opinion.

BERGER, Judge, dissenting in separate opinion.

"The determination of child support must be done in such way to result in fairness to all parties." *Walker v. Walker*, 38 N.C. App. 226, 228, 247 S.E.2d 615, 616 (1978) (citation omitted). Because the trial court's child support order is more than 100% of the minor child's reasonable needs, I respectfully dissent.

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c) (2019).

The statute is clear and unambiguous: child support payments "shall be in such amount as to meet the reasonable needs of the child[.]" N.C. Gen. Stat. § 50-13.4(c). Here, the trial court determined that the "total reasonable needs" of the minor child was $7,926.23 per month based upon a finding that "Plaintiff currently incurs needs of $5,431.18 per month, and [ ] Defendant currently incurs needs of $2,495.05 per month." The trial court also found as fact that "[Defendant] would incur greater expenses for [the minor child] if she had the means to do so."

The trial court then concluded as a matter of law that increases in the parties' incomes and "an increase in the minor child's reasonable needs" constituted a substantial change in circumstances justifying modification of the prior support order. In ordering Plaintiff to pay $3,289.00 per month in child support, the trial court imposed a child support obligation on Plaintiff that was 110% of "the total reasonable needs" of the minor child.

There is no support in the record for the amount awarded by the trial court. The majority is correct, "[m]ath is important," and parties should have some assurance that a child support order is based on objective criteria; not guesswork, flawed processes, or even a judge's implicit bias against wealth and wealth creators. However, the majority opinion allows trial courts to impose random, arbitrary child support obligations that it deems subjectively fair, thus, taxing parents of means in an effort to create emotional equality.

Child support payments are not intended, as the trial court found in finding of fact 24, to meet Defendant's needs. Child support is not spousal support. However, the trial court appears to have considered a new car as one of the expenses Defendant would incur "if she had the means to do so." The trial court addressed the age and mileage of Defendant's vehicle, and determined that "[i]t is not reasonable to assume that [ ] Defendant will be able to continue to drive this vehicle without purchasing a new vehicle in the future." Even if we assume that Plaintiff should be solely responsible for purchasing Defendant's new car as part

of his child support obligation, the trial court improperly considered this unsubstantiated future expense. *See Witherow v. Witherow*, 99 N.C. App 61, 65, 392 S.E.2d 627, 630 (1990) ("[A]n award which takes into consideration an unsubstantiated expense rather than a current expense is an abuse of the court's discretion."). *See generally Thomas v. Burgett*, 265 N.C. App. 364 (2019).[1]

I would remand this matter to the trial court for entry of an order that limits Plaintiff's child support obligation to the minor child's reasonable needs in accordance with N.C. Gen. Stat. § 50-13.4(c).

FUND HOLDER REPORTS, LLC, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF STATE TREASURER, RESPONDENT

No. COA20-94

Filed 31 December 2020

Administrative Law—final agency decision—interpretation of N.C.G.S. § 116B-78(d)—appealed to superior court—reasonable basis

The superior court properly affirmed the declaratory ruling issued by the North Carolina Department of State Treasurer, in which the agency interpreted N.C.G.S. § 116B-78(d) as prohibiting petitioner, a property finder that helped residents collect escheated funds pursuant to the Unclaimed Property Act (Chapter 116B), from depositing into its trust account checks that it collected from the agency on behalf of its clients, even if it held a valid power of attorney to act on behalf of a client. The agency's interpretation was reasonable in light of the statute's plain language and legislative history.

Judge TYSON dissenting.

Appeal by Petitioner from Order entered 26 November 2019 by Judge Vinston Rozier in Wake County Superior Court. Heard in the Court of Appeals 26 August 2020.

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1. Because the South Eastern Reporter incorrectly lists *Thomas v. Burgett* as an unpublished case, we only include a citation to the North Carolina Appellate Reporter.

Stam Law Firm, PLLC, by R. Daniel Gibson, for petitioner.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc X. Sneed, for respondent.

HAMPSON, Judge.

Factual and Procedural Background

Fund Holder Reports, LLC (FHR) appeals from an Order of the Wake County Superior Court affirming a Declaratory Ruling by the North Carolina Department of State Treasurer (the Department) interpreting N.C. Gen. Stat. § 116B-78(d) and its application to FHR's business practices. The Record before us reflects the following:

FHR is a multi-state company that assists its clients in locating and processing escheated fund claims. FHR began assisting North Carolina residents in collecting their escheated funds in 2015. FHR typically enters into a written agreement with a client stating FHR will advance the expenses related to finding and collecting the escheated funds and will receive a percentage of the escheated funds as a finder's fee. FHR, as part of the agreement, also obtains a power of attorney to collect the funds and "to perform all acts necessary to protect and recover [the funds]." Once FHR has located and negotiated recovery of the escheated funds on a client's behalf, the State sends FHR a check payable to the client in the "care of" FHR. FHR endorses the check for deposit only and deposits the check into its client trust account. Then, FHR sends its client a check from the client trust account for the value of the escheated funds minus FHR's finder's fee. FHR then transfers the value of the finder's fee into its operating account after the client deposits the check from FHR.

The Department is the North Carolina state agency responsible for administering the Unclaimed Property Act as codified in Chapter 116B of the North Carolina General Statutes. On 24 October 2018, FHR received a letter from the Department notifying FHR it was in violation of N.C. Gen. Stat. § 116B-78(d). Specifically, the letter stated the Department's Unclaimed Property Division learned FHR was "endorsing and depositing checks from the Division made payable to claimants" and that the Department would "cease processing any pending or submitted claims from [FHR] until it receives assurances that [FHR] is no longer in violation of [Section 116B-78(d)]."

Section 116B-78(d) states:

> Any person who enters into an agreement covered by this section with an owner shall be allowed to receive cash property, but not tangible property or securities, on behalf of the owner but shall not be authorized to negotiate the check made payable to the owner. Tangible property shall be delivered to the owner by the Treasurer, and securities will be registered into the owner's name.

N.C. Gen. Stat. § 116B-78(d) (2019). On 7 December 2018, FHR's counsel sent the Department a response to its 24 October letter requesting the Department issue a Declaratory Ruling pursuant to N.C. Gen. Stat. § 150B-4[1] as to whether: (1) FHR, with a valid power of attorney, may deposit a check made payable to the owner; (2) the Department is authorized to issue a check payable to the owner and a separate check payable to FHR for its finder's fee; and (3) the Department interpreted Section 116B-78 to permit FHR to receive cash but not negotiate a check. On 22 February 2019, the Department issued its Declaratory Ruling concluding: (1) FHR may not deposit a check made payable to the owner using a valid power of attorney; (2) the Department may only issue checks to the legal owner and may not issue separate checks to FHR for its finder's fee; and (3) under Section 116B-78(d), FHR may receive cash property in the form of checks, but may not negotiate those checks.

On 29 March 2019, FHR filed a Petition for Judicial Review of the Department's Declaratory Ruling in Wake County Superior Court.[2] Before the Superior Court, FHR argued the Department's Ruling misinterpreted and misapplied North Carolina law by: (1) reading Section 116B-78(d) as superseding the North Carolina Power of Attorney Act; (2) reading Section 116B-78(d) as preventing FHR from negotiating or depositing checks made payable to its clients when it had a valid power of attorney; and (3) reading Section 116B-78(d) as preventing the Department from issuing separate checks to FHR.

On 26 November 2019, the Wake County Superior Court entered an Order affirming the Department's Declaratory Ruling. In its Order, the Superior Court first determined the applicable standard of review of

1. "On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency." N.C. Gen. Stat. § 150B-4(a).

2. N.C. Gen. Stat. § 150B-4(a1)(3) (2019) provides: "A declaratory ruling is subject to judicial review in accordance with Article 4 of this Chapter." Article 4 of Chapter 150B provides authorization and procedures for seeking judicial review of final administrative decisions in contested cases. N.C. Gen. Stat. § 150B-43, *et seq*. (2019).

the Department's Declaratory Ruling under N.C. Gen. Stat. § 150B-51(c) was de novo. Applying this de novo standard of review, the Superior Court concluded the "plain language," of Section 116B-78(d): (1) allows a property finder to receive cash property, but not to negotiate a check even if the property finder possesses a valid power of attorney; (2) does not allow the issuance of a separate payment to a property finder for its finder's fee; and (3) the Department, thus, did not err in its Declaratory Ruling. FHR filed a written Notice of Appeal from the Superior Court's Order on 23 December 2019.

Issue

The dispositive issue on appeal is whether the Superior Court properly affirmed the Department's conclusion that Section 116B-78(d) does not permit FHR, even with a valid power of attorney, to endorse and deposit checks made payable to an owner in its client trust accounts.[3]

Standard of Review

Under North Carolina's Administrative Procedure Act the role of a superior court reviewing a final agency decision is as follows:

> The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners *may* have been prejudiced because the findings, inferences, conclusions, or decisions are:
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> (1) In violation of constitutional provisions;
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> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
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> (3) Made upon unlawful procedure;
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> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
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> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2019) (emphasis added).

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3. FHR also argues the Superior Court erred by employing "an initial determination as to whether [FHR] has been prejudiced by the [the Department's] ruling" and in concluding FHR was not prejudiced by the Declaratory Ruling. Because, however, the Superior Court did not end its analysis there and addressed the merits of FHR's arguments on judicial review and based on our disposition of this case on these merits, we do not reach the question of whether the Superior Court erred in its analysis of whether FHR suffered any prejudice from the Department's ruling.

"A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in G.S. 7A-27." N.C. Gen. Stat. § 150B-52 (2019). Our scope of review under § 150B-52 is "the same as it is for other civil cases." *Id.* When this Court reviews an order from a superior court examining a final agency decision, we examine the order for errors of law. *Shackleford-Moten v. Lenoir Cnty. Dep't of Soc. Servs.*, 155 N.C. App. 568, 572, 573 S.E.2d 767, 770 (2002) (citations omitted). This process is a "twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Nat. Res.*, 361 N.C. 531, 535, 648 S.E.2d 830, 834 (2007) (citation and quotation marks omitted).

Thus, as an initial matter, when a superior court reviews a final agency decision, the standard of review "depends upon the particular issues presented on appeal." *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citation and quotation marks omitted). Questions of law receive de novo review. N.C. Gen. Stat. § 150B-51(c) (2019); *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (citation and quotation marks omitted). Here, FHR petitioned the Superior Court to review the Department's Declaratory Ruling arguing the Declaratory Ruling "misinterpret[ed] and misappl[ied]" North Carolina law. As FHR raised questions of law, the Superior Court accordingly correctly applied a de novo standard of review. *Id.*

FHR contends, however, the Superior Court erred in its de novo review by affirming the Department's interpretation that N.C. Gen. Stat. § 116B-78(d)'s prohibition on property finders negotiating checks bars FHR from depositing its clients' checks. Although the Superior Court did not expressly conclude Section 116B-78(d) prohibited FHR from depositing checks, it did conclude the law prevented FHR from negotiating checks and affirmed the Department's Declaratory Ruling, which itself concluded FHR could not deposit its clients' checks.

We review an agency's alleged error of law de novo. *Carroll*, 358 N.C. at 666, 599 S.E.2d at 898. Our courts give "great weight to an agency's interpretation of a statute it is charged with administering; however, an agency's interpretation is not binding." *N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Exam'rs*, 371 N.C. 697, 700, 821 S.E.2d 376, 379 (2018) (citation and quotation marks omitted); *see also Carpenter v. N.C. Dep't of Human Res.*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992) ("the court should defer to the agency's

interpretation of the statute . . . as long as the agency's interpretation is reasonable and based on a permissible construction of the statute."). Our "primary task in construing a statute is to effectuate the intent of the legislature" and the "best indicia of . . . legislative purpose [is] the language of the statute[.]" *N.C. Acupuncture Licensing Bd.*, 371 N.C. at 701, 821 S.E.2d at 380 (citations and quotation marks omitted).

Analysis

N.C. Gen. Stat. § 116B-78 is a statute of limited application. It governs contracts to locate unclaimed property within the scope of Chapter 116B. Specifically, it only governs an agreement "if its primary purpose is to locate, deliver, recover, or assist in the recovery of property that is distributable to the owner or presumed abandoned." N.C. Gen. Stat. § 116B-78(a1) (2019).

It is in this specific context the Department issued its Declaratory Ruling responding to a very general question posed by FHR. FHR asked whether the Department believed FHR, as a property finder[4], "may (as the owners' power of attorney) deposit a check [made] payable to a property owner." In response, the Department issued a very general ruling, expressly noting: "the Department's response is not to be construed as anything other than a general ruling." The Department responded, given Section 116B-78(d)'s prohibition on property finders negotiating checks: "as a property finder, if FHR possesses a valid power of attorney to act on behalf of an owner, it would nevertheless be unable to deposit a check that is payable to the owner."

Thus, the Declaratory Ruling simply determined FHR, where it was acting in its capacity as a property finder governed by Section 116B-78(d), was not authorized to deposit checks made out to its clients by the Department, even with a purported power of attorney. Notably, as the Department pointed out, it was not provided with any power of attorney to review. The Department's ruling is clearly limited only to persons or entities acting as property finders under an agreement governed by Section 116B-78(d). The Department's ruling does not address instances where a person or entity with power of attorney is acting other than as a property finder—for example a family member holding a general power of attorney, a guardian, or even a more general

4. We adopt the this use of the term "property finder" by the parties and refer to "property finder" to denote a person or entity that enters into an agreement with a property owner when the agreement's "primary purpose is to locate, deliver, recover, or assist in the recovery of property that is distributable to the owner or presumed abandoned" under the Unclaimed Property Act. In this context, FHR is a property finder.

attorney-client relationship. Moreover, the ruling does not address instances in which the Department might issue payment to an owner other than by check—for instance, electronic funds transfer, although it does acknowledge Section 116B-78(d) does permit a property finder "to receive cash property."

Having received this general Declaratory Ruling, upon judicial review and appeal to this Court, FHR makes a more nuanced argument. FHR contends the Department's ruling was erroneous because Section 116B-78(d)'s prohibition on property finders negotiating client checks should not bar *all* deposits by a property finder. FHR submits that because its agreements with its clients contain a clause purportedly granting FHR power of attorney and FHR, on behalf of its clients, endorses and deposits client checks into a trust account for its clients, these deposits do not constitute a negotiation.

Here, as both the Department and Superior Court recognized, the plain language of Section 116B-78(d) clearly provides a property finder is not authorized to negotiate a check payable to its client (the property owner):

> Any person who enters into an agreement covered by this section with an owner shall be allowed to receive cash property, but not tangible property or securities, on behalf of the owner but shall not be authorized to negotiate the check made payable to the owner. Tangible property shall be delivered to the owner by the Treasurer, and securities will be registered into the owner's name.

N.C. Gen. Stat. § 116B-78(d) (2019). FHR, however, contends the Department interpreted the term "negotiate" too broadly to include any deposit by a property finder of a check made payable to an owner. We disagree and conclude the Department's interpretation of the statute is reasonable in light of the statute's language and purpose.

"Negotiation" is not a defined term under Chapter 116B. Rather, as FHR notes, North Carolina's Uniform Commercial Code (UCC) defines "negotiation" as "a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder." N.C. Gen. Stat. § 25-3-201(a) (2019).[5] A "holder" is defined under the UCC as the "person in possession of a

5. Black's Law Dictionary likewise defines "negotiate," in relevant part, "to transfer (an instrument) by delivery or endorsement . . . for value, in good faith, without notice of conflicting title claims . . . ." *Negotiate*, *Black's Law Dictionary* (11th ed. 2019).

negotiable instrument that is payable to . . . an identified person that is the person in possession[.]" N.C. Gen. Stat. § 25-1-201(21) (2019).

Here, the Department issues a check to the property owner in care of FHR. *See* N.C. Gen. Stat. § 25-3-105(c) (2019) ("Issuer" means a "maker or drawer of an instrument"). FHR, as an agent of the owner, endorses client checks payable specifically to its bank and deposits the checks in its trust account. *See Summerlin v. Nat'l Serv. Indus., Inc.*, 72 N.C. App. 476, 478, 325 S.E.2d 12, 14 (1985). In so doing, FHR transfers possession of the checks to FHR's depositary bank by endorsing and depositing the checks. Again, applying the UCC, under N.C. Gen. Stat. § 25-4-205: "The depositary bank becomes a holder of the item at the time it receives the item for collection if the customer at the time of delivery was a holder of the item, whether or not the customer indorses the item[.]" N.C. Gen. Stat. § 25-4-205 (2019). Therefore, by these plain terms, the Department's interpretation of Section 116B-78(d)—that FHR's deposits of its client's checks are unauthorized negotiations—is reasonable and consistent with the plain language of the statute.[6]

For its part, FHR nevertheless contends because its agreements with the property owners require the property owner to provide FHR power of attorney, FHR is the "legal representative" of its clients and, thus, tantamount to being a property owner. *See* N.C. Gen. Stat. § 116B-52(9) (2019) (" 'Owner' means a person who has a legal or equitable interest in property subject to this Chapter or the person's legal representative."). This contention ignores the fact that—at least on the Record before

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6. FHR argues banks do not always become "holders in due course" under the UCC citing N.C. Gen. Stat. §§ 25-4-208 and 209. Thus, FHR contends because not every deposit makes a bank a holder in due course, the bank may not become a holder, and, thus, no negotiation occurs. FHR's argument overlooks the fact under the UCC the terms "holder" and "holder in due course" are not synonymous. N.C. Gen. Stat. § 25-3-302 (2019) provides:

> "holder in due course" means the holder of an instrument if:
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> (1) The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and
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> (2) The holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in G.S. 25-3-306, and (vi) without notice that any party has a defense or claim in recoupment described in G.S. 25-3-305(a).

N.C. Gen. Stat. § 25-3-302 (2019).

us—any purported power of attorney between FHR and its clients is a term of the agreement which is expressly governed by N.C. Gen. Stat. § 116B-78. *See* N.C. Gen. Stat. § 116B-78(a1) (2019) ("An agreement by an owner is covered by this section if its primary purpose is to locate, deliver, recover, or assist in the recovery of property that is distributable to the owner or presumed abandoned.").

Moreover, as the Department recognized, North Carolina's Uniform Power of Attorney Act, found in Chapter 32C of the General Statutes, "does not supersede any other law applicable to financial institutions or other entities, and the other law controls if inconsistent with the provisions of this Chapter." N.C. Gen. Stat. § 32C-1-122 (2019). Thus, in interpreting Section 116B-78(d), the Department determined the plain language of the statute meant that even if a property finder possesses a valid power of attorney, it cannot, while acting as a property finder governed by N.C. Gen. Stat. § 116B-78(d), under its agreement with its client negotiate a check payable to the client. This interpretation is entirely reasonable. Indeed, under FHR's position, allowing a property finder to rely on a purported power of attorney in an agreement governed by Section 116B-78 for the purpose of circumventing the express prohibition on property finders negotiating their clients' checks would appear to run directly contrary of the plain language of subsection 116B-78(d) as intended by the General Assembly.

The Department's interpretation of Section 116B-78 is further consistent with the purpose of the statute as demonstrated in its legislative history. The statute was enacted as part of the Unclaimed Property Act in 1999. An Act to Enact the North Carolina Unclaimed Property Act, 1999 N.C. Sess. Laws 1904, 1923-24. In 2009, the General Assembly made sweeping amendments to the statute's language including enacting Section 116B-78(d); the law stands today as amended in 2009. An Act to Protect Property Owners of Abandoned Property by Regulating Property Finders, 2009 N.C. Sess. Laws 509, 510-11. These 2009 amendments demonstrate a clear legislative intent to protect property owners. These provisions added specific criteria for such agreements between property finders and owners, including express limits on the amount of compensation a finder could receive. *Id*. The General Assembly also added a subsection providing any violation of Section 116B-78 "constitutes an unfair or deceptive trade practice under G.S. 75-1.1." *Id*. These changes, coupled with the 2009 Act's title, clearly evince the General Assembly's intent to protect property owners and regulate property finders—by strictly defining the methods for compensation and limiting exactly what a property finder could do with property.

Whether or not the blanket prohibition in Section 116B-78 on property finders negotiating checks does or does not constitute good policy or has a chilling effect on an otherwise sound business model is a question for the General Assembly, and we are not free to ignore its plain language. *Orange County ex rel. Byrd v. Byrd*¸ 129 N.C. App. 818, 822, 501 S.E.2d 109, 112 ("[W]e are not free to either ignore or amend legislative enactments because when the language of a statute is clear and unambiguous, the courts must give it its plain meaning." (citing *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977))). FHR's recourse is with the General Assembly as "the judiciary should avoid ingrafting upon a law something that has been omitted, which it believes ought to have been embraced." *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 463, 665 S.E.2d 449, 453 (2008) (alterations, citations, and quotation marks omitted).

Thus, the Department's Declaratory Ruling interpreting Section 116B-78(d) as precluding FHR from negotiating checks payable to its clients by depositing those checks in FHR's client trust accounts, even with a valid power of attorney, is reasonable and consistent with the plain language and purpose of the statute. Therefore, the Department did not err in its Declaratory Ruling. Consequently, in turn, the Superior Court did not err in affirming the Department's Declaratory Ruling.

Conclusion

Accordingly, we affirm the Superior Court's Order affirming the Department's Declaratory Ruling.

AFFIRMED.

Judge BROOK concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

The specific issue before this Court on appeal from the superior court and State Treasurer is whether a principal's legal representative's sole act of receiving a check, issued to the principal, and depositing that check into a trust account for the benefit of the principal is a "deposit" or a "negotiation" of that check. The superior court's order is properly reversed and remanded. I respectfully dissent.

The Treasurer asserted FHR was "endorsing and depositing checks from the Division made payable to claimants." The Treasurer threatened to "cease processing any pending or submitted claims from [FHR] until it receives written assurances that [FHR] is no longer in violation of [N.C. Gen. Stat. § 116B-78(d)]."

N.C. Gen. Stat. § 116B-78(d) states:

> Any person who enters into an agreement covered by this section with an owner shall be allowed to receive cash property, but not tangible property or securities, on behalf of the owner but shall not be authorized to negotiate the check made payable to the owner. Tangible property shall be delivered to the owner by the Treasurer, and securities will be registered into the owner's name.

N.C. Gen. Stat. § 116B-78(d) (2019).

N.C. Gen. Stat. § 116B's definition of "owner" includes "the [owner's] legal representative." N.C. Gen. Stat. § 116B-52(9) (2019). After FHR locates the principal's funds held by the Treasurer in the unclaimed property fund and provides the required proof of principal's ownership, the State issues a check payable to the principal and delivers the check in the "care of" FHR.

The common law of agency has recognized for centuries "the acts of an agent are the acts of the principal." *Young & McQueen Grading Co. v. Mar-Comm & Assocs.*, 221 N.C. App. 178, 183, 728 S.E.2d 1, 4 (2012) (citation omitted). "Payment by an agent is payment by the principal" and payment to an agent is payment to the principal. Joseph Story, Commentaries on the Law of Agency 528 (8th ed. 1874). Under the North Carolina power of attorney statute ("UPA"), unless otherwise restricted, the agent's act is the act of its principal. N.C. Gen. Stat § 32C-1-114 (2019).

These funds at issue are not State funds. The escheated funds belong to and remain the property of the principal. The Treasurer is merely holding these funds until the true owner is identified and provides proof to support its claims for delivery. Once the Treasurer complies with the statute to identify and deliver the unclaimed funds to the owner or the owner's legal representative, it has no further role or oversight in the principal's subsequent disposition of its funds. If the principal directs its agent to bet the funds on a gamble or to purchase an exotic automobile for the principal, it is the principal's money and their sole prerogative on when, where, how, and to whom they are spent. N.C. Gen. Stat. § 32C-1-114(a).

As the principal's legal representative, unless otherwise limited or restricted, the agent is empowered to act in the stead of, as and for, the principal, subject to the fiduciary duties of, among others, loyalty, honesty, to avoid self-dealing, and to account for all its actions on behalf of the principal. N.C. Gen. Stat. § 32C-1-114(b).

I. Interpretation

FHR argues the superior court erred in its *de novo* review by affirming the Treasurer's interpretation asserting N.C. Gen. Stat. § 116B-78(d)'s prohibition on property finders-agents negotiating checks and also bars FHR from depositing its principal's checks. The Treasurer also asserted even if FHR possesses a valid power of attorney to act on behalf of an owner, it would nevertheless be unable to deposit a check that is payable to the owner.

As correctly noted by the majority's opinion, the superior court did not expressly conclude the statutory language in Section 116B-78(d) prohibits FHR from "depositing" checks issued and payable to the principal. *See* N.C. Gen. Stat. § 116B-78(d) ("but shall not be authorized to negotiate the check made payable to the owner").

Deposit is defined as "the act of placing money in a bank for safety and convenience." *Deposit*, Black's Law Dictionary (11th ed. 2019). As previously noted, the statutory definition of an "owner" includes, "the [owner's] legal representative." N.C. Gen. Stat. § 116B-52(9).

N.C. Gen. Stat. § 116B does not define either "deposit" or "negotiate." "Negotiate" is defined as "to transfer (an instrument) by delivery or [e]ndorsement." *Negotiate*, Black's Law Dictionary (11th ed. 2019). Under N.C. Gen. Stat. § 25-3-201 (2019), the Uniform Commercial Code defines "negotiation" as "a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder." The UCC itself is confusing on this issue as a depository bank is merely "a collecting agent" for the principal's check on one hand and, on the other hand, the bank becomes a "holder" upon receiving the instrument for collection. N.C. Gen. Stat. §§ 25-4-208, 25-1-201(21) (2019). In either event, the depository bank acts as the agent of the principal, who is the owner of the funds.

II. The UPA and Common Law Agency

Under the UPA, FHR, as agent and the holder of a valid power of attorney, possesses the broad authority and powers of the principal. Agents may claim, receive, obtain, and disburse money of which the principal is entitled. N.C. Gen. Stat § 32C-2-203 (2019). Agents, under

the UPA, can also demand or obtain money the principal is due through an estate or trust. *See* N.C. Gen. Stat. § 32C-1-114(b) (2019). Estates and trust or escrow accounts are common sources of escheated funds. *See* N.C. Gen. Stat. §§ 116B-2.2, 116B-3 (2019).

Once the agent has received the principal's funds, the agent can deposit, use, disburse, or invest those funds on behalf of the principal, as is consistent with the principal's instructions. Unless a power of attorney expressly provides otherwise, the agent may lawfully exercise these broad powers to act on behalf of its principal. Basically, the agent can perform any act the principal can lawfully perform for itself. *Young & McQueen Grading Co.*, 221 N.C. App. at 183, 728 S.E.2d at 4 (citation omitted).

The principal hires FHR for the express purpose of locating and receiving their funds, held by the Treasurer on their behalf, and then to deliver these funds. It is undisputed the common law of agency, the UPA, and N.C. Gen. Stat. § 116B empower FHR to do this on behalf of its principal.

The Treasurer reads UPA exclusion provisions applicable to banks and financial institutions to purportedly exempt N.C. Gen. Stat. § 116B-78(d) from the general applicability of the UPA or the common law of agency. The UPA "does not supersede" other laws applicable to "financial institutions or other entities." N.C. Gen. Stat. § 32C-1-122 (2019). As correctly noted in the majority's opinion, this overly broad interpretation of the statute is untenable.

The official comments to this section of the UPA "addresses concerns" from banking and insurance industries governing banking and insurance regulations which may conflict with the UPA. *See* N.C. Gen. Stat. § 32C-1-122.

> The primary rule of construction . . . is to ascertain the intent of the legislature and to carry out such intention to the fullest extent. To effectuate that intent, statutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each. It is a fundamental rule of statutory construction that sections and acts *in pari materia*, and all parts thereof, should be construed together and compared with each other. Words and phrases of a statute are to be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the statute permits.

In re Hayes, 199 N.C. App. 69, 78-79, 681 S.E.2d 395, 401 (2009) (alterations omitted) (citations and internal quotation marks omitted). When harmonized, N.C. Gen. Stat. § 116B, the UCC, and the UPA authorizes FHR, as the owner's representative and under a valid power of attorney, to receive and deposit checks on behalf of its principal, but not "negotiate" these checks.

If the Court reads these two statutes to be in conflict, this interpretation unnecessarily abrogates the common law and the UPA. As noted, in the common law of agency, "payment by an agent is payment by the principal" and payment to an agent is payment to the principal. Joseph Story, Commentaries on the Law of Agency 528 (8th ed. 1874).

Unless a statute specifically abrogates the common law, the common law continues in full force and effect. N.C. Gen. Stat. § 4-1 (2019). It must "affirmatively appear[]"a statute abrogates the common law. *Price v. Edwards*, 178 N.C. 493, 500, 101 S.E. 33, 37 (1919).

N.C. Gen. Stat. § 116B does not clearly abrogate the common law nor the UPA or UCC. *In re Hayes*, 199 N.C. App. at 78-79, 681 S.E.2d at 401 ("It is a fundamental rule of statutory construction that sections and acts *in pari materia*, and all parts thereof, should be construed together and compared with each other").

IV. N.C. Gen. Stat. § 116B

To read N.C. Gen. Stat. § 116B to preclude FHR, or any other similar agent, from depositing the check it receives from the Treasurer issued to its principal would write words into and broaden the meaning of the statute, which the General Assembly did not enact. The statute only precludes FHR from negotiating the checks, not receiving and depositing the cash funds or a cash equivalent check it is enabled to lawfully acquire under the statute, as an "[owners'] legal representative," and an agent of the principal under common law and the UPA. N.C. Gen. Stat. § 116B-52(d).

N.C. Gen. Stat. § 116B expressly allows and does not restrict a property finder-agent like FHR from receiving and depositing, but not to negotiate a check, made payable to its principal. Those two are separate functions, as their definitions clearly indicate. After admittedly lawful receipt by FHR from the Treasurer, there is no change in possession since the funds are always held by the principals' agents in trust for its use and benefit and are disbursed according to the principal's express instructions. "The acts of an agent are the acts of the principal." *Young & McQueen Grading Co.*, 221 N.C. App. at 183, 728 S.E.2d at 4 (citation omitted).

In other words, FHR may lawfully receive and deposit a check into a trust account for the benefit of its principal, but it may not negotiate the check to anyone other than the principal or for its benefit, its account, or to another of the principal's agents.

A natural reading of the statute suggests FHR, or any agent of the principal may receive checks directly from the Treasurer and then deposit these checks as instructed by its principal as any other agent is empowered to do, *e.g.* parents, employees, attorneys, securities or real estate brokers, accountants, administrators, guardians, trustees, or executors. If FHR does not negotiate or convert the checks to its own use or transfer to an unauthorized third party, it has merely deposited the check for the principal's benefit and has not violated the statute.

If FHR is "the owner" of escheated funds as is defined in the statute, via their being a legal representative of the principal, FHR has the power, as attorney in fact, to deposit escheated funds. This power continues so long as FHR is acting within the scope of its agency. Distinguishing depositing from negotiating allows the remainder of N.C. Gen. Stat. § 116B to function and harmonizes the statute with common law principles of agency, the UPA, and the UCC.

The Treasurer argues FHR merely depositing a check requires an "[e]ndorsement" by the depositor, which then makes the deposit a "negotiation," is wholly subsumed by N.C. Gen. Stat. § 116B itself. As the "owner," which definition includes the owner's legal representative, FHR's act of "depositing" the check is not a negotiation, because the deposit does not transfer ownership of the funds. The funds were received as and remain the property of the principal, held in a trust account for the benefit of the principal and eventually disbursed per its instructions.

FHR does not "endorse" the check, separate from being an act of the principal, to deposit nor incur endorser's liability. *See Young & McQueen Grading Co.*, 221 N.C. App. at 183, 728 S.E.2d at 4 (citation and quotation marks omitted).

Only after the principal has received and cashed the trust account check for the balance due does the agent receive their agreed-upon compensation.

V. Conclusion

A principal's authority to appoint FHR as its agent to find and recover escheated funds on their behalf is evidenced not only by the principal hiring FHR, but also providing FHR with valid power of attorney.

Depositing the principal's check by FHR is not a negotiation, either by definition or under the statute, because FHR is the owner's legal representative in the transaction and ownership of the funds remains with the principal or its agents. This situation is entirely contemplated by the General Assembly's enactment of N.C. Gen. Stat. § 116B, as is evidenced by the definitions in the statute.

Common law agency principals, the UPA, UCC, and N.C. Gen. Stat. § 116B can be harmonized to recognize FHR's authority, as agent to deposit the principal's formerly escheated funds, and to prevent FHR from negotiating the check for other than the principal's benefit or account. If FHR were "endorsing" the check and keeping the funds for themselves or transferring the funds other than for the principal's benefit, then the fiduciary duty inherent in the agency relationship and protected by the statute and UPA would be broken. FHR would have then "negotiated" the check, which is disallowed under N.C. Gen. Stat. § 116B.

This is not the case here. FHR lawfully deposited the principal's check into a trust account, sent the agreed amount due to its principal and, only after the principal cashes the trust check as ratification of the transaction, remits its earned compensation. The trial court's order is properly reversed. I respectfully dissent.

JERRY A. HAILEY, JR., PLAINTIFF
v.
TROPIC LEISURE CORP., MAGENS POINT RESORT, INC. D/B/A MAGENS POINT RESORT, RESORT RECOVERY, LLC, AND JOHN JUREIDINI, DEFENDANTS

No. COA19-908

Filed 31 December 2020

1. Constitutional Law—42 U.S.C. § 1983—under color of law—state action—small claims court—active engagement with magistrates

In a 42 U.S.C. § 1983 action, in which plaintiff alleged defendants deprived him of his constitutional right to due process, equal protection, and trial by jury by availing themselves of the U.S. Virgin Islands' Small Claims Court, which did not allow plaintiff to be represented by counsel, the trial court properly granted summary judgment to plaintiff where evidence established that defendants operated under color of law when they deprived plaintiff of his constitutional rights. The small claims' court magistrates' active

coaching of defendants through the filing and default judgment process conferred upon defendants the status of a state actor.

2. Discovery—sanctions award—Rule 37—no argument of unjust expenses

The trial court did not abuse its discretion by awarding plaintiff discovery sanctions pursuant to Civil Procedure Rule 37 in a 42 U.S.C. § 1983 action after granting several of plaintiff's motions to compel discovery. Defendants did not argue that the award was unjust, they failed to show that they were justified in opposing plaintiff's motions to compel, and the award was limited to reasonable expenses incurred.

3. Judgments—entry of default—motion to set aside—denial proper

In a 42 U.S.C. § 1983 action, the trial court did not abuse its discretion by denying one defendant's motion to set aside entry of default. Defendants did not support their arguments on this issue with any authority, and there was no indication the court failed to apply the proper good cause standard.

4. Damages and Remedies—compensatory damages—requested jury instructions—intervening causes

In a 42 U.S.C. § 1983 action, the trial court's instructions to the jury on proximate cause were not in error where, although the court declined to give the specific instructions requested by defendants regarding intervening causes, the charge in its entirety explained proximate cause and foreseeability, and defendants failed to state how the instructions as given were prejudicial.

5. Evidence—expert testimony—video deposition—decision to exclude—trial court's discretion

In an appeal in a 42 U.S.C. § 1983 action, the Court of Appeals found no abuse of discretion in a trial court's decision to exclude defendants' proffered video deposition of the president of the U.S. Virgin Islands Bar Association—regarding the issues of proximate cause and foreseeability in the compensatory damages phase—where defendants failed to articulate why the decision, which the trial court stated was based on lack of foundation, speculation, and irrelevance, constituted an abuse of discretion.

6. Evidence—expert testimony—Rule 702—appellate law expert—former justice

In a 42 U.S.C. § 1983 action, there was no abuse of discretion in the trial court's decision to allow an expert on appellate practice

and procedure (a former North Carolina Supreme Court justice) to testify regarding the reasonableness of plaintiff's attorney's fees. Defendants failed to articulate how the admission was an abuse of discretion, since Evidence Rule 702 allows an expert to give an opinion without having firsthand knowledge of a matter, and the opinion given here was within the expert's field of expertise.

7. Constitutional Law—42 U.S.C. § 1983 claim—proximate cause —JNOV

In a 42 U.S.C. § 1983 action, sufficient evidence was presented from which a jury could conclude that defendants were the proximate cause of plaintiff's injury—stemming from defendants' use of the U.S. Virgin Islands' Small Claims Court to deprive plaintiff of his constitutional right to due process, equal protection, and trial by jury, which caused plaintiff to incur attorney fees and costs in subsequent litigation. Where defendants failed to show that any of the intervening causes they cited as breaking the causal chain superseded their actions, the trial court properly denied their motion for judgment notwithstanding the verdict.

8. Attorney Fees—jurisdiction to award—notice of appeal filed while motion pending—trial court divested of jurisdiction

In a 42 U.S.C. § 1983 action, the trial court lacked jurisdiction to award attorney fees to plaintiff after defendants filed their first notice of appeal challenging the underlying judgments. Since the award was based on plaintiff's status as a prevailing party, the exception to the rule that notice of appeal removes jurisdiction to the appellate court, found in N.C.G.S. § 1-294, was inapplicable. The fee order was vacated and the matter remanded for reconsideration.

Appeal by Defendants from Orders entered 23 March 2018, 3 May 2018, 12 June 2018, 13 June 2018, 19 June 2018, 16 August 2018, and 20 November 2018, Judgment entered 28 June 2018, and Amended Judgment entered 16 August 2018, by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 12 August 2020.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III, and L. Lamar Armstrong, Jr., for plaintiff-appellee.

Martin & Gifford, PLLC, by John L. Wait, for defendants-appellants.

HAMPSON, Judge.

Factual and Procedural Background

Tropic Leisure Corp. (Tropic Leisure), Magens Point Resort, Inc. d/b/a Magens Point Resort (Magens Point), Resort Recovery, LLC (Resort Recovery), and John Jureidini (Jureidini) (collectively, Defendants) appeal from a Judgment and subsequent Amended Judgment entered upon a jury verdict in favor of Jerry A. Hailey, Jr. (Plaintiff). In addition, Defendants also appeal from a number of interlocutory orders entered during the pendency of this litigation including the: Order on Cross Motions for Summary Judgment granting in part Plaintiff's Motion for Summary Judgment and denying in whole Defendants' Motion for Summary Judgment (Summary Judgment Order); Order Denying Defendants' JNOV Motion and Motion to Alter or Amend Judgment (JNOV Order); Order on Defendants' Pre-Trial Motions (Pretrial Order); and Orders Granting Plaintiff's Motion to Compel. Further, in a separate Notice of Appeal, Defendants also appeal the trial court's post-judgment Order Granting Plaintiff's Motion to Tax Attorney's Fees and Costs and Denying Defendants' Motion to Tax Attorney's Fees and Costs (Fees Order).

Following briefing and oral argument in this Court, Tropic Leisure and Magens Point filed a Motion to Withdraw Appeal in light of the Supreme Court of the Virgin Islands issuing its decision in *In re Hailey*, 2020 VI 14 (2020). In their Motion to Withdraw, Tropic Leisure and Magens Point request this Court allow their Motion because *In re Hailey*, "accomplishes what Defendants have requested from this Court on appeal . . . ." Whether or not this is an accurate assertion is a matter of some dispute between the parties. Nevertheless, in our discretion, we grant Tropic Leisure and Magens Point their requested relief and allow their Motion to withdraw from this appeal. N.C. R. App. P. 37(e)(2) (2020). However, Resort Recovery and Jureidini (the Appealing Defendants) remain parties to the appeal and continue to assert the same arguments raised by all Defendants. Accordingly, as a practical matter, our review of the Judgment and Orders entered against Defendants is substantively unchanged.

For purposes of this appeal, the parties agree there are no disputes of material fact. Accordingly, the Record reflects the following relevant facts:

In February of 2015, Tropic Leisure and Magens Point sought to enforce a Default Judgment obtained against Plaintiff in North Carolina. *See Tropic Leisure Corp. v. Hailey*, 251 N.C. App. 915, 916, 796 S.E.2d 129, 130, *disc. rev. denied*, 369 N.C. 754, 799 S.E.2d 871, *cert. denied*, 138 S. Ct. 505, 199 L. Ed. 2d 385 (2017) (*Tropic Leisure I*). Plaintiff appealed

enforcement of the Default Judgment in North Carolina, and this Court concluded the foreign Default Judgment was not entitled to full faith and credit in North Carolina "because the [Default] Judgment was obtained in a manner that denied [Plaintiff] his right to due process[.]" *Id.* at 924, 796 S.E.2d at 135. Specifically, this Court concluded the U.S. Virgin Islands' Small Claims Court, which did not allow a litigant to be represented by counsel under its No Attorney Rule, denied Plaintiff " 'the opportunity to be heard at a meaningful time and in a meaningful manner.' " *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L. Ed. 2d. 18, 32 (1976)). After this Court issued its opinion in *Tropic Leisure I*, Defendants petitioned for review at the North Carolina Supreme Court, 369 N.C. 754, 799 S.E.2d 871, and the United States Supreme Court, 138 S. Ct. 505, 199 L. Ed. 2d 385, both of which were denied.

The present appeal arises out of the same operative facts as *Tropic Leisure I*. Here, however, the underlying litigation began on 4 May 2015, several months after Defendants sought enforcement of their Default Judgment in North Carolina. This time, Plaintiff filed his Complaint alleging Defendants violated 42 U.S.C. § 1983 by depriving him of his constitutional rights "to due process and equal protection, and to his right to trial by jury[.]" Plaintiff alleged "[b]y acting jointly and participating with the USVI judicial authorities and using the USVI small claims system, defendants were acting under color of law" and, therefore, "defendants' conduct as private parties using unconstitutional state law constitutes 'state action.' "

The subsequent litigation involved extensive discovery resulting in several motions to compel and related sanctions. Plaintiff and Defendants both filed Motions for Summary Judgment. On 3 May 2018, the trial court, after taking the parties' briefs, supporting documents, and arguments under advisement, entered its written Summary Judgment Order denying Defendants' Motion for Summary Judgment and granting in part and denying in part Plaintiff's Motion for Partial Summary Judgment. The trial court took judicial notice of this Court's prior opinion in *Tropic Leisure I* and concluded "there [we]re no genuine issues of material fact concerning defendants' violation of plaintiff's constitutional right to due process and, further, that such violation was accomplished under color of law." The trial court further concluded, "as a matter of law, plaintiff is entitled to judgment against defendants on his 42 U.S.C. § 1983 claim for at least nominal damages of $1.00." However, "genuine issues of material fact exist[ed] as to plaintiff's actual damages and as to punitive damages"; therefore, Plaintiff's claims for actual and punitive damages remained for jury trial.

Consistent with the Summary Judgment Order, Plaintiff's claims for actual and punitive damages proceeded in two parts, with the compensatory damage phase beginning on 11 June 2018. On 15 June 2018, the jury returned a verdict finding Defendants, "under the color of law, subject[ed] [Plaintiff] to a deprivation of a right secured by the United States Constitution." The jury found Plaintiff was entitled to $29,311.00 in compensatory damages. The trial court proceeded to the punitive phase and on 19 June 2018, the jury returned a verdict finding Plaintiff was not entitled to punitive damages. The trial court entered written Judgment on both jury verdicts on 28 June 2018, and ordered interest on the compensatory award of $29,311.00 to be taxed at "the legal rate of eight percent (8%) from the date the complaint was filed on 4 May 2015 until this sum and accrued interest is paid in full."

On 29 June 2018, Plaintiff filed a Motion to Tax Costs and Attorney's Fees pursuant to 42 U.S.C. § 1988. On 12 July 2018, Defendants filed a competing Motion for Attorney's Fees and Court Costs. The same day, Defendants also filed a Motion for JNOV and Motion to Alter or Amend Judgment. Defendants first argued under Rule 50(b) of the North Carolina Rules of Civil Procedure the trial court should set aside the jury verdict in favor of Plaintiff and enter judgment in favor of Defendants, reducing compensatory damages from $29,311.00 to $0.00. In the alternative, under Rule 59(e) Defendants requested the trial court alter or amend the Summary Judgment Order and the Judgment on the Jury Verdict to reflect judgment was entered in favor of Defendants' claims. Defendants also requested Judgment on the Jury Verdict be amended to disallow prejudgment interest.

On 14 August 2018, the trial court held a hearing on Defendants' Motion for JNOV and Motion to Alter or Amend the Judgment, and on 16 August 2018, the trial court entered its JNOV Order denying Defendants' Motion for JNOV and Motion to Alter or Amend the Judgment. However, the trial court did enter an Amended Judgment, with Plaintiff's consent, to reflect the proper post-judgment interest rate. Plaintiff's and Defendants' competing motions for attorney's fees also came on for hearing on 14 August 2018. On 20 November 2018, the trial court entered its written Fees Order granting Plaintiff's motion for attorney's fees and court costs pursuant to 42 U.S.C. § 1988 and denying Defendants' request for fees and costs.

Defendants filed two separate Notices of Appeal, first on 12 September 2018, and a second from the Fees Order on 19 December 2018.[1]

1. In their 12 September 2018 Notice of Appeal, Defendants noticed their intent to appeal from twenty-eight different Orders. We, however, only address the Orders and

Issues

The Appealing Defendants assert six issues on appeal. The primary issue is (I) whether the trial court erred in granting partial Summary Judgment and concluding under 42 U.S.C. § 1983 that Defendants acted under color of law in depriving Plaintiff of his right to due process. The Appealing Defendants also raise the additional issues of whether: (II) the trial court abused its discretion in awarding Plaintiff attorney's fees pursuant to N.C. R. Civ. P. 37 upon a Motion to Compel; (III) the trial court abused its discretion in denying Resort Recovery's Motion to Set Aside the Entry of Default; (IV) the trial court erred during the compensatory phase of the trial (A) when it instructed the jury on proximate cause and (B) abused its discretion when it excluded proffered deposition testimony and admitted expert testimony regarding reasonableness of fees; (V) there was sufficient evidence of proximate cause presented at trial for the trial court to deny Defendants' Motion for JNOV and to Alter or Amend the Judgment; (VI) the trial court's Fees Order was based on an abuse of discretion.

Analysis

I. Summary Judgment

[1] The Appealing Defendants argue the trial court erred in denying its Motion for Summary Judgment and in granting, in part, Plaintiff's Motion for Summary Judgment on the issue of Defendants' liability under Section 1983. We review the trial court's ruling on these cross motions for summary judgment de novo. *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007). When conducting a de novo review, "the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

The parties agree the issue before this Court is a question of law arising under 42 U.S.C. § 1983. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

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arguments actually raised by Defendants in briefing and deem the remainder abandoned on appeal. N.C. R. App. P. 28(a) (2020).

> shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2019).

Under Section 1983, there are

> two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." This second element requires that the plaintiff show that the defendant acted "under color of law."

Adickes v. S.H. Kress & Co., 398 U.S. 144, 150, 26 L. Ed. 2d 142, 150 (1970) (citations omitted). "In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." *United States v. Price*, 383 U.S. 787, 794 n.7, 16 L. Ed. 2d 267, 272 n.7 (1966); *see Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 935, 73 L. Ed. 2d 482, 494 (1982) ("If the challenged conduct of respondents constitutes state action as delimited by our prior decisions, then that conduct was also action under color of state law and will support a suit under § 1983."); *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295 n.2, 148 L. Ed. 2d 807, 817 n.2 (2001).

In *Tropic Leisure I*, this Court held: "because the [Default] Judgment was obtained in a manner that denied [Plaintiff] his right to due process, it is not entitled to full faith and credit in North Carolina." *Tropic Leisure I*, 251 N.C. App. at 924, 796 S.E.2d at 135. Accordingly, the crux of the issue before this Court is based upon the second element—whether Defendants acted under color of law.

> [T]o act 'under color of' state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions.

Dennis v. Sparks, 449 U.S. 24, 27-28, 66 L. Ed. 2d 185, 189-90 (1980) (citations omitted). However, the Supreme Court in *Dennis* cautioned, "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the

judge." *Id.* at 28, 66 L. Ed. 2d at 189-90. Instead, there must be an additional level of engagement between the private party and the state officials for the acts of the private party to arise to state action or action "under color of law."

In his complaint, Plaintiff alleged Defendants' "unconstitutional deprivation of [Plaintiff's] rights to due process and equal protection, and to his right to trial by jury," violated 42 U.S.C. § 1983. Plaintiff specifically alleged Defendants acted under color of law by "acting jointly and participating with USVI judicial authorities and using the USVI small claims system[.]" And, therefore, Defendants' conduct amounted to state action because it relied upon "unconstitutional state law[.]" Plaintiff filed his Motion for Summary Judgment on this basis and argued under the Supreme Court's opinion in *Lugar v. Edmonson Oil Co.*, Defendants' actions were under color of law. In their cross Motion for Summary Judgment, Defendants contended Plaintiff had not sufficiently demonstrated Defendants acted "under color of law" and, therefore, Defendants were entitled to summary judgment. The trial court concluded, in Plaintiff's favor, "there [were] no genuine issues of material fact concerning [Defendants]' violation of [Plaintiff's] constitutional right to due process and, further, that such violation was accomplished under color of law."

On appeal, Plaintiff and Defendants argue competing standards for what qualifies as action "under color of law." Defendants argue the correct standard is articulated in *Adickes* and requires Plaintiff show Defendants " 'somehow reached an understanding' or engaged in 'joint action' with a state authority in order to deny plaintiff's constitutional rights." Defendants further contend Plaintiff has not sufficiently demonstrated Defendants' and the USVI court system "somehow reached an understanding" to deprive Plaintiff of his right to counsel. *Adickes*, 398 U.S. at 152, 26 L. Ed. 2d at 151. Defendants also argue Plaintiff's reliance on *Lugar* was misplaced because *Lugar* was expressly limited to prejudgment attachments.

Indeed, as Defendants assert, the *Lugar* Court expressly stated: "[W]e do not hold today that 'a private party's mere invocation of state legal procedures constitutes "joint participation" or "conspiracy" with state officials satisfying the § 1983 requirement of action "under color of law." ' The holding today . . . is limited to the particular context of prejudgment attachment." *Lugar*, 457 U.S. at 939 n.21, 73 L. Ed. 2d at 497 n.21 (citations omitted). The Supreme Court has not, however, limited its subsequent discussions of *Lugar*'s holding on state action solely to cases involving prejudgment attachments. *See Manhattan Cmty. Access*

Corp. v. Halleck, 139 S. Ct. 1921, 1928, 204 L. Ed. 2d 405, 413 (2019) ("Under this Court's cases, a private entity can qualify as a state actor in a few limited circumstances—including, for example, . . . (iii) when the government acts jointly with the private entity[.]" (citing *Lugar* 457 U.S. at 941-942, 73 L. Ed. 2d at 497-98)); *Brentwood Acad.*, 531 U.S. at 296, 148 L. Ed. 2d at 817; *Nat'l Collegiate Ath. Ass'n v. Tarkanian*, 488 U.S. 179, 199, 102 L. Ed. 2d 469, 489 (1988); *see also Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622, 114 L. Ed. 2d 660, 674 (1991) ("[O]ur cases have found state action when private parties make extensive use of state procedures with 'the overt, significant assistance of state officials.' " (quoting *Tulsa Professional Collection Servs. Inc. v. Pope*, 485 U.S. 478, 486, 99 L. Ed. 2d 565, 576) (citing, *inter alia*, *Lugar*, 457 U.S. at 922, 73 L. Ed. 2d at 482)). Thus, although as Defendants argue *Lugar* itself is expressly limited to cases involving prejudgment attachments, the Supreme Court has not so limited its subsequent reasoning; *Lugar*'s discussion of state action remains instructive.

In *Lugar*, the Supreme Court considered whether Edmonson Oil Co. acted "under color of law" for purposes of Section 1983 liability when it attached Lugar's property pursuant to a Virginia statute authorizing prejudgment attachments. 457 U.S. at 924-25, 73 L. Ed. 2d at 487. *Lugar* outlined a two-part, fair-attribution test for determining whether "state action" may be fairly attributed to a private party:

> Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of 'fair attribution.' First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id. at 937, 73 L. Ed. 2d at 495 (citations omitted). The Court discussed its various tests for "state action" as articulated through its jurisprudence:

> [T]he Court has articulated a number of different factors or tests in different contexts: e. g., the "public function" test, see Terry v. Adams, 345 U.S. 461, [ ] 97 L. Ed. 1152

> (1953); Marsh v. Alabama, 326 U.S. 501 [ ] 90 L. Ed. 265 (1946); the "state compulsion" test, see Adickes v. S. H. Kress & Co., 398 U.S., at 170, 26 L. Ed. 2d 142; the "nexus" test, see Jackson v. Metropolitan Edison Co., 419 U.S. 345 [ ] 42 L. Ed. 2d 477 (1974); Burton v. Wilmington Parking Authority, 365 U.S. 715 [ ] 6 L. Ed. 2d 45 (1961); and, in the case of prejudgment attachments, a "joint action test," Flagg Brothers, 436 U.S., at 157 [ ] 56 L. Ed. 2d 185.

Id. at 939, 73 L. Ed. 2d at 496-97. The Court continued to note, however, that regardless of the exact context, the state-action inquiry is a "necessarily fact-bound inquiry that confronts the Court . . . ." *Id.* at 939, 73 L. Ed. 2d at 497 (citations omitted).

More recently, the Supreme Court opined upon the state-action issue as it relates to Section 1983:

> In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and *the question is whether the State was sufficiently involved to treat that decisive conduct as state action*. This may occur if the State creates the legal framework governing the conduct, if it delegates its authority to the private actor, or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior. Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.

Nat'l Collegiate Ath. Ass'n, 488 U.S at 192, 102 L. Ed. 2d at 484-85 (emphasis added) (citations omitted).

Accordingly, under the framework articulated by our Supreme Court, this Court must engage in a fact-bound inquiry into whether Defendants were acting "under color of law" sufficient to confer upon them status as state actors. Here, Plaintiff contended the U.S. Virgin Island's small claims court system—a state actor—coached Defendants—private parties—via Jureidini through the small claims process, and in doing so was acting jointly with the private entity sufficient to confer upon Defendants the status of state actor. Thus, the ultimate question is whether Defendants were "jointly engaged with state officials in the challenged action," *Dennis*, 449 U.S. at 27-28, 66 L. Ed. 2d at 189, considering "whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor." *Nat'l Collegiate Ath. Ass'n*, 488 U.S. at 192, 102 L. Ed. 2d at 485 (footnote omitted).

Jureidini's deposition testimony is instructive to our analysis. Specifically, Jureidini testified:

> [Plaintiff's counsel]. So you're collecting dues under the arrogance of saying the six year statute of limitations applies and you have no clue when it even starts.
>
> [Jureidini]. *I went with what the magistrates told me.* . . . And it wouldn't be arrogance, it would have been -- listen, this is what we are submitting, is it correct and they would say "Well, you can collect this or you can't collect that." And they asked me to back up everything that -- that I was claiming for a fee.
>
> . . . .
>
> The judges -- the magistrates let me go back six years and collect six years. If it was past six years, I couldn't collect on it.
>
> Now I wanted to bring over another point, too. When I started filing these, they got two magistrates like within a month. . . . So, you know, they were -- well, I'll say, probably figuring out the rules, too, going into it. But, you know, along the way, *we came up with what was fair* and what I could collect and what I could not collect.
>
> . . . .
>
> [Plaintiff's counsel]. . . . . So you can just file whatever you want and, hey, if it ain't right, the magistrate is going to say, "We're not going to let you do that, John?"
>
> [Jureidini]. Yeah. That's pretty much how --
>
> . . . .
>
> In the very beginning we were sitting down with or appearing before a magistrate court, a magistrate themself, you know. We went through a lot of stuff and discussed a lot of different things and, you know, at the end of the day, I wanted to be fair. And so I was like, what can I charge. I mean, they said, you know, partial rental credits, they said you can only go back six years. Well, okay, so that's what it was.

Then again, when Plaintiff's counsel questioned Jureidini regarding the six-year statute of limitations, Jureidini replied, "That's the way the

magistrates explained it to me." "They explained it to you?" Jureidini: "Correct." On the topic of collection fees, Plaintiff's counsel questioned, "then you've got five hundred dollars ($500) collection . . ." And Jureidini acknowledged: "Yeah, I thought -- I thought at the beginning that I was able to charge that, *but the magistrate set me straight that I couldn't. They -- they would not accept that.*" (emphasis added).

The process Jureidini described is not the "mere invocation of state legal procedures" cautioned against in *Lugar* and *Dennis*. *Lugar*, 457 U.S. at 939 n. 21, 73 L. Ed. 2d at 497; *Dennis*, 449 U.S. at 28, 66 L. Ed. 2d at 190. Nor does Jureidini's testimony simply describe friendly reminders by court officials that actions in small claims court must not exceed ten thousand dollars. Instead, Jureidini describes repeated instances by U.S. Virgin Islands small claims court officials not only directing Jureidini in *how* to file collection actions on behalf of Defendants, but further coaching Jureidini on *what* to include in the contents of his filings. The magistrates advised Jureidini regarding the statute of limitations and directed what claims would or would not be barred. "*They*"—meaning the USVI small claims magistrates—instructed Jureidini to charge partial rental credits and "set [Jureidini] straight" by advising him he could not charge a collection fee.

Thus, even setting aside *Lugar*'s "fair attribution test" as Defendants contend we must, Jureidini's testimony establishes, under the standards set forth in *Adickes*, *Dennis*, and more recently *Nat'l Collegiate Ath. Ass'n*, that Defendants were acting under color of law. Not only did the U.S. Virgin Island's small claims court system "create[] the legal framework governing the conduct," *Nat'l Collegiate Ath. Ass'n*, 488 U.S at 192, 102 L. Ed. 2d at 485, it actively participated in counseling Jureidini through the filing and default judgment process. This is sufficiently state action. The trial court properly granted Summary Judgment in favor of Plaintiff on this issue. Because we affirm the trial court's Summary Judgment Order, we turn to Appealing Defendants' remaining arguments.

II. Discovery Sanctions

[2] Appealing Defendants contend the trial court abused its discretion in awarding Plaintiff discovery sanctions on 23 March 2018, and 12 June 2018, pursuant to Plaintiff's motions to compel under N.C. R. Civ. P. 37. We review a trial court's award of sanctions pursuant to a motion to compel discovery for abuse of discretion. *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 292 (1996).

> Once a motion to compel is granted, the court *shall* require the party or deponent whose conduct necessitated the

> motion to pay the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that party's opposition to the motion was substantially justified or if circumstances make an award of expenses unjust.

Id. (emphasis added) (citing N.C. R. Civ. P. 37(a)(4)).

In the present case, the trial court issued several motions to compel discovery. In two separate orders, one Order Granting Plaintiff's Motion to Compel, entered 23 March 2018, and one Order Granting Plaintiff's Motion for Sanctions, entered 12 June 2018, the trial court granted Plaintiff's requests for costs and attorney's fees related to the respective motions to compel. On appeal, Defendants do not argue the award of expenses was unjust. Instead, Defendants contend paralegal costs in the amount of $4,750.00 from the 23 March Order were an abuse of discretion because "Plaintiff's counsel never mentioned that he would attempt to seek such costs." Defendants contend the additional discovery sanction in the amount of $9,735.00, awarded in the 12 June Order, entered after Plaintiff filed a fourth motion to compel, "was another example of Plaintiff's counsel's overbilling." Defendants' arguments ignore the requirements of Rule 37, which directs, upon the grant of a motion to compel,

> the court *shall*, after opportunity for hearing, *require* the party or deponent whose conduct necessitated the motion . . . to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, *unless* the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

N.C. Gen. Stat. § 1-1A, Rule 37 (2019) (emphasis added). Defendants make no argument they were justified in their opposition to the motions to compel. Accordingly, the trial court's award of monetary sanctions, limited to the reasonable expenses incurred, was not an abuse of discretion.

III. Entry of Default

[3] The Appealing Defendants also contend the trial court abused its discretion in denying Resort Recovery's Motion to Set Aside the Entry of Default. "The decision of whether to set aside an entry of default . . . is within the sound discretion of the trial court [and] therefore will not be disturbed on appeal absent a showing of abuse of that discretion." *Swan Beach Corolla, L.L.C. v. Cty. of Currituck*, 255 N.C. App. 837, 841, 805

S.E.2d 743, 746 (2017), *aff'd per curiam*, 371 N.C. 110, 813 S.E.2d 217 (2018) (citations and quotation marks omitted). "A trial court abuses its discretion when the party appealing the denial of its motion to set aside the entry of default demonstrates that the trial court did not apply the proper 'good cause' standard in its determination." *Id.* at 842, 805 S.E.2d at 747 (citation omitted).

Here, Defendants summarily argue the trial court abused its discretion because Plaintiff would not be prejudiced by setting aside the default, Resort Recovery could not afford to hire counsel, and due to the law's general preference for hearing a case on the merits. Defendants provide no authority to support their argument. Furthermore, Defendants do not argue, let alone demonstrate, the trial court failed to apply a proper good cause standard in denying Resort Recovery's Motion to Set Aside Default. *See id.* Accordingly, the trial court's Pretrial Order denying Defendants' Motion to Set Aside Default as to Resort Recovery, LLC, is affirmed.

IV. Compensatory Damage Phase

Next, Appealing Defendants contend the trial court "committed numerous prejudicial errors during the compensatory phase of the trial" thereby entitling Defendants to a new trial. Defendants first assert the trial court erred in failing to instruct the jury in accordance with Defendants' proposed instructions on intervening causes. Defendants also argue the trial court abused its discretion when it excluded Defendants' proffered video deposition and when it admitted the testimony of Robert Orr, a former Justice of the Supreme Court of North Carolina.

A. Jury Instructions

[4] "On appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed." *Hammel v. USF Dugan, Inc.*, 178 N.C. App. 344, 347, 631 S.E.2d 174, 177 (2006) (citations and quotation marks omitted). "[W]hile not obliged to adopt the precise language of the prayer, [the trial court] is nevertheless required to give the instruction, in substance at least[.]" *Erie Ins. Exch. v. Bledsoe*, 141 N.C. App. 331, 335, 540 S.E.2d 57, 60 (2000) (citations omitted). "Failure to give a requested and appropriate jury instruction is reversible error if the requesting party is prejudiced as a result of the omission." *Outlaw v. Johnson*, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (citations omitted).

In the present case, Defendants contend the trial court erred when it did not instruct the jury, as follows, on intervening causes:

> To find that Defendants' act [or omission] caused plaintiff's injury, you need not find that Defendants' act [or omission] was the nearest cause, either in time or space. However, if plaintiff's injury was caused by a later, independent event that intervened between Defendants' act [or omission] and plaintiff's injury, Defendants are not liable unless the injury was reasonably foreseeable by the Defendants.

During the charge conference, counsel for Defendants contended there were three intervening causes that warranted instruction to the jury: Hailey himself, "by his failing to consult with a Virgin Islands attorney before deciding to take the actions he did in North Carolina"; this Court in *Tropic Leisure I*; and the U.S. Virgin Islands court system. The trial court declined to instruct the jury in accordance with Defendants' proposed instructions; however, the trial court instructed the jury on proximate cause as follows:

> A proximate cause is a cause which in a natural and continuous sequence produces a person's damage and is a cause which a reasonable and prudent person could have foreseen would probably produce such damage or some similar injurious result. There may be more than one proximate cause of damage; therefore, the plaintiff need not prove that the defendants' conduct was the sole proximate cause of the damage. The plaintiff must prove by the greater weight of the evidence only that the defendants' conduct was a proximate cause.

Defendants contend the trial court's instruction is error because "the issue of whether Mr. Hailey, this Court, or the USVI court system were intervening causes in this case was litigated throughout the trial and supported by the evidence." However, Defendants fail to articulate both how the trial court's actual instruction did not incorporate, in substance, their request on intervening causes and further, how they were prejudiced as a result of the trial court's omission. *See Outlaw*, 190 N.C. App. at 243, 660 S.E.2d at 559. Indeed, the trial court stated: "There may be more than one proximate cause of damage . . . plaintiff must prove by the greater weight of the evidence only that the defendants' conduct was *a* proximate cause." (emphasis added). The trial court's actual instruction also included the element of foreseeability, as did

Defendants' proposed instruction. Accordingly, the trial court did not err in its instructions to the jury.

B. Admission and Exclusion of Evidence

[5] Appealing Defendants further contend the trial court abused its discretion in excluding Defendants' proffered video deposition of Russell Pate and by allowing Plaintiff's expert in North Carolina appellate practice and procedure, former-Justice Robert Orr, to testify regarding the reasonableness of Plaintiff's counsel's attorney's fees.

"We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008). Similarly, a trial court "is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony" and will only be reversed upon abuse of discretion. *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984).

Defendants proffered a video deposition of Russell Pate, 2016 president of the U.S. Virgin Islands Bar Association, arguing it was relevant because it addressed proximate cause and foreseeability. Pursuant to a pretrial motion in limine filed by Plaintiff, the trial court excluded the deposition testimony, concluding it lacked adequate foundation, was speculative, and ultimately "irrelevant in light of the [trial court's] granting of partial summary judgment on the issue of liability." The trial court also concluded, pursuant to Rule 403, even "if any of Pate's testimony is relevant, it's [sic] probative value is substantially outweighed by its unfair prejudice, confusion of issues, and probable misleading the jury." Defendants again attempted to introduce Pate's testimony during trial; again, the trial court denied Defendants' request.

Although Defendants argue the trial court's decision was an abuse of discretion, Defendants do not provide any arguments explaining why. Instead, Defendants simply assert the testimony was "relevant and critical to Defendants' case on the issue of compensatory damages." Accordingly, the trial court did not abuse its discretion in excluding Pate's testimony.

[6] Defendants also assert the trial court abused its discretion in admitting former-Justice Orr's testimony regarding the reasonableness of Plaintiff's counsel's attorney's fees, contending it was "not relevant and highly prejudicial" because former-Justice Orr "had no first hand knowledge about Mr. Hailey's legal costs in *Tropic Leisure I*." Former-Justice Orr was tendered and accepted without objection as an expert in "appellate practice and procedure in North Carolina." Former-Justice

Orr testified after reviewing the Record, filings, *Tropic Leisure I*, and the various rates of Plaintiff's counsel's for work done by attorneys and paralegals, that the amount of attorney's fees Plaintiff requested was reasonable. Defendants, however, objected on the basis that as an expert in appellate practice, former-Justice Orr could not give an opinion on the reasonableness of trial fees, which the trial court overruled.

Again, Defendants do not explain how the trial court's ruling was an abuse of discretion. Rule 702, which governs expert testimony, provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2019). Rule 702 does not require an expert have firsthand knowledge before providing his or her opinion; moreover, former-Justice Orr's testimony concerning the reasonableness of Plaintiff's attorney's fees is within the purview of his expertise as an appellate practitioner. We discern no abuse of discretion on behalf of the trial court.

V. JNOV

[7] "On appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury." *Tomika Invs., Inc. v. Macedonia True Vine Pent. Holiness Ch. of God, Inc.*, 136 N.C. App. 493, 498-99, 524 S.E.2d 591, 595 (2000).

> In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn

> therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke University, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989 (citation omitted).

The Appealing Defendants argue the trial court erred in denying Defendants' Motion for Directed Verdict, Motion for JNOV, and Motion to Alter or Amend the Judgment. Defendants contend there is not sufficient evidence they proximately caused Plaintiff's alleged damages as required for anything more than nominal damages under Section 1983.

"[W]hen § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306, 91 L. Ed. 2d 249, 258 (1986) (citations omitted). "[T]he causal link in § 1983 cases is analogous to proximate cause." *Shaw v. Stroud*, 13 F.3d 791, 800 (4th Cir. 1994). "Proximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case." *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979) (alterations, citations, and quotation marks omitted). Moreover, "[i]n most cases involving private defendants, there is no proximate cause issue at all. . . . The issue is whether the particular conduct is purely private, and thus immune from section 1983 liability, or is state action." *Arnold v. Intern. Business Machine*, 637 F.2d 1350, 1356 (9th Cir. 1981).

Here, considering all evidence in the light most favorable to Plaintiff, there is sufficient evidence to reach the jury on the question of whether Defendants were the proximate cause of Plaintiff's alleged damages—the attorney's fees and costs stemming from the litigation in *Tropic Leisure I*. Defendants obtained a Default Judgment against Plaintiff and subsequently sought to enforce the Default Judgment in North Carolina, initiating the action in *Tropic Leisure I*. Defendants argue intervening causes—Plaintiff's own actions, our decision in *Tropic Leisure I*, and the USVI Small Claims Court—effectively broke the casual chain. However, "[a]n efficient intervening cause is a new proximate cause. It must be an independent force which *entirely supersedes* the original action and renders its effect in the chain of causation remote." *Adams v. Mills*, 312 N.C. 181, 194, 322 S.E.2d 164, 173 (1984) (emphasis added) (citations omitted). Defendants do not demonstrate that any of the alleged intervening causes were sufficient to *supersede* Defendants' actions. Therefore, there was sufficient evidence

to reach the jury on the issue of proximate cause; the trial court's JNOV Order is affirmed.

VI. Attorney's Fees

[8] In the present case, the trial court entered its Amended Judgment on the jury verdicts and JNOV Order on 16 August 2018, and Defendants timely filed Notice of Appeal on 12 September 2018. The parties' cross motions for attorney's fees remained pending, and the trial court entered its written Fees Order on 20 November 2018, which granted Plaintiff's attorney's fees on the basis Plaintiff was the "prevailing party" under 42 U.S.C. § 1983 as required by 42 U.S.C. § 1988. 42 U.S.C. § 1988(b) (2019) ("the court, in its discretion, may allow the *prevailing party*, other than the United States, a reasonable attorney's fee as part of the costs" (emphasis added)).

Although not an argument raised by the parties, we conclude the trial court lacked jurisdiction to enter its award of attorney's fees once Defendants filed their first Notice of Appeal from the underlying judgments. "Jurisdiction of the court over the subject matter of an action is the most critical aspect of the court's authority to act." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). "Every court necessarily has the inherent judicial power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction[,]" therefore, "[t]he question of subject matter jurisdiction may be raised at any time[.]" *Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986).

Generally, "timely notice of appeal removes jurisdiction from the trial court and places it in the appellate court." *McClure v. County of Jackson*, 185 N.C. App. 462, 469, 648 S.E.2d 546, 550 (2007) (citation and quotation marks omitted). N.C. Gen. Stat. § 1-294 provides an exception for matters "not affected by the judgment appealed from." N.C. Gen. Stat. § 1-294 (2019). However, "[w]hen, as in the instant case, the award of attorney's fees was based upon the plaintiff being the 'prevailing party' in the proceedings, the exception set forth in N.C. Gen. Stat. § 1-294 is not applicable." *McClure*, 185 N.C. App. at 471, 648 S.E.2d at 551.

Accordingly, the trial court was divested of jurisdiction to enter the Fees Order when Defendants filed their first Notice of Appeal. This Court has expressly held the exception provided by N.C. Gen. Stat. § 1-294 is inapplicable in cases like the present where the decision to grant or deny awards of attorney's fees is based on a party's status as the "prevailing party." *See id.* Because it was entered without jurisdiction, we

vacate the Fees Order and remand the matter to the trial court to reconsider the award, including any fees and costs incurred on appeal claimed by Plaintiff. *C.f. Fungaroli v. Fungaroli*, 53 N.C. App. 270, 273, 280 S.E.2d 787, 790 (1981) (affirming a trial court's award of appellate attorney's fees, noting "an award of attorney's fees for services performed on appeal should ordinarily be granted, provided the general statutory requirements for such an award are duly met"); *Vasquez v. Fleming*, 617 F.2d 334, 336 (3d Cir. 1980) ("[A]ttorney fees may be awarded to the prevailing party under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, by a court of appeals for a successful appeal.").

Conclusion

Accordingly, for the foregoing reasons, the trial court's Summary Judgment Order, 23 March Order Granting Plaintiff's Motion to Compel, 12 June Order Granting Plaintiff's Motion for Sanctions, Pretrial Order, and JNOV Order are affirmed. Further, we conclude there was no error in the entry of the Amended Judgment (amending the prior Judgment) upon the jury verdict against Defendants. We vacate the Fees Order and remand this matter to the trial court for reconsideration.

AFFIRMED IN PART; NO ERROR IN PART; VACATED IN PART AND REMANDED.

Judges STROUD and YOUNG concur.

IN RE A.S.

[275 N.C. App. 506 (2020)]

IN THE MATTER OF A.S. & A.C.

No. COA20-69

Filed 31 December 2020

Child Abuse, Dependency, and Neglect—permanency planning order—findings of fact—unsupported by competent evidence

In a permanency planning order involving two children, in which the trial court eliminated reunification from one child's permanent plan, the Court of Appeals vacated the order after determining that several findings of fact—regarding respondent-mother's delay, compliance with her case plan, and availability to the department of social services—were not supported by competent evidence or were contradicted by record evidence and the trial court's other permanency planning orders. The conclusions of law, including that respondent was unfit and had acted inconsistent with her constitutional right to parent, were also in error where they rested upon the unsupported findings.

Appeal by Respondent-Mother from an Order entered 11 October 2019, by Judge Tiffany M. Whitfield in Cumberland County District Court. Heard in the Court of Appeals 3 November 2020.

James D. Dill for petitioner-appellee Cumberland County Department of Social Services.

Forrest Firm, P.C., by Patrick S. Lineberry, for respondent-appellant mother.

K&L Gates, LLP, by Sophie Goodman, for guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

Respondent-Mother (Respondent-Mother) appeals from a "Subsequent Permanency Planning Order & Order to Close Juvenile File" (Order) ceasing reunification efforts with her minor child A.C. (Antoinette).[1] The Record reflects the following:

1. Pseudonyms are used pursuant to N.C. R. App. P. 42 to protect the identity of the minor children.

Respondent-Mother is the mother of two minor children—A.S. (Alexis), born March 2011, and A.C. (Antoinette), born December 2009. The Cumberland County Department of Social Services (DSS) became involved in the present case beginning on 22 February 2018, after receiving a Child Protective Services Report regarding the safety of Alexis and Antoinette in October and December of 2017. DSS alleged Alexis and Antoinette were abused, neglected, and dependent. The Petition incorporated the results of child medical examinations performed on both children. During Antoinette's exam, she disclosed Respondent-Mother's then-boyfriend had touched her inappropriately and had made her touch his penis. Alexis's exam revealed markings on her buttocks consistent with a belt mark. Both children informed the medical examiners of behavior that was consistent with their injuries. The same day, DSS obtained nonsecure custody of Alexis and Antoinette, and the sisters were placed with Antoinette's paternal grandparents.

After a hearing on 30 May 2018, the trial court entered its written Adjudication Order on 25 June 2018, formally adjudicating Alexis and Antoinette neglected pursuant to N.C. Gen. Stat. § 7B-101(15) and dismissing the allegations of abuse and dependency. The trial court ordered Alexis and Antoinette remain at their out-of-home placement with Antoinette's paternal grandparents and ordered Respondent-Mother have supervised visitation weekly. The trial court accordingly entered its Disposition Order on 12 September 2018, which continued Alexis and Antoinette's physical and legal custody with DSS and their placement with Antoinette's paternal grandparents. The Disposition Order continued Respondent-Mother's weekly supervised visitation and granted DSS the authority to expand Respondent-Mother's visitation. The trial court ordered Respondent-Mother: "(a) Continue to engage in mental health counseling; (b) Continue to engage in medication management; (c) Complete age-appropriate parenting classes; (d) Obtain and maintain stable and suitable housing; and (e) obtain and maintain stable employment."

In accordance with N.C. Gen. Stat. § 7B-906.1, the trial court held an initial permanency planning hearing on 5 September 2018, and the trial court entered its written Review and Initial Permanency Planning Order (Initial Order) on 28 January 2019. The Initial Order set the primary permanent plan for both Alexis and Antoinette as reunification with Respondent-Mother with a secondary permanent plan of guardianship. After the initial permanency planning hearing but before the filing of the Initial Order, on 27 December 2018, Respondent-Mother filed for a Domestic Violence Protective Order against her former boyfriend

for "threatening to shoot [her] house and kill [her,]" which was granted on 4 January 2019.

The trial court held another permanency planning hearing on 29 January 2019, where the sisters' out-of-home placement with Antoinette's paternal grandparents was continued; however, on 11 February 2019, DSS met with the paternal grandparents and they indicated they could no longer serve as Alexis's placement. Accordingly, on 19 February 2019, DSS filed a Motion for Review requesting a hearing on the placement of the juveniles. The trial court granted the request to move Alexis to a new placement while Antoinette stayed with her paternal grandparents.

In preparation for a 16 July 2019 subsequent permanency planning hearing, DSS prepared its court report and recommended no changes to either child's permanent plan of reunification. DSS reported Respondent-Mother was actively participating in her recommended services and made herself available to DSS. DSS also noted it had no concerns with Respondent-Mother's ability to provide for the health and safety of her children. The Guardian ad litem report echoed DSS's and recommended the sisters' respective placements remain the same, while Respondent-Mother "should have increased overnight visits that lead up to a trial home visit with both girls."

The trial court held the subsequent permanency planning hearing on 16 July 2019, and entered its written Order on 26 September 2019, which it re-filed on 11 October 2019. At the hearing, both the Guardian ad litem and DSS reports were submitted to the trial court. Social Worker Ebony Alford testified before the trial court and reiterated Respondent-Mother had stable housing, was employed, and was still engaging in counseling and medication management and working with DSS. Alford described Respondent-Mother's visitation and noted "she's only getting one overnight visit due to her work schedule"; however, Alford also testified Respondent-Mother indicated her employer was willing to switch her shifts if her children were returned to her. Alford recommended the permanent plan remain reunification with Respondent-Mother for both Alexis and Antoinette.

After counsel provided their respective closing arguments, the trial court inquired: "Let me hear from the social worker [DSS]'s position on why the Court should not just proceed with custody in [Antoinette's] matter on today's date." Counsel for Respondent-Mother objected; however, the trial court continued and granted legal and physical custody of Antoinette to her paternal grandparents, eliminating reunification with Respondent-Mother from Antoinette's permanent plan.

In its written Order, the trial court entered Findings of Fact and ordered Alexis's permanent plan should remain reunification with Respondent-Mother; however, consistent with its Order as orally rendered at the hearing, the trial court eliminated reunification from Antoinette's permanent plan, updating it to custody with other suitable persons—her paternal grandparents. The trial court also eliminated Antoinette's secondary plan on the basis "the primary plan of custody with other suitable persons has been achieved[.]" Antoinette's visitation with Respondent-Mother remained unchanged with the option for expansion. Respondent-Mother timely appealed the trial court's Order.

Issue

On appeal, the issue before this Court is whether the trial court's findings of fact are supported by competent evidence and whether those findings, in turn, support the trial court's conclusions of law.

Analysis

I. Standard of Review

"Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and [if] the findings support the conclusions of law. If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal." *In re N.B.*, 240 N.C. App. 353, 358, 771 S.E.2d 562, 566 (2015) (citation and quotation marks omitted). We review the trial court's conclusions of law de novo. *In re K.L.*, 254 N.C. App. 269, 272-73, 802 S.E.2d 588, 591 (2017).

II. Permanency Planning Order

A. Findings of Fact

On appeal, Respondent-Mother challenges a multitude of the trial court's Findings of Fact as unsupported by competent evidence. First, Respondent-Mother contends Finding of Fact 14 is "too vague to shed any meaningful insight into any of the trial court's other findings or conclusions of law." In Finding of Fact 14, the trial court found, citing testimony from the hearing, "[Antoinette] has behaviors when she comes back from a visit with the Respondent Mother and that this behavior is being addressed in therapy." Indeed, Respondent-Father and the paternal grandfather both testified at the permanency planning hearing regarding Antoinette's behavior when she returned from visitations, including specific examples of her being defiant with her grandparents and Antoinette questioning why Respondent-Father "didn't want her."

The Finding is supported by competent evidence reflecting Antoinette has a change in behavior when returning from visitations.

In Finding 22 the trial court found Respondent-Mother "is not [a] fit or proper person for the continued care, custody, or control of the juvenile. She has not remained available to the Court, [DSS], and the Guardian ad litem for the juvenile." The same statement—that Respondent-Mother has not "remained available" to the trial court—is set forth again in Finding 54:

> Based upon the facts herein, the court finds that return of the juveniles to the custody of the Respondents would be contrary to the welfare and best interest of the juvenile. The Respondents are not fit or proper persons for the continued care of the, custody or control of the juveniles. *The Respondents have not remained available to the Court, [DSS], and the Guardian ad Litem for the juvenile.*"

(emphasis added).

Respondent-Mother challenges these Findings and correctly highlights they are contradicted by the trial court's other Findings and the Record. Indeed, immediately preceding Finding 22, in Finding 21, the trial court found Respondent-Mother "is actively participating or cooperating with the permanent plan, [DSS], and the Guardian ad Litem for the juveniles."[2] The Record similarly reflects Respondent-Mother did, in fact, "remain available" to the trial court, DSS, and the Guardian ad litem. Respondent-Mother was present at all the hearings in the underlying case except for the very first, where she was represented by counsel. DSS included in its most recent report prepared for the subsequent permanency planning hearing, that Respondent-Mother "makes herself available to the agency" and was "engaging in her services." Furthermore, there is no evidence in the Record of attempts to contact Respondent-Mother by the trial court, DSS, or the Guardian ad litem that were unsuccessful.

In brief DSS concedes the portion of the Findings repeating Respondent-Mother "has not remained available" is "most likely [ ] a

2. Respondent-Mother also highlights the inconsistency contained within Finding 21 alone: "The Court finds that [Respondent-Mother] is not making adequate progress within a reasonable period of time to achieve the permanent plan. She is actively participating or cooperating with the permanent plan, [DSS], and the Guardian ad Litem for the juveniles." As discussed *infra*, the trial court's finding Respondent-Mother is "not making adequate progress within a reasonable period of time" is not supported by competent evidence in the Record.

clerical error and should not include [Respondent-Mother] as her availability has not been questioned, only the timeliness of her compliance with her case plan and alleviating the conditions that led to the removal of the juveniles." However, "[a] clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *In re R.S.M*, 257 N.C. App. 21, 23, 809 S.E.2d 134, 136 (2017) (alterations, citations, and quotation marks omitted). The inclusion of the word *not* changes the entire meaning of the trial court's Finding. It is not clear that the trial court's inclusion of the word *not* is merely a clerical error especially as it is included in more than one of the trial court's Findings. Accordingly, Finding 22 and the portion of Finding 54 repeating that Respondent-Mother did not "remain available" is not supported by competent evidence.

Respondent-Mother next challenges Findings 16, 17, 20, and 38 as they relate to the timeliness and purported delay in addressing her case plan:

> 16. The Court finds that at the time of the filling of the Court Report submitted by [DSS] on July 5, 2019, the juvenile had been in the care of [DSS] in excess of 481 days. That is beyond the time frame for creating and finalizing some form of permanency for the juveniles. . . .
>
> 17. The Court finds that with regard to the juveniles, the failure of the Respondents to address issues which gave rise to removal of the juveniles from the home *within a timely manner* and in a reasonable manner, constituted waiver of their constitutional right of paramount custody . . . .
>
> . . . .
>
> 20. The Court finds that [Respondent-Mother] has been compliant with continuing her therapy services and psychoeducation. She has completed a mental health assessment, a psychiatric assessment and parent psychoeducational classes. She continues to engage in other services as well . . . . She is employed and has stable housing. She has completed parenting classes and in regard to her case plan only needs to remain compliant with ongoing counseling and medication management. However, the Court finds that Respondent Mother's *delay* in fully engaging in this matter has caused the juveniles to remain in

> foster care for an unreasonable amount of time without showing to the satisfaction of this court a reasonable answer for not completely satisfying to [sic] objectives laid out at the Disposition in order to reunify with the juveniles . . . .
>
> . . . .
>
> 38. . . . On today's date, over 481 days into the case, neither the Respondent Mother or the Respondent Father have completely to the satisfaction of this Court alleviated those issues which led to the removal of [Antoinette] from the home and placed into the custody of [DSS]. . . .

Respondent-Mother contends the Record "does not indicate [Respondent-Mother] delayed in engaging with her case plan in any way that would underwrite the trial court's concerns." Indeed, the Record, including DSS's own reports, reflects the Petition was filed 22 February 2018, and by 1 May 2018, Respondent-Mother was enrolled in treatment and had "participated in a comprehensive clinical assessment." Respondent-Mother had attended her therapy sessions and also enrolled in parenting classes.

On 27 June 2018, DSS prepared its dispositional report and reported Respondent-Mother had housing and employment, yet needed parenting classes, transportation, and to continue with mental health treatment. In an 8 August 2018 report, DSS again reported Respondent-Mother was engaging in her services and made herself available to the agency. DSS noted concerns regarding Respondent-Mother's contact with her former boyfriend at that time but requested Respondent-Mother consent to random home visits to show he was not present in the home. In letters dated 30 August 2018, and 28 January 2019, Respondent-Mother's Parent Child Interaction Therapist stated Respondent-Mother continued to attend her psychiatric appointments and was "fully compliant with services and treatment recommendations." In multiple reports prepared for subsequent permanency planning hearings, DSS reported Respondent-Mother was engaging in her services and made herself available to DSS. Moreover, in the trial court's subsequent permanency planning order filed 14 April 2019, the trial court found Respondent-Mother "has been fully compliant with therapy and other services that have been recommended[,]" "is employed[,]" and "has engaged in her case plan." The trial court noted it "still ha[d] concerns about [Respondent-Mother's] ability to keep the juveniles safe if placed back in her custody at this time given her contact with [her former boyfriend]. . . ." However, in a subsequent permanency planning order filed 28 May 2019, the trial court

made no findings regarding further contact with him. Instead, the trial court found "there are no remaining services for Respondent-Mother to complete on her case plan other than to remain compliant with ongoing counseling and medication management."

Thus, the Record—including DSS's own filings and reports and the trial court's past subsequent permanency planning orders—reflects Respondent-Mother was engaged and compliant in her case plan and made herself available to the trial court, DSS, and the Guardian ad litem. The trial court's Order does not include any specific findings of fact that support its finding Respondent-Mother delayed in meaningfully engaging with her case plan or referred services. Instead, it appears from the Record within almost two-months of the filing of the Petition and *prior* to the trial court's adjudication of neglect, Respondent-Mother began engaging with her recommended services. There are no reports of Respondent-Mother missing appointments or court hearings or of any additional behavior that would support the trial court's Finding of Respondent-Mother's delay. Accordingly, the portions of the trial court's Findings that purport to find Respondent-Mother delayed in engaging with her case plan and services recommended by DSS are not supported by competent evidence.

Respondent-Mother also contends the portion of Finding 17 stating her failure "to address issues which gave rise to the removal of the juveniles from the home within a timely manner and in a reasonable manner, constituted a waiver of [her] constitutional right of paramount custody" and was "inconsistent with [her] constitutionally protected status as [a] parent[,]" is more appropriately a conclusion of law. We agree and address it *infra*. *See In re A.C.*, 247 N.C. App. 528, 535, 786 S.E.2d 728, 735 (2016).

Respondent Mother also challenges portions of Findings 35, and 36 as unsupported by competent evidence and contends several portions, in addition to Finding 37, are also more appropriately conclusions of law:

> 35. The Court finds that it is not possible for the juveniles to return home immediately, or within the next six (6) months, inasmuch as the Respondent Parents have not yet fully alleviate[d] the conditions which led to the removal of the juveniles. . . . Finally, as to [Respondent-Mother], the Court notes that she has been complaint [sic] in obtaining and following through with services at this time; however, her compliance with the case plan and fully engagement [sic] in the services previously ordered has

> reached beyond a reasonable [time] to complete the services that were aimed at alleviating the conditions that led to the juveniles being removed from her care. As such, the juveniles have remained placed outside of the home for an extensive period of time. . . .
>
> 36. . . . At the last hearing the Court informed the Respondent Parents that if they did not substantially comply with their case plan to alleviate the issues that led to the removal of the juveniles from the home that [DSS] may possibly be relieved of reunification efforts. [DSS] has made referrals for services for Respondent Mother and Respondent Mother has not taken full advantage of those referrals. . . .
>
> 37. The Court finds that inasmuch as the juvenile's placement with a parent is unlikely within six months, a legal guardianship should be established with the Respondents still maintaining the ability to have visitation with the juveniles . . . .

Respondent-Mother contends the trial court's Finding she had "not yet fully alleviate[d] the conditions which led to the removal of the juveniles" is not supported by competent evidence. To the extent this is a finding of fact, we agree with Respondent-Mother. The trial court found, in Finding 18, "Respondent-Mother was ordered to complete the following services at the time of the disposition order *to alleviate the behaviors or conditions which led to the removal of the juveniles*: Mental Health Counseling, Medication Management, Age Appropriate Parenting classes, obtain and maintain stable housing; and to obtain and maintain stable employment." (emphasis added). Then in Finding 20, the trial court found Respondent-Mother "has been compliant with continuing her therapy services and psychoeducation. . . . She is employed and has stable housing. She has completed parenting classes and in regard to her case plan *only* needs to remain compliant with ongoing counseling and medication management." (emphasis added). Therefore, the trial court's Finding Respondent-Mother "ha[s] not yet fully alleviate[d] the conditions which led to the removal of the juveniles" is not supported by competent evidence. By the terms of the trial court's own Order it appears Respondent-Mother alleviated the conditions that led to the removal of the juveniles—"Mental Health Counseling, Medication Management, Age Appropriate Parenting classes, obtain and maintain stable housing; and to obtain and maintain stable employment."

Instead, it seems the trial court bases Finding 35 on Respondent-Mother's purported delay in "fully alleviat[ing] the conditions which led to the removal of the juveniles." The Finding continued: "her compliance with the case plan and fully engagement [sic] in the services previously order[ed] has reached beyond a reasonable [time] to complete the services . . . ." However, as discussed, the trial court did not make sufficient factual findings regarding Respondent-Mother's delay in engaging with her case plan or offered services. Therefore, this Finding is also not supported by competent evidence in the Record.

Finding 36 contains the conclusory statement that DSS "made referrals for services for Respondent Mother and Respondent Mother has not taken full advantage of those referrals"; however, the Order contains no additional findings elaborating on what services DSS referred Respondent-Mother complete. The Record similarly does not include evidence of any referrals of which Respondent-Mother did not take full advantage of or that remained incomplete. DSS contends this Finding is supported because Respondent-Mother "did not have a viable plan to allow for Antoinette to be placed back in her home nor was she even able to fully exercise overnight weekend visitation . . . ." Although there was no exact plan for altering Respondent-Mother's work schedule presented at the hearing, Alford testified regarding her conversation with Respondent-Mother where Respondent-Mother indicated that she spoke with her employer about altering her schedule should she have custody of her children. Regardless, the trial court made no factual findings to this point. Accordingly, the trial court's conclusory Finding Respondent-Mother did not take full advantage of DSS's referrals is not supported by any competent evidence in the Record.

B. Conclusions of Law

Ultimately, Respondent-Mother contends the trial court erred in its Conclusions of Law eliminating reunification from Antoinette's permanent plan.[3] The trial court concluded in mixed Findings of Fact and its express conclusions of law: Respondent-Mother is "not [a] fit or proper person[ ] for the continued care, custody and control of the juveniles"; "Return of the juveniles to the custody of the Respondent Parents would be contrary to the welfare and best interests of the juveniles"; "The primary permanent plan of custody with other suitable persons for

3. In addition to the portions of the above Findings of Fact that operate more as ultimate findings or conclusions of law, Respondent-Mother challenges Conclusions of Law 3, 4, 5, 6, 8, and 11.

[Antoinette] is in her best interest"; and Respondent-Mother's failure "to address issues which gave rise to the removal of the juveniles from the home within a timely manner and in a reasonable manner, constituted waiver of [her] constitutional right of paramount custody" and was "inconsistent with [her] constitutionally protected status as [a] parent." Based upon these conclusions, the trial court eliminated reunification with Respondent-Mother from Antoinette's permanent plan and granted physical and legal custody to her paternal grandparents.

We review the trial court's conclusions of law de novo. *See In re A.C.*, 247 N.C. App. at 535, 786 S.E.2d at 735. We also review "a trial court's determination as to the best interest of the child for an abuse of discretion." *Id.* at 532-33, 786 S.E.2d at 733 (citation and quotation marks omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.H.*, 266 N.C. App. 41, 44, 832 S.E.2d 162, 164 (2019) (citations and quotation marks omitted). However, when a trial court concludes a parent acted inconsistent with his or her constitutionally protected status, "[t]he trial court must clearly 'address whether respondent is unfit as a parent or if her conduct has been inconsistent with her constitutionally protected status as a parent, should the trial court . . . consider granting custody or guardianship to a nonparent.' " *In re K.L.*, 254 N.C. App. at 283, 802 S.E.2d at 597 (citation omitted) (second alternation in original). Such findings must be supported by clear and convincing evidence, which is "more exacting than the preponderance of the evidence standard generally applied in civil cases, but less than the beyond a reasonable doubt standard applied in criminal matters." *Id.* (citations and quotation marks omitted).

Here, the trial court's conclusions, including that Respondent-Mother was unfit and acting inconsistent with her constitutionally protected status, rests upon the purported findings she did not alleviate the conditions that led to the removal of the juveniles and that she delayed in engaging with her case plan. As discussed *supra*, such findings are unsupported by competent evidence or, in some instances, contradicted by the Record. Accordingly, under our de novo review, the trial court's conclusions of law are error. *See id.* ("No findings of fact in the trial court's order addresses, whether Respondent-mother was unfit or how she was acting inconsistently with her protected status as a parent at the time of the hearing. The trial court's conclusion is unsupported by findings of fact."). If, indeed, the trial court's concerns regarding Respondent-Mother's delay or noncompliance with her case plan are founded, the trial court should make appropriate findings of fact

supported by competent evidence in the Record. Accordingly, the trial court's Order is vacated and this matter is remanded for reconsideration in light of this opinion.

Conclusion

Accordingly, for the foregoing reasons, the trial court's Order eliminating reunification from Antoinette's permanent plan is vacated and the matter is remanded to the trial court for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges TYSON and MURPHY concur.

IN THE MATTER OF J.M., MINOR CHILD

No. COA20-153

Filed 31 December 2020

1. Judges—substitute judge—scope of authority—order on remand

After a case was returned to the district court on remand in a juvenile neglect matter for reconsideration of a conclusion of law, the substitute trial judge did not exceed her authority by making findings of fact without taking new evidence and instead relying on a transcript of a previous hearing. The substitute judge, who took over the case after the original judge left office when his term expired, acted in accordance with Civil Procedure Rule 63 (authorizing a substitute judge to take over court duties when the original judge is unable to perform those duties) and with the appellate court's mandate on remand.

2. Child Abuse, Dependency, and Neglect—neglect—order on remand—different judge—new findings

In a juvenile case that was returned to the district court on remand for reconsideration of a neglect adjudication, the substitute trial judge did not improperly resolve an evidentiary conflict in the original evidence when she made findings regarding allegations and recantations of the child's mother about respondent-father's misconduct. The Court of Appeals affirmed the adjudication order where

the substitute judge's findings were consistent with those made by the original judge (whose findings were largely upheld on appeal) and supported the adjudication of neglect.

Appeal by respondent-father from orders entered 1 November 2019 by Judge Shamieka L. Rhinehart in Durham County District Court. Heard in the Court of Appeals 17 November 2020.

The Law Office of Derrick J. Hensley, PLLC, by Derrick J. Hensley, for petitioner-appellee Durham County Department of Social Services.

Matthew D. Wunsche for guardian ad litem.

Richard Croutharmel for respondent-appellant father.

ZACHARY, Judge.

Respondent, the father of "Jazmin,"[1] appeals from adjudication and disposition orders entered on remand, in which the trial court concluded that Jazmin was a neglected juvenile and ordered that she remain in the custody of the Durham County Department of Social Services. After careful review, we affirm.

Background

This case arises out of a hearing and orders entered on remand following this Court's decision in *In re J.M.*, 255 N.C. App. 483, 804 S.E.2d 830 (2017), *disc. review improvidently allowed*, 371 N.C. 132, 813 S.E.2d 847 (2018) (per curiam). A complete recitation of the underlying facts in this case can be found in that prior opinion. We recite here those facts necessary for our disposition of this appeal.

On 11 September 2015, the Durham County Department of Social Services ("DSS") filed a juvenile petition alleging that Jazmin and her younger brother were abused, neglected, and dependent juveniles. On 12 July 2016, the matter came on for hearing in Durham County District Court before the Honorable William A. Marsh, III. Judge Marsh rendered his findings of fact and conclusions of law in open court, and entered his written order on 21 November 2016. Judge Marsh concluded that Jazmin was a "seriously neglected child" and that her brother was

1. The pseudonym adopted by the parties is used for ease of reading and to protect the juvenile's identity.

an abused child. Judge Marsh further concluded that "[r]eunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile[s'] health or safety." Judge Marsh suspended the parents' visitation with their children, and set guardianship with the children's maternal grandparents as the primary permanent plan, with adoption as the secondary plan.

Respondent appealed to this Court.[2] Respondent challenged eight of the trial court's findings of fact; this Court determined that all but one finding and portions of two other findings were supported by competent evidence. *Id.* at 486–95, 804 S.E.2d at 833–38. On 19 September 2017, this Court affirmed in part, vacated in part, and reversed in part and remanded the trial court's order. *Id.* at 500, 804 S.E.2d at 841. This Court affirmed the trial court's adjudication of Jazmin's brother as an abused juvenile, *id.* at 495–96, 804 S.E.2d at 838–39, and vacated the "portion of the trial court's order that released DSS from further reunification efforts," *id.* at 500, 804 S.E.2d at 841. However, we reversed the adjudication of Jazmin as "seriously neglected" because "the trial court was acting under a misapprehension of the law—the trial court used the definition of 'serious neglect' in N.C.G.S. § 7B-101(19a), pertaining to the responsible individuals' list, as opposed to the definition of 'neglect' in N.C.G.S. § 7B-101(15), pertaining to an adjudication of neglect." *Id.* at 497, 804 S.E.2d at 839. This Court remanded that adjudication "for the trial court's consideration of neglect within the proper statutory framework." *Id.*

On 8 June 2018, after hearing oral arguments, our Supreme Court determined that it had improvidently allowed discretionary review of this Court's opinion. *In re J.M.*, 371 N.C. 132, 813 S.E.2d 847 (2018) (per curiam). By the time this matter returned to the district court on remand, Judge Marsh's term had ended and he was no longer a district court judge.[3] On 14 November 2018, following the recusal of another judge, this matter was assigned to the Honorable Shamieka L. Rhinehart.

On 17 June 2019, following a pretrial hearing, Judge Rhinehart determined, over Respondent's objection, that the transcript of the 12 July 2016 hearing before Judge Marsh, as well as "[a]ll exhibits previously

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2. The children's mother did not join in Respondent's appeal of the trial court's order. *Id.* at 486 n.1, 804 S.E.2d at 833 n.1.

3. Judge Marsh was defeated in the 2016 general election. N.C. State Bd. of Elections, 11/08/2016 Official General Election Results – Durham, https://er.ncsbe.gov/?election_dt=11/08/2016&county_id=32&office=JUD&contest=1283 (last visited Dec. 1, 2020).

accepted by the Court in the prior hearing[,]" constituted "competent, relevant and admissible evidence and [would] be allowed admitted." Judge Rhinehart similarly determined that she was "bound by any and all orders, rulings and findings of the Court of Appeals and [would] not disturb those," and that she would "take judicial notice of any Findings of Fact and decretal portions of the order of Judge Marsh which [were] not challenged or disturbed by the Court of Appeal's opinion referenced above and [would] therefore adopt those findings."

On 8 August 2019, this matter came on for hearing on remand before Judge Rhinehart. Consistent with her pretrial ruling, Judge Rhinehart admitted the 2016 hearing transcript into evidence, over Respondent's renewed objection. Judge Rhinehart then admitted into evidence several other exhibits—including Jazmin's September 2015 Complete Medical Examination ("CME") and her brother's medical records—that had been accepted by Judge Marsh at the 2016 hearing. Judge Rhinehart also took judicial notice of Judge Marsh's findings of fact "that were undisturbed [by] the Court of Appeals" as well as his adjudication of Jazmin's brother as abused.

Neither DSS, nor the guardian *ad litem*, nor Respondent offered any new testimony or other evidence at the adjudication phase. After hearing the arguments of counsel, Judge Rhinehart rendered her findings of fact and conclusions of law in open court, determining, *inter alia*, that Jazmin was a neglected juvenile. Following a disposition hearing at which Respondent testified, Judge Rhinehart ordered, *inter alia*, that (1) Jazmin remain in the temporary legal custody of DSS and the physical custody of her maternal grandparents; and (2) Respondent's visitation with Jazmin be suspended, with the provision that Respondent could send Jazmin cards through her social worker. Judge Rhinehart also set adoption as the permanent primary plan, with reunification or guardianship as secondary plans.

On 1 November 2019, Judge Rhinehart entered separate written adjudication and disposition orders, documenting the rulings announced in open court. Respondent timely appealed.

Standard of Review

"The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2019).

> The role of this Court in reviewing a trial court's adjudication of neglect . . . is to determine (1) whether the findings

> of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact. If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary.

In re T.N.G., 244 N.C. App. 398, 405–06, 781 S.E.2d 93, 99 (2015) (citation and internal quotation marks omitted). "Unchallenged findings are binding on appeal." *In re V.B.*, 239 N.C. App. 340, 341, 768 S.E.2d 867, 868 (2015). The trial court's conclusion that a juvenile is neglected is subject to de novo review on appeal. *Id.*

Discussion

Respondent argues on appeal that the trial court "reversibly erred in concluding that Jazmin was a neglected juvenile at the remand adjudication hearing" because Judge Rhinehart "resolved an evidentiary conflict, that the initial adjudication hearing judge had not resolved, without hearing any sworn testimony." We disagree.

On appeal, Respondent asserts:

> The issue here is whether a judge acting in a substitute capacity (Judge Rhinehart) had the authority to resolve an evidentiary conflict (the mother's conflicting statements about Respondent-Father's care of the children) when the substitute judge heard no sworn testimony and relied solely on a written transcript of the hearing where the testimony was received by another judge (Judge Marsh).

Respondent's argument is premised on the oft-stated axiom that "when acting as the finder of fact, the trial court has the opportunity to observe the demeanor of the witnesses and determine their credibility, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *Balawejder v. Balawejder*, 216 N.C. App. 301, 318, 721 S.E.2d 679, 689 (2011) (citation omitted). Respondent essentially contends that because Judge Rhinehart relied on a transcript of a previous hearing, which denied her the opportunity to observe the demeanor of the witnesses, Judge Rhinehart lacked the authority to make findings of fact that resolved any conflicts in the evidence beyond those findings Judge Marsh made in the original order.

I. Role of Judge on Remand

[1] We first address Respondent's assertion that at the hearing on remand, Judge Rhinehart resolved an evidentiary conflict, and thereby

violated her "ministerial duty [as a substitute judge] of carrying out the mandate of this Court[.]"

Respondent cites *State v. Bartlett*, 368 N.C. 309, 776 S.E.2d 672 (2015), a criminal case, in support of his assertion that Judge Rhinehart exceeded her authority as a substitute judge by acting in more than a ministerial manner. In *Bartlett*, after noting that "a trial court is in no better position than an appellate court to make findings of fact if it reviews only the cold, written record," *id.* at 313, 776 S.E.2d at 674, our Supreme Court interpreted N.C. Gen. Stat. § 15A-977(d) (2013)—part of our Criminal Procedure Act—as "requir[ing] *the judge who presides* at [a] suppression hearing to make the findings of fact necessary to decide" a motion to suppress evidence in a criminal case, *id.* at 314, 776 S.E.2d at 675 (emphasis added). This holding, however, is not relevant to the instant juvenile case.

Respondent candidly admits that there is no similar requirement for adjudicatory orders in our Juvenile Code. *See* N.C. Gen. Stat. § 7B-807(b) (2019) ("The adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law."). However, Respondent asserts that this Court's holding in *In re Whisnant*, 71 N.C. App. 439, 322 S.E.2d 434 (1984), lends additional support for his contention that Judge Rhinehart exceeded her authority as a substitute judge. In *Whisnant*, one judge presided over the hearing, but another judge signed the adjudication and disposition orders. *Id.* at 440, 322 S.E.2d at 434–35. This Court held that the judge presiding over the hearing must sign the order from that hearing, or the hearing must be conducted de novo before another judge. *Id.* at 442, 322 S.E.2d at 436.

Significantly, Rule 63 of our Rules of Civil Procedure was not applicable to the situation presented in *Whisnant*. *Id.* at 441, 322 S.E.2d at 435. Rule 63 permits expanded authority for a substitute judge in limited circumstances:

> If by reason of death, sickness or other disability, resignation, retirement, expiration of term, removal from office, or other reason, a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, including entry of judgment, may be performed [by an appropriate substitute judge].

N.C. Gen. Stat. § 1A-1, Rule 63. The judge who presided over the hearing in *Whisnant* "was neither disabled nor did he ever make findings of fact." *Whisnant*, 71 N.C. App. at 441, 322 S.E.2d at 435.

In contrast, it is evident that Rule 63 applies to the case at bar. Unlike the original judge in *Whisnant*, Judge Marsh *was in fact* "*unable* to perform the duties to be performed by the court" on remand "by reason of . . . expiration of term," because during the pendency of the appeal, his term ended and he was not re-elected. N.C. Gen. Stat. § 1A-1, Rule 63 (emphasis added). Rule 63 thus authorized Judge Rhinehart "to perform the duties to be performed by the court" when the case returned to the district court on remand. *Id.* Accordingly, Respondent's reliance on *Whisnant* is misplaced.

Indeed, "[t]his Court has interpreted the language of Rule 63 to statutorily authorize a substitute judge to reconsider [on remand] an order entered by a judge who has since" left the bench. *Springs v. City of Charlotte*, 222 N.C. App. 132, 135, 730 S.E.2d 803, 805 (2012) (citing *In re Expungement for Kearney*, 174 N.C. App. 213, 214–15, 620 S.E.2d 276, 277 (2005)), *disc. review denied*, 366 N.C. 428, 736 S.E.2d 756 (2013). In *Springs*, the original trial court failed to enter a written opinion stating "its reasons for upholding or disturbing the finding or award" of punitive damages as required by N.C. Gen. Stat. § 1D-50, and thus this Court remanded the case to the trial court with instructions to reconsider, *inter alia*, the award of punitive damages. *Id.* at 134, 730 S.E.2d at 804–05. Because the original trial court judge had retired, on remand a substitute judge entered the section 1D-50 punitive damages opinion. *Id.* at 134, 730 S.E.2d at 805. On appeal, this Court rejected the argument that "only [the retired judge] had jurisdiction to enter the [s]ection 1D-50 opinion," *id.*, and held that the substitute judge had the authority on remand under Rule 63 to enter the requisite section 1D-50 opinion that the original judge failed to enter, *id.* at 135, 730 S.E.2d at 805.

As DSS observes in its brief, Respondent's argument "might fare differently if the trial court's prior adjudication had been vacated, rather than essentially affirmed except for the remand" for reconsideration of the conclusion of law that Jazmin was "seriously neglected." The nature of our mandate on remand was limited and precise, and quite the opposite in effect from that of a vacatur. "When an order of a lower court is vacated, those portions that are vacated become void and of no effect." *In re D.S.*, 260 N.C. App. 194, 198, 817 S.E.2d 901, 905 (2018). On remand, however, "the general rule is that an inferior court must follow the mandate of an appellate court in a case without variation or departure." *In re S.R.G.*, 200 N.C. App. 594, 597, 684 S.E.2d 902, 904 (2009) (citation and internal quotation marks omitted), *disc. review and cert. denied*, 363 N.C. 804, 691 S.E.2d 19 (2010). "Remand is not intended to be an opportunity for either respondent or petitioner to retry its case." *In re J.M.D.*, 210 N.C. App. 420, 429, 708 S.E.2d 167, 173 (2011).

Here, Judge Rhinehart complied with this Court's mandate on remand, which was that the trial court reconsider Jazmin's adjudication "within the proper statutory framework." *J.M.*, 255 N.C. App. at 497, 804 S.E.2d at 839. We find no error in Judge Rhinehart's execution of her duty in presiding over the hearing on remand.

II. Evidentiary Conflict

[2] We are also unconvinced that Judge Rhinehart resolved an evidentiary conflict at the hearing on remand. As both Judge Marsh's and Judge Rhinehart's adjudication orders recite, Jazmin's mother made allegations concerning Respondent's mistreatment of Jazmin and her brother, and then recanted those allegations. Respondent contends that "Judge Marsh did not resolve this conflict regarding the mother's statements" and that Judge Rhinehart did resolve it by finding that "the mother's statements to others were more believable than the mother's recantation of those statements." Our careful review of the two adjudication orders finds little difference between Judge Rhinehart's consideration of the mother's recantation and Judge Marsh's.

The findings of fact in Judge Rhinehart's adjudication order to which Respondent appears to object on appeal are:

> 33. Notwithstanding [Jazmin's mother's] low cognitive functioning and mental health diagnoses and her failure to protect these children, [the mother] still sought medical attention for [Jazmin's brother] despite her expressions of fearfulness at the UNC ED. *The court finds that* [*the mother*] *did recant her statements made to the social worker, medical personnel and her own mother, in that she subsequently denied that there was domestic violence between her and* [*Respondent*] *and denied that [Respondent] abused the children. People recant for various reasons, and the court does not know why [the mother] recanted her statement. But this court gives great weight to her statements made to medical professionals while she was seeking medical attention for* [*Jazmin's brother].*
>
> 34. Beth Herold of CANMEC testified as an expert in child maltreatment in the original hearing, and stated the opinion that the injuries observed in [Jazmin's brother] were consistent with the instances described by [the mother] in her statements to the medical staff at UNC. *The Court gives great weight to this consistency, in determining*

> *whether* [*the mother's*] *original statements are more credible than her subsequent recantation.*

(Emphases added).

Contrary to Respondent's assertions, at no point did Judge Rhinehart explicitly conclude that "the mother's statements to others were *more believable* than the mother's recantation of those statements."[4] (Emphasis added). Respondent reads between the lines and finds an explicit conclusion that does not exist regarding the weight afforded to the mother's various conflicting statements. Rather than resolving any conflicts in the findings of fact that Judge Marsh had not resolved, our careful review suggests that Judge Rhinehart's order is in accord with the implications of Judge Marsh's order.

The vast majority of Judge Marsh's findings of fact were either unchallenged by Respondent on appeal or survived that challenge. In either circumstance, those findings "are binding on appeal." *V.B.*, 239 N.C. App. at 341, 768 S.E.2d at 868. Judge Rhinehart was thus bound by the following relevant findings of fact from Judge Marsh's order:

> 7. The family received in-home services beginning in March 2015, due to a finding of improper care *based upon the mother disclosing that* [*Respondent*] *hit the child*, [*Jazmin*].
>
> 8. *The mother subsequently denied the hitting* and a CME in February 2015 was inconclusive.
>
> . . . .
>
> 12. During the week prior to Labor Day [2015], *the mother contacted her mother . . . in New York, several times a day by phone and text to attempt to tell her something. Finally, the mother called her mother, informing her that* [*Respondent*] *was treating the children too rough; it was serious; she didn't know how to handle it and he was abusing them. . . .*
>
> 13. On September 8, 2015, *the mother brought* [*Jazmin's brother*] *to a well-baby check-up and expressed her*

4. Respondent also asserts that, in the oral rendition of her findings of fact following the adjudication hearing, "Judge Rhinehart openly stated that she was crediting the mother's allegations of mistreatment to others over the mother's subsequent recantation." In fact, Judge Rhinehart's spoken rendition at the hearing was substantively identical to the written findings of fact 33 and 34 in the adjudication order, quoted above.

> *concerns to the doctor that* [*Respondent*] *was too rough with the child*. Marks on [the child]'s neck and conjunctival hemorrhages (bloodshot eyes) were observed by the medical provider. [The child] was two (2) months old at the time. The child was sent to UNC Hospital Emergency Department for further testing.
>
> 14. *The mother disclosed the same information to the Emergency Department doctor*. A consult was requested from the Beacon Program which reviews cases of suspected child maltreatment. [*The mother*] *repeated the same information to Holly Warner from the Beacon Program*, specifically that on separate occasions she had witnessed [Respondent] flicking the child . . . under the chin, holding him upside down by his ankles, and punching him in the stomach. [The] mother failed to take steps to adequately protect [the child].
>
> 15. A skeletal survey showed that [Jazmin's brother] had healing right tibia and fibula fractures. The child also had ear bruising, sub conjunctival hemorrhages, excoriation under the chin and tongue bruising. There was no history of falls, accidents or injuries to explain the injuries. . . . [*The child*]*'s injuries were consistent with the instances described by the mother.*[5]
>
> . . . .
>
> 20. [*The mother*] *was not forthcoming during the prior CPS investigation in February 2015, and continued to mislead the in-home services social worker about the circumstances in the home during bi-weekly home visits.*
>
> . . . .
>
> 22. [The mother] subsequently recanted her statements and moved out of the family home.

(Emphases added).

These findings evince a pattern of the mother making and recanting allegations—Judge Marsh went so far as to describe the mother as "not forthcoming" and "mislead[ing]"—and acknowledge that the

5. Although Respondent successfully challenged a portion—which we have omitted—of this finding of fact in his prior appeal, this Court "reject[ed] [his] argument as to finding of fact 15 in all other respects." *J.M.*, 255 N.C. App. at 494, 804 S.E.2d at 838.

physical evidence and the testimony of others corroborated the mother's recanted allegations. While Judge Marsh's order does not explicitly state that he afforded more weight to the mother's original statements than to her recantation, that is the clear implication. In this respect, rather than resolving any unresolved evidentiary conflict, Judge Rhinehart's findings are consistent with Judge Marsh's original findings of fact. We are thus unconvinced by Respondent's assertion that Judge Rhinehart resolved any "evidentiary conflict" that Judge Marsh had not.

Finally, we note that Respondent's argument is centered not on the substance of Judge Rhinehart's adjudication of Jazmin as neglected, but rather on a dispute over the credibility of Jazmin's mother. Respondent is arguing less that the trial court erred in concluding that Jazmin was neglected, and more that it erred in finding that the mother's allegations against him were more credible than her recantations of those allegations. This focus is misguided.

"In determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *In re Q.A.*, 245 N.C. App. 71, 74, 781 S.E.2d 862, 864 (2016) (citation omitted).

> The purpose of the adjudication and disposition proceedings should not be morphed on appeal into a question of culpability regarding the conduct of an individual parent. The question this Court must look at on review is whether the court made the proper determination in making findings and conclusions as to the status of the juvenile.

In re J.S., 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007).

After careful review of both adjudication orders in this case, and in light of our mandate on remand that the trial court reconsider the adjudication of Jazmin "within the proper statutory framework," *J.M.*, 255 N.C. App. at 497, 804 S.E.2d at 839, we conclude that the trial court made the proper determination regarding Jazmin's status. Respondent's argument is overruled.

Conclusion

For the foregoing reasons, the trial court's adjudication and disposition orders on remand are affirmed.

AFFIRMED.

Judges DIETZ and COLLINS concur.

M.E. v. T.J.

[275 N.C. App. 528 (2020)]

M.E., Plaintiff-Appellant
v.
T.J., Defendant-Appellee

No. COA18-1045

Filed 31 December 2020

1. Constitutional Law—North Carolina—as-applied challenge—domestic violence statute—protection denied to same-sex partners—no State interest

The application of N.C.G.S. § 50B-1(b)(6) to plaintiff, who was denied a domestic violence protective order against her same-sex partner because their relationship did not meet the statutory definition of "personal relationship," violated plaintiff's constitutional rights to equal protection and due process under Art. I of the North Carolina Constitution. There was no legitimate State interest which would allow the statute as applied to plaintiff and similarly situated persons to survive even the lowest level of scrutiny.

2. Constitutional Law—Fourteenth Amendment—due process—as-applied challenge—domestic violence statute—protection denied to same-sex partners—fundamental rights violated

Adopting the reasoning in *United States v. Windsor*, 570 U.S. 744 (2013), the Court of Appeals held that the application of N.C.G.S. § 50B-1(b)(6) to plaintiff, who was denied a domestic violence protective order because her same-sex relationship did not meet the statutory definition of "personal relationship," violated plaintiff's fundamental liberty rights to personal security, dignity, and autonomy, and therefore violated plaintiff's due process rights under the Fourteenth Amendment of the U.S. Constitution.

3. Constitutional Law—Fourteenth Amendment—equal protection—as-applied challenge—domestic violence statute—protection denied to same-sex partners—strict scrutiny

In an as-applied constitutional challenge to N.C.G.S. § 50B-1(b)(6), the statute's application to plaintiff, which served to prevent her from obtaining a domestic violence protective order against her same-sex partner, could not survive strict scrutiny—the heightened standard of review appropriate given the fundamental liberty at stake—where the denial was based on plaintiff's LGBTQ+ status. Plaintiff's right to equal protection under the Fourteenth Amendment of the U.S. Constitution was violated where the statute's protection of opposite-sex couples only was based on an

arbitrary classification that bore no reasonable relation to the statute's purpose.

4. Constitutional Law—as-applied challenge—domestic violence statute—rational basis review—intermediate scrutiny

In an as-applied constitutional challenge to N.C.G.S. § 50B-1(b)(6), under which plaintiff was denied a domestic violence protective order against her same-sex partner, although the Court of Appeals determined strict scrutiny was the appropriate level of review, the court also held that the statute's application to plaintiff and to others similarly situated could not withstand rational basis review, much less intermediate scrutiny, because there was no government interest to support the statute's distinction between opposite-sex and same-sex couples.

5. Constitutional Law—Fourteenth Amendment—hybrid review—denial of rights based on LGBTQ+ status—balancing test

In an as-applied constitutional challenge to N.C.G.S. § 50B-1(b)(6), under which plaintiff was denied a domestic violence protective order against her same-sex partner, the Court of Appeals reviewed federal constitutional decisions regarding state action against persons based on their LGBTQ+ status and determined that those decisions, culminating in *Obergefell v. Hodges*, 576 U.S. 644 (2015), require certain factors to be considered when evaluating a state action that denies rights to LGBTQ+ persons, including the actual intent of the state in enacting the law and the particular harms suffered by the targeted group. Using this review, the Court of Appeals determined section 50B-1(b)(6) was unconstitutional.

6. Constitutional Law—Fourteenth Amendment—equal protection—discrimination based on LGBTQ+ status also based on sex or gender

In an as-applied constitutional challenge to N.C.G.S. § 50B-1(b)(6), under which plaintiff was denied a domestic violence protective order against her same-sex partner, the Court of Appeals determined that the U.S. Supreme Court's definition of "sex" or gender in *Bostock v. Clayton County*, 590 U.S. __ (2020), was relevant to the Fourteenth Amendment equal protection issue of whether section 50B-1(b)(6) discriminated against plaintiff based on her LGBTQ+ status. Where the statute's distinction between opposite-sex and same-sex couples constituted discrimination based on sex, the statute could not survive intermediate scrutiny.

7. Appeal and Error—court-appointed amicus curiae—Appellate Rule 28(i)—scope of amicus arguments—limited to issues raised by the record

In an as-applied constitutional challenge to N.C.G.S. § 50B-1(b)(6) in which defendant did not file an appellate brief and the State's amicus brief did not defend the statute's constitutionality, where the Court of Appeals on its own motion appointed amicus curiae to brief a response to plaintiff's arguments on appeal, issues raised by amicus on appeal that were outside the record on appeal were not properly before the appellate court. Amicus curiae was without standing to file a motion to dismiss and motion to amend the record on appeal, made according to its argument that jurisdictional defects prevented appellate review. Since the trial court's jurisdiction was never challenged and no jurisdictional defect appeared on the record, the motions were dismissed as a nullity.

Judge TYSON dissenting.

Appeal by Plaintiff from order entered 7 June 2018 by Judge Anna Worley in District Court, Wake County. Heard in the Court of Appeals 17 September 2019.

Sharff Law Firm, PLLC, by Amily McCool, and ACLU of North Carolina Legal Foundation, Inc., by Emily E. Seawell and Irena Como, for Plaintiff-Appellant.

Lorin J. Lapidus, court appointed amicus curiae.

Governor Roy A. Cooper, III, and Attorney General Joshua H. Stein, by Deputy Solicitor General Ryan Y. Park, for North Carolina Department of Justice, amicus curiae.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Sarah M. Saint and Eric M. David, and Equality NC, by Ames B. Simmons, for North Carolina LGBTQ+ Non-Profit Organizations, amici curiae.

Womble Bond Dickinson, by Amalia Manolagas, Kevin Hall, pro hac vice, and Allen O'Rourke, Legal Aid of North Carolina, by Celia Pistolis, Amy Vukovich, and Elyisa Prendergast-Jones, and North Carolina Coalition Against Domestic Violence, by Sherry Honeycutt Everett, for Legal Aid of North Carolina, North

Carolina Coalition Against Domestic Violence, and several local domestic violence support organizations, amici curiae.

McGEE, Chief Judge.

I. Factual and Procedural Background

A. *Introduction*

M.E. ("Plaintiff") and T.J. ("Defendant") were in a dating relationship that did not last. Plaintiff decided the relationship had reached its end and, on 29 May 2018, Plaintiff undertook the difficult task of informing Defendant that their relationship was over. According to Plaintiff, Defendant did not accept Plaintiff's decision, and responded in a manner that ultimately led Plaintiff to visit the Wake County Clerk of Court's office on the morning of 31 May 2018, seeking the protections of a Domestic Violence Protective Order ("DVPO"), as well as an *ex parte* temporary "Domestic Violence Order of Protection" ("*ex parte* DVPO"), pursuant to Chapter 50B of the North Carolina General Statutes: "An Act to Provide Remedies for Domestic Violence" (the "Act" or "Chapter 50B"). 1979 North Carolina Laws Ch. 561, §§ 1–8. At the time of the enactment of Chapter 50B, same-sex marriage was not legal, and the General Assembly specifically limited the protections of Chapter 50B to unmarried couples comprising "persons of the opposite sex." *Id.*

Although the trial court determined Plaintiff's "allegations [we]re significant," and "[P]laintiff ha[d] suffered unlawful conduct by [D]efendant," the trial court denied Plaintiff's request for an *ex parte* DVPO. The order denying Plaintiff's request for an *ex parte* DVPO states that the "only reason [P]laintiff [is] not receiving [an *ex parte*] 50B DVPO today" is because Plaintiff and Defendant had been in a "same sex relationship and [had] not live[d] together[.]" Plaintiff received the same result at a 7 June 2018 hearing on her request for a permanent DVPO. The trial court denied Plaintiff the protections of a Chapter 50B DVPO in a 7 June 2018 order that stated: "A civil no-contact (50C) order was granted contemporaneously on the same allegations and had the parties been of opposite genders, those facts would have supported the entry of a [DVPO] (50B)." As the trial court note, it contemporaneously entered a "No-Contact Order for Stalking" granting Plaintiff the lesser protections afforded by Chapter 50C.

On appeal, Plaintiff argues that the denial of her requests for *ex parte* and permanent DVPOs under Chapter 50B violated her Fourteenth Amendment and state constitutional rights to due process and equal

protection of the laws. We set forth additional relevant facts and address Plaintiff's arguments below.

B. *Additional Facts*

Plaintiff went to the Clerk's office on 31 May 2018 and explained her situation to the staff members, who gave Plaintiff the appropriate forms to file a Chapter 50B "Complaint and Motion for Domestic Violence Protective Order" ("AOC-CV-303"), which also includes a section to request a temporary "Ex Parte Domestic Violence Order of Protection." *See* N.C.G.S. § 50B-2(d) (2017) ("The clerk of superior court of each county shall provide to pro se complainants all forms that are necessary or appropriate to enable them to proceed pro se pursuant to this section. The clerk shall, whenever feasible, provide a private area for complainants to fill out forms and make inquiries.").

Plaintiff filled out AOC-CV-303 and additional forms she had been given, alleging Defendant had committed physical and otherwise threatening actions against her, and stating her concern that Defendant had "access to [Defendant's] father's gun collection." Plaintiff requested "emergency relief" by way of "an Ex Parte Order," based upon her belief that "there [wa]s a danger of [further] acts of domestic violence against [her]" before a formal DVPO hearing could be set. Plaintiff stated: "I want [] [D]efendant ordered not to assault, threaten, abuse, follow, harass or interfere with me[;]" "I want [] [D]efendant to be ordered to have no contact with me." Plaintiff also asked the trial court to order Defendant "not to come on or about" Plaintiff's residence or her place of work; to take anger management classes; and "to prohibit [] [D]efendant from possessing or purchasing a firearm."

Form AOC-CV-303 is based on the requirements for a DVPO as set forth in Chapter 50B, including the definition of "domestic violence" found in N.C.G.S. § 50B-1. The definition of "domestic violence" in N.C.G.S. § 50B-1 includes acts by a defendant "[a]ttempting to cause bodily injury, [] intentionally causing bodily injury[, or] [p]lacing the aggrieved party . . . in fear of imminent serious bodily injury or continued harassment . . . that rises to such a level as to inflict substantial emotional distress" when the defendant's acts were against a "person," the plaintiff, with whom the defendant was in a "personal relationship." N.C.G.S. §§ 50B-1(a)(1)-(2). Relevant to Plaintiff's appeal, the definition of "personal relationship" required that Plaintiff and Defendant were either "in a dating relationship or had been in a dating relationship." N.C.G.S. §§ 50B-1 (b)(6). Therefore, pursuant to the definitions in N.C.G.S. § 50B-1, violence against a person with whom the perpetrator either is, or has been, in a "dating relationship" is not "domestic

violence," no matter how severe the abuse, *unless* the perpetrator of the violence and the victim of the violence "[a]re persons of the opposite sex[.]" N.C.G.S. § 50B-1(b)(6). The only box on AOC-CV-303 relevant to the "dating" nature of Plaintiff's relationship with Defendant was the one that stated: "The defendant and I . . . are persons of the opposite sex who are in or have been in a dating relationship." Having no other option, Plaintiff checked that box and filed her complaint.

Plaintiff first spoke with the trial judge concerning her "request for Ex Parte Order" during the morning family court session on 31 May 2018, but was informed that because both she and Defendant were women, and only in a "dating" type relationship, N.C.G.S. § 50B-1(b)(6) did not allow the trial court to grant her an *ex parte* DVPO or any other protections afforded by Chapter 50B. Plaintiff was informed that she could seek a civil *ex parte* temporary no-contact order and a permanent civil no-contact order, pursuant to Chapter 50C. *See* N.C.G.S. § 50C-2 (2017). Chapter 50C expressly states that its protections are for "person[s] against whom an act of unlawful conduct has been committed by another person *not involved in a personal relationship* with the person *as defined in G.S. 50B-1(b)*." N.C.G.S. § 50C-1(8) (2017) (emphasis added).

Plaintiff returned to the Clerk's office, obtained the forms for Chapter 50C protections, including Form AOC-CV-520, "Complaint for No-Contact Order for Stalking," filled them out, and filed them. Plaintiff's motions for both civil *ex parte* and permanent no-contact orders were filed under a new case file number. Plaintiff decided to argue for both an *ex parte* DVPO and a permanent DVPO under Chapter 50B and, should these Chapter 50B requests be denied, for Chapter 50C *ex parte* and permanent civil "Temporary No-Contact Order[s] for Stalking."

Plaintiff's actions were heard at the afternoon session that same day, 31 May 2018, and the trial court entered its " 'Amended' Ex Parte Domestic Violence Order of Protection," which denied Plaintiff's request for an *ex parte* DVPO, but set a hearing date of 7 June 2018 for a hearing on Plaintiff's request for a permanent DVPO.[1] In the "Relationship to Petitioner" section of this order, the box checked by the trial court to define Plaintiff's relationship to Defendant was "of opposite sex, currently or formerly in dating relationship[.]" The trial court also checked Box 8, which states that "[P]laintiff has failed to prove grounds for

1. This order had "Amended" handwritten at the top of the order, likely because the original date set for the hearing of Plaintiff's "Complaint and Motion for Domestic Violence Protective Order," 12 June 2018, was changed by hand on the order to 7 June 2018.

ex parte relief[;]" Box 14, stating "the request for Ex Parte Order is denied[;]" and Box 15, "Other: (*specify*)[,]" writing: "HEARING ONLY – set for hearing on [7 June 2018] . . .; allegations are significant but parties are in same sex relationship and have never lived together, therefore do not have relationship required in [N.C.G.S. § 50B-1(b)]."

The trial court granted Plaintiff's *ex parte* request pursuant to Chapter 50C by entering a "Temporary No-Contact Order for Stalking or Nonconsensual Sexual Conduct" (the "*ex parte* 50C Order"), also on 31 May 2018. *See* N.C.G.S. § 50C-6(a) (2017). In the *ex parte* 50C Order, the trial court found as fact that "[P]laintiff has suffered unlawful conduct by [] [D]efendant in that:" "On 5/29/18, [D]efendant got physically aggressive and was screaming in [Plaintiff's] face; [D]efendant then left after LEO [law enforcement officers] were called; after LEO left," Defendant "attempted to re-enter [Plaintiff's] house; LEO returned to remove [Defendant] from [Plaintiff's] house; since that date, [D]efendant has repeated[ly] called [Plaintiff], texted [P]laintiff from multiple numbers, and contacted [P]laintiff's friends and family[.]" The trial court found that Defendant "continues to harass [P]laintiff[,]" and that "[D]efendant committed acts of unlawful conduct against [] [P]laintiff." The trial court concluded that the "*only reason [P]laintiff [is] not receiving [a] 50B DVPO today" is because Plaintiff and Defendant had been "in [a] same sex relationship and do not live together*[,]" and that N.C.G.S. § 50B-1(b), as plainly written, requires the dating relationship involved to have consisted of people of the " 'opposite sex[.]' " (Emphasis added).

The "HEARING ON [Plaintiff's] 50B and 50C MOTIONS" was conducted on 7 June 2018. At this hearing, the trial court considered Plaintiff's "Complaint for No-Contact Order for Stalking or Nonconsensual Sexual Conduct" under N.C.G.S. §§ 50C-2 and 50C-5, and her "Complaint and Motion for Domestic Violence Protective Order" under N.C.G.S. §§ 50B-2 and 50B-3. Defendant appeared *pro se*, but Plaintiff was represented at this hearing, and her attorney informed the trial court:

> [Plaintiff] came in on May 31st and filed a complaint for that [DVPO]. She – that was what she was intending in getting the relief for, for a [DVPO] against [Defendant]. As I'm sure this court knows, that [DVPO] gives [Plaintiff] more protection than a 50C.
>
> [Plaintiff was] in an intimate relationship with [Defendant]. However, when [Plaintiff] went to file for that [DVPO] and looked at the boxes that describe the allowable personal

> relationships, that – unfortunately, there was not a personal relationship box that fit her relationship with [Defendant] because they [we]re in a same-sex dating relationship and have never lived together.
>
> Because of that, [Plaintiff] did go ahead and proceed with filing that complaint for a [DVPO] and chose the box that was the closest that fit her relationship [with Defendant] and checked the opposite-sex dating partners.

Defendant consented to an amendment to the order to indicate her relationship with Plaintiff was one "of same sex currently or formerly in dating relationship."[2] The trial court questioned the necessity of amending the Form AOC-CV-306, which is the AOC form used by trial courts to grant or deny a petitioner's request for a DVPO—thereupon becoming the trial court's order. The trial court stated: "I do not have a complaint that . . . would survive a Rule 12 motion" because the plain language of N.C.G.S. § 50B-1(b)(6) limits relief to only those victims who suffer violence from dating or ex-dating partners that are of the "opposite sex." Plaintiff's attorney argued:

> [Plaintiff] should be allowed to proceed with the [DVPO], that . . . the statute, . . . 50B, is unconstitutional as it's written post the same-sex marriage equality case from the Supreme Court in *Obergefell* and that there's no rational basis at this point to have a statute that limits dating relationships to folks of opposite sex. So we would ask that Your Honor consider allowing [Plaintiff] to proceed with her [DVPO] case.

(Emphasis added). The trial court, by order entered 7 June 2018 (the "50B Order"), dismissed Plaintiff's complaint under Chapter 50B based upon a finding that Plaintiff had "failed to prove grounds for issuance of a" DVPO. On the 50B Order, the trial court checked Box 8, "Other," and wrote in the space included for Box 8:

> [P]laintiff has failed to state a claim upon which relief can be granted pursuant to the statute, due to the lack of statutorily defined personal relationship. A civil no-contact (50C) order was granted contemporaneously on the same allegations *and had the parties been of opposite genders*,

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2. On the Form AOC-CV-306, the word "opposite" was stricken and the word "same" was written just above.

> *those facts would have supported the entry of a Domestic Violence Protective Order (50B).*

(Emphasis added). The trial court continued, noting:

> N.C.G.S. 50B was last amended by the legislature in 2017 without amending the definition of "personal relationship" to include persons of the same sex who are in or have been in a dating relationship. This recent amendment in 2017 was made subsequent to the United States Supreme Court decision in *Obergefell v. Hodges*[] and yet the legislature did not amend the definition of personal relationship to include dating partners of the same sex.

(Emphasis added). The trial court also attached "Exhibit A"—a separate document titled "Order Denying Plaintiff's Motion for a DVPO," which the trial court "fully incorporated" into the 50B Order. Exhibit A states in relevant part:

> 2. [ ] Plaintiff, through her counsel, argued that she should be allowed to proceed on her request for a [DVPO] because the current North Carolina General Statute 50B-1(b) is unconstitutional after the United States Supreme Court decision in *Obergefell v. Hodges* and that there is no rational basis for denying protection to victims in same-sex dating relationships who are not spouses, ex-spouses, or current or former household members.
>
> 3. North Carolina General Statute 50B was passed by the North Carolina General Assembly in 1979 and later amended on several occasions. It states that an aggrieved party with whom they have a personal relationship may sue for a [DVPO] in order to prevent further acts of domestic violence. The question for the Court is how a personal relationship is defined. North Carolina General Statute 50B-1 states: "for purposes of this section, the term 'personal relationship' means wherein the parties involved: (1) are current or former spouses; (2) are persons of opposite sex who live together or have lived together; (3) are related as parents and children, including others acting in loco parentis to a minor child, or as grandparents and grandchildren. For purposes of this subdivision, an aggrieved party may not obtain an order of protection against a child or grandchild under the age of 16; (4) have a child in common; (5) are current or former household members; (6) are persons

of the opposite sex who are in a dating relationship or have been in a dating relationship." . . . .

4. *This definition prohibits victims of domestic violence in same sex dating relationships that are not spouses, ex-spouses, or current of former household members from seeking relief against a batterer under Chapter 50B.*

5. *[This court] must consider whether it has jurisdiction to create a cause of action that does not exist and to enter an order under this statute when the statute specifically excludes it. The difficult answer to this question is no, it does not.* The General Assembly has the sole authority to pass legislation that allows for the existence of any domestic violence protective order. The legislature has not extended this cause of action to several other important family relationships including siblings, aunts, uncles, "step" relatives, or in-laws.

6. In this context, *the Courts only have subject matter jurisdiction and the authority to act and enjoin a defendant when the legislature allows it.* On numerous occasions the Court of Appeals has stricken orders entered by the District Court that do no[t] include proper findings of fact or conclusions of law that are necessary to meet the statute. [ ] Defendant must be on notice that a cause of action exists under this section when the act of domestic violence is committed. *[This court] cannot enter a [DVPO] against a [d]efendant when there is no statutory basis to do so.* . . . .

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows:

1. [ ] Plaintiff has failed to prove grounds for issuance of a [DVPO] as Plaintiff *does not have a required "personal relationship" with [ ] Defendant as required by [Chapter] 50B.*

(Emphasis added). Plaintiff appeals.

This Court granted motions to file *amicus curiae* briefs, in support of Plaintiff, from two separate groups consisting of non-profit organizations involved in domestic violence and LGBTQ+ issues: "North Carolina Coalition Against Domestic Violence" and "North Carolina LGBTQ+ Non-Profit Organizations." Notably, the Attorney General of the State

of North Carolina also filed a motion to brief the matter as an *amicus curiae*, which was granted. This motion stated "the Attorney General, on behalf of the State, seeks to file a brief as *amicus curiae* in this case to vindicate the State's powerful interests in safeguarding all members of the public from domestic violence." The State argued that its interest, including the "State's law-enforcement community," is in "ensuring that law enforcement has robust tools at its disposal to prevent and punish domestic violence" and "in ensuring that all its people are treated equally under the law"—particularly "where certain groups are being denied equal legal protections from private violence[,]" because "[t]he State and its law-enforcement community have an obligation to ensure the safety and security of all North Carolinians, without regard to their sexual orientation." Defendant did not file an appellee brief, and no *amici* sought to file briefs contesting Plaintiff's arguments on appeal. There were also no motions filed by any entity of the State to submit an *amicus* brief, or otherwise intervene in this action, for the purpose of arguing in favor of the constitutionality of the Act. Therefore, this Court, on its own motion and by order entered 3 May 2019, appointed an *amicus curiae* ("*Amicus*"), to brief an argument in response to Plaintiff's arguments on appeal.

II. Plaintiff's Arguments on Appeal

Plaintiff argues that the trial court's denial of her request for a DVPO violated constitutional rights protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as the associated provisions of the North Carolina Constitution. *See* U.S. Const. amend. V; U.S. Const. amend. IX; U.S. Const. amend. XIV, § 1; N.C. Const. art. I, Declaration of Rights; N.C. Const. art. I, §§ 1, 2, 18, 19, 35, 36, 37. Therefore, as discussed below, our analysis is limited to a *de novo* review of whether Plaintiff was unconstitutionally denied a DVPO under N.C.G.S. § 50B-1(b)(6) *solely based on the fact that Plaintiff is a woman* and *Defendant is also a woman*. "Defendant's appeal raises questions of public policy as well as of law. We are concerned with the law, of course, but matters of public policy . . . cannot be disregarded in their interpretation." *State v. Harris*, 216 N.C. 746, 751, 6 S.E.2d 854, 858 (1940).

Plaintiff also states that her challenge to N.C.G.S. § 50B-1(b)(6) is an "as-applied" challenge, not a facial challenge. There is no dispute that, in general, *if* the "parties involved" in a "personal relationship" "[a]re persons of the opposite sex[,]" as defined by N.C.G.S. § 50B-1(b)(6), one of those "parties involved" may seek the protections of a DVPO against the other. Therefore, the application of N.C.G.S. § 50B-1(b)(6) does *not* violate the constitutional rights of "parties involved." N.C.G.S. § 50B-1(b)(6);

see also Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc., 247 N.C. App. 444, 460, 786 S.E.2d 335, 347 (2016), *aff'd*, 369 N.C. 722, 799 S.E.2d 611 (2017). There are important applications of N.C.G.S. § 50B-1(b)(6), such as protecting people in "opposite-sex" relationships from domestic violence through the issuance of DVPOs, that clearly do not violate the constitutional rights of those applicants; therefore, based upon the facts before us, Plaintiff's challenge to N.C.G.S. § 50B-1(b)(6) is as-applied. *Genesis Wildlife*, 247 N.C. App. at 460, 786 S.E.2d at 347 (citation omitted) (" 'an as-applied challenge represents a plaintiff's protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act, while a facial challenge represents a plaintiff's contention that a statute is incapable of constitutional application in any context' "); *see also Doe v. State*, 421 S.C. 490, 504, 808 S.E.2d 807, 814 (2017) (in which the Supreme Court of South Carolina found a statute similar to N.C.G.S. § 50B-1(b)(6) facially constitutional, but unconstitutional as applied to the petitioner).

Although Plaintiff is making an as-applied challenge to N.C.G.S. § 50B-1(b)(6) in this action, as in *Doe*, if we decide in favor of Plaintiff's as-applied challenge, our holdings will also prevent the unconstitutional denial of DVPOs to other persons "in similar same-sex relationships[.]" *Doe*, 421 S.C. at 509–10, 808 S.E.2d at 817 (citation omitted) ("[W]e declare sections [of the relevant statutes] unconstitutional as applied to Doe. Therefore, the family court may not utilize these statutory provisions to prevent Doe or those in similar same-sex relationships from seeking an Order of Protection."). In other words, if this Court decides that N.C.G.S. § 50B-1(b)(6) was unconstitutionally applied to Plaintiff in denying her request for a DVPO, based solely or in part on her gender or gender-identity, denial of the protections of Chapter 50B to any similarly situated plaintiff would also be prohibited as an unconstitutional application of the statute to that plaintiff.

We note that the trial court found as fact: "A civil no-contact (50C) order was granted contemporaneously *on the same allegations* [contained in Plaintiff's complaint and motion for a DVPO] and *had the parties been of opposite genders, those facts would have supported the entry of a Domestic Violence Protective Order (50B)*." (Emphasis added). This finding of fact is not challenged on appeal, and is therefore binding.[3] *Matter of M.C.*, 374 N.C. 882, 886, 844 S.E.2d 564, 567 (2020).

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3. Had the trial court granted Plaintiff a Chapter 50B DVPO, that decision would be a matter of law that we would review *de novo*, but the unchallenged statement that the trial court *would have* granted the DVPO, had Plaintiff been a man, is a finding of fact that is conclusive on appeal.

III. *N.C.G.S. § 50B-1*

The trial court concluded that "had [Plaintiff and Defendant] been of opposite genders, th[e] facts [found] would have supported the entry of a" DVPO, but it denied Plaintiff's request for a DVPO because the "definition [in N.C.G.S. § 50B-1(b)(6)] prohibits victims of domestic violence in same sex dating relationships that are not spouses, ex-spouses, or current or former household members from seeking relief against a batterer under Chapter 50B." Issuance of a DVPO pursuant to both N.C.G.S. §§ 50B-2 and 3 requires a proper allegation of "domestic violence" as defined by N.C.G.S. § 50B-1, which states in relevant part:

> (a) *Domestic violence means the commission of one or more of the following acts upon an aggrieved party* or upon a minor child residing with or in the custody of the aggrieved party *by a person with whom the aggrieved party has or has had a personal relationship*, but does not include acts of self-defense:
>
> > (1) *Attempting to cause bodily injury*, or intentionally causing bodily injury; or
> >
> > (2) *Placing the aggrieved party* or a member of the aggrieved party's family or household *in fear of imminent serious bodily injury or continued harassment*, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress[.]
> >
> > . . . .
>
> (b) For purposes of this section, *the term "personal relationship" means a relationship wherein the parties involved*:
>
> > (1) Are current or former spouses;
> >
> > (2) Are persons of *opposite sex* who live together or have lived together;
> >
> > (3) Are related as parents and children, including others acting in loco parentis to a minor child, or as grandparents and grandchildren. For purposes of this subdivision, an aggrieved party may not obtain an order of protection against a child or grandchild under the age of 16;
> >
> > (4) Have a child in common;

> (5) Are current or former household members;
>
> (6) *Are persons of the opposite sex who are in a dating relationship or have been in a dating relationship*. . . . .

N.C.G.S. § 50B-1 (emphasis added).

The clear intent of this definition of "domestic violence" is to exclude victims of domestic violence from the protection of the Act if they and their abusive partners are of the same "sex"—though both men and women can seek the protections of a DVPO, so long as their alleged abusers are of the "opposite sex." Although the Act has been amended multiple times, including after the United States Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644, 192 L. Ed. 2d 609 (2015), N.C.G.S. § 50B-1 has not been amended to retract the language limiting the protections of a DVPO in certain circumstances to persons in "opposite-sex" relationships.

IV. Legal Background and Review

Plaintiff's arguments are challenges based upon the due process and equal protection clauses of both our state and federal constitutions. Below, we will review Plaintiff's challenge under the Constitution of North Carolina, then review Plaintiff's Fourteenth Amendment arguments.

In the recent opinions involving Fourteenth Amendment challenges to state action directed at people of "same-sex" status, the analyses of the United States Supreme Court have been based upon the Due Process Clause, the Equal Protection Clause, and a hybrid application of both—incorporating both the due process concept of fundamental "liberty" and equal protection "disparate treatment" review. The review in these cases does not appear to fit neatly within the traditional "rational basis," "intermediate scrutiny," or "strict scrutiny" review of challenges under the Fourteenth Amendment. We will hereafter refer to this "hybrid" review as "full Fourteenth Amendment" review.

In addition, the Supreme Court recently decided *Bostock v. Clayton County*, 590 U.S. __, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020), in which Justice Gorsuch's majority opinion held, in a federal employment discrimination action, that when an employer takes discriminatory action against an employee based on the employee's "status" as gay, lesbian, or transgender, the employer is necessarily discriminating against the employee based upon that employee's "sex." *Id.* at __, 140 S. Ct. at 1746, 207 L. Ed. 2d at __. Although this opinion was not decided under the Fourteenth Amendment, we consider Justice Gorsuch's analysis in order

to determine if the definitional holdings related to discrimination "based upon" "sex" should, or must, be applied to Fourteenth Amendment challenges alleging discrimination based on LGBTQ+ status. If so, then allegations of discrimination based on the LGBTQ+ status of an individual are also allegations of discrimination based on the "sex" or "gender" of that person for Fourteenth Amendment purposes, and would require at least "intermediate scrutiny" review, as required in all actions alleging "sex" or "gender" discrimination.

In light of the ambiguity surrounding the appropriate test to apply in LGBTQ+ based Fourteenth Amendment cases, we will conduct alternative reviews—pursuant to due process, equal protection, and the full Fourteenth Amendment review we discern from the line of opinions culminating in *Obergefell*.

> " '[A]n alternative holding is not dicta but instead is binding precedent. *See, e.g.*, *Massachusetts v. United States*, 333 U.S. 611, 623 (1948) (explaining that where a case has "been decided on either of two independent grounds" and "rested as much upon the one determination as the other," the "adjudication is effective for both")' "

Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255–56 (11th Cir. 2017) (citations omitted)). We believe these alternative holdings under the state and federal constitutions are both appropriate and necessary because it is ultimately our Supreme Court that has the authority to definitively decide these issues under the Constitution of North Carolina, *State v. Berger*, 368 N.C. 633, 638–39, 781 S.E.2d 248, 252 (2016), and it is axiomatic that the United States Supreme Court is the ultimate arbiter of issues raised under the Constitution of the United States. Further, the Supreme Court has regularly rendered opinions basing its holdings finding Fourteenth Amendment violations on *both* the Due Process Clause *and* the Equal Protection Clause.

A. *North Carolina Constitution*

1. General Principles

The immutable fact when deciding a statutory challenge under the North Carolina Constitution is: "[W]e cannot construe the provisions of the North Carolina Constitution to accord the citizens of North Carolina any lesser rights than those which they are guaranteed by parallel federal provisions in the federal Constitution." *Libertarian Party of N. C. v. State*, 200 N.C. App. 323, 332, 688 S.E.2d 700, 707 (2009) (citation omitted), *aff'd as modified*, 365 N.C. 41, 707 S.E.2d 199 (2011). However,

while "the United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States, [] the state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution." *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998).

The sections of the North Carolina Constitution relevant to this case are found in Article I:

> Article I, Section 1 establishes that all persons are afforded the "inalienable rights [of] . . . life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." N.C. Const. art. I, § 1. Article I, Section 19 provides, "[n]o person shall be . . . deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. "The law of the land, like due process of law, serves to limit the state's police power to actions which have a real or substantial relation to the public health, morals, order, safety or general welfare."

Hope – A Women's Cancer Ctr., *P.A. v. State*, 203 N.C. App. 593, 602–03, 693 S.E.2d 673, 680 (2010) (citation omitted); *see also State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949) (citations omitted) ("The term 'law of the land' is synonymous with 'due process of law,' a phrase appearing in the Federal Constitution and the organic law of many states."). The protections of the "law of the land" or "due process," requirements are " 'intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' " *Gunter v. Town of Sanford*, 186 N.C. 452, 456, 120 S.E. 41, 43 (1923) (citations omitted).

> These fundamental guaranties are very broad in scope, and are intended to secure to each person subject to the jurisdiction of the State extensive individual rights, including that of personal liberty. The term "liberty," as used in these constitutional provisions, does not consist simply of the right to be free from arbitrary physical restraint or servitude, but is "deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. . . . It includes the right of the citizen to be free to use his faculties in all lawful ways[.]"
>
> . . . .

> An exertion of the police power inevitably results in a limitation of personal liberty, and legislation in this field "is justified only on the theory that the social interest is paramount." In exercising this power, the legislature must have in view the good of the citizens as a whole rather than the interests of a particular class.

Ballance, 229 N.C. at 769, 51 S.E.2d at 734-35 (citations omitted).

Concerning the equal protection clause of section 19:

> [Our Supreme] Court has said that the principle of the equal protection of the law, made explicit in the Fourteenth Amendment to the Constitution of the United States, was also inherent in the Constitution of this State even prior to the revision thereof at the General Election of 1970. . . . .
>
> . . . .
>
> [Even when "]the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with . . . an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

S.S. Kresge Co. v. Davis, 277 N.C. 654, 660–61, 178 S.E.2d 382, 385–86 (1971) (emphasis added) (citations omitted).

It is a fundamental obligation of the courts of this state to protect the people from unconstitutional laws, as well as the unconstitutional *application* of the laws. *Id.* at 660–61, 178 S.E.2d at 385–86 (emphasis added) (citations omitted) (the "constitutional protection against unreasonable discrimination under color of law" "*extends also to the administration and the execution of laws* valid on their face"). Article I is construed liberally in this regard:

> In *Trustees of the University of North Carolina v. Foy*, 5 N.C. 57 (1805), the Court recognized the supremacy of rights protected in Article I [of the North Carolina Constitution] and indicated that it would only apply the rules of decision derived from the common law and such acts of the legislature that are consistent with the Constitution. . . . .

> It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State. Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens. . . . . *We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to* both *person* and property.

Corum v. Univ. of N.C. Through Bd. of Governors, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) (emphasis added) (citations omitted).

The police powers of the State, though broad, are limited by constitutional guarantees.

> "In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see that the enactment *has for its object the prevention of some offence or manifest evil, or the preservation of the public health, safety*, morals, *or general welfare*, and that there is some *clear, real, and substantial connection between the assumed purpose of the enactment and the actual provisions thereof*, and that *the latter do, in some plain, appreciable, and appropriate manner, tend towards the accomplishment of the object* for which the power is exercised."

State v. Williams, 146 N.C. 618, 627, 61 S.E. 61, 64 (1908) (emphasis added) (citations omitted).

When no fundamental rights or protected classes of people are involved, the courts apply the following test:

> *If a statute is to be sustained* as a legitimate exercise of the police power, it must have a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare. In brief, *it must be reasonably necessary to promote the accomplishment of a public good, or to prevent the infliction of a public harm.*

Ballance, 229 N.C. at 769–70, 51 S.E.2d at 735 (emphasis added) (citations omitted).

Certain restrictions on constitutional rights, such as ones based on "sex" or gender, require "intermediate scrutiny": "Articulations of intermediate scrutiny vary depending on context, but tend to require an important or substantial government interest, a direct relationship between the regulation and the interest, and regulation no more restrictive than necessary to achieve that interest." *State v. Packingham*, 368 N.C. 380, 387, 777 S.E.2d 738, 745 (2015) (citation omitted), *rev'd on other grounds*, *North Carolina v. Packingham*, ___ U.S. ___, 198 L. Ed. 2d 273 (2017). However: " '[A] law which burdens certain explicit or implied fundamental rights must be strictly scrutinized. It may be justified only by a compelling state interest, and must be narrowly drawn to express only the legitimate interests at stake.' " *Libertarian Party*, 200 N.C. App. at 332, 688 S.E.2d at 707 (citation omitted).

As our Supreme Court has recognized, the "liberty" protected by our constitution includes the right to live as one chooses, within the law,[4] unmolested by unnecessary State intrusion into one's privacy, or attacks upon one's dignity. *Tully v. City of Wilmington*, 370 N.C. 527, 534, 810 S.E.2d 208, 214 (2018) (citation omitted) ("The basic constitutional principle of personal liberty and freedom embraces the right of the individual to be free to enjoy the faculties with which he has been endowed[.] This precept emphasizes the dignity, integrity and liberty of the individual, the primary concern of our democracy.").

2. Application to Plaintiff's Appeal

[1] After *Obergefell*, and other precedent of the Supreme Court, there is no longer any doubt that *any* two consenting adults have a fundamental right to marry each other—absent fraud impacting a legitimate government interest. As far as romantic relationships are concerned, any member of the LGBTQ+ community has the same rights and freedoms to make personal decisions about dating, intimacy, and marriage as any non-LGBTQ+ individual. Therefore, there can be *no* State interest in interfering with Plaintiff's liberty to date whomever she wants to date, or to interfere with Plaintiff's private and intimate choices related to dating another consenting adult. Under the North Carolina Constitution, Plaintiff is similarly situated with every other adult in this regard.

The minimum level of review for Plaintiff's state constitutional challenges is that required by the Constitution of the United States, which we hold below is at least intermediate scrutiny. Therefore, N.C.G.S. § 50B-1(b)(6) can only survive Plaintiff's as-applied challenge if the State

4. Meaning valid, constitutional laws.

proves, at a minimum, (1) that the statute protects an "important or substantial government interest," (2) that the statute's requirements have a "direct relationship between the regulation and the interest [the State seeks to protect]," and (3) that the "regulation [is] no more restrictive than necessary to achieve that interest." *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 298, 749 S.E.2d 429, 436 (2012) (citation omitted). The State cannot meet its burden in this case.

" 'The best indicia of [legislative] intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.' " *State v. Byrd*, 185 N.C. App. 597, 603, 649 S.E.2d 444, 449 (2007) (citation omitted), *rev'd on other grounds*, 363 N.C. 214, 675 S.E.2d 323 (2009). "It is without question that the language of the statute, the spirit of Section 50B, and what [it] seeks to accomplish is to protect individuals from domestic violence through, inter alia, the imposition of an enhanced sentencing to serve as a deterrent against those who perpetrate the violence." *Id.* We can conceive of no scenario in which denying the protections of a DVPO to victims of domestic violence perpetrated by a same-sex partner furthers the "intent" of Chapter 50B, nor "what [it] seeks to accomplish"—reduction in domestic violence. *Id.* The requirement in N.C.G.S. § 50B-1(b)(6) that Plaintiff's complaint for a DVPO be denied solely based upon the "same-sex" nature of her relationship serves no government interest, much less any "important or substantial government interest." *Hest Techs.*, 366 N.C. at 298, 749 S.E.2d at 436. As applied to Plaintiff, the "regulation" involved, N.C.G.S. § 50B-1(b)(6), is in direct conflict with the purposes of the Act. Also, the "regulation," along with serving *no* "important," "substantial," or even legitimate government interest, is highly restrictive—it constitutes a *total and complete ban* on Plaintiff, and those similarly situated, obtaining DVPO protections against those who desire to do them harm. There is no question but that, as applied to Plaintiff, N.C.G.S. § 50B-1(b)(6) fails strict scrutiny, and violates both the due process clause—substantive and procedural, and the equal protection clause, of art. I, § 19, and the State, in its *amicus* brief, does not make any such argument—it argues the Act was unconstitutional as applied to Plaintiff and those similarly situated.

Even had the State desired to make such an argument, N.C.G.S. § 50B-1(b)(6) cannot survive even the lowest level of scrutiny. Absent any legitimate State interest, the statute is not "a legitimate exercise of the police power"; there is no "rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare"; and there is no scenario where it could be considered "reasonably necessary

to promote the accomplishment of a public good, or to prevent the infliction of a public harm." *Ballance*, 229 N.C. at 769–70, 51 S.E.2d at 735 (citations omitted). Instead, N.C.G.S. § 50B-1(b)(6), by denying Plaintiff and similarly situated people the protections it provides victims of domestic violence in "opposite-sex" dating relationships, runs directly counter to the promotion of the public good, welfare, morals, safety, and any other legitimate public interests of the State.

We hold, pursuant to the North Carolina Constitution, that N.C.G.S. § 50B-1(b)(6) is unconstitutional as-applied to Plaintiff and those similarly situated. *See Dunn v. Pate*, 334 N.C. 115, 123, 431 S.E.2d 178, 183 (1993) ("Plaintiffs have offered no argument as to what significant governmental interests, if any, were served by this gender-based distinction . . . and we will not speculate as to what those interests may have been. Since the . . . statutes at issue required unequal application of the law while serving no clearly discernable important governmental interest, they were unconstitutional . . . and will not [] be enforced by this Court.").

B. *The Fourteenth Amendment*

1. Text and Purpose

The first clause, the Privileges and Immunities Clause, prohibits differential treatment of any citizen of the United States based upon their present or former *state* citizenship. It also lays the foundational principle upon which the Due Process Clause and the Equal Protection Clause are premised—United States citizenship stands as a guarantee against the abridgement, by state action, of certain "privileges and immunities" that are fundamental rights of every United States citizen. *Id.*

It is the duty of this Court, like every court, to ensure the "privileges and immunities" referenced in the Fourteenth Amendment—which include the guarantee that all individual rights recognized in the Bill of Rights, as well as all other "fundamental rights" recognized as such in the Constitution and common law—are available to every citizen of our nation, and that all such persons, regardless of any other "statuses" that might be applied to them, receive equal privilege and protection under the law as those similarly situated.

The Supreme Court's recent decisions involving laws discriminating against "same-sex" individuals rely, in part, on the dissent from the *Civil Rights Cases*, decided shortly after ratification of the Fourteenth Amendment. The dissenting opinion recognized that the particular "status" of an individual, or "classifications" of particular groups of people

to which an individual may be deemed a member, were generally irrelevant when considering the individual's rights under the Fourteenth Amendment, and whether any of these rights had been violated. *Civil Rights Cases*, 109 U.S. 3, 29–30, 27 L. Ed. 835, 845 (1883) (Harlan, J., dissenting). The *only* status generally relevant to an individual's right to the full panoply of privileges, immunities, and protections guaranteed by the Constitution is that of *citizen*.[5]

2. Due Process

"[T]he Due Process Clause, like its forebear in the Magna Carta, was intended to secure the individual from the arbitrary exercise of the powers of government[,]" *Daniels v. Williams*, 474 U.S. 327, 331, 88 L. Ed. 2d 662, 668 (1986) (citations and quotation marks omitted), and it "furnishes a guaranty against *any* encroachment by the State on the fundamental rights belonging to *every* citizen." *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 617, 89 S.E.2d 290, 295 (1955) (emphasis added) (citation omitted). Of course, the State can pass and enforce laws that impact the fundamental rights of certain groups of people, when done constitutionally:

> The police power of the State extends to all the compelling needs of the public health, safety, morals and general welfare. Likewise, the liberty protected by the Due Process . . . Clause[] of the Federal . . . Constitution[] extends to all fundamental rights of the individual. It is the function of the courts to establish the location of the dividing line between the two by the process of locating many separate points on either side of the line.

State v. Dobbins, 277 N.C. 484, 497, 178 S.E.2d 449, 457 (1971).

There are two interests protected by the Due Process Clause:

> Due process has come to provide two types of protection for individuals against improper governmental action, substantive and procedural due process. *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998). Substantive due process ensures that the government does not engage in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172 (1952), or hinder rights "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). In the event that

5. When a citizen is similarly situated to others to whom a particular law applies.

> the legislation in question meets the requirements of substantive due process, procedural due process "ensures that when government action deprive[s] a person of life, liberty, or property . . . that action is implemented in a fair manner." *Thompson*, 349 N.C. at 491, 508 S.E.2d at 282.

State v. Bryant, 359 N.C. 554, 563–64, 614 S.E.2d 479, 485 (2005) (citations omitted). Certain violations of substantive due process are so substantial that no procedure is sufficient to remedy the violation and, therefore, procedural due process analysis is not required to find the state action in question unconstitutional. Lesser violations of substantive due process require procedural due process analysis to determine whether the interests of the state advanced by its action, along with the procedural safeguards included in the state action, are sufficient to survive due process analysis. As recognized by our Supreme Court:

> That there is a limit to the police power which the courts must, when called upon in a judicial proceeding, ascertain and declare is as well settled as the existence of the power itself. . . . . "It does not at all follow that every statute enacted ostensibly for the promotion of [the public good] is to be accepted as a legitimate exercise of the police power of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. . . . . If, therefore, *a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge and thereby give effect to the Constitution.*"

Williams, 146 N.C. at 627, 61 S.E. at 64 (emphasis added) (citations omitted). We review substantive and procedural due process in turn.

a. Substantive Due Process

" 'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.' " *Lawrence v. Texas*, 539 U.S. 558, 578, 156 L. Ed. 2d 508, 526 (2003) (citation omitted). The Due Process Clause "furnishes a guaranty against any encroachment by the State on the *fundamental rights* belonging to *every* citizen." *Sale*, 242 N.C. at 617, 89 S.E.2d at 295 (emphasis added) (citation omitted). When state action is alleged to abridge recognized personal rights fundamental to every individual, or when it is alleged to intrude upon constitutionally recognized liberty interests by targeting certain "categories" or "classes"

of individuals, substantive due process review is required. If state action unduly encroaches on "fundamental personal rights," whether of an individual or a "class" of people, then strict scrutiny review applies. *Clayton v. Branson*, 170 N.C. App. 438, 455, 613 S.E.2d 259, 271 (2005) (citations omitted); *Lawrence*, 539 U.S. at 577–79, 156 L. Ed. 2d at 525–26 (substantive due process prohibits state proscription of the liberty rights of members of a particular group—a "suspect class"—based on animus or historical acceptance of discrimination against the class). Under strict scrutiny review, " '*the party seeking to apply the law* must demonstrate that it serves *a compelling state interest*.' " *State v. Fowler*, 197 N.C. App. 1, 21, 676 S.E.2d 523, 540–41 (2009) (emphasis added) (citation omitted); *Clayton*, 170 N.C. App. at 455, 613 S.E.2d at 271.

However, " '[i]f the right infringed upon is not fundamental in the constitutional sense, the party seeking to apply it need only meet the traditional test of establishing that *the law is rationally related to a legitimate state interest*.' " *Fowler*, 197 N.C. App. at 21, 676 S.E.2d at 540–41 (emphasis added) (citation omitted); *Clayton*, 170 N.C. App. at 455, 613 S.E.2d at 271 (citations and quotation marks omitted) (explaining that, "[u]nless legislation involves a suspect classification or impinges upon fundamental personal rights, . . . the mere rationality standard applies and the law in question will be upheld if it has any conceivable rational basis").

When fundamental rights are abridged by state action, the state's interest must be weighed against the intrusion into those rights—factoring the nature of the fundamental right as well as the extent of the "intrusion." *See, e.g.*, *Dobbins*, 277 N.C. at 499, 178 S.E.2d at 457–58 ("the right to travel on the public streets is a fundamental segment of liberty and, of course, the absolute prohibition of such travel requires substantially more justification than the regulation of it by traffic lights and rules of the road"); *Lawrence*, 539 U.S. at 574, 156 L. Ed. 2d at 523 (citing *Romer v. Evans*, 517 U.S. 620, 624, 634, 134 L. Ed. 2d 855, 861(2003)) ("*Romer* invalidated an amendment to Colorado's Constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by 'orientation, conduct, practices or relationships,' and deprived them of protection under state antidiscrimination laws. We concluded that the provision was 'born of animosity toward the class of persons affected' and further that it had no rational relation to a legitimate governmental purpose." (citing *Romer v. Evans*, 517 U.S. 620, 624, 634, 134 L. Ed. 2d 855, 861(2003))). Pursuant to precedent set by the Supreme Court, substantive due process prohibits state proscription of the liberty rights of members of a particular group—a suspect class—when

it is based on animus towards the class, or historical acceptance of discrimination against the class. *Lawrence*, 539 U.S. at 575–79, 156 L. Ed. 2d at 523–26 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

Substantive due process therefore prohibits a state from arbitrarily deciding which "classes" of people may enjoy the constitutional protections of recognized fundamental rights and which "classes" may be excluded. For example:

> [In *United States v. Windsor*, 570 U.S. 744, 186 L. Ed. 2d 808 (2013), the Supreme Court's] concern sprung from [the] creation of two classes of married couples within states that had legalized same-sex marriage: opposite-sex couples, whose marriages the federal government recognized, and same-sex couples, whose marriages the federal government ignored. The resulting injury to same-sex couples served as the foundation for the Court's conclusion that [the Defense of Marriage Act] violated the Fifth Amendment's Due Process Clause."

Bostic v. Schaefer, 760 F.3d 352, 378 (4th Cir. 2014). This Court, like the Supreme Court in *Lawrence*, 539 U.S. at 574, 156 L. Ed. 2d at 523, considers the Court's equal protection analysis in *Romer* in our substantive due process analysis. The Court in *Romer* noted:

> [The challenged law] identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. The absence of precedent for [the law] is itself instructive; '[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.' "

Romer, 517 U.S. at 633, 134 L. Ed. 2d at 866 (citation omitted).

b. Procedural Due Process

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' . . . interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 31 (1976). "The

fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Id.* at 333, 47 L. Ed. 2d at 32 (citation omitted).

> " '[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334–35, 47 L. Ed. 2d at 33 (citations omitted).

c. Application to Plaintiff's Appeal

[2] We first determine whether, by denying Plaintiff a DVPO based upon the nature of the relationship she had with the Defendant, any fundamental rights of Plaintiff's were abridged. Plaintiff, like everyone, enjoys a fundamental right to personal safety:

> The liberty preserved from deprivation without due process include[s] the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Among the historic liberties so protected was a right to be *free from*, and to *obtain judicial relief for*, unjustified *intrusions on personal security*.

Ingraham v. Wright, 430 U.S. 651, 673, 51 L. Ed. 2d 711, 731 (1977) (emphasis added) (citations omitted). "The State may not, of course, *selectively deny its protective services to certain disfavored minorities* without violating the Equal Protection Clause." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 n.3, 103 L. Ed. 2d 249, 259 n.3

(1989) (emphasis added) (citation omitted); *see also Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006) ("It is well established that the Constitution protects a citizen's liberty interest in her own bodily security. It is also well established that, although the state's failure to protect an individual against private violence does not generally violate the guarantee of due process, it can where the state action 'affirmatively place[s] the plaintiff in a position of danger,' that is, where state action creates or exposes an individual to a danger which he or she would not have otherwise faced." (citations omitted)).

Plaintiff had the same constitutional right under the Fourteenth Amendment to seek love or companionship with another woman as she would have had to seek such a relationship with a man. Her liberty rights were identical to those of any other woman seeking a dating relationship with a man. Plaintiff's constitutional rights to liberty, privacy, and intimacy in her relationship with Defendant were identical in every way to those of any other woman in an "opposite sex" relationship. Plaintiff would have had the fundamental right to marry Defendant; just as she had the fundamental liberty right to decide to end her relationship with Defendant. However, pursuant to N.C.G.S. § 50B-1(b)(6), Plaintiff, and those similarly situated, are intentionally denied, *by the State*, the same protections against the domestic violence that may occur after a "break-up," or for any other "reason" one person decides to intentionally injure another.

The State, through its legislation, has subjected Plaintiff to a heightened potential of harassment, or physical abuse, by denying her the more stringent and immediately accessible remedies and protections provided to "opposite sex" victims of domestic violence in situations similar to hers.[6] By its plain language, N.C.G.S. § 50B-1(b)(6) creates a class of persons *singled out* for exposure to a heightened risk of "fear of imminent serious bodily injury or continued harassment," as well as "intentionally caus[ed] bodily injury." N.C.G.S. §§ 50B-1(a)(1)-(2).

The class of excluded, or potentially excluded, persons is that class of people who are identified as members of the LGBTQ+ community, whether by self-identification or by statutory definition. The factors most commonly used in identifying members of the LGBTQ+ class are sexual orientation and gender identity—though we do not mean to suggest

6. We again note that the State, through the executive branch, argues in favor of Plaintiff, and a ruling requiring all persons, including those in the LGBTQ+ community, equal access to the full protections offered in Chapter 50B. However, only the General Assembly can amend the statutes.

these two classifications, which are themselves made up of people whose "sexual" and "gender" "identities" express great diversity, are meant to approach a full definition of the LGBTQ+ "class," or its "members." However, because the courts are required to classify people based upon the plain language of the statute, the Act requires the courts to intrude into the private lives of petitioners in order to know whether it must tell an abused person that Chapter 50B protections cannot be provided—because the State has determined they are not entitled to the same protections granted to similarly situated "opposite-sex" petitioners. A judicial inquiry and experience that may be, for many, an unwanted intrusion into their private lives that could lead to harmful consequences. N.C.G.S. § 50B-1(b)(6) imposes a *statutory requirement* that the trial court conduct this invasive inquiry, and the inquiry itself can result in emotional and psychological harm to the petitioners—and under the Act the outcome must always result in denial of the requested DVPO.

In this case, based on her allegations, Plaintiff, after having been physically assaulted, having been accosted on her property, having had the sanctity of her home invaded, and having been harassed, was seeking protections the State affords solely to a single class of people—one comprised of those whose personal identity includes romantic attraction to people of the opposite sex.[7] Further, Plaintiff could have obtained a DVPO if she and Defendant had cohabitated, if they were married, or had joint custody of a child.

Plaintiff's right of personal security, like everyone's, is fundamental, yet the State has denied her protective services it affords others based entirely on her LGBTQ+ status. It is solely this status that led the trial court to believe it lacked the jurisdiction to grant Plaintiff a DVPO. The Act's denial of Plaintiff's right to security placed her in a position that "expose[d] [her] to a danger which . . . she would not have otherwise faced." *Kennedy*, 439 F.3d at 1061 (citation omitted).

The Supreme Court has also recognized a general fundamental liberty right to personal "autonomy," "identity," and "dignity": "The fundamental liberties protected by [the Due Process] Clause include most of the rights enumerated in the Bill of Rights. In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell*, 576 U.S. at 663, 192 L. Ed. 2d at 623 (citations

7. And whose requests for protection under the act are based on alleged injury resulting from an "opposite sex" "dating relationship."

omitted). The Supreme Court recognizes that some of the most important and fundamental choices involving protected "liberties" are those involving personal and intimate unions with others. *Id.* at 665–66, 192 L. Ed. 2d at 624. Though these choices may lead to marriage, it is not necessary that they reach that point before they become constitutionally fundamental. *Id.* (emphasis added) (citation omitted) ("Like choices concerning contraception, family relationships, procreation, and childrearing, *all of which are protected by the Constitution*, decisions concerning marriage are among the most intimate that an individual can make."). The Court has stated:

> In explaining the respect the Constitution demands for the autonomy of the person in making these [very personal] choices, we stated as follows:
>
> > "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are *central to the liberty protected by the Fourteenth Amendment.* At the *heart of liberty* is the *right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.*"
>
> Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.

Lawrence, 539 U.S. at 574, 156 L. Ed. 2d at 523 (emphasis added) (citation omitted).

Plaintiff has a right to the liberty to pursue her "own concept of existence" and the other "myster[ies] of human life" with the same autonomy, dignity and security as any other person in her situation. This pursuit will undeniably be impacted by the choices she makes regarding romantic or intimate partners. This right, "central to personal dignity and autonomy," is fundamental, and should not be interfered with by the State. By telling Plaintiff that her existence is not as valuable as that of individuals who engage in "opposite-sex" relationships, the State is not just needlessly endangering Plaintiff, it is expressing State-sanctioned animus toward her. Adopting the reasoning and analysis of the Court in *Windsor*, we hold:

> [T]hough [the General Assembly] has great authority to design laws to fit its own conception of sound . . .

> policy, it cannot deny the liberty protected by the Due Process Clause[.]
>
> What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of [N.C.G.S. § 50B-1(b)(6) is] to demean those persons who are in a lawful [dating relationship that turns violent]. This requires the Court to hold, as it now does, that [N.C.G.S. § 50B-1(b)(6), as applied,] is unconstitutional as a deprivation of the liberty of the person protected by the [Fourteenth] Amendment of the Constitution.

Windsor, 570 U.S. at 774, 186 L. Ed. 2d at 829–30.

3. Equal Protection

a. General Principles

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 87 L. Ed. 2d 313, 320 (1985) (citation omitted).

> The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. We have attempted to reconcile the principle with the reality by stating that, *if* a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

Romer, 517 U.S. at 631, 134 L. Ed. 2d at 865 (emphasis added) (citations omitted). Further, the State must respect "the principle that government and each of its parts remain open on impartial terms to all who seek its assistance:

> " 'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.' " Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall

> be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' "

Romer, 517 U.S. at 633–34, 134 L. Ed. 2d at 866–67 (citations omitted).

At a minimum, the state cannot make a statutory classification of people in order "to make them unequal to everyone else. . . . . A State cannot so deem a class of persons a stranger to its laws." *Romer*, 517 U.S. at 635, 134 L. Ed. 2d at 868. " '[A] classification cannot be made arbitrarily[.]' . . . . '[A]rbitrary selection can never be justified by calling it classification.' " *McLaughlin v. Florida*, 379 U.S. 184, 190, 13 L. Ed. 2d 222, 227 (1964) (citations omitted). Finally, "[j]udicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose[.]" *Id*. at 191, 13 L. Ed. 2d at 228.

Pursuant to the generally applied approach:

> Our analysis of the Opponents' Fourteenth Amendment claims has two components. First, we ascertain what level of constitutional scrutiny applies: either rational basis review or some form of heightened scrutiny, such as strict scrutiny. Second, we apply the appropriate level of scrutiny to determine whether the . . . [l]aws pass constitutional muster.
>
> Under both the Due Process and Equal Protection Clauses, interference with a fundamental right warrants the application of strict scrutiny. *Glucksberg*, 521 U.S. 702, 719–20; *Zablocki*, 434 U.S. 374, 383. We therefore begin by assessing whether the . . . [l]aws infringe on a fundamental right. Fundamental rights spring from the Fourteenth Amendment's protection of individual liberty, which the Supreme Court has described as "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Casey*, 505 U.S. 833, 851.

Bostic, 760 F.3d at 375 (citations omitted). Strict scrutiny also applies "when a regulation classifies persons on the basis of certain designated suspect characteristics[.]" *Dep't of Transp. v. Rowe*, 353 N.C. 671,

675, 549 S.E.2d 203, 207 (2001) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16–17, 36 L. Ed. 2d 16, 33 (1973); *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980)).

> If a regulation receives strict scrutiny, then the state must prove that the classification is necessary to advance a compelling government interest; otherwise, the statute is invalid. *San Antonio*, 411 U.S. at 16–17. Other classifications, including gender and illegitimacy, trigger intermediate scrutiny, which requires the state to prove that the regulation is substantially related to an important government interest. *Clark v. Jeter*, 486 U.S. 456 (1988); *Craig v. Boren*, 429 U.S. 190 (1976), 429 U.S. 190407 (1976). If a regulation draws any other classification, it receives only rational-basis scrutiny, and the party challenging the regulation must show that it bears no rational relationship to any legitimate government interest. If the party cannot so prove, the regulation is valid. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *Texfi*, 301 N.C. at 11.

Rowe, 353 N.C. at 675, 549 S.E.2d at 207 (citations omitted).

b. Application to Plaintiff's Appeal

[3] The *core* of the Equal Protection Clause is the principle that "all persons similarly circumstanced shall be treated alike." *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37, 72 L. Ed. 770, 774 (1928) (citations and quotation marks omitted). As noted, "generally [ ] the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, and that it applies to the exercise of all the powers of the state which can affect the individual[.]" *Id.* "[C]lassifications affecting fundamental rights are given the most exacting scrutiny." *Clark*, 486 U.S. at 461, 100 L. Ed. 2d at 471 (citations omitted). We have held above that Plaintiff has a fundamental right to liberty, which includes the right to personal security, dignity and " 'the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.' *Casey*, 505 U.S. 833, 851." *Bostic*, 760 F.3d at 375 (citation omitted). Therefore, we hold Plaintiff's as-applied challenge to the Act must be reviewed under strict scrutiny.

The *only* thing preventing Plaintiff from being similarly situated to an "opposite-sex" person in a former "dating relationship" is *the statute* itself—N.C.G.S. § 50B-1(b)(6). Plaintiff's LGBTQ+ status is a "mere difference" between her and a woman in an "opposite-sex" "dating relationship," and this status "is not enough" to justify the injury the State is

perpetrating on Plaintiff. *Coleman*, 277 U.S. at 37, 72 L. Ed. at 774 (citations omitted). The statute only serves to promote both the frequency and severity of domestic violence, in a targeted group that is, pursuant to the Constitution of the United States, in no legally cognizable or relevant manner different from the group identified by N.C.G.S. § 50B-1 as persons who are, or have been, in a "dating relationship" with a person of the "opposite-sex" and, therefore, permitted the protections of a DVPO by N.C.G.S. § 50B-1(b)(6). The "opposite-sex" distinction limiting the protections of N.C.G.S. § 50B-1(b)(6) was "made arbitrarily," and so remains, and N.C.G.S. § 50B-1(b)(6) bears no "reasonable" nor "just relation to [Chapter 50B] in respect to which the classification is proposed[.]" *Coleman*, 277 U.S. at 37, 72 L. Ed. at 774 (citations and quotation marks omitted). N.C.G.S. § 50B-1(b)(6) "is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Romer*, 517 U.S. at 635, 134 L. Ed. 2d at 868. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government *is itself* a denial of equal protection of the laws in the most literal sense." *Id.* at 633, 134 L. Ed. 2d at 867 (emphasis added) (citations omitted). Because the State has provided Chapter 50B protections to the "majority" of persons in "dating relationships," it cannot deny them to a "minority" without surviving strict scrutiny review—which it cannot do. *DeShaney*, 489 U.S. at 197 n.3, 103 L. Ed. 2d at 259 n.3 (citation omitted) ("The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.").

[4] We further hold that N.C.G.S. § 50B-1(b)(6), as applied to Plaintiff and those similarly situated, cannot withstand even "rational basis" review and, therefore, it would also fail "intermediate scrutiny." There is simply no rational basis that could support this law, in part because there is no cognizable government interest that N.C.G.S. § 50B-1(b)(6) could serve to protect as applied in Plaintiff's case.

4. Review in Cases Alleging State Action Targeted at LGBTQ+ Status

[5] Seventeen years after the Supreme Court upheld a Georgia statute outlawing certain sex acts associated with same-sex relationships in *Bowers v. Hardwick*, 478 U.S. 186, 92 L. Ed. 2d 140 (1986), the Court overruled *Bowers* in *Lawrence*, later noting that "*Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation." *Obergefell*, 576 U.S. at 678, 192 L. Ed. 2d at 633. *Lawrence* relied heavily on two cases the Court had decided after

Bowers, one based on due process grounds and the other on equal protection grounds:

> Two principal cases decided after *Bowers* cast its holding into . . . doubt. In *Planned Parenthood [] v. Casey*, [] the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:
>
> > "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."
>
> Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.
>
> The second post-*Bowers* case of principal relevance is *Romer v. Evans*. There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. *Romer* invalidated an amendment to Colorado's Constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose.

Lawrence, 539 U.S. at 573–74, 156 L. Ed. 2d at 522–23 (citations omitted). In *Casey*, the Supreme Court stated in plain terms that the "liberties" protected by the Fourteenth Amendment have, and will continue to, evolve as society evolves:

> The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office. As Justice Harlan observed:
>
> > "Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound."

Casey, 505 U.S. at 849–50, 120 L. Ed. 2d at 697 (citations omitted).

In *Romer*, the Supreme Court considered of the Colorado amendment, and decided: "Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies." It was this specific targeting of people of LGBTQ+ status for discriminatory treatment by the state that the Court found unacceptable and in direct contradiction to the guarantees of the Fourteenth Amendment:

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. " 'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.' " Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare.

> A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' "

Romer, 517 U.S. at 633–34, 134 L. Ed. 2d at 866–67 (citations omitted). The Court recognized the *particular* harm that is done when state discrimination is directed against a classification of people who are, and have historically been, subjected to societal animus. "[L]aws of the kind now before us raise the *inevitable inference* that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634, 134 L. Ed. 2d at 867 (emphasis added) (citation omitted).

The Supreme Court recognized, in *Lawrence*, that its test for determining the constitutionality of allegedly discriminatory state action against a minority group included, *as justification for upholding the challenged action*, the fact that discrimination and animus directed at the targeted minority group had been considered acceptable and appropriate by the "majority" for some historically "significant" period of time. *Lawrence*, 539 U.S. at 567, 156 L. Ed. 2d at 518. The Court held this kind of judicial review—one that considered *as the basis* for upholding discriminatory state action the fact that such discrimination not only *existed* in reality, but *was approved of* by a majority of the populace, based upon "historical" and ongoing animus toward the group targeted by the state action—was violative of both the spirit and the constitutional requirements of the Fourteenth Amendment. *Id.*; *see also Obergefell*, 576 U.S. at 671–72, 192 L. Ed. 2d at 628. This truth was further recognized by the Court in *Windsor*, as well as that the fundamental right of "liberty" includes personal "dignity" and "integrity"—the right to make intimate decisions and live one's life in a manner that is true to oneself without unwarranted interference or judgment backed by the laws of the state:

> By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's

> considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

Windsor, 570 U.S. at 769, 186 L. Ed. 2d at 826–27 (citation omitted).

In considering a Fourth Amendment challenge to the Defense of Marriage Act ("DOMA"), the Court in *Windsor*, following *Romer*, conducted a review that was, in large part, "animus"-based review:

> DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. In determining whether a law is motived by an improper animus or purpose, " '[d]iscriminations of an unusual character' " especially require careful consideration. *Supra*, at 2692 (quoting *Romer*, *supra*, at 633). DOMA cannot survive *under these principles*.

Id. at 769–70, 186 L. Ed. 2d at 827 (emphasis added) (citations omitted); *see also id.* at 772, 186 L. Ed. 2d at 828 (citations omitted) ("By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. . . . . The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship [New York] State has sought to dignify."). "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality[.]" *Windsor*, 570 U.S. at 772, 186 L. Ed. 2d at 828. "Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways." *Id.* "[T]hough Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment"—"the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved." *Id.* at 774, 186 L. Ed. 2d at 829, 830. "What has been explained to this point should more than suffice to establish that *the principal purpose and*

the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution." *Id.* at 774, 186 L. Ed. 2d at 829–30 (emphasis added).

In *Obergefell*, the Court finally held what its opinions in *Romer*, *Lawrence*, and *Windsor* had been trending toward—that the fundamental right to marry attaches to all people, and it is a violation of the Fourteenth Amendment for the state to deprive a person of this fundamental right based *solely* on who they love and choose to marry. The state cannot deny someone in the LGBTQ+ community the benefit of a constitutionally protected right based *solely* on that person's LGBTQ+ status.[8] The Court, building on *Romer*, *Lawrence*, and *Windsor*, recognized what, in retrospect, was obvious—discrimination, whether newly minted or historically accepted, cannot be the very justification for upholding the law challenged as discriminatory. *Obergefell*, 576 U.S. at 665, 192 L. Ed. 2d at 624–25; *id.* at 671–72, 192 L. Ed. 2d at 628.

> The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." . . . . History and tradition guide and discipline this inquiry but do not set its outer boundaries. *That method respects our history and learns from it without allowing the past alone to rule the present.*
>
> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we *learn* its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Id. at 663–64, 192 L. Ed. 2d at 623–24 (emphasis added) (citations omitted).

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8. And though there may be some particular set of facts that could survive Fifth or Fourteenth Amendment review for such a law, we do not doubt that such a law, and set of facts, would be the rare exception.

> *If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.* This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. *See Loving*, 388 U.S. 1, 12; *Lawrence*, 539 U.S. at 566–67.
>
> The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. . . . . [W]hen [a] sincere, personal opposition [to same-sex marriage based on "religious or philosophical premises,"] becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

Id. at 671–72, 192 L. Ed. 2d at 628–29 (emphasis added) (citations omitted).

The Court's opinion in *Obergefell* establishes that legislation targeting the rights of those in the LGBTQ+ community is subject to something greater than "rational basis" review.[9] The Court in *Obergefell* highlighted the interconnected role of the Due Process Clause's "liberty" guarantees and the right to "equal protection under the law" guaranteed by the Equal Protection Clause, held that the protections of the Fourteenth Amendment apply equally to LGBTQ+ and non-LGBTQ+ persons, and gave particular attention to the *injuries inflicted* by laws targeting LGBTQ+ persons for unequal treatment. *Obergefell*, 576 U.S. at 671–76, 192 L. Ed. 2d at 628–31. The Court concluded:

> It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in

9. The words "rational basis," "intermediate scrutiny," "strict scrutiny," "test," and "review" do not occur in the opinion within any context related to the review conducted by the Court based on the facts before it.

> essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.

Id. at 675, 192 L. Ed. 2d at 631 (citations omitted). The Court then held "that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty." *Id.* at 675–76, 192 L. Ed. 2d at 631. The Court in *Obergefell*, as it did in *Romer*, *Lawrence*, and *Windsor*, was clearly operating pursuant to this principle as it labored to determine the correct standards to apply in the face of government action that had a discriminatory effect on members of the LGBTQ+ community. *Id.* at 675, 192 L. Ed. 2d at 631 (citation omitted) ("*Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State 'cannot demean their existence or control their destiny by making their private sexual conduct a crime.' "); *id.*, at 675, 192 L. Ed. 2d at 631.

The resulting standard, which must be applied in light of the particular facts of the case under review, is based upon both the Due Process and Equal Protection Clauses, incorporating both the due process concept of fundamental "liberty" and the equal protection "disparate treatment" review—what we, above, have called "full Fourteenth Amendment" review.[10] *See Lawrence*, 539 U.S. at 575, 156 L. Ed. 2d at 523 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."). "In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our

10. We recognize that these cases were neither brought nor decided pursuant to the first clause of section 1 of the Fourteenth Amendment, the Privileges and Immunities Clause.

understanding of what freedom is and must become." *Obergefell*, 576 U.S. at 672, 192 L. Ed. 2d at 629 (citations omitted). The Court noted that review based upon the interrelationship between both clauses was not a novel proposition. *Id.* at 674, 192 L. Ed. 2d at 630–31. This full Fourteenth Amendment review clearly requires the government to prove more than is required by the "rational basis" test, though the Court has not named or defined the appropriate "test" that should be applied in cases of this nature. We believe this omission was intentional, and that, in the cases culminating in *Obergefell*, the full Fourteenth Amendment review applied by the Court is a more comprehensive review that does not readily fit within the "rational basis," "intermediate scrutiny," or "strict scrutiny" triad.

Instead, the Court has focused on (1) the clear intent of the government in passing challenged laws as part of its review, as the clear intent may "belie any legitimate justifications that may be claimed for" the laws, *Romer*, 517 U.S. at 635, 134 L. Ed. 2d at 867; *id.* at 634–35, 134 L. Ed. 2d at 867 (citation omitted) (" '[I]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.' "); (2) the additional impact when majority "opposition becomes enacted law and public policy" and "the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied[,]" *Obergefell*, 576 U.S. at 672, 192 L. Ed. 2d at 629; and (3) the particular harms the laws inflicted on same-sex individuals, couples, and families: "Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them[,]" *id.* at 675, 192 L. Ed. 2d at 631; *id.* at 668, 192 L. Ed. 2d at 627 (explaining "children suffer the stigma of knowing their families are somehow lesser" as a result of such laws).

Pursuant to *Romer*, *Lawrence*, *Windsor*, and *Obergefell*, this Court must "dr[a]w upon principles of liberty and equality to define and protect the rights of gays and lesbians," and insure "the State '[does not] demean their existence or control their destiny' " through legislation that "impos[es] . . . disabilit[ies] on gays and lesbians serv[ing] to disrespect and subordinate them[,]" *id.* at 675, 192 L. Ed. 2d at 631; "impose[s] stigma and injury of the kind prohibited by our basic charter[,]" *id.* at 670–71, 192 L. Ed. 2d at 628; or constitutes an "unjustified infringement [upon their] fundamental right[s,]" *id.* at 675, 192 L. Ed. 2d at 631 (citations omitted).

From our review, we hold that *Obergefell* counsels, in relevant part, the following: (1) Laws that serve to deny members of the LGBTQ+ community rights afforded to non-LGBTQ+ individuals are highly suspect, and a reviewing court *must* consider a number of factors that will weigh against the constitutionality of such a law; among these factors (2) the reviewing court must consider the *actual* intent of the state in enacting the law, if possible—whether indicated by its plain language, consideration of the law's real-world impact, through historical and legislative review including the failure to amend a law that is unnecessarily discriminatory in fact;[11] (3) the court must consider the *particular* harms suffered by LGBTQ+ persons when the State denies them equal rights to liberty and access to the law based on their LGBTQ+ status; (4) the court must factor that the particular harms suffered are based in part on "a long history of disapproval of the[] relationships" between LGBTQ+ persons, *id.* at 675, 192 L. Ed. 2d at 631; (5) the court must assess the injury that occurs when official State action, which singles out members of the LGBTQ+ community for the denial of rights afforded non-LGBTQ+ persons—including that such action imposes a state-sanctioned "stigma" upon LGBTQ+ individuals which "diminishes" them, "demeans their existence," interferes with their "autonomy" and "control of their destiny," impugns their "dignity," and serves to unfairly call into question their rightful place as equal members of society—as equal "citizens," *id.* at 670–71, 675, 192 L. Ed. 2d at 628, 631 (citations omitted).

These factors must be weighed against whatever legitimate interest is advanced by the challenged action, considering the context and particular facts involved. The Court in *Obergefell* emphasized the importance of the principle that " '[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power[,]" *id.* at 677, 192 L. Ed. 2d at 632 (alteration in original) (citation omitted), and held "the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of [a] fundamental right" denied based upon a person's LGBTQ+ status, *id.* at 675, 192 L. Ed. 2d at 631.

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11. Neither the government's stated intent—unless determined to be the same as its actual intent, nor any *hypothetically conceivable* legitimate purpose, shall serve to mitigate the weight given to the harm that results when "the imprimatur of the State itself on an exclusion[ary law] . . . demeans or stigmatizes those whose own liberty is then denied." *Obergefell*, 576 U.S. at 672, 192 L. Ed. 2d at 629; *see also Lawrence*, 539 U.S. at 580, 156 L. Ed. 2d at 526–27 (citations omitted) ("We have consistently held . . . that some objectives, such as 'a bare . . . desire to harm a politically unpopular group,' are not legitimate state interests. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

We hold in this case that N.C.G.S. § 50B-1(b)(6) does not survive this balancing test. "A State cannot so deem a class of persons a stranger to its laws." *Romer*, 517 U.S. at 635, 134 L. Ed. 2d at 868. Plaintiff has asked this Court "for equal dignity in the eyes of the law. The Constitution grants [Plaintiff] that right." *Obergefell*, 576 U.S. at 681, 192 L. Ed. 2d at 635. The Act fails to survive the review required pursuant to our analyses of *Romer*, *Lawrence*, *Windsor*, and *Obergefell*, and we so hold.

D. *Bostock v. Clayton County*

1. The Decision

The United States Supreme Court recently decided *Bostock*, 590 U.S. __, 140 S. Ct. 1731, 207 L. Ed. 2d 218, which this Court finds relevant to our review. Writing for the majority, Justice Gorsuch noted: "Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status." *Id.* at ___, 140 S. Ct. at 1737, 207 L. Ed. 2d at ___. The Court was deciding a statutory challenge to part of Title VII—42 U.S.C. § 2000e-2(a)(1): "This Court normally interprets a statute in accord with the *ordinary public meaning* of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President"—42 U.S.C. § 2000e-2 was enacted in 1964. *Bostock*, 590 U.S. at ___, 140 S. Ct. at 1738, 207 L. Ed. 2d at ___ (emphasis added) (citation omitted). Further, the Court added, "we must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally." *Id.* at ___, 140 S. Ct. at 1750, 207 L. Ed. 2d at ___. The Court stated in relevant part: "With this in mind, our task is clear. We must determine the *ordinary public meaning* of Title VII's command that it is 'unlawful . . . for an employer to . . . discriminate against any individual . . . *because of* such individual's . . . *sex*[.]' § 2000e–2(a)(1)." *Id.* at ___, 140 S. Ct. at 1738, 207 L. Ed. 2d at ___ (emphasis added) (citation omitted).

In *Bostock*, "The only statutorily protected characteristic at issue . . . [was] 'sex[.]' " *Id.* at ___, 140 S. Ct. at 1739, 207 L. Ed. 2d at ___. "Appealing to roughly contemporaneous dictionaries, the employers [argued] that, as used here, the term 'sex' in 1964 referred to 'status as either male or female [as] determined by reproductive biology.' " *Id.* The Court stated that it would "proceed on the *assumption* that 'sex' signified what the employers suggest, referring only to biological distinctions

between male and female[,]" "because nothing in our approach to these cases turns on the outcome of the parties' debate [concerning the definition of 'sex'], and because the employees concede the point *for argument's sake*[.]" *Id.* (emphasis added). Therefore, the Court focused on whether, pursuant to a plain language reading, discrimination "because of" an employee's "sex"—even when narrowly defined as limited to reproductive biology—included discrimination based upon a person's status as gay, lesbian, or transgender. The Court noted that, applying the restricted definition of "sex" argued by the employers, and the "ordinary meaning" of "because of," the statute required at a minimum proof of "but-for" causation:

> [T]he statute prohibits employers from taking certain actions "because of " sex. And, as this Court has previously explained, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.' " In the language of law, this means that Title VII's "because of" test incorporates the " 'simple' " and "traditional" standard of but-for causation. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

Id. (citations omitted). The Court held:

> It doesn't matter if other factors besides the plaintiff's sex contributed to the decision [to fire the employee]. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred.

Id. at ___, 140 S. Ct. at 1741, 207 L. Ed. 2d at ___. The Court gives plenary examples to demonstrate the principles and logic behind this holding, which are instructive. *See Id.* at ___, 140 S. Ct. at 1741–49, 207 L. Ed. 2d at ___. Although in *Bostock* the Court was construing a statute, its definitions and analysis are relevant to due process and equal protection claims, in that it holds the definition of "sex," absent any qualifying language, includes "homosexuals" or "transgender" people when the issue is discrimination or disparate treatment based, at least in part, on the

status of a person as "homosexual" and "transgender"—*i.e.*, based on a person's sexual orientation or gender identity.

Therefore, the majority held that discrimination against someone because that person is "homosexual" or "transgender"—*i.e.*, based on who that person chooses to have intimate relations with, or the gender identity with which the person identifies—constitutes discrimination against that person, at least in part, based on their gender, or "sex;"

> Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender *fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision[.]*

Id. at ___, 140 S. Ct. at 1737, 207 L. Ed. 2d at ___ (emphasis added); *id.* at ___, 140 S. Ct. at 1742, 207 L. Ed. 2d at ___ ("an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person"). The Court reasoned:

> [H]omosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because *to discriminate on these grounds requires [the] . . . intentiona[l] treat[ment of] individual[s] . . . differently because of their sex.*

Id. at ___, 140 S. Ct. at 1742, 207 L. Ed. 2d at ___ (emphasis added).

Neither does it affect the analysis if an employer "is equally happy to fire male *and* female employees who are homosexual or transgender." *Id.* Further, "the plaintiff's sex need not be the sole or primary cause of the employer's adverse action. . . . . [The analysis does not change i]f another factor—*such as the sex the plaintiff is attracted to or presents as*—might also be at work, or even play a more important role in the employer's decision." *Id.* at ___, 140 S. Ct. at 1744, 207 L. Ed. 2d at ___ (emphasis added). The Court held: "We do not hesitate to recognize today . . .: An employer who fires an individual merely for being gay or transgender" is discriminating against that person because of that individual's "sex." *Id.* at ___, 140 S. Ct. at 1754, 207 L. Ed. 2d at ___. "The

fact that [it is the combination of] female sex *and* attraction to women [that] can . . . get an employee fired does no more than show the same outcome can be achieved through the combination of different factors. In either case . . . sex plays an essential but-for role." *Id.* at ___, 140 S. Ct. at 1748, 207 L. Ed. 2d at ___ (emphasis added). The context surrounding the discriminatory act must be factored into the analysis, and that includes the "sex" of a complainant's partner, or the "sex" of the complainant at birth, as determined by biology. *Id.*

2. Relevance to Plaintiff's Appeal

[6] We first note that the Supreme Court has held that "because of" language used to determine a "discriminatory purpose" when required for an Equal Protection Clause challenge "applies to the 'class-based, invidiously discriminatory animus' requirement of" federal statutes. Therefore, the Court's analysis of Title VII in *Bostock* is also relevant to similar requirements imposed by the Fourteenth Amendment in the case before us. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 272, 122 L. Ed. 2d 34, 48 (1993) (citations omitted). Though *Bostock* was decided by statutory interpretation of certain language in Title VII, the reasoning in *Bostock* in support of its determination, that "*it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex*[,]" includes a common, plain language definition of "sex" in the context of discrimination that, absent some exclusionary language, must logically include sexual-orientation and gender identity. *Bostock*, 590 U.S. at ___, 140 S. Ct. at 1741, 207 L. Ed. 2d at ___ (emphasis added). Therefore, the definition of "sex" in *Bostock* should apply equally to any law denying protections or benefits to people based upon sexual orientation or gender identity—disparate treatment based on these "statuses" is disparate treatment based, at least in part, upon "sex" or gender. *See id.*

This Court has conducted an analysis similar to that in *Bostock* concerning the meaning of "racial animus" in a statute increasing punishment for certain crimes committed "with racial animus," and reached an analogous conclusion. *See* N.C.G.S. § 14-3 (2019); *State v. Brown*, 202 N.C. App. 499, 503, 689 S.E.2d 210, 213, *disc. review denied*, 364 N.C. 243, 698 S.E.2d 657 (2010). In *Brown*, the defendant "argue[d] that because both he and Peterson[, the victim,] [we]re of the same race, . . . the ethnic animosity statute, [could]not apply." *Brown*, 202 N.C. App. at 503, 689 S.E.2d at 213. N.C.G.S. § 14-3(c) mandates increased sentences when certain misdemeanors are "committed because of the victim's race, color, religion, nationality, or country of origin[.]" N.C.G.S.

§ 14-3(c). This Court looked in part to Title VII opinions for guidance and noted: "There is nothing in either the language of [the statute], or the title of the bill, to suggest the General Assembly intended a narrow construction of what constituted 'ethnic animosity' or acts 'committed because of the victim's race or color.' " *Brown*, 202 N.C. App. at 508, 689 S.E.2d at 215. We held that a white man who assaults another white man based, in part, on the defendant's objection to the victim's romantic relationship with an African-American woman, has committed the assault " 'because of the victim's race or color' ":

> Had Peterson been an African–American, Defendant might not have shot at Peterson. Therefore, the jury could reasonably find that Defendant[, a white man,] only shot at Peterson *because Peterson was white*, and Defendant was acting out his disgust with, or anger towards, Peterson because of Peterson's relationship with a woman of a different race or color.

Id. at 508, 689 S.E.2d at 215–16 (emphasis added).

When an equal protection challenge is raised: "Our decisions . . . establish that the party seeking to uphold a statute that classifies individuals on the basis of their *gender* must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724, 73 L. Ed. 2d 1090, 1098 (1982) (emphasis added) (citations omitted). Therefore, the Supreme Court's definition of "sex," or gender, in *Bostock* is relevant in this Court's review of Plaintiff's Fourteenth Amendment challenge before us.

In this case, N.C.G.S. § 50B-1(b)(6) limits the protections of DVPOs to "persons of the opposite sex who are in a dating relationship or have been in a dating relationship." N.C.G.S. § 50B-1(b)(6). The plain language of the statute specifically denies the protections of DVPOs to similarly situated "persons of the [same] sex who are in a dating relationship or have been in a dating relationship." N.C.G.S. § 50B-1(b)(6) (alteration in bracket). Pursuant to well-established precedent, cited above, and the reasoning in *Bostock*, N.C.G.S. § 50B-1(b)(6), on its face, treats similarly situated people differently based upon their "sex" or gender. Pursuant to *Bostock*, "An individual's homosexuality or transgender status is not relevant [to the review]. That's because *it is impossible* to discriminate against a person for being homosexual or transgender *without discriminating against that individual based on sex*." *Bostock*, 590 U.S. at ___, 140 S. Ct. at 1741, 207 L. Ed. 2d at ___ (emphasis added). As we have already held above, N.C.G.S. § 50B-1(b)(6) does not survive "intermediate scrutiny," which applies in cases where the alleged government

discrimination is based on "sex" or gender and, therefore, the statute does not survive application to Plaintiff pursuant to the review demanded by *Bostock*.

VI. Amicus Curiae

We must now address certain issues involving this Court's appointment of an *amicus curiae* to brief counterarguments to Plaintiff's appeal. The trial court entered two final judgments on 7 June 2018, the 50B Order that denied Plaintiff's request for a DVPO, and the 50C Order that granted Plaintiff a "permanent" civil no-contact order. In both of these orders, the trial court indicated that it would have granted Plaintiff's request for a DVPO had Plaintiff been a man—a person of the opposite "sex" from Defendant. Plaintiff gave notice of appeal from the 50B Order. Approximately three months after Plaintiff's request for a DVPO was denied, Defendant informed the trial court by a letter, dated 8 September 2018, that she did not "want [to] be involved."

This appeal involves issues of great public interest, the decision of which will affect the protections available to individuals of LGBTQ+ status who suffer domestic violence. Therefore, this Court's decision will have an impact far beyond the immediate impact it will have on Plaintiff and Defendant. The public interest in the resolution of Plaintiff's appeal is in part demonstrated by the fact that, on appeal, Plaintiff is represented by attorneys representing ACLU of North Carolina Legal Foundation along with Plaintiff's trial attorney.

Notably, the State of North Carolina, in its *amicus* brief, does *not* defend the constitutionality of N.C.G.S. § 50B-1(b)(6), noting that "the State maintains a variety of programs to assist victims of domestic violence" and "the State also has a related interest in ensuring that all its people are treated equally under the law. This interest is particularly [strong] . . . where certain groups are being denied equal legal protections from private violence[,]" because "[t]he State and its law-enforcement community have an obligation to ensure the safety and security of all North Carolinians, without regard to their sexual orientation." The Governor moved to join the State's *amicus* brief, noting "[t]his case concerns whether persons in same-sex relationships should be afforded equal legal rights and protections from domestic violence" and stating the "Governor shares the State's strong interest in ensuring that law enforcement has robust tools at its disposal to prevent and punish all forms of domestic violence." The Governor "also shares the State's overlapping interest in ensuring that all North Carolinians are treated equally under the law."

Additionally, an *amicus* brief was filed by

> North Carolina Coalition Against Domestic Violence [("NCCADV")]; Legal Aid of North Carolina [("LANC")]; and several local domestic violence support organizations, including Albemarle Hopeline, serving Camden, Chowan, Currituck, Gates, Pasquotank, and Perquimans Counties; Center for Family Violence Prevention, serving Pitt, Martin, and Washington Counties; Cleveland County Abuse Prevention Council, Inc., serving Cleveland County; Compass Center for Women and Families, serving Orange County; Domestic Violence Shelter and Services, Inc., serving New Hanover County; Durham Crisis Response Center, serving Durham County; Families First, serving Bladen and Columbus Counties; Family Service of the Piedmont, serving Guilford County and the Central Hub of the LGBTQ Capacity Building Grant serving 25 counties; Helpmate Domestic Violence Services, serving Buncombe County; Hoke County Domestic Violence and Sexual Assault Center, serving Hoke County; Outer Banks Hotline, Inc., serving Dare County; InterAct, serving Wake County; A Safe Home for Everyone, serving Ashe County; and Southeastern Family Violence Center, serving Robeson County.

NCCADV states that it "strives to empower all North Carolina communities to build a society that prevents and eliminates domestic violence" as "a nonprofit agency that leads the state's movement to end domestic violence and to enhance work with survivors through collaborations, innovative trainings, prevention, technical assistance, state policy development and legal advocacy." LANC "is a statewide, nonprofit law firm that provides free legal services in civil matters to low-income people in order to ensure equal access to justice."

Another *amicus* brief was filed by " 'North Carolina LGBTQ+ Non-Profit Organizations' " ("NCLNPO"), comprised of statewide and southeastern regional divisions of Equality N.C., Campaign for Southern Equality, Safe Schools NC, Inc., four organizations based in the law schools of North Carolina Central University, the University of North Carolina, Wake Forest University, and Duke University, as well as an additional ten non-profit organizations providing support for the LGBTQ+ community in North Carolina. NCLNPO is "interested in ensuring that victims of same-sex domestic violence receive the same state protections as victims of opposite-sex domestic violence."

However, no appellee brief was filed by, or on behalf of, Defendant, nor did any *amici* request to file briefs in support of the constitutionality of N.C.G.S. § 50B-1(b)(6). Therefore, this Court was left to decide the important matter before us without the benefit of competing appellate arguments. In light of this deficit, this Court, by order entered 3 May 2019 (the "Appointing Order"), appointed *Amicus* "to defend the ruling of the trial court"; because the parties and the public interest would be best served by the addition of a brief setting forth a well-considered argument for the constitutionality of N.C.G.S. § 50B-1(b)(6).

Amicus was directed to argue the *correctness* of the trial court's ruling, *including* its reasoning, and to contest Plaintiff's arguments, in order to provide this Court with an independent source of legal argument addressing the fundamental issues of important public interest raised by Plaintiff's appeal—whether the trial court's refusal to grant Plaintiff a Chapter 50B DVPO constituted an as-applied violation of Plaintiff's constitutional rights. This was the issue of broad public interest raised by the trial court's ruling in the 50B Order and the issue that motivated this Court to appoint *Amicus*.

The Appointing Order states in part:

> In the absence of a brief on behalf of appellee, the Court appoints [*Amicus*] to appear as court assigned amicus curiae in the above-captioned appeal to defend the ruling of the trial court.
>
> [*Amicus*] shall file an amicus curiae brief not exceeding 8,750 words in length within thirty days of the date of this order. The appellant may file a reply brief not exceeding 3,750 words in length in response to the brief of amicus curiae[.]

A. *Role of Assigned* Amici Curiae

"As a general matter, appointing an amicus is reserved for rare and unusual cases that involve questions of general or public interest[.]" 4 Am. Jur. 2d Amicus Curiae § 3 (citations omitted). We review, below, the responsibilities of *amici curiae*, as well as the legal limits of the powers that may be conferred upon *amici curiae*, and clarify the non-litigating status of *amici curiae*, whether appointed by the Court acting *sua sponte* or in response to motions duly filed.

> *Amicus curiae* is a Latin phrase for "friend of the court" *as distinguished from an advocate* before the court. It serves only for the benefit of the court, assisting the court

> in cases of general public interest, by making suggestions to the court, . . . and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision.
>
> An *amicus curiae* is *not a party to the litigation* and therefore does not necessarily represent the views or interests of either party. Since an *amicus does not represent the parties* but participates only for the benefit of the court, *it is solely within the discretion of the court to determine the fact, extent, and manner of participation* by the *amicus*.

Alexander v. Hall, 64 F.R.D. 152, 155 (D.S.C. 1974) (emphasis added) (citations omitted) (*see also* omitted citations). However, the powers a court may grant *amici* are limited by the law. Some additional general powers granted, and limitations attached, to an *amicus curiae* follow:

> An amicus curiae is not a party and generally cannot assume the functions of a party, or an attorney for a party. . . . . When amicus status is granted, *the named parties should always remain in control, with the amicus merely responding to the issues presented by the parties*.
>
> . . . .
>
> An amicus curiae has *no control over the litigation* and *no right to institute any proceedings* in it. An amicus curiae is not vested with the management of the case. He or she is not bound by the judgment of the court, nor can he or she appeal it, except in rare circumstances. Moreover, an amicus curiae ordinarily cannot conduct discovery or *file* pleadings or *motions in the cause* but is restricted to suggestions relative to matters apparent *on the record* or to matters of practice. *It is not the proper role of an amicus to comment on the existence of allegedly newly discovered evidence*.

4 Am. Jur. 2d Amicus Curiae § 6 (emphasis added) (citations omitted); *see also* 3B C.J.S. Amicus Curiae § 3; *Knetsch v. United States*, 364 U.S. 361, 370, 5 L. Ed. 2d 128, 134 (1960) (refusing to consider an argument "made in an amicus curiae brief," the Supreme Court held: "This argument has never been advanced by petitioners in this case. Accordingly, we have no reason to pass upon it."); *Evans v. Georgia Reg'l Hosp.*,

850 F.3d 1248, 1257–58 (11th Cir. 2017) (citations omitted) ("Moreover, without 'exceptional circumstances, *amici curiae* may not expand the scope of an appeal to implicate issues not presented by the parties to the district court.' "); *Richardson v. Ala. State Bd. of Educ.*, 935 F.2d 1240, 1247 (11th Cir. 1991) (citation omitted) ("Although this court granted amici's motion for leave to file a brief, the arguments raised only by amici may not be considered. This court has recently held that an appellate court will not consider issues not presented to the trial court[.] We will not consider on appeal . . . defenses that were neither raised in the district court nor argued by appellants on appeal."); *United States v. State of Mich.*, 940 F.2d 143, 165 (6th Cir. 1991) (emphasis added) (citations omitted) ("amicus has been *consistently precluded from* initiating legal proceedings, filing pleadings, or otherwise *participating and assuming control of the controversy* in a totally adversarial fashion"); *Miller-Wohl Co., Inc. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982) (citations omitted) ("[T]he classic role of *amicus curiae* [consists of] assisting in a case of general public interest . . . and drawing the court's attention to law that escaped consideration. Courts have rarely given party prerogatives to those not formal parties. A petition to intervene and its express or tacit grant are prerequisites to this treatment."); *Common Cause v. Bolger*, 512 F. Supp. 26, 35 (D.D.C. 1980) (citations omitted) (finding the notion "that amicus curiae has standing to raise arguments not pressed by the parties" a "dubious assumption" only found in "rare extraordinary cases").

North Carolina has adopted federal law regarding the powers and limitations of *amici curiae*. *See McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 484 n.3, 687 S.E.2d 690, 693 n.3 (2009) ("As the issue is raised only in the *amici curiae's* brief, we decline to address the issue in the absence of exceptional circumstances. *See Artichoke Joe's Ca[l.] Grand Casino v. Norton*, 353 F.3d 712, 719 n.10 (9th Cir.[ ]2003) (citation omitted) (declining to address whether a tribe was necessary party to challenge the validity of tribal-state gaming compacts because the issue was 'raised only in an amicus brief'), *cert. denied*, 543 U.S. 815 (2004).").
Further, as discussed by our Supreme Court:

> A judgment *regular upon the face of the record* is presumed to be valid until the contrary is shown *in a proper proceeding*.
>
> Moreover, it is to be noted that an *amicus curiae* may *not assume the place of a party* in a legal action. Nor may he *take over the management of a suit*. And he has *no right to institute proceedings* therein. He *takes the case*

> *as he finds it*. 3 C.J.S. Amicus Curiae § 3, p. 1049. It follows that the *amicus curiae* was *not a competent person . . . to make the jurisdictional affidavit*[.] The affidavit made by [*amicus*] is a *nullity*. . . . .
>
> We have given consideration to the argument made by the *amicus curiae* to the effect that the facts of this case take it out of the general rule which requires that a direct attack on a voidable judgment may be made only by a party or privy. . . . . The *amicus curiae* says in his brief that "The integrity of the judicial process and the public welfare demand that there be a hearing of this matter on the merits[.]" . . . . We cannot accept the premise or the arguments based thereon. If this judgment . . . is subject to attack by the *amicus curiae* appointed for that purpose, then other judgments, and any number of them, are subject to be attacked the same way. If we approve the appointment of this *amicus curiae* for the performance of the duties assigned him by the court, then other *amici curiae*, and any number of them, may be appointed . . . to work over any . . . other judgments . . . in which it is suspected that fraud was perpetrated on the court. *The practice could lead to a serious weakening of the rule that a motion in the cause directly attacking a judgment may be made only by a party to the action* or by one in privity with a party. Moreover, *to approve the unprecedented procedure adopted below would be a step toward undermining the integrity of personal and property rights acquired on the faith of judicial proceedings, as well as the public interests involved in the finality and conclusiveness of judgments*.

Shaver v. Shaver, 248 N.C. 113, 119–20, 102 S.E.2d 791, 796–97 (1958) (emphasis added); *see also Cape Hatteras Elec. Membership Corp. v. Stevenson*, 249 N.C. App. 11, 16, 790 S.E.2d 675, 679 (2016) (*citing Poore v. Poore*, 201 N.C. 791, 792, 161 S.E. 532, 533 (1931)) ("Amicus contends that these bylaws are 'common' among electric cooperatives and guidance is needed. But the parties have not briefed this issue, and we are unwilling to delve into this sort of advisory dicta without an appropriate record and argument from the parties."); *Crockett v. First Fed. Sav. & Loan Ass'n of Charlotte*, 289 N.C. 620, 632, 224 S.E.2d 580, 588 (1976) (refusing to consider argument in *amicus curiae* brief that federal law preempted the field covering the plaintiff's action, *thereby*

depriving the trial court of subject matter jurisdiction, because "[a]t no time have the parties in this action addressed themselves to the question of the applicability of federal law").

Opinions limiting the standing of *amici curiae* to the record and arguments *as developed by the parties* are plenary:

> The critical point is that an impartial friend of the court steps out of the role of amicus when it essentially assumes the role of being not just adversarial but a "party in interest to the litigation." There has, therefore, "been a bright-line distinction between amicus curiae and named parties/real parties in interest."

Wyatt By & Through Rawlins v. Hanan, 868 F. Supp. 1356, 1358 (M.D. Ala. 1994) (citations omitted). The Sixth Circuit has held that court appointed *amici curiae* are "without standing to compel the disclosure of . . . [new evidence], or to exercise any litigating rights equal to a named party/real party in interest[.]" *State of Mich.*, 940 F.2d at 166.

Our Supreme Court has treated the powers of *amici curiae* similarly:

> The amicus curiae brief, in addition to presenting an argument under state law similar to that of defendant, asserts that federal law preempts the field insofar as "due-on-sale" clauses in loan instruments of federal savings and loan associations are concerned. The amicus curiae then argues that under federal law the due-on-sale clause involved in this case is valid. At no time have the parties in this action addressed themselves to the question of the applicability of federal law or incorporated by reference the amicus curiae brief. Under Rule 28, N.C. Rules of Appellate Procedure, appellate review is limited to the arguments upon which the parties rely in their briefs.

Crockett, 289 N.C. at 632, 224 S.E.2d at 588 (citation omitted); N.C. R. App. P. 28. Allowing an appointed *amicus* to act as a party in interest "is not proper because it injects an element of unfairness into the proceedings[.] The [appellants] in this case are entitled to have their contentions and arguments" considered as presented on appeal. *Leigh v. Engle*, 535 F. Supp. 418, 422 (N.D. Ill. 1982). Therefore, " '[i]n view of the rule that an amicus curiae must accept the case before the court with issues as made by the parties, a new question raised only in a brief filed by an amicus curiae, by leave of court, will not be considered.' " *United States v. Barnett*, 330 F.2d 369, 423 n.6 (5th Cir. 1963) (citations omitted),

certified question answered, 376 U.S. 681, 12 L. Ed. 2d 23 (1964). Further, *amici curiae* are limited to questions of law, not fact. If an *amicus curiae* discovers new or additional facts that are not included in the record on appeal, it may not argue these extra-record facts in support of its legal arguments. *See United States v. F.M. Jabara & Bros.*, 19 C.C.P.A. 76, 79 (1931). This rule is in place to avoid prejudice to the appellant's appeal, which is reliant on the settled record on appeal.

In this matter, Defendant prevailed in the Chapter 50B action, entered into a consent order with Plaintiff in the Chapter 50C action, and did not cross-appeal or file an appellee brief. The purpose of the Appointing Order was to obtain briefing from *Amicus* on any potentially meritorious arguments contradicting Plaintiff's appellate arguments and those of the supporting *amici*. As a service to this Court and the citizens of North Carolina, *Amicus* agreed to undertake this role. *Amicus* apparently wanted to alert this Court to possible *alternative* options for affirming the 50B Order, believing this Court had the power to confer that authority, and that we had in fact conferred upon *Amicus* that duty and the authority to undertake it. *Amicus*' participation in this appeal is as though *Amicus* was Defendant's counsel, and the *amicus curiae* brief was Defendant's appellee brief. *Amicus* also filed certain motions that *Amicus* lacked the standing to file—meaning this Court lacks subject matter jurisdiction over those motions and cannot consider them. This Court is also without the authority to consider any arguments made by Amicus that are not responsive to Plaintiff's appellate arguments and limited to the record as settled by the parties to Plaintiff's action. In light of the apparent uncertainty in this area, we seek to provide clear guidance on the expectations, definitions, powers, and limitations of *amici curiae*.[12]

B. *The Mandate of This Court's "Assigned* Amicus Curiae"

In this case, the trial court clearly articulated the reasoning in support of its ruling: that it believed it lacked the authority or jurisdiction to grant a DVPO to Plaintiff because Plaintiff and Defendant were not of the "opposite sex" and, therefore, not in a "dating relationship" constituting a "personal relationship" as defined by N.C.G.S. § 50B-1(b)(6). According to the trial court's orders, it determined it could not grant

12. This Court expresses its appreciation to *Amicus* in this case for accepting the challenge presented, and for the zealous and thorough attention given. Although the wording in the Appointing Order is similar to that commonly used in similar situations, this Court will endeavor in the future to more clearly set the parameters of its appointing mandates, including the limits of appointed *amici curiae's* standing and authority to act in an appeal to avoid unnecessary confusion.

Plaintiff a DVPO under N.C.G.S. § 50B-1(b)(6) because acts perpetrating or threatening to perpetrate "bodily injury" against another, or "[p]lacing the aggrieved party . . . in fear of imminent serious bodily injury or continued harassment[,]" are only considered acts of "domestic violence" if the abuser and the victim are "of opposite sex." N.C.G.S. §§ 50B-1(a), (b)(6). The trial court found and concluded that *had* Plaintiff and Defendant been "of opposite sex," Plaintiff's complaint for a DVPO would have been granted. In so ruling, the trial court rejected Plaintiff's argument that the trial court should grant her request for a DVPO, stating, before Plaintiff made her constitutional argument, that Plaintiff's "complaint . . . would [not] survive a Rule 12 motion."

Plaintiff's counsel responded to the trial court:

> I understand . . . that you don't believe it would survive a motion to dismiss. However . . . we do feel that at this point [Plaintiff] should be allowed to proceed with the [DVPO], that . . . the statute, that 50B, is unconstitutional as it's written post the same-sex marriage equality case from the Supreme Court in *Obergefell* and that there's no rational basis at this point to have a statute that limits dating relationships to folks of opposite sex.

The trial court asked about the legislative history of N.C.G.S. § 50B-1, and Plaintiff's attorney informed the trial court that "our legislature has amended 50B for different reasons, but they have not amended the personal relationship categories any time in the recent past[.]" The trial court rejected Plaintiff's argument and stated that it would not consider whether Plaintiff's constitutional rights were violated, supporting its ruling, in part, based on the following:

> N.C.G.S. 50B was last amended by the legislature in 2017 without amending the definition of "personal relationship" to include persons of the same sex who are in or have been in a dating relationship. This recent amendment in 2017 was made subsequent to the United States Supreme Court decision in *Obergefell v. Hodges*, . . . and *yet the legislature did not amend the definition of personal relationship to include dating partners of the same sex.*

(Emphasis added.) The trial court continued:

> 4. Th[e] definition [in N.C.G.S. § 50B-1(b)(6)] prohibits victims of domestic violence in same sex dating relationships that are not spouses, ex-spouses, or current or

> former household members from seeking relief against a batterer under Chapter 50B.
>
> 5. [This court] must consider *whether it has jurisdiction to create a cause of action that does not exist and to enter an order under this statute when the statute specifically excludes it.* The *difficult answer to this question is no*, it does not. The General Assembly has the sole authority to pass legislation that allows for the existence of any [DVPO]. The legislature has not extended this cause of action to several other important family relationships including siblings, aunts, uncles, "step" relatives, or in-laws.
>
> 6. In this context, *the Courts only have subject matter jurisdiction and the authority to act and enjoin a defendant when the legislature allows it.* On numerous occasions the Court of Appeals has stricken orders entered by the District Court that do no[t] include proper findings of fact or conclusions of law that are necessary to meet the statute. . . . *[This court] cannot enter a domestic violence protective order against a [d]efendant when there is no statutory basis to do so.*
>
> . . . .
>
> Plaintiff has failed to prove grounds for issuance of a [DVPO] as Plaintiff does not have a required "personal relationship" with [ ] Defendant as required by [Chapter] 50B.

(Emphasis added).

The trial court further found: "A civil no-contact (50C) order was granted contemporaneously on the same allegations *and had the parties been of opposite genders, those facts would have supported the entry of a [DVPO] (50B).*" (Emphasis added). The trial court concluded: "The General Assembly has the sole authority to pass legislation that allows for the existence of any [DVPO]"; the trial court "only ha[d] subject matter jurisdiction and the authority to act and enjoin a defendant when the legislature allows it"; and, in this case, "[t]he legislature has not extended this cause of action to several other important family relationships" including same-sex dating relationships as defined by N.C.G.S. § 50B-1(b)(6).

Amicus was also free to make any non-frivolous arguments sufficiently related to the issues of public interest that prompted appointment

of *Amicus* in the first instance. This Court was not seeking new issues to decide; we were requesting well-briefed counterarguments to the issues already presented to us in Plaintiff's appellate brief. *See Newark Branch, N.A.A.C.P. v. Town of Harrison*, 940 F.2d 792, 808–09 (3d Cir. 1991) (including the following partial citation: "*Berry v. Doles*, 438 U.S. 190, 202 (1978) (Rehnquist, J., dissenting) (*amicus curiae* has no standing to request relief not requested by the parties")). Further, *Amicus'* counterarguments are limited, by law, to the evidence and posture of the case *as set forth in the settled record.*

> [*Amicus curiae*] is allowed to file an amicus brief, within the page limits set by local rules, regarding any objections to the Report and Recommendation which are filed by the parties to this suit; however, *because it is not a party* to this suit, *it will not be permitted to file an Objection itself* and will be *limited to briefing only those issues raised by the parties pursuant to their Objections*. Further [*amicus*] may not submit evidence and *may not attach documents* to its amicus brief. [*Amicus'*] sole status in this proceeding is to assist the court with regard to the *issues raised by the parties* to the suit *based on the evidence submitted by them* in the suit. To permit further participation would be, in effect, to grant [*amicus*] intervenor status, which will not be done[.]

Parm v. Shumate, No. CIV.A. 3-01-2624, 2006 WL 1228846, at *1 (W.D. La. May 1, 2006) (emphasis added) (unreported opinion citing opinions from the Second Circuit, Fifth Circuit, Ninth Circuit, and orders from several federal district courts).

C. *Jurisdictional Issues Regarding* Amicus' *Filings*

[7] *Amicus* was appointed "to defend the ruling of the trial court." This Court ordered that *Amicus* "shall file an amicus curiae brief not exceeding 8,750 words in length within thirty days of the date of this order." This Court granted Amicus' motion to extend time to file the *amicus curiae* brief until 3 July 2019. *Amicus* filed three documents on 3 July 2019, the *amicus curiae* brief, a motion to dismiss Plaintiff's appeal, and a "Motion to Seal Rule 9(b)(5) Supplement." *Amicus* filed a supplement to the record on 8 July 2019.

Amicus argues in the motion to dismiss that Plaintiff had voluntarily dismissed her Chapter 50B action on 31 May 2018, thereby divesting the trial court of jurisdiction to hear Plaintiff's claim and enter the 50B Order. However, this Court is without jurisdiction to consider *Amicus'*

purported motion to dismiss Plaintiff's appeal, or the document *Amicus* requested be added to the record. As set out above, only parties to an action, personally or through their attorneys, have standing to participate in the litigation of an action.

Our appellate rules governing *amici curiae* are found in Rule 28(i): "Amicus Curiae Briefs." N.C. R. App. P. 28(i). "An amicus curiae may file a brief with the permission of the appellate court in which the appeal is docketed." *Id.* "*A party to the appeal* may file and serve a reply brief that responds to an amicus curiae brief no later than thirty days after having been served with the amicus curiae brief. . . . . The court *will not accept* a reply brief from an amicus curiae." N.C. R. App. P. 28(i)(6). "The court will allow a motion of an amicus curiae requesting permission to participate in oral argument only for extraordinary reasons." N.C. R. App. P. 28(i)(7). "An *appellee* may supplement the record with any materials pertinent to the issues presented on appeal, as provided in Rule 9(b)(5)." N.C. R. App. P. 28(c) (emphasis added). "Additional authorities discovered by *a party* after filing its brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court[.]" N.C. R. App. P. 28(g) (emphasis added). The Rules of Appellate Procedure (the "Rules") are, in the main, directed to the parties in the matter on appeal. The rights granted to *amici curiae* are limited to submitting briefs on pre-identified "issues of law to be addressed[,]" N.C. R. App. P. 28(i)(1), and, in extraordinary circumstances, participation in oral arguments, N.C. R. App. P. 28(i)(7). "Because the North Carolina Rules of Appellate Procedure generally speak in terms of actions which a 'party' to a proceeding must take on appeal, it is implicit that any appellate brief must be filed on behalf of one of those parties." *In re Estate of Tucci*, 104 N.C. App. 142, 148, 408 S.E.2d 859, 863 (1991). We hold that it is also implicit in the Rules that *amici curiae* are generally limited to the authority granted by N.C. R. App. P. 28(i), which does not include the authority to file motions substantively impacting the parties to the appeal, or otherwise acting on appeal with the powers solely granted to the parties. *Id.*; *see also Johnson v. Schultz*, 195 N.C. App. 161, 164, 671 S.E.2d 559, 562 (2009) (and cases cited), *aff'd and remanded*, 364 N.C. 90, 691 S.E.2d 701 (2010).

In the present case, neither Defendant, the State nor any *amicus curiae* was defending the constitutionality of N.C.G.S. § 50B-1(b)(6) by contesting Plaintiff's state constitution and Fourteenth Amendment arguments. *Amicus* did not have the authority or the standing to act as Defendant's attorney, present new arguments not raised by either party, or file any motions in the action beyond those related to the Rule 28(i)

requirements for *amici curiae*. Neither the mandate of this Court, nor the law, permitted *Amicus* to look outside the record settled by the parties for support of its briefed arguments, to make novel arguments, or to take any action reserved for party litigants. Only a party had standing to move this Court to amend the record or dismiss Plaintiff's appeal. To allow otherwise would be to place Plaintiff at a disadvantage not imposed on similarly situated appellants. *Leigh*, 535 F. Supp. at 422; *see also State of Mich.*, 940 F.2d at 164; *Hanan*, 868 F. Supp. at 1360 (this Court's decision on whether to appoint an *amicus curiae* depends in part on "whether participation by the amicus will be . . . helpful to the court and will not prejudice the parties").

This Court does not have the authority to give to an *amicus curiae* powers reserved to the parties. Appointment as an *amicus curiae* does not, and cannot, confer standing on the *amicus* to move this Court to dismiss an appeal, nor to alter the record, settled by the parties on appeal, in order to support that motion. In short, "*amicus curiae* has no standing to request relief not requested by the parties." *Newark Branch, N.A.A.C.P.*, 940 F.2d at 808-09 (citation omitted). Our Supreme Court has held: "A judgment *regular upon the face of the record, though irregular in fact*, requires evidence *aliunde* for impeachment. Such a judgment is voidable and not void, and may be opened or vacated after the end of the term only by *due proceedings instituted by a proper person*." *Shaver*, 248 N.C. at 119, 102 S.E.2d at 795 (emphasis added) (citations omitted). As the Court in *Shaver* determined, the judgment on review was

> regular upon its face. We conclude that the Superior Court . . . was without power to initiate on its own motion proceedings to vacate the judgment. Rather, it was the duty of the court to indulge *the legal presumption* that the *judgment [wa]s valid*. A judgment regular upon the face of the record is presumed to be valid until the contrary is shown in a *proper* proceeding.
>
> Moreover, it is to be noted that *an amicus curiae may not assume the place of a party in a legal action. Nor may he take over the management of a suit*. And he has *no right to institute proceedings therein*. He *takes the case as he finds it*.

Id. at 119–20, 102 S.E.2d at 796 (emphasis added) (citations omitted). Our Supreme Court has recently reaffirmed this rule:

> "In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the

> verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to [Rule 9 of the North Carolina Rules of Appellate Procedure]." N.C. R. App. P. 9(a). "Although the question of subject matter jurisdiction may be raised at any time . . . where the trial court has acted in a matter, 'every presumption not inconsistent with the record will be indulged in favor of jurisdiction. . . .' " *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 557, 359 S.E.2d 792, 797 (1987) (internal citations omitted) (quoting *Dellinger v. Clark*, 234 N.C. 419, 424, 67 S.E.2d 448, 452 (1951)). Nothing else appearing, we apply "the *prima facie* presumption of rightful jurisdiction which arises from the fact that a court of general jurisdiction has acted in the matter." *Williamson v. Spivey*, 224 N.C. 311, 313, 30 S.E.2d 46, 47 (1944) (citations omitted). As a result, "[t]he burden is on the *party* asserting want of jurisdiction to show such want."[13] *Dellinger*, 234 N.C. at 424, 67 S.E.2d at 452.

In re N.T., 368 N.C. 705, 707, 782 S.E.2d 502, 503–04 (2016) (emphasis added); *see also Matter of S.E.*, 373 N.C. 360, 363–64, 838 S.E.2d 328, 331 (2020).

The 50B Order in this case is regular on its face. The trial court's jurisdiction to decide the matter was never challenged, and the record on appeal reveals no jurisdictional deficiency. Because *Amicus* is not a party to the action *Amicus* does not step into Defendant's shoes as appellee, and cannot litigate any matter in Plaintiff's action. Therefore, *Amicus* was without standing to take on the burden of proving a lack of jurisdiction. *Town of Midland v. Morris*, 209 N.C. App. 208, 224–25, 704 S.E.2d 329, 341 (2011) (citation and quotation marks omitted) ("Standing typically refers to the question of whether a particular litigant is a proper party to assert a legal position[,] and whether the party before the court [is] the appropriate one to assert the right in question."). If a person participates in an action without standing, the "Court does not have subject matter jurisdiction to hear the argument." *Id.* at 225, 704 S.E.2d at 341; *see also Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002) (citing *Friends of Earth v. Laidlaw Env. S.*, 528 U.S. 167, 185, 145 L.Ed.2d 610, 629 (2000) ("a plaintiff must demonstrate standing separately for each form of relief

13. In that *Amicus* is not a "party," *Amicus* cannot act as "the party asserting want of jurisdiction[.]" *Dellinger*, 234 N.C. at 424, 67 S.E.2d at 452 (citation omitted).

sought")); *Estate of Apple v. Com. Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005) (citation omitted) ("If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim.").

Because *Amicus* was without standing to file the motion to dismiss and the motion to amend the record on appeal, these motions are a "nullity" and must be dismissed as such. *Shaver*, 248 N.C. at 120, 102 S.E.2d at 796; *Morris*, 209 N.C. App. at 224–25, 704 S.E.2d at 341. Allowing the motions would also be improper because they would "inject[] an element of unfairness into the proceedings[.] [Plaintiff] in this case [is] entitled to have [her] contentions and arguments" considered as presented on appeal. *Leigh*, 535 F. Supp. at 422. Therefore, the motion to dismiss and motion to supplement the record are dismissed for lack of standing and subject matter jurisdiction—they are a nullity, and this Court has conducted our review under the presumption that the trial court's orders are correct. Further, because they were in reply to a nullity, and there is no authority to file a reply to a motion that does not exist, Plaintiff's responses to *Amicus'* motion to dismiss are also dismissed. The record includes only the settled record on appeal and any supplementation properly sought by Plaintiff. Therefore, this Court's review has been limited to the record as settled by the parties, Plaintiff's arguments on appeal, the arguments of the *amici curiae* whose motions to file *amicus* briefs were granted by this Court, and the briefed arguments of *Amicus* that are responsive to Plaintiff's briefed arguments.

VII. Conclusion

Because this opinion is subject to review by our Supreme Court, and there is always the potential for review of federal constitutional questions by the United States Supreme Court, we have decided to include alternative holdings. Further reason for this decision is that the Supreme Court's decisions in *Romer*, *Windsor*, *Lawrence*, and *Obergefell* strongly suggest the kind of statutory challenge before us, one based on Plaintiff's "minority" status, is subject to a particular kind of review—one that does not seek to apply the "rational basis," "intermediate scrutiny," "strict scrutiny" framework. Finally, the recently decided Supreme Court opinion of *Bostock* includes a thorough analysis resulting in the conclusion that discrimination based upon a person's "homosexuality" or "transgender status" is *always* also discrimination based on "sex," or gender. Therefore, applying *Bostock*, we conclude that equal protection challenges of a law based upon LGBTQ+ status are also challenges based upon "sex" or gender and, therefore, require at least "intermediate scrutiny." As it is unsettled which review is appropriate, or if there are

multiple permissible reviews that may be applied, we have conducted review pursuant to all potentially applicable tests, and include alternative holdings for each. No matter the review applied, N.C.G.S. § 50B-1(b)(6) does not survive Plaintiff's due process and equal protection challenges under either the North Carolina Constitution or the Constitution of the United States.

We therefore reverse the trial court's denial of Plaintiff's complaint for a Chapter 50B DVPO, and remand for entry of an appropriate order under Chapter 50B. The trial court shall apply N.C.G.S. § 50B-1(b)(6) as stating: "Are persons who are in a dating relationship or have been in a dating relationship." The holdings in this opinion shall apply to all those similarly situated with Plaintiff who are seeking a DVPO pursuant to Chapter 50B; that is, the "same-sex" or "opposite-sex" nature of their "dating relationships" shall not be a factor in the decision to grant or deny a petitioner's DVPO claim under the Act.

REVERSED AND REMANDED.

Judge BRYANT concurs.

Judge TYSON dissents with separate opinion.

TYSON, Judge, dissenting.

The trial court was without and this Court possesses no jurisdiction to consider any issues on the merits of this appeal. Plaintiff's purported appeal is not properly before this Court because of: (1) Plaintiff's filing of a voluntary dismissal of the N.C. Gen. Stat. § 50B complaint, *see* N.C. Gen. Stat. § 50B-1(b)(6) (2019); (2) Plaintiff's failure to file a post-dismissal Rule 60 motion, *see* N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2019); (3) Plaintiff's failure to argue and preserve any constitutional issue for appellate review; (4) Plaintiff's failure to join necessary parties, *see* N.C. Gen. Stat. § 1A-1, Rule 19(d) (2019); and, (5) Plaintiff's failure to comply with Rule 3 to invoke appellate review, *see* N.C. R. App. P. 3.

In addition to these five undisputed and unaddressed failures, no petition for writ of certiorari was filed to invoke appellate jurisdiction. *See* N.C. R. App. P. 21. Presuming jurisdiction does exist, Rule 2 is not requested nor invoked to suspend the appellate rules to review any merits. N.C. R. App. P. 2. There is no subject matter jurisdiction nor any other issues that are properly before this Court. This matter is properly dismissed. I respectfully dissent.

I. Background

On 31 May 2018 at 9:10 a.m., Plaintiff filed a complaint and motion for a domestic violence protective order ("DVPO") under N.C. Gen. Stat. § 50B-1(b)(6), using an AOC-CV-303 form which was assigned docket number 18 CV 600733 by a clerk of superior court. Plaintiff asserted, "There is not another court proceeding pending in this or any other state." At 3:04 p.m. the same day, Plaintiff filed an additional complaint for a no-contact order under N.C. Gen. Stat. § 50C, using an AOC-CV-520 form, which was assigned docket number 18 CV 005088 by a clerk of superior court. The allegations in these two complaints were the same, but Plaintiff asserted and attested in her § 50C complaint that the parties were "co-workers." Eight minutes after filing her N.C. Gen. Stat. § 50C complaint, Plaintiff signed, dated, and filed an AOC-CV-405 form notice of voluntary dismissal of her prior § 50B complaint without prejudice under docket number 18 CV 600733.

While her complaint for a no-contact order under N.C. Gen. Stat. § 50C remained pending and without any explanation of the intervening circumstances or basis, Plaintiff or someone acting on her behalf filed a purported withdrawal of the completed dismissal of the § 50B complaint. The signed, dated, and file-stamped AOC-CV-405 notice of voluntary dismissal form was struck through diagonally, the handwritten word "Amended" was added to the top right-hand corner, and handwritten text was included: "I strike through this voluntary dismissal. I do not want to dismiss this action." None of these handwritten additions were signed, initialed, or dated. This paper was then filed with the clerk of superior court, and contains two separate file stamps. No new docket number was assigned upon the purported withdrawal of the dismissed complaint. Plaintiff was issued a no contact order for stalking against Defendant under N.C. Gen. Stat. § 50C on 7 June 2018 by the same trial judge.

II. Plaintiff's Voluntary Dismissal

A. Standard of Review

"The issue of jurisdiction over the subject matter of an action may be raised at any time during the proceedings, *including on appeal*. This Court is required to dismiss an appeal *ex mero motu* when it determines the lower court was without jurisdiction to decide the issues." *McClure v. County of Jackson*, 185 N.C. App. 462, 469, 648 S.E.2d 546, 550 (2007) (emphasis supplied).

"Subject matter jurisdiction cannot be conferred upon a court by consent, waiver, or estoppel, and therefore failure to . . . object to the

jurisdiction is immaterial." *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (citations and internal quotation marks omitted). A court's subject matter jurisdiction is not invoked *sua sponte*, and is "never dependent upon the conduct of the parties" or inaction by the Court. *Feldman v. Feldman*, 236 N.C. 731, 734, 73 S.E.2d 865, 867 (1953).

B. Effect of Dismissal

When Plaintiff signed and filed her voluntary dismissal of the N.C. Gen. Stat. § 50B-1(b)(6) complaint, the dismissal was complete and the court's jurisdiction over that action was extinguished upon filing. When a plaintiff filed a voluntary dismissal, she "terminate[s] the action, leaving nothing in dispute[.]" *Teague v. Randolph Surgical Assoc.*, 129 N.C. App. 766, 773, 501 S.E.2d 382, 387 (1988). Plaintiff's signed and filed dismissal divested the district court of subject matter jurisdiction to proceed on that dismissed action. N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) provides: "Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case[.]" N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2019).

After Plaintiff's voluntary dismissal is filed, Plaintiff must file a new complaint for relief under N.C. Gen. Stat. § 50B-1(b)(6), to re-invoke the district court's jurisdiction under that statute, with a new complaint and docket number assigned, instead of filing an unsigned and undated purported "Amended" withdrawal of the properly signed, dated, and previously filed notice of dismissal form. *See id.*

III. No Rule 60(b) Motion

As an alternative, to filing a new complaint, Plaintiff's counsel could have filed a Rule 60(b) motion to seek to revive the dismissed complaint. No Rule 60(b) motion was filed and the deadline for filing has expired. N.C. Gen. Stat. § 1A-1, Rule 60(b) (motion must be filed not later than one year after the order or proceeding was entered or taken). "[T]he one-year period for filing a Rule 60(b) motion is not tolled by the taking of an appeal from the original judgment." *Talbert v. Mauney*, 80 N.C. App. 477, 479, 343 S.E.2d 5, 7 (1986). The dismissed action was not revived under this rule.

IV. Commencement of Action

Plaintiff's filing of a purported withdrawal of her previously signed and filed notice of dismissal is not a refiling, commencement, or revival of the allegations of the original § 50B dismissed complaint. An "action

is commenced by filing a complaint with the court." *See* N.C. Gen. Stat. § 1A-1, Rule 3 (2019).

The refiling of the purported amended dismissal, failed to comply with N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) (2019) ("An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state with particularity the grounds therefore, and shall set for the relief or order sought.").

Plaintiff could have remedied the jurisdictional default by filing a new § 50B complaint, within the filing parameters of Rule 41, or a Rule 60(b) motion in the district court within one year of the filing of the voluntary dismissal. N.C. Gen. Stat. § 1A-1, Rule 41, Rule 60(b). She failed to do either.

The trial court and, consequently, this Court acquired no jurisdiction. Plaintiff's purported appeal is properly dismissed. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) ("A jurisdictional default, therefore, precludes the appellate court from acting in any manner other than to dismiss the appeal.").

V. Failure to Preserve

During the purported N.C. Gen. Stat. § 50B-1(b)(6) hearing, Plaintiff's counsel argued:

> [Plaintiff] should be allowed to proceed with the Domestic Violence Protective Order . . . the statute, that 50B, is unconstitutional as its written post the same-sex marriage equality case from the Supreme Court in *Obergefell* and that there's no rational basis at this point to have a statute that limits dating relationships to folks of opposite sex.

The above quote is the total extent of Plaintiff's constitutional argument before the trial court.

The trial court responded: "Without a more expansive argument on constitutionality, I won't do it. I think there is room for that argument. I think that with some more presentation that maybe we could get there, but I don't think on the simple motion I'm ready to do that." The trial court sought to elicit more specific and additional arguments on constitutionality of the statute beyond a cryptic reference, which Plaintiff's counsel failed to argue or advance further. The trial court did not declare N.C. Gen. Stat. § 50B-1(b)(6) to be unconstitutional, which Plaintiff now purports to assert upon appeal.

For the first time on appeal, Plaintiff now seeks to invalidate the order on additional theories beyond her single reference to *Obergefell*. *Obergefell v. Hodges*, 576 U.S. 644, 192 L. Ed. 2d 609 (2015). These additional arguments were not raised nor argued before the trial court. Our Rules of Appellate Procedure require: "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a). Plaintiff's new arguments demonstrate her cryptic argument quoted above was "not apparent from the context." *Id*.

Until now, our Supreme Court and this Court have consistently applied the appellate rules and binding precedents to dismiss unpreserved and unargued constitutional issues sought to be asserted for the first time on appeal: "A constitutional issue not raised at trial will generally not be considered for the first time on appeal." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002). *See In re Cline*, 230 N.C. App. 11, 27, 749 S.E.2d 91, 102 (2013) ("Since this argument was not raised before the trial court, it is not properly before us on appeal."); *Fields v. McMahan*, 218 N.C. App. 417, 417, 722 S.E.2d 793, 793 (2012) ("Because plaintiff raises on appeal a constitutional argument which has not been presented and ruled upon by the trial court, we dismiss the appeal."); *Powell v. N.C. Dep't of Transp.*, 209 N.C. App. 284, 296, 704 S.E.2d 547, 555 (2011) ("Thus petitioner did not give the superior court the opportunity to consider and rule on the specific constitutional argument he now attempts to bring before this court.").

Plaintiff's cryptic reference to *Obergefell* failed to raise any facial or as-applied constitutional issue before the trial court or to preserve any issue for appellate review. The trial court requested counsel to assert and argue additional constitutional arguments. Plaintiff's counsel failed to provide any further arguments or authority. The district court correctly ruled Plaintiff had failed to assert any proper constitutional argument, had failed to carry her burden, and the § 50B statute was not unconstitutional.

The transcript and record on appeal is utterly devoid of any other constitutional argument. Plaintiff's arguments on purported additional constitutional grounds, asserted for the first time on appeal, were not raised before the trial court and are not preserved before this Court. N.C. R. App. P. 10(a). "A constitutional issue not raised at trial will generally not be considered for the first time on appeal." *Anderson*, 356 N.C. at 416, 572 S.E.2d at 102. This matter is properly dismissed.

VI. Failure to Join Necessary Parties

Our General Statutes mandate:

> The Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, *must be joined* as defendants in any civil action challenging the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law.

N.C. Gen. Stat. § 1A-1, Rule 19(d) (emphasis supplied).

Plaintiff challenges the constitutionality of N.C. Gen. Stat. § 50B-1(b)(6). Both the President *Pro Tempore* of the Senate and the Speaker of the House of Representatives are necessary parties and "must be joined as defendants" in the civil action. *Id.* The record shows no service upon nor mandatory joinder of these necessary parties.

Our Supreme Court held neither the district court, nor this Court, can address the underlying merits of Plaintiff's assertions until this mandatory joinder defect is cured. *See Booker v. Everhart*, 294 N.C. 146, 158, 240 S.E.2d 360, 367 (1978) ("Where, as here, a fatal defect of the parties is disclosed, the court should refuse to deal with the merits of the case until the absent parties are brought into the action, and in the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the court. Absence of necessary parties does not merit a nonsuit, instead, the court should order a continuance so as to provide a reasonable time for them to be brought in and plead.") (internal citations omitted).

The Speaker of the House of Representatives and the President *Pro Tempore* of the Senate "must be joined" as necessary parties. N.C. Gen. Stat. § 1A-1, Rule 19(d). *See also* N.C. Gen. Stat. § 1-72.2(b) (2019) ("The Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, by and through counsel of their choice, including private counsel, shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution."). Separate from and in addition to the lack of subject matter jurisdiction, no further action or review is proper until this statutory and mandatory defect is cured. *Booker*, 294 N.C. at 158, 240 S.E.2d at 367.

VII. No Valid Notice of Appeal

Our Rules of Appellate Procedure provide: "The notice of appeal required to be filed and served . . . *shall specify the party* or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and *shall be signed* by counsel of record." N.C. R. App. P. 3(d) (emphasis supplied).

Our Rules of Appellate Procedure further provide:

> The body of the document *shall* at its close bear the printed name, post office address, telephone number, State Bar number, and e-mail address of counsel of record, and in addition and in the appropriate place, *the manuscript signature of counsel of record*. If the document has been filed electronically by use of the electronic filing site . . . the manuscript signature of counsel of record is not required.

N.C. R. App. P. 26(g)(3) (emphasis supplied).

Plaintiff's trial counsel's hard copy of the purported notice of appeal was filed with the clerk of superior court and bears no "manuscript signature." The signature line is left blank. An effective notice of appeal can only be filed with the clerk of superior court in traditional hard copy with a "manuscript signature of counsel of record." *Id.* Counsel's lack of compliance with the mandatory signature requirement on the notice of appeal is no different from another Rule of Appellate Procedure requiring any counsel arguing before this Court must have signed the hard copy brief, or otherwise be barred from arguing. N.C. R. App. P. 33(a).

The subsequent electronic filing exceptions to this rule are not applicable to this case, nor do any of the Emergency Directives and Orders of the North Carolina Chief Justice for court operations during the COVID-19 pandemic waive or set aside this mandatory requirement. N.C. R. App. P. 26(g)(3).

Our Supreme Court has held a jurisdictional default occurs when the record fails "to contain a notice of appeal in compliance with Rule 3[.]" *Crowell Constructors, Inc. v. State ex rel. Cohen*, 328 N.C. 563, 563, 402 S.E.2d 407, 408 (1991). Plaintiff's counsel's mandatory "manuscript signature" is lacking and not contained on the filed notice of appeal. The purported notice fails to satisfy the express criteria that our appellate rules mandate to invoke appellate jurisdiction. N.C. R. App. P. 3(d); 26(g)(3). Our Supreme Court's and this Court's binding precedents mandate dismissal of the purported appeal for counsel's failure to sign and file an effective and compliant notice of appeal to invoke this Court's

jurisdiction. *Dogwood*, 362 N.C. at 192, 657 S.E.2d at 365. This matter is properly dismissed.

VI. *Amicus Curiae*

The majority's opinion fails to review and entirely dismisses the arguments regarding subject matter jurisdiction raised by *amicus curiae* in its brief. This Court's appointed *amicus curiae* cited and advanced these determinative statutes, rules, and precedents in its brief, and during oral arguments before this Court.

Black's Law Dictionary defines *amicus curiae* as "[Latin 'friend of the court'] (17c) *Someone who* is not a party to a lawsuit but who petitions the court or *is requested by the court to file a brief in the action* because that person has a strong interest in the subject matter." *amicus curiae*, Black's Law Dictionary (11th ed. 2019) (emphasis supplied). The *amicus curiae* in this case was both invited and appointed by this Court by order entered 3 May 2019 to specifically "appear as court appointed *amicus curiae*," "defend the ruling of the trial court," "file a brief," and attended oral arguments. Appointed *amicus curiae* did not petition this Court for leave to submit a brief.

In the absence of any motion to strike by Plaintiff, the majority's opinion inexplicitly treats the specifically approved supplement containing the omitted notice of dismissal from the record on appeal as a nullity. This Court's order allowing and sealing of *amicus curiae's* filed Rule 9(b)(5) Supplement, is signed by a judge who joins the majority's opinion.

The sole contents of the *amicus curiae's* filed Rule 9(b)(5) Supplement is a document raising jurisdictional defects before the trial court in an *ex parte* proceeding. This document in the Wake County Clerk of Court's file was unexplainedly and inextricably omitted from the Plaintiff's record on appeal. "In an *ex parte* proceeding, a *lawyer shall inform the tribunal of all material facts known* to the lawyer that will enable the tribunal to make an informed decision, *whether or not the facts are adverse*." N.C. R. Prof. Conduct 3.3(d) (emphasis supplied). Citing Supreme Court precedents, this Court stated: "It is well-settled that an attorney's responsibilities extend not only to his client but also to the court[s]." *N.C. State Bar v. Key*, 189 N.C. App. 80, 85, 658 S.E.2d 493, 497 (2008) (citation omitted); *see also Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 306 (1965).

"The record on appeal and other testimonial and material evidence is the only 'evidence' this Court has to review the rulings of lower

courts." *Hackos v. Smith*, 194 N.C. App. 532, 537, 669 S.E.2d 761, 764 (2008). *Amicus Curiae* was specifically appointed because this *ex parte* proceeding lacks the adversarial nature of typical court proceedings and the Defendant was neither being represented before the trial court nor on appeal. This Court shall insist upon the filing of a complete record on appeal, and certainly any document which is the basis of the purported appeal and which calls into question the Court's subject matter jurisdiction over the matter. *Id.* *Amicus curiae's* supplemental filing is vital and should have been included in the record on appeal. *Id.*

Presuming *amicus curiae* cannot move to dismiss the action, these reasoned arguments by this Court's designated appointee puts this Court on actual notice of the lack of subject matter jurisdiction, to reject Plaintiff's unasserted and unpreserved constitutional arguments, and to dismiss this wholly baseless appeal.

The absence of subject matter jurisdiction cannot be waived and can and should be raised for the first time on appeal, whether by opposing counsel or *sua sponte*. This Court must dismiss a purported action and appeal, *sua sponte*, upon the lack of subject matter jurisdiction. *See McClure*, 185 N.C. App. at 469, 648 S.E.2d at 550.

All cases cited by the majority's opinion to challenge this Court's issued order, involve an *amicus* who moved and sought leave to file a brief and are inapposite. The majority's opinion cites *Shaver v. Shaver*, 248 N.C. 113, 102 S.E.2d 791 (1958) wherein a trial court appointed an *amicus curiae* to re-open divorce proceedings closed ten years previously, because the trial court had learned the parties had not lived apart for the required two years prior to the filing. The block quote from *Shaver* refers to an *amicus curiae* challenging a ten year old judgment by motion to re-initiate the proceedings. *Id.* at 115, 102 S.E.2d at 793.

Here, the case was purportedly appealed to this Court by Plaintiff. The party before the trial court, the Defendant who received the benefit of the trial court's ruling, did not participate nor was represented by counsel. This Court appointed the *amicus curiae* for a specific purpose: "to defend the ruling of the trial court." An inherent part of that appointment, to file a brief and appear at oral argument, would be to challenge and argue whether jurisdiction and preservation was present for the appellate court to hear or review a matter.

Unlike *amicus curiae* in *Shaver*, this Court's appointed *amicus* does not attempt to re-open long-settled litigation. The purported appeal was pending before this Court upon Plaintiff's unsigned, and ineffective attempt at withdrawal of her signed and filed notice of

dismissal and her counsel's unsigned and ineffective notice of appeal prior to *amicus*' appointment.

Beyond asserting *amicus curiae* does not have the power to submit a motion to dismiss, the majority's opinion also asserts this Court's appointed *amicus curiae* does not have standing. In support of this notion, the majority's opinion cites *Town of Midland v. Morris*, 209 N.C. App. 208, 224-25, 704 S.E.2d 329, 341 (2011). *Town of Midland* involved a wholly inapposite condemnation action wherein the statutory provision utilized only provided a cause of action to a county, not to a landowner.

Neither *Town of Midland* nor any of the cases listed in the string citation involve the standing of an *amicus curiae*, who was specifically appointed to "file a brief" and appear at oral argument by order of this Court "to defend the ruling of the trial court['s]" presumed to be correct judgment and order. *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002); *Friends of Earth v. Laidlaw Env. S.*, 528 U.S. 167, 185, 145 L. Ed. 2d 610, 629 (2000); and *Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005).

The appointed *amicus*, a sworn officer of the court and experienced appellate counsel, who was expressly appointed by order of this Court on 3 May 2019, to specifically "defend the ruling of the trial court," served with dignity and exceptional knowledge, and has fulfilled his assigned duties *pro bono*. He earned and is due recognition and gratitude for his able service to this Court and to the Bar.

VII. Conclusion

The trial court was divested of subject matter jurisdiction when Plaintiff signed, entered, and filed her voluntary notice of dismissal of the N.C. Gen. Stat. § 50B-1(b)(6) complaint. Plaintiff's counsel's attempt to re-file an unsigned, undated, and purported hand-notated withdrawal of her properly filed and entered dismissal form did not revive that complaint and failed to commence or allege any basis of relief required in a new complaint under Rule 3 and Rule 41. No new action was commenced, nor new docket number assigned. No Rule 60 motion was filed and the time for Plaintiff to have filed has elapsed. *See Talbert*, 80 N.C. App. at 479, 343 S.E.2d at 7.

No signed notice of appeal was filed to invoke appellate jurisdiction to allow appellate review of the dismissed complaint. Appellate review of unpreserved, new and non-argued constitutional issues also violates our binding precedents, rules, and procedures. *See Anderson*, 356 N.C.

at 416, 572 S.E.2d at 102; *Fields*, 218 N.C. App. at 417, 722 S.E.2d at 793. The Speaker of the House of Representatives and the President *Pro Tempore* of the Senate were not served and "must be joined" as necessary parties. N.C. Gen. Stat. 1A-1, Rule 19(d).

This Court is also not vested with appellate jurisdiction due to counsel's unsigned and defective notice of appeal filed with the clerk of superior court. N.C. R. App. P. 3; 26(g)(3); *Crowell*, 328 N.C. at 563, 402 S.E.2d at 408.

No petition for writ of certiorari to invoke appellate jurisdiction has been filed under Rule 21, and, presuming jurisdiction exists, no motion to invoke Rule 2 to suspend the appellate rules was argued. These jurisdictional defaults and waivers preclude any appellate review. *Crowell*, 328 N.C. at 563, 402 S.E.2d at 408.

No appeal is pending before this Court. Any attempt at analysis beyond examining jurisdiction, preservation, proper joinder and compliance with the Rules of Civil and Rules of Appellate Procedure is *ultra vires*, a notion, and a nullity. I respectfully dissent.

VERED MADAR, PLAINTIFF
v.
GIL MADAR, DEFENDANT

No. COA20-28

Filed 31 December 2020

1. Divorce—alimony—dependency—findings of fact

In an alimony action, the trial court's findings of fact supported its conclusion that plaintiff wife was a dependent spouse as defined by N.C.G.S. § 50-16.1A(2) where its findings established that plaintiff's reasonable monthly expenses exceeded her income and that her periods of unemployment were not due to bad faith. The findings were supported by record evidence, along with a narrative provided by defendant describing a portion of plaintiff's testimony that was missing from the verbatim transcript and that appeared to support the challenged findings.

2. Divorce—alimony—supporting spouse

In an alimony action, the trial court's findings of fact supported its conclusion that defendant husband was a supporting spouse as

defined in N.C.G.S. § 50-16.3A(5) where the findings established that defendant's monthly income exceeded his monthly expenses. Although defendant provided an affidavit detailing higher expenses, those included expenses related to the couple's youngest son, and absent those expenses, the evidence supported the court's findings.

3. Divorce—alimony—amount of award—discretionary decision

In an alimony action, the specific amount of alimony awarded to plaintiff wife was not an abuse of discretion where the trial court considered all of the relevant factors, including both parties' earning capacity, needs, expenses, and accustomed standard of living during the marriage—as well as defendant husband's ability to pay the amount awarded.

4. Child Custody and Support—child support—calculation—extraordinary expenses—residential treatment program

In determining child support obligations, the trial court did not abuse its discretion by ordering both parties to contribute to the extraordinary expenses, as defined by the N.C. Child Support Guidelines, incurred by their youngest son for in-patient treatment and associated costs for transportation and psychological evaluations. The court's unchallenged findings supported its conclusion that defendant father had the ability to pay his portion of the expenses, and the court was not required to make specific findings before making a discretionary adjustment regarding the extraordinary expenses, which was not a deviation from the guidelines.

5. Child Custody and Support—child support—calculation—unreimbursed and uninsured medical expenses

In determining child support obligations, the trial court did not abuse its discretion by ordering defendant father to pay all of the minor child's unreimbursed/uninsured medical expenses given evidence of the large disparity between the parties' respective incomes, which supported the court's determination that defendant had the ability to pay for those expenses.

6. Child Custody and Support—child support—reimbursement of expenses—not addressed by trial court—remanded for additional findings

In a child support action, the trial court's order was reversed and remanded for additional findings on defendant father's contention that plaintiff mother should reimburse him for forty percent of the cost of enrolling the parties' youngest son in a residential treatment program. Although the court had determined that the parties should

both contribute to the program's costs, there was no indication in the record that the court addressed defendant's claim despite submission of evidence that defendant paid the full cost of enrollment.

Appeal by defendant from judgment entered 13 August 2019 by Judge Sherri T. Murrell in Orange County District Court. Heard in the Court of Appeals 8 September 2020.

Chapel Hill Family Law, by Brian C. Johnston, for plaintiff-appellee.

Tharrington Smith, LLP, by Steve Mansbery and Jeffrey R. Russell, for defendant-appellant.

BRYANT, Judge.

Defendant Gil Madar appeals from a trial court's order for child support and alimony ("2019 Order") wherein the trial court awarded alimony to plaintiff Vered Madar and the parties were ordered to share responsibilities related to their son's treatment. Where the trial court correctly determined that plaintiff was a dependent spouse and thus entitled to alimony, we affirm the trial court's ruling. Where the trial court provided no explanation to support the amount and duration of its alimony award, we remand this matter for further findings on the amount and duration of its alimony award. Where the trial court correctly determined the parties' child support obligations, we affirm the trial court's rulings. Where the trial court failed to address defendant's claim for reimbursement of residential treatment enrollment costs associated with the parties' minor child, we reverse and remand for additional findings.

On 16 September 1994, plaintiff and defendant married in Israel and had three children—all sons—over the course of their marriage. Each of the children suffered severe emotional issues at various times since 2013. Mental health issues and treatment regarding the youngest child (hereinafter "the minor child") became the central part of the parties' litigation and court orders, including the 2019 Order at issue on appeal. When the 2019 Order was entered, the two oldest children had reached the age of majority.

In August 2008, the parties and their three children relocated to the United States and purchased a home in Chapel Hill. They resided in the home together until they separated on 10 September 2016. During the marriage, the parties acquired an E-Trade investment account, which had a date-of-separation balance of $273,505; a 401(k) retirement account in defendant's name, which had a date-of-separation balance

of $214,109.96; and a money market account, which had a date-of-separation balance of $95,254.24.

On 30 September 2016, plaintiff filed a complaint seeking child custody, child support, postseparation support, alimony, attorney's fees, and equitable distribution. Defendant filed an answer and counterclaims for child custody and equitable distribution. Pursuant to a resolution of the parties' claims for equitable distribution, plaintiff received the home in Chapel Hill, and defendant received the E-Trade Investment account. The parties equally divided the sale proceeds of a condominium they shared in Israel, the money from defendant's 401(k) retirement account, and the money market account.

In 2016, the minor child began having severe emotional issues. Plaintiff, who was last employed full-time in 2013, was his primary caregiver.

On 8 February 2017, the trial court entered an order for temporary child support and postseparation support. The order established defendant's temporary child support obligation at $2,014.00 per month and his postseparation support obligation at $2,220.00 per month, based upon his monthly income at that time of $12,706.00. Defendant was ordered to pay all unreimbursed medical expenses for the minor child.

In March 2017, the minor child was hospitalized for inpatient care at UNC School of Medicine due to his mental health issues. Approximately a year later, on 20 March 2018, the trial court ordered psychological evaluations of plaintiff and defendant to determine their fitness as custodial parents. Plaintiff was ordered to participate in reunification therapy and personal therapy.

On 27 August 2018, the parties attended a hearing to determine temporary placement for the minor child, and the trial court ordered the parties to enroll him in an intensive therapeutic program at New Vision Wilderness Therapy in Wisconsin (hereinafter referred to as "New Vision Wisconsin"). The trial court also ordered the parties to equally divide the program treatment costs. On 29 November 2018, the minor child was transferred to another treatment facility in Utah: Telos Residential Treatment Program (hereinafter referred to as "Telos"). The parties were ordered to comply with the treatment requirements at Telos, which included following a visitation schedule and participating in family therapy. The parties incurred expenses related to the minor child's enrollment at Telos. The minor child was still residing at Telos when the trial court entered the 2019 Order.

In 2019, the parties appeared for a hearing on the matter of child support and alimony before the Honorable Sherri T. Murrell, District Court Judge presiding. Following the hearing, the trial court entered the 2019 Order. Defendant appeals.

On appeal, defendant argues the trial court erred by (I) finding that plaintiff was entitled to an award of alimony and determining the amount defendant should pay, (II) concluding both parties have a duty to provide child support for the minor child's needs and failing to apply the proper guidelines for its child support determination, (III) ordering defendant to pay all of the minor child's unreimbursed medical expenses, and (IV) failing to address defendant's claim for reimbursement of the minor child's cost of enrollment at Telos.

I

Defendant first appeals from the portion of the order awarding plaintiff alimony. Specifically, defendant contends the trial court erred in its findings of fact that plaintiff was a dependent spouse and defendant a supporting spouse and concluding plaintiff was entitled to receive alimony. Additionally, defendant argues the trial court abused its discretion by ordering defendant to pay alimony without making the necessary findings to support the award.

"As our statutes outline, alimony is comprised of two separate inquiries." *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000). The trial court's first determination as to whether a party is *entitled* to alimony is reviewed *de novo*. *Id.* If the trial court determines that a party is entitled to alimony, then a second determination is made as to the amount of alimony to be awarded, which we review for abuse of discretion. *Id.*

> Entitlement to alimony is governed by N.C. Gen. Stat. § 50-16.3A(a) . . . . [A] party is entitled to alimony if three requirements are satisfied: (1) [] [the] party [seeking alimony] is a dependent spouse; (2) the other party is a supporting spouse; and (3) an award of alimony would be equitable under all the relevant factors.

Id. We address each argument in order.

Dependent Spouse

[1] By statute, a "dependent spouse" is one "who is actually substantially dependent upon the other spouse for his or her maintenance and

support or is substantially in need of maintenance and support from the other spouse." N.C. Gen. Stat. § 50-16.1A(2) (2019).

> A spouse is 'actually substantially dependent' if he or she is currently unable to meet his or her own maintenance and support. A spouse is 'substantially in need of maintenance' if he or she will be unable to meet his or her needs in the future, even if he or she is currently meeting those needs.

Barrett, 140 N.C. App. at 371, 536 S.E.2d at 644–45 (internal citation omitted). "[T]o properly find a spouse dependent[,] the court need only find that the spouse's reasonable monthly expenses exceed her monthly income and that the party has no other means with which to meet those expenses." *Beaman v. Beaman*, 77 N.C. App. 717, 723, 336 S.E.2d 129, 132 (1985).

In the instant case, the trial court made the following findings of fact:

> 46. Throughout their time as a married couple living in Israel, [p]laintiff earned substantially less than [d]efendant, receiving only a modest stipend during the approximately nine years while she was working on her Masters and Ph.D.
>
> . . . .
>
> 48. Throughout their lives, [p]laintiff was the primary caretaker of the parties' three sons, maintaining primary responsibility for overseeing the boys' health, development, education, and general welfare.
>
> . . . .
>
> 52. In August 2008, [p]laintiff and [d]efendant and their three boys relocated to the United States for [p]laintiff's post-doc position. . . .
>
> . . . .
>
> 58. Plaintiff's post-doc position . . . ended in 2009.
>
> 59. Following the end of her post-doc position . . . in 2009, [p]laintiff was unable to work for a period of approximately eighteen months due to work restrictions with her H4B visa.
>
> 60. In 2010, [p]laintiff began working at UNC in a grant-funded position.

> 61. The grant funding for [p]laintiff's position at UNC ended in 2013, and [p]laintiff's position at UNC was terminated at this time.[1]
>
> . . . .
>
> 68. Plaintiff assumed primary responsibility for managing the boys' emotional issues and mental health needs, by, for example, transporting the boys to and from their many therapy appointments.
>
> . . . .
>
> 71. As of the Hearing Dates, [p]laintiff's unemployment has not been willful or the product of bad faith.
>
> . . . .
>
> 78. Plaintiff earned $0 in 2018; $0 in 2017; $4,800 in 2016; $0 in 2015; $6,750 in 2014; and $40,500 in 2013.
>
> . . . .
>
> 91. As of the Hearing Dates, [p]laintiff's reasonable fixed monthly expenses totaled $2,012, and [p]laintiff's reasonable individual monthly expenses totaled $1,866, for total reasonable monthly expenses of $3,878.

Here, the trial court's findings of fact demonstrate that prior to the parties' separation and at the time of the hearing, plaintiff was unable to earn sufficient income to support her reasonable needs. As defendant does not except to most of the findings of fact, those findings are presumed to be supported by competent evidence and are binding on appeal. *Hall v. Hall*, 65 N.C. App. 797, 799, 310 S.E.2d 378, 380 (1984). Plaintiff's reasonable monthly expenses, which totaled $3,878, contributed to a deficit because she did not have monthly income due to her unemployment. Moreover, no evidence was presented as to any bad faith on plaintiff's part. Thus, the findings of fact were sufficient to support the trial court's order that plaintiff was a dependent spouse.

Conversely, defendant does challenge some of the trial court's findings of fact––also addressing plaintiff's dependency––arguing the findings were not supported by competent evidence:

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1. Although defendant contends on appeal that finding of fact 61 is not supported by the evidence, defendant concedes in his brief that plaintiff was terminated from her position at UNC and does not dispute that plaintiff had been unemployed since her termination. Plaintiff also concedes that her year of termination was in 2014, rather than 2013.

> 63. With the loss of her job at UNC, [p]laintiff turned much of her attention towards tending to [childcare] needs.
>
> . . . .
>
> 70. Plaintiff has been diagnosed with Post Traumatic Stress Disorder.
>
> . . . .
>
> 81. Plaintiff was unable to set aside any funds for her retirement during the parties' separation.
>
> . . . .
>
> 85. As of November 5, 2018, [p]laintiff had $45.40 remaining from her aforementioned one-half share of the parties' money market account.
>
> . . . .
>
> 87. As of November 20, 2018, [p]laintiff had . . . approximately $30,000, remaining from her aforementioned share of the proceeds from the sale of the [condo in Israel].

We note that defendant's challenge to findings of fact 63, 70, and 81 appear to reference plaintiff's testimony at trial which was not included in the record.[2]

"The unavailability of a verbatim transcript does not automatically constitute error. . . . [A] party must demonstrate that the missing recorded evidence resulted in prejudice." *State v. Quick*, 179 N.C. App. 647, 651, 634 S.E.2d 915, 918 (2006).

> [O]ur Supreme Court has held that the lack of a transcript does not prejudice the defendant when alternatives–such as a narrative of testimonial evidence compiled pursuant to Rule 9(c)(1) of the North Carolina Rules of Appellate Procedure–"are available that would fulfill the same functions as a transcript and provide the defendant with a meaningful appeal."

State v. Hobbs, 190 N.C. App. 183, 186, 660 S.E.2d 168, 170 (2008) (quoting *State v. Lawrence*, 352 N.C. 1, 16, 530 S.E.2d 807, 817 (2000)). "Any dispute regarding the accuracy of a submitted narration of the

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2. Part of the transcript from the hearing is unavailable due to no fault of either party.

evidence can be resolved by the trial court settling the record on appeal. . . . Overall, a record must have the evidence necessary for an understanding of all errors assigned." *Quick*, 179 N.C. App. at 651, 634 S.E.2d at 918.

Here, the trial court made the requisite findings of fact addressing plaintiff's mental health condition, her work history, and her financial status based upon the testimony presented at trial. The proposed record on appeal, submitted by counsel for defendant, included a narration of the missing evidence stating the following:

> Plaintiff was called to testify. . . [and] [] was the only witness who testified that day. Plaintiff's testimony consisted largely of background information about the parties and their children. Plaintiff testified about the parties' date of marriage, date of separation, the children's names and dates of birth, her education and work history, her mental health condition, [d]efendant's work background, the parties' living arrangements in Israel, their ability to save money while living in Israel, and the children's medical, emotional, and mental health issues.

The narration of evidence clearly referenced the missing testimony, and we find the narration was an adequate alternative to a verbatim transcript. *See In re Shackleford*, 248 N.C. App. 357, 362, 789 S.E.2d 15, 19 (2016) ("[I]n virtually all of the cases in which we have held that an adequate alternative to a verbatim transcript existed, the transcript of the proceeding at issue was only *partially* incomplete, and any gaps therein were capable of being filled."); *see also Hobbs*, 190 N.C. App. at 187–88, 660 S.E.2d at 171 ("Although our Courts have declined to find prejudice in cases in which a transcript is unavailable for only a portion of the trial proceedings, [an] appeal [can be] hindered by the total unavailability of either a transcript or an acceptable alternative for a *majority* of defendant's trial.").

Defendant has not demonstrated nor does he assert an argument that he was prejudiced by the missing verbatim transcript. Based on the narration of evidence provided by defendant, the excepted findings of fact appear to be supported by plaintiff's testimony at trial. Absent evidence to the contrary, there is a presumption of regularity in the proceedings of a lower court. *See R & L Const. of Mt. Airy, LLC v. Diaz*, 240 N.C. App. 194, 197–98, 770 S.E.2d 698, 701 (2015); *State v. Bass*, 133 N.C. App. 646, 649, 516 S.E.2d 156, 158 (1999). Here, where the unavailability of the transcript is due to no fault of either party, there is no basis for this Court to set aside the presumption of regularity and strike the

trial court's findings of fact. According, defendant's argument on these points is overruled.

Additionally, having reviewed the record, we conclude the trial court's findings of fact, including 85 and 87, were supported by competent evidence, and thus, support the trial court's determination that plaintiff is a dependent spouse under N.C.G.S. § 50-16.1A(2).

Supporting Spouse

[2] N.C. Gen. Stat. § 50-16.1A(5) provides that " '[s]upporting spouse' means a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent for maintenance and support or from whom such spouse is substantially in need of maintenance and support." N.C.G.S. § 50-16.3A(5). While "evidence one spouse is dependent does not necessarily infer the other spouse is supporting," *Williams v. Williams*, 299 N.C. 174, 186, 261 S.E.2d 849, 857 (1980), this Court has stated, "[a] surplus of income over expenses is sufficient in and of itself to warrant a supporting spouse classification." *Barrett*, 140 N.C. App. at 373, 536 S.E.2d at 645.

Here, the trial court found that defendant's net monthly income was $5,910.00 per month, which net monthly income included a monthly 401(k) contribution of $960.69, and his total reasonable monthly expenses were $3,729; yielding a monthly surplus of $2,181. However, defendant challenges the trial court's finding of fact regarding his monthly expenses, arguing the finding was not supported by the evidence. We disagree.

Prior to the hearing, defendant submitted an affidavit of financial standing indicating his fixed monthly expenses and individual monthly expenses; stating that his fixed monthly expenses were $3,922, which included expenses for a parenting coordinator and education planner for the minor child totaling $1,556. Defendant also stated that his individual monthly expenses were $9,613, which included $8,250 for expenses related to the minor child's enrollment at Telos. The trial court, using defendant's affidavit, did not include in its calculation, expenses related to the minor child's enrollment at Telos, the parenting coordinator, or the education planner. Similarly, the trial court also did not include those expenses in plaintiff's monthly expenses when finding plaintiff to be a dependent spouse. Absent consideration of the expenses associated with Telos, the evidence supports the trial court's finding that defendant's "reasonable fixed monthly expenses totaled $2,366," and his "reasonable individual monthly expenses totaled $1,363, for total reasonable monthly expenses of $3,729."

Moreover, the trial court also made several unchallenged findings of facts as to defendant's income and expenses:

> 72. Defendant lost his job at Qualcomm in August 2018 as a result of corporate restructuring.
>
> 73. In August 2018, [d]efendant received a gross vacation payout in the amount of $21,414.75 in his final paycheck from Qualcomm.
>
> 74. Defendant earned a total of $131,025.81 from Qualcomm in 2018 through August 24.
>
> 75. Additionally, in September 2018, [d]efendant received a one-time gross severance payment from Qualcomm in the amount of $83,556.94
>
> 76. Defendant earned an additional $24,326 from his employment with Channel One in 2018, for total earnings of $238,907 in 2018.
>
> 77. Defendant earned $196,176 in 2017; $178,100 in 2016; $173,302 in 2015; $341,883 in 2014; and $208,805 in 2013.
>
> . . . .
>
> 79. Plaintiff and [d]efendant were able to save for retirement during their marriage; specifically, in 2013, [d]efendant contributed $13,125 to his 401(k); in 2014, [d]efendant contributed $13,125 to his 401(k); in 2015, [d]efendant contributed $13,533.08 to his 401(k) and $4,466.92 to his Roth 401(k); and, in 2016, [d]efendant contributed $13,594.56 to his 401(k) and $5,151.80 to his Roth 401(k).
>
> 80. Following the parties' separation, [d]efendant continued to save for retirement; specifically, in 2017, [d]efendant contributed $15,869.84 to his 401(k) and $1,639.44 to his Roth 401(k); and, in 2018, [d]efendant contributed $11,679.06 to his Qualcomm 401(k) and $1,769.24 to his Channel One 401(k).

Based on these findings, defendant's income-expenses surplus adequately supports the trial court's determination that defendant is a supporting spouse.

Alimony Award

[3] The amount of alimony to be awarded is within the trial judge's sound discretion and is not reviewable on appeal absent a manifest abuse of discretion. *Id.* at 371, 536 S.E.2d at 644.

N.C. Gen. Stat. § 50-16.3A, which governs alimony awards, states, in pertinent part:

> The court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors. . .

N.C.G.S. § 50-16.3A(a).

> [I]n determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors including, *inter alia*, the following: marital misconduct of either spouse; the relative earnings and earning capacities of the spouses; the ages of the spouses; the amount and sources of earned and unearned income of both spouses; the duration of the marriage; the extent to which the earning power, expenses, or financial obligations of a spouse are affected by the spouse's serving as custodian of a minor child; the standard of living of the spouses during the marriage; the assets, liabilities, and debt service requirements of the spouses, including legal obligations of support; and the relative needs of the spouses.

Hartsell v. Hartsell, 189 N.C. App. 65, 69, 657 S.E.2d 724, 727 (2008). The parties' needs and expenses for purposes of computing alimony should be measured in light of their accustomed standard of living during the marriage. *Barrett*, 140 N.C. App. at 372, 536 S.E.2d at 645. "While the court must consider the needs of the spouse seeking alimony in the context of the family unit's accustomed standard of living, it also must determine that the supporting spouse has the financial capacity to provide the support needed therefor." *Whedon v. Whedon*, 58 N.C. App. 524, 527, 294 S.E.2d 29, 31 (1982).

Here, as discussed *supra*, the trial court considered all the relevant factors and made findings of fact addressing, *inter alia*, each party's earning capacity, respective needs and expenses, and the accustomed standard of living during their marriage. In the order, the trial court found, based on all the evidence presented, that "[d]efendant ha[d] the

present ability to pay monthly alimony to [p]laintiff in the amount of $2,395, beginning February 1, 2019, and continuing for a period of eight years and seven months thereafter." However, defendant argues the trial court failed to make the necessary findings setting forth its reasoning for the amount and duration of the alimony award. We agree.

While the trial court found that defendant had the ability to pay $2,395, the order did not expressly include findings to support its rationale for awarding plaintiff that specific amount. Additionally, the trial court provided no explanation to support the duration of its alimony award. Thus, we must remand this matter to the trial court for further findings on the trial court's rationale for the amount and duration of its alimony award. *See* N.C.G.S. § 50-16.3A(c) (stating that the trial court "*shall* set forth the reasons for its award or denial of alimony and, *if making an award*, *the reasons for its amount*, *duration*, *and manner of payment*." (emphasis added)); *see also Wise v. Wise*, 264 N.C. App. 735, 749, 826 S.E.2d 788, 798 (2019); *Hartsell*, 189 N.C. App. at 76, 657 S.E.2d at 730.

II

[4] Defendant next appeals from the trial court's child support determination. Defendant argues the trial court erred by concluding that both parties have a duty to provide support to their minor child for his expenses relating to Telos. We disagree.

"Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Mason v. Erwin*, 157 N.C. App. 284, 287, 579 S.E.2d 120, 122 (2003) (citation and quotation marks omitted). "To support such a reversal, an appellant must show that the trial court's actions were manifestly unsupported by reason." *State v. Williams*, 163 N.C. App. 353, 356, 593 S.E.2d 123, 126 (2004).

N.C. Gen. Stat. § 50-13.4(c) authorizes the trial court to order a child support award

> in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C.G.S. § 50-13.4(c) (2019). Generally, both parents have an equal duty to provide support for their children. *See Plott v. Plott*, 313 N.C. 63, 68,

326 S.E.2d 863, 867 (1985) ("Today, the equal duty of both parents to support their children is the rule."); *see also* N.C. Gen. Stat. § 50-13.4(b) ("In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child."). However, while parents have an equal duty to support their children, "the equal duty to support does not necessarily mean the amount of child support is to be automatically divided equally between the parties. Rather, the amount of each parent's obligation varies in accordance with their respective financial resources." *Plott*, 313 N.C. at 68, 326 S.E.2d at 867.

"Child support payments are ordinarily determined based on a party's actual income at the time the award is made." *Williams*, 163 N.C. App. at 356, 593 S.E.2d at 126. "In determining the amount of a child support obligation, [t]he judge must evaluate the circumstances of each family and also consider certain statutory requirements[.]" *Bowers v. Bowers*, 141 N.C. App. 729, 731, 541 S.E.2d 508, 509 (2001) (alterations in original) (citation and quotation marks omitted).

In the instant case, the trial court made the following findings of fact relating to the minor child's reasonable needs and child care:

> 23. Plaintiff and [d]efendant each acknowledged that it was in [the minor child]'s best interest to be enrolled at Telos and that [the minor child] has benefitted substantially from his time at Telos.
>
> 24. The expenses incurred for [the minor child]'s benefit in connection with his enrollment at New Vision and Telos, as well as his transportation expenses incurred with Right Direction, psychological evaluation expenses incurred [], and [p]laintiff's Telos Expenses, are extraordinary expenses, as defined by the North Carolina Child Support Guidelines.
>
> . . . .
>
> 97. Plaintiff has the present ability to pay 40% of the Dr. KKJ [e]xpenses, and [d]efendant has the present ability to pay 60% of the Dr. KKL[']s psychological evaluation e]xpenses.
>
> 98. Plaintiff has the present ability to pay 50% of the Dr. Zeisz [e]xpenses, and [d]efendant has the present ability to pay 50% of the Dr. KKL [e]xpenses.

> 99. Plaintiff has the present ability to pay 40% of the expenses associated with [minor child]'s enrollment at Telos, including expense account expenses, and [d]efendant has the present ability to pay 60% of expenses associated with [minor child]s enrollment at Telos, including expense account expenses.
>
> 100. Plaintiff has the present ability to pay 40% of the Right Direction [e]xpenses for Telos, and [d]efendant has the present ability to pay 60% of the Right Direction [e]xpenses for Telos.
>
> 101. Plaintiff has the present ability to pay 40% of [p]laintiff's Telos [e]xpenses, and [d]efendant has the present ability to pay 60% [p]laintiff's Telos [e]xpenses.

We note defendant does not take exception to the findings made by the trial court regarding his financial status at the time of the hearing in 2019. The trial court found that after the parties had separated, defendant earned $196,176 in 2017, and $238,907 in 2018.[3] In addition to defendant's ability to make substantial contributions to his retirement accounts in 2017 and 2018, the trial court found that defendant had assets in an E-Trade investment account with a date-of-separation balance of $273,505, one-half interest in a Qualcomm 401(k) account with a date-of-separation balance of $214,109.96, and one-half interest in a money market account with a date-of-separation balance of $95,254.24. Additionally, defendant received $238,000 in 2018 from the sale of the parties' condominium in Israel. At the time of the hearing, defendant had not spent any of the proceeds from the condominium sale. Those findings, which are binding on this Court, support the finding of fact and conclusion of law that defendant had the ability to pay child support.

Defendant also contends the trial court deviated from the Child Support Guidelines because the trial court concluded that defendant "ha[d] the ability to pay the child support ordered. The trial court did not make any findings of fact to support this conclusion." We also reject this argument.

Although N.C. Gen. Stat. § 50-13.4 mandates a trial court use the presumptive guidelines when determining the amount of child support payments, the North Carolina Child Support Guidelines (the "Guidelines"), effective 1 January 2019, provide that

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3. The hearing for child support and alimony took place on 2 January, 8 February, and 20 March 2019.

> extraordinary child-related expenses (including (1) expenses related to special or private elementary or secondary schools to meet a child's particular education needs, and (2) expenses for transporting the child between the parent's homes) *may be added to the basic child support obligation and ordered paid by the parents in proportion to their respective incomes if the court determines the expenses are reasonable, necessary, and in the child's best interest.*

N.C. Child Support Guidelines 2019 Ann. R. N.C. 5 (emphasis added).

> [D]etermination of what constitutes an extraordinary expense is . . . within the discretion of the trial court[.] Based upon the Guideline language above, the court may, in its discretion, make adjustments [in the Guideline amounts] for extraordinary expenses. However, incorporation of such adjustments into a child support award does not constitute deviation from the Guidelines, but rather is deemed a *discretionary adjustment* to the presumptive amounts set forth in the Guidelines. . . . [A]bsent a party's request for deviation, the trial court is not required to set forth findings of fact related to the child's needs and the non-custodial parent's ability to pay extraordinary expenses.

Biggs v. Greer, 136 N.C. App. 294, 298, 524 S.E.2d 577, 581–82 (2000) (alteration in original) (emphasis added) (internal citations and quotation marks omitted).

Here, the trial court's findings of fact regarding expenses related to the minor child's inpatient treatment, which included travel expenses and psychological evaluations, appropriately fall under the definition of extraordinary expenses in the Guidelines. The court properly exercised its discretion and determined that plaintiff had the ability to pay 40% of the minor's expenses and defendant had the ability to pay 60% of the expenses.[4] *Ferguson v. Ferguson*, 238 N.C. App. 257, 265, 768 S.E.2d 30, 36 (2014) ("The trial court is vested with discretion to make adjustments to the guideline amounts for extraordinary expenses, and the determination of what constitutes such an expense is likewise within its sound discretion." (citation and quotation marks omitted)).

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4. Prior to the trial court's order, the parties had already shared the responsibility of the minor child's expenses and made payments towards his treatment.

Contrary to defendant's assertion, the trial court was not required to make specific findings regarding the child's reasonable needs or the parents' ability to provide support as the court's "discretionary adjustment" did not constitute a deviation under the Guidelines. *See Greer*, 136 N.C. App. at 298, 524 S.E.2d at 582. In fact, the trial court's finding—that plaintiff and defendant should be obligated to pay extraordinary child care expenses in varying proportions to meet the minor child's needs—is consistent with the underlying assumption of the Guidelines that "child support is *a shared parental obligation*[.]" N.C. Child Support Guidelines 2019 Ann. R. N.C. 5 (emphasis added). We see nothing in the record to indicate that either party requested a deviation from the Guidelines.

Therefore, we hold the trial court did not abuse its discretion by ordering both parties to provide the above-referenced support to their minor child.

III

[5] Defendant raises another argument regarding his child support obligation, contending the trial court erred by ordering him to pay all the minor child's unreimbursed/uninsured medical expenses. We disagree.

Typically, "uninsured medical and dental expenses are to be apportioned between the parties in the discretion of the trial court. In other words, any decision by the court in this regard must be upheld absent a showing that it is manifestly unsupported by reason." *Lawrence v. Tise*, 107 N.C. App. 140, 150, 419 S.E.2d 176, 183 (1992). The Guidelines include a provision referring to uninsured medical or dental expenses, stating:

> [t]he basic guideline support obligation includes $250 per child for the child's annual uninsured medical and/or dental expenses. . . . [T]he court *may* order that uninsured health care costs in excess of $250 per year (including reasonable and necessary costs related to medical care, dental care, orthodontia, asthma treatments, physical therapy, treatment of chronic health problems, and counseling or psychiatric therapy for diagnosed mental disorders) incurred by a parent *be paid by either parent or both parents in such proportion as the court deems appropriate.*

N.C. Child Support Guidelines 2019 Ann. R. N.C. 5 (emphasis added). We note the Guidelines do not include mandatory language advising the trial court on the allocation of uninsured expenses between the parties. Instead, this Court has stated that the trial court is vested with wide discretion in deciding the allocation of such expenses on a child's behalf:

> [T]he Child Support Guidelines . . . include a generalized, cursory instruction concerning how the court 'may' structure the responsibility for these uninsured expenses [which] does not in any way alter the trial court's discretion to apportion these expenses, described and applied in *Tise*, 107 N.C. App. at 150, 419 S.E.2d at 183. . . . [T]he Child Support Guidelines neither require the trial courts to follow a certain formula nor prescribe what the trial courts 'should' or 'must' do in this regard[.] . . . Given the wide discretion afforded [to] our trial courts in matters concerning the allocation of uninsured medical or dental expenses, then, such decisions cannot be disturbed on appeal absent a manifest abuse of discretion.

Holland v. Holland, 169 N.C. App. 564, 571–72, 610 S.E.2d 231, 236–37 (2005).

Here, considering the disparity between the parties' respective incomes, we find the trial court's order requiring defendant to pay all medical expenses not covered by insurance on behalf of the minor child was not manifestly unsupported by reason so as to constitute an abuse of discretion. *See Roberts v. McAllister*, 174 N.C. App. 369, 381, 621 S.E.2d 191, 199 (2005) ("It is in the discretion of the trial court to determine a fair sharing arrangement for the uninsured medical expenses.").

We reject defendant's contention that there was no competent evidence presented to show what the minor child's expenses were and what they would cost defendant. In defendant's affidavit of financial standing [] submitted to the trial court, he included $433 for the minor child's "medical/dental bills not paid by insurance" in his total individual expense estimate. The court included this expense in its finding of defendant's reasonable individual expenses and determined that defendant had a surplus in income to enable him to afford those expenses if they occur. Accordingly, we affirm the trial court's ruling.

IV

[6] Defendant finally argues the trial court erred by failing to address his claim for reimbursement of the minor's cost of enrollment at Telos. We agree.

Here, defendant submitted evidence that he was charged the full amount of $5,250.00, relating to the minor child's enrollment costs in Telos on 30 October 2018. The trial court found that plaintiff had the ability to pay "40% of the expenses associated with the minor child's enrollment at Telos." Thus, pursuant to the trial court's order, defendant

contends plaintiff was required to reimburse him for 40% of this cost, totaling $2,100.

Given the lack of findings by the trial court on this issue, we are unable to discern from the record how or whether the trial court considered defendant's argument for reimbursement on his Telos's costs. Thus, we reverse and remand for additional findings as to defendant's claim for reimbursement.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judges ZACHARY and ARROWOOD concur.

WILLIAM S. MILLS, AS GUARDIAN AD LITEM FOR ANGELINA DEBLASIO, PLAINTIFF
v.
THE DURHAM BULLS BASEBALL CLUB, INC., DEFENDANT

No. COA19-510

Filed 31 December 2020

Premises Liability—Baseball Rule—injury to spectator from foul ball—duty of care satisfied—summary judgment proper

The trial court properly granted summary judgment in favor of a baseball club in a negligence action in which plaintiff sought damages for injuries sustained when she was hit by a foul ball while sitting in a picnic area of a baseball stadium during a game. The common law Baseball Rule operated to shield the baseball club from liability where the club satisfied its duty to protect spectators by providing a reasonable number of screened seats, there was no evidence that the area where plaintiff was seated was negligently designed, and evidence was presented that plaintiff had sufficient knowledge of the game of baseball to understand the danger foul balls represented to people sitting in the stands.

Appeal by Plaintiff from an order entered 28 December 2018 by Judge Eric C. Morgan in Superior Court, Durham County. Heard in the Court of Appeals 3 December 2019.

Ward & Smith, P.A., by Alexander C. Dale, A. Charles Ellis, and Christopher S. Edwards, for Plaintiff-Appellant.

Fox Rothschild LLP, by D. Erik Albright and Kip David Nelson, for Defendant-Appellee.

McGEE, Chief Judge.

Plaintiff Angelina DeBlasio ("Plaintiff"),[1] who was hit and injured by a foul ball at a baseball game, appeals from an order granting summary judgment in favor of The Durham Bulls Baseball Club, Inc. ("Defendant") and dismissing her complaint. On appeal, Plaintiff contends that the common law "Baseball Rule," which disclaims liability for baseball stadium operators who satisfy their duty to protect patrons from errant balls by providing an adequate number of screened seats, *Bryson v. Coastal Plain League, LLC*, 221 N.C. App. 654, 656–57, 729 S.E.2d 107, 109–10 (2012), does not apply to the facts of this case. Though Plaintiff undoubtedly suffered a painful and unfortunate injury, we hold that the Baseball Rule is applicable and affirm the trial court's order.

I. Factual and Procedural History

Plaintiff was born in 2004 in the Pittsburgh, Pennsylvania area. Plaintiff took up softball while living in Pittsburgh, and attended several Pittsburgh Pirates games in 2014 and 2015 with her family. Plaintiff's younger siblings both play either baseball or softball, and baseball is a popular sport with Plaintiff's parents and siblings; since 2014, Plaintiff's family would get together and watch three or four Major League Baseball playoff games on TV each season. Plaintiff paid attention to the majority of each game she watched on TV or attended in person.

Plaintiff's father worked for Panasonic Avionics ("Panasonic"), a job which led Plaintiff's family to relocate to North Carolina in 2015. To celebrate the move and introduce Plaintiff's family to the other area employees, Panasonic arranged for a picnic meet-and-greet at Durham Bulls Athletic Park during a baseball game hosted by the Durham Bulls on 5 August 2015. Panasonic reserved a publicly accessible picnic area called the Bull Pen Picnic Area ("Picnic Area") for the event.

The Picnic Area is an open-air section of the stadium situated behind the left-field foul line in the corner of the outfield at one of the furthest spots in left field from home plate. Located at about field level and—as of 5 August 2015—separated from the area of play only by a low wall, the Picnic Area is outside the 110 feet of protective netting that runs

1. Though formally represented by her Guardian ad Litem, we refer to Angelina DeBlasio as the singular "Plaintiff" for simplicity and ease of reading.

from behind home plate towards each team's dugout. The portion of the Picnic Area closest to the field includes picnic tables with umbrellas, while the area furthest from the field is open space. Three warning signs are posted along the Picnic Area's field wall, stating "PLEASE BE AWARE OF OBJECTS LEAVING THE PLAYING FIELD," and other similar signs are placed throughout the stadium. Prior to each game, the Durham Bulls play an announcement over the public address system warning visitors that baseballs may "come flying at ya' at a high rate of speed, so please stay alert while you're in the seating bowl."

On the night of the picnic, Plaintiff's family arrived at the ballpark around 6:15 p.m. and learned for the first time that they would be sitting in the Picnic Area. They made their way to the Picnic Area before the game started and took pictures of several players warming up. Plaintiff did not pay attention to the game once it started, later testifying at deposition that she saw "[j]ust a little bit" of the game. Instead, Plaintiff spent most of her time talking to her parents while occasionally getting food from the buffet at the back of the Picnic Area. Plaintiff's father paid closer attention to the game and saw three or four foul balls enter the stands during play. He also spoke to one of the players from the visiting team, who sometimes sat on the low wall separating the Picnic Area from the field. Neither he nor his daughter heard the public announcement about errant balls, nor did they see any of the signs warning attendees about objects leaving the field.

Around 8:00 p.m., as Plaintiff was seated on a bench facing the field and talking to her mother, a foul ball exited the field of play, entered the Picnic Area, and struck Plaintiff in the face. She suffered severe injuries, including multiple dislocated teeth and broken bones in and around her jaw. She was taken from the stadium to Duke University Medical Center's Emergency Department, where she underwent endodontic and orthodontic surgeries later that night. She returned to the Medical Center the following month for additional endodontic and orthodontic surgery.

Plaintiff filed suit against Defendant on 21 December 2016, alleging one count of negligence in connection with the events of 5 August 2015. Defendant filed an answer on 28 February 2017 and, following discovery, moved for summary judgment on 13 November 2018. In its motion, Defendant asserted that "[u]nder long-standing North Carolina precedent known as the 'baseball rule,' . . . Defendant was not negligent as a matter of law." The trial court granted Defendant's motion and entered an order dismissing Plaintiff's complaint on 28 December 2018. Plaintiff appeals.

II. Analysis

Plaintiff's appeal from summary judgment is subject to *de novo* review. *Bryson*, 221 N.C. App. at 656, 729 S.E.2d at 109. The trial court's grant of summary judgment will be affirmed "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). To demonstrate a valid cause of action for negligence at the summary judgment stage, a claimant must forecast evidence showing that: " '(1) the defendant owed the plaintiff a duty of care; (2) the defendant's conduct breached that duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered damages as a result of the injury.' " *Hamby v. Thurman Timber Co., LLC*, 260 N.C. App. 357, 363, 818 S.E.2d 318, 323 (2018) (quoting *Wallen v. Riverside Sports Ctr.*, 173 N.C. App. 408, 411, 618 S.E.2d 858, 861 (2005)).

The parties dispute whether the common law Baseball Rule necessarily defeats Plaintiff's claim based on the evidence presented at summary judgment. Under the Rule, baseball field "operators 'are held to have discharged their full duty to spectators in safeguarding them from the danger of being struck by thrown or batted balls by providing adequately screened seats for patrons who desire them, and leaving the patrons to their choice between such screened seats and those unscreened.' " *Bryson*, 221 N.C. App. at 657, 729 S.E.2d at 109 (quoting *Cates v. Cincinnati Exhibition Co.*, 215 N.C. 64, 66, 1 S.E.2d 131, 133 (1939)). That duty is discharged even when there are not enough screened seats to meet the demand for them. *Id.* at 657, 729 S.E.2d at 109–10. In other words:

> Reasonable care is all that is required,—that is, care commensurate with the circumstances of the situation,—in protecting patrons from injuries.
>
> And the duty to exercise reasonable care imposes no obligation to provide protective screening for all seats . . . . Nor is management required, in order to free itself from negligence, to provide protected seats for all who may possibly apply for them. It is enough to provide screened seats, in the areas back of home plate where the danger of sharp foul tips is greatest, in sufficient number to accommodate as many patrons as may reasonably be expected to call for them on ordinary occasions.

Erickson v. Lexington Baseball Club, 233 N.C. 627, 628, 65 S.E.2d 140, 141 (1951) (citations omitted).

In this case, Plaintiff argues that the Baseball Rule should not apply for five reasons: (1) Plaintiff lacked sufficient knowledge of the game of baseball to understand that foul balls could be hit into the stands and cause injury to unprotected spectators; (2) she did not have a choice between sitting in the Picnic Area and the stadium's screened seats; (3) she was not, in fact, a spectator, as she considered herself to be attending a company picnic rather than a baseball game; (4) the Picnic Area was negligently designed and that negligent design caused Plaintiff's injury; and (5) the Baseball Rule, created at a time when baseball was central to and synonymous with American popular culture and sport, should be abandoned as outdated. We address each argument in turn.

In her first argument, Plaintiff maintains that the Baseball Rule applies only to cases in which a spectator of sufficient age and experience with the game of baseball is hit by an errant baseball based on the following language from *Cates*: "[']We believe that as to all who, *with full knowledge of the danger from thrown or batted balls*, attend a baseball game the management cannot be held negligent when it provides a choice between a screened in and an open seat[.][']" *Cates*, 215 N.C. at 66, 1 S.E.2d at 132 (emphasis added) (quoting *Wells v. Minneapolis Baseball & Athletic Assoc.*, 142 N.W. 706, 707 (1913)). Plaintiff asserts that because she was eleven years old at the time of the injury and had never personally witnessed a foul ball enter the stands, she lacked "full knowledge of the danger from thrown or batted balls." *Id.* The contention fails, however, because evidence introduced at the trial level demonstrates Plaintiff had adequate knowledge of the game under North Carolina law to be aware of the danger posed by foul balls regardless of whether she had ever personally witnessed one enter the stands.

Our Supreme Court has held that "*[a]nyone* familiar with the game of baseball knows that balls are frequently fouled into the stands and bleachers. Such are common incidents of the game which necessarily involve dangers to spectators." *Erickson*, 233 N.C. at 629, 65 S.E.2d at 141 (emphasis added). Plaintiff certainly had this "ordinary knowledge of the game of baseball," *id.*, based on the uncontroverted evidence introduced below. She had attended multiple baseball games in person, watched several games on TV, and played softball[2] for several years prior

2. The Baseball Rule applies to both softball and baseball. *See Bryson*, 221 N.C. App. at 657, 729 S.E.2d at 110 (applying the Rule to "[p]ersons familiar with the game of softball or baseball" (citation and quotation marks omitted)).

to attending the game in question. Plaintiff paid close attention to all of the games she attended or saw on TV. At the games she attended, she "watch[ed] . . . for the entire time [she] was there" with the exception of trips to the bathroom and concessions; as for the games she watched on TV, she paid attention to about "85 percent" of each game. We hold that, as stated by our Supreme Court, Plaintiff, like "anyone familiar with the game," *Erickson*, 233 N.C. at 629, 65 S.E.2d at 141, had sufficient knowledge of the sport to comprehend the danger of balls fouled into the stands even if she had never witnessed such an event herself.

Plaintiff's subsequent assertion that she did not have a choice of seats does not preclude application of the Baseball Rule. The "choice" embodied in the Rule is the choice on the part of the spectator to attend a baseball game in an unprotected seat when the ballpark operator has satisfied its duty to protect patrons by offering a reasonable number of protected seats. *Id.* at 628, 65 S.E.2d at 140–41. For example, in *Erickson*, a spectator struck by a ball attempted to sue the stadium operator "on the theory that the defendant was negligent in not providing him with a choice between screened and unscreened seats." *Erickson*, 233 N.C. at 628, 65 S.E.2d at 140. The plaintiff bought a general admission ticket and arrived at the game "about ten minutes before game time" when "[a]ll of the screened seats were then occupied." *Id.* at 628, 65 S.E.2d at 141.

Our Supreme Court held on these facts that "[t]he defendant's failure to provide the plaintiff with a screened seat . . . [did] not support an issue of actionable negligence." *Id.* This was the case because the ballpark operator had provided a reasonable number of screened seats and, even though those seats were unavailable to the plaintiff, he chose to sit in an unprotected seat with knowledge that he could be injured by a batted ball. *Id.* at 628–29, 65 S.E.2d at 141. Plaintiff and her family, in this case, arrived at a baseball game to learn that they would not be seated in a protected area of the stadium and, with adequate knowledge of baseball to recognize the danger posed by foul balls, nonetheless chose to stay and sit in an unprotected area. As in *Erickson*, the Baseball Rule precludes recovery for spectators who make such a choice. *Id.*

Plaintiff's argument that she did not consider herself to be a "spectator" because she was at the stadium to attend a company picnic also does not preclude application of the Baseball Rule. Even though Plaintiff had no plans to watch the game and considered herself to be attending a picnic, there can be no serious dispute from the evidence that she did not know she was at a picnic in a baseball stadium while a baseball game was taking place. Plaintiff's deposition testimony unambiguously shows that she knew she was in a baseball stadium, that she was aware

a baseball game was underway while she was in the Picnic Area, and that the game could be observed from that area; indeed, she testified that she watched players warm-up before the game and even caught "a little bit" of the game while it was underway. Plaintiff was, for all intents and purposes, a "spectator" within the meaning of the Baseball Rule. *Cf. Wheeler v. Central Carolina Scholastic Sports, Inc.*, 253 N.C. App. 240, 798 S.E.2d 438, 2017 WL 1381646, *1 (Unpublished) (applying the Baseball Rule to a plaintiff who was struck by a ball while talking to a friend behind a fence beside the stadium bleachers), *aff'd per curiam*, 370 N.C. 390, 808 S.E.2d 143 (2017). Plaintiff's argument on this point is one of semantics rather than law and does not render the Baseball Rule inapplicable.

Plaintiff's fourth argument states that the Baseball Rule does not apply because Defendant negligently designed the Picnic Area and those negligent design elements were the proximate cause of her injury. *See Cates*, 215 N.C. at 66–67, 1 S.E.2d at 132 (holding the Baseball Rule applied where there was no evidence that the stadium was negligently designed or that the design of the stadium caused the plaintiff's injury). She specifically contends that the Picnic Area was negligently designed in that it "purposefully distracts patrons from the game" in the following ways: (1) patrons in the Picnic Area have to turn their backs to the game to get food from the buffet at the rear of the space; (2) several of the picnic tables allow patrons to sit with their backs to the game while eating or socializing; (3) umbrellas which extend above the picnic tables may obscure lines of sight; and (4) visiting players sometimes sit on the low wall separating the Picnic Area from the field, which could block views of the game. She argues that these elements dangerously "beckon[] patrons to turn their backs to the game and to ignore baseball's dangers," which in turn led Plaintiff and her family to think the Picnic Area was "a safe place" insulated from baseball's inherent risks.

Plaintiff has introduced no evidence demonstrating that the above design elements actually contributed to her injury and thus her argument lacks merit. The record shows that Plaintiff was sitting at a picnic table that was directly adjacent to the low wall and on a side with views of home plate at the time she was struck by a foul ball.[3] No

3. That Plaintiff was speaking to her mother, who was sitting at the same picnic table when Plaintiff was struck, does not show that the Picnic Area was negligently designed; professional baseball games are inherently social events where people congregate to cheer players and teams together. It is both expected and routine for attendees to speak to those around them during the game, no matter where they may be seated. Plaintiff, who was speaking to her mother from a bench next to the field with a view of home plate, was

evidence suggests—and Plaintiff points to none—that the foul ball that hit her was obscured by an umbrella or player from the opposing team. Defendant directly sought to dispel any indication that the Picnic Area was free from the dangers posed by foul balls by placing three signs along the low wall specifically warning attendees to "BE AWARE OF OBJECTS LEAVING THE PLAYING FIELD." In sum, no design elements identified by Plaintiff appear to have interfered with Plaintiff's ability to avoid injury, and neither did they convey that foul balls could not enter the Picnic Area. Because the evidence does not show the design of the Picnic Area caused or contributed to her injury, we hold the Baseball Rule applies to this case. *Cates*, 215 N.C. at 66–67, 1 S.E.2d at 132.

In her final argument, Plaintiff argues that the Baseball Rule should be abandoned as archaic and out-of-step with the sport's arguably diminished place in popular culture compared to its historical primacy in the American sporting landscape. Because the Rule was announced by our Supreme Court, applied by prior panels of this Court, and has not been disclaimed by a higher court, we are without authority to set it aside. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

III. Conclusion

For the foregoing reasons, we affirm the trial court's order granting summary judgment for Defendant and dismissing Plaintiff's complaint.

AFFIRMED.

Judges TYSON and ZACHARY concur.

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thus not engaged in an activity particular to the Picnic Area's design when injured. *Cf. Wheeler*, 2017 WL 1381646 at *1 (applying the rule to a plaintiff who was talking to a friend at the time of his injury).

PONDER v. BEEN

[275 N.C. App. 626 (2020)]

MARK W. PONDER, PLAINTIFF
v.
STEPHEN R. BEEN, DEFENDANT

No. COA19-1021

Filed 31 December 2020

Jurisdiction—personal—alienation of affection—out-of-state defendant—electronic communications

In an alienation of affection action in which plaintiff husband and his wife resided in North Carolina, defendant resided in Florida, and the alleged affair between defendant and the wife occurred in Florida, the allegations and evidence were insufficient to support the trial court's findings made in support of its conclusion that it had specific jurisdiction over defendant. Instead, the evidence would have only supported finding that defendant communicated with a telephone number registered in North Carolina, because no evidence was presented that the number was the wife's.

Judge BROOK concurring in result only.

Judge STROUD dissenting.

Appeal by defendant from order entered 29 October 2019 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 August 2020.

Sodoma Law, P.C., by Amy Elizabeth Simpson, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, and Claire J. Samuels, for defendant-appellant.

BRYANT, Judge.

Where the trial court's findings of fact were insufficient to meet the threshold requirements to exercise personal jurisdiction over defendant Stephen R. Been pursuant to our long-arm statute, General Statutes, section 1-75.4, we reverse the trial court's 29 October 2019 order denying defendant's Rule 12(b)(2) motion to dismiss plaintiff's complaint for lack of personal jurisdiction.

On 14 September 2017, plaintiff Mark W. Ponder filed a complaint against defendant in Mecklenburg County Superior Court seeking

compensatory damages in excess of $10,000.00 on the claim of alienation of affection, as well as punitive damages.

Plaintiff alleged that he met a woman named Mary in 2008, and the couple wed on 26 June 2010. Mary had two children from a previous relationship and worked in the home as a stay-at-home mother. On 13 November 2013, the parties separated following the issuance of a domestic violence restraining order against plaintiff. In his complaint, plaintiff contended that Mary occasionally traveled to his condo in Naples, Florida for recreation and relaxation. In 2013, she met defendant, who was a Florida resident. In November 2013, plaintiff accused Mary of having an affair. Before the separation, while Mary still resided in North Carolina, plaintiff alleged that Mary and defendant engaged in frequent communications by email, text message, and telephone. Plaintiff argued that defendant sent Mary airline tickets and "other things of value." Further, plaintiff argued that after 13 November 2013, defendant paid legal fees for services by an attorney who practiced exclusively in Mecklenburg County.

Following her separation from plaintiff, Mary and her children relocated to Naples, Florida in June 2014. Mary and her children resided in homes owned by defendant. Plaintiff asserted that "[w]ith full knowledge of her marital status, [d]efendant, willfully, maliciously and intentionally engaged in a campaign to alienate [Mary] from [p]laintiff, and to damage if not destroy the bonds of matrimony that existed between them."

On 3 January 2018, defendant filed a motion to dismiss plaintiff's civil action for lack of personal jurisdiction. Defendant noted that this was the second action plaintiff had filed against defendant in a North Carolina court claiming alienation of affection. The first action was commenced 5 November 2015, and plaintiff voluntarily dismissed it on 15 September 2016, after defendant moved to dismiss pursuant to Rule 12(b)(2) ("Lack of jurisdiction over the person"). As to the current action, defendant again challenged the court's exercise of personal jurisdiction over him as a violation of North Carolina's long-arm statute, N.C. Gen. Stat. § 1-75.4, and the Due Process Clause under the Fourteenth Amendment of the United States Constitution.

In support of his motion to dismiss, defendant filed a brief challenging the exercise of personal jurisdiction as a violation of due process. In response, plaintiff filed "points and authorities in opposition to defendant's motion to dismiss," and he asserted that prior to plaintiff and Mary's separation, Mary and defendant communicated by telephone 476 times between 30 June and 13 November 2013. A hearing on the matter was conducted on 4 March 2019 in Mecklenburg County Superior Court,

before the Honorable William R. Bell, Judge presiding. On 29 October 2019, the trial court entered its order denying defendant's motion to dismiss.

Defendant appeals.

On appeal, defendant argues that the trial court erred by making insufficient findings of fact in support of its ruling to deny defendant's motion to dismiss for lack of personal jurisdiction and concluding that the exercise of personal jurisdiction over defendant could be exercised in compliance with North Carolina's long-arm statute and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Right to Appeal

In *Love v. Moore*, our Supreme Court held that a right of immediate appeal exists from an order finding jurisdiction over the person, made on the basis of "minimum contacts" (the subject matter of Rule 12(b)(2)). 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982); *see also* N.C. Gen. Stat. § 1-277(b) (2019).

Personal Jurisdiction

Defendant argues the trial court erred by denying his motion to dismiss for lack of personal jurisdiction. We agree.

> "The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record[.]" *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140–41, 515 S.E.2d 46, 48 (1999). " 'Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.' " *Nat'l Util. Review, LLC v. Care Ctrs., Inc.*, 200 N.C. App. 301, 303, 683 S.E.2d 460, 463 (2009) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). We review *de novo* the issue of whether the trial court's findings of fact support its conclusion of law that the court has personal jurisdiction over defendant. *Id.*

Bell v. Mozley, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011).

> To resolve a question of personal jurisdiction, the court must engage in a two step analysis. First, the court must determine if the North Carolina long-arm statute's (N.C.

> Gen. Stat. § 1–75.4) requirements are met. If so, the court must then determine whether such an exercise of jurisdiction comports with due process.

Cooper v. Shealy, 140 N.C. App. 729, 732, 537 S.E.2d 854, 856 (2000) (citation omitted).

Long-Arm Statute

Pursuant to our General Statutes, section 1-75.4 ("Personal jurisdiction, grounds for generally"),

> [a] court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action . . . under any of the following circumstances:
>
> . . . .
>
> (3) **Local Act or Omission.** – In any action claiming injury to person . . . within or without this State arising out of an act or omission within this State by the defendant.
>
> (4) **Local Injury; Foreign Act.** – . . . [I]n any action claiming injury to person . . . within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:
>
> > a. Solicitation . . . w[as] carried on within this State by or on behalf of the defendant[.]

N.C. Gen. Stat. § 1-75.4(3) and (4)a. (2019). "[T]his Court has acknowledged that actions for alienation of affection[] and criminal conversation constitute injury to person or property as denoted by N.C. Gen. Stat. § 1–75.4(3)." *Cooper*, 140 N.C. App. at 733, 537 S.E.2d at 857 (citation and quotation marks omitted); *see also Brown v. Ellis*, 363 N.C. 360, 678 S.E.2d 222 (2009) (per curiam) (upholding the trial court's exercise of personal jurisdiction over a non-resident defendant in a civil action for alienation of affection pursuant to N.C. Gen. Stat. § 1–75.4(4)a.).

"We recognize that [General Statutes, section 1-75.4,] requires only that the action 'claim' injury to person or property within this state in order to establish personal jurisdiction." *Fox v. Gibson*, 176 N.C. App. 554, 558, 626 S.E.2d 841, 843 (2006) (citations and quotations omitted). Moreover, "the failure to plead the particulars of personal jurisdiction is not necessarily fatal, so long as the facts alleged permit the reasonable inference that jurisdiction may be acquired." *Tompkins v. Tompkins*, 98 N.C. App. 299, 304, 390 S.E.2d 766, 769 (1990) (citation omitted).

In his complaint, plaintiff alleged the following:

> 6. Plaintiff and [Mary] . . . were married on June 26, 2010 . . . .
>
> . . . .
>
> 8. Throughout the course of their marriage, Plaintiff and [Mary] enjoyed a true and genuine marital relationship of love and affection.
>
> . . . .
>
> 10. On November 13, 2013, Plaintiff and [Mary] legally separated . . . .
>
> . . . .
>
> 12. Plaintiff owns a condo in Naples, Florida. [Mary] traveled to the condo alone for purposes of recreation and relation and during 2013 she traveled more and more frequently to Naples . . . .
>
> 13. While on those trips [Mary] met Defendant. When [Mary] returned to North Carolina . . . she seemed changed, distant and less affectionate. Plaintiff began to suspect [Mary] was having an affair.
>
> 14. Plaintiff began to search phone records and then caught [Mary] in a lie about her whereabouts and who she was with the weekend of November 8, 2013. Plaintiff confronted [Mary] about the lie and whether she was having an affair on Sunday, November 10, 2013. She denied it.
>
> . . . .
>
> 16. From the day [defendant and Mary] met in 2013 through the date of separation of the parties, Defendant initiated and engaged in regular and frequent communication with [Mary] while she resided and was located in North Carolina by email, text message, and telephone. Defendant knew or at the very least could infer that [Mary] was located in North Carolina during these communications.
>
> . . . .
>
> 18. Prior to November 13, 2013, Defendant delivered communications, airline tickets and other things of value to [Mary] while she was residing in North Carolina.

. . . .

> 21. Defendant has known since the day he met [Mary] that she was a married woman and . . . has at all times acted in conscious disregard of the union.
>
> 22. With full knowledge of her marital status, Defendant . . . engaged in a campaign to alienate [Mary] from Plaintiff, and to damage if not destroy the bonds of matrimony that existed between them.

"Where unverified allegations in the complaint meet [the] plaintiff's initial burden of proving the existence of jurisdiction . . . and [the] defendant[] d[oes] not contradict [the] plaintiff's allegations in [his] sworn affidavit, such allegations are accepted as true and deemed controlling." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 218 (2000) (second alteration in original).

> [But] when a defendant supplements its motion [to dismiss] with affidavits or other supporting evidence, the allegations of the plaintiff's complaint can no longer be taken as true or controlling and [the] plaintiff[ ] cannot rest on the allegations of the complaint, but must respond by affidavit or otherwise . . . set[ting] forth specific facts showing that the court has jurisdiction.

Wyatt v. Walt Disney World Co., 151 N.C. App. 158, 163, 565 S.E.2d 705, 708 (2002) (citations and quotations omitted). Whether the trial court rules on the defendant's challenge to the exercise of personal jurisdiction based on the affidavits or conducts a hearing with witness testimony or depositions, N.C. Gen. Stat. § 1A-1, Rule 43(e), where the defendant challenges the exercise of personal jurisdiction, "the burden is on the plaintiff to prove by a preponderance of the evidence that grounds exist for the exercise of personal jurisdiction over a defendant." *Eluhu v. Rosenhaus*, 159 N.C. App. 355, 359, 583 S.E.2d 707, 710–11 (2003) (citation and quotations omitted), *aff'd*, 358 N.C. 372, 595 S.E.2d 146 (2004).

On 3 January 2018, defendant moved to dismiss plaintiff's lawsuit for lack of personal jurisdiction (including affidavits by defendant and Mary in which both deny having had an affair or a sexual relationship), and on 28 February 2019, defendant further supported his motion to dismiss with a brief challenging the exercise of personal jurisdiction as a violation of due process. In materials provided to the court, defendant acknowledged having spoken with Mary via telephone and emailing her, though he did not indicate that these communications were frequent.

Plaintiff filed points and authorities in which he asserted that defendant provided Mary with a cell phone and between 30 June and 13 November 2013, communicated with Mary 476 times. During the 4 March 2019 hearing on the matter, plaintiff presented phone records listing phone calls made from defendant's phone to a number with a 704 area code but failed to present evidence that the phone number reflected on the records was to a number associated with Mary.

For a moment, let us consider the exercise of personal jurisdiction over defendant as it comports to the Due Process Clause.

2

"[I]f the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution." *Brown*, 363 N.C. at 363, 678 S.E.2d at 223 (citing *Skinner v. Preferred Credit*, 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006)).

To satisfy the due process prong of the personal jurisdiction analysis, there must be sufficient 'minimum contacts' between the nonresident defendant and our State 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Skinner*, 361 N.C. at 122, 638 S.E.2d at 210 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945)) (quotation marks omitted).

> The United States Supreme Court has noted two types of long-arm jurisdiction. Where the controversy arises out of the defendant's contacts with the forum state, the state is said to be exercising "specific" jurisdiction. In this situation, the relationship among the defendant, the forum state, and the cause of action is the essential foundation for the exercise of *in personam* jurisdiction. Where the controversy is unrelated to the defendant's activities within the forum, due process may nevertheless be satisfied if there are "sufficient contacts" between the forum and the defendant.

Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 366, 348 S.E.2d 782, 786 (1986) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 80 L. Ed. 2d 404, 411 (1984)).

Specific Jurisdiction

In the exercise of specific jurisdiction, "the relationship among the defendant, the forum state, and the cause of action is the essential

foundation for the exercise of *in personam* jurisdiction." *Id.* "[T]here must be sufficient 'minimum contacts' between the nonresident defendant and our state 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Skinner*, 361 N.C. at 122, 638 S.E.2d at 210 (quoting *Int'l Shoe Co.*, 326 U.S. at 316, 66 S.Ct. at 158, 90 L. Ed. at 102).

Following, our Supreme Court's issuance of its opinion in *Brown*, 363 N.C. 360, 678 S.E.2d 222 (holding that frequent phone calls and email solicitations by the out-of-state defendant regarding the romantic and sexual relationship with the plaintiff's wife were sufficient to satisfy North Carolina's long-arm statute), the matter was remanded to this Court to address whether the defendant had

> "minimum contacts" with the State of North Carolina sufficient to satisfy the requirements of due process.
>
> . . . .
>
> Although a determination of whether the required minimum contacts are present necessarily hinges upon the facts of each case, there are several factors a trial court typically evaluates in determining whether the required level of contacts exists: (1) quantity of the contacts between the defendant and the forum state, (2) quality and nature of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest in the forum state, and (5) convenience of the parties.

Brown v. Ellis, 206 N.C. App. 93, 97, 696 S.E.2d 813, 817 (2010) (citations, quotation marks, and indentation omitted); *see also id.* at 98, 696 S.E.2d at 818 (holding because the "alienation of [the] [plaintiff's] wife's affections occurred within the jurisdiction of North Carolina[,] the factual allegations permit the reasonable inference that personal jurisdiction over [the] defendant could properly be acquired in this case" (second and third alterations in original) (citations and quotations omitted)).

In plaintiff's points and authorities submitted in response to defendant's motion to dismiss and brief, plaintiff asserted that defendant provided Mary with a cell phone that defendant used to communicate with her and that he paid Mary's legal fees in the domestic violence litigation which resulted in a domestic violence protective order being entered against plaintiff. Moreover, plaintiff asserted that the quality of the communications between defendant and Mary controls the minimum contacts question. Plaintiff also contended that his claim would not

be recognized in Florida and that defendant has the means to travel to North Carolina such that it would not be inconvenient for him.

The Trial Court's 29 October 2019 Order

In its 29 October 2019 order denying defendant's motion to dismiss, the court made its ruling after considering "the Motion[s], the court file, the law presented by counsel, [and] the briefs and evidentiary materials submitted by counsel."

> 3. In his Motion, Defendant moved the [c]ourt pursuant to Rule 12(b)(2) for a dismissal with prejudice based on his Florida residency and domicile, and that he had not specifically availed himself to the laws of the State of North Carolina.
>
> 4. With regard to Defendant's Motion pursuant to Rule 12(b)(2), said Motion should be DENIED. The [c]ourt finds the following:
>
> > a. Defendant availed himself to the laws of the State of North Carolina by actively communicating electronically with Mary Ponder on or before the date she and Plaintiff separated on November 13, 2013, while Mary was still living in North Carolina. This finding is supported by *Cooper v. Shealy*, 140 N.C. App. 729, 537 S.E.2d 854 (2000), which held that telephone calls and emails were "solicitations" within the meaning of N.C. Gen. Stat. § 1-75.4(4)a.; and
> >
> > b. This [c]ourt finds that Defendant's electronic contacts with Mary Ponder while Mary Ponder still lives in North Carolina were significant and that he availed himself to the specific jurisdiction of North Carolina with respect to Plaintiff's claims for alienation of affections.

On these findings of fact, the trial court made the following conclusions:

> 1. The [c]ourt has specific jurisdiction over the persons involved in this matter.
>
> 2. The [c]ourt concludes that Defendant had minimum contacts with North Carolina sufficient to establish specific personal jurisdiction within this state regarding Plaintiff's claim for alienation of affections. As a result, [defendant's motion to dismiss] should be denied.

The evidence presented before the trial court may support a finding that defendant communicated with a telephone number registered in North Carolina, but the evidence does not support finding defendant's communications were with Mary or that their communications were significant. *Cf. Brown*, 363 N.C. 360, 678 S.E.2d 222; *Cooper*, 140 N.C. App. 729, 537 S.E.2d 854.

We hold that the allegations presented in plaintiff's complaint, in conjunction with the points and authorities presented in opposition to defendant's motion to dismiss as well as the evidentiary materials presented before the trial court during the 4 March 2019 hearing, are not sufficient to support the trial court's findings that defendant

> availed himself of the laws of the State of North Carolina by actively communicating electronically with Mary . . . on or before the date she and Plaintiff separated, [or that] . . . Defendant's electronic contacts with Mary . . . were significant and that he availed himself of the specific jurisdiction of North Carolina with respect to Plaintiff's claim for alienation of affections.

Thus, the court's findings fail to meet the threshold for the exercise of personal jurisdiction over defendant pursuant to General Statutes, section 1-75.4. Accordingly, the trial court's 29 October 2019 order denying defendant's motion to dismiss plaintiff's action pursuant to Rule 12(b)(2) is

REVERSED.

Judge BROOK concurs in result only.

Judge STROUD dissents by separate opinion.

STROUD, Judge, dissenting.

Because I conclude the trial court's findings of fact support the trial court's determination that it has personal jurisdiction over defendant, I respectfully dissent and would affirm the trial court's order. I would first note that I agree with the majority's summary of the case. Where I diverge from the majority is in their summation and determination of what the findings of fact establish; namely, the majority concludes they are insufficient to establish personal jurisdiction while I deem them sufficient.

I. Standard of Review

The standard of review of the issue of personal jurisdiction depends upon the information presented to the trial court. *See Providence Volunteer Fire Department v. Town of Weddington*, 253 N.C. App. 126, 135, 800 S.E.2d 425, 432 (2017). In this case, both parties submitted voluminous evidence.

> [W]hen the parties submit competing evidence—such as affidavits or an affidavit and a verified complaint—the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions. When the trial court decides the motion on affidavits, *the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror*. Even when the trial court is required to weigh evidence, it is not required to make findings of fact unless requested by a party when deciding a motion to dismiss. When the record contains no findings of fact, it will be presumed that the judge, upon proper evidence, found facts sufficient to support his ruling. Where such presumed findings are supported by competent evidence, they are deemed conclusive on appeal, despite the existence of evidence to the contrary.

Id. (emphasis added) (citations, quotation marks, and footnote omitted).[1]

I begin by emphasizing the proper standard of review because this standard determines whether this Court may substitute its own judgment for that of the trial court. *See generally Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005). While the issue of "jurisdiction" in some contexts presents a legal issue subject to *de novo* review, in actuality "**personal jurisdiction is a question of fact**. *Eluhu v. Rosenhaus*, 159 N.C. App. 355, 357, 583 S.E.2d 707, 710, *aff'd per curiam*, 358 N.C. 372, 595 S.E.2d 146 (2004)." *Bradley v. Bradley*, 256 N.C. App. 1, 5, 806 S.E.2d 58, 62 (2017) (emphasis added) (quotation marks omitted). Indeed, "[t]he determination of whether jurisdiction is statutorily and constitutionally permissible due to contact with the forum *is a question of fact*." *Cooper v. Shealy*, 140 N.C. App. 729, 732, 537 S.E.2d 854, 856 (2000) (emphasis added) (citation and quotation marks omitted). Prior cases have consistently determined

1. Defendant filed an affidavit and plaintiff's complaint was verified. In addition, defendant was deposed, and both parties filed multiple exhibits.

the issue before us is one of fact. *See*, *e.g.*, *Bradley*, 256 N.C. App. at 5, 806 S.E.2d at 62; *Cooper*, 140 N.C. App. at 732, 537 S.E.2d at 856; *Hedden v. Isbell*, 250 N.C. App. 189, 192, 792 S.E.2d 571, 574 (2016); *Hiwassee Stables, Inc. v. Cunningham*, 135 N.C. App. 24, 27, 519 S.E.2d 317, 320 (1999).

Further, and equally important,

> [w]hen this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court. Under Rule 52(a)(2) of the Rules of Civil Procedure, however, the trial court is not required to make specific findings of fact unless requested by a party. When the record contains no findings of fact, it is presumed that the court on proper evidence found facts to support its judgment.

Banc of Am. Sec. LLC, 169 N.C. App. at 694, 611 S.E.2d at 183 (citations, quotation marks, and ellipses omitted). Here too, I emphasize that our cases have consistently determined if the findings of fact are supported by competent evidence, "this Court *must affirm*" the trial court order. *Id.* (emphasis added); *see*, *e.g.*, *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 141, 515 S.E.2d 46, 48 (1999); *Better Business Forms, Inc. v. Davis*, 120 N.C. App. 498, 500, 462 S.E.2d 832, 833 (1995). In other words, no matter how I might have viewed the evidence, this Court's standard is to consider "only whether the findings of fact by the trial court are supported by competent evidence in the record[,]" and, if they are, we "must affirm the order of the trial court." *Banc of Am. Sec. LLC*, 169 N.C. App. at 694, 611 S.E.2d at 183.

II. Findings of Fact

On appeal, defendant does not challenge finding nos. 1-3, and therefore they are binding on this Court. *See Bell v. Mozley*, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011) (noting unchallenged findings of fact are binding on appeal). The trial court found:

> 1. Plaintiff filed this action on September 14, 2017, asserting a claim against Defendant for alienation of affections.
>
> 2. Defendant, who at all times material to this action has resided and been domiciled in Florida, filed his Motion and certain evidentiary materials on January 3, 2018.

> 3. In his Motion, Defendant moved the [c]ourt pursuant to Rule 12(b)(2) for a dismissal with prejudice based on his Florida residency and domicile, and that he had not specifically availed himself to the laws of the State of North Carolina.

A. Classification of Finding of Fact No. 4

Defendant contends "finding of fact" no. 4 is a mixed determination including findings of fact and conclusions of law. "Finding of fact" no. 4 provides,

> 4. With regard to Defendant's Motion pursuant to Rule 12(b)(2), said Motion should be DENIED. The [c]ourt finds the following:
>
> > a. Defendant availed himself to the laws of the State of North Carolina by actively communicating electronically with Mary Ponder on or before the date she and Plaintiff separated on November 13, 2013, while Mary was still living in North Carolina. This finding is supported by *Cooper v. Shealy*, 140 N.C. App. 729, 537 S.E.2d 854 (2000), which held that telephone calls and emails were "solicitations" within the meaning of N.C. Gen. Stat. § 1-75.4(4)a.; and
> >
> > b. This Court finds that Defendant's electronic contacts with Mary Ponder while Mary Ponder still lives in North Carolina were significant and that he availed himself to the specific jurisdiction of North Carolina with respect to Plaintiff's claims for alienation of affections.

Defendant contends "finding of fact" should be categorized as follows:

> **Factual Findings**
>
> - Mr. Ponder and [Mary] separated on 13 November 2013;
> - [Mary] was still living in North Carolina on 13 November 2013;
> - Mr. Been actively communicated electronically with [Mary] on or before 13 November 2013; and

> ➢ Mr. Been's electronic contacts with [Mary] while she still was still living in North Carolina were significant.
>
> **Legal Conclusions**
>
> ➢ Mr. Been availed himself to the laws of North Carolina through his electronic communications with [Mary] on or before 13 November 2013;
>
> ➢ Mr. Been's electronic communications with [Mary] were "solicitations" under the long-arm statute; and
>
> ➢ Mr. Been availed himself to the specific jurisdiction of North Carolina with respect to the claim for alienation of affections through his electronic contacts with [Mary].

Essentially, defendant seeks a more favorable standard of review on appeal as legal conclusions are reviewed *de novo*. *See generally Green v. Howell*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (COA20-204) (3 Nov. 2020). Defendant invites this Court to substitute its judgment for that of the trial court, and the majority accepted this invitation, coming to a different result than the trial court. However, whether evidence establishes contacts sufficient to support personal jurisdiction "is a question of fact[,]" *Bradley*, 256 N.C. App. at 5, 806 S.E.2d at 62, and we review simply for "competent evidence" to support the findings, which if found, requires we "affirm" the order. *See Banc*, 169 N.C. App. at 694, 611 S.E.2d at 183.

B. Sufficiency of Findings of Fact to Permit Appellate Review

Defendant next contends "the aforementioned components of Finding of Fact 4 that actually constitute factual findings are insufficient to permit meaningful appellate review" as the trial court failed to comply with his request for written findings of fact under Rule 52(a)(2). As to the first part of defendant's contention, defendant argues if we remove the portions of the finding of fact he contends are "legal conclusions" then the findings of fact are insufficient. I have already explained why the trial court's findings of fact regarding personal jurisdiction are indeed findings and not legal conclusions. *See Bradley*, 256 N.C. App. at 5, 806 S.E.2d at 62.

As to the second part of defendant's contention:

> Rule 52(a)(2) specifically provides that findings of fact and conclusions of law are necessary on decisions of any motion or order *ex mero motu* only when requested

> by a party and as provided by Rule 41(b). A trial court's compliance with the party's Rule 52(a)(2) motion is mandatory. Once requested, the findings of fact and conclusions of law on a decision of a motion, as in a judgment after a non-jury trial, must be sufficiently detailed to allow meaningful appellate review. When the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence, then the order entered must be vacated and the case remanded.

Agbemavor v. Keteku, 177 N.C. App. 546, 549, 629 S.E.2d 337, 340 (2006) (citations, quotation marks, ellipses, and brackets omitted). Defendant did request findings of fact, and the trial court made finding of fact. Defendant simply hoped for different findings. While the trial court could have made more detailed findings of fact, I would conclude the findings are sufficient to allow for meaningful appellate review. The majority also recognizes the findings are sufficient to allow review, as it engages in appellate review of the question on appeal. *Contrast with Agbemavor* at 549-51, 629 S.E.2d at 340-41 (vacating and remanding because the trial court made "no findings of fact").

C. Competency of the Evidence to Support Findings of Fact

Defendant's third contention as to the findings of fact finally addresses the actual issue of whether the trial court's findings are supported by the evidence. Defendant contends "there is no competent evidence to support various factual findings delineated in Finding of Fact 4." Specifically, defendant claims the evidence does not support the trial court findings of "active" or "substantial" communications with Mary in North Carolina during her marriage to plaintiff. But defendant's arguments actually address the weight of the evidence -- whether it should be deemed "active" or "substantial" -- not its competence. As I have noted, "the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror." *Providence Volunteer Fire Department*, 253 N.C. App. at 135, 800 S.E.2d at 432.

As to issues of actual *competency* of the evidence, defendant contends there is no competent evidence exists (1) linking the phone defendant bought Mary to the 704 number defendant's number was communicating with, and (2) establishing any communication took place while Mary was actually in North Carolina. We first note that plaintiff's complaint was verified, and thus it is a part of the competent evidence, and therefore as to plaintiff's verified complaint and defendant's affidavit, the trial court was to act "as a juror" determining "weight and sufficiency of the evidence." *Id.* Plaintiff's verified complaint contends that

> [f]rom the day they met in 2013 through the date of separation of the parties, Defendant initiated and engaged in regular and frequent communications with [Mary] while she resided and was located in North Carolina by email, text message, and telephone. Defendant knew or at the very least could infer that [Mary] was located in North Carolina during these communications.

Defendant controverted the allegations in the complaint and seems to contend that his assertions somehow cancel out plaintiff's assertion, but again, it was upon the trial court to determine the weight and credibility of each. *See id.*

Defendant seeks to distinguish this case from *Brown v. Ellis*, 363 N.C. 360, 678 S.E.2d 222 (2009), where the Supreme Court determined *per curiam* that the plaintiff's verified complaint and affidavit statements regarding telephone calls and emails to his wife were enough to satisfy the long-arm statute and establish the personal jurisdiction of the defendant. In *Brown*, the only contacts the defendant had in North Carolina were telephone calls and emails to the plaintiff's wife. *See generally id.*, 363 N.C. at 363, 678 S.E.2d at 224. This Court determined the plaintiff failed to show "that defendant solicited plaintiff's wife while she was in North Carolina." *Id.* at 362, 678 S.E.2d at 223 (citation and quotation marks omitted). Specifically, this Court noted the plaintiff's arguments that he had shown personal jurisdiction because he and his wife lived in North Carolina at the relevant time and the defendant had called the wife when she was in plaintiff's presence, although he did not specifically allege they were both in North Carolina at the time:

> Plaintiff offers the following facts in an attempt to show that defendant carried on solicitation activities in the State of North Carolina sufficient to authorize the exercise of personal jurisdiction over defendant: 1) plaintiff is a resident of North Carolina; 2) plaintiff's wife lived with plaintiff; 3) defendant made phone calls to plaintiff's wife in the presence of plaintiff (although there is no allegation regarding where these calls were actually received); and 4) evidence as to defendant's telephonic contacts with plaintiff's wife can be found in North Carolina (although nothing in the record indicates that actual evidence of such contacts was forecast).
>
> After review of the record, we conclude that it contains no evidence to support the trial court's conclusion that the State of North Carolina may exercise personal

> jurisdiction over defendant pursuant to the long-arm statute. Even liberally construed, these facts offer no evidence that defendant solicited plaintiff's wife while she was in North Carolina.

Brown v. Ellis, 184 N.C. App. 547, 549, 646 S.E.2d 408, 410–11 (2007), *rev'd and remanded per curiam*, 363 N.C. 360, 678 S.E.2d 222 (2009).

The Supreme Court reversed this Court and affirmed the trial court's determination that it had personal jurisdiction over the defendant based only upon these telephone and email contacts. *See Brown*, 363 N.C. 360, 678 S.E.2d 222. The Supreme Court agreed with this Court that the plaintiff had not specifically alleged his wife was physically present in North Carolina when defendant called her, but she did live in North Carolina at the time and this Court's reading of the complaint was "overly strict[:]"

> In the instant case, defendant argues the complaint failed to allege that plaintiff's wife was in North Carolina at the time she received defendant's telephone calls and e-mail. The Court of Appeals agreed with defendant, concluding there was "no evidence that defendant solicited plaintiff's wife while she was in North Carolina." *Brown*, 184 N.C .App. at 549, 646 S.E.2d at 411. We believe this reading of plaintiff's complaint to be overly strict. Plaintiff alleged that he resided in Guilford County with his wife and daughter and that defendant "initiat[ed] frequent and inappropriate, and unnecessary telephone and e-mail conversations with [plaintiff's wife] on an almost daily basis." According to the complaint, defendant and plaintiff's wife discussed their "sexual and romantic relationship" in the presence of plaintiff and his minor child. In his supporting affidavit, plaintiff specifically averred that defendant's alienation of his wife's affections "occurred within the jurisdiction of North Carolina." Although the complaint does not specifically state that plaintiff's wife was physically located in North Carolina during the telephonic and e-mail communications, that fact is nevertheless apparent from the complaint. In his own affidavit, defendant never denied that he telephoned or e-mailed plaintiff's spouse in North Carolina; rather, he merely characterized the conversations as work related.

Id. at 363–64, 678 S.E.2d at 223–24.

Here, unlike in *Brown*, plaintiff did specifically assert that his wife was in North Carolina when she received the communications from

defendant encouraging the destruction of her marriage. *Contrast with id.* at 363-64, 678 S.E.2d at 224. Further, defendant admitted in his deposition that he purchased a cell phone for Mary, and the bill for that phone with a North Carolina zip code is in defendant's name.

Defendant attempts to rely upon his refusal or failure to answer questions in his deposition regarding where Mary was when he communicated with her as evidence that she was not in North Carolina. Of course, this argument again asks this Court to re-weigh the credibility of the evidence, but that is not this Court's role. *See generally Banc of Am. Sec. LLC*, 169 N.C. App. at 694, 611 S.E.2d at 183. The evidence supports the trial court's findings.

In his deposition, defendant answered very few questions regarding his communications with Mary and claimed to remember almost nothing, repeatedly stating phrases such as "I just don't have any recollection[;]" "I don't know[;]" "I don't have any recollection right now[;]" and "I don't recall." Contrary to defendant's contentions, his failure to answer questions does not constitute an affirmative showing of evidence that Mary was *not* in North Carolina – her home at that time – when he communicated with her over 400 times as shown by plaintiff's summary of the phone records produced by AT&T. Further, plaintiff asserted that defendant contacted Mary on their *home* phone, in North Carolina. Thus, the fact that defendant does not remember the hundreds of phone calls and text messages reflected in the billing statements is in conflict with the forecast and actual presentation of evidence from plaintiff, and here, the trial court resolved that conflict in favor of plaintiff.

D. Summary

As to the findings of fact, they are properly classified as findings of fact and sufficient to support meaningful appellate review. The competent evidence supports the findings of fact. Ultimately, the competent evidence supports the findings of fact, and I would overrule defendant's arguments challenging them.

III. Solicitations

Defendant next contends the trial court erred in concluding he engaged in "solicitations" for purposes of the long-arm statute. Defendant focuses on (1) a lack of evidence that he *initiated* any alleged contact with Mary and (2) his contention that since he denied the allegations of an improper purpose of any alleged communications there was not "evidence sufficient to overcome these sworn denials." Plaintiff asserted in his verified complaint that he and Mary "enjoyed a true and genuine marital relationship of love and affection[,]" and defendant knowingly

destroyed "the bonds of matrimony" by his frequent communication with Mary, whom he knew was married, in North Carolina and sending her things of value such as airline tickets.

North Carolina General Statutes § 1-75.2 defines "solicitation" for purposes of jurisdiction as "a request or appeal of any kind, direct or indirect, by oral, written, visual, electronic, or other communication, whether or not the communication originates from outside the State." N.C. Gen. Stat. § 1-75.2 (2013). Defendant argues the trial court's finding that the communications were "solicitations" is a conclusion of law, not a finding of fact, so this Court should review the trial court's determination *de novo*. Defendant has not provided any authority to support his argument for *de novo* review, and to the extent prior cases do address this issue, it has been treated as a finding of fact, and the same standard of review as discussed above applies. *See Cooper*, 140 N.C. App. at 734, 537 S.E.2d at 857 ("The trial judge *found* that the alleged telephone contacts (including telephone calls and telephone transmitted e-mail) were 'solicitations' within the meaning of N.C. Gen. Stat. § 1–75.4(4) and we agree." (emphasis added)). But whether the "solicitation" issue is a finding of fact or a conclusion of law, the trial court's findings of fact support its conclusion, as does the law.

A. Initiation of Contact

The trial court's findings and the evidence demonstrate that defendant had direct communications with Mary by cell phone and text messages. But defendant argues that the evidence here does not show that *he* "initiated" the phone calls to Mary and that the evidence does not show sufficient frequency of phone calls, citing to the factual allegation of "almost daily" phone calls in *Brown*.

> ➢ The first call of the day emanated from Mr. Been's cell phone only three times during the pertinent 89-day period covered by those records, (Doc. Ex. 44, 49, 58) (reflecting Mr. Been called first on 2 August 2013, 20 August 2013, and 20 September 2013);
>
> ➢ Those three calls lasted a grand total of 0 minutes, 0 seconds, (Doc. Ex. 44, 49, 58) (listing an elapsed time ("ET") of 0:00 for each call);
>
> ➢ The 73 total calls emanating from Mr. Been's cell phone collectively amounted to an ET of just over 68 minutes during the 89-day span. (Doc. Ex. 32-65).

The plain language of North Carolina General Statute § 1-75.2 does not support an assertion that a defendant must initiate the contact within

North Carolina to support a finding of "solicitation." *See* N.C. Gen. Stat. § 1-75.2. North Carolina General Statute § 1-75.2 speaks to "a request or appeal of any kind[,]" it does not state, as defendant contends, that the out-of-state defendant must initiate the phone call, email, text message, or any other form of communication, but rather that once initiated "a request or appeal" is made, and the trial court did not weigh it of critical importance here. *Id.* Whether the calls were "originated" or "initiated" by Mary or defendant, the communications occurred. And in this context, it would be logical for the trial court to surmise that defendant and Mary would have arranged for their conversations to occur when no one, particularly plaintiff, was nearby to overhear them.

B. Sufficiency of Evidence for Solicitation

In *Cooper v. Shealy*, this Court found solicitation and a sufficient basis for personal jurisdiction based on an unspecified number of phone calls and emails made to the plaintiff's husband when he was living in North Carolina:

> The trial judge found that the alleged telephone contacts (including telephone calls and telephone transmitted e-mail) were "solicitations" within the meaning of N.C. Gen. Stat. § 1–75.4(4) and we agree. Plaintiff alleged that defendant telephoned her husband in North Carolina in order to solicit his affections and entice him to leave his family. In addition, plaintiff claimed that she suffered injury, the destruction of her husband's love and affection, as the direct result of defendant's wrongful conduct. *We conclude, therefore, that the North Carolina long-arm statute authorizes personal jurisdiction since the plaintiff's injury allegedly occurred within North Carolina and was allegedly caused by defendant's solicitation of plaintiff's husband's love and affection by telephoning plaintiff's home in North Carolina.*

140 N.C. App. at 734, 537 S.E.2d at 857 (emphasis added). In this case, the trial court had far more evidence regarding the number or frequency of communication than was present in *Cooper* where solicitation was found for purposes of the long-arm statute. *See id.* at 734-35, 537 at 857-58.

Plaintiff alleged in his verified complaint that the defendant had sent plane tickets to North Carolina and once Mary and her children left North Carolina, they lived in homes in Florida owned by defendant. Defendant's deposition confirmed these allegations. Defendant also admitted to loaning plaintiff $85,000. These alleged results of communications, money and plane tickets, between defendant and Mary are

based on circumstantial evidence, but circumstantial evidence is still valid evidence. Unless a plaintiff has managed to obtain direct physical evidence such as recordings of conversations, incriminating photographs or video, or written communications, much of the evidence in cases such as this is normally circumstantial, and this circumstantial evidence may include post-separation conduct. *See Nunn v. Allen*, 154 N.C. App. 523, 534, 574 S.E.2d 35, 42 (2002) ("Under *Pharr*, *supra*, post-separation conduct is admissible and relevant to corroborate evidence of pre-separation conduct, and the evidence of post-separation conduct here provides strong circumstantial evidence explaining and corroborating defendant's pre-separation conduct.").

North Carolina law also does not require any particular type, frequency, or quantity of communications. *See generally Cooper*, 140 N.C. App. at 734–35, 537 S.E.2d at 858. In *Cooper*, this Court noted the number of contacts was not in the record, so the number of calls was not a controlling factor. *See id.* In fact, this Court cited favorably to a federal case in which a single phone call from out of state was held to be a sufficient "minimum contact" with the forum state:

> In the principal case, we have no transcript of the hearing and plaintiff's complaint does not allege the number of contacts defendant had with plaintiff's husband here in North Carolina. Therefore, we do not know how many contacts defendant had with plaintiff and her husband in North Carolina. However, we note that federal courts have found personal jurisdiction when the defendant had only minimal contacts with the forum state. *See Brown v. Flowers Industries, Inc.*, 688 F.2d 328 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023, 103 S.Ct. 1275, 75 L.Ed.2d 496 (1983), and *J.E.M. Corporation v. McClellan*, 462 F.Supp. 1246 (D.Kan. 1978) (exercising personal jurisdiction when defendant's sole contact with the forum state was a single phone call from out-of-state).
>
> The quantity of defendant's contacts with North Carolina may not have been extensive. However, we have already determined that the contacts were sufficient for purposes of N.C. Gen. Stat. § 1-75.4[.]

Id.

C. Content of Communications

Defendant also contends that plaintiff did not present sufficient evidence of the content of the communications between himself and Mary.

Defendant argues that he and Mary "acknowledged they communicated electronically, (R pp 59(¶¶11-14), 84(¶15)), but they also vehemently denied that such communications had any improper purpose or content. (R pp 59(¶¶11, 13), 84-85(¶¶15-23), 95(¶5)). Mr. Ponder did not present evidence sufficient to overcome those sworn denials."

Again, for purposes of personal jurisdiction, plaintiff was not required to prove the precise content of the communications between defendant and Mary. *See generally Cooper*, 140 N.C. App. 729, 537 S.E.2d 854. Plaintiff is required only to present evidence of the communications and some evidence, which may be circumstantial, that the communications were for the purpose of alienating the affections of his spouse. *See generally id.* Quite often in cases dealing with alienation of affections, the defendant and the spouse of the plaintiff allege some proper reason for their communications other than encouraging or seeking a romantic relationship or alienation of the affections between the plaintiff and his or her spouse. *See, e.g.*, *Brown*, 363 N.C. at 364, 678 S.E.2d at 224. For example, in *Brown*, our Supreme Court noted that in the defendant's affidavit, he "never denied that he telephoned or e-mailed plaintiff's spouse in North Carolina; rather, he merely characterized the conversations as work related." *Id.* Here, defendant also has not denied that he communicated with Mary by telephone and text, but to the extent that he admits recalling such communications, he claimed he was merely providing information regarding where Mary could seek assistance related to domestic violence.

Other evidence also tends to support plaintiff's claim that the content and purpose of the communications between defendant and Mary was to alienate the affection of the marriage. The evidence before the trial court included defendant's affidavit executed on 1 June 2016, in which he states that "I consider Ms. Ponder a friend and somewhat of a daughter and that is how it has always been." However, on 20 December 2017, defendant testified in a deposition that he and Mary had been dating for "[f]ive years." Defendant filed an Errata Sheet to this deposition, changing his answer from "five years" to "five months." Certainly, defendant may have misspoken -- twice -- by saying "years" instead of "months," but his testimony does raise a credibility issue, particularly in light of the other evidence forecast including defendant's provision of $85,000, plane tickets, and a home for Mary. And if assuming defendant did make a mistake and they had been dating only months, not years, defendant testified in the same deposition that in December 2017, after dating for only five *months*, he and Mary lived together in a house they jointly owned, and he provided for her daily expenses. Defendant's relationship with Mary had progressed since his June 2016 affidavit from

"friend" and "somewhat of a daughter" to husband and wife. In Mary's affidavit executed 2 March 2018, she noted she and defendant had gotten married in December of 2017. This Court cannot determine if plaintiff should ultimately prevail in his claims. But here, while defendant mostly asserts he cannot remember if had communicated with Mary or not, and to what extent, the evidence forecast and presented by plaintiff indicates that he did, and the extent to which that qualifies as a tort is a question for the trial court and/or jury.

D. Summary

In summary, solicitation does not require initiation, and there was sufficient evidence upon which the trial court made its determination that the long-arm statute was satisfied as to solicitation. I need not determine specifically if the communication arose to the level of a tort for which defendant would be liable as that is not the question before us. I would overrule defendant's arguments.

IV. Due Process

Finally, defendant contends the trial court erred in exercising jurisdiction over him because "doing so contravenes the North Carolina long-arm statute and the due process clause of the United States Constitution[.]" (Original in all caps.) I have already noted that the trial court had competent evidence for its finding of fact that defendant solicited plaintiff for purposes of the long-arm statute. *See* N.C. Gen. Stat. § 1-75.4 (2013). Thus, the remaining inquiry is one of due process; returning to *Cooper*,

> Since we have determined that personal jurisdiction is authorized by the long-arm statute, we must now address whether defendant had such minimum contacts with the forum state to comport with due process. *Fraser v. Littlejohn*, 96 N.C. App. 377, 386 S.E.2d 230 (1989). Due process requires that the defendant have "minimum contacts" with the state in order to satisfy " 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278, 283 (1940)). The factors to consider when determining whether defendant's activities are sufficient to establish minimum contacts are: "(1) the quantity of the contacts; (2) the quality and nature of the contacts; (3) the source and connection of the cause of action to the contacts; (4) the interests of

the forum state, and (5) the convenience to the parties." *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 114, 516 S.E.2d 647, 650 (1999).

In the principal case, we have no transcript of the hearing and plaintiff's complaint does not allege the number of contacts defendant had with plaintiff's husband here in North Carolina. Therefore, we do not know how many contacts defendant had with plaintiff and her husband in North Carolina. However, we note that federal courts have found personal jurisdiction when the defendant had only minimal contacts with the forum state. See Brown v. Flowers Industries, Inc., 688 F.2d 328 (5th Cir.1982), cert. denied, 460 U.S. 1023, 103 S.Ct. 1275, 75 L.Ed.2d 496 (1983), and *J.E.M. Corporation v. McClellan*, 462 F.Supp. 1246 (D.Kan.1978) (exercising personal jurisdiction when defendant's sole contact with the forum state was a single phone call from out-of-state).

The quantity of defendant's contacts with North Carolina may not have been extensive. However, we have already determined that the contacts were sufficient for purposes of N.C. Gen. Stat. § 1–75.4, *especially considering that the alleged injury under the claim (ultimately the destruction of plaintiff's marriage) was suffered by plaintiff allegedly within this state.* Plaintiff claims that there is a direct relationship between the contacts and plaintiff's injuries. Furthermore:

> North Carolina has a strong interest in protecting its citizens from local injury caused by the tortious conduct of foreign citizens:
>
> > "In light of the powerful public interest of a forum state in protecting its citizens against out-of-state tortfeasors, the court has more readily found assertions of jurisdiction constitutional in tort cases."

Saxon v. Smith, 125 N.C. App. 163, 173, 479 S.E.2d 788, 794 (1997) (quoting *Ciba–Geigy Corp. v. Barnett*, 76 N.C. App. 605, 608, 334 S.E.2d 91, 93 (1985)). It is important to note that plaintiff cannot bring the claims for alienation of affections and criminal conversation in South Carolina (defendant's resident state) since that state has abolished those causes of actions. *Russo v. Sutton*, 310 S.C. 200, 422 S.E.2d 750 (1992). Therefore, North Carolina's interest in

> providing a forum for plaintiff's cause of action is especially great in light of the circumstances. Furthermore, North Carolina's legislature and courts have repeatedly demonstrated the importance of protecting marriage. N.C. Gen. Stat. § 8–57(c) (spouses may not be compelled to testify against each other if confidential information made by one to the other would be disclosed)[.]
>
> Finally, we must consider the convenience to the parties. As mentioned earlier, plaintiff would be unable to bring her claims in South Carolina (defendant's resident state) since those causes of action are no longer in existence in South Carolina. Furthermore, several possible witnesses and evidence relevant to plaintiff's marriage and the destruction thereof would more than likely be located in North Carolina. In addition, because defendant is a resident of our neighboring state, South Carolina, there is a minimal traveling burden on defendant to defend the claims in North Carolina. For the reasons stated above, we do not believe that allowing plaintiff to bring these claims against defendant in North Carolina in any way "offend[s] 'traditional notions of fair play and substantial justice.' " *International Shoe Co.*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278, 283).

140 N.C. App. at 734–36, 537 S.E.2d at 857–58 (emphasis added) (alterations in original) (citations omitted).

Here, phone records indicate there were more than 400 communications between defendant and Mary. While we do not know the exact nature of these contacts, plaintiff's verified complaint notes defendant provided Mary with airplane tickets and a home in Florida to live in upon leaving North Carolina. Just as in *Cooper*, [p]laintiff claims that there is a direct relationship between the contacts and plaintiff's injuries[;]" namely, "the destruction of plaintiff's marriage[.]" *Id.* at 735, 537 S.E.2d at 858. Also, as in *Cooper*, *id.*, North Carolina's interest in providing a forum to protect marriage law is high, particularly as alienation of affections is no longer a claim under Florida law. *Davis v. Hilton*, 780 So. 2d 974, 975 (Fla. Dist. Ct. App. 2001) ("The clear language of Florida Statutes § 771.01 abolishes the claim of alienation of affections."). As to the convenience of the parties, plaintiff would be unable to bring his claim in Florida. *See id.*; *see also Cooper*, 140 N.C. App. 735-36, 537 S.E.2d at 858. "Furthermore, several possible witnesses and evidence

relevant to plaintiff's marriage and the destruction thereof would more than likely be located in North Carolina." *Id.* at 736, 537 S.E.2d at 858. Ultimately, just as in *Cooper*, I "do not believe that allowing plaintiff to bring these claims against defendant in North Carolina in any way offends traditional notions of fair play and substantial justice." *Id.* (citation, quotation marks, and brackets omitted). Summarizing, just as the trial court determined based on the competent evidence before it, due process standards have been met. I would overrule this argument.

In conclusion, I would affirm the order of the trial, and therefore I respectfully dissent.

MICHAEL BRANDON POYTHRESS, PLAINTIFF
v.
LISSETTE R. POYTHRESS, DEFENDANT

No. COA20-137

Filed 31 December 2020

1. Divorce—premarital agreements—real estate—marital presumption

In a dispute over real property acquired during marriage, where the parties' premarital agreement generally provided that property acquired during the marriage with the husband's separate property would remain his separate property but that the husband could make gifts to the wife and to the marital estate, a holding company for investment real estate and its six properties were joint property because the record evidence failed to rebut the marital presumption. The husband's testimony indicated that he intended the holding company and its properties to be joint assets—among other things, the husband testified that he had wanted the wife to be involved in their real estate investing, the wife was in fact involved, they intended to acquire ten rental properties so that they could give two to each of their children (from different marriages) one day, and several of the properties were acquired using both the husband's and the wife's personal guarantees on the loans.

2. Divorce—premarital agreements—real estate—marital presumption

In a dispute over real property acquired during marriage, where the parties' premarital agreement generally provided that property

acquired during the marriage with the husband's separate property would remain his separate property but that the husband could make gifts to the wife and to the marital estate, on the issue of a beach house that the husband acquired in his own name with his own assets and later re-titled to both himself and the wife as tenants by the entirety, the trial court erroneously relied, in part, on the premarital agreement as evidence to rebut the marital presumption. The issue was remanded to the trial court for further findings on the husband's intent.

3. Divorce—premarital agreement—real estate—findings

In a dispute over real property acquired during marriage, where the parties' premarital agreement generally provided that property acquired during the marriage with the husband's separate property would remain his separate property but that the husband could make gifts to the wife and to the marital estate, the trial court properly exercised jurisdiction over assets in Peru acquired during the marriage. However, because it was unclear from the findings how the properties were titled, the matter was remanded for further findings and determination of ownership of those properties.

4. Attorney Fees—order vacated—dispute over premarital agreement —underlying order reversed in part

Where the trial court erred by concluding that the wife breached her premarital agreement when she refused to execute documents transferring her legal interest in disputed properties to the husband, the award of attorney fees in favor of the husband was vacated.

Judge YOUNG concurring in result only.

Appeal by Defendant from judgment entered 8 August 2019 by the Honorable Ned Magnum in Wake County District Court. Heard in the Court of Appeals 21 October 2020.

Fox Rothschild LLP, by Michelle D. Connell, for Plaintiff-Appellee.

John M. Kirby for Defendant-Appellant.

DILLON, Judge.

Defendant Lissette R. Poythress ("Wife") appeals portions of a judgment in favor of Plaintiff Michael Brandon Poythress ("Husband"), declaring certain real estate to be his sole property based on the terms of their premarital agreement.

I. Background

Husband and Wife were married in 2010 and separated in 2017.

Just prior to getting married, Husband and Wife entered into a premarital agreement (the "Premarital Agreement" or "Agreement").

Husband had recently divorced his first wife, a marriage which produced three children. Though he had significant assets, he lost much of his wealth in the divorce, prompting him to seek the Agreement before marrying again to protect his assets should his second marriage also end in divorce.

Wife was also previously married and had two children of her own. She, however, did not have any significant assets.

During the marriage, the parties acquired several properties which, at the time of their separation, were titled *either* to them jointly *or* to an entity which they purportedly jointly owned. The consideration paid to acquire these properties came from Husband's separate property and from loans guaranteed by both parties.

Husband and Wife now dispute whether, under the terms of their Premarital Agreement, these assets belong to the marriage or to Husband. The Agreement provides, generally, that the property owned by Husband prior to the marriage and all property he acquired during the marriage with his separate property would remain his separate property if the parties separated. The Agreement, however, also provides that Husband could make gifts to Wife and to the marital estate.

Husband brought this action to enforce the Agreement, claiming that the disputed assets are solely his and that Wife is obligated under the Agreement to sign over her legal interest in them. Wife, though, claims that the disputed assets are marital and should be divided equally, as the Agreement provides that all marital property is to be split equally if the marriage ended in divorce.

After a hearing on the matter, the court entered an order declaring Husband as the sole owner of the disputed assets and directing Wife to execute documents to transfer her legal interest therein. The trial court also awarded Husband attorneys' fees, based on its finding that Wife had breached the Agreement by not previously executing the documents. Wife appeals.

II. Disputed Property

The trial court's order covered real estate, interests in the entity the parties set up during the marriage to hold other real estate, and some

personal property. These assets are located either in North Carolina or Peru. Wife's brief on appeal only takes issue with some of these assets. Accordingly, we address the trial court's order, only with respect to those assets. As to the assets about which Wife makes no argument, the order is affirmed.

One of the assets is POGO, LLC, ("POGO"), the entity that they set up during the marriage. The purpose of POGO was to be the holding company for investment real estate. POGO, in fact, owned six investment properties in North Carolina at the parties' date of separation.

Three of these six properties were acquired early in the marriage, all with consideration provided from Husband's sole property, but which were initially titled in their names personally. After they set up POGO, they re-titled these three properties to POGO.

The fourth and fifth properties were acquired directly by POGO, as follows: POGO obtained a line of credit which was secured by the original three properties and guaranteed by both Husband and Wife. POGO purchased two additional rental properties with proceeds from this line and from a mortgage guaranteed by both parties.

The sixth property owned by POGO was contributed to POGO by Husband. Husband came to own this sixth property in his own name in resolution of claims from his first divorce. He re-titled that home to POGO. POGO then obtained a cash-out mortgage loan secured by this property which was guaranteed by both parties.

In addition to the ownership interests in POGO, the parties dispute ownership of a beach house in North Carolina titled to the parties as tenants by the entirety. Husband purchased this property during the marriage, but entirely with his separate assets. Husband, though, later re-titled to him and Wife as tenants by the entirety.

The other assets in this appeal are located in Wife's home country of Peru. They include interests in various businesses and four real estate properties, all acquired during the marriage with Husband's separate property.

III. Analysis

The trial court determined that all the disputed properties are solely Husband's. The trial court based its decision largely on its findings that Husband had provided all the consideration for their acquisitions; that Husband never intended to gift the properties to the marital estate; but that *if* titling the properties jointly or to POGO created a presumption

of a gift, there was clear, cogent, and convincing evidence to rebut this presumption, based on the Agreement and Husband's reliance thereon.

For the reasons stated below, we hold as follows with respect to the North Carolina properties:

- POGO is jointly owned by Husband and Wife in equal shares. POGO was capitalized with joint assets. Husband has failed to produce clear, cogent, and convincing evidence to show otherwise, as a matter of law. And both parties provided consideration, in the form of their personal guarantees, for the purchase of other real estate owned by POGO. We reverse the portion of the trial court order holding otherwise.
- The trial court relied, in part, on its erroneous interpretation of the Agreement to find clear, cogent, and convincing evidence that Husband did not intend to gift the beach house to the marital estate. There is evidence from which the trial court could make this finding. We, therefore, remand this portion of the order so that the trial court can reconsider the matter.
- With respect to the Peru properties, we hold that the trial court did not err in exercising jurisdiction over the parties' dispute concerning these properties. However, we vacate and remand the portion of the trial court order concerning these properties for further proceedings.
- Finally, we vacate the portion of the trial court's order awarding attorneys' fees to Husband.

Gifts

One issue on appeal is whether Husband *intended a gift at all* when he allowed the disputed properties to be titled to the marriage, including the properties that were used to capitalize POGO. That is, did Husband intend a *present* transfer of interest or did he intend to create a resulting trust, whereby he was simply transferring *title* to be held in trust for his benefit?

A second issue on appeal is, if Husband did intend a present gift, whether Husband intended the present gift to be *conditional* in nature. That is, did Husband intend his gifts to be conditioned such that any interest acquired by Wife by the gift would revert to him if the marriage ended in divorce?

A valid gift (whether conditional or unconditional) occurs when there is (1) donative intent and (2) actual or constructive delivery. *Halloway v. Wachovia*, 333 N.C. 94, 100, 423 S.E.2d 752, 755 (1992).

In any event, our Supreme Court has held – as a matter of common law, apart from our equitable distribution statutes – that where a spouse allows his separate assets to be used to acquire property titled to both spouses as tenants by the entirety or to the other spouse, it is presumed that the spouse supplying the consideration has made a gift to the marriage; it is not presumed that the transaction creates a resulting trust in favor of the spouse supplying the consideration. *Mims v. Mims*, 305 N.C. 41, 53-54, 286 S.E.2d 779, 788 (1982). Our Supreme Court further instructs that this gift presumption may only be overcome by "clear, cogent, and convincing" evidence. *Id.* at 57, 286 S.E.2d at 790.[1]

Trial Court's Erroneous Findings

Before discussing the assets at issue specifically, we first discuss findings by the trial court to support its determination that no gift occurred by Husband and our holding that the trial court erred in two key findings in reaching its ultimate finding that Husband did not intend any gifts to the marriage when the assets were acquired.

First, the trial court erroneously relied on the Agreement as evidence to rebut the marital gift presumption, finding that Husband's "procurement of and reliance on the definitions of separate property in the Premarital Agreement is clear, cogent, and convincing evidence sufficient to rebut any such presumption."

Though the Agreement provided that property acquired during the marriage by Husband with his separate assets would be his solely upon separation, the Agreement also provided that Husband could make gifts of his separate property to Wife or to the marriage. Specifically, the Agreement provided as follows:

If Husband and Wife separated, the distribution of their properties would be controlled by the Agreement and not by Chapter 50.[2]

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1. Our equitable distribution statute states that the presumption may be overcome by "the greater weight of the evidence." N.C. Gen. Stat. § 50-20(b)(1) (2017). However, this present case is not governed by that statute but is a contract claim.

2. In her Answer, Wife prayed that the trial court declare the Agreement void, such that Chapter 50 would apply to determining the classification and distribution of their property. However, Wife makes no argument on appeal that the Agreement is void. Rather, her arguments on appeal concern her disagreement as to how the trial court construed the Agreement.

If Husband and Wife divorced, the property owned by Husband prior to marriage and any property he acquired during marriage using his separate property would be his separate property. Wife waived all marital interest in Husband's property, whether the marriage ended in divorce or Husband's death.

Paragraph 21 of the Agreement, though, provided that Husband could make gifts to Wife or to the marital estate during the marriage and bequests to Wife which would take effect upon his death:

> 21. VOLUNTARY TRANSFERS PERMITTED. The purpose of this Agreement is to limit the rights of each party in the assets of his or her spouse in the event of death, separation or divorce, but this Agreement shall not be construed as placing any limitation on the rights of either party to make voluntary *inter vivos* and/or testamentary transfers of his or her assets to his or her spouse.
>
> In the event that [Husband] shall create [ ] tenancies by the entirety, or otherwise so establish assets that upon [his] death[,] it shall be presumed that [Husband] presumed that [he] intended such passage and [that Wife] shall then become the sole and uncontested owner of such asset or assets, anything herein contained to the contrary notwithstanding.
>
> . . . [It is] the wish of each party that any affirmative action taken by either after the signing of this Agreement, whether it be testamentary or in the creation of joint assets, shall override the releases and renunciations herein set forth.
>
> [T]he parties acknowledge that no representation or promises of any kind whatsoever have been made by either of them to the other with respect to any such transfers, gifts, contracts, conveyances, or fiduciary relationships.

The language in this paragraph is unambiguous: The first section recognizes that Husband may make gifts of his separate property during the marriage to Wife or could leave Wife any of his separate property in his last will.

The second and third sections indicate that Husband could transfer property to the marital estate, which would then become "solely" Wife's property upon his death, notwithstanding her waiver of her marital interests in his estate provided by North Carolina law. These sections, however, do *not* state that such transfers to the marital estate by

Husband otherwise were not to be deemed a present gift to the marital estate and that such transfers should not be divided equally as a marital asset should the parties separate. Rather, the third section expressly provides that any affirmative action by Husband to create joint assets during the marriage "shall override [Wife's] releases and renunciations" in the Agreement.

And the fourth section affirms there was no understanding at the time the Agreement was executed between the parties with respect to any transfers that might be made during the marriage.

Second, the trial court erroneously relied on its finding that Husband provided *all* consideration to acquire the properties. This finding was erroneous for two reasons. First, the trial court fails to recognize that Wife provided consideration for many of the assets by personally guaranteeing the loans used to acquire them. Under the Agreement, Wife had no obligation to personally guarantee any loan to help Husband mortgage or acquire his separate property: she was only required to pledge her marital interest in Husband's separate properties whenever Husband sought a loan secured by these properties. Her personal guarantees used to acquire some of the assets are strong evidence that these assets were intended to be marital. And, second, many assets were acquired with the line which was itself secured by the three properties owned by the marriage which was used to initially capitalize POGO.

Having concluded that the trial court erroneously relied upon the Agreement to support its finding that the marital gift presumption had been rebutted, we now turn to address whether there was *other* evidence to support the trial court's finding. It would be appropriate to vacate and remand with respect to such properties where there is other competent evidence.

POGO

[1] The only evidence that Husband did not intend a gift of POGO, including the properties contained therein, was a few lines in Husband's testimony that he did not subjectively intend gifts to Wife when he allowed properties to be titled to POGO. We have held that testimony by a spouse concerning a lack of intent to make a gift when titling separate property to the marriage, without other evidence, is not necessarily insufficient to constitute clear, cogent, and convincing evidence to overcome the marital gift presumption. *Romulus v. Romulus*, 215 N.C. App. 495, 506, 715 S.E.2d 308, 316 (2011) ("Yet, arguably the only evidence which could potentially support findings of fact to rebut the marital presumption is plaintiff's testimony as to her intent. Herein lies the issue which the trial court must resolve on remand.")

Romulus, however, is distinguishable from the present case. In *Romulus*, there was not much in evidence from which it could be determined *either way* whether a wife intended to gift a house to the marriage when she titled it to her and her spouse. Accordingly, in that case, we held that the wife's testimony alone might be enough to constitute evidence sufficient to rebut the marital presumption.

Here, though, there is substantial evidence *from Husband* regarding his words and actions that would indicate that he intended POGO and its properties to be joint assets. Accordingly, we hold that the evidence in the record, as a matter of law, fails to arise to the level of clear, cogent, and convincing evidence to rebut the marital presumption. For instance, Husband testified that he wanted Wife to be involved in real estate investing and that the first property, originally titled to her only, was purchased to get her started. He testified that Wife was active in locating properties, that she participated in managing them, that she helped in negotiating for some of the purchases, and that she found a property and the tenant for one of the properties that they acquired through POGO. He testified that POGO was so named based on a combination of their last names and that their intent was to acquire ten properties total in POGO so that their combined five children would each one day have two rental properties. He testified that he told his accountant on one occasion that the ownership interests in POGO should be reflected as 70% for himself and 30% for Wife rather than equal ownership, though he never followed through with any change. Husband participated with Wife in the acquisition of several properties by POGO with the proceeds from loans guaranteed by both of them, never telling Wife that she was guaranteeing loans to buy property he considered to be his separate property. And we note that there was no evidence that Husband ever indicated to Wife or anyone else that he did *not* intend gifts.

It may be that Husband, otherwise, thought that POGO and the properties therein would revert to him if the marriage ended in divorce. However, this belief would still indicate that he intended gifts, though conditional gifts, rather than the creation of a resulting trust, whereby POGO was merely holding *his sole* property in trust for him. Our Court has held as follows with conditional gifts generally:

> A person has the right to give away his or her property as he or she chooses and may limit a gift to a particular purpose, and render it so conditioned and dependent upon an expected state of facts that, failing that state of facts, the gift should fail with it. . . .

> The intention of the donor to condition the gift must be measured at the time the gift is made, as any undisclosed intention is immaterial in the absence of mistake, fraud, and the like, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expression and excludes all questions in regard to his unexpressed intention.

Courts v. Annie Penn, 111 N.C. App. 134, 139, 431 S.E.2d 864, 866-67 (1993) (quotation marks omitted). The record here, though, does not disclose any evidence regarding Husband's words or actions when the properties were titled to Wife, the marital estate, or POGO that suggested that the properties would revert to him if the marriage ended in divorce.

The Beach House

[2] The beach house was never titled to POGO. Rather, Husband acquired this property in his own name with his own assets and then later re-titled it to both him and Wife as tenants by the entirety. Though the trial court erroneously found that the marital gift presumption was overcome, in part, by the Agreement, the trial court also relied on a conversation that Husband and Wife had when he made the transfer. In this conversation, Wife indicated that she was afraid that Husband's ex-wife would kick her out of the beach house were he to die as the sole owner. The trial court found that Husband, therefore, re-titled the property to the marital estate so that it would become Wife's if he were to die. This conversation is *some* evidence as to what the parties, especially Husband, was thinking when the property was re-titled. This finding could support an ultimate finding that Husband intended only a resulting trust, that the property be held by the marital estate for his benefit, whereby Wife would only acquire any interest when he died. We, therefore, vacate this portion of the order and remand for further findings on this issue.

Peru Properties

[3] Wife identifies interests in four Peruvian companies owned by Husband and several parcels of real estate in Peru.

She argues that the trial court erred by exercising jurisdiction over these Peruvian properties. We disagree. The trial court had *in personam* jurisdiction over the parties, as they were married in North Carolina, entered the Agreement in North Carolina, and subjected themselves to

the jurisdiction of the court. And the trial court had subject matter jurisdiction to resolve the contract claim. Of course, whether Peru will honor a judgment from North Carolina concerning property located in Peru is not before us.

Alternatively, Wife argues that the trial court erred by declaring Husband the sole owner of these Peruvian properties. It is unclear from the findings how these properties are actually titled in Peru or how they came to be so titled. We vacate the portion of the order declaring that these properties are Husband's properties and remand for the trial court to make further findings with respect to these properties and to determine ownership of these properties based on those findings. The trial court, in its discretion, may hear additional evidence concerning these properties and consider legal arguments from the parties, including the effect of Peruvian property law, if any, on our marital gift presumption.

Breach of Contract and Attorneys' Fees

[4] We conclude that the trial court erred by concluding that Wife breached the Agreement when she refused to execute documents transferring her legal interest in the disputed properties to Husband. Accordingly, we vacate the award of attorneys' fees.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judge MURPHY concurs.

Judge YOUNG concurs in result only.

SEMELKA v. UNIV. OF N. CAROLINA

[275 N.C. App. 662 (2020)]

RICHARD C. SEMELKA, M.D., PETITIONER
v.
THE UNIVERSITY OF NORTH CAROLINA, AND THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, RESPONDENTS

No. COA19-1076

Filed 31 December 2020

1. Public Officers and Employees—termination—tenured university faculty member—improper reimbursement requests—tenure policy

A tenured University of North Carolina (UNC) faculty member (petitioner) who was fired for improperly seeking reimbursements for personal expenses from his department's operating fund failed on appeal to overcome the presumption that the UNC Board of Governors' (BOG) decision to discharge him was made in good faith and in accordance with governing law. Contrary to petitioner's argument, the BOG, in its review of petitioner's appeal, did not violate its own tenure policy by considering certain allegations of travel expense reimbursement violations, because those alleged violations had not been rejected by the Faculty Hearings Committee, and even if they had been, the chancellor's adoption of the Faculty Hearings Committee's findings and recommendation did not constitute a final decision removing these allegations from the case.

2. Public Officers and Employees—termination—tenured university faculty member—improper reimbursement requests—applicable code

Where a tenured University of North Carolina (UNC) faculty member (petitioner) was fired for improperly seeking reimbursements for personal expenses from his department's operating fund, the Court of Appeals rejected his argument that he did not commit misconduct sufficiently serious to justify discharge under The Code of the Board of Governors of UNC (The Code). A review of the whole record revealed substantial evidence supporting the conclusion that petitioner misrepresented several reimbursement requests and specifically that he misrepresented his reasons for retaining the law firm whose charges he sought reimbursement for, constituting misconduct "sufficiently serious as to adversely reflect on his honesty, trustworthiness or fitness to be a faculty member" under The Code.

3. Public Officers and Employees—termination—tenured university faculty member—improper reimbursement requests—applicable code

Where a tenured University of North Carolina (UNC) faculty member (petitioner) was fired for improperly seeking reimbursements for personal expenses from his department's operating fund, the Court of Appeals rejected his argument that discharge was an excessive discipline and that UNC should have considered less severe discipline. There was no provision in The Code of the Board of Governors of UNC (The Code) requiring consideration of discipline less severe than discharge, and defendant's conduct merited discharge under The Code.

4. Public Officers and Employees—termination—tenured university faculty member—improper reimbursement requests—not unjust and arbitrary

Where a tenured University of North Carolina (UNC) faculty member (petitioner) was fired for improperly seeking reimbursements for personal expenses from his department's operating fund, the Court of Appeals rejected his argument that the decision to discharge him was unjust and arbitrary because UNC set him up and misrepresented the evidence against him. A review of the whole record showed that petitioner's own actions prompted UNC to investigate him and that he did indeed misrepresent the nature of the legal expenses for which he sought reimbursement.

5. Public Officers and Employees—termination—tenured university faculty member—improper reimbursement requests—cessation of pay

Where a tenured University of North Carolina (UNC) faculty member (petitioner) was fired for improperly seeking reimbursements for personal expenses from his department's operating fund, UNC violated its own policies—which requires faculty members notified of UNC's intent to discharge to be given full pay until a final decision has been reached—when it ceased petitioner's pay at the date of the Board of Trustees' decision, which was prior to the issuance of the Board of Governors' final decision.

Appeal by Petitioner and cross-appeal by Respondents from order entered 25 April 2019 by Judge Allen Baddour in Superior Court, Orange County. Heard in the Court of Appeals 8 September 2020.

Law Office of Barry Nakell, by Barry Nakell, for Petitioner-Appellant/ Cross Appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Vanessa N. Totten, Special Deputy Attorney General Kimberly Potter, and Assistant Attorney General Zachary Padget, for Respondents-Appellees/Cross-Appellants.

McGEE, Chief Judge.

Richard C. Semelka, M.D. ("Petitioner") appeals and the University of North Carolina ("UNC") and the University of North Carolina at Chapel Hill ("UNC-CH") (collectively, "Respondents") cross-appeal from the trial court's order affirming the UNC Board of Governors' ("BOG") decision to discharge Petitioner from his employment and reversing the BOG's decision that UNC-CH could cease payment of Petitioner's salary following the decision of UNC-CH's Board of Trustees ("BOT"). We affirm.

I. Factual and Procedural Background

Petitioner was previously employed as the Director of Quality and Safety of Radiology and a Professor of Radiology within UNC-CH's School of Medicine's Department of Radiology. Between 2011 and 2015, Petitioner sent numerous emails to administrators within the Department of Radiology, the Office of the Dean of UNC-CH's School of Medicine, and UNC-CH's Office of University Counsel ("OUC") regarding safety concerns relating to the conduct of certain colleagues within the Radiology Department. Petitioner learned in January of 2016 that he had not been selected to fill the position that he had applied for – Division Chief of Abdominal Imaging. Petitioner sent UNC-CH Chancellor Carol Folt ("Chancellor Folt") a letter on 8 January 2016 expressing his concerns with how the Department of Radiology's administrators handled the investigations into his complaints and asserting his grievances with Department Chair, Dr. Matthew Mauro ("Dr. Mauro"), as well as certain other colleagues. In addition to alleging a "dereliction of responsibility by [Dr.] Mauro," Petitioner asserted that Dr. Mauro retaliated against him by "not appointing [him] as the [D]ivision [C]hief of Abdominal Imaging, but rather selected the only outside candidate that applied."

In response to Petitioner's letter to Chancellor Folt, the Executive Vice Chancellor and Provost, Dr. James W. Dean, Jr. ("Provost Dean"), sent Petitioner a letter on 21 January 2016 stating that he had read Petitioner's email to Chancellor Folt and spoken with "several people

connected to the events that [Petitioner] describe[d].” Provost Dean informed Petitioner that a “thorough investigation” had been conducted into each of Petitioner’s previously-communicated concerns. The letter rejected Petitioner’s claim that he was retaliated against by Dr. Mauro, explaining that “any personnel decision is open to a number of interpretations, and may have been made based on a number of factors.” Finally, Provost Dean outlined the faculty grievance process for Petitioner “to further pursue [his] concerns.”

Petitioner retained the law firm of Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, P.C. (“Mintz Levin”) in February of 2016. In an engagement letter dated 5 February 2016, Mintz Levin advised Petitioner that “[t]he Firm will represent and advise you with regard to issues concerning the University of North Carolina at Chapel Hill, and related matters.” Petitioner submitted an expense reimbursement request to the Department of Radiology’s Associate Chair for Administration, Bob Collichio (“Mr. Collichio”), on 13 July 2016. Petitioner sought reimbursement from the Radiology Operating Fund[1] for approximately $30,000 in legal fees he had paid to Mintz Levin. As justification for his request for reimbursement of legal fees, Petitioner sent Mr. Collichio a series of four emails explaining the “business-related” reasons he had hired Mintz Levin.

Mr. Collichio sought the assistance of OUC in determining whether any of Petitioner’s legal expenses were reimbursable. In a 25 July 2016 email, Mr. Collichio informed Petitioner that he had not “provide[d] enough detail to make any decision on what can be reimbursed or not,” and asked Petitioner to submit additional documentation in support of his request. In response, Petitioner sent Mr. Collichio the engagement letter from Mintz Levin, a partially redacted Mintz Levin invoice for February in the amount of $14,861.80, a partially redacted Mintz Levin

1. The Radiology Department Operating Fund operates in accordance with the UNC School of Medicine Faculty Affairs Code (“Faculty Affairs Code”) and the Policy on Clinical Department Faculty Providing Expert Legal Services and Testimony (“Expert Legal Services”). Under these policies, every clinical department within the School of Medicine has an established Departmental Operating Fund “to receive collections for professional services” related to patient care, including income generated for expert witness testimony by faculty members within that department. The Faculty Affairs Code expressly provides that funds within a Departmental Operating Fund “may not be used to fund items which would be construed as non-business or personal in nature.” Instead, “[f]unds deposited into Departmental Operating Funds may be expended on approved budgeted items which serve to maintain and/or improve the departmental capabilities in the areas of teaching, research, patient care, and public service[,]” including “expenses incurred as a result of appropriate professional travel, attendance at meetings” and “expenditures for supplies and general operational costs[.]”

invoice for March in the amount of $10,780.60, and an April invoice in the amount of $1,833.60. Petitioner informed Mr. Collichio in a 5 August 2016 email of his intention to terminate Mintz Levin because he had been charged "more money that [he had] derived benefit from." Petitioner also expressed frustration that his reimbursement request had not been approved and offered to personally meet with OUC.

In a 23 August 2016 email, Mr. Collichio informed Petitioner that OUC had provided feedback that was "not good news." The email explained that Petitioner's request for reimbursement of legal fees could not be honored because Petitioner did not get prior approval by OUC and "faculty do not have the authority to bind the University in contract for outside counsel," as "these are the decisions made by the OUC." The email also stated that OUC "looked at the line items in the invoices [Petitioner] provided, and, though vague, they do not appear to align with all of the reasons [Petitioner] provided as the purpose of retaining outside counsel."

At the request of the OUC, in August of 2016, UNC-CH's Director of Internal Audit Department, Phyllis Petree ("Ms. Petree"), commenced an investigation into Petitioner's request for reimbursement of legal fees. Ms. Petree also initiated an audit into Petitioner's prior travel and business reimbursements from the Radiology Operating Fund from July 2010 to September 2016. In a final audit report entered 5 January 2017, Ms. Petree concluded that "the primary purpose of the law firm engagement giving rise to the legal fees in question was for personal matters, though [Petitioner] initially represented that the fees were for consultation related to cybersecurity and to his University duties." Additionally, Ms. Petree concluded that between September 2010 and September 2016, Petitioner "claimed and was reimbursed for costs of nine trips that were primarily personal in nature and were not reimbursable as business travel."

In a letter dated 11 January 2017, Provost Dean informed Petitioner of his intention to discharge him from his employment as a professor at UNC-CH for misconduct under the Trustee Policies and Regulations Governing Academic *Tenure in the University of North Carolina at Chapel Hill* (the "Tenure Policy").[2] Relying on Ms. Petree's audit report, the letter stated that Petitioner submitted to the Radiology Department a request for reimbursement of $30,000 in legal fees, "knowingly representing that these expenses were incurred for legal advice regarding [his] work performed for the University when, instead, these legal services were obtained for primarily personal reasons, including

2. Pursuant to Section 3(a)(1) of the Tenure Policy, discharge is appropriate when a tenured faculty member engages in misconduct "sufficiently serious as to adversely reflect on the individual's honesty, trustworthiness or fitness to be a faculty member."

pursuing legal action against the University." Provost Dean described Petitioner's behavior as "inappropriate and unethical conduct that may also constitute a criminal violation" and found "this significant act alone constitutes misconduct of such a nature to indicate that [Petitioner is] no longer fit to be a member of the faculty[.]" The letter stated that "[f]urther contributing to a pattern of dishonesty and false representations, [Ms. Petree] thereafter discovered that, over the past five years, [Petitioner had] established a practice of improperly seeking full reimbursement from the University for trips that were personal in nature." According to Provost Dean, Petitioner's behavior was "sufficiently serious as to adversely reflect on [his] honesty, trustworthiness and fitness to be a faculty member" and his "actions constitute misconduct of such a nature as to indicate that [Petitioner] is no longer fit to be a member of the faculty[.]" The letter informed Petitioner of his right to appeal the decision and explained that pursuant to Section 3 of the Tenure Policy, Petitioner was suspended "pending [his] discharge or other resolution of [the] matter," but that his suspension would be "with full pay."

On that same day, the Executive Dean of the School of Medicine, Dr. Wesley Burks ("Dr. Burks") sent Petitioner a letter outlining "the specific terms of [his] suspension from employment pursuant to Section 3(b)(9)" of the Tenure Policy. The letter explained that Petitioner would continue to receive his full pay during his suspension, which was "effective immediately and shall continue until a final decision concerning [his] discharge from employment."

Petitioner appealed Provost Dean's decision to the UNC-CH Faculty Hearings Committee (the "Faculty Hearings Committee") on 11 January 2017, in accordance with the Tenure Policy.[3] The matter was heard by a five-member panel over the course of three days. At the hearing, Petitioner argued that he was the victim of retaliation on behalf of UNC-CH based on the safety concerns he had previously raised. The Faculty Hearings Committee submitted a memorandum to Chancellor Folt on 23 May 2017 with its findings and its unanimous recommendation that Chancellor Folt uphold Provost Dean's decision to discharge Petitioner. Finding that UNC-CH's investigations into Petitioner's concerns revealed no evidence of retaliation against Petitioner, the Faculty Hearings Committee rejected Petitioner's retaliation claim. Specifically, the Faculty Hearings Committee concluded:

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3. The Tenure Policy authorized Petitioner to appeal his termination by requesting a hearing before a panel of at least five members of the Faculty Hearings Committee. Following the hearing, the findings and recommendations of the Faculty Hearings Committee are submitted to Chancellor Folt for her adoption or rejection.

> Dr. Semelka's choice to seek reimbursement for $30,000 worth of legal fees and his description of the need for this outside legal consultation as being related to various activities such as writing books or considering new safety procedures was disingenuous and dishonest. Indeed, he eventually admitted to Ms. Petree that a significant portion (40%) of his conversations with Mintz Levin were related to taking legal action against the University. *Such conduct constitutes misconduct of such a nature as to adversely reflect on Dr. Semelka's honesty, trustworthiness and fitness to be a faculty member. Therefore, we find Dr. Semelka's conduct was of such a nature as to indicate that he is unfit to continue as a member of the faculty.* We were not convinced that the travel improprieties noted by Ms. Petree by themselves rose to the level requiring discharge since those requests were clear, did reference at least some University-related meetings, and went through multiple levels of review before being granted.

(Emphasis added).

In a letter dated 9 June 2017, Chancellor Folt notified Petitioner of her decision to accept the "findings and recommendations" of the Faculty Hearings Committee:

> I concur and determine that you engaged in misconduct that was sufficiently serious so as to adversely reflect on your honesty, trustworthiness or fitness to be a faculty member. I further concur and determine that your actions constitute misconduct of such nature as to render you unfit to serve as a member of the faculty at the University. I also concur with the Committee's findings that the University investigated your prior safety concerns and that no evidence indicated that the University took employment action against you for voicing such concerns. Accordingly, I agree that discharge is the appropriate sanction for your misconduct.

The letter also apprised Petitioner of his right to seek review of Chancellor Folt's decision by the BOT under Section 3(b)(8) and Section 8 of the Tenure Policy.[4]

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4. Under Section 8(2) of the Tenure Policy, the BOT may review, *inter alia*, "[a] decision by the Chancellor under 3.b.8. concurring in a [Faculty] [H]earings [Co]mmittee recommendation unfavorable to the faculty member." The BOT's review is limited, however, to "the question of whether the Chancellor or the [Faculty] [H]earings [C]ommittee, as the case may be, committed clear and material error in reaching the decision under review."

Petitioner appealed Chancellor Folt's decision to the BOT on 17 June 2017. The BOT affirmed Chancellor Folt's decision on 1 August 2017, finding that Chancellor Folt "did not commit clear and material error" either (1) "when she concurred with the [Faculty Hearings Committee's] unanimous recommendation and determined [Petitioner] engaged in misconduct that was sufficiently serious so as to adversely reflect on his honesty, trustworthiness or fitness to be a faculty member" or (2) "when she concurred with the [Faculty Hearings Committee's] unanimous recommendation and determined [Petitioner's misconduct] was of such a nature as to render him unfit to serve as a member of the faculty at [UNC-CH]."

Petitioner appealed[5] the BOT's decision to the BOG on 10 August 2017. In addition to his request that the BOG "reverse the improper decision that ha[d] been made about [his] employment at UNC[,]" Petitioner also asked the BOG to bring in an independent investigator to assess the circumstances of his dismissal and "the background misconduct in the School of Medicine." Provost Dean sent Petitioner a letter on 24 August 2017 confirming UNC-CH's final decision to discharge him and explaining that Petitioner's final paycheck would reflect wages paid through 1 August 2017 – the date of the BOT's decision. In a 26 October 2017 position statement to the BOG, Petitioner asserted his salary should not have been terminated "while the appeal process is ongoing."

In a decision entered 12 September 2018, the BOG affirmed UNC-CH's dismissal decision, concluding that "there [was] sufficient evidence in the record to determine that [Petitioner] knowingly misrepresented that multiple reimbursement requests for legal and travel expenses were for university purposes when, in fact, substantial portions of the expenses were for personal purposes, constituting misconduct under Section 603(1) of *The Code*."[6] The BOG rejected Petitioner's retaliation claim, finding "insufficient evidence to support [Petitioner's] claim that UNC-CH selected another candidate for the Division Chief Position or chose to discharge [Petitioner] from employment as acts of retaliation against him for reporting safety concerns about colleagues to UNC-CH administrators." Moreover, the BOG rejected Petitioner's salary claim, finding:

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5. Section 8 of the Tenure Policy enabled Petitioner to appeal the BOT's decision to the BOG "alleging with particularity the specific provisions of *The Code*" which Petitioner "alleges to have been violated."

6. Throughout this opinion, we refer to "*The Code of the Board of Governors of the University of North Carolina*" as "*The Code*."

> The [BOG's] interpretation of its own policy in Section 603(10) is that the final decision concerning discharge from employment at a constituent institution is the decision made by a constituent institution's chancellor. The surrounding language in Section 603(10) supports this interpretation. Section 603(9) states that "the chancellor's decision shall be final." Additionally, Section 603(9) refers to consideration of the chancellor's final decision by a board of trustees or the [BOG] as an "appeal." Because Chancellor Folt made a final decision consistent with Section 603(9) with regard to [Petitioner's] discharge from employment on June 9, 2017, [Petitioner] is not entitled to pay beyond June 9, 2017.

Petitioner filed a petition for judicial review in Superior Court, Orange County. A hearing on the petition was conducted on 18 March 2019. The trial court entered an order on 25 April 2019 affirming the BOG's decision to discharge Petitioner from his employment and reversing the BOG's decision to stop payment of Petitioner's salary as of the date of the BOT's decision. Petitioner appeals and Respondents cross-appeal from the order.

II. Direct Appeal

On appeal, Petitioner argues that: (1) the BOG violated its policy by considering dismissed allegations of travel expense reimbursement violations, (2) Petitioner did not commit misconduct sufficiently serious to justify his discharge, (3) discharge was an excessive discipline and UNC wrongfully failed to consider any discipline less than discharge, and (4) the decision to discharge Petitioner was an unjust and arbitrary application of disciplinary penalties because of the way that UNC-CH officials "set up" Petitioner and misrepresented the evidence of the purpose of his relationship with Mintz Levin.

A. Standard of Review

"The North Carolina Administrative Procedure Act (APA), codified at Chapter 150B of the General Statutes, governs trial and appellate court review of administrative agency decisions." *Amanini v. N.C. Dep't of Human Res.*, 114 N.C. App. 668, 673, 443 S.E.2d 114, 117 (1994). " 'When a superior court exercises judicial review over an agency's final decision, it acts in the capacity of an appellate court[,]' " *Bernold v. Bd. of Governors of Univ. of N.C.*, 200 N.C. App. 295, 297, 683 S.E.2d 428, 430 (2009) (citation omitted), and " 'the substantive nature of each assignment of error dictates the standard of review[,]' " *Wetherington v. N.C.*

Dep't of Pub. Safety, 368 N.C. 583, 590, 780 S.E.2d 543, 546 (2015) (citations omitted). The scope of a superior court's judicial review is limited as follows:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2019). This Court's review

> under the APA is the same as it is for other civil cases. Thus, our appellate courts have recognized that the proper appellate standard for reviewing a superior court order examining a final agency decision is to examine the order for errors of law. Our appellate courts have further explained that this twofold task involves: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly. As a result, this Court has required that the trial court, when sitting as an appellate court to review an administrative agency's decision, must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.

EnvironmentaLEE v. N.C. Dep't of Env't & Nat. Res., 258 N.C. App. 590, 595, 813 S.E.2d 673, 677 (2018) (internal citations, quotation marks, and brackets omitted).

"Our Supreme Court has observed that the first four grounds enumerated under [N.C. Gen. Stat. § 150B-51(b)] may be characterized as law-based inquiries, whereas the final two grounds may be characterized

as fact-based inquiries." *Sound Rivers, Inc. v. N.C. Dep't of Envtl. Quality, Div. of Water Res.*, 271 N.C. App. 674, 695, 845 S.E.2d 802, 816 (2020). "Where the petitioner alleges that the agency decision was based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency." *Avant v. Sandhills*, 132 N.C. App. 542, 546, 513 S.E.2d 79, 82 (1999) (citations omitted). For alleged errors under subsections 150B-51(b)(5) and (6)—the fact-based inquiries—we apply the whole record standard of review. *Smith v. N.C. Dep't of Pub. Instruction*, 261 N.C. App. 430, 442, 820 S.E.2d 561, 569 (2018).

In the present case, the trial court applied *de novo* review to Petitioner's first argument and whole record review to Petitioner's remaining three assertions. Petitioner does not contend that the trial court applied the wrong standard of review; as a result, this Court's review is limited to deciding whether the trial court properly exercised the appropriate standard of review. *EnvironmentaLEE*, 258 N.C. App. at 595, 813 S.E.2d at 677.

B. De Novo Review

[1] Petitioner argues that the BOG violated its own policy—under the Tenure Policy and *The Code*—because it considered dismissed allegations of travel expense reimbursement violations in its decision. This assertion presents a law-based inquiry as to whether the BOG's decision was in excess of its statutory authority or jurisdiction, made upon unlawful procedure, and/or affected by other errors of law; therefore, *de novo* review is appropriate. Avant, 132 N.C. App. at 546, 513 S.E.2d at 82. Under a *de novo* review,

> [t]he agency's decision is presumed to be made in good faith and in accordance with governing law. Therefore, the burden is on the party asserting otherwise to overcome such presumptions by competent evidence to the contrary when making a claim that the decision was affected by error of law or procedure.

Richardson v. N.C. Dep't of Pub. Instruction Licensure Section, 199 N.C. App. 219, 223–24, 681 S.E.2d 479, 483 (2009) (citation omitted).

The Code § 603(9) provides: "If the chancellor concurs in a recommendation of the committee that is favorable to the faculty member, the chancellor's decision shall be final."[7] Petitioner contends that the

7. The Tenure Policy § 3(b)(8) contains almost identical language to *The Code* § 603(9): "If the Chancellor concurs in a recommendation of the hearing committee that is favorable to the faculty member, his or her decision shall be final."

BOG violated *The Code* § 603(9) because it considered evidence of Petitioner's dishonesty relating to his travel expense reimbursement requests—a ground that had been "rejected" by the Faculty Hearings Committee—in its decision to terminate Petitioner. As support for his assertion, Petitioner notes the following pertinent facts.

When Provost Dean informed Petitioner by letter that he intended to discharge him, he stated that Petitioner's $30,000 reimbursement request for legal fees "alone constitutes misconduct of such a nature as to indicate that [Petitioner is] no longer fit to be a member of the faculty of this University." The letter also stated that "[f]urther contributing to a pattern of dishonesty and false representations, [Ms. Petree] thereafter discovered that, over the past five years, [Petitioner] ha[d] established a practice of improperly seeking full reimbursement from the University for trips that were primarily personal in nature." In its 23 May 2017 memorandum to Chancellor Folt, the Faculty Hearings Committee concluded that Petitioner's reimbursement request for $30,000 in legal fees was "disingenuous and dishonest" and "of such a nature as to indicate that he is unfit to continue as a member of the faculty[;]" however, they "were not convinced that the travel improprieties noted by Ms. Petree by themselves rose to the level requiring discharge since those requests were clear, did reference at least some University-related meetings, and went through multiple levels of review before being granted." Notably, the memorandum contained the Faculty Hearings Committee's recommendation to Chancellor Folt: "The Faculty Hearings Committee unanimously recommends that the Chancellor uphold Provost Dean's decision to discharge [Petitioner] from the faculty of the University. The Committee finds that permissible grounds for discharge under the Tenure Policy exist."

According to Petitioner, when Chancellor Folt "accept[ed] the [Faculty Hearings] Committee's findings and recommendations" on 9 June 2017, the travel reimbursement allegation was resolved in favor of Petitioner and constituted a final decision under *The Code* § 603(9). As a result, Petitioner argues that the BOG's decision improperly referenced "the dismissed allegations of travel expense improprieties" when it found "evidence related to [Petitioner's] reimbursements for travel or a personal nature over a period of several years supports UNC-CH's decision-maker's finding that [Petitioner] engaged in 'a pattern of dishonesty and false representations.' " On judicial review, the trial court concluded:

> 5. After a *de novo* review, the decision to discharge Petitioner from his position at UNC-CH based on his

> misconduct was not in violation of any constitutional provisions, in excess of the statutory authority or jurisdiction of the agency, made upon lawful procedure or affected by another error of law. Moreover, the decision to discharge Petitioner was properly made and was consistent with the requirements of *The Code*.

Petitioner contends that "[b]ecause the BOG did not uphold the discharge decision on the basis of the attorney's fee reimbursement request alone, and violated UNC policy by relying on finally dismissed allegations, the Superior Court could not remedy that Policy violation by deciding in its opinion that the one violation was sufficient to support the BOG decision."

As an initial matter, we reject Petitioner's characterization of the Faculty Hearings Committee's decision as "reject[ing] the allegation with regard to the travel reimbursement request." A review of the memorandum to Chancellor Folt reveals that the travel reimbursement allegation was *not* rejected. Indeed, the Faculty Hearings Committee "found that Ms. Petree's audit revealed that there were multiple instances dating from 2011 in which [Petitioner] was reimbursed by the University for travel that appeared to be primarily personal in nature[.]" The Faculty Hearings Committee further found that Petitioner's "*pattern* is repeated in multiple trips, suggesting that his personal travel was primary in many cases and that brief meetings with colleagues were used to justify multiple days of travel reimbursement requests." (Emphasis added). However, the Faculty Hearings Committee concluded that it was "not convinced that the travel improprieties noted by Ms. Petree *by themselves* rose to the level requiring discharge since those requests were clear, did reference at least some University-related meetings, and went through multiple levels of review before being granted." (Emphasis added). We do not believe that the Faculty Hearings Committee's conclusion—that Petitioner's reimbursement requests for travel expenses, on their own, did not rise to the level of discharge—compels the conclusion that the Faculty Hearings Committee "rejected" the allegation, especially in light of the memorandum's references to Petitioner's "pattern" of justifying reimbursement requests for primarily personal travel with brief meetings with colleagues.

However, assuming *arguendo* that the Faculty Hearings Committee had "rejected" the allegation of travel expense violations, we disagree with Petitioner that Chancellor Folt's adoption of the Faculty Hearings Committee's findings and recommendation constituted a "final" decision in favor of Petitioner that removed the travel reimbursement

issue from the case. The plain language of *The Code* § 603(9) provides that "the chancellor's decision shall be final" if she "concurs *in a recommendation* of the committee that is favorable to the faculty member[.]" (Emphasis added). Although Chancellor Folt's letter to Petitioner stated that she was agreeing with the "findings and recommendations" of the Faculty Hearings Committee, the memorandum to Chancellor Folt provided a *singular* recommendation: "The Faculty Hearings Committee unanimously recommends that the Chancellor uphold Provost Dean's decision to discharge [Petitioner] from the faculty of the University. The Committee finds that permissible on that grounds for discharge under the Tenure Policy exist."

The Faculty Hearings Committee's singular recommendation to Chancellor Folt to "uphold Provost Dean's decision to discharge [Petitioner] from the faculty" was *not* "favorable" to Petitioner. Accordingly, Chancellor Folt's adoption of the Faculty Hearings Committee's recommendation was not "final" under *The Code* § 603(9). As a result, we hold that Petitioner has not overcome the presumption that the BOG's decision to discharge Petitioner from his employment was made "in good faith and in accordance with governing law." *Richardson*, 199 N.C. App. at 223–24, 681 S.E.2d at 483.

C. Whole Record Test

Petitioner contends that he did not commit misconduct justifying discharge, his discharge was an excessive discipline in violation of the UNC policy, and the decision to discharge him was an unjust and arbitrary application of discretionary penalties. For these alleged errors, the reviewing court applies the "whole record" test. *See Smith*, 261 N.C. App. at 442, 820 S.E.2d at 569. The North Carolina Supreme Court has descried the "whole record" test as follows:

> The whole record test requires the reviewing court to examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Therefore, if we conclude there is substantial evidence in the record to support the Board's decision, we must uphold it. We note that while the whole-record test does require the court to take into account both the evidence justifying the agency's decision and the contradictory evidence from which a different result could be reached, the test does not allow

> the reviewing court to replace the [ ] Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.

Meads v. N.C. Dep't of Agric., 349 N.C. 656, 663, 509 S.E.2d 165, 170 (1998) (internal quotation marks, citations, and brackets omitted). "This Court has held that under the whole record test, administrative agency decisions may be reversed as arbitrary or capricious if they are patently in bad faith, or whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment." *Richardson*, 199 N.C. App. at 224, 681 S.E.2d at 483 (internal quotation marks, citations, and brackets omitted).

1. Misconduct

[2] Petitioner contends that he did not commit misconduct sufficiently serious to justify his discharge under *The Code* § 603(1).[8] *The Code* § 603(1) includes "misconduct of such a nature as to indicate that the faculty member is unfit to continue as a member of the faculty" as one of the permissible grounds for discharging a tenured faculty member. However, *The Code* § 603(1) establishes that

> [t]o justify serious disciplinary action, such misconduct should be either (i) sufficiently related to a faculty member's academic responsibilities as to disqualify the individual from effective performance of university duties, or (ii) sufficiently serious as to adversely reflect on the individual's honesty, trustworthiness or fitness to be a faculty member[.]

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8. To support this assertion, Petitioner discusses "a compelling comparator" case in which the BOG "took no action" against Dr. William Roper, the former Medical School Dean, who committed "a more serious violation" than Petitioner's alleged conduct. Petitioner requests this court take judicial notice of documents included in the appendix of his brief related to the Roper case. On 5 June 2020, Respondents filed a "Motion to Strike" Petitioner's argument related to Roper and the documents attached to the appendix, arguing that they were neither part of the established record on appeal nor part of the administrative record before the agency and lower court. Respondents filed a "Second Motion to Strike" on 2 July 2020 as to certain portions of Petitioner's reply brief referencing the Roper case and two disciplinary decisions from the North Carolina State Bar. We allow Respondents' Motion to Strike and Respondents' Second Motion to Strike. *See West v. G.D. Reddick, Inc.*, 48 N.C. App. 135, 137, 268 S.E.2d 235, 236 (1980), *rev'd on other grounds*, 302 N.C. 201, 274 S.E.2d 221 (1981) ("The Court of Appeals can judicially know only what appears of record . . . . Matters discussed in a brief but not found in the record will not be considered by this Court. It is incumbent upon the appellant to see that the record is properly made up and transmitted to the appellate court." (internal citation omitted)).

Petitioner contends that the BOG's decision was not supported by substantial evidence because it was reasonable for him to seek reimbursement for legal fees he incurred when he sought "advice and assistance" from Mintz Levin regarding his concerns about his colleagues. Petitioner maintains that he hired Mintz Levin to write a letter to the BOT, not to initiate a lawsuit against UNC, and thus, he made no false statement in connection with his reimbursement request. Moreover, according to Petitioner, there is no evidence that any person had concerns about his ability to perform his duties[9] and, so, the decision to discharge him, " 'the superstar faculty member within the Department of Radiology,' who endeavored commendable to safeguard the Department from true serious misconduct that endangered the health and safety of patients and staff, [was] not justified by the statements he made when he was set up by the University's stealth investigation of him."

A whole record review supports the BOG's conclusion that "there is sufficient evidence in the record to determine that [Petitioner] knowingly misrepresented that multiple reimbursement requests for legal and travel expenses were for University purposes when, in fact, substantial portions of the expenses were for personal purposes, constituting misconduct under Section 603(1) of *The Code*." Ms. Petree's audit report referenced several emails that Petitioner sent to Mintz Levin demonstrating that Petitioner knowingly misrepresented to Mr. Collichio the basis for his reimbursement request. For example, Petitioner began a 1 February 2016 email to Mintz Levin by stating, "I believe you are the attorney who represented [another former faculty member] against UNC a few years back." Petitioner proceeded to discuss his "[p]roof of retaliation" and his grievances with how administrators handled the safety concerns he had raised. Explaining that he did not "intend to run away with a settlement[,]" Petitioner noted that he "want[ed] a message sent to UNC." Petitioner stated his belief that "once a case has been established[,]" faculty and staff "who are aware of what has happened" will "step up and testify." Additionally, Petitioner expressed his willingness to "take over the chair position department of Radiology[.]" In a subsequent email to Mintz Levin, Petitioner stated his desire "to move forward with the case." Petitioner expressed his plan to ask for "at least $10 million" for "damages to career and personal life," noted the individuals he wanted dismissed from UNC, and stated, "[a]s fewer people get dismissed, the higher [he would] request the settlement." In a

9. Petitioner was dismissed for *misconduct* under The Code § 603(1)(c)(ii); dismissal of a faculty member for *incompetence* or *neglect of duty* is found under *The Code* §§ 603(1)(a) and (b).

30 August 2016 email admonishing Mintz Levin for unsatisfactory performance, Petitioner expressed his frustration that he was now having to "deal with a financial conflict with the attorney who [he] had hired to protect [him]."

However, the day after submitting his request for reimbursement of legal fees, Petitioner sent Mr. Collichio an email stating that that he had hired Mintz Levin because he "wanted to obtain a broad overview of operational aspects, responsibilities, duties, of major university organizations." Petitioner explained that in addition to seeking legal advice related to his "current work on a new disease" known as "gadolinium deposition disease[,]" he sought consultation in the areas of "physician burn-out, safety of work environments, [and] competency," which are "all subjects that pertain directly to the role [he] serve[s] in the department of Radiology." In another email dated 18 July 2016, Petitioner noted additional subjects that he consulted with Mintz Levin about, including "nation-wide experiences and approaches to root cause analysis[,]" "nationwide experience with IRB [Institutional Review Board] and appropriate interaction[,]" "nationwide experience with FDA [Food and Drug Administration] and policies[,]" and "Focus on FDA IND [investigational new drug applications]." Thus, a review of the whole record reveals substantial evidence supporting the conclusion that Petitioner misrepresented the reasons he engaged Mintz Levin, constituting misconduct "sufficiently serious as to adversely reflect on [Petitioner's] honesty, trustworthiness or fitness to be a faculty member."

2. Excessive Discipline

[3] Petitioner also argues "discharge was an excessive discipline and UNC wrongfully failed to consider any discipline less than discharge." *The Code* § 603(1) provides that "[a] faculty member who is the beneficiary of institutional guarantees of tenure shall enjoy protection against unjust and arbitrary application of disciplinary penalties."

Petitioner contends that UNC should have counseled him regarding its concerns or "considered progressive discipline, since [Petitioner] had never had any disciplinary action against him in 24 years on the faculty." As support for this assertion, Petitioner cites cases where our courts utilized the "just cause" standard to review an agency's decision to discharge a state employee. *See* N.C. Gen. Stat. § 126-35(a) (2019) (providing that a career state employee subject to the North Carolina Human Resources Act may only be "discharged, suspended, or demoted for disciplinary reasons" upon a showing of "just cause"). However, as a tenured professor at UNC-CH, Petitioner is exempt from the provisions of the North Carolina Human Resources Act. *See* N.C. Gen. Stat.

§ 126-5(c1)(8) (2019). Thus, Petitioner's reliance on cases applying the "just cause" standard is misplaced. Moreover, as discussed above, there is substantial evidence in the record supporting the BOG's conclusion that Petitioner engaged in misconduct "sufficiently serious as to adversely reflect on the individual's honesty, trustworthiness or fitness to be a faculty member." There is no provision in *The Code* requiring UNC to consider discipline less severe than discharge. Pursuant to *The Code*, this level of misconduct on behalf of a tenured faculty member is a permissible ground for termination.

3. Unjust and Arbitrary Application of Disciplinary Penalties

[4] Petitioner also argues that "the decision to discharge [him] was an unjust and arbitrary application of disciplinary penalties because of the way that University officials set up [Petitioner] and misrepresented the evidence of the purpose of his relationship with Mintz [Levin]." According to Petitioner, "UNC embarked on a course of action to set [him] up for more serious discipline[,]" "[t]hey covertly invaded his email[,]" and "[t]hen they selectively 'cherry picked' excerpts of emails they had obtained from their invasion of his email file to manufacture a false case that [he] had retained Mintz [Levin] to file a lawsuit against the University." Petitioner asserts that UNC "ignored the compelling evidence contradicting their theory[,]" including emails Petitioner sent to Mintz Levin clarifying "that his purpose was only to have Mintz [Levin] correspond with the BOT" and evidence that he "never provided Mintz [Levin] the funding necessary for a lawsuit against UNC, never discussed or made any arrangements for such funding in the emails UNC accessed and read, and never did file a lawsuit against UNC."

However, by submitting the reimbursement request for $30,000 in legal fees and emailing Mr. Collichio explanations that the BOG found to be "dishonest," it was Petitioner's actions that led UNC-CH to investigate Petitioner's affairs. Petitioner's representations to UNC-CH that his legal fees were reimbursable because they were "business related" prompted Mr. Collichio to request supporting documentation. Thus, it was Petitioner, not a covert action on behalf of UNC-CH, that placed Petitioner's communication with Mintz Levin directly at issue. As discussed above, a review of Petitioner's communication with Mintz Levin supports the determination that Petitioner misrepresented the nature of the legal expenses for which he sought reimbursement. Thus, Petitioner has failed to demonstrate that the BOG's decision to terminate him was made "patently in bad faith," lacked "fair and careful consideration[,] or fail[ed] to indicate any course of reasoning and the exercise of judgment." *Richardson*, 199 N.C. App. at 224, 681 S.E.2d at 483.

For the reasons discussed above, as to Petitioner's direct appeal, we affirm.

III. Cross-Appeal

[5] Respondents contend that the trial court erred by concluding that UNC-CH should have paid Petitioner through the BOG's decision on 12 September 2018. In particular, Respondents argue that the trial court's decision is inconsistent with the plain language of *The Code* and state law governing judicial review of administrative agency decisions.[10]

As noted before, we conduct *de novo* review of a trial court's decision that an agency's interpretation of its policies was "affected by other error of law." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894–95 (2004). Generally, we give "controlling weight" to an agency's own interpretation of its policies, "unless it is plainly erroneous or inconsistent with the [policy]." *Morrell v. Flaherty*, 338 N.C. 230, 237–38, 449 S.E.2d 175, 180 (1994) (quotation and citations omitted). But we will not defer to an interpretation when an "alternative reading is compelled by the [policy's] *plain language*." *Id.* (emphasis added). Further, "[i]f the *only* authority for the agency's interpretation of the law is the decision in that case, that interpretation may be viewed skeptically on judicial review." *Frampton v. Univ. of N.C.*, 241 N.C. App. 401, 411, 773 S.E.2d 526, 533 (2015) (quoting *Rainey v. N.C. Dep't of Pub. Instruction*, 361 N.C. 679, 681–82, 652 S.E.2d 251, 252–53 (2007)).

In its 12 September 2018 decision regarding Petitioner's termination, the BOG found: "The [BOG's] interpretation of its own policy in Section 603(10) is that the final decision concerning discharge from employment at a constituent institution is the decision made by a constituent institution's chancellor." The decision further stated that "[b]ecause Chancellor Folt made a final decision consistent with Section 603(9) with regard to [Petitioner's] discharge from employment on June 9, 2017, [Petitioner] is not entitled to pay beyond June 9, 2017." On judicial review, the trial court disagreed with the BOG and concluded the following:

> 8. Reviewing *de novo* Petitioner's claim that UNC-CH should have continued to pay his salary throughout his administrative appeal through the decision of the BOG,

10. Petitioner filed a "Motion to Strike Respondents-Appellants' Brief on Cross-Appeal" on 23 March 2020, arguing that Respondents' brief "grossly violates Rule 28(b)(3) and (5) of the North Carolina Rules of Appellate Procedure and thereby grossly disregards the requirement of a fair presentation of the issues to the appellate court." We deny Petitioner's motion because Respondents' brief includes a sufficient summary of this case's procedural history and relevant facts in accordance with Rule 28(b)(3) and (5).

> the Court finds that the determination to stop paying Petitioner after the UNC Board of Trustees issued its decision and while Petitioner's appeal was pending before the BOG was not consistent with Section 603(9) and (10) of The Code and, thus, was affected by other error of law. Instead, Petitioner should have been paid through the September 12, 2018 decision of the BOG.

As noted above, *The Code* § 603(9) provides, in relevant part, that:

> If the chancellor concurs in a recommendation of the [Faculty Hearings Committee] that is favorable to the faculty member, the chancellor's decision shall be final. If the chancellor . . . concurs in a committee recommendation that is unfavorable to the faculty member, the faculty member may appeal the chancellor's decision to the board of trustees. . . . [The decision of the board of trustees] shall be final except that the faculty member may[] . . . file a written notice of appeal[] . . . with the Board of Governors if the faculty member alleges that one or more specified provisions of the Code of the University of North Carolina have been violated.

The Code § 603(10) further states:

> When a faculty member has been notified of the institution's intention to discharge the faculty member, the chancellor may reassign the individual to other duties or suspend the individual at any time *until a final decision* concerning discharge has been reached by the *procedures* described herein. Suspension shall be exceptional *and with full pay*.

(Emphasis added).

Respondents interpret *The Code* §§ 603(9) and (10) to mean that Chancellor Folt's determination was final, that any other review by the BOT or BOG qualifies as an "appeal," and, therefore, UNC-CH was not obligated to pay Petitioner beyond the decision of Chancellor Folt on 9 June 2017, let alone that of the BOT on 1 August 2017. In our *de novo* review of the plain language of *The Code*, however, the BOG's determination to stop paying Petitioner after the BOT issued its decision and while Petitioner's appeal was pending before the BOG was not consistent with *The Code* §§ 603(9) and (10). The Code § 603(9) clearly distinguishes between a "favorable" and "unfavorable" recommendation for a faculty

member and uses different language to describe the finality of each decision. Where there is a "favorable" determination for a faculty member, the chancellor's decision is clearly "final." For a recommendation "unfavorable" to the faculty member, as in this case, *The Code* explicitly provides that a faculty person "may appeal the chancellor's decision to the [BOT]." The decision of the BOT, then, "*shall be final except* that the faculty member may[] . . . file a written notice of appeal[] . . . with the [BOG]." (Emphasis added). Here, *The Code*, as written, carves out a specific exception for the finality of a decision regarding a faculty member's dismissal until review by the BOG.

The Code § 603(10) supports this reading of § 603(9). Under § 603(10), once a faculty person has been notified of the "institution's intention to discharge," the chancellor may "reassign" or "suspend" the individual "*until a final decision* concerning discharge has been reached *by the procedures described herein*." (Emphasis added). The provision provides for "full pay" until that point. The procedures referred to in § 603(10) and outlined, in full, under § 603(9), indicate that the decision regarding Petitioner's employment was not final while the appeal to the BOG was ongoing. Accordingly, Petitioner should have been compensated through the BOG's decision on 12 September 2018.

Beyond an examination of the plain language of *The Code*, Respondents attempt to compare this case to several other cases that distinguish between a "decision" and an "appeal" or in which a chancellor's decision was deemed "final." Yet, none of those cases interpret the language of *The Code* §§ 603(9) and (10) at issue here. Nor do they consider the continuation of salary of a tenured faculty member through the appeal process of a discharge decision. In addition, Respondents fail to provide any prior examples, except in this case, where the BOG has determined to end payment to a tenured faculty member at the decision of the BOT while an appeal is pending to the BOG.

Based on the foregoing reasons, we conclude that UNC violated its own policies when it ceased Petitioner's pay at the date of the BOT decision before the BOG issued its ultimate decision. Thus, as to Respondents' cross-appeal, we affirm the decision of the trial court.

IV. Conclusion

For the reasons discussed above, we affirm the trial court.

AFFIRMED.

Judges DIETZ and HAMPSON concur.

SEMELKA v. UNIV. OF N. CAROLINA

[275 N.C. App. 683 (2020)]

RICHARD C. SEMELKA, M.D., PLAINTIFF-APPELLEE

v.

THE UNIVERSITY OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE INSTITUTION OF THE STATE OF NORTH CAROLINA; THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, A CONSTITUENT INSTITUTION OF THE UNIVERSITY OF NORTH CAROLINA; CAROL L. FOLT, SUED IN HER INDIVIDUAL AND OFFICIAL CAPACITIES; JAMES WARREN DEAN, JR., SUED IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; WILLIAM L. ROPER, SUED IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; ARVIL WESLEY BURKS, JR., SUED IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; AND MATTHEW A. MAURO, SUED IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES, DEFENDANTS-APPELLANTS

No. COA19-1090

Filed 31 December 2020

1. Appeal and Error—preservation of issues—issue raised in motion and at hearing—issue not abandoned

In an action alleging that plaintiff's termination from the University of North Carolina was retaliatory in violation of the Whistleblower Act, where defendants specifically raised N.C.G.S. § 1-77 in their motion to dismiss and at the hearing before the trial court, plaintiff's contention that defendants waived their argument regarding section 1-77 was meritless.

2. Venue—action against UNC—all parties in Orange County—transferred to Orange County

In an action alleging that plaintiff's termination from the University of North Carolina (UNC) was retaliatory in violation of the Whistleblower Act, the Court of Appeals agreed with defendants that venue in Wake County was improper and held that N.C.G.S. § 1-82 was the controlling statute, pursuant to which the case should be tried in Orange County because plaintiff and defendants resided there (in addition to UNC being located there) at all times relevant to the case.

Appeal by Defendants from order entered 19 June 2019 by Judge G. Bryan Collins, Jr., in Superior Court, Wake County. Heard in the Court of Appeals 8 September 2020.

Bailey & Dixon, LLP, by J. Heydt Philbeck, Sr., and Law Office of Mark L. Hayes, by Mark L. Hayes, for Plaintiff-Appellee.

Joshua H. Stein, Attorney General, by Special Deputy Attorney General Vanessa N. Totten, Special Deputy Attorney General Kimberly D. Potter, and Assistant Attorney General Zachary Padget, for Defendants-Appellants.

McGEE, Chief Judge.

The University of North Carolina ("UNC"), The University of North Carolina at Chapel Hill ("UNC-CH"), Carol L. Folt, James Warren Dean, Jr., William L. Roper, Arvil Wesley Burks, Jr., and Matthew A. Mauro (collectively, "Defendants") appeal from the trial court's 19 June 2019 order denying their motion to dismiss for improper venue, or, alternatively, to transfer from Superior Court in Wake County, North Carolina to Superior Court in Orange County, North Carolina. We vacate the trial court's order and remand with instructions to transfer this action to Superior Court, Orange County.

I. Factual and Procedural History

Richard C. Semelka, M.D. ("Plaintiff") was formerly employed as a tenured professor at UNC-CH's School of Medicine. Plaintiff was dismissed from his employment on 9 June 2017 for allegedly exhibiting a "pattern of dishonesty[,]" including, but not limited to, requesting reimbursement for non-reimbursable expenses. After exhausting the administrative remedies available under the Administrative Procedures Act, N.C. Gen. Stat. § 150B–1 *et seq.*, Plaintiff filed a "Petition for Judicial Review" in Superior Court, Orange County, requesting review of the dismissal decision by the UNC Board of Governors.[1] The trial court entered an order affirming the UNC Board of Governors' decision to discharge Plaintiff on 25 April 2019, and that appeal is presently pending before this Court (COA19-1076).[2]

Plaintiff filed a complaint in Superior Court, Orange County (the "Orange County complaint") on 11 January 2018, alleging that his termination was retaliatory in violation of the North Carolina Whistleblower Act, N.C. Gen. Stat. § 126-84 *et seq.*[3] Defendants moved to dismiss Plaintiff's claims; however, on 10 August 2018, the day before the scheduled hearing on Defendants' motion, a voluntary dismissal of the Orange County complaint was filed. Two weeks later, Plaintiff filed a complaint

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1. In the Petition for Judicial Review, Plaintiff alleged that UNC has a "principal office in Orange County[.]"

2. In the parallel case (COA19-1076), UNC and UNC-CH filed a cross-appeal of certain issues, as well.

3. In regard to venue, the Orange County complaint alleges: all individual Defendants reside in Orange County; UNC-CH "is located in Orange County, North Carolina[;]" UNC "has a principal place of business in Orange County, North Carolina[;]" and the cause of action "occurred in Orange County, North Carolina."

on 24 August 2018 in Superior Court, Wake County (the "Wake County complaint") alleging again that his termination was retaliatory in violation of the North Carolina Whistleblower Protection Act, N.C. Gen. Stat. § 126-84 *et seq*. The Wake County complaint named the same Defendants and included the same fundamental causes of action as the Orange County complaint.

Defendants filed a motion to dismiss the Wake County complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), 12(b)(2), 12(b)(3) and 12(b)(6) on 28 September 2018, asserting: "Plaintiff has filed this case in Wake County, which is an improper venue. Orange County is the County of proper venue in this matter, and therefore Plaintiff's Complaint should be dismissed for improper venue pursuant to Rule 12(b)(3) of the N.C. Rules of Civil Procedure and N.C. Gen. Stat. §§ 1-77(2), 1-82, 1-83(1)." Defendants asked the trial court to dismiss the Wake County complaint in its entirety and for "such other relief as the Court deems proper[.]" At a hearing on 2 May 2019, the parties argued whether venue was proper in Wake County, or, alternatively, whether the case should be transferred to Orange County—or dismissed without prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(3). The trial court treated Defendants' motion to dismiss as a request for change of venue and stated the following: "Since this is a case of first impression, I'm going to give the Plaintiff the benefit of the doubt and find that Wake County is a proper venue for this case. Barely."

The trial court entered a written order denying Defendants' motion to dismiss in its entirety on 19 June 2019. Defendants appeal.

II. Discussion

Defendants argue that the trial court erred by denying their motion to dismiss and contend that this "case must be remanded to Wake County Superior Court with instructions to dismiss this case or, in the alternative, to transfer this case to Orange County Superior Court." Specifically, Defendants argue that under N.C. Gen. Stat. § 1-77, venue in Wake County is improper because the individual Defendants "are public officials, and [because] the alleged cause of action in this case arose in Orange County[.]" Alternatively, Defendants assert that this case is governed by N.C. Gen. Stat. § 1-82 (2019) as "no party to this action resides in Wake County."

Because Defendants have a statutory right to a legally proper venue and because the interlocutory order below had an effect on this "substantial right," this appeal is properly before this Court pursuant to

N.C. Gen. Stat. § 7A-27(b)(3)(a) (2019). *See* N.C. R. App. P. 3(a) (2020); *see also Stokes v. Stokes*, 371 N.C. 770, 773, 821 S.E.2d 161, 164 (2018) (citations omitted) ("An interlocutory order changing venue as of right affects a substantial right and thus is immediately appealable."); *Caldwell v. Smith*, 203 N.C. App. 725, 727, 692 S.E.2d 483, 484 (2010) (citations omitted) ("The denial of a motion for change of venue, though interlocutory, affects a substantial right and is immediately appealable where the county designated in the complaint is not proper.").

A. Waiver

[1] Plaintiff first contends that Defendants failed to preserve, and thus waived, their argument that N.C. Gen. Stat. § 1-77 is the controlling venue provision.

Defendants filed a motion to dismiss Plaintiff's Wake County complaint on multiple grounds, including improper venue pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(3) (2019). In support thereof, as discussed *supra*, Defendants argued that venue in Wake County was improper pursuant to "N.C. Gen. Stat. §§ 1-77(2), 1-82, 1-83(1)[,]" thereby specifically raising N.C. Gen. Stat. § 1-77 in their motion to dismiss. In addition to Defendants' motion specifically stating venue in Wake County was improper based on N.C. Gen. Stat. § 1-77(2), at the 2 May 2019 hearing, defense counsel clarified that Defendants "moved to dismiss on improper venue based [on] . . . venue statutes [N.C. Gen. Stat. §] 1-77 as well as [N.C. Gen. Stat. §] 1-82." Defendants expressly contended that N.C. Gen. Stat. § 1-77 governs the issue in this case, "[b]ut in the alternative . . . it should be addressed by [N.C. Gen. Stat. §] 1-82[.]" Thus, Plaintiff's contention that Defendants abandoned their argument regarding N.C. Gen. Stat. § 1-77 (or N.C. Gen. Stat. § 1-82) is without merit.

B. Venue

[2] Defendants argue that venue in Wake County is improper under N.C. Gen. Stat. § 1-77 or, in the alternative, under N.C. Gen. Stat. § 1-82.

Regarding legally improper venues, N.C. Gen. Stat. § 1-83 provides the following:

> If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place

> of trial is thereupon changed by consent of parties, or by order of the court.
>
> The court may change the place of trial in the following cases:
>
> (1) When the county designated for that purpose is not the proper one.
>
> (2) When the convenience of witnesses and the ends of justice would be promoted by the change.
>
> (3) When the judge has, at any time, been interested as party or counsel.
>
> (4) When motion is made by the plaintiff and the action is for divorce and the defendant has not been personally served with summons.

N.C. Gen. Stat. § 1-83(1)-(4) (2019). As this Court has stated, "[d]espite the use of the word 'may,' it is well established that 'the trial court has no discretion in ordering a change of venue if demand is properly made and it appears that the action has been brought in the wrong county.' " *Stern v. Cinoman*, 221 N.C. App. 231, 232, 728 S.E.2d 373, 374 (2012) (quoting *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 495, 216 S.E.2d 464, 465 (1975)). This Court reviews determinations of venue under N.C. Gen. Stat. § 1-83(1) *de novo*. *Id.* (citations omitted).

Under the specific facts of this case, we hold that N.C. Gen. Stat. § 1-82 controls. This statute provides that cases not covered by more specific venue statutes "must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at [the] commencement[]" of the action. N.C. Gen. Stat. § 1-82 (2019). The Wake County complaint—which is basically a carbon copy of the Orange County complaint—alleges that Plaintiff himself is a resident of Orange County and that Defendants UNC-CH, Folt, Dean, Roper, Burks, and Mauro resided in Orange County at all times relevant to this case. Plaintiff nonetheless argues that venue is proper in Wake County because "UNC resides in Wake County and venue is proper there." Plaintiff contends that "UNC's corporate body is more akin to a starfish than a person, with each constituent institution a co-equal arm." Employing this logic, Plaintiff maintains that an action against any institution under the "UNC umbrella" may be filed in any county in which one of its sixteen constituents has a "principal office" or "wherever it maintains a business presence." Indeed, Plaintiff alleged in his Petition for Judicial Review, filed in Orange County, that UNC is

"capable to be sued in all courts whatsoever . . . ." Plaintiff proffers no authority to support these positions.[4]

The "University of North Carolina is a public, multicampus university dedicated to the service of North Carolina and its people. It encompasses the 16 diverse constituent institutions and other educational, research, and public service organizations." N.C. Gen. Stat. § 116-1(b) (2019). UNC is an "agency of the State[.]" *Martinez v. Univ. of N. Carolina*, 223 N.C. App. 428, 431, 741 S.E.2d 330, 332 (2012); *Appeal of Univ. of N. Carolina*, 300 N.C. 563, 572, 268 S.E.2d 472, 478 (1980). Moreover, UNC is "located" for venue purposes in Orange County. *See generally Willingham v. Univ. of N. Carolina*, No. 5:14-CV-432, 2014 WL 6606578, at *2 (E.D.N.C. Nov. 19, 2014) (noting that all parties to an action brought against UNC—including many of the same Defendants named in this case—are located in Orange County for venue purposes). Moreover, in the Orange County complaint, Plaintiff acknowledged that "UNC has a principal place of business in Orange County, North Carolina." Also, Plaintiff concedes that, under N.C. Gen. Stat. § 1-82, venue is proper wherever UNC has a "principal office." Accordingly, because Plaintiff filed suit against an agency of the State, which is located in Orange County, and public officers associated therewith, and because all parties resided in Orange County for venue purposes at the time of the commencement of Plaintiff's suit, this matter should be adjudicated in Superior Court, Orange County. *Smith v. State*, 289 N.C. 303, 334, 222 S.E.2d 412, 432 (1976) ("[N.C. Gen. Stat. §] 1-77, however, does not apply to actions against the State . . . . This case, therefore, is governed by [N.C. Gen. Stat. §] 1-82 . . . . We recognize that there may be reasons why any action against the State should be brought in Wake County, where its capital is located. If so, the General Assembly will undoubtedly so provide."). "While a party has a right to a legally proper venue, a party does not have a right to a preferred venue." *Stokes v. Stokes*, 371 N.C. 770, 774, 821 S.E.2d 161, 164 (2018).

"[W]hen an action is instituted in the wrong county, the Superior Court should, upon apt motion, remove the action, not dismiss it."

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4. We do not reach Plaintiff's argument that N.C. Gen. Stat. § 1-79 governs this case as Plaintiff provides no support for the proposition that UNC (or any other Defendant) is a "domestic corporation" under N.C. Gen. Stat. § 1-79 (2019) or N.C. Gen. Stat. § 55-1-40(4) (2019) (defining "corporation" and "domestic corporation" under the North Carolina Business Corporation Act). Moreover, Plaintiff does not identify UNC (or any other Defendant) as a domestic corporation in the *unverified* Wake County complaint. *See generally Kiker v. Winfield*, 234 N.C. App. 363, 365, 759 S.E.2d 372, 373 (2014), *aff'd*, 368 N.C. 33, 769 S.E.2d 837 (2015) (holding that allegations in unverified complaint were insufficient to establish venue).

Coats v. Sampson Cty. Mem'l Hosp., Inc., 264 N.C. 332, 335, 141 S.E.2d 490, 492 (1965) (citations omitted). Accordingly, we decline Defendants' invitation to dismiss this action outright; rather, under the facts of this case, the matter shall be transferred to the proper venue–Superior Court, Orange County.

III. Conclusion

For the foregoing reasons, we vacate the trial court's 19 June 2019 order and remand to Superior Court, Wake County with instructions to transfer this action to Superior Court, Orange County.

VACATED AND REMANDED.

Judges DIETZ and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
DARRELL TRISTAN ANDERSON, DEFENDANT

No. COA19-841

Filed 31 December 2020

1. Constitutional Law—Eighth Amendment—juvenile offender —consecutive life sentences with parole—constitutionally permissible

The trial court's imposition of two consecutive life sentences with the possibility of parole on defendant—who was 17 years old when he committed two murders—did not violate defendant's rights under the Eighth Amendment to the U.S. Constitution or Art. I, sec. 27 of the North Carolina Constitution. Although defendant would not be eligible for parole for fifty years, the sentences did not constitute a de facto life sentence without parole because they did not exceed his expected lifespan.

2. Sentencing—two life sentences—concurrent versus consecutive—trial court did not exercise discretion—remanded for resentencing

The trial court erroneously determined it lacked discretion to have defendant's two sentences for murder run concurrently, rather than consecutively, at defendant's new sentencing hearing (held after defendant's motion for appropriate relief was granted).

Where the trial court resentenced defendant from two consecutive sentences of life without parole to two consecutive sentences of life with the possibility of parole, but indicated it might have chosen a different option if allowed to do so, the matter was remanded for resentencing. There was nothing in the statutes to suggest that N.C.G.S. § 15A-1354(a) (giving trial courts discretion to have multiple sentences run concurrently or consecutively) did not apply to new sentencing hearings under N.C.G.S. § 15A-1340.19B.

Chief Judge McGEE dissenting.

Appeal by Defendant from judgments entered 20 February 2019 by Judge Joseph N. Crosswhite in Superior Court, Davidson County. Heard in the Court of Appeals 25 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

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

DILLON, Judge.

Defendant Darrell Tristan Anderson was sentenced to two consecutive sentences of life without parole ("LWOP") for two murders he committed when he was 17 years old.

Following the General Assembly's enactment of N.C. Gen. Stat. § 15A-1340.19A, *et seq*. to comply with *Miller v. Alabama*, 567 U.S. 460 (2012), Defendant filed a motion for appropriate relief ("MAR") requesting resentencing.

Defendant's motion was granted, and he was resentenced to two consecutive terms of life *with* parole. Based on the statute, under these sentences, Defendant will be eligible for parole after 50 years imprisonment when he is 67 years of age. Defendant appeals.

I. Argument

[1] On appeal, Defendant contends that this punishment – two consecutive life sentences with parole – amounts to a *de facto* LWOP sentence and is unconstitutional under the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution.

This Court recently held an identical sentence unconstitutional on these grounds in *State v. Kelliher*, 273 N.C. App. 616, 849 S.E.2d 333 (2020). However, our Supreme Court has stayed *Kelliher* and granted discretionary review of that decision. Accordingly, *Kelliher* is not binding on our Court.

We hold that the sentences imposed by the trial court, though significant, are not unconstitutional. *Miller v. Alabama* has never held as being unconstitutional a life *with* parole sentence imposed on a defendant who commits a murder when he was 17 years old. Here, Defendant will be eligible for parole in 50 years. Assuming that a *de facto* LWOP sentence (where a defendant is sentenced to consecutive terms for multiple felonies) is unconstitutional, we hold that a 50-year sentence does not equate to a *de facto* life sentence based on the evidence in this case. Our General Statutes recognize that the life expectancy for a 17-year old is 59.8 years. N.C. Gen. Stat. § 8-46 (2002).

[2] Defendant also argues that the trial court erred by determining it lacked discretion to modify Defendant's sentence to run concurrently, rather than consecutively, as he was originally sentenced. For the reasons explained below, we agree and remand for resentencing.

The trial court stated that it lacked jurisdiction to order the terms to run concurrently. The court did state that it "was not inclined to do so," assuming it did have the jurisdiction. But this statement does not reflect what the trial court would actually do if it was forced to make a decision. People often end up doing things they are not "inclined" to do. It is apparent then that the trial court did not exercise discretion to determine whether a concurrent sentence might be appropriate.

Sections 15A-1340.19A-C, which governed the MAR hearing, described the procedure as a new sentencing hearing. N.C. Gen. Stat. § 15A-1340.19A-C (2019). Section 15A-1340.19B states that the trial court may only sentence the defendant in this context either to LWOP or life with parole. N.C. Gen. Stat. § 15A-1340.19B. However, the Section is silent as to whether the trial court can sentence the defendant to concurrent terms, even though he was sentenced previously to consecutive terms.

Section 15A-1354, though, states that when "multiple sentences of imprisonment are imposed on a person at the same time[,]" the trial court has discretion to determine whether those sentences are to run consecutively or concurrently. N.C. Gen. Stat. § 15A-1354(a). There is nothing in this statute that suggests that it does not apply to a new sentencing hearing under N.C. Gen. Stat. § 15A-1340.19B.

We hold, therefore, that the trial court does have discretion to determine whether multiple sentences are to run concurrently, notwithstanding how the defendant might have been sentenced previously. We, therefore, remand for resentencing on this issue.

II. Conclusion

For the foregoing reasons, we affirm the portion of the judgment imposing two sentences of life with parole. However, we vacate the portion of the judgment directing that the sentences are to run consecutively. We remand that portion for a new hearing and direct the trial court to exercise discretion to determine whether consecutive or concurrent sentences are appropriate.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judge MURPHY concurs.

Chief Judge McGEE dissents by separate opinion.

McGEE, Chief Judge, concurring in part and dissenting in part.

I agree with the majority that N.C. Gen. Stat. §§ 15A-1340.19A, *et seq*. does not prohibit consecutive sentences as a statutory matter based on the reasoning stated in my dissent in *State v. Conner*, 275 N.C. App. ___, 853 S.E.2d 824 (filed December 31, 2020). I also agree with the majority's determination that Defendant must be resentenced. However, because I would hold that consecutive sentences of life with parole constitute a *de facto* life without parole ("LWOP") punishment prohibited by our state and federal constitutions as explained in *State v. Kelliher*, 273 N.C. App. 616, 849 S.E.2d 333, *temp. stay allowed*, 376 N.C. 554, 848 S.E.2d 493 (2020), I respectfully dissent.

I. FACTUAL AND PROCEDURAL HISTORY

Although I would decide this appeal consistent with *Kelliher*, the individual facts leading to Defendant's convictions, sentencing, and resentencing are unique. Those particular details are recited below to describe Defendant's specific circumstances and provide relevant context absent from the majority.

A. Defendant's Early Life

Defendant was born in 1984 as the youngest of four children. He lived with his brother, two sisters, and both parents, but his father, James

Anderson, Sr. ("Mr. Anderson"), did not contribute to raising Defendant. Instead, Defendant's mother and his three siblings took responsibility for Defendant's care. Mr. Anderson was gainfully employed, but the family frequently went without electricity because he did not pay the utility bills; when the utility company would shut the lights off, Mr. Anderson would steal power by reconnecting it himself.

Mr. Anderson regularly smoked crack cocaine at home and would choke his children; Mr. Anderson first physically abused Defendant in this manner at age five. He also encouraged Defendant to drink often by supplying him with alcohol as early as age seven. His abuse further included sexually molesting Defendant's two sisters when they were as young as age six. In 2008, Mr. Anderson was convicted of sexually abusing a child outside the nuclear family.

Defendant was ill-behaved early on and frequently fought with his older brother; he was eventually diagnosed with ADHD and prescribed Ritalin. At around ten years old, Defendant started living part-time with his older sister, who had since moved into her own house. She tried to be a positive influence on her younger brother and was apparently successful; Defendant never got into trouble while living there, was able to control his ADHD with Ritalin, and told his sister that he wanted to grow up, have a family, and be a writer. He was also succeeding in school, and his teachers spoke well of him to his sister.

Defendant had few other good role models. When Defendant was eleven, his older brother participated in a robbery and murder. Defendant's older cousin, Eddie Neely, was his only friend, and the two would spend time together at Defendant's parents' house. Mr. Neely used and dealt cocaine, and, according to Defendant's sister, would "tell [Defendant] to do all his bad things. . . . Eddie was just using [Defendant] to do his dirty work."

Defendant's behavior and family life declined when he stayed at his parents' house and outside the presence of his sister. He began to use marijuana at age 13 and was smoking marijuana and drinking alcohol on a daily basis by the following year. This drug use—which sometimes involved Mr. Neely—would extend to powdered cocaine and ecstasy later. His father grew increasingly physically abusive as Defendant aged, on one occasion going so far as to attack Defendant with an axe. When Defendant turned 17, he began smoking crack cocaine with his father. Defendant dropped out of school that same year.

B. The Robbery and Murders

Defendant and Mr. Neely were spending time together on the night of 3 December 2002 when they decided to sell crack cocaine to an acquaintance, Myra Hedgepeth. The two arrived at Ms. Hedgepeth's home to find her with her boyfriend, Edward Baird, and two other men. The group smoked crack cocaine and drank beer together before Defendant, Mr. Neely, and one of the other men at the house left to drink liquor elsewhere.

Around 10:00 p.m., and after he and Defendant had returned to Defendant's home, Mr. Neely told Defendant he wanted more crack cocaine. They considered robbing a convenience store for drug money but ultimately decided to rob Ms. Hedgepeth instead. Defendant took a shotgun from his closet and the two walked back to Ms. Hedgepeth's house to carry out the crime.

Ms. Hedgepeth was not at the home when Defendant and Mr. Neely arrived. They were greeted instead by Mr. Baird, who Defendant took hostage in the living room while Mr. Neely went to find Ms. Hedgepeth. Mr. Neely located her and brought her back to the house; once inside, Mr. Neely subdued the couple while Defendant searched Ms. Hedgepeth's belongings for cash.

Defendant's search came up empty. He asked Ms. Hedgepeth where her money was, and she replied that she did not have any. Moments later, Defendant shot Mr. Baird in the head.

Ms. Hedgepeth attempted to flee, pushing Defendant towards Mr. Neely while she ran for the door. Defendant managed to grab her and a struggle ensued. The shotgun fired again during the course of the fight, striking Mr. Neely in the hand. Ms. Hedgepeth eventually made it out of the house in the confusion. Defendant and Mr. Neely ran outside after her, where they found her lying in the front yard screaming. Defendant shot and killed her, and the two fled the scene in Ms. Hedgepeth's car.

Defendant and Mr. Neely were arrested in connection with the murders, each telling the police that the other shot and killed Mr. Baird and Ms. Hedgepeth. Defendant later revised his earlier statements and confessed to killing both victims.

C. Defendant's Plea, Sentencing, and Resentencing

Defendant was indicted on two counts each of first-degree murder and robbery with a dangerous weapon in December of 2002. The State filed a notice of intent to seek the death penalty the following January,

and a grand jury issued superseding indictments for two counts of first-degree murder with aggravating circumstances a month later. Defendant subsequently pled guilty to the murder charges in exchange for dismissal of the robbery counts and two sentences of life without parole. The trial court entered judgments consistent with the plea in August of 2003.

After the General Assembly enacted N.C. Gen. Stat. §§ 15A-1340.19A, *et seq*. in an effort to comply with *Miller*, Defendant filed an MAR on 26 June 2013 requesting a new sentencing hearing. The trial court granted Defendant's motion in an order entered a week later.

By 2018, Defendant had not yet received a resentencing hearing. His counsel filed a motion challenging the constitutionality of both LWOP sentences and N.C. Gen. Stat. § 15A-1340.19A that November, which was heard at his resentencing hearing on 20 February 2019. At resentencing, and after the State recited the facts of Defendant's crimes, Defendant offered evidence in mitigation through the testimony of Defendant's sister. In addition to recounting Defendant's upbringing, she described how Defendant had changed in prison:

> Well, since he's been incarcerated, he . . . wrote a 500-page book and then he wrote maybe about four or five little small books that I'm trying to get published.
>
> . . . .
>
> The stories [are] about young teens getting in trouble.
>
> . . . .
>
> [H]e's trying to encourage teens and abus[ed] children[] not to follow no one's steps, for one. And listen to people getting in trouble. Change [their] [lives] around[.]

His sister further testified that Defendant had attained his GED and job training in upholstery while incarcerated.

Defendant also offered documentary evidence in mitigation. This included several of his short stories and a report from the Department of Correction disclosing Defendant's full scale I.Q. of 65, reflecting a "notable life deficit" in learning. Defendant's presentation concluded with an allocution in which he expressed regret for his crimes and detailed how his troubled upbringing and drug abuse substantially diminished his mental and moral development. He further explained his desire to help children learn from his mistakes, but was concerned that consecutive sentences of life with parole would "hinder [his] success and

prevent [him] from reaching the children and being successful at [his] desire and [his] dreams and dedicating something to society." The trial court responded to the allocution by saying, "I've been doing this job for eleven years and that's one of the most powerful things I've ever heard anybody say. . . . So I want to thank you for saying that. I just want to acknowledge that. So thank you very much for saying that." The judge then asked Defendant if he had another copy of his written allocution so the court could mark it as an exhibit and place it in the file.

In closing arguments, Defendant's counsel asked the trial court to sentence Defendant to concurrent sentences of life with parole, as the alternative presented, "under the auspices of the Eighth Amendment, . . . a de facto life without parole [sentence]." The prosecutor responded by first acknowledging that "it was my opinion that [Defendant's] apology was sincere and that his remorse was genuine." He then "concede[d] that the defendant has presented evidence from which the Court could find . . . [facts in] mitigation" under N.C Gen. Stat § 15A-1340.19B(c). The State also stated that it would "trust the Court to weigh whether a sentence of life with or without parole is appropriate in light of that mitigating evidence." As for whether Defendant's sentences should run concurrently or consecutively, the State argued that the former would be contrary to his plea agreement, and that: (1) such a sentence was procedurally barred by denial of a prior MAR in which Defendant argued his plea was not freely and voluntarily made; (2) the trial court lacked jurisdiction to enter concurrent sentences because Defendant's MARs did not "provide a factual and legal basis for that relief[;]" (3) Defendant's evidence at resentencing did not support a conclusion that his plea was involuntarily given; and (4) the facts of Defendant's crimes support a discretionary imposition of consecutive sentences.

The trial court announced its sentencing decision from the bench, ordering that Defendant be sentenced to life with parole on both counts. It denied Defendant's motion and request for concurrent sentences, concluding that it lacked jurisdiction and, even if it did have jurisdiction, would not run the sentences concurrently in its discretion. Defendant gave oral notice of appeal, and the trial court entered written orders and judgments consistent with its oral ruling following the hearing.

II. ANALYSIS

Defendant's sentences, which place parole eligibility at age 67 after 50 years imprisonment, are identical to the sentences this Court held unconstitutional in *Kelliher* following consideration of *Roper v. Simmons*, 543 U.S. 551, 161 L. Ed. 2d 1 (2005), *Graham v. Florida*, 560

U.S. 48, 176 L. Ed. 2d 825 (2010), *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), and *Montgomery v. Louisiana*, ___ U.S. ___, 193 L. Ed. 2d 599 (2016). As we held in that case:

> (1) *de facto* LWOP sentences imposed on juveniles may run afoul of the Eighth Amendment; (2) such punishments may arise out of aggregated sentences; and (3) a sentence that provides no opportunity for release for 50 or more years is cognizable as a *de facto* LWOP sentence. Consistent with the Eighth Amendment as interpreted by *Roper*, *Graham*, *Miller*, and *Montgomery*, these holdings compel us to reverse and remand Defendant's sentence. Under different circumstances, we would leave resentencing to the sound discretion of the trial court. Here, however, we hold that of the two binary options available—consecutive or concurrent sentences of life with parole—one is unconstitutional. We therefore instruct the trial court on remand to enter two concurrent sentences of life with parole as the only constitutionally permissible sentence available under the facts presented.

Kelliher, 273 N.C. App. at 644, 849 S.E.2d at 352 (citation omitted). That decision's reasoning applies with equal force to this case, and I would hold that the same relief should be granted here.

The majority, as in *Conner*, declines to apply *Kelliher*'s reasoning because: (1) "*Miller* has never held as being unconstitutional a life with parole sentence imposed on a defendant who commits a murder when he was 17 years old[;]" and (2) the life expectancy and mortality table found in N.C. Gen. Stat. § 8-46 (2019) lists a 17-year old's life expectancy as 59.8 years. In making its first point, the majority does not address the numerous decisions from state appellate courts—expressly relied upon in *Kelliher*—that have held *Miller* does apply to juveniles convicted of homicides and sentenced to terms of imprisonment that are the functional equivalent of a LWOP punishment. *See*, *Kelliher*, 273 N.C. App. at 633-34 n. 11, 849 S.E.2d at 345 n. 11 (citing 17 states whose appellate courts have recognized lengthy term-of-years sentences as *de facto* LWOP sentences subject to the constitutional protections of *Roper*, *Graham*, and/or *Miller*, including eleven decisions with holdings that directly applied those protections to a juveniles convicted of homicide or would apply them to such cases).

To the extent the statutory mortality table found in N.C. Gen. Stat. § 8-46, which was not relied upon by the State at resentencing or on

appeal, applies to the constitutional question before this Court, that statute by its very terms provides that it "*shall* be received . . . *with other evidence as to the health, constitution and habits of the person*[.]" (emphasis added). Thus, the life expectancy "table . . . is not conclusive, but only evidentiary," *Young v. E. A. Wood & Co.*, 196 N.C. 435, 437, 146 S.E.2d 70, 72 (1929) (construing a predecessor statute), and "life expectancy is determined from evidence of the plaintiff's health, constitution, habits, and the like, *as well as* from [the statutory] mortuary tables." *Wooten v. Warren by Gilmer*, 117 N.C. App. 350, 259, 451 S.E.2d 342, 359 (emphasis added) (citation omitted). The 59.8 year life expectancy for 17-year-old minors found in the statute cannot be said to be conclusive in light of Defendant's "health, constitution, habits, and the like." *Id.* For example—and setting aside any impact that a minimum of 50 years of imprisonment will have on Defendant—it is uncontroverted that Defendant has a years-long history of heavy and varied drug abuse dating back to at least age seven that could bear upon longevity.

In sum, though I agree with the majority that Defendant should be resentenced, the majority does not convince me that *Kelliher*'s analysis is inapplicable to the present case. I would reverse Defendant's sentence and remand with the instruction to resentence him to concurrent terms of life with parole. *See Kelliher*, 273 N.C. App. at 644, 849 S.E.2d at 352. For these reasons, I respectfully dissent from the majority's holding to the contrary.