279 N.C. App.—No. 4 Pages 514-684

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

APRIL 12, 2022

MAILING ADDRESS: The Judicial Department
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OF

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COURT OF APPEALS

CASES REPORTED

FILED 5 OCTOBER 2021

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Denial of motion to suppress—failure to preserve right to appeal—by no fault of defendant—After pleading guilty to charges of drug trafficking and possession of a firearm by a felon, defendant failed to preserve his appeal from the denial of his motion to suppress where the plea transcript did not include a statement by defendant reserving the right to appeal the trial court's judgment. However, because defendant had lost his right to appeal through no fault of his own but rather due to his trial counsel's failure to give proper notice of appeal, defendant's appeal was reviewed by certiorari. **State v. Robinson, 643.**

Interlocutory appeal—motion to transfer—three-judge panel—facial constitutional challenge—In an action asserting claims for alienation of affection and criminal conversation (together, "covenant claims"), and intentional and negligent infliction of emotional distress, defendant's appeal from an order denying his motion to transfer the case per Civil Procedure Rule 42(b)(4) for a three-judge panel to review his facial constitutional challenge to N.C.G.S. § 52-13 (codifying the covenant

claims as actionable) was dismissed as interlocutory. Although the denial of a motion to transfer may be immediately appealable as affecting a substantial right, here, defendant could not show he was deprived of a substantial right where statutory mandatory transfer rules did not apply because not all issues unrelated to the constitutional challenge had yet been resolved. Further, nothing prevented defendant from raising the constitutional challenge before a three-judge panel if the covenant claims survived summary judgment. **Hull v. Brown, 570.**

Interlocutory order—substantial right—defense of absolute privilege—In a libel suit brought by plaintiffs who were accused in an election protest of illegal double-voting, the trial court's interlocutory order granting summary judgment to plaintiffs on defendants' affirmative defenses—including absolute privilege regarding the allegedly defamatory statements that were made in a quasi-judicial proceeding—was immediately appealable because the denial of immunity under the absolute privilege claim affected a substantial right. **Bouvier v. Porter, 528.**

Interlocutory order—substantial right—First Amendment violation—ecclesiastical abstention doctrine—In a lawsuit arising from an employment dispute between a church and one of its former pastors, in which the pastor filed a counterclaim against the church and a third-party complaint against a group of church elders, the church and the elders (appellants) were entitled to immediate review of their appeal from an interlocutory order denying their motion to dismiss the pastor's claims and granting the pastor's motion to amend his pleadings. The challenged order affected a substantial right where appellants argued that, to resolve the pastor's claims, the court would have to interpret religious matters in violation of the ecclesiastical abstention doctrine stemming from the First Amendment. **Nation Ford Baptist Church Inc. v. Davis, 599.**

Interlocutory orders—substantial right—res judicata—paternity—In a child support case in which the issue of paternity was raised, the appellate court invoked Appellate Rule 2 to consider the Child Support Enforcement Agency's argument raised in its reply brief that the interlocutory order continuing hearing of a "Motion to Modify/Order to Show Cause" affected a substantial right, in that the issue of paternity had previously been adjudicated. The appellate court elected to consider the merits of the appeal in order to prevent manifest injustice. **Guilford Cnty. v. Mabe, 561.**

Interlocutory orders—writ of certiorari—serious question that might escape review—The appellate court invoked Appellate Rule 2 and issued a writ of certiorari pursuant to Appellate Rule 21 to review an interlocutory order that was not entitled to immediate appeal but that raised a serious question, regarding the trial court's exercise of jurisdiction in supplemental proceedings, that might otherwise escape review. **Milone & MacBroom, Inc. v. Corkum, 576.**

Preservation of issues—statutory right to confront witnesses—probation revocation hearing—objection—insufficient—At a probation revocation hearing, where a law enforcement officer with no personal knowledge of the case testified to the contents of notes written by defendant's probation officer, defendant failed to preserve for appellate review his argument that the trial court violated his statutory right to confront witnesses (N.C.G.S. § 15A-1345(e)), despite objecting to the testimony, because he did not specify the statutory violation as the grounds for his objection, nor were such grounds apparent from context where defendant did not request his probation officer to appear at the hearing. Further, because defendant failed to

church and his third-party complaint against a group of church elders, in which he alleged that the church (through the elders) violated then-controlling church bylaws when firing him. A determination of whether the pastor also had standing to bring a derivative action on the church's behalf—seeking money damages from the elders for breaching their fiduciary duties to the church—required a preliminary determination of which church bylaws governed at the relevant time, which could not be made on appeal. **Nation Ford Baptist Church Inc. v. Davis, 599.**

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Children born out of wedlock—challenges—proper motion—In a child support case in which defendant's paternity of a child had previously been adjudicated, the appellate court held that, even assuming defendant and the mother were not married at the time the child was born so that N.C.G.S. § 49-14(h) was applicable, the word "paternity" being written on defendant's motion to modify child support did not meet the standard of a "proper motion" pursuant to section 49-14(h), and defendant failed to allege any proper legal basis for requesting paternity testing to challenge the prior adjudication of paternity. **Guilford Cnty. v. Mabe, 561.**

PLEADINGS

Motion to amend—Rule 15—counterclaim and third-party complaint—employment dispute—In a lawsuit arising from an employment dispute between a church and one of its former pastors, the trial court did not abuse its discretion by granting the pastor's motion to amend his counterclaim against the church and his third-party complaint against a group of church elders. The church could not show any justifiable reason for denying the pastor's motion, nor did any material prejudice result from the court's decision to grant it. **Nation Ford Baptist Church Inc. v. Davis, 599.**

PROBATION AND PAROLE

Clerical error—checked box on judgment form—multiple probation violations as independent grounds for revocation—After the trial court determined that defendant had absconded and had used illegal drugs while on probation, the order revoking defendant's probation was remanded where the court erroneously checked a box on the judgment form indicating that both probation violations independently justified revocation. The record indicated that the court revoked defendant's probation solely on grounds that defendant absconded, and therefore the checked box was deemed a clerical error in need of correction. **State v. Thorne, 655.**

Probation revocation—absconding—in-court admission by defendant—waiver of presentation of State's evidence—The trial court did not abuse its discretion in revoking defendant's probation where defendant, appearing pro se, repeatedly admitted during the revocation hearing that he had absconded from supervision, and therefore waived the requirement that the State present competent evidence that he violated a condition of his probation. **State v. Brown, 630.**

Probation revocation—judgment form—clerical errors—A judgment revoking defendant's probation was remanded for the trial court to correct three clerical errors in the judgment form, in which the court mistakenly listed a different crime than the one defendant was convicted of, listed the wrong number of probation violations alleged in the violation report, and inadvertently checked a box indicating

PROBATION AND PAROLE—Continued

that each violation alone could activate defendant's sentence when, in fact, the court revoked defendant's probation based solely on his absconding. **State v. Brown, 630.**

Revocation of probation—absconding—sufficiency of evidence—The trial court did not abuse its discretion by revoking defendant's probation for absconding where defendant admitted at the revocation hearing that, during a routine probation office visit, he told law enforcement he had taken drugs, was asked to provide a drug screening sample, and then left the office without authorization and without providing the sample. Further evidence showed that defendant's probation officer went twice to defendant's last known address, but defendant was not there, and that defendant did not contact the officer or the probation office for at least twenty-two days after walking out on his drug screen. **State v. Thorne, 655.**

PUBLIC OFFICERS AND EMPLOYEES

Career employees—dismissal—just cause—agency analysis of resulting harm —Where a career state employee was dismissed from her employment with a county department of social services (DSS) for using a racial epithet, meaningful appellate review of the determination by DSS that just cause existed to terminate was precluded where the agency did not consider the required resulting harm factor, one of several necessary factors set forth in *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583 (2015). The order of the administrative law judge (ALJ) imposing alternative discipline—after acknowledging the agency's failure to fully exercise its discretionary review—was remanded with instructions for the ALJ to remand to DSS to conduct a complete investigation. **Ayers v. Currituck Cnty. Dep't of Soc. Servs., 514.**

SENTENCING

Prior record level—calculation—unclear from record—stipulation invalid— Defendant was entitled to a new sentencing hearing because his stipulation to a prior record level worksheet that listed eighteen convictions was invalid where the record was indeterminate regarding which convictions were used to assign twelve points (making defendant a prior record level IV offender for sentencing purposes). The worksheet included several crossed-out and hand-written items, making it unclear whether the trial court improperly included convictions used as a predicate to establish defendant's status as a habitual felon. Further, if any of the out-of-state convictions were used, defendant's stipulation was inadequate to establish that they were substantially similar to North Carolina offenses, which involved a question of law to be proved by the State. **State v. Bunting, 636.**

STATUTES OF LIMITATION AND REPOSE

Legal malpractice—discovery of defect—genuine issue of material fact—In plaintiff's legal malpractice suit filed against his attorneys after his ex-wife successfully challenged a property settlement, the trial court improperly granted summary judgment to the attorneys after determining that the suit was time-barred. There was a genuine issue of material fact regarding when plaintiff reasonably could have discovered his attorneys' mistakes or any resulting consequences. It could be inferred from the evidence that plaintiff could not have discovered the mistakes until after his ex-wife moved to dismiss the domestic action, particularly where his attorneys continued to insist to plaintiff that the agreement was enforceable despite their failure to notarize documents related to the settlement. **Podrebarac v. Horack, Talley, Pharr & Lowndes, P.A., 624.**

WILLS

Patent ambiguity—personal property—testator's intent—Where a will contained a patent ambiguity regarding certain property—by bequeathing "all my personal property" to defendant but making conflicting bequests of specific personal property to others—the trial court properly resolved the discord in light of the prevailing purpose of the entire will and relevant attendant circumstances, concluding that certain contested property was intended to pass to plaintiffs rather than defendant. **Treadaway v. Payne, 664.**

N.C. COURT OF APPEALS
2022 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	10 and 24
February	7 and 21
March	7 and 21
April	4 and 25
May	9 and 23
June	6
August	8 and 22
September	5 and 19
October	3, 17, and 31
November	14 and 28
December	None (unless needed)

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

JUDITH M. AYERS, PETITIONER
v.
CURRITUCK COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT

No. COA20-464

Filed 5 October 2021

Public Officers and Employees—career employees—dismissal—just cause—agency analysis of resulting harm

Where a career state employee was dismissed from her employment with a county department of social services (DSS) for using a racial epithet, meaningful appellate review of the determination by DSS that just cause existed to terminate was precluded where the agency did not consider the required resulting harm factor, one of several necessary factors set forth in *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583 (2015). The order of the administrative law judge (ALJ) imposing alternative discipline—after acknowledging the agency's failure to fully exercise its discretionary review—was remanded with instructions for the ALJ to remand to DSS to conduct a complete investigation.

Judge GORE concurring with separate opinion.

Appeal by Respondent from final decision entered 5 May 2020 by Administrative Law Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Court of Appeals 23 March 2021.

Hornthal, Riley, Ellis, & Maland, L.L.P., by John D. Leidy, for petitioner-appellee.

The Twiford Law Firm, P.C., by John S. Morrison, for respondent-appellant.

MURPHY, Judge.

¶ 1 When a party challenges findings of fact and conclusions of law in an administrative law judge's ("ALJ") order reviewing discipline of a career State employee, we conduct a whole record test to determine whether substantial evidence supported the findings of fact and review the challenged conclusions of law de novo. When determining whether an agency had just cause for the disciplinary action taken against a

career State employee, we must evaluate: (1) whether the employee engaged in the conduct the employer alleges; (2) whether the employee's conduct qualifies as unacceptable personal conduct under the North Carolina Administrative Code; and (3) whether that employee's misconduct amounted to just cause for the disciplinary action taken. *See Warren v. N.C. Dep't. of Crime Control & Pub. Safety*, 221 N.C. App. 376, 382-83, 726 S.E.2d 920, 925, *disc. rev. denied*, 366 N.C. 408, 735 S.E.2d 175 (2012).

¶ 2 However, when the Record shows an agency failed to consider a necessary factor in determining appropriate disciplinary action to take against a career State employee, resulting in the agency's failure to fully exercise its discretionary review under *Wetherington v. N.C. Dep't of Pub. Safety*, the ALJ must remand to the agency for an investigation that considers each required factor. Without the agency's full consideration of all factors, we cannot conduct an adequate de novo review on appeal. *See Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583, 592, 780 S.E.2d 543, 548 (2015) ("*Wetherington I*"). Here, the agency failed to consider a required factor under *Wetherington I*–resulting harm from the career State employee's unacceptable personal conduct–in its decision to terminate the career State employee, and the administrative law judge failed to remand this matter to the agency for a complete investigation and consideration of the required factor.

BACKGROUND

¶ 3 Respondent-Appellant Currituck County Department of Social Services ("DSS" or "the agency") brings its second appeal in this case. While facts from this case are set out in the original appeal, *Ayers v. Currituck Cty. Dep't of Soc. Servs.*, 267 N.C. App. 513, 514-17, 833 S.E.2d 649, 651-53 (2019) ("*Ayers I*"), we include a recitation of "the facts and procedural history relevant to the issues currently before us." *Premier, Inc. v. Peterson*, 255 N.C. App. 347, 348, 804 S.E.2d 599, 601 (2017).

A. Prior to Incident

¶ 4 Petitioner-Appellee Judith Ayers had been employed with DSS from 2007 until the incident in 2017. Ayers was the supervisor for the Child Protective Services Unit at DSS who reported directly to the DSS Director. Neither party contests that Ayers was a career State employee.[1]

1. "Career State employee" is a term of art defined in N.C.G.S. § 126-1.1 as follows: "'[C]areer State employee' means a State employee or an employee of a local entity who is covered by this Chapter pursuant to [N.C.G.S. §] 126-5(a)(2) who: (1) Is in a permanent position with a permanent appointment, and (2) Has been continuously employed by the

¶ 5 Ayers consistently received positive work performance reviews and had never been disciplined as a DSS employee before the incident occurred. Until 30 June 2017, her boss was the DSS Director, Kathy Romm, who had hired Ayers; Romm had asked Ayers whether she wanted to take her position upon Romm's retirement. Ayers declined to pursue the position, and Romm hired another DSS employee, Samantha Hurd. Both Ayers and Hurd are Caucasian women.

¶ 6 Prior to Hurd's promotion, she supervised DSS's Foster Care Unit, and she and Ayers had a history of disagreements and conflict in their roles. The disagreements and conflict continued after Hurd's promotion.

B. Incident

¶ 7 On 3 November 2017, Hurd asked Ayers about a racial demarcation–"NR"–that a social worker had included on a client intake form; Hurd did not recognize the demarcation, asked Ayers what it stood for multiple times, and Ayers responded with a racial epithet. Ayers claimed she said "nigra rican," while Hurd claimed Ayers said "[n----] rican" ("the N word"). According to testimony from Hurd and Ayers, Ayers initially laughed about the comment, but became apologetic and embarrassed soon afterward. After investigation, Hurd and Ayers discovered the client referred to on the form was Caucasian.

C. Disciplinary Action

¶ 8 The incident occurred on Friday, 3 November 2017, and Hurd conferred with DSS's counsel over the following weekend. After receiving guidance, Hurd applied a twelve-factor test, derived from a guide for North Carolina public employers published by the University of North Carolina at Chapel Hill Institute of Government, to Ayers's comment and instituted disciplinary proceedings against her on Monday, 6 November 2017. The twelve-factor test[2] included the following considerations:

> 1. The nature and the seriousness of the offense and its relation to the employee's duties, position, and responsibilities, including whether the offense was

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State of North Carolina or a local entity as provided in [N.C.G.S. §] 126-5(a)(2) in a position subject to the North Carolina Human Resources Act for the immediate 12 preceding months." N.C.G.S. § 126-1.1(a) (2019). At the time of the incident and subsequent termination, Ayers was a career State employee.

2. Hurd obtained this twelve-factor test from the third edition of *Employment Law: A Guide for North Carolina Public Employers*, by Stephen Allred. *See* Stephen Allred, *Employment Law: A Guide for North Carolina Public Employer*s (3d ed. 1999).

intentional or technical or inadvertent, was committed maliciously or for gain, or was frequently repeated.

2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.

3. The employee's past disciplinary record.

4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers and dependability.

5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon [the] supervisor's confidence in the employee's ability to perform assigned duties.

6. The consistency of the penalty with those imposed[] upon other employees for the same or similar offenses.

7. The impact of the penalty upon the reputation of the agency[.]

8. The notoriety of the offense or its impact upon the reputation of the agency.

9. The clarity with which the employee was aware of any rules that were violated in committing the offense or had been warned about the conduct in question.

10. The potential for the employee's rehabilitation.

11. The presence of mitigating circumstances surrounding the offense such as unusual job tension; personality problems[;] mental impairment; harassment; or bad faith, malice or provocation on the part of others involved in the matter.

12. The adequacy and the effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

¶ 9 After meeting with Ayers, Hurd placed her on investigatory status with pay, and subsequently terminated her employment with DSS; Ayers appealed, and Hurd affirmed her decision. Ayers filed a *Petition for a Contested Case* Hearing with the Office of Administrative Hearings.

D. 13 June 2018 ALJ Decision

¶ 10 An ALJ held a contested case hearing on 19 April 2018 and reversed Hurd's termination decision in a *Final Decision* filed 13 June 2018 ("First ALJ Order"). Findings of Fact 23 and 47 in the First ALJ Order described Ayers's and Hurd's different recollections of the word Ayers used, but the First ALJ Order also included the word "negra-rican," which was a third variation of the word. A fourth variation, "negro-rican," appeared in Conclusion of Law 13. The ALJ applied the three-prong test from *Warren*, determined the first prong of "whether the employee engaged in the conduct the employer alleges[,]" was not met in light of the disagreements on verbiage, and reversed Hurd's termination of Ayers. *See Warren*, 221 N.C. App. at 382-83, 726 S.E.2d at 925. DSS appealed the First ALJ Order.

E. *Ayers I*

¶ 11 In an opinion filed 1 October 2019, we vacated and remanded the First ALJ Order. *Ayers I*, 267 N.C. App. at 513, 833 S.E.2d at 649. We noted Finding of Fact 23 from the First ALJ Order, which included a third and incorrect variation of the word used when describing the disagreement on epithet verbiage between Ayers and Hurd, was the "critical finding driving the ALJ's analysis" in its reversal of Hurd's termination decision. *Id.* at 523, 833 S.E.2d at 656. We found,

> the ALJ's [f]inding is not supported by the evidence in the Record[, particularly Ayers's own testimony]. It is then apparent the ALJ carried out the remainder of its analysis under the misapprehension of the exact phrase used and that the ALJ's understanding of the exact phrase used was central to both the rest of the ALJ's [f]indings and its [c]onclusions of [l]aw. Therefore, we vacate the [First ALJ Order] in its entirety and remand this matter for the ALJ to reconsider its factual findings in light of the evidence of record and to make new conclusions based upon those factual findings.

Id. at 524, 833 S.E.2d at 656-57. In addition to noting "the ALJ's conclusions and considerations of the 'totality of the circumstances' were also grounded in its misapprehension of the evidentiary record[,]" we held either " 'n----- rican' or the variant 'nigra rican' " "constitute[d] a racial epithet[,]" and DSS "met its initial burden of proving [Ayers] engaged in the conduct alleged under *Warren*." *Id.* at 525-26, 833 S.E.2d at 657-58. In vacating the First ALJ Order, we instructed the ALJ to "make new

findings of fact supported by the evidence in the record and continue its analysis under *Warren* of whether [Ayers] engaged in unacceptable conduct constituting just cause for her dismissal or for the imposition of other discipline." *Id.* at 526-27, 833 S.E.2d at 658.[3]

F. ALJ Decision on Remand

¶ 12 On remand, the ALJ entered its *Final Decision on Remand* ("Second ALJ Order") on 5 May 2020, made additional findings of fact and conclusions of law, applied the three-prong *Warren* test, and reversed DSS's termination of Ayers. The ALJ decided the first two prongs of the *Warren* test–Ayers engaging in the conduct alleged and the conduct constituting unacceptable personal conduct–were met. Ayers, as the appellee, does not contest that decision. However, the ALJ concluded the third prong of the *Warren* test–whether DSS had just cause for the disciplinary action taken under N.C.G.S. § 126-35(a)–was not met. *See Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925. In concluding a lesser disciplinary measure was warranted, the Second ALJ Order focused on: Ayers's "ten-year employment history with no prior disciplinary actions" and high performance reviews; that Hurd "did not think it was significant whether anyone heard [Ayers's] comment"; the lack of evidence that this one-time comment was harassment of a specific individual or caused actual harm to DSS, until DSS revealed the incident to others; and that DSS's decision "was influenced by . . . past philosophical differences [between Hurd and Ayers] and their past history." However, the Second ALJ Order also found that "[DSS] did not consider if [Ayers's] . . . comment caused any actual harm to the agency's reputation. [DSS] only considered potential harm to the agency." The Second ALJ Order also acknowledged the lack of resolution regarding whether anyone other than Hurd heard Ayers's epithet, which the ALJ deemed a "necessary consideration." Despite the lack of resolution of the resulting harm factor from *Wetherington I*, the Second ALJ Order retroactively reinstated Ayers with a two-week suspension without pay, ordered back pay, and ordered reimbursement of Ayers's attorney fees. *See Wetherington I*, 368 N.C. at 592, 780 S.E.2d at 548.

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3. In our review of the First ALJ Order in *Ayers I*, we reversed "the ALJ's conclusion that DSS 'failed to prove the first prong of *Warren*[,]'" and further held, "on remand, the ALJ should make new findings of fact supported by the evidence in the record and continue its analysis under *Warren* of whether [Ayers] engaged in unacceptable conduct constituting just cause for her dismissal or for the imposition of other discipline." *Ayers I*, 267 N.C. App. at 526-27, 833 S.E.2d at 658. As such, *Ayers I* did not reach the third prong of the *Warren* test–whether that employee's misconduct amounted to just cause for the disciplinary action taken. *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925. Here, the third prong of the *Warren* test is at issue for the first time.

¶ 13 DSS appeals the Second ALJ Order and presents the following three arguments: (A) "the ALJ made findings of fact not supported by substantial evidence" in its Second ALJ Order; (B) specific conclusions of law from the Second ALJ Order are erroneous; and, (C) DSS "had just cause to dismiss [Ayers]." After analyzing the nature of ALJ and appellate court review of an agency's disciplinary decision regarding a career State employee, including standards of review, we determine that our appellate review cannot meaningfully be conducted in light of DSS's investigation and the Second ALJ Order.

ANALYSIS

A. ALJ Review of Career State Employee Discipline

¶ 14 A career State employee may be disciplined for two reasons: unsatisfactory job performance ("UJP") or unacceptable personal conduct ("UPC"). *See* 25 N.C.A.C. 1J.0604(b) (2019). Under the North Carolina Administrative Code, just cause for the written warning, dismissal, suspension, or demotion of a career State employee may be established only on a showing of UPC or UJP, "including grossly inefficient job performance." 25 N.C.A.C. 1J.0604(a)-(b) (2019). Here, UJP is not the proffered reason for DSS's discipline of Ayers; instead, UPC is at issue.

¶ 15 UPC includes, *inter alia*, the following examples, which DSS accused Hurd of committing:

> (a) conduct for which no reasonable person should expect to receive prior warning;
>
> . . .
>
> (d) the willful violation of known or written work rules;
>
> (e) conduct unbecoming a [S]tate employee that is detrimental to [S]tate service . . . .

25 N.C.A.C. 1J.0614(8)(a), (d), (e) (2019); *see Ayers I*, 267 N.C. App. at 521-22, 833 S.E.2d at 655. Where a career State employee has committed UJP or UPC, "[t]he North Carolina Administrative Code sets forth four disciplinary alternatives, which may be imposed against an employee upon a finding of just cause: '(1) [W]ritten warning; (2) Disciplinary suspension without pay; (3) Demotion; and (4) Dismissal.' " *Harris v. N.C. Dep't of Pub. Safety*, 252 N.C. App. 94, 108, 798 S.E.2d 127, 137 (quoting 25 N.C.A.C. 1J.0604(a) (2017)), *aff'd per curiam*, 370 N.C. 386, 808 S.E.2d 142 (2017).

¶ 16 An ALJ has authority to impose discipline that is different from what the agency originally decided, as long as that discipline is approved under the North Carolina Administrative Code and just cause did not exist for the discipline imposed by the agency.

> An ALJ, reviewing an agency's decision to discipline a career State employee within the context of a contested case hearing, owes no deference to the agency's conclusion of law that . . . just cause existed . . . [for] the agency's action. . . . [W]hether just cause exists is a conclusion of law, which the ALJ had authority to review *de novo*.
>
> . . . .
>
> Because the ALJ hears the evidence, determines the weight and credibility of the evidence, makes findings of fact, and balances the equities, the ALJ has the authority under *de novo* review to impose an alternative discipline. Upon the ALJ's determination that the agency met the first two prongs of the *Warren* standard, but just cause does not exist for the particular disciplinary alternative imposed by the agency, the ALJ may impose an alternative sanction within the range of allowed dispositions.

Harris, 252 N.C. App. at 102, 109, 798 S.E.2d at 134, 138 (marks and citations omitted).

¶ 17 In conducting its de novo review of the agency's disciplinary investigation and determination, an ALJ reviews, *inter alia*, whether the agency, in the agency's discretionary review of whether to discipline a career State employee, considered the following required factors:

> [T]he severity of the violation, the subject matter involved, the resulting harm, the [career State employee's] work history, or discipline imposed in other cases involving similar violations. . . . [C]onsideration of these factors is an appropriate *and necessary component* of a decision to impose discipline upon a career State employee for [UPC].

Wetherington I, 368 N.C. at 592, 780 S.E.2d at 548 (emphasis added).

B. Appellate Court Just Cause Review

¶ 18 "It is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (marks omitted). "An appellate court's standard of review of an agency's final decision–and now, an administrative law judge's final decision–has been, and remains, whole record on the findings of fact and *de novo* on the conclusions of law." *Harris*, 252 N.C. App. at 102, 798 S.E.2d at 134.

¶ 19 Accordingly, "[d]etermining whether a public employer had just cause to discipline its employee *requires two separate inquiries*: first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken." *Carroll*, 358 N.C. at 665, 599 S.E.2d at 898 (emphasis added) (marks omitted). "The first half of the inquiry, *Carroll* instructs us, is a question of fact to be examined under the whole record test. The second half, by contrast, is a question of law to be examined *de novo*." *Early v. Cty. of Durham Dep't of Soc. Servs.*, 172 N.C. App. 344, 360, 616 S.E.2d 553, 564 (2005) (citing *Carroll*, 358 N.C. at 665-66, 599 S.E.2d at 898), *disc. rev. improvidently allowed*, 361 N.C. 113, 637 S.E.2d 539 (2006).

¶ 20 While the application of the whole record test to questions of fact is important,

> the fundamental question in a case brought under N.C.G.S. § 126-35 is whether the disciplinary action taken was just. Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations. Just cause is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case.

Wetherington I, 368 N.C. at 591, 780 S.E.2d at 547 (marks and citation omitted); see N.C.G.S. § 126-35(a) (2019) ("No career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause."). "Whether conduct constitutes just cause for the disciplinary action taken is a question of law we review *de novo*." *Warren*, 221 N.C. App. at 378, 726 S.E.2d at 923.

¶ 21 *Warren* summarized this precedent as follows:

> Just cause, like justice itself, is not susceptible of precise definition. It is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case. Thus, not *every* violation of law gives rise to just cause for employee discipline.
>
> . . . .
>
> We conclude that the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis. This avoids contorting the language of the Administrative Code defining unacceptable personal conduct.[] The proper analytical approach is to *first determine* whether the employee *engaged in the conduct* the employer alleges. The *second inquiry* is whether the employee's conduct falls within one of the categories of *unacceptable personal conduct* provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the *third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken*. Just cause must be determined based upon an examination of the facts and circumstances of each individual case.

Id. at 381, 382-83, 726 S.E.2d at 924, 925 (emphases added) (marks and footnote omitted).

C. Meaningful Appellate Review

¶ 22 Here, the first two prongs under *Warren*–whether Ayers engaged in the conduct the agency alleges and whether that conduct falls within disciplinable UPC–were met. Whether just cause existed for DSS to terminate Ayers's employment is the subject of this appeal, which we review de novo. *Id.* at 378, 726 S.E.2d at 923.

¶ 23 However, the ALJ found DSS did not consider one of the required factors under *Wetherington I*–the resulting harm from Ayers's UPC.

See Wetherington I, 368 N.C. at 592, 780 S.E.2d at 548. In challenging the Second ALJ Order, DSS does not address the *Wetherington I* factors, but instead emphasizes that Hurd appropriately used her discretion in making the disciplinary decision after thoroughly conducting the twelve-factor analysis from Stephen Allred's UNC School of Government publication *Employment Law: A Guide for North Carolina Public Employers*. *See Stephen Allred, Employment Law: A Guide for North Carolina Public Employers* (3d ed. 1999). The factors Hurd considered are listed in Finding of Fact 69, and do not include "resulting harm." *See Wetherington I*, 368 N.C. at 592, 780 S.E.2d at 548 (requiring consideration of the "resulting harm" from the career State employee's violation). DSS relies on our interpretation of *Wetherington I* in *Wetherington v. N.C. Dep't of Pub. Safety*, 270 N.C. App. 161, 840 S.E.2d 812 ("*Wetherington II*"), *disc. rev. denied*, 374 N.C. 746, 842 S.E.2d 585 (2020), to emphasize Hurd's discretion in making the decision to discipline Ayers. In *Wetherington II*, we stated: "Although the primary holding in [*Wetherington I*] was that public agency decision-makers must use discretion in determining what disciplinary action to impose in situations involving alleged unacceptable personal conduct, the Court did identify factors that are appropriate and necessary components of that discretionary exercise." *Wetherington II*, 270 N.C. App. at 190, 840 S.E.2d at 832 (quoting *Brewington v. N.C. Dep't of Pub. Safety*, 254 N.C. App. 1, 25, 802 S.E.2d 115, 131 (2017), *disc. rev. denied*, 371 N.C. 343, 813 S.E.2d 857 (2018)). DSS emphasizes our inclusion of "must use discretion" and "discretionary exercise" in the above quote and claims Hurd properly exercised her discretion through consideration of the factors, "all facts and circumstances, [and] different available punishments[.]"

¶ 24 However, *Wetherington I*, and our reasoning in *Wetherington II*, exemplify that DSS did not properly exercise its discretion in its disciplinary investigation of Ayers. In *Wetherington II*, we characterized the *Wetherington I* factors–severity of the violation, subject matter involved, resulting harm, work history, and discipline imposed in other similar cases–as "appropriate and necessary components" for consideration when an agency makes a disciplinary decision regarding a career State employee. *Id.* Additionally, we emphasized the "[r]espondent was directed to consider *all of these factors*, at least to the extent there was any evidence to support them. [The] [r]espondent could not rely on one factor while ignoring the others." *Id.* (emphasis added); *see also Wetherington I*, 368 N.C. at 592, 780 S.E.2d at 548. Similar to the respondent in *Wetherington II*, DSS was required to consider all of the factors from *Wetherington I*. However, the ALJ found that Hurd, as DSS's representative in the disciplinary decision regarding Ayers, did not consider

the necessary resulting harm factor, and thus did not consider all of the required factors.[4]

¶ 25 The ALJ's Findings of Fact 71 and 74–that DSS did not consider the required factor of resulting harm–are also supported by substantial evidence in the Record.[5] *See Harris*, 252 N.C. App. at 107, 798 S.E.2d at 137 (marks omitted) ("We afford a high degree of deference to the ALJ's findings, when they are supported by substantial evidence in the record."). DSS did not consider whether there was any harm to DSS in its consideration of discipline for Ayers, despite the detailed nature of Hurd's investigation. Instead, Hurd's testimony revealed she considered the *potential* for harm to the reputation of, and workers at, DSS and acknowledged the lack of evidence that anyone other than her heard Ayers's epithet. On cross-examination, Hurd testified:

> [AYERS'S COUNSEL:] You're talking about [considering] the potential for harm, right?
>
> [HURD:] Yes, sir.
>
> [AYERS'S COUNSEL:] But I'm asking whether you considered whether there was any actual harm resulting from her statement?
>
> [HURD:] Well, I don't know. I guess it depends on how it could be defined. She called the -- she referred to the children in the F family as [the N word] rican, and I heard it. I thought that was extremely offensive and inflammatory.
>
> [AYERS'S COUNSEL:] But you have no evidence that they were harmed in any way by her statement, right?
>
> [HURD:] Well, not that I know of.

Substantial evidence supports the ALJ's determination that Hurd, and DSS, did not consider a required factor under *Wetherington I*.

¶ 26 In *Wetherington I*, when our Supreme Court determined the employing agency did not conduct its discretionary disciplinary review appropriately, it remanded to the employing agency for a disciplinary review that employed, *inter alia*, the consideration of the factors required.

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4. Hurd admitted to her lack of investigation and consideration of the resulting harm to DSS from Ayers's UPC in the disciplinary decision.

5. On appeal, DSS challenges Findings of Fact 33, 39, 50, 55, 60, 67, 71, 74, 76, 77, and 82 as not supported by substantial evidence.

Wetherington I, 368 N.C. at 593, 780 S.E.2d at 548. Under *Wetherington I*, the ALJ and subsequently reviewing courts are tasked with conducting de novo review of DSS's disciplinary decision, relying on corresponding findings of fact from the ALJ regarding whether just cause existed to terminate Ayers; DSS's disciplinary investigation must be complete for proper, subsequent review of that decision to occur.

¶ 27 As a result of DSS's incomplete investigation, a remand was necessary for a completion of that investigation, and we cannot conduct meaningful de novo appellate review regarding whether just cause existed to terminate Ayers. *See Mills v. N.C. Dep't of Health & Human Servs.*, 251 N.C. App. 182, 193-95, 794 S.E.2d 566, 573-74 (2016) (noting "inadequacies in the ALJ's analysis frustrate meaningful [appellate] review"). DSS's failure to consider the resulting harm to the agency from Ayers's UPC was a failure to fully exercise its discretionary review under *Wetherington I*. The incomplete nature of DSS's investigation, as well as the ALJ's de novo review of DSS's disciplinary decision, is demonstrated by Conclusion of Law 24 from the Second ALJ Order, which stated "Hurd admitted that she did not think it was significant *whether* anyone heard [Ayers's] comment on [3 November 2017]. However, whether anyone else heard such statement was a *necessary consideration* in weighing the evidence *to determine* the severity of the conduct and *whether just cause existed* to terminate [Ayers]." (Emphases added). DSS did not make such a necessary consideration in its disciplinary investigation, rendering the investigation incomplete and the ALJ's findings regarding whether such harm occurred too speculative. For us to conduct meaningful appellate review regarding just cause for disciplinary action, the ALJ must make complete findings of fact regarding the harm to DSS resulting from Ayers's UPC, including whether any occurred. *See Wetherington I*, 368 N.C. at 593, 780 S.E.2d at 548. The ALJ can only make such findings if DSS conducts a complete investigation under *Wetherington I*.

¶ 28 Similar to our Supreme Court's mandate in *Wetherington I*, we must remand to the ALJ with instructions to remand to DSS to conduct a complete, discretionary review regarding Ayers's UPC and corresponding disciplinary action.

CONCLUSION

¶ 29 From a review of the Record and Transcript, DSS did not consider the necessary factor of resulting harm in her determination regarding whether and how to discipline Ayers. The ALJ's determination in the Second ALJ Order that DSS's investigation into Ayers's conduct was incomplete comports with *Wetherington I* and *II*. Under *Wetherington I*,

the appropriate remedy was to remand this matter to DSS with instructions to conduct a complete disciplinary investigation regarding Ayers's UPC. We remand to the ALJ with instructions to remand this matter to DSS for additional proceedings not inconsistent with this opinion.

REMANDED.

Judge DIETZ concurs.

Judge GORE concurs with separate opinion.

GORE, Judge, concurring.

¶ 30 I concur with the majority in its legal reasoning. However, I must draw attention to the concern I have for our current law to require a resulting harm in an employee and agency dispute that is charged with the unwavering responsibility of protecting children in North Carolina. Social workers employed by County Department of Social Services ("DSS") are on the front line of the battle against harm that might come to our children. The facts of this case are concerning.

¶ 31 I am troubled that our law requires a resulting harm that involves employees charged with protecting children. I know this standard is balanced against the rights afforded to state employees. However, I analyze that standard against the fact that the same state employees are responsible for substantiating facts related to the actual harm or risk of harm to children within areas of DSS care. It is arguable that a proven resulting harm to the agency might not directly affect a child in DSS care. In contrast, it can be put forth that anything negatively affecting DSS ultimately hurts a child in its care. It is this Court's responsibility to thoroughly analyze the law as it is and its results.

¶ 32 I want to make sure that it is discussed that conduct by state employees have varying degrees of resulting harm. A DSS employee's conduct that creates a resulting harm or even conduct that presents a risk of harm should not be taken lightly. Our child protective system works to prevent harm upon one of our most precious resources, our children, and the law should be equally vigilant. I hereafter concur.

BOUVIER v. PORTER

[279 N.C. App. 528, 2021-NCCOA-522]

LOUIS M. BOUVIER, JR., KAREN ANDREA NIEHANS, SAMUEL R. NIEHANS, AND JOSEPH D. GOLDEN, PLAINTIFFS

v.

WILLIAM CLARK PORTER, IV, HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC, STEVE ROBERTS, ERIN CLARK, GABRIELA FALLON, STEVEN SAXE, AND THE PAT MCCRORY COMMITTEE LEGAL DEFENSE FUND, DEFENDANTS

No. COA20-441

Filed 5 October 2021

1. Appeal and Error—interlocutory order—substantial right—defense of absolute privilege

In a libel suit brought by plaintiffs who were accused in an election protest of illegal double-voting, the trial court's interlocutory order granting summary judgment to plaintiffs on defendants' affirmative defenses—including absolute privilege regarding the allegedly defamatory statements that were made in a quasi-judicial proceeding—was immediately appealable because the denial of immunity under the absolute privilege claim affected a substantial right.

2. Elections—protest—defense of absolute privilege—applicability—quasi-judicial proceeding

In a libel suit brought by plaintiffs who were accused in an election protest of illegal double-voting, absolute privilege was available to defendants as an affirmative defense because statements made in an election protest to a county board of elections—which has statutory authority to conduct investigations into and make discretionary decisions about how elections are conducted—are statements made in the course of a quasi-judicial proceeding.

3. Elections—protest—defense of absolute privilege—challenge to individual voters—relevance to protest

In a libel suit brought by plaintiffs who were accused in an election protest of illegal double-voting, although plaintiffs argued that absolute privilege was not available to defendants as an affirmative defense on the basis that defendants' allegedly defamatory statements regarding individual voters should have been classified as an untimely voter challenge rather than an election protest (each governed by different statutory provisions), the statements were sufficiently relevant to the subject matter of the controversy put before the elections boards to qualify for the privilege.

4. Immunity—libel suit involving election protest—absolute privilege—applicable only to direct participant in suit

In a libel suit brought by plaintiffs who were accused in an election protest of illegal double-voting, the defense of absolute privilege applied to the individual who filed the election protest, but not to a candidate's legal defense fund or the law firm defendants hired by that fund to prepare the election protest. Since the privilege extends only to statements made in the due course of a judicial proceeding, where neither the defense fund nor the law firm defendants directly participated in the election protest proceedings or acted on behalf of the individual protestor, they were not entitled to the protection of absolute immunity.

Appeal by Defendants from Order entered 21 December 2019, by Judge R. Allen Baddour, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 24 March 2021.

Southern Coalition for Social Justice, by Jeffrey Loperfido and Allison J. Riggs, and Womble Bond Dickinson (US) LLP, by Pressly M. Millen and Ripley Rand, for plaintiffs-appellees Louis M. Bouvier, Jr., Karen Andrea Niehans, Samuel R. Niehans, and Joseph D. Golden.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Gary S. Parsons and Craig D. Schauer, for defendants-appellants Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, and Steven Saxe.

Blanchard, Miller, Lewis & Isley, P.A., by Philip R. Isley, and Higgins Benjamin, PLLC, by Robert N. Hunter, Jr., for defendant-appellant Pat McCrory Committee Legal Defense Fund.

Jewel A. Farlow for defendant-appellant William Clark Porter, IV.

Fox Rothschild LLP, by Matthew Nis Leerberg and Zachary Thomas Dawson, for amici curiae Sharad Goel, Marc Meredith, David Rothschild, and Houshmand Shirani-Mehr.

HAMPSON, Judge.

¶ 1 This appeal arises from a libel suit filed by Louis Bouvier, Jr. (Bouvier), Karen and Samuel Niehans (the Niehans), and Joseph Golden

(Golden) (collectively, Plaintiffs). Plaintiffs' libel suit is premised on allegations that, following the 2016 General Election, defamatory statements, including in election protests filed with their respective County Boards of Elections following the General Election, were made against Plaintiffs falsely accusing Plaintiffs of double-voting. As presently constituted, Plaintiffs' libel suit names: William Clark Porter, IV (Porter), under whose signature one of the election protests was filed; the Pat McCrory Legal Defense Fund (the Defense Fund); and Holtzman Vogel Josefiak Torchinsky PLLC (HVJT) along with HVJT attorneys Steve Roberts, Erin Clark, Gabriela Fallon, and Steven Saxe (HVJT and the HVJT attorneys are collectively referred to as the Law Firm Defendants), who were hired by the Defense Fund and were responsible for preparing the election protests at issue.

¶ 2 Porter, the Defense Fund, and the Law Firm Defendants (collectively, Defendants) now appeal from a partial Summary Judgment Order entered in favor of Plaintiffs. The trial court's Summary Judgment Order denied Defendants' Motion for Summary Judgment and granted Plaintiffs' Motion for Summary Judgment as to Defendants' affirmative defenses, and, thus, dismissed Defendants' claimed affirmative defenses of: absolute privilege; qualified privilege; fair report privilege; fair comment privilege; free speech defense; right to petition; immunity based on the Findings of the Guilford County Board of Elections; statutory right to make a protest; and failure to mitigate damages.

¶ 3 In this appeal, Defendants raise a single issue: whether the trial court erred in concluding none of the Defendants was entitled to the protection of absolute privilege from this defamation suit arising from allegations made in the election protests before County Boards of Elections. Thus, we review only this limited issue and make no determination on the merits of Plaintiffs' underlying libel claim or the availability of any other defenses to Defendants. Ultimately, we conclude that while Porter—who was a party to a quasi-judicial election protest proceeding—is entitled to absolute privilege, the remaining Defendants—who did not make their allegedly defamatory statements while participating in election protest proceedings in any capacity (e.g., as parties, witnesses, or attorneys), and thus, did not make allegedly defamatory statements in the course of a quasi-judicial proceeding—are not entitled to the defense of absolute privilege. As a result, we affirm the trial court's Summary Judgment Order in part, reverse it in part, and remand this matter to the trial court to enter Summary Judgment for Defendant Porter and to conduct further proceedings in the case. The Record before us tends to reflect the following:

Factual and Procedural Background

¶ 4 Plaintiffs, registered voters and North Carolina residents, each cast ballots in the 2016 General Election during early voting and did so in their county of residence—Bouvier and the Niehans in Guilford County; and Golden in Brunswick County. The 2016 General Election included a tightly contested gubernatorial race between then-incumbent Governor Pat McCrory and then-challenger Roy Cooper. Vote tallies the morning after the election reflected McCrory trailed Cooper by approximately 5,000 votes.

¶ 5 On 10 November 2016, in the wake of this close election, the McCrory campaign formed the Defense Fund "in preparation for an ongoing legal battle and associated expenses relating to the extended gubernatorial contest." The Defense Fund engaged Jason Torchinsky (Torchinsky) of HVJT to serve as the Defense Fund's counsel. HVJT is a law firm with offices in Virginia and Washington, D.C. A press release announcing the formation of the Defense Fund dated 10 November 2016 identified Torchinsky as "chief legal counsel" for the Defense Fund. Four HVJT lawyers—Defendants Steve Roberts, Erin Clark, Gabriela Fallon, and Steven Saxe—joined Torchinsky in North Carolina to work on the Defense Fund's post-election efforts. On this Record, it does not appear that any of these four lawyers were licensed or authorized to practice law in North Carolina. As a general proposition, the Law Firm Defendants claim the work they were doing in North Carolina on behalf of the Defense Fund did not constitute legal work or the practice of law. In particular, Attorney Roberts testified in deposition that this was so "[b]ecause [they] were not entering appearances before any judicial bodies."

¶ 6 The Law Firm Defendants, working with Republican National Committee data analysts, compiled a list of names of potential double voters and prepared election protest forms to be filed with County Boards of Elections challenging purportedly ineligible voters. The Defense Fund authorized the Law Firm Defendants to file election protests challenging these allegedly ineligible voters. However, the Defense Fund decided local residents—rather than then-Governor McCrory himself—should file the protests. On 17 November 2016, the McCrory campaign announced protests were being filed in 50 counties "to challenge known instances of votes being cast by dead people, felons or individuals who voted more than once[,]" seeking "to void anywhere between 100 to 200 ballots . . . ." These included the election protests at issue in this case alleging Plaintiffs each voted more than once in the 2016 General Election.

¶ 7 Attorney Roberts was charged with preparing the election protest forms to be filed in Guilford County, which included allegations against Bouvier and the Niehans. One such protest identified Bouvier and the Niehans as "persons known to have voted in multiple states" (Guilford County Protest). When asked what specific data he relied on that indicated these three Plaintiffs had voted in another state, Attorney Roberts testified:

> The specific data was that they appeared on a list produced by a data analyst who had run whatever processes on the data that were enough to satisfy [the analyst] and Jason Torchinsky, that there was enough . . . for him to reasonably believe those individuals . . . had voted in more than one jurisdiction in the same election.

When asked if he knew upon what data the analyst relied, Attorney Roberts testified: "I would have no reason to understand a dataset that I was looking at, so no."

¶ 8 Meanwhile, the Defense Fund identified Porter as a potential volunteer to file the Guilford County Protest. During a phone call from Attorney Roberts to Porter, Porter asked Attorney Roberts whether the protest was "frivolous, because [he] didn't want to attach [his] name to anything regardless of what it was if it was just frivolous[,]" to which Attorney Roberts replied, "no, it had meat." Following the conversation, Porter permitted Attorney Roberts via e-mail to sign the Guilford County Protest on his behalf. Attorney Roberts testified in preparing and filing the Guilford County Protest he did not engage in the practice of law or legal work on behalf of the Defense Fund. He also testified in filing the Protest he was not acting either as Porter's attorney or as Porter's "attorney in fact."

¶ 9 As far as Porter's knowledge of the allegations in the Guilford County Protest, when asked during his deposition whether he had heard of the individuals accused of double voting in the Protest, Porter replied:

> A. To the best of my knowledge, no.
>
> . . . .
>
> Q. What was the basis of accusing Karen Andrea Niehans of casting an invalid ballot and having voted in another state?
>
> A. What's the basis? Attorney Steve Roberts.
>
> Q. What Roberts told you?

A. Yes.

Q. Did Roberts tell you anything specifically about her?

A. Not that I recall. He may not even -- he may not have mentioned her name specifically.

Q. Okay. Do you personally have any basis for stating that she was, quote, known to have voted in multiple states?

A. Other than maybe what Attorney Roberts stated.

Q. Well, I understand you might have been told something by somebody else, but my question is do you have personal knowledge ---

A. --- I do not have any in-hand [sic] knowledge.

Q. Did you witness any misconduct on the part of Ms. Niehans?

A. To the best of my knowledge, no.

Q. Okay. The same questions regarding Samuel R. Niehans. What was the basis of accusing Samuel R. Niehans of casting an invalid ballot and having voted in another state?

A. Here, again, I -- to the best of my knowledge, I'm not even sure if their names were mentioned.

. . . .

Q. All right. Do you have any personal knowledge that he was known to have voted in a state other than North Carolina?

A. Not directly, no, other than what Attorney Roberts told me.

. . . .

Q. Okay. Did you witness any misconduct on the part of Mr. Niehans?

A. Obviously to the best of my knowledge, no.

Q. Okay. What was the basis of accusing Louis Maurice Bouvier, Jr. of casting a[n] invalid ballot and having voted in another state?

A. The same answer would apply from what you just asked, and with Attorney Steve Roberts.

Q. Do you have any recollection of a discussion specifically about Mr. Bouvier?

A. No.

Q. Do you have any personal basis for stating that he was known to have voted in more than one state?

A. I don't have any personal [sic] other than what Attorney Steve Roberts told me.

Q. Did you witness any misconduct on the part of Mr. Bouvier?

A. To the best of my knowledge, no.

¶ 10 The Guilford County Protest, filed on 17 November 2016, contained the following language:

> 5. Does this protest involve an alleged error in vote count or tabulation? If so, please explain in detail.
>
> Upon review of early voting files from other states, it appears that nine (9) individuals cast ballots in both North Carolina and another state. Casting a ballot in more than one state is a clear violation of North Carolina and federal election laws. Therefore, these ballots were erroneously counted and tabulated by the GUILFORD County Board of Elections.
>
> . . . .
>
> 8. Please provide the names, addresses, and phone numbers of any witnesses to any misconduct alleged by you in this protest, and specify what each witness listed saw or knows.
>
> William Porter
>
> . . . .
>
> Based on a review of the public records described in section 5 above, I allege as described herein.
>
> . . . .
>
> 10. Do you contend the allegations set out by you are sufficient to have affected or cast doubt upon the results of the protested election? If you answer is yes, please state the factual basis for your opinion.

> Yes. The described allegations clearly demonstrate that ballots cast by persons who voted in multiple states, for the election held on November 8, 2016 in GUILFORD County, are invalid under State law. The invalid ballots cast by persons who have voted in multiple states in violation of state and federal law, must not be counted for any office voted.

¶ 11 The first time Porter saw the Guilford County Protest itself was at his deposition. Prior to a 21 November 2016 hearing before the Guilford County Board of Elections, Porter tried contacting Attorney Roberts, but Attorney Roberts did not answer. While Porter expected Attorney Roberts or a colleague to appear at the hearing, nobody appeared to represent him. The Guilford County Board of Elections dismissed the protest against Bouvier and the Niehans for "lack of any evidence presented[.]"

¶ 12 Separately, Attorney Clark drafted an election protest form, to be filed in Brunswick County (Brunswick County Protest), which alleged Golden, among others, had voted twice. Thereafter, Joseph Agovino (Agovino) received a call "from somebody from the state committee or somebody from McCrory's campaign . . . who indicated that they had identified a case of voter fraud of somebody who ha[d] lived in this area who came from another jurisdiction and voted twice." The caller asked Agovino "if [he] would be willing to, you know, make a complaint against an individual[.]" Agovino recalled during his deposition:

> They gave me the name of [Golden]. They told me where he lived and told me how to file or, you know, number one, they asked me would I be interested in filing or please file, you know. It was one of those things they said it was part of my -- you know, I should be doing this as the chairperson. I remember asking, "You definitely have evidence of this?" And they said yes. And I said - you know, I wanted to make sure they had evidence of this, and they said yes.

Agovino advised the caller: " 'As long as you can prove it, I would be more than willing to' -- you know, not more than willing but I would be willing to do it." Attorney Clark provided a completed election protest form to Agovino, who signed it. The Protest was then filed with the Brunswick County Board of Elections. Attorney Clark later testified Agovino was not her client.

¶ 13 When asked during his deposition whether he reviewed any files with respect to Golden's alleged voting, Agovino replied:

A. Personally? No.

Q. Did you review any voter files from this state before the protest was filed?

A. No, I did not.

Q. Okay. But on November 17th when the protest was filed, did you believe that Mr. Golden had voted in two states?

A. Yes, I did.

Q. And why is that?

A. Because of the conversations and so-called evidence that I was supposed to have received that he had voted in two places.

Q. And you did ask to review the voting files before the protest was filed?

A. I asked for evidence. I did not ask to review specific voting files, no. I assumed that's what she was going to get me and so that never came.

The Brunswick County Protest contained the following:

> 5. Does this protest involve an alleged error in vote count or tabulation? If so, please explain in detail.
>
> Upon review of early voting files from other states, it appears that one (1) individual cast ballots in both North Carolina and another state. Casting a ballot in more than one state is a clear violation of North Carolina and federal election laws. Therefore, these ballots were erroneously counted and tabulated by the BRUNSWICK County Board of Elections.
>
> . . . .
>
> 8. Please provide the names, addresses, and phone numbers of any witnesses to any misconduct alleged by you in this protest, and specify what each witness listed saw or knows.
>
> Joe Agovino, . . . early voting files from other states[.]
>
> . . . .
>
> 10. Do you contend the allegations set out by you are sufficient to have affected or cast doubt upon the

> results of the protested election? If your answer is yes, please state the factual basis for your opinion.
>
> Yes. The described allegations clearly demonstrate that ballots cast by persons who voted in multiple states, for the election held on November 8, 2016 in BRUNSWICK County, are invalid under State law. The invalid ballots cast by persons who have voted in multiple states in violation of state and federal law, must not be counted for any office voted.

¶ 14 Regarding the filing of the Brunswick County Protest, Clark was asked the following:

> Q. Section eight of this protest says please provide the names, addresses and phone numbers of any witnesses to any misconduct alleged by you in this protest. Do you see that?
>
> A. Yes.
>
> Q. You listed Mr. Agovino's name here, is that correct?
>
> A. Yes.
>
> Q. That was false because Mr. Agovino in fact wasn't a witness to any misconduct was he?
>
> A. I guess not.
>
> Q. So it was false?
>
> A. Yes.
>
> . . . .
>
> Q. Was the fact of Mr. Golden's alleged multiple voting known to Mr. Agovino – the person who signed the protest?
>
> A. Yes.
>
> Q. How was it known to him?
>
> A. I guess it wasn't known. This was the wording drafted by whoever wrote the election protest . . . .
>
> Q. When you filled this out you said that it was known that Mr. Golden had voted in multiple states, right?
>
> A. Yes.
>
> . . . .

> Q. It wasn't known by Mr. Agovino, the person who signed the protest, right?
>
> A. Yes.

¶ 15 After filing the Brunswick County Protest, Agovino kept in touch with the director of the Board of Elections, who, in turn, "checked with the county in which [Golden] was supposed to have resided in the other state . . . ." The director then got back to Agovino informing him "there was no evidence that [Golden] voted in that county, absentee or otherwise." Agovino then "called the state party." "They put me in touch with the campaign because that's who was running it and stuff. The attorney said that she was going to get back to me." A week later, Agovino learned "all the attorneys essentially went back to where they came from" and the attorney with whom he had been in contact "was from out of state[.]" "[S]omeone else said that, you know, they'll get back to me. They never got back to me." On 22 November 2016, Agovino withdrew the protest. "I was a little upset then[,]" he recalled. "They left me hanging down there[.]"

¶ 16 On 8 February 2017, Plaintiffs filed an action for libel against Porter, and on 9 November 2017 filed an Amended Complaint adding the Law Firm Defendants and the Defense Fund.[1] In the Amended Complaint, Plaintiffs also added a claim for civil conspiracy against all Defendants and requested a class action certification. The same day, the case was designated as exceptional under Rule 2.1 of the General Rules of Practice for the Superior and District Courts. On 6 June 2018, the trial court granted Defendants' Motion to Dismiss Plaintiffs' proposed class certification and denied it as to Plaintiffs' remaining claims alleged in the Amended Complaint.

¶ 17 On 3 September 2019, Defendants jointly moved for Summary Judgment on all claims asserted by Plaintiffs. On the same day, Plaintiffs moved for Summary Judgment on all Defendants' affirmative defenses, including, among others, the defense of absolute privilege. After a 20 November 2019 hearing, the trial court entered its Order denying Defendants' Motion, granting Plaintiffs' Motion, and dismissing Defendants' affirmative defenses. On 17 January 2020, Defendants timely filed a written Notice of Appeal.

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1. The original Complaint included Gabriel Arthur Thabet as a Plaintiff. Thabet filed a Notice of Voluntary Dismissal on 10 July 2017 and was not a party to the Amended Complaint.

Appellate Jurisdiction

¶ 18 **[1]** As Defendants acknowledge, the trial court's Order denying Defendants' Motion for Summary Judgment and granting Plaintiffs partial Summary Judgment is interlocutory in nature in that it leaves pending Plaintiffs' claims against Defendants. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." (citation omitted)). Defendants, however, argue this Court has appellate jurisdiction over this appeal under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)(a) because the trial court's Order rejecting their invocation of the absolute privilege defense affects a substantial right which would be lost absent an immediate appeal.

¶ 19 Indeed, in *Topping v. Myers*, this Court analogized the absolute privilege defense to a defense of sovereign or public official immunity and recognized: "[i]f an absolute bar to suit extends and applies to [d]efendants' actions, the trial court's failure to dismiss [p]laintiff's claims deprives [d]efendants of immunity from suit[.]" 270 N.C. App. 613, 617, 842 S.E.2d 95, 99 (2020), *appeal dismissed*, *review denied*, 854 S.E.2d 800 (N.C. 2021). "If applicable, this denial of immunity from suit, as asserted in Defendants' motion, is a substantial right for Defendants, which would be lost, absent interlocutory review." *Id.* (citation omitted). In *Topping*, we conducted a full analysis of the merits to determine whether to dismiss the appeal as interlocutory. *Id.* We ultimately determined statements at issue in that case made during an "out-of-court press conference during pending litigation are too far afield to be considered 'made in due course of a judicial proceeding' " to justify invocation of the absolute privilege against defamation suits. *Id.* at 628, 842 S.E.2d at 106 (citation omitted). As such, there we dismissed the appeal as interlocutory. *Id.*

¶ 20 Turning to this case, "[i]t is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). "Whether an interlocutory appeal affects a substantial right is determined on a case-by-case basis." *Grant v. High Point Reg'l Health Sys.*, 172 N.C. App. 852, 853, 616 S.E.2d 688, 689 (2005) (citation omitted).

¶ 21 Here, unlike in *Topping*, Defendants' claim of absolute privilege does not arise from an out-of-court press conference, but rather rests on Defendants' contention their allegedly defamatory statements were made in the course of election protests, which Defendants maintain were quasi-judicial proceedings, to which the absolute privilege is applicable. Thus, on the facts of this case, we conclude—to the extent the trial court's Summary Judgment Order dismissed Defendants' absolute privilege defense and declined to grant Summary Judgment to Defendants on this defense— Defendants have established that the trial court's Order affects a substantial right, which may be lost absent immediate review. Therefore, this Court has appellate jurisdiction pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)(a) to consider the merits of this otherwise interlocutory appeal.[2] N.C. Gen. Stat. § 1-277(a) (2019); § 7A-27(b)(3)(a).

Issues

¶ 22 The key issues for decision are whether: (I) the election protests at issue in this case constituted quasi-judicial proceedings to which the absolute privilege against defamation suits may apply; and (II) the absolute privilege applies to bar this libel action against any of the Defendants in this case.

Analysis

¶ 23 "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Hidalgo v. Erosion Control Servs., Inc.*, 272 N.C. App. 468, 471, 847 S.E.2d 53, 55 (2020) (quotation marks omitted) (quoting *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008)). Likewise, we apply de novo review to a trial court's conclusions on the applicability of absolute privilege. *Topping*, 270 N.C. App. at 619, 842 S.E.2d at 100-01.

I. Applicability of Absolute Privilege to Election Protest Proceedings

¶ 24 **[2]** Our analysis begins with two threshold matters. The first is the applicability of absolute privilege to statements made in the due course of an election protest generally. The second is Plaintiffs' contention state-

2. Defendants have also filed, in the alternative, a Petition for Writ of Certiorari requesting we review the merits of their case in the event we determine Defendants have no right of immediate appeal. Resting on our conclusion the Order appealed from affects a substantial right and, thus, immediate appeal of this issue is permitted, we dismiss the Petition for Writ of Certiorari as moot.

ments made in the course of these specific election protests should not be afforded absolute privilege because Defendants' challenges to individual voters were improperly brought as election protests and not based on the conduct of the election as a whole, and were thereby irrelevant to an election protest proceeding.

¶ 25 "The general rule is that a defamatory statement made in the due course of a judicial proceeding is absolutely privileged and will not support a civil action for defamation, even though it be made with express malice." *Jarman v. Offutt*, 239 N.C. 468, 472, 80 S.E.2d 248, 251 (1954) (citation omitted). "Our courts have held that statements are 'made in due course of a judicial proceeding' if they are submitted to the court presiding over litigation or to the government agency presiding over an administrative hearing and are relevant or pertinent to the litigation or hearing." *Burton v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 702, 705, 355 S.E.2d 800, 802 (1987) (citations omitted). To determine whether an allegedly defamatory statement was made in the due course of a judicial proceeding, our courts have, therefore, applied a two-step analysis: "[i]n deciding whether a statement is absolutely privileged, a court must determine (1) whether the statement was made in the course of a judicial proceeding; and (2) whether it was sufficiently relevant to that proceeding." *Harman v. Belk*, 165 N.C. App. 819, 824, 600 S.E.2d 43, 47 (2004) (citation omitted).

¶ 26 As to the question of the applicability of absolute privilege to election protests generally: "[t]he phrase 'judicial proceeding' in the context of absolute privilege . . . encompasses quasi-judicial proceedings." *Topping*, 270 N.C. App. at 625, 842 S.E.2d at 104 (citation omitted); *see also Angel v. Ward*, 43 N.C. App. 288, 293, 258 S.E.2d 788, 792 (1979) ("The privilege attending communications made in the course of judicial proceedings has been extended to protect communications in an administrative proceeding only where the administrative officer or agency in the proceeding in question is exercising a judicial or quasi-judicial function." (citation omitted)).

¶ 27 Here, the election protests were filed with the respective County Boards of Elections under the alleged authority of N.C. Gen. Stat. § 163-182.9 in existence in 2016[3] and utilizing the form promulgated by the State Board of Elections. Our Supreme Court has recognized the State Board of Elections acts as a quasi-judicial body in the context

3. In 2017, these statutes were recodified by S.L. 2017-6. In 2018, S.L. 2017-6 was repealed effective 31 January 2019 by S.L. 2018-146. Thus, the current statutes are apparently in-line with the statutes in effect following the 2016 election.

of considering protests concerning the conduct of an election. *Ponder v. Joslin*, 262 N.C. 496, 501, 138 S.E.2d 143, 147 (1964) ("The State Board of Elections is a quasi-judicial agency and may . . . investigate alleged frauds and irregularities in elections in any county upon appeal from a county board or upon a protest filed in apt time with the State Board of Elections[.]"). Moreover, our Court has also previously approved a definition of "quasi-judicial" in the absolute privilege context as: "[a] term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature." *Angel*, 43 N.C. App. at 293, 258 S.E.2d at 792 (quotation marks omitted; alteration in original) (quoting Black's Law Dictionary 1411 (4th ed. rev. 1968)). By statute, a County Board of Elections considering an election protest must: (a) ascertain whether there is probable cause for the protest; (b) provide notice of hearing of the protest; (c) conduct some form of evidentiary hearing which must be recorded; and (d) make findings of fact and conclusions of law based on the evidence presented. N.C. Gen. Stat. § 163-182.10 (2016).

¶ 28 Thus, election protest proceedings before County Boards of Elections fall squarely in the category of quasi-judicial proceedings. *Cf. Rotruck v. Guilford Cnty. Bd. of Elections*, 267 N.C. App. 260, 264, 833 S.E.2d 345, 349 (2019) (stating a County Board of Elections sits as a quasi-judicial body in reviewing a voter registration challenge); *Knight v. Higgs*, 189 N.C. App. 696, 699, 659 S.E.2d 742, 745 (2008) (stating a County Board of Elections sits as a quasi-judicial body in deciding to remove a voter from rolls). Therefore, statements made or submitted to a County Board of Elections in an election protest are statements made in the course of a quasi-judicial proceeding. Consequently, as a general principle, absolute privilege applies to defamatory statements made in the course of an election protest filed with a County Board of Elections.

¶ 29 **[3]** Next, Plaintiffs argue, however, the allegedly defamatory statements contained in the election protests made by Defendants were so far outside the bounds of the proper scope of an election protest proceeding to render the statements insufficiently relevant or pertinent to the election protest proceeding. Plaintiffs contend the election protests in this case, in fact, merely disputed the eligibility of individual voters and, thus, should properly be classified as untimely voter challenges and not election protests. Plaintiffs specifically assert a proper election protest, as defined in N.C. Gen. Stat. § 163-182(4), is one which relates to the overall "conduct of the election." Rather, Plaintiffs claim the protests filed across the state at the behest of the Defense Fund challenging the eli-

gibility of individual voters actually constituted voter challenges under N.C. Gen. Stat. §§ 163-84 and 163-87, which were required to be made on or before Election Day. Indeed, Plaintiffs note, during the course of the election protests filed on behalf of the McCrory campaign following the 2016 General Election, the State Board of Elections issued its own determination making this distinction and administratively ruling County Boards of Elections "shall dismiss a protest of election that merely disputes the eligibility of a voter" unless it was a timely-filed voter challenge or, in fact, there were sufficient ineligible votes cast to potentially impact the outcome of an election.

¶ 30 Defendants here were aware at the time the protests were filed challenging individual voters that those protests—even if they all had merit—would not have impacted the outcome of the election. Nevertheless, Defendants, pointing to cases from other jurisdictions, argue that, even though the election protests filed in Guilford and Brunswick Counties were meritless, absolute privilege should still apply. *See, e.g.*, *Mixter v. Farmer*, 215 Md. App. 536 (slip op. at *6), 81 A.3d 631, 635 (2013) ("[U]nder Maryland law, even a meritless complaint is privileged and the complainant's motive is immaterial." (citation omitted)); *Barker v. Huang*, 610 A.2d 1341, 1345-46 (Del. 1992) ("We therefore hold that no 'sham litigation' exception to the defense of absolute privilege exists under the law of Delaware.").

¶ 31 For purposes of determining whether the absolute privilege applies to the election protest filings at issue in this case, however, it is unnecessary to resolve the question of whether those filings were valid election protests. Applying North Carolina law, "the matter to which the privilege does not extend must be so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety." *Jones v. Coward*, 193 N.C. App. 231, 233, 666 S.E.2d 877, 879 (2008) (quoting *Scott v. Statesville Plywood & Veneer Co.*, 240 N.C. 73, 76, 81 S.E.2d 146, 149 (1954)). "If it is so related to the subject matter of the controversy that it may become the subject of inquiry in the course of the trial, the rule of absolute privilege is controlling." *Scott*, 240 N.C. at 76, 81 S.E.2d at 149.

¶ 32 Here, even absent any indication that the ultimately disproven allegations of individual voter irregularities in this case would have altered the outcome of the election, for purposes of applying absolute privilege, however, they were at least related to the subject matter of the controversy such that they may have "become the subject of inquiry in the course" of the administrative hearing. *See id.* Certainly, we cannot conclude they were so "palpably irrelevant" to an election protest that "no

reasonable man [could] doubt [their] irrelevancy or impropriety." *See id.* This is underscored by the fact the State Board of Elections issued its determination concluding individual voter challenges not impacting the outcome of an election were not properly brought as election protests only after—and in light of—the filing of these and other protest forms at the behest of the Defense Fund and the McCrory campaign. Consequently, on the Record and facts before us, absolute privilege applies to the election protests containing the allegedly defamatory statements in this case.

II. Applicability of Absolute Privilege to Defendants

¶ 33 **[4]** Having determined absolute privilege applies to election protest proceedings before County Boards of Elections and to the putative election protests at issue in this case, the question becomes whether Defendants are entitled to the protection of the absolute privilege for the allegedly defamatory statements made here. Application of the absolute privilege here merits separate analyses for (A) Porter, (B) the Law Firm Defendants, and (C) the Defense Fund. We address each in turn.

A. Porter

¶ 34 "The public policy underlying this privilege is grounded upon the proper and efficient administration of justice. Participants in the judicial process must be able to testify or otherwise take part without being hampered by fear of defamation suits." *Harman*, 165 N.C. App. at 824, 600 S.E.2d at 47 (citation and quotation marks omitted). Consistent with this public policy, our Courts have then recognized the absolute privilege applies to statements by participants in judicial and quasi-judicial proceedings made within the scope of those proceedings. For example, this Court has noted:

> The scope of the accompanying absolute privilege has been held to include not only statements made by judge, counsel and witnesses at trial, but also statements made in pleadings and other papers filed in the proceeding, out-of-court affidavits or reports submitted to the court and pertinent to the proceedings, communications in administrative proceedings where the officer or agency involved is exercising a quasi-judicial function, and out-of-court statements between parties to a judicial proceeding, or their attorneys, relevant to the proceedings.

Harris v. NCNB Nat'l Bank of N.C., 85 N.C. App. 669, 673, 355 S.E.2d 838, 842 (1987).

¶ 35 In this regard then, absolute privilege most clearly applies to Defendant Porter. Porter was the actual protestor in the Guilford County Protest filed against Bouvier and the Niehans. The allegedly defamatory statements made by Porter were those adopted by him and made on the protest form filed with the Guilford County Board of Elections upon which he authorized his signature as a party. *See id.* at 674, 355 S.E.2d at 842 ("The absolute privilege extends to parties to the litigation."). Thus, Porter is entitled to the protection of absolute privilege from suit in this case. Therefore, the trial court erred in denying Summary Judgment for Porter and granting partial Summary Judgment for Plaintiffs on his defense of absolute privilege.

B. Law Firm Defendants

¶ 36 For their part, the Law Firm Defendants advocate for a broad application of the absolute privilege. Specifically, the Law Firm Defendants argue—largely in the passive voice—that because their allegedly defamatory statements were included in election protest forms filed with the respective County Boards of Elections, they necessarily benefit from the absolute privilege. The Law Firm Defendants further assert that this is so even though they were not "participants" in the election protest proceedings, going so far as to argue there is no requirement that one be a "participant" in a legal proceeding to receive the benefit of the absolute privilege against a defamation suit based upon statements made in the due course of a legal proceeding.

¶ 37 Our analysis of this issue folds back into the question of whether the allegedly defamatory statements made by the Law Firm Defendants in this case were made in the course of a legal proceeding. Indeed, in *Topping*, our Court recently concluded participants in a lawsuit were not entitled to absolute immunity for allegedly defamatory statements made outside of their actual participation in the lawsuit. *Topping*, 270 N.C. App. at 624, 842 S.E.2d at 104. In that case, we declined to extend absolute privilege to a party's attorneys for statements made at an "out-of-court press conference[] during pending litigation." *Id.* (citation omitted). In fact, our Court reasoned even defamatory statements that " 'mirror' allegations made in a filed complaint[] deviate from and stray too far beyond the core and 'occasion' of speech to invoke immunity from suit." *Id.* at 624, 842 S.E.2d at 103. "Such immunity cannot be justified by asserted public interest beyond encouraging frankness and protecting testimony, communications between counsel *inter se* or with the court, and participation within the judicial proceeding." *Id.* at 624, 842 S.E.2d at 103-04.

¶ 38 Our decision in *Topping* provides guidance in this case. *Topping* acknowledged the general policy behind absolute privilege is to protect "[p]articipants in the judicial process" such that they may be able to "testify or otherwise take part without being hampered by fear of defamation suits." *Id.* at 624, 842 S.E.2d at 103 (quotation marks omitted) (quoting *Jones*, 193 N.C. App. at 234, 666 S.E.2d at 879). This Court, in turn, reaffirmed "an attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding." *Id.* at 620, 842 S.E.2d at 101 (quotation marks omitted) (quoting *Jones*, 193 N.C. App. at 234, 666 S.E.2d at 879 (quoting Restatement (Second) of Torts § 586 (1977))).

¶ 39 As such, even when attorneys are participants in a judicial proceeding, the absolute privilege only extends to statements made during the course of their participation in (or in preliminary matters related to) those proceedings. *Id.* Thus, absolute privilege does not apply to allegedly defamatory statements made by an attorney when they are not participating in the judicial proceeding. *See id.*; *see also Oparaugo v. Watts*, 884 A.2d 63, 81 (D.C. 2005) ("Thus, merely acting as an attorney is insufficient; the attorney must participate as counsel in the relevant proceeding.").

¶ 40 In this case, the Law Firm Defendants have disclaimed acting as attorneys for the protestors in the election protest proceedings. They did not appear at the hearings before the Guilford and Brunswick County Boards of Elections on the protests. In fact, it does not appear the Law Firm Defendants were licensed or authorized to practice law in North Carolina at the time the election protests were filed. As such, the allegedly defamatory statements attributed to the Law Firm Defendants were not made while they were participating as counsel in the election protest proceeding.

¶ 41 On appeal, the Law Firm Defendants, however, argue that even if they were not acting as counsel for the protestors, they were nevertheless participating in the election protest proceedings because they were acting as Porter's and Agovino's "agents" in drafting and filing the protests with the County Boards of Elections, thereby initiating the quasi-judicial proceedings. To the extent there is a distinction here between the Law Firm Defendants acting as attorneys for the protestors or merely as their "agents" in drafting and filing documents initiating quasi-judicial proceedings, it is one without a difference. *See Topping*, 270 N.C. App. at 622, 842 S.E.2d at 102 ("Where the relation of attorney

and client exists, the law of principal and agent is generally applicable." (quotation marks omitted) (quoting *Bank v. McEwen*, 160 N.C. 414, 420, 76 S.E. 222, 224 (1912))). The Law Firm Defendants' assertion is also undermined by the Record, including, for example, Attorney Roberts's deposition testimony in which not only did he testify he was not acting as Porter's attorney in filing the Guilford County Protests but was also not acting as Porter's "attorney in fact."

¶ 42 Indeed, the Law Firm Defendants make no argument they were mere couriers, process servers, private investigators employed by the protestors, or paralegals engaged to prepare legal filings, expert witnesses or any other type of "agent" of Porter and Agovino in this case. To the contrary, the Record here reflects in drafting and disseminating election protests in counties throughout North Carolina—including the Guilford and Brunswick County Protests in this case—the Law Firm Defendants were actually acting in their capacity as counsel to the Defense Fund, leaving the individual protestors to initiate and prosecute the actual protest proceedings pro se. In that capacity, the Law Firm Defendants were not participating in the election protests when they prepared the allegedly defamatory statements in this case and aided in recruiting individuals to actually prosecute those protests.[4]

¶ 43 Thus, the statements attributed to the Law Firm Defendants were not made by the Law Firm Defendants in the course of a quasi-judicial proceeding and are not entitled to the protection of the absolute privilege against defamation suits. *See R. H. Bouligny, Inc. v. United Steelworkers of Am., AFL-CIO*, 270 N.C. 160, 171, 154 S.E.2d 344, 354 (1967) ("The privilege belongs to the occasion. It does not follow the speaker or publisher into other surroundings and circumstances. The judge, legislator or administrative official, when speaking or writing apart from and independent of the functions of his office, is liable for slanderous or libelous statements upon the same principles applicable to other individuals."). Therefore, the trial court did not err in denying Summary Judgment for the Law Firm Defendants and in granting partial Summary Judgment for Plaintiffs on the defense of absolute privilege.

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4. The Law Firm Defendants also argue that, if they are not deemed participants in the election protest, this necessarily defeats Plaintiffs' libel claims against them because then they cannot be deemed to have "published" the allegedly defamatory statements contained in the protests. We do not address this contention. Rather, we simply conclude, assuming the evidence reflects the Law Firm Defendants made defamatory statements about Plaintiffs and caused those statements to be published to third parties, the Law Firm Defendants are not entitled to the protection of absolute privilege because they were not making and disseminating these statements in the course of their participation in an election protest proceeding.

C. The Defense Fund

¶ 44 In its briefing to this Court,[5] the Defense Fund argues persuasively for the application of absolute privilege to Porter but offers no independent basis for the application of absolute privilege to itself. The Defense Fund makes no argument that it was a party, witness, potential witness, or acting in any representative capacity in the course of the election protest proceeding or any other person or entity to which the absolute privilege has previously been applied by our Courts. Moreover, the Defense Fund does not argue it was participating in the election protest proceeding.

¶ 45 Indeed, the Record here reflects the Defense Fund expressly made the decision not to take part in the election protest proceedings. Instead, the Defense Fund authorized the Law Firm Defendants to prepare the election protests containing false and allegedly defamatory accusations of voter fraud against Plaintiffs, use those allegations to recruit individuals like Porter and Agovino, and convince them to adopt those accusations and file protests based on those false statements. Thus, because the Defense Fund was not participating in the election protest proceeding and, indeed, makes no argument the allegedly defamatory statements attributed to it were made by the Defense Fund in the due course of the election protest proceedings, the Defense Fund is not entitled to the absolute privilege defense in this case. Therefore, the trial court did not err in denying Summary Judgment for the Defense Fund and granting partial Summary Judgment for Plaintiffs on the defense of absolute privilege.

Conclusion

¶ 46 Accordingly, for the foregoing reasons, we affirm the trial court's Summary Judgment Order, in part, to the extent it denied Summary Judgment for the Law Firm Defendants and the Defense Fund on the defense of absolute privilege and granted Summary Judgment for the Plaintiffs against those Defendants on the defense of absolute privilege. We reverse the portion of the trial court's Summary Judgment Order to the extent it denied Porter Summary Judgment on the defense of absolute privilege and granted Summary Judgment for the Plaintiffs against Porter as to his absolute immunity defense. We remand the matter to the trial court with instructions to enter judgment for Porter consistent with this opinion and to permit the parties to pursue further proceedings in this case.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges ARROWOOD and CARPENTER concur.

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5. The Defense Fund did not appear at oral argument.

BUTTERFIELD v. GRAY

[279 N.C. App. 549, 2021-NCCOA-523]

CONNIE BUTTERFIELD AND TRACIE CAVENESS AS CO-ADMINISTRATORS OF THE ESTATE OF TODD L. CAVENESS, PLAINTIFFS
v.
HAYLEE GRAY, RN, SOUTHERN HEALTH PARTNERS, INC., VICKIE SHAW, R.T. ADCOCK, SHERIFF CALVIN WOODARD, JR., WILSON COUNTY, AND HARTFORD FIRE INSURANCE COMPANY, DEFENDANTS

No. COA20-218

Filed 5 October 2021

Immunity—governmental—liability insurance—waiver of immunity—inmate death

Where an inmate in a county detention center died from dehydration and malnutrition and his estate brought claims against multiple defendants (two detention officers, the county sheriff, and the county), defendants' purchase of liability insurance did not waive their governmental immunity because the policy in question specifically stated that it did not waive immunity. The sheriff's governmental immunity was waived only to the extent of the $20,000 coverage in his sheriff's bond, which he had purchased to comply with N.C.G.S. § 162-8.

Appeal by Defendants Vickie Shaw, R.T. Adcock, Sheriff Calvin Woodard, Jr., and Wilson County from order entered 22 October 2019 by Judge R. Allen Baddour in Wilson County Superior Court. Heard in the Court of Appeals 2 September 2021.

Abrams and Abrams, P.A., by Douglas B. Abrams and Noah B. Abrams, and Henson & Fuerst, by Rachel A. Fuerst, for Plaintiffs-Appellees.

Womble Bond Dickinson (US), LLP, by Bradley O. Wood, for Defendants-Appellants Vickie Shaw, R.T. Adcock, Sheriff Calvin Woodard, Jr., and Wilson County.

Crumley Roberts, LLP, by Karonnie R. Truzy, for Amicus Curiae, North Carolina Advocates for Justice.

COLLINS, Judge.

¶ 1 This appeal arises from the death of Todd Caveness while in the custody of the Wilson County Detention Center. Following Caveness'

death, Connie Butterfield and Tracie Caveness, as the co-administrators of his estate ("Plaintiffs"), sued Vickie Shaw and R.T. Adcock, in their individual capacities and in their official capacities as Wilson County Sheriff's Detention Officers; Calvin Woodard, Jr., in his individual capacity and in his official capacity as the Sheriff of Wilson County; and Wilson County (collectively "Defendants"). Plaintiffs also brought claims against Southern Health Partners ("SHP"), the contractor providing medical care at the Detention Center; Haylee Gray, a nurse employed by SHP; and the Hartford Fire Insurance Company, the surety on Sheriff Woodard's statutory bond purchased pursuant to N.C. Gen. Stat. § 162-8.[1]

¶ 2 Defendants appeal from an order denying their motions for summary judgment on Plaintiffs' official capacity claims against Shaw, Adcock, and Sheriff Woodard, and Plaintiffs' claims against Wilson County.[2] Shaw, Adcock, and Sheriff Woodard each argue that governmental immunity bars Plaintiffs' official capacity claims against them to the extent that Plaintiffs seek to recover in excess of the amount of Sheriff Woodard's official bond. The County also argues that governmental immunity bars Plaintiffs' claims against it and that it cannot be held liable for the actions of its co defendants. Together, Defendants argue that Plaintiffs may not assert a direct claim under the North Carolina Constitution, because Plaintiffs have an adequate remedy at law that is not barred by governmental immunity. We dismiss Defendants' argument regarding Plaintiffs' direct constitutional claim and the County's argument concerning its liability for the acts of its co-defendants because Defendants have not shown a basis for immediate appellate review of these issues. Because Defendants are entitled to the defense of governmental immunity, we reverse the order denying Defendants' motions for summary judgment on the remaining issues.

I. Factual Background and Procedural History

¶ 3 Todd Caveness was arrested and confined in the Wilson County Detention Center ("Detention Center") on 10 January 2016. Caveness entered the Detention Center with documented schizophrenia and anxiety diagnoses. While confined in the Detention Center, Caveness refused food and water, expressing his belief that it had been tampered with. By 2 February 2016, Caveness was weak and had lost approximately 30 pounds since entering the Detention Center. The next day, 3 February

1. The claims against SHP and Gray are not before this Court.

2. The claims again Shaw, Adcock, and Woodard, in their individual capacities, were not subjects of Defendants' motion for summary judgment and remain in the trial court.

2016, Caveness was taken from the Detention Center to the hospital, where he died on the morning of 5 February 2016. An autopsy found that he died of a bilateral pulmonary thromboembolism resulting from dehydration and malnutrition.

¶ 4 Plaintiffs instituted this suit on 7 November 2017. Plaintiffs asserted six claims for relief: (1) "negligent and wanton conduct" by Haylee Gray; (2) "vicarious liability and negligent and wanton conduct" by SHP; (3) "negligent and wanton conduct" by Adcock and Shaw; (4) "relief against Sheriff Calvin Woodard, Jr. in his individual and in his official capacity and action on bond against Hartford Fire and Insurance Company"; (5) "violation of [Caveness'] constitutional rights"; and (6) "liability of Wilson County." Plaintiffs' claim for relief against Sheriff Woodard was premised on three causes of action: wrongful death under N.C. Gen. Stat. § 28A-18-12, an action against the sheriff's bond under N.C. Gen. Stat. § 58-76-5, and treble damages for injury to a prisoner by a jailer under N.C. Gen. Stat. § 162 55. Plaintiffs also pled that Defendants had waived any applicable immunity.

¶ 5 Defendants answered and raised multiple defenses, including that governmental immunity barred Plaintiffs' claims. Defendants moved for summary judgment. Adcock, Shaw, and Sheriff Woodard each argued that governmental immunity barred the claims brought against them in their official capacities to the extent that Plaintiffs sought to recover in excess of the amount of Sheriff Woodard's official bond. Wilson County argued that governmental immunity barred Plaintiffs' claim against it, and that it could not be held liable for the acts of the other defendants as a matter of law. Defendants collectively argued that the availability of adequate remedies at law foreclosed Plaintiffs' direct claim under the North Carolina Constitution. Following briefing and argument of counsel, the trial court denied the motions for summary judgment. Defendants timely gave written notice of appeal.

II. Appellate Jurisdiction

¶ 6 The trial court's order denying Defendants' motions for summary judgment is interlocutory "because it is not a judgment that 'disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.' " *Snyder v. Learning Servs. Corp.*, 187 N.C. App. 480, 482, 653 S.E.2d 548, 550 (2007) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950)). Parties are generally not entitled to an immediate appeal of an interlocutory order. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990).

¶ 7 Immediate appeal of an interlocutory order is permitted, however, where the order affects a substantial right. N.C. Gen. Stat. § 1-277(a) (2019). "To confer appellate jurisdiction based on a substantial right, 'the appellant must include in its opening brief, in the statement of the grounds for appellate review, sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Doe v. City of Charlotte*, 273 N.C. App. 10, 21, 848 S.E.2d 1, 9 (2020) (quoting *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019)); *see also* N.C. R. App. P. 28(b)(4). The appellant has the burden of showing that the order appealed from affects a substantial right. *Coates v. Durham Cnty.*, 266 N.C. App. 271, 273, 831 S.E.2d 392, 394 (2019).

¶ 8 Defendants assert as the sole ground for appellate review that "the denial of a motion for summary judgment grounded on the defense of governmental immunity affects a substantial right and therefore is immediately appealable." "[I]t is well-established that the denial of a motion for summary judgment grounded on governmental immunity affects a substantial right and is immediately appealable[.]" *Lucas v. Swain Cnty. Bd. of Educ.*, 154 N.C. App. 357, 360, 573 S.E.2d 538, 540 (2002) (citation omitted). We will therefore review the trial court's denial of Defendants' motions for summary judgment to the extent the denial concerns the defense of governmental immunity.

¶ 9 Defendants have failed, however, to meet their burden of showing that the denial of summary judgment as to Plaintiffs' direct constitutional claim is immediately appealable. Defendants fail to address the direct constitutional claim in their statement of grounds for appellate review. In the body of their brief, Defendants argue only that adequate remedies at law foreclose Plaintiffs' constitutional claim; they do not argue that the constitutional claim is barred by immunity. Accordingly, we lack jurisdiction to address Defendants' appeal of the trial court's denial of summary judgment as to the direct constitutional claim and we dismiss Defendant's appeal of this issue.

¶ 10 Similarly, Wilson County has failed to meet its burden of showing that the denial of summary judgment based on its argument that it could not be held liable for the acts of the other defendants as a matter of law is immediately appealable. Wilson County fails to address this argument as a basis for immediate review in its statement of grounds for appellate review. In the body of its brief, Wilson County advances no argument for immediate review on this basis. Accordingly, we lack jurisdiction to address Wilson County's appeal of the trial court's denial of summary judgment based on this theory and we dismiss Wilson's County's appeal of this issue.

III. Standard of Review

¶ 11 We review a trial court's order denying summary judgment de novo. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs.*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019). The party moving for summary judgment has the burden of showing that summary judgment is proper. *Leake v. Sunbelt Ltd. of Raleigh*, 93 N.C. App. 199, 201, 377 S.E.2d 285, 287 (1989). The movant may do so "by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted).

IV. Discussion

A. Governmental Immunity

¶ 12 Shaw, Adcock, Sheriff Woodard, and Wilson County each argue that governmental immunity bars Plaintiffs' claims.[3]

¶ 13 Governmental immunity is not only an affirmative defense, "it is a complete immunity from being sued in court." *Ballard v. Shelley*, 257

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3. We note that previous decisions of this Court have used the terms "sovereign immunity" and "governmental immunity" interchangeably. *See, e.g.*, *White v. Cochran*, 229 N.C. App. 183, 189, 748 S.E.2d 334, 339 (2013) (stating that "a sheriff is a public official entitled to sovereign immunity" but analyzing whether the sheriff waived "governmental immunity"); *Myers v. Bryant*, 188 N.C. App. 585, 587, 655 S.E.2d 882, 885 (2008) (county sheriff is a public official entitled to "sovereign immunity"). These forms of immunity are, however, distinct: Sovereign immunity applies when the State or one of its agencies is the defendant, *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997), while "[g]overnmental immunity is that portion of the State's sovereign immunity which extends to local governments," *Wray v. City of Greensboro*, 370 N.C. 41, 47, 802 S.E.2d 894, 898 (2017). Governmental immunity applies where the defendant is a county or a county agency. Meyer, 347 N.C. at 104, 489 S.E.2d at 884. The distinction is salient because "[t]hese immunities do not apply uniformly. The State's sovereign immunity applies to both its governmental and proprietary functions, while the more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions." *Evans v. Hous. Auth. of City of Raleig*h, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (citations omitted). Lastly, public official immunity is derivative of governmental immunity, and applies where the public official is sued in his individual capacity. *Fullwood v. Barnes*, 250 N.C. App. 31, 38, 792 S.E.2d 545, 550 (2016).

N.C. App. 561, 564, 811 S.E.2d 603, 605 (2018) (quotation marks and citation omitted). Because a suit against a public official in his official capacity operates as a suit against the governmental entity itself, an official sued in this capacity may raise the defense of governmental immunity. *Paquette v. Cnty. of Durham*, 155 N.C. App. 415, 420, 573 S.E.2d 715, 719 (2002); *Summey v. Barker*, 142 N.C. App. 688, 690, 544 S.E.2d 262, 265 (2001). A county may also raise the defense of governmental immunity. *Est. of Williams ex rel. Overton v. Pasquotank Cnty. Parks & Recreation Dep't*, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012).

¶ 14 Under the doctrine of governmental immunity, both a county and a county's public officials[4] are immune from suits alleging negligence in the exercise of a governmental function, unless the plaintiff shows that the county or county's public officials waived immunity. *Id.* "A county is also generally immune from suit for intentional torts of its employees in the exercise of governmental functions." *Fuller v. Wake Cnty.*, 254 N.C. App. 32, 39, 802 S.E.2d 106, 111 (2017) (citation omitted).

¶ 15 Sheriffs, sheriff's deputies, and jailers have all been recognized as public officials who may avail themselves of the defense of governmental immunity. *Baker v. Smith*, 224 N.C. App. 423, 434, 737 S.E.2d 144, 151; *Phillips v. Gray*, 163 N.C. App. 52, 56-57, 592 S.E.2d 229, 232 (2004); *Summey*, 142 N.C. App. at 691, 544 S.E.2d at 265. Our courts have also long deemed the operation of a county jail to be a governmental function. *Pharr v. Garibaldi*, 252 N.C. 803, 810-11, 115 S.E.2d 18, 24 (1960) ("The . . . operation of prisons and jails, whether by the state, a county, or a municipality, is a purely governmental function, being an indispensable part of the administration of the criminal law . . . .") (citations omitted); *Gentry v. Town of Hot Springs*, 227 N.C. 665, 668, 44 S.E.2d 85, 86 (1947) (recognizing governmental immunity for the chief of police and jailer against a claim of wrongful death in the town jail); *Kephart v. Pendergraph*, 131 N.C. App. 559, 563, 507 S.E.2d 915, 918 (1998) ("[T]he actions of a county and its officials in maintaining confinement facilities within the context of law enforcement services are likewise encompassed within the rubric of governmental functions."); *Hare v. Butler*, 99 N.C. App. 693, 698, 394 S.E.2d 231, 235 (1990) ("Certain activities are clearly governmental such as law enforcement operations and the operation of jails, public libraries, county fire departments, public parks and city garbage services.").

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4. A sheriff is not considered a county public official as our Constitution and statutes provide that each sheriff is an independently elected public official who acts at the county level. N.C. Const. art. VII § 2; N.C. Gen. Stat. § 162-1; *Young v. Bailey*, 368 N.C. 665, 669, 781 S.E.2d 277, 280 (2016); *Boyd v. Robeson Cnty.*, 169 N.C. App. 460, 476, 621 S.E.2d 1, 11 (2005).

¶ 16 Relying on *Leonard v. Bell*, 254 N.C. App. 694, 803 S.E.2d 445 (2017), and *Medley v. N.C. Dep't of Corr.*, 330 N.C. 837, 412 S.E.2d 654 (1992), Plaintiffs argue that the provision of medical services to inmates is not a governmental function. Plaintiffs' reliance is misplaced.

¶ 17 In *Leonard*, the plaintiff sued two physicians employed by the Department of Public Safety in their individual capacities, alleging medical malpractice. 254 N.C. App. at 695, 803 S.E.2d at 447. On appeal, the physicians contended that they were entitled to public official immunity. *Id.* at 696, 803 S.E.2d at 447. The sole question on appeal was whether the physicians qualified as public officials, as opposed to mere public employees, and thus were entitled to immunity from suit in their individual capacities. *Id.* at 698, 803 S.E.2d at 449.

¶ 18 This Court held that the physicians did not qualify as public officials and accordingly were not entitled to immunity from suit in their individual capacities. *Id.* at 705, 803 S.E.2d at 453. While the Court "note[d] that there is nothing uniquely sovereign about the health services provided by defendants," *id.*, this observation pertained only to the treatment provided by the individual physicians themselves—not whether the broader operation of the facility and the provision of medical services within it was a governmental function. Moreover, the basis of Plaintiffs' complaint in this case is Defendants' failure to provide Caveness with adequate medical care while operating the jail and supervising its detainees.

¶ 19 *Medley* is likewise distinguishable. In *Medley*, an inmate brought a medical malpractice claim under the North Carolina Tort Claims Act against the state Department of Correction. 330 N.C. at 838, 412 S.E.2d at 655. The Department of Correction moved to dismiss on the ground that the physician who treated the plaintiff was an independent contractor. *Id.* Our Supreme Court held that the state has a nondelegable duty to provide adequate medical care to inmates. *Id.* at 844, 412 S.E.2d at 659. As such, an independent contractor physician was considered an "agent" for purposes of claims against the state under the North Carolina Tort Claims Act. *Id.* at 845, 412 S.E.2d at 659.

¶ 20 Neither *Leonard* nor *Medley* support the conclusion that Defendants —in their respective roles as an elected sheriff, detention officers, and a county government—were engaged in a proprietary function not subject to governmental immunity. Governmental immunity applies, and Defendants are immune from the claims at issue unless Plaintiffs have shown waiver.

1. Waiver of Immunity by Liability Insurance

¶ 21 Plaintiffs assert that Defendants waived governmental immunity by purchasing liability insurance. Defendants respond that the provisions of their applicable insurance policy left their governmental immunity intact.

¶ 22 The purchase of liability insurance pursuant to N.C. Gen. Stat. § 153A-435 may waive governmental immunity for both a county and a sheriff. *Patrick v. Wake Cnty. Dep't of Human Servs.*, 188 N.C. App. 592, 595, 655 S.E.2d 920, 923 (2008); Myers, 188 N.C. App. at 588, 655 S.E.2d at 885; N.C. Gen. Stat. § 153A-435 (2019). Section 153A-435 provides:

> A county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment.

N.C. Gen. Stat. § 153A-435(a). "Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function." *Id.* Governmental immunity is therefore not waived where the applicable liability insurance policy excludes a plaintiff's claim from coverage. *Patrick*, 188 N.C. App. at 596, 655 S.E.2d at 923.

¶ 23 In *Patrick*, this Court held that governmental immunity was not waived by the defendant county agency's purchase of insurance because the policy contained the following exclusion:

> This policy is not intended by the insured to waive its governmental immunity as allowed by North Carolina General Statutes Sec. 153A-435. Accordingly, subject to this policy and the Limits of Liability shown on the Declarations, this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defenses is asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable.

Id.

¶ 24 On multiple occasions since, our Court has held that purchase of similar insurance policies did not waive a defendant's governmental immunity. In *Owen v. Haywood Cnty.*, 205 N.C. App. 456, 697 S.E.2d 357 (2010), we held that immunity had not been waived where the policy excluded from coverage "any claim, demand, or cause of action against any Covered Person as to which the Covered Person is entitled to sovereign immunity or governmental immunity under North Carolina law." *Id.* at 460, 697 S.E.2d at 359. Similarly, in *Earley v. Haywood Cnty. Dep't of Soc. Servs.*, 204 N.C. App. 338, 694 S.E.2d 405 (2010), we held that immunity was not waived where the policy contained an exclusion substantively identical to that in *Owen* and the policy further specified that the parties

> intend for no coverage to exist . . . as to any claim for which the Covered Person is protected by sovereign immunity and/or governmental immunity under North Carolina law. It is the express intention of the parties to this Contract that none of the coverage set out herein be construed as waiving in any respect the entitlement of the Covered Person to sovereign immunity and/or governmental immunity.

Id. at 342, 694 S.E.2d at 409. We reached the same conclusion in *Bullard v. Wake Cnty.*, 221 N.C. App. 522, 729 S.E.2d 686 (2012), where the insurance policy similarly provided that it was

> not intended by the insured to waive its governmental immunity as allowed by North Carolina General Statutes Sec. 153A-435. Accordingly, subject to this policy and the Limits of Liability shown on the Declarations, this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defense is asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable.

Id. at 527, 729 S.E.2d at 690.

¶ 25 In this case, it is undisputed that a policy provided by the North Carolina Association of County Commissioners ("NCACC Policy") covered Defendants during the relevant time period. Sections II, V, and VI of the NCACC Policy are pertinent.

¶ 26 Section II, entitled "General Liability Coverage," extends certain coverage to the County, its employees, and its volunteers. Section II contains a provision entitled "Immunity" which states:

> This Section II of the Contract does not cover claims against a Covered Person against which the Covered Person may assert sovereign and/or governmental immunity in accordance with North Carolina Law. It is the express intention of the parties to this Contract that the coverage provided in this Section of the Contract does not waive the entitlement of a Covered Person to assert sovereign immunity and/or governmental immunity.

Section II also contains an exclusion stating that it "does not apply to any claim or Suit . . . [a]s to which a Covered Person is entitled to sovereign immunity or governmental immunity under North Carolina law."

¶ 27 Section V, entitled "Public Officials Liability Coverage," extends certain coverage to the County, certain officers of the County, and certain employees of the County. Section V contains a similar provision entitled "Immunity" which states:

> The parties to this Contract intend for no coverage to exist under Section V (Public Officials Liability Coverage) as to any claim for which the Covered Person is protected by sovereign immunity and/or governmental immunity under North Carolina law. It is the express intention of the parties to this Contract that none of the coverage set out herein be construed as waiving in any respect the entitlement of the Covered Person to sovereign immunity and/or governmental immunity.

Section V also contains a similar exclusion stating that it "does not apply to . . . Claims or Suits to which a Covered Person is entitled to sovereign immunity or governmental immunity under North Carolina law."

¶ 28 Finally, Section VI, entitled "Law Enforcement Liability Coverage," extends coverage to the County, and is the sole portion of the policy extending coverage to the Sheriff, sheriff's deputies, and other law enforcement personnel. Section VI likewise contains a provision entitled "Immunity" which states:

> The parties to this Contract intend for no coverage to exist under this Section VI of the Contract as to any

> claim for which the Covered Person is protected by sovereign immunity and/or governmental immunity under North Carolina law. It is the express intention of the parties to this Contract that none of the coverage set out herein be construed as waiving in any respect the entitlement of the Covered Person to sovereign immunity and/or governmental immunity.

Additionally, Section VI contains an exclusion stating that it "does not apply to . . . Claims or Suits to which a Covered Person is entitled to sovereign immunity or governmental immunity under North Carolina Law."

¶ 29 The NCACC Policy's immunity provisions and policy exclusions are substantively equivalent—and in many respects identical—to those we held did not waive immunity in *Patrick*, *Earley*, *Bullard*, and *Owen*. The NCACC policy specifically states that the parties to the insurance contract did not intend for the purchase of the coverage to waive immunity for any of the covered parties, did not intend to cover any claims to which an immunity defense applied, and that such claims were excluded from coverage. Accordingly, the NCACC Policy did not waive Defendants' governmental immunity.

¶ 30 Plaintiffs argue that "the absurd result created by these cases, which in effect spends taxpayer funds for policies that will never pay out on behalf of the named insured, is improper." But "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

2. Waiver of Immunity by Sheriff's Bond

¶ 31 Though we conclude that Defendants did not waive immunity by purchasing liability insurance, we must also consider whether Sheriff Woodard waived immunity by purchasing a sheriff's bond. Pursuant to statute, each sheriff "shall furnish a bond payable to the State of North Carolina for the due execution and return of process, the payment of fees and moneys collected, and the faithful execution of his office as sheriff . . . ." N.C. Gen. Stat. § 162-8 (2019). Purchasing a sheriff's bond as required by N.C. Gen. Stat. § 162-8 waives the sheriff's governmental immunity, but only "to the extent of the coverage provided." *White v. Cochran*, 229 N.C. App. 183, 190, 748 S.E.2d 334, 339 (2013); *see also Smith v. Phillips*, 117 N.C. App. 378, 384, 451 S.E.2d 309, 314 (1994) ("[W]aiver of a sheriff's official immunity may be shown by the existence of his official bond[.]"); *Summey*, 142 N.C. App. at 690, 544 S.E.2d at

265 (holding sheriff's immunity waived only to the extent of the amount of the bond). To recover on the sheriff's bond, "[e]very person injured by the neglect, misconduct, or misbehavior in office of any . . . sheriff . . . may institute a suit or suits against said officer or any of them and their sureties upon their respective bonds for the due performance of their duties in office in the name of the State . . . ." N.C. Gen. Stat. § 58-76-5 (2019).

¶ 32 Sheriff Woodard concedes that he has purchased a $20,000 bond pursuant to section 162-8. He has therefore waived his governmental immunity for claims up to $20,000 against the bond, "the extent of the coverage provided." *Cochran*, 229 N.C. App. at 190, 748 S.E.2d at 339.

3. Constitutional Challenge

¶ 33 Plaintiffs appear to argue that governmental immunity violates the North Carolina Constitution. Plaintiffs argue that the amount of damages must be assessed by a jury, and the Constitution "does not permit [] an override of the rights and remedies held by the people when an award of governmental immunity at the summary judgment stage results in a duty left intact without remedy for its breach."

¶ 34 Our Supreme Court has consistently recognized the continued vitality of the doctrine of governmental immunity. *See*, *e.g.*, *Est. of Williams*, 366 N.C. at 198, 732 S.E.2d at 140 ("Our jurisprudence has recognized the rule of governmental immunity for over a century."). On multiple occasions, the Court has declined to limit or abrogate the doctrine when asked to do so. *See*, *e.g.*, *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 324, 420 S.E.2d 432, 435 (1992) ("The plaintiff asks us either to abolish governmental immunity or to change the way it is applied. . . . We feel that any change in this doctrine should come from the General Assembly."); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 529, 186 S.E.2d 897, 908 (1972) ("We again decline to abrogate the firmly embedded rule of governmental immunity."); *Steelman v. City of New Bern*, 279 N.C. 589, 594, 184 S.E.2d 239, 242 (1971) (declining to follow a "modern trend" of abrogating governmental immunity because "this judge-made doctrine is firmly established in our law today, and by legislation has been recognized by the General Assembly as the public policy of the State."). We are bound by these decisions upholding the doctrine of governmental immunity. *State v. Gillis*, 158 N.C. App. 48, 53, 580 S.E.2d 32, 36 (2003) ("This Court is bound by precedent of the North Carolina Supreme Court.").

V. Conclusion

¶ 35 We dismiss Defendants' argument regarding Plaintiffs' direct constitutional claim and the County's argument concerning its liability for the acts of its co-defendants because Defendants have not shown a basis for immediate appellate review of these issues. Governmental immunity bars Plaintiffs' suit against the County and Plaintiffs' official capacity claims against Shaw and Adcock. Additionally, governmental immunity bars Plaintiffs' claims in excess of Sheriff Woodard's statutory bond. The trial court therefore erred in denying Defendants' motions for summary judgment on those causes of action.

DISMISSED IN PART; REVERSED IN PART.

Judges DIETZ and ZACHARY concur.

GUILFORD COUNTY BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT UNIT, EX. REL., HALEIGH MABE, PLAINTIFF
v.
JUSTIN MABE, DEFENDANT

No. COA20-347

Filed 5 October 2021

1. Appeal and Error—interlocutory orders—substantial right—res judicata—paternity

In a child support case in which the issue of paternity was raised, the appellate court invoked Appellate Rule 2 to consider the Child Support Enforcement Agency's argument raised in its reply brief that the interlocutory order continuing hearing of a "Motion to Modify/Order to Show Cause" affected a substantial right, in that the issue of paternity had previously been adjudicated. The appellate court elected to consider the merits of the appeal in order to prevent manifest injustice.

2. Paternity—children born out of wedlock—challenges—proper motion

In a child support case in which defendant's paternity of a child had previously been adjudicated, the appellate court held that, even assuming defendant and the mother were not married at the time the child was born so that N.C.G.S. § 49-14(h) was applicable, the

word "paternity" being written on defendant's motion to modify child support did not meet the standard of a "proper motion" pursuant to section 49-14(h), and defendant failed to allege any proper legal basis for requesting paternity testing to challenge the prior adjudication of paternity.

Appeal by plaintiff from order entered 23 October 2019 by Judge Tonia A. Cutchin in District Court, Guilford County. Heard in the Court of Appeals 23 February 2021.

Deputy County Attorney Taniya D. Reaves, for plaintiff-appellant.

Melrose Law, PLLC, by Adam R. Melrose, for defendant-appellee.

STROUD, Chief Judge.

¶ 1 Plaintiff appeals a continuance order. Because defendant did not file a proper motion pursuant to North Carolina General Statute § 49-14 to challenge the prior adjudication of paternity, we reverse and remand.

I. Background

¶ 2 On or about 3 July 2014, Guilford County Child Support Enforcement Agency, ("CSEA") on behalf of Ms. Haleigh Mabe ("Mother") filed a IV-D complaint against defendant Mr. Justin Mabe for child support. The complaint alleged Ms. Mabe was the "caretaker" of the minor child, and Mr. Mabe was the father of the minor child. A copy of the child's birth certificate was attached to the complaint, and it lists Mother as the child's mother; the blank for "father" states: "*HUSBAND* INFORMATION REFUSED[.]" (Emphasis added.) Defendant was served with the summons and complaint on 7 July 2015, but he failed to answer or file any responsive pleading.

¶ 3 On 24 November 2015, the trial court entered a default judgment against defendant establishing child support. The order includes both a finding of fact and a conclusion of law that defendant was the father of the minor child. The child support order also decreed that, "[p]aternity is established between the Defendant and child[.]" Defendant did not appeal from the child support order.

¶ 4 After entry of the child support order, in February of 2016, CSEA filed a "motion for order to show cause" for defendant's failure to pay his child support. (Capitalization altered.) On 25 February 2016, the trial court entered an order for defendant to appear and show cause. From

our record at least three show cause orders were entered by the trial court, although none of the orders in our record were served. Several continuance orders were also entered.[1]

¶ 5 On 23 September 2019, defendant filed a *pro se* motion to modify child support, using 2003 AOC form AOC0CV0200, Rev. 3/03.[2] Defendant identified the "circumstances [that] have changed" as the basis for modification of his child support obligation as "RECALL ORDER FOR ARREST & PATERNITY[.]" Thus, it appears that defendant's "motion for modification" was actually requesting recall of an order for arrest and raising an issue regarding paternity.

¶ 6 On 22 October 2019, the trial court held a hearing based on defendant's motion for recall of the arrest order and "paternity[.]" (Capitalization altered.) At the hearing, defendant argued that his name was not on the birth certificate and he did not "know nothing about the kid and she won't let me speak to him or nothing" as the basis for challenging paternity. By order entered 22 October 2019, the trial court recalled defendant's order for arrest issued on 12 December 2017. On 23 October 2019, the trial court entered a continuance order, continuing hearing of "a Motion to Modify/Order to Show Cause" to 8 January 2020. The trial court found that the continuance was requested "[f]or the Defendant (sic) request for a paternity test be scheduled and monitor compliance for the Order to Show Cause." CSEA appeals.

II. Interlocutory Order

¶ 7 **[1]** CSEA contends the trial court erred in ordering DNA testing to establish paternity because paternity was already established in 2015.

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1. On 10 October 2017, defendant appeared for hearing on one of the prior orders to show cause. The hearing was continued based upon defendant's agreement to pay $184 that day and $100 for each of the three following months. The continuance order required defendant to appear in court for hearing on 12 December 2017. Defendant failed to appear and an order for arrest was issued.

2. The statutory authorities noted on this form are North Carolina General Statutes §§ 50-13.7 and -13.10. North Carolina General Statute § 50-13.7 governs a motion for modification of child support based upon "a showing of changed circumstances" and is "subject to the limitations of G.S. 50-13.10[,]" N.C. Gen. Stat. § 50-13.7 (2019), which provides in part that "[e]ach past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, or otherwise modified in any way for any reason, in this State or any other state, except that a child support obligation may be modified as otherwise provided by law, and a vested past due payment is to that extent subject to divestment, if, but only if, a written motion is filed, and due notice is given to all parties either: (1) Before the payment is due or (2) If the moving party is precluded by physical disability, mental incapacity, indigency, misrepresentation of another party, or other compelling reason from filing a motion before the payment is due, then promptly after the moving party is no longer so precluded." N.C. Gen. Stat. § 50-13.10 (2019).

While CSEA contends the appeal is from "a final judgment[,]" the order on appeal is not a final order but an order to continue the hearing on defendant's "modification" motion and on an order to show cause. *Turner v. Norfolk Southern Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) ("A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." (citation and quotation marks omitted)). As the order appealed is a continuance order setting a new hearing date for defendant's motion to modify child support and to "monitor compliance for the Order to Show Cause[,]" the order is interlocutory as it "is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *Id.* (citation and quotation marks omitted). The very name, *continuance* order, indicates that the action is being continued until a later time. (Emphasis added.)

> There are only two means by which an interlocutory order may be appealed: (1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C. R. Civ. P. 54(b) or (2) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

Id. (citation omitted).

¶ 8 The trial court has not certified the order for immediate appeal under Rule 54, and thus CSEA's only method for review is demonstrating a substantial right. *See generally id.*

> A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment. The right to immediate appeal is reserved for those cases in which the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed. Our courts have generally taken a restrictive view of the substantial right exception. *The burden is on the appealing party to establish that a substantial right will be affected.*

Id. at 142, 526 S.E.2d at 670 (emphasis added) (citation and quotation marks omitted).

¶ 9 In CSEA's original brief, CSEA contended the order was final, in the sense that the order required paternity testing, and CSEA contends there is no legal basis for paternity testing as the court had already established paternity in 2015. According to CSEA, the order "is void *ab initio*" because it was entered without subject matter jurisdiction on the specific issue of paternity. CSEA's legal nullity argument stems from the contention that there was no cognizable motion pending before the trial court. However, defendant's "motion to modify" was before the trial court for hearing, as was stated in the "NOTICE OF HEARING" placing the issue before the trial court, although we agree that defendant's "motion to modify" was substantively not a motion for modification. CSEA seems to be contending the trial court did not have *authority* to order paternity testing, but that is a different question than whether it had jurisdiction. Even CSEA admits the "cases cited [in its brief] go towards the paternity issue being *res judicata*[.]" CSEA contends *res judicata* "overlaps with the issue of subject matter jurisdiction because subject matter jurisdiction is not captured when the issue has already been litigated placing the matter in the *res judicata* bin."

¶ 10 The confusion in this argument was perhaps caused by the use of forms intended for different purposes, so the titles and statutory references do not coincide with the substance of the documents. The "motion to modify" was not really a motion for modification of child support based upon a change of circumstances, and the trial court's "CONTINUANCE ORDER" is really an order for paternity testing. But looking to the substance of the "motion to modify" and the "order for continuance," this case does present an issue of *res judicata*.

¶ 11 Furthermore, we acknowledge an important procedural feature of this particular case on appeal. Defendant appeared *pro se* and initially did not file a responsive brief. This Court *sua sponte* offered defendant the opportunity to participate in the North Carolina Appellate Pro Bono Program. Defendant accepted, and an attorney was appointed to represent him on appeal. Thereafter, his attorney filed a brief on his behalf. By order entered 9 February 2021, this Court allowed CSEA to file a reply brief and scheduled this case for oral argument.

¶ 12 Out of an abundance of caution, we invoke North Carolina Rule of Appellate Procedure 2 to consider the substantive arguments in CSEA's reply brief in order "[t]o prevent manifest injustice to a party [and] to expedite decision in the public interest[.]" N.C. R. App. P. 2. Rule 2 allows this Court "except as otherwise expressly provided by these rules [to] suspend or vary the requirements or provisions of any of these rules in a case pending before it[.]" Dismissal of this appeal as interlocutory based

upon a technical argument regarding the timing of CSEA's assertion of a substantial right, particularly in a case where the briefing schedule was altered by the *sua sponte* appointment of *pro bono* counsel by this Court, would not serve to "expedite decision in the public interest[.]" *Id.* Instead, dismissal would harm the public interest because of the importance of clarity and finality in establishment of paternity to both parent and child. The General Assembly has recognized the importance of this public interest in finality of paternity adjudications in North Carolina General Statute § 49-14, which allows challenge to a prior adjudication of paternity only under specific, well-defined circumstances. Thus, to the extent review of the order on appeal is not appropriate under Rule 28(h) regarding reply briefs, review would be appropriate "[t]o prevent manifest injustice" to the mother and child in this case and "in the public interest" of this State in the finality of parentage once established. *Id.* Accordingly, under Rule 2, we consider CSEA's substantial rights argument presented in its reply brief.

¶ 13 An argument of *res judicata* may involve a substantial right. *See Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) ("[A] motion for summary judgment based on *res judicata* is directed at preventing the possibility that a successful defendant, or one in privity with that defendant, will twice have to defend against the same claim by the same plaintiff, or one in privity with that plaintiff. Denial of the motion could lead to a second trial in frustration of the underlying principles of the doctrine of *res judicata*. Defendant's motion simply seeks to relitigate an issue which was already adjudicated. Therefore, we hold that the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable."). In this case, the parties are the same, and defendant's motion was filed in the very same case in which paternity was already adjudicated, so there is no question of whether this is the "same claim" or the same parties for purposes of *res judicata*. *Id.* We conclude finality of a paternity adjudication by a prior court order demonstrates a substantial right which may be adversely affected if review were delayed. Once paternity has been established, CSEA should not have to litigate the claim again unless defendant has presented a valid legal basis to challenge the prior adjudication. Accordingly, we consider CSEA's appeal.

III. Paternity

¶ 14 **[2]** Defendant contends he is entitled to challenge the trial court's prior adjudication of paternity under North Carolina General Statute § 49-14(h). North Carolina General Statute § 49-14(h) provides,

> (h) Notwithstanding the time limitations of G.S. 1A-1, Rule 60 of the North Carolina Rules of Civil Procedure, or any other provision of law, an order of paternity may be set aside by a trial court if each of the following applies:
>
> (1) The paternity order was entered as the result of fraud, duress, mutual mistake, or excusable neglect.
>
> (2) Genetic tests establish the putative father is not the biological father of the child.
>
> The burden of proof in any motion to set aside an order of paternity shall be on the moving party. Upon proper motion alleging fraud, duress, mutual mistake, or excusable neglect, the court shall order the child's mother, the child whose parentage is at issue, and the putative father to submit to genetic paternity testing pursuant to G.S. 8-50.1(b1). If the court determines, as a result of genetic testing, the putative father is not the biological father of the child and the order of paternity was entered as a result of fraud, duress, mutual mistake, or excusable neglect, the court may set aside the order of paternity. *Nothing in this subsection shall be construed to affect the presumption of legitimacy where a child is born to a mother and the putative father during the course of a marriage.*

N.C. Gen. Stat. § 49-14(h) (2019).

¶ 15 Even if we were to assume North Carolina General Statute § 49-14(h) could be applicable to defendant, we disagree with defendant that the word "paternity" on the motion to modify and his few statements before the trial court qualify as a "proper motion[.]" *Id.* North Carolina General Statute § 49-14(h) sets out the required showing for a putative father to seek paternity testing and specifically places the burden of proof to establish a basis to order testing upon the father by filing a "proper motion" alleging that the paternity order was entered "as the result of fraud, duress, mutual mistake, or excusable neglect." *Id.* Here, defendant's written motion purportedly sought to modify child support based

upon changed circumstances, and the word "paternity" on the modification motion does not meet the standard set by North Carolina General Statute § 49-14(h).[3] *See generally id.* Even in his statements to the trial court at the hearing, defendant did not identify any factual basis to support a claim "of fraud, duress, mutual mistake, or excusable neglect." *Id.* Defendant simply asked for DNA testing without any statutory or factual basis. But paternity had already been adjudicated by the trial court, and the order was entered on 24 November 2015; defendant did not appeal the order. Accordingly, we must reverse the trial court's order as defendant did not file a "proper motion" with the requisite allegations. *Id.*

¶ 16 Furthermore, we must note that defendant's ability to file a "proper motion" under North Carolina General Statute § 49-14(h) depends upon whether the child was born while the parties were married. It is unclear from the record if and when the parties were married to one another and if and when that marriage was terminated. The complaint did not allege that the child was born during the marriage, and the child support order did not include any finding of fact regarding the marital status of the parents. CSEA's argument essentially assumes that the parents were married at the time of the child's birth. Nothing in the record directly contradicts the assumption that the child was born to the marriage of the parties, but nothing in the record establishes this fact either. The only information in our record indicating the child may have been born to the marriage is that the parents have the same last name and that the child's birth certificate had a note that Mother's husband's information was refused, indicating that she reported she had a husband at the time of the child's birth.

¶ 17 Defendant's claim that he is entitled to paternity testing is based upon North Carolina General Statute § 49-14, which is within Article 3 of the General Statute regarding, "CIVIL ACTIONS REGARDING CHILDREN BORN OUT OF WEDLOCK[.]" At the beginning of North Carolina General Statute, § 49-14, subsection (a), addresses the cases in which the statute applies: "The paternity *of a child born out of wedlock* . . . . " N.C. Gen. Stat. § 49-14(a) (2019) (emphasis added). In addition, subsection (h) of North Carolina General Statute § 49-14 makes it clear that this provision does not apply if the child was born during the marriage of the parents: "Nothing in this subsection shall be construed to affect the presumption of legitimacy where a child is born to a mother

3. The word "paternity" also does not meet the statutory basis for modification of child support based upon a change of circumstances set forth by North Carolina General Statute § 50-13.7, which was the statutory authority noted on defendant's motion.

and the putative father during the course of a marriage." N.C. Gen. Stat. § 49-14(h). Thus, North Carolina General Statute § 49-14(h) would not be applicable to defendant if the child was born during his marriage to Mother. However, nothing in our record establishes this fact, and thus this Court cannot determine whether defendant may be entitled to seek relief under North Carolina General Statute § 49-14(h). We hold only that the motion for modification was not a "proper motion" under North Carolina General Statute § 49-14(h), even if we assume *arguendo* that defendant and Mother were not married at the time of the child's birth.

¶ 18 Accordingly, we reverse the trial court's order and remand for further proceedings. Specifically, on remand the trial court shall enter an order dismissing defendant's purported motion for DNA testing and motion to modify as the motion did not allege changed circumstances under North Carolina General Statute § 50-13.7 or any grounds for relief under North Carolina General Statute § 49-14(h) and schedule a new hearing date for the "Order to Show Cause" which was also continued by the order of continuance.

IV. Conclusion

¶ 19 Because defendant has failed to demonstrate any legal basis for requesting paternity testing to challenge the trial court's prior adjudication of paternity, the trial court erred by ordering paternity testing. We reverse and remand for further proceedings as described above.

REVERSED and REMANDED.

Judges MURPHY and GRIFFIN concur.

HULL v. BROWN

[279 N.C. App. 570, 2021-NCCOA-525]

EHREN HULL, PLAINTIFF
v.
TONY McLEAN BROWN, DEFENDANT

No. COA20-748

Filed 5 October 2021

Appeal and Error—interlocutory appeal—motion to transfer—three-judge panel—facial constitutional challenge

In an action asserting claims for alienation of affection and criminal conversation (together, "covenant claims"), and intentional and negligent infliction of emotional distress, defendant's appeal from an order denying his motion to transfer the case per Civil Procedure Rule 42(b)(4) for a three-judge panel to review his facial constitutional challenge to N.C.G.S. § 52-13 (codifying the covenant claims as actionable) was dismissed as interlocutory. Although the denial of a motion to transfer may be immediately appealable as affecting a substantial right, here, defendant could not show he was deprived of a substantial right where statutory mandatory transfer rules did not apply because not all issues unrelated to the constitutional challenge had yet been resolved. Further, nothing prevented defendant from raising the constitutional challenge before a three-judge panel if the covenant claims survived summary judgment.

Appeal by defendant from order entered 17 September 2020 by Judge Julia Lynn Gullett in Iredell County Superior Court. Heard in the Court of Appeals 25 August 2021.

Homesley and Wingo Law Group, PLLC, by Andrew J. Wingo and Kyle L. Putnam, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, G. Russell Kornegay, III, and Caroline T. Mitchell, for defendant-appellant.

TYSON, Judge.

I. Background

¶ 1 Ehren Hull, ("Plaintiff") commenced this action against Tony Brown ("Defendant") asserting claims for alienation of affection and criminal conversation (together, "covenant claims") regarding Plaintiff's wife. Plaintiff also brought claims for negligent infliction of emotional distress

("NIED"), and intentional infliction of emotional distress ("IIED") (together, "emotional distress claims").

¶ 2 Defendant timely filed his Motion to Dismiss and Request for Transfer to the Superior Court of Wake County for Determination by a Three-Judge Panel ("Motion") pursuant to N.C. R. Civ. P. 42(b)(4). In the Motion, Defendant sought: (1) dismissal of Plaintiff's covenant claims on the basis the statute purportedly codifying them, N.C. Gen. Stat. § 52-13, is facially unconstitutional; and, (2) expeditious transfer of such constitutional challenge for resolution by a three-judge panel. The Motion failed to show the following statutory amendments changed any of the common law elements of either tort. The statute establishes:

> (a) No act of the defendant shall give rise to a cause of action for alienation of affection or criminal conversation that occurs after the plaintiff and the plaintiffs spouse physically separate with the intent of either the plaintiff or plaintiffs spouse that the physical separation remain permanent.
>
> (b) An action for alienation of affection or criminal conversation shall not be commenced more than three years from the last act of the defendant giving rise to the cause of action.
>
> (c) A person may commence a cause of action for alienation of affection or criminal conversation against a natural person only.

N.C. Gen. Stat. § 52-13 (2019).

¶ 3 The trial judge made extensive findings of fact and conclusions of law and denied Defendant's transfer request and his motion to dismiss Plaintiff's covenant claims.

¶ 4 At the close of the hearing, Defendant moved to certify this matter for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. The trial court denied the motion and did not certify for immediate review.

¶ 5 Defendant filed and served: (1) his responsive pleading; (2) his objections and responses to Plaintiff's first request for admission; and, (3) his Notice of Appeal from the trial judge's ruling.

II. Issues

¶ 6 Defendant raises two issues on appeal. First, whether the trial court erred by denying his motion to transfer based upon his purported facial

constitutional challenge to the covenant claims. Second, whether the trial court erred by denying Defendant's motion to dismiss because it lacked jurisdiction to adjudicate the merits.

III. Jurisdiction

¶ 7 Defendant argues his interlocutory appeal is properly before this Court pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3) (2019).

> Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment . . . Essentially a two-part test has developed[:] the right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment.

Goldston v. American Motors Corp., 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citations and internal quotation marks omitted).

> [T]he 'substantial right' test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.

Waters v. Qualified Personnel, Inc., 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

¶ 8 Defendant argues the trial court's order affects a substantial right: the right to transfer to a three-judge panel, as promulgated by statute.

¶ 9 A litigant has a right to immediately appeal from an interlocutory order denying a motion to transfer a matter from a statutorily improper venue to a statutorily proper venue. *See, e.g.*, *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980) ("Although the initial question of venue is a procedural one, there can be no doubt that a right to venue established by statute is a substantial right.").

¶ 10 Defendant appeals pursuant to Rule 42, and "[w]e must be mindful of the longstanding 'presumption [ ] that the legislature was fully cognizant of prior and existing law within the subject matter of its enactment." *State v. Daw*, 277 N.C. 240, 2021-NCCOA-180, ¶ 39, 860 S.E.2d 1, 12 (2021) (citation omitted). "The avoidance of one trial is not ordinarily

a substantial right." *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982) (citation omitted).

IV. Trial Court's Compliance with Rule 42

¶ 11 Defendant argues "any facial challenge to the validity of an act of the General Assembly shall be transferred pursuant to G.S. 1A-1, Rule 42(b)(4)[.]" N.C. Gen. Stat. § 1-267.1 (2019). Rule 42(b)(4) provides in relevant part:

> [A]ny facial challenge to the validity of an act of the General Assembly . . . shall be heard by a three-judge panel in the Superior Court of Wake County . . . if such a challenge is raised by the defendant in the defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive pleading. In that event, the court shall, on its own motion, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel *if, after all other matters in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any matters in the case*. The court in which the action originated shall maintain jurisdiction over all matters other than the challenge to the act's facial validity. For a motion filed under Rule 11 or Rule 12(b)(1) through (7), the original court shall rule on the motion, however, it may decline to rule on a motion that is based solely upon Rule 12(b)(6). If the original court declines to rule on a Rule 12(b)(6) motion, the motion shall be decided by the three-judge panel. The original court shall stay all matters that are contingent upon the outcome of the challenge to the act's facial validity pending a ruling on that challenge and until all appeal rights are exhausted. Once the three-judge panel has ruled and all appeal rights have been exhausted, the matter shall be transferred or remanded to the three-judge panel or the trial court in which the action originated for resolution of any outstanding matters, as appropriate.

N.C. Gen. Stat. § 1A-1, Rule 42(b)(4) (2019) (emphasis supplied).

¶ 12 Rule 42 requires the transfer for the facial constitutional challenge should not happen until "after" a trial on the other unaffected claims in the lawsuit. *Id.*

¶ 13 In *Holdstock v. Duke*, this Court held:

> The trial court also has to determine what issues, if any, are not "contingent upon the outcome of the challenge to the act's facial validity[,]" and *resolve those issues before deciding whether it is necessary to transfer the facial challenge to the three-judge panel.*

Holdstock v. Duke Univ. Health Sys., Inc., 270 N.C. App. 267, 281, 841 S.E.2d 307, 317 (2020) (citation omitted) (emphasis in original and supplied).

¶ 14 This Court further held in *Holdstock*:

> [I]f the trial court had found reason to grant summary judgment in favor of either Plaintiffs or Defendants, based upon matters not contingent on Plaintiffs' facial challenge, the trial court would not have transferred Plaintiff's facial challenge to a three-judge panel because the underlying action would have already been decided in full. However, if the trial court had decided all matters not "contingent upon the outcome of" resolution of Plaintiffs' facial challenge, but matters contingent on resolution of the facial challenge remained "in order to completely resolve" the action, the trial court would have been required, "on its own motion, [to] transfer that portion of the action challenging the validity of [Rule 9(j)] . . . for resolution by a three-judge panel[.]

Id. at 278–79, 841 S.E.2d at 315. (citation omitted).

¶ 15 Defendant argues Plaintiff's claims in this action for alienation of affections, criminal conversation, NIED, and IIED involve the same facts, the same damages, and all seek compensatory and punitive damages for all four claims, so the same jury must hear all four claims pursuant to N.C. Gen. Stat. § 1D-30 (2019) (stating "the issues of liability for compensatory damages and the amount of compensatory damages, if any, shall be tried separately from the issues of liability for punitive damages and the amount of punitive damages . . . The same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to

punitive damages."). Defendant overstates the nature of these four categories of claims.

¶ 16 Nothing prevents Defendant from raising the constitutionality of the covenant claims before a three-judge panel after all other issues in the case are resolved. If the claims subject to constitutional challenge survive summary judgment on other grounds, a jury may determine the damages of each cause of action separately while Defendant preserves its right to raise the constitutional issues before the three-judge panel before the trial court enters a final judgment. Because not all matters have been fully resolved, the statutory mandated transfer provisions of N.C. Gen. Stat. §§ 1-267.1 & 1-81.1 and Rule 42(b)(4) do not apply. This interlocutory appeal is premature.

V. Conclusion

¶ 17 Rule 42 requires all non-contingent matters to be resolved before the facial challenge can be resolved. N.C. Gen. Stat. § 1A-1, 42(b)(4). Once "all other matters in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made[.]" *Id.*

¶ 18 Defendant has not shown any "deprivation of that substantial right . . . [to] potentially work injury to [Defendant] if not corrected before appeal from final judgment." *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736.

¶ 19 This appeal is interlocutory and dismissed. *It is so ordered.*

DISMISSED.

Judges DIETZ and GRIFFIN concur.

MILONE & MacBROOM, INC., Plaintiff
v.
KYLE V. CORKUM, ET AL., Defendants

No. COA20-921

Filed 5 October 2021

1. Appeal and Error—interlocutory orders—writ of certiorari—serious question that might escape review

The appellate court invoked Appellate Rule 2 and issued a writ of certiorari pursuant to Appellate Rule 21 to review an interlocutory order that was not entitled to immediate appeal but that raised a serious question, regarding the trial court's exercise of jurisdiction in supplemental proceedings, that might otherwise escape review.

2. Judgments—supplemental proceedings—subject matter jurisdiction—no writ of execution issued

The trial court lacked statutory authority—and thus subject matter jurisdiction—to grant relief pursuant to Chapter 1, Article 31 ("Supplemental Proceedings") of the General Statutes where plaintiff had obtained a judgment against defendants but no writ of execution was issued to enforce the judgment or returned unsatisfied, in whole or in part, before plaintiff undertook the supplemental proceedings. The trial court's order compelling defendant to respond to discovery issued pursuant to Article 31 and imposing sanctions was vacated.

Appeal by Defendant from Order entered 5 March 2020 by Judge Michael J. Denning in Wake County District Court. Heard in the Court of Appeals 11 August 2021.

Smith, Debnam, Narron, Drake, Saintsing & Myers, LLP, by Byron L. Saintsing and Thomas A. Gray, for plaintiff-appellee.

Akins, Hunt, Atkins, P.C., by Donald G. Hunt, Jr., and Kristen Atkins Lee, for defendants-appellants.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Kyle Corkum (Defendant) appeals from the trial court's Order granting Milone & MacBroom, Inc.'s (Plaintiff) Motion to Compel responses to Plaintiff's post-judgment discovery requests in supplemental proceedings, denying Defendant's Motion for a Protective Order, and indicating the trial court's intent to award Plaintiff attorneys' fees as a Rule 11 sanction against Defendant. By prior Order of this Court, this appeal was consolidated for the "purpose of hearing only" under N.C. R. App. P. 40 with Plaintiff's subsequent appeal in COA20-922 taken after the trial court entered a later order imposing monetary sanctions against Defendant pursuant to Rule 11 in the amount of $8,500.00. The Record before us tends to reflect the following:

¶ 2 On 30 October 2012, as memorialized in a Statement Authorizing Entry of Judgment (Statement), Plaintiff entered into an agreement with Defendant, individually, and with Defendant as the manager of a number of Limited Liability Companies (LLCs) for payment of monies owed by Defendant and the LLCs for "services, capital, and equipment" in the total amount of $2,500,000. The parties agreed that Defendant and the LLCs would authorize entry of judgment against them for the full $2,500,000, but Plaintiff would not record the judgment if Defendant and the LLCs made a series of quarterly payments beginning in December 2012 and concluding in March 2019 totaling $1,402,000. Defendant and the LLCs made payments under the agreement—paying $1,138,500 towards their obligation—before defaulting in September 2018.

¶ 3 As a result of this default by Defendant and the LLCs, on 23 October 2018, Plaintiff filed the Statement and a supporting affidavit with the Wake County Clerk of Superior Court and the clerk's office entered a Confession of Judgment, pursuant to Rule 68.1 of the North Carolina Rules of Civil Procedure, against Defendant and the LLCs in Plaintiff's favor in the full amount of $2,500,000 with interest. A few days later, on 30 October 2018, Plaintiff filed a Certificate of Credit on Judgment noting Defendant and the LLCs payments of $1,138,500 and crediting the payments towards the Judgment.

¶ 4 The Record before us does not reflect any writ of execution was issued or returned unsatisfied in whole or part, and it appears there was no further effort to execute on the judgment. Nevertheless, on 26 March 2019, Plaintiff served Interrogatories to Supplemental Proceedings and Request for Production of Documents, pursuant to N.C. Gen. Stat. §§ 1-352.1 and 1-352.2, on attorneys Plaintiff believed were Defendant's counsel. Plaintiff filed a Motion to Compel in Wake County District

Court on 7 May 2019 alleging Defendant had not responded to its interrogatories and request for production.[1] Plaintiff withdrew its Motion to Compel on 26 July 2019. In addition, also on 26 July 2019, Plaintiff served a new set of interrogatories and requests for production on Defendant.

¶ 5 On 8 August 2019, Defendant filed a Motion to Dismiss for Lack of Jurisdiction, Insufficiency of Process and Improper Service of Process and Failure to Comply with N.C. Gen. Stat. §§ 1-352.1 and 1-352.2, in the Alternative, Motion for Protective Order, Motion to Dismiss and for Protective Order captioned as filed in Wake County Superior Court. Plaintiff subsequently filed a second Motion to Compel in Wake County District Court on 27 November 2019.[2]

¶ 6 Both parties' Motions came on for hearing in Wake County District Court on 27 February 2020. Following the hearing, the trial court entered an Order granting Plaintiff's Motion to Compel and denying Defendant's Motion for a Protective Order on 5 March 2020.[3] In addition, the trial court's Order stated it was awarding Plaintiff attorneys' fees under N.C. R. Civ. P. 11 as a sanction for Defendant seeking a protective order but did not set the amount of fees. Defendant filed written Notice of Appeal of the trial court's Order on 10 March 2020.

ISSUE

¶ 7 The dispositive issue in this appeal is whether the trial court had subject-matter jurisdiction to issue orders in supplemental proceedings in aid of execution where no writ of execution was issued or returned unsatisfied in whole or in part.

ANALYSIS

¶ 8 **[1]** As a threshold matter, although Plaintiff does not argue this Court lacks appellate jurisdiction to hear this case, Defendant acknowledges the trial court's Order granting Plaintiff's Motion to Compel could be construed as an interlocutory discovery order not, generally, directly immediately appealable. Indeed, as a general proposition, "an order compelling discovery is not immediately appealable because it is interlocutory and does not affect a substantial right which would be lost if the ruling is not reviewed before final judgment." *Benfield v. Benfield*,

1. This Motion to Compel was captioned as being filed "In the Court of Common Pleas District Court Division[.]"

2. Again, captioned as being filed in the "Court of Common Pleas District Court Division[.]"

3. This Order also is captioned as in "The Court of Common Pleas District Court Division."

89 N.C. App. 415, 418, 366 S.E.2d 500, 502 (1988) (citations omitted). Similarly, as a general matter, an appeal from an award of attorneys' fees may not be brought until the trial court has finally determined the amount to be awarded. *Triad Women's Ctr., P.A. v. Rogers*, 207 N.C. App. 353, 358, 699 S.E.2d 657, 660 (2010).

¶ 9 Here, on the Record before us, compliance with the trial court's 5 March 2020 Order granting Plaintiff's Motion to Compel has not been enforced by sanctions. Moreover, the trial court's 5 March 2020 Order imposing Rule 11 sanctions on Plaintiff for opposing the Motion to Compel is not an appealable Order because it does not award an amount of attorneys' fees. *In re Cranor*, 247 N.C. App. 565, 569, 786 S.E.2d 379, 382 (2016) ("Where an order imposes judicial discipline, an appeal from such order is interlocutory if the order involves the imposition of attorneys' fees and if the *amount* of the fee award was not set in the order."). Thus, Defendant's appeal is interlocutory and, we conclude—in the absence of any argument before this Court of an established privilege being asserted by Defendant, any sanction imposed for failure to comply with the Order compelling discovery, or a specific amount of attorneys' fees awarded under Rule 11—the trial court's 5 March 2020 Order does not affect a substantial right. Therefore, Defendant is not entitled to an immediate appeal from the 5 March 2020 Order.

¶ 10 Nevertheless, and in the alternative, Defendant also requests this Court to treat his appeal as a Petition for Writ of Certiorari and allow review on the merits. While the better practice would have been for Defendant to file a separate Petition for Writ of Certiorari compliant with N.C. R. App. P. 21, we exercise our discretion to invoke N.C. R. App. P. 2 to vary the Rules of Appellate Procedure and allow Defendant's request to consider this appeal as a Petition for Writ of Certiorari notwithstanding the failure to comply with the requirements of N.C. R. App. P. 21. We do so because this case raises serious questions of how and when a trial court may exercise jurisdiction in supplemental proceedings that may otherwise escape review leading to manifest injustice to a party subjected to supplemental proceedings improperly instituted contrary to the express statutory requirements. Having invoked N.C. R. App. P. 2, our decision, then, on whether to issue the Writ of Certiorari necessarily turns on the merits of the appeal. *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) ("A petition for the writ must show merit or that error was probably committed below. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." (citations omitted)).

¶ 11 **[2]** Defendant argues the trial court lacked subject-matter jurisdiction over the supplemental proceedings. "Subject matter jurisdiction, a

threshold requirement for a court to hear and adjudicate a controversy brought before it, is conferred upon the courts by either the North Carolina Constitution or by statute." *Burgess v. Burgess*, 205 N.C. App. 325, 327-28, 698 S.E.2d 666, 668 (2010) (citation and quotation marks omitted). We review challenges to subject-matter jurisdiction de novo. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

¶ 12 " 'Subject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter jurisdiction may be raised for the first time on appeal.' " *Burgess*, 205 N.C. App. at 328, 698 S.E.2d at 668-69 (quoting *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007), *aff'd*, 362 N.C. 170, 655 S.E.2d 712 (2008)). "Although defendant made no arguments concerning subject matter jurisdiction before the trial court, a party may raise the issue at any stage of a proceeding." *Composite Tech., Inc. v. Advanced Composite Structures (USA), Inc.*, 150 N.C. App. 386, 389, 563 S.E.2d 84, 85 (2002) (citation omitted). "This Court may also raise the issue even if neither party has addressed the matter." *Id.* Indeed, here, we discern a fundamental jurisdictional defect in the institution of the supplemental proceedings in this case which neither party has identified either below or in this Court: no writ of execution was issued to enforce the Judgment or returned unsatisfied in whole or in part prior to Plaintiff undertaking supplemental proceedings.

¶ 13 In an early opinion discussing statutory supplemental proceedings, our Supreme Court recognized statutory supplemental proceedings served to replace the prior Creditor's Bill in equity. *Rand v. Rand*, 78 N.C. 12, 14-15 (1878) ("We think it clear that proceedings supplementary to execution under the Code of Procedure are a substitute for the former creditor's bill, and are governed by the principle established under the former practice in administering this species of relief in behalf of judgment creditors."). The Court recognized: "The object of the proceeding is to compel the application of property concealed by the debtor, or which from its nature cannot be levied upon under execution, to the payment of the creditor's judgment." *Id.* at 15. It followed then: "The only purpose of the creditor's bill was to enforce satisfaction of a judgment out of the property of the judgment debtor when an execution could not reach it, and the only purpose of supplemental proceedings is to attain the same end by the same means." *Id.*

¶ 14 Article 31 of Chapter 1 of the North Carolina General Statutes contains the current statutes governing supplemental proceedings. The first statute in this article, N.C. Gen. Stat. § 1-352, is titled: "Execution unsatisfied; debtor ordered to answer." The text of that statute provides:

> *When an execution against property of a judgment debtor, or any one of several debtors in the same judgment*, issued to the sheriff of the county where he resides or has a place of business, or if he does not reside in the State, to the sheriff of the county where a judgment roll or a transcript of a judgment is filed, *is returned wholly or partially unsatisfied, the judgment creditor at any time after the return, and within three years from the time of issuing the execution, is entitled to an order from the court to which the execution is returned or from the judge thereof*, requiring such debtor to appear and answer concerning his property before such court or judge, at a time and place specified in the order, *within the county to which the execution was issued.*

N.C. Gen. Stat. § 1-352 (2019) (emphases added). Likewise, N.C. Gen. Stat. § 1-352.1 provides a judgment creditor may serve interrogatories on a judgment debtor concerning the debtor's property "at any time the judgment remains unsatisfied, *and within three years from the time of issuing an execution*." N.C. Gen. Stat. § 1-352.1 (2019) (emphasis added). Further, N.C. Gen. Stat. § 1-352.2 provides for additional methods of discovering assets that may be employed "at any time the judgment remains unsatisfied, *and within three years from the time of issuing an execution*[.]" N.C. Gen. Stat. § 1-352.2 (2019) (emphasis added).[4]

¶ 15 Thus, as our Court explained: "Article 31 provides for supplemental proceedings, equitable in nature, after execution against a judgment debtor is returned unsatisfied to aid creditors to reach property . . . subject to the payment of debts which cannot be reached by the ordinary process of execution. These proceedings are available only after execution is attempted." *Massey v. Cates*, 2 N.C. App. 162, 164, 162 S.E.2d 589, 591 (1968). In fact, our Supreme Court, applying a prior version of the statutes, expressly answered the question: "Can supplemental proceedings be instituted against a defendant when there has been no execution issued within three years from the institution of such supplementary proceedings?" *Int'l Harvester Co. of Am. v. Brockwell*, 202 N.C. 805, 806

4. By way of further examples: N.C. Gen. Stat. § 1-353 allows for a judgment creditor "[a]fter issuing an execution against property" to seek an order requiring the judgment debtor to appear if the debtor is deemed to be "unjustly refus[ing]" to apply property towards the judgment; N.C. Gen. Stat. § 1-354 provides for "Proceedings supplemental to execution" upon the "return of an execution unsatisfied" against joint debtors.

164 S.E. 322, 322 (1932). The Court recognized: "A reading of the statutes discloses that a supplemental proceeding is based upon an execution." *Id.* As such, based on this reading of the statute the Court held: "if the defendant himself is supplemented, the proceedings must be instituted 'within three years of the issuing of execution.' " *Id.*, 164 S.E. at 323. It is apparent from both the plain language of the supplemental proceeding statutes and our prior case law that a statutory precondition to instituting supplemental proceedings against a defendant is the issuance of a writ of execution and, under Section 1-352, the return of that writ unsatisfied in whole or in part.

¶ 16 In this case, there is nothing in the Record before us which establishes Plaintiff sought issuance of a writ of execution or that any such writ was returned unsatisfied in whole or part. Thus, supplemental proceedings under Article 31 of Chapter 1 of the General Statutes were not available to Plaintiff. Therefore, the trial court lacked statutory authority over these supplemental proceedings and, as such, lacked subject-matter jurisdiction to grant any relief under Article 31 of Chapter 1 of the General Statutes. *See Burgess*, 205 N.C. App. at 327-28, 698 S.E.2d at 668; see also *In re Transportation of Juveniles*, 102 N.C. App. 806, 808, 403 S.E.2d 557, 558 (1991) ("[B]efore a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question."). Consequently, the trial court erred in entering its 5 March 2020 Order compelling Defendant to respond to discovery issued pursuant to Sections 1-352.1 and 1-352.2 and imposing sanctions under N.C. R. Civ. P. 11 on Defendant for opposing discovery in supplemental proceedings. As such, we further conclude it is appropriate to issue our Writ of Certiorari under N.C. R. App. P. 21 for purposes of vacating the trial court's 5 March 2020 Order.

Conclusion

¶ 17 Accordingly, for the foregoing reasons, we vacate the trial court's 5 March 2020 Order granting Plaintiff's Motion to Compel. We do so, however, without prejudice to any right of Plaintiff to institute supplemental proceedings consistent with Article 31 of Chapter 1 of the North Carolina General Statutes.

VACATED.

Judges ZACHARY and JACKSON concur.

MOLE' v. CITY OF DURHAM

[279 N.C. App. 583, 2021-NCCOA-527]

MICHAEL MOLE', PLAINTIFF
v.
CITY OF DURHAM, NORTH CAROLINA, A MUNICIPALITY, DEFENDANT

No. COA19-683

Filed 5 October 2021

1. Constitutional Law—North Carolina—fruits of their own labor clause—police disciplinary process—failure to follow policy

Where a police sergeant was fired for keeping his promise to allow an armed suspect, who had barricaded himself in a bedroom and threatened to shoot himself, to smoke a marijuana cigarette after he surrendered to police, the sergeant adequately pled a claim that his employer, the City of Durham, had violated Article I, Section 1's "fruits of their own labor" clause, which applied to the disciplinary action taken against him. His complaint properly stated the claim by alleging that the City had violated its own policy, which was designed to further a legitimate government interest, by failing to give him the minimum 72 hours of notice of his pre-disciplinary conference and that he was thereby injured by having inadequate time to prepare his response.

2. Constitutional Law—North Carolina—due process—police officer terminated—right to continued employment

Where a police sergeant was fired for keeping his promise to allow an armed suspect, who had barricaded himself in a bedroom and threatened to shoot himself, to smoke a marijuana cigarette after he surrendered to police, the sergeant failed to state a claim that his employer, the City of Durham, had violated his state constitutional right to due process. Employees in the state of North Carolina generally do not have a property interest in continued employment, and the sergeant did not allege that any statute, ordinance, or contract created such an interest.

3. Constitutional Law—North Carolina—equal protection—class of one—police officer terminated

Where a police sergeant was fired for keeping his promise to allow an armed suspect, who had barricaded himself in a bedroom and threatened to shoot himself, to smoke a marijuana cigarette after he surrendered to police, the sergeant failed to state a claim that his employer, the City of Durham, had violated his state constitutional right to equal protection by subjecting him to disparate

treatment as compared to similarly situated employees. This type of equal protection claim—a "class of one" claim—cannot be stated in the employment context.

Appeal by Plaintiff from order entered 24 May 2019 by Judge John M. Dunlow in Durham County Superior Court. Heard in the Court of Appeals 10 June 2021.

The McGuinness Law Firm, by J. Michael McGuinness, and Edelstein & Payne, by M. Travis Payne, for Plaintiff-Appellant.

Kennon Craver, PLLC, by Henry W. Sappenfield and Michele L. Livingstone, for Defendant-Appellee.

Essex Richards, P.A., by Norris A. Adams, II, for North Carolina Fraternal Order of Police, amicus curiae.

INMAN, Judge.

¶ 1 In his first experience negotiating the surrender of an armed and barricaded suspect, without another negotiator backing him up, Durham Police Sergeant Michael Mole' might have given up when the suspect's gun discharged at close range. He didn't, and two hours later he had persuaded the suspect to drop his weapon and surrender. The suspect, other citizens, and law enforcement officers were safe. But Sergeant Mole' was fired because he had secured the suspect's surrender by promising to allow him to smoke a marijuana cigarette once in custody, and he made good on the promise immediately following the arrest.

¶ 2 Sergeant Mole' sued the City of Durham, alleging that his employer violated his rights under the North Carolina Constitution. The trial court dismissed his complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

¶ 3 Because the complaint alleges a colorable violation of Article I, Section 1 of the North Carolina Constitution, which protects each person's right to enjoy the fruits of their own labor, we hold the trial court erred in dismissing that claim. We otherwise affirm the trial court because binding precedent precludes a holding that Sergeant Mole' has a constitutionally protected interest in continued employment under theories of due process or equal protection.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 4 The complaint pleads the following facts:

¶ 5 Sergeant Mole' began working for the Durham Police Department in May 2007. He received hostage negotiation training in May 2014, but he did not negotiate a barricaded subject or hostage situation until the events giving rise to this case.

¶ 6 On 28 June 2016, the Durham Police Department dispatched officers to an apartment in Durham to serve an arrest warrant on Julius Smoot ("Smoot"). After entering the apartment, officers discovered that Smoot had barricaded himself in an upstairs bedroom. Smoot yelled that he had a gun and that he would use it on himself in ten minutes unless he was allowed to see his wife and son. The officers retreated and requested a hostage negotiator.

¶ 7 Sergeant Mole' was the only hostage negotiator on duty at the time. He arrived at the apartment five minutes before Smoot's deadline and began negotiations with the primary goals of extending the deadline and keeping Smoot alive. During these negotiations, Smoot accidentally discharged his firearm.

¶ 8 Sergeant Mole' continued to negotiate with Smoot for approximately two hours. During this time, Smoot said he planned to smoke a "blunt," a marijuana cigarette. Sergeant Mole', reluctant to allow an armed and barricaded subject to impair his mental state, asked Smoot to refrain. Sergeant Mole' promised Smoot that if he disarmed and peacefully surrendered, he would be allowed to smoke the blunt.

¶ 9 Smoot then dropped his gun, handcuffed himself, and surrendered to Sergeant Mole' in the apartment. Still in handcuffs, Smoot asked for his pack of legal tobacco cigarettes and lighter, which were on a nearby table, and Sergeant Mole' handed those items to him. Smoot then pulled a marijuana blunt from behind his ear, lit it with the lighter, and smoked approximately half of it.

¶ 10 The Durham Police Department launched an internal investigation of Sergeant Mole's actions following Smoot's peaceful surrender. On 24 October 2016, approximately four months after the incident, Sergeant Mole' was informed in writing that a pre-disciplinary hearing would take place the next day, despite Durham's written policy requiring advance notice of at least three days. Following the hearing, Sergeant Mole's immediate supervisors recommended that he be reprimanded. But Durham terminated him.

¶ 11 In November 2018 Sergeant Mole' filed a complaint alleging Durham had violated his state constitutional rights to due process, equal protection, and the fruits of his labor under the North Carolina Constitution. The trial court entered an order granting Durham's motion to dismiss the complaint under Rule 12(b)(6) on 22 May 2019. Sergeant Mole' appeals.

II. ANALYSIS

¶ 12 Sergeant Mole' argues that the facts pled in his complaint support claims for violations of his state constitutional rights to due process, equal protection, and the fruits of his labor. Article I, Section 1 of the North Carolina Constitution, in a provision unique to that document as compared to the federal constitution, protects the people's rights to enjoy the fruits of their own labor. This provision was recently applied by our Supreme Court in *Tully v. City of Wilmington*, 370 N.C. 527, 810 S.E.2d 208 (2018). Following the Supreme Court's reasoning in *Tully*, we hold that Sergeant Mole's complaint adequately pleads a claim for violation of Article I, Section 1. We are constrained by binding precedents to affirm the trial court's dismissal of his remaining constitutional claims.

A. Standard of Review

¶ 13 We review an order granting a 12(b)(6) motion to dismiss *de novo* to determine whether the complaint states a claim under which relief can be granted. *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 195, 767 S.E.2d 374, 377 (2014). We liberally construe the complaint and take the material factual allegations as true. *Id.* Legal conclusions, unlike factual allegations, are not presumed valid. *Id.*

B. Fruits of One's Labor

¶ 14 **[1]** Sergeant Mole' argues that his termination violated his right to the fruits of his labor guaranteed by Article I, Section 1 of the North Carolina Constitution. This provision ensures each person the right to "life, liberty, *the enjoyment of the fruits of their own labor*, and the pursuit of happiness." N.C. Const. art. I, § 1 (emphasis added). Unlike the due process and equal protection provisions of our state constitution, which have been interpreted to provide the same protection as provisions in the federal constitution, this guarantee has no analogous federal constitutional clause. *See infra* Parts II.C (1) and (2).

¶ 15 The "fruits of their own labor" clause was added to our state constitution in 1868. It was adopted the same year the Fourteenth Amendment to the United States Constitution was ratified, at a time when formerly enslaved persons were newly able to work for their own benefit. *See* John V. Orth, *The North Carolina State Constitution with History and*

Commentary 38 (1995) (recognizing that the clause was "an addition that may have been intended to strike an ideological blow at the slave labor system").

¶ 16 Our appellate courts did not consider the clause until the 20th century, when it was applied to check the State's professional licensing powers. *See generally, e.g.*, *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940) (dry cleaning); *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949) (photography); *Roller v. Allen*, 245 N.C. 516, 96 S.E.2d 851 (1957) (tile installation). These decisions recognized a person's ability to earn a livelihood as a protected constitutional right and struck down licensing restrictions not rationally related to public health, safety, or welfare and not reasonably necessary to promote a public good or prevent a public harm. *Roller*, 245 N.C. at 518, 96 S.E.2d at 854; *Ballance*, 229 N.C. at 769-70, 51 S.E.2d at 735.

¶ 17 In recent years, our Supreme Court has extended application of the fruits of one's labor clause beyond licensing restrictions to other state actions that interfere with one's right to earn a livelihood. *King v. Town of Chapel Hill* held that a town ordinance capping towing fees was arbitrary and violated tow truck drivers' rights to enjoy the fruits of their labor. 367 N.C. 400, 408, 758 S.E.2d 364, 371 (2014). *Tully v. City of Wilmington* held that a municipal police department violated a public employee's constitutional right to enjoy the fruits of his own labor when it failed to follow its own promotion procedures. 370 N.C. at 539, 810 S.E.2d at 217.

¶ 18 *Tully* involved a Wilmington police officer who was denied a promotion after he failed a mandatory examination that tested an officer's knowledge of the law. 370 N.C. at 528-29, 810 S.E.2d at 211. His exam answers were correct based on the current state of the law, but he failed the exam because the answer key was outdated. *Id.* Written department policy laid out the promotion and examination procedures and provided that candidates could appeal any portion of the selection process, so the officer sought to appeal his test results. *Id.* at 529-30, 810 S.E.2d at 211. The City of Wilmington refused to hear the officer's appeal, determining the test results "were not a grievable item" and that nothing could be done. *Id.* at 529, 810 S.E.2d at 211 (quotation marks omitted).

¶ 19 Our Supreme Court held that this denial of process violated the officer's constitutional rights under Article I, Section 1, reasoning the provision applies "when a governmental entity acts in an arbitrary and capricious manner toward one of its employees by failing to abide by promotional procedures that the employer itself put in place." *Id.* at

535-36, 810 S.E.2d at 215. It established the following requirements to plead such a constitutional claim:

> [T]o state a direct constitutional claim grounded in this unique right under the North Carolina Constitution, a public employee must show that no other state law remedy is available and plead facts establishing three elements: (1) a clear, established rule or policy existed regarding the employment promotional process that furthered a legitimate governmental interest; (2) the employer violated that policy; and (3) the plaintiff was injured as a result of that violation.

Id. at 536-37, 810 S.E.2d at 216.[1]

1. Tully and Article I, Section 1 Apply to Mole's Discipline

¶ 20 In deciding whether Sergeant Mole' has asserted a valid Article I, Section 1 claim, we must first resolve whether this state constitutional claim is limited to the "employment promotional process" language used by our Supreme Court in *Tully*. A strict reading of *Tully* would foreclose his claim. However, *Tully* detailed the underlying constitutional injury in that case in terms broader than the promotional process, and the logic employed in that decision applies with equal force to the disciplinary action taken against Sergeant Mole'. Our understanding of *Tully* and its rationale, combined with its instruction to "give our [state] 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," *id.* at 533, 810 S.E.2d at 214 (citation and quotation marks omitted), leads us to hold that Article I, Section 1 applies to the disciplinary action taken against Sergeant Mole'.

¶ 21 In declaring the existence of a valid claim under Article I, Section 1 in *Tully*, the Supreme Court acknowledged "the right to pursue one's profession free from unreasonable governmental action." *Id.* at 535, 810 S.E.2d at 215. It did so in part based on *Presnell v. Pell*, which recognized an allegedly unreasonable termination of a public school teacher implicated "the right to engage in any of the common occupations of life, unfettered by unreasonable restrictions imposed by actions of the state or its agencies." 298 N.C. 715, 724, 260 S.E.2d 611, 617 (1979)

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1. The Supreme Court declined to decide the form of remedy to which a successful *Tully* plaintiff is entitled, leaving that to the trial court to determine based on the facts of the case. *Id.* at 538, 810 S.E.2d at 216.

(citations and quotation marks omitted) (quoted in *Tully*, 370 N.C. at 535, 810 S.E.2d at 214).[2] *Tully* quoted *Presnell* for the further proposition that "[t]he right of a citizen to live and work where he will is offended when a state agency unfairly imposes some stigma or disability that will itself foreclose the freedom to take advantage of employment opportunities." *Tully*, 370 N.C. at 535, 810 S.E.2d at 214-15 (quoting *Presnell*, 298 N.C. at 724, 260 S.E.2d at 617). It is undeniable that unreasonable employee discipline—including termination—by a government employer implicates this same right and raises the same concerns. *See Presnell*, 298 N.C. at 724, 260 S.E.2d at 617.

¶ 22 The Supreme Court in *Tully* ultimately announced that "Article I, Section 1 also applies when a governmental entity acts in an arbitrary and capricious manner toward one of its employees by failing to abide by promotional procedures that the employer itself put in place." 370 N.C. at 535-36, 810 S.E.2d at 215. In reaching this conclusion, *Tully* relied on the United States Supreme Court's reasoning in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 98 L. Ed. 681 (1954), and lower court decisions applying *Accardi*. According to *Tully*, *Accardi* and the cases applying it "recognize[] the impropriety of government agencies ignoring their own regulations, albeit in other contexts." 370 N.C. at 536, 810 S.E.2d at 215 (citing *Accardi*, 347 U.S. at 268, 98 L. Ed. at 687; then citing *United States v. Heffner*, 420 F.2d 809, 811-12 (4th Cir. 1969); and then citing *Farlow v. N.C. State Bd. of Chiropractic Exam'rs*, 76 N.C. App. 202, 208, 332 S.E.2d 696, 700 (1985)).

¶ 23 Decisions recognizing the impropriety of government agencies ignoring their own rules in "other contexts," though not directly cited in *Tully*,[3] include the termination of public employees in violation of internal disciplinary procedures. *See Service v. Dulles*, 354 U.S. 363, 388-89, 1 L. Ed. 2d 1403, 1418 (1957) (applying *Accardi* to reinstate a foreign service officer fired by the Secretary of State despite a federal statute allow-

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2. *Presnell* held that the discharged teacher was not denied due process protections, but *Tully* was not resolved on due process grounds. *Tully*, 370 N.C. at 532 n.4, 810 S.E.2d at 213 n.4. The Supreme Court nevertheless relied on *Presnell* in its Article I, Section 1 analysis in *Tully*. *Id.* at 534-35, 810 S.E.2d at 214-15. We rely on *Presnell* to the same extent here.

3. *Tully* cites *Accardi*, *Heffner*, and *Farlow* by way of a "*See*, *e.g.*," signal. 370 N.C. at 536, 810 S.E.2d at 215. Courts, practitioners, and legal academics use the signal "*E.g.*," to show that the "[c]ited authority states the proposition; other authorities also state the proposition, but citation to them would not be helpful or is not necessary." *The Bluebook: A Uniform System of Citation* R. 1.2(a) (Colum. L. Rev. Ass'n et al. eds., 21st ed. 2020). In other words, *Tully* acknowledges *Accardi*'s application beyond the other two decisions cited.

ing at-will discharge because the agency violated its own procedures); *Vitarelli v. Seaton*, 359 U.S. 535, 545-46, 3 L. Ed. 2d 1012, 1020-21 (1959) (reinstating employment of a federal security guard under *Accardi* because the agency violated its own procedural rules at his termination hearing). These decisions do not interpret North Carolina law. But just as *Tully* found other decisions applying *Accardi* pertinent, we find the analysis in *Dulles* and *Vitarelli* instructive in our review of *Tully* and, for the reasons above, hold that *Tully's* articulation of Article I, Section 1's protections extends to the discipline of Sergeant Mole'.

2. Sufficiency of Mole's Complaint Under Tully

¶ 24 Having held that the disciplinary procedure at issue here falls within the ambit of *Tully*, we next examine whether the allegations in Sergeant Mole's complaint otherwise satisfy the three elements established by our Supreme Court in that decision.[4] The first two elements require Sergeant Mole' to allege the existence and violation of an internal employment policy that was "clear [and] established . . . [and] that furthered a legitimate governmental interest." *Tully*, 370 N.C. at 537, 810 S.E.2d at 216.

¶ 25 Sergeant Mole's complaint alleges several policy violations of varying stripes, namely: (1) the acting watch commander failed to deploy the hostage negotiation team, the Special Enforcement Team, or stage fire and emergency medical services; (2) the watch commander negotiated with Smoot without Sergeant Mole's knowledge; (3) an "after-action report/critical incident critique" was not completed; (4) Sergeant Mole' took Smoot into custody because the designated tactical personnel were never deployed; (5) Sergeant Mole' was not offered psychological services following the incident; (6) other officers failed to secure prior written consent to conduct the search that initiated the standoff with Smoot; (7) the incident should have been designated a high-risk warrant service but was not; (8) Sergeant Mole' was not provided quarterly training and he did not meet annually with the department's Special Enforcement Team as required for hostage negotiators; and (9) Durham gave Sergeant Mole' only 24 hours' notice of his pre-disciplinary conference instead of the minimum 72 hours' notice mandated by policy.

¶ 26 The first eight policy violations alleged above put Sergeant Mole' into an untenable position, but they do not state a claim under *Tully*. *Tully* protects public employees from unreasonable violations of *employment* policies, not field operating or training procedures that do not bear upon

4. The complaint asserts, and Durham did not contest before this Court, that Sergeant Mole' has no other remedy in state law.

internal processes governing the employer-employee relationship. *See Tully*, 370 N.C. at 537, 810 S.E.2d at 216 ("Tully's allegations show that the City's actions injured him by denying him a fair opportunity to proceed to the next stage of the competitive promotional process, thereby 'unfairly impos[ing] [a] stigma or disability that will itself foreclose the freedom to take advantage of employment opportunities.' " (quoting *Presnell*, 298 N.C. at 724, 260 S.E.2d at 617) (alteration in original)).

¶ 27 But Sergeant Mole's allegation that he was given improper and inadequate notice of his pre-disciplinary hearing does fall within Article I, Section 1's protections. This shortened notice period violated Durham's own employment disciplinary procedures. Sergeant Mole' further alleges that these pre-disciplinary procedures were designed to further a legitimate government interest, namely that its employees be treated fairly in the administration of discipline. *Cf. id.* (recognizing "the legitimate governmental interest of providing a fair procedure that ensures qualified candidates move to the next stage of the promotional process"). Sergeant Mole' has thus pled a redressable violation of his employer's disciplinary procedures designed to further a legitimate governmental interest, in satisfaction of the first two elements from *Tully*.

¶ 28 Sergeant Mole' has likewise satisfied the final element, injury, based on a liberal construction of his complaint. Sergeant Mole' specifically alleges that "[h]ad [he] been afforded his opportunity . . . to prepare at a minimum of three days instead of less than 24 hours, Sergeant Mole' would have had reasonable notice and could have better prepared and provided a more comprehensive response." From there, he asserts Durham "failed to comply with mandatory conditions precedent before proceeding with dismissal . . . [and] did not comply with its own stated [disciplinary] policies," before alleging Durham's "conduct including actions and omissions in its treatment of Sergeant Mole' w[as] arbitrary, capricious, irrational and predicated upon selective enforcement of personnel and law enforcement policies and disparate treatment in discipline and thereby deprived Sergeant Mole' of the fruits of [his] labors." These allegations are similar to those held adequate to demonstrate a claim in *Tully*, 370 N.C. at 536-37, 810 S.E.2d at 215-16, and we therefore hold Sergeant Mole' has sufficiently alleged he "was injured as a result of [Durham's procedural] violation[s]." *Id.* at 537, 810 S.E.2d at 216.[5]

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5. Durham argues this procedural violation does not rise to a cognizable constitutional injury based on *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 620 S.E.2d 14 (2005). *Hilliard* was decided prior to *Tully*, did not involve a claim under Article I, Section 1, and is therefore not controlling on this issue.

¶ 29 We acknowledge North Carolina's general policy of at-will employment, long established in common law. *See, e.g.*, *Presnell*, 298 N.C. at 723-24, 260 S.E.2d at 616 ("Nothing else appearing, an employment contract in North Carolina is terminable at the will of either party."). We do not hold that Durham could not terminate Sergeant Mole' based on the conduct at issue, or that Durham could not terminate Sergeant Mole' without cause. Given the stage of proceedings, "we express no opinion on the ultimate viability of [Sergeant Mole']s claim." *Id.* at 537, 810 S.E.2d at 216. Like the Supreme Court in *Tully*, "we [do] not speculate regarding whether [Sergeant Mole'] would [not have been terminated] had [Durham] followed its own [disciplinary] policy." *Id.* at 537-38, 810 S.E.2d at 216. At this early stage of litigation, we do not address whether Sergeant Mole' must be reinstated or what relief must be afforded to him should he prevail, as "[i]t will be a matter for the trial judge to craft the necessary relief." *Id.* at 538, 810 S.E.2d at 216 (quoting *Corum v. Univ. of N.C.*, 330 N.C. 761, 784, 413 S.E.2d 276, 290-91 (1992)). We only hold that Durham must follow its own disciplinary procedures—created to protect its legitimate governmental interest in treating city employees fairly—in discharging Sergeant Mole'. If the evidence shows that Durham failed to do so and that Sergeant Mole' was harmed by that failure, Article I, Section 1 of our Constitution provides a remedy.

C. Due Process and Equal Protection

¶ 30 We next address the two remaining constitutional claims dismissed by the trial court. As explained below, we affirm the trial court based on precedent.

1. Due Process

¶ 31 **[2]** The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of the law." U.S. Const. amend. XIV, § 1. The North Carolina Constitution provides that "no person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art I, § 19. Our state's "law of the land clause is considered 'synonymous' with the Fourteenth Amendment to the United States Constitution." *Woods v. City of Wilmington*, 125 N.C. App. 226, 230, 480 S.E.2d 429, 432 (1997) (citation omitted). Decisions of the United States Supreme Court as to federal due process are "highly persuasive, but not binding on the courts of this State." *State v. Smith*, 90 N.C. App. 161, 163, 368 S.E.2d 33, 35 (1988).

¶ 32 In order to succeed on a due process challenge, the plaintiff must first show that he "has been deprived of a protected interest in 'property' or 'liberty.' " *Dobrowolska v. Wall*, 138 N.C. App. 1, 11, 530 S.E.2d 590, 598 (2000) (quoting *Am. Mfrs. Mut. Ins. v. Sullivan*, 526 U.S. 40, 59, 143 L. Ed. 2d 130, 149 (1999)). The court must decide whether the interest relates to a fundamental right "rooted in the traditions and conscience of our people." *Reno v. Flores*, 507 U.S. 292, 303, 123 L. Ed. 2d 1, 17 (1993) (citation and quotation marks omitted). "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 561 (1972). Whether a person's interest in continued employment falls within the scope of constitutional protection is determined under the law of the state where the person is employed. *Bishop v. Wood*, 426 U.S. 341, 344, 48 L. Ed. 2d 684, 690 (1976).

¶ 33 We are constrained by North Carolina Supreme Court precedent holding that employees in this state generally do not have a property interest in continued employment. *Presnell*, 298 N.C. at 723-24, 260 S.E.2d at 616. The Court in *Presnell* held that this rule applies to both private and public employment. *Id.* ("The fact that plaintiff was employed by a political subdivision of the state does not entitle her to tenure . . . ."). The state may create a property interest in employment by statute, ordinance, or express or implied contract. *Id.* at 723, 260 S.E.2d at 616. In the absence of any of these, however, no such interest exists. *Id.* at 723-24, 260 S.E.2d at 616.

¶ 34 Sergeant Mole' argues Durham's internal personnel policies established an "indirect or informal" property right in his continued employment. His complaint identifies governing provisions such as Durham's "Disciplinary and Grievance" policy and its "practice and custom of commensurate discipline." However, the complaint does not identify any policies that have been incorporated into ordinance or statute or included in Sergeant Mole's employment contract.

¶ 35 We are bound by precedent holding that policies like those identified by Sergeant Mole' do not give rise to a protected property interest. In *Wuchte v. McNeil*, this Court held that a Durham police officer, terminated without being afforded procedures provided by the city's personnel policies, could not state a claim for wrongful termination without evidence that his employment contract, a statute, or an ordinance provided

that he could only be dismissed for good cause. 130 N.C. App. 738, 741-42, 505 S.E.2d 142, 145 (1998).[6] We noted that "[a]n employee is presumed to be an employee-at-will absent a definite term of employment or a condition that the employee can only be fired only 'for cause.' " *Id.* at 740, 505 S.E.2d at 144 (citation omitted). In *Wuchte*, as in this case, the plaintiff relied on personnel policies that had not been enacted as an ordinance, and we held that unilaterally promulgated personnel memoranda did not establish a protected property interest. *Id.* at 742, 505 S.E.2d at 145.[7]

¶ 36 By contrast, in *Howell v. Town of Carolina Beach*, this Court held that a manual adopted by the town as an ordinance granted employees a "reasonable expectation of employment and a property interest within the meaning of the due process clause." 106 N.C. App. 410, 417, 417 S.E.2d 277, 281 (1992). Sergeant Mole's complaint does not allege that Durham has codified its personnel policies in an ordinance.

¶ 37 As we noted above, whether an employee has a constitutionally protected interest under the due process clause is not determined by reference to the federal constitution but depends on state law. *Bishop*, 426 U.S. at 344, 48 L. Ed. 2d at 690. Federal courts applying North Carolina law have recognized that personnel rules and regulations merely supply internal administrative guidelines and do not grant a property interest subject to due process protections unless enacted as an ordinance. *Pittman v. Wilson Cty.*, 839 F.2d 225, 229 (4th Cir. 1988); *Dunn v. Town of Emerald Isle*, 722 F.Supp. 1309, 1311 (E.D.N.C. 1989).

¶ 38 Sergeant Mole' notes that he was granted "permanent employee" status after a probationary period, and his complaint alleges this status grants him the "right to be afforded due process in the disciplinary system." But without contract provisions setting a term of employment or procedures by which the employment might be terminated, "permanent" employment is presumed to be terminable at the will of either party and does not alone confer a property or liberty interest in continued employment. *Nantz v. Emp't Sec. Comm'n*, 290 N.C. 473, 477, 226 S.E.2d 340,

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6. *Wuchte* was decided two decades prior to *Tully*, strictly on due process grounds. 130 N.C. App. at 744, 505 S.E.2d at 146-47.

7. This Court has previously questioned the rationale of this black-letter law. *See, e.g.*, *Walker v. Westinghouse Elec. Corp.*, 77 N.C. App. 253, 259, 335 S.E.2d 79, 83-84 (1985) ("[T]here are strong equitable and social policy reasons militating against allowing employers to promulgate for their employees potentially misleading personnel manuals while reserving the right to deviate from them at their own caprice. Nevertheless, the law of North Carolina is clear that unilaterally promulgated employment manuals or policies do not become part of the employment contract unless expressly included in it." (citations omitted)).

343 (1976). *But see Presnell*, 298 N.C. at 724, 260 S.E.2d at 617 ("The liberty interest here implicated—the freedom to seek further employment—was offended not by her dismissal alone, but rather by her dismissal upon alleged unsupported charges which, left unrefuted, might wrongfully injure her future placement possibilities.").

¶ 39 Sergeant Mole' also argues that his dismissal was arbitrary and capricious, giving rise to a claim for violation of his due process rights "to continued employment when Defendant arbitrarily terminated [him]." But our Supreme Court has held that an at-will employee has no right to continued employment, and thus arbitrary conduct by an at-will employer does not state a cognizable violation of the due process protections of the North Carolina Constitution. *See Tully*, 370 N.C. at 538-39, 810 S.E.2d at 216-17 (holding Tully's allegations that the City of Wilmington "arbitrarily and irrationally deprived [him]" of an alleged "property interest in his employment with the City" failed to state a valid due process claim under the North Carolina Constitution because, per *Presnell*, at-will public employees have no cognizable property interest in continued employment).

¶ 40 To be sure, this Court has recognized violations of state and federal substantive due process protections without requiring the plaintiff allege or demonstrate the deprivation of a recognized property or liberty interest where the State's conduct was "so egregious that it shocks the conscience or offends a sense of justice." *Toomer v. Garrett* 155 N.C. App. 462, 470, 574 S.E.2d 76, 84 (2002). But that case, unlike *Tully*, did not involve an employment decision. It instead concerned a state agency's public disclosure of an employee's personnel file, including social security number, medical diagnoses, and personal financial data, without any rational relationship to any governmental interest. 155 N.C. App. at 472, 574 S.E.2d at 85.[8] In contrast to *Toomer*, a holding here that

8. Sergeant Mole' cites a United States Supreme Court decision holding that Oklahoma state employees' federal substantive due process protections were violated by their employer's arbitrary and capricious conduct, without finding that the employees had a property or liberty interest in the employment. *Wieman v. Updegraf* held that a statute requiring state employees to take a loyalty oath asserting they were not affiliated with communist organizations was unconstitutional. 344 U.S. 183, 191, 97 L. Ed. 216, 222 (1952). However, *Weiman* did not specifically address, and lower federal court decisions have not held, that arbitrary termination from at-will employment gives rise to a substantive due process claim. *See, e.g.*, *Darr v. Town of Telluride, Colo*, 495 F.3d 1243, 1258 (10th Cir. 2007) (observing *Wieman* did not address at-will employment and holding a town could terminate a marshal, even for allegedly arbitrary and capricious reasons, because "[t]he substantive-due-process clause does not forbid a public employer from terminating its at-will employees without cause"); *Singleton v. Cecil*, 176 F.3d 419, 423-24 (8th Cir. 1999) ("[T]he defendants' alleged arbitrary and capricious firing of Officer Singleton, an at-will employee[,] . . . did not violate his substantive due process rights.").

Sergeant Mole's allegedly arbitrary and capricious termination violated his substantive due process rights, without a cognizable property interest in continued employment, would effectively hold that he could not be terminated except for cause. As discussed above, North Carolina employees do not enjoy that substantive due process protection unless it is explicitly incorporated into their employment contract or promulgated by statute or ordinance.

2. Equal Protection

¶ 41 **[3]** Sergeant Mole' also asserts that Durham subjected him to disparate treatment as compared to similarly situated employees. His complaint cites examples of misconduct by other Durham police officers that he alleges were more egregious than the actions that led to his termination.

¶ 42 Both our federal and state constitutions guarantee that individuals receive "the equal protection of the laws." N.C. Const. Art. I, § 19; U.S. Const. amend. XIV, § 1. The equal protection clause of the United States Constitution's Fourteenth Amendment "has been expressly incorporated in Art. I, § 19 of the Constitution of North Carolina," *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971), and the same analysis applies to both. *Toomer*, 155 N.C. App. at 476, 574 S.E.2d at 88; *see also Richardson v. N.C. Dep't of Corr.*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996) (applying "the same test as federal courts" to determine whether limiting working prisoners' remedy to workers' compensation violates their right to equal protection).

¶ 43 A typical equal protection claim alleges that the plaintiff was treated differently by legislation or a state actor due to their membership in a suspect class: race, color, religion, national origin, etc. *See Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 601, 170 L. Ed. 2d 975, 985 (2008). Where the treatment varies based upon a suspect class or impacts a fundamental right, we apply strict scrutiny and determine whether the state action is necessary to promote a compelling government interest. *State ex. rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 681, 446 S.E.2d 332, 346 (1994). The United States Supreme Court and, in turn, North Carolina courts, have also recognized the existence of "class of one" equal protection claims in which plaintiffs allege they were intentionally treated differently from others similarly situated. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 145 L. Ed. 2d 1060, 1063 (2000); *In re Application of Ellis*, 277 N.C. 419, 424, 178 S.E.2d 77, 80 (1970) (recognizing "the constitutional limitation forbidding arbitrary and unduly discriminatory interference with the right of property owners"). When the plaintiff is not a member of a suspect class and does not as-

sert wrongful termination in violation of a fundamental right,[9] "it is necessary to show only that the classification created by the [government action] bears a rational relationship to some legitimate state interest." *Richardson*, 345 N.C. at 134, 478 S.E.2d at 505 (citation omitted).

¶ 44 Sergeant Mole' asserts a class-of-one claim by arguing that he was situated similarly to other Durham police officers who violated department policies and received significantly less severe discipline. The United States Supreme Court has recognized this type of claim in relation to real property rights. In *Olech* the Court held the complaint, alleging that the defendant arbitrarily required the plaintiff to cede a larger easement than her neighbors in order to connect to the municipal water supply, was sufficient to state a class-of-one claim. 528 U.S. at 565, 145 L. Ed. 2d at 1063-64. Previous Supreme Court decisions also recognized this type of claim without explicitly identifying the claims as "class-of-one." *See Sioux City Bridge Co. v. Dakota Cty.*, 260 U.S. 441, 446-47, 67 L. Ed. 340, 343 (1923) (holding that assessing property at 100% of its true value when all other property in the county was evaluated at 55% violated equal protection); *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster Cty.*, 488 U.S. 336, 341-43, 102 L. Ed. 2d 688, 695-96 (1989) (holding assessment methodology that produced "dramatic differences in valuation" between petitioners' property and comparable surrounding land violated equal protection).

¶ 45 But the United States Supreme Court has held that class-of-one claims cannot be stated in the employment context. In *Engquist*, the plaintiff asserted a class-of-one equal protection claim against her employer, alleging that she was terminated for arbitrary, vindictive, and malicious reasons. 553 U.S. at 595, 170 L. Ed. 2d at 982. A coworker who had personal issues with the plaintiff formed an alliance with an assistant director who had assured a client that the plaintiff would be "gotten rid of." *Id.* at 594, 170 L. Ed. 2d at 981. The plaintiff was then passed over for a promotion in favor of a less-qualified coworker and told that she could only stay with the department if she accepted a demotion. *Id.* at 595, 170 L. Ed. 2d at 981.

¶ 46 While the Court recognized that the equal protection clause's protections apply to administrative as well as legislative acts and that states do not escape its requirements in their role as employers, it

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9. Fundamental rights recognized by the United States Supreme Court include the right to vote, the right of interstate travel, rights guaranteed by the first amendment such as freedom of expression and religion, and the right to procreate. *Carolina Utility Customers Ass'n*, 336 N.C. at 681 n.6, 446 S.E.2d at 346 n.6 (1994).

distinguished between the government taking action as a regulator and the government taking action "as proprietor, to manage its internal operation." *Id.* at 598, 170 L. Ed. 2d at 983 (cleaned up). The *Engquist* Court noted that some forms of state action, including employment decisions, "involve discretionary decisionmaking based on a vast array of subjective, individualized assessments." *Id.* at 603, 170 L. Ed. 2d at 987. The Court reasoned that as opposed to the regulation of third parties, treating similarly situated employees differently is "par for the course." *Id.* at 604, 170 L. Ed. 2d at 988. The Court characterized class-of-one claims in the public employment context as "contrary to the concept of at-will employment," *id.* at 606, 170 L. Ed. 2d at 989, and held that "the class-of-one theory of equal protection has no application in the public employment context[.]" *Id.* at 607, 170 L. Ed. 2d at 989.

¶ 47 We must again consider whether the analogous clause in the North Carolina Constitution is more protective and extends the guarantee of equal protection in the public employment context. As with due process, the fact that the Fourteenth Amendment does not provide a cause of action for Sergeant Mole' does not necessarily foreclose the possibility that our state Constitution could yield a remedy: the United States Constitution is the floor of constitutional protections in North Carolina, not the ceiling. *See State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988). The North Carolina Constitution is to be liberally construed, especially the provisions safeguarding individual liberty and property rights. *Tully*, 370 N.C. at 533, 810 S.E.2d at 214.

¶ 48 However, precedent precludes us from unfettered liberal analysis. This Court has clearly and explicitly held that the equal protection rights guaranteed by the North Carolina Constitution are the same as those in the United States Constitution, and the analysis under each is the same. *Toomer*, 155 N.C. App. at 476, 574 S.E.2d at 88. We have searched without success for decisions holding otherwise. Our review reveals no decision in North Carolina recognizing class-of-one claims in the employment context. We are bound by our existing precedent. *Johnson v. State*, 224 N.C. App. 282, 297, 735 S.E.2d 859, 871 (2012). But the final arbiter of the North Carolina Constitution is the North Carolina Supreme Court. *Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 610, 304 S.E.2d 164, 170 (1983). Because our constitution is to be liberally construed, we urge the Supreme Court to address this issue.[10]

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10. In dissent, Justice Stevens characterized the *Engquist* majority's exclusion of public employees as applying a "meat-axe" to resolve an issue better addressed with a scalpel. 553 U.S. at 610, 170 L. Ed. 2d at 991. It is not necessary that protections provided by our state constitution exclude the same broad category of claims.

III. CONCLUSION

¶ 49 For the reasons explained above, we hold that the trial court erred in dismissing Sergeant Mole's claim for violation of his right to the fruits of his labor and reverse that portion of the trial court's order. We affirm the trial court's dismissal of Sergeant Mole's remaining claims. The matter is remanded to the trial court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Judges ZACHARY and CARPENTER concur.

NATION FORD BAPTIST CHURCH INCORPORATED
D/B/A NATIONS FORD COMMUNITY CHURCH, PLAINTIFF
v.
PHILLIP RJ DAVIS, DEFENDANT/THIRD-PARTY PLAINTIFF
v.
JOSEPH DIXON, CHARLES ELLIOT AND DOUGLAS WILLIE, THIRD-PARTY DEFENDANTS

No. COA20-800

Filed 5 October 2021

1. Appeal and Error—interlocutory order—substantial right—First Amendment violation—ecclesiastical abstention doctrine

In a lawsuit arising from an employment dispute between a church and one of its former pastors, in which the pastor filed a counterclaim against the church and a third-party complaint against a group of church elders, the church and the elders (appellants) were entitled to immediate review of their appeal from an interlocutory order denying their motion to dismiss the pastor's claims and granting the pastor's motion to amend his pleadings. The challenged order affected a substantial right where appellants argued that, to resolve the pastor's claims, the court would have to interpret religious matters in violation of the ecclesiastical abstention doctrine stemming from the First Amendment.

2. Churches and Religion—subject matter jurisdiction—ecclesiastical abstention doctrine—termination of pastor's employment

In a lawsuit arising from an employment dispute between a church and one of its former pastors, the ecclesiastical entanglement

doctrine of the First Amendment did not bar the trial court from reviewing the pastor's counterclaim against the church and third-party complaint against a group of church elders, where the court could resolve the first determinative issue—whether the elders' procedure for firing the pastor violated the church's then-controlling bylaws—by applying neutral principles of law. Although the second determinative issue—whether the elders properly found the pastor was unfit to serve as the church's senior pastor—would require the court to impermissibly engage with ecclesiastical matters, there was no guarantee that the court would have to reach that second issue, which depended on how it resolved the first issue.

3. Jurisdiction—standing—derivative—individual—claims—employment dispute

In a lawsuit arising from an employment dispute between a church and one of its former pastors, the pastor had individual standing to bring his counterclaim against the church and his third-party complaint against a group of church elders, in which he alleged that the church (through the elders) violated then-controlling church bylaws when firing him. A determination of whether the pastor also had standing to bring a derivative action on the church's behalf—seeking money damages from the elders for breaching their fiduciary duties to the church—required a preliminary determination of which church bylaws governed at the relevant time, which could not be made on appeal.

4. Pleadings—motion to amend—Rule 15—counterclaim and third-party complaint—employment dispute

In a lawsuit arising from an employment dispute between a church and one of its former pastors, the trial court did not abuse its discretion by granting the pastor's motion to amend his counterclaim against the church and his third-party complaint against a group of church elders. The church could not show any justifiable reason for denying the pastor's motion, nor did any material prejudice result from the court's decision to grant it.

Judge MURPHY concurring in part and dissenting in part.

Appeal by Plaintiff/Third-Party Defendant from order entered 22 July 2020 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 August 2021.

Knox, Brotherton, Knox & Godfrey, by Lisa G. Godfrey, H. Edward Knox, and J. Gray Brotherton, for the Plaintiff- and Third-Party Defendants-Appellants.

Nexsen Pruet, PLLC, by James C. Smith and Nicholas T. Pappayliou, for the Defendant/Third-Party Plaintiff-Appellee.

GRIFFIN, Judge.

¶ 1 Plaintiff Nation Ford Baptist Church Incorporated (the "Church") and Third-Party Defendants Joseph Dixon, Charles Elliot, and Douglas Willie (together, the "Elders") appeal the trial court's order denying their motion to dismiss and granting Defendant and Third-Party Plaintiff Phillip R.J. Davis's ("Davis") motion to amend his counterclaim and third-party complaint. The Church and the Elders argue the trial court erred in denying their motion, granting Davis's motion, and concluding Davis had standing to bring the claims asserted in his counterclaim and third-party complaint.

¶ 2 The primary issue presented in this appeal is whether the resolution of Davis's claims would require our Courts to interpret religious matters in violation of the ecclesiastical abstention doctrine which stems from the First Amendment to the United States Constitution. We hold that there is no guarantee that our Courts will be forced to weigh ecclesiastical matters at this stage of the proceedings. We affirm the decision of the trial court.

I. Factual and Procedural History

¶ 3 The Church was incorporated as a North Carolina nonprofit corporation in 1988. At the Church's time of incorporation, the Elders acted as the Board of Directors for the Church. On 31 March 2016, the Elders hired Davis to serve as Senior Pastor for the Church. Davis was employed on an " 'at-will' basis." The employment agreement letter signed by Davis on 31 March 2016 set out his terms of employment, in pertinent part, as follows:

> An "at-will" employment relationship has no specific duration. This means that an employee can resign their employment at any time, with or without reason or advance notice. *The [C]hurch has the right to terminate employment at any time, with or without reason or advance notice as long as there is no violation of applicable state or federal law.*

(Emphasis added).

¶ 4 The Record in this case contains two different sets of bylaws, and the parties disagree which bylaws governed the Church's operations during the time relevant to this case. The Church adopted a set of bylaws ("the First Bylaws") on 8 January 1997. On or about April 2008, the Church applied for a bank loan, and incorporated another set of bylaws ("the Second Bylaws") as part of its loan application.

¶ 5 Effective 17 June 2019, the Elders unanimously decided to terminate Davis's employment at the Church. Despite his termination, Davis ignored the instructions of the Church and continued to conduct religious activities at the Church.

¶ 6 The Church initiated this action on 17 September 2019 seeking, *inter alia*, a preliminary injunction to prohibit Davis from accessing the Church. In response, Davis filed an answer, counterclaim, third-party complaint, and motion for injunctive relief on 24 October 2019. Davis's claims are centered around an employment dispute for which the remedy is dependent upon determining which bylaws governed the Church's actions. An order granting the Church's motion for a preliminary injunction was entered on 30 October 2019.

¶ 7 On 22 April 2020, the Church and the Elders filed a motion to dismiss Davis's counterclaim and third-party complaint. Davis moved to amend his answer, counterclaim, and third-party complaint on 6 May 2020. The court entered an order ("the Order") granting Davis's motion to amend and denying the Church and the Elders' motion to dismiss on 22 July 2020. According to the Order,

> The [c]ourt finds and concludes that (i) this [c]ourt has subject matter jurisdiction over the matters and claims asserted in [Davis]'s Counterclaim and Third-Party Complaint, (ii) [Davis] has standing to bring the claims asserted in his Counterclaim and Third-Party Complaint, and (ii) [Davis]'s Motion to Amend should be granted.

The Church and the Elders timely appeal.

II. Analysis

¶ 8 The Church and the Elders raise three issues on appeal. First, they contend the trial court erred in concluding that it has subject matter jurisdiction over the matters asserted in Davis's amended counterclaim and third-party complaint. Second, they argue the trial court erred in concluding that Davis has standing to bring the claims asserted in his amended counterclaim and third-party complaint. Third, they assert the

trial court erred in granting Davis's motion to amend the counterclaim and third-party complaint. We address each issue in turn.

A. Interlocutory Jurisdiction

¶ 9 **[1]** We acknowledge that this appeal is interlocutory. An interlocutory order is "made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the rights of all the parties involved in the controversy." *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002) (citation omitted). There is generally no right to immediately appeal from an interlocutory order. *Id.* Immediate appeal of an interlocutory order is, however, appropriate when "the challenged order affects a substantial right that may be lost without immediate review." *McConnell v. McConnell*, 151 N.C. App. 622, 624, 566 S.E.2d 801, 803 (2002) (citation omitted).

¶ 10 A "substantial right" is "a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right." *Oestreicher v. Stores*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (citation and quotation marks omitted). The appellant has the burden of establishing that a substantial right will be affected unless they are allowed to immediately appeal from an interlocutory order. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994).

¶ 11 The trial court's Order denying the Church and Elders' motion to dismiss and granting Davis's motion to amend is an interlocutory order. It was made during the pendency of the action and it does not dispose of the case. However, the Church and the Elders argue that their motion to dismiss should have been granted because resolution of Davis's claims would require the trial court to impermissibly entangle itself in ecclesiastical matters in violation of the First Amendment of the United States Constitution. "First Amendment rights are substantial and . . . are implicated when a party asserts that a civil court action cannot proceed without impermissibly entangling the court in ecclesiastical matters." *Harris v. Matthews*, 361 N.C. 265, 270, 643 S.E.2d 566, 569 (2007). "When First Amendment rights are asserted, this Court has allowed appeals from interlocutory orders." *Id.* (citation omitted).

¶ 12 The Church and the Elders have asserted a violation of First Amendment rights. Their appeal is properly before this Court.

B. Motion to Dismiss for Ecclesiastical Abstention

¶ 13 **[2]** The Church and the Elders contend the trial court erred in concluding that it had subject matter jurisdiction over the claims asserted in

Davis's amended counterclaim and third-party complaint because the court would be forced to interpret and resolve ecclesiastical questions to resolve the claims.

¶ 14 The standard of review for a trial court's decision to deny a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) is *de novo*. *Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324, 327, 605 S.E.2d 161, 163 (2004) (citation omitted). When ruling on or reviewing a Rule 12(b)(1) motion to dismiss, our courts may "consider and weigh matters outside of the pleadings." *Id.* (citation omitted). Upon review of a motion to dismiss for lack of subject matter jurisdiction, the trial court must accept the allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Johnson v. Antioch United Holy Church, Inc.*, 214 N.C. App. 507, 510, 714 S.E.2d 806, 809 (2011) (citations omitted).

¶ 15 The trial court properly determined it had subject matter jurisdiction over Davis's claims. "The First Amendment of the United States Constitution prohibits a civil court from becoming entangled in ecclesiastical matters." *Id.* at 510, 714 S.E.2d at 810 (citing *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969)). "An ecclesiastical matter is one which concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership." *W. Conf. of Original Free Will Baptists of N.C. v. Miles*, 259 N.C. 1, 10–11, 129 S.E.2d 600, 606 (1963) (citations omitted).

¶ 16 However, civil courts do not violate the First Amendment "merely by opening their doors to disputes involving church property." *Presbyterian Church*, 393 U.S. at 449. "And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." *Id.* "The First Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine." *Serbian E. Orthodox Diocese for U.S. of A. and Canada v. Milivojevich*, 426 U.S. 696, 710 (1976) (citation omitted). "This principle applies with equal force to church disputes over church polity and church administration." *Id.* "The dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine." *Smith v. Privette*, 128 N.C. App. 490, 494, 495 SE.2d 396, 398 (1998). "If not, the First Amendment is not implicated and neutral principles of law are properly applied to adjudicate the claim." *Id.* (citation omitted). "When a party brings a proper complaint, '[w]here civil,

contract[][,] or property rights are involved, the courts will inquire as to whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules.' " *Harris v. Matthews*, 361 N.C. 265, 274–75, 643 S.E.2d 566, 572 (2007) (quoting *Atkins v. Walker*, 284 N.C. 306, 320, 200 S.E.2d 641, 650 (1973)).

¶ 17 Davis's claims request the following:

> (I) Declaratory judgment against the Church and the Elders, declaring that: (i) Davis is the "Bishop" and "Senior Pastor" of the Church; (ii) Davis was not an "at-will" employee of the Church; (iii) the Elders' attempt to terminate Davis's employment with the Church was unauthorized by the then-controlling Second Bylaws; and (iv) Davis is entitled to recover back-pay and benefits earned since his purported termination;
>
> (II) Preliminary and permanent injunction allowing Davis to resume employment with the Church, earning full compensation and benefits;
>
> (III) Money damages from the Elders for breach of fiduciary obligations owed to Davis and to the Church;
>
> (IV) Money damages from the Elders for wrongful interference with Davis's employment relationship with the Church;
>
> (V) Rights (i) to inspect the Church's financial records, (ii) to receive an accounting from the Elders and the Church of Church funds or assets the Elders misappropriated, and (iii) to impose a constructive trust upon the Elders' assets in an amount equal to any Church funds or assets found to have been misappropriated; and
>
> (VI) Money damages from the Elders for civil conspiracy to remove Davis from employment with the Church and to seize complete control of the Church's operations.

¶ 18 As Davis asserts, "[t]his is an employment dispute." The core tenet upon which all of Davis's claims depend is the determination of which bylaws governed the Church at the relevant time. Davis was an employee of the Church and now raises disputes regarding the Church's bylaws. His claims do not fall under the protections of ecclesiastical matters within the First Amendment.

¶ 19 Resolving Davis's claims requires a two-part determination: First, which bylaws were the governing authority at the relevant time, and whether Davis's termination was in accordance with the proper bylaws? Second, whether the Elders properly determined that Davis was unfit to serve as Senior Pastor of the Church?

¶ 20 The first determination may be made by applying neutral principles of law without engaging in ecclesiastical matters. *Smith*, 128 N.C. App. at 494, 495 SE.2d at 398. The trial court must first determine which set of bylaws controlled at the relevant time, based solely on contract and business law. The court will then be able to assess whether the Church's procedure for firing Davis complied with the requirements of the controlling bylaws. The court may determine that the Church's method of terminating Davis did not comply with the requirements of the controlling bylaws, making Davis's termination void. In this instance, this dispute would be resolved without the necessity of answering the second question—whether Davis was unfit to serve—and engaging with ecclesiastical matters.

¶ 21 If the court determines that the Church's method of terminating Davis *did* comply with the requirements of the controlling bylaws, then our Courts would be required to assess whether the Church, through its Elders, properly determined that Davis was unfit to serve as Senior Pastor. That determination cannot be made applying only neutral principles of law. Answering this second question may require an impermissible engagement with ecclesiastical matters, but there is no guarantee at this stage of the proceedings that our courts will be forced to answer this second question.

¶ 22 The first determination required in the present case is analogous to *Tubiolo v. Abundant Life Church, Inc.* The plaintiffs in *Tubiolo* brought claims against the defendant church for wrongful termination, arguing that the persons who sought termination of the plaintiffs lacked the requisite authority to do so. *Tubiolo*, 167 N.C. App. at 326, 605 S.E.2d at 163. The Court in *Tubiolo* was tasked with determining what bylaws governed the actions of the defendant church, and whether the actions taken by the defendant church were in accordance with the appropriate bylaws. *Id.* at 329, 605 S.E.2d at 164. The *Tubiolo* Court noted "the courts do have jurisdiction over the very narrow issue of whether the bylaws were properly adopted by the defendant [church]." *Id.* The *Tubiolo* Court then held, as this Court has previously acknowledged, that it is

> proper for a court to address the "very narrow issue" of whether the plaintiffs' membership was terminated in accordance with the church's bylaws—whether

> bylaws had been adopted by the church, and whether those individuals who signed a letter revoking the plaintiffs' membership had the authority to do so.

Johnson, 214 N.C. App. at 512, 714 S.E.2d at 811 (discussing the holding of *Tubiolo*, 167 N.C. App. at 329, 605 S.E.2d at 164–65). The present case requires determining which bylaws were in effect, whether new bylaws had been adopted by the Church, whether the Elders had the authority to terminate Davis, and whether the termination was done in accordance with the proper bylaws. "This inquiry can be made without resolving any ecclesiastical or doctrinal matters." *Tubiolo*, 167 N.C. App. at 329, 605 S.E.2d at 164–65. Our courts have jurisdiction over each of these determinations.

C. Standing

¶ 23 **[3]** The Church and the Elders argue that Davis does not have standing to bring his claims because they are derivative and brought on behalf of the Church. We disagree.

¶ 24 The Church and the Elders specifically argue that Davis does not have standing to bring a derivative suit on behalf of the Church for his first, second, third, and fifth claims. N.C. Gen. Stat. § 55A-7-40(a) outlines derivative actions, providing:

> An action may be brought in a superior court of this State, which shall have exclusive original jurisdiction over actions brought hereunder, in the right of any domestic or foreign corporation by any member or director, provided that, in the case of an action by a member, the plaintiff or plaintiffs shall allege, and it shall appear, that each plaintiff-member was a member at the time of the transaction of which he complains.

N.C. Gen. Stat. § 55A-7-40(a) (2019).

¶ 25 A majority of Davis's first, second, third, and fifth claims allege injuries incurred in his individual capacity, and not on behalf of the Church. However, a portion of Davis's third claim appears to request money damages from the Elders for breach of their fiduciary obligations owed to the Church itself. Seeking remedy on behalf of the Church for harm done to the Church would be a derivative action. The Church and the Elders argue that Davis lacks standing to bring a derivative action as a member of the Church because the First Bylaws explicitly state that the Church has no members. A determination of which bylaws were the

proper governing authority of the Church at the relevant time is necessary to the determination of whether Davis has standing to bring the derivative action in his third claim.

¶ 26 The remainder of Davis's claims are brought in an individual capacity and are not derivative on behalf of the Church. A plaintiff must show the following three elements in order to establish individual standing:

> (1) 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

McDaniel v. Saintsing, 260 N.C. App. 229, 232–33, 817 S.E.2d 912, 914–15 (2018) (citation omitted). The alleged wrongful termination of Davis is an "injury in fact" that satisfies the first element. Davis was terminated by the actions of the Church and the Elders. If the court finds in favor of Davis, the injury will be sufficiently redressed.

¶ 27 The trial court did not err in determining that Davis had standing to bring the claims asserted in his amended counterclaim and third-party complaint at this stage of the proceedings.

D. Motion to Amend

¶ 28 **[4]** The Church and the Elders assert the trial court erred in granting Davis's motion to amend the counterclaim and third-party complaint under Rule 15 of the North Carolina Rules of Civil Procedure. We review a trial court's decision to grant a motion to amend the pleadings for an abuse of discretion. *Carter v. Rockingham Cnty. Bd. Of Educ.*, 158 N.C. App. 687, 690, 582 S.E.2d 69, 72 (2003); *Mabrey v. Smith*, 144 N.C. App. 119, 121, 548 S.E.2d 183, 185–86 (2001) ("A motion to amend the pleadings is addressed to the sound discretion of the trial court."). "[A] trial judge abuses his discretion when he refuses to allow an amendment unless justifying reasoning is shown." *Taylor v. Triangle Porsche–Audi, Inc.*, 27 N.C. App. 711, 714, 220 S.E.2d 806, 809 (1975) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). "Generally, Rule 15 is construed liberally to allow amendments where the opposing party will not be materially prejudiced." *Delta Envtl. Consultants of N.C., Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 165, 510 S.E.2d 690, 694 (1999) (citation omitted).

¶ 29 The Church has not shown reason justifying a denial of Davis's motion to amend or any materially unfair prejudice as a result of the trial

court's decision to grant Davis's motion to amend. The trial court did not abuse its discretion by granting Davis's motion to amend the counterclaim and third-party complaint.

III. Conclusion

¶ 30 We hold the trial court did not err in determining it had subject matter jurisdiction over Davis's counterclaims and third-party complaint at this stage of the proceedings. The Church's motion to dismiss for lack of subject matter jurisdiction was properly denied. The trial court did not err in determining Davis had standing to bring the counterclaims and third-party complaint. We hold there was no abuse of discretion in the trial court's decision to grant Davis's motion to amend the counterclaim and third-party complaint. The Order of the trial court is affirmed.

AFFIRMED.

Judge ARROWOOD concurs.

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

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

¶ 31 While I concur with the Majority's analysis regarding our jurisdiction over this interlocutory appeal, *supra* at ¶¶ 9-12, I respectfully dissent from its conclusion that we have subject matter jurisdiction over this appeal. *Supra* at ¶¶ 15, 18. I would reverse the trial court's order denying the motion to dismiss for lack of subject matter jurisdiction, which would render the issue regarding Davis's standing moot. I would also hold the trial court lacked subject matter jurisdiction over the complaint, counterclaim, and amended counterclaim and remand for the trial court to dismiss the action with prejudice.[1]

ANALYSIS

A. Complete Entanglement of the Original Counterclaim

¶ 32 "Civil court intervention into church property disputes is proper *only when* 'relationships involving church property [have been structured] *so as not to require* the civil courts to resolve ecclesiastical questions.' "

1. For ease of reading, "counterclaim" and "original counterclaim" refer to both the counterclaim and third-party complaint filed 24 October 2019. "Amended counterclaim" refers to the amended counterclaim and third-party complaint filed 30 July 2020.

Harris v. Matthews, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007) (emphases added) (marks in original) (quoting *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449, 21 L. Ed. 2d 658, 665 (1969)); *Western Conference of Original Free Will Baptists of N.C. v. Creech*, 256 N.C. 128, 140, 123 S.E.2d 619, 627 (1962) (marks omitted) ("The legal or temporal tribunals of the State have no jurisdiction over, and no concern with, purely ecclesiastical questions and controversies but the courts do have jurisdiction, as to civil, contract and property rights which are involved in, or arise from, a church controversy."). Our Supreme Court has defined an ecclesiastical matter as

> one which concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership, and the power of excluding from such associations those deemed unworthy of membership by the legally constituted authorities of the church; and all such matters are within the province of church courts and their decisions will be respected by civil tribunals.

Eastern Conference of Original Free Will Baptists of N.C. v. Piner, 267 N.C. 74, 77, 147 S.E.2d 581, 583 (1966) (quoting *Western Conference of Original Free Will Baptists of N.C. v. Miles*, 259 N.C. 1, 10-11, 129 S.E.2d 600, 606 (1963)), *overruled in part by Atkins v. Walker*, 284 N.C. 306, 200 S.E.2d 641 (1973). "When a congregational church's internal property dispute cannot be resolved using neutral principles of law, the courts must intrude no further[.]" *Harris*, 361 N.C. at 271-72, 643 S.E.2d at 570. Such judicial intrusion would constitute "impermissibl[e] entangle[ment] in the dispute." *Id.* at 273, 643 S.E.2d at 571.

1. "Spiritual Leader"

¶ 33 Davis's original counterclaim repeatedly requested judicial recognition that he is "the Bishop, Senior Pastor and *spiritual leader of the Church*." (Emphasis added). Davis specifically claimed he "is entitled to *judgment declaring* that [he] is the Bishop, Senior Pastor and spiritual leader of the Church[.]" (Emphasis added). The trial court stated it had subject matter jurisdiction over *the original counterclaim* and allowed Davis's motion to amend. Despite stating in his motion to amend that the purpose was "to amend the factual allegations of the [original counterclaim][,] . . . add a claim for back pay and benefits[,] . . . and . . . add a claim for civil conspiracy[,]" Davis's amended counterclaim

also removed the "spiritual leader" language throughout. The amended counterclaim included a request for a "judgment declaring that [Davis] is the Bishop and Senior Pastor of the Church." Davis's requests for recognition as the "Bishop" and "Senior Pastor" throughout the amended counterclaim included that language, sans the additional term "spiritual leader." The removal of the "spiritual leader" language did not fit the stated purpose for amending the counterclaim and suggests an attempt to avoid the prohibition against reviewing purely ecclesiastical issues. Further, the removal of "spiritual leader" underscores the religious nature of the "Bishop" and "Senior Pastor" terms, as well as the similarity and connectedness of all three terms. The original counterclaim required impermissible entanglement in ecclesiastical matters and should have been dismissed for lack of subject matter jurisdiction.

¶ 34 Davis's request for recognition as the "spiritual leader" of the Church was an explicit request for judicial review of his role within the Church. Davis's request would require

> an examination of the church's view of the role of the pastor, staff, and church leaders[.] . . . Because a church's religious doctrine and practice affect its understanding of each of these concepts, seeking a court's review . . . is no different than asking a court to determine whether a particular church's grounds for membership are spiritually or doctrinally correct[.] . . . None of these issues can be addressed using neutral principles of law."

Id. at 273, 643 S.E.2d at 571.

2. Bylaws–"Special Meeting" and "Congregation"

¶ 35 Even assuming, *arguendo*, that a later set of bylaws controls the purported termination of his role as Bishop, Pastor, and spiritual leader of the Church, as Davis claimed, such bylaws would require a special meeting with a specific percentage of congregants to vote for his termination. According to both his original counterclaim and amended counterclaim, "the New Bylaws expressly provide[] that the Bishop of the Church can be dismissed only by a 75% vote of the congregation attending a Special General Meeting called for that purpose. No Special General Meeting of the congregation was convened[.]" What constitutes such a special meeting to dismiss Davis from that role, as well as the definition of congregants or members of the Church, are ecclesiastical matters, which courts may not analyze and where we may not exercise the authority of the State. *See Azige v. Holy Trinity Ethiopian Orthodox Tewahdo*

Church, 249 N.C. App. 236, 241, 790 S.E.2d 570, 574 (2016) ("Membership in a church is a core ecclesiastical matter. The power to control church membership is ultimately the power to control the church. It is an area where the courts of this State should not become involved. This stricture applies regardless of whether the church is a congregational church, incorporated or unincorporated, or an hierarchical church."), *disc. rev. denied*, 369 N.C. 532, 797 S.E.2d 290 (2017); *Emory v. Jackson Chapel First Missionary Baptist Church*, 165 N.C. App. 489, 493, 598 S.E.2d 667, 671 (2004) ("As the trial court would be required to delve into 'ecclesiastical matters' regarding how the church interprets [bylaw requirements such as] types of meetings, the trial court [lacked] subject matter jurisdiction.").

> We are prohibited from becoming entangled in ecclesiastical matters and have no jurisdiction over disputes which require an examination of religious doctrine and practice in order to resolve the matters at issue. . . . Only when an issue to be determined in connection with a party's claim is a *purely secular* one, then neutral principles of law govern the inquiry and subject matter jurisdiction exists in the trial court over the claim. . . . Therefore, because a church's religious doctrine and practice affect its understanding of each of the concepts at issue, [the trial court's involvement] is like asking a court to determine whether a particular church's grounds for membership are spiritually or doctrinally correct or whether a church's charitable pursuits accord with the congregation's beliefs, which are barred.

Lippard v. Holleman, 271 N.C. App. 401, 408, 410-11, 844 S.E.2d 591, 598-99, 600 (citations and marks omitted), *disc. rev. denied*, *appeal dismissed*, 375 N.C. 492, 847 S.E.2d 882 (2020), *cert. denied*, 594 U.S. __, 2021 WL 2637859 (2021).

¶ 36 The entirety of the original counterclaim should have been dismissed for lack of subject matter jurisdiction, as it required the trial court to delve into ecclesiastical matters. On appeal, judicial analysis of Davis's original counterclaim requires impermissible entanglement in this dispute, as no neutral principles of law can be applied to determine whether Davis is the spiritual leader of the Church, whether a special meeting was held to dismiss him from that role, and who constituted a congregant or member of the Church. The Majority's approach jeopardizes the Church's "First Amendment values," as this "church property

litigation . . . turn[s] on the resolution by civil courts of controversies over *religious doctrine and practice*." *Harris*, 361 N.C. at 271, 643 S.E.2d at 570 (quoting *Presbyterian*, 393 U.S. at 449, 21 L. Ed. 2d at 665). I would hold the trial court lacked subject matter jurisdiction over Davis's original counterclaim; we should reverse the order for lack of subject matter jurisdiction and remand to the trial court to dismiss the action with prejudice, rendering the issue regarding Davis's standing moot. *See id.* at 275, 643 S.E.2d at 572.

B. The Amended Counterclaim

¶ 37 As previously noted, the original counterclaim should have been dismissed as requiring impermissible judicial entanglement in ecclesiastical matters due to Davis's request for judicial recognition as the spiritual leader of the Church, as well as the requirements under the later set of bylaws. However, even if the original counterclaim was overlooked and the amended counterclaim was the sole focus of our analysis, the amended counterclaim still requires impermissible judicial entanglement in ecclesiastical matters. The following portions of the amended counterclaim, which mirror similar requests and references in the original counterclaim, are ecclesiastical matters requiring impermissible judicial entanglement:

> 35. [Davis] is entitled to judgment declaring that:
>
> (a) [he] is the Bishop and Senior Pastor of the Church;
>
> . . .
>
> (d) [and that his] appearances on Church property to conduct church services, minister to the congregation, and otherwise perform his duties as Bishop and Senior Pastor of the Church were and are lawful[.]
>
> . . . .
>
> 38. . . . [T]he Third-Party Defendants, purporting to act on behalf of and in the name of the Church, have unlawfully interfered and will continue to interfere with [Davis's] employment relationship with the Church and with his performance of duties as the Bishop and Senior Pastor of the Church, unless restrained by this Court.
>
> 39. [Davis] is entitled to a preliminary and permanent injunction enjoining, restraining and directing plaintiff and the Third-Party Defendants, as follows:

(a) to allow [Davis] to resume his role and duties as the Bishop and Senior Pastor of the Church, with full compensation and benefits, until such time as the Church's congregation may vote to remove [him] in accordance with the requirements of the New Bylaws of the Church;

(b) to refrain from excluding [Davis] from the Church premises and/or any other Church properties; and

(c) to refrain from taking any action to interfere with, subvert or disrupt [Davis] in the performance of his duties as the Bishop and Senior Pastor of the Church.

. . . .

41. A fiduciary relationship of trust and confidence existed between [Davis], as the Bishop and Senior Pastor of the Church, and the Third-Party Defendants as Elders of the Church.

42. A fiduciary relationship of trust and confidence also existed between the Third-Party Defendants as Elders and the Plaintiff Church they were supposed to serve.

43. Due to the fiduciary relationship that existed between them, the Third-Party Defendants were required in equity and in good conscience to act honestly, in good faith and in the best interests of the Church and [Davis] as the Bishop and Senior Pastor of the Church.

44. . . . [T]he Third-Party Defendants[] have breached their fiduciary duties owed to [Davis] and the Church, in that the Third-Party Defendants have arrogated to themselves the sole management and control of the Church and have prevented [Davis] from exercising his rightful role as the Bishop and Senior Pastor of the Church, all in violation of the requirements of the New Bylaws of the Church.

45. As a direct and proximate result of the Third-Party Defendants' breaches of their fiduciary duties[,] . . . [Davis] has been damaged . . . .

. . . .

49. The Third-Party Defendants intentionally induced the Plaintiff church to breach the employment relationship that existed between the Church and [Davis], and in so doing the Third-Party Defendants acted with malice and without justification.

. . . .

52. . . . [T]he Third-Party Defendants have utilized Church assets to fund this litigation against [Davis].

53. Additionally, the Church maintained a "Key Man" insurance policy issued by New York Life Insurance company on the life of [Davis's] father [who was] his predecessor as the Bishop and Senior Pastor of the Church, in a benefit amount believed to be several million dollars. Upon information and belief, after [Davis's] father died in August of 2015, a majority of the benefit amount of that policy was paid to the Church.

54. Because the Third-Party Defendants arrogated to themselves all control and management of the Church's business affairs and activities, to the exclusion of [Davis] notwithstanding his status and role as the Bishop and Senior Pastor of the Church, [Davis] has been unable to determine how those insurance proceeds have been utilized by the Third-Party Defendants and whether those proceeds have been properly devoted to the Church's benefit.

55. [Davis], as the Bishop and Senior Pastor of the Church, is entitled to inspect the books and records of the Church, in order to determine how Church assets and funds have been utilized and whether any such assets or funds have been misused or misappropriated by the Third-Party Defendants.

56. [Davis] is entitled to a complete accounting from the Church and the Third-Party Defendants for any and all items of Church property and money diverted, misappropriated, received, used or expended by the Third-Party Defendants, or any of them.

57. [Davis] is further entitled to have a constructive trust imposed upon the assets of the Third-Party Defendants, for the benefit of the Church, in an amount equal to any Church money or property found by this Court to have been wrongfully misappropriated or taken by the Third-Party Defendants, or any of them.

. . . .

59. The Third-Party Defendants . . . formed an agreement among themselves to do unlawful acts or to do lawful acts in an unlawful way, resulting in injury to the Third-Party Plaintiff, [Davis].

60. After [Davis] discovered the existence of the New Bylaws in November of 2017 and demanded the resignations of the Third-Party Defendants as Elders of the Church, the Third-Party Defendants conspired among themselves to oust [him] and his family members from the Church and thereby arrogate to themselves full control of the Church's operations and activities.

61. Pursuant to their conspiracy, as described above, the Third-Party Defendants committed, or caused to be committed, the following overt acts:

. . . .

(b) In January of 2018, the Third-Party Defendants submitted to [Davis] a purported "evaluation" of his performance. No such "performance evaluation" had ever been previously done on the Bishop and Senior Pastor of the Church, and the Third-Party defendants had no authority under the New Bylaws to conduct such an "evaluation."

(c) Throughout 2018 and the first half of 2019, the Third-Party Defendants refused to meet with [Davis] and instead actively worked to undermine [his] leadership role as the Bishop and Senior Pastor of the Church.

. . . .

WHEREFORE, . . . Davis prays the Court for relief as follows:

. . .

3. That the [trial] [c]ourt issue an Order requiring the Church and the Third-Party Defendants to appear and show cause why [his] Motion for Preliminary Injunction should not be granted;

4. That, following a hearing on [Davis's] Motion for Preliminary Injunction, the [trial] [c]ourt issue an Order of Preliminary Injunction directing, enjoining and restraining the Church, the Third-Party Defendants, and all other persons or entities acting at their instruction or in concert with any of them, as follows:

(a) to allow [Davis] to resume his role and duties as the Bishop and Senior Pastor of the Church, with full compensation and benefits, to include back pay from June 2019, pending further Order of the [trial] [c]ourt or until such time as the Church's congregation may vote to remove [Davis] in accordance with the requirements of the New Bylaws of the Church;

(b) to refrain from excluding [Davis] from the Church premises and/or any other Church properties; and

(c) to refrain from taking any action to interfere with, disrupt or subvert [Davis] in the performance of his duties as the Bishop and Senior Pastor of the Church.

5. That, following a trial on the merits, the [trial] [c]ourt enter judgment in favor of [Davis] and against the Church and the Third-Party Defendants on [Davis's] Counterclaim and Third-Party Complaint as follows:

(a) Declaring that [Davis] is the Bishop and Senior Pastor of the Church; that [Davis's] employment relationship with the Church is not an "at-will" employment but instead is an employment relationship governed by the New Bylaws of the Church; that the purported "termination" of [Davis's] employment with the Church, undertaken by the Third-Party Defendants acting on behalf of and in the name of the Church, was contrary to the New Bylaws and therefore unlawful; that [Davis's] appearances on Church property to conduct church services, minister to the

> congregation, and otherwise perform his duties as Bishop and Senior Pastor of the Church were and are lawful; and that [Davis] is entitled to receive back pay and benefits from the Church from the date of the purported termination of his employment with the Church.
>
> (b) Entering an Order of Permanent Injunction, directing, enjoining and restraining the Church, the Third-Party Defendants, and all other persons or entities acting at their instruction or in concert with them, to allow [Davis] to perform his role and duties as the Bishop and Senior Pastor of the Church, with full compensation and benefits, until such time as the Church's congregation may vote to remove [Davis] in accordance with the requirements of the New Bylaws of the Church; to refrain from excluding [Davis] from the Church premises and/or any other Church properties; and to refrain from taking any action to interfere with, disrupt or subvert [Davis] in the performance of his duties as the Bishop and Senior Pastor of the Church.
>
> . . . .
>
> (d) Ordering the Church and the Third-Party Defendants to [p]ermit [Davis] to inspect the books and records of the Church; ordering the Third-Party Defendants to provide a complete accounting for all items of church money or property misappropriated, diverted, received, used or expended by the Third-Party Defendants, or any of them; and imposing a constructive trust upon the assets of the Third-Party Defendants, for the benefit of the Church, in an amount equal to any Church money or property found to have been wrongfully misappropriated or taken by the Third-Party Defendants, or any of them.

1. "Bishop" and "Senior Pastor"

¶ 38 As identified above, Davis still requests a "judgment declaring that [he] is the Bishop and Senior Pastor of the Church" in Paragraph 35(a) of his amended counterclaim, and includes repeated statements that he is "the duly installed Bishop and Senior Pastor of the Church." These requests and references require a court to determine what constitutes a "bishop" and a "senior pastor," and how such a leader can be "duly

installed." Such a determination would run afoul of our caselaw prohibition against judicial "examination of the church's view of the role of the pastor, staff, and church leaders[.]" *Harris*, 361 N.C. at 273, 643 S.E.2d at 571. The ecclesiastical nature of Davis's requests and references is evidenced by his repeated pairing of the positions of "Bishop and Senior Pastor" with "conduct[ing]," "resum[ing]," and "perform[ing] his duties," as well as "exercising his rightful role" in the Church. For example, Davis asks for a judicial intervention into the purported unlawful interference with his "employment relationship with the Church and with his performance of duties as the Bishop and Senior Pastor of the Church[.]" Courts may not define the role, duties, and services of a church's leader; but, by affirming its denial of the motion to dismiss, that is exactly what the Majority has allowed the trial court to do. *See id.*; *supra* at ¶¶ 14-15.

2. Fiduciary Relationship

¶ 39 Further, Davis claims that "[a] fiduciary relationship of trust and confidence existed between [him], as the Bishop and Senior Pastor of the Church, and the Third-Party Defendants as the Elders of the Church[,]" and that "the Third-Party Defendants[] . . . breached their fiduciary duties owed to [Davis] and the Church" by "arrogat[ing] to themselves the sole management and control of the Church[.]" Davis's breach of fiduciary duty claim is similar to the plaintiffs' allegations in *Harris*. Our Supreme Court has already determined that the ecclesiastical entanglement doctrine prohibits judicial review of whether a church's internal governing body "breached [its] fiduciary duties by improperly using church funds." *Harris*, 361 N.C. at 273, 643 S.E.2d at 571. Such a review required an improper "examination of the church's view of the role of the pastor, staff, and church leaders, their authority and compensation, and church management." *Id.* We similarly cannot examine the role and relationship between the elders and a pastor, as it involves an improper review of not only roles, duties, and authority, but also church management.

3. Employment Relationship

¶ 40 Davis also claims "[a] valid employment relationship existed between [him and] the Church[,] . . . [and] [t]he Third-Party Defendants intentionally induced the Plaintiff Church to breach the employment relationship that existed between the Church and [Davis], and in so doing the Third-Party Defendants acted with malice and without justification." "[T]he application of a secular standard to secular conduct that is tortious is not prohibited by the Constitution," and tortious conduct could be analyzed if neutral laws could be applied. *Smith v. Privette*, 128 N.C. App. 490, 494, 495 S.E.2d 395, 397 (marks omitted), *appeal dismissed*,

348 N.C. 284, 501 S.E.2d 913 (1998). However, "the decision to hire or discharge a minister is inextricable from religious doctrine and protected by the First Amendment from judicial inquiry." *Id.* at 495, 495 S.E.2d at 398. Whether the decision to fire Davis was due to failure to perform a religious role or was nefarious would require the examination of religious doctrine, and we cannot allow such an examination.

4. "Church's Benefit"

¶ 41 In his fifth claim for relief in the amended counterclaim, Davis argues "the Third-Party Defendants have utilized Church assets to fund this litigation against [Davis,]" which entitles Davis "to have a constructive trust imposed upon the assets of the Third-Party Defendants" in the amount of funds "wrongfully misappropriated or taken[.]" According to Davis, he and, by inference, the trial court, must be allowed to inspect Church records to determine whether the portion of a keyman life insurance policy paid to the Church has "been properly devoted to the Church's benefit."

> Determining whether actions, *including expenditures*, by a church's [staff and leadership] were proper requires an examination of the church's view of the role of the pastor, staff, and church leaders, their authority and compensation, and church management. Because a church's religious doctrine and practice affect its understanding of each of these concepts, seeking a court's review of the [expenditures] is no different than asking a court to determine whether a particular church's grounds for membership are spiritually or doctrinally correct or whether a church's charitable pursuits accord with the congregation's beliefs. None of these issues can be addressed using neutral principles of law.

Harris, 361 N.C. at 273, 643 S.E.2d at 571 (emphasis added). What constitutes the proper devotion of life insurance proceeds toward the Church's benefit is an analysis inextricably linked to ecclesiastical issues, and we cannot permit such an analysis.

5. Control of the Church

¶ 42 Davis's civil conspiracy claim is replete with references to the Third-Party Defendants attempting to "arrogate to themselves full control" of the Church, acting with "no authority," "actively work[ing] to undermine [Davis's] leadership role," and terminating Davis without the

"75% affirmative vote of the congregation" required under the bylaws. Judicial engagement with claims concerning membership, roles, and duties within the Church requires an analysis we may not conduct. *See id.*; *Emory*, 165 N.C. App. at 492-93, 598 S.E.2d at 670-71.[2]

6. Injunctive Relief

¶ 43 Finally, Davis's prayer for relief requests a judicial determination, via injunction, that "allow[s] [Davis] to resume his role and duties as the Bishop and Senior Pastor of the Church" until another court order or congregational removal via "the requirements of the New Bylaws of the Church" takes effect. He also requests a judicial declaration "that [he] is the Bishop and Senior Pastor of the Church[,] . . . that the purported 'termination' . . . was contrary to the New Bylaws[,] . . . [and] that [his] . . . perform[ance of] his duties as the Bishop and Senior Pastor of the Church were and are lawful[.]" According to Davis, "the New Bylaws expressly provide[] that the Bishop of the Church can be dismissed only by a 75% vote of the congregation attending a Special General Meeting called for that purpose. No Special General Meeting of the congregation was convened[.]" As previously discussed, the ecclesiastical entanglement doctrine prohibits judicial review of roles within a church, or of what constitutes an appropriate special meeting or membership within a church. *See Harris*, 361 N.C. at 273, 643 S.E.2d at 571; *Emory*, 165 N.C. App. at 492-93, 598 S.E.2d at 670-71. The trial court did not have subject matter jurisdiction over Davis's request for a positive injunction in his prayer for relief.

7. Conclusion

¶ 44 Even assuming, *arguendo*, we should review the amended counterclaim rather than the original counterclaim, each of Davis's claims require judicial review of ecclesiastical matters, which runs afoul of the ecclesiastical entanglement doctrine. Davis's amended counterclaim should have been dismissed for lack of subject matter jurisdiction, and we lack subject matter jurisdiction over the amended counterclaim on appeal. We should remand to the trial court for dismissal of the amended counterclaim, with prejudice. *Harris*, 361 N.C. at 275, 643 S.E.2d at 572.

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2. Davis also argues his mother was wrongfully terminated, but he lacks standing to bring such a claim. *See Munger v. State*, 202 N.C. App. 404, 409, 689 S.E.2d 230, 235 (2010) (marks omitted) ("The rationale of the standing rule is that only one . . . personally injured . . . can be trusted to battle the issue."), *disc. rev. denied*, 365 N.C. 3, 705 S.E.2d 734 (2011).

C. Lack of Subject Matter Jurisdiction Over Plaintiffs' Complaint

¶ 45 "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal. An appellate court has the power to inquire into subject-matter jurisdiction in a case before it at any time, even *sua sponte*." *Henson v. Henson*, 261 N.C. App. 157, 160, 820 S.E.2d 101, 104 (2018) (citation and marks omitted). The complaint is properly analyzed within this appeal, Davis's original counterclaim and amended counterclaim included an answer to the complaint, and the Majority does not review whether the trial court had subject matter jurisdiction over the matter from the start. *See Hayes v. Turner*, 98 N.C. App. 451, 454-55, 391 S.E.2d 513, 515 (1990) ("[The plaintiff's] complaint in summary ejectment alleges that there was no rent and that no lease existed. The record contains neither allegations nor evidence of a landlord-tenant relationship, and [the plaintiff] also failed to allege any of the statutory violations. [The plaintiff's] amended complaint also fails to assert the required allegations for summary ejectment or for any other cause of action. We therefore, *sua sponte*, conclude that the trial court lacked subject matter jurisdiction to hear the summary ejectment action. We therefore vacate the trial court's grant of summary judgment for [the] plaintiff on [the] plaintiff's cause of action and remand for dismissal of that action."). I would review the complaint to see whether it too runs afoul of the ecclesiastical entanglement doctrine.

¶ 46 The complaint alleges that "[t]he Plaintiff is the owner and lawful possessor of the Premises[,]" "[Davis] continues to attempt to hold unauthorized services and meetings at Plaintiff's facilities[,]" "[Davis] has disrupted the ongoing legitimate ministries of the Plaintiff and prevented the Plaintiff from carrying on its mission[,]" and "[Davis], by his unauthorized collection and retention of funds and by his failure to return Plaintiff's property, has committed conversion of Plaintiff's property." Much like Davis's counterclaims, these allegations require improper judicial inquiry into Church governance and membership as it relates to the appropriate leaders and owners of the premises, as well as who has the authority to approve Davis in his attempt to hold services and meetings. *See Harris*, 361 N.C. at 273, 643 S.E.2d at 571; *Emory*, 165 N.C. App. at 492-93, 598 S.E.2d at 670-71. Further, in addition to these allegations, the complaint requires impermissible analysis of what constitutes the legitimate ministry and mission of the Church: "[Davis] has disrupted the ongoing legitimate ministries of the Plaintiff and prevented the Plaintiff from carrying on its mission[.]" *See generally Piner*, 267 N.C. at 77, 147 S.E.2d at 583. Finally, the complaint requests judicial analysis of alleged unauthorized conversion of Church property, which is similar

to Davis's claims and those of the plaintiffs' improper request in *Harris* for judicial determination of whether expenditures were proper. *See Harris*, 361 N.C. at 273, 643 S.E.2d at 571.

¶ 47 The complaint also requires judicial review of roles within and doctrine of the Church, which runs afoul of the ecclesiastical entanglement doctrine. For this reason, the trial court did not have subject matter jurisdiction over the complaint, and we must remand to the trial court to dismiss it with prejudice along with the original counterclaim and amended counterclaim. *See id.* at 275, 643 S.E.2d at 572.

CONCLUSION

¶ 48 Our courts may not intrude on church disputes that cannot be resolved via only neutral principles of law. Such judicial intrusion constitutes impermissible entanglement in ecclesiastical matters and is prohibited by the First Amendment. The determination of issues from Davis's original counterclaim requires judicial review of ecclesiastical matters. Even if we were to review Davis's amended counterclaim, each claim still requires judicial review of ecclesiastical matters. Finally, the original complaint similarly requires judicial review of ecclesiastical matters. As a result, the trial court lacked subject matter jurisdiction over the entirety of this matter.

¶ 49 While I concur that the Order is properly before us as an interlocutory appeal, I would reverse the trial court's order denying the motion to dismiss for lack of subject matter jurisdiction, rendering the issue regarding Davis's standing moot. I would also hold the trial court lacked subject matter jurisdiction over the complaint, counterclaim, and amended counterclaim and remand for the trial court to dismiss the action with prejudice. For these reasons, I respectfully dissent.

DONALD PODREBARAC, PLAINTIFF
v.
HORACK, TALLEY, PHARR & LOWNDES, P.A., AND GENA G. MORRIS, DEFENDANTS

No. COA20-619

Filed 5 October 2021

1. Attorneys—legal malpractice—failure to notarize mediated settlement—enforceability—genuine issue of material fact

In plaintiff's legal malpractice suit filed against his attorneys after his ex-wife successfully challenged a property settlement, the trial court improperly granted summary judgment to the attorneys after determining that their mistakes—after mediation, the attorneys presented stipulations to the trial court that had not been notarized and did not attach a chart of the assets to be distributed—could not have been the proximate cause of any harm to plaintiff. There was a genuine issue of material fact regarding whether the stipulations would have been enforceable if they had been notarized, since they appeared to contain all material and essential terms, making them binding if properly filed.

2. Statutes of Limitation and Repose—legal malpractice—discovery of defect—genuine issue of material fact

In plaintiff's legal malpractice suit filed against his attorneys after his ex-wife successfully challenged a property settlement, the trial court improperly granted summary judgment to the attorneys after determining that the suit was time-barred. There was a genuine issue of material fact regarding when plaintiff reasonably could have discovered his attorneys' mistakes or any resulting consequences. It could be inferred from the evidence that plaintiff could not have discovered the mistakes until after his ex-wife moved to dismiss the domestic action, particularly where his attorneys continued to insist to plaintiff that the agreement was enforceable despite their failure to notarize documents related to the settlement.

Appeal by Plaintiff from an order entered 10 February 2020 by Judge Jesse B. Caldwell, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 May 2021.

The Law Offices of James Scott Farrin, by Paul R. Dickinson Jr., Gary W. Jackson, and Christopher R. Bagley, for the Plaintiff-Appellant.

Poyner Spruill LLP, by Cynthia L. Van Horne, for the Defendants-Appellees.

DILLON, Judge.

¶ 1 Plaintiff Donald R. Podrebarac appeals from an order granting summary judgment for Defendants, Horack, Talley, Pharr & Lowndes, P.A., and Gena G. Morris. We vacate and remand.

I. Background

¶ 2 Plaintiff commenced this action claiming Defendants committed legal malpractice in their representation of him in an equitable distribution matter (the "domestic case") against his ex-wife. During the mediation in the domestic case, Plaintiff and his ex-wife verbally agreed to a distribution of assets. At the conclusion of the mediation, they signed a document (hereinafter the "Stipulations") that essentially outlined what they had just verbally agreed to. Further, the Stipulations provided that they agreed to *formalize* the terms pertaining to "property settlement and alimony provisions" in a to-be-drafted settlement agreement.

¶ 3 When Defendants presented the Stipulations to the trial court on behalf of their client (Plaintiff) for entry, Defendants mistakenly forgot to attach an accompanying "Asset Chart" *and* failed to have the Stipulations notarized. *See* N.C. Gen. Stat. § 50-20(d) (2009) (requiring that to settle equitable distribution with a stipulation, the stipulation must be notarized). The Asset Chart was significant as it set forth the agreed-upon distribution of all property between the parties.

¶ 4 In any event, a document entitled "Marital Property Settlement Agreement" was circulated amongst the Plaintiff and his ex-wife to formalize their oral agreement, but neither signed the document. Notwithstanding the foregoing, for two years, Plaintiff and his ex-wife acted in lockstep with the terms set forth in this unsigned document.

¶ 5 At some point, though, Plaintiff's ex-wife began questioning the legitimacy of the Stipulations, triggering Plaintiff to file a Motion for Declaratory Judgment. Plaintiff's ex-wife responded with a motion to dismiss. The court ruled in her favor, finding the Stipulations to be unenforceable, primarily because they were not notarized.

¶ 6 After continued litigation, Plaintiff and his ex-wife finally settled the dispute, though Plaintiff found the terms less favorable than the terms he thought he and his wife had orally agreed to at their mediation.

¶ 7 Because of the "unfavorable" settlement in the domestic case, Plaintiff filed this present malpractice action, claiming that Defendants' failure to properly file the Stipulations caused further litigation with his ex-wife, resulting in additional legal fees and a less favorable result. In response, Defendants filed a motion to dismiss based on the statute of limitations, which the trial court granted. On appeal, in *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 752 S.E.2d 661 (2013), we reversed and remanded. Upon remand, the parties proceeded with discovery, but ultimately, the trial court entered an order granting summary judgment for Defendants. Plaintiff timely appealed.

II. Standard of Review/Legal Malpractice

¶ 8 The standard of review on appeal from a grant of summary judgment is *de novo*. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012). "The party moving for summary judgment is entitled to judgment as a matter of law only when there is no genuine issue of material fact." *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998).

¶ 9 As for legal malpractice, to prevail against one's attorney, the client must show "(1) that the attorney breached the duties owed to his client . . . and that this negligence (2) proximately caused (3) damage to the plaintiff." *Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 366 (1985).

III. Analysis

¶ 10 The trial court entered summary judgment against Plaintiff based on two different theories: (1) the Stipulations do not constitute an enforceable agreement as it was an "agreement to agree," so Plaintiff could not establish proximate cause of any harm by Defendants' failures obtaining the trial court's acceptance of the Stipulations; and (2) Plaintiff's claim is barred by the statute of limitations. We disagree and conclude that a genuine issue of material fact exists on both issues.

A. Binding Agreement or "Agreement to Agree"

¶ 11 **[1]** The trial court determined the Stipulations to be an "agreement to agree." As such, the Stipulations, even if properly notarized, would have had no binding effect on Plaintiff and his ex-wife. Therefore, Defendants' mistakes could not be the *proximate cause* of any harm to Plaintiff.

¶ 12 We conclude, however, that there is at least an issue of fact as to whether the Stipulations with the Asset Chart, if properly notarized, would have been a valid, enforceable agreement for the reasoning below.

¶ 13 Our Supreme Court has instructed that "[a] contract, or offer to contract, *leaving material portions open for future agreement* is nugatory and void for indefiniteness." *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974) (emphasis added) (citations and quotations omitted). The Court explained that:

> The reason for this rule is that there would be no way by which the court could determine what sort of a contract the negotiations would result in; no rule by which the court could ascertain what damages, if any, might follow a refusal to enter into such future contract on the arrival of the time specified. Therefore, [to be itself enforceable] a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations.

Id. at 734, 208 S.E.2d at 695.

¶ 14 Further, if the parties to a "preliminary" agreement "manifested an intent not to become bound until the execution of a more formal agreement or document, then such intent would be given effect[,]" even if the preliminary agreement otherwise contained all material terms. *County of Jackson v. Nichols*, 175 N.C. App. 196, 199, 623 S.E.2d 277, 279 (2005).

¶ 15 In any case, our Supreme Court also instructs that "[i]n the usual case, the question whether an agreement is complete or partial is left to inference or further proof." *Boyce*, 285 N.C. at 734, 208 S.E.2d at 695.

¶ 16 Relying on our Supreme Court's reasoning in *Boyce*, our Court has held that a contract that the parties expect to formalize is not rendered invalid simply because the parties do not subsequently execute such a formal agreement so long as the parties "assent to the same thing in the same sense, and their minds meet as to all the [material] terms." *Smith v. Young Moving & Storage, Inc.*, 167 N.C. App. 487, 493, 606 S.E.2d 173, 177 (2004) (citation and quotation omitted); *see also Lemly v. Colvard Oil Co.*, 157 N.C. App. 99, 103, 577 S.E.2d 712, 715 (2003) (discussing requirements of (1) a meeting of the minds as to all essential terms; and (2) "sufficiently definite and certain" terms when enforcing preliminary memorandum of settlement).

¶ 17 In the present case, it could be inferred that the Stipulations and Asset Chart, in conjunction, contain all material and essential terms for a binding settlement agreement. And there is otherwise no language therein conclusively expressing an intent that the Stipulations, on their

own, were *not* binding. The divorcing parties' wishes for alimony, child support, health insurance, life insurance, attorney's fees, taxes, real estate distribution, household goods and furnishings, and property distribution are all included. Thus, when comparing the Stipulations to the unsigned Settlement Agreement, it could be inferred that not one material term goes unaccounted for.

B. Statute of Limitations

¶ 18 **[2]** The trial court also relied on its conclusion that Plaintiff's claims are barred by the applicable statute of limitations. We disagree.

¶ 19 A claim for legal malpractice has a three-year statute of limitations and accrues on the date of the last act of the defendant giving rise to the cause of action. N.C. Gen. Stat. § 1-15(c) (2009). When the statute of limitations has been pleaded as a defense by the defendant, the burden is on the plaintiffs to show that they have timely filed their claim. *Hooper v. Carr Lumber Company*, 215 N.C. 308, 311, 1 S.E.2d 818, 820 (1939).

¶ 20 The record shows that Defendants presented the Stipulations to the trial court for entry in the domestic case on 1 May 2009. Plaintiff did not commence this present suit until 14 June 2012, three years *and a month* later. Thus, under the general rule, Plaintiff would be barred by the statute of limitations.

¶ 21 There is, however, an exception to the general rule. The law, often referred to as the "latent discovery proviso," further provides that: (1) if the loss is not readily apparent at the time of its origin and (2) the loss is discovered or should reasonably be discovered by the claimant two or more years after the last act, then [3] suit must be brought within one year from the date the discovery is made. N.C. Gen. Stat. § 1-15(c). "[But] in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action." *Id.* § 1-15(c).

¶ 22 Here, there is some evidence as to the first prong, that the Defendants' errors were not readily apparent to Plaintiff at the time the Stipulations were submitted to the trial court.

¶ 23 Moving to the second prong, it could be inferred from the evidence that Defendants' defective representation was not reasonably discoverable by Plaintiff until on 13 April 2012, when Plaintiff's ex-wife moved for a dismissal in the domestic case. *See Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 75, 752 S.E.2d 661, 664 (2013) (stating that "[t]he earliest that plaintiff could reasonably have been expected to discover that defect was on 13 April 2012, when Ms. Podrebarac's attorney filed a motion to 'dismiss' his motion to enforce

the 'mediated settlement agreement' "). This date (13 April 2012) occurred two years after the last act (1 May 2009).

¶ 24 Further, it could be inferred from the evidence that Defendants confirmed to Plaintiff, and later redoubled, that the settlement was definite regardless of the error, deterring any assumption of malpractice. *Contra Thorpe v. DeMent*, 69 N.C. App. 355, 317 S.E.2d 692 (1984) (holding that the date of discovery occurred when the defendant-lawyer informed plaintiffs of his error, which effectively destroyed their wrongful death claim, and plaintiffs dismissed lawyer shortly after).

¶ 25 Finally, as the third prong dictates, suit must be brought within a year of discovery. Because it could be inferred that reasonable discovery occurred on 13 April 2012, Plaintiff had until 13 April 2013 (one year later) to file. Plaintiff filed within this window, on 14 June 2012. Accordingly, it could be inferred that Plaintiff timely filed his complaint in this present action.

IV. Conclusion

¶ 26 We hold that a genuine issue of material fact exists as to whether the Stipulations, if properly filed by Defendants, would have been binding. Further, it could be inferred that Plaintiff's malpractice claim is not time-barred. Accordingly, the trial court erred in granting Defendants' motion for summary judgment based on these two grounds. We, therefore, vacate the summary judgment order and remand the case for further proceedings.

VACATED AND REMANDED.

Judges CARPENTER and GORE concur.

STATE v. BROWN

[279 N.C. App. 630, 2021-NCCOA-531]

STATE OF NORTH CAROLINA
v.
CARROLL JOSHUA BROWN, DEFENDANT

No. COA20-769

Filed 5 October 2021

1. Probation and Parole—probation revocation—absconding—in-court admission by defendant—waiver of presentation of State's evidence

The trial court did not abuse its discretion in revoking defendant's probation where defendant, appearing pro se, repeatedly admitted during the revocation hearing that he had absconded from supervision, and therefore waived the requirement that the State present competent evidence that he violated a condition of his probation.

2. Probation and Parole—probation revocation—judgment form—clerical errors

A judgment revoking defendant's probation was remanded for the trial court to correct three clerical errors in the judgment form, in which the court mistakenly listed a different crime than the one defendant was convicted of, listed the wrong number of probation violations alleged in the violation report, and inadvertently checked a box indicating that each violation alone could activate defendant's sentence when, in fact, the court revoked defendant's probation based solely on his absconding.

Appeal by Defendant from judgment entered 30 May 2019 by Judge Todd Pomeroy in Lincoln County Superior Court. Heard in the Court of Appeals 25 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Allison A. Angell, for the State.

Shawn R. Evans for Defendant-Appellant.

INMAN, Judge.

¶ 1 Carroll Joshua Brown ("Defendant") appeals from the revocation of his probation based on an absconding violation. Defendant contends that the trial court erred in finding he violated his probation because the

State did not present competent evidence that he had absconded and that the trial court made three clerical errors in its judgment. After careful review, we affirm the trial court's activation of Defendant's sentence, but we remand the case for the trial court to correct the clerical errors.

I. FACTUAL & PROCEDURAL BACKGROUND

¶ 2 Defendant on 15 February 2018 entered an *Alford* plea on a charge of possession with intent to sell and deliver methamphetamine. The trial court sentenced Defendant to 8 to 19 months in prison, suspended for 30 months of supervised probation.

¶ 3 Defendant's first probation officer filed a probation violation report on 1 November 2018, alleging Defendant had failed to attend and comply with cognitive behavioral intervention ("CBI") services, had not paid supervision and court costs, and had been terminated from the Treatment Accountability for Safer Communities ("TASC") program because he did not report. The trial court found Defendant in willful violation of the conditions of his probation and ordered Defendant complete CBI and TASC.

¶ 4 Defendant's case was eventually transferred to another probation officer. His new probation officer could not locate Defendant, so the officer filed a second probation violation report on 9 April 2019. The report alleged five violations:

> 1. The defendant has failed to report or contact the probation office and has failed to provide his current address, making his whereabouts unknown. The defendant has absconded supervised probation.
>
> The defendant moved from the residence, 3448 East Highway 27 Lincolnton, NC 28092, without permission. The defendant has failed to provide the address to where he is currently residing.
>
> 3. The defendant failed to complete CBI as ordered by the court.
>
> 4. The defendant is in arrears $380.00 for probation supervision fees.
>
> 5. The defendant is in arrears $1,782.50 for court cost indebtedness.
>
> 6. The defendant has failed to comply with court ordered two drug screens per month.

Defendant was taken into custody on or about 2 May 2019. After being made aware of the allegations against him, Defendant waived his right to counsel and the matter was scheduled for hearing.

¶ 5 At the probation hearing on 30 May 2019, Defendant, *pro se*, admitted to absconding. Addressing Defendant, the prosecutor asked, "one of the regular conditions of your probation was to not abscond. The allegation is that you failed to report or contact the probation office. And you failed to provide your current address, making your whereabouts unknown. As such, you have violated your supervision. Do you admit that violation?" Defendant responded, "I may have absconded, but I think my current address that I was staying at is in my file. She asked me for that." The trial court judge clarified, "You are admitting absconding then?" Defendant replied, "Yes, Sir." Defendant further admitted he had failed to complete CBI and to pay court and supervision costs. The prosecutor then asked, "And then you failed to comply with the court ordered drug screens, two per month; do you admit that?" Defendant answered, "Yes, sir, since I absconded." When the trial court asked Defendant if he wished to say anything further, Defendant again said, "I absconded."

¶ 6 The trial court found Defendant had violated the conditions of his probation. Because Defendant absconded pursuant to N.C. Gen. Stat. § 15A-1343(b)(3a), the trial court revoked his probation and activated his sentence of 8 to 19 months with 136 days of jail credit. Defendant filed a handwritten notice of appeal with the clerk on 6 June 2019. On appeal, contemporaneously with his brief, Defendant has filed a petition for writ of certiorari, requesting that we exercise our discretion to review the merits of his appeal in the event his notice is defective.

II. ANALYSIS

1. Appellate Jurisdiction

¶ 7 Defendant's notice of appeal failed to comply with Rule 4 of our Rules of Appellate Procedure because the notice does not include Defendant's signature, designate the judgment from which Defendant appealed or the court to which he appealed, or contain a certificate of service.[1] *See* N.C. R. App. P. 4(b) (2021).

¶ 8 In our discretion and because one of Defendant's arguments is meritorious, we grant Defendant's petition for certiorari review. N.C. R. App.

1. In addition, Defendant's notice of appeal was untimely, though through no fault of his own. Defendant filed his notice of appeal on 6 June 2019, but the trial court did not enter the appellate entries until 28 August 2019, almost two months after the entry of the judgment.

P. 21(a)(1) (2021) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action.").

2. Competent Evidence to Support Finding of Absconding

¶ 9 **[1]** Defendant argues the trial court erred in finding he violated his probation by absconding because the State failed to present competent evidence.

¶ 10 We review a trial court's revocation of probation for abuse of discretion. *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014). A trial court abuses its discretion "when a ruling is so manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009) (quotation marks and citation omitted). Probation may be revoked in three circumstances: (1) the trial court has previously ordered two 90-day periods of confinement, (2) the probationer commits a new criminal offense, or (3) the probationer absconded from supervision. N.C. Gen. Stat. § 15A-1344(a)(d2) (2019); N.C. Gen. Stat. §§ 15A-1343(b)(1), (b)(3a) (2019). A probationer absconds by "willfully avoiding supervision" or "making the defendant's whereabouts unknown to the supervising probation officer." § 15A-1343(b)(3a).

¶ 11 Defendant's insistence on appeal that his probation officer had his correct address in her file is not availing. He waived the requirement that the State present evidence and at no time asked to submit sworn testimony. And assuming *arguendo* that Defendant could have offered this factual assertion as testimony and did so, as the trier of fact in a probation violation hearing, the trial court judge is not compelled to accept any testimony as credible. *State v. Robinson*, 248 N.C. 282, 286, 103 S.E.2d 376, 379 (1958) ("In determining whether the evidence warrants the revocation of a suspended sentence, the credibility of the witnesses and the evaluation and weight of their testimony, are for the judge.") (citations omitted)).

¶ 12 Our caselaw is clear that "a waiver of the presentation of the State's evidence by an in-court admission of the willful or without lawful excuse violation as contained in the written notice (or report) of violation" satisfies due process requirements at a probation revocation hearing. *State v. Sellers*, 185 N.C. App. 726, 728, 649 S.E.2d 656, 657 (2007) (citing *State v. Williamson*, 61 N.C. App. 531, 533-34, 301 S.E.2d 423, 425 (1983)). Put differently, when a defendant admits to willfully violating a condition of his or her probation in court, the State does not need to

present evidence to support the violations. A probation hearing is not a "formal trial" in North Carolina, so the trial court is not required to "personally examine a defendant regarding his admission that he violated his probation." *Id.* at 727, 649 S.E.2d at 656 (citing *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 479 (1967) ("Proceedings to revoke probation are often regarded as informal or summary.")).

¶ 13 Here, Defendant waived his right to counsel before the hearing. At the hearing, Defendant unequivocally and repeatedly admitted that he had absconded. The trial court asked Defendant directly if he was "admitting absconding;" it was not required to personally examine Defendant further. *Sellers*, 185 N.C. App. at 727, 649 S.E.2d at 656. When Defendant admitted to absconding, he waived the State's burden of producing competent evidence of the violation.[2] Defendant cannot now argue that the State failed to meet this burden.

¶ 14 Defendant contends that when he admitted to absconding, he did not understand the legal definition of the word. We reject this argument.

¶ 15 Defendant relies on *State v. Crompton*, 270 N.C. App. 439, 842 S.E.2d 106 (2020), to his detriment. First, *Crompton* held that allegations in a probation violation report tracking the language of Sections 15A-1343(b)(2) and (3) may be sufficient to allege an absconding violation under Section 15A-1343(b)(3a). 270 N.C. App. at 442-49, 842 S.E.2d at 110-14. Defendant does not contend the allegations in the probation violation report were insufficient. *See* N.C. R. App. P. 28(a) (2021) ("Issues not presented and discussed in a party's brief are deemed abandoned."). Second, in *Crompton* the probationer admitted to the underlying factual allegations in the probation violation report. 270 N.C. App. at 441, 842 S.E.2d at 109. Here, Defendant admitted to the violation of willfully absconding throughout the course of the probation hearing. Finally, *Crompton* did not cite or rely upon *Sellers*, which is controlling in this case.

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2. North Carolina Department of Public Safety Community Corrections' policies and procedures require probation officers to take the following investigative actions before declaring a probationer an absconder: (1) review AOC alerts; (2) attempt to call the offender via telephone; (3) conduct, at a minimum, two home contacts on separate days and leave written reporting instructions; (4) attempt to contact the offender at school or work; (5) contact a relative or reference; (6) contact treatment providers; and (7) contact local law enforcement. N.C. Dep't Pub. Safety Cmty. Corr., Policy & Procedures, *Absconder Investigation* § D.0503, 275-76 (April 2019), https://www.ncdps.gov/document/community-corrections-policy-manual. Because Defendant admitted that he had absconded at the revocation hearing, the trial court did not need to consider what investigative steps the probation officer took to locate him.

¶ 16 We affirm the trial court's finding that Defendant absconded in violation of his probation, based on Defendant's own admissions and the allegations in the probation violation report.

3. Clerical Errors in the Judgment

¶ 17 **[2]** Defendant requests we remand this case to the trial court to correct clerical errors in the judgment. The State concedes error, and we agree.

¶ 18 When the trial court's written judgment contradicts its findings in open court, we will remand the judgment to correct the clerical error, *State v. Newsome*, 264 N.C. App. 659, 665, 828 S.E.2d 495, 500 (2019) (citations omitted), "because of the importance that the record speak the truth," *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (quotation marks and citations omitted).

¶ 19 Defendant alleges three clerical errors in the judgment. First, the record reveals Defendant was convicted of possession with intent to sell and deliver methamphetamine. However, the judgment form incorrectly lists Defendant's conviction as possession with intent to manufacture, sell, or deliver marijuana. Second, while the violation report only alleges five violations, paragraphs 1, 3, 4, 5, and 6, the judgment inadvertently denotes six different violations—1, 2, 3, 4, 5, and 6. Third, the trial court mistakenly checked a box on the judgment form to indicate that each violation alone could activate Defendant's sentence. It is clear from the transcript of the probation violation hearing that the trial court revoked Defendant's probation based only on the absconding violation in accordance with our statutes and caselaw. N.C. Gen. Stat. § 15A-1344(d2); §§ 15A-1343(b)(1), (b)(3a); *Newsome*, 264 N.C. App. at 665, 828 S.E.2d at 500.

¶ 20 Accordingly, we remand so the judgment may reflect the appropriate conviction, number of probation violations, and revocation of Defendant's probation based on his absconding. *See Newsome*, 264 N.C. App. at 665, 828 S.E.2d at 500 (remanding so the judgment may "clearly indicate that probation was revoked because Defendant had committed a criminal offense or absconded").

III. CONCLUSION

¶ 21 For the reasons explained above, we affirm the activation of Defendant's sentence. However, we remand to the trial court to correct the described clerical errors in the judgment.

AFFIRMED IN PART; REMANDED IN PART.

Judges WOOD and JACKSON concur.

STATE v. BUNTING

[279 N.C. App. 636, 2021-NCCOA-532]

STATE OF NORTH CAROLINA
v.
JAMES CHRISTOPHER BUNTING, DEFENDANT

No. COA20-643

Filed 5 October 2021

Sentencing—prior record level—calculation—unclear from record—stipulation invalid

Defendant was entitled to a new sentencing hearing because his stipulation to a prior record level worksheet that listed eighteen convictions was invalid where the record was indeterminate regarding which convictions were used to assign twelve points (making defendant a prior record level IV offender for sentencing purposes). The worksheet included several crossed-out and hand-written items, making it unclear whether the trial court improperly included convictions used as a predicate to establish defendant's status as a habitual felon. Further, if any of the out-of-state convictions were used, defendant's stipulation was inadequate to establish that they were substantially similar to North Carolina offenses, which involved a question of law to be proved by the State.

Appeal by defendant from judgment entered 10 January 2020 by Judge John E. Nobles, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 11 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary L. Maloney, for the State.

Kimberly P. Hoppin for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 James Christopher Bunting ("Defendant") appeals from judgment after a jury convicted him of one count of felony sale or delivery of heroin, one count of felony sale or delivery of heroin within 1,000 feet of a school, and one count of felony possession with intent to sell or deliver heroin, and after Defendant plead guilty to habitual felon status pursuant to a plea agreement. On appeal, Defendant argues the trial court erred in sentencing him as a prior record level IV offender because it was unclear from the record and prior record level worksheet whether the felony convictions used to establish his habitual felon status were improperly

included in the trial court's calculation of his prior conviction points and prior record level, to which Defendant stipulated. Furthermore, Defendant contends the State failed to meet its burden of proving his out-of-state offenses were felonies in the respective states of origin, or that they were substantially similar to felonies in North Carolina. After careful review, we remand for a new sentencing hearing because the terms of the stipulation fail to definitively identify which convictions the trial court used to calculate Defendant's prior record level.

I. Factual & Procedural Background

¶ 2 On 27 June 2018, Defendant was arrested and charged with the following offenses: (1) sale and delivery of a Schedule I controlled substance, in violation of N.C. Gen. Stat. § 90-95(a)(1); (2) the manufacture, sale, and delivery, or possession of a controlled substance within 1,000 feet of a school, in violation of N.C. Gen. Stat. § 90-95(e)(8); and (3) possession with intent to sell or deliver a Schedule I controlled substance, in violation of N.C. Gen. Stat. § 90-95(a)(1). On 29 October 2018, a New Hanover County grand jury returned a true bill of indictment for the three drug-related offenses under case file number 18 CRS 55008. On the same day, Defendant was charged in a true bill of indictment with obtaining the status of habitual felon in violation of N.C. Gen. Stat. 14-7.1 under case file number 18 CRS 5278. This true bill of indictment alleged Defendant was previously convicted of at least three successive felonies including possession with the intent to sell or distribute cocaine on 18 May 2001, possession of cocaine on 12 January 2006, and possession of marijuana on 28 October 2013.

¶ 3 On 10 January 2020, Defendant was tried by jury and was unanimously convicted of the three felony drug charges. Defendant then entered into a plea agreement in which Defendant agreed to plead guilty to his status as an habitual felon. Defense counsel and the prosecutor signed, and Defendant stipulated to, a prior record level worksheet prepared by the State listing eighteen total convictions. Of the eighteen total prior convictions, four convictions relate to or establish Defendant's habitual felon status, five are out-of-state convictions, two are class A1 or 1 misdemeanor convictions eligible for calculating Defendant's prior record level, two are Class H or I North Carolina felonies eligible for purposes of counting towards Defendant's prior record level, and five are North Carolina misdemeanor convictions not eligible for purposes of counting towards Defendant's prior record level. Four of the five total out-of-state convictions were crossed through by hand. Under Section V of the worksheet, an aggregate of 18 points was handwritten beside ten of the eighteen prior convictions. Of the convictions assigned points,

three are out-of-state convictions, two are misdemeanor convictions, two are North Carolina felony convictions, and three are felony convictions used to establish Defendant's status as an habitual felon. All but one of the three out-of-state convictions assigned points were crossed out. Defendant's prior felony Class H and I convictions under Section I of the worksheet were initially assigned 14 points—this number was crossed out by hand and changed to 10 points without explanation. Defendant's prior Class A1 or 1 misdemeanor convictions were assigned 2 points. Thus, Defendant was assigned a total of 12 prior record level points on the worksheet, which classified Defendant as a prior record level IV offender for sentencing purposes.

¶ 4 Defendant again stipulated during an exchange between the trial court, the prosecutor, and Defendant's counsel to the calculation of points and his status as a prior record level IV offender. Following this colloquy, the State summarized the evidence it would have presented had the case proceeded to trial, and Defendant did not object to the State's factual basis for finding habitual felon status. The State stipulated to certain mitigating factors presented by defense counsel, including Defendant's voluntary acknowledgment of wrongdoing at an early stage of the criminal process, Defendant's support system in the community, Defendant's support to his family, and Defendant's gainful employment. The trial court accepted the mitigating factors proffered by Defendant, consolidated Defendant's convictions for judgment, and entered judgment. It arrested judgment on the charge of manufacture, sale, and delivery, or possession of a controlled substance within 1,000 feet of a school. After calculating Defendant's prior record level at IV based on 12 prior record points, and finding mitigating factors outweighed aggravating factors, the trial court judge sentenced Defendant to a minimum term of 80 months and a maximum term of 108 months of imprisonment in the custody of the North Carolina Department of Correction. Defendant gave notice of appeal in open court.

II. Jurisdiction

¶ 5 This Court has jurisdiction to address Defendant's appeal from a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b) (2019) and N.C. Gen. Stat. § 15A-1444 (2019).

III. Issue

¶ 6 The issues presented on appeal are whether: (1) there is competent evidence in the record to support Defendant's prior record level IV where he stipulated to his prior conviction points and prior record level; (2) Defendant received ineffective assistance of counsel to the extent he

stipulated to his out-of-state convictions; and (3) the trial court committed prejudicial error in calculating Defendant's prior record level points.

IV. Prior Record Level Calculation

¶ 7 As an initial matter, we address the State's contention that Defendant's stipulation as to his prior record level "negate[d] the basis for appeal." We disagree and note Defendant has a direct right of appeal from the trial court's alleged miscalculation of his prior record level pursuant to N.C. Gen. Stat. § 15A-1444(a2)(1) (2019).

¶ 8 Next, Defendant contends the trial court committed reversible error in calculating he had 12 prior conviction points and sentencing him as a prior record level IV. The State maintains Defendant's appeal seeking assignment of error on the calculation of the prior record level worksheet is without merit and should be denied because Defendant stipulated to his prior convictions. For the reasons set forth below, we conclude Defendant's stipulation to his prior conviction points and prior record level was invalid.

A. Standard of Review

¶ 9 "The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citing *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007)). Therefore, we consider "whether the competent evidence in the record adequately supports the trial court's [determination]" of Defendant's prior record level. *Id.* at 633, 681 S.E.2d at 804.

B. Analysis

¶ 10 The Structured Sentencing Act of North Carolina provides that "the [trial] court shall determine the prior record level for the offender pursuant to [N.C. Gen. Stat. §] 15A-1340.14" before imposing a sentence on the defendant. N.C. Gen. Stat. § 15A-1340.13 (2019). "The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court, or . . . the jury, finds to have been proved in accordance with . . . section [15A-1340.14(a)]." N.C. Gen. Stat. § 15A-1340.14(a) (2019). Class A1 and Class 1 prior misdemeanor convictions are assigned 1 point each. N.C. Gen. Stat. § 15A-1340.14(a)(5). Class H or I felony convictions are assigned 2 points each. N.C. Gen. Stat. § 15A-1340.14(a)(4). "In determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used." N.C. Gen. Stat. § 14-7.6 (2019).

¶ 11 "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f)(4) (2019). "Stipulation of the parties" is one method by which a prior conviction may be proved. N.C. Gen. Stat. § 15A-1340.14(f)(1) (2019). As our Supreme Court has stated, the "terms [of a stipulation] must be definite and certain in order to afford a basis for judicial decision . . . ." *State v. Powell*, 254 N.C. 231, 234, 118 S.E.2d 617, 619 (1961), *superseded by statute on other grounds*, N.C. Gen. Stat. § 20-179(a) (2003) (citation omitted). "[P]roof by stipulation necessarily includes the factual basis and legal application to the facts underlying the conviction. Once a defendant makes this stipulation, the trial court then makes a legal determination by reviewing the proper classification of an offense so as to calculate the points assigned to that prior offense." *State v. Arrington*, 371 N.C. 518, 524, 819 S.E.2d 329, 333 (2018).

¶ 12 Here, Defendant does not challenge the 2 prior record level points assessed for two misdemeanor convictions but maintains the record is unclear as to which five felony convictions listed on the prior record level worksheet were counted for purposes of determining his prior felony conviction points totaled 10, and his prior record level is IV. He asserts the trial court was prohibited from including the three predicate felony convictions that establish his habitual felon status in the indictment. The State argues that even if the convictions that are crossed out are not counted, there are 14 remaining points that can be counted towards Defendant's prior record level. Additionally, the State maintains that since Defendant and the State stipulated to the worksheet, Defendant's prior record level was agreed upon by the parties, and therefore, the State met its burden of proving Defendant's prior record level by the preponderance of the evidence.

¶ 13 We disagree with the State's assessment. In this case, 6 of the 14 remaining points—after the crossed-out convictions are excluded—are attributable to the three felony convictions that were used as a predicate for Defendant's status of habitual felon, and therefore, cannot be used in determining Defendant's prior record level. *See* N.C. Gen. Stat. § 14-7.6. However, we are unable to discern from the record whether the trial court did in fact apply the three predicate felony convictions used to establish Defendant's habitual status in its prior record level calculation or whether the trial court used all or some of the out-of-state convictions in calculating Defendant's prior record level.

¶ 14 The State relies on *State v. Arrington* in its assertion that the State met its burden of proof as to Defendant's prior conviction points and

prior record level because both parties agreed to the stipulation. *See* 371 N.C. at 524–25, 819 S.E.2d at 333. We find *State v. Arrington* readily distinguishable from the case *sub judice*. In *Arrington*, the felonies used to calculate the defendant's prior record level were not unclear or indeterminate from the record. Rather, in that case, our Supreme Court considered a defendant's appeal of right after the Court of Appeals held the defendant's stipulation as to the type of North Carolina second-degree murder conviction, following the state legislature's division of the offense into two classifications, "was an improper legal stipulation." *Id.* at 519, 521, 819 S.E.2d at 330–31. The Court reversed the Court of Appeals' decision and held the classification of the offense was a question of fact; thus, the defendant properly stipulated to the question of fact regarding the conviction classification as well as his prior record level points. *Id.* at 527, 819 S.E.2d at 335.

¶ 15 In the instant case, the trial court had to have either included one or more of Defendant's out-of-state convictions or one or more of Defendant's prior felonies used to establish his habitual felon status in order to reach 12 points in calculating Defendant's prior conviction points. If the out-of-state convictions were used, then the State failed to prove by the preponderance of the evidence that Defendant's strangulation in the second-degree conviction was substantially similar to a particular North Carolina felony. *See Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 ("[T]he trial court may not accept a stipulation to the effect that a particular out-of-state conviction is 'substantially similar' to a particular North Carolina felony or misdemeanor."). Unlike *Arrington*, in which the defendant properly stipulated to a question of fact, in this case, Defendant could not have properly stipulated to a question of law nor could he have properly stipulated to a prior conviction level calculation that included the felonies used as a predicate for establishing his status as an habitual felon. *See State v. Hanton*, 175 N.C. App. 250, 623 S.E.2d 600 (2006), *disc. rev. denied*, 362 N.C. 477, 666 S.E.2d 766 (2008) "([T]he question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court."); *State v. Chappelle*, 193 N.C. App. 313, 333, 667 S.E.2d 327, 339 (2008) ("[A] stipulation regarding out-of-state convictions is insufficient, absent a determination of substantial similarity by the trial court, to support the trial court's prior record determination."); N.C. Gen. Stat. § 15A-1340.14(e) (establishing the default classification for out-of-state felony convictions is "Class I"); N.C. Gen. Stat. § 14-7.6.

¶ 16 We hold the signed prior record level worksheet was not sufficiently "definite and certain" to constitute a valid stipulation by Defendant. *See*

Powell, 254 N.C. at 234, 118 S.E.2d at 619. The matter must be remanded to the trial court for re-sentencing.

¶ 17 To avoid errors on remand, the State must meet its burden of proof with respect to proving Defendant's out-of-state convictions. *See* N.C. Gen. Stat. § 15A-1340.14(e) (2019). Although Defendant can properly stipulate to the existence of offenses and whether the offenses are felonies or misdemeanors, Defendant cannot stipulate that an out-of-state conviction is substantially similar to a North Carolina offense. *See Bohler*, 198 N.C. App. at 637–38, 681 S.E.2d at 806; *State v. Burgess*, 216 N.C. App. 54, 58–59, 715 S.E.2d 867, 871 (2011). We note Defendant's prior record level worksheet is evidence of his binding stipulation as to the existence of the out-of-state convictions and as to the fact the offenses were felonies under the law of the states where the offenses originated. *See Bohler*, 198 N.C. App. at 637–38, 681 S.E.2d at 806.

¶ 18 Because we remand the case for a new sentencing hearing, we need not consider whether Defendant received ineffective assistance of counsel with respect to his stipulations to out-of-court convictions or whether the trial court committed prejudicial error by miscalculating Defendant's prior record level.

V. Conclusion

¶ 19 We hold Defendant's stipulation as to his prior felony convictions is not sufficiently definite because we cannot reasonably determine whether his prior felonies, which predicated his habitual felon status, were improperly used by the trial court in calculating Defendant's prior record level. We remand the matter to the trial court for a re-sentencing hearing.

REMANDED FOR RE-SENTENCING.

Judges DILLON and INMAN concur.

STATE v. ROBINSON

[279 N.C. App. 643, 2021-NCCOA-533]

STATE OF NORTH CAROLINA
v.
KENNETH ANTON ROBINSON

No. COA20-763

Filed 5 October 2021

1. Appeal and Error—denial of motion to suppress—failure to preserve right to appeal—by no fault of defendant

After pleading guilty to charges of drug trafficking and possession of a firearm by a felon, defendant failed to preserve his appeal from the denial of his motion to suppress where the plea transcript did not include a statement by defendant reserving the right to appeal the trial court's judgment. However, because defendant had lost his right to appeal through no fault of his own but rather due to his trial counsel's failure to give proper notice of appeal, defendant's appeal was reviewed by certiorari.

2. Criminal Law—denial of motion to suppress—Anders review—no issues of arguable merit

After defendant pleaded guilty to charges of drug trafficking and possession of a firearm by a felon, the trial court's judgment was upheld on appeal where defendant's appellate counsel filed a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), raising four legal issues that, ultimately, lacked arguable merit. Specifically, the indictments against defendant were sufficient to confer jurisdiction upon the trial court; the trial court properly denied defendant's motion to suppress evidence from law enforcement's search of his home because competent evidence showed that the officers did not act in bad faith by turning off their body-worn cameras and that no exculpatory evidence was lost; a sufficient factual basis existed for defendant's guilty plea; and the trial court properly sentenced defendant within the statutory guidelines.

Judge MURPHY dissenting.

Appeal by defendant from judgment entered 11 July 2019 by Judge Gregory R. Hayes in Guilford County Superior Court. Heard in the Court of Appeals 10 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Brenda Rivera, for the State.

Richard J. Costanza for defendant-appellant.

ARROWOOD, Judge.

¶ 1 Kenneth Anton Robinson ("defendant") appeals from judgment entered upon defendant's guilty plea to trafficking in opium by possession and possession of a firearm by a felon. We dismiss defendant's appeal and by *writ of certiorari* find no error.

I. Background

¶ 2 On 6 February 2017, a Guilford County grand jury indicted defendant on charges of trafficking in opium by possession and possession of a firearm by a felon. Defendant was indicted with an additional charge of trafficking in opium by possession on 7 May 2018.

¶ 3 The trial court heard defendant's motion to suppress at a hearing on 8 July 2019. At the hearing, the trial court heard testimony that law enforcement officers with the Greensboro Police Department executed a search warrant at defendant's residence on 16 December 2016. The law enforcement officers were equipped with body-worn cameras and had the cameras activated prior to entering the residence. During the initial entry of the residence, a law enforcement officer conducted a walk-through of the property with their body-worn camera activated. After the walk-through, the supervising officer directed the other officers to turn off their body-worn cameras.

¶ 4 The State introduced a copy of the Greensboro Police Department's departmental directives regarding body-worn cameras. The directive requires body-worn cameras to be used during the execution of search warrants, but also allows officers to turn off their cameras if directed to do so by a supervising officer.

¶ 5 The trial court denied the motion to suppress by order entered 10 July 2019. In doing so, the trial court found that turning off the body-worn cameras was not done in bad faith and that no materially exculpatory evidence was lost; only potentially useful evidence was lost.

¶ 6 On 9 July 2019, defendant entered guilty pleas to two charges of trafficking in opium by possession and one charge of possession of a firearm by a felon. In the factual basis, the State noted that defendant was present at the search at issue in the motion to suppress as well as a later search on 7 February 2018. During the sentencing hearing, the trial court declined defendant's invitation to make a substantial assistance deviation from the mandatory minimum sentence but did note defendant's

assistance following his 16 December 2016 arrest. The trial court consolidated the charges into a single judgment and imposed an active sentence of 90 to 120 months in prison.

¶ 7 Defendant filed written notice of appeal 17 July 2019. Defendant additionally filed a petition for *writ of certiorari* on 29 December 2020.

II. Discussion

A. Appellate Jurisdiction

¶ 8 **[1]** Under N.C. Gen. Stat. § 15A-979, a defendant entering notice of appeal following the denial of a motion to suppress is required to either include in the plea transcript a statement reserving the right to appeal the trial court's judgment, or to orally advise the trial court and prosecutor before the conclusion of plea negotiations that the defendant intended to appeal the trial court's judgment. *See State v. Brown*, 217 N.C. App. 566, 569, 720 S.E.2d 446, 449 (2011). Because the plea transcript is silent as to defendant's intent to appeal the trial court's judgment, defendant has failed to preserve his appeal. Defendant's appellate counsel has filed a petition for *writ of certiorari* requesting appellate review of the trial court's judgment under Rule 21 of the North Carolina Rules of Appellate Procedure.

¶ 9 Rule 21 provides that "writ of certiorari may be issued in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21. This Court has previously granted petitions for *writ of certiorari* where, as here, "[d]efendant lost [their] right to appeal through no fault of [their] own but rather due to [their] trial counsel's failure to give proper notice of appeal." *State v. Holanek*, 242 N.C. App. 633, 640, 776 S.E.2d 225, 232 (2015). In such circumstances, the defendant's appeal is dismissed and this Court issues *writ of certiorari* to address the merits of the defendant's argument. *Id.* (citing *In re I.T.P-L.*, 194 N.C. App. 453, 460, 670 S.E.2d 282, 285 (2008)). Because defendant has lost the right to appeal without fault, we dismiss his appeal and exercise our discretion to grant defendant's petition for *writ of certiorari* and address the merits of defendant's appeal.

B. *Anders* Brief

¶ 10 **[2]** Defendant's appellate counsel could not "identify any meritorious issues that could support a meaningful argument for relief on appeal[,]" and requests this Court review the record on appeal for any issues of merit, pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). In order

to comply with *Anders*, appellate counsel was required to file a brief referring any arguable assignments of error, as well as provide defendant with copies of the brief, record, transcript, and the State's brief. *Kinch*, 314 N.C. at 102, 331 S.E.2d at 666-67. Defendant's counsel has done so and accordingly has fully complied with *Anders* and *Kinch*. Defendant did not file a *pro se* brief with this Court.

¶ 11 Pursuant to *Anders*, this Court must conduct "a full examination of all the proceedings[,]" including a "review [of] the legal points appearing in the record, transcript, and briefs, not for the purpose of determining their merits (if any) but to determine whether they are wholly frivolous." *Kinch*, 314 N.C. at 102-103, 331 S.E.2d at 667 (citation omitted). Defendant's appellate counsel submitted the following legal points: (1) whether the indictments were sufficient to confer jurisdiction upon the trial court; (2) whether the trial court erred in denying the motion to suppress; (3) whether there was a sufficient factual basis for the plea; and (4) whether the trial court erred in sentencing defendant. We agree with defendant's appellate counsel that it is frivolous to argue these issues.

¶ 12 In this case, the indictments against defendant were legally sufficient and conferred jurisdiction upon the trial court, as they gave defendant sufficient notice of the charges against him. *See State v. Harris*, 219 N.C. App. 590, 592-93, 724 S.E.2d 633, 636 (2012).

¶ 13 There was competent evidence to support the trial court's denial of defendant's motion to suppress. The circumstances of the search reflect that defendant was aware of and cooperating in the search and was on notice of the execution of the warrant. The video evidence of the warrant execution also shows that the law enforcement officers announced their presence before entering the residence, with defendant standing nearby. Furthermore, the officers executing the search complied with departmental guidelines and directives in turning off their body-worn cameras. The trial court properly found that the law enforcement officers did not act in bad faith by turning off their body-worn cameras and that only potentially useful evidence was lost.

¶ 14 The transcript reflects the factual basis for the plea was sufficient for each charge in the judgment. The factual basis included a thorough recitation of the evidence presented at the suppression hearing and addressed all charges to which defendant pleaded guilty.

¶ 15 Finally, the trial court did not err in sentencing defendant to the mandatory minimum sentence pursuant to the structured sentencing chart. Although defendant's trial counsel argued that defendant's sentence

should be mitigated due to substantial assistance, the trial court chose to credit defendant with substantial assistance by consolidating the charges for the 7 February 2018 event into one offense. The trial court did not err in concluding that defendant's efforts did not rise to the level of substantial assistance to be applied to multiple offenses.

¶ 16 Apart from the potential issues provided by defendant's appellate counsel, our review of the record has revealed no other arguable issues. Accordingly, we hold the trial court did not err in denying defendant's motion to suppress and in sentencing defendant along statutory guidelines.

III. Conclusion

¶ 17 For the foregoing reasons, we dismiss defendant's appeal, grant defendant's petition for *writ of certiorari*, and find no error.

DISMISSED, NO ERROR.

Judge GRIFFIN concurs.

Judge MURPHY dissents by separate opinion.

MURPHY, Judge, dissenting.

¶ 18 When we conduct an *Anders* review of the Record and identify an issue of arguable merit, we may remand for the appointment of new appellate counsel to provide briefing on that issue. Here, Defendant's appellate counsel was unable to identify any issues of potential merit for appeal and requested that we examine the Record in accordance with *Anders*. After conducting such an examination of the Record, I have identified multiple issues of arguable merit—the application of Defendant's substantial assistance to sentence mitigation under N.C.G.S. § 90-95(h)(5), and whether law enforcement's execution of the search warrant violated the notice requirements of N.C.G.S. § 15A-249. Accordingly, I would remand for the appointment of new appellate counsel to provide briefing on these, and any other, issues of potential merit.

BACKGROUND

¶ 19 The Greensboro Police Department arrested Defendant Kenneth Anton Robinson for trafficking "opium or heroin" by possession and possession of a firearm by a felon on 16 December 2016. Defendant was indicted for these charges on 6 February 2017. After his release from custody, Defendant was also arrested for a second charge of trafficking

"opium or heroin" by possession on 7 February 2018. Defendant was indicted for the second charge on 7 May 2018.

¶ 20 Defendant moved to suppress evidence related to the 16 December 2016 offenses that the Greensboro Police Department obtained via execution of a search warrant on that date. The trial court held a suppression hearing on 8 July 2019 and denied Defendant's motion to suppress. Without retaining his right to challenge the order denying his motion to suppress, Defendant subsequently pled guilty to all three charges on 9 July 2019. The trial court consolidated the convictions into one judgment, the Class E felony of trafficking in opium by possession for the 7 February 2018 charge. Defendant received an active sentence of 90 to 120 months in accordance with the mandatory minimum sentence of N.C.G.S. § 90-95(h)(4).

¶ 21 Defendant filed a *Notice of Appeal* on 17 July 2019, but in his *Petition for Writ of Certiorari*, Defendant's appellate counsel concedes

> Defendant (and his trial counsel) failed to preserve [] Defendant's right to appeal. Specifically, [] Defendant did not comply with [N.C.G.S.] § 15A-979[,] . . . [which] requires a defendant entering notice of appeal following the denial of a motion to suppress to (1) include in the plea transcript a statement reserving the right to appeal the trial court's judgment, or (2) to orally advise the trial court and prosecutor before plea negotiations have ended that [] Defendant intends to appeal the judgment.

Defendant's appellate counsel petitioned this Court on 29 December 2020 to issue a writ of certiorari for the review of the 9 July 2019 judgment.

¶ 22 In his no-merit brief on appeal pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967) and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), Defendant's appellate counsel stated he had

> examined the trial court record and relevant cases and statutes and is unable to identify any meritorious issues that could support a meaningful argument for relief on appeal. As such, appellate counsel respectfully asks the Court to examine the [R]ecord on appeal for possible prejudicial error and to determine whether counsel overlooked any meritorious issues.

In response, the State moved to dismiss Defendant's appeal. According to the State, "no reversible error appears on the face of the [R]ecord[,]" and it argues we should deny Defendant's *Petition for Writ of Certiorari*. I disagree with Defendant's appellate counsel's review of the Record, as well as the Majority's analysis of the issues of arguable merit, and would withhold my decision on the bulk of Defendant's *Petition for Writ of Certiorari*.

ANALYSIS

¶ 23 In accordance with *Anders*, we fully examine the Record to identify any issues of arguable merit. *Anders*, 386 U.S. at 744, 18 L. Ed. 2d at 498 (holding that if a court "finds any of the legal points arguable on their merits (and therefore not frivolous) [in a case in which an *Anders* brief was filed] it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal"). With respect to *Anders* briefs, North Carolina defines a frivolous appeal as "[o]ne in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed." *Kinch*, 314 N.C. at 102 n.1, 331 S.E.2d at 667 n.1 (1985) (citing *Frivolous Appeal*, Black's Law Dictionary (5th ed. 1979)).

¶ 24 While the Majority relies on the proper standard for *Anders*, it fails to properly apply it. *Supra* at ¶¶ 10-16. The blanket assertions that the trial court did not err in its analysis of the search warrant execution and application of substantial assistance to mitigate sentencing do not obviate the need for further briefing under *Anders*. *Supra* at ¶¶ 13, 15.

A. Possible Meritorious Issues on Appeal

1. Sentencing

¶ 25 In my examination of the Record, I have identified the following issue of arguable merit: whether the trial court abused its discretion by applying Defendant's "substantial assistance" to only one case under N.C.G.S. § 90-95(h)(5) in light of *State v. Baldwin*. *State v. Baldwin*, 66 N.C. App. 156, 158, 310 S.E.2d 780, 781, *aff'd per curiam*, 310 N.C. 623, 313 S.E.2d 159 (1984); N.C.G.S. § 90-95(h)(5) (2019).

¶ 26 N.C.G.S. § 90-95(h) governs controlled substance trafficking charges, including the mandatory sentencing range for violations of the statute. N.C.G.S. § 90-95(h) (2019). N.C.G.S. § 90-95(h)(5) provides the following regarding mitigation of sentences for violations of the statute:

> Except as provided in this subdivision, a person being sentenced under this subsection may not receive a

> suspended sentence or be placed on probation. The sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

N.C.G.S. § 90-95(h)(5) (2019).

¶ 27 In *Baldwin*, we established that a trial court may apply "substantial assistance" in other cases to mitigate sentencing for the case being heard. *Baldwin*, 66 N.C. App. at 158, 310 S.E.2d at 781. We stated:

> It is clear from the trial court's comments during the sentencing hearing and its finding of fact number 4 that the [trial] court read [N.C.G.S. § 90-95(h)] to limit its consideration of [the] defendant's "substantial assistance" to assistance in the case being heard. [The] [d]efendant argues that the "accomplices, accessories, co-conspirators, or principals" need not be involved in the case for which the defendant is being sentenced, and that [N.C.G.S.] § 90-95(h)(5) therefore permits the trial court to consider [the] defendant's "substantial assistance" in other cases. We agree.

Id. I note the relevant statutory section effective at the time the offense was committed in *Baldwin* was not substantially different in any way from the current relevant statutory section quoted above. *Compare* N.C.G.S. § 90-95 (1981), *with* N.C.G.S. § 90-95 (2019).

¶ 28 Here, my review of the transcript reveals the trial court may have improperly applied N.C.G.S. § 90-95(h)(5), as the trial court may have believed it could only apply substantial assistance to mitigate sentencing regarding cases on one date, based on the trial court's following statement:

> There's no doubt in the [trial] [c]ourt's mind and based on everybody's testimony that [Defendant] deserves credit for substantial -- [Defendant] deserves credit

> for substantial assistance that he provided . . . in the [*16 December 2016*] case. And he's -- the way that credit is going to be delivered is to, therefore -- therefore, consolidate -- consolidate all the cases into the [7 February 2018] event[.]
>
> . . . .
>
> Everything is consolidated into that one offense for -- for a mandatory -- *there was no substantial assistance in that case* -- for the mandatory sentence in that one[.]

(Emphases added). It is not clear whether the trial court understood it could apply Defendant's substantial assistance to multiple cases on different dates—specifically, whether the trial court understood it could apply Defendant's substantial assistance regarding the 16 December 2016 offense to both that offense and the 7 February 2018 offense under N.C.G.S. § 90-95(h)(5). The trial court's potential failure to exercise discretion by applying substantial assistance to the 7 February 2018 offense could be prejudicial under *Baldwin*. *Baldwin*, 66 N.C. App. at 161, 310 S.E.2d at 782-83 ("Since there was evidence of [the] defendant's 'substantial assistance' before the trial court, the error was prejudicial.").

¶ 29 As an initial matter, the Majority's assertion that "[t]he trial court did not err in concluding that [D]efendant's efforts did not rise to the level of substantial assistance to be applied to multiple offenses" is a de novo determination by a majority of a panel of this Court and misconstrues the role of our Court. *Supra* at ¶ 15. Further, it appears to apply a pre-*Baldwin* interpretation of the *availability* of sentence mitigation under N.C.G.S. § 90-95. *Id*. The appropriate issue that requires additional briefing is whether the trial court properly understood its ability to apply the substantial assistance mitigating factor to multiple offenses from multiple dates. If it did, then there was no error; if it did not, then Defendant is entitled to a new sentencing hearing. I would remand for further briefing regarding this issue and how this Court should interpret the language used by, and ruling of, the trial court.

2. Search of Residence

a. Failure to Announce

¶ 30 An additional potentially meritorious issue on appeal is whether law enforcement violated N.C.G.S. § 15A-249 during the execution of the 16 December 2016 search warrant, as depicted in State's Exhibit 1. *See* N.C.G.S. § 15A-249 (2019). A search warrant was issued on 16 December

2016 for the search of Defendant's residence and a 2009 Honda Accord. N.C.G.S. § 15A-249 requires:

> The officer executing a search warrant must, *before entering the premises*, *give appropriate notice* of his identity and purpose to the person to be searched, or the person in apparent control of the premises to be searched. If it is unclear whether anyone is present at the premises to be searched, *he must give the notice in a manner likely to be heard by anyone who is present.*

N.C.G.S. § 15A-249 (2019) (emphases added).

¶ 31 State's Exhibit 1, which depicts the search of Defendant's residence via a body camera worn by an officer executing the search warrant, shows law enforcement did not announce "police department, search warrant" until after opening both the storm door and the main door of the residence.

¶ 32 However, the Majority inaccurately portrays the evidence in this matter. According to the Majority, "[t]he video evidence of the warrant execution also shows that the law enforcement officers announced their presence before entering the residence, with [D]efendant standing nearby." *Supra* at ¶ 13. This statement is incorrect and incomplete for at least three reasons: (i) the sentence says "[t]he video evidence . . . shows . . . [D]efendant standing nearby[,]" but a review of State's Exhibit 1 does not show Defendant; (ii) a review of State's Exhibit 1 shows the screen door being opened *prior to* the announcement that police were there serving a search warrant; and (iii) a review of State's Exhibit 1 shows what appears to be the main door being opened *prior to* the announcement that police were there serving a search warrant, as analyzed below. *Id.*

i. Defendant's Presence

¶ 33 According to the plea hearing transcript, the State's attorney claimed the following during the presentation of the factual basis for the entry of the plea:

> [Defendant] had been taken into custody on unrelated matters that same day and was brought back to the scene while the search warrant was being executed. . . . When they brought him back to the scene, they asked him prior to entering the scene if there was anything that could harm them in any way, any individuals in the house. He indicated that there was not

> anyone in the home; however, there was a shotgun inside of the house. He told them the location of the shotgun, and at that point, the warrant was executed.

Taking this statement by counsel for the State into account, it does not resolve how close Defendant was to the scene at the time of entry, though it would have been outside the view of the body camera in State's Exhibit 1, which panned the front yard. While I recognize the statement above is relevant to the notice issue, the Majority's conclusion regarding Defendant's "standing nearby" at the time of law enforcement's entry into the residence is not grounded in the video exhibit, testimony, or any findings of fact. *Id.* Additionally, the Majority does not resolve how this impacts the potential violation of Defendant's constitutional or statutory rights during the execution of the search warrant, which further underscores the need for briefing on this issue. Accordingly, I would remand in light of the following:

ii. Opening of the Storm Door

¶ 34 Approximately one minute and three seconds into State's Exhibit 1, law enforcement officers open the storm door of Defendant's residence. However, law enforcement did not announce "police department, search warrant" until around one minute and fifteen seconds into State's Exhibit 1, approximately twelve seconds after opening the storm door. In *Sabbath v. United States*, the Supreme Court of the United States, within the context of analyzing notice requirements for warrant execution, noted entry through a screen door was sufficient to constitute breaking and entering for the purposes of burglary, and drew a comparison between warrant execution and burglary regarding entry into a residence. *Sabbath v. United States*, 391 U.S. 585, 589 n.5, 20 L. Ed. 2d 828, 833 n.5 (1968) (marks and citations omitted) ("While distinctions are obvious, a useful analogy is nonetheless afforded by the common and case law development of the law of burglary: a forcible entry has generally been eliminated as an element of that crime under statutes using the word break, or similar words. . . . What constitutes breaking seems to be the same as in burglary: lifting a latch, turning a door knob, unhooking a chain or hasp, removing a prop to, or pushing open, a closed door of entrance to the house,—even a closed screen door is a breaking."). According to the Supreme Court of the United States, "[a]n unannounced intrusion into a dwelling . . . is no less an unannounced intrusion whether officers break down a door, force open a chain lock on a partially open door, open a locked door by use of a passkey, or . . . open a closed but unlocked door." *Id.* at 590, 20 L. Ed. 2d at 834 (footnote omitted).

¶ 35 Law enforcement's opening of the storm door before providing notice is an issue of arguable merit. I would instruct counsel on remand to provide briefing concerning whether law enforcement's opening of the storm door at Defendant's residence prior to providing notice constituted an entry of the premises to execute a search warrant prior to providing notice, in violation of the requirements of N.C.G.S. § 15A-249.

iii. Opening of the Main Door

¶ 36 At one minute and thirteen seconds into State's Exhibit 1, law enforcement appears to open the main door to Defendant's residence, approximately two seconds before announcing "police department, search warrant" at around one minute and fifteen seconds into State's Exhibit 1. According to N.C.G.S. § 15A-249, law enforcement must provide notice *before* entering the premises to execute a search warrant. N.C.G.S. § 15A-249 (2019). I note that "[t]he amount of time required between the giving of notice and entering the premises is dependent upon the circumstances of each case." *State v. Sumpter*, 150 N.C. App. 431, 434, 563 S.E.2d 60, 62 (2002); *see also State v. Gaines*, 33 N.C. App. 66, 69, 234 S.E.2d 42, 44 (1977).

¶ 37 Law enforcement's opening of the main door before providing notice is an issue of arguable merit. I would instruct counsel on remand to provide briefing concerning whether law enforcement's opening of the main door at Defendant's residence occurred prior to providing notice and whether such actions violated the requirements of N.C.G.S. § 15A-249.

b. Ineffective Assistance of Counsel

¶ 38 Defendant's trial counsel did not preserve issues regarding law enforcement's notice under N.C.G.S. § 15A-249 in the execution of the search warrant. This lack of preservation by trial counsel is an issue of arguable merit. I would instruct appellate counsel on remand to brief whether there was any related ineffective assistance of counsel claim for failing to preserve the second issue, regarding law enforcement's potential failure to provide appropriate notice under N.C.G.S. § 15A-249, for appeal.

CONCLUSION

¶ 39 After an *Anders* review of the Record, I have identified multiple issues of arguable merit—the application of Defendant's substantial assistance to sentence mitigation under N.C.G.S. § 90-95(h)(5) and whether law enforcement's execution of the search warrant violated the notice requirements of N.C.G.S. § 15A-249. I would allow Defendant's *Petition for Writ of Certiorari* for the limited purpose of remanding for the appointment of

new appellate counsel and otherwise hold the petition in abeyance. On remand, I would instruct Defendant's new appellate counsel to provide briefing on the issues identified in this Dissent, as well as any additional issues of arguable merit. For these reasons, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
TERRY LEE THORNE

No. COA20-750

Filed 5 October 2021

1. Appeal and Error—preservation of issues—statutory right to confront witnesses—probation revocation hearing—objection—insufficient

At a probation revocation hearing, where a law enforcement officer with no personal knowledge of the case testified to the contents of notes written by defendant's probation officer, defendant failed to preserve for appellate review his argument that the trial court violated his statutory right to confront witnesses (N.C.G.S. § 15A-1345(e)), despite objecting to the testimony, because he did not specify the statutory violation as the grounds for his objection, nor were such grounds apparent from context where defendant did not request his probation officer to appear at the hearing. Further, because defendant failed to properly invoke his confrontation rights, defendant's contention that the issue was preserved because the court violated a statutory mandate lacked merit.

2. Probation and Parole—revocation of probation—absconding—sufficiency of evidence

The trial court did not abuse its discretion by revoking defendant's probation for absconding where defendant admitted at the revocation hearing that, during a routine probation office visit, he told law enforcement he had taken drugs, was asked to provide a drug screening sample, and then left the office without authorization and without providing the sample. Further evidence showed that defendant's probation officer went twice to defendant's last known address, but defendant was not there, and that defendant did not contact the officer or the probation office for at least twenty-two days after walking out on his drug screen.

3. Probation and Parole—clerical error—checked box on judgment form—multiple probation violations as independent grounds for revocation

After the trial court determined that defendant had absconded and had used illegal drugs while on probation, the order revoking defendant's probation was remanded where the court erroneously checked a box on the judgment form indicating that both probation violations independently justified revocation. The record indicated that the court revoked defendant's probation solely on grounds that defendant absconded, and therefore the checked box was deemed a clerical error in need of correction.

Appeal by Defendant from judgment entered 27 January 2020 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 10 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Kyle Peterson, for the State-Appellee.

Gilda C. Rodriguez for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Terry Lee Thorne appeals a judgment revoking his probation and activating his suspended sentence. Defendant argues that the trial court violated his right to confrontation at the probation violation hearing, erred by revoking his probation based on a finding of absconding, and erred by revoking his probation based on a non-revocable violation. We affirm the trial court's order. However, we remand to the trial court to correct a clerical error in the judgment indicating that each of Defendant's violations were independently sufficient to support the revocation of Defendant's probation.

I. Background

¶ 2 On 7 July 2019, Defendant entered an *Alford* plea[1] to one count of conspiracy to obtain property by false pretenses. The trial court sentenced Defendant to 10 to 21 months in prison, suspended this sentence, and placed Defendant on 36 months of supervised probation.

1. An *Alford* plea is a guilty plea in which the defendant does not admit to any criminal act, but admits that there is sufficient evidence to convince the judge or jury of the defendant's guilt. *See North Carolina v. Alford*, 400 U.S. 25, 37 (1970); *State v. Baskins*, 260 N.C. App. 589, 592 n.1, 818 S.E.2d 381, 387 n.1 (2018).

¶ 3 On 16 August 2019, Officer Eric Phillips, then Defendant's probation officer, filed a Violation Report ("Report"). In the Report, Phillips attested under oath that

> [D]efendant has willfully violated . . . [the] Condition of Probation [to] "Not use, possess or control any illegal drug or controlled substance unless it has been prescribed for the defendant by a licensed physician and is in the original container with the prescription number affixed on it . . ." in that on August 05, 2019, during a[] routine office visit, the offender admitted to using marijuana and cocaine and signed the DCC-26 form. When attempting to gain a sample, the offender advised that he could not use the restroom. PO asked him to have a seat in the lob[b]y until he could produce a sample. The defendant left the office building without giving a sample. (original capitalization omitted).

¶ 4 On 27 August 2019, Phillips filed an addendum to the Report ("Addendum") in which he attested under oath that

> [D]efendant has willfully violated . . . [the] Regular Condition of Probation: General Statute 15A-1343 (b)(3a) "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, on August 5, 2019 the defendant left the office after probation requested a drug screen knowing that he would test positive for the use of marijuana and admitting the same. To date he has failed [to] make any contact with the probation department or his officer and has made his whereabouts unknown to his supervising officer or the probation department, therefore statutory [sic] absconding supervision. (original capitalization omitted).

¶ 5 The trial court held a probation violation hearing on 27 January 2020. Defendant admitted that "during a routine office visit, [he had] admitted to using marijuana and cocaine on August 5th, 2019, and that when he was asked to provide a sample, [he] left the probation office and failed to provide a sample." Defendant denied the allegation that he absconded.

¶ 6 Jeremy Locus, an employee of Adult Probation and Parole, testified for the State. Locus was not Defendant's supervising parole officer.

Neither Phillips nor Defendant's supervising officer at the time of the hearing appeared or testified. When Locus testified that he did not personally have any information about the case, Defendant objected to further testimony on the grounds that Locus was "going to read from a file . . . from somebody," was "not even involved in the case," and did not "know any details about the matter[.]" The trial court overruled the objection and permitted Locus to testify to the contents of Phillips' notes.

¶ 7 According to Phillips' notes, on 5 August 2019, "[D]efendant was asked to provide a drug sample after admitting that he would be positive for marijuana and cocaine"; Defendant indicated he could not use the bathroom; and after Phillips asked Defendant to wait until he could provide a sample, Defendant left the building and did not return. On Sunday, 18 August 2019, Phillips went to Defendant's last known address to locate Defendant, but Defendant was not there. Phillips left a message with Defendant's relatives asking Defendant to report to the probation office by the next Wednesday morning, 21 August. Phillips returned to Defendant's last known address on 20 August but was again unable to locate Defendant. Defendant never reported to the office.

¶ 8 Defendant also testified. He acknowledged that he had used marijuana and cocaine and had admitted to doing so when he met Phillips on 5 August. Defendant testified, however, that Phillips told him he could leave when he was still unable to produce a sample after ten to fifteen minutes of waiting in the office. Defendant further testified that when Phillips went to his house, Defendant was either working or with his nephew, and he had unsuccessfully attempted to set up an appointment with Phillips. Defendant acknowledged that he never returned to the probation office but explained that Phillips had told Defendant that he would call and arrange an appointment for Defendant to come by.

¶ 9 Following the hearing, the trial court entered a Judgment and Commitment Upon Revocation of Probation. The trial court found that Defendant had violated his conditions of probation as alleged in the Report and Addendum, revoked Defendant's probation, and activated his suspended sentence. Defendant filed a notice of appeal on 5 February 2020.

II. Appellate Jurisdiction

¶ 10 We must first address whether Defendant's appeal is properly before this Court. A written notice of appeal in a criminal proceeding must be filed with "the clerk of superior court and serv[ed] . . . upon all adverse parties within fourteen days after entry of the judgment or order[.]" N.C. R. App. P. 4(a)(2). The notice "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 for the party or parties taking the appeal, or by any such party not represented by counsel of record." N.C. R. App. P. 4(b). Compliance with these requirements for giving notice of appeal is jurisdictional. *State v. Oates*, 366 N.C. 264, 266, 732 S.E.2d 571, 573 (2012).

¶ 11 While Defendant's *pro se* notice is signed and specifies that he is the party taking appeal, it does not clearly "designate the judgment or order from which appeal is taken and the court to which appeal is taken." N.C. R. App. P. 4(b). Instead, Defendant's notice states only, "I would like to appeal my probation violation that was heard on January 27th, 2020." Additionally, Defendant failed to properly serve his notice of appeal on the State.

¶ 12 Recognizing these defects in the notice of appeal, Defendant has filed a petition for a writ of certiorari seeking this Court's review of the 27 January 2020 judgment. This Court may issue a writ of certiorari "in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1). In our discretion, we grant Defendant's petition and review the merits of his appeal.

III. Discussion

A. Confrontation Right

¶ 13 **[1]** Defendant first argues that the trial court violated his right under N.C. Gen. Stat. § 15A-1345(e) to confront Phillips by permitting Locus to testify over Defendant's objection. Defendant has failed to preserve this issue for appellate review.

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1). At a probation violation hearing, a probationer "may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." N.C. Gen. Stat. § 15A-1345(e) (2019).

¶ 14 In the present case, the following exchange took place at the hearing:

> [Prosecutor:] And do you supervise the defendant, Terry Thorne?
>
> [Locus:] No, I do not. This case belongs to Officer Patterson right now, but at the time of this violation, it belonged to Officer Eric Phillips.
>
> [Prosecutor:] And is he no longer with Adult Probation and Parole?
>
> [Locus:] That's correct.
>
> [Prosecutor:] Okay. Now, do you have any information about this case?
>
> [Locus:] I do not.
>
> > [Defense Counsel:] I mean, he's going to read from a file, Judge, from somebody. He's not even involved in the case; doesn't know any details about the matter, Judge, and I would object.
>
> [The Court:] Overruled.

¶ 15 Defendant did not state that the legal basis for his objection was his statutory confrontation right, nor was that ground apparent from context. Defendant did not request to cross examine Phillips, did not request Phillips' presence at the hearing, and did not request Phillips be subpoenaed and required to testify. At most, it could be inferred that Defendant objected to Locus testifying because Locus did not have personal knowledge of the underlying events,[2] and because Locus's reading from Officer Phillips' case notes constituted inadmissible hearsay.[3]

¶ 16 Defendant argues that, notwithstanding his failure to object, the issue of the confrontation right under section 15A-1345(e) is preserved because the trial court acted contrary to a statutory mandate. We disagree.

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2. *See* N.C. Gen. Stat. § 8C-1, Rule 602 (2020) ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.").

3. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c) (2020) (" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); N.C. Gen. Stat. § 8C-1, Rule 802 (2020) ("Hearsay is not admissible except as provided by statute or by these rules.").

¶ 17 It is true that "[w]hen a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial." *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000). Here, however, the trial court did not act contrary to a statutory mandate because Defendant's objection was insufficient to trigger the trial court's obligation under section 15A-1345(e) to either permit cross-examination of Phillips or find good cause for disallowing confrontation. Under these circumstances, Defendant has failed to preserve for appellate review the issue of his right to confrontation under section 15A-1345(e).

B. Absconding

¶ 18 **[2]** Defendant next argues that the trial court erred by revoking his probation based on a finding of absconding because the behavior alleged in the Report and Addendum, and the evidence presented at the hearing, did not show absconding.

¶ 19 As a regular condition of probation, a defendant placed on supervised probation must "[n]ot abscond by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer[.]" N.C. Gen. Stat. § 15A-1343(b)(3a) (2019). A trial court may revoke probation where a defendant absconds. N.C. Gen. Stat. § 15A-1344(a) (2019).

> An alleged violation by a defendant of a condition upon which his sentence is suspended need not be proven beyond a reasonable doubt. All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended. The findings of the judge, if supported by competent evidence, and his judgment based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion.

State v. Tennant, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000) (quotation marks and citations omitted).

¶ 20 The Report, the Addendum, and Locus' testimony at the hearing tended to show that Defendant left the probation office on 5 August without authorization and then failed to appear or otherwise contact his probation officer or the probation office for at least 22 days. Phillips went twice to Defendant's last known address to locate Defendant, but Defendant was not there, and Defendant did not report to the probation

office after Phillips left a message with Defendant's relatives asking him to do so.

¶ 21 Relying on *State v. Williams*, 243 N.C. App. 198, 776 S.E.2d 741 (2015), Defendant contends that the State's evidence only showed that he violated the condition that a probationer "permit the [probation] officer to visit him at reasonable times," N.C. Gen. Stat. § 15A-1343(b)(3), which by itself cannot justify revocation, N.C. Gen. Stat. § 15A-1344(a). Defendant's reliance is misplaced. In *Williams*, the probation officer was able to speak with the defendant by phone on several occasions, and ultimately learned his location, though the defendant had failed to inform the officer of his address, missed appointments with the officer, and was travelling out of state without permission. *Williams*, 243 N.C. App. at 198-99, 776 S.E.2d at 742. We agreed with defendant that these facts did not amount to absconding under section 15A-1343(b)(3a) and held that the State may not "convert violations" of requirements for which probation is not revocable "into a violation of [section] 15A-1343(b)(3a)." *Id.* at 205, 776 S.E.2d at 745-46. Here, the State presented evidence that Phillips was twice unable to locate Defendant at his last known address; Defendant failed to report to Phillips despite a message left with his family requesting that he do so; and unlike in *Williams*, Defendant otherwise failed to contact or make his whereabouts known to Phillips for a 22-day period.

¶ 22 Defendant also emphasizes portions of his testimony that contradict the State's evidence. But because the trial court sat as the finder of fact in the probation revocation hearing, N.C. Gen. Stat. § 15A-1345(e), it had discretion to determine the weight and credibility of the evidence, *Sellers v. Morton*, 191 N.C. App. 75, 79, 661 S.E.2d 915, 920 (2008). In these circumstances, the trial court did not abuse its discretion in revoking Defendant's probation on the basis that Defendant had absconded, in violation of N.C. Gen. Stat. § 15A-1343(b)(3a). We affirm the portion of the trial court's judgment revoking Defendant's probation and activating his sentence.

C. Clerical Error

¶ 23 **[3]** Defendant lastly argues that the trial court erred by revoking his probation for the commission of a criminal offense based on his use of illegal drugs because the Report alleged only that this was a non-revocable violation of probation.

¶ 24 The Report alleged only that Defendant had violated the condition to "[n]ot use, possess or control any illegal drug or controlled substance[,]" not that he had committed a new criminal offense. The

Addendum alleged only that Defendant had absconded. The trial court found that Defendant violated his conditions of probation as alleged in both the Report and Addendum. Although only the Addendum alleged a revocable violation, *see* N.C. Gen. Stat. § 15A-1344(a), the trial court checked the box on the form judgment indicating that "[e]ach violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence."

¶ 25 The State contends that this was a clerical error and not grounds for reversal. "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." *State v. Lark*, 198 N.C. App. 82, 95, 678 S.E.2d 693, 702 (2009) (quotation marks, brackets, and citations omitted). Because the checked box on the form judgment indicating that both violations found by the trial court independently justified revocation is unsupported by the record, contradicted by the plain language of section 15A-1344(a), and appears to be a clerical error, we remand to the trial court for correction. *See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) ("When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." (quotation marks omitted)).

IV. Conclusion

¶ 26 Defendant failed to preserve the issue of the right to confront his former probation officer at the violation hearing. The trial court did not abuse its discretion by revoking Defendant's probation for absconding but did commit a clerical error by checking the box indicating that each violation found by the trial court independently justified revocation. Accordingly, we affirm the trial court's revocation of probation, but remand for correction of the clerical error.

AFFIRMED; REMANDED WITH INSTRUCTIONS.

Judges DIETZ and GORE concur.

TREADAWAY v. PAYNE

[279 N.C. App. 664, 2021-NCCOA-535]

LAURA ELIZABETH (LAIL) TREADAWAY, BRADLEY CHARLES LAIL AND GRAHAM SCOTT LAIL, PLAINTIFFS
v.
CHARLES RAY PAYNE, INDIVIDUALLY, AND BRYAN C. THOMPSON, AS PUBLIC ADMINISTRATOR FOR THE ESTATE OF CHARLES MELTON MULL, DEFENDANTS

No. COA20-861

Filed 5 October 2021

Wills—patent ambiguity—personal property—testator's intent

Where a will contained a patent ambiguity regarding certain property—by bequeathing "all my personal property" to defendant but making conflicting bequests of specific personal property to others—the trial court properly resolved the discord in light of the prevailing purpose of the entire will and relevant attendant circumstances, concluding that certain contested property was intended to pass to plaintiffs rather than defendant.

Appeal by defendant Charles Ray Payne from judgment and order entered 21 July 2020 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 24 August 2021.

Craige Jenkins Liipfert & Walker LLP, by William W. Walker, for plaintiffs-appellees.

Crumpler Freedman Parker & Witt, by Stuart L. Brooks, for defendant-appellant Charles Ray Payne.

ZACHARY, Judge.

¶ 1 Defendant-appellant Charles Ray Payne appeals from the trial court's order and declaratory judgment determining that the will of Charles Melton Mull ("Testator") contained a patent ambiguity; construing Testator's intent to convey certain of his property to Plaintiffs-appellees Laura Treadaway, Bradley Lail, and Scott Lail (collectively, "Plaintiffs"); and concluding that Defendant was liable to Plaintiffs for conversion. After careful review, we affirm.

Background

¶ 2 This appeal concerns the trial court's interpretation of the phrase "personal property" as used in Testator's will. Specifically, at issue is the proper disposition of the funds and securities (collectively, "the

contested property") held in Testator's Ameritrade investment account and Wells Fargo checking, savings, and brokerage accounts, as well as Testator's interest in Furniture Enterprises of Hickory. Defendant argues that Testator's will clearly evidences Testator's intent to bequeath the contested property to him, while Plaintiffs argue that Testator intended that the contested property pass to them.

¶ 3 On 21 February 2018, Testator executed his last will and testament (the "Will"). In his Will, Testator appointed Defendant—with whom Testator had lived from 1994 to 2001 and again from 2015 until Testator's death on 1 May 2018—to serve as the executor of his estate. Defendant is named in the Will as a beneficiary of Testator's estate, as are Plaintiffs.

¶ 4 Throughout his Will, Testator repeatedly refers to his "personal property" or "personal possessions." Article III of the Will first provides, in pertinent part:

> Subject to the special bequests in Article V, I *bequeath and devise all my personal property*, including my automobile, furniture, clothing, watches, rings, electronics, art and any currency which I may have on my person, in my home or in my automobile in fee simple to my partner, [Defendant].

(Emphasis added).

¶ 5 Article III then directs the executor to sell the condominium in which Defendant and Testator resided no sooner than six months after Testator's death, during which time the executor "shall be entitled to *sell* [*Testator's*] *personal possessions* (which have not been listed herein as being devised to [Testator's] partner, [Defendant])." (Emphasis added). Article III continues:

> After the end of the said six months after my demise, I direct my Executor to sell *all of my remaining personal possessions at the condominium*; . . . .
>
> The *net proceeds from the sale of the personal possessions and the condominium shall be used to fund my bequest set forth in Article V*, with the remaining sale proceeds hereby devised in fee simple to my partner, [Defendant].

(Emphases added).

¶ 6 Article IV names Plaintiffs—Testator's niece and nephews—as the residuary beneficiaries of the Will:

> All the residue of the property which I may own at the time of my death, real or personal, tangible and intangible, of whatever nature and wheresoever situated, including all property which I may acquire or become entitled to after the execution of this will, including all lapsed legacies and devises, or other gifts made by this will which fail for any reason, I bequeath and devise, in fee simple in equal shares, subject to special bequests in Article V, to [Plaintiffs].

¶ 7 Article V sets forth the specific bequests referenced in Articles III and IV, items (a)–(i) of which constitute a series of bequests of specific sums of money to particular named individuals, together with other bequests of personal property:

> j. I bequeath and devise *any funds I may have at the time of my demise with the Winston-Salem Foundation, to the University of North Carolina School of the Arts in Winston-Salem, North Carolina*, to be used for landscaping and outside art.
>
> k. I bequeath and devise *any outstanding loan balance owed to me by Jeff Propst or his successors at the time of my demise in equal shares to* [*Plaintiffs*].
>
> l. I direct that *any motor vehicles I may own at the time of my demise* be sold within thirty days of my demise. I bequeath and devise *all of the net proceeds from the said sales to the University of North Carolina School of the Arts in Winston-Salem, North Carolina.*

(Emphases added).

¶ 8 Following Testator's death on 1 May 2018, the Forsyth County Clerk of Court admitted the Will to probate, and on 4 June 2018, Defendant qualified as executor of the estate. In the fall of 2018, Defendant sold the condominium, used the proceeds from its sale to satisfy the Article V specific bequests, and transferred the net proceeds into a personal account in his name. Defendant also closed Testator's Wells Fargo and Ameritrade accounts and transferred the proceeds from these accounts into his personal accounts.

¶ 9 On 10 July 2019, Plaintiffs filed a complaint in Forsyth County Superior Court, seeking a declaratory judgment as to whether the Will contained a patent ambiguity with regard to the meaning of the phrase

"personal property" and whether the contested property passed to Plaintiffs as residuary beneficiaries under the provisions of Article IV of the Will. Plaintiffs also asserted claims for conversion and breach of fiduciary duty, and moved the trial court for injunctive relief, requesting that the contested property be held in escrow pending resolution of the parties' dispute. On 15 July 2019, the trial court entered a consent order reflecting the parties' agreement that Defendant would freeze the accounts holding the contested property pending further order of the court.

¶ 10 On 16 September 2019, Defendant filed a motion to dismiss Plaintiffs' complaint. With the parties' consent, the Clerk of Court removed Defendant as executor and appointed Bryan C. Thompson, the Public Administrator, to serve as administrator c.t.a. of the estate.[1] Plaintiffs filed an amended complaint on 30 October 2019, naming Thompson in his representative capacity as a party to this action, and then filed a motion for summary judgment the following day. On 14 November 2019, Defendant filed a motion to dismiss the amended complaint. On 21 November 2019, the trial court entered an order denying both Plaintiffs' motion for summary judgment and Defendant's motion to dismiss.

¶ 11 On 29 June 2020, the matter came on for trial in Forsyth County Superior Court before the Honorable David L. Hall. On 21 July 2020, the trial court entered its order and declaratory judgment in which it concluded, *inter alia*, that (1) the Will contained a patent ambiguity with respect to the phrase "personal property" as used in Articles III, IV, and V; (2) the contested property and Testator's interest in Furniture Enterprises passed to Plaintiffs as residuary beneficiaries; and (3) Defendant was liable to Plaintiffs for conversion of the proceeds from Testator's closed Wells Fargo and Ameritrade accounts. The trial court further determined that Defendant was not liable to Plaintiffs for breach of fiduciary duty. Defendant timely filed notice of appeal.

Discussion

¶ 12 On appeal, Defendant argues that (1) the trial court erred by concluding that the Will contained a patent ambiguity requiring judicial construction, and (2) the trial court's conclusions of law are not supported by the text of the Will or Testator's circumstances at the time that the Will was executed.

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1. Thompson is a party to this action in his representative capacity only, and he has not participated in this appeal.

I. Standards of Review

¶ 13 "The interpretation of a will's language is a matter of law." *Brawley v. Sherrill*, 267 N.C. App. 131, 133, 833 S.E.2d 36, 38 (citation omitted), *appeal dismissed*, 373 N.C. 587, 835 S.E.2d 463 (2019). We review questions of law de novo. *Id.*

¶ 14 "The standard of review in declaratory judgment actions where the trial court decides questions of fact is whether the trial court's findings are supported by any competent evidence. Where the findings are supported by competent evidence, the trial court's findings of fact are conclusive on appeal." *Nelson v. Bennett*, 204 N.C. App. 467, 470, 694 S.E.2d 771, 774 (2010) (citation omitted). "Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *In re Estate of Harper*, 269 N.C. App. 213, 215, 837 S.E.2d 602, 604 (2020) (citation and internal quotation marks omitted).

II. Patent Ambiguity

¶ 15 Defendant argues that the trial court's conclusion that the Will contained a patent ambiguity as to the phrase "personal property" is not supported by the text of the Will, is "speculative about Testator's intent, and fails to adhere to our law's principles of testamentary interpretation." We disagree.

¶ 16 "Whenever the meaning of a will or a part of a will is in controversy, the courts may construe the provision in question and declare its meaning." *Mitchell v. Lowery*, 90 N.C. App. 177, 179–80, 368 S.E.2d 7, 8, *disc. review denied*, 323 N.C. 365, 373 S.E.2d 547 (1988). It is well settled that "the intention of the testator is the polar star which is to guide in the interpretation of all wills, and, when ascertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy." *Brawley*, 267 N.C. App. at 133, 833 S.E.2d at 38 (citation omitted). "The interpretation of any will is as simple, or complicated, as its language. Where the language employed by the testator is plain and its import is obvious, the judicial chore is light work; . . . the words of the testator must be taken to mean exactly what they say." *Id.* at 134, 833 S.E.2d at 38 (citation and internal quotation marks omitted). "Resort to canons of construction is warranted only when the provisions of a will are set forth in unclear, equivocal, or ambiguous language." *Id.*

¶ 17 "[W]here parts of the will are dissonant or create an ambiguity, the discord thus created must be resolved in light of the prevailing purpose of the entire instrument." *Mitchell*, 90 N.C. App. at 180, 368 S.E.2d at 9. "In attempting to determine the testator's intention, the language used,

and the sense in which it is used by the testator, is the primary source of information, as it is the expressed intention of the testator which is sought." *Brawley*, 267 N.C. App. at 133–34, 833 S.E.2d at 38 (citation omitted). "To ascertain the intent of the testator, the will must be considered as a whole. If possible, meaning must be given to each clause, phrase and word. If it contains apparently conflicting provisions, such conflicts must be reconciled if this may reasonably be done." *Wachovia Bank & Tr. Co. v. Wolfe* (*Wolfe II*), 245 N.C. 535, 537, 96 S.E.2d 690, 692 (1957).

¶ 18 In the present case, the trial court concluded that the Will contained a patent ambiguity "in its description and attempts to devise personal property," with "several inconsistent passages that are mutually exclusive[.]" "[A] patent ambiguity occurs when doubt arises from conflicting provisions or provisions alleged to be repugnant." *Wachovia Bank & Tr. Co. v. Wolfe* (*Wolfe I*), 243 N.C. 469, 478, 91 S.E.2d 246, 253 (1956). "The meaning of the word 'property' and of the words 'personal property' varies according to the subject treated . . . and according to the context." *Poindexter v. Wachovia Bank & Tr. Co.*, 258 N.C. 371, 379, 128 S.E.2d 867, 874 (1963). "Courts have frequently held that the words 'personal property' are susceptible of two meanings: one, the broader, including all property which is the subject of ownership, except land or interests in land; the other, more restricted, oftentimes embraces only goods and chattels." *Id.* at 379–80, 128 S.E.2d at 874. "These words, 'personal property,' have a popular meaning different from their technical meaning, and are frequently used as including goods and chattels only, and embracing such movable and tangible things as are the subject of personal use." *Id.* at 380, 128 S.E.2d at 874.

¶ 19 Here, the trial court correctly determined that Testator's Article III bequest of "all my personal property" to Defendant conflicts with other provisions of his Will. For instance, subsection (d) of Article III permits the executor "to sell [Testator's] personal possessions (which have not been listed herein as being devised to [Testator's] partner, [Defendant])." This authorization suggests that Testator intended that there would be personal possessions that were not otherwise included as part of the bequest to Defendant of "all [Testator's] personal property[.]" Similarly, Article III also directs the executor to sell "all [Testator's] remaining personal possessions at the condominium" and to use the net proceeds from these sales to fund some of the specific bequests in Article V. However, the very existence of "remaining personal possessions at the condominium" is incompatible with a bequest of "all [Testator's] personal property" to Defendant. In addition, the provisions of Article V, subsection (l) are unquestionably inconsistent with the provisions of Article III bequeath-

ing all of Testator's personal property to Defendant. Subsection (l) expressly requires the sale of "any motor vehicles [Testator] may own at the time of [Testator's] demise" and specifically directs that the net-sales proceeds be distributed to the University of North Carolina School of the Arts, while "[Testator's] automobile" was left to Defendant in Article III.

¶ 20 That there is discord in the language employed by Testator in his Will is beyond cavil, and judicial construction was therefore appropriate to ascertain his intent, "in light of the prevailing purpose of the entire instrument." *Mitchell*, 90 N.C. App. at 180, 368 S.E.2d at 9. Thus, the trial court did not err in concluding that the Will contained a patent ambiguity in the various provisions regarding Testator's "personal property." Having so concluded, we turn to Defendant's second argument, concerning the trial court's construction of the Will.

III. Construction of the Will

¶ 21 In determining that the Will contained a patent ambiguity, the trial court made the following findings of fact, which Defendant challenges on appeal:

> 47. The Will, in its description and attempts to devise personal property, contains several inconsistent passages that are mutually exclusive, including, without limitation, Article III, lines 1-4; Article III, paragraph two, subsection (d); Article III, paragraph three, lines 1-2; Article III, paragraph four (in its entirety); Article V, paragraph 1, lines 1-2 and Article V, subsections (j), (k), and (l).
>
> 48. The inconsistent descriptions of personal property as described herein, without limitation, cannot be construed, nor Testator's intent be determined, without considering the circumstances attendant to the Testator and the Will.

¶ 22 These findings of fact are supported by competent evidence, and thus are conclusive on appeal. *See Nelson*, 204 N.C. App. at 470, 694 S.E.2d at 774. However, Defendant contends that these findings of fact are actually conclusions of law, to be reviewed de novo. "Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law." *Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951). This is a distinction without a difference here, where we have independently reached the same conclusions, as discussed above. Defendant's challenge to these findings of fact is overruled.

¶ 23 Defendant further challenges that portion of the trial court's finding of fact #49 specifically construing Testator's intent:

> f. The terms of the Will that are not ambiguous, as well as the circumstances attendant to the Testator's life and the making of the Will, as found above by the undersigned, demonstrate that Testator intended that all other intangible personal property, including his interest in the family business Furniture Enterprises of Hickory, and monies and securities Testator had in investment accounts with Ameri[t]rade and Wells Fargo at the time of his death, pass to the residuary beneficiaries ([P]laintiffs), as set forth in Article IV, the Residue of Testator's Estate[.]

¶ 24 Defendant generally challenges the trial court's interpretation of Testator's intent, which the record reflects that the court gleaned from the text of the Will and "the circumstances attendant to the Testator's life and the making of the Will[.]" Indeed, Defendant repeatedly refers to his contentions as the "plain text" or "plain language" interpretation of Testator's Will. Consequently, he posits that no ambiguity exists, stating that "the trial court made *no* specific findings to justify the conclusion that the terms of the Will should be re-cast or to establish Plaintiffs should take the contested property." However, we have already concluded that the text of the Will is patently ambiguous as to the personal property in question. Accordingly, there are no "re-cast" terms; there is only the trial court's attempt to reconcile the "apparently conflicting provisions" of the Will as reasonably as may be done in discerning Testator's intent. *Wolfe II*, 245 N.C. at 537, 96 S.E.2d at 692.

¶ 25 Further, Defendant does not challenge the preceding portions of finding of fact #49—subsections (a) through (e)—that detail the relevant, unambiguous provisions of the Will and explain Testator's intent as to each of those provisions. The trial court meticulously analyzed Testator's intent, as best it could be ascertained from the text of the Will's unambiguous provisions and from the relevant attendant circumstances:

> a. Testator intended in Article III that Testator's residence . . . (hereinafter referred to as "Residence"), which he shared with [D]efendant, be held in trust by [D]efendant upon Testator's death for no fewer than six (6) months, and that [D]efendant thereafter sell the Residence in order to fund the special devises found in Article V, subsections (a) through

> (i), with the remaining proceeds from the sale of the Residence to pass to [D]efendant in fee simple;
>
> b. Testator intended that [D]efendant be allowed to remain at the Residence, which Testator had shared with [D]efendant, for at least six (6) months after Testator's death; Testator's intention was to give [D]efendant flexibility to maximize the funds going to [D]efendant from the sale of the Residence;
>
> c. Testator intended that [D]efendant hold Testator's items of tangible personal property, located in the Residence or on Testator's person, in trust for no fewer than six (6) months following Testator's death, including inherently personal items of tangible personal property such as Testator's valuable fine art collection, personal effects in the Residence, cash money on Testator's person or in the Residence, furnishings in the Residence, and other items of tangible personalty located in the Residence, in the event that those items of tangible personal property should be needed to fund Testator's special devises listed in Article V, subsections (a) through (i), and if not needed to fund the special devises, pass to [D]efendant in fee simple;
>
> d. Testator specifically intended that certain intangible personal property, such funds held by the Winston-Salem Foundation, be distributed to the North Carolina School of the Arts upon Testator's death, as provided in Article V, subsection (j);
>
> e. Testator specifically intended that certain intangible personal property, such as monies owed to Testator by Jeff Propst and reflected in the Promissory Note in favor of Testator . . . , pass to [P]laintiffs upon Testator's death, as provided in Article V, subsection (k)[.]

¶ 26 These unchallenged findings of fact—which are binding on appeal, *Harper*, 269 N.C. App. at 215, 837 S.E.2d at 604—support the trial court's construction of Testator's intent with respect to the contested property. The trial court's thorough analysis reflects an examination of Testator's intent that squares the initial bequest of all of Testator's personal property, and the repeated conflicting bequests of Testator's personal property thereafter, with Testator's evident intent to leave certain intangible property, which the trial court determined included the contested property, to

Plaintiffs. After careful review of the trial court's analysis, we conclude that the trial court properly resolved the discord created by the patent ambiguity "in light of the prevailing purpose of the entire instrument." *Mitchell*, 90 N.C. App. at 180, 368 S.E.2d at 9. We are unpersuaded by Defendant's arguments to the contrary. Accordingly, we affirm the trial court's order and declaratory judgment.

Conclusion

¶ 27 The trial court did not err in concluding that Testator's Will contained a patent ambiguity as regards the contested property. Nor did the trial court err in interpreting Testator's intent from the text of the Will and the relevant attendant circumstances. Thus, the trial court's order and declaratory judgment is affirmed.

AFFIRMED.

Judges MURPHY and GORE concur.

WAKE RADIOLOGY DIAGNOSTIC IMAGING LLC, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTH CARE PLANNING AND CERTIFICATE OF NEED, RESPONDENT, AND THE BONE AND JOINT SURGERY CLINIC, LLP, RESPONDENT-INTERVENOR

No. COA20-759

Filed 5 October 2021

Hospitals and Other Medical Facilities—certificate of need—MRI scanner—change in project—new institutional health service

Where the Department of Health and Human Services (DHHS) issued a certificate of need (CON) to an orthopedic surgery clinic for a limited-use, fixed extremity MRI scanner as part of a state-sponsored research project, and where the clinic was allowed to replace the scanner with a more advanced model many years later, DHHS had the authority under N.C.G.S. § 131E-176(16)(e) to approve the clinic's application for a new CON—which removed the use restrictions under the original CON—without requiring a traditional need determination or competitive review process. Under a plain reading of section 131E-176(16)(e), DHHS could issue the new

CON because the clinic's application sought a "change in project" within one year after state health officials chose to end the research project, and the change would allow for additional MRI scanning services at a diagnostic center that was established under the project.

Appeal by petitioner from final decision entered 12 June 2020 by Administrative Law Judge Stacey Bice Bawtinhimer in the Office of Administrative Hearings. Heard in the Court of Appeals 10 August 2021.

Wyrick Robbins Yates & Ponton LLP, by Frank Kirschbaum and Charles George, for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Bethany A. Burgon, for respondent-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James C. Adams, II, and Forrest W. Campbell, Jr., for intervenor-appellee.

DIETZ, Judge.

¶ 1 In North Carolina, health care providers cannot acquire a new MRI scanner (or most other types of medical equipment) without permission from the State in the form of a "certificate of need." In the typical scenario, State health experts would first determine that there is a need for another MRI scanner in a particular community, and then interested providers would apply to the State and fight over whose application should be accepted, with the winner ultimately getting the new piece of equipment.

¶ 2 This case is not the typical scenario. Fifteen years ago, State health experts identified a need for a "demonstration project" in Wake County. That project required a provider to acquire an MRI scanner solely for extremity scans, not whole-body scans. State health officials wanted to use the demonstration project to assess whether this type of limited-use MRI scanner would save patients money.

¶ 3 Bone and Joint Surgery Clinic received a certificate of need for use with this demonstration project and acquired an MRI scanner. The certificate of need stated that the MRI machine would create a "diagnostic center" at Bone and Joint's location to carry out the demonstration project. Many years later, during an office move, the MRI scanner was destroyed. Bone and Joint got permission to replace it with a more

advanced MRI machine, but only if it used the new machine for the limited functions in the existing certificate of need.

¶ 4 The following year, State health experts ended the demonstration project and recategorized Bone and Joint's MRI scanner as just another scanner of the many located in Wake County. Bone and Joint then applied for a new certificate of need that removed the existing restrictions, so it could use its current MRI scanner to its full capabilities. The agency approved that request.

¶ 5 As a result, Bone and Joint acquired a whole-body MRI scanner without having to compete with other health care providers to get it. Wake Radiology Diagnostic Imaging, one of those potential competitors, challenged the agency's decision. An administrative law judge ruled against Wake Radiology and this appeal followed.

¶ 6 We affirm. By law, State regulators can change the scope of an existing certificate of need if the change was proposed "within one year after the project was completed" and the change concerned "the addition of a health service that is to be located in the facility . . . that was . . . developed in the project." N.C. Gen. Stat. § 131E-176(16)(e).

¶ 7 Here, within one year after the demonstration project ended, Bone and Joint applied for a change to offer additional MRI services at the diagnostic center created when it initially acquired its limited-use MRI scanner. That application falls squarely within the plain language of N.C. Gen. Stat. § 131E-176(16)(e) and we therefore hold that the agency properly issued the challenged certificate of need. Wake Radiology contends that this plain reading of the statute creates a loophole, allowing an end-run around the intended need determination and competitive review process. That is not a concern for this Court. We interpret the law as it is written. If that interpretation results in an unintended loophole, it is the legislature's role to address it.

Facts and Procedural History

¶ 8 In 2006, Bone and Joint Surgery Clinic applied for a certificate of need (CON) to obtain a .23T fixed extremity MRI scanner to be used for a "demonstration project" under the State Medical Facilities Plan. The Department of Health and Human Services awarded Bone and Joint the requested CON in March 2007.

¶ 9 The designated scope of this CON was to "[a]cquire a fixed extremity MRI scanner resulting in the establishment of a diagnostic center."

The CON imposed a number of conditions on Bone and Joint designed to achieve the goals of the demonstration project.

¶ 10 First, it limited the use of the .23T MRI scanner to extremity scans and not "whole body scans." Second, it required Bone and Joint to conduct a "research study" meant to provide insight into the "convenience, cost effectiveness and improved access" provided by this limited-use MRI machine. The ultimate goal was to "demonstrate any cost savings to the patient or third party payer" from this sort of use of an MRI scanner.

¶ 11 Finally, the CON required Bone and Joint to submit annual reporting to both DHHS and the State Health Coordinating Council for three years. Although this reporting requirement lasted only for three years, the demonstration project continued, and Bone and Joint continued to use the .23T MRI scanner for many years after the reporting requirement ended.

¶ 12 In 2016, nearly a decade after receiving the initial CON, Bone and Joint applied for an exemption from CON review to purchase a replacement .23T MRI scanner machine for the same purpose and use as the existing machine. DHHS granted this exemption with no appeal.

¶ 13 Then, in 2018, Bone and Joint's existing .23T MRI machine was destroyed during an office move. Bone and Joint again applied for a CON exemption to obtain replacement equipment. This time, Bone and Joint asked to purchase a 3.0T MRI scanner—a machine with greater imaging functionality than its existing .23T MRI scanner—but only for the same use and purpose as its existing machine. DHHS granted this exemption as well.

¶ 14 Wake Radiology appealed this agency decision as an "affected person" under N.C. Gen. Stat. § 131E-188(b). In 2019, an administrative law judge concluded that, although the 3.0T MRI scanner had greater capabilities than the .23T MRI scanner it would replace, it still constituted "replacement equipment under N.C. Gen. Stat. § 131E-176(22a)." But the ALJ also ruled that "operation of the replacement MRI is conditioned on conformance with the March 28, 2007 Certificate of Need"; that the new 3.0T "MRI must be used for the same diagnostic or treatment purposes"; and that Bone and Joint "is entitled to use the 3.0 Tesla to perform only the types of studies previously done with the extremity scanner it replaces, unless and until the certificate of need is modified or replaced." Again, there was no appeal of this decision.

¶ 15 Several months later, on 29 May 2019, the State Health Coordinating Council declared that the 2007 demonstration project concerning Bone

and Joint's MRI scanner was now complete. As a result, Bone and Joint's 3.0T MRI machine moved from the demonstration project category into the State's regular MRI inventory category in the 2020 State Medical Facilities Plan. This decision was approved by the Governor.

¶ 16 On 15 August 2019, Bone and Joint applied to DHHS for a new CON so that it could use the 3.0T MRI scanner to its full capability, consistent with its designation in the State Medical Facilities Plan.

¶ 17 The agency reviewed the application and determined that a need assessment and full competitive review process were not required. But the agency chose to solicit public comment and hold a public hearing on the matter under N.C. Gen. Stat. § 131E-185, although the agency believed it was not legally required to do so. Wake Radiology submitted public comment opposing the application.

¶ 18 On 7 January 2020, the agency approved Bone and Joint's application. Wake Radiology timely filed a contested case petition in the Office of Administrative Hearings. An ALJ rejected Wake Radiology's argument and entered summary judgment for the agency, determining that the agency had the authority to issue the CON under either N.C. Gen. Stat. § 131E-176(16)(b) as an "expansion of use" or N.C. Gen. Stat. § 131E-176(16)(e) as a "change in project" for a "new institutional health service." Wake Radiology timely appealed the ALJ's decision to this Court.

Analysis

¶ 19 The parties in this case concede that there are no genuine issues of material fact and Wake Radiology's arguments on appeal all assert that the ALJ made errors of law. We review the agency's determination of these legal questions, at the summary judgment stage, under a *de novo* standard of review. *Blue Ridge Healthcare Hosps. Inc. v. North Carolina Dep't of Health & Hum. Servs.*, 255 N.C. App. 451, 456, 808 S.E.2d 271, 274 (2017); N.C. Gen. Stat. § 150B-51(b).

¶ 20 We begin with the ALJ's determination that the agency had the authority to expand the scope of use for Bone and Joint's MRI scanner through a CON under N.C. Gen. Stat. § 131E-176(16)(e). Wake Radiology concedes that, if Bone and Joint's application falls under this statutory provision, the agency was permitted to issue a CON with the expanded scope of use—essentially a modification of the earlier CON—without a traditional need determination or competitive review process. But Wake Radiology argues that this statutory provision does not apply, and that the General Assembly could not have intended for this provision to apply, in a case like this one. We therefore begin our analysis by examining

N.C. Gen. Stat. § 131E-176(16)(e) and its place in this complex series of statutes governing certificates of need.

¶ 21 In North Carolina, health care providers cannot acquire or replace most of their medical equipment and facilities without permission from State regulators. That permission comes in the form of a certificate of need awarded by the State. The General Statutes provide that no person "shall offer or develop a new institutional health service without first obtaining a certificate of need" from the Department of Health and Human Services. N.C. Gen. Stat. § 131E-178(a).

¶ 22 Accompanying this provision is a lengthy definitional statute identifying the types of medical facilities and equipment that are considered "new institutional health services." N.C. Gen. Stat. § 131E-176(16). Among those definitions is subsection (16)(e), which provides that a "new institutional health service" includes a "change in a project" proposed "within one year after the project was completed" if the change is "the addition of a health service" located at the facility developed during the project:

> The following definitions apply in this Article:
>
> . . .
>
> (16) New institutional health services. – Any of the following:
>
> . . .
>
> e. A change in a project that was subject to certificate of need review and for which a certificate of need was issued, if the change is proposed during the development of the project or within one year after the project was completed. For purposes of this subdivision, a change in a project is a change of more than fifteen percent (15%) of the approved capital expenditure amount or the addition of a health service that is to be located in the facility, or portion thereof, that was constructed or developed in the project.

N.C. Gen. Stat. § 131E-176(16)(e).

¶ 23 The agency, and the ALJ, determined that Bone and Joint's application fell within this statutory language because Bone and Joint applied for the CON within one year after the demonstration project for its existing MRI ended and Bone and Joint requested a change to provide

additional health services at the diagnostic center established through its initial CON.

¶ 24 Wake Radiology argues that this determination is wrong for several reasons. First, it argues that Section 131E-176(16)(e) does not apply because the change to the CON was not proposed within one year after the "project" was completed. In May 2019, the State Health Coordinating Council ended the demonstration project for Bone and Joint's MRI scanner, with the Governor's approval, and moved that MRI machine from the demonstration project category to the general inventory category in the State Medical Facilities Plan. Within one year of that action, Bone and Joint applied for the broader CON for its 3.0T MRI scanner.

¶ 25 But Wake Radiology contends that "the project for which the 2007 CON was issued was for a fixed extremity MRI scanner, and that 'project' was completed long before 2019." Specifically, it argues that the "project" referenced in the statutory provision ended either when Bone and Joint acquired the MRI scanner in 2007 or, at the latest, when the three-year data collection and reporting period described in the CON expired in 2010. This is so, Wake Radiology argues, because the State Health Coordinating Council's decision "to end the project twelve years after it started in 2007, and several years after its completion, does not change the completion date of the project to 2019." The State Health Coordinating Council, in Wake Radiology's view, "is essentially an advisory body created by executive order" and its decisions are "irrelevant" to the legal question of when a project ends under the CON statutes.

¶ 26 We are not persuaded by Wake Radiology's argument. When the language of a statute is clear and unambiguous, courts must construe the statute using its plain meaning. *Total Renal Care of North Carolina, LLC v. North Carolina Dep't of Health & Hum. Servs.*, 242 N.C. App. 666, 672, 776 S.E.2d 322, 326 (2015). "When examining the plain language of a statute, undefined words in a statute must be given their common and ordinary meaning." *Krishnan v. North Carolina Dep't of Health & Hum. Servs.*, 274 N.C. App. 170, 172, 851 S.E.2d 431, 433 (2020).

¶ 27 The ordinary meaning of a "project" is "a specific plan or design" or "a planned undertaking: such as a definitely formulated piece of research." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003). Here, Bone and Joint's initial CON did not function like a typical CON for an MRI scanner. Ordinarily, when a provider obtains a CON for an MRI scanner, the "project" is the acquisition of the MRI scanner itself. Once the provider acquires the MRI scanner, it can offer any procedures it chooses.

¶ 28 Bone and Joint's original CON was different. In 2006, the State Medical Facilities Plan included a need determination for a "demonstration project" for a fixed extremity MRI scanner in Wake County. Bone and Joint applied for a CON based on that need assessment and its original CON contained conditions that related to that demonstration project. For example, Bone and Joint could not perform "whole body scans" with its MRI; it was required to "conduct an organized research study" during its use of the MRI to assess "the convenience, costs effectiveness and improved access provided by a fixed extremity MRI scanner"; and it was required to "provide annual reports" about its research "for a 3-year reporting period from the date of installation." Thus, unlike a typical CON, in which the "project" is completed upon construction or acquisition of the facility or piece of equipment at issue, this project was ongoing—it was a "demonstration project" that State health experts used to assess the benefits of this type of limited-use, fixed extremity MRI scanner. That ongoing project continued until the same State health experts who created it (the State Health Coordinating Council, subject to approval by the Governor) decided to end it.

¶ 29 In short, applying the ordinary meaning of the word "project" to the circumstances surrounding this particular CON, we conclude that the "project was completed," as that phrase is used in N.C. Gen. Stat. § 131E-176(16)(e), when the State Health Coordinating Council chose to end the demonstration project, and corresponding research study, for Bone and Joint's MRI scanner.

¶ 30 Wake Radiology next argues that, even if Bone and Joint applied for the CON within one year after the project was completed, the new CON was not for "the addition of a health service that is to be located in the facility, or portion thereof, that was constructed or developed in the project." N.C. Gen. Stat. § 131E-176(16)(e). Specifically, Wake Radiology contends that "under no plausible interpretation could a demonstration project for an extremity MRI scanner be considered a 'facility' that was 'constructed or developed in the project.' "

¶ 31 This argument, too, ignores a key feature of Bone and Joint's CON. The initial CON expressly stated that its "scope" was for "a fixed extremity MRI scanner resulting in the establishment of a diagnostic center/ Wake County." In other words, the CON itself acknowledged that, once Bone and Joint acquired the limited-use MRI scanner, it necessarily created a "diagnostic center" wherever that MRI scanner was located. The term "health service facility" in the statute is defined to include a "diagnostic center." N.C. Gen. Stat. § 131E-176(9b). Thus, when the agency

removed the limitations on the MRI scanner's use in the new CON, the effect was to permit Bone and Joint to add additional health services (the expanded functionality of its 3.0T MRI scanner) at a diagnostic center (the one expressly created in the CON through the acquisition of and use of the MRI scanner). We thus conclude that the new CON concerned "the addition of a health service that is to be located in the facility . . . that was . . . developed in the project." N.C. Gen. Stat. § 131E-176(16)(e).

¶ 32 Lastly, we address a policy argument that runs throughout Wake Radiology's challenge to the ALJ's decision. The argument, in essence, is that the agency's actions in this case would "interpret out of existence" a central feature of the CON laws: the notion that, before a new piece of medical equipment (say, a whole-body MRI scanner) is purchased in our State, there must be a need determination by State regulators and an opportunity for all the interested medical providers to apply for the right to acquire it. Those medical providers get to fight it out in a complicated regulatory process to see who comes out on top and gets the State's permission to acquire the machine.

¶ 33 So, the argument goes, applying the plain language of N.C. Gen. Stat. § 131E-176(16)(e) to this case creates a loophole in the usual process. Bone and Joint got a new, whole-body MRI scanner (which, to be fair, it already possessed, but with restrictions on use) without affording Wake Radiology and other providers who may want a new MRI machine the chance to compete for the right to acquire it instead.

¶ 34 There is a fatal flaw in this policy argument: The role of the courts is to interpret statutes as they are written. We cannot reject what is written to avoid a loophole that we, or the parties in a lawsuit, believe might undermine the legislature's policy goals. *Sykes v. Vixamar*, 266 N.C. App. 130, 138, 830 S.E.2d 669, 675 (2019). This is particularly true for a complicated regulatory regime like our State's certificate of need laws—a regime that has spawned a legion of lawyers and other experts who learn to navigate the intricate language chosen by our General Assembly. The role of the judicial branch is not to speculate about the consequences of the language the legislature chose; we interpret that language according to its plain meaning and "if the result is unintended, the legislature will clarify the statute." *Wells Fargo Bank, N.A. v. Am. Nat'l Bank & Tr. Co.*, 250 N.C. App. 280, 287, 791 S.E.2d 906, 911 (2016).

¶ 35 Accordingly, we hold that the agency had the legal authority to issue the challenged CON to Bone and Joint. That CON was authorized by N.C. Gen. Stat. § 131E-176(16)(e) because Bone and Joint sought a

"change in a project that was subject to certificate of need review and for which a certificate of need was issued," the change was proposed "within one year after the project was completed," and the change concerned "the addition of a health service that is to be located in the facility . . . that was . . . developed in the project." *Id.* Because we conclude that the ALJ's decision on this ground was correct, we need not address Wake Radiology's challenges to the ALJ's alternative grounds to uphold the agency decision.

Conclusion

¶ 36 We affirm the final decision.

AFFIRMED.

Judges COLLINS and GORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 OCTOBER 2021)

IN RE J.D.F. 2021-NCCOA-300 No. 20-371	Iredell (19JB44)	Vacated and Remanded
BLACKWELL v. BLACKWELL 2021-NCCOA-537 No. 20-710	Iredell (17CVD391)	Affirmed in part, Vacated in part and Remanded
CAPPS v. CUMBERLAND CNTY. BD. OF EDUC. 2021-NCCOA-538 No. 20-519	Cumberland (19CVS152)	Reversed
GAINEY v. OLSON 2021-NCCOA-539 No. 20-640	Wake (16CVD3067)	Affirmed
IN RE A.L. 2021-NCCOA-540 No. 21-227	Robeson (20JA166)	Vacated and Remanded
IN RE B.J. 2021-NCCOA-541 No. 21-136	Cumberland (19JA5)	Affirmed
IN RE P.C. 2021-NCCOA-542 No. 21-161	Rowan (20JA46-48)	AFFIRMED IN PART, REMANDED IN PART.
LEHN v. LEHN 2021-NCCOA-543 No. 20-639	New Hanover (16CVD4146)	Affirmed
MacGREGOR v. SPRUNG 2021-NCCOA-544 No. 21-59	Wake (19CVS3269)	Dismissed
MILONE & MacBROOM, INC. v. CORKUM 2021-NCCOA-545 No. 20-922	Wake (18CVS13036)	Vacated
SPAHR v. SPAHR 2021-NCCOA-546 No. 20-570	Wake (13CVD3440)	VACATED AND REMANDED; NEW TRIAL

STATE v. ALSTON 2021-NCCOA-547 No. 20-691	Wake (16CRS220542)	No Error
STATE v. ARTHUR 2021-NCCOA-548 No. 20-635	New Hanover (19CRS1877) (19CRS50630-32)	No Error
STATE v. BLACKMON 2021-NCCOA-549 No. 20-801	Mecklenburg (18CRS236708)	NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.
STATE v. CORBETT 2021-NCCOA-550 No. 20-155	New Hanover (17CRS52176)	No Error
STATE v. COX 2021-NCCOA-551 No. 20-678	Union (19CRS50151)	No Error
STATE v. HOLLIDAY 2021-NCCOA-552 No. 20-768	Forsyth (19CRS61945) (19CRS61946)	Dismissed
STATE v. LANCASTER 2021-NCCOA-553 No. 20-727	Craven (17CRS52632-33) (18CRS151)	No Error
STATE v. McCONNEAUGHEY 2021-NCCOA-554 No. 20-467	Cleveland (17CRS52463)	Dismissed
STATE v. REDD 2021-NCCOA-555 No. 20-684	Pitt (03CRS64482)	VACATED AND REMANDED FOR RESENTENCING.
TAYLOR v. BANK OF AM., N.A. 2021-NCCOA-556 No. 20-160-2	Mecklenburg (18CVS8266)	Reversed and Remanded
WARREN v. GEMZIK 2021-NCCOA-557 No. 21-48	Halifax (13CVD237)	Affirmed

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