280 N.C. App.—No. 4 Pages 372-562

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JUNE 15, 2022

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

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OF

NORTH CAROLINA

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[1]Resigned 19 November 2021.
[2]Began 7 October 2021.

COURT OF APPEALS

CASES REPORTED

FILED 7 DECEMBER 2021

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ALIENATION OF AFFECTIONS

Elements—sufficiency of evidence—sexual affair—In an action for intentional infliction of emotional distress and alienation of affection based on defendant's affair with plaintiff's husband, defendant was not entitled to relief on her post-trial motion for judgment notwithstanding the verdict, where plaintiff presented more than a scintilla of evidence of each element of alienation of affection, including that plaintiff and her husband had some love and affection between them as shown by their communications and marital relations; that defendant interfered with the marital relationship and caused the loss of affection between the spouses by having a sexual relationship with plaintiff's husband, conceiving a child with him, and sharing texts and at least one sexually explicit photo with him; and that the husband's behavior toward plaintiff changed as a result. **Clark v. Clark, 403.**

Subject matter jurisdiction—conduct in North Carolina—text messages— The trial court had subject matter jurisdiction over a claim for alienation of affection where plaintiff presented more than a scintilla of evidence that the injury to the marital relationship occurred in North Carolina, including that she discovered text messages between her husband and defendant during the time when her husband was in the marital home in North Carolina and that her husband sent defendant a

not enter findings of fact addressing whether respondent-mother lacked an appropriate alternative care arrangement for her child. **In re R.B., 424.**

Neglect adjudication—impairment or substantial risk—ultimate findings required—A neglect adjudication was reversed and remanded where the trial court failed to enter ultimate findings of fact stating that the child had suffered an impairment or was at substantial risk of such impairment under respondent-mother's care, there was no evidence to support such findings, and the adjudication order merely recited the allegations in the juvenile petition filed by the department of social services (DSS). Further, the court improperly adopted DSS's allegation that respondent-mother "made threats of harm toward the child" where, although respondent-mother did send text messages to a friend indicating that she was "going to kill" the child, the record showed the friend did not take the messages literally; respondent-mother was only venting and did not actually intend to kill her child; and that when respondent-mother made the statements, she was suffering from sleep deprivation, anxiety, and depression, all of which she was actively addressing through therapy. **In re R.B., 424.**

CHILD CUSTODY AND SUPPORT

Best interests of the child—findings of fact—abusive stepfather—In a custody action, the trial court's unchallenged findings of fact—including that the mother had failed to protect her daughter from the stepfather's abusive behavior, that the daughter had said she would kill herself if she had to continue living with her stepfather, and that the mother had no intention to separate from the stepfather—supported the conclusion that it was in the best interests of the daughter for her grandparents to have sole legal and physical custody of her. **Thomas v. Oxendine, 526.**

Best interests of the child—no visitation for parent—support by unchallenged findings—In a child custody matter, the unchallenged findings supported the ultimate findings and conclusions that it was in the children's best interests for their father to have sole legal and physical custody and for their mother not to have visitation, where the teenage boys were doing well with their father, were angry with their mother for "essentially kidnapping" them, and did not want to see their mother. **Malone-Pass v. Schultz, 449.**

Constitutionally protected status as parent—findings of fact—failure to protect child—relinquishment of exclusive parental authority—In a custody action, the trial court's unchallenged findings of fact—showing that the mother had failed to protect her daughter from the stepfather's abusive behavior and that the mother had relinquished otherwise exclusive parental authority to the grandparents—supported the conclusion that the mother had acted inconsistently with her constitutionally protected status as a parent. **Thomas v. Oxendine, 526.**

Order concerning parent—psychiatric evaluation and treatment—psychological issues—The trial court did not abuse its discretion in a child custody matter by ordering a mother to undergo a psychiatric evaluation and comply with all recommended treatments, where there were ongoing abuse issues in the household and the mother had been diagnosed with PTSD, Borderline Personality Disorder, and mania. **Thomas v. Oxendine, 526.**

Order concerning third party—completion of classes and evaluations—contact with child—The trial court did not abuse its discretion in a child custody matter by ordering the child's stepfather to complete parenting classes, anger management

evaluations, and substance abuse evaluations, where the stepfather's ability to have contact with the child was conditioned on his compliance with the order because of the stepfather's past abuse of the child. **Thomas v. Oxendine, 526.**

Standing—grandparents—allegations in complaint—The paternal grandparents of a child had standing to bring a custody action under N.C.G.S. § 50-13.1(a) where their complaint alleged that they were the child's grandparents and that the child's mother had acted inconsistently with her constitutionally protected status as a parent by repeatedly and willfully failing to protect the child from her stepfather. **Thomas v. Oxendine, 526.**

Uniform Child Custody Jurisdiction and Enforcement Act—jurisdiction—home state—allegations of unjustifiable conduct—The trial court had jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to modify an out-of-state child custody order where the children had lived with the father in North Carolina for more than six consecutive months immediately preceding the filing and where the out-of-state custody order relinquished that state's jurisdiction and required the parties to register the order in North Carolina within seven days. Further, the trial court fully considered the mother's allegations that the father had committed fraud and properly concluded that jurisdiction was not barred by N.C.G.S. § 50A-208(a); in any event, the court would have had jurisdiction under the exceptions to N.C.G.S. § 50A-208(a) because both parents had acquiesced to the court's jurisdiction and the out-of-state court had determined that North Carolina was the more appropriate forum. **Malone-Pass v. Schultz, 449.**

CONSTITUTIONAL LAW

Confrontation Clause—lab report—blood sample test not conducted by testifying expert—chain of custody—In a prosecution for assault with a deadly weapon inflicting serious injury, felony serious injury by a motor vehicle, and driving while impaired, there was no violation of defendant's constitutional rights under the Confrontation Clause and no error in the admission of a lab report regarding defendant's blood sample because the report constituted an independent expert opinion created and analyzed by the testifying expert—who related his experience and training as a forensic toxicologist—based on the results of data generated by lab analysts. Further, the trial court did not abuse its discretion by admitting the chain of custody report for defendant's blood sample where the arresting officer and the expert testified about how the sample was handled, and defendant provided no reason to believe that the sample had been altered. **State v. Bucklew, 494.**

CRIMINAL LAW

Defenses—voluntary intoxication—jury instruction—The trial court properly denied defendant's request for a jury instruction on voluntary intoxication where defendant failed to show he was so intoxicated from using methamphetamine that he could not form the specific intent to commit first-degree murder and first-degree kidnapping. In support of defendant's murder conviction based on malice, premeditation, and deliberation, the evidence showed that he brandished a gun while declaring he "smelled death," ordered his girlfriend to shoot and kill the victim, orchestrated the disposal of the victim's body, retained the spent bullet as a "trophy," and fled the state to avoid arrest. With regard to kidnapping—the underlying felony for defendant's felony murder conviction—evidence showed defendant confined the victim over successive days, thwarted the victim's escape attempt, offered freedom

DAMAGES AND REMEDIES

DISCOVERY

DIVORCE

EMOTIONAL DISTRESS

was not entitled to relief on her post-trial motion for judgment notwithstanding the verdict, where plaintiff presented more than a scintilla of evidence of each element of IIED, including that plaintiff experienced severe distress in the form of anxiety, frequent hysterical crying, and hyperventilation, for which plaintiff sought counseling, and that her distress was directly caused by defendant's extreme and outrageous conduct consisting not only of having the affair but also of conceiving a child with plaintiff's husband while the couple were attempting a reconciliation, telling plaintiff she would do everything she could to make her life miserable, and creating fake social media profiles announcing plaintiff's supposed availability for "no strings attached" sexual intercourse. **Clark v. Clark, 403.**

Intentional infliction—judgment notwithstanding the verdict—sufficiency of evidence—In an action for libel per se, intentional infliction of emotional distress, and unlawful disclosure of private images brought by plaintiff against her husband, defendant was not entitled to relief on his post-trial motion for judgment notwithstanding the verdict where plaintiff presented more than a scintilla of evidence of each element of IIED, including that plaintiff experienced severe distress in the form of anxiety, frequent hysterical crying, and hyperventilation, for which plaintiff sought counseling, and that her distress was directly caused by defendant's extreme and outrageous conduct consisting not only of conducting an affair with another woman but also of harassing and stalking plaintiff, telling plaintiff he would do everything he could to make her life miserable, humiliating plaintiff by posting her personal information and photographs of her online, and creating a fake social media profile announcing plaintiff's supposed availability for "no strings attached" sexual intercourse. **Clark v. Clark, 384.**

EVIDENCE

Car accident—judicial notice of weather report—In a prosecution for assault with a deadly weapon inflicting serious injury, felony serious injury by a motor vehicle, and driving while impaired, the trial court did not abuse its discretion by declining to take judicial notice of a weather report of the conditions that existed on the day that defendant caused a collision where there was sufficient evidence from multiple witnesses about the weather conditions from which the jury could make its own conclusion. Further, where the issue was how much rain fell at the time of the crash, the report did not meet the standard for judicial notice under Evidence Rule 201(b) because the precise amount of rain is not a generally known fact, and the report was not a document of indisputable accuracy because its data stopped several hours prior to when the crash occurred. **State v. Bucklew, 494.**

Witness testimony—process of making digital copy of electronic devices—not involving specialized knowledge—In an action for intentional infliction of emotional distress and alienation of affection, there was no error in the admission of testimony by plaintiff's witness regarding how the witness made a digital copy of plaintiff's electronic devices. Although the testimony did not rely on specialized knowledge and was therefore more properly considered to be lay testimony and not expert testimony, plaintiff could not demonstrate prejudice in its admission, since it served to corroborate plaintiff's own testimony about her electronic communications and social media posts. **Clark v. Clark, 403.**

Witness testimony—process of making digital copy of electronic devices—not involving specialized knowledge—In an action for libel per se, intentional infliction of emotional distress, and unlawful disclosure of private images, there was

no error in the admission of testimony by plaintiff's witness regarding how the witness made a digital copy of plaintiff's electronic devices. Although the testimony did not rely on specialized knowledge and was therefore more properly considered to be lay testimony and not expert testimony, plaintiff could not demonstrate prejudice in its admission, since it served to corroborate plaintiff's own testimony about her electronic communications and social media posts. **Clark v. Clark, 384.**

HOMICIDE

Murder by torture—sufficiency of evidence—The trial court properly denied defendant's motion to dismiss a charge for first-degree murder by torture where substantial evidence showed that defendant had detained, humiliated, and beaten the victim over a period of days, during which he shot the victim in the leg, polled others to vote on whether the victim should live or die, demanded that a "hot shot" of poison and methamphetamine be mixed and injected into the victim, tried to make the victim hang himself, ordered the victim's beating with a rock, and then ordered his girlfriend—under threats to her and her family's lives—to fire the gunshot that ultimately killed the victim. **State v. Bowman, 483.**

LIBEL AND SLANDER

Damages—compensatory—punitive—no substantial miscarriage of justice—Where a jury awarded plaintiff $1 million in damages after finding defendant responsible for libel per se, the trial court did not err by denying defendant's post-trial motion for judgment notwithstanding the verdict where there was no substantial miscarriage of justice because libel per se allows for presumed damages for pain and suffering without a showing of special damages. Further, there was no error in the punitive damages award because there was no requirement that the jury had to consider all of the factors contained in N.C.G.S. § 1D-35. **Clark v. Clark, 384.**

Libel per se—publication—authentication—sufficiency of evidence—In an action for libel per se, intentional infliction of emotional distress, and unlawful disclosure of private images filed by plaintiff against her husband, defendant was not entitled to relief on his post-trial motion for judgment notwithstanding the verdict on the per se libel claim. Plaintiff presented more than a scintilla of evidence that defendant published two libelous social media postings where she detailed how she traced the postings to defendant's email address and one of his online profiles. Further, plaintiff's own testimony provided the necessary authentication of the postings through her first-hand observation and knowledge of them as required by Evidence Rule 901(b)(1). **Clark v. Clark, 384.**

MOTOR VEHICLES

Impaired driving—felony serious injury by motor vehicle—assault with deadly weapon—sufficiency of evidence—The State presented substantial evidence of each element of assault with a deadly weapon inflicting serious injury, felony serious injury by a motor vehicle, and driving while impaired—based on a car crash caused by defendant—to send the charges to the jury. Witnesses observed defendant's erratic and reckless driving just prior to the accident, defendant admitted to having taken several medications earlier that day, the collision caused serious injuries to both the victim and defendant, there were no skid marks to show any attempt by defendant to slow his vehicle before he swerved into oncoming traffic

and hit two vehicles, defendant appeared lethargic and had slow speech, and his blood sample revealed the presence of impairing substances, including benzodiazepines and opiates. **State v. Bucklew, 494.**

Impaired driving—felony serious injury by motor vehicle—warrantless blood draw—probable cause—exigent circumstances—In a prosecution for assault with a deadly weapon inflicting serious injury, felony serious injury by a motor vehicle, and impaired driving, competent evidence supported a determination that probable cause existed to justify a warrantless blood draw of defendant after he was taken to a hospital with serious injuries from the accident he caused. An eyewitness observed defendant's erratic driving just prior to the accident, defendant admitted to having taken several impairing substances that day, he appeared lethargic and had slow speech, and, where his injuries were so severe that he subsequently had to be taken by helicopter to another hospital, exigent circumstances existed to take a blood sample without obtaining a warrant so that medical treatment including pain medication could be administered. **State v. Bucklew, 494.**

PRIVACY

Unlawful disclosure of private images—"intimate parts"—topless photo—In an action for libel per se, intentional infliction of emotional distress, and unlawful disclosure of private images (pursuant to N.C.G.S. § 14-190.5A(b)) brought by plaintiff against her husband, defendant was not entitled to relief on his post-trial motion for judgment notwithstanding the verdict on the unlawful disclosure claim where plaintiff presented more than a scintilla of evidence that the images of plaintiff that defendant had posted online—including a topless photo—showed "intimate parts" as defined in section 14-190.5A(a)(3). **Clark v. Clark, 384.**

SEARCH AND SEIZURE

Traffic stop—articulable suspicion of criminal activity—officer's mistake of law—reasonableness—The trial court erred by denying defendant's motion to suppress evidence seized from his car during a traffic stop where the officer's mistaken belief that the car's transporter plate could only be used on trucks was not objectively reasonable because the statute enumerating the circumstances in which both trucks and motor vehicles could have transporter plates was clear and unambiguous. Further, the totality of the circumstances was not sufficient to support a reasonable articulable suspicion to conduct the traffic stop where defendant's vehicle was exiting the parking lot of a closed business that had no other cars present in an area that had recently had a trailer theft, and where there were no findings regarding what actions of defendant warranted suspicion. **State v. Jonas, 511.**

THREATS

Mass violence on educational property—sufficiency of evidence—true threat—juvenile delinquency—The portion of an order adjudicating a juvenile delinquent for communicating a threat of mass violence on educational property (N.C.G.S. § 14-277.6) was reversed where the juvenile had told four of her classmates she was going to blow up their school but where the State failed to meet its burden of showing that a reasonable hearer would have objectively construed her statement as a true threat. At the adjudication hearing, three classmates testified that they did not believe she was serious when she made the statement, and the fourth classmate's

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.

ALDRIDGE v. NOVANT HEALTH, INC.

[280 N.C. App. 372, 2021-NCCOA-651]

JENNIFER ALDRIDGE, EMPLOYEE, PLAINTIFF
v.
NOVANT HEALTH, INC., EMPLOYER (SELF-INSURED), DEFENDANT

No. COA21-70

Filed 7 December 2021

Workers' Compensation—accident—interruption of regular work routine—moving heavy patient—without usual assistance

Plaintiff nurse suffered an injury by accident and therefore was entitled to workers' compensation where competent evidence and the findings supported the conclusion that the injury resulted from an interruption of plaintiff's regular work routine. Plaintiff's injury occurred when she was attempting to change a soiled bed pad for a very heavy patient with only one other person helping, and she had never attempted to do so for a heavy patient without the assistance of more than one person.

Appeal by Defendant from an Opinion and Award entered 30 September 2020 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 October 2021.

Campbell & Associates, by Bradley H. Smith, for plaintiff-appellee.

Jason P. Burton for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Novant Health, Inc., (Defendant) appeals from an Opinion and Award entered by the Full Commission (Commission) of the North Carolina Industrial Commission concluding Jennifer Aldridge (Plaintiff) suffered an injury by accident and granting Plaintiff's claim for compensation under the Workers' Compensation Act. The Record reflects the following:

¶ 2 Plaintiff began working as a registered nurse for Defendant in November 2010. Plaintiff worked at "Stanback Rehabilitation" unit in Rowan Hospital in Salisbury, North Carolina. On 7 March 2018, Plaintiff was assigned to work on the "med-surg unit"—not her usually assigned unit. On that day, Kayla Beeker (Beeker) a certified nursing

assistant (CNA), asked Plaintiff to assist Beeker in changing a pad underneath a patient who had soiled herself. The patient was "very large" weighing between 300 and 400 pounds. While Beeker stood on one side of the patient and pulled the patient's hip toward Beeker, Plaintiff stood on the other side and pushed the patient's hip with Plaintiff's left hand and pulled on the soiled pad with her right hand.

¶ 3 As Plaintiff pulled the pad, she heard a "snapping sound" and felt "a very sharp pain and burning sensation that went from [her] wrist to [her] elbow" and to her shoulder, neck, and back. Plaintiff had to pull with more force than usual because of the patient's size. Moreover, the patient did not help as Plaintiff tried to pull the pad from under the patient. Plaintiff sought medical treatment, including surgery, as a result of her injury. Plaintiff filed a Notice of Accident with Defendant. Defendant denied Plaintiff's workers' compensation claim on the basis that Plaintiff's injury was "not the result of an accident or sudden traumatic event."

¶ 4 On 31 July 2018, Plaintiff filed a request for a hearing with the Industrial Commission on her compensation claim. Plaintiff's compensation claim came on for hearing on 17 January 2019 before a Deputy Commissioner. The Deputy Commissioner heard testimony from both Plaintiff's and Defendant's witnesses. In addition to the factual circumstances leading to Plaintiff's injury, Plaintiff testified that when she changes a patient's pad, the patient typically pulls themselves up on the side of the bed so that Plaintiff can roll the patient to the right and remove the pad. According to Plaintiff, the patient in this instance "wasn't helping . . . at all." When Plaintiff assisted with moving a patient who weighed as much as the patient in the incident in question, Plaintiff would always be part of a team of at least three people moving the patient. Plaintiff estimated she moved a patient of that size twice a month as part of a team of three to four people. Plaintiff also stated she would help others move patients "once a shift" on any given floor of the hospital and that "one out of five" patients were overweight.

¶ 5 Beeker testified as Defendant's witness. Although Beeker could not recall how much the patient in this case weighed, she described the patient as "pretty hefty, but it's not uncommon for two of us to be turning a patient that is overweight and not willing to help." However, Beeker explained when a patient is "extremely obese or they're a difficult patient that we've already tried once to move . . . we'll call for extra help and a lot of times it's maybe three of us, maybe four at the most." Beeker also stated she would have preferred to have three or four people moving the patient she and Plaintiff moved on the day in question. She had also never witnessed Plaintiff attempt to move a patient weighing approximately

350 pounds with only one other person helping in the time Beeker had worked with Plaintiff.

¶ 6 Victoria Tuttle (Tuttle) testified on Plaintiff's behalf. Tuttle was employed by Defendant as a CNA at Rowan Hospital and worked with Plaintiff once or twice a month at the time. Tuttle testified she had to move patients weighing 350 pounds to change their pads as part of her duties with Defendant; but, when she did, "[t]hree to four" people would assist and "[s]ix would be great if they're noncompliant or they can't help themselves." Tuttle stated she had previously tried to move a patient weighing 350 pounds with only one other person assisting but could not do it, and she had to get more help.

¶ 7 Christopher Cook (Cook) testified on Defendant's behalf. Cook testified he was employed as a nurse manager for Defendant at Rowan Hospital on the date in question. According to Cook, nurses and nursing assistants would change pads on patients every day and that he noticed a "trend in the population of obesity [in patients] increasing[.]" Cook testified multiple nurses would work together in teams to move overweight patients "daily." However, Cook was not aware of an official policy or protocol directing nurses or nursing assistants on how many employees should assist in moving patients based on a patient's weight and size. Cook also stated that teams of at least three employees were needed to move patients on a "daily basis[.]"

¶ 8 On 16 October 2019, the Deputy Commissioner entered an Opinion and Award in Plaintiff's favor. Based on the testimony, exhibits, and depositions filed in the claim, the Deputy Commissioner made the following pertinent Findings of Fact:

> 5. In an attempt to change the soiled bed pad, CNA Beeker pulled the patient towards herself, and Plaintiff pushed from the opposite side of the bed, while also pulling on the bed pad with her right arm. The patient did not assist in moving herself. As she was pulling on the bed pad, Plaintiff heard a snap and felt sharp pain and a burning sensation in her right arm. Plaintiff immediately stopped and indicated to CNA Beeker that she had injured herself. . . .
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> . . . .
>
> 7. It was not unusual for Plaintiff to be asked to work a different unit; this occurred approximately two to three times per month. In general, it was not unusual

for a CNA to ask Plaintiff for help; this occurred regularly. It was also not unusual for Plaintiff to pull a bed pad out from under a patient; she estimated she performed this specific task twice per month.

. . . .

9. It was also not uncommon for patients to be unable or unwilling to help when being moved; this could be due to dementia, being sedated, or being post-surgical.

10. Prior to March 7, 2018, Plaintiff had assisted in moving large patients before, but only as a team of three or four people. Plaintiff estimated she assisted in this fashion approximately twice per month.

11. Prior to March 7, 2018, Plaintiff had never tried to pull out a soiled bed pad from underneath such a large patient who did not assist, with only one other employee helping.

12. . . . As a CNA, Tuttle had removed bed pads from soiled patients weighing 350 pounds as part of a team of three or four people. It was not unusual for a team of 3 or 4 people to perform this task as it occurred daily.

13. CNA Tuttle had also attempted to perform the task of removing a bed pad from a 350-pound patient with one other person, without success. CNA Tuttle had never seen Plaintiff attempt to do so.

. . . .

15. CNA Beeker agreed that with a patient as large as 350 pounds who was unable to assist, you would want a team of three or four people moving the patient, and she would call for extra help.

16. CNA Beeker had also not seen Plaintiff attempt to move a 350 pound patient with the help of just one other person.

17. The undersigned finds that removing the soiled bed pad from underneath an uncooperative patient weighing 350 pounds, with just one other employee's

> assistance, was not part of Plaintiff's normal work routine as a Registered Nurse for Defendant-Employer. Such task was unusually difficult and had not been performed by Plaintiff previously; therefore, it constituted an interruption of Plaintiff['s] usual work routine.

¶ 9 Consequently, the Deputy Commissioner concluded:

> 4. The preponderance of the evidence in this matter demonstrates Plaintiff's injury occurred while she was assisting a CNA with the task of removing a soiled bed pad from underneath an unusually large patient who was either unable or unwilling to assist in lifting herself; said task was typically performed by a team of 3 or more employees; . . . This unusually difficult task was something Plaintiff had never performed before and was not part of her normal work routine.
>
> 5. Accordingly, the undersigned concludes the March 7, 2018, incident constituted an interruption of plaintiff's regular work routine that was neither designed nor expected by plaintiff and is, therefore, compensable as an injury by accident. N.C. Gen. Stat. § 97-2(6).

Therefore, the Deputy Commissioner entered an award in Plaintiff's favor. Defendant filed Notice of Appeal to the Full Commission on 29 October 2019.

¶ 10 On 30 September 2020, "[h]aving reviewed the prior Opinion and Award based upon the record of proceedings before Deputy Commissioner Brown, . . . and the parties' briefs and oral arguments, the Full Commission" entered its Opinion and Award "pursuant to N.C. Gen. Stat. § 97-85." The Commission made the following relevant Findings of Fact:

> 4. While attempting to change the soiled bed pad, CNA Beeker pulled the patient toward herself, and plaintiff pushed from the opposite side of the bed, while also pulling on the bed pad with her right arm. The patient did not assist in moving herself. As she was pulling on the bed pad, plaintiff heard a snap and felt sharp pain and burning sensation in her right arm. Plaintiff immediately stopped and indicated to CNA Beeker that she had injured herself.

. . . .

7. It was not unusual for plaintiff to encounter overweight or obese patients while at work. Mr. Cook estimated that on any given day, 50% of the patients were overweight and 25% of the patients were obese, with on average two patients as large as 350 pounds. It was also not uncommon for patients to be unable or unwilling to help when being moved, which could be due to dementia, being sedated, or being post-surgical.

8. Prior to March 7, 2018, plaintiff assisted in moving large patients, but only as a team of three or four people. Plaintiff estimated she assisted in this fashion approximately twice per month. Also prior to March 7, 2018, plaintiff never attempted to remove a soiled bed pad from underneath such a large uncooperative patient, with only one other employee helping.

¶ 11 Consequently, the Commission concluded:

1. "A plaintiff is entitled to compensation for any injury under the Workers' Compensation Act 'only if (1) it is caused by an accident, and (2) the accident arises out of and in the course of employment.' " N.C. Gen. Stat. § 97-2(6); *Gray v. RDU Airport Auth.*, 203 N.C. App. 521, 525, 692 S.E.2d 170, 174 (2010) (quotng *Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 645, 566 S.E.2d 807, 811 (2002); N.C. Gen. Stat. § 97-1(6) (2009)). "The plaintiff bears the burden of proving both elements of the claim." *Id.* (quoting *Morrison v. Burlington Industries*, 304 N.C. 1, 13, 282 S.E.2d 458, 467 (1981)).

2. The elements of an "accident" include the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences. An "accident" within the meaning of the North Carolina Workers' Compensation Act is "an unlooked for and untoward event which is not expected or designed by the injured employee." *Adams v. Burlington Indus. Inc.*, 61 N.C. App. 258, 260, 300 S.E.2d 455, 456 (1983).

> 3. "The terms 'accident' and 'injury' are separate and distinct concepts, and there must be an 'accident' that produces the complained-of 'injury' in order for the injury to be compensable." N.C. Gen. Stat. § 97-2(6); *Gray*, 203 N.C. App. at 525, 692 S.E.2d at 174; *O'Mary v. Clearing Corp.*, 261 N.C. 508, 510, 135 S.E.2d 193, 194 (1964).
>
> 4. In the present case, the preponderance of the evidence in this matter demonstrates plaintiff's injury occurred while she was assisting a CNA with the task of removing a soiled bed pad from beneath an unusually large patient who was either unable or unwilling to assist in lifting herself. This task was typically performed by a team of three or more employees. This unusually difficult task was something plaintiff had never performed before and was not part of her normal work routine. Accordingly, the Full Commission concludes the March 7, 2018, incident constituted an interruption of plaintiff's regular work routine that was neither designed nor expected by plaintiff and is, therefore, compensable as an injury by accident. N.C. Gen. Stat. § 97-2(6); *See Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, 135 N.C. App. 112, 519 S.E.2d 61 (1999).

Therefore, the Full Commission entered an award in Plaintiff's favor. Defendant timely filed written Notice of Appeal from the Full Commission's Opinion and Award to this Court on 29 October 2020.

Issue

¶ 12 The issue on appeal is whether the Commission erred in determining Plaintiff suffered an injury by accident, and thus, was entitled to compensation.

Analysis

¶ 13 Defendant argues the Commission erred in awarding Plaintiff's claim because the competent evidence in the Record did not support the Commission's Finding and Conclusion the 7 March 2018 incident was an "accident" under the Workers' Compensation Act. Our standard of review for a Commission's opinion and award is limited to whether the Commission's findings of fact support its conclusions of law. Where the competent evidence supports the Commission's findings, those findings

are binding on appeal. *Legette v. Scotland Mem'l Hosp.*, 181 N.C. App. 437, 442, 640 S.E.2d 744, 748 (2007) (citation omitted). "Thus, on appeal, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation and quotation marks omitted). We review the Commission's conclusions of law de novo. *McRae v. Toastmaster Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted).

¶ 14 Although Defendant's brief asserts the competent evidence did not support the Commission's Findings regarding Plaintiff's injury, Defendant really argues the Commission's Findings did not support its Conclusion the 7 March 2018 incident was an "accident" under the statute and, thus, compensable. Here, the Commission found: Plaintiff was injured as a result of moving the patient while trying to change the patient's soiled bed pad; it was not unusual for Plaintiff to assist in moving patients, even obese patients weighing 350 pounds; that it was not unusual for some patients to be unable or unwilling to help as Plaintiff attempted to move them and change their bed pads; but, that Plaintiff had never before attempted to change a bed pad on a patient weighing 350 pounds with only one other person, and Plaintiff had always attempted to move a patient of this size as part of a team of three to four people.

¶ 15 The competent evidence in this case supports these Findings. Plaintiff testified she had never before moved a patient of this size with only one other person helping. Beeker testified the patient involved in this case was a patient she would have preferred to have a team of three to four to move. Moreover, Beeker testified she had never seen Plaintiff move a patient of that size with just one other person before. Similarly, Tuttle testified: she had usually moved a patient of that size as part of a team of three to four; she had previously tried to move a patient of that size with just one other person helping but could not; and Tuttle had never witnessed Plaintiff move a patient of that size with just one person helping. Cook testified that, although he was not aware of any protocols for moving patients of this size, using teams of three to four people to do so occurred on a daily basis. Thus, the Record evidence supports the Commission's Finding Plaintiff had never moved a patient of this size with just one other person helping and that she routinely moved a patient of this size as part of a team of three to four.

¶ 16 The crux of Defendant's argument is that these Findings do not support the Commission's Conclusion Plaintiff's injury was the result of a compensable accident under the Workers' Compensation Act codified

in Chapter 97 of our General Statutes. " 'Injury and personal injury' shall mean only injury by accident arising out of and in the course of the employment . . . ." N.C. Gen. Stat. § 97-2(6) (2019). "A plaintiff is entitled to compensation for an injury under the Workers' Compensation Act only if (1) it is caused by an accident, and (2) the accident arises out of and in the course of employment." *Pitillo v. N.C. Dep't of Envtl. Health & Nat. Res.*, 151 N.C. App. 641, 645, 566 S.E.2d 807, 811 (2002) (citation and quotation marks omitted). "There must be an accident followed by an injury by such accident which results in harm to the employee before it is compensable under our statute." *O'Mary v. Clearing Corp.*, 261 N.C. 508, 510, 135 S.E.2d 193, 194 (1964) (citation and quotation marks omitted).

¶ 17 An accident is "an unlooked for or untoward event which is not expected or designed by the person who suffers the injury[;] [t]he elements of an accident are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Shay v. Rowan Salisbury Sch.*, 205 N.C. App. 620, 624, 696 S.E.2d 763, 766 (2010) (citations omitted, brackets in original). However: "Once an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee's normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an 'injury by accident' under the Workers' Compensation Act." *Bowles v. CTS of Asheville*, 77 N.C. App. 547, 550, 335 S.E.2d 502, 504 (1985) (citations omitted).

¶ 18 Here, the Commission concluded:

> This unusually difficult task was something plaintiff had never performed before and was not part of her normal work routine. Accordingly, the Full Commission concludes the March 7, 2018, incident constituted an interruption of plaintiff's regular work routine that was neither designed nor expected by plaintiff and is, therefore, compensable as an injury by accident. N.C. Gen. Stat. § 97-2(6); *See Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, 135 N.C. App. 112, 519 S.E.2d 61 (1999).

The Commission's Findings Plaintiff had never moved a patient weighing 350 pounds with only one person helping and that such patients were typically moved by a team of three to four people supports the Commission's Conclusion the incident in question constituted an interruption of Plaintiff's work routine and was not designed or expected by Plaintiff.

¶ 19 *Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, the case the Commission cited in its Opinion and Award, supports Plaintiff's assertion this incident was an accident under the Workers' Compensation Act. 135 N.C. App. 112, 519 S.E.2d 61 (1999). In *Calderwood*, the plaintiff was a nurse in a labor and delivery unit. *Id.* at 113, 519 S.E.2d at 62. Plaintiff was injured when she lifted a patient's leg numerous times over a thirty-minute period; however, this patient weighed 263 pounds and was unable to assist in lifting her leg. *Id.* The plaintiff testified she routinely lifted patients' legs during labor and delivery, but that this patient's leg was unusually heavy and the plaintiff had never had to lift a patient's leg without assistance from the patient. *Id.* The Commission found that the plaintiff had conducted her job "in the usual way" and concluded the plaintiff's injury did not occur by accident. *Id.* at 114, 519 S.E.2d at 63.

¶ 20 On appeal, this Court concluded there was no evidence to support the Commission's finding the plaintiff conducted her employment in the usual way where the "undisputed evidence" was that she had never lifted a patient's leg where the patient was unusually large and unable to assist the plaintiff. *Id.* at 115-16, 519 S.E.2d at 63. We reasoned: "The question is whether her regular work routine required lifting the legs of women weighing 263 pounds" and were unable to assist. *Id.* at 116, 519 S.E.2d at 63. Although *Calderwood* addressed whether the evidence supported the Commission's finding the plaintiff conducted her work in the usual way, this Court's reversal of the Commission implied the incident could have been an accident under the statute.

¶ 21 Similarly, here, the question before the Commission was whether Plaintiff's regular work routine required her to help move a patient weighing 350 pounds, and who was unable or unwilling to assist, with only the help of one other person. The Commission's Findings that Plaintiff had never attempted to move a patient of this size with only one other person, and that such patients were usually moved by a team of three to four people supported the Conclusion this incident was unforeseen and was an interruption not designed or expected by Plaintiff. *See Legette*, 181 N.C. App. at 446, 640 S.E.2d at 750-51 (holding plaintiff moving a patient alone was an interruption to her work routine where the plaintiff had to exert more force than usual and where the maneuver was typically a two-person task).

¶ 22 Defendant argues this case is similar to *Evans v. Wilora Lake Healthcare/Hilltopper Holding Corp.*, 180 N.C. App. 337, 637 S.E.2d 194 (2006), and *Landry v. U.S. Airways, Inc.*, 150 N.C. App. 121, 563 S.E.2d 23, *rev'd per curiam*, 356 N.C. 419, 571 S.E.2d 586 (2002), where our

courts held the plaintiffs' injuries were not the result of accidents. In *Evans*, the plaintiff worked for a healthcare facility caring for residents within the facility. *Evans*, 180 N.C. App. at 337, 637 S.E.2d at 194-95. The plaintiff's duties included: "Feeding, passing trays, . . . grooming, dressing, undressing, [and] changing . . . garments[.]" *Id.* at 338, 637 S.E.2d at 195. The plaintiff claimed her left wrist was injured as she was helping a resident—with the assistance of the resident's family member—remove the resident's pants. *Id.* We held although the plaintiff claimed she "exerted unexpected force to move the pad on which the resident lay . . . [n]othing in the record indicates plaintiff was performing unusual or unexpected job duties." *Id.* at 341, 637 S.E.2d at 196.

¶ 23 The plaintiff in *Landry* worked for the airline unloading mail, freight, and luggage. *Landry*, 150 N.C. App. at 121-22, 563 S.E.2d at 24. The plaintiff injured himself as he lifted a mail bag that was heavier than the plaintiff had expected. *Id.* at 122, 563 S.E.2d at 24. The mailbags ranged from one pound to 400 pounds. *Id.* The Commission concluded the plaintiff's injury was not the result of an accident. *Id.* at 123, 563 S.E.2d at 25. This Court held the Commission's finding that "[m]ailbags often . . . were heavier or lighter than anticipated" was unsupported by the evidence where the plaintiff "merely testified mailbags were often overweight, not that this fact was unanticipated by him when he lifted them." *Id.* at 124, 563 S.E.2d at 26. Therefore, this Court reversed the Commission's Opinion and Award. *Id.* at 124-25, 563 S.E.2d at 26.

¶ 24 However, the dissenting opinion concluded that, although the bags were sometimes heavier or lighter than expected, "the evidence as a whole clearly supports the Commission's findings that plaintiff's job required him to lift weights up to 400 pounds"; "that plaintiff never knew prior to lifting mailbags how much they weighed"; and "that it was not unusual for mailbags to be extremely heavy" and for the plaintiff to be unaware of that fact until he moved them. *Id.* at 126, 563 S.E.2d at 27. Consequently, the dissent would have concluded the plaintiff "engaged in his normal duties and using his normal motions when injured." *Id.* The North Carolina Supreme Court reversed this Court for the reasons stated in the dissent. 356 N.C. 419, 571 S.E.2d 586 (2002).

¶ 25 Here, unlike in *Evans*, Plaintiff testified she had never moved a patient of this size without more than one person assisting. The plaintiff in *Evans* did not claim that she would have usually had more help—indeed, the resident's family member was assisting the plaintiff—only that moving the resident required more force than she expected. Similarly, the plaintiff in *Landry* did not claim he would usually lift a heavy bag with more assistance, only that he did not expect the particular bag in

question to be as heavy as it was. However, there was no evidence in either of these cases showing the plaintiffs experienced unexpected circumstances outside the normal course of their employment. In this case, although Plaintiff did have to move large patients as a part of her normal duties, the Commission's Findings reflect she never had to do so in the manner which led to her injury and, unlike in *Evans* and *Landry*, this was outside the usual, normal, and expected job duties. Moreover, the testimony during the hearing supports those Findings, and it is not this Court's place to reweigh the evidence. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

¶ 26 Thus, here, we conclude the Commission's Findings support its Conclusion Plaintiff's injury was the result of an accident. Therefore, in turn, the Commission did not err in concluding Plaintiff suffered a compensable injury under the Workers' Compensation Act. Consequently, the Commission did not err in entering its Opinion and Award in favor of Plaintiff.

Conclusion

¶ 27 Accordingly, for the foregoing reasons, we affirm the Commission's Opinion and Award.

AFFIRMED.

Judges DILLON and DIETZ concur.

CLARK v. CLARK

[280 N.C. App. 384, 2021-NCCOA-652]

ELIZABETH ANN CLARK, PLAINTIFF
v.
ADAM MATTHEW CLARK AND KIMBERLY RAE BARRETT, DEFENDANTS

No. COA20-447

Filed 7 December 2021

1. Evidence—witness testimony—process of making digital copy of electronic devices—not involving specialized knowledge

In an action for libel per se, intentional infliction of emotional distress, and unlawful disclosure of private images, there was no error in the admission of testimony by plaintiff's witness regarding how the witness made a digital copy of plaintiff's electronic devices. Although the testimony did not rely on specialized knowledge and was therefore more properly considered to be lay testimony and not expert testimony, plaintiff could not demonstrate prejudice in its admission, since it served to corroborate plaintiff's own testimony about her electronic communications and social media posts.

2. Appeal and Error—preservation of issues—affirmative defense—election of remedies—not raised before trial court

In an action for libel per se, intentional infliction of emotional distress (IIED), and unlawful disclosure of private images, defendant did not preserve for appeal his argument that the IIED claim could not go forward on the basis that it was subsumed by other causes of action, where he failed to raise this affirmative defense of election of remedies either at trial or in his post-trial motions.

3. Emotional Distress—intentional infliction—judgment notwithstanding the verdict—sufficiency of evidence

In an action for libel per se, intentional infliction of emotional distress, and unlawful disclosure of private images brought by plaintiff against her husband, defendant was not entitled to relief on his post-trial motion for judgment notwithstanding the verdict where plaintiff presented more than a scintilla of evidence of each element of IIED, including that plaintiff experienced severe distress in the form of anxiety, frequent hysterical crying, and hyperventilation, for which plaintiff sought counseling, and that her distress was directly caused by defendant's extreme and outrageous conduct consisting not only of conducting an affair with another woman but also of harassing and stalking plaintiff, telling plaintiff he would do

everything he could to make her life miserable, humiliating plaintiff by posting her personal information and photographs of her online, and creating a fake social media profile announcing plaintiff's supposed availability for "no strings attached" sexual intercourse.

4. Libel and Slander—libel per se—publication—authentication—sufficiency of evidence

In an action for libel per se, intentional infliction of emotional distress, and unlawful disclosure of private images filed by plaintiff against her husband, defendant was not entitled to relief on his post-trial motion for judgment notwithstanding the verdict on the per se libel claim. Plaintiff presented more than a scintilla of evidence that defendant published two libelous social media postings where she detailed how she traced the postings to defendant's email address and one of his online profiles. Further, plaintiff's own testimony provided the necessary authentication of the postings through her first-hand observation and knowledge of them as required by Evidence Rule 901(b)(1).

5. Privacy—unlawful disclosure of private images—"intimate parts"—topless photo

In an action for libel per se, intentional infliction of emotional distress, and unlawful disclosure of private images (pursuant to N.C.G.S. § 14-190.5A(b)) brought by plaintiff against her husband, defendant was not entitled to relief on his post-trial motion for judgment notwithstanding the verdict on the unlawful disclosure claim where plaintiff presented more than a scintilla of evidence that the images of plaintiff that defendant had posted online—including a topless photo—showed "intimate parts" as defined in section 14-190.5A(a)(3).

6. Divorce—separation agreement and property settlement—effect of mutual release provision—conduct occurring after execution

In an action for libel per se, intentional infliction of emotional distress, and unlawful disclosure of private images brought by plaintiff against her husband, defendant's argument that plaintiff waived these claims by signing a separation agreement and property settlement, which included a mutual release provision, had no merit where the conduct forming the basis of the claims took place after the parties executed the agreement.

7. Libel and Slander—damages—compensatory—punitive—no substantial miscarriage of justice

Where a jury awarded plaintiff $1 million in damages after finding defendant responsible for libel per se, the trial court did not err by denying defendant's post-trial motion for judgment notwithstanding the verdict where there was no substantial miscarriage of justice because libel per se allows for presumed damages for pain and suffering without a showing of special damages. Further, there was no error in the punitive damages award because there was no requirement that the jury had to consider all of the factors contained in N.C.G.S. § 1D-35.

Appeal by Defendant from judgment entered 17 September 2019 and order entered 30 October 2019 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 12 May 2021.

The Michael Porter Law Firm, by Michael R. Porter; and The Charleston Law Group, by Jose A. Coker and R. Jonathan Charleston, for Plaintiff-Appellee.

Tharrington Smith, LLP, by Jeffrey R. Russell and Evan B. Horwitz, for Defendant-Appellant.

WOOD, Judge.

¶ 1 On September 17, 2019, a jury found Defendant, Adam Clark, ("Defendant Clark") liable for unlawful disclosure of private images, intentional infliction of emotional distress ("IIED"), and libel. Post-trial, Defendant Clark filed a motion for judgment notwithstanding the verdict ("JNOV"), and in the alternative, motion for new trial, which was denied. On appeal, Defendant Clark contends the trial court erred in admitting expert witness testimony; allowing Plaintiff, Elizabeth Clark, ("Plaintiff") to proceed with an IIED claim; and denying his post-trial motion. After careful review of the record and applicable law, we disagree.

I. Factual and Procedural Background

¶ 2 On April 3, 2010, Plaintiff and Defendant Clark were married. At the time of their marriage, Defendant Clark held the rank of Captain in the United States Army. In or around May 2010, Plaintiff placed a personal advertisement on the website Craigslist. Through this advertisement, Plaintiff met a man with whom she had a sexual affair. According to Plaintiff, her extramarital affair lasted approximately ten months.

¶ 3 The couple remained together and attended several "marriage retreats," through the U.S. Army. During their marriage retreats, Plaintiff and Defendant Clark completed "exercises of trying to open up to your spouse, reconnect[ing] . . . . [T]hey go into forgiveness of things." Thereafter, the couple procreated two children in 2014 and 2015, respectively. In October 2015, Defendant Clark was promoted to Major.

¶ 4 In the spring of 2016, Defendant Clark attended Army training at Fort Belvoir, Virginia. While staying at Fort Belvoir, Defendant Clark met Defendant, Kimberly Barrett, MD ("Defendant Barrett"). Defendant Barrett held the rank of Lieutenant Colonel in the Army and knew Defendant Clark was married at the time. While at Fort Belvoir, Defendants Clark and Barrett stayed in barracks. The barracks were "like a U shape and it was two floors and [Defendants Clark and Barrett] were [in] the same long building, but [Defendant Barrett] was down on the other end." While attending their training, Defendants Clark and Barrett "had been all alone in each other's rooms."

¶ 5 Defendant Barrett testified that her relationship with Defendant Clark started by Defendant Clark "helping [her] with homework or papers. Sometimes [she] had questions. There is a lot of acronyms in the -- field, but in the military, there are a lot of acronyms that [she] wasn't familiar with." While at Fort Belvoir, Defendant Clark told Defendant Barrett "he did not have a good relationship" with his wife.

¶ 6 While Defendant Clark completed his educational program at Fort Belvoir, Plaintiff "notice[d] a little bit of change" in her husband. Defendant Clark did not travel home to North Carolina to visit and "wasn't texting [Plaintiff] as often. One time [Plaintiff] couldn't get ahold of him and [she] tried calling his hotel room, [but he] wouldn't pick up when he was supposed to be in there . . . . He was short with [her] on the telephone."

¶ 7 Plaintiff used her cellphone to "trace or track" Defendant Clark's cellphone, during which time Defendant Clark's phone was "showing a different location from where his room was at." Defendant Clark's phone was "pinging . . . from the other end of the hall," from where Defendant Barrett was staying.

¶ 8 When Defendant Clark came home from Fort Belvoir for Independence Day, Plaintiff discovered he "was texting a female. [She] found a number in his phone." When Plaintiff asked Defendant Clark who the female was, he replied, "I don't know what you're talking about." Finding the phone number caused Plaintiff "a lot of emotional distress." The couple argued about it, and Plaintiff experienced

"stroke-like symptoms." Plaintiff was ultimately diagnosed with "[m]igraines and stress." Defendant Clark returned to Fort Belvoir shortly thereafter.

¶ 9 In September 2016, Plaintiff discovered text messages between Defendants Clark and Barrett, in which Defendant Clark sent Defendant Barrett a picture of his penis taken in Plaintiff and Defendant Clark's home. At the time she discovered the sexually explicit photograph, Defendant Clark had changed Defendant Barrett's name in his cellphone's contact information to "Jane S." Plaintiff knew "Jane S." was Defendant Barrett because she had matched the cellphone number of "Jane S." with that of Defendant Barrett.

¶ 10 On September 11, 2016, Plaintiff asked Defendant Clark if he "still had [Defendant Barrett's] number." Plaintiff threatened to call Defendant Barrett, and Defendant Clark "jumped up really fast and chased after [Plaintiff] as [Plaintiff] was dialing [Defendant Barrett's] number." Plaintiff threatened to ask Defendant Barrett if she and Defendant Clark were having an extramarital affair. Because of this interaction, the couple fought, and Defendant Clark left their marital home.

¶ 11 Although Plaintiff and Defendant Clark separated on September 11, 2016, the couple attempted reconciliation by maintaining an emotionally and sexually intimate relationship. On March 17, 2017, Plaintiff and Defendant Clark executed a separation agreement, in which Defendant Clark agreed to pay $1,850 in monthly child support to Plaintiff. The separation agreement was drafted by Defendant Clark's attorney, and Plaintiff was not represented by independent counsel at the time.

¶ 12 Throughout June and July 2017, Plaintiff and Defendant Clark engaged in sexual intercourse and recorded themselves doing so. Also in July 2017, Defendant Clark and Defendant Barrett conceived a child together through *in vitro* fertilization. Defendant Clark continued to maintain an intimate and sexual relationship with both his wife and with his paramour during this time. In August 2017, Defendant Clark was located in Boston, Massachusetts for additional training. Plaintiff attempted to videocall Defendant Clark through Facetime, but Defendant Clark did not answer. When Defendant Clark did not answer, Plaintiff "sent him a topless photo." Plaintiff did not send the topless photograph to anyone else.

¶ 13 In September 2017, Plaintiff and Defendant Clark stopped having sexual intercourse. Around this time, Defendant Clark began complaining about the amount he paid to Plaintiff in child support. In October 2017, Plaintiff and Defendant Clark exchanged text messages, in which

Plaintiff sent Defendant Clark "a picture of female genitalia." Around that same time, Plaintiff discovered Defendant Barrett was pregnant with Defendant Clark's child.[1]

¶ 14 In January 2018, Plaintiff discovered a Craigslist advertisement and believed it to be about herself. The advertisement stated,

> Liz is super hot! Shows you what plastic surgeons and eating disorders can do for you in 2018. There's a reason she's been divorced twice and can't take care of her kids. She's a plaything, nothing more. Hope you fellas are wearing condoms, she's got herpes.

Plaintiff believed Defendant Clark posted the advertisement, because he "always said [she] had an eating disorder and when [they] started not getting along, he said that [she] didn't take care of [her] children and [she] was a bad mother." Plaintiff responded to the advertisement, stating that she knew Defendant Clark posted it. Whomever posted the advertisement denied being Defendant Clark. However, when Plaintiff sent insulting language to the poster of the advertisement, Defendant Clark sent Plaintiff a text message inquiring as to why he received such language.

¶ 15 In the text message, Defendant Clark included a "screenshot" of the message he received. Plaintiff observed that the message was sent to an email address with the username "elizabethclark0403." Plaintiff did not use an email address with that username but attempted to log into the email account. When Plaintiff attempted to do so, the "recovery email" matched that of Defendant Clark's personal email address.

¶ 16 In March 2018, Plaintiff began interacting with Defendant Clark, who was using the alias "Brian Bragg" on the social networking platform, Kik.[2] The Brian Bragg[3] account sent Plaintiff the photograph of her nude breasts, saying, "Saw this floating around the internet in the Fayetteville chat rooms just letting you know." "Brian Bragg" also stated the image was "all over the place," and that he hoped Plaintiff "[slept] well knowing [her] fun bags [were] hanging out there for the world to see."

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1. Defendants Clark and Barrett had a child together on March 7, 2018.

2. When asked if Defendant Clark used the alias "Brian Bragg," Defendant Clark pled the Fifth Amendment.

3. Plaintiff believed "Brian Bragg" was Defendant Clark, as the "Brian Bragg" account used a photograph that Plaintiff took of Defendant Clark as a profile picture.

¶ 17 In May 2018, Plaintiff discovered a Facebook "weight loss" advertisement depicting Plaintiff. The advertisement was composed of a post-pregnancy photograph of Plaintiff next to the photograph of Plaintiff's nude breasts. Prior to Plaintiff finding the advertisement, "Brian Bragg" had threatened to find and post Plaintiff's post-pregnancy photographs on Kik.

¶ 18 Throughout 2018, Plaintiff's friends and co-workers contacted her when they saw "Liz Clark" profiles, using a photograph of Plaintiff as a profile picture, in Kik chatrooms soliciting "no strings attached sex." Kik business records revealed that the "Liz Clark" Kik profiles could be traced to an IP address that matched the IP address of Defendants Clark and Barrett's residence.

¶ 19 When Plaintiff's friends and co-workers notified her that they saw the saw "Liz Clark" Kik profiles, she "was extremely embarrassed" and her "heart started racing." Plaintiff also received photographs from "Brian Bragg" depicting herself and her vehicle. Attached to these photographs were messages discussing how people were following Plaintiff. One message from "Brian Bragg" stated, "We are going to continue doing everything in our power to make your life miserable."

¶ 20 In August 2018, Plaintiff brought the instant action, asserting claims against both Defendants Clark and Barrett for libel *per se*; intentional and negligent infliction of emotional distress; and a violation of N.C. Gen. Stat. § 14-190.5A, a statute providing criminal sanctions for what is commonly known as "revenge porn." Plaintiff asserted additional causes of action against Defendant Barrett for alienation of affection and criminal conversation. In April 2019, Defendant Clark was arrested for stalking and cyberstalking Plaintiff in violation of N.C. Gen. Stat. §§ 14-277.3(A)(c) and 14-196.3.

¶ 21 In July 2019, the Cumberland County Superior Court barred the use of expert witness testimony in the civil actions filed by Plaintiff based upon a motion filed by Defendants Clark and Barrett to strike Plaintiff's tardy designation of an expert witness.

¶ 22 The case proceeded to trial in August 2019. During trial, Derek Ellington ("Ellington") was permitted to testify. Ellington is a digital forensics examiner in Cumberland County. During Ellington's testimony, he laid the foundation for the entry of a flash drive containing nearly 32,000 files. Ellington preserved the files from Plaintiff's electronic devices, and social media and email accounts. The data Ellington gathered and saved demonstrated that Plaintiff had only sent the "topless photo" of herself to Defendant Clark.

¶ 23 After a jury trial, the trial court entered judgment against Defendant Clark for libel *per se*, unlawful disclosure of private images/revenge porn, and IIED on September 17, 2019. Plaintiff was awarded $1,510,000.00 in compensatory damages and $500,000.00 in punitive damages. Defendant Clark filed a motion for judgment notwithstanding the verdict ("JNOV"), and in the alternative, a motion for a new trial on September 26, 2019. The trial court denied Defendant Clark's motions on October 30, 2019. Defendant Clark appeals from both the September 17, 2019 judgment and the October 30, 2019 order denying his post-trial motion.

II. Discussion

¶ 24 Defendant Clark raises several arguments on appeal. Each will be addressed in turn.

A. Ellington's Testimony

¶ 25 **[1]** Defendant Clark first contends the trial court erred "by admitting evidence and testimony from an expert witness who was not qualified as such." We disagree.

1. Standard of Review

¶ 26 As a preliminary matter, the parties dispute the proper appellate standard of review. Defendant Clark contends the appropriate standard of review is *de novo*, because "[w]here the plaintiff contends the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*." *Cornett v. Watauga Surgical Grp., P.A.*, 194 N.C. App. 490, 493, 669 S.E.2d 805, 807 (2008) (citations omitted). Conversely, Plaintiff asks this Court to review the admission of Ellington's testimony for an abuse of discretion. Rule 104(a) of our rules of evidence provides that "preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court." N.C. Gen. Stat. § 8C-1, Rule 104(a) (2020). Decisions made under Rule 104(a) are addressed to the sound discretion of the trial court. *See State v. Fearing*, 315 N.C. 167, 174, 337 S.E.2d 551, 554 (1985).

¶ 27 After careful review of the applicable law, we review *de novo* whether Ellington testified as an expert witness. *See State v. Broyhill*, 254 N.C. App. 478, 488, 803 S.E.2d 832, 839 (2017) (citation omitted); *see also State v. Jackson*, 258 N.C. App. 99, 107, 810 S.E.2d 397, 402 (2018) (noting that the Court applied a *de novo* standard of review "because determining whether the State's experts' testimonies

constituted expert opinions . . . was a question" of law.) (citing *State v. Davis*, 368 N.C. 794, 797-98, 785 S.E.2d 312, 314-15 (2015)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted). However, whether the trial court erroneously admitted Ellington's testimony is reviewed for an abuse of discretion. *See Crocker v. Roethling*, 363 N.C. 140, 143, 675 S.E.2d 625, 628-29 (2009) (citation omitted); *see also State v. Turbyfill*, 243 N.C. App. 183, 185-86, 776 S.E.2d 249, 252 (2015) (citation omitted). "Abuse of discretion results where the Court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Turbyfill*, 243 N.C. App. at 185-86, 776 S.E.2d at 252 (citation omitted).

2. Whether Ellington's Testimony Constitutes Expert Testimony

¶ 28 The parties next dispute whether Ellington testified as an expert or gave a lay opinion. "Our Supreme Court . . . explained the threshold difference between expert opinion and lay witness testimony." *Broyhill*, 254 N.C. App. at 485, 803 S.E.2d at 839 (citing *Davis*, 368 N.C. at 798, 785 S.E.2d at 315). "[W]hen an expert witness moves beyond reporting what he saw or experienced through his senses, and turns to interpretation or assessment 'to assist' the jury based on his 'specialized knowledge,' he is rendering an expert opinion." *Davis*, 368 N.C. at 798, 785 S.E.2d at 315 (quoting N.C. Gen. Stat. § 8C-1, Rule 702(a)). "Ultimately, 'what constitutes expert opinion testimony requires a case-by-case inquiry' through an examination of 'the testimony as a whole and in context.' " *Broyhill*, 254 N.C. App. at 485, 803 S.E.2d at 839 (quoting *Davis*, 368 N.C. at 798, 785 S.E.2d at 315).

¶ 29 Here, Ellington testified about the general process for making a forensic or digital copy of electronic devices and specifically testified as to how he made a copy of Plaintiff's electronic devices. Ellington's testimony laid the foundation[4] for a flash drive containing files from Plaintiff's devices, demonstrating Plaintiff did not send the "topless photo" to anyone other than Defendant Clark. A review of Ellington's testimony reveals that he testified not as an expert, but as a lay witness. Ellington testified as to what he "saw or experienced" in creating copies of Plaintiff's devices and accounts. He did not interpret or assess

4. Defendant Clark does not argue that the flash drive was improperly authenticated under N.C. Gen. Stat. § 8C-1, Rule 901.

the devices or accounts but explained the process he used for Plaintiff's devices was one that he did daily.

¶ 30 Presuming *arguendo* Ellington testified as an expert, Defendant Clark failed to sufficiently demonstrate prejudice. *See State v. Babich*, 252 N.C. App. 165, 172, 797 S.E.2d 359, 364 (2017) ("Where it does not appear that the . . . admission of evidence played a pivotal role in determining the outcome of the trial, the error is harmless.") (quoting *State v. Mason*, 144 N.C. App. 20, 27-28, 550 S.E.2d 10, 16 (2001)). Here, Plaintiff testified about the text messages, emails, and social media messages and postings. Ellington's testimony was not "pivotal" in determining whether Defendants Clark and Barrett posted Plaintiff's nude breasts on the internet; rather, it corroborated Plaintiff's testimony that she sent the topless photograph to Defendant Clark. Therefore, we find no error in the trial court's decision to allow Ellington to testify.

B. IIED Claims

¶ 31 Next, Defendant Clark contends the trial court erred by allowing Plaintiff's IIED claim to proceed "when the conduct is subsumed by other causes of action," and by denying Defendant Clark's post-trial motion "because there was insufficient evidence for the claim of IIED to be submitted to the jury." We disagree.

¶ 32 Whether Plaintiff's IIED cause of action is subsumed by her other asserted torts is a question of law reviewed *de novo*. *See Piazza v. Kirkbride*, 246 N.C. App. 576, 579, 785 S.E.2d 695, 698 (2016), *modified*, 372 N.C 137, 827 S.E.2d 479 (2019). "The standard of review of a ruling entered upon a motion for judgment notwithstanding the verdict is 'whether, upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury.' " *Everhart v. O'Charley's Inc.*, 200 N.C. App. 142, 148-49, 683 S.E.2d 728, 735 (2009) (quoting *Branch v. High Rock Realty, Inc.*, 151 N.C. App. 244, 249-50, 565 S.E.2d 248, 252 (2002)). Generally, "[i]f there is more than a scintilla of evidence supporting each element of the nonmoving party's claim, the motion for directed verdict or JNOV should be denied." *Horner v. Byrnett*, 132 N.C. App. 323, 325, 511 S.E.2d 342, 344 (1999) (citation omitted); *see also Norman Owen Trucking, Inc. v. Morkoski*, 131 N.C. App. 168, 172, 506 S.E.2d 267, 270 (1998). "A scintilla of evidence is defined as very slight evidence." *Hayes v. Waltz*, 246 N.C. App. 438, 442-43, 784 S.E.2d 607, 613 (2016).

¶ 33 In determining whether the trial court erred in denying a JNOV, "we must take the plaintiff's evidence as true, and view all of the evidence in the light most favorable to him/her, giving him/her the benefit of every reasonable inference which may be legitimately drawn therefrom, with conflicts, contradictions, and inconsistencies being resolved in the plaintiff's favor." *Watson v. Dixon*, 130 N.C. App. 47, 52, 502 S.E.2d 15, 19 (1998) (citations and internal quotation marks omitted).

3. Election of Remedies

¶ 34 **[2]** Defendant Clark contends the trial court erred in permitting Plaintiff to pursue her claim for IIED, "when the conduct is subsumed by other causes of action." Defendant Clark specifically contends that Plaintiff cannot recover under both IIED and another tort for the same conduct. Plaintiff argues Defendant Clark failed to preserve this argument for appellate review, as it "was never raised in [Defendant] Clark's post-trial motions."

¶ 35 "One is held to have made an election of remedies when he chooses with knowledge of the facts between two inconsistent remedial rights." *Lamb v. Lamb*, 92 N.C. App. 680, 685, 375 S.E.2d 685, 687 (1989) (citation omitted). "The purpose of the doctrine of election of remedies is to prevent more than one redress for a single wrong." *Triangle Park Chiropractic v. Battaglia*, 139 N.C. App. 201, 204, 532 S.E.2d 833, 835 (2000) (citation omitted). The doctrine of "[e]lection of remedies is an affirmative defense which must be pleaded by the party relying on it." *North Carolina Federal Sav. & Loan Ass'n v. Ray*, 95 N.C. App. 317, 323, 382 S.E.2d 851, 856 (1989) (citations omitted).

¶ 36 While Defendant Clark contends Plaintiff's IIED claim should not have been submitted to a jury because it was subsumed by other causes of action, Defendant Clark did not raise the defense of election of remedies at trial or in his post-trial motions. Therefore, he may not raise this argument on appeal. *Id.*; *see also State ex rel. Easley v. Rich Food Servs., Inc.*, 139 N.C. App. 691, 704, 535 S.E.2d 84, 92-93 (2000).

4. Sufficiency

¶ 37 **[3]** Next, Defendant Clark contends the trial court erred in denying his post-trial motions because Plaintiff did not present evidence to support each element of IIED. We disagree.

¶ 38 "To state a claim for intentional infliction of emotional distress, a plaintiff must allege: '(1) extreme and outrageous conduct (2) which is intended to cause and does cause (3) severe emotional distress to another." ' *Norton v. Scotland Mem'l Hosp., Inc.*, 250 N.C. App. 392, 397, 793 S.E.2d 703, 708 (2016) (citation omitted). "Extreme and outrageous

conduct is defined as conduct that is 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Id.* (citation omitted).

a. Severe Emotional Distress

¶ 39 Defendant Clark first argues Plaintiff failed to present evidence that she suffered from "severe emotional distress." We disagree.

¶ 40 "[T]he term 'severe emotional distress' means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Waddle v. Sparks*, 331 N.C. 73, 83, 414 S.E.2d 22, 27 (1992) (citation and emphasis omitted). However, severe emotional distress does not require medical expert testimony. *Williams v. HomEq Serv. Corp.*, 184 N.C. App. 413, 419, 646 S.E.2d 381, 385 (2007). Testimony of a plaintiff's "friends, family, and pastors can be sufficient to support a claim. . . ." *Id.* (citations omitted).

¶ 41 Here, Plaintiff testified at trial that she cried hysterically, hyperventilated, and sought out a counselor at a local clinic in response to the conduct of Defendants Clark and Barrett. One of Plaintiff's friends testified that Plaintiff was "very emotionally distraught and crying" on a weekly basis and that Plaintiff experienced anxiety. Although Plaintiff did not attend counseling for her anxiety on a regular basis, she testified this was out of fear that such treatment would negatively impact her probability of maintaining shared custody of her children. Taking the evidence in the light most favorable to Plaintiff, we hold there was more than a scintilla of evidence she suffered severe emotional distress as a result of the conduct of Defendants Clark and Barrett.

b. Causation

¶ 42 Defendant Clark further contends the trial court erred in denying his post-trial motion because Plaintiff failed to show a causal link between Defendant Clark's conduct and Plaintiff's emotional harm. We disagree.

¶ 43 Intentional infliction of emotional distress requires outrageous conduct that is intended to cause and does cause severe emotional distress. *See Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 487-88, 340 S.E.2d 116, 119-20 (1986) (citation omitted).

> The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress. Recovery

> may be had for the emotional distress so caused and for any other bodily harm which proximately results from the distress itself.

Id. (citation omitted).

¶ 44 Defendant Clark argues Plaintiff failed to show his conduct caused Plaintiff severe emotional distress because Plaintiff experienced "stroke-like symptoms" and was diagnosed with "migraines and stress" prior to the complained of conduct to support her IIED claim. While the trial court noted Plaintiff's emotional distress included "stroke-like symptoms," it did not solely rely on such symptoms in finding Plaintiff produced evidence of severe emotional distress. Specifically, the trial court noted, "that Defendant Clark's conduct did cause severe emotional distress to Plaintiff in the form of anxiety and also physical manifestations, including stroke like symptoms." Plaintiff presented evidence that Defendant Clark acted with a disregard to Plaintiff's emotional state and that there was a high possibility of emotional distress in that, Defendant Clark posed as "Brian Bragg" and engaged in "long-term electronic harassment of . . . Plaintiff to include, inter alia, calling the Plaintiff disparaging names, including 'whore' and 'white trash' "; Defendant Clark created a fake Kik profile and posed as Plaintiff, causing the profile to become a member in various chatrooms intended for "no strings attached sex"; and Defendant Clark posted libelous social media postings about Plaintiff on Craigslist and Facebook.

¶ 45 There is no dispute Plaintiff experienced "stroke-like symptoms" prior to the parties' execution of the separation agreement. Plaintiff experienced anxiety, hyperventilation, and other emotional distress as a result of the conduct of Defendants Clark and Barrett. Plaintiff testified this was caused by Defendants Clark and Barrett messaging her that they would do "everything in [their] power to make [her] life miserable" and by discovering fake "Liz Clark" Kik profiles soliciting "no strings attached" sexual intercourse. Accordingly, we hold there was more than a scintilla of evidence to find a causal link between the complained of conduct and Plaintiff's emotional distress.

c. Outrageous Conduct

¶ 46 Next, Defendant Clark argues Plaintiff failed to present sufficient evidence of extreme and outrageous conduct because trading mere insults does not give rise to a claim of IIED. We disagree.

¶ 47 "[T]he initial determination of whether conduct is extreme and outrageous is a question of law," to be determined by the court. *Johnson*

v. Bollinger, 86 N.C. App. 1, 6, 356 S.E.2d 378, 381 (1987) (citing *Briggs v. Rosenthal*, 73 N.C. App. 672, 676, 327 S.E.2d 308, 311, *cert. denied*, 314 N.C. 114, 332 S.E.2d 479 (1985)). Conduct is considered extreme or outrageous "when a defendant's conduct exceeds all bounds usually tolerated by decent society." *Watson*, 130 N.C. App. at 52, 502 S.E.2d at 19 (citation omitted). Conduct has also been deemed "extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Chidnese v. Chidnese*, 210 N.C. App. 299, 316, 708 S.E.2d 725, 738 (2011) (internal quotation marks and citation omitted).

> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime, plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion . . . .

Id. (citation omitted). In *Watson v. Dixon*, this Court found sufficient evidence of "extreme and outrageous behavior" where the defendant "harass[ed]" the plaintiff, and "frightened and humiliated [the plaintiff] with cruel practical jokes, which escalated to obscene comments and behavior of a sexual nature . . . ." 130 N.C. App. at 53, 502 S.E.2d at 20.

¶ 48 Viewing the evidence in the light most favorable to Plaintiff, and taking that evidence as true, the evidence tends to show that Defendant Clark began harassing and stalking Plaintiff after the date of separation; frightened Plaintiff by stating, "We are going to continue doing everything in our power to make your life miserable"; and humiliated Plaintiff by posting advertisements and photographs of Plaintiff online, containing Plaintiff's personal information. Thus, we hold the trial court did not err in denying Defendant Clark's JNOV, as Plaintiff presented more than a scintilla of evidence of "extreme and outrageous behavior." *See Watson*, 130 N.C. App. at 53, 502 S.E.2d at 20 (citing *Denning-Boyles v. WCES, Inc.*, 123 N.C. App. 409, 473 S.E.2d 38 (1996); *Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 378 S.E.2d 232 (1989), *disc. review improvidently allowed*, 326 N.C. 356, 388 S.E.2d 769 (1990); *Hogan*, 79 N.C. App. 483, 340 S.E.2d 116).

C. Plaintiff's Libel Claim

¶ 49 **[4]** Next, Defendant Clark contends the trial court erred in denying his post-trial motion with respect to Plaintiff's libel claim. Defendant Clark brings forth two arguments with respect to Plaintiff's claim for libel *per se*; namely, whether Plaintiff failed to prove the libelous statements were published and whether two libelous publications were properly authenticated.

¶ 50 "North Carolina law recognizes three classes of libel . . . . [P]ublications obviously defamatory . . . are called libel *per se*." *Daniels v. Metro Magazine Holding Co., L.L.C.*, 179 N.C. App. 533, 538, 634 S.E.2d 586, 590 (2006) (citation omitted). Libel *per se* is

> a publication by writing, printing, signs or pictures which, when considered alone without innuendo, colloquium or explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt, or disgrace.

Renwick v. News & Observer Pub. Co., 310 N.C. 312, 317-18, 312 S.E.2d 405, 409 (1984) (citation omitted). "It is an elementary principle of law that there can be no libel without a publication of the defamatory matter." *Satterfield v. McLellan Stores Co.*, 215 N.C. 582, 584, 2 S.E.2d 709, 711 (1939). "To constitute a publication, such as will give rise to a civil action, there must be a communication of the defamatory matter to some third person or persons." *Id.* (citation omitted).

a. Publication

¶ 51 Defendant Clark first contends Plaintiff failed to present sufficient "evidence that Defendant Clark publicized the alleged content to Facebook or Craigslist." We disagree.

¶ 52 There are two libelous electronic social media postings at issue: a Craigslist advertisement and the Facebook "weight loss" advertisement. Craigslist itself is a website in which individuals can post personal advertisements for third-party viewing. Plaintiff testified she discovered the Craigslist advertisement, and presumably, other individuals observed the personal advertisement as well. Thus, there was sufficient evidence that the Craigslist advertisement was published.

¶ 53 Plaintiff further testified that she responded to the Craigslist ad online with an insulting message directed at Defendant Clark. Defendant

Clark, in response, text messaged a picture of Plaintiff's message, inquiring as to why she had sent him such a message. From Defendant Clark's response, Plaintiff was able to see that the "poster" of the personal ad used the email "elizabethclark0403." This was not Plaintiff's personal email, but she attempted to log into the email account. Because Plaintiff did not have the login information for "elizabethclark0403," she attempted to "recover" the login information through Google's email system.[5] Upon doing so, Plaintiff discovered the "recovery email" for "elizabethclark0403" was Defendant Clark's personal email address. Therefore, we hold there was more than a scintilla of evidence that Defendant Clark published the Craigslist advertisement.

¶ 54 Defendant Clark further argues there was insufficient evidence that Defendant Clark published the Facebook "weight loss" advertisement. We disagree.

¶ 55 Plaintiff testified a third party sent Plaintiff the Facebook advertisement, establishing that the ad was indeed published. Plaintiff further testified that both photographs used in the advertisement were in the sole possession of Defendant Clark. Further, "Brian Bragg" mentioned Plaintiff's post-pregnancy photographs and that he would "make sure to find" such photographs shortly before the Facebook advertisement was posted. As Plaintiff presented more than a scintilla of evidence that Defendant Clark published the Facebook advertisement, we find no error.

b. Authentication

¶ 56 Defendant Clark next argues the trial court erred by denying his motion for JNOV because Plaintiff did not properly authenticate the libelous postings. We disagree.

¶ 57 Under Rule 901 of our evidentiary rules, "[t]he requirement of authentication . . . is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2020). Rule 901(b) provides examples of authentication methods that satisfy the requirements of Subsection (a), including testimony of a witness with knowledge "that a matter is what it is

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5. If a "gmail" or Google email account holder forgot their password or username, they can recover their Google account by entering certain information such as their username, their "recovery" email address, or a phone number. *See How to recover your Google account or Gmail*, https://support.google.com/accounts/answer/7682439?hl=en.

A "recovery email" is a separate email account Google account holders can use to recover their lost username or password.

claimed to be." N.C. Gen. Stat. § 8C-1, Rule 901(b)(1). Here, Plaintiff authenticated the libelous electronic postings through her own testimony. Plaintiff testified that she personally saw the advertisement, recognized it to be about her, and made a copy of the ad. Likewise, Plaintiff authenticated the Facebook advertisement by testifying the advertisement was sent directly to her by a third party and the advertisement exhibits characteristics of Facebook as a social media site, in that it demonstrates where viewers can interact with the posting. Accordingly, we hold Plaintiff sufficiently authenticated each libelous posting through first-hand knowledge under Rule 901(b)(1).

D. N.C. Gen. Stat. § 14-190.5A

¶ 58 **[5]** Next, Defendant Clark contends the trial court erred by denying his post-trial motion as there was insufficient evidence for the issue of "revenge porn" to be submitted to the jury. Specifically, Defendant Clark argues Plaintiff failed to show that he shared an image of "intimate parts" under N.C. Gen. Stat. § 14-190.5A.

¶ 59 N.C. Gen. Stat. § 14-190.5A prohibits the "disclosure of private images" and is commonly known as the "revenge porn" statute. Section 14-190.5A provides,

> A person is guilty of disclosure of private images if all of the following apply:
>
> (1) The person knowingly discloses an image of another person with the intent to do either of the following:
>
> a. Coerce, harass, intimidate, demean, humiliate, or cause financial loss to the depicted person.
>
> b. Cause others to coerce, harass, intimidate, demean, humiliate, or cause financial loss to the depicted person.
>
> (2) The depicted person is identifiable from the disclosed image itself or information offered in connection with the image.
>
> (3) The depicted person's intimate parts are exposed or the depicted person is engaged in sexual conduct in the disclosed image.
>
> (4) The person discloses the image without the affirmative consent of the depicted person.

N.C. Gen. Stat. § 14-190.5A(b) (2020). "Intimate parts" is statutorily defined as "[a]ny of the following naked human parts: (i) male or female genitals, (ii) male or female pubic area, (iii) male or female anus, or (iv) the nipple of a female over the age of 12." N.C. Gen. Stat. § 14-190.5A(a)(3).

¶ 60 Defendant Clark argues in his brief that the issue of revenge porn should not have been submitted to the jury, because the Facebook "weight loss" advertisement had a star emoji[6] covering one of Plaintiff's nipples and did not violate the "revenge porn" statute or Facebook's "Community Standards." However, Defendant Clark ignores that the topless photograph that appeared on Facebook with a star is the same photograph shared through Kik, sans star emoji. We hold that there was sufficient evidence as to each element contained within the "revenge porn" statute such that the trial court did not err in submitting the issue to the jury.

E. Separation Agreement & Property Settlement

¶ 61 **[6]** In his sixth argument on appeal, Defendant Clark contends that "[t]o the extent that the factual basis for any of Plaintiff's claims against Defendant Clark occur prior to March 16, 2017, they are waived by a provision in the parties' separation agreement entitled 'Mutual Release.' "

¶ 62 The "Mutual Release" provision provides,

> [E]ach party does hereby release and discharge the other of and from all causes of action, claims, rights or demands whatsoever, at law or in equity, which either of the parties ever had or now has against the other, known or unknown, by reason of any matter, cause, or thing up to the date of the execution of this agreement, except the cause of action for divorce based upon the separation of the parties. It is the intention of the parties that henceforth there shall be, as between them, only such rights and obligations as are specifically provided for in this agreement, the right of action for divorce, and such rights and obligations as are specifically provided for in any deed or other instrument executed contemporaneously or in connection herewith.

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6. The Merriam-Webster dictionary defines an "emoji" as "any of various small images, symbols, or icons used in text fields in electronic communication (such as text messages, email, and social media) to express the emotional attitude of the writer, convey information succinctly, communicate a message playfully without using words, etc."

However, Plaintiff's claims arise from Defendant Clark's conduct that occurred after the parties executed the agreement in March 2017. Plaintiff's claims arise from Defendant Clark's posting of libelous statements and explicit photographs in 2018. Therefore, this assignment of error is without merit.

F. Damages

¶ 63 **[7]** In Defendant Clark's final argument on appeal, he contends the trial court erred in denying his motion for JNOV "because the damages awarded to Plaintiff were improper and not supported by the evidence." We disagree.

¶ 64 The trial court has discretion to grant a new trial where the jury awards "[e]xcessive or inadequate damages appearing to have been given under the influence of passion or prejudice." N.C. R. Civ. P. 59(a)(6). However,

> our appellate courts should place great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for a new trial. Due to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observances of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires in a certain case.

Worthington v. Bynum, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982). "Consequently, an appellate court should not disturb a Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.*

¶ 65 Here, there is no evidence of a "substantial miscarriage of justice." Although the jury awarded $1,000,0000 in damages for libel *per se*, libel *per se* allows for presumed damages for pain and suffering without a showing of special damages. *See Iadanza v. Harper*, 169 N.C. App. 776, 779-80, 611 S.E.2d 217, 221 (2005).

¶ 66 Defendant Clark also contends that the award of punitive damages was inappropriate as the trial court failed to receive evidence or make findings of fact concerning all of the factors enumerated in N.C. Gen. Stat. § 1D-35. However, the jury is not mandated to consider all factors enumerated in Section 1D-35. The plain language of the statute allows

the trier of fact to consider such factors, but it is not a requirement. Accordingly, we hold the trial court did not err in denying Defendant Clark's post-trial motion with respect to damages.

III. Conclusion

¶ 67 After careful review of the record and applicable law, we conclude there was no error at trial. Additionally, we hold the trial court did not err in denying Defendant Clark's motion for JNOV. Plaintiff presented more than a scintilla of evidence in support of each asserted cause of action. We further hold the trial court did not err in denying Defendant Clark's post-trial motion because the separation agreement is inapplicable to the complained of conduct and the damages awarded to Plaintiff were proper.

NO ERROR AND AFFIRMED.

Judges TYSON and HAMPSON concur.

ELIZABETH ANN CLARK, Plaintiff
v.
ADAM MATTHEW CLARK and KIMBERLY RAE BARRETT, Defendants

No. COA20-446

Filed 7 December 2021

1. Evidence—witness testimony—process of making digital copy of electronic devices—not involving specialized knowledge

In an action for intentional infliction of emotional distress and alienation of affection, there was no error in the admission of testimony by plaintiff's witness regarding how the witness made a digital copy of plaintiff's electronic devices. Although the testimony did not rely on specialized knowledge and was therefore more properly considered to be lay testimony and not expert testimony, plaintiff could not demonstrate prejudice in its admission, since it served to corroborate plaintiff's own testimony about her electronic communications and social media posts.

2. Appeal and Error—preservation of issues—affirmative defense—election of remedies—not raised before trial court

In an action for intentional infliction of emotional distress and alienation of affection, defendant did not preserve for appeal her

argument that the former claim could not go forward on the basis that it was subsumed by other causes of action. Defendant failed to raise this affirmative defense of election of remedies either at trial or in her post-trial motion for judgment notwithstanding the verdict.

3. Emotional Distress—intentional infliction—judgment notwithstanding the verdict—sufficiency of evidence

In an action for intentional infliction of emotional distress (IIED) and alienation of affection based on defendant's affair with plaintiff's husband, defendant was not entitled to relief on her post-trial motion for judgment notwithstanding the verdict, where plaintiff presented more than a scintilla of evidence of each element of IIED, including that plaintiff experienced severe distress in the form of anxiety, frequent hysterical crying, and hyperventilation, for which plaintiff sought counseling, and that her distress was directly caused by defendant's extreme and outrageous conduct consisting not only of having the affair but also of conceiving a child with plaintiff's husband while the couple were attempting a reconciliation, telling plaintiff she would do everything she could to make her life miserable, and creating fake social media profiles announcing plaintiff's supposed availability for "no strings attached" sexual intercourse.

4. Alienation of Affections—subject matter jurisdiction—conduct in North Carolina—text messages

The trial court had subject matter jurisdiction over a claim for alienation of affection where plaintiff presented more than a scintilla of evidence that the injury to the marital relationship occurred in North Carolina, including that she discovered text messages between her husband and defendant during the time when her husband was in the marital home in North Carolina and that her husband sent defendant a sexually explicit photograph from the marital home. Further, defendant's invocation of the Fifth Amendment when asked about her sexual activity with plaintiff's husband in North Carolina could give rise to an inference that her truthful testimony on that subject would not be favorable to her.

5. Alienation of Affections—elements—sufficiency of evidence—sexual affair

In an action for intentional infliction of emotional distress and alienation of affection based on defendant's affair with plaintiff's husband, defendant was not entitled to relief on her post-trial motion for judgment notwithstanding the verdict, where plaintiff presented more than a scintilla of evidence of each element of alienation of

affection, including that plaintiff and her husband had some love and affection between them as shown by their communications and marital relations; that defendant interfered with the marital relationship and caused the loss of affection between the spouses by having a sexual relationship with plaintiff's husband, conceiving a child with him, and sharing texts and at least one sexually explicit photo with him; and that the husband's behavior toward plaintiff changed as a result.

6. Damages and Remedies—alienation of affection—intentional infliction of emotional distress—compensatory—punitive—not excessive

After a jury awarded plaintiff $1,200,000 in damages in her claims for intentional infliction of emotional distress (IIED) and alienation of affection—asserted against the woman who had an affair with plaintiff's husband—the trial court did not err by denying defendant's post-trial motion for judgment notwithstanding the verdict seeking relief from what she contended were excessive damages. Juries have wide latitude in awarding damages for heart balm torts, and the $450,000 compensatory damages were not improper given plaintiff's mental distress, her much lower earning potential than her husband's, the fact that she assumed half the marital debt and cared for their two children, and her loss of benefits as a military spouse. Further, the trial court properly instructed the jury regarding punitive damages as to the IIED claim, and there was no requirement that the jury had to consider all of the factors contained in N.C.G.S. § 1D-35(2).

Appeal by Defendant from judgment entered 17 September 2019 and order entered 30 October 2019 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 12 May 2021.

The Charleston Law Group, by Jose A. Coker and R. Jonathan Charleston; The Michael Porter Law Firm, by Michael Porter, for Plaintiff-Appellee.

Tharrington Smith, LLP, by Jeffrey R. Russell and Evan B. Horwitz, for Defendant-Appellant.

WOOD, Judge.

¶ 1 On September 17, 2019, a jury found Defendant, Kimberly Barrett, ("Defendant Barrett") liable for intentional infliction of emotional distress ("IIED") and alienation of affection. Post-trial, Defendant Barrett filed a motion for judgment notwithstanding the verdict ("JNOV"), which was denied. On appeal, Defendant Barrett contends the trial court erred in admitting expert witness testimony; allowing Plaintiff, Elizabeth Clark, ("Plaintiff") to proceed with her IIED claim; and denying her motion for JNOV. After careful review of the record and applicable law, we conclude there was no error at trial and affirm the trial court.

I. Factual and Procedural Background

¶ 2 Plaintiff married Defendant, Adam Clark, ("Defendant Clark") on April 3, 2010. At the time of their marriage, Defendant Clark held the rank of Captain in the United States Army. In or around May 2010, Plaintiff placed a personal advertisement on the website Craigslist, through which she met a man with whom she had a sexual affair. Plaintiff's extramarital affair lasted approximately ten months.

¶ 3 Plaintiff testified Defendant Clark was unaware of her affair, and the couple remained together and attended several "marriage retreats" provided by the Army. During these retreats, Plaintiff and Defendant Clark completed "exercises of trying to open up to your spouse, reconnect[ing] . . . . [T]hey go into forgiveness of things." The couple "wrote each other letters on trying to put the past behind [them] and move forward, how much [they] really loved each other." Thereafter, the couple procreated two children in 2014 and 2015, respectively.

¶ 4 In the spring of 2016, Defendant Clark attended a training at Fort Belvoir, Virginia. While staying at Fort Belvoir, Defendant Clark met Defendant Barrett, a Lieutenant Colonel in the Army and a staff obstetrics and gynecology physician. At the time Defendants Clark and Barrett met, Defendant Barrett knew Defendant Clark was married, but felt Defendant Clark "did not have a good relationship" with his wife.

¶ 5 While at Fort Belvoir, Defendants Clark and Barrett resided in barracks. The barracks were "like a U shape and it was two floors and [Defendants Clark and Barrett] were [in] the same . . . building, but [Defendant Barrett] was down on the other end." While attending their training, Defendants Clark and Barrett spent time "all alone in each other's rooms."

¶ 6 Defendant Barrett testified that her relationship with Defendant Clark started by Defendant Clark "helping [her] with homework or papers. Sometimes [she] had questions. There is a lot of acronyms in

the—field, but in the military, there are a lot of acronyms that [she] wasn't familiar with." After Defendants Clark and Barrett met each other, Plaintiff "notice[d] a little bit of change" in her husband. Defendant Clark did not travel home to North Carolina to visit and "wasn't texting [Plaintiff] as often. One time [Plaintiff] couldn't get ahold of him and [she] tried calling his hotel room, [but he] wouldn't pick up when he was supposed to be in there . . . . He was short with [her] on the telephone." Because of the changes she noted in Defendant Clark's behavior, Plaintiff used her cellphone to "trace or track" Defendant Clark's cellphone, during which time Defendant Clark's phone was "showing a different location from where his room was at." Defendant Clark's phone was "pinging . . . from the other end of the hall," from where Defendant Barrett's room was located.

¶ 7 On or around July 4, 2016, Defendant Clark traveled home to North Carolina for Independence Day. While he was home, Plaintiff discovered he "was texting a female. [She] found a number in his phone." When Plaintiff asked Defendant Clark who the female was, he replied, "I don't know what you're talking about." Finding the phone number caused Plaintiff "a lot of emotional distress." The couple argued, and Plaintiff experienced "stroke-like symptoms" and went to the hospital for treatment. Plaintiff was ultimately diagnosed with "[m]igraines and stress." Defendant Clark returned to Fort Belvoir the same day Plaintiff was hospitalized.

¶ 8 In September 2016, Plaintiff discovered text messages between Defendants Clark and Barrett, in which Defendant Clark sent Defendant Barrett a picture of his penis. The picture sent was taken in a bathroom in Plaintiff and Defendant Clark's home. At the time Plaintiff discovered the sexually explicit photograph, Defendant Clark had changed Defendant Barrett's name in his cellphone's contact information to "Jane S." Plaintiff knew "Jane S." was Defendant Barrett because she had matched the cellphone number of "Jane S." with that of Defendant Barrett.

¶ 9 On September 11, 2016, Plaintiff confronted Defendant Clark and asked if he "still had [Defendant Barrett's] number." Plaintiff threatened to call Defendant Barrett, and Defendant Clark "jumped up really fast and chased after [Plaintiff] as [Plaintiff] was dialing [Defendant Barrett's] number." Plaintiff threatened to ask Defendant Barrett if she and Defendant Clark were having an extramarital affair. Because of this interaction, the couple fought, and Defendant Clark left their marital home.

¶ 10 Although Defendant Clark left the marital home in September 2016, the couple maintained an emotionally and sexually intimate relationship. Plaintiff testified, "It was very complicated, because he would keep coming over . . . . And he was holding me and we had sex a couple of times." In January 2017, Plaintiff and Defendant Clark purchased real property together. The property the couple purchased was owned by a close family friend of Plaintiff's, whom she knew through her father. Ultimately, the loan obtained to purchase the land was put in Defendant Clark's sole name, because Plaintiff "didn't really have any kind of credit or anything like that." At the time the real property was purchased, Defendant Clark and Plaintiff "were actually reconciling at that time. And [Defendant Clark] told Plaintiff that . . . [they were] going to still build a house on it." At the time of trial, Defendants Clark and Barrett had built a house on the land and were residing on this property together.[1]

¶ 11 In March 2017, Plaintiff and Defendant Clark executed a separation agreement, in which Defendant Clark agreed to pay $1,850 in monthly child support. The separation agreement was drafted by Defendant Clark's attorney, and Plaintiff was not represented by independent counsel at the time of its execution.

¶ 12 Throughout June and July 2017, Plaintiff and Defendant Clark engaged in sexual intercourse and recorded videos of themselves doing so. Also in July 2017, Defendant Clark and Defendant Barrett conceived a child together through *in vitro* fertilization. Defendant Clark continued to maintain an intimate and sexual relationship with both his wife and with his paramour during this time. In August 2017, Defendant Clark traveled to Boston, Massachusetts for additional training. Plaintiff attempted to videocall Defendant Clark through Facetime, but Defendant Clark did not answer. When Defendant Clark did not answer, Plaintiff "sent him a topless photo," in which Plaintiff's naked breasts were exposed. Plaintiff did not send the topless photograph to anyone else.

¶ 13 In September 2017, Plaintiff and Defendant Clark stopped having sexual intercourse. Around this time, Defendant Clark began complaining about the amount he paid to Plaintiff in child support. In October 2017, Plaintiff and Defendant Clark were still texting one another, and Plaintiff sent Defendant Clark "a picture of female genitalia." It was

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1. Defendant Barrett testified she moved into the house built on the property in "November or December of 2018." Testimony at trial further suggests Defendants Clark and Barrett began living together in 2017. Specifically, Defendant Barrett stated she lived independently for approximately four months beginning in August 2017. When asked where she resided afterwards, Defendant Barrett utilized her Fifth Amendment privilege.

around this time that Plaintiff discovered Defendant Barrett was pregnant with Defendant Clark's child.[2]

¶ 14 In January 2018, Plaintiff discovered a Craigslist advertisement and believed it to be about herself. The advertisement stated,

> Liz is super hot! Shows you what plastic surgeons and eating disorders can do for you in 2018. There's a reason she's been divorced twice and can't take care of her kids. She's a plaything, nothing more. Hope you fellas are wearing condoms, she's got herpes.

¶ 15 Plaintiff believed Defendant Clark posted the advertisement, because he "always said [she] had an eating disorder and when [they] started not getting along, he said that [she] didn't take care of [her] children and [she] was a bad mother."

¶ 16 In March 2018, Plaintiff began interacting with Defendant Clark, who was using the alias "Brian Bragg" on the social networking platform, Kik.[3] The Brian Bragg[4] account sent Plaintiff the "topless photo," with a message saying, "Saw this floating around the internet in the Fayetteville chat rooms just letting you know." Brian Bragg also informed Plaintiff that the image was "all over the place," and that he hoped Plaintiff "[slept] well knowing [her] fun bags [were] hanging out there for the world to see."

¶ 17 In May 2018, Plaintiff discovered a Facebook "weight loss" advertisement depicting Plaintiff. The advertisement was composed of a post-pregnancy photograph of Plaintiff next to the photograph of Plaintiff's nude breasts. Prior to Plaintiff finding the advertisement, "Brian Bragg" had threatened to find and post Plaintiff's post-pregnancy photographs on Kik.

¶ 18 Throughout 2018, Plaintiff's friends and co-workers contacted her when they saw "Liz Clark" profiles, using a photograph of Plaintiff as a profile picture, in Kik chatrooms soliciting "no strings attached sex." Kik business records revealed that the "Liz Clark" Kik profiles could be

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2. Defendants Clark and Barrett had a child together on March 7, 2018. Defendant Clark is listed as the child's father on the birth certificate, and the child bears his last name.

3. When asked if Defendant Clark used the alias "Brian Bragg," Defendant Clark pled the Fifth Amendment.

4. Plaintiff believed "Brian Bragg" was Defendant Clark, as the "Brian Bragg" account used a photograph that Plaintiff took of Defendant Clark as a profile picture.

traced to an IP address that matched the IP address of Defendants Clark and Barrett's residence.

¶ 19 When Plaintiff's friends and co-workers notified her that they saw the "Liz Clark" Kik profiles, she "was extremely embarrassed" and her "heart started racing." Plaintiff also received photographs from "Brian Bragg" depicting herself and her vehicle. Attached to these photographs were messages discussing how people were following Plaintiff. One message from "Brian Bragg" stated, "We are going to continue doing everything in our power to make your life miserable."

¶ 20 In August 2018, Plaintiff brought the instant action, asserting claims against both Defendants Clark and Barrett for libel *per se*; intentional and negligent infliction of emotional distress; and a violation of N.C. Gen. Stat. § 14-190.5A, a statute providing criminal sanctions for what is commonly known as "revenge porn." Plaintiff asserted additional causes of action against Defendant Barrett for alienation of affection and criminal conversation. In April 2019, Defendant Clark was arrested for stalking and cyberstalking Plaintiff in violation of N.C. Gen. Stat. §§ 14-277.3(A)(c) and 14-196.3.

¶ 21 In July 2019, the Cumberland County Superior Court barred the use of expert witness testimony in the civil actions filed by Plaintiff based upon a motion filed by Defendants Clark and Barrett to strike Plaintiff's tardy designation of an expert witness. The case proceeded to trial in August 2019. During trial, Derek Ellington ("Ellington") was permitted to testify. Ellington is a digital forensics examiner in Cumberland County. During Ellington's testimony, he laid the foundation for the entry of a flash drive containing nearly 32,000 files that he preserved from Plaintiff's electronic devices, and social media and email accounts. The data Ellington gathered and saved demonstrated that Plaintiff had only sent the "topless photo" of herself to Defendant Clark.

¶ 22 The jury found Defendant Barrett responsible for alienation of affection and IIED. The trial court entered judgment against Defendant Barrett for alienation of affection and IIED on September 17, 2019. Plaintiff was awarded $1,200,000 in damages. On September 25, 2019, Defendant Barrett filed a motion for judgment notwithstanding the verdict ("JNOV") and, in the alternative, motion for new trial. The court denied Defendant Barrett's motion on October 30, 2019. Defendant Barrett appeals from both the September 17, 2019 judgment and the October 30, 2019 order denying her post-trial motion.

II. Discussion

¶ 23 Defendant Barrett raises several issues on appeal. Each will be addressed in turn.

A. Ellington's Testimony

¶ 24 **[1]** Defendant Barrett contends the trial court erred "by admitting evidence and testimony from an expert witness who was not qualified as such." We disagree.

1. Standard of Review

¶ 25 As a preliminary matter, the parties dispute the proper appellate standard of review. Defendant Barrett asks this Court to review the admission of Ellington's testimony *de novo*, because "[w]here the plaintiff contends the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*." *Cornett v. Watauga Surgical Grp., P.A.*, 194 N.C. App. 490, 493, 669 S.E.2d 805, 807 (2008) (citations omitted). Conversely, Plaintiff contends the appropriate standard of review is one of an abuse of discretion. Rule 104(a) of our rules of evidence provides that "preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court." N.C. Gen. Stat. § 8C-1, Rule 104(a) (2020). Decisions made under Rule 104(a) are addressed to the sound discretion of the trial court. *See State v. Fearing*, 315 N.C. 167, 174, 337 S.E.2d 551, 554 (1985).

¶ 26 After careful review of the applicable law, we review *de novo* whether Ellington testified as an expert witness. *See State v. Broyhill*, 254 N.C. App. 478, 488, 803 S.E.2d 832, 839 (2017) (citation omitted); *see also State v. Jackson*, 258 N.C. App. 99, 107, 810 S.E.2d 397, 402 (2018) (noting that the Court applied a *de novo* standard of review "because determining whether the State's experts' testimonies constituted expert opinions . . . was a question" of law.) (citing *State v. Davis*, 368 N.C. 794, 797-98, 785 S.E.2d 312, 314-15 (2015)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted). However, whether the trial court erroneously admitted Ellington's testimony is reviewed for an abuse of discretion. *See Crocker v. Roethling*, 363 N.C. 140, 143, 675 S.E.2d 625, 628-29 (2009) (citation omitted); *see also State v. Turbyfill*, 243 N.C. App. 183, 185-86, 776 S.E.2d 249, 252 (2015) (citation omitted). "Abuse of discretion results where the Court's

ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Turbyfill*, 243 N.C. App. at 185-86, 776 S.E.2d at 252 (citation omitted).

2. Whether Ellington's Testimony Constitutes Expert Testimony

¶ 27 The parties next dispute whether Ellington testified as an expert or gave a lay opinion. "Our Supreme Court . . . explained the threshold difference between expert opinion and lay witness testimony." *Broyhill*, 254 N.C. App. at 485, 803 S.E.2d at 839 (citing *Davis*, 368 N.C. at 798, 785 S.E.2d at 315). "[W]hen an expert witness moves beyond reporting what he saw or experienced through his senses, and turns to interpretation or assessment 'to assist' the jury based on his 'specialized knowledge,' he is rendering an expert opinion." *Davis*, 368 N.C. at 798, 785 S.E.2d at 315 (quoting N.C. Gen. Stat. § 8C-1, Rule 702(a)). "Ultimately, 'what constitutes expert opinion testimony requires a case-by-case inquiry' through an examination of 'the testimony as a whole and in context.' " *Broyhill*, 254 N.C. App. at 485, 803 S.E.2d at 839 (quoting *Davis*, 368 N.C. at 798, 785 S.E.2d at 315).

¶ 28 Here, Ellington testified about the general process for making a forensic or digital copy of electronic devices and specifically testified as to how he made a copy of Plaintiff's electronic devices. Ellington's testimony laid the foundation[5] for a flash drive containing files from Plaintiff's devices, demonstrating Plaintiff did not send the "topless photo" to anyone other than Defendant Clark. A review of Ellington's testimony reveals that he testified not as an expert, but as a lay witness. Ellington testified as to what he "saw or experienced" in creating copies of Plaintiff's devices and accounts. He did not interpret or assess the devices or accounts but explained the process he used for Plaintiff's devices was one that he did daily.

¶ 29 Presuming *arguendo* Ellington testified as an expert, Defendant Barrett failed to demonstrate how this was prejudicial. *See State v. Babich*, 252 N.C. App. 165, 172, 797 S.E.2d 359, 364 (2017) ("Where it does not appear that the . . . admission of evidence played a pivotal role in determining the outcome of the trial, the error is harmless.") (quoting *State v. Mason*, 144 N.C. App. 20, 27-28, 550 S.E.2d 10, 16 (2001)). Here, Plaintiff testified about the text messages, emails, and social media messages and postings. Ellington's testimony was not "pivotal" in determining whether Defendants Clark and Barrett posted Plaintiff's

5. Defendant Barrett does not argue that the flash drive was improperly authenticated under N.C. Gen. Stat. § 8C-1, Rule 901.

nude breasts on the internet; rather, it corroborated Plaintiff's testimony that she sent the topless photograph to Defendant Clark. Therefore, we find no error in the trial court's decision to allow Ellington to testify.

B. Plaintiff's IIED Claim

¶ 30 Next, Defendant Barrett contends the trial court erred by allowing Plaintiff's claim for IIED to proceed "when the conduct is subsumed by other causes of action," and by denying Defendant Barrett's post-trial motion "because there was insufficient evidence for the claim of IIED to be submitted to the jury." We disagree.

¶ 31 Whether Plaintiff's IIED cause of action is subsumed by her other asserted torts is a question of law reviewed *de novo*. *See Piazza v. Kirkbride*, 246 N.C. App. 576, 579, 785 S.E.2d 695, 698 (2016), *modified*, 372 N.C 137, 827 S.E.2d 479 (2019). "The standard of review of a ruling entered upon a motion for judgment notwithstanding the verdict is 'whether, upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury.' " *Everhart v. O'Charley's Inc.*, 200 N.C. App. 142, 148-49, 683 S.E.2d 728, 735 (2009) (quoting *Branch v. High Rock Realty, Inc.*, 151 N.C. App. 244, 249-50, 565 S.E.2d 248, 252 (2002)). Generally, "[i]f there is more than a scintilla of evidence supporting each element of the nonmoving party's claim, the motion for directed verdict or JNOV should be denied." *Horner v. Byrnett*, 132 N.C. App. 323, 325, 511 S.E.2d 342, 344 (1999) (citation omitted); *see also Norman Owen Trucking, Inc. v. Morkoski*, 131 N.C. App. 168, 172, 506 S.E.2d 267, 270 (1998). "A scintilla of evidence is defined as very slight evidence." *Hayes v. Waltz*, 246 N.C. App. 438, 442-43, 784 S.E.2d 607, 613 (2016) (citation omitted).

¶ 32 In determining whether the trial court erred in denying a JNOV, "we must take the plaintiff's evidence as true, and view all of the evidence in the light most favorable to him/her, giving him/her the benefit of every reasonable inference which may be legitimately drawn therefrom, with conflicts, contradictions, and inconsistencies being resolved in the plaintiff's favor." *Watson v. Dixon*, 130 N.C. App. 47, 52, 502 S.E.2d 15, 19 (1998) (citations and internal quotation marks omitted).

3. Election of Remedies

¶ 33 **[2]** Defendant Barrett first contends the trial court erred in permitting Plaintiff to pursue her claim for IIED, "when the conduct is subsumed by other causes of action." Defendant Barrett specifically contends that

Plaintiff cannot recover under both IIED and another tort for the same conduct. Plaintiff argues Defendant Barrett failed to preserve this argument for appellate review, as Defendant "Barrett failed to plead election of remedies as an affirmative defense and raise this issue at trial."

¶ 34 "One is held to have made an election of remedies when he chooses with knowledge of the facts between two inconsistent remedial rights." *Lamb v. Lamb*, 92 N.C. App. 680, 685, 375 S.E.2d 685, 687 (1989) (citation omitted). "The purpose of the doctrine of election of remedies is to prevent more than one redress for a single wrong." *Triangle Park Chiropractic v. Battaglia*, 139 N.C. App. 201, 204, 532 S.E.2d 833, 835 (2000) (citation omitted). The doctrine of "[e]lection of remedies is an affirmative defense which must be pleaded by the party relying on it." *North Carolina Federal Sav. & Loan Ass'n v. Ray*, 95 N.C. App. 317, 323, 382 S.E.2d 851, 856 (1989) (citations omitted).

¶ 35 While Defendant Barrett contends Plaintiff's IIED claim should not have been submitted to a jury because it was subsumed by other causes of action, Defendant Barrett did not raise the defense of election of remedies at trial or in her post-trial motion. Therefore, she may not raise this argument on appeal. *Id.*; *see also State ex rel. Easley v. Rich Food Servs., Inc.*, 139 N.C. App. 691, 704, 535 S.E.2d 84, 92-93 (2000).

4. Sufficiency

¶ 36 **[3]** Next, Defendant Barrett argues the trial court erred in denying her post-trial motion because Plaintiff did not present evidence to support each element of IIED. We disagree.

¶ 37 To state a claim for intentional infliction of emotional distress, a plaintiff must allege: "(1) extreme and outrageous conduct (2) which is intended to cause and does cause (3) severe emotional distress to another." *Norton v. Scotland Mem'l Hosp., Inc.*, 250 N.C. App. 392, 397, 793 S.E.2d 703, 708 (2017) (citation omitted). "Extreme and outrageous conduct is defined as conduct that is 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Id.* (citation omitted).

a. Severe Emotional Distress

¶ 38 Defendant Barrett contends Plaintiff failed to present evidence that she suffered from "severe emotional distress." We disagree.

¶ 39 "[T]he term 'severe emotional distress' means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic

depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Waddle v. Sparks*, 331 N.C. 73, 83, 414 S.E.2d 22, 27 (1992) (citation and emphasis omitted). However, severe emotional distress does not require medical expert testimony. *Williams v. HomEq Serv. Corp.*, 184 N.C. App. 413, 419, 646 S.E.2d 381, 385 (2007). Testimony of a plaintiff's "friends, family, and pastors can be sufficient to support a claim. . . ." *Id.* (citations omitted).

¶ 40 Here, Plaintiff testified at trial that she cried hysterically, hyperventilated, and sought out a counselor at a local clinic in response to the conduct of Defendants Clark and Barrett. One of Plaintiff's friends testified that Plaintiff was "very emotionally distraught and crying" on a weekly basis and that Plaintiff experienced anxiety. Although Plaintiff did not attend counseling for her anxiety on a regular basis, she testified this was out of fear that such treatment would negatively impact her probability of maintaining shared custody of her children. Taking the evidence in the light most favorable to Plaintiff, we hold there was more than a scintilla of evidence she suffered severe emotional distress as a result of the conduct of Defendants Clark and Barrett.

b. Causation

¶ 41 Defendant Barrett further contends the trial court erred in denying her JNOV because Plaintiff failed to show a causal link between Defendant Barrett's conduct and Plaintiff's emotional harm.

¶ 42 Intentional infliction of emotional distress requires outrageous conduct that is intended to cause and does cause severe emotional distress. *See Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 487-88, 340 S.E.2d 116, 119-20 (1986) (citation omitted).

> The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress. Recovery may be had for the emotional distress so caused and for any other bodily harm which proximately results from the distress itself.

Id. (citation omitted). Stated differently, a defendant is liable for IIED when,

> he desires to inflict serious severe emotional distress or knows that such distress is certain, or substantially certain, to result from his conduct or where he acts recklessly in deliberate disregard of a high degree of

> probability that the emotional distress will follow and the mental distress does in fact follow.

Dickens v. Puryear, 302 N.C. 437, 449, 276 S.E.2d 325, 333 (1981) (cleaned up).

¶ 43 Defendant Barrett specifically contends Plaintiff failed to show her conduct caused severe emotional distress because Plaintiff experienced "stroke-like symptoms" and was diagnosed with "migraines and stress" prior to the complained of conduct – "posing as Brian Bragg, posting a Craigslist ad, posting a Facebook ad, posting a picture on Kik," all occurred after Plaintiff was hospitalized.

¶ 44 While the trial court noted Plaintiff's emotional distress included "stroke-like symptoms," it did not solely rely on such symptoms in finding Plaintiff produced evidence of severe emotional distress. Specifically, the trial court noted, "That Defendant Barrett's conduct did cause severe emotional distress to Plaintiff in the form of anxiety, sleeplessness, and severe depression and physical manifestations, including stroke-like symptoms." Plaintiff presented evidence that Defendant Barrett acted with a disregard to Plaintiff's emotional state and that there was a high possibility of emotional distress in that, while Plaintiff and Defendant Clark were attempting reconciliation, Defendant Barrett asked Defendant Clark to partake in *in vitro* fertilization; Defendant Barrett had an affair with Defendant Clark while Plaintiff and Defendant Clark were still married; and Defendant Barrett allowed and potentially encouraged Plaintiff's daughter to call her "Mommy."

¶ 45 There is no dispute that Plaintiff experienced "stroke-like symptoms" prior to the complained of conduct; however, Plaintiff experienced anxiety, hyperventilation, and other emotional distress as a result of the conduct of Defendants Clark and Barrett. Plaintiff testified her emotional distress was caused by Defendants Clark and Barrett messaging her that they would do "everything in [their] power to make [her] life miserable" and by discovering fake "Liz Clark" Kik profiles soliciting "no strings attached" sexual intercourse. Thus, we hold there was more than a scintilla of evidence to find a causal link between the complained of conduct and Plaintiff's emotional distress.

c. Outrageous Conduct

¶ 46 Next, Defendant Barrett contends Plaintiff failed to present sufficient evidence of extreme and outrageous conduct by Defendant Barrett, because "[t]he evidence showed that Defendant Barrett did not engage with Plaintiff at all." We disagree.

¶ 47 "[T]he initial determination of whether conduct is extreme and outrageous is a question of law," to be determined by the court. *Johnson v. Bollinger*, 86 N.C. App. 1, 6, 356 S.E.2d 378, 381 (1987) (citing *Briggs v. Rosenthal*, 73 N.C. App. 672, 676, 327 S.E.2d 308, 311, *cert. denied*, 314 N.C. 114, 332 S.E.2d 479 (1985)). Conduct is considered extreme or outrageous "when a defendant's conduct exceeds all bounds usually tolerated by decent society." *Watson*, 130 N.C. App. at 52, 502 S.E.2d at 19 (citation omitted). Conduct has also been deemed "extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Chidnese v. Chidnese*, 210 N.C. App. 299, 316, 708 S.E.2d 725, 738 (2011) (internal quotation marks and citation omitted).

> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime, plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion . . . .

Id. (citation omitted). In *Watson v. Dixon*, this Court found sufficient evidence of "extreme and outrageous behavior" where the defendant "harass[ed]" the plaintiff, and "frightened and humiliated [the plaintiff] with cruel practical jokes, which escalated to obscene comments and behavior of a sexual nature . . . ." 130 N.C. App. at 53, 502 S.E.2d at 20.

¶ 48 Viewing the evidence in the light most favorable to Plaintiff, and taking that evidence as true, the evidence tends to show that Defendant Barrett began a sexual relationship with Defendant Clark while he was married to Plaintiff; conceived a child with Defendant Clark while Plaintiff and Defendant Clark were attempting reconciliation; and sent at least one email to Plaintiff in which Defendant Barrett told Plaintiff she "was a bad mother, that [she was] uneducated . . . [she] was a bad wife," and that Plaintiff came "from an unsuccessful family." Further, both Defendant Barrett and Plaintiff testified Defendant Barrett resided with Defendant Clark and had access to the computer from which degrading messages were sent to Plaintiff. As Plaintiff presented more than a scintilla of evidence of "extreme and outrageous behavior," we hold the trial court did not err in denying Defendant Barrett's JNOV.

C. Alienation of Affection

¶ 49 Next, Defendant Barrett contends the trial court lacked subject matter jurisdiction over the claim of alienation of affection and erred in denying her motion for JNOV because there was insufficient evidence of the claim.

1. Subject Matter Jurisdiction

¶ 50 **[4]** Defendant Barrett contends the trial court lacked subject matter jurisdiction to hear Plaintiff's alienation of affection claim "[b]ecause alienation of affection is a transitory tort" and Plaintiff failed to show that the injury occurred in North Carolina. We disagree.

¶ 51 "Subject matter jurisdiction is conferred upon the courts by either the North Carolina constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citation omitted). "Jurisdiction of the court over the subject matter of an action is the most critical aspect of the court's authority to act. Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Id.* (citation omitted); *see also Farquhar v. Farquhar*, 254 N.C. App. 243, 245, 802 S.E.2d 585, 587 (2017) (citation omitted). Whether a trial court is vested with subject matter jurisdiction is a question of law, reviewed *de novo*. *Farquhar*, 254 N.C. App. at 245, 802 S.E.2d at 587 (citations omitted).

¶ 52 Alienation of affection is "a transitory tort because it is based on transactions that can take place anywhere and that harm the marital relationship." *Hayes*, 246 N.C. App. at 443, 784 S.E.2d at 613 (quoting *Jones v. Skelley*, 195 N.C. App. 500, 506, 673 S.E.2d 385, 389-90 (2009)). "Establishing that the defendant's alienating conduct occurred within a state that still recognizes alienation of affections as a valid cause of action is essential to a successful claim since most jurisdictions have abolished the tort." *Id.* (citing *Darnell v. Rupplin*, 91 N.C. App. 349, 353-54, 371 S.E.2d 743, 746-47 (1988)). However, "even if it is difficult to discern where the tortious injury occurred, the issue is generally one for the jury." *Id.* (quoting *Jones*, 195 N.C. App. at 507, 673 S.E.2d at 390); *see also Darnell*, 91 N.C. App. at 354, 371 S.E.2d at 747.

¶ 53 In *Hayes*, the plaintiff's wife had an extramarital affair with the defendant in Cancun, Mexico. *Id.* at 440, 784 S.E.2d at 611. Thereafter, the plaintiff's wife returned to the marital home in North Carolina, and the defendant returned to his residence in Indiana. *Id.* Thereafter, the plaintiff's wife and the defendant "communicated . . . via email, telephone, and text messaging." *Id.* The defendant later came to North Carolina and took the plaintiff's wife to Indiana with him. *Id.* at 441, 784

S.E.2d at 612. The defendant was found liable for alienation of affection and appealed. *Id.* On appeal, the defendant argued the trial court improperly denied his motion for JNOV, because "all of the sexual conduct [between the defendant and the plaintiff's wife] occurred outside North Carolina." *Id.* at 443, 784 S.E.2d at 613. This Court held, however, that there was more than a scintilla of evidence that "a wrongful and malicious act" causing the alienation of the plaintiff and his wife's affection occurred in North Carolina. *Id.* at 444, 784 S.E.2d at 614-15.

¶ 54 Here, Plaintiff presented more than a scintilla of evidence that the alienation of Defendant Clark's affection occurred in North Carolina. At the time Defendants Clark and Barrett met, Plaintiff resided in the couple's marital home in North Carolina; Plaintiff discovered text messages between Defendants Clark and Barrett while Defendant Clark was in the couple's marital home; and Plaintiff testified to a sexually explicit photograph Defendant Clark sent Defendant Barrett from the couple's marital home. Further, although Defendant Barrett invoked her Fifth Amendment right whenever questioned about her sexual activity with Defendant Clark in North Carolina, "the finder of fact in a civil case may use a witness's invocation of his fifth amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable to him." *In re Estate of Trogdon*, 330 N.C. 143, 152, 409 S.E.2d 97, 902 (1991) (citing *Fedoronko v. American Defender Life Ins. Co.*, 69 N.C. App. 655, 657-58, 318 S.E.2d 244, 246 (1984)). Therefore, we hold Plaintiff presented more than a scintilla of evidence that the tortious injury occurred in North Carolina.

¶ 55 Defendant Barrett further contends the aforementioned messages and photographs remain unauthenticated, and thus are not sufficient evidence to show the tortious conduct occurred in our State. However, this assignment of error is without merit as N.C. R. Evid. 901(b) permits the authentication of exhibits through testimony of a witness with personal knowledge. Here, Plaintiff testified she observed the text messages on Defendant Clark's telephone, took a picture of said messages using her cellphone, and matched the phone number of "Jane S." with that of Defendant Barrett. Accordingly, the trial court was vested with subject matter jurisdiction to hear Plaintiff's alienation of affection cause of action.

2. Sufficiency

¶ 56 **[5]** Next, Defendant Barrett contends the trial court erred in denying her motion for JNOV, because there was insufficient evidence to support each element of alienation of affection. We disagree.

¶ 57 As discussed *supra*, "[a] motion for JNOV 'should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim.' " *Hayes*, 246 N.C. App. at 442, 784 S.E.2d at 613 (quoting *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491, *disc. review denied*, 363 N.C. 583, 682 S.E.2d 389 (2009)). To succeed on an alienation of affection claim, a plaintiff must present evidence demonstrating "(1) a marriage with genuine love and affection; (2) the alienation and destruction of the marriage's love and affection; and (3) a showing that defendant's wrongful and malicious acts brought about the alienation of such love and affection." *Heller v. Somdahl*, 206 N.C. App. 313, 315, 696 S.E.2d 857, 860 (2010) (citation omitted); *see also Hayes*, 246 N.C. App. at 443, 784 S.E.2d at 613 (citation omitted).

a. Love and Affection

¶ 58 Defendant Barrett specifically argues that "[t]here was no genuine love and affection in Plaintiff's marriage," because "from the very beginning of their marriage, the parties had an unhappy marriage, full of infidelity and arguments."

¶ 59 To succeed on an alienation of affection cause of action, "the plaintiff need not prove that he and his spouse had a marriage free from discord, only that some affection existed between them." *Nunn v. Allen*, 154 N.C. App. 523, 533, 574 S.E.2d 35, 42 (2002) (citing *Brown v. Hurley*, 124 N.C. App. 377, 477 S.E.2d 234 (1996)). "The marriage need not be a perfect one, but plaintiff's spouse must have had '*some* genuine love and affection for him' before the marriage's disruption." *Heller*, 206 N.C. App. at 315, 696 S.E.2d at 860 (emphasis in original) (quoting *Brown*, 124 N.C. App. at 381, 477 S.E.2d at 23). "Even if a plaintiff's spouse retains feelings and affections for a plaintiff, an alienation of affections claim can succeed." *Id.* at 316, 696 S.E.2d at 861 (citation omitted).

¶ 60 Here, Plaintiff testified the couple would "try to keep intimacy alive even though" the couple often would be separated by distance due to Defendant Clark's Military assignments. While married, Defendant Clark would visit Plaintiff on weekends, and the couple would text message and call each other often. Defendant Clark "would constantly say, I love you; are you coming over," and the couple continued to have sexual intercourse after their separation. The couple had sexual relations when Defendant Clark visited North Carolina while studying at Fort Belvoir and continued to have sexual relations after Defendant Clark left the marital home. Defendant Clark texted Plaintiff, "I love you" when Plaintiff requested a copy of the video of the couple engaged in sexual intercourse.

¶ 61 Although Defendant Clark testified that he did not love his wife or that there were "problems with that love," Plaintiff need only present "very slight evidence" of some love and affection to survive a motion for JNOV. *See Hayes*, 246 N.C. App. at 442-43, 784 S.E.2d at 613 ("A scintilla of evidence is defined as very slight evidence." (citation omitted)). Accordingly, we hold Plaintiff presented more than a scintilla of evidence of a genuine love and affection between Plaintiff and Defendant Clark.

b. Alienation of Affection

¶ 62 Defendant Barrett further contends the trial court erred in denying her motion for JNOV because "Plaintiff failed to produce evidence that Defendant Barrett engaged in actionable unlawful conduct."

¶ 63 "The alienation and destruction element [of alienation of affection] is proved by showing 'interference with one spouse's mental attitude toward the other, and the conjugal kindness of the marital relation." ' *Heller*, 206 N.C. App. at 315-16, 696 S.E.2d at 860-61 (quoting *Jones*, 195 N.C. App. at 507, 673 S.E.2d at 390 (citation omitted)). "The loss" of affection "can be full or partial and can be accomplished through one act or a series of acts." *Id.* at 316, 696 S.E.2d at 861 (citing *Darnell*, 91 N.C. App. at 354, 371 S.E.2d at 747). "In the context of an alienation of affections claim, a wrongful and malicious act has been 'loosely defined to include any intentional conduct that would probably affect the marital relationship.' " *Hayes*, 246 N.C. at 444, 784 S.E.2d at 613 (quoting *Jones*, 195 N.C. App. at 508, 673 S.E.2d at 391 (citation omitted)).

¶ 64 Here, Plaintiff testified Defendant Clark's behavior began to change after he met Defendant Barrett in that he did not travel home to North Carolina as often; he was short with her on the telephone; and he did answer his phone or text Plaintiff as often. When Plaintiff could not reach Defendant Clark over the phone, she "traced or tracked" his cellphone to Defendant Barrett's room. Upon confronting Defendant Clark about the extramarital affair, Defendant Clark moved out of the couple's marital home and the couple separated.

¶ 65 Plaintiff presented further evidence that Defendant Barrett knew Defendant Clark was married at the time the Defendants met. Regardless of this knowledge, Defendant Barrett chose to carry on a sexual relationship and conceive a child through *in vitro* fertilization with Defendant Clark. Defendants Barrett and Clark spoke on the phone, text messaged, and sent at least one sexually explicit photograph. Thus, we hold Plaintiff presented more than a scintilla of evidence regarding the malicious or wrongful alienation of affection.

c. Wrongful and Malicious Causation

¶ 66 Defendant Barrett argues that her conduct did not cause the loss of affection between spouses because the couple's extramarital affairs and arguments caused the couple to separate. "However, it is well established that while the defendant's conduct must proximately cause the alienation of affections, this does not mean that the 'defendant's acts [must] be the sole cause of the alienation, as long as they were the controlling or effective cause.' " *Hayes*, 246 N.C. App. at 446, 784 S.E.2d at 615 (citation omitted) (alteration in original); *see also Nunn*, 154 N.C. App. at 533, 574 S.E.2d at 42 (citation omitted).

¶ 67 Upon meeting Defendant Barrett, Defendant Clark's behavior within his marriage and toward his wife changed. Ultimately, Plaintiff and Defendant Clark separated, and Defendant Clark now resides with Defendant Barrett on the property he purchased with Plaintiff. Thus, Plaintiff presented a scintilla of evidence regarding causation.

D. Damages

¶ 68 **[6]** Defendant Barrett further contends the trial court erred in denying her motion for JNOV because "[t]he damages awarded to Plaintiff were improper and the evidence insufficient."

¶ 69 The trial court has discretion to grant a new trial where the jury awards "[e]xcessive or inadequate damages appearing to have been given under the influence of passion or prejudice." N.C. R. Civ. P. 59(a)(6). However,

> our appellate courts should place great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for a new trial. Due to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observances of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires in a certain case.

Worthington v. Bynum, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982). "Consequently, an appellate court should not disturb a Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.*

¶ 70 In the context of alienation of affection,

> the measure of damages is the present value in money of the support, consortium, and other legally protected marital interests lost by her through the defendant's wrong. In addition thereto, she may also recover for the wrong and injury done to her health, feelings, or reputation.

Hutelmyer v. Cox, 133 N.C. App. 364, 373, 514 S.E.2d 554, 561 (1999) (quoting *Sebastian v. Kluttz*, 6 N.C. App. 201, 219, 170 S.E.2d 104, 115 (1969)). "[T]he gravamen of damages in [heartbalm] torts is mental distress, a fact that gives juries considerable freedom in their determinations." *Id.* (quoting 1 Suzanne Reynolds, Lee's North Carolina Family Law § 5.48(A) (5th ed. 1993)).

¶ 71 In *Hayes*, the trial court denied the defendant's Rule 59 motion and determined the plaintiff presented sufficient evidence in that he lost the emotional and financial support of his wife and the marital home; suffered a diminished household income; and "was 'devastated' emotionally." 246 N.C. App. at 452, 784 S.E.2d at 618. Here, Plaintiff testified she cried frequently, and her friend reported Plaintiff experienced anxiety. Due to the discovery of Defendants Clark and Barrett's relationship, Plaintiff was hospitalized for "stroke-like symptoms." Plaintiff is employed as a bartender/server, whereas Defendant Clark holds the rank of Major in the U.S. Army and, accordingly, has a higher earning potential. Plaintiff assumed half of the marital debt and cares for the couple's two minor children, one of whom has special needs. Plaintiff further presented evidence of the loss of benefits provided to her as a spouse of an active duty servicemember, including medical and life insurance, and Defendant Clark's pension. Accordingly, the trial court did not abuse its discretion in concluding $450,000 in compensatory damages was not excessive.

¶ 72 Defendant Barrett further contends the trial court erred in denying her post-trial motion where the trial court declined to instruct the jury on punitive damages for the alienation of affection claim. The trial court, here, instructed the jury regarding punitive damages for Plaintiff's IIED claim. The trial court did not instruct the jury on punitive damages in connection with alienation of affection, because, under *Oddo v. Presser*, 358 N.C. 128, 592 S.E.2d 195 (2004), there must be proof of sexual relations before the date of physical separation for punitive damages. Contrary to Defendant Barrett's contention, there is no

requirement of pre-separation sexual intercourse to recover punitive damages for IIED.

¶ 73 Defendant Barrett also argues that the trial court failed to make findings of fact regarding all the factors enumerated in N.C. Gen. Stat. § 1D-35(2). However, the jury is not mandated to consider all factors enumerated in Section 1D-35. The plain language of the statute allows the trier of fact to consider the factors, but it is not a requirement. Accordingly, we hold the trial court did not err in denying Defendant Barrett's post-trial motion regarding damages.

III. Conclusion

¶ 74 After careful review of the record and applicable law, we hold the trial court properly exercised subject matter jurisdiction over Plaintiff's alienation of affection claim and did not err in either the admission of Ellington's testimony or denial of Defendant Barrett's motion for JNOV.

NO ERROR AND AFFIRMED.

Judges TYSON and HAMPSON concur.

IN THE MATTER OF R.B.

No. COA21-285

Filed 7 December 2021

1. Child Abuse, Dependency, and Neglect—neglect adjudication —impairment or substantial risk—ultimate findings required

A neglect adjudication was reversed and remanded where the trial court failed to enter ultimate findings of fact stating that the child had suffered an impairment or was at substantial risk of such impairment under respondent-mother's care, there was no evidence to support such findings, and the adjudication order merely recited the allegations in the juvenile petition filed by the department of social services (DSS). Further, the court improperly adopted DSS's allegation that respondent-mother "made threats of harm toward the child" where, although respondent-mother did send text messages to a friend indicating that she was "going to kill" the child, the record showed the friend did not take the messages literally; respondent-mother was only venting and did not actually intend

to kill her child; and that when respondent-mother made the statements, she was suffering from sleep deprivation, anxiety, and depression, all of which she was actively addressing through therapy.

2. Child Abuse, Dependency, and Neglect—dependency adjudication—alternative child care arrangement—findings required

An adjudication of dependency was reversed where the trial court did not enter findings of fact addressing whether respondent-mother lacked an appropriate alternative care arrangement for her child.

Judge CARPENTER concurring in part and concurring in result only in part by separate opinion.

Appeal by Respondent from order entered 1 February 2021 by Judge Erica S. Brandon in Rockingham County District Court. Heard in the Court of Appeals 6 October 2021.

Lisa Anne Wagner for Respondent-Appellant-Mother.

Stam Law Firm, PLLC, by R. Daniel Gibson, for Guardian ad Litem.

No brief filed on behalf of Rockingham County Department of Social Services, Petitioner-Appellee.

WOOD, Judge.

¶ 1 Respondent-Mother appeals an order adjudicating her minor child, Riley,[1] neglected and dependent and continuing non-secure custody with Rockingham County Department of Social Services ("DSS"). On appeal, Respondent-Mother contends the trial court erred in adjudicating Riley neglected and dependent and abused its discretion in continuing non-secure custody with DSS. After careful review of the record and applicable law, we reverse the adjudication order.

I. Factual and Procedural Background

¶ 2 Respondent-Mother has one child, Riley, born on August 15, 2017. Respondent-Mother has a history of depression and anxiety. In December 2019, Respondent-Mother was having difficulty getting Riley

1. A pseudonym is used to protect the identity of the juvenile(s). *See* N.C. R. App. P. 42.

to sleep independently and called several friends and a parenting hotline for support. Respondent-Mother felt overwhelmed and exhausted and believed it would be best for another adult to be in the home until she rested. Ultimately, Respondent-Mother called 9-1-1 due to her exhaustion.[2] Law enforcement arrived to Respondent-Mother's residence, and "didn't see a problem in the home."

¶ 3 Thereafter, one of Respondent-Mother's friends picked Riley up and kept him for a few days. During this time, Respondent-Mother voluntarily underwent a mental health evaluation and began therapy. Another friend of Respondent-Mother's traveled from Baltimore to stay with Respondent-Mother "in the event that it was determined" Respondent-Mother needed supervision. Shortly thereafter, Riley returned to Respondent-Mother's care.

¶ 4 Also in December 2019, Respondent-Mother befriended Ms. D. Ms. D and her four-year-old daughter resided with Respondent-Mother for approximately one month during the Covid-19 pandemic. After Ms. D moved out of Respondent-Mother's residence, Respondent-Mother had additional difficulty getting Riley to sleep independently. Respondent-Mother attempted to arrange respite care for Riley but these arrangements fell through for various reasons.

¶ 5 On June 7, 2020, Respondent-Mother was suffering from exhaustion and depression.[3] Respondent-Mother texted Ms. D, "I have two black eyes[4] from him kicking me in the head. He has been screaming and banging on the door all night and I have not slept in 22 hours and I swear to God I think I'm going to kill him." Respondent-Mother further texted that she "want[ed] to strangle the [expletive omitted] lights out of him"; she"[expletive omitted] hate[d] his guts [she] hated the [expletive omitted] guts and [she] hope[d] he [expletive omitted] chokes a [expletive omitted] hate every never lets me sleep"; she "hate[d] being a mom it's the worst"; and Riley "could fend for himseld [sic] and [she] wil sray [sic] in [her] room." Respondent-Mother expressed her frustration to Ms. D and her feeling that no one understood the difficulty she was experiencing. Specifically, Respondent-Mother sent a text message to Ms. D stating, "Everyone keeps just telling me that it's normal and I'm [sic]

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2. Respondent-Mother testified she called 9-1-1 "out of an abundance of caution," and that law enforcement officers "were confused as to why [she] called them." Respondent-Mother further testified that law enforcement officers did not see a problem in the home.

3. Respondent-Mother testified she was "deeply-depressed and sleep-deprived."

4. Respondent-Mother did not have two black eyes on June 7, 2020.

keep telling everybody that I literally had my hands around his throat because I can't [expletive omitted] take it anymore but nobody wants to hear it."[5]

¶ 6 Ms. D testified that she "didn't take [Respondent-Mother's messages] literally,"[6] and did not believe Respondent-Mother would harm Riley or herself at the time she received the text messages. Respondent-Mother testified these messages were "hyperbole and blowing off steam." After Respondent-Mother sent Ms. D these messages, Riley went to stay with Ms. D for approximately one week. Respondent-Mother periodically messaged Ms. D throughout the week to inquire about Riley's well-being and picked Riley up on June 14, 2020. Ms. D later testified that she had some reservations about returning Riley to Respondent-Mother's care, "not because [Ms. D] didn't think that she could do it. [Ms. D] just didn't think she could do it at that time" due to her mental state. Nonetheless, she ultimately returned Riley to the care of Respondent-Mother, because "she's the mother. And ultimately, [Ms. D is] just another human being. It's not for [her] to say. [She] can only have an opinion and that doesn't make [her] the person who can make the decision."

¶ 7 Shortly after Riley returned to Respondent-Mother's care, Respondent-Mother and Ms. D got into an argument unrelated to Riley's care. Around this same time, Ms. D was contacted by DSS, and she provided DSS with screenshots of Respondent-Mother's text messages from June 7, 2020.

¶ 8 On June 17, 2020, social workers visited Respondent-Mother's home. Respondent-Mother did not allow the social worker into her home, but allowed Ms. N, a community behavioral health counselor, into the residence. Ms. N spent approximately thirty minutes in Respondent-Mother's residence talking to her before determining Respondent-Mother did not need to be involuntarily committed.

¶ 9 After Ms. N exited the residence, she, the social worker, and law enforcement remained in Respondent-Mother's driveway discussing the visit. Ms. N, the social worker, and law enforcement sat in their vehicles for approximately two and a half hours before the social worker took non-secure custody of Riley. Riley was temporarily placed in

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5. Additional text messages included hyperbolic language, including that Riley "ripped the door off the hinges."

6. When asked, "[Y]ou didn't take [Respondent-Mother] seriously about what she said?", Ms. D testified "I mean, obviously, I took it as she was frustrated." Ms. D further testified, "Oh no. God, no. I didn't take it literally," when asked if she believed Respondent-Mother stated she would kill Riley.

foster care before returning to Respondent-Mother's residence with Respondent-Mother under the supervision of his maternal grandmother.

¶ 10 After Riley was temporarily removed from Respondent-Mother's care, she contacted her therapist and voluntarily underwent a psychological evaluation. Her therapist recommended she continue therapy and comply with all of DSS's recommendations. In response to her therapist's recommendations, Respondent-Mother continued therapy throughout the adjudication.

¶ 11 On June 17, 2020, more than a week after Respondent-Mother sent Ms. D the text messages, DSS filed a juvenile petition alleging Riley was a neglected and dependent juvenile. The adjudication hearing occurred over three days: October 12, 2020, November 5, 2020, and December 3, 2020. On November 5, 2020, Respondent-Mother moved to dismiss the juvenile petition, but the court denied her motion. Riley's appointed Guardian *ad litem* submitted a report recommending Riley be returned to Respondent-Mother's care. Specifically, the Guardian *ad litem* reported

> In my short time as a GAL, I have not encountered another parent like [Respondent-Mother]. She uses appropriate language with her son, has displayed age-appropriate discipline, and overall, appears to be a very good mother. She repeats regularly that she wants what is best for her son, always. I think that extenuating circumstances of excessive isolation during the pandemic must be taken into consideration in this case.
>
> In every call I have with the family, [Respondent-Mother's] behavior with her son is exemplary. This was also true during what had to be a very stressful time from the audio recording I listened to that was recorded by [Respondent-Mother] on the day that DSS removed [Riley] from the home. [Respondent-Mother] remained a present and engaged parent even as her mental health was in question by the DSS staff member, [Ms. N]. [Respondent-Mother] has stated time and time again that [Riley] comes first. When she feels like depression might overtake her, she seeks care of [Riley.] . . .
>
> . . .
>
> [Respondent-Mother] appears to be directly dealing with her known and acknowledged mental health

> issues and HAS dealt with those issues without harm to her child and of her own volition, without outside intervention, [f]rom her history and from her dogged determination to clear her name in this case, she appears to have a firm grasp on what being a parent means. In every single interaction I have had with the family, the mother is directly engaged with her son, pays attention to his requests, disciplines appropriately when necessary, and interacts positively with him no matter what is going on.

Included in the record on appeal are several letters drafted by Respondent-Mother's friends advocating for Riley's return to Respondent-Mother's care. These letters were drafted in June 2020 and include the following language: "The way [Respondent-Mother] is with [Riley] is beautiful and heartwarming. . . . She would bend over backwards if there was any possible threat to [Riley]"; Riley "is [Respondent-Mother's] world. I know firsthand that [Respondent-Mother] is a BRILLIANT mother"; "I could never imagine [Respondent-Mother's] love and ability to care for [Riley] would ever be argued"; and "[Respondent-Mother] is a remarkable mother: doting affectionate, and emotionally intuitive to her son's needs."

¶ 12 The trial court orally adjudicated Riley a neglected and dependent juvenile and proceeded to disposition on December 3, 2020. On February 1, 2021, the trial court entered its written adjudication and disposition order, in which it adjudicated Riley a neglected and dependent juvenile and found "the juvenile's return to his/her own home would be contrary to the juvenile's best interests." The trial court continued non-secure custody with DSS, but placed Riley "in the home of his mother, . . . under constant supervision of the maternal grandmother." Respondent-Mother timely filed a written notice of appeal on February 11, 2021.

II. Discussion

¶ 13 Respondent-Mother appeals from the adjudication and disposition order.

> In North Carolina, juvenile abuse, neglect, and dependency actions are governed by Chapter 7B of the General Statutes, commonly known as the Juvenile Code. Such cases are typically initiated when the local department of social services (DSS) receives a report indicating a child may be in need of protective services. DSS conducts an investigation, and if the allegations in the report are substantiated, it files a

> petition in district court alleging abuse, dependency, or neglect. The first stage in such proceedings is the adjudicatory hearing. . . . If the allegations in the petition are not proven, the trial court will dismiss the petition with prejudice and, if the juvenile is in DSS custody, returns the juvenile to the parents.

In re A.K., 360 N.C. 449, 454-55, 628 S.E.2d 753, 756-57 (2006) (citations omitted). "The adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition. In the adjudicatory hearing, the court shall protect the rights of the juvenile and the juvenile's parent to assure due process of law." N.C. Gen. Stat. § 7B-802 (2020). "The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2020). "Immediately following adjudication, the trial court must conduct a dispositional hearing." *In re A.K.*, 360 N.C. at 455, 628 S.E.2d at 757 (citing N.C. Gen. Stat. § 7B-901 (2005)).

¶ 14 We review adjudication orders to determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re C.B.*, 245 N.C. App. 197, 199, 783 S.E.2d 206, 208 (2016) (citation omitted); *see also* N.C. Gen. Stat. § 7B-805.

> [W]hen a trial judge sits as both judge and juror, as he or she does in a non-jury proceeding, it is that judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom.

In re Whisnant, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (internal quotation marks omitted). Given the deference we give to our trial courts in non-jury proceedings, we do not reweigh the evidence; "the trial court's findings of fact supported by *clear and convincing* competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (citation omitted) (emphasis added). "Clear and convincing evidence 'is greater than the preponderance of the evidence standard required in most civil cases.' " *In re Smith*, 146 N.C. App. 302, 304, 552 S.E.2d 184, 186 (2001) (citation omitted). "It is defined as evidence which should fully convince." *Id.* (citation and internal quotation marks omitted).

¶ 15 "Unchallenged findings are binding on appeal." *In re C.B.*, 245 N.C. App. at 199, 783 S.E.2d at 208 (citing *In re C.B.*, 180 N.C. App. 221, 223, 636 S.E.2d 336, 337 (2006), *aff'd*, 361 N.C. 345, 643 S.E.2d 587 (2007)). The court's "conclusions of law are reviewed *de novo*." *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006) (citation omitted). A disposition order is reviewed to determine whether the trial court abused its discretion in deciding what action is in the juvenile's best interest. *In re C.W.*, 182 N.C. App. 214, 219, 641 S.E.2d 725, 729 (2007).

¶ 16 The Juvenile Code provides that adjudication orders "shall contain appropriate findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-807(b) (2020). Rule 52 of our rules of civil procedure mandates that the trial court make findings of "facts specially and state separately its conclusions of law thereon. . . ." N.C. Gen. Stat. § 1A-1, Rule 52. "[T]he trial court's factual findings must be more than a recitation of allegations. They must be the specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (citing *Montgomery v. Montgomery*, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977)).

¶ 17 It is "not *per se* reversible error for a trial court's fact findings to mirror the wording of a petition or other pleading prepared by a party. . . . [T]his Court will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case." *In re J.W.*, 241 N.C. App. 44, 48-49, 772 S.E.2d 249, 253, *disc. review denied*, 368 N.C. 290, 776 S.E.2d 202 (2015) (citation omitted). "Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts." *In re Anderson*, 151 N.C. App. at 97, 564 S.E.2d at 602 (citation omitted); *see also In re H.J.A.*, 223 N.C. App. 413, 418, 735 S.E.2d 359, 363 (2012) (citation omitted).

A. Adjudication of Neglect

¶ 18 **[1]** Respondent-Mother first argues the trial court erred in adjudicating Riley a neglected juvenile. We agree.

> The purpose of the adjudication hearing is to determine the existence of the juvenile's conditions as alleged in the petition. *In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 14 (2006); N.C. Gen. Stat. § 7B-802 (2015). At this stage, the court's decisions must often be 'predictive in nature, as the trial court must assess

> whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.'

In re E.P.-L.M., 272 N.C. App. 585, 593, 847 S.E.2d 427, 434 (2020) (quoting *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999)). Section 7B-101(15) of our general statutes defines a "neglected juvenile" as "[a]ny juvenile . . . whose parent . . . does not provide proper care, supervision, or discipline . . . or who lives in an environment injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15) (2020). To adjudicate a juvenile neglected, "some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline" is required. *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (citation and internal quotation marks omitted); *In re C.M.*, 183 N.C. App. 207, 210, 644 S.E.2d 588, 592 (2007) (citation omitted); *In re E.P.-L.M.*, 272 N.C. App. at 596, 847 S.E.2d at 436 (citation omitted). "Similarly, in order for a court to find that the child resided in an injurious environment, evidence must show that the environment in which the child resided has resulted in harm to the child or a substantial risk of harm." *In re K.J.B.*, 248 N.C. App. 352, 354, 797 S.E.2d 516, 518 (2016) (citation omitted). In adjudicating a child neglected, "the circumstances and conditions surrounding the child," not "the fault or culpability of the parent," are "what matters." *In re Z.K.*, 375 N.C. 370, 373, 847 S.E.2d 746, 748-49 (2020) (citation omitted).

¶ 19 Here, the trial court's order is in a "check box" format, in which the trial court "checked" the following findings of fact:

> 12. After receiving evidence, the Court finds: facts as alleged in the Juvenile Petition which was filed by [DSS] and which appears in the juvenile's court file. Said copy of the Juvenile Petition is incorporated herein by reference and its allegations are found as fact by the Court. These facts are also set out in the attached page or pages (entitled "Additional Findings of Fact").
>
> . . .
>
> 13. The juvenile, [Riley,] is neglected, in that the juvenile . . . lives in an environment injurious to the juvenile's welfare. . . . The juvenile is at risk of future abuse, neglect or dependency.

In the trial court's "Additional Findings of Fact," the court recites, verbatim, the allegations of the juvenile petition. Respondent-Mother challenges the following facts contained therein:

> On or about June 14, 2020, [DSS] received a neglect report on the minor child based on injurious environment. Specifically, the reporter was concerned over the safety of the minor child based on the mother's mental health. The child was placed in the care of [Ms. D] by the mother because the mother was having a mental health crisis. After a couple of days, [Ms. D] attempted to return the child to the mother, but the mother refused to take the child. . . . The mother asked a friend for help in trying to find the child an adoptive home. The mother finally picked the child up from [Ms. D] on Sunday.
>
> . . . The mother is refusing to cooperate with the [social worker]. The mother would only speak to [the social worker] through the screen door. The [social worker] could see the minor child inside the home. The mother did willingly let [Ms. N] into the home so that [Ms. N] could assess the mother's mental health. The mother is refusing to make a plan of care for the minor child as the mother states the child is safe. The mother advised the [social worker] that the mother is not cooperating because the [social worker] is a bully and a liar.
>
> The mother has CPS history based on her mental health issues. . . .

¶ 20 The trial court's findings of fact regarding the alleged "injurious environment" are limited to those regarding Respondent-Mother's mental health. The trial court made no factual findings regarding any prior harm Riley suffered, nor did it make any findings regarding a substantial risk of harm. *In re K.J.B.*, 248 N.C. App. at 354, 797 S.E.2d at 518. (citation omitted). "Where there is no finding that the juvenile has been impaired or is at substantial risk of impairment, there is no error if all the evidence supports such a finding." *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003) (citation omitted); *see also In re K.J.B.*, 248 N.C. App. at 354, 797 S.E.2d at 518 ("A trial court's failure to make specific findings regarding a child's impairment or risk of harm will not require reversal where the evidence supports such findings." (citation omitted)).

¶ 21 Although the trial court made findings regarding Respondent-Mother's mental health and Ms. D's fear for Riley's wellbeing, many of these findings are unsupported by competent evidence. For example, the trial court found that Respondent-Mother refused to make a plan of care for Riley, but the evidence showed that Respondent-Mother had an established Temporary Safety Plan ("TSP") that she did not feel she needed to activate. The court further found Ms. D attempted to return Riley to Respondent-Mother's care and Respondent-Mother refused; however, Ms. D testified she did not tell DSS that she attempted to return Riley to Respondent-Mother's care prior to June 14, 2020.

¶ 22 Finding of fact 12 merely incorporates the allegations contained in Exhibit A as factual findings. Although it is "not *per se* error for a trial court's fact findings to mirror the wording of a petition," the trial court is mandated to find "the ultimate facts necessary to dispose of the case." *In re J.W.*, 241 N.C. App. at 48-49, 772 S.E.2d at 253 (citation omitted). As the evidence presented tended to contradict the allegations in the petition, we hold the trial court's findings of fact regarding the alleged neglect are unsupported by competent evidence. *See In re Anderson*, 151 N.C. App. at 97, 564 S.E.2d at 602 ("[T]he trial court's . . . findings must be more than a recitation of allegations."); *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (citation omitted). Further, the trial court's fact findings also include, "See Exhibit B which is incorporated by reference." "Exhibit B" is not attached to the order. It is clear the trial court's findings are no "more than a recitation of the allegations" contained in Exhibit A, as the language is identical. The trial court failed to make its own ultimate findings of facts.

¶ 23 Moreover, the trial court did not make any factual findings regarding the injurious environment in which it believed Riley resided. The evidence tends to show that the only alleged "threats of harm to the child" made by Respondent-Mother were in the text messages she sent to Ms. D; however, both the sender and the receiver of the texts testified that they neither meant nor took the texts literally. Although not required to do so, the trial court did not address the approximately ten-day long time frame between Respondent-Mother's text messages and DSS intervention. We emphasize, "in order for a court to find that the child resided in an injurious environment, evidence must show that the environment in which the child resided *has resulted in harm* to the child or a *substantial risk* of harm." *In re K.J.B.*, 248 N.C. App. at 354, 797 S.E.2d at 518 (citation omitted) (emphasis added). There is no evidence in the record before us that Riley suffered prior harm while in the care of Respondent-Mother. The trial court made no factual findings regarding

substantial risk of future harm to Riley; rather it impermissibly adopted DSS's allegation that Respondent-Mother "made threats of harm toward the child." Where both parties testified at trial that the texts were not meant literally when sent nor taken literally when received, we decline to hold that the text messages Respondent-Mother sent to Ms. D standing alone, constitute clear and convincing evidence of a substantial risk of harm toward Riley. While we agree the trial court is in a better position to determine the credibility of the witnesses than the appellate court is based on the cold record, *see In re Whisnant*, 71 N.C. App. at 441, 322 S.E.2d at 435, when, as here, the trial court fails to make the ultimate findings of fact necessary to dispose of the case or support the conclusion that Riley is a neglected juvenile, we must reverse the adjudication order and remand to the trial court.

¶ 24 This Court reversed an adjudication of neglect and abuse where the mother sent a friend "Yahoo" messages about killing her children. *See In re L.L.*, No. COA11-1460, 220 N.C. App. 416, 2012 WL 1514870, at *1, 4 (unpublished). Specifically, the mother sent messages stating, "i need a break from it all"; "im about to fukn lose it"; and "ima fukn kill em both." *Id.* at *1. During her psychiatric evaluation, the mother "told the physician she made the threatening statements because she was 'severely stressed' and thought she could 'vent' to her best friend." *Id.* In reversing the adjudication order, this Court reasoned, "[t]he evidence does show that the mental health professional who examined [the mother] for involuntary commitment found that [the mother] displayed no evidence of a desire to harm herself or her children," and the messages were "written three weeks earlier while [the mother] was 'venting' to a friend." *Id.* at *4.

¶ 25 Likewise, in *In re A.O.T.*, No. COA19-168, 268 N.C. App. 323, 2019 WL 5726809, this Court vacated an adjudication of neglect where the mother "shook the bassinet in which the baby was contained" and feared "she was going to hurt the child"; the mother admitted she "scream[ed] and curs[ed] at the child"; and the mother sent text messages to the child's father in which she stated, "I shook him again cause he's being [expletive omitted] annoying" and "I [expletive omitted] hate him . . . I'm about to throw him/ I will [expletive omitted] kill him." *Id.* at *3. There, the trial court made further findings regarding the mother's post-partum depression and messages that she hit the baby and "threw him off" her. *Id.* Although the mother "did not actually" harm the child, "she wanted the . . . father to think that she actually had shaken the baby." *Id.* This Court vacated the adjudication order, stating, "[T]he [trial] court made no finding of any 'physical, mental, or emotional impairment of the juvenile or a

substantial risk of such impairment' as required by our case law." *Id.* (citations omitted). In vacating the adjudication, this Court reasoned that, "in light of [the] [m]other's testimony that her text messages to [the] [f]ather were not true and merely an attempt to get his attention, we cannot say 'all the evidence supports . . . a finding' that [the juvenile] was either harmed or at a substantial risk of harm in his mother's care." *Id.* at *4 (citation omitted). We find the reasoning in *In re L.L.*, and *In re A.O.T.*, persuasive and adopt it herein.

¶ 26 In the present appeal, Respondent-Mother sent text messages to a close friend, messages which Ms. D testified she "didn't take literally." Respondent-Mother testified she was "venting," "blowing off steam," and that the messages were hyperbole and exaggeration. Respondent-Mother had a history of anxiety and depression, and stated she was "deeply-depressed and sleep-deprived" at the time the messages were sent. More than a week passed from the time Respondent-Mother sent the text messages until DSS arrived at the residence to evaluate Respondent-Mother for involuntary commitment. Ms. N, the community behavioral health counselor who questioned Respondent-Mother about her mental health, did not believe Respondent-Mother should be involuntarily committed. If Ms. N had determined that Respondent-Mother posed a danger to herself or others, she would have presumably recommended Respondent-Mother be involuntarily committed. Other evidence presented showed that Respondent-Mother was aware of her mental health needs and sought assistance and respite care for her child when she believed it to be necessary. The trial court made no factual findings regarding whether Riley was harmed in his mother's care or whether there was a substantial risk that he would be harmed. Accordingly, we "cannot say 'all the evidence supports a finding that [Riley] was either harmed or at a substantial risk of harm in his mother's care." ' *See id.*; *see also In re L.L.*, 2012 WL 1514870, at *4; *In re T.X.W.*, No. COA 17-855, 258 N.C. App. 204, 2018 WL 944766 (reversing an adjudication of neglect and dependency where the mother was diagnosed with mental illness and believed her friend was plotting to have DSS take the children away where "there was no evidence that [the minor children] were actually harmed or faced a substantial risk of harm while in [the mother's] care."). Based on the review of the cold record, we are not persuaded that the evidence presented at the hearing rises to the level of such evidence that would "fully convince" a fact finder that Riley suffered harm or a substantial risk of harm in his mother's care. However, we recognize that the trial court is in a better position to determine the credibility of the witnesses and to resolve the inconsistencies in the evidence. Because the trial court did not make the ultimate findings of fact

regarding the risk of harm Riley faced, we remand to the trial court for the court to make any additional findings of fact which may support its conclusion that Riley is a neglected juvenile or for the trial court to dismiss the petition in absence of such findings.

B. Adjudication of Dependency

¶ 27 **[2]** Respondent-Mother further contends the trial court erred in adjudicating Riley dependent. We agree.

¶ 28 A "dependent juvenile" is one whose "parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9). An adjudication of dependency requires the trial court to "address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the court." *In re L.C.*, 253 N.C. App. 67, 80, 800 S.E.2d 82, 91-92 (2017) (citation omitted); *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007).

¶ 29 Regarding dependency, the trial court made the following findings of fact:

> 12. After receiving evidence, the Court finds: facts as alleged in the Juvenile Petition which was filed by [DSS] and which appears in the juvenile's court file. Said copy of the Juvenile Petition is incorporated herein by reference and its allegations are found as fact by the Court. These facts are also set out in the attached page or pages (entitled "Additional Findings of Fact").
>
> . . .
>
> 13. . . . The juvenile, [Riley], is dependent, in that the juvenile needs assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision. [T]he juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement.

In the trial court's additional findings, the court found that "[t]he child is dependent in that he does not have a parent who is capable of providing safe care or supervision to the child."

¶ 30 After careful review, we hold finding of fact 13 is more appropriately classified as a conclusion of law. *See In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675 ("As a general rule, . . . any determination requiring the exercise of judgment . . . or the application of legal principles . . . is more properly classified a conclusion of law." (citations omitted)). Accordingly, the only finding of fact regarding Riley's alleged dependency is the trial court's additional finding that Riley "does not have a parent who is capable of providing safe care or supervision." This finding, however, does not address the second prong of a dependency determination. The trial court's order is devoid of factual findings regarding an alternative child care arrangement. We note, however, that there is evidence in the record from multiple sources that Respondent-Mother sought respite care for the minor child as she believed necessary. Consequently, we reverse the adjudication of dependency for the trial court's failure to consider the second prong.

III. Conclusion

¶ 31 After careful review, we reverse the adjudication order finding the juvenile to be a neglected and dependent juvenile. We remand to the trial court for additional findings of fact to support the trial court's finding of neglect or for the trial court to dismiss the petition in the absence of such findings. Because we reverse the adjudication order, we need not address the dispositional order.

REVERSED AND REMANDED.

Judge ZACHARY concurs.

Judge CARPENTER concurs in part and concurs in result only in part by separate opinion.

CARPENTER, Judge, concurring in part and concurring in result only in part.

¶ 32 I fully concur with the majority's conclusion with respect to the issue of adjudication of dependency. I respectfully concur in result only on the issue of neglect adjudication, and I write separately to differentiate my reasoning from that of the majority in reaching the decision

to reverse and remand. Regarding the trial court's adjudication of neglect, I agree with the majority's holding that "[t]he trial court made no factual findings regarding whether Riley was harmed in his mother's care or whether there was a substantial risk that he would be harmed." *See In re K.J.B.*, 248 N.C. App. 352, 354, 797 S.E.2d 516, 518 (2016) ("[I]n order for a court to find that the child resided in an injurious environment, evidence must show that the environment in which the child resided has resulted in harm to the child or a substantial risk of harm.") (citation omitted). I further agree the trial court failed to "f[ind] the ultimate facts necessary to dispose of the case" "through processes of logical reasoning." *See In re J.W.*, 241 N.C. App. 44, 48–49, 772 S.E.2d 249, 253, *disc. rev. denied*, 368 N.C. 290, 776 S.E.2d 202 (2015) (citation omitted). Instead, the trial court simply recited verbatim the allegations from DSS's petition. *See In re M.K.*, 241 N.C. App. 467, 470–71, 773 S.E.2d 535, 538–39 (2015). However, for the following reasons, I disagree with the analysis of the majority opinion with respect to whether there is sufficient evidence in the record for the trial court to find Riley resided in an injurious environment.

¶ 33 This Court reviews a trial court's adjudicatory decision "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372, N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (citation omitted). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379, 831 S.E.2d 305, 310 (2019) (citation omitted).

¶ 34 As an initial matter, I note the trial court was not required to making findings of fact regarding the credibility of witnesses or resolve inconsistences in the evidence—the trial court *was* required to "find the ultimate facts essential to support the conclusions of law." *See In re J.W.*, 241 N.C. App. at 48, 772 S.E.2d at 253.

¶ 35 The majority appears to decline to hold there is sufficient evidence in the record that would permit the trial judge to find the child suffered a substantial risk of harm in his mother's care by weighing the evidence and assessing the credibility of the witnesses presented at trial. It is not this Court's role to weigh evidence and determine the credibility of witnesses. *See In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) ("[I]t is [within the trial court] judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom.") (citing *Knutton v. Cofield*, 273 N.C. 355, 160

S.E.2d 29 (1968)). By doing so, it appears this Court is stepping into the shoes of the trial court judge.

¶ 36 Seemingly disregarded by the majority is record evidence and the plain language of text messages that were received in evidence in which Respondent-Mother admits to taking a step toward harming the child—which was consistent with her threats. In her text messages, Respondent-Mother stated, *inter alia*, she: "*want[ed] to strangle the [expletive omitted] lights out of [her child]*," was "going to have to abandon him," was "going to hurt him," was "going to kill him" and "*literally had [her] hands around his throat*." (Emphasis added). The majority declines to conclude these text messages could be found by the trial judge to be clear and convincing evidence that Riley was at a substantial risk of harm based on the Respondent-Mother's and Ms. D's testimony. Rather, the majority appears to re-weigh evidence and determine witness credibility, as evidenced by the majority's description of Respondent-Mother's text messages as including "hyperbolic language" and its presumption that Respondent-Mother did not pose a substantial risk of harm to Riley because Respondent-Mother was not involuntarily committed following DSS's evaluation.

¶ 37 I note the record also includes testimony of Ms. D on 12 October 2020 that she "absolutely" had reservations about returning Riley to the care of his mother after Respondent-Mother agreed to place Riley in a "safe home" through a foster care program. Ms. D was hesitant to return the child to Respondent-Mother "because [she] didn't think that [Respondent-Mother] could [care for the child]" based on "all the stuff she said and texted [her] and telling [her] that [she] was trying to find [Riley a home]." The majority focuses its attention on testimony provided by Ms. D at the second adjudication hearing, held over three weeks later, on 5 November 2020. At the 5 November hearing, Ms. D testified she "didn't take [Respondent-Mother's text message in which she stated she was going to kill Riley] literally." However, the majority notes on multiple instances Ms. D "didn't take literally" Respondent-Mother's text messages. This statement by the majority takes Ms. D's testimony out of context since her response at the hearing only pertained to the text messages in which Respondent-Mother stated she was going to *kill* Riley—not to the text message string in general. Also, the majority's emphasis on Ms. D's testimony in which she testified she did not take Respondent-Mother's text messages "literally," conflicts with the other evidence of record, including Ms. D's earlier testimony. The majority's emphasis on certain evidence, while being dismissive of other evidence, necessarily demonstrates its undertaking of determining witness credibility and the weight to be given to the evidence—a role reserved for the

trial judge and not this Court. *See In re Whisnant*, 71 N.C. App. at 441, 322 S.E.2d at 435.

¶ 38 Similarly, the majority appears to hold that the text messages could not be clear and convincing evidence of a substantial risk of harm toward Riley based in part on Respondent-Mother's own testimony at the adjudication hearing in which she testified she was only "venting" in her "hyperbolic" text messages to Ms. D. This reasoning again involves determining witness credibility and evidence weight, which was solely within the province of the trial court. *See In re Whisnant*, 71 N.C. App. at 441, 322 S.E.2d at 435.

¶ 39 Finally, the majority relies heavily on unpublished opinions of this Court in considering whether the trial court's neglect adjudication was based on sufficient findings of fact or sufficient evidence. As this Court has previously noted, "a parent's conduct in a neglect determination must be viewed on a case-by-case basis considering the totality of the evidence." *In re L.T.R.*, 181 N.C. App. 376, 384, 639 S.E.2d 122, 128 (2007). In the instant case, the evidence included, *inter alia*, testimony by Respondent-Mother in which she describes calling 911 "to make sure that there would be another adult [at her home]," testimony by witnesses including Ms. D, and multiple text messages sent by Respondent-Mother to Ms. D in which Respondent-Mother threatened to harm Riley. Accordingly, I would hold there was sufficient evidence in the record for the trial court to make a finding Respondent-Mother posed a "substantial risk of [physical] impairment" to Riley "as a consequence of [her] failure to provide proper care . . . ." *See In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901–02 (1993). Since the trial court failed to make such a finding, I would conclude the trial court's findings were insufficient under N.C. Gen. Stat. § 7B-101(15) (2019) to support a conclusion of law that Riley was a neglected juvenile. Therefore, I agree with the majority's decision to reverse the trial court's adjudication of neglect and remand to the trial court to make additional findings of fact regarding "the existence or nonexistence of any of the conditions alleged in [DSS's] petition." *See In re V.B.*, 239 N.C. App. 340, 344, 768 S.E.2d 867, 869–70 (2015); *In re H.J.A.*, 223 N.C. App. 413, 419, 735 S.E.2d 359, 363 (2012) (stating our Court "must reverse the trial court's order" where there is sufficient evidence in the record to support a finding, yet the trial court failed to make such a finding).

¶ 40 For the reasons stated above, I fully concur with the majority opinion on the issue of the dependency adjudication. I disagree with the majority's reasoning with respect to the issue of the neglect adjudication, and therefore, I respectfully concur in result only with the majority's opinion on this issue.

IN RE Z.P.

[280 N.C. App. 442, 2021-NCCOA-655]

IN THE MATTER OF Z.P.

No. COA21-184

Filed 7 December 2021

1. Appeal and Error—preservation of issues—juvenile delinquency—sufficiency of evidence—no statutory mandate—Rule 2

In an appeal from an order adjudicating a juvenile delinquent for communicating threats, the juvenile could not preserve for appellate review her challenge to the sufficiency of the evidence by arguing that N.C.G.S. § 7B-2405(6) (requiring the court in an adjudicatory hearing to protect the juvenile's rights) contained a statutory mandate that the trial court had violated. Nevertheless, the Court of Appeals invoked Appellate Rule 2 to review the juvenile's sufficiency argument, noting that the State was not prejudiced at the adjudication hearing where the juvenile's counsel did not move to dismiss at the close of all the evidence, since it was obvious from the transcript that the juvenile's defense rested largely on the insufficiency of the State's evidence.

2. Threats—mass violence on educational property—sufficiency of evidence—true threat—juvenile delinquency

The portion of an order adjudicating a juvenile delinquent for communicating a threat of mass violence on educational property (N.C.G.S. § 14-277.6) was reversed where the juvenile had told four of her classmates she was going to blow up their school but where the State failed to meet its burden of showing that a reasonable hearer would have objectively construed her statement as a true threat. At the adjudication hearing, three classmates testified that they did not believe she was serious when she made the statement, and the fourth classmate's equivocal testimony that the statement was either "a joke or it could be serious" was insufficient to satisfy the State's burden.

3. Threats—to physically injure a classmate—sufficiency of evidence—juvenile delinquency

The portion of an order adjudicating a juvenile delinquent for communicating a threat (N.C.G.S. § 14-277.1) was affirmed where, based on the State's evidence, the juvenile threatened to kill her classmate with a crowbar and "bury him in a shallow grave," the classmate testified that he was scared of the juvenile and believed

she could carry out the threat, and the classmate's fear was reasonable given that the juvenile was larger than him and had physically threatened him on other occasions.

Appeal by Juvenile from orders entered 30 July 2020 and 27 August 2020 by Judge Carole Hicks in Iredell County District Court. Heard in the Court of Appeals 22 September 2021.

Attorney General Joshua H. Stein, by Deputy General Counsel Tiffany Lucas, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for the Juvenile-Appellant.

DILLON, Judge.

¶ 1 Z.P. ("Sophie")[1] appeals from the trial court's 30 July 2020 order adjudicating her delinquent ("Adjudication Order") and the 27 August 2020 order sentencing her to a Level 1 Disposition ("Disposition Order").

I. Background

¶ 2 This matter involves two petitions filed against Sophie for statements she made in September 2019 at her school to fellow students when she was eleven years old.

¶ 3 One petition alleged a felony, specifically that she communicated a threat of mass violence on educational property by stating that she was going to blow up her school. The other petition alleged a misdemeanor, specifically that she communicated a threat of physical violence towards another student, Cameron.

¶ 4 The trial court adjudicated Sophie delinquent, finding that she committed both offenses and imposed a Level One disposition. Sophie appealed to our Court, essentially contending that the State failed to present sufficient evidence to prove the allegations contained in either petition.

II. Preservation of Arguments

¶ 5 **[1]** The State contends that Sophie's counsel did not preserve her arguments regarding the sufficiency of the State's evidence.

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1. Pseudonyms are used to protect the identity of the juveniles in this case. *See* N.C. R. App. P. 42(b)(1).

¶ 6 Sophie argues that our Court should address her sufficiency arguments (1) by considering N.C. Gen. Stat. § 7B-2405(6) (2019) a statutory mandate or (2) by invoking Rule 2 of our Rules of Appellate Procedure. Section 7B-2405(6) states that "[i]n [an] adjudicatory hearing, the court shall protect [a juvenile's rights, including a]ll rights afforded adult offenders except the right to bail, the right of self-representation, and the right of trial by jury." We conclude that Section 7B-2405(6) does not preserve Sophie's argument on appeal. Notwithstanding, we exercise our discretion to invoke Rule 2 of our Rules of Appellate Procedure to review Sophie's arguments. In doing so, we note that the State was not prejudiced by the failure of Sophie's counsel to formally move to dismiss at the close of all the evidence and that it is obvious from the transcript that Sophie's defense rested largely on the insufficiency of the State's evidence.

III. Analysis

¶ 7 At the juvenile hearing, the State called as witnesses four of Sophie's classmates who heard one or more of Sophie's statements. The State also called the assistant principal and resource officer, both of whom investigated the matter. On appeal, Sophie argues that the State failed to present sufficient evidence to support the allegations in each of the two petitions. As in other types of cases, our Supreme Court has held that in a case where a petition is filed alleging that a juvenile has committed a criminal act, the standard of review is as follows:

> This Court reviews de novo a trial court's denial of a motion to dismiss for insufficiency of the evidence to determine whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.
>
> Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion.
>
> All evidence is viewed in the light most favorable to the State and the State receives the benefit of every reasonable inference supported by that evidence.

In re J.D., 376 N.C. 148, 155, 852 S.E.2d 36, 42 (2020) (internal citations and quotation marks omitted). We address Sophie's sufficiency argument separately as to each petition.

A. Threat of Mass Violence to Educational Property

¶ 8 **[2]** The State filed a juvenile petition alleging that Sophie violated Section 14-277.6 of our General Statutes by "willfully and feloniously [ ] threaten[ing] to commit an act of mass violence on an educational property by stating that she was going to blow up the school [in the presence of four of her classmates.]" As set forth below, the evidence is uncontradicted that Sophie did make a statement to the effect that she was going to blow up the school. However, Sophie argues that there was insufficient evidence that her threat was a "true threat," something that must be proven under Section 14-277.6.

¶ 9 The United States Supreme Court has concluded that an anti-threat statute requires the government to prove a "true threat." *Watts v. United States*, 394 U.S. 705, 708 (1969). That Court has explained that a true threat, for purposes of *criminal* liability, depends on *both* how a reasonable hearer would objectively construe the statement *and* how the perpetrator subjectively intended her statement to be construed. *Elonis v. United States*, 575 U.S. 723, 737-38 (2015).

¶ 10 However, there seems to be a split in cases construing criminal anti-threat statutes concerning exactly what the State must prove regarding the perpetrator's subjective intent to be. For instance, in an unpublished 2012 case, we held that, to satisfy the subjective intent prong, the State must merely prove that the perpetrator subjectively intended to communicate a statement to a hearer, irrespective of whether the perpetrator intended the communication to be construed as a threat:

> Defendant's testimony showed that he knew about the history of the WANTED posters and was aware that they could be "threatening." While defendant testified that he did not intend to make [the victim] fearful, his testimony showed that by handing out the posters, defendant intended to communicate with [the victim] and that communication caused [the victim] to fear for his own safety. Therefore, the WANTED posters distributed by defendant fall under the definition of a true threat, an unprotected category of speech.

State v. Benham, 222 N.C. App. 635, 731 S.E.2d 275, 2012 N.C. App. LEXIS 979, *27 (2012) (unpublished) (construing a misdemeanor stalking statute).

¶ 11 More recently, though, in a case that is currently pending at our Supreme Court, we held that the State must show that the perpetrator's

"subjective intent [was] to threaten a person or group of persons by communicating the alleged threat." *State v. Taylor*, 270 N.C. App. 514, 561, 841 S.E.2d 776, 816 (2019).

¶ 12 In any event, we need not decide in this case whether the State's burden here was to show Sophie subjectively intended to make a threat, or merely that she subjectively intended to make a statement that constituted what others thought was a threat.

¶ 13 For the reasoning below, we conclude that the State's evidence failed the objective portion of the "true threat" test. In other words, the State did not meet its burden of showing that an objectively reasonable hearer would have construed Sophie's statement about bombing the school as a true threat.

¶ 14 The State's evidence essentially showed as follows:

¶ 15 Three of Sophie's classmates (Madison, Tyler, and Caleb) each testified to hearing Sophie threaten to blow up the school, though none of them testified that they thought she was serious when she made the threat.

¶ 16 Madison testified that Sophie talked about bombing the school. Madison testified that she did not think Sophie was serious when making the statement, and Madison did not report the threat to any adult.

¶ 17 Tyler testified that Sophie "said something about a bomb" and said "she was going to blow up the school." Tyler offered in a joking manner to help her build the bomb and stated that he "thought it was just a joke."

¶ 18 Caleb also heard Sophie's threat about blowing up the school but was equivocal about his perception of Sophie's seriousness, stating that her statement was "either [ ] a joke or it could be serious."

¶ 19 The State's evidence may create a *suspicion* that it would be objectively reasonable for Sophie's classmates to think Sophie was serious in making her threat. But we do not believe that the evidence is enough to create an *inference* to satisfy the State's burden. Indeed, none of Sophie's classmates who heard her statement believed that Sophie was serious, with most of them convinced that she was joking. She had made outlandish threats before, never carrying out any of them. *See Watts*, 394 U.S. at 707-08 (stating that the "context" in which the alleged threat was made must be considered); *see also Taylor*, 270 N.C. App. at 562, 841 S.E.2d at 816-17 (holding that the context in which the statement is made must be considered to evaluate whether the hearers would think the statement was a "serious expression of an intent to kill or injure [others]").

¶ 20 We note that there was evidence that Sophie told her fellow students that there may be a school shooting and that they could protect themselves from the shooter if they wore a certain color. However, the State's petition only makes allegations about a threat to "blow up" the school, and we only evaluate the sufficiency of the evidence as to that allegation.

¶ 21 Accordingly, we reverse the trial court's judgment with respect to this petition.

B. Communicating a Threat to Harm a Fellow Student

¶ 22 **[3]** In the other petition, the State alleged that Sophie "unlawfully and willfully threaten[ed] to physically injure the person or damage the property of [Cameron]" by stating that "she was going to kill him with a crowbar and bury him in a shallow grave." Again, there is overwhelming evidence that Sophie made this statement.

¶ 23 The State alleged that Sophie violated Section 14-277.1 of our General Statutes which states that a person is guilty of a misdemeanor if:

1. She "willfully threatens to physically injure" another;
2. She communicates the threat orally to the other person;
3. A reasonable hearer would "believe that the threat is likely to be carried out;" and
4. The hearer actually believes that the threat will be carried out.

N.C. Gen. Stat. § 14-277.1(a) (2019).

¶ 24 Here, the State's evidence showed that Sophie told another student that she was going to physically injure Cameron when Cameron was in earshot. Specifically, the State's evidence was as follows:

¶ 25 Cameron testified that Sophie had physically threatened him previously; that he heard Sophie make the statement that she was going to hit him with a crowbar; and that Sophie is larger and stronger than he is. Cameron did testify that Sophie may have been joking but also that he believed that Sophie could hit him with a crowbar. He also testified that he was scared of Sophie because of her past threats.

¶ 26 Madison testified that she heard Sophie threaten to hit Cameron with a crowbar and bury him in a shallow grave.

¶ 27 The assistant principal testified that Cameron seemed very fearful of Sophie and that Sophie admitted to not liking Cameron and wishing he were dead.

¶ 28 The trial court found that Sophie made the statement "in a manner that was intended for [Cameron] to hear it" and that Cameron believed Sophie could carry out the threat regarding the crowbar.

¶ 29 We conclude the evidence, in the light most favorable to the State, was sufficient to sustain the trial court's finding that Sophie violated Section 14-277.1. Taken in this light, Cameron took her threat about hitting him with a crowbar and burying him in a shallow grave seriously. Further, it would be reasonable for a person in his position to take the threat seriously, in that Cameron is a person who is smaller in stature than Sophie and had been physically threatened by her on other occasions.

¶ 30 We, therefore, affirm the trial court's judgment regarding the petition alleging a violation of Section 14-277.1.

IV. Conclusion

¶ 31 Regarding the Adjudication Order, we affirm as to the finding that Sophie violated Section 14-277.1 (communicating a threat). However, we reverse as to the finding that Sophie violated Section 14-277.6 (communicating a threat of mass violence on educational property).

¶ 32 Accordingly, we vacate the trial court's Disposition Order and remand to allow the trial court to reconsider the disposition in light of our reversal of its finding that Sophie violated Section 14-277.6. On remand, the trial court may enter a disposition up to a Level 1, as it previously did.

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

Judges COLLINS and WOOD concur.

MALONE-PASS v. SCHULTZ

[280 N.C. App. 449, 2021-NCCOA-656]

KELLY MALONE-PASS, PLAINTIFF
v.
DAVID SCHULTZ, DEFENDANT

No. COA20-911

Filed 7 December 2021

1. Child Custody and Support—Uniform Child Custody Jurisdiction and Enforcement Act—jurisdiction—home state—allegations of unjustifiable conduct

The trial court had jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to modify an out-of-state child custody order where the children had lived with the father in North Carolina for more than six consecutive months immediately preceding the filing and where the out-of-state custody order relinquished that state's jurisdiction and required the parties to register the order in North Carolina within seven days. Further, the trial court fully considered the mother's allegations that the father had committed fraud and properly concluded that jurisdiction was not barred by N.C.G.S. § 50A-208(a); in any event, the court would have had jurisdiction under the exceptions to N.C.G.S. § 50A-208(a) because both parents had acquiesced to the court's jurisdiction and the out-of-state court had determined that North Carolina was the more appropriate forum.

2. Child Custody and Support—best interests of the child—no visitation for parent—support by unchallenged findings

In a child custody matter, the unchallenged findings supported the ultimate findings and conclusions that it was in the children's best interests for their father to have sole legal and physical custody and for their mother not to have visitation, where the teenage boys were doing well with their father, were angry with their mother for "essentially kidnapping" them, and did not want to see their mother.

Appeal by plaintiff from order entered on or about 4 November 2019 by Judge Edward A. Pone in District Court, Cumberland County. Heard in the Court of Appeals 25 May 2021.

Culbertson & Associations, by K.E. Krispen Culbertson, for plaintiff-appellant.

No brief filed by defendant-appellee.

STROUD, Chief Judge.

¶ 1 Kelly Malone-Pass ("Mother") appeals from an amended order granting David Schultz ("Father") sole legal and physical custody of their two minor children and denying Mother visitation with the children. Mother first argues the trial court lacked subject matter jurisdiction or should have declined to exercise it under North Carolina General Statute § 50A-208(a). N.C. Gen. Stat. § 50A-208(a) (2019). Mother then challenges Findings of Fact and Conclusions of Law that she acted inconsistently with her constitutionally protected status as a parent, that Father was a fit and proper person to have sole legal and physical custody, that granted Father sole legal and physical custody, and that determined it was not in the children's best interest to have visitation with Mother. After *de novo* review, we hold the trial court had jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") and that North Carolina General Statute § 50A-208(a)'s jurisdictional bar does not apply here. In addition, we hold that the trial court's Findings of Fact support its ultimate Findings and Conclusions of Law that it was in the children's best interest for Father to have sole legal and physical custody and for Mother to have no visitation, and the trial court did not abuse its discretion by entering this order. Therefore, we affirm.

I. Background

¶ 2 The uncontested Findings of Fact in this case show the proceedings in North Carolina started when Mother filed a petition to register a foreign child custody order from New York in late 2017.[1] The New York custody order granted Mother and Father joint custody, with the children, D.S. and A.S.,[2] living primarily with Father, and set out visitation schedules. The New York order also required the parties to register the order in North Carolina within seven days and stated that "New York State is relinquishing jurisdiction." The North Carolina trial court "asserted and assumed jurisdiction from New York over the minor children and the parties," finding at the time "both parties and the children resided in North Carolina."

¶ 3 Later, "both parties filed subsequent motions and countermotions for North Carolina to assert jurisdiction, civil contempt, and motions to

1. The record in this case was filed by Mother as the "Proposed Record on Appeal." Father did not file any "notices of approval or objections, amendments, or proposed alternative records on appeal," so Mother's "proposed record on appeal thereupon constitutes the record on appeal." N.C. R. App. P. Rule 11(b).

2. We use the children's initials to shield their identity.

modify child custody due to a substantial change in circumstances affecting the welfare of the minor children." Mother's motion alleged she was a resident of both New York and of North Carolina. Over the course of 2018 and into early 2019, the trial court entered a number of orders that granted Father temporary custody of the children and set various visitation schedules for Mother. Mother failed to appear at one of these hearings. Also during 2018, both parents moved, Father to Summerville, South Carolina and Mother to Massachusetts.

¶ 4 In March 2019, Mother, claiming residence in Massachusetts, filed a domestic violence action against Father in Massachusetts and obtained a domestic violence protective order from the Massachusetts court; this order also granted her emergency temporary custody of the children. Pursuant to the Massachusetts order, Mother traveled to South Carolina, took custody of the children, and brought them to Massachusetts with her. In response, Father filed before the North Carolina trial court an emergency motion to suspend Mother's visitation, alleging that Mother had made fraudulent claims before the Massachusetts court. The Massachusetts court then dismissed the action and dissolved its orders nunc pro tunc. The same day as the Massachusetts court's action, the North Carolina trial court held a hearing on the issue. The North Carolina court ordered the children be returned to Father's custody in compliance with its previous orders and notwithstanding the Massachusetts action because North Carolina was the only state with subject matter jurisdiction regarding child custody.

¶ 5 Following the Massachusetts incident, the trial court held multiple hearings over the course of April 2019, culminating in the May 2019 order and amended order. On 3 April 2019, the trial court held an in-chambers discussion with the children about the Massachusetts incident and found the children:

> are very upset with . . . Mother for taking them from South Carolina. The anger had not subsided; however, during the course of the conversation, the court determined that they still loved their [M]other. The minor children did not want to visit with their [M]other, however, they understood the court was likely to order visitation. It was clear that they wanted the visits to be in South Carolina if there was going to be visitation. They did not want to travel to Massachusetts. The minor children gave no indication that . . . Father had influenced them in any way or talked negatively about . . . [M]other.

The court also barred Mother and Father from asking the children about the in-chambers conversation between the court and the children. Following the hearing, the court allowed Mother to take the children to lunch. At the lunch, among other events, Mother asked the children about the in-chambers conversation they had with the court, thereby violating the court's order. The trial court made an unchallenged Finding of Fact that the lunch "added further toxicity to the relationship" between the children and Mother. Following that lunch, Father filed a motion to suspend Mother's visitation, and the court held a hearing on that motion on 11 April 2019. The April hearings culminated in an amended order on 9 May 2019 granting temporary joint custody to Mother and Father with Father having temporary legal and physical custody of the children. The trial court set a visitation schedule for Mother, but it also stated: "***The minor children will not be forced to visit with [Mother] if they choose not [to] do so and they must inform . . . [Mother] of their desire not to visit with [Mother]***." (Bold and italics in original.)

¶ 6 The court held a final hearing on the motions for modification of the New York custody order on 14–16 August 2019. The day before the hearing, Mother filed a motion to dismiss alleging the court lacked subject matter jurisdiction, and she then renewed that motion in court at the beginning of the hearing. Mother argued that New York had subject matter jurisdiction, not North Carolina, that Father had committed fraud by telling the New York court he would live permanently in North Carolina with the children, and that the New York court would be the best place to address the fraud issue. In Findings of Fact and a Conclusion of Law which Mother challenges on appeal, the trial court found North Carolina had subject matter jurisdiction to modify the New York custody order and therefore denied Mother's motion to dismiss. The trial court's ruling was based on unchallenged Findings of Fact that Father and the children moved to North Carolina in March 2017 and lived there continuously for more than six months before the action was filed, that Mother previously acknowledged and averred to those facts, and that the New York order specifically stated the parties were required to register the order in North Carolina within seven days and that New York was relinquishing jurisdiction.

¶ 7 Following the hearing in mid-August 2019, the trial court appointed a Guardian Ad Litem ("GAL") so that the children's "voices could be heard." The GAL spoke with both parties and the children and prepared a report for the court. The court held a hearing about the GAL's report in September 2019 where it received her report into evidence, heard

testimony about it, and allowed the parties the opportunity to question the GAL. Mother was not present at the hearing without explanation, and Father had his attorney present although the attorney did not ask the GAL any questions.

¶ 8 The August and September 2019 hearings led to the trial court's order now on appeal, the "Order on Motions to Modify Custody/Contempt," in November 2019. (Capitalization altered.) The order granted Father sole legal and physical custody of the children, denied Mother visitation because it was not in the best interest and welfare of the children, and dismissed the contempt issues as moot. To support those orders, the trial court made numerous unchallenged Findings of Fact. Beyond the issues discussed above, the trial court made the following unchallenged Findings of Fact by "clear, cogent and convincing evidence." (Underline in original.)

¶ 9 First, the trial court made Findings about the children's living arrangements with Father. The children lived with Father from the start of the case, and Father and the children moved to North Carolina with the previous family therapist's approval. The trial court further found the children were doing well with Father. The court noted that prior to the Massachusetts incident, "The children were not in any danger. They were very happy in the home of . . . [F]ather. They were doing well in school." The children also continued to do well in their Father's care following the time their Mother took them to Massachusetts, with the court finding at the time of the order:

> 174. The minor children are doing well in their [F]ather's care. They are both doing well in school and are happy in the home of their [F]ather and step-mother.
>
> 175. [A.S.] developed encopresis which had been treated following the removal and placement in foster care in Colorado.[3] It recurred and he had a few incidents after . . . [M]other removed him from South Carolina with the Massachusetts order which was subsequently dismissed. It is stress related and he is having less stress since the visitation [with Mother] had stopped.

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3. Prior to living in New York, Mother and the children had resided in Colorado, where there was an investigation by child protective services that resulted in the children being removed from Mother's care and being placed in foster care.

> 176. They are doing much better now in therapy. They enjoy the sessions as it is now totally focused on them. They enjoy school and they have good grades.
>
> 177. They attend [redacted] High School. [D.S.] is playing football and running track. His grades last year were all A's except a B in Spanish.

¶ 10 The trial court also considered and ultimately rejected Mother's evidence that Father was harming her and the children. Mother introduced evidence from the children's therapist with accusations that Father had "heavily coached" the children to "alienate[]" them from Mother and that Father was "fixated about making accusations against" Mother. After reviewing and evaluating the evidence, the trial court made unchallenged Findings the therapist's accusations were "without a valid basis" and based on "assumptions he was not in a position to make." The trial court also made further Findings about the Massachusetts incident, concluding in line with the Massachusetts court that Mother had falsely alleged domestic violence:

> 127. On or about March, 2019, she went to the Massachusetts court and obtained a DVPO [domestic violence protection order] with custody provisions by making false statements and testimony to the Massachusetts court.
>
> . . .
>
> 129. She alleged domestic violence which was not true.
>
> . . .
>
> 132. She lied to the Judge in Massachusetts to the point that the matter was not just dismissed but vacated nunc pro tunc.
>
> 133. The Judge was clearly disgusted with the whole process as she had questioned . . . [M]other extensively at the ex-parte hearing as she felt she did not have jurisdiction.
>
> 134. The Court determined . . . [M]other made false statements. She uprooted the children and took them to a state in which they had never lived.
>
> 135. She told the Judge at the Ex-parte hearing that she and the children had lived there since September, 2018. That she had to have surgery so she took the children to . . . [F]ather to stay. She further alleged

> domestic violence including harm to the children, all of which was untrue.

¶ 11 Beyond the unchallenged Findings about Father, the trial court also made unchallenged Findings about Mother's actions and relationship with the children. First, the trial court noted the negative impact the Massachusetts incident had on the children. The trial court found the incident "was a very traumatic experience for both boys" that "is having a lasting impact upon them emotionally." Mother "disrupted their education in that she took them without warning, did not enroll them in school and cut off their contact with their [F]ather and stepmother as well as their friends. (This lasted for approximately two (2) weeks.)." The trial court found the children viewed the situation as Mother having "essentially kidnapped them." As a result, the children were "angry" with Mother and "no longer want[ed] to have contact with" Mother because of Mother's actions. At the time, Mother had not realized the impact of the Massachusetts incident, and the trial court also found she still did not "demonstrate an appreciation for the trauma she caused."

¶ 12 The trial court also made unchallenged Findings beyond the Massachusetts incident. It found Mother hindered the children's therapy by "dominat[ing] the sessions" such that they "obtained little if any benefit." Once the children transitioned to individual therapy without Mother, they started "doing much better in therapy." Further, the trial court made an unchallenged Finding that it is "very likely" that Mother "suffers from mental or emotional issues of unknown etiology."

¶ 13 Finally, the trial court made several unchallenged Findings of Fact about the children's resistance to continued visitation with Mother. Even before the trial court got involved, the children were "resistant to visiting" with Mother, although under a therapist's supervision they initially graduated from supervised visitation to unsupervised visitation. Following the Massachusetts incident, the children told the court at the in-chambers meeting they "did not want to visit with" Mother. Following that time, "[t]he children have become increasingly resistant to visiting with" Mother. Ultimately, by the time the order was entered, the trial court found the children "do not want to visit with or even talk to" Mother. The children even "declined to have dinner or otherwise visit with" Mother during the trial. The trial court further found Mother had "disrupt[ed] the peace and tranquility of the minor children's lives in her effort to force visitation on them." The stress of visitation was so great that it caused one of the children to suffer a reoccurrence of a stress-related ailment that has improved since visitation stopped, which decreased the children's stress levels.

¶ 14 Based upon all these Findings, the trial court granted Father sole legal and physical custody of the children and denied Mother visitation, finding it was not in the best interest and welfare of the children. This Court allowed Mother's petition for writ of certiorari "for purposes of reviewing the 'Order on Motions to Modify Custody/ Contempt' " and the amended order.

II. Subject Matter Jurisdiction

¶ 15 **[1]** Mother first argues the trial court lacked subject matter jurisdiction. The argument takes two forms. First, Mother lists a number of "[e]xception[s]," all of which relate to the trial court's denial of Mother's motion to dismiss based on lack of subject matter jurisdiction or the trial court's Findings of Fact and Conclusions of Law on subject matter jurisdiction. We note that exceptions were eliminated in changes to the Rules of Appellate Procedure effective as of October 2009. *See* 363 N.C. at 901, 935–38 (enacting new Rules of Appellate Procedure and listing new Rule 10 as well as history of changes, including "delet[ion of] former 10(a)"); 324 N.C. at 638 (laying out old Rule of Appellate Procedure 10(a), requiring assignments of error); 287 N.C. at 698–99 (recounting Rule of Appellate Procedure 10(a) as originally enacted, which includes the term "exceptions" in the places where Rule 10(a) before 2009 used the term "assignments of error" and requires "exceptions" to be the basis of assignments of error).[4] Although this method is not in compliance with the Rules of Appellate Procedure, we will treat Mother's "exceptions" as challenges to the noted Findings of Fact and Conclusions of Law.

¶ 16 Mother's other arguments on subject matter jurisdiction are more specific. First, Mother argues the trial court should have declined to exercise jurisdiction pursuant to North Carolina General Statute § 50A-208(a) because "any subject matter jurisdiction" the trial court "might have obtained was the result of fraud." (Capitalization altered.) Specifically, Mother argues she had evidence that Father "falsely represented to her and the New York court that he planned to live in North Carolina at least until the children graduated from high school." As part of this argument under § 50A-208(a), Mother would have to demonstrate that the New York court, as a "court of the state otherwise having jurisdiction," did not determine "that this State [North Carolina] is a more appropriate forum." N.C. Gen. Stat. § 50A-208(a)(2) (citations omitted). Mother's response to this exception to § 50A-208(a)'s requirement for a

4. This citation sentence cites to appendices in the hardcopy versions of the North Carolina Reporter. A citation to the hardcopy is required because the online versions of the North Carolina Reporter on Westlaw and Lexis do not include the appendices nor historical versions of the North Carolina Rules of Appellate Procedure.

trial court to decline jurisdiction in certain situations is that, "it would be up to the New York court to make the determination that North Carolina would be the more appropriate forum." The crux of these arguments is again that "the trial court erred in finding and concluding that North Carolina had subject matter jurisdiction and had jurisdiction to modify the New York custody order" and denying Mother's motion to dismiss on those grounds. (Capitalization altered.)

A. Standard of Review

¶ 17 Oddly, Mother filed the "Petition for Registration of Foreign Child Custody Order" and the "Motion for Modification of Parenting Time Schedule" that led to the order from which Mother appeals. (Capitalization altered.) *See Booker v. Strege*, 256 N.C. App 172, 174, 807 S.E.2d 597, 599 (2017) ("Oddly, it was defendant who filed for modification of custody in North Carolina[.]"). "[N]onetheless, a party cannot confer subject matter jurisdiction on a court merely by requesting relief in it." *Id.* (citing *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) ("Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to object to the jurisdiction is immaterial. Because litigants cannot consent to jurisdiction not authorized by law, they may challenge jurisdiction over the subject matter at any stage of the proceedings, even after judgment." (noting alterations))). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010); *see also Matter of T.R.*, 250 N.C. App. 386, 389, 792 S.E.2d 197, 200 (2016) ("The issue of whether a trial court possesses jurisdiction under the UCCJEA is a question of law that we review *de novo*.") (citing *In re J.H.*, 244 N.C. App. 255, 260, 780 S.E.2d 228, 233 (2015)).

B. Analysis

¶ 18 As explained above, Mother challenges both the general Findings of Fact and Conclusions of Law determining the trial court had subject matter jurisdiction by listing exceptions and makes a specific challenge to such jurisdiction via North Carolina General Statute § 50A-208(a). We first address the general argument that the trial court lacked subject matter jurisdiction and then turn to the specific argument pursuant to § 50A-208(a).

1. Subject Matter Jurisdiction Generally

¶ 19 Since the original child custody order in this case is from New York, the applicable provision of the UCCJEA is North Carolina General

Statute § 50A-203, which addresses when North Carolina courts can modify a "child-custody determination made by a court of another state." N.C. Gen. Stat. § 50A-203 (2019).

> Under the applicable provisions of N.C. Gen. Stat. § 50A–203, a North Carolina court may modify an out-of-state child custody determination if both (1) North Carolina "has jurisdiction to make an initial determination under G.S. 50A–201(a)(1) or G.S. 50A–201(a)(2)" *and* (2) "[t]he court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A–202 *or* that a court of this State would be a more convenient forum under G.S. 50A–207[.]" N.C. Gen. Stat. § 50A–203(1) (emphasis added).

Matter of T.R., 250 N.C. App. at 389, 792 S.E.2d at 200 (footnote omitted) (all alterations and emphasis in original).

¶ 20 The first part of § 50A-203's test imports the requirements from § 50A-201(a). The latter section states:

> (a) Except as otherwise provided in G.S. 50A-204, a court of this State has jurisdiction to make an initial child-custody determination only if:
>
> (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:
>
> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and

> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

N.C. Gen. Stat. § 50A-201(a) (2019). The term "home state" is defined as:

> the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

N.C. Gen. Stat. § 50A-102(7) (2019).

¶ 21 Here, North Carolina was the home state for the children when the child custody proceeding commenced. The uncontested Findings of Fact found: "The children and . . . [F]ather resided in North Carolina for more than six consecutive months immediately preceding the filing of the matter. (March, 2017 until the registration in December, 2017 and the filings beginning in January, 2018)." This Finding of Fact was based on Mother's own original Motion for Modification of Parenting Time Schedule that indicated both children lived with Father in North Carolina for the past six months. Thus our *de novo* review does not find anything different from the trial court. Because a parent, Father, and the children lived in North Carolina for at least six months before proceedings began, North Carolina is the home state. N.C. Gen. Stat. § 50A-102(7). Because North Carolina is the home state, its courts, including the trial court, had jurisdiction under § 50A-201(a)(1).

¶ 22 Turning to the second requirement to modify an out-of-state child custody order, § 50A-203 requires "[t]he court of the other state [to] determine[] it no longer has exclusive, continuing jurisdiction under G.S. 50A–202 or that a court of this State would be a more convenient forum under G.S. 50A–207[.]" *Matter of T.R.*, 250 N.C. App. at 389, 792 S.E.2d at 200 (citing N.C. Gen. Stat. § 50A-203(1)) (first and last alterations in original). Here, as the trial court found, the New York child custody order specifically stated it was "relinquishing [j]urisdiction," once as a freestanding statement and once when it ordered the parents to register the order in North Carolina within seven days. Thus, the second jurisdictional requirement to modify an out-of-state child custody order is also met. Because both requirements of § 50A-203 are met, we conclude after *de novo* review that the trial court had subject matter jurisdiction.

2. Jurisdiction and § 50A-208(a)

¶ 23 Turning to Mother's second argument, we must address whether the trial court should have declined to exercise jurisdiction under North Carolina General Statute § 50A-208(a). That section provides: "Except as otherwise provided in G.S. 50A-204 or by other law of this State, if a court of this State has jurisdiction under this Article because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless" one of its exceptions applies. N.C. Gen. Stat. § 50A-208(a). The exceptions[5] that allow the court to still exercise jurisdiction are:

> (1) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;
>
> (2) A court of the state otherwise having jurisdiction under G.S. 50A-201 through G.S. 50A-203 determines that this State is a more appropriate forum under G.S. 50A-207; or
>
> (3) No court of any other state would have jurisdiction under the criteria specified in G.S. 50A-201 through G.S. 50A-203.

N.C. Gen. Stat. § 50A-208(a)(1)–(3).

¶ 24 Here, the trial court's undisputed Findings of Fact show that the lower court fully considered Mother's allegations of Father's fraud and simply did not find them credible. The trial court heard from Mother and reviewed both the New York order and court file. The trial court found the necessary facts to support subject matter jurisdiction. A review of the transcript from the trial court hearing further supports that the trial court fully considered the alleged fraud issue; it asked questions of Mother and took time to review the papers throughout. At one point, the trial court even said, "I'm just going to let her [Mother] argue at this point," after Father's attorney made repeated motions to strike Mother's arguments and the trial court had previously sustained Father's objections.

¶ 25 We further note that the "fraud" alleged by Mother was Father's representation that he "planned to live in North Carolina at least until the children graduated from high school" but he later moved to South Carolina. There is no question that he and the children did live in North

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5. This specifically refers to the exceptions in § 50A-208(a)(1)–(3) because the opening clause's references to § 50A-204 or other law in North Carolina do not apply.

Carolina for one year and three months (March 2017 to June 2018) and he later moved to South Carolina. Normally, fraud is a misrepresentation of a past or existing fact. *See Odom v. Little Rock & I-85 Corp.*, 299 N.C. 86, 91, 261 S.E.2d 99, 103 (1980) (requiring for a prima facie case of fraud that a plaintiff show "(a) that the defendant made a representation relating to some material *past or existing fact* . . . ." (Emphasis added.)), *overruled on other grounds Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988). Mother does not allege that Father misrepresented his actual residence in North Carolina. Home state jurisdiction under the UCCJEA is based upon the actual residence of the parent and children for a period of at least six months, N.C. Gen. Stat. § 50A-102(7), and there is no question that Father and the children did reside in North Carolina for this time, even if they later moved. The UCCJEA does not base jurisdiction on where a parent plans or intends to reside in the future, but on the actual residence. Thus, we do not find support for invoking § 50A-208(a)'s jurisdictional bar based on unjustifiable conduct.

¶ 26 But even if we assume Father made some misrepresentation of his future intent, this case would fall within the exceptions in § 50A-208(a)(1)–(3). First, the parents acquiesced in the exercise of jurisdiction, meeting the requirement of § 50A-208(a)(1). Parents can acquiesce to jurisdiction by registering an out-of-state child custody order here or by filing a child custody action in the state. *Quevedo-Woolf v. Overholser*, 261 N.C. App. 387, 411, 820 S.E.2d 817, 833 (2018). While Father does not challenge jurisdiction, we note he acquiesced in jurisdiction when he filed a motion to modify custody in the case. As with the plaintiff in *Quevedo-Woolf*, Mother here acquiesced to the exercise of jurisdiction both by registering the New York custody order here and by filing her own motion to modify child custody here. *Id.* Mother argues she only arguably acquiesced to jurisdiction in North Carolina "on the basis of [Mother]'s reasonable reliance upon [Father]'s false representations that he intended to remain in North Carolina with the children."

¶ 27 Beyond Mother's acquiescence to jurisdiction, the exception in § 50A-208(a)(2) also applies. Under that exception, when a state otherwise having jurisdiction determines that North Carolina is the more appropriate forum, North Carolina courts will have jurisdiction even when there has been unjustifiable conduct. N.C. Gen. Stat. § 50A-208(a)(2). Here, New York determined North Carolina was the more appropriate forum at the end of the child custody order Mother sought to register and then modify. The New York order specifically stated New York was relinquishing jurisdiction and ordered the parties to register the

order in North Carolina within seven days. Mother argues in response that "it would be up to the New York court to make the determination that North Carolina would be the more appropriate forum." This argument overlooks that the New York court did just that in its order, as laid out above. Thus, even if Father engaged in unjustifiable conduct, the North Carolina courts would still have jurisdiction under the exception in § 50A-208(a)(2).

¶ 28 While Mother alleges Father committed fraud, the trial court made undisputed Findings of Fact that she had engaged in fraud in Massachusetts. The trial court recounted how Mother "gave false statements to the Court in Massachusetts in order to obtain a DVPO [domestic violence protection order] against . . . [F]ather with custody provisions," how Mother falsely told the Massachusetts court that the children lived in Massachusetts, and how Mother "alleged domestic violence including harm to the children, all of which was untrue." Mother's misconduct in Massachusetts was so bad "that the matter was not just dismissed but vacated nunc pro tunc," a mechanism which exists, *inter alia*, "*to prevent a failure of justice* resulting, directly or indirectly from delay in court proceedings subsequent to a time when a judgment, order or decree ought to and would have been entered, save that the cause was pending under advisement." *Perkins v. Perkins*, 114 N.E. 713, 714 (Mass. 1917) (emphasis added).

¶ 29 Beyond Mother's fraud in the Massachusetts action, Mother's allegations regarding jurisdiction have also been inconsistent. Mother has alleged at various times throughout this litigation that her residence was North Carolina, Massachusetts, or New York. Mother's residence status was so confusing that rather than definitively stating where she resided in the order being appealed, the trial court could only state Mother "is *currently believed* to be residing in the state of Massachusetts." (Emphasis added.) Thus, while Mother alleges Father committed fraud to manipulate jurisdiction, the trial court found she had engaged in that behavior herself as well as other inconsistencies as to her residence.

¶ 30 After *de novo* review, we reject Mother's § 50A-208(a) argument as well and determine the trial court correctly determined North Carolina courts had subject matter jurisdiction under the UCCJEA.

III. Challenges to Specific Findings of Fact and Conclusions of Law

¶ 31 **[2]** Following her jurisdictional argument, Mother challenges numerous Findings of Fact and Conclusions of Law. As with the jurisdictional challenge, Mother's argument includes a list of exceptions, and

we again treat them as challenges to the specified Findings of Fact or Conclusions of Law. This time, the exceptions align with Mother's arguments more precisely.

¶ 32 Mother's challenges can be broken down into specific subjects. First, Mother argues the trial court erred in finding and concluding she "acted inconsistently with her constitutionally protected status as a parent." (Capitalization altered.) Further, Mother alleges the trial court erred in finding and concluding that "[Father] is a fit and proper person to have sole legal and physical custody" and in granting him such custody. (Capitalization altered.) These challenges are only made in the exceptions and the remainder of the brief does not expand upon them.

¶ 33 In contrast, Mother's final argument includes both exceptions and further discussion in her brief. Mother argues the trial court erred by finding and concluding, "it is not in the best interest of the minor children to force visitation on them." (Capitalization altered.) In a similar vein, Mother contends the trial court erred in "not allowing [Mother] any visitation with the minor children in that the circumstances of the case do not give rise to complete denial of access to the minor children." (Capitalization altered.) Specifically, Mother argues the trial court erred by denying all visitation because there were no findings "of physical or sexual abuse or severe neglect of the children." Mother further contends we should consider that the trial court's May 2019 order came after Mother took the children from South Carolina to Massachusetts and even then the trial court allowed Mother to have "full weekend visitation (to be exercised in South Carolina) and summer visitation (which could be exercised in Massachusetts)." After addressing the standard of review, we address each subject in turn.

A. Standard of Review

¶ 34 "When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quotation and citation omitted). Trial courts are given "broad discretion" in child custody matters:

> This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate

> judges. Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary.

Id., 357 N.C. at 474–75, 586 S.E.2d at 253–54 (citations and quotations omitted). Unchallenged findings of fact are "presumed to be supported by competent evidence and [are] binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

¶ 35 In addition to evaluating whether findings of fact are supported by substantial evidence, the reviewing court "must determine if the trial court's factual findings support its conclusions of law." *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254. We review whether the findings of fact support the conclusions of law *de novo*. *Respess v. Respess*, 232 N.C. App. 611, 614, 754 S.E.2d 691, 695 (2014) (citing *Owenby v. Young*, 357 N.C. 142, 145, 579 S.E.2d 264, 268 (2003)) (other citation omitted). "If the trial court's uncontested findings of fact support its conclusions of law, we must affirm the trial court's order." *Id.*, 232 N.C. App. at 614–15, 754 S.E.2d at 695 (citing *Mussa v. Palmer-Mussa*, 366 N.C. 185, 191, 731 S.E.2d 404, 409 (2012)).

B. Analysis

¶ 36 We now address in turn each of the subjects in Mother's challenges to the Findings of Fact and Conclusions of Law, as laid out above. We briefly note a common issue across the areas. Mother challenged only the ultimate Findings of Fact, not Findings as to specific events and actions upon which the ultimate Findings are based. Because unchallenged Findings of Fact are binding, *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731, we merely need to assess whether the unchallenged Findings of Fact that describe Mother's conduct support the ultimate Findings of Fact. In other words, we are assessing the challenged Findings of Fact in essentially the same way we would review disputed Conclusions of Law. That the challenged Findings of Fact mirror the challenged Conclusions of Law further supports this approach. As this Court has previously stated, findings of fact and conclusions of law that "say the same thing . . . are best characterized as conclusions of law." *Walsh v. Jones*, 263 N.C. App. 582, 589, 824 S.E.2d 129, 134 (2019). Thus, as to each of the challenged categories, we will assess whether the unchallenged Findings of Fact support the challenged Conclusions of Law. If they do, then, by definition, the mirroring ultimate Findings of Fact are supported by substantial evidence. *See Shipman*, 357 N.C. at 474,

586 S.E.2d at 253 ("Substantial evidence is such relevant evidence as a reasonable mind might accept as *adequate to support a conclusion*.") (citation and quotations omitted) (emphasis added).

1. Findings and Conclusions on Mother's Constitutionally Protected Status as a Parent

¶ 37 Mother's first set of exceptions takes issue with the trial court's Findings of Fact and Conclusions of Law that she acted inconsistently with her constitutionally protected status as a parent. Mother makes no argument beyond listing the exceptions, and it is not clear to us, absent any argument to the contrary, that these Findings and Conclusions are even relevant. As our Supreme Court recently reiterated in *Routten v. Routten*, the constitutionally protected status right of parents "*is irrelevant in a custody proceeding between two natural parents* . . . . In such instances, the trial court must determine custody using the 'best interest of the child' test." *See* 374 N.C. 571, 577–78, 843 S.E.2d 154, 158–59 (2020) (reiterating support for the quoted language from past cases and "expressly overrul[ing]" cases from this Court that applied the constitutionally protected status right to disputes between two parents) (quoting *Owenby*, 357 N.C. at 145, 579 S.E.2d at 267) (emphasis in original). Since this is a dispute between two natural parents, these Findings and Conclusions are irrelevant to the custody modification order, so we do not address them.

¶ 38 Beyond Mother expressly challenging the constitutionally protected status Finding, one of the relevant exceptions extends the challenge to the trial court's Finding that she was not "a fit and proper person for care, custody, and control of the minor children." Fitness, or lack thereof, is part of the same constitutionally protected status of a parent framework that does not apply to child custody disputes between two parents, except as relevant to the denial of visitation under North Carolina General Statute § 50-13.5(i) as discussed below. *See Owenby*, 357 N.C. at 145, 579 S.E.2d at 266–67 (explaining "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally protected paramount right of parents to custody, care, and control of their children must prevail" before then stating that right is irrelevant in a custody proceeding between natural parents) (quoting *Petersen v. Rogers*, 337 N.C. 397, 403–04, 445 S.E.2d 901, 905 (1994)). While we discuss the Finding that Mother was unfit below in the statutory context, we note that in the constitutional context, it is irrelevant, so we do not address it further.

2. *Findings and Conclusions on Father's Sole Legal and Physical Custody*

¶ 39 Mother's next set of exceptions, which also contain no separate argument, challenge the trial court's Findings of Fact and Conclusions of Law that Father is a fit and proper person to have legal custody and that it is in the best interest of the children that Father have sole custody. Mother likewise listed exceptions to the trial court's order, which was subsequently amended, granting Father "sole legal and physical custody." (Emphasis omitted.) We address the Findings and Conclusions on Father being a fit and proper person to have legal and physical custody and then review the best interest of the child analysis.

¶ 40 As with the Findings and Conclusions on Mother's constitutionally protected status as a parent above, the parts of the custody modification order concerning Father's fitness are irrelevant. As explained above, fitness is part of the same constitutionally protected status of a parent framework that does not apply to child custody disputes between two parents, except as relevant to the statutory denial of visitation scheme. *Owenby*, 357 N.C. at 145, 579 S.E.2d at 266–67. Rather, in child custody disputes between two parents, the trial court determines custody solely using the "best interest of the child" test. *Routten*, 374 N.C. at 578, 843 S.E.2d at 159 (citing *Adams v. Tessener*, 354 N.C 57, 61, 550 S.E.2d 499, 502 (2001)).

¶ 41 "The welfare or best interest of the child, in light of all the circumstances, is the paramount consideration which guides the court in awarding the custody of the minor child[ren]. It is the polar star by which the discretion of the court is guided." *Phelps v. Phelps*, 337 N.C. 344, 354, 446 S.E.2d 17, 23 (1994) (internal citations and quotations omitted). "Trial courts are permitted to consider an array of factors in order to determine what is in the best interest of the child[ren]." *Id.*, 337 N.C. at 352, 446 S.E.2d at 22. "Since the trial court had the opportunity to see the parties in person and to hear the witnesses and determine credibility," appellate review "is confined to whether the court abused its discretion." *Cox v. Cox*, 133 N.C. App. 221, 228–29, 515 S.E.2d 61, 67 (1999).

¶ 42 Here, the trial court made extensive, unchallenged Findings of Fact to support its ultimate Finding of Fact, similar Conclusion of Law, and order that "[i]t is in the best interest and welfare of the minor children that . . . Father be awarded sole custody of the minor children." First, the trial court made numerous unchallenged Findings of Fact indicating the children have been and are doing well living with Father. The trial court noted the children lived primarily with Father at the start of this

case and the children's previous therapist in New York approved that setup. Prior to the incident when Mother took them to Massachusetts, the children were doing well with Father, with the trial court specifically finding they were happy in Father's home and doing well in school. Further, the trial court found at the time of its ruling: "The minor children are doing well in their [F]ather's care. They are both doing well in school and are happy in the home of their [F]ather and step-mother."

¶ 43 The trial court also made unchallenged Findings about the harm Mother's actions have caused the children. It specifically found the children are "angry" with Mother and "no longer want[] to have contact with her" because of her own actions. The trial court also recounted Mother's actions in taking the children to Massachusetts, which the children viewed as Mother having "essentially kidnapped them." Further, the trial court found the Massachusetts incident "was a very traumatic experience for both boys" that "is having a lasting impact upon them emotionally." Mother also "does not demonstrate an appreciation for the trauma she caused" by that incident nor the negative impacts taking the children to Massachusetts had on them: "She disrupted their education in that she took them without warning, did not enroll them in school and cut off their contact with their [F]ather and stepmother as well as their friends. (This lasted for approximately two (2) weeks.)." Lastly, as to Mother, the trial court made an unchallenged Finding that it is "very likely" that Mother "suffers from mental or emotional issues of unknown etiology."

¶ 44 Finally, in addition to its Findings about the benefits of staying with Father and the harm Mother had caused, the trial court considered Mother's evidence that Father was harming her and the children. Mother introduced via the children's therapist accusations that Father had "heavily coached" the children in order to "alienate[]" them from Mother as part of his "fixat[ion] about making accusations against" Mother. While the trial court extensively reviewed that evidence, the trial court found the therapist had no "valid basis" to make the statements he did because he made "assumptions he was not in a position to make." The trial court also considered Mother's previous allegations that Father had committed domestic violence against her and the children, but again it rejected those allegations.

¶ 45 Given the unchallenged Findings of Fact, it is clear the trial court had substantial support for its ultimate Findings of Fact, the Conclusions of Law, and its determination that it was in the best interest of the children for Father to have sole legal and physical custody of the children. We

conclude the trial court did not abuse its discretion, and Mother's exceptions suggesting otherwise are unfounded.

3. Findings and Conclusions on Visitation with Mother

¶ 46 Mother's final arguments center on the trial court's Findings, Conclusions, and order that it is not in the best interest of the children for Mother to have visitation. In addition to the exceptions she lists, Mother argues the trial court erred in denying her all visitation because: (1) there were no findings of physical or sexual abuse or severe neglect as she alleges are required and (2) the May 2019 order still granted Mother full weekend and summer visitation, even though it came after many relevant events. We address the general argument via the exceptions first before turning to Mother's specific arguments about the lack of abuse or neglect and the visitation provisions of the May 2019 order.

¶ 47 Visitation, like custody, employs the best interests of the child test, and that test can lead to denying a parent all visitation:

> Our courts have long recognized that sometimes, a custody order denying a parent all visitation or contact with a child may be in the child's best interest:
>
> > "Although courts seldom deny visitation rights to a noncustodial parent, a trial court may do so if it is in the best interests of the child:
> >
> > > 'The welfare of a child is always to be treated as the paramount consideration. Courts are generally reluctant to deny all visitation rights to the divorced parent of a child of tender age, but it is generally agreed that visitation rights should not be permitted to jeopardize a child's welfare.'
> >
> > This principle is codified in N.C. Gen. Stat. § 50–13.5(i), which provides that:
> >
> > > 'In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.' "

Huml v. Huml, 264 N.C. App. 376, 399–400, 826 S.E.2d 532, 548 (2019) (quoting *Respess*, 232 N.C. App. at 615–16, 754 S.E.2d at 696) (alterations from original, citations, and quotations omitted).

¶ 48 Here, the trial court made extensive, detailed Findings as to Mother's actions and the effect those actions had on her children. As part of gathering evidence to make these Findings, the trial court appointed a GAL for the children to provide additional information. The GAL spoke with Mother, Father, and both children and then prepared a report.

¶ 49 Many of these Findings focused on the fallout from the incident when Mother took the children to Massachusetts, which we have already discussed above. The trial court's findings also went beyond that incident. First, the trial court recounted how it allowed Mother to take the children to lunch shortly after the Massachusetts incident only to have the lunch dominated by Mother asking the children about what they had told the court in chambers, in violation of a court order, which "added further toxicity to the relationship" between Mother and the children. The trial court also recounted how when the children were in therapy, Mother "dominated the sessions and they obtained little if any benefit." Finally, the trial court documented how the children did not want to see Mother as the case was being tried, which was in part due to one of the children being forced to spend his sixteenth birthday in court. This culminated in a situation where the children no longer want to see Mother at all because of how she acts during visits. The stress she causes is so extreme that one of her children suffered a reoccurrence of a stress-related physical ailment that subsided once visitation stopped and he was having less stress.

¶ 50 As the children were ages 14 and 16 by the time the trial court's order came out, they were old enough for the trial court to give their wishes to no longer see Mother considerable weight. *See Falls v. Falls*, 52 N.C. App. 203, 209–10, 278 S.E.2d 546, 551 (1981) ("[T]he wishes of a child of sufficient age to exercise discretion in choosing a custodian is entitled to considerable weight when the contest is between the parents, but is not controlling." (quoting *Hinkle v. Hinkle*, 266 N.C. 189, 197, 146 S.E.2d 73, 79 (1966))); *see also Clark v. Clark*, 294 N.C. 554, 555, 576–77, 243 S.E.2d 129, 130, 142 (1978) (reversing and remanding case in part because the children were all older than eleven at the time of remand and thus it was "appropriate and desirable for the judge to ascertain and consider their wishes in respect to their custody"). The trial court took the children's wishes into account when it ordered that no visitation schedule be set.

¶ 51 Mother acknowledges that the children's wishes should be taken into account, relying on *Clark*. However, she argues the children's wishes "should not be the sole determining factor." That is an accurate statement of law. *See Falls*, 52 N.C. App. at 209–10, 278 S.E.2d at 551 (recounting how wishes of children are not controlling). But it is not an accurate statement of the trial court's actions here. As discussed above, the trial court made extensive Findings about the negative impacts Mother had on the children, including the harm visitation was causing them. While those negative impacts may have underlay the children's wishes to no longer have visitation with Mother, they are also separate facts supporting the trial court's order denying Mother visitation. As such, the trial court did not make its decision solely based on the children's wishes.

¶ 52 Adding extra weight to the Findings, the trial court made them all by "clear, cogent and convincing evidence," higher than the required preponderance standard. (Emphasis omitted); *Walsh*, 263 N.C. at 590 n.3, 824 S.E.2d at 134–35 n.3 (citing *Speagle v. Seitz*, 354 N.C. 525, 533, 557 S.E.2d 83, 88 (2001) ("[T]he applicable standard of proof in child custody cases is by a preponderance, or greater weight, of the evidence." (alteration in original))). Further, all these Findings are unchallenged; Mother only challenges the ultimate Finding, Conclusion of Law, and order denying her visitation. Mother further recognized the weighty evidence in support of the trial court's Findings. Her brief includes many of the same Findings we discussed above in stating "there are evidentiary findings adverse to [Mother]."

¶ 53 Despite the significant unchallenged Findings on which the trial court relied in determining it was in the best interest of the children to not have visitation with Mother, she still argues the evidence was insufficient for two reasons. First, Mother argues the trial court erred in denying all visitation because there was not "any finding of physical or sexual abuse or severe neglect of the children." Contrary to that argument, which Mother makes without citation to authority, the trial court does not have to find a parent has physically or sexually abused the children or "severely neglected" them before ceasing visitation. Under North Carolina General Statute § 50-13.5(i):

> In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the

> child or that such visitation rights are not in the best interest of the child.

As we have already discussed, the trial court made extensive Findings of Fact regarding its reasons for the custody order and the denial of visitation, including both a Finding of Mother's unfitness and a Finding that visitation rights are not in the best interest of the children. Section 50-13.5(i) requires specific findings to support the denial of visitation and the best interests of the children but does not require findings of physical or sexual abuse or severe neglect. The trial court correctly applied the best interest of the child standard, and the extensive unchallenged Findings of Fact support its determination. *See Huml*, 264 N.C. App. at 399–400, 826 S.E.2d at 548 (noting courts use the best interest of the child standard on questions about visitation). While Mother cites cases in which all visitation was denied because of sexual or physical abuse, that argument misses the point. While sexual or physical abuse could support the denial of visitation in the appropriate case, such abuse is not necessary to make that decision.

¶ 54 Mother also argues the trial court erred in denying her any visitation because its May 2019 orders, which came after the Massachusetts incident and court inquiry into it, "nevertheless granted [Mother] full weekend visitation . . . and summer visitation." This argument fails both in theory and on the evidence before us. First, Mother's argument would upend a basic tenet of family law, that courts have the power to make changes to even permanent orders in response to a substantial change in circumstances. *E.g. Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974); *see also In re Marlowe*, 268 N.C. 197, 199, 150 S.E.2d 204, 206 (1966) ("Changed conditions will *always* justify inquiry by the courts in the interest and welfare of the children, and decrees may be entered as often as the facts justify." (emphasis added)). We therefore reject Mother's argument that a past grant of visitation on a temporary custody order bars the court from denying visitation in the future.

¶ 55 Beyond the legal issues, Mother's argument does not align with the trial court's actions and the evidence it had available to it. While Mother says the May 2019 order granted her visitation, she fails to include the part of the order stating, "***The minor children will not be forced to visit with [Mother] if they choose not [to] do so and they must inform . . . [Mother] of their desire not to visit with [Mother]***." (Bold and italics in original.) Thus, the trial court's May 2019 order envisioned the possibility of Mother having no visitation because the children would not be forced to visit. Further, in changing the order to not set any visitation, the trial court relied on additional, unchallenged

Findings from the period after May 2019, such as the additional information from the GAL, which further detailed the children's feelings, the fact that the children did not want to see Mother during trial, and the decrease in stress and resulting health improvement one of the children had after visitation stopped. Given these additional facts as well as the court's authority to change even permanent orders in certain circumstances, Mother's argument about the May 2019 order's visitation provision does not convince us.

¶ 56 The trial court's unchallenged Findings of Fact provide ample support for its ultimate Finding, Conclusion of Law, and order that it is in the children's best interests for Mother to not have visitation. As a result, the trial court did not abuse its discretion. The trial court in this case went above and beyond the call of duty in documenting each of many in-chambers conferences and in explaining its rulings as to each and every request Mother made. The trial court also accommodated Mother's pro se filings and her failures to appear on several occasions. The trial court took its role of protecting the best interests of the children very seriously, and this is evident in the orders. We find no issue with its analysis.

IV. Conclusion

¶ 57 After *de novo* review, we find the trial court had subject matter jurisdiction under the UCCJEA and that no unjustifiable conduct under North Carolina General Statute § 50A-208(a) otherwise interferes with the jurisdiction, especially given that section's exceptions. We do not address Mother's challenges to the Findings of Fact and Conclusions of Law that she did not act consistently with her constitutionally protected status as a parent and that Father was a fit and proper person to have custody because those are not relevant in a custody dispute between two parents, except as to the visitation issue. Finally, we find the uncontested Findings support the ultimate Findings, Conclusions, and the order provisions granting Father sole legal and physical custody and denying Mother visitation based on the best interest of the children, so the trial court did not abuse its discretion on those matters. Therefore, we affirm the trial court's order.

AFFIRMED.

Judges HAMPSON and GRIFFIN concur.

McAULEY v. N.C. A&T STATE UNIV.

[280 N.C. App. 473, 2021-NCCOA-657]

ANGELA McAULEY, Widow of STEVEN L. McAULEY,
Deceased employee, Plaintiff-Appellant
v.
NORTH CAROLINA A&T STATE UNIVERSITY, Employer, and
SELF-INSURED (CORVEL CORPORATION, Third-Party Administrator),
Defendant-Appellee

No. COA20-923

Filed 7 December 2021

Workers' Compensation—death benefits—timeliness of claim—statutory deadline

Where an injured state university employee died 10 days after he filed a Form 18 (Notice of Accident to Employer and Claim of Employee) and his widow filed a Form 33 (Request that Claim be Assigned for Hearing) seeking death benefits nearly three years after his death, the Industrial Commission correctly concluded that it lacked jurisdiction to hear the widow's claim because it was untimely filed. The deceased husband's Form 18 filing could not serve to invoke the Commission's jurisdiction over the widow's death benefits claim for purposes of meeting the two-year filing deadline set forth in N.C.G.S. § 97-24.

Judge ARROWOOD dissenting.

Appeal by Plaintiff-Appellant from Opinion and Award entered 28 August 2020 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 September 2021.

Daggett Shuler, by Griffis C. Shuler, for Plaintiff-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Brittany K. Brown, for Defendant-Appellee.

CARPENTER, Judge.

¶ 1 Plaintiff appeals from an opinion and award of the North Carolina Industrial Commission concluding that it lacked jurisdiction to hear Plaintiff's claim on its merits. For the following reasons, we affirm the North Carolina Industrial Commission lacks jurisdiction to hear Plaintiff's claim on the merits.

I. Factual and Procedural Background

¶ 2 On 30 January 2015, Mr. Steven McAuley ("Decedent") suffered an injury to his back while employed by North Carolina A&T State University ("Defendant"). On 11 February 2015, Decedent filed a Form 18, Notice of Accident to Employer and Claim of Employee. On 21 February 2015, Decedent passed away, leaving behind a dependent widow, Mrs. Angela McAuley ("Plaintiff"). On 16 March 2015, Defendant filed a Form 63 and thereafter paid temporary total disability compensation and medical compensation to Decedent. "Within a couple of weeks" of Decedent's death, Plaintiff attended a meeting with representatives from Defendant's human resources department to sign papers related to insurance policies and an accidental death insurance policy. Plaintiff testified that at the time, she believed she was signing all the paperwork related to Decedent's death and the benefits she was entitled to.

¶ 3 On 18 January 2018, almost three years after the death of Decedent, Plaintiff filed a Form 33 Request that Claim be Assigned for Hearing with the North Carolina Industrial Commission ("Industrial Commission") seeking death benefits. On 15 May 2018, Defendant filed a Form 33R Response to Request that Claim be Assigned for Hearing, asserting the Industrial Commission "lack[ed] jurisdiction to hear any death claim brought by the next of kin as the same was not timely filed under [N.C. Gen. Stat.] § 97-24." Defendant also filed a motion to dismiss Plaintiff's death claim as time barred under N.C. Gen. Stat. § 97-24 (2017) and § 97-22 (2017).

¶ 4 On 30 July 2018, Deputy Commissioner Tyler Younts entered an order holding Defendant's motion to dismiss in abeyance. The order also bifurcated the parties' hearing, separating the issue of the Industrial Commission's jurisdiction in the case from the issue of the proximate cause of Decedent's death. On 31 October 2018, Deputy Commissioner Younts filed an Opinion and Award denying Plaintiff's claim for death benefits with prejudice, concluding as a matter of law the Industrial Commission did not acquire jurisdiction of Plaintiff's death claim, as Plaintiff had not timely filed.

¶ 5 On 13 November 2018, Plaintiff appealed the 31 October 2018 Opinion and Award. On 28 August 2020, the Full Commission[1] of the Industrial Commission filed its Opinion and Award again denying Plaintiff's claim and dismissing the claim with prejudice. Industrial Commission Chair

1. A party disputing the decision of the Commission may appeal to the Full Commission. N.C. Gen. Stat. § 97-87(c)(5) (2019).

Phillip A. Baddour, III dissented from the Opinion and Award of the Full Commission in a separate opinion. On 23 September 2020, Plaintiff filed her notice of appeal to this Court.

II. Jurisdiction

¶ 6 Jurisdiction lies in this Court as a matter of right over a final judgment from the North Carolina Industrial Commission pursuant to N.C. Gen. Stat. § 7A-29(a) (2019).

III. Issues

¶ 7 The issue on appeal is whether a deceased employee's filed claim qualifies as a dependent's "filing" for purposes of N.C. Gen. Stat. § 97-24.

IV. Standard of Review

¶ 8 The standard for appellate review of an opinion and award of the Industrial Commission is limited to "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings." *Barham v. Food World, Inc.*, 300 N.C. 329, 331, 266 S.E.2d 676, 678, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 105 (1980). "The findings of fact by the Industrial Commission are conclusive on appeal if supported by . . . competent evidence." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). The Industrial Commission's conclusions of law are reviewed *de novo*. *Allen v. Roberts Elec. Contrs.*, 143 N.C. App. 55, 63, 546 S.E.2d 133, 139 (2001).

V. Analysis

¶ 9 Our Courts have explained that "the timely filing of a claim for compensation is a condition precedent to the right to receive compensation and failure to file timely is a jurisdictional bar for the Industrial Commission." *Reinhardt v. Women's Pavilion, Inc.*, 102 N.C. App. 83, 86, 401 S.E.2d 138, 140 (1991).

¶ 10 N.C. Gen. Stat. § 97-24 states, in relevant part:

> Right to compensation barred after two years; destruction of records.
>
> (a) The right to compensation under this Article shall be forever barred unless (i) a claim or memorandum of agreement as provided in [N.C. Gen. Stat. §] 97-82 is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or (ii) a claim or memorandum of agreement as provided in [N.C. Gen. Stat.

> §] 97-82 is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article.

N.C. Gen. Stat. § 97-24(a).

¶ 11 While death benefits are not specifically mentioned in N.C. Gen. Stat. § 97-24(a), the text of the statute refers to "compensation," a term defined in N.C. Gen. Stat. § 97-2 as encompassing "the money allowance payable to an employee or to his dependents as provided for in this Article, and includes funeral benefits provided herein." N.C. Gen. Stat. § 97-2(11) (2019). We therefore agree with the Full Commission in its conclusion the timeliness of death claims is contemplated and governed by N.C. Gen. Stat. § 97-24(a).

¶ 12 Plaintiff contends the Industrial Commission initially obtained jurisdiction of this matter when Decedent filed his Form 18 on 11 February 2015, within the two-year deadline prescribed by N.C. Gen. Stat. § 97-24. If this Court were to agree with Plaintiff, the Industrial Commission would have jurisdiction to hear Plaintiff's claim on its merits. However, for the following reasons, we hold Plaintiff did not assert a claim for compensation until her filing of a Form 33 on 18 January 2018, more than two years after her cause of action arose, and Decedent's filing of a Form 18 within the two-year deadline cannot qualify as a filing for the purposes of Plaintiff's separate cause of action.

¶ 13 Our case law points to the conclusion Plaintiff's claim for death and funeral benefits arose only upon Decedent's death, not concurrent with Decedent's own, separate filing of a Form 18 for workers' compensation benefits. Death and funeral benefits were not at issue at the time of the filing of the Form 18 and could not have been raised during Decedent's lifetime. Plaintiff's pursuit of benefits as Decedent's widow and sole dependent is a separate claim from that filed originally by Decedent prior to his death. *See, e.g.*, *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 466, 256 S.E.2d 189, 195 (1979) (A claim under the Workers' Compensation Act originates when the cause of action arises.); *Brown v. N.C. Dep't of Pub. Safety*, 254 N.C. App. 374, 378, 802 S.E.2d 776, 780 (2017) (A dependent's right to compensation is separate and distinct from the rights of the injured employee and that right only arises upon the death of the injured employee.); *Pait v. Se. Gen. Hosp.*, 219 N.C. App. 403, 414, 724 S.E.2d 618, 627 (2012) (A death benefits claim under the Workers' Compensation Act is a distinct claim to those beneficiaries upon the death of the

injured worker.). We agree with the majority of the Full Commission that Decedent's filing of a Form 18 for workers' compensation benefits had no effect on when Plaintiff's cause of action arose.

¶ 14 Our dissenting colleague considers this matter in the context of a civil wrongful death claim by analogy. We agree the civil wrongful death analysis is not controlling in the worker's compensation context. Our dissenting colleague notes the Official Comment to N.C. R. Civ. P. Rule 15(c) (2019) provides in part: "[t]he amended pleading will therefore relate back if the new pleading merely amplifies the old cause of action, or now even if the new pleading constitutes a new cause of action, provided that the defending party had originally been placed on notice of the events involved." *Id.* (citation and quotation marks omitted). Rule 15(c), however, does not allow for the relation back of a different cause of action, carried by a separate plaintiff, when said cause of action is still time-barred.

¶ 15 In *Williams v. Advance Auto Parts, Inc.*, this Court clarified "a new and independent [cause] of action and cannot be permitted when the statute of limitations has run." *Id.*, 251 N.C. App. 712, 713, 795 S.E.2d 647, 649 (2017).

> Under the North Carolina Rules of Civil Procedure, a party may amend a pleading "once as a matter of course at any time before a responsive pleading is served[.]" N.C. Gen. Stat. § 1A-1, Rule 15(a) (2015). Amendment to substitute a party is within the scope of the rule, although doing so represents the creation of "a new and independent [cause] of action and cannot be permitted when the statute of limitations has run." If the statute of limitations has expired in the interim between the filing and the amendment, a plaintiff may preserve his claim only if the amendment can be said to relate back to the date of the original claim under Rule 15(c) . . ..

Williams, 251 N.C. App. at 717-18, 795 S.E.2d at 651-52 (internal citations omitted). As we previously iterated, our case law points to the conclusion Plaintiff's pursuit of benefits as Decedent's dependent is a separate cause of action from Decedent's. Our case law does not provide for the conclusion Plaintiff's cause of action can be said to relate back to the date of Decedent's separate cause of action where Plaintiff's cause of did not exist at the time of the filing of Decedent's cause of action, and the statute of limitations has otherwise expired as to Plaintiff's cause of action.

¶ 16 Plaintiff further contends a dependent's right to receive death benefits under the Workers' Compensation Act after a claim has been timely filed under N.C. Gen. Stat. § 97-24 is governed by N.C. Gen. Stat. § 97-38 (2019), which provides in relevant part:

> If death results proximately from a compensable injury or occupational disease and within six years thereafter, or within two years of the final determination of disability, whichever is later, the employer shall pay or cause to be paid, subject to the provisions of other sections of this Article, weekly payments of compensation . . . .

N.C. Gen. Stat. § 97-38.

¶ 17 Plaintiff contends the language of N.C. Gen. Stat. § 97-38 does not require a dependent to file a separate claim or request a hearing within two years of an employee's death. Because Decedent's death occurred within the six years cited in N.C. Gen. Stat. § 97-38, Plaintiff argues the Industrial Commission has jurisdiction to hear Plaintiff's claim for death benefits on the merits. However, this Court has no reason to interpret N.C. Gen. Stat. § 97-24 and N.C. Gen. Stat. § 97-38 as mutually exclusive provisions. Rather, N.C. Gen. Stat. § 97-38 provides for a statute of limitations for payments to a dependent when death results proximately from a compensable injury. N.C. Gen. Stat. § 97-38 (emphasis added). Because timely filing is a condition precedent to compensation under N.C. Gen. Stat. § 97-24, a *compensable* injury would not be at issue prior to a timely filing of a claim for workers' compensation benefits. Therefore, the condition precedent specified in N.C. Gen. Stat. § 97-24 still applies to Plaintiff's filing.

VI. Conclusion

¶ 18 Because an employee's death is a condition precedent for the filing of a dependent's claim for death benefits under N.C. Gen. Stat. § 97-24, a deceased employee's claim filed for workers' compensation benefits cannot serve as the dependent's "filing of a claim" for purposes of meeting the condition precedent prescribed by N.C. Gen. Stat. § 97-24 to obtain death benefits. Plaintiff did not file her own claim for compensation under the Workers' Compensation Act until 18 January 2018, more than two years after Plaintiff's cause of action arose. Plaintiff's claim is therefore time-barred, and the North Carolina Industrial Commission lacks jurisdiction to hear it.

AFFIRM.

Judge GRIFFIN concurs.

Judge ARROWOOD dissents in a separate opinion.

ARROWOOD, Judge, dissenting.

¶ 19 I respectfully dissent from the majority's holding that the Industrial Commission lacks jurisdiction. In what appears to be an issue of first impression for our Courts, I would hold that under N.C. Gen. Stat. § 97-24(a), a dependent is not required to file a separate and distinct claim within the two-year statutory period, so long as an initial claim satisfies the limitation period.

¶ 20 "Where the language of a statute is clear and unambiguous, there is no room for judicial construction[,] and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Matter of Redmond by & through Nichols*, 369 N.C. 490, 495, 797 S.E.2d 275, 279 (2017) (citation and quotation marks omitted; alterations in original). "When, however, a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *Purcell v. Friday Staffing*, 235 N.C. App. 342, 347, 761 S.E.2d 694, 698 (2014) (citation and quotation marks omitted).

¶ 21 N.C. Gen. Stat. § 97-24(a) addresses statutory limitations for the right to compensation under the Workers' Compensation Act:

> The right to compensation under this Article shall be forever barred unless (i) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or (ii) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article.

N.C. Gen. Stat. § 97-24(a) (2019). Additionally, under N.C. Gen. Stat. § 97-38,

> [i]f death results proximately from a compensable injury or occupational disease and within six years thereafter, or within two years of the final

> determination of disability, whichever is later, the employer shall pay or cause to be paid . . . weekly payments of compensation equal to sixty-six and two-thirds percent . . . of the average weekly wages of the deceased employee at the time of the accident . . . and burial expenses not exceeding ten thousand dollars . . . to the person or persons entitled thereto . . . .

N.C. Gen. Stat. § 97-38 (2019).

¶ 22 Pursuant to the plain language of N.C. Gen. Stat. § 97-24(a), the Commission may obtain jurisdiction where: (1) a claim or memorandum of agreement as provided in N.C. Gen. Stat. § 97-82 is filed with the Commission within two years after an accident; (2) an employee is paid compensation as provided under the Article within two years after an accident; or (3) a claim or memorandum of agreement is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under the Article.

¶ 23 The statute requires that "a claim" is filed "within two years after the accident." N.C. Gen. Stat. § 97-24(a). Decedent complied with statutory requirements by filing a Form 18 within two years of his injury. The plain language of the statute does not require plaintiff to file a separate claim for benefits. On these grounds, I would hold that the Full Commission erred in dismissing plaintiff's claim for death benefits.

¶ 24 Although I believe it is unnecessary in this case to engage in judicial construction to ascertain legislative intent, I disagree with the majority's application of caselaw and failure to address legislative actions that are informative of legislative intent. The majority applies the definition of "compensation" found in N.C. Gen. Stat. § 97-2 to reach the conclusion that "the timeliness of death claims is contemplated and governed by N.C. Gen. Stat. § 97-24(a)." I do not see how this definition serves to bar plaintiff's claim and override the additional timing requirements for death benefits specifically set out in N.C. Gen. Stat. § 97-38.

¶ 25 "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history," to assess " 'the spirit of the act and what the act seeks to accomplish.' " *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citation and some quotation marks omitted). Traditional principles of statutory construction provide that " '[i]n construing a statute with reference to an amendment, it is presumed that the Legislature intended either (1) to change the substance of the original act or (2) to clarify the

meaning of it.' " *Nello L. Teer Co. v. N.C. Dep't of Transp.*, 175 N.C. App. 705, 710, 625 S.E.2d 135, 138 (2006) (some quotation marks omitted) (quoting *Spruill v. Lake Phelps Volunteer Fire Dep't, Inc.*, 351 N.C. 318, 323, 523 S.E.2d 672, 676 (2000)). "While the presumption is that the legislature intended to change the law through its amendments, where the language of the original statute is ambiguous such amendments may be deemed, not as a change in the law, but as a clarification in the language expressing that law." *N.C. Elec. Membership Corp. v. N.C. Dep't of Econ. & Cmty. Dev.*, 108 N.C. App. 711, 720, 425 S.E.2d 440, 446 (1993) (citation omitted). Where the language of the original statute is unambiguous and "the legislature deletes specific words or phrases from a statute, it is presumed that the legislature intended that the deleted portion should no longer be the law." *Nello L. Teer Co.*, 175 N.C. App. at 710, 625 S.E.2d at 138 (citation omitted).

¶ 26 In this case, the statute originally stated "[t]he right to compensation under this act shall be forever barred unless a claim be filed with the Industrial Commission within one year after the accident, and if death results from the accident, unless a claim be filed with the Commission within one year thereafter." *Wray v. Carolina Cotton & Woolen Mills Co.*, 205 N.C. 782, 783, 172 S.E. 487, 488 (1934) (quotation marks omitted) (quoting Pub. Laws 1929, c. 120, § 24). In 1955, the statute was modified to allow two years to file a claim following an accident, while the requirement to file a separate claim for death benefits within one year of the date of death was maintained. S.L. 1955-1026, § 12. In 1973, the General Assembly again amended N.C. Gen. Stat. § 97-24(a) by removing the language requiring that a separate claim be filed for death benefits. S.L. 1973-1060, § 1.

¶ 27 By deleting the words "if death results from the accident, unless a claim be filed with the Commission within one year thereafter," I believe the General Assembly expressed its clear intent that a separate claim for death benefits is not required and that an employee's filing of a claim within two years after the accident is sufficient for the Industrial Commission to acquire jurisdiction over a subsequent claim for death benefits. If the General Assembly intended to maintain a separate filing requirement for death benefit claims, it would have maintained the language requiring the filing of a separate death benefit claim and increased the limitation period from one to two years. The majority's analysis relies on the definition of "compensation" found in N.C. Gen. Stat. § 97-2 and several cases addressing claims under the Workers' Compensation Act but fails to address the legislative history of the operative statute itself. Accordingly, in applying traditional principles of

statutory construction, I would hold that the General Assembly intended to remove the requirement to file a separate death benefits claim within a specified period.

¶ 28 In addition to my analysis of the plain language and judicial construction of the statute, I find it appropriate to consider the context of a civil wrongful death claim. While this analysis is not controlling in the worker's compensation context, I believe how we treat those claims is instructive in how we should view this situation. Prior to our State's amendment of the Rules of Civil Procedure in 1967, it was "a familiar principle that if a wrongful death action was brought by a foreign personal representative who had not qualified locally within the period permitted for bringing the action, the complaint could not be amended to show that after the expiration of such period the plaintiff had locally qualified[,]" and was instead "dismissed as not having been timely filed." *Burcl v. N.C. Baptist Hosp., Inc.*, 306 N.C. 214, 218, 293 S.E.2d 85, 88 (1982) (citation omitted). The *Burcl* Court held that "[w]hether an amendment to a pleading relates back under Rule 15(c) depends no longer on an analysis of whether it states a new cause of action; it depends, rather, on whether the original pleading gives 'notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.' " *Id.* at 224, 293 S.E.2d at 91 (citation omitted). The Court also noted the Official Comment to North Carolina Rule 15(c), which provides in part: "[t]he amended pleading will therefore relate back if the new pleading merely amplifies the old cause of action, or now even if the new pleading constitutes a new cause of action, provided that the defending party had originally been placed on notice of the events involved." *Id.* (citation and quotation marks omitted).

¶ 29 Wrongful death claims, while creatures of a different statutory scheme than is at issue in this case, address similar subject matter and are bound by similar principles. Although I believe the plain language and legislative history of the Workers' Compensation Act are sufficient grounds for reversal, the principles contained within our wrongful death jurisprudence are instructive, and support a holding that is in line with those principles.

STATE v. BOWMAN

[280 N.C. App. 483, 2021-NCCOA-658]

STATE OF NORTH CAROLINA
v.
TRAVIS WAYNE BOWMAN

No. COA21-170

Filed 7 December 2021

1. Criminal Law—defenses—voluntary intoxication—jury instruction

The trial court properly denied defendant's request for a jury instruction on voluntary intoxication where defendant failed to show he was so intoxicated from using methamphetamine that he could not form the specific intent to commit first-degree murder and first-degree kidnapping. In support of defendant's murder conviction based on malice, premeditation, and deliberation, the evidence showed that he brandished a gun while declaring he "smelled death," ordered his girlfriend to shoot and kill the victim, orchestrated the disposal of the victim's body, retained the spent bullet as a "trophy," and fled the state to avoid arrest. With regard to kidnapping—the underlying felony for defendant's felony murder conviction—evidence showed defendant confined the victim over successive days, thwarted the victim's escape attempt, offered freedom if the victim would kill his own mother, and tried to make the victim hang himself.

2. Homicide—murder by torture—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge for first-degree murder by torture where substantial evidence showed that defendant had detained, humiliated, and beaten the victim over a period of days, during which he shot the victim in the leg, polled others to vote on whether the victim should live or die, demanded that a "hot shot" of poison and methamphetamine be mixed and injected into the victim, tried to make the victim hang himself, ordered the victim's beating with a rock, and then ordered his girlfriend—under threats to her and her family's lives—to fire the gunshot that ultimately killed the victim.

Appeal by defendant from judgments entered 14 February 2020 by Judge Gary M. Gavenus in Mitchell County Superior Court. Heard in the Court of Appeals 17 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Michael T. Henry, for the State.

Leslie Rawls for defendant-appellant.

TYSON, Judge.

¶ 1 Travis Wayne Bowman ("Defendant") appeals from a jury's verdicts finding him guilty of first-degree murder under three separate bases, possession of a firearm by a convicted felon, conspiracy to commit first-degree murder, and first-degree kidnapping. We find no error.

I. Background

¶ 2 Joshua Emmanuel Buchanan ("Buchanan") had allowed Defendant to borrow his Ford Mustang vehicle. Defendant was driving the Mustang and was pulled over by law enforcement. Buchanan's Mustang was impounded. Defendant concluded he was stopped by law enforcement because Buchanan had told law enforcement about his trafficking and dealing in methamphetamine. Defendant presumed Buchanan had provided names of individuals involved in methamphetamine distribution to law enforcement. Defendant's girlfriend, Felicia Fox, was present in the Mustang during the traffic stop. She stated that she had no reason to believe Buchanan had provided any names to law enforcement.

¶ 3 Defendant went to a residence located on Valley View Road in Bakersville, which Buchanan shared with his mother, Regina Pittman, and Fox, after Buchanan's Mustang was impounded. Buchanan, Pittman, and Fox all suffered from substance abuse and drug addictions and abused methamphetamine and other controlled substances. Defendant had been selling methamphetamine to Buchanan, Fox, and Pittman for around three months. Defendant brandished a gun and told Fox "I smell death."

¶ 4 Several days after the Mustang was impounded, Defendant took Buchanan and Fox to Kevin Buchanan's ("Kevin") residence where they smoked marijuana with William Guttendorf. Defendant asked Guttendorf and Buchanan to drive to town to buy cigarettes, bottles of Mountain Dew soft drink, and 9mm ammunition. Defendant sent Guttendorf and Buchanan to the store because the license tag on his Jeep was not valid.

¶ 5 When Guttendorf and Buchanan returned with a couple packs of cigarettes, a bottle of Mountain Dew, and 9mm ammunition, Defendant accused Buchanan of "snitching" about his methamphetamine dealing. Defendant grabbed Buchanan by the collar of his shirt and continued to question Buchanan about "snitching." Defendant fired two rounds from a pistol into the ground near Buchanan's feet.

¶ 6 Defendant had Buchanan to call several of Defendant's family members and asked them to vote on whether Buchanan should live or die. Defendant struck Buchanan and briefly held him in a chokehold.

¶ 7 Defendant had Buchanan, Guttendorf, and Fox to accompany him to Clayton Speaks' residence to transact a methamphetamine sale. While at Speaks' house, Defendant told Speaks that Buchanan had "snitched" and asked if Buchanan should live or die. Speaks told Defendant not to hurt Buchanan.

¶ 8 Defendant left Speaks and drove himself, Buchanan, Guttendorf, and Fox to Matthew Ledford's house. On the way to Matthew's house, Defendant struck Buchanan and stated if he killed Buchanan, he would have to "figure out" what to do with Guttendorf and Fox.

¶ 9 At Matthew's house, Defendant told him that Buchanan had given law enforcement a list of people who were involved in methamphetamine distribution. At some point, Matthew's brother, Chad Ledford, who lived across the street, arrived. Defendant insisted that the group smoke methamphetamine, which he claimed contained "truth serum." Defendant struck Buchanan demanding to know "why he had snitched." While holding a gun, Defendant filmed Buchanan's "admission" to cooperating with law enforcement on his cell phone. Defendant asked Matthew and Chad what he should do with Buchanan.

¶ 10 Members of the group smoked methamphetamine twice from two bags. After dark, Defendant claimed "people . . . from Georgia" had arrived to "take care of [Buchanan]." Defendant took Buchanan outside the house and a green laser was focused on Buchanan. The source of the green laser was unknown. Defendant asked Buchanan "if he was ready to die." Buchanan tried to hide behind Fox, then attempted to run away. Defendant tackled him and dragged him back towards Matthew's house. Once Buchanan was back under his control, Defendant used his cellphone and recorded him pleading for his life. Buchanan urinated on himself. Defendant did not allow Buchanan to leave, and Defendant, Buchanan, Guttendorf, and Fox spent the night at either Chad or Matthew's house.

¶ 11 The next morning, Defendant, Buchanan, Guttendorf, and Fox used methamphetamine twice. Defendant returned the group back to the home which Buchanan and Fox shared with Pittman. After arrival, Defendant, Buchanan, Guttendorf, Fox, and Pittman used more methamphetamine. In the home, Defendant threatened to keep Buchanan as a hostage unless Buchanan's grandmother gave Defendant $3,000.

Defendant stopped requesting a ransom. He began accusing Buchanan of molesting two unnamed minor girls and Buchanan's sister.

¶ 12 Defendant took the group to one of the Ledford brothers' houses. Defendant showed Buchanan a website showing young girls dancing in their underwear he claimed he had "created . . . to catch people who are being perverted to little girls." Defendant prohibited Buchanan from being able to "walk around by himself."

¶ 13 The group slept for a period before they went to Kevin's house for Guttendorf to retrieve his pickup truck. Defendant, Buchanan, Guttendorf, Fox, and Kevin returned to the home Buchanan, Fox, and Pittman shared. Defendant hit Buchanan a couple of times in the car.

¶ 14 The group began injecting methamphetamine intravenously. Defendant asked Kevin if he had anything to make a "hot shot," a mixture for injection of some kind of poison and methamphetamine, so Defendant could make Buchanan, Fox, and maybe Pittman "kill [them] selves." Kevin found something he called "rat poison" which he loaded into a syringe, which no one injected.

¶ 15 Defendant offered to release Buchanan if he would kill his mother, Pittman. Defendant then changed his mind and revoked the offer to Buchanan. Defendant ordered Fox to beat up Pittman, which she did.

¶ 16 Defendant seized Buchanan by his shirt and hit him in the back of the head with the butt of the gun, while asking Guttendorf if he thought "this shit's a game?" Defendant ordered Buchanan to sit on the floor, telling him "he wouldn't make it far" if he ran because he "had people staked out." Defendant, Buchanan, Fox, Guttendorf, and Pittman went to Guttendorf's apartment where they got high "a couple of times" on methamphetamine. Defendant, Buchanan, Guttendorf, and Fox spent the night at Guttendorf's apartment and continued to use methamphetamine.

¶ 17 The next morning Defendant, Buchanan, Guttendorf, and Fox used more methamphetamine. Defendant had Guttendorf to take Fox and Pittman back to their home and told him to pick up cigarettes and drinks. Defendant told Guttendorf to return to the apartment so they could "kick [Buchanan's] ass and then let him go."

¶ 18 During the drive to the home, which Pittman, Fox, and Buchanan shared, Guttendorf told Fox "the best thing [Pittman and Fox] could do was just keep their mouths shut." Once Guttendorf dropped Pittman and Fox off, he stopped at a Texaco gas station and purchased two packs of cigarettes and two bottles of soft drink. Guttendorf also stopped to pick

up a friend, Melissa Thompson, because he "didn't want to be alone with [Defendant] and [Buchanan]."

¶ 19 Defendant bound Buchanan's hands with duct tape and filmed an eight-minute video on his cell phone of him "interrogating" Buchannan and his "confessing" to various acts of child molestation. The video depicts Buchanan trembling and admitting to all accusations Defendant made.

¶ 20 Defendant pistol whipped and hit Buchanan. Defendant shot Buchanan in the left shin, shattering his tibia. Another video depicts Buchanan bleeding profusely from the gunshot wound and attempting to use towels to control the bleeding and stabilize his broken leg.

¶ 21 Law enforcement later interviewed Guttendorf and Fox, who were not aware of any evidence that Buchanan had ever molested children. Law enforcement also interviewed the purported victims, which revealed no evidence of child molestation or any other crime warranting further investigation.

¶ 22 Defendant returned Buchanan to the home he shared with Fox and Pittman. When Guttendorf arrived at his apartment he saw a bloody footprint on the front steps. Guttendorf went inside to investigate, while Thompson remained inside the truck. Inside his apartment, Guttendorf found "blood all over the place" in his living room. Defendant called Guttendorf and told him to come to Buchanan's home.

¶ 23 When Guttendorf and Thompson pulled into the driveway, Guttendorf saw Defendant armed with a gun. Buchanan had a "homemade bandage" around his leg. Guttendorf attempted to leave and began to pull the truck out of the driveway. He stopped and put his hands up after Defendant approached the truck with the gun. Guttendorf and Thompson exited the vehicle and entered the house. Defendant showed Guttendorf, Fox, and Thompson the cell phone videos taken at Guttendorf's apartment of Buchanan's "confessions" of child molestation, of Defendant hitting Buchanan in the head, pistol whipping Buchanan, and Defendant shooting Buchanan in the leg.

¶ 24 At some point Pittman said she was "not gonna have a pedophile in [her] house." Buchanan limped out onto the porch and fell down. Defendant then kicked Buchanan. Guttendorf went inside the home, a few minutes later, Defendant came inside looking for a rope or cord to "make [Buchanan] hang himself." Defendant found a telephone cord and went back outside.

¶ 25 When Guttendorf and Fox went outside a few minutes later, they saw the cord draped over a tree branch and wrapped around Buchanan's neck. Buchanan was almost on his knees and his face was turning blue. Buchanan's feet could touch the ground, if he could have stood up. Fox determined Buchanan "was just [too] tired." Defendant told Fox not to call 911.

¶ 26 The telephone cord broke, and Buchanan fell onto the ground. Buchanan attempted to crawl under Guttendorf's truck, but Defendant "pulled him backout (sic)" and told him "he wasn't going nowhere."

¶ 27 Buchanan limped into the home, but Pittman told Defendant "to get [Buchanan] out of the house and . . . [to] do whatever he needed to do." Defendant forcefully took Buchanan out of the house and threw him down in a patch of weeds in the yard. Buchanan began to scream. Defendant held out the gun and told Thompson, Guttendorf, and Fox they could either "get involved or [they] could be next." Defendant ordered Thompson or Fox to get a large rock and hit Buchanan. Buchanan was hit at least twice in the head with a large rock approximately ten inches in diameter. Defendant told Buchanan to go "lay somewhere and die." Buchanan stumbled approximately fifteen to twenty feet before collapsing.

¶ 28 Defendant told Fox she could either kill Buchanan or that he would hurt her younger sister and family. Fox initially refused, but Defendant reiterated she would either shoot Buchanan or he was "gonna hurt [them] all." Fox took the gun from Defendant, shot Buchanan once in the side of the head killing him. Fox handed the gun back to Defendant. Defendant acted surprised Fox had shot Buchanan as instructed. Guttendorf testified Defendant remarked: "I can't believe she did it, she f[–]king did it, she shot him."

¶ 29 Defendant told the group "none of [them] could leave" because they were "a part of it now." Defendant instructed Guttendorf and Thompson to move Buchanan's body and directed the others to begin mixing bleach and water to pour over the areas where they had dragged Buchanan's body.

¶ 30 Defendant left and picked up Kevin. When they returned, Buchanan's body was wrapped in a blanket and they left with the body in the bed of Guttendorf's truck. Defendant and Kevin initially left Buchanan's body beside Cane Creek. Defendant later decided this spot was not satisfactory. Defendant had Guttendorf follow him back to retrieve Buchanan's body. Defendant and Guttendorf loaded Buchanan's body in the back of Guttendorf's truck and went to Chad's house to borrow a wheelbarrow.

¶ 31 Defendant, Fox, Thompson, Kevin and Guttendorf went to Guttendorf's apartment. Defendant retrieved the spent bullet from the couch from when he had shot Buchanan in the leg. Thompson and Guttendorf cleaned up the blood from the floor. Defendant kept the spent bullet "as a trophy." Defendant later put a string through the bullet and "showed" it to people.

¶ 32 Behind a shed at Guttendorf's apartment, Defendant, Guttendorf, and Kevin dug a hole and placed Buchanan's body in it, poured a chemical on the body, filled the hole with dirt, and placed a wooden pallet on top of the ground. Fox cleaned Defendant's Jeep and threw items off an embankment along the road.

¶ 33 Thompson, Guttendorf, Defendant, and Fox separated into two groups. Thompson and Guttendorf did not contact law enforcement because Defendant had "threatened [their] families" and threatened they would "end up like" Buchanan. Defendant and Fox went to Georgia to stay with Defendant's family. Guttendorf testified Buchanan's body was buried around 27 September 2016. Buchanan's sister and cousin reported him missing on 2 October 2016. Law enforcement officers located and exhumed Buchanan's body on 7 October 2016.

¶ 34 Defendant was arrested by the Bartow County (Georgia) Sherriff's Office on 10 October 2016. Defendant was indicted for possession of a firearm by a convicted felon, conspiracy to commit first-degree murder, first-degree kidnapping, and first-degree murder on 14 November 2016.

¶ 35 Defendant was tried capitally. The jury found Defendant guilty of all charges including first-degree murder on three bases of malice, premeditation, and deliberation; by torture; and, under the felony-murder rule. The jury deadlocked on imposing the death sentence.

¶ 36 Defendant was sentenced to life imprisonment without the possibility of parole for the first-degree murder. Defendant was also sentenced to serve consecutive active sentences of 17 to 30 months for the possession of a firearm by a felon conviction, 207 to 261 months for the conspiracy to commit first-degree murder conviction, and 96 to 128 months for first-degree kidnapping conviction, all to run consecutively to Defendant's life imprisonment without parole. Defendant appeals.

II. Jurisdiction

¶ 37 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2019).

III. Issues

¶ 38 Defendant argues the trial court erred by denying his request for a jury instruction on voluntary intoxication and by denying his motion to dismiss the first-degree murder charge on the basis of torture.

IV. Voluntary Intoxication

¶ 39 **[1]** Defendant argues the trial court erred by denying his request for a jury instruction on voluntary intoxication. He asserts his voluntary intoxication of methamphetamine defeated his ability to form the specific intent necessary to support first-degree murder, based on malice, premeditation, and deliberation and the felony-murder rule, and for first-degree kidnapping.

A. Standard of Review

¶ 40 Arguments "challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to [the] defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990).

B. Analysis

¶ 41 Over a century ago, our Supreme Court warned "the doctrine [of voluntary intoxication] should be applied with great caution." *State v. Murphy*, 157 N.C. 614, 617-18, 72 S.E. 1075, 1076-77 (1911). A defendant is not entitled to a jury instruction on voluntary intoxication "in every case in which a defendant . . . consum[es] . . . controlled substances." *State v. Baldwin*, 330 N.C. 446, 462, 412 S.E.2d 31, 41 (1992).

¶ 42 A defendant "must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form a deliberate and premeditated intent to kill." *Mash*, 323 N.C. at 346, 372 S.E.2d at 536. "Evidence of mere intoxication . . . is not enough to meet defendant's burden of production." *Id.* Defendant's intent to kill can be inferred by his actions "before, during, and after a crime." *State v. Phillips*, 365 N.C. 103, 141, 711 S.E.2d 122, 149 (2011).

¶ 43 "The evidence must show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and

premeditated purpose to kill." *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987) (citation omitted); *see State v. Cureton*, 218 N.C. 491, 495, 11 S.E.2d 469, 471 (1940) ("[T]here must be some evidence tending to show that the defendant's mental processes were so overcome by the excessive use of . . . intoxicants that he had temporarily, at least, lost the capacity to think and plan."). If a defendant does not produce "evidence of intoxication to such degree, the court is not required to charge the jury thereon." *Strickland*, 321 N.C. at 41, 361 S.E.2d at 888 (citation omitted). Voluntary intoxication is only a defense to specific intent crimes. *See State v. Jones*, 300 N.C. 363, 365, 266 S.E.2d 586, 587 (1980).

¶ 44 Defendant argues his specific intent convictions: first-degree murder based on malice, premeditation, and deliberation and the felony-murder rule and first-degree kidnapping must be reversed because he lacked the requisite intent due to intoxication from methamphetamine. Defendant and the others present before and after Buchanan's killing were smoking and injecting methamphetamine. Defendant asserts the inconsistencies in locations and time spans in the State's witnesses' testimony stem from their use of methamphetamine. Witnesses testified to experiencing symptoms of methamphetamine intoxication: lack of sleep, confusion as to the timeline of events, paranoia, and agitation.

¶ 45 Defendant further asserts Fox's testimony, stating that Defendant that was becoming paranoid and "wigging," during the events mandates the trial court should have issued the voluntary intoxication instruction. Fox defined these phrases as "paranoia in my book would be seeing things and stuff like that. But wigging out is like what I would consider them actually believing that stuff's there."

¶ 46 Contrary to Defendant's assertion, Fox's testimony was only evidence of his intoxication. Defendant has failed to show his "mind and reason were so completely intoxicated and overthrown [from methamphetamine use] as to render him utterly incapable of forming a deliberate and premeditated purpose to kill." *Strickland*, 321 N.C. at 41, 361 S.E.2d at 888 (citation omitted).

¶ 47 Ample evidence of Defendant's specific intent supports the first-degree murder conviction based on malice, premeditation, and deliberation. Defendant's actions showing he "intended for his action[s] to result" in Buchanan's death are that he brandished the gun while declaring he "smell[ed] death," pondered having to "figure out" what to do with the witnesses if he killed Buchanan, ordered Fox or Thompson to hit Buchanan with a large rock, told Fox to kill Buchanan, orchestrated

the disposal of Buchanan's body, retained the spent bullet as a "trophy," fled to Georgia to avoid arrest after the killing, described his actions to family in Georgia, and showed videos he filmed of Buchanan on his cellphone. *Phillips*, 365 N.C. at 141, 711 S.E.2d at 149 (citation omitted).

¶ 48 Ample evidence of Defendant's specific intent to kill supports the first-degree murder conviction based on the felony-murder rule. The underlying crime for the felony-murder rule was first-degree kidnapping. "[T]he actual intent to kill may be present or absent; however, the actual intent to commit the underlying felony is required." *State v. Jones*, 353 N.C. 159, 167, 538 S.E.2d 917, 924 (2000). Defendant's actions show his specific intent to unlawfully restrain or confine over successive days, stating he was doing this in retribution for Buchanan's "snitching," binding Buchanan's hands behind his back, retrieving Buchanan when he tried to escape on foot, offering freedom if Buchanan killed his mother, Pittman, threatening to kill Buchanan by a "hot shot," and orchestrating the attempted hanging of Buchanan.

¶ 49 Defendant possessed and demonstrated the requisite intent to commit the underlying felony, first-degree kidnapping, to support the felony murder conviction. Defendant's argument is without merit and overruled.

V. First-Degree Murder by Torture

¶ 50 **[2]** Defendant argues the trial court erred by denying his motion to dismiss the first-degree murder charge on the basis of torture.

A. Standard of Review

¶ 51 "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

¶ 52 "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "The denial of a motion to dismiss for insufficient evidence is a question of law which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citation omitted).

B. Analysis

¶ 53 Defendant asserts the trial court erred by denying his motion to dismiss the first-degree murder on a basis of torture. He argues the State's medical expert, Jerri Lynn McLemore, MD testified Buchanan died from Fox's gunshot.

¶ 54 "First-degree murder by torture requires the State to prove that the accused intentionally tortured the victim and that such torture was a proximate cause of the victim's death." *State v. Pierce*, 346 N.C. 471, 492, 488 S.E.2d 576, 588 (1997) (citations and internal quotation marks omitted). Torture is defined as "the course of conduct by one or more persons which intentionally inflicts grievous pain and suffering upon another for the purpose of punishment, persuasion, or sadistic pleasure." *State v. Anderson*, 346 N.C. 158, 161, 484 S.E.2d 543, 545 (1997) (citation omitted). Our Supreme Court defines the course of conduct to constitute torture as "the pattern of the same or similar acts, repeated over a period of time, however short, which established that there existed in the mind of the defendant a plan, scheme, system or design to inflict cruel suffering upon another." *Id.* (citation omitted).

¶ 55 The Court upheld a first-degree murder by torture conviction in *State v. Lee*, 348 N.C. 474, 489-90, 501 S.E.2d 334, 344 (1998). In *Lee*, the defendant participated in repeated physical abuse of the victim for a three-day period and then left the residence six days before the victim was killed. *Id.*

¶ 56 Defendant's actions "to inflict cruel suffering" intended to punish Buchanan for purportedly "snitching." Defendant's course of conduct occurred over the period of days while Buchanan was detained, humiliated, beaten, and tortured. *Id.* Contrary to Defendant's assertions, the torture of Buchanan did not just occur when he shot him in the leg, but began before when he struck Buchanan, polled others to vote if Buchanan should live or die, demanded a "hot shot" be mixed to inject Buchanan, set up and attempted to hang Buchanan by the telephone cord, ordered Buchanan's beating with a rock, and concluded with Defendant ordering Fox, under threats to her and her familiy's lives, to shoot and kill Buchanan. The trial court properly denied Defendant's motion to dismiss the first-degree murder charge under a theory of torture. Defendant's argument is overruled.

VI. Conclusion

¶ 57 Defendant failed to show his "mind and reason were so completely intoxicated and overthrown [from methamphetamine use so] as to

render him utterly incapable of forming a deliberate and premeditated purpose to kill." *Strickland*, 321 N.C. at 41, 361 S.E.2d at 888 (citation omitted). The trial court properly denied Defendant's request for an instruction on voluntary intoxication.

¶ 58 Viewing the evidence in the light most favorable to the State, sufficient evidence exists to infer Defendant intended to terrorize or injure Buchanan during the period of confinement. Sufficient evidence exists to show acts of "grievous pain and suffering" were inflicted by Defendant for punishment. *Anderson*, 346 N.C. at 161, 484 S.E.2d at 545 (citation omitted).

¶ 59 The trial court did not err in denying Defendant's motion to dismiss the first-degree murder by torture charge. Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges DIETZ and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
KEITH AARON BUCKLEW, DEFENDANT

No. COA20-556

Filed 7 December 2021

1. Motor Vehicles—impaired driving—felony serious injury by motor vehicle—warrantless blood draw—probable cause—exigent circumstances

In a prosecution for assault with a deadly weapon inflicting serious injury, felony serious injury by a motor vehicle, and impaired driving, competent evidence supported a determination that probable cause existed to justify a warrantless blood draw of defendant after he was taken to a hospital with serious injuries from the accident he caused. An eyewitness observed defendant's erratic driving just prior to the accident, defendant admitted to having taken several impairing substances that day, he appeared lethargic and had slow speech, and, where his injuries were so severe that he subsequently had to be taken by helicopter to another hospital, exigent

circumstances existed to take a blood sample without obtaining a warrant so that medical treatment including pain medication could be administered.

2. Evidence—car accident—judicial notice of weather report

In a prosecution for assault with a deadly weapon inflicting serious injury, felony serious injury by a motor vehicle, and driving while impaired, the trial court did not abuse its discretion by declining to take judicial notice of a weather report of the conditions that existed on the day that defendant caused a collision where there was sufficient evidence from multiple witnesses about the weather conditions from which the jury could make its own conclusion. Further, where the issue was how much rain fell at the time of the crash, the report did not meet the standard for judicial notice under Evidence Rule 201(b) because the precise amount of rain is not a generally known fact, and the report was not a document of indisputable accuracy because its data stopped several hours prior to when the crash occurred.

3. Constitutional Law—Confrontation Clause—lab report—blood sample test not conducted by testifying expert—chain of custody

In a prosecution for assault with a deadly weapon inflicting serious injury, felony serious injury by a motor vehicle, and driving while impaired, there was no violation of defendant's constitutional rights under the Confrontation Clause and no error in the admission of a lab report regarding defendant's blood sample because the report constituted an independent expert opinion created and analyzed by the testifying expert—who related his experience and training as a forensic toxicologist—based on the results of data generated by lab analysts. Further, the trial court did not abuse its discretion by admitting the chain of custody report for defendant's blood sample where the arresting officer and the expert testified about how the sample was handled, and defendant provided no reason to believe that the sample had been altered.

4. Motor Vehicles—impaired driving—felony serious injury by motor vehicle—assault with deadly weapon—sufficiency of evidence

The State presented substantial evidence of each element of assault with a deadly weapon inflicting serious injury, felony serious injury by a motor vehicle, and driving while impaired—based on a car crash caused by defendant—to send the charges to the jury.

Witnesses observed defendant's erratic and reckless driving just prior to the accident, defendant admitted to having taken several medications earlier that day, the collision caused serious injuries to both the victim and defendant, there were no skid marks to show any attempt by defendant to slow his vehicle before he swerved into oncoming traffic and hit two vehicles, defendant appeared lethargic and had slow speech, and his blood sample revealed the presence of impairing substances, including benzodiazepines and opiates.

Appeal by Defendant from judgment entered 11 December 2019 by Judge Leonard L. Wiggins in Martin County Superior Court. Heard in the Court of Appeals 26 May 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Keith Bucklew ("Defendant") appeals from judgments from the superior court finding Defendant guilty of assault with a deadly weapon inflicting serious injury, felony serious injury by a motor vehicle, and driving while impaired. We hold the trial court committed no error.

I. Background

¶ 2 The appeal arises from the convictions of Defendant, a retired Marine with twenty years of service. On November 26, 2014, Defendant was driving himself and his ten year old son in a white Land Rover. An eyewitness reported Defendant was speeding, drifting within his lane toward the center line, crossing the center line, and driving erratically and aggressively. Around dusk, Defendant's Land Rover swerved into oncoming traffic and hit a white Cadillac Escalade driven by Tina Wasinger ("Wasinger"), with her two minor sons as passengers, and a Hyundai Sante Fe driven by Richard Sermon ("Sermon"), with his wife and four children as passengers. Trooper Mark Peaden ("Trooper Peaden") of the North Carolina State Highway Patrol responded to the call. Trooper Peaden observed that Defendant and Wasinger's vehicles had heavy front end damage and Sermon's vehicle appeared to have been sideswiped. As a result of the collision, Wasinger suffered both significant, long-term, physical injuries and the loss of her job. At the scene of the

accident, Trooper Peaden observed that there were no apparent skid marks indicating an attempt to stop the vehicle.

¶ 3 Trooper Peaden located Defendant at the scene and noted Defendant appeared impaired; acted loopy, apathetic, and lethargic; had slurred speech; and was very tired. Due to Defendant's injuries, Defendant was transported to the hospital. Defendant had sustained substantial injuries, including a fractured femur and broken hand.

¶ 4 At the hospital, Defendant was described as having "droopy eyelids, a blank stare, slurred speech and [was] lethargic"; but also having a few coherent moments where he could answer questions. In response to Trooper Peaden's inquiry about whether Defendant was taking any medication or drinking alcohol, Defendant responded he was on oxycodone, valium, and morphine which he reported he last took at 4:00 o'clock that morning. Trooper Peaden performed an alcosensor breath test on Defendant which indicated Defendant had not consumed alcohol prior to the collision.

¶ 5 Trooper Peaden found Defendant to be at-fault in the collision and impaired to the extent he was unable to appreciate the danger of the collision. Trooper Peaden placed Defendant under arrest for driving while impaired ("DWI"), notified Defendant of his rights to a chemical analysis test, and requested Defendant to submit to a chemical analysis test. Defendant's blood sample revealed the presence of oxycodone, diazepam, nordiazepam, and morphine. A urine screen conducted at the hospital was positive for benzodiazepines, opiates, and tricyclic antidepressants.[1] Defendant was transported by helicopter to another hospital to receive a higher level of care after the blood draw was complete. On November 26, 2014, Defendant was indicted for assault with a deadly weapon inflicting serious injury, DWI, misdemeanor child abuse, and felony serious injury by vehicle.

¶ 6 Defendant filed a pretrial motion to suppress the seizure and analysis of his blood. The trial court denied Defendant's motion to suppress, explaining that based upon testimony from Trooper Peaden; the eyewitness's, a hospital nurse's, Defendant's and Sermon's statements; the emergent medical care needed by Defendant; and the results of Defendant's blood draw, there was sufficient probable cause to charge Defendant with the offense of DWI and there was sufficient exigent and articulable basis to conduct a warrantless blood draw for a

1. Benzodiazepines work to sedate or calm a person and includes medication such as Valium. Nat'l Institute on Drug Abuse, https://www.drugabuse.gov/drug-topics/opioids/benzodiazepines-opioids, (last visited Oct. 15, 2021).

chemical analysis. The trial court also denied Defendant's motion for judicial notice of the National Weather Service's weather report ("Weather Report"), motions to dismiss, objection to the lab and chain of custody report, and objection to the analyst's testimony regarding Defendant's blood sample. On December 11, 2019, Defendant was found guilty of assault with a deadly weapon inflicting serious injury, DWI, and felonious serious injury by a motor vehicle. On appeal, Defendant contends the trial court erred by denying Defendant's motion for judicial notice, motion to suppress the blood draw, and motion to dismiss, and by admitting, over Defendant's objection, the lab result and chain of custody report and analyst's testimony.

II. Discussion

A. Motion to Suppress Defendant's Blood Draw

1. Competent Evidence Existed

¶ 7 **[1]** We turn first to Defendant's contention the trial court's findings of fact in the order denying Defendant's motion to suppress the blood draw (the "Denial Order") were not supported by competent evidence. We note at the outset the standard of review for a motion to suppress is not substantial competent evidence, but rather a lower threshold of competent evidence. *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). "In reviewing a trial judge's ruling on a suppression motion, we determine only whether the trial court's findings of fact are supported by *competent evidence*, and whether these findings of fact support the [trial] court's conclusions of law." *State v. Pulliam*, 139 N.C. App. 437, 439-40, 533 S.E.2d 280, 282 (2000) (citation omitted and emphasis added)). The trial court's findings of fact which are supported by competent evidence are "conclusive on appeal . . . even if the evidence is conflicting." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2010) (quoting *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994)). "[T]he trial court's conclusions of law are reviewed de novo and must be legally correct." *State v. Scruggs*, 209 N.C. App. 725, 727, 706 S.E.2d 836, 838 (2011) (citation omitted).

¶ 8 Here, the findings of fact in the Denial Order support the conclusion probable cause and exigent circumstances existed to initiate a warrantless blood draw. Probable cause is the "facts and circumstances within an officer's knowledge and of which he had reasonably trust-worthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *State v. Williams*, 314 N.C. 337, 343, 333 S.E.2d 708, 713 (1985) (citations omitted). Whether exigent circumstances exist as to justify a

warrantless blood draw, though yet to be precisely defined, depends on the totality of the circumstances. *Missouri v. McNeely*, 569 U.S. 141, 156, 133 S. Ct. 1552, 1563, 185 L. Ed. 2d 696, 709 (2013); *State v. McCrary*, 237 N.C. App. 48, 53, 764 S.E.2d 477, 481 (2014).

¶ 9 We are not persuaded by Defendant's argument the Denial Order's findings of fact were not supported by competent evidence. The evidence in the record tends to show the eyewitness reported that Defendant, prior to collision, crossed the center line, drifted within his lane, and drove aggressively and erratically. Sermon testified Defendant's vehicle swerved from oncoming traffic and "almost made like a left turn directly into [Wasinger's vehicle] . . . ." Once Trooper Peaden arrived at the scene, he noted there were no skid marks indicating any attempt to stop. After Defendant was transported to the hospital due to his injuries, a breath alcosensor test revealed no presence of alcohol, but Defendant admitted to taking oxycodone, valium, and morphine that morning. When Trooper Peaden spoke with Defendant at the hospital, he noticed Defendant had slurred speech, a loopy demeanor, was lethargic and slow to answer questions. At one point Defendant told Trooper Peaden he did not remember what happened while, at another point, he told Trooper Peaden he was hit by a car. Nurse Warren, a nurse at the first hospital to which Defendant was taken, testified Defendant had a significant injury to his femur, injury to his neck, a contusion, a fracture, swelling, and enlarged pupils, and that he was falling asleep between questions.

¶ 10 Based off his observations, Trooper Peaden formed the opinion Defendant had consumed a "sufficient quantity of impairing substances so that his mental and physical facilities were appreciably impaired." However, Trooper Peaden did not have time to leave the hospital to acquire a search warrant because Defendant was "very, very badly injured" and the hospital does not administer pain medication until after a blood draw is performed. Defendant's injuries, moreover, were so severe as to warrant air-lifting Defendant to another hospital for a higher level of care after the blood draw was complete. Based on the evidence presented at trial, there was competent evidence to support the findings of fact in the Denial Order.

¶ 11 In addition to a general challenge to the findings of fact in the Denial Order, Defendant specifically challenges findings of fact twelve, fourteen, seventeen, and twenty-three.

a. No Error as to Finding of Fact Number 12

¶ 12 Finding of fact number twelve states, "Stacy Toppin, RN, described the defendant as alert and able to answer questions. She described his

speech as slow and thick tongued. He was further described as neurologically intact with no visible head injuries. She described his pupils as appearing pinpoint." Competent evidence exists to support fact number twelve through Stacy Toppin's testimony where she stated Defendant "had slurred speech at the time, [was a] little thick tongue, [and had a] little bit of confusion[,]" and his pupils were "pinpoint looking." On voir dire, Stacy Toppin explained that Defendant had no apparent head injuries, was stable, and was able to answer questions. The testimony provided by Stacy Toppin provided competent evidence to support finding of fact number twelve.

b. No Error as to Findings of Fact Number 14 and 17

¶ 13 Findings of fact fourteen and seventeen state:

> (14) [i]n addition to defendant's statement and disclosures, Trooper Peaden also administered a portable breath test in an effort to rule out the presence of alcohol. Due to the acute nature of the defendant's injuries, the court finds that it was not appropriate to administer or attempt to administer the Horizontal Gaze Nystagmus, the Walk and Turn or One-legged stand test standard field sobriety tests due to the acute nature of the defendant's injuries and the dynamic and emergent medical nature of the environs and surroundings of a medical facility.
>
> . . .
>
> (17) [a]fter stabilizing treatment was administered at Martin General Hospital, the defendant was subsequently transferred to Vidant Greenville for further and more advanced trauma care, which further demonstrated the dynamic and emergent medical care needed by the defendant which further underscores the necessity and exigency for a blood draw."

¶ 14 At trial, the evidence showed Defendant sustained substantial injuries including a broken hand and fractured femur. Defendant's injuries were so severe he ultimately had to be transported by helicopter to another hospital for more advanced care. Despite the existence of conflicting evidence which may refute finding of fact number fourteen, conflicting evidence does not affect a finding of fact which is supported by competent evidence. *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826. Based on the severity of Defendant's injuries, findings of fact numbers fourteen and seventeen were supported by competent evidence.

c. No Error as to Finding of Fact 23

¶ 15 Finding of fact number twenty-three states, "[n]o search warrant was obtained or necessary based on the facts and totality of the circumstances presented." The evidence tends to show Trooper Peaden found probable cause existed Defendant had committed the offense of DWI based on Defendant's admission to taking multiple medications, the lack of skid marks indicating any attempt to stop, eye witness reports of Defendant's erratic driving, and Defendant's lethargic and loopy behavior. Moreover, per our analysis above, Defendant's injuries were substantial and required immediate medical care, including the administration of pain-relieving medication. Because of the evidence presented, finding of fact number twenty-three is based upon competent evidence.

2. Warrantless Blood Draw was Justified

¶ 16 Next, Defendant argues the findings of fact do not support the conclusion that exigent circumstances and probable cause existed to support a warrantless blood test. Both the Fourth Amendment to the United States Constitution and Article I Section 20 of the North Carolina Constitution protect a person from unreasonable searches and seizures. U.S. Const. Amend. IV; N.C. Const. art. I, § 20. Blood tests "plainly constitute searches of persons" and thus are considered seizures under the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 767, 86 S. Ct. 1826, 1834, 16 L. Ed. 2d 908, 918 (1996) (internal quotation marks omitted); *see also State v. Carter*, 322 N.C. 709, 714, 370 S.E.2d 553, 556 (1988) (holding "[t]he withdrawal of a blood sample from a person is a search subject to protection by article I, section 20 of our constitution"). A blood test may only be performed after a warrant or valid consent is obtained or under exigent circumstances with probable cause "unless probable cause and exigent circumstances exist that would justify a warrantless search." *State v. Welch*, 316 N.C. 578, 585, 342 S.E.2d 789, 793 (1986). *See State v. Romano*, 369 N.C. 678, 692, 800 S.E.2d 644, 653 (2017).

¶ 17 First we must determine whether probable cause existed. Probable cause is defined as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." *State v. Smith*, 222 N.C. App. 253, 255, 729 S.E.2d 120, 123 (2012) (citation omitted)." *See Carroll v. United States*, 267 U.S. 132, 161, 45 S. Ct. 280, 288, 69 L. Ed. 543, 555 (1925) (citation omitted). Here, the circumstances provided Trooper Peaden with reasonable grounds to suspect Defendant had committed the offense of a DWI. Prior to the accident, an eyewitness placed a 911-call to report to the police Defendant was driving erratically,

Defendant's vehicle was "weaving about the road[,]" and Defendant ultimately struck two vehicles. Upon arriving to the scene of the accident, Trooper Peaden discovered further evidence which indicated Defendant was responsible for the crash. Trooper Peaden observed vehicle debris were "everywhere", three heavily damaged vehicles were present including Defendant's car, and no brake skid marks were present to indicate anyone attempted to stop their vehicles prior to the collision. All three vehicles rested outside of and to the left of Defendant's lane of travel. Trooper Peaden did not detect alcohol on Defendant, but Defendant voluntarily admitted to taking his medications that morning. Defendant held valid prescriptions for oxycodone, valium, and morphine and voluntarily stated to Trooper Peaden he had last taken his medications that morning at 4 a.m. Trooper Peaden described Defendant as lethargic, and having slurred speech, droopy eyelids, and a blank stare. However, Defendant's injuries were of such severity that he was classified as a trauma patient and was rapidly deteriorating. Based on these findings of fact, the trial court properly concluded probable cause existed to perform a warrantless blood test. Accordingly, this Court is compelled to hold the trial court did not err when it determined probable cause existed for Trooper Peaden to form the opinion that Defendant had committed the offense of DWI so as to justify a warrantless blood test.

¶ 18 Turning our analysis to whether the findings of fact supported the conclusion exigent circumstances were present, the underlying question as to whether exigent circumstances exist is whether "there is a compelling need for official action and no time to secure a warrant." *Missouri v. McNeely*, 569 U.S. 141, 149, 133 S. Ct. 1552, 1559, 185 L. Ed. 2d 696, 705 (2013) (citation omitted). In the case of a DWI, the reasonableness of a warrantless blood test "must be determined case by case based on the totality of the circumstances." *Id.* at 156, 133 S. Ct. at 1563, 185 L. Ed. 2d at 709 (2013). *See State v. Dahlquist*, 231 N.C. App. 100, 103, 752 S.E.2d 665, 667 (2013). Though the natural dissipation of a substance within a person's blood stream is a factor to consider, it is not a *per se* exception to the totality of the circumstances test. *McNeely*, 569 U.S. at 156, 133 S. Ct. at 1563, 185 L. Ed. 2d at 709. In *State v. Granger*, we held a totality of the circumstances illustrated exigent circumstances when sufficient probable cause had already been established, the officer could not thoroughly investigate due to the extent of defendant's injuries, delays in the warrant application process, and the potential of imminent administration of pain medication. *State v. Granger*, 235 N.C. App. 157, 165, 761 S.E.2d 923, 928 (2014).

¶ 19 In this case, like *Granger*, a totality of the circumstances show exigent circumstances existed to justify a warrantless blood draw. First,

sufficient probable cause existed to establish Defendant was driving while impaired prior to the initiation of the blood draw. Next, the officer was not able to thoroughly question Defendant at the scene of the accident because Defendant was "pinned in his vehicle" and subsequently taken to the hospital as a trauma patient due to the extent of Defendant's injuries. Indeed, Defendant's own affidavit confirmed Defendant's injuries caused "acute blood loss." Moreover, Defendant's "condition was deteriorating" due to his injuries. In light of these circumstances, the officer did not have the time necessary to acquire a search warrant due to the extent of Defendant's injuries and the fact that pain medication in par with stabilizing treatment was administered immediately after a blood drawn was taken. Defendant was transferred to another hospital for advanced trauma care due to the severity of his injuries and his deteriorating medical condition. Although we question the efficacy of reading Defendant his Notice of Rights when he was in such critical condition, the totality of the circumstances in the instant case shows the lack of time to acquire a warrant in light of the compelling need to perform a blood test on Defendant once the officer formed the opinion that Defendant had driven while impaired. Thus, we must hold the trial court did not err when finding sufficient exigent circumstances existed to justify a warrantless blood draw.

B. Judicial Notice of Weather Conditions

¶ 20 **[2]** Defendant next argues the trial court erred by not taking judicial notice of the Weather Report. We also conclude the trial court did not err by denying to take judicial notice of the National Weather Station's weather conditions on the date of the collision. Under N.C. Gen. Stat. § 8C-1 Rule 201(b) "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201(b) (2021). An indisputable fact is one that is "so well established as to be a matter of common knowledge." *In re L.G.A.*, 277 N.C. App. 46, 2021-NCCOA-137, ¶ 24 (citation omitted). A trial court has discretion when deciding whether or not to take judicial notice, and this Court reviews for abuse of discretion. *State v. McDougald*, 38 N.C. App. 244, 248, 248 S.E.2d 72, 77 (1978). However, a court "cannot take judicial notice of a disputed question of fact," *Hinkle v. Hartsell*, 131 N.C. App. 833, 836, 509 S.E.2d 455, 458 (1998) (citation omitted), and "any subject that is open to reasonable debate is not appropriate for judicial notice." *In re R.D.*, 376 N.C. 244, 264, 852 S.E.2d 117, 132 (2020) (citation and internal ellipses omitted).

¶ 21 This Court's opinion in *State v. McDougald* describes an applicable example of when the trial court did not abuse its discretion by denying a defendant's motion to take judicial notice. In *McDougald*, the defendant appealed the trial court's denial to take judicial notice of news broadcasts concerning the case. *State v. McDougald*, 38 N.C. App. 244, 248, 248 S.E.2d 72, 77 (1978). The *McDougald* Court rejected the defendant's assignment of error, writing, "[s]uch facts could have been easily proven by witnesses ordinarily available. There was no showing of abuse of discretion by the trial court. Therefore, the trial court did not err in failing to take judicial notice that the case was the subject of radio and television broadcasts." *Id.* *McDougald* held a trial court does not abuse its discretion when denying to take judicial notice of a fact if there exists an opportunity to otherwise prove the fact at trial.

¶ 22 This concept has direct application to the trial court's decision not to take judicial notice of the Weather Report in this case. The trial court denied Defendant's motion for judicial notice as multiple witnesses testified to the weather conditions on the date of the collision. Thus the trial court had the right to conclude sufficient evidence existed from the witnesses' testimonies to allow the jury to form their own conclusion on the state of the weather. Following the reasoning in *McDougald*, the trial court did not abuse its discretion when it declined to take judicial notice of the National Weather Service weather conditions report on the date of collision.

¶ 23 Against this conclusion, Defendant argues his motion for judicial notice should have been granted under N.C. Gen. Stat. § 8C-1, Rule 201(d). Rule 201(d) states "[a] court shall take judicial notice if requested by a party and supplied with the necessary information." § 8C-1, Rule 201(d). The implication, Defendant argues, is that "the trial court has no discretion when supplied with the information prescribed by Rule 201." Of course Rule 201(d) is only a portion of Rule 201 as a whole, and thus we must view section (d) in light of the entirety of Rule 201. *See Pilos-Narron v. Narron*, 239 N.C. App. 573, 771 S.E.2d. 633 (2015) (viewing the portion of Rule 56(e) quoted by plaintiff in its entirety).

¶ 24 Section (d) of Rule 201 is predicated upon the two-part test of Rule 201's Section (b) which states a judicially noticed fact is one that cannot be reasonably disputed because it is either 1) general knowledge or 2) "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." § 8C-1, Rule 201(b). The issue in contention here is the level of rain fall at the time of the collision, thus why, not unreasonably, Defendant wanted the trial court to take judicial notice of the Weather Report. However, the contentious

issue, the level of rainfall fails the first prong of Section (b)'s test because though individuals may know if it is raining, the precise amount of rain is not a generally known fact. Under the second prong of the test, sources as used in Section (b) must be "a document of such indisputable accuracy as [to] justif[y] judicial reliance." *State v. Dancy*, 297 N.C. 40, 42, 252 S.E.2d 514, 515 (1979). The amount of rain is generally a fact that is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201(b) (2021). In *State v. Canaday*, this Court held a document of indisputable accuracy "contemplates material from a primary source in whose hands the gathering of such information rests." 110 N.C. App. 763, 766, 431 S.E.2d 500, 501 (1993). Flowing from our reasoning in *Canaday*, weather reports from the National Weather Service are a result of data gathered by the National Weather Service and thus typically are documents of indisputable accuracy.[2] *See Bain Enters., LLC v. Mountain States Mutality Casualty Co.*, 267 F. Supp. 3d 796, 819 (W.D. Tex. 2016); *Kovera v. Envirite of Ill., Inc.*, 2015 IL App (1st) 133049, ¶28.

¶ 25 However, this proffered Weather Report from the National Weather Service is not a document of indisputable accuracy for the purpose of illustrating the amount of rain on the date of the collision. The Weather Report for the date of the crash does not state the level of rain that was occurring at the time of the crash. An examination of the Weather Report reveals the level of rain stopped being reported for the day up to three hours prior to the collision. The party moving for judicial notice has the responsibility to "supply [the trial judge] with appropriate data" as the "trial judge is not required to make an independent search for data of which he may take judicial notice." *Dancy*, 297 N.C. at 42, 252 S.E.2d at 515. Because the proffered weather report did not contain the necessary data showing the level of rain at the time of the collision, the Weather Report fails under the second prong of Rule 201(b). The trial court was not required under Rule 201(d) to take judicial notice but was free to use its discretion pursuant to Rule 201(c). Accordingly, we

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2. Forecast from the National Weather service is the product of observations from scientists "using technology such as radar, satellite and data from an assortment of ground-based and airborne instruments to get a complete picture of current conditions. Forecasters often rely on computer programs to create what's called an 'analysis,' which is simply a graphical representation of current conditions. Once this assessment is complete and the analysis is created, forecasters use a wide variety of numerical models, statistical and conceptual models, and years of local experience to determine how the current conditions will change with time. Numerical modeling is fully ingrained in the forecast process, and our forecasters review the output of these models daily." NATIONAL WEATHER SERVICE, https://www.weather.gov/about/forecast-process (last visited Sept. 21, 2021).

are compelled to hold the trial court did not abuse its discretion by not taking judicial notice of the Weather Report.

C. Lab and Chain of Custody Report

¶ 26 **[3]** We next turn to Defendant's assignment of error to the trial court's admission of the lab and chain of custody report (the "Report") of Defendant's blood and Evan Lowery's ("Lowery") testimony regarding Defendant's blood sample. Defendant argues his right to confrontation and cross-examination were violated because only Lowery, the State's independent expert, testified at trial, not the people who actually conducted the analysis of his blood and urine samples. We disagree and conclude the trial court did not err in admitting the Report.

¶ 27 First, Lowery's testimony was properly admitted by the trial court. The United States Constitution's Confrontation Clause prohibits expert testimony that is predicated only on the reports of an analyst who is not testifying. *State v. Locklear*, 363 N.C. 438, 452-53, 681 S.E.2d 293, 304-05 (2009). An expert's testimony is nonetheless admissible "when the expert testifies not just to the results of other experts' tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts tests, and her own expert opinion based on a comparison of the original data." *State v. Hartley*, 212 N.C. App. 1, 12-13, 710 S.E.2d 385, 396 (2011) (citation and internal quotations omitted). The crucial question here is whether Lowery's testimony was merely a recitation of the analysts' Report or was his independent expert opinion derived from the proper methods.

¶ 28 A review of the record reveals Lowery's expert testimony was admissible. Lowery was admitted as an expert in forensic toxicology and utilized his "training, education, and experience" in conducting his analysis of the data. Though Lowery received data from the analysis done at the crime lab, Lowery analyzed and reviewed the data, analyzed Defendant's blood sample in accordance with the North Carolina State Crime Laboratory and Department of Health and Human Services, crafted with his own opinion as to the results of the data, and finally produced the Report utilized at trial. In other words, the Report introduced at trial was created by Lowery, not the analysts who did not testify. Although the data used by Lowery originated from other analysts, the Report was an independent expert opinion analyzed and created by Lowery, and, accordingly, the trial court did not err in admitting Lowery's testimony.

¶ 29 Second, Defendant argues the State failed to establish the chain of custody and the trial court erred in admitting the chain of custody report. Our Supreme Court requires a two-prong test to be satisfied prior

to the admission of evidence: the "item offered must be identified as being the same object involved in the incident and it must be shown that the object has undergone no material change." *State v. Taylor*, 332 N.C. 372, 388, 420 S.E.2d 414, 423-24 (1992) (quoting *State v. Campbell*, 311 N.C. 386, 388, 317 S.E.2d 391, 392 (1984)). The State does not need to establish a detailed chain of custody unless "the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered." *Campbell*, 311 N.C. at 389, 317 S.E.2d at 392. Even if the chain of custody does have points of weakness, this only goes to the "weight to be given the evidence and not to its admissibility." *Id.* (citation omitted).

¶ 30 In light of these principles, we hold the trial court did not abuse its discretion by finding the State established an adequate chain of custody. Trooper Peaden testified after Defendant's blood was taken by the nurse, the blood was then transferred to the officer. The blood vial contained a security seal which identifies Defendant, the person who drew the blood, and the date and time. The subsequent signatories to the chain of custody revealed Defendant's blood sample was received by the State crime lab. Lowery testified to the chain of custody of Defendant's blood from the date it was received by the State crime lab until the date the blood was analyzed. The testimonies from both Trooper Peaden and Lowery satisfy both prongs required for admission of evidence by our Supreme Court. The security seal upon the vial and the chain of custody report tend to prove the sample at all times contained Defendant's blood and no material change occurred throughout the transfers and testing of the blood. *See Taylor*, 332 N.C. at 388, 420 S.E.2d at 423-24. In summation, the testimony presented effectively established the chain of custody and the trial court committed no error by admitting the chain of custody report.

¶ 31 Defendant raises questions about the circumstances surrounding his blood sample in order to undermine the admissibility of the chain of custody report. These purported points of weakness only go to the "weight to be given the chain of custody not its admissibility." *Campbell*, 311 N.C. at 389, 317 S.E.2d at 392. Under *Campbell*, the evidence presented must not only be susceptible to alteration or not readily identifiable, but also there must be a reason to believe the evidence was altered. *Id.* Here, Defendant offered no reason to believe the blood sample was altered and thus his attempt to present questionable circumstances surrounding the blood sample fails under *Campbell*. The conclusion follows that the trial court did not abuse its discretion by admitting the chain of custody report.

D. Defendant's Motion to Dismiss

¶ 32 **[4]** Finally, we look to Defendant's argument the trial court erred in denying Defendant's motion to dismiss first at the close of the State's evidence and then at the close of all evidence. We review a motion to dismiss *de novo*. *Locklear v. Cummings*, 262 N.C. App. 588, 592, 822 S.E.2d 587, 590 (2018). In a criminal trial, the law is well settled as follows, "upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). A motion to dismiss should be allowed if the evidence only raises a "suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it." *Id*. (citations omitted). Evidence is to be viewed in "the light most favorable to the State" and tested only to determine if a "*reasonable* inference of the defendant's guilt of the crime charged may be drawn from the evidence." *Id*. at 99, 261 S.E.2d. at 117 (citations omitted and emphasis in original).

¶ 33 Defendant alleges there was no substantial evidence for the offenses of impaired driving, assault with a deadly weapon inflicting serious injury, and felonious serious injury by vehicle. First, Defendant was charged with driving while impaired under N.C. Gen. Stat. § 20-138.1 which provides, in relevant parts, "[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . [w]hile under the influence of an impairing substance . . . ." N.C. Gen. Stat. § 20-138.1(a) (2021). The State showed a white Land Rover was reported to be driving erratically upon a public road in North Carolina; a crash later occurred caused by the Land Rover; and when Trooper Peaden arrived at the scene, Defendant was trapped inside the Land Rover in the driver's seat. As analyzed above, probable cause existed to charge Defendant with the offense of DWI based upon eyewitness reports of Defendant's erratic driving, the severity of the crash, Defendant's admission of taking his medications that morning, Defendant's impaired behavior, and the result of Defendant's blood test. As such, we are obligated to hold substantial evidence exists to support each element of driving while impaired and that Defendant was the one who committed the DWI.

¶ 34 Next, Defendant was charged with assault with a deadly weapon inflicting serious injury to Tina Wasinger pursuant to N.C. Gen. Stat. 14-32(b) which states, "[a]ny person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class

E felon." N.C. Gen. Stat. § 14-32(b) (2021). The elements of a Statute 14-32(b) are "(1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990). An assault is "an overt act or attempt, with force or violence, to do some immediate physical injury to the person of another, which is sufficient to put a person of reasonable firmness in fear of immediate physical injury." *State v. Jones*, 353 N.C. 159, 164, 538 S.E.2d 917, 922 (2000) (citation omitted). A deadly weapon is "any article, instrument or substance which is *likely* to produce death or great bodily harm." *Id.* (citation omitted and emphasis in original).

¶ 35 In North Carolina, an automobile "can be a deadly weapon if it is driven in a reckless or dangerous manner." *Id.* One who "operates a motor vehicle in a manner such that it constitutes a deadly weapon, thereby proximately causing serious injury to another, may be convicted of AWDWISI provided there is either an actual intent to inflict injury or culpable or criminal negligence from which such intent may be implied." *Id.* at 164-65, 538 S.E.2d at 922-23. Culpable or criminal negligence is defined as "such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *Id.* at 165, 538 S.E.2d at 923 (quoting *State v. Weston*, 273 N.C. 275, 280, 159 S.E.2d 883, 886 (1968)).

¶ 36 Particularly, culpable negligence exists when a safety statute is unintentionally violated and is "accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable [foreseeability], amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others." *Id.* (quoting *State v. Hancock*, 248 N.C. 432, 435, 103 S.E.2d 491, 494 (1958)). A safety statue is one that is "designed for the protection of human life or limb." *State v. McGill*, 314 N.C. 633, 637, 336 S.E.2d 90, 92 (1985) (citation omitted). We note as well, N.C. Gen. Stat. § 20-138.1 is a safety statute created to protect human life or limb by prohibiting driving impaired. *See Jones*, 353 N.C. at 165, 538 S.E.2d at 923.

¶ 37 In the case before us, Defendant assaulted Wasinger by hitting her vehicle with his vehicle, a white Land Rover. According to eyewitness reports and the lack of skid marks to indicate an attempt to stop his vehicle, Defendant was driving his vehicle in an erratic and reckless manner. Thus, Defendant's vehicle may be considered a deadly weapon. As a matter of law, Defendant's culpable negligence was established when Defendant proceeded to operate a vehicle while under the influence of impairing substances. Such negligence was further shown by reports

of Defendant's driving from both Sermon and another eyewitness. Though Wasinger survived the crash, she suffered serious injury, including weeks in the hospital, two months in a wheelchair, and extremely restricted movement of her hand and legs. Due to her injuries, Wasinger lost her job and is now enrolled in disability with Social Security. In sum, the elements of assault with a deadly weapon inflicting serious injury were satisfied, and we affirm the judgment of the trial court.

¶ 38 Defendant was also convicted of felony serious injury by motor vehicle under N.C. Gen. Stat. § 20-141.4(a3) which provides,

> A person commits the offense of felony serious injury by vehicle if:
>
> (1) The person unintentionally causes serious injury to another person,
>
> (2) The person was engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2, and
>
> (3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of the serious injury.

N.C. Gen. Stat. § 20-141.4(a3) (2021). Because we have already explained that substantial evidence exists to illustrate Defendant caused serious injury to Wasinger due to his driving while impaired, the elements of felony serious injury by motor vehicle were met. Thus, the trial court did not err in denying Defendant's motion to dismiss.

III. Conclusion

¶ 39 As a result of the foregoing analysis, we are compelled to hold there was no error when the trial court denied Defendant's motion to suppress the blood draw, declined to take judicial notice of the Weather Report, admitted the Report and Lowery's testimony, and denied Defendant's motion to dismiss. While we sympathize with Defendant in that he was operating his vehicle while under the influence of only prescribed medications and not under the influence of alcohol and was also seriously injured in the resulting collision, we hold that the Defendant received a fair trial free from error.

NO ERROR.

Judges DIETZ and INMAN concur.

STATE v. JONAS

[280 N.C. App. 511, 2021-NCCOA-660]

STATE OF NORTH CAROLINA
v.
DANIEL RAYMOND JONAS, DEFENDANT

No. COA20-712

Filed 7 December 2021

1. Appeal and Error—right to appeal—guilty plea—not part of plea arrangement—notice to State not required

Where defendant's plea of guilty to possession of a controlled substance was not made as part of a plea arrangement with the State, he was not required to give notice to the State of his intent to appeal the denial of his motion to suppress pursuant to *State v. Reynolds*, 298 N.C. 380 (1979) (interpreting N.C.G.S. § 15A-979(b)).

2. Search and Seizure—traffic stop—articulable suspicion of criminal activity—officer's mistake of law—reasonableness

The trial court erred by denying defendant's motion to suppress evidence seized from his car during a traffic stop where the officer's mistaken belief that the car's transporter plate could only be used on trucks was not objectively reasonable because the statute enumerating the circumstances in which both trucks and motor vehicles could have transporter plates was clear and unambiguous. Further, the totality of the circumstances was not sufficient to support a reasonable articulable suspicion to conduct the traffic stop where defendant's vehicle was exiting the parking lot of a closed business that had no other cars present in an area that had recently had a trailer theft, and where there were no findings regarding what actions of defendant warranted suspicion.

Appeal by Defendant from judgment entered 3 March 2020 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 21 September 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Jessica Macari, for the State.

Sigler Law, PLLC, by Kerri L. Sigler, for defendant-appellant.

MURPHY, Judge.

¶ 1 When a defendant pleads guilty but does not plead guilty pursuant to a plea arrangement with the State, he is not required to give the State notice of his intent to appeal before plea negotiations are finalized to pursue his statutory right to appeal a final order denying a motion to suppress pursuant to N.C.G.S. § 15A-979(b). We have jurisdiction to hear the merits of Defendant's appeal of his *Motion to Suppress*.

¶ 2 A traffic stop made without reasonable articulable suspicion is unconstitutional as it violates the Fourth Amendment. Evidence illegally obtained as a result of an unconstitutional traffic stop must be suppressed. Reviewing the totality of the circumstances, law enforcement did not have reasonable articulable suspicion to stop Defendant and, as such, the traffic stop was unconstitutional. The trial court erred by denying Defendant's *Motion to Suppress*.

BACKGROUND

¶ 3 On 28 June 2019, around 10:00 p.m., Officer Andrew Berry of the Concord Police Department was on routine patrol of Highway 49 South when he noticed a vehicle with three occupants pull out ahead of him from a trucking company parking lot. Due to the empty parking lot, the fact the gate was closed, and that there was only one light on in the parking lot, Officer Berry believed the business was closed, which "kind of raised [his] suspicion on why the vehicle [was] pulling out of there." Officer Berry followed the vehicle and, when he was close enough behind it, he noticed the vehicle displayed a transporter plate, which he had "never seen . . . on a car." Officer Berry ran the plate through his computer system, and the plate came back as "not assigned to [a] vehicle."

¶ 4 Defendant Daniel Raymond Jonas was a passenger in the vehicle as well as its registered owner. "[B]ased on the fact that the vehicle was displaying [what Officer Berry believed to be] a fictitious tag, and [he was] attempting to determine what tag was supposed to be on the vehicle[,]" Officer Berry initiated a traffic stop. During the stop, the Concord Police Department canine unit arrived and conducted an open-air sniff around the vehicle. Law enforcement located 0.1 grams of methamphetamine in a backpack in the trunk of the vehicle.

¶ 5 Defendant was subsequently indicted for possession of a Schedule II controlled substance. Prior to trial, Defendant filed a *Motion to Suppress*, requesting any evidence seized in connection with Officer Berry's traffic stop on 28 June 2019 be suppressed as fruit of the poisonous tree because Officer Berry lacked a reasonable articulable suspicion to stop the vehicle. After a hearing on the motion, the trial court entered

an order denying Defendant's *Motion to Suppress* ("Order"), which contained the following findings of fact:

> 1. [Defendant] is charged with [p]ossession of a Schedule II [c]ontrolled [s]ubstance as a result of an interaction he had with Officer Andrew Berry of the Concord Police Department on [28 June 2019] in Concord, North Carolina.
>
> 2. That on [28 June 2019], at approximately 10:00 PM, Officer Berry was on duty within his jurisdiction driving on NC Highway 49 when a vehicle displaying a transporter registration plate pulled onto Highway 49 in front of him from [] a trucking company. Officer Berry believed the business was closed because the business's office was dark and there were no other vehicles in the office parking lot.
>
> 3. Even though [Defendant's] vehicle did not have a trailer attached to it, Officer Berry was aware of a recent trailer theft in the area.
>
> 4. Officer Berry ran the transporter registration plate and the plate came back as not assigned to a vehicle.
>
> 5. Officer Berry initiated a traffic stop on the vehicle.
>
> 6. The [trial court] is considering [] Defendant's motion to suppress filed on [31 October 2019].

The Order contained the following relevant conclusions of law:

> 3. The vehicle was exiting from a closed business with no lights visible to the [roadway].[1]
>
> 4. [N.C.G.S. §] 20-79.2 provides: "The Division of Motor Vehicles may issue a transporter plate authorizing the limited operation of a motor vehicle in the circumstances listed in this subsection. A person who received a transporter plate must have proof of financial responsibility that meets the requirements

1. We note Conclusion of Law 3 is more properly characterized as a finding of fact. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations and marks omitted) ("[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact."). However, this distinction is not relevant to our analysis.

> of Article 9A of this Chapter." The statute goes on to list ten (10) limited circumstances in which a person to whom a transporter plate and the vehicle bearing the plate may be operated.
>
> 5. The officer had reasonable articulable suspicion to stop the vehicle in question to ensure its compliance with N.C.G.S. § 20-79.2.

¶ 6 Following the denial of the *Motion to Suppress*, Defendant pled guilty[2] to possession of a Schedule II controlled substance and received a suspended sentence of 6 to 17 months. After the trial court announced its judgment, through counsel, Defendant orally gave notice of appeal of the Order. In open court, following the trial court's acceptance of his guilty plea, counsel stated: "Your Honor, [Defendant] would enter notice of appeal. I filed written notice[3] with regard to the motion to suppress. I just wanted to put it on the record now, and I'll be filing a notice." Defendant has also filed a petition for writ of certiorari with this Court, "should [we] find that trial counsel failed to give proper notice of appeal following the denial of [Defendant's] suppression motion as required by *State v. Reynolds*, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979)[.]" This matter was calendared before us on 21 September 2021; however, on 22 September 2021, we invited the parties to file supplemental briefs addressing

> whether our Supreme Court's holding in State v. Reynolds-'when a defendant intends to appeal from a suppression motion denial pursuant to N.C.G.S. [§] 15A-979(b), he must give notice of his intention to the prosecutor and the trial court before plea negotiations are finalized or he will waive the appeal of right provisions of the statute'-applies in a situation where, as here, Defendant's plea of guilty is not 'part of a plea arrangement.' State v. Reynolds, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979), cert. denied, 446 U.S. 941, 64 L. Ed. 2d 795 (1980)[.]

We further cited to *State v. Tew*, 326 N.C. 732, 734-35, 392 S.E.2d 603, 604-05 (1990); *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995), *aff'd per curiam*, 344 N.C. 623, 476 S.E.2d 106 (1996); Form

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2. Defendant did not plead guilty pursuant to a plea arrangement with the State. *See* Part A, *infra* at ¶ 9.

3. A written notice of appeal does not appear anywhere in the Record on appeal.

AOC-CR-300 paragraph 20 (Rev. 5/18); Record page 17 at paragraph 20; and page 7 lines 4-10 of the plea transcript.

ANALYSIS

A. Appellate Jurisdiction

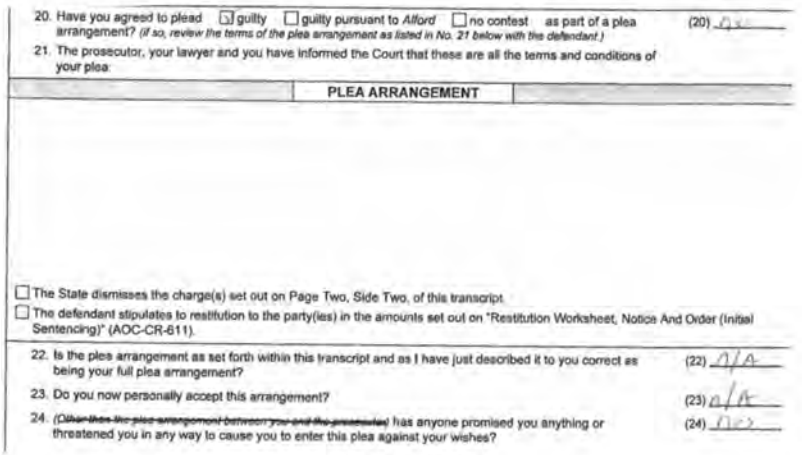
¶ 7 **[1]** "In North Carolina, a defendant's right to pursue an appeal from a criminal conviction is a creation of state statute." *McBride*, 120 N.C. App. at 624, 463 S.E.2d at 404. Generally, a defendant who pleads guilty does not have a right to appeal. *See* N.C.G.S. § 15A-1444(e) (2019). However, N.C.G.S. § 15A-979(b) provides an exception for defendants appealing a final order denying a motion to suppress. *See* N.C.G.S. § 15A-979(b) (2019) (emphasis added) ("An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, *including a judgment entered upon a plea of guilty.*").

¶ 8 In *Reynolds*, our Supreme Court interpreted this exception and held that "when a defendant intends to appeal from a suppression motion denial pursuant to [N.C.G.S. §] 15A-979(b), he must give notice of his intention to the prosecutor and the [trial] court *before plea negotiations are finalized* or he will waive the appeal of right provisions of the statute." *Reynolds*, 298 N.C. at 397, 259 S.E.2d at 853 (emphasis added). Our Supreme Court reasoned:

> We do not believe that [N.C.G.S. § 15A-979(b)] . . . contemplates a factual pattern . . . which would cause the State to be trapped into agreeing to a plea bargain . . . and then have the defendant contest that bargain.
>
> As stated by the United States Supreme Court, "Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained."
>
> The plea bargaining table does not encircle a high stakes poker game. It is the nearest thing to arm's length bargaining the criminal justice system confronts. As such, it is entirely inappropriate for either side to keep secret any attempt to appeal the conviction.

Id. (quoting *Lefkowitz v. Newsome*, 420 U.S. 283, 289, 43 L. Ed. 2d 196, 202 (1975)).

¶ 9 The State argues Defendant did not comply with the *Reynolds* notice requirement because his "intent to appeal came after the entry of the plea" and "notice of the intention to appeal is required before the conclusion of plea negotiations." (Emphasis omitted). However, Defendant did not agree to plead guilty as part of a plea arrangement, as indicated on the *Transcript of Plea*, reproduced below:



20. Have you agreed to plead ☒ guilty ☐ guilty pursuant to *Alford* ☐ no contest as part of a plea arrangement? *(If so, review the terms of the plea arrangement as listed in No. 21 below with the defendant.)* (20) No

21. The prosecutor, your lawyer and you have informed the Court that these are all the terms and conditions of your plea:

PLEA ARRANGEMENT

☐ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript.

☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).

22. Is the plea arrangement as set forth within this transcript and as I have just described it to you correct as being your full plea arrangement? (22) N/A

23. Do you now personally accept this arrangement? (23) N/A

24. *(Other than the plea arrangement between you and the prosecutor)* has anyone promised you anything or threatened you in any way to cause you to enter this plea against your wishes? (24) No

Defendant also testified during his plea colloquy that he did not plead guilty pursuant to a plea arrangement with the State:

> THE COURT: Have you agreed to plead guilty as part of a plea arrangement?
>
> [DEFENDANT]: Yes, sir. Oh. No, sir.
>
> THE COURT: No. There's not one listed here.

As Defendant did not plead guilty pursuant to a plea arrangement with the State, he was not required to comply with the *Reynolds* notice requirement in order to invoke his statutory right to appeal.

¶ 10 The concerns that were present in *Reynolds* are not present here. Defendant neither received nor accepted the benefits of a plea offer from the State. The State was not "trapped into agreeing to a plea bargain" only to later "have [] [D]efendant contest that bargain." *Id.* Defendant was not required to give the State and the trial court notice of his intent to appeal before plea negotiations were finalized because there were no plea negotiations. Defendant has a statutory right to appeal the Order pursuant to N.C.G.S. § 15A-979(b), and we dismiss his petition for writ of certiorari as moot.

B. Motion to Suppress

¶ 11 **[2]** Having established that this Court has proper appellate jurisdiction, we turn to the merits of Defendant's appeal. Defendant's sole argument on appeal is that the trial court erred by denying his *Motion to Suppress* because Officer Berry did not have a reasonable articulable suspicion to conduct the traffic stop.

¶ 12 Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial [court's] underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the [trial court's] ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *State v. Miller*, 243 N.C. App. 660, 663, 777 S.E.2d 337, 340 (2015). "While the trial court's factual findings are binding [on appeal] if sustained by the evidence, the [trial] court's conclusions based thereon are reviewable *de novo* on appeal." *State v. Parker*, 137 N.C. App. 590, 594, 530 S.E.2d 297, 300 (2000).

¶ 13 Defendant does not challenge any of the Order's findings of facts, and they are deemed to be supported by competent evidence and binding on appeal. *See Miller*, 243 N.C. App. at 663, 777 S.E.2d at 340. Rather, Defendant challenges Conclusion of Law 5, and argues "the trial court erred by denying [his] motion to suppress because there was no reasonable articulable suspicion for the traffic stop." Conclusion of Law 5 states:

> The officer had reasonable articulable suspicion to stop the vehicle in question to ensure its compliance with N.C.G.S. § 20-79.2.

¶ 14 The Fourth Amendment of the United States Constitution protects individuals "against unreasonable searches and seizures[.]" U.S. Const. amend. IV. The North Carolina Constitution provides the same protection. N.C. Const. art. I, § 20; *State v. Elder*, 368 N.C. 70, 73, 773 S.E.2d 51, 53 (2015) ("Though Article I, Section 20 of the North Carolina Constitution contains different language, it provides the same protection against unreasonable searches and seizures [as the Fourth Amendment]."). A traffic stop is a seizure "even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653, 59 L. Ed. 2d 660, 667 (1979). Consistent with the Fourth Amendment, "an officer may . . . conduct a brief, investigatory stop when

the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000); *see also State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999).

¶ 15 "Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (marks omitted), *cert. denied*, 555 U.S. 914, 172 L. Ed. 2d 198 (2008).

> [Our Supreme Court] has determined that the reasonable suspicion standard requires that the stop be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. Moreover, a court must consider the totality of the circumstances–the whole picture in determining whether a reasonable suspicion exists.

Id. (citation and marks omitted).

¶ 16 During the *Motion to Suppress* hearing, Officer Berry testified to the following:

> [DEFENSE COUNSEL:] Can you tell us about what led up to you encountering [Defendant].
>
> [OFFICER BERRY:] . . . . I noticed a car pull out in front of me coming from a parking lot to the left. . . . .
>
> And [as] soon as I saw him pull out, I remember looking to the left, and I know that's the [trucking company] building which I knew it was late. There's -- I mean, there's no cars. I know the office hours are closed, and it's a trucking company. So that kind of raised my suspicion on why the vehicle is pulling out of there. . . . .
>
> And then I got behind [the vehicle]. I actually had to slow down a little bit and my lights were on the tag, so I was able to type it in on NCIC. But before I typed it in, I noticed, I've never seen a plate like that on a car. I mean, I had seen it on trucks. It was TP-664 and so on, like 66462. And when I ran it, it came back to plates not assigned to vehicle.

[DEFENSE COUNSEL:] And what does the TP mean in the TP66462?

[OFFICER BERRY:] At the time I was not -- I didn't know if TP meant anything special or -- but I just -- my thought, theory through it was just came from a trucking company, I've seen those on trucks. I mean, it just raised my suspicion for it to be pulling out of there and the tag to be on that vehicle.

[DEFENSE COUNSEL:] And you said the tags came back unassigned?

[OFFICER BERRY:] Correct, yes, sir.

[DEFENSE COUNSEL:] Meaning that it was not assigned, the tag was not assigned to a particular vehicle?

[OFFICER BERRY:] Correct.

[DEFENSE COUNSEL:] The tag was not invalid?

[OFFICER BERRY:] It came back on my computer, and if it comes back not assigned, I'm under the impression it's not valid, it's . . .

[DEFENSE COUNSEL:] You're under the impression that it's not valid?

[OFFICER BERRY:] Well, I'm saying like what I'm looking at on my computer is what it's telling; do you know what I'm saying?

[DEFENSE COUNSEL:] So does your computer tell you that it was an invalid tag?

[OFFICER BERRY:] No, no, sir, no. It just said, plates not assigned to vehicle. I'm sorry, maybe I misunderstood.

[DEFENSE COUNSEL:] And so the tag was not canceled?

[OFFICER BERRY:] It just said, plates not assigned to vehicle. That's the only thing it told me. It didn't say canceled, revoked, or anything of that, no, sir.

[DEFENSE COUNSEL:] Okay, it didn't say revoked?

[OFFICER BERRY:] No. The transport plate did not, no, sir.

[DEFENSE COUNSEL:] And your computer would normally tell you if a tag is cancelled or –

[OFFICER BERRY:] Correct, if that tag was, yes, sir, correct.

[DEFENSE COUNSEL:] It wasn't expired?

[OFFICER BERRY:] No, sir, not the plate, no. . . . .

[DEFENSE COUNSEL:] The tag wasn't altered in any way?

[OFFICER BERRY:] No, sir.

[DEFENSE COUNSEL:] The tag didn't show suspended?

[OFFICER BERRY:] No, sir.

[DEFENSE COUNSEL:] And it wasn't canceled?

[OFFICER BERRY:] No. Just plates not assigned to [a] vehicle.

. . . .

[DEFENSE COUNSEL:] And it was a valid North Carolina plate?

[OFFICER BERRY:] Like I said, sir, I've seen those tags on trucks. I've never seen them on a car, that's why it brought my attention to it. When I ran it, it just came back plates not assigned to vehicle.

. . . .

[DEFENSE COUNSEL:] And so, because the tag came back unassigned, you stopped the vehicle?

[OFFICER BERRY:] No, sir. It was included in my reasonable suspicion.

[DEFENSE COUNSEL:] Well, what else was included in your reasonable suspicion?

> [OFFICER BERRY:] Well, when [the vehicle] pulled out of the closed business, like I said, [the vehicle] pulled out in front of me, and I noticed that I've seen those [transporter] tags on trucks before and [the vehicle] just pulled out of a trucking company, a business that I know to be closed at that time, okay. And we've had -- actually, it was exactly a month ago there was a stolen trailer on [Highway] 49.[4] I mean, I'm just including all of this into the fact that I thought that plate should not have been on that vehicle. Closed business.

¶ 17 This testimony demonstrates Officer Berry's purported reasonable articulable suspicion of criminal activity was based on, *inter alia*, the fact that Officer Berry had never seen a transporter plate on a motor vehicle other than a truck before and believed transporter plates could not be used on regular motor vehicles.

¶ 18 A transporter plate may be issued under the following circumstances:

> The Division may issue a transporter plate authorizing the limited operation of a motor vehicle in the circumstances listed in this subsection. A person who receives a transporter plate must have proof of financial responsibility that meets the requirements of Article 9A of this Chapter. The person to whom a transporter plate may be issued and the circumstances in which the vehicle bearing the plate may be operated are as follows:
>
> (1) To a business or a dealer to facilitate the manufacture, construction, rebuilding, or delivery of new or used truck cabs or bodies between manufacturer, dealer, seller, or purchaser.
>
> (2) To a financial institution that has a recorded lien on a motor vehicle to repossess the motor vehicle.
>
> (3) To a dealer or repair facility to pick up and deliver a motor vehicle that is to be repaired, is to undergo a safety or emissions inspection, or is to otherwise be

4. As Defendant does not challenge the trial court's determination in Finding of Fact 3 that the theft was "recent," we do not address any issue related to the validity of such a characterization.

prepared for sale by a dealer, to road-test the vehicle, if it is repaired or inspected within a 20-mile radius of the place where it is repaired or inspected, and to deliver the vehicle to the dealer. A repair facility may not receive more than two transporter plates for this purpose.

(4) To a business that has at least 10 registered vehicles to move a motor vehicle that is owned by the business and is a replaced vehicle offered for sale.

(5) To a dealer or a business that contracts with a dealer and has a business privilege license to take a motor vehicle either to or from a motor vehicle auction where the vehicle will be or was offered for sale. The title to the vehicle, a bill of sale, or written authorization from the dealer or auction must be inside the vehicle when the vehicle is operated with a transporter plate.

(6) To a business or dealer to road-test a repaired truck whose GVWR is at least 15,000 pounds when the test is performed within a 10-mile radius of the place where the truck was repaired and the truck is owned by a person who has a fleet of at least five trucks whose GVWRs are at least 15,000 pounds and who maintains the place where the truck was repaired.

(7) To a business or dealer to move a mobile office, a mobile classroom, or a mobile or manufactured home, or to transport a newly manufactured travel trailer, fifth-wheel trailer, or camping trailer between a manufacturer and a dealer. Any transporter plate used under this subdivision may not be used on the power unit.

(8) To a business to drive a motor vehicle that is registered in this State and is at least 35 years old to and from a parade or another public event and to drive the motor vehicle in that event. A person who owns one of these motor vehicles is considered to be in the business of collecting those vehicles.

(9) To a dealer to drive a motor vehicle that is part of the inventory of a dealer to and from a motor vehicle

> trade show or exhibition or to, during, and from a parade in which the motor vehicle is used.
>
> (10) To drive special mobile equipment in any of the following circumstances:
>
> a. From the manufacturer of the equipment to a facility of a dealer.
>
> b. From one facility of a dealer to another facility of a dealer.
>
> c. From a dealer to the person who buys the equipment from the dealer.

N.C.G.S. § 20-79.2(a) (2019). Contrary to Officer Berry's belief at the time of the traffic stop, the plain language of the statute indicates that transporter plates can be used on both trucks and motor vehicles. *See id*. We must decide whether Officer Berry's genuine, but mistaken, belief that transporter plates could not be displayed on motor vehicles was reasonable and thus could be considered part of his reasonable articulable suspicion for the traffic stop.

¶ 19 In *Heien v. North Carolina*, the United States Supreme Court distinguished between reasonable and unreasonable mistakes of law: "The Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes–whether of fact or of law–must be *objectively* reasonable. We do not examine the subjective understanding of the particular officer involved." *Heien v. North Carolina*, 574 U.S. 54, 66, 190 L. Ed. 2d 475, 486 (2014). In *State v. Eldridge*, we had the opportunity to apply *Heien*. *See State v. Eldridge*, 249 N.C. App. 493, 497-500, 790 S.E.2d 740, 743-44 (2016). We held that "in order for an officer's mistake of law while enforcing a statute to be objectively reasonable, the statute at issue must be ambiguous." *Id*. at 499, 740 S.E.2d at 743.

¶ 20 The text of N.C.G.S. § 20-79.2(a) is clear and unambiguous. Transporter plates can be displayed on both cars and trucks, as the statute uses the phrase "motor vehicle" in the general sense. N.C.G.S. § 20-79.2(a) (2019). The requirements of the statute clearly apply to both cars and trucks and does not calculate into our reasonable suspicion analysis of this traffic stop merely because the transporter plate was displayed on a car.

¶ 21 The additional facts that the trucking company was closed and there was a recent trailer theft in the area are insufficient to support reasonable articulable suspicion, even when considered in totality. While

similar factors have historically been cited in the totality of the circumstances analysis to help support establishment of reasonable articulable suspicion, they are insufficient in this context given the lack of other circumstances in this case. *See Wardlow*, 528 U.S. at 124, 145 L. Ed. 2d at 576 (marks omitted) (noting the United States Supreme Court has "previously noted the fact that the stop occurred in a high crime area among the relevant contextual considerations" in a reasonable suspicion analysis, and holding "it was not merely [the] respondent's presence in [a high crime area] that aroused the officers' suspicion, but his unprovoked flight upon noticing the police"); *State v. Fields*, 195 N.C. App. 740, 744, 673 S.E.2d 765, 768 (emphasis added) ("When determining if reasonable suspicion exists under the totality of the circumstances, a police officer may also evaluate factors such as *traveling at an unusual hour* . . . ."), *disc. rev. denied*, 363 N.C. 376, 679 S.E.2d 390 (2009); *State v. Watkins*, 337 N.C. 437, 442-43, 446 S.E.2d 67, 70-71 (1994) (citing the business where the defendant's vehicle was located being closed as one factor to support reasonable articulable suspicion, in addition to the fact it was 3:00 a.m. and there was an anonymous tip that "a suspicious vehicle" was at the location). The totality of the circumstances indicates the vehicle was exiting the parking lot of a closed building where there were no other cars present, in an area where there was a recent trailer theft. These circumstances are insufficient to support the reasonable articulable suspicion necessary to allow a lawful traffic stop. *See State v. Horton*, 264 N.C. App. 711, 716, 723, 826 S.E.2d 770, 774, 779 (2019) (holding the fact that a defendant was in front of a closed building where there were no other cars present in an area where a business across the street experienced prior break-ins was insufficient to support an officer's reasonable articulable suspicion).

¶ 22 The Order states that Defendant's vehicle displayed a transporter registration plate that came back as not assigned to any vehicle; the trucking company appeared to be closed as the office was dark and there were no other vehicles in the parking lot; and Officer Berry was aware of a recent trailer theft in the area. However, the trial court made no findings as to what activity by Defendant warranted Officer Berry's suspicion. These circumstances, taken in their totality, were insufficient to support a reasonable articulable suspicion necessary to allow a lawful traffic stop. When coupled with the fact that the vehicle did not commit any traffic violations prior to getting stopped, there exists insufficient findings that Defendant was committing, or about to commit, criminal activity. *See Wardlow*, 528 U.S. at 123, 145 L. Ed. 2d at 576 (emphasis added) ("[A]n officer may . . . conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that

criminal activity is afoot."). We hold the totality of the circumstances provided Officer Berry with nothing more than an "inchoate and unparticularized suspicion or hunch."[5] *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989) (marks omitted).

¶ 23 As Officer Berry's mistake of law was not objectively reasonable under the standard set out in *Heien* and *Eldridge*, no reasonable articulable suspicion existed to support the stop of Defendant's vehicle. Accordingly, the trial court erred in denying Defendant's *Motion to Suppress*. We reverse the trial court's order denying the *Motion to Suppress* and remand to the trial court for entry of an order vacating Defendant's guilty plea. *See State v. Cottrell*, 234 N.C. App. 736, 752, 760 S.E.2d 274, 285 (2014) ("Because [the] defendant's consent to search his car was the product of an unconstitutional seizure, the trial court erred in denying [the] defendant's motion to suppress. Accordingly, we reverse and remand to the trial court for entry of an order vacating [the] defendant's guilty pleas.").

CONCLUSION

¶ 24 We have jurisdiction to hear the merits of Defendant's appeal of his *Motion to Suppress*. Officer Berry's mistake of law was not objectively reasonable because N.C.G.S. § 20-79.2 is unambiguous. The traffic stop was unconstitutional, and all evidence seized from the traffic stop must be suppressed. We reverse the Order and remand to the trial court for entry of an order vacating Defendant's guilty plea.

REVERSED AND REMANDED.

Judges INMAN and HAMPSON concur.

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5. We further note the trial court's fifth conclusion, to the extent it suggests Officer Berry could stop the vehicle to ascertain whether there was a statutory violation or not, is not compatible with our Fourth Amendment jurisprudence. Our caselaw establishes that an officer may stop a vehicle when there is a reasonable articulable suspicion that criminal activity, such as violating a statute, has occurred or is about to occur. The officer could not initiate a traffic stop without any reasonable articulable suspicion "to ensure its compliance" with a statute.

THOMAS v. OXENDINE

[280 N.C. App. 526, 2021-NCCOA-661]

TRINA THOMAS AND SCOTTY THOMAS, PLAINTIFFS
v.
KIMBERLY OXENDINE AND BRIAN A. THOMAS, DEFENDANTS

No. COA21-31

Filed 7 December 2021

1. Child Custody and Support—standing—grandparents—allegations in complaint

The paternal grandparents of a child had standing to bring a custody action under N.C.G.S. § 50-13.1(a) where their complaint alleged that they were the child's grandparents and that the child's mother had acted inconsistently with her constitutionally protected status as a parent by repeatedly and willfully failing to protect the child from her stepfather.

2. Child Custody and Support—constitutionally protected status as parent—findings of fact—failure to protect child—relinquishment of exclusive parental authority

In a custody action, the trial court's unchallenged findings of fact—showing that the mother had failed to protect her daughter from the stepfather's abusive behavior and that the mother had relinquished otherwise exclusive parental authority to the grandparents—supported the conclusion that the mother had acted inconsistently with her constitutionally protected status as a parent.

3. Child Custody and Support—best interests of the child—findings of fact—abusive stepfather

In a custody action, the trial court's unchallenged findings of fact—including that the mother had failed to protect her daughter from the stepfather's abusive behavior, that the daughter had said she would kill herself if she had to continue living with her stepfather, and that the mother had no intention to separate from the stepfather—supported the conclusion that it was in the best interests of the daughter for her grandparents to have sole legal and physical custody of her.

4. Child Custody and Support—order concerning parent—psychiatric evaluation and treatment—psychological issues

The trial court did not abuse its discretion in a child custody matter by ordering a mother to undergo a psychiatric evaluation and comply with all recommended treatments, where there were

ongoing abuse issues in the household and the mother had been diagnosed with PTSD, Borderline Personality Disorder, and mania.

5. Child Custody and Support—order concerning third party—completion of classes and evaluations—contact with child

The trial court did not abuse its discretion in a child custody matter by ordering the child's stepfather to complete parenting classes, anger management evaluations, and substance abuse evaluations, where the stepfather's ability to have contact with the child was conditioned on his compliance with the order because of the stepfather's past abuse of the child.

Appeal by Defendant Kimberly Oxendine from orders entered 26 March 2019, 10 April 2019, 11 June 2019, and 17 April 2020 by Judge Juanita Boger-Allen in Cabarrus County District Court. Heard in the Court of Appeals 22 September 2021.

Kathleen Arundell Jackson for Plaintiff-Appellees.

Ferguson, Hayes, Hawkins, & DeMay, PLLC, by James R. DeMay, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Kimberly Oxendine[1] appeals the trial court's orders which culminated in sole legal and physical custody of her minor child being awarded to Plaintiffs, Trina and Scotty Thomas. We affirm the orders of the trial court.

I. Factual and Procedural History

¶ 2 Defendants Kimberly Oxendine ("Mother") and Brian A. Thomas ("Father") are the biological parents of Josie,[2] born in 2005. Plaintiffs Trina Thomas ("Grandmother") and Scotty Thomas ("Grandfather") (together, "Grandparents") are Josie's paternal grandparents. Mother, Father, Josie, and Skylar–Mother's child from a previous relationship–lived in Grandparents' home from 2006 to 2007. Father left Grandparents' home in 2007 while Mother, Josie, and Skylar remained in the home until 2008.

1. Defendant Brian A. Thomas is not a party to this appeal.

2. We use pseudonyms in this case to protect the identity of the minor children.

¶ 3 Mother met Stephen Oxendine ("Chip") in 2009. Mother, Josie, and Skylar moved into Chip's home in 2010, and Mother and Chip married in 2014. The couple had two children together, Carson and Diane.

¶ 4 After Mother, Josie, and Skylar moved out of Grandparents' home in 2008, Josie spent most weekends, parts of each summer, and every spring break with Grandparents. Grandparents picked Josie up from school when she was ill, took her to therapy appointments, and paid for and attended her school sporting events. They also provided her with clothing, school supplies, and other essentials on a regular basis, and had recently purchased her a laptop. Grandparents also paid most child support payments on Father's behalf. Josie has a strong bond with Grandparents. Grandmother has been a "constant emotional resource" for Josie, and Mother relied on Grandmother's guidance and support in parenting Josie.

¶ 5 Josie's relationship with Chip was strained. Chip used unusually harsh punishment methods to discipline Josie, including forcing her to stay in an unairconditioned, unvented upstairs room during the summer, which "was far too hot for healthy living conditions." Chip yelled at her and called her names. He would yell in her face, getting so close he would spew spit on her. Mother and Chip sometimes refused to let Josie stay with Grandparents as punishment. Chip had also threatened to kick Josie out of the house, telling her to "pack her things and leave." Mother did not get involved when Chip was aggressive towards Josie. Josie is afraid of Chip and does not believe that Mother tries to protect her.

¶ 6 After bruises were found on Skylar's buttocks in 2011, Cabarrus County social services[3] investigated the Oxendine home. Social services closed the case, instructing Mother and Chip on proper discipline and recommending that they receive parenting and counseling services.

¶ 7 In May 2016, Josie wrote a letter stating she'd "rather kill herself" than live in the home with Chip. Mother had Josie admitted to Brynn Mar Hospital for treatment. Josie was admitted for depression and suicidal ideation and stayed in the hospital for nine days.

¶ 8 While Josie was being treated at Brynn Mar, Grandmother stayed with Josie. Mother visited but did not spend nights at the hospital as she feared Chip would be "mad" at her for leaving the other children.

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3. Although documents bearing the names Cabarrus County Department of Social Services (CCDSS) and Cabarrus County Department of Human Services (CCDHS) are provided in the Record, these names refer to the same entity. We use "Cabarrus County social services" for consistency and to avoid confusion.

Mother told Grandmother that because of the strained relationship between Josie and Chip, she "knew it would come to this," and that she had tried to talk to Chip but he would not listen.

¶ 9 Upon release from the hospital, Josie was prescribed anti-depressant medication and recommended for outpatient therapy. Mother enrolled Josie in therapy with Daymark Recovery Services and Turning Point Family Services. Josie reported to Daymark that she didn't "feel safe around Chip" and that she was scared Chip would "get mad and hit her mother." Daymark recommended the entire family enroll in in-home, teamwork therapy. No evidence was presented that the family followed through with Daymark's recommendation. Josie only attended one session at Daymark and then stopped; Mother testified that this was due to Medicaid eligibility. Mother testified that Josie was in counseling with Turning Point for "quite a while" and then no longer needed treatment, but did not provide evidence to support her assertion.

¶ 10 On 19 February 2019, Chip discovered that Josie was using a cell phone that she was not permitted to have and confronted her. Chip "grabbed [Josie] by her shoulders, flinging her to the ground." The following day, when Josie arrived home from school, Chip confronted her again and the situation escalated. That day, Mother called Grandmother and asked if Josie could stay with Grandparents because things were "not working with [Josie] and Chip." Grandparents agreed to have Josie stay with them. Josie stayed with Grandparents for about a week.

¶ 11 Following this incident, Cabarrus County social services received a report about the family. Mother suspected the report had been filed by Grandparents and demanded that Josie return home on 24 February 2019. Subsequently, Cabarrus County social services investigated the report, but closed the case with a recommendation that the Oxendine family obtain individual and family counseling services to address any discord present in the home.

¶ 12 Grandparents filed a Complaint for Child Custody and Motion for Emergency Custody on 26 March 2019. The trial court entered an Order for Emergency Custody on that date, awarding temporary emergency custody of Josie to Grandparents and setting the matter for a temporary custody hearing on 3 April 2019. Following the temporary custody hearing, the trial court continued temporary custody of Josie with Grandparents and determined that Mother should have contact with Josie, but that Chip should not. The trial court entered a written Temporary Custody Order on 10 April 2019.

¶ 13 On 9 April 2019, Mother filed an Answer and Motion in the Cause. Mother moved to dismiss Grandparents' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief can be granted, arguing that Grandparents' complaint "does not list even one specific fact or allegation regarding [Mother], or her parenting abilities to properly meet their burden under N.C. [Gen. Stat. §] 50-13.1(a) to show [Mother] has either acted inconsistently with her constitutionally protected right to parent, or that she is an unfit [] parent" and that Grandparents "do not have standing to seek custody of the minor child at issue pursuant to N.C. [Gen. Stat. §] 50-13.1(a)" because Grandparents did not "allege an in loco parentis relationship with the minor child."

¶ 14 The trial court held a hearing on Mother's motion to dismiss on 6 May 2019. By order entered 12 June 2019 ("Order Denying Motion to Dismiss"), it denied Mother's motion, finding and concluding that Grandparents had standing to bring the custody action and that Mother "engaged in conduct inconsistent with her protected status as a parent as demonstrated by clear and convincing evidence."

¶ 15 A hearing was held on 2 December 2019 to address Josie's best interests and determine permanent custody. The trial court entered an Amended Permanent Custody Order on 17 April 2020 wherein it concluded, in relevant part, that "[i]t is in the best interest of the minor child that the [Grandparents] have sole legal and physical custody of the minor child" and that Mother be granted visitation as outlined in the order.

¶ 16 Mother appealed the Order for Emergency Custody, the Temporary Custody Order, the Order Denying Motion to Dismiss, and the Amended Permanent Custody Order. On appeal, Mother's arguments are directed only to the Order Denying Motion to Dismiss and the Amended Permanent Custody Order.

II. Discussion

A. Standing

¶ 17 **[1]** Mother first argues that the trial court erred by denying her motion to dismiss Grandparents' complaint for custody because the trial court erroneously determined that Grandparents have standing to bring a custody action under N.C. Gen. Stat. § 50-13.1(a).

¶ 18 Standing is required to confer subject matter jurisdiction. *Wellons v. White*, 229 N.C. App. 164, 176, 748 S.E.2d 709, 718 (2013). "A [trial] court's subject matter jurisdiction over a particular matter is invoked by the pleading." *Boseman v. Jarrell*, 364 N.C. 537, 546, 704 S.E.2d 494, 501 (2010). At the motion to dismiss stage, all factual allegations in the

pleadings are viewed in the light most favorable to the plaintiff, granting the plaintiff every reasonable inference. *Grindstaff v. Byers*, 152 N.C. App. 288, 293, 567 S.E.2d 429, 432 (2002). We review de novo whether a plaintiff has standing to bring a claim. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001).

¶ 19 N.C. Gen. Stat. § 50-13.1(a) provides that "[a]ny parent, relative, or other person . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child." N.C. Gen. Stat. § 50-13.1(a) (2019). The statute "grants grandparents the broad privilege to institute an action for custody . . . ." *Eakett v. Eakett*, 157 N.C. App. 550, 552, 579 S.E.2d 486, 488 (2003). "Although grandparents have the right to bring an initial suit for custody, they must still overcome" the parents' constitutionally protected rights. *Sharp v. Sharp*, 124 N.C. App. 357, 361, 477 S.E.2d 258, 260 (1996).

¶ 20 To survive a motion to dismiss for lack of standing, grandparents must allege both that they are the grandparents of the minor child and facts sufficient to demonstrate that the minor child's parent is unfit or has engaged in conduct inconsistent with their parental status. *See*, *e.g.*, *Rodriguez v. Rodriguez*, 211 N.C. App. 267, 276, 710 S.E.2d 235, 241-42 (2011) ("[The] plaintiffs had standing to proceed in an action for custody pursuant to N.C. Gen. Stat. § 50-13.1(a) as they alleged they are the grandparents of the children and that [the] defendant had acted inconsistently with her parental status and was unfit because she had neglected the children.") (citation omitted); *Grindstaff*, 152 N.C. App. at 292, 567 S.E.2d at 432 ("[G]randparents alleging unfitness of their grandchildren's parents have a right to bring an initial suit for custody[.]").

¶ 21 Here, Grandparents alleged in their complaint, in relevant part, the following:

> 4. . . . Trina Thomas and Scotty Thomas are the child's paternal grandparents.
>
> . . . .
>
> 6. [Grandparents] have standing pursuant to [N.C. Gen. Stat.] § 50-13.l(a) to file this action for child custody in that they have [] had a substantial and material contact with the child throughout her life in the nature of a parent and child.
>
> . . . .
>
> 8. [Mother] has acted inconsistent with her constitutionally protected status as a parent. She has

repeatedly and willfully failed to protect the child from her husband [Chip].

. . . .

b. Shortly after [Carson]'s birth, [Mother] called the Plaintiffs to report that she had left Chip because of his poor treatment of her and [Josie] who was about four years old. However, she returned shortly thereafter because [Chip] refused to let her take the infant [Carson] with her.

c. When [Josie] was four, she cut her hair with a pair of scissors. As punishment, [Chip] shaved the child's head to "teach her a lesson."

d. Throughout the time [Josie] has been in the home with [Chip], he has singled her out for hostile treatment. He is easily agitated and frequently yells at [Josie] calling her names. At times he gets so close to [Josie]'s face, the force of his screaming has caused him to spit on the child.

e. When [Josie] was eight years old, she developed chronic constipation. [Chip] belittled her and called her names. He refused to allow [Mother] to follow [Josie]'s doctor's recommendations for treatment, saying, "She can s*** on her own. I do it every morning."

f. Frequently [Josie] is the victim of [Chip]'s unfair punishment. In the Spring of 2016, [Josie] stated that she would rather kill herself than live with [Chip]. As a result, she was hospitalized for mental health treatment.

g. On February 19, 2019, [Chip] assaulted [Josie]. Although he did not hit the child, he grabbed her and caused her to fall on the ground. [Mother] called [Grandparents] to the home. When [they] arrived at the Oxendine home, [Chip] stated, "All I got to say is you better be glad your grandparents are here."

> h. On February 20, 2019, [Mother] called [Grandmother], crying and asked her to come pick up [Josie], saying, "I need you to meet me to get [Josie]. Things are not working with her and Chip." [Mother] admitted that Chip had told [Josie] to get her things and prepare to leave the home. [Mother] stated that she wanted to leave [Chip] but she had her other children to consider.
>
> i. By February 24, 2019, [Mother] was demanding that [Josie] return to her home. She accused [Grandparents] of calling [Cabarrus County social services] regarding [Chip]'s domestic violence incident on February 19, 2019. According to [Mother], the Department is investigating her home.
>
> j. Since that time, [Mother] has refused to allow [Josie] to visit [Grandparents'] home. They have had limited telephone contact with her. The substance of the calls leads them question [Josie]'s safety in the Oxendine home. [Mother] stated that she was not going to allow [Josie] to visit her grandparents until the [social services'] investigation was over.
>
> k. [Social services] investigated the Oxendine home after [Chip] left bruises on the minor child [Skylar].

¶ 22 Viewed in the light most favorable to Grandparents, and granting Grandparents the benefit of every reasonable inference, Grandparents have alleged both that they are Josie's grandparents and that Mother acted inconsistently with her constitutionally protected status as a parent by repeatedly and willfully failing to protect Josie from danger and harm caused by Chip. Accordingly, Grandparents had standing to proceed in an action for custody of Josie pursuant to N.C. Gen. Stat. § 50-13.1(a).

¶ 23 Mother asserts that "the trial court must find that a parent has acted inconsistent with his or her constitutionally protected status as a parent by clear and convincing evidence for grandparents to have standing to seek custody of a minor child." (Original in all capital letters). Mother argues that Grandparents lacked standing to bring this action because the trial court's determination that Mother acted inconsistent with her

constitutionally protected status as a parent was not supported by the evidence.

¶ 24 Mother confuses

> two distinct but related stages in a custody dispute between a parent and non-parent, namely: (1) the standing and pleading requirements of the complaint at the motion to dismiss stage, and (2) the burden of producing evidence at the custody hearing sufficient to prove that a parent has waived the constitutional protections guaranteed to them.

¶ 25 *Gray v. Holliday*, 2021-NCCOA-178, ¶19 (unpublished). Where, as here, the pleading alleges sufficient facts to show that plaintiffs are the grandparents of the minor child and that the parent is unfit or has engaged in conduct inconsistent with their parental status, Grandparents had standing, and the trial court had subject matter jurisdiction to hear the case.

B. Conduct Inconsistent with Parental Status

¶ 26 **[2]** Mother argues that the trial court erred by denying Mother's motion to dismiss Grandparents' custody action because the trial court's determination that Mother "engaged in conduct inconsistent with her protected status as a parent" was not supported by clear and convincing evidence.

¶ 27 "A trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001). In custody actions, "the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 268 (2003). Findings of fact are likewise conclusive on appeal if they are unchallenged. *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011). We review whether the findings of fact support the conclusions of law de novo. *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008).

¶ 28 Even when grandparents have standing to bring a custody action, to gain custody they must still overcome a parent's "constitutionally-protected paramount right . . . to custody, care, and control of [the child]." *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994). "When grandparents initiate custody lawsuits under [N.C. Gen. Stat.] § 50-13.1(a), . . . the grandparent[s] must show that the parent is

unfit or has taken action inconsistent with her parental status in order to gain custody of the child." *Eakett*, 157 N.C. App. at 553, 579 S.E.2d at 489. If, however, the grandparents are not able to show that the parent has lost their protected status, the custody claim against the parent must be dismissed. *See*, *e.g.*, *Owenby*, 357 N.C. at 148, 579 S.E.2d at 268 (reinstating the trial court's order dismissing grandparent's custody action where grandparent "failed to carry her burden of demonstrating that defendant forfeited his protected status").

¶ 29 Here, Mother challenges the following nine of the trial court's 66 findings of fact in its Order Denying Motion to Dismiss as not supported by competent evidence:

> 12. The minor child views [Grandfather] as the only father she has ever known and considers both [Grandmother] and [Mother] as her mother figures.
>
> . . . .
>
> 30. [Grandparents] exercised a significant amount of parental responsibility for the minor child, which was formed and perpetuated by [Mother].
>
> . . . .
>
> 42. [Mother] has failed to protect the minor child.
>
> . . . .
>
> 51. That after the February 2019 incident, [Chip] demanded that the minor child pack her things and leave the Oxendine home.
>
> . . . .
>
> 53. Based on her actions, [Mother] believed that there was a substantial risk of harm to the minor child if the minor child remained in the Oxendine home.
>
> . . . .
>
> 55. [Mother] did not indicate that the placement would be temporary. [Grandparents] cared for the minor child as they had on numerous other occasions. [Mother] abdicated her parental responsibilities while [Grandparents] often cared for the daily needs of the minor child.

. . . .

60. That [Mother]'s decision to demand that [Grandparents] return the minor child to the Oxendine home was adverse to the minor child.

61. [Mother] unilaterally altered the established relationship between [Grandparents] and the minor child by ceasing all contact between the minor child and [Grandparents] upon being contacted by [social services]. That this act by [Mother] was adverse to the minor child.

. . . .

63. There is a substantial risk of harm to the minor child while in the Oxendine home.

¶ 30 Our review of the record reveals clear and convincing evidence to support each of the nine challenged findings. Moreover, even in the absence of every contested finding, the unchallenged findings support the trial court's conclusion that Mother "engaged in conduct inconsistent with her protected status as a parent[.]" *See Hall*, 188 N.C. App. at 532, 655 S.E.2d at 905 (affirming a modification of custody on the unchallenged findings).

¶ 31 The unchallenged findings include, in relevant part:

14. [Grandparents] have played an integral part in rearing the minor child. [Mother] and the minor child moved in with [Grandparents] in 2006 when the minor child was [one] year old.

. . . .

16. [Grandparents] provided housing, clothing, transportation[,] and financial assistance for the minor child while the minor child resided in the home.

. . . .

18. [Grandparents] continued to have ongoing and consistent contact with the minor child after moving from [Grandparents'] home and continued to provide financially for the minor child. [Grandparents] purchased clothing and other essential items for the minor child.

19. The minor child stayed with [Grandparents] on weekends, every Spring Break, holidays and every summer, with the exception of summer 2016 when the minor child was hospitalized. The minor child was in the home of [Grandparents] every weekend unless prevented by [Chip]. Friends and neighbors of [Grandparents] were accustomed to seeing the minor child with [Grandparents] during the times mentioned above.

20. [Grandparents] have been involved in the minor child's education by assisting with homework and school projects. [Grandparents] purchased school clothing and supplies each year for the minor child. In February 2019, [Grandparents] purchased a computer for the minor child.

21. [Grandparents] supported the minor child in her extracurricular activities and paid the fees for the minor child to play sports. The minor child also attended social and family gatherings events with [Grandparents].

. . . .

31. [Mother] relied on [Grandparents] in a parental capacity for the minor child and intended for [Grandparents] to shoulder the parental responsibility.

32. [Grandmother] has been a constant emotional resource for the minor child and [Mother], especially with matters relating to the minor child and the dynamics in [Mother]'s household.

. . . .

34. [Mother] benefitted by sharing the decision-making, caretaking, and financial responsibility for the minor child with [Grandparents]. . . .

. . . .

37. The minor child is in fear of [Chip] and does not believe that [Mother] makes an effort to protect her.

38. During the summer of 2016, the minor child was hospitalized for mental health treatment after the

minor child stated that she would rather kill herself [] than live with [Chip].

39. During the minor child's hospital stay, [Grandmother] was at the hospital each day with the minor child. [Mother] told [Grandmother] that she was unable to be at the hospital daily because [Chip] stated that [Mother] did not need to be there because she had other children at home. . . .

40. An incident occurred in the Oxendine home in February 2019 where the minor child ended up on the floor after being confronted by [Chip].

41. [Mother] was in the home, but did not intervene.

. . . .

43. [Mother] admits that [Chip] and the minor child have had arguments that have been inappropriate.

. . . .

45. The minor child does not feel welcome in the Oxendine home, suffers from constant anxiety and feels that she is treated differently from her other siblings who reside in the Oxendine home.

. . . .

48. That [Mother], [Chip] nor the minor child have demonstrated the ability to deescalate conflicts.

49. The minor child's presence in the Oxendine home has created a hostile environment for the minor child.

50. The minor child has been unable to cope in the Oxendine home.

. . . .

52. [That after the February 2019 incident], [Mother] called [Grandmother] and asked her to immediately meet and keep the minor child due to things not working out between [Chip] and the minor child.

. . . .

> 54. [Mother] voluntarily placed the minor child with [Grandparents] and provided no definitive timeframe, oversight or instructions.
>
> . . . .
>
> 64. [Mother] has engaged in conduct inconsistent with her protected status as a parent as demonstrated by clear and convincing evidence.

¶ 32 These unchallenged findings show that Mother failed to protect Josie from Chip's abusive behavior and inappropriate discipline. This failure alone is conduct inconsistent with Mother's protected status as a parent. *See Sharp*, 124 N.C. App. at 361, 477 S.E.2d at 260 (allegations in complaint sufficient to survive motion to dismiss where grandparents alleged that parent's actions put her children at a "substantial risk of harm"); *Grindstaff*, 152 N.C. App. at 293, 567 S.E.2d at 432 (allegations in complaint sufficient to survive motion to dismiss where grandmother alleged parents had "not shown they are capable of meeting the needs of the children for care and supervision"). The unchallenged findings also show that, by her volitional acts, Mother "relinquish[ed] otherwise exclusive parental authority to" Grandparents. *See Rodriguez*, 211 N.C. App. at 277, 710 S.E.2d at 242 (quotation marks and citation omitted). Such voluntary relinquishment is the "gravamen" of inconsistent conduct. *Id.*

¶ 33 Mother additionally argues that, by finding that she "had little or no income," the trial court improperly relied on her socioeconomic status in its determination that she acted inconsistent with her parental rights.

¶ 34 It is true that a parent's socioeconomic status is not relevant to a determination of a parent's unfitness or acts inconsistent with a parent's constitutionally protected status. *Dunn v. Covington*, 272 N.C. App. 252, 265, 846 S.E.2d 557, 567 (2020) (citing *Raynor v. Odom*, 124 N.C. App. 724, 731, 478 S.E.2d 655, 659 (1996)). However, where the remaining findings are sufficient to support the court's conclusion that Mother acted inconsistently with her parental status, any potential error was harmless. *See In re S.R.F.*, 376 N.C. 647, 2021-NCSC-5, ¶15. In summary, the challenged findings of fact are supported by clear and convincing evidence. The unchallenged findings of fact, by themselves and together with the challenged findings, support the trial court's conclusion that Mother "engaged in conduct inconsistent with her protected status as a parent[.]"

C. Best Interests Determination

¶ 35 **[3]** Mother argues the trial court abused its discretion by concluding, "it is in the best interest of the minor child that [Grandparents] have sole legal and physical custody of the minor child."

¶ 36 Where a parent's conduct is determined to be inconsistent with their constitutionally protected status, the trial court will determine custody using the "best interest of the child" standard. *Tessener*, 354 N.C. at 62, 550 S.E.2d at 502. "Before awarding custody of a child to a particular party, the trial court must conclude as a matter of law that the award of custody to that particular party 'will best promote the interest and welfare of the child.' " *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978) (quoting N.C. Gen. Stat. § 50-13.2(a)).

¶ 37 The standard of review for a best interests determination in a custody dispute is well-established:

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

Peters, 210 N.C. App. at 12-13, 707 S.E.2d at 733 (quotation marks and citations omitted).

¶ 38 Mother challenges the following 13 of the trial court's 75 findings of fact in its Amended Permanent Custody Order as not supported by the evidence:

> 8. . . . [Mother]'s [other] children [i.e. Skylar, Carson, and Diane] considered the Plaintiffs [Trina and Scotty Thomas] as grandparents prior to the initiation of this action.
>
> . . . .
>
> 11. . . . [Mother] stated that [Chip] overstepped her and punished [Josie] inappropriately. [Grandparents]

asked [Mother] if they could talk with [Chip] and [Mother] stated that it would not help to do so.

12. [Chip] and the minor child have had arguments and interactions that have been inappropriate. [Mother] has not appropriately intervened.

. . . .

15. . . . [Mother] has not received the necessary psychological education and treatment to help her cope within the Oxendine family dynamics.

. . . .

30. [Mother] has not shown any interest in visiting or knowing anything about [Josie]'s school. [Grandmother] has provided updates and sent pictures to [Mother] regarding [Josie] even though [Mother] rarely responds.

31. [Mother] does not effectively co-parent and demonstrates an unwillingness to do so. [Mother]'s actions demonstrate that she is bitter towards [Josie] and [Grandmother].

32. . . . [Mother]'s actions appear to be punitive in nature and are passive aggressive.

. . . .

40. . . . It was inappropriate and against [Josie]'s best interest for the Oxendines to isolate [Josie] from [Grandparents] as a punishment.

. . . .

44. Over time, [Josie] was shunned by her family. . . .

. . . .

54. [Mother] has not taken advantage of the services offered to her and her family and failed to comply with the recommendations made to help her effectively parent [Josie] and provide [Josie] with a safe and healthy home environment.

55. [Mother] has failed to protect the minor child while in her care. [Mother] has failed to participate

> and/or demonstrate skills on how to deescalate conflicts within her household and with [Josie].
>
> 56. During various points of her life, [Josie] has been withheld from people who have been caregivers to her. [Josie] has had significant routine experience to events such as hitting, choking, pushing, shaking, yelling, and punishment to a point where bruising occurred.
>
> . . . .
>
> 60. . . . [Mother] shared with [Grandmother] that [Chip] told her that he can't be around [Josie] and presented [Mother] with an ultimatum. . . .

¶ 39 Our review of the record reveals clear and convincing evidence to support each of the challenged findings. Moreover, even in the absence of every contested finding, the unchallenged findings support the trial court's conclusion that "it is in the best interest of the minor child that [Grandparents] have sole legal and physical custody of the minor child." These unchallenged findings include:

> 14. On November 28, 2010, a report was made to the Department of Social Services alleging that [Chip] bruised [Skylar]. [Skylar]'s paternal grandparents observed bruising on [Skylar] and took her to the hospital. . . . [Mother] indicated that she did not know about the bruising until after [Skylar] was taken to the hospital. [Mother] confirmed that [Chip] caused the bruising on [Skylar]. . . . [Chip] admitted that he hit [Skylar] out of anger by pulling her pants down and spanking her with his hand. . . .
>
> . . . .
>
> 16. The social worker involved with the Oxendine family described [Mother] as being nonchalant in her disciplining and allowed [Chip] to take on this responsibility although he didn't have any experience. . . . The social worker also noted that [Mother] told her she would start counseling for [Josie]. . . . No evidence was presented to show that [Mother] followed through with obtaining counseling for [Josie] or herself at this time. . . .

. . . .

23. [Josie] needs consistency and structure. [Grandparents] have [Josie] on a schedule.

. . . .

27. . . . [Since living with Grandparents], [Josie]'s grades have improved and [she] is progressing in therapy. [Josie]'s self-esteem has improved.

. . . .

38. [Chip] and [Josie] have a tumultuous relationship. From the onset of the relationship between [Mother] and [Chip], [Grandparents] noticed that Chip was overly harsh in punishing [Josie]. [Grandparents] witnessed [Chip] calling [Josie] names in front of [Mother], but [Mother] would not do anything.

. . . .

40. [Chip] would often tell [Josie] to pack her things and leave. There were other times when [Chip] would withhold [Josie]'s visits with [Grandparents]. The Oxendines believe that [Josie]'s visiting with [Grandparents] was the "only thing" that [Josie] seemed to like. . . . It was inappropriate and against [Josie]'s best interest for the Oxendines to isolate [Josie] from [Grandparents] as punishment.

. . . .

46. In May 2016, [Josie] threw a note downstairs stating that she wanted to kill herself if she had to continue living with [Chip]. [Josie] was hospitalized on May 13, 2016 at Atrium Health until a bed became available at Brynn Marr Hospital. [Grandmother] stayed with [Josie] while hospitalized. [Mother] was unable to stay because [Chip] relayed that [Mother] had other kids at home to care for.

. . . .

48. . . . [Josie] received an Admissions Assessment and reported that she will kill herself if she must go back to live with her stepfather. [Josie] reported that

her stepfather is abusive and physically punishes her leaving whip marks. [Josie] also reported having nightmares about her stepfather. . . .

49. . . . [Josie] reported that she and her mother "go at it" and "yell at each other." [Josie] expressed that she did not feel safe around [Chip] and was scared [Chip] would get mad and hit her mother. [Josie] also expressed that "about every day" she (Josie) and [Chip] would "get into arguments." . . .

. . . .

53. [Josie] has consistently cried out for help for years. [Mother] failed to ensure that [Josie]'s psychological and emotional needs were met.

. . . .

57. An altercation occurred between [Josie] and [Chip] on February 19, 2019. Prior to said altercation, [Josie] and [Skylar] were arguing about a cellphone while they both were in the bathroom . . . [Chip] got out of bed and headed towards the bathroom to get the phone. . . .

58. [Josie] ended up on the floor after being confronted by [Chip]. [Chip] yelled at [Josie] causing his spit to come in contact with [Josie]'s face. [Chip] demanded that [Josie] pack her things and leave the Oxendine home. The next day, [Mother] called [Grandmother] and asked her to meet her and keep [Josie] due to things not working out between Chip and [Josie].

. . . .

60. . . . [Josie] reported that [Chip] grabbed her by her shoulders, "flinging her to the ground." When talking about this event [Mother] told [Grandparents] that [Chip] "bowled her (Josie) over." [Mother] called [Grandmother] and indicated that [she] would need to meet her to pick up [Josie] because "things weren't working out with [Josie] and Chip." . . . [Josie] shared that she heard [Mother] and [Chip] fighting and [Chip] kept saying that [Josie] is the problem. [Mother]

subsequently sided with [Chip]. [Josie] shared, "I can't take it anymore. I hate this family."

. . . .

62. The April 25, 2019 assessment from Creative Counseling and Learning Solutions found that [Josie] has experienced a threat of serious harm by her stepfather [Chip] on numerous occasions from ages 6-12. [Josie] has heard about the Oxendines physically fighting, hitting, slapping, kicking and pushing each other. . . . [Josie] has repeatedly been told that she is no good, been yelled at in scary ways, and has received threats of abandonment, and removal by her stepfather. This conduct has worsened throughout [Josie]'s life. [Josie] does not feel safe in the Oxendine home. The court adopts these findings.

. . . .

64. The court adopts the findings of the April 25, 2019 assessment that [Josie] has not experienced a singular traumatic experience, [but] rather years of events which are leading to both behavioral and emotional responses to which [Josie] feels she has no control. [Josie] has directly experienced violent acts, both toward her as well as her mother. This includes violence to her in the form of harsh punishments, punishments resulting in bruises to her sister, and violence toward her mother. She has also learned about events occurring to others. [Josie] experiences excessive worry that something else is going to happen and is always "walking on egg shells." [Josie] has experienced intrusion symptoms including recurring distressing dreams in which the content and effect of the dream are related to the trauma events, dissociative reactions in which she reports feeling as if the trauma events are occurring in the present, intense and prolonged psychological distress at exposure to internal and external cues that resemble an aspect of the trauma events, such as fighting and heat. . . . [She experiences] persistent and distorted cognitions about the cause of the traumatic event, negative emotional state, including

> horror, fear, guilt, shame, anger, and vindictiveness. [Josie] experiences diminished interest in significant activities and will often provoke problems in what was a pleasant experience. [Josie] feels estranged from others. She additionally is experiencing reactivity symptoms including irritable behavior and anger responses, hypervigilance, exaggerated startle response, and poor concentration problems.
>
> 65. The family dynamics are such that [Josie] is exposed to physical and emotional abuse while in the care of [Mother].
>
> 66. [Josie] has a need to reside in a safe environment. [She] needs emotionally healthy caretakers who are actively involved in her life. . . .
>
> . . . .
>
> 68. . . . [Mother] expressed no intent of separating from [Chip].

¶ 40 The challenged findings of fact are supported by competent evidence and the unchallenged findings, by themselves and together with the challenged findings, support the trial court's conclusion that "it is in the best interest of [Josie] that [Grandparents] have sole legal and physical custody of the minor child." The trial court did not abuse its discretion in granting Grandparents custody. *See Cox v. Cox*, 133 N.C. App. 221, 228, 515 S.E.2d 61, 67 (1999) ("A trial court is given broad discretion in determining the custodial setting that will advance the welfare and best interest of minor children.").

D. Order that Mother Complete a Psychiatric Evaluation

¶ 41 **[4]** Mother argues that the trial court abused its discretion when it "condition[ed] [her] custodial rights upon undergoing a psychiatric evaluation when there was no evidence that [her] mental health affected her parenting of the minor child, and [ordered her] to take prescription medication."

¶ 42 "In cases involving child custody, the trial court is vested with broad discretion." *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 97 (2000). "The decision of the trial court should not be upset on appeal absent a clear showing of abuse of discretion." *Id.* (citation omitted). This Court has affirmed the decisions of trial courts ordering a psychological evaluation. *See, e.g.*, *Maxwell v. Maxwell*, 212 N.C. App. 614, 620-21, 713

S.E.2d 489, 493-94 (2011) (affirming the trial court's decision to order a mental health evaluation as a condition of father's visitation rights); *Pass v. Beck*, 156 N.C. App. 597, 601, 577 S.E.2d 180, 182 (2003) (holding that "the trial court did not abuse its discretion in delaying determination of the best interests of the child regarding visitation pending a recommendation from a psychologist"); *Rawls v. Rawls*, 94 N.C. App. 670, 676-77, 381 S.E.2d 179, 183 (1989) (holding that the trial court did not abuse its discretion by requiring a defendant to consult a psychiatrist or a psychologist before awarding specific visitation rights).

¶ 43 Here, the court ordered:

> 19. [Mother] shall undergo a psychological evaluation and comply with all recommended education and treatment. [Mother] shall reveal to the treatment evaluator/ provider her prior diagnosis and suicide attempt and the name and contact information of her past and current treatment provider(s). [Mother] shall provide any documentation requested by the treatment evaluator/ provider including a release of medical records. In addition [Mother] shall provide the treatment evaluator/provider with a copy of this Order and the April 10, 2019 temporary custody order. [Mother] shall also request to be evaluated to determine the necessity for her to be prescribed any medication. [Mother] shall keep all medical appointments and follow the treatment plan of her medical providers. [Mother] shall comply with taking her medication as prescribed by her medical provider.

¶ 44 Contrary to Mother's assertion, the trial court did not "condition her custodial rights upon undergoing a psychiatric evaluation." Nonetheless, such a condition is permissible and ordering Mother to undergo a psychiatric evaluation was within the broad discretion of the trial court. *See Maxwell*, 212 N.C. App. at 621, 713 S.E.2d at 494.

¶ 45 The following findings of fact support the trial court's order:

> 15. During the [2011 social services investigation], [Mother] told the social worker that she had been diagnosed with PTSD and Borderline Personality Disorder. She also stated that she was diagnosed as manic and had a prior suicide attempt. [Mother] stated that she attended Daymark and was taking medication but stopped because it made her sleep

> a lot. [Mother] has not received the necessary psychological education and treatment to help her cope within the Oxendine family dynamics.
>
> 16. The social worker involved with the Oxendine family described [Mother] as being nonchalant in her disciplining and allowed [Chip] to take on this responsibility although he didn't have any experience. . . . The social worker also noted that [Mother] told her she would start counseling for [Josie]. . . . No evidence was presented to show that [Mother] followed through with obtaining counseling for [Josie] or herself at this time. . . .
>
> . . . .
>
> 67. [Mother] . . . need[s] parenting classes, coping skills, individual therapy and family therapy.

¶ 46 Mother challenges the portion of finding of fact 15 that states she "has not received the necessary psychological education and treatment to help her cope within the Oxendine family dynamics." Cabarrus County social services' records indicate that Mother was diagnosed with PTSD and Borderline Personality Disorder in 2008 and stopped taking her medication. She was diagnosed as manic and had a prior suicide attempt. Further, there was no evidence before the trial court that Mother and Chip engaged in therapy or services offered to help them effectively parent, including the recommended course of in-home, family therapy and training.

¶ 47 This evidence was competent to support the challenged finding. Based on a review of the findings, it is apparent that the trial court's decision to require Plaintiff to undergo a psychological evaluation and comply with all recommendations did not represent an abuse of discretion. *See id.*

E. Order that Chip Complete Programming

¶ 48 **[5]** Mother finally argues that the trial court abused its discretion when it ordered Chip to complete, and provide the court with proof of completion, a series of parenting classes and trainings, and anger management and substance abuse evaluations. Mother asserts that a trial court may not condition a parent's custodial and visitation rights on the actions of a third-party. Mother mischaracterizes the court's order, and her argument is without merit.

¶ 49 The challenged portion of the Amended Permanent Custody Order does not condition Mother's visitation with Josie on Chip's compliance with the order; rather, the order conditions Chip's ability to have contact with Josie on his compliance with the order. Mother argues that these conditions violate Chip's constitutional due process rights. We decline to address this argument as Mother does not have standing to assert Chip's constitutional rights. *Transcon. Gas Pipe Line Corp. v. Calco Enters.*, 132 N.C. App. 237, 247, 511 S.E.2d 671, 678 (1999) ("Ordinarily, one may not claim standing . . . to vindicate the constitutional rights of some third party.") (citation omitted).

¶ 50 The order does state that Mother's "visitation shall occur at the Oxendine home so long as Chip . . . is not present in the home at any time during the weekend of [Mother's] visitation. [Mother's] visitation shall immediately cease if Chip . . . is/has been in the home during the visitation period."

¶ 51 Trial courts possess broad discretion to fashion visitation arrangements appropriate to the situations before them, and trial courts are always guided by the best interests of the child. *Burger v. Smith*, 243 N.C. App. 233, 239, 776 S.E.2d 886, 891 (2015). To that end, a trial court has the discretion to prohibit the exercise of visitation rights by a non-custodial parent in the presence of a specified person if the evidence demonstrates that exposure to the prohibited person would adversely affect the child. *See Harris v. Harris*, 56 N.C. App. 122, 125, 286 S.E.2d 859, 860 (1982); *cf. Mongerson v. Mongerson*, 285 Ga. 554, 555-56, 678 S.E.2d 891, 894 (2009).

¶ 52 Here, there was ample competent evidence that exposure to and contact with Chip adversely affected Josie's welfare. Accordingly, the trial court did not abuse its discretion and this argument is overruled.

III. Conclusion

¶ 53 For the reasons stated above, we affirm the orders of the trial court.

AFFIRMED.

Judges DILLON and WOOD concur.

WING v. GOLDMAN SACHS TR. CO.

[280 N.C. App. 550, 2021-NCCOA-662]

MARY COOPER FALLS WING, PLAINTIFF
v.
GOLDMAN SACHS TRUST COMPANY, N.A., ET AL., DEFENDANTS

RALPH L. FALLS III, ET AL., PLAINTIFFS
v.
LOUISE FALLS CONE, ET AL., DEFENDANTS

RALPH L. FALLS III, ET AL., PLAINTIFFS
v.
JOHN T. BODE, DEFENDANT

IN RE ESTATE OF RALPH L. FALLS, JR., DECEASED

RALPH L. FALLS, III, ET AL., PLAINTIFF
v.
GOLDMAN SACHS TRUST COMPANY, N.A., ET AL., DEFENDANTS

No. COA21-133

Filed 7 December 2021

1. Appeal and Error—interlocutory order—substantial right—order compelling discovery—privileged information

Plaintiff's appeal from an interlocutory order compelling her to produce documents she received by subpoena—including communications between her and her counsel regarding the litigation—was immediately appealable where the order affected plaintiff's substantial right to protect documents from discovery under the attorney-client privilege and work product doctrine.

2. Discovery—request for production—subpoenaed documents—irrelevant and privileged—Rules 45 and 26

Defendants in an estate dispute were not entitled to automatic production of documents that plaintiff had received from her ex-husband by subpoena, where plaintiff had informed defendants of the subpoenaed documents within five days after she received them, pursuant to Civil Procedure Rule 45(d1), and took the steps required under Rule 26(b)(5)(a) to object to defendants' discovery request on grounds that the documents were either irrelevant or protected by attorney-client privilege and the work product doctrine. Although Rule 45(d1) requires parties who obtain subpoenaed materials to afford other parties a reasonable opportunity to inspect those materials, the interplay between Rules 45 and 26 shows the General Assembly's intent to limit access to subpoenaed documents that are privileged or non-responsive to discovery requests.

WING v. GOLDMAN SACHS TR. CO.

[280 N.C. App. 550, 2021-NCCOA-662]

Appeal by plaintiff Mary Cooper Falls Wing from order entered 26 October 2020 by Judge Edwin G. Wilson, Jr. in Wake County Superior Court. Heard in the Court of Appeals 3 November 2021.

Womble Bond Dickinson (US) LLP, by Johnny M. Loper, Elizabeth K. Arias and Jesse A. Schaefer, for plaintiff-appellant Mary Cooper Falls Wing.

Mullins Duncan Harrell & Russell PLLC, by Alan W. Duncan, Allison Mullins, and Hillary M. Kies, for defendant-appellee Dianne C. Sellers.

Ellis & Winters LLP, by Leslie C. Packer, Alex J. Hagan, and Michelle A. Liguori, for defendant-appellees, Louise Falls Cone, Toby Cone, Gillian Falls Cone, and Katherine Lenox Cone.

TYSON, Judge.

¶ 1 Mary Cooper Falls Wing ("Plaintiff") appeals from a superior court order compelling her to produce all documents for review by Dianne Sellers and Louise Cone (together "Defendants"). We vacate and remand.

I. Background

¶ 2 In the underlying litigation, Plaintiff seeks to invalidate certain testamentary instruments concerning her late father Ralph L. Falls, Jr. ("Decedent"). Plaintiff alleges Decedent lacked legal and testamentary capacity and was suffering from undue influence in the years before his death. The challenged instruments purport to disinherit Plaintiff and her brother in favor of Defendants.

¶ 3 On 20 May 2019, the trial court entered an order requiring the Trustee (Goldman Sachs) to continue making distributions from the trust to Defendants for them to pay for their legal fees during the pendency of the litigation. This Court unanimously reversed that order on 20 October 2020. *Wing v. Goldman Sachs Trust Co.*, 274 N.C. App. 144, 156, 851 S.E.2d 398, 400 (2020). Goldman Sachs filed petitions for discretionary review to the Supreme Court of North Carolina. Those petitions remain pending. This Court's opinion and order has not been stayed.

¶ 4 Plaintiff and her husband, Mike Wing, divorced during the pendency of the events above. In November 2019, Defendants served Plaintiff with discovery requests. Plaintiff believed some of the information and documents Defendants requested remained in her former home in the possession of her ex-husband.

¶ 5 After unsuccessful attempts to recover her personal papers through counsel, Plaintiff sought a North Carolina subpoena to recover documents she believed to be necessary to respond to the discovery and for prosecution of the underlying cases. The North Carolina subpoena was submitted to a court in Maine. The court in Maine issued a subpoena pursuant to the Uniform Interstate Depositions and Discovery Act. ME. R. CIV. P. 14 § 403 (2019). The Maine Court's subpoena, with a copy of the North Carolina subpoena attached, was served upon Mike Wing, with notice to all parties.

¶ 6 Plaintiff's counsel received multiple productions of Plaintiff's personal papers from Mike Wing in May and June 2020 via electronic thumb drive. The papers produced and recovered included many documents not responsive to the subpoena nor any discovery requests in the case.

¶ 7 Plaintiff's sworn affidavit states:

> The vast majority of the documents have nothing to do with this case. Almost the entire production consists of documents like recipes, personal notes between me and my then-husband, insurance policies, homework assignments, lesson plans, resumes, personal and draft correspondence unrelated to this litigation, tax returns, retirement planning documents, expense trackers, usernames/ passwords, garbage collection schedules, images saved from websites, and similar documents that I have accumulated in my day-to-day life.

¶ 8 Also included with these documents were dozens of written communications between Plaintiff and her counsel in the underlying litigation, asserted work product materials prepared by counsel as part of the litigation, and documents that are responsive to Defendants' discovery requests.

¶ 9 On 15 June 2020, two business days after receiving the final production of documents from Mike Wing, Plaintiff's counsel informed counsel for all parties that Plaintiff had received a complete response to the subpoena. Plaintiff objected to Defendants' informal request for her to produce all of the personal papers she had recovered and received from Mike Wing, noting the request sought irrelevant and privileged material, and such materials and documents were not reasonably calculated to lead to the discovery of admissible evidence.

¶ 10 Subject to this objection, Plaintiff supplemented her prior discovery responses by producing all non-privileged personal papers on 26 June

2020 assertedly responsive to Defendants' prior discovery requests. Plaintiff also provided a log of the personal papers withheld on the basis of privilege. She noted that the personal and privileged papers received from Mike Wing pursuant to the subpoena that were neither relevant to the case nor responsive to any discovery request had not been produced.

¶ 11 Defendants filed a "Joint Motion to Compel Mary Cooper Falls Wing to Produce Documents Received Pursuant to Subpoena." The motion was heard in August 2020. Defendants argued because Plaintiff had served a subpoena, she had prospectively waived all objections to every document Mike Wing had produced in response to the subpoena.

¶ 12 On 26 October 2020, the trial court entered an order ("Production Order") compelling Plaintiff to produce all of the documents to the Defendants she had received pursuant to the subpoena, including documents claimed to be attorney-client privileged and protected by the work product doctrine. Plaintiff filed a notice of appeal of the Production Order on 30 October 2020.

II. Jurisdiction

¶ 13 This Court has jurisdiction pursuant to N.C. Gen. Stat. §§ 1-277(a) (2019).

III. Interlocutory Appeal

¶ 14 **[1]** A party may appeal from any interlocutory order that affects a substantial right. N.C. Gen. Stat. §§ 1-277(a); 7A-27(b)(3)(a) (2019). "A substantial right is a right which will be lost or irremediably adversely affected if the order is not reviewable before the final judgment." *Jenkins v. Maintenance, Inc.*, 76 N.C. App. 110, 112, 332 S.E.2d 90, 92 (1985) (citation omitted).

¶ 15 Plaintiff argues the Production Order affects her substantial rights and this Court has jurisdiction to hear this appeal. "[W]here a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right." *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 24, 541 S.E.2d 782, 786 (2001) (citation and internal quotation marks omitted). When a party "asserts the common law attorney-client privilege," on appeal, this claim "affects a substantial right which would be lost if not reviewed before the entry of final judgment." *Id.*

¶ 16 Plaintiff argues her right to maintain privileged and confidential communications with her attorney will be infringed if she is forced to

produce the documents. We agree this is a substantial right and allow this interlocutory appeal.

IV. Issue

¶ 17 **[2]** The issue is whether Rule 45 of the Rules of Civil Procedure permits an adverse party to request production of documents a party received by subpoena even if those documents would have been protected by attorney-client privilege, work product, or are non-responsive to discovery requests when the requesting party appropriately objected. N.C. Gen. Stat. § 1A-1, Rule 45 and Rule 26 (2019).

V. Standard of Review

¶ 18 "Discovery orders compelling production and applying the attorney-client privilege and work-product immunity are subject to an abuse of discretion analysis." *Crosmun v. Trs. of Fayetteville Tech. Cmty. Coll.*, 266 N.C. App. 424, 435, 832 S.E.2d 223, 233 (2019) (citation omitted).

¶ 19 "[T]he determination of privilege is a question of law. Questions of law are reviewed *de novo*." *State v. Matsoake*, 243 N.C. App. 651, 656, 777 S.E.2d 810, 813 (2015) (alterations, citations and internal quotation marks omitted).

VI. Argument

¶ 20 Defendants argue because Plaintiff subpoenaed documents from her ex-husband, Rule 45 of the Rules of Civil Procedure automatically entitles them to review all documents produced upon their request. Rule 45 provides in relevant part:

> A party or attorney responsible for the issuance and service of a subpoena shall, within five business days after the receipt of *material produced in compliance with the subpoena*, serve all other parties with notice of receipt of the material produced in compliance with the subpoena and, upon request, *shall provide all other parties a reasonable opportunity to copy and inspect such material at the expense of the inspecting party.*

N.C. Gen. Stat. § 1A-1, Rule 45(d1) (2019) (emphasis supplied).

¶ 21 "In resolving issues of statutory construction, we look first to the language of the statute itself." *Fid. Bank v. N. C. Dep't of Revenue*, 370 N.C. 10, 18, 803 S.E.2d 142, 148 (2017) (citation omitted). "When the

language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc.* Servs., 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006); *see Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) ("The best indicia of that intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish."). Our Supreme Court has repeatedly held: "Statutes dealing with the same subject matter must be construed in *pari materia* and harmonized, if possible, to give effect to each." *Bd. of Adjustment of Town of Swansboro v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993).

¶ 22 Rule 26 of the North Carolina Rules of Civil Procedure has been in effect for more than 50 years, and Rule 45 was modified within the last decade. "A presumption exists that the legislature was fully cognizant of prior and existing law within the subject matter of its enactment." *Biddix v. Henredon Furniture Indus., Inc.*, 76 N.C. App. 30, 34, 331 S.E.2d 717, 720 (1985) (citation omitted).

> When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must (i) expressly make the claim and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed, and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

N.C. Gen. Stat. § 1A-1, Rule 26(b)(5)(a) (2019).

¶ 23 It follows if the General Assembly intended to protect the subpoenaed party from being forced to produce privileged or non-responsive documents, those same protections would extend to a party who has received privileged or non-responsive documents as a result of the subpoena, at no fault of their own.

> Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, *largely related to discovery of electronically stored information*. In addition, in a number of places, words identifying parts of the rule have been changed *to make this rule consistent with the language of*

> *other Rules of Civil Procedure, without an intention to change substance.*

N.C. Gen. Stat. § 1A-1, Rule 45, cmt. (2011 Amendment) (emphasis supplied).

¶ 24 This Court has dealt with the interplay of Rule 45 and Rule 26 many times before. "[T]he trial court, in granting a motion to compel under Rule 45(c)(6), is required to protect the party producing documents from 'significant expense.' " *Kelley v. Agnoli*, 205 N.C. App. 84, 96, 695 S.E.2d 137, 145 (2010). *Kelley* requires the trial court to bear the burden of ensuring Rule 26(b)(1a) is complied with, even if Rule 45 does not explicitly require it. *See* N.C. Gen. Stat. § 1A-1, Rule 26(b)(1a) ("the discovery methods set forth in section (a) *shall be limited by the court if it determines that*: (i) the discovery sought is unreasonably cumulative or duplicative . . . less burdensome, or less *expensive* . . . (iii) the discovery is unduly burdensome or expensive[.]") (emphasis supplied). The trial court's authority to read Rule 45 and Rule 26 together is further highlighted in *Hall v. Cumberland County Hospital System, Inc.*, 121 N.C. App. 425, 430, 466 S.E.2d 317, 320 (1996) ("The trial court shall quash, upon motion of the objecting party, any subpoena for the production of documents that seeks discovery of materials protected by Rule 26(b)"). With regard to electronically stored information, our courts have consistently held Rule 45 is expressly subject "the limitations of Rule 26(b)(1a)." N.C. Gen. Stat. § 1A-1, Rule 45(d)(4).

¶ 25 Defendants argue Plaintiff failed to object prior to required compliance and Plaintiff can no longer challenge the subpoena. Defendant mis-states the standard set forth in *Kilgo v. Wal-Mart Stores, Inc.*, 138 N.C. App. 644, 649, 531 S.E.2d 883, 888 (2000), which held a subpoena *duces tecum* "must be raised before the time of compliance."

¶ 26 Here, Plaintiff sought to comply with the original and intended discovery requests and collected those documents from her ex-husband via subpoena after her documents and papers were not voluntarily produced. Mike Wing produced substantially more material and documents than the responsive documents had requested. Plaintiff's counsel informed opposing counsel of the complete response to the subpoena within two days of completion as is required by Rule 45. Plaintiff expressly objected to Defendants' request for both non-reasonable, irrelevant, and privileged documents and asserted privilege.

¶ 27 Plaintiff complied with the statutes by producing all non-privileged personal papers responsive to Defendants' prior discovery requests. Plaintiff provided a log of the personal papers she had withheld from

production on the basis of privilege, and asserted the personal papers received from Mike Wing pursuant to the subpoena were neither relevant to the case nor responsive to any discovery request. Plaintiff undertook and complied with the statutorily required steps to protect her privileged and non-responsive and irrelevant documents from disclosure.

VII. N.C. Gen. Stat. § 1A-1, Rule 45(d1)

¶ 28 Both parties argue the General Assembly intended their desired result. Defendants argue Rule 45 allows them unbridled access to subpoenaed documents upon their request. Plaintiff contends the addition of subsection (d1) to Rule 45 "expressly reaffirmed the federal process." Federal Rule 45 has no counterpart to subsection (d1) specifying the party issuing the subpoena must provide notice of receipt of subpoenaed materials and a reasonable opportunity to copy and inspect such materials. *See* Fed. R. Civ. P. 45.

¶ 29 A review of the Rule 45 history provides further guidance. Under the Federal Rules, upon which the North Carolina Rules were modeled, there is no provision for automatic discovery of all subpoenaed materials. A party is required to produce documents it has received pursuant to subpoena only if it receives a discovery demand for those documents from the other party. *See* Fed. R. Civ. P. 45 Advisory Comm. Note (1991) (recognizing notice of a subpoena is required in order to "afford other parties an opportunity to object to the production or inspection, or to *serve a demand* for additional documents or things" and to allow the other parties to "*pursue* access to any information that may or should be produced [pursuant to the subpoena]") (emphasis supplied).

¶ 30 Before 2003, Rule 45 "did not permit the issuance of a subpoena separately from a trial, hearing, or deposition." N.C. State Bar Ethics Op. 4 (2008). Prior to 2003, all parties would be present when the third party produced the requested materials at the trial, hearing, or deposition and would have equal access to review and obtain copies of those materials. This equal access was jeopardized when the 2003 amendments permitted a stand-alone subpoena *duces tecum* for the first time. *See* N.C. Gen. Stat. § 1A-1, Rule 45(a)(2). In 2007, subsection (d1) was added to Rule 45 as a remedy. It required the party issuing the subpoena to provide notice of receipt of subpoenaed materials and allow all other parties the opportunity to copy and inspect those materials.

¶ 31 In 2007, the General Assembly adopted the current text of Rule 45(d1), which requires: (1) the party serving the subpoena to provide notice of receipt; and, (2) any other parties desiring the documents to make a request to the receiving party. N.C. Gen. Stat. § 1A-1, Rule 45(d1).

In codifying the notice-and-request procedure, the General Assembly expressly reaffirmed the federal process and left the questions about the propriety of interparty requests for documents to be governed by the existing discovery rules.

¶ 32 It is clear that the purpose of amending Rule 45(d1) in 2007 was to ensure the opposing party is given notice and the opportunity to request to see documents that comply with the subpoena and are responsive to discovery requests. *See N.C. State Bar v. Barrett*, 219 N.C. App. 481, 487, 724 S.E.2d 126, 130 (2012) (holding "a party [does not] waive[] her due process rights by failing to request documents which the opposing party has implied do not exist and will not be part of the case against her").

¶ 33 Defendants' interpretation would make a Rule 45(d1) demand inconsistent with the otherwise harmonious rules governing discovery. If the trial court's hyper-technical reading of Rule 45(d1) is upheld, a Rule 45(d1) request would become the only discovery device not subject to assertions of privilege and limitations. A party would never be able to use a subpoena to recover her own confidential and privileged documents, and a subpoena recipient would be free to harass the requesting party by producing sensitive, embarrassing, irrelevant and privileged documents that are not responsive to the discovery request.

¶ 34 Our General Assembly could not have reasonably intended that result by amending Rule 45, while also maintaining the longer standing limitations contained in Rule 26 and other statutory and common law privileges. *See* N.C. Gen. Stat. § 1A-1, Rule 45, cmt. (2011 Amendment). Rule 45 is meant to be limited by adequate compliance with Rule 26. Plaintiff fully complied with Rule 26(5)(a) and thus garners the protections inherent in Rule 26.

VIII. Content of Subpoena

¶ 35 Defendants argue they would have been entitled to all of the subpoenaed information upon deposition of Mr. Wing.

> Parties may obtain discovery regarding any matter, *not privileged*, which is *relevant to the subject matter involved in the pending action*, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.

N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (2019) (emphasis supplied). This assertion is not supported by our statutes. *See* N.C. Gen. Stat. § 1A-1, Rule 30 (giving the court authority to limit a deposition to the confines

of Rule 26(c) from "unreasonable annoyance, embarrassment, oppression, or undue burden or expense" based upon "certain matters not to be inquired into, or that the scope of the discovery be limited to certain matter"). Communications between Plaintiff and her attorney are privileged. The recipes, schedules, documents pertaining to home renovations are not relevant to the subject matter involved in the pending action, involving Decedent's capacity and the rightful beneficiaries of his estate. *See id.*

IX. Conclusion

¶ 36 This interlocutory appeal affects Plaintiff's substantial right. Plaintiff's substantial right to preserve privileged communication with her counsel and litigation work product is infringed upon by the trial court's production order. Defendants' contention that Rule 45 circumvents the long-established principles of attorney-client privilege and Rule 26 is without merit.

¶ 37 The conflict between Rule 45 and Rule 26 is a question of law reviewed *de novo*. Upon *de novo* review, we hold our General Assembly intended Rule 26 to limit Defendant's access to Plaintiff's subpoenaed privileged documents. We vacate the production order and remand for an order, to require Plaintiff to provide only non-privileged and relevant documents for Defendant's review, which are responsive to Defendant's discovery request. *It is so ordered.*

VACATED AND REMANDED.

Judges ZACHARY and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 DECEMBER 2021)

ADDISON v. MANNING 2021-NCCOA-663 No. 21-42	Wake (16CVD11994) (17CVD6558)	Dismissed
ASLUND v. OSLUND 2021-NCCOA-664 No. 21-300	Mecklenburg (20CVD12409)	Vacated
ASSURE RE INTERMEDIARIES, INC. v. PYRTLE 2021-NCCOA-665 No. 21-132	Alamance (19CVS2170)	Affirmed
CAIN v. CAIN 2021-NCCOA-666 No. 20-387	Bladen (18CVD241)	Affirmed
EUBANKS v. BUCK 2021-NCCOA-667 No. 20-668	Pitt (14CVD2771)	Affirmed
FLOWERS PLANTATION FOUND., INC. v. CARE OF CLAYTON, LLC 2021-NCCOA-668 No. 21-147	Johnston (20CVD2479)	Affirmed
GREENLEAF CONDO. HOMEOWNERS ASS'N v. FOREST LEAF, LLC 2021-NCCOA-669 No. 20-413	Mecklenburg (18CVS20330)	Dismissed.
HARRINGTON v. HARRINGTON 2021-NCCOA-670 No. 21-142	Mecklenburg (10CVD4758)	Vacated and Remanded
IN RE K.R. 2021-NCCOA-671 No. 21-338	Cumberland (20JA205)	Affirmed
IN RE S.S. 2021-NCCOA-672 No. 21-125	Durham (20SPC1599)	Affirmed
IN RE T.S. 2021-NCCOA-673 No. 20-821	Mecklenburg (17SPC4673)	Affirmed

IN RE V.W.-J. 2021-NCCOA-674 No. 21-363	Wake (19JB592)	Vacated and Remanded
KANDARAS v. JONES 2021-NCCOA-675 No. 20-788	Alleghany (19CVD108)	REVERSED IN PART AND AFFIRMED IN PART.
MONTI v. ADELSTEIN 2021-NCCOA-676 No. 21-50	Wake (19CVS2878)	Appeal Dismissed.
NEAL v. PRESTWICK HOMEOWNERS ASS'N OF UNION CNTY., INC. 2021-NCCOA-677 No. 20-920	Union (17CVS3185)	Dismissed
NESBETH v. FLYNN 2021-NCCOA-678 No. 20-404	Wake (17CVD9670)	Affirmed
PRESTON v. PRESTON 2021-NCCOA-679 No. 20-901	Mecklenburg (18CVD19752)	Dismissed
SALVADORE v. SALVADORE 2021-NCCOA-680 No. 20-741	Mecklenburg (18CVD8603)	Affirmed
STATE v. BROWN 2021-NCCOA-681 No. 21-47	Forsyth (17CRS52401) (17CRS52702) (19CRS54463)	REVERSED AND REMANDED TO THE TRIAL COURT FOR A NEW BATSON HEARING.
STATE v. BURCH 2021-NCCOA-682 No. 20-753	Mecklenburg (17CRS244216-17) (17CRS244225-33) (17CRS244235)	No Error
STATE v. HENRY 2021-NCCOA-683 No. 20-567	Mecklenburg (17CRS217292) (17CRS217294-95)	No Error
STATE v. JOYNER 2021-NCCOA-684 No. 21-5	Nash (18CRS53101) (18CRS53102)	No Error
STATE v. PARKER 2021-NCCOA-685 No. 21-191	Cherokee (17CRS536)	No Error

STATE v. WHISENANT 2021-NCCOA-686 No. 21-114	Caldwell (17CRS53916) (18CRS1529-30)	NO ERROR AT TRIAL, JUDGMENT VACATED AND REMANDED FOR HEARING AND RESENTENCING.
STEVENSON v. ANC HIGHLANDS CASHIERS HOSP., INC. 2021-NCCOA-687 No. 20-905	Macon (20CVS2)	Affirmed

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