284 N.C. App.—No. 1 Pages 1-207

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

DECEMBER 2, 2022

MAILING ADDRESS: The Judicial Department
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COURT OF APPEALS

CASES REPORTED

FILED 21 JUNE 2022

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Civil judgment for attorney fees—no judgment entered—petition for writ of certiorari denied—Defendant's request for a writ of certiorari to review a civil judgment for attorney fees was denied where there was no indication that the civil judgment was filed with the clerk of court. **State v. Wright, 178.**

Interlocutory order—ex parte—disclosure of criminal investigation records from non-joined third parties—In a civil action against a church conference and an affiliated children's home (defendants), in which plaintiff alleged that she had been sexually abused as a minor at the home, the Court of Appeals dismissed defendants' appeal from an interlocutory ex parte order in which the trial court granted plaintiff's motion for production of criminal investigation records (pursuant to N.C.G.S. § 132-1.4) relating to alleged sexual abuse by the home's employees against any minor at the home. Defendants did not receive prior notice of plaintiff's motion, but because the motion concerned third parties who had not been joined to the action (the public agencies ordered to produce the records and the employees that the records described), defendants had no substantial right to prior notice

circumstances have on the best interests of a child is necessarily relevant to a determination of whether a substantial change in circumstances affecting the welfare of the child has occurred that would justify modification. The order denying the motion to modify was vacated and the matter remanded for a new hearing. **Cash v. Cash, 1.**

CHILD VISITATION

Permanency planning order—mother denied visitation post-incarceration—abuse of discretion—In a permanency planning proceeding, the trial court abused its discretion by failing, pursuant to N.C.G.S. § 7B-905.1(a), to address a mother's visitation rights with her son upon the mother's then-imminent release from incarceration—after determining that visitation would not be in the son's best interest while the mother was incarcerated. **In re R.J.P., 53.**

CIVIL PROCEDURE

Intervention—timeliness—factors—water pollution litigation—In an environmental action brought by the State arising from defendant chemical company's discharge of per- and polyfluoroalkyl substances (PFAS) into groundwater and the Cape Fear River, the trial court did not abuse its discretion by denying proposed intervenor Cape Fear Public Utility Authority's (CFPUA) motion to intervene as untimely. When CFPUA filed its motion to intervene, the parties had already resolved the State's claims by agreeing to a consent order, which constituted a final judgment; intervention would have been highly prejudicial to the parties by subjecting the matter to relitigation after the years of investigation, analysis, and negotiation involved in reaching the consent order; there were no changed circumstances justifying CFPUA's delay; CFPUA remained able to pursue relief in its federal lawsuit against defendant; and CFPUA had long been aware of the litigation, made comments in multiple instances, conferred with the State party on several occasions, and repeatedly asserted throughout the proceedings that the State was failing to adequately represent CFPUA's interests. **State ex rel. Biser v. Chemours Co. FC, LLC, 117.**

CONSTITUTIONAL LAW

Effective assistance of counsel—implied admission of guilt—elements of sexual offenses—Defense counsel committed a per se *Harbison* violation by admitting in his closing argument that defendant committed sexual acts with a 15-year-old—based on an incriminating statement defendant denied making to law enforcement—after which defendant was found guilty of first-degree statutory sex offense and taking indecent liberties with a minor. However, where the trial court did not make specific findings in its order denying defendant's motion for appropriate relief regarding whether defendant consented in advance to his counsel's strategy, the order was reversed and the matter remanded for a determination on that issue. **State v. Cholon, 152.**

CRIMINAL LAW

Habitual felon status—underlying convictions—sufficiency of evidence—Where the State presented an exhibit listing incident dates and other information pertaining to defendant's prior felony convictions, there was sufficient evidence

regarding the date of commission of two previous felony offenses that were used to establish defendant's habitual felon status. The underlying offenses were committed after defendant turned eighteen years old, and there was no overlap where each was committed after defendant pleaded guilty to the previous offense used. **State v. Wright, 178.**

Jury instructions—failure to update address—willfulness—There was no plain error in the trial court's jury instructions on failure to notify the last registered sheriff of a change of address pursuant to N.C.G.S. § 14-208.11(a)(2) where the instructions as a whole explicitly referred to the proper burden of proof as guilty beyond a reasonable doubt and where the instructions regarding willfulness were consistent with the pattern jury instructions. Even if the instructions were unclear, they were not sufficiently prejudicial to impact the jury's verdict. **State v. Wright, 178.**

Jury instructions—second-degree kidnapping—no definition of "serious bodily injury"—The trial court did not plainly err in its instructions to the jury regarding second-degree kidnapping where, although it did not define "serious bodily injury," there was no requirement for the court to do so, and the instructions were given in accordance with the pattern jury instructions. **State v. Grimes, 162.**

Right to allocution—sentencing hearing—denied—Defendant was entitled to a new sentencing hearing for failure to update his address and attaining habitual felon status where the trial court erred by depriving defendant of his right to allocution, pursuant to N.C.G.S. § 15A-1334(b), after defendant expressed his desire to make a statement to the court but was not allowed to do so. Although defendant also asked more than once to be given papers, to which the court responded, "we're not going to do that," defendant clearly invoked his right to be heard but was not asked whether he wanted to make a statement without his papers prior to sentencing. **State v. Wright, 178.**

DIVORCE

Equitable distribution—evidentiary support—record on appeal—The trial court's equitable distribution order was remanded where the appellate court was unable to determine from the record whether competent evidence existed to support the trial court's findings regarding plaintiff-husband's retirement account or whether plaintiff-husband intentionally omitted the evidence from the record on appeal, which was composed by plaintiff-husband and settled pursuant to Appellate Procedure Rule 11(b). **Shropshire v. Shropshire, 92.**

Equitable distribution—reopening evidence—date-of-trial value of retirement accounts—In an equitable distribution matter, the trial court did not abuse its discretion by sua sponte reopening evidence after the close of the hearing in order to request that plaintiff-husband provide the date-of-trial value of his retirement accounts, where defendant-wife, who appeared pro se, had provided the same information about her own retirement accounts and had raised the issue with the trial court during the hearing. Further, the trial court did not improperly shift the burden of proof by requiring the information from plaintiff-husband where it offered to hold another hearing to give plaintiff-husband the opportunity to be heard and to present evidence regarding the classification and valuation of the retirement accounts—which he declined. **Shropshire v. Shropshire, 92.**

show that such remedies would have been inadequate. Defendants were permitted to raise this jurisdictional defect on appeal under Appellate Rule 28(c), and because jurisdictional defects may be raised at any time during a legal proceeding. **Singleton v. N.C. Dep't of Health & Hum. Servs., 104.**

Certificate of need—as-applied constitutional challenge—substantive due process—jurisdiction—In a declaratory judgment action brought by a doctor and his ophthalmology clinic (plaintiffs) against the Department of Health and Human Services and multiple state government officials (defendants), the trial court had subject matter jurisdiction to review plaintiffs' as-applied constitutional challenge in which plaintiffs argued that N.C.G.S. § 131E-175—the law requiring plaintiffs to obtain a certificate of need (CON) in order to perform surgeries at the clinic—violated their substantive due process rights under the state constitution. Unlike plaintiffs' claims asserting procedural due process violations, plaintiffs' substantive due process claim could be brought in a declaratory judgment action in superior court regardless of whether administrative remedies had been exhausted. **Singleton v. N.C. Dep't of Health & Hum. Servs., 104.**

JUDGES

Substitute judge—signing judgment on behalf of presiding judge—ministerial act—An order terminating parental rights in a minor child was valid where, although the judge presiding over the termination proceedings did not sign the order upon entry of judgment, a substitute judge—without altering the order or making any substantive determinations in the case—signed the order on behalf of the presiding judge in accordance with Civil Procedure Rule 63, which permits another judge to perform purely ministerial acts on behalf of a judge who is unavailable to complete those duties. **In re L.M.B., 41.**

KIDNAPPING

Second-degree—removal—for purpose of inflicting serious bodily harm—For purposes of proving second-degree kidnapping, the State presented substantial evidence that defendant intended to cause serious bodily harm to the victim when he started driving his car with the victim sitting in the passenger's seat with her door still open and one leg hanging out. Further, the victim begged to be let out of the car; defendant grabbed the victim repeatedly while driving, attempted to choke her, and continued hitting her after he stopped the car; and defendant then held the victim down and grabbed her around the throat. **State v. Grimes, 162.**

SATELLITE-BASED MONITORING

Lifetime—reasonableness—aggravated offender—The trial court's order imposing lifetime satellite-based monitoring (SBM) on defendant upon his release from prison based on his status as an aggravated offender was affirmed where, after considering the totality of the circumstances—including defendant's reduced expectation of privacy due to having to register as a sex offender, the State's legitimate interest in protecting the public and in preventing and solving future sex crimes, and the limited intrusion caused by lifetime SBM for aggravated offenders—the application of SBM was reasonable in defendant's case. **State v. Anthony, 135.**

with clothing, toys, diapers, and other items, the trial court was not required to consider these "in kind" contributions as a form of child support where there was no agreement in place allowing for these items to offset respondent-parents' support obligation. **In re L.M.B., 41.**

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.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

KATHERINE GLEDHILL CASH (NOW MCGEE), PLAINTIFF
v.
MATTHEW CASH, DEFENDANT

No. COA21-156

Filed 21 June 2022

Child Custody and Support—motion to modify custody—substantial change in circumstances—best interest evidence disallowed—abuse of discretion

In a hearing addressing a father's motion to modify custody, the trial court abused its discretion and acted under a misapprehension of the law by strictly bifurcating the hearing and preventing the father from presenting evidence regarding the best interests of the child when he was testifying about changed circumstances, since the effect that changed circumstances have on the best interests of a child is necessarily relevant to a determination of whether a substantial change in circumstances affecting the welfare of the child has occurred that would justify modification. The order denying the motion to modify was vacated and the matter remanded for a new hearing.

Appeal by defendant from order entered 9 March 2020 by Judge Juanita Boger-Allen in District Court, Cabarrus County. Heard in the Court of Appeals 30 November 2021.

Fox Rothschild LLP, by Michelle D. Connell and Kip D. Nelson, for plaintiff-appellee.

Plumides, Romano & Johnson, P.C., by Richard B. Johnson, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Defendant-Father appeals from a trial court's order denying his motion to modify a child custody order. Defendant challenges the trial court's order on four grounds, but we only reach one issue. Because consideration of the effect of changes in circumstances of the minor child includes consideration of how those changes affect the best interests of the child, the trial court abused its discretion by strictly bifurcating the hearing of Defendant's motion to modify the existing child custody order and preventing Defendant from presenting evidence regarding his contentions regarding the best interests of the child. We therefore vacate and remand for the trial court to hold a new hearing where both parties shall be allowed to present evidence regarding the motion for modification, including evidence regarding their contentions as to how the changes in circumstances may affect the best interests of the child, either negatively or positively, and for the court to enter a new order ruling on Defendant's motion to modify the child custody order following the hearing.

I. Background

¶ 2 Defendant-Father and Plaintiff-Mother married in 2007 and had one child in 2008. As part of their subsequent divorce, they entered into a consent child custody order on 12 February 2010. The consent child custody order granted primary legal and physical custody to Plaintiff with regular weekly and weekend visitation for Defendant as well as holiday visitation, summer visitation, and further visitation as the parties agreed. When the consent order was entered, the child was about a year and a half old.

¶ 3 During the next few years, Plaintiff remarried and had additional children. The child whose custody is at issue here began school and began receiving additional academic support as needed, including speech therapy and tutoring in math and reading. The child was also diagnosed with ADD and started medication as a result. Defendant only exercised his summer visitation twice and had different job schedules that affected his regular visitation. To account for the disruptions to Defendant's regular visitation, the parties agreed to allow Defendant additional visitation. Perhaps due to these accommodations as to the visitation schedule, Defendant did not file any contempt or modification motions for many years.

¶ 4 On or about 14 August 2018, Defendant filed a motion to modify the child custody order alleging a "substantial and material change in the circumstances" since the time of the consent custody order. Specifically, Defendant alleged: Plaintiff had denied him visitation; Plaintiff had placed conditions on contact with the child, including Defendant paying her more money; Plaintiff had blocked Defendant on the child's cellphone; Plaintiff berated Defendant in front of the child, "which is not in the best interest of the minor child"; Plaintiff told Defendant the child does not want custody to change; the child cries when Defendant drops him off at Plaintiff's residence and asks to spend more time with Defendant, which Plaintiff does not allow; Plaintiff does not keep Defendant informed about the child's medical treatment or medications; Plaintiff "interrogates the minor child" after his visitation with Defendant about Defendant's romantic relationships; Plaintiff schedules the child's activities for weekends Defendant has visitation; Plaintiff does not allow the child to be involved with sports; Plaintiff has other children and cannot devote enough time to care for the parties' child; and Defendant has his own house and accommodations for the child. Defendant also alleged "[i]t is in the best interest of all parties" to give Defendant primary custody of the child with appropriate visitation and requested modification of the consent child custody order.

¶ 5 The trial court held a hearing on the motion to modify the child custody order over two days, 2 October 2019 and 13 February 2020. At the hearing, Defendant presented testimony from five witnesses: himself, two co-workers of Defendant, Defendant's new wife, and Plaintiff. All the witnesses discussed the parties' current circumstances to address Defendant's allegation of substantial and material changes in circumstances since the entry of the consent custody order. But the trial court limited the Defendant's presentation of evidence regarding the best interest of the child, as discussed in more detail below.

¶ 6 In addition to Defendant's five witnesses, the trial court heard from the minor child off the record in chambers with both parties' attorneys present. Plaintiff did not present any evidence.

¶ 7 On 9 March 2020, the trial court entered an order denying Defendant's motion to modify the child custody order. First, the trial court recounted the consent custody order and incorporated it by reference. Then, the trial court recounted several changes since the entry of the consent custody order. Specifically, the trial court found: the child had grown from age one to age ten; the child had started school and received the additional support recounted above; the child had been diagnosed with ADD and been prescribed medication to treat it; both parties had remarried;

and Plaintiff had additional children. The trial court also made Findings regarding the parties' current circumstances such as their employment statuses. Finally, the trial court made Findings on all of Defendant's allegations and either found a lack of (credible) evidence to support them or found evidence that contradicted the allegations. Based on those Findings, the trial court further found and concluded Defendant "failed in his burden of demonstrating a substantial and material change in circumstances affecting" the child's welfare. Therefore, the trial court denied Defendant's motion to modify the existing child custody order.

¶ 8 Following the trial court's order, Defendant filed a motion for North Carolina Rule of Civil Procedure 59 relief.[1] The trial court denied the Rule 59 motion, and Defendant filed a written notice of appeal.

II. Analysis

¶ 9 Defendant challenges four components of the order denying his motion to modify the existing child custody order. First, he argues "the trial court abused its discretion by determining there had not been a substantial change of circumstances." (Capitalization altered.) Second, he contends parts of Finding of Fact 10(w) "are not supported by the evidence." (Capitalization altered.) Third, Defendant alleges "the trial court abused its discretion when it failed to make any Findings of Fact regarding its interview of the minor child and the wishes of the minor child." (Capitalization altered.) Finally, Defendant argues the trial court abused its discretion "when it prevented [him] from presenting evidence because it misunderstood the two prong test for a motion to modify child custody." (Capitalization altered.) We agree with Defendant's final argument, so we do not reach his other three arguments. We address that issue after explaining the general law on modifying child custody orders and the standard of review.

¶ 10 An existing child custody order "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances . . . ." N.C. Gen. Stat. § 50-13.7(a) (2019). Applying that statute in practice, the trial court has a multi-part analytical process:

> The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the

1. The Rule 59 motion tolled the 30-day time period for taking an appeal. *See* N.C. R. App. P. 3(c)(3) ("[I]f a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion . . . .").

> trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered. If, however, the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.

Shipman v. Shipman, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003); *see also Lamm v. Lamm*, 210 N.C. App. 181, 185–86, 707 S.E.2d 685, 689 (2011) (explaining a trial court must make three separate conclusions to modify a child custody order: "(1) that 'there has been a substantial change in circumstances,' (2) that the substantial 'change affected the minor child,' and (3) that 'a modification of custody [is] in the child's best interests[.]' " (quoting *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254) (alterations in original)).

¶ 11 The requirement for a showing of changed circumstances reflects that

> [a] decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. To hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child constantly torn between parents and in a resulting state of turmoil and insecurity. This in itself would destroy the paramount aim of the court, that is, that the welfare of the child be promoted and subserved.

Pulliam v. Smith, 348 N.C. 616, 620, 501 S.E.2d 898, 900 (1998) (quoting *Shepherd v. Shepherd*, 237 N.C. 71, 75, 159 S.E.2d 357, 361 (1968)) (alteration in original). The trial court's paramount focus on the welfare of the child thus reinforces the other part of the modification standard, the requirement that the modification be in the child's best interest. *See Shipman*, 357 N.C. at 474, 586 S.E.2d at 253 ("As in most child custody proceedings, a trial court's principal objective is to measure whether a change in custody will serve to promote the child's best interests.").

¶ 12 When conducting its analysis, the trial court must heed two different burdens of proof. "The party moving for modification bears the burden of demonstrating" a substantial change in circumstances affecting the welfare of the child has occurred. *Hibshman v. Hibshman*, 212 N.C. App. 113, 120, 710 S.E.2d 438, 443 (2011) (quotations and citation omitted). As to the best interest of the child, however, "there is no burden of proof on either party . . . ." *Lamond v. Mahoney*, 159 N.C. App. 400, 405, 583 S.E.2d 656, 659 (2003). "Instead, the parties have the obligation to present whatever evidence they believe is pertinent in deciding the best interests of the child. The trial court bears the responsibility of requiring production of any evidence that may be competent and relevant on the issue." *Id.*, 159 N.C. App. at 405, 583 S.E.2d at 659–60 (quotations and citations omitted). With this background on child custody modification law, we now turn to our standard of review of the trial court's determinations followed by Defendant's argument.

A. Standard of Review

¶ 13 Our Supreme Court has explained in detail how appellate courts review child custody modification orders:

> 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. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
>
> Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record 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.
>
> In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law. With regard

> to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

Shipman, 357 N.C. at 474–75, 586 S.E.2d at 253–54 (quotations and citations omitted).

¶ 14 The dispositive issue here—the trial court preventing Defendant from presenting certain evidence—is an evidentiary issue. "On appeal, the standard of review of a trial court's decision to exclude or admit evidence is that of an abuse of discretion." *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (2006). A trial court abuses its discretion when it acts under a misapprehension of law. *See Riviere v. Riviere*, 134 N.C. App. 302, 307, 517 S.E.2d 673, 676 (1999) (concluding the trial court abused its discretion because it acted under a misapprehension of law); *see also Hines v. Wal-Mart Stores East, L.P.*, 191 N.C. App. 390, 393, 663 S.E.2d 337, 339 (2008) ("A discretionary ruling made under a misapprehension of the law, may constitute an abuse of discretion."); *State v. Nunez*, 204 N.C. App. 164, 170, 693 S.E.2d 223, 227 (2010) ("When a trial judge acts under a misapprehension of the law, this constitutes an abuse of discretion." (citing *Hines*, 191 N.C. App. at 393, 663 S.E.2d at 339, and *Riviere*, 134 N.C. App. at 307, 517 S.E.2d at 676)).

B. Exclusion of Best Interest Evidence

¶ 15 Defendant argues the trial court erred by preventing him from "presenting evidence because it misunderstood the two prong test for a motion to modify child custody." (Capitalization altered.) Specifically, Defendant contends the trial court erred by preventing him from presenting evidence related to the best interest of the child part of the modification standard. By doing this, the trial court improperly bifurcated the trial into two distinct portions: first, evidence regarding changes in circumstances, and second, only if Defendant met his burden of proving

substantial changes in circumstances, evidence regarding the best interests of the child.

¶ 16 We first note there is no question in this case that many changes in circumstances of the parties and child had occurred, and these changes are typically the types of changes which may be considered as substantial changes and can support a modification of custody. *See West v. Marko*, 141 N.C. App. 688, 692, 541 S.E.2d 226, 229 (2001) (determining evidence supported the conclusion of a substantial change in circumstances based on findings of fact about medical care, education, family living conditions, etc.). In fact, the trial court found several changes occurred. Over the seven years since entry of the prior order, both parties' home, family, and work circumstances had all changed; the child was no longer a toddler but was age ten and involved in school, sports, and social activities; and the child had been diagnosed and treated for ADD. This is not a case which presents one isolated change in circumstances or some change unrelated to the child's circumstances.

¶ 17 We recognize, as Plaintiff argues, that individual changes such as the mere passage of time, increased age of the child, a change in residence, or a change in family composition are not necessarily sufficient changes of circumstances to justify the modification of a custody order. *See Frey v. Best*, 189 N.C. App. 622, 637–39, 659 S.E.2d 60, 72 (2008) (after recognizing the same standards apply to modifying child custody and modifying visitation, determining the facts on changes in children's ages, parent's work schedule, and parent's residence did not support concluding a substantial change in circumstances occurred); *Evans v. Evans*, 138 N.C. App. 135, 140, 530 S.E.2d 576, 579 (2000) (explaining "remarriage, in and of itself, is not a sufficient change of circumstances affecting the welfare of the child to justify modification of the child custody order without a finding of fact indicating the effect of the remarriage on the child" and then further stating, "[s]imilarly, a change in the custodial parent's residence is not itself a substantial change in circumstances affecting the welfare of the child . . ."). Any one of those changes may or may not constitute a substantial change justifying modification of a custody order; to make this determination, the trial court must consider evidence regarding the effect of the particular change on the child, whether positive or negative. *See Warner v. Brickhouse*, 189 N.C. App. 445, 452, 658 S.E.2d 313, 318 (2008) ("[C]ourts must consider and weigh all evidence of changed circumstances *which affect or will affect the best interests of the child*, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child." (quoting *Metz*

v. Metz, 138 N.C. App. 538, 540, 530 S.E.2d 79, 81 (2000)) (emphasis added; other alteration in original)). In other words, the trial court must consider not only the change, but also if and how that change affects the child and the best interests of the child. Plaintiff argues "[Defendant-] Father has not explained how [the changes] affect[] the well-being of the child." But the trial court did not permit Father to explain how the changes affected the well-being of the child. Because the trial court bifurcated the hearing and prevented Father from addressing the best interests of the child, he could not present evidence as to his contentions of how the changes affected the child. If Father had been allowed to present this evidence, the trial court may or may not have found Father's evidence credible or it might have determined the effects of changes in circumstances were not so significant as to justify modification, but Father was entitled to the opportunity to present evidence to support his claim.

¶ 18 Our review of the hearing transcript reveals two instances where the trial court disallowed evidence on best interests. Defendant tried to present evidence related to how the current circumstances affected the child's best interests and how he believed changes in custody and visitation would serve the best interest of the child, but the trial court did not allow him to present such evidence. First, while Defendant testified, the following exchange took place:

> Q. A 50/50. And do you think that would work best if it was a week with you and then a week with [Plaintiff]?
>
> A. Yes. It would help him -- it would be in his best interest. Because right now, it's ---
>
> MS. JOHNSON: Again, Judge, we're talking about best interest, which I think is what the slant has been all along.
>
> MS. BELL: Your Honor, I would respectfully disagree. Again, it goes hand in hand. We're talking about a Consent Order from '09. So obviously, a great deal has changed since then. We were dealing with a one year old; now we're dealing with a ten year old. So there's going to be some crossover between best interest and substantial change.
>
> Just because this Order is so old. It's not like we're dealing with something that's just a few years. So there's been a lot that's changed. And so that's why I want to point out. Again, we're talking about things in the Consent Order, but we're also talking about a

> child. Obviously, when the law talks about substantial change, it doesn't have to be a negative effect on the child. It just has to be a substantial change affecting the child.
>
> And thankfully, a lot of the changes we've been talking about today have been positive, you know. We're dealing with a young man who's doing well. So I just want the Court to understand and hear my position that, again, there's going to be crossover between best interest and substantial change. Because not all substantial change is negative.
>
> So I just want to make that point to the Court.
>
> THE COURT: All right. And I do understand the objection that was made. *So I'm going ·to ask [Defendant] if he would not testify as to what would be in the child's best interest.*

(Emphasis added.) The other instance where the trial court indicated it would not accept best interest evidence came during a discussion about whether the minor child whose custody is in dispute would testify:

> MS. JOHNSON: . . . .
>
> *We're at the motion stage. We're not at best interest. And so asking him questions that are limited to what those allegations are on this motion, are the only thing that's going to be relevant to illicit [sic] from him.*
>
> THE COURT: Okay.
>
> MS. BELL: And Your Honor, if I may respond. If you look at the bench book, it talks about substantial change of circumstance. And how there's a correlation there with information that the child can provide. So you can ask questions about the child's well-being, their relationship with their parent, the child's wishes. All of that goes to substantial change of circumstance. And of course, there's some crossover with best interest as well.
>
> So I just want to put that on the record.
>
> MS. JOHNSON: And had she [sic] alleged that in his Motion, Judge, then that would have been fine. But it hasn't been.

(Emphasis added.) The court did not say anything further on the best interest evidence issue after this exchange; it just told the parties it would hear from a different witness then and from the child later.

¶ 19 In both these instances, the trial court abused its discretion by not allowing Defendant to present best interest evidence. In particular, the trial court appears to have based these rulings on a misapprehension of the law which led to a strict bifurcation of the evidence allowed in the two stages of the hearing. *See Riviere*, 134 N.C. App. at 307, 517 S.E.2d at 676 (concluding the trial court abused its discretion because it acted under a misapprehension of law). Defendant should have been allowed to present his contentions and evidence addressing both changed circumstances and best interests as part of his case-in-chief because both are part of the requirements to modify a child custody order. *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. As Defendant's attorney argued, there is "crossover between best interest and substantial change." Further, in the context of the best interest inquiry, the trial court has the affirmative "responsibility of requiring production of any evidence that may be competent and relevant on the issue." *Lamond*, 159 N.C. App. at 405, 583 S.E.2d at 659–60.

¶ 20 The trial court's exclusion of best interest evidence also conflicts with its "principal objective" in a child custody modification case, i.e., "to measure whether a change in custody will serve to promote the child's best interests." *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. As explained above, even the requirement to show changed circumstances serves to protect the child's best interests by ensuring stability. *Pulliam*, 348 N.C. at 620, 501 S.E.2d at 900. Further, this Court has recognized the link between changed circumstances and best interests as well as the potential for the evidence on the two inquiries to overlap. *See Warner*, 189 N.C. App. at 452, 658 S.E.2d at 318 ("[C]ourts must consider and weigh all evidence of changed circumstances *which affect or will affect the best interests of the child*, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child." (emphasis added)); *see also* 3 *Reynolds on North Carolina Family Law* § 8.43 ("Parties may offer evidence of any number of factors in support of a substantial change of circumstances. Like the original order, the factors must relate to the child's best interest and focus on the child's present or future well-being."). Thus, by excluding best interest evidence, the trial court shifted focus from its principal objective and also risked excluding evidence relevant to the changed circumstances inquiry as well as from the best interest inquiry.

¶ 21 The trial court's exclusion of best interest evidence is particularly striking here given Defendant presented significant evidence that could have supported finding a substantial change in circumstances affecting the welfare of the child, although the trial court found Defendant ultimately did not meet his burden under that inquiry. For example, the trial court found: the child was age one at the time of the original order and ten at the time of the modification hearing; the child has started school and received additional educational supports in the intervening time; the child has medical issues requiring medication; and both parents remarried and the child gained additional siblings since the time of the original order. As noted above, the passage of time alone is not necessarily a change affecting the child's welfare. *See Frey*, 189 N.C. App. at 637–39, 659 S.E.2d at 72 (explaining facts on, *inter alia*, children getting older did not justify conclusion a substantial change in circumstances occurred). But despite the trial court's findings of many major changes in circumstances, it did not address the effects these changes had on the child's best interests.

¶ 22 The trial court also made several findings noting that the prior order did not address certain issues and on this basis determined that there was no substantial and material change in circumstances to justify modification, particularly as to those issues. For example, the trial court found the prior order did not address phone calls between Father and the child and it did not address sporting activities. Because the prior order did not *specifically* address these issues, the trial court found that the evidence regarding phone calls and sports participation did not constitute "a substantial and material change in circumstances to warrant a modification." But a prior order need not address everything that may come up in a child's life before a party may later demonstrate a substantial change in circumstances justifying modification. When the consent order was entered, the child was under 2 years old. Sports participation and phone calls are not addressed in every child custody order and are typically not relevant for a one-year-old child but may become extremely important to a child who is age 10. We do not address whether the trial court erred when it characterized all the changes in circumstances it found not to be "substantial" changes in circumstances. Rather, the trial court here abused its discretion by operating under a misapprehension of the law and failing to consider all the relevant evidence needed to determine if these changes were substantial changes which affect the best interests of the child. It is impossible to consider whether a change is a *substantial* change affecting the child without considering if that change has an effect on the best interest of the child.

¶ 23 Plaintiff contends "the trial court did not abuse its discretion in excluding best-interest evidence" because the child custody modification process involves two steps such that the trial court cannot reach the best interest analysis before it finds a substantial change in the circumstances. (Capitalization altered.) As an initial matter, the two main cases on which Plaintiff relies are taken out of context. First, Plaintiff cites *Kanellos v. Kanellos* to support her argument "[m]odification of child custody awards is a two-step process." (Citing 251 N.C. App. 149, 158 n.4, 795 S.E.2d 225, 232 n.4 (2016).) This portion of *Kanellos*, 251 N.C. App. at 158 n.4, 795 S.E.2d at 232 n.4, comes from a footnote that relies on *Browning v. Helff*, 136 N.C. App. 420, 524 S.E.2d 95 (2000), and *Browning* itself was remanded for the trial court to make additional findings of fact on the effect on the child. 136 N.C. App. at 425, 524 S.E.2d at 99. The *Browning* Court did not address whether the trial court should have barred best interest *evidence* at the hearing; it only addressed whether the trial court's *analysis* followed the correct route. Plaintiff makes a similar error with her citation to *West v. Marko*. In *West*, this Court concluded the court incorrectly believed it could modify a child custody order based on best interests alone without finding a substantial change in circumstances. 141 N.C. App. at 691–92, 541 S.E.2d at 229. But the trial court had also made the appropriate findings on change in circumstances, so this Court upheld the order. *Id.*, 141 N.C. App. at 691–92, 694, 541 S.E.2d at 229, 231. Thus, again, the trial court did not bar a party from presenting best interest evidence. And this Court only faulted the trial court for not following the correct *analytical* steps.

¶ 24 These out-of-context cites also reveal the larger flaw in Plaintiff's counter argument. The trial court must find a substantial change in circumstances affecting the welfare of the child before it can *analyze* whether a change of custody would be in the best interest of the child. *See Garrett v. Garrett*, 121 N.C. App. 192, 196, 464 S.E.2d 716, 719 (1995), *disapproved of on other grounds by Pulliam*, 348 N.C. 616, 501 S.E.2d 898 ("The best interest *analysis* is rendered nugatory if the party requesting the custody change does not meet its burden on the substantial change of circumstances issue." (emphasis added)). But the trial court must still consider *evidence* relevant to best interest at the hearing on a motion to modify child custody, and in this case, there were clearly many changes in circumstances that are part of the typical considerations for modification—remarriage, relocation, additions to the family of stepparents and siblings, changes in the child's medical condition and educational needs, changes in work and school schedules, and more. *See West*, 141 N.C. App. at 692, 541 S.E.2d at 229 (finding evidence to support a substantial change in circumstances based on findings of

fact about medical care, education, family living conditions, etc.). Particularly because best interest evidence can overlap with the change in circumstances evidence, *see Warner*, 189 N.C. App. at 452, 658 S.E.2d at 318 (noting potential for overlap), the trial court should not finish its analysis before a party's case-in-chief is even done. As a result, the trial court abused its discretion by not allowing Defendant's evidence relating to best interest. The trial court could ultimately decide that despite the many changes in circumstances over the years since the prior order, the changes either had no substantial effect on the child, either positive or negative, or that despite the substantial changes in circumstances, a modification of custody would not be in the best interest of the child, but the child's best interests cannot be entirely removed from the evidence or analysis.

¶ 25 Plaintiff also argues even if the trial court should have received Defendant's best interest evidence, it did not reversibly err because Defendant "did not make an offer of proof." While counsel must usually make a specific offer of the excluded evidence to enable an appellate ruling, a proffer is not necessary when "the significance of the evidence is obvious from the record." *Currence v. Hardin*, 296 N.C. 95, 99–100, 249 S.E.2d 387, 390 (1978); *see also Waynick Const., Inc. v. York*, 70 N.C. App. 287, 292, 319 S.E.2d 304, 307 (1984) (explaining proffer is not necessary when "record plainly discloses the significance of the evidence"); N.C. Gen. Stat. § 1A-1, Rule 43(c) (explaining procedure for proffer). Here, the significance of the excluded best interest evidence is obvious, and Defendant addressed this issue with the trial court several times during the hearing. A trial court cannot grant a motion to modify child custody unless it is in the best interest of the child. *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. For this reason, we also reject Plaintiff's counter argument about Defendant not making a proffer of the best interest evidence.

¶ 26 Having rejected both of Plaintiff's counter arguments, we find the trial court abused its discretion by not allowing Defendant to present best interest evidence. We vacate and remand for a new hearing to allow both parties to present additional evidence regarding the child's current circumstances including evidence regarding the effect upon the best interests of the child of both current circumstances and any proposed change in the custodial arrangement. The trial court shall then enter a new order addressing Defendant's motion for modification of custody. We do not express any opinion on whether the trial court should or should not order any modification of custody; that decision is in the discretion of the trial court, after considering all the evidence, including any evidence

regarding the best interests of the child. Because we vacate and remand on this issue, we do not need to reach any of Defendant's three other arguments.

III. Conclusion

¶ 27 The trial court abused its discretion by preventing Defendant from presenting evidence regarding his contentions as to the best interests of the child; evidence regarding the best interests of the child may be part of the evidence supporting a party's claim that a particular change in circumstances is a substantial change in circumstances which may justify a modification of the custody order. As a result, we vacate and remand on that issue. Because we vacate and remand on this evidentiary issue, we do not need to reach Defendant's remaining issues. On remand, the trial court shall hold a new hearing and both parties shall have the opportunity to present evidence regarding how the changes in circumstances since the prior order have affected—or have not affected—the best interest of the child, either negatively or positively, and the trial court shall enter a new order on Defendant's motion to modify the child custody order following the hearing.

VACATED AND REMANDED.

Judges ZACHARY and GORE concur.

LISA BIGGS FORE, PLAINTIFF
v.
THE WESTERN NORTH CAROLINA CONFERENCE OF THE UNITED METHODIST CHURCH (A/K/A WESTERN NORTH CAROLINA CONFERENCE); AND THE CHILDREN'S HOME, INCORPORATED (A/K/A THE CHILDREN'S HOME, A/K/A THE CROSSNORE SCHOOL & CHILDREN'S HOME, A/K/A CROSSNORE CHILDREN'S HOME), DEFENDANTS

No. COA21-546

Filed 21 June 2022

Appeal and Error—interlocutory order—ex parte—disclosure of criminal investigation records from non-joined third parties

In a civil action against a church conference and an affiliated children's home (defendants), in which plaintiff alleged that she had been sexually abused as a minor at the home, the Court of Appeals dismissed defendants' appeal from an interlocutory ex parte order in which the trial court granted plaintiff's motion for production of criminal investigation records (pursuant to N.C.G.S. § 132-1.4) relating to alleged sexual abuse by the home's employees against any minor at the home. Defendants did not receive prior notice of plaintiff's motion, but because the motion concerned third parties who had not been joined to the action (the public agencies ordered to produce the records and the employees that the records described), defendants had no substantial right to prior notice and an opportunity to oppose the motion. Further, section 132-1.4 did not require plaintiffs to provide notice to defendants, defendants lacked standing to challenge the motion because they were not real parties in interest relating to the records request, and defendants could not assert the non-joined third parties' rights as a defense in the action.

Chief Judge STROUD dissenting.

Appeal by defendants from order entered 11 June 2021 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 April 2022.

Janet Janet & Suggs, LLC, by Richard Serbin and Matthew White, for plaintiff-appellee.

Ogletree Deakins, by Kelly S. Hughes and Ashley P. Cuttino, admitted pro hac vice, for defendant-appellant The Western

North Carolina Conference of the United Methodist Church (a/k/a Western North Carolina Conference).

Nelson Mullins Riley & Scarborough LLP, by Lorin J. Lapidus, G. Gray Wilson and D. Martin Warf, for defendant-appellant The Children's Home, Incorporated (a/k/a The Children's Home, a/k/a The Crossnore School & Children's Home, a/k/a Crossnore Children's Home).

TYSON, Judge.

¶ 1 The Western North Carolina Conference of the United Methodist Church ("WNCCUMC") and The Crossnore School & Children's Home ("Children's Home") (together "Defendants") purport to appeal a trial court's *ex parte* order directing disclosure of non-joined, third-party records of alleged child sexual abuse. We dismiss this interlocutory appeal without prejudice.

I. Background

¶ 2 Plaintiff asserts she was sexually abused as a minor, while she resided at The Children's Home in Winston-Salem during the 1970s. Plaintiff claims she reported the alleged abuse by her former Children's Home employee-parents to officials in Rockingham County. Plaintiff filed a civil action in Mecklenburg County Superior Court against Defendants on 6 January 2021. Plaintiff claims Defendants negligently supervised the staff and breached fiduciary duties they owed to her.

¶ 3 Defendants filed motions to dismiss Plaintiff's complaint under Rule 12(b)(6), contending 2019 N.C. Sess. Laws 5 § 4.2(b) and N.C. Gen. Stat. § 1-56(b) (2021) are unconstitutional as-applied to them under Article I, Section 19 of the North Carolina Constitution. WNCCUMC moved to dismiss Plaintiff's claims pursuant to Rule 12(b)(1). These motions remain pending before the trial court.

¶ 4 On 3 June 2021, Plaintiff filed a motion for production of criminal investigation records pursuant to N.C. Gen. Stat. § 132-1.4 (2021). Plaintiff's motion sought confidential records of alleged child sexual abuse by any Children's Home employee against any minor residing therein from the surrounding counties' sheriff's offices, Departments of Social Services, and police departments.

¶ 5 Plaintiff prepared a proposed order and submitted it along with her motion, which was mailed to the Mecklenburg County Clerk's Office for

filing. Plaintiff did not file nor serve a notice of hearing on her motion for production of records on Defendants. On 11 June 2021, the trial court entered Plaintiff's proposed order, *ex parte*. The order decreed the various agencies and departments:

> *shall produce any and all information in whatever form it exists in connection with the alleged child sexual abuse* committed by [employee parents] or other employees of the Children's Home alleged to have sexually abused and/or engaged in sexual activities with a minor while a resident of the home. (emphasis supplied).

¶ 6 Defendants filed notice of appeal, separately sought and obtained a temporary stay, and petitioned for and obtained a writ of supersedeas.

II. Jurisdiction

¶ 7 Defendants' appeal is clearly interlocutory. Appellate review is proper pursuant to N.C. Gen. Stat. § 7A-27(b)(3) if the party proves one of the requirements therein.

¶ 8 "An order is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the rights of all the parties involved in the controversy." *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002) (citation omitted). Defendant is entitled to review "where 'the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.' " *Id.* (citation omitted).

III. Argument

¶ 9 Defendants argue their substantial rights are violated because they were not given prior notice and an opportunity to oppose Plaintiff's motion for the production of alleged child sexual abuse records of non-joined third parties from surrounding county public entities. For nearly seventy years, the courts of this state have held:

> *The notice required by these constitutional provisions in such proceedings is the notice inherent in the original process* whereby the court acquires original jurisdiction, and not notice of the time when the jurisdiction vested in the court by the service of the original process will be exercised . . . *After the court has once obtained jurisdiction in a cause through the service of original process, a party has*

> *no constitutional right to demand notice of further proceedings in the cause.*

Collins v. Highway Commission, 237 N.C. 277, 281, 74 S.E.2d 709, 713 (1953) (emphasis supplied).

¶ 10 Defendants cite *Mission Hosps., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 189 N.C. App. 263, 270, 658 S.E.2d 277, 281 (2008), and *Pask v. Corbitt*, 28 N.C. App. 100, 104, 220 S.E.2d 378, 382 (1975), to support their contention they were entitled to prior notice of the hearing. Defendants' reliance on these cases is misplaced.

¶ 11 *Mission Hospital* was a DHHS agency appeal, in which the party had directly violated North Carolina statutes forbidding a "member or employee of the agency making a final decision in the case [from] communicat[ing], *directly or indirectly*, in connection with any issue of fact, or question of law, *with any person or party or his representative, except on notice and opportunity for all parties to participate*." *Mission Hosps., Inc.*, 189 N.C. App. at 270, 658 S.E.2d at 281 (emphasis supplied) (citation omitted).

¶ 12 In *Pask*, the plaintiff filed a motion to add parties to the action pursuant to Rule 21 of our Rules of Civil Procedure, and this Court noted, "[l]ong prior to the adoption of G.S. 1A-1, Rule 21, North Carolina has held that existing parties to a lawsuit are entitled to notice of a motion to bring in additional parties." *Pask*, 28 N.C. App. at 103, 220 S.E.2d at 381. The facts and issues in *Mission Hospital* and *Pask* are wholly inapposite from those before us and do not show a substantial right to immediate review.

¶ 13 Here, both Defendants have been haled into court by five different plaintiffs under recent legislation titled SAFE Child Act, 2019 N.C. Sess. Laws 5 § 4.2(b). This statute revived previously time-barred claims for child sexual abuse for a period of two years. *Id.* The plaintiffs in the first two cases filed and served written discovery requests on Defendants. Defendants failed to produce any responses to discovery to date, instead delaying with objections to each request and a reference to pending motions for a protective order which they have not noticed for hearing.

¶ 14 Before Plaintiff could serve any written discovery requests, Defendants filed a motion to stay discovery pending the outcome of their motions to dismiss. Plaintiff was left with the choice to proceed without discovery or to file the contested motion seeking alternative means of locating evidence to support her claims.

¶ 15 Unlike the requirements in *Mission Hospital* and *Pask*, no statute or constitutional provision under these facts requires Plaintiff to provide prior notice to Defendants for a hearing seeking criminal records of non-joined third parties from public entities, and which may affect Defendants' prior employees, who are not joined as parties herein. Further, Defendants were aware through prior discovery requests of Plaintiff's demand and intent to obtain the evidence. No formal notice was needed, because the order to produce was related and made to, and was obtained from, non-joined third parties.

¶ 16 Defendants' arguments are without merit asserting prior notice of a records request to public entities concerning non-joined third parties as a substantial right to an immediate appeal. As further discussed below, Defendants have shown no "substantial right which would be lost absent immediate review." *Flitt*, 149 N.C. App. at 477, 561 S.E.2d at 513 (citations and internal quotation marks omitted).

IV. Jus Tertii

¶ 17 Purported claims or rights of a third party cannot be asserted as a defense by an unrelated litigant. "In general, *jus tertii* cannot be set up as a defense by the defendant, unless he can in some way connect himself with the third party." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 592, 2021-NCSC-6, ¶ 60, 853 S.E.2d 698, 723 (2021) (*quoting Holmes v. Godwin*, 69 N.C. 467, 470 (1873)).

¶ 18 *Jus Tertii* is a principle of law prohibiting a party from raising the claims or rights of third parties. *Id.* (citation omitted). *Jus Tertii* is defined as: "The right of a third party. The doctrine that [. . .] courts do not decide what they do not need to decide." *Jus Tertii*, Black's Law Dictionary (11th ed. 2019). "A *jus tertii* situation arises when the defendant has no defense of his own but wishes to defeat the plaintiff's action by alleging a defect in the plaintiff's title or the fact that the plaintiff has no title at all." *Jus Tertii Under Common Law and the N.I.L.*, 26 St. John's L. Rev. 135, 135 (1951).

¶ 19 The Idaho Supreme Court provides persuasive guidance in an illustrative case of mistaken assertion by a defendant of rights owned by a non-joined third party. *Gissel v. State*, 727 P.2d 1153, 1154 (Idaho 1986). Gissel had unlawfully harvested wild rice growing on lands jointly owned by the State of Idaho and the United States National Forest Service. *Id.* Gissel was convicted in state court of trespass. *Id.* Idaho officials seized and sold the harvested rice. *Id.* Because the State of Idaho owned only a one-half interest in the land, Gissel challenged the state's authority to seize, sell, and keep all profits from the sale of the rice. *Id.*

¶ 20 The Idaho Supreme Court held Gissel was entitled to one-half of the proceeds from the sale, because the State of Idaho did not effectively join or make the *jus tertii* argument on behalf or under the authority of the United States National Forest Service. *Id.* at 1156. "The Gissels, though trespassers and without legal title, which title rests with the Forest Service, still by mere possession have greater rights superior to that of the state" to the other one-half of the proceeds from the sale. *Id.*

¶ 21 Defendants are barred from asserting any of DSS' or non-joined former employees' third parties' purported rights to notice of records as a *jus tertii* defense, when neither are parties to this action, Defendants cannot collaterally attack the orders and judgment entered in other cases to which they were not a party. *Id.*

¶ 22 Plaintiff's motion to the court does not need a "mother may I" from Defendants to obtain relevant evidence to support their claims, particularly where Defendants are non-responsive to and delaying their access to that evidence. N.C. Gen. Stat. § 132-1.4(a) (2021); *Collins*, 237 N.C. at 281, 74 S.E.2d at 713. Their purported assertions of entitlement to prior notice of a motion seeking non-party and third-party records to challenge the order are without merit.

V. Standing

¶ 23 "Every claim shall be prosecuted in the name of the real party in interest[.]" N.C. Gen Stat. § 1A-1, Rule 17(a) (2021). "The real party in interest is the party who by substantive law has the legal right to enforce the claim in question." *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 19, 234 S.E.2d 206, 209 (1977) (citation omitted).

¶ 24 Here, Defendants are not the real party in interest relating to the request for records. Defendants are not the party investigated in the records requested. In fact, the records were requested from non-joined third-parties. Only those parties whose records were requested are "the real party in interest" with standing to challenge the motion to produce those records. Defendants do not have standing to challenge the motion in this case because they are not the real party in interest. *Id.*

VI. Records of Criminal Investigations

¶ 25 Presuming, *arguendo*, Defendants should have been given prior notice of the hearing under any theory, Defendants are not the subject of the criminal investigation records and were not entitled to prior notice on those grounds. Defendants and our dissenting colleague argue the production of the criminal records and investigation of purported

former employees ordered by the court will violate Defendants' procedural and substantial rights.

> Records of criminal investigations conducted by public law enforcement agencies, records of criminal intelligence information compiled by public law enforcement agencies, and records of investigations conducted by the North Carolina Innocence Inquiry Commission, are not public records as defined by G.S. 132-1. *Records of criminal investigations conducted by public law enforcement agencies or records of criminal intelligence information may be released by order of a court of competent jurisdiction.*

N.C. Gen. Stat. § 132-1.4(a) (2021) (emphasis supplied). Unlike the cases Defendants rely upon, the statute includes no restrictions on the trial court's power and discretion to release criminal investigation records, nor assert any right or requirement of prior notice to non-parties.

¶ 26 Further, Defendants have not shown they are "aggrieved" parties to merit immediate review. *See Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) ("[O]nly a 'party aggrieved' may appeal a trial court order or judgment, and such a party is one whose rights have been directly or injuriously affected by the action of the court.") (citation omitted).

¶ 27 The record on appeal also omits the facts, pleadings, and orders from this Court on Defendants' motion for temporary stay, which was allowed on 12 July 2021, and their petition for a writ of supersedeas, which was allowed on 21 August 2021, staying the trial court's order "pending the outcome of petitioner's appeal to this Court." Our dissenting colleague agrees "this writ of supersedeas references the appeal before us." That order remains unaffected by the dismissal of this interlocutory appeal.

VII. Conclusion

¶ 28 Defendants have failed to carry their burden to show their substantial rights were violated by the superior court's order to warrant an immediate interlocutory review. Defendants moved for and received a temporary stay and petitioned for a writ of supersedeas, which this Court allowed. With no Rule 54(b) certification or showing of a substantial right which will be lost without immediate review, Defendants' interlocutory appeal is denied. This case is dismissed without prejudice.

DISMISSED WITHOUT PREJUDICE.

Judge ZACHARY concurs.

Chief Judge STROUD dissents with separate opinion.

STROUD, Chief Judge, dissenting.

¶ 29 The Majority's opinion dismisses Defendants' appeal on the ground it is interlocutory and Defendants cannot show a Rule 54(b) certification or loss of a substantial right absent immediate review. I agree Defendant's appeal is interlocutory and the trial court has not issued a Rule 54(b) certification. But I believe Defendants have demonstrated a substantial right because the trial court entered an *ex parte* order with no notice to the Defendants; the trial court should not take any action without proper notice of the hearing to all parties. Defendants have also demonstrated a substantial right based on the statutory protections they claim the *ex parte* order violates. Turning to the merits, I would hold the trial court erred both because it entered the order *ex parte*, without statutory authority to do so without notice to Defendants, and because the order released Department of Social Services ("DSS") records and law enforcement records of child abuse investigations protected by North Carolina General Statute § 7B-2901(b) without following its plain, unambiguous language about giving DSS proper notice and a chance to be heard. Finally, I disagree with the Majority Opinion when it claims the writ of supersedeas remains unaffected by our dismissal of this appeal.

¶ 30 "Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." *Matter of Duvall*, 268 N.C. App. 14, 19, 834 S.E.2d 177, 181 (2019) (quoting *Lankford v. Idaho*, 500 U.S. 110, 126, 111 S. Ct. 1723, 1732 (1991)). "In addition to prior notice, a 'fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.' " *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 902 (1976)) (internal quotations and citation from *Mathews* omitted). These fundamental components of due process extend to the issue at hand where Defendants had no notice of Plaintiff's request to the trial court for entry of an *ex parte* order requiring disclosure of documents from DSS and several law enforcement agencies to Plaintiff. *See In re Officials of Kill Devil Hills Police Dept.*, 223 N.C. App. 113, 118, 733 S.E.2d 582, 587 (2012) (finding a due process violation when the trial court entered an order "without providing notice or opportunity to be heard"). For example, in *In re Officials of Kill Devil Hills Police Dept.*, this Court found a trial court violated the appellants' due process rights when it ordered them

to turn over police personnel files because the implicated officers had no "notice or opportunity to be heard" since the trial court had never conducted a hearing. *Id.*, 233 N.C. App. at 114, 118, 733 S.E.2d at 584–85, 587. Here, likewise the trial court's actions raised due process concerns by granting Plaintiff's motion without hearing or prior notice to Defendant and ordering various government entities, including police departments and DSS, to turn over a broad range of documents regarding investigations of abuse of minors without any notice or an opportunity to be heard.

¶ 31 These due process concerns allow Defendants to demonstrate the trial court's interlocutory *ex parte* order "affects some substantial right claimed by . . . [them] and will work an injury to [them] if not corrected before an appeal from the final judgment." *Department of Transp. v. Rowe*, 351 N.C. 172, 174–75, 521 S.E.2d 707, 709 (1999) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). This Court has "previously recognized the 'constitutional right to due process is a substantial right.' " *Hall v. Wilmington Health, PLLC*, 2022-NCCOA-204, ¶ 20 (quoting *Savage Towing Inc. v. Town of Cary*, 259 N.C. App. 94, 99, 814 S.E.2d 869, 873 (2018)). Since the trial court entered an *ex parte* order without notice to Defendants and thereby implicated their due process rights, Defendants have demonstrated a substantial right sufficient to allow us to hear their appeal from an interlocutory order.

¶ 32 The Majority Opinion rejects Defendant's notice argument by relying on *Collins v. N. Carolina State Highway & Pub. Works Comm'n*, 237 N.C. 277, 74 S.E.2d 709 (1953), to contend constitutional notice only requires notice of the original proceeding. But the constitutional due process landscape has developed significantly since 1953. As part of those developments, this Court has recognized "engaging in *ex parte* communications with one party without notice to the other parties" in the middle of proceedings violates due process. *See Mission Hospitals, Inc. v. N.C. Dept. of Health and Human Services, Div. of Facility Services*, 189 N.C. App. 263, 265, 267–69, 658 S.E.2d 277, 278, 280–81 (2008) (so holding when, after a hearing but before issuing the final agency decision, the decision-maker received additional materials and argument *ex parte*). The Majority Opinion dismisses *Mission Hospitals* on the grounds it relied on a statutory violation, but this Court clearly concluded the *ex parte* actions "compromised [appellant's] due process rights." *Id.*, 189 N.C. App. at 269, 658 S.E.2d at 281.

¶ 33 The Majority Opinion also contends Defendants cannot immediately appeal because they are not aggrieved parties given the statutes at

issue here do not require Plaintiff to provide Defendants notice about a hearing on Plaintiff's receipt of records from third parties. The Majority Opinion relies on *Bailey v. State*, 353 N.C. 142, 540 S.E.2d 313 (2000), to argue only an aggrieved party can appeal a trial court order or judgment. First, it is not clear *Bailey* applies to the situation here. *Bailey* involved a case where a non-party, our State's Attorney General, attempted to appeal a case in which he was not a party. 353 N.C. at 156, 540 S.E.2d at 322. By contrast, here Defendants-Appellants are parties.

¶ 34 Second, Defendants are aggrieved parties. "A party aggrieved is one whose legal rights have been denied or directly and injuriously affected by the action of the trial court." *In re Winstead*, 189 N.C. App. 145, 151, 657 S.E.2d 411, 415 (2008) (quotations and citation omitted). Here, Defendants did not receive the notice of the hearing they were supposed to receive, thereby implicating their due process rights. As a result, Defendants are aggrieved parties who can appeal the order at issue. *See Wachovia Bank & Trust Co., N.A. v. Parker Motors, Inc.*, 13 N.C. App. 632, 634, 186 S.E.2d 675, 677 (1972) (linking whether a party is aggrieved to whether the order affects a substantial right).

¶ 35 In addition—as part of an argument that Defendants were not entitled to notice because they are not the subject of the requested criminal investigation records and thus do not have a substantial right—the Majority Opinion addresses only the Public Records statute regarding release of records of criminal investigations, but the records covered by the trial court's order include records of abuse of juveniles investigated by two Departments of Social Services in addition to records of law enforcement agencies. All the records sought, both as to criminal investigations and investigations by DSS, address sexual abuse of minor children. Confidentiality of records of child abuse and statutory procedures for release of these records is addressed in Chapter 7B, Article 29 of the General Statutes, specifically in North Carolina General Statute § 7B-2901(b)(2) (2021).

¶ 36 The Majority Opinion does not discuss Chapter 7B but relies solely upon North Carolina General Statute § 132-1.4, which deals with the limitations upon public records in the context of law enforcement investigations. N.C. Gen. Stat. § 132-1.4 (2021). As a general rule, "[t]he Public Records Act does not provide for disclosure of records of criminal investigations or criminal intelligence information . . . ." *Gannett Pacific Corp. v. North Carolina State Bureau of Investigation*, 164 N.C. App. 154, 160–61, 595 S.E.2d 162, 166 (2004). "Because records of criminal investigations and records of criminal intelligence information are not public records, a party seeking disclosure of such records must seek

release 'by order of a court of competent jurisdiction.' " *Id.*, 164 N.C. App. at 157, 595 S.E.2d at 164 (quoting N.C. Gen. Stat. § 132-1.4(a) (2003)[1]). This Court has previously recognized that the fact that a criminal investigation has concluded does not convert records of criminal investigations into public records because the justifications for protection of these records remain even after an investigation has ended:

> As noted by our Supreme Court,
>
> > "[i]t is clear that if investigatory files were made public subsequent to the termination of enforcement proceedings, the ability of any investigatory body to conduct future investigations would be seriously impaired. Few persons would respond candidly to investigators if they feared that their remarks would become public record after the proceedings. Further, the investigative techniques of the investigating body would be disclosed to the general public." An equally important reason for prohibiting access to police and investigative reports arises from recognition of the rights of privacy of individuals mentioned or accused of wrongdoing in unverified or unverifiable hearsay statements of others included in such reports.
>
> [*News and Observer v. State; Co. of Wake v. State; Murphy v. State*, 312 N.C. 276,] 282–83, 322 S.E.2d [133,] 138 [(1984)] (citations omitted) (quoting *Aspin v. Department of Defense*, 491 F.2d 24, 30 (D.C.Cir.1973)).

Gannett Pacific Corp., 164 N.C. App. at 160, 595 S.E.2d at 166 (first alteration in original; case citations added). And the records Plaintiff sought deal with abuse of minors. Because the records deal with child abuse, §132-1.4 *specifically* requires compliance with Article 29 of Chapter 7B: "Records of investigations of alleged child abuse shall be governed by Article 29 of Chapter 7B of the General Statutes." N.C. Gen. Stat. § 132-1.4(*l*) (2021). Within Article 29 of Chapter 7B, North Carolina General Statute § 7B-2901(b)(2) specifically provides for notice to DSS in civil actions when a party seeks these types of records in a civil action

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1. The current version of § 132-1.4(a) contains the same language quoted by *Gannett*; the only change since the 2003 version of the statute is the addition of protection for records of investigations from the North Carolina Innocence Inquiry Commission. *Compare* N.C. Gen. Stat. § 132-1.4(a) (2003) *with* N.C. Gen. Stat. § 132-1.4(a) (2021).

and DSS is not already a party, thereby refuting the Majority Opinion's conclusion § 132-1.4 does not require prior notice to non-parties or entities that are not the subject of the criminal investigations.

¶ 37 The Majority Opinion further claims Plaintiff had no choice but to pursue her case without discovery or to file the motion to seek to locate evidence to support her case. Certainly Plaintiff has the option of seeking to locate evidence by requesting records from the law enforcement agencies and Departments of Social Services, but Plaintiff still has the obligation to follow statutory procedures in seeking these records and to give all parties to her lawsuit notice before asking the trial court to enter an order. Plaintiff was entitled to seek production of records, but she was not entitled to do so without following statutory procedures and without notice to Defendants—because Defendants are *parties* to this case, not because information in records is about Defendants.

¶ 38 The Majority Opinion finally notes there is no specific statute requiring Defendants to have notice of the hearing before the trial court, but *ex parte* hearings are the exception to the general rule and are allowed only in specific circumstances, as recognized by Rule 5 of the North Carolina Rules of Civil Procedure. Under Rule 5, "every written motion *other than one which may be heard ex parte*, and every written notice, appearance, demand, offer of judgment and similar paper shall be served upon each of the parties." N.C. Gen. Stat. § 1A-1, Rule 5(a) (2021) (emphasis added). Numerous other rules reinforce the importance of and ensure the provision of notice. *See* General Rules of Practice for the Superior and District Court, Rules 6 (2021) (indicating "[m]otions may be heard and determined either at the pre-trial conference or on motion calendar as directed by the presiding judge"), 7 (requiring plaintiff and defendant attorneys to work together to schedule a pre-trial conference), 2(b) (indicating civil calendar be published "no later than four weeks prior to the first day of court")[2]; 26 Jud. Dist. Sup. Civil R. 12.1–12.3 (2021) (local rules applicable to Mecklenburg County Superior Court requiring filing party to calendar motions for a hearing and then file a "notice of hearing" which then "will be served on counsel for the opposing party or parties" within two business days); N.C. R. Prof. Conduct 3.5(a)(3), (d) (2021) (barring attorneys from communicating

2. The current version of the Rules of Practice for Superior and District Court now includes slightly different language around notice. *See* General Rules of Practice for the Superior and District Court, Rule 6 (eff. 1 Sept. 2021) (requiring an attorney "scheduling a hearing on a motion" to "make a good-faith effort to request a date for the hearing on which each interested party is available" except "if a motion is *properly* made ex parte" (emphasis added)).

ex parte "with the judge or other official regarding a matter pending before the judge or official" except where "authorized to do so by law or court order" where "[*e*]*x parte* communication means a communication on behalf of a party to a matter pending before a tribunal that occurs in the absence of an opposing party, without notice to that party, and outside the record"); North Carolina Code of Judicial Conduct Canon 3(A)(4) (2021) ("A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding."). Plaintiff did serve her motion on Defendants, but she did not serve any notice of hearing or notification that she would be requesting the trial court to enter an order without a hearing, and she has not identified any statutory basis to have had her motion heard *ex parte*.

¶ 39 Beyond the due process notice issue, Defendants also have a substantial right on the grounds they are asserting a statutory privilege. In *Sharpe v. Worland*, our Supreme Court recognized when "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 . . . ." 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999). This Court then extended the "reasoning set forth in *Sharpe*" to find an appeal "affect[ed] a substantial right" where the defendants challenged an order compelling discovery on the grounds it would lead to the release of "juvenile records, social services records, [and] law enforcement records" in violation of statutes requiring a court order to release those records, including North Carolina General Statutes §§ 7B-2901(b) and 132-1.4, both of which are at issue here.[3] *Jane Doe 1 v. Swannanoa Valley Youth Development Center*, 163 N.C. App. 136, 139, 592 S.E.2d 715, 717–18 (2004). Given Defendants here are asserting the same statutory privilege this Court, with the Majority Opinion's author concurring, determined implicated a substantial right before, Defendants' appeal here also involves a substantial right.

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3. Specifically, the defendants there challenged the order releasing those records on the grounds the North Carolina Industrial Commission was not a court that could order disclosure of the records as required by statute, but this Court found the Industrial Commission was a court for these purposes. *Jane Doe 1*, 163 N.C. App. at 139, 592 S.E.2d at 718. Regardless of the specific nature of the defendants' challenge on the merits in that case, *Jane Doe 1* should guide our decision here on the question of whether Defendants have demonstrated a substantial right because it found defendants asserting the same statutory protections at issue here had shown a substantial right as laid out above.

¶ 40 *Jane Doe 1* informs whether Defendants asserted a substantial right here despite the fact that case involved a discovery request directly to its defendants. *Id.*, 163 N.C. App. at 137–38, 592 S.E.2d at 717. In addition to my previous response to the Majority Opinion's aggrieved party argument, in *Jane Doe 1*, the defendants were not asserting a statutory privilege they explicitly directly held. Focusing on one of the common statutes at issue, North Carolina General Statute § 7B-2901(b), the protections there, based on the statute in effect in 2004, only indicated records "may be examined only by order of the court." N.C. Gen. Stat. § 7B-2901(b) (2003). The statute was silent on whether a party in litigation who did not hold those records could assert the protection afforded by § 7B-2901(b). *Id.* Despite the statute not stating they held the statutory protection, the defendants in *Jane Doe 1* had a substantial right based on asserting such protection, 163 N.C. App. at 139, 592 S.E.2d at 717–18, and similar reasoning applies here. Although the current statute does not say Defendants hold the statutory privilege, *see* N.C. Gen. Stat. § 7B-2901(b)(2) (2021) (providing for DSS to have "reasonable notice and an opportunity to be heard"), they can still claim a substantial right by asserting such protection.

¶ 41 Thus, on both due process notice grounds and statutory privilege grounds, Defendants have shown they have a substantial right which will be lost without review of their interlocutory appeal. I therefore dissent from the dismissal of the appeal.

¶ 42 Turning to the merits of the case, I would hold the trial court erred because § 7B-2901(b)(2) explicitly requires notification to DSS and in camera review of any records which may be released and that did not occur here. Specifically, § 7B-2901(b)(2) states records kept by DSS about juveniles under their care or court placement "may be examined only in the following circumstances":

> . . .
>
> (2) A district or superior court judge of this State presiding over a civil matter in which the department [DSS] is not a party may order the department to release confidential information, *after providing the department with reasonable notice and an opportunity to be heard* and then determining that the information is relevant and necessary to the trial of the matter before the court and unavailable from any other source. This subsection shall not be construed to relieve any court of its duty to conduct hearings

> and make findings required under relevant federal law before ordering the release of any private medical or mental health information or records related to substance abuse or HIV status or treatment. *The department may surrender the requested records to the court, for in camera review, if surrender is necessary to make the required determinations.*
>
> . . .

N.C. Gen. Stat. § 7B-2901(b) (emphasis added). The plain, unambiguous language of the statute requires DSS to receive notice and an opportunity to be heard before Plaintiff can examine the DSS records to which she is granted access under the trial court order. "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). Here, therefore, the trial court had to give DSS notice and an opportunity to be heard. Since nothing in our record indicates DSS received such notice or chance to be heard, I would hold the trial court erred.

¶ 43 This case also involves the scenario this statute aims to avoid. Section 7B-2901(b) provides for DSS to keep a list of sensitive records under protective custody and then includes a catch-all provision to protect "other information which the court finds should be protected from public inspection in the best interests of the juvenile." N.C. Gen. Stat. § 7B-2901(b). And as noted above, these same provisions apply to the records of the law enforcement agencies to the extent the records deal with investigations of child abuse, under North Carolina General Statute § 132-1.4(*l*). Based on the catch-all provision, the purpose of the statute is to protect sensitive information in the best interest of the juvenile. Section 7B-2901(b)(2) builds on that purpose by placing upon trial courts a further duty to help protect the sensitive information by ensuring DSS has notice and an opportunity to be heard before determining if the information "is relevant and necessary to the trial of the matter before the court and unavailable from any other source." *Id.* at (b)(2). These procedures help protect victims of abuse, in this case sexual abuse, who are not parties to the case because they ensure someone—specifically the trial court—can decide what should and should not be released and any conditions placed on the release. For example, even if the records Plaintiff seeks here are released to Plaintiff, they would likely be placed under seal and not simply released to the Plaintiff's attorney with no restrictions on how they are used or shared. By not following the DSS

notification procedures laid out in § 7B-2901(b)(2), the trial court has not fulfilled its duty under the statute to protect this sensitive information about victims of sexual abuse.

¶ 44 Finally, the Majority Opinion implies this Court's writ of supersedeas will remain in effect to stay the *ex parte* discovery order before us despite the dismissal of the appeal, thus preventing the wholesale release of records of sexual abuse of children, now adults, who may be harmed by the public release of this information. But the writ will not prevent the release of the records because it will no longer have any effect. " 'Supersedeas' is a writ issuing from an appellate court to preserve the status quo *pending the exercise of the appellate court's jurisdiction, is issued only to hold the matter in abeyance pending review*, and may be issued only by the court in which an appeal is pending." *City of New Bern v. Walker*, 255 N.C. 355, 356, 121 S.E.2d 544, 545–46 (1961) (per curiam) (all emphasis included has been added; emphasis from original removed) (citing *Seaboard Air-Line R. Co. v. Horton*, 176 N.C. 115, 96 S.E.2d 956 (1918)). In other words, the writ of supersedeas only applies when the appeal is pending before this Court. *See Craver v. Craver*, 298 N.C. 231, 237–38, 258 S.E.2d 357, 362 (1979) ("The writ of supersedeas may issue only in the exercise of, and as ancillary to, the revising power of an appellate court; its office is to preserve the *status quo pending the exercise of appellate jurisdiction.*" (emphasis added after "status quo")). The writ of supersedeas in this case recognizes that it only applies while this appeal is pending; it states, the *ex parte* order on appeal "is hereby stayed *pending the outcome of petitioner's* [Defendants'] *appeal to this Court.*"[4] COA# P21-243, Dkt. No. 1 (24 August 2021) (emphasis added). The Majority Opinion dismisses Defendants' appeal, and thus the writ of supersedeas can have no further effect; there is no longer an appeal pending to which its power can attach. The writ of supersedeas here and writs of supersedeas in general only apply when the appeal in connection with which they are issued is pending, and once the Majority Opinion dismisses the interlocutory appeal, the plain language of the writ here instructs the order on appeal is no longer stayed.

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4. The writ of supersedeas provides as follows: "The order entered by Judge Lisa C. Bell on 11 June 2021 ordering production of records in the custody of the Winston-Salem Police Department, the Richmond County Sheriff's office, the Richmond County Department of Social Services, the Richmond County Juvenile Division, the Richmond County Court, the Forsyth County Sheriff's office, and the Forsyth County Department of Social Services is hereby stayed pending the outcome of petitioner's appeal to this Court." COA# P21-243, Dkt. No. 1 (24 August 2021). The order referenced in the writ of supersedeas is the order on appeal here.

¶ 45 Because I believe Defendants have shown a substantial right on both due process and statutory grounds, I would not dismiss their appeal as interlocutory. Further, because Defendants were entitled to notice of the hearing of Plaintiff's motion by the trial court and the plain, unambiguous language of § 7B-2901(b) also requires the trial court to give DSS notice and the chance to be heard before releasing the DSS records at issue, I would find the trial court erred by entering the order *ex parte* and without prior notice to either Defendants or DSS. Lastly, since the Majority Opinion dismisses this appeal, the writ of supersedeas provides no further protection.

¶ 46 Respectfully, I dissent.

IN THE MATTER OF THE ESTATE OF
BOBBY RONALD GERRINGER, DECEASED

No. COA21-556

Filed 21 June 2022

Estates—surviving spouse—elective share—total net estate—property held jointly by decedent and another with right of survivorship—statute amended

In an estate dispute between a decedent's wife and his son, the superior court's order was vacated and remanded where, after the clerk of court awarded the wife an elective share of the decedent's estate, the superior court (hearing the son's appeal) entered an order reducing the amount of the elective share on grounds that the clerk had incorrectly determined under N.C.G.S. § 30-3.2(3f)(c) what portion of three bank accounts—jointly held by the decedent and his son with right of survivorship—should be included in the value of the decedent's total net estate. Because the General Assembly amended section 30-3.2(3f)(c) between the entry of the clerk's order and the superior court's review of respondent's appeal, the clerk's factual findings and legal conclusions were not based on "good law" when the superior court reviewed the clerk's order; therefore, the superior court should have remanded the matter to the clerk with instructions to apply the amended statute to the case.

Appeal by Petitioner from order entered 21 April 2021 by Judge Lora C. Cubbage in Guilford County Superior Court. Heard in the Court of Appeals 23 March 2022.

Narron Wenzel, P.A., by Benton Sawrey and M. Kemp Mosley, for Petitioner-Appellant.

Casey Gerringer, pro se Respondent-Appellee.

COLLINS, Judge.

¶ 1 Petitioner appeals the superior court's order awarding her an elective share of her late husband's estate. We vacate the superior court's order and remand to the superior court with instructions to remand to the clerk of court for further proceedings.

I. Background

¶ 2 Bobby Ronald Gerringer ("Decedent") died testate in December 2017. Patricia Gerringer ("Petitioner") had been Decedent's wife for approximately forty-five years at the time he died. Casey Lynn Gerringer ("Respondent") is Decedent's son. Decedent's last will and testament was submitted to the Guilford County Clerk of Court in February 2018 and accepted for probate in common form. Decedent's will named Respondent executor of the estate and devised the entirety of his estate to Respondent.

¶ 3 On 20 February 2018, Petitioner filed a Petition for Elective Share by Surviving Spouse ("Petition"), seeking an elective share of 50% of Decedent's net estate, pursuant to N.C. Gen. Stat. § 30-3.1.

¶ 4 A preliminary hearing on the Petition was held before the Guilford County Assistant Clerk of Court ("Clerk") on 6 August 2018. A central issue at the hearing was what portion of three joint bank accounts held by Decedent and Respondent as joint tenants with right of survivorship should be included in the value of Decedent's net estate. The Clerk ordered Respondent to prepare a statement of Decedent's assets, pursuant to N.C. Gen. Stat. § 30-3.4(e2), and set a future hearing date at which Respondent could offer evidence of his contribution to the joint accounts. The Clerk also ordered a partial distribution of Decedent's estate in an amount of $158,617.47 be paid to Petitioner, without prejudice to either party.

¶ 5 Respondent submitted a statement of Decedent's assets on 5 September 2018, which showed total assets of $670,625.35. In addition to real property, personal property, and life insurance benefits, the statement listed two accounts held by Decedent alone, naming Respondent the sole beneficiary, and three joint accounts held by Decedent and

Respondent as joint tenants with rights of survivorship in the amounts of $386,630.39; $12,650.53; and $143,659.91, for a total of $542,940.83.

¶ 6 A hearing was held before the Clerk on 24 September 2018 to determine what percentage of the value of the joint accounts should be included in the value of Decedent's net estate. Respondent testified about his contributions to the three joint accounts as follows: Respondent deposited money into the joint accounts "a couple of different times." He deposited an unspecified amount in the year 2000 and again in 2010 or 2011, but did not have bank records confirming those deposits. He deposited $22,000 on 8 August 2014 and withdrew $35,000 that same day. Three days before Decedent died, Respondent transferred $250,000 from one of the joint accounts to another of the joint accounts. At the hearing, Respondent also informed the Clerk that Decedent's stepson, Anthony Gerringer, had filed a claim for $109,200 for personal services to the Decedent and Decedent's estate and that Respondent had denied the claim.

¶ 7 The Clerk entered her Order Awarding Elective Share ("Clerk's Order") on 7 November 2018, awarding Petitioner an elective share of fifty percent of the Decedent's net estate. The Clerk's Order found and concluded, in part:

> 8. Pursuant to the calculation of values listed on the Statement of Total Assets filed in this matter, the Total Assets of this Estate are $670,625.35.
>
> 9. Total Net Assets of the Estate are defined by North Carolina statute as the total assets reduced by claims and by year's allowances to persons other than the surviving spouse. One claim has been filed in this matter on October 4, 2018, by Anthony C. Gerringer, in the amount of $109,200.00. On September 6, 2018, the Executor filed a letter with the Clerk of Superior Court denying the claim made by Anthony C. Gerringer. No year's allowances to persons other than the surviving spouse have been allotted. Therefore, the Total Net Assets of this Estate are $670,625.35.
>
> 10. Pursuant to N.C. [Gen. Stat.] § 30-3.1, the applicable share of Total Net Assets to which the surviving spouse is entitled is ½ of Total Net Assets, a value of $335,312.68.
>
> 11. Pursuant to N.C. [Gen. Stat.] § 30-3.2, Property Passing to Surviving Spouse equals zero.

> 12. The amount of the elective share Petitioner is entitled to is determined by the following calculation: [$335,312.68 – 0 = $335,312.68.]
>
> 13. Parties agree that [Petitioner] has already received a partial distribution of her elective share in the amount of $158,617.47 from the Executor. The balance of the elective share then remaining due is $176,695.20. ($335,312.68 – $158,617.47 = $176,695.20).

¶ 8 The Clerk thus ordered Respondent to deliver a check to Petitioner in the amount of $176,695.20.

¶ 9 Respondent, through counsel, appealed the Clerk's Order on 21 November 2018. Respondent's sole alleged error was that the Clerk "ordered that the elective share would be one-half (1/2) of the gross assets without taking into consideration in (sic) an outstanding claim in excess of $100,000.00. Thus, [the Clerk's] Order Awarding Elective Share entered on November 7, 2018 is not based upon the net estate." Between the time that Respondent filed his appeal and the time the appeal came on for hearing before the superior court, Respondent's attorney withdrew. The attorney filed a claim against the estate for attorney's fees for $9,541.

¶ 10 Respondent's appeal was heard by the superior court on 23 March 2021. Respondent, appearing pro se, argued that the Clerk's Order had failed to consider outstanding claims against the estate, including the Decedent's stepson's $109,200 claim and Respondent's counsel's claim for $9,541. The superior court *sua sponte* raised the issue of whether the Clerk had used the correct value of the joint accounts when calculating Decedent's net estate.

¶ 11 The superior court entered its Order Awarding Elective Share ("Superior Court's Order") on 21 April 2021 finding, in part:

> 13. That after the review this Court determined that [] while the Assistant Clerk of Court found that pursuant to [N.C. Gen. Stat.] § 30-3.2(3f), fifty percent (50%) of the funds held in the joint accounts with the right of survivorship, listed on the statement of total assets filed September 6, 2018, were to be included in the sum of values used to calculate total assets, that the Assistant Clerk of Court erroneously used the total amount of funds in the aforementioned accounts as part of her calculation of the Total Assets of the

Estate that were to be used in calculating the elective share due to the Petitioner [].

14. That this Court agrees [N.C. Gen. Stat. §] 30-3.2(3f) allows only one half of the total funds in the joint accounts with the right of survivorship to be used in the calculation of Total Assets of the deceased when it comes to determining the amount of Petitioner's elective share.

15. That this Court recalculated only the Joint Accounts with Right of Survivorship using one half of the total amount in each account and finds the following:

. . . .

16. That when the recalculation is completed, the total of the Total Assets to be used in the calculation to determine the amount due Petitioner under the Elective Share statute is: $399,154.98.

. . . .

19. That this Court finds that attorney fees due out of the Estate are due to Attorney Tom Maddox in the amount of $9,541.00.

20. That this Court finds that claims due to be paid from the Estate are $11,989.30.

21. That this Court finds that Total Assets of the Estate of Bobby Ronald Gerringer are $399,154.98 – $21,530.30 = $377,624.68.

22. That this Court finds the Total Assets of the Estate of Bobby Ronald Gerringer is $377,624.68 for the purpose of calculating the Elective Share that is due to Petitioner [].

23. That this Court finds the Elective Share statute provides that Petitioner [] is entitled to one half of the Total Assets of the Estate of Bobby Ronald Gerringer which equates to: $377,624.68 [divided by] 2 = $188,812.34.

24. That this Court finds that the final amount remaining due to Petitioner [] from the Estate of Bobby

> Ronald Gerringer is: $188,812.34 – $158,617.47 = $30,194.87.

¶ 12 The superior court ordered Respondent to deliver a cashier's check to Petitioner "in the amount of $30,194.87 made payable to [Petitioner], representing the payment to her of the balance of the Claim for Elective Share owed to her." Petitioner timely appealed the Superior Court's Order.

II. Discussion

A. Standard of Review

¶ 13 The clerk of court has "jurisdiction of the administration, settlement, and distribution of estates of decedents including, but not limited to, estate proceedings as provided in [N.C. Gen. Stat. §] 28A-2-4." N.C. Gen. Stat. § 28A-2-1 (2021). Section 28A-2-4(a) provides that the clerk has "original jurisdiction of estate proceedings." *Id.* § 28A-2-4(a) (2021). "Estate proceedings" are "matter[s] initiated by petition related to the administration, distribution, or settlement of an estate, other than a special proceeding." *Id.* § 28A-1-1(1b). In estate proceedings, the clerk shall "determine all issues of fact and law . . . [and] enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment." *Id.* § 1-301.3(b).

¶ 14 "On appeal to the superior court of an order of the clerk in matters of probate, the [superior] court . . . sits as an appellate court." *In re Estate of Pate*, 119 N.C. App. 400, 402, 459 S.E.2d 1, 2 (1995) (citation omitted). The superior court's standard of review is as follows:

> Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:
>
> (1) Whether the findings of fact are supported by the evidence.
>
> (2) Whether the conclusions of law are supported by the findings of facts.
>
> (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

N.C. Gen. Stat. § 1-301.3(d) (2021).

¶ 15 The appellant must make specific exceptions to any finding or conclusion in the clerk's order with which he disagrees. *In re Swinson's Estate*, 62 N.C. App. 412, 415, 303 S.E.2d 361, 363 (1983). "[T]he [superior court] may review any of the clerk's findings of fact when the finding is

properly challenged by specific exception and may thereupon either affirm, modify or reverse the challenged findings." *Id.* at 416, 303 S.E.2d at 363 (quoting *In re Taylor*, 293 N.C. 511, 519, 238 S.E.2d 774, 778 (1977)). Unchallenged findings of fact "are presumed to be supported by competent evidence and are binding on appeal." *In re Estate of Harper*, 269 N.C. App. 213, 215, 837 S.E.2d 602, 604 (2020) (citation omitted).

¶ 16 "The standard of review in [the Court of Appeals] is the same as in the superior court." *Pate*, 119 N.C. App. at 403, 459 S.E.2d at 2-3. Errors of law by the superior court, including whether the superior court has applied the correct standard of review, are reviewed de novo. *In re Estate of Johnson*, 264 N.C. App. 27, 32, 824 S.E.2d 857, 861 (2019).

B. Superior Court's Review of Clerk's Order

¶ 17 The dispositive issue on appeal is whether the superior court erred in its review of the Clerk's Order.

¶ 18 N.C. Gen. Stat. § 30-3.1(a), which governs the elective share of a surviving spouse, provides as follows:

> The surviving spouse of a decedent who dies domiciled in this State has a right to claim an 'elective share', which means an amount equal to (i) the applicable share of the Total Net Assets. . . less (ii) the value of Net Property Passing to Surviving Spouse[1]. . . .

N.C. Gen. Stat. § 30-3.1 (2021). The "applicable share" of the Total Net Assets for a surviving spouse who had been married to the decedent for 15 years or more is 50%. *Id.* § 30-3.1(a)(4). "Total Net Assets" are "[t]he total assets reduced by year's allowances to persons other than the surviving spouse and claims." *Id.* § 30-3.2(4). "Total assets" are defined by N.C. Gen. Stat. § 30-3.2 and include property held jointly with right of survivorship. *Id.* § 30-3.2(3f)(c).

¶ 19 At the time that the Clerk heard the matter in September 2018 and entered the Clerk's Order in November 2018, N.C. Gen. Stat. § 30-3.2(3f)(c)(2) provided that

> property held by the decedent and one or more other persons other than the surviving spouse as joint

1. Net Property Passing to Surviving Spouse is "[t]he Property Passing to Surviving Spouse reduced by (i) death taxes attributable to property passing to surviving spouse, and (ii) claims payable out of, charged against or otherwise properly allocated to Property Passing to Surviving Spouse." N.C. Gen. Stat. § 30-3.2(2c) (2021).

> tenants with right of survivorship is included [in the calculation of "total assets"] to the following extent:
>
> > I. All property attributable to the decedent's contribution.
> >
> > II. The decedent's pro rata share of property not attributable to the decedent's contribution, except to the extent of property attributable to contributions by a surviving joint tenant.
>
> The decedent is presumed to have contributed the jointly owned property unless otherwise proven by clear and convincing evidence.

N.C. Gen. Stat. § 30-3.2(3f)(c)(2) (2018).

¶ 20 However, between entry of the Clerk's Order in November 2018 and the superior court hearing Respondent's appeal in April 2021, the North Carolina General Assembly amended N.C. Gen. Stat. § 30-3.2(3f)(c). This amendment became effective on 30 June 2020 and "applies to estate proceedings to determine the elective share which are not final on [30 June 2020] because the proceeding is subject to further judicial review." S.L. 2020-60, § 1. The amended version of N.C. Gen. Stat. § 30-3.2(3f)(c)(2) reads as follows:[2]

> Property held by the decedent and one or more other persons as joint tenants with right of survivorship is included [in the calculation of "total assets"] to the extent of the decedent's pro rata share of property attributable to the decedent's contribution.
>
> The decedent and all other joint tenants are presumed to have contributed in-kind in accordance

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2. The amended N.C. Gen. Stat. § 30-3.2(3f)(c)(2) deleted the marked-through text and added the bolded text, as illustrated below:

> Property held by the decedent and one or more other persons ~~other than the surviving spouse~~ as joint tenants with right of survivorship is included [in the calculation of "total assets"] to the ~~following extent:~~
>
> > ~~I. All property attributable to the decedent's contribution.~~
> >
> > ~~II. The~~ **extent of the** decedent's pro rata share of property ~~not~~ attributable to the decedent's **contribution**~~, except to the extent of property attributable to contributions by a surviving joint tenant~~.
>
> The decedent ~~is~~ **and all other joint tenants are** presumed to have contributed **in-kind in accordance with their respective shares for** the jointly owned property unless ~~contribution by another is~~ **otherwise** proven by clear and convincing evidence.

> with their respective shares for the jointly owned property unless otherwise proven by clear and convincing evidence.

N.C. Gen. Stat. § 30-3.2(3f)(c) (2021).

¶ 21 Essentially, where property was held by the decedent and one other person as joint tenants with right of survivorship, the amendment (1) changed the maximum percentage of the joint property attributable to the decedent from 100% to 50%, (2) changed the percentage the decedent is presumed to have contributed to the joint property from 100% to 50%, and (3) changed the burden of proof to rebut this presumption from the surviving joint tenant to the spouse seeking an elective share.

¶ 22 In this case, Petitioner is seeking an elective share of Decedent's estate. The estate proceeding to determine Petitioner's elective share was not final on 30 June 2020 because the Clerk's Order was, and still is, subject to further judicial review. Accordingly, while the former statute applied to the proceeding before the Clerk, the amended statute applied to the proceeding on appeal in the superior court. Consequently, the findings of fact and conclusions of law in the Clerk's Order were based on a statute that was no longer "good law" when the superior court reviewed it. As a result, the superior court could not review the Clerk's order under the applicable standard of review and should have remanded the matter to the Clerk with instructions to apply the amended statute.[3] *See*, *e.g.*, *Johnson*, 264 N.C. App. at 34, 824 S.E.2d at 862 ("When the order or judgment appealed from was entered under a misapprehension of the applicable law, the judgment, including the findings of fact and conclusions of law on which the judgment was based, will be vacated and the case remanded for further proceedings.") (citation omitted). In light of our holding, we do not reach Petitioner's remaining arguments.

III. Conclusion

¶ 23 We vacate the Superior Court's Order and remand the case to the superior court with instructions to remand to the clerk of court for further proceedings. The clerk of court may, in its discretion, receive more evidence.

VACATED AND REMANDED.

Judges ZACHARY and WOOD concur.

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3. It is not clear from the record or transcript that the superior court was aware that N.C. Gen. Stat. § 30-3.2 had changed between the date the matter was heard by the Clerk and the date the matter was heard in the superior court on appeal.

IN RE L.M.B.

[284 N.C. App. 41, 2022-NCCOA-406]

IN THE MATTER OF L.M.B.

No. COA21-544

Filed 21 June 2022

1. Termination of Parental Rights—grounds for termination—failure to pay a reasonable portion of the cost of care—findings of fact—"in kind" contributions

The trial court properly terminated respondent-parents' parental rights in their daughter on the ground of willful failure to pay a reasonable portion of the cost of care (N.C.G.S. § 7B-1111(a)(3)), where the court's uncontested findings of fact showed that respondent-mother was employed throughout most of the case and received unemployment benefits when she lost her job, while respondent-father received disability payments and also was briefly employed. Although respondent-parents did provide their daughter with clothing, toys, diapers, and other items, the trial court was not required to consider these "in kind" contributions as a form of child support where there was no agreement in place allowing for these items to offset respondent-parents' support obligation.

2. Termination of Parental Rights—best interests of the child—consideration of dispositional factors—weighing of evidence

The trial court did not abuse its discretion in determining that termination of respondent-father's parental rights in his daughter was in the child's best interests, where the court considered and entered written findings addressing each dispositional factor in N.C.G.S. § 7B-1110, the findings were supported by competent evidence, and the court properly determined the weight of the evidence and the reasonable inferences to be drawn from it.

3. Judges—substitute judge—signing judgment on behalf of presiding judge—ministerial act

An order terminating parental rights in a minor child was valid where, although the judge presiding over the termination proceedings did not sign the order upon entry of judgment, a substitute judge—without altering the order or making any substantive determinations in the case—signed the order on behalf of the presiding judge in accordance with Civil Procedure Rule 63, which permits another judge to perform purely ministerial acts on behalf of a judge who is unavailable to complete those duties.

IN RE L.M.B.

[284 N.C. App. 41, 2022-NCCOA-406]

Appeal by respondent mother and respondent father from orders entered 17 May 2021 and 2 June 2021 by Judge Frederick B. Wilkins Jr. in Alamance County District Court. Heard in the Court of Appeals 22 February 2022.

Ewing Law Firm, P.C., by Robert W. Ewing, for respondent-appellant mother.

Kimberly Connor Benton for respondent-appellant father.

Jamie L. Hamlett for petitioner-appellee Alamance County Department of Social Services.

Matthew D. Wunsche for the Guardian ad Litem.

GORE, Judge.

I. Factual and Procedural Background

¶ 1 On 28 July 2019, the Burlington Police Department ("BPD") responded to a service call at the Knights Inn motel. When law enforcement arrived, respondent mother told the officer that respondent father had slapped her on the face and threw a remote control at her, which struck the infant L.M.B ("Lilly") on the head.[1] Respondent mother had a visible bruise from the slap. The responding officer also noticed Lilly needed a diaper change and to be fed. Lilly was less than three months old at the time. Respondent father was charged with assaulting respondent mother.

¶ 2 The Alamance County Department of Social Services ("DSS") received a report about the family on 8 August 2019. The social worker had difficulty arranging a meeting with respondent parents. When the social worker met with respondent mother, she denied any domestic violence with respondent father or that he hit Lilly with a remote, but she agreed to have no contact with him pursuant to a no-contact order. Once the no-contact order was lifted, however, respondent parents began living together again.

¶ 3 On 3 September 2019, BPD received a service call at the Knights Inn for a child welfare check. When the responding officer spoke to respondent mother, she was "incoherent and said she had been up all night because she was concerned about snakes" in the motel room. Respondent

1. We use a pseudonym to protect the identity of the juvenile and for ease of reading.

father was asleep on the bed and difficult to wake up. It took several more minutes for respondent father to become coherent after officers woke him. Respondent father also told the officers that there were snakes in the motel room. Officers did not find any snakes in the room and contacted DSS.

¶ 4 DSS reported the motel room was in "complete disarray" and there was no appropriate place for Lilly to sleep. There were open food containers, feminine hygiene products on the floor, and no sheets on the bed.

¶ 5 On 20 September 2019, DSS filed a petition alleging Lilly was neglected and dependent. DSS alleged respondent parents believed there were snakes in the motel room where they lived with Lilly, although none were present. DSS requested respondent parents submit to a drug screen, but both declined. During a later Child and Family Team meeting, respondent parents denied substance misuse and continued to assert there were snakes in the motel room. Respondent parents agreed to a Temporary Safety Plan, which included placement with a maternal aunt and uncle. Respondent father later objected to the placement. A Rule 17 Guardian ad Litem was appointed for respondent father due to him suffering bipolar and depressive episodes and a traumatic brain injury from being struck in the head.

¶ 6 On 6 November 2019, the trial court adjudicated Lilly neglected and dependent. In the dispositional portion of the order, the trial court ordered respondent mother: 1) maintain sufficient employment; 2) obtain and maintain safe and stable housing; 3) utilize mental health services and undergo psychological assessment; 4) engage in substance abuse treatment and submit to drug screens; 5) participate in parenting and domestic violence classes; and 6) update DSS about her progress on her case plan. The trial court ordered respondent father to take similar steps to achieve reunification, in addition to Substance Abuse Intensive Outpatient Program ("SAIOP") classes.

¶ 7 The trial court kept Lilly in her placement with the maternal aunt and uncle. The trial court granted respondent parents weekly supervised visits with Lilly. In a July 2020 order, the trial court expanded respondent parents' visitation.

¶ 8 In September 2020, the trial court entered an initial permanency planning order, which set a primary permanent plan of reunification and a secondary plan of adoption. The trial court again ordered specific steps towards reunification as outlined in its dispositional order. It further indicated visitation could expand to include unsupervised visits if there were no issues or concerns with visitation.

¶ 9 A subsequent November 2020 order suspended all unsupervised visits between respondent parents and Lilly. The trial court found that respondent parents had gone to the home of a known drug dealer, that respondent father had suffered a cardiac incident, and that respondent parents had submitted diluted urine samples for drug screens. At the hearing, respondent father interrupted respondent mother's testimony and attempted to direct her. The next permanency planning hearing was continued until January 2021, and the trial court changed the permanent plan to a primary plan of adoption with a secondary plan of reunification.

¶ 10 On 29 January 2021, DSS filed a motion to terminate respondent parents' parental rights to Lilly. As to both respondent parents, the motion alleged grounds of neglect, willful failure to make reasonable progress, and willful failure to pay a reasonable portion of the cost of care. As to respondent father only, the motion also alleged dependency.

¶ 11 At the termination hearing, social worker Freddie Omotosho testified that Lilly came into DSS custody because of concerns about respondent parents' domestic violence, substance misuse, hallucinations, and lack of proper care and supervision. Respondent parents were ordered in the initial disposition to resolve their housing, mental health, substance abuse, and domestic violence issues to achieve reunification with Lilly. Ms. Omotosho testified in detail about respondent parents' lack of progress on their case plans. Social worker Madalyn Schulz, who received the case after Ms. Omotosho, similarly described respondent parents' difficulties in working with the services offered by DSS to complete the goals of their respective case plans.

¶ 12 Dr. Julianna Ludlam conducted psychological evaluations on both respondent parents, which were admitted at the termination of parental rights adjudication hearing. Dr. Ludlam described how both respondent parents denied the existence of domestic violence and substance misuse despite evidence to the contrary, including police reports from prior incidents. Dr. Ludlam testified she did not have "major concerns" about respondent mother's substance misuse, but that respondent father's frequent trips to the hospital "showed the extent of his potential substance abuse problem," in part because some addicts use the emergency department as a method of obtaining prescription drugs. Respondent parents described one another as great parents, and they did not recognize any issues in their relationship with Lilly. According to Dr. Ludlam, respondent mother's ongoing relationship with respondent-father and her continued defense of him placed Lilly "at higher risk." Dr. Ludlam testified:

> So it was not my concern that either [respondent father] or [respondent mother] would purposefully, intentionally neglect or abuse their daughter. It was clear to me that both parents love their daughter and want the best for her. My concerns were, at the time of the evaluation, that [respondent father's] use of substances could—for one, could either lead to her being neglected or being exposed to risky situations involving drug use or the aftermath of drug use. I think that was my primary concern.

¶ 13 After hearing the evidence, the trial court adjudicated grounds to terminate respondent parents' parental rights based on neglect, willful failure to make reasonable progress, and willful failure to pay a reasonable portion of the cost of care. In a separate dispositional order, the trial court also concluded that termination of parental rights was in Lilly's best interests. The dispositional order indicates that the matter was heard by Judge Fred Wilkins, but the order is signed "F. Wilkins by Bradley Reid Allen 6/1/21."

II. Standard of Review

¶ 14 A termination of parental rights proceeding consists of a two-stage process: adjudication and disposition. N.C. Gen. Stat. §§ 7B-1109, -1110 (2020). At adjudication, the trial court examines the evidence and determines whether sufficient grounds exist under § 7B-1111 to authorize the termination of parental rights. § 7B-1109(e). The burden is upon the petitioner to demonstrate that grounds for termination exist, and the trial court's findings of fact must be based on "clear, cogent, and convincing evidence." § 7B-1109(f). "If the trial court determines that any one of the grounds for termination listed in § 7B-1111 exists, the trial court may then terminate parental rights consistent with the best interests of the child." *In re T.D.P.*, 164 N.C. App. 287, 288, 595 S.E.2d 735, 736-37 (2004); § 7B-1110(a).

¶ 15 "We review a trial court's adjudication under N.C.G.S.§ 7B-1111 to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed for abuse of discretion." *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quotation marks and citations omitted). The trial court's conclusions of law are subject to *de novo* review. *In re N.D.A.*, 373 N.C. 71, 74, 833 S.E.2d 768, 771 (2019). An abuse of discretion occurs "where the court's ruling is manifestly unsupported by

reason or so arbitrary that it could not have been the result of a reasoned decision." *In re N.K.*, 375 N.C. 805, 819, 851 S.E.2d 321, 332 (2020).

¶ 16 "When the trial court is the trier of fact, the court is empowered to assign weight to the evidence presented at the trial as it deems appropriate. In this situation, the trial judge acts as both judge and jury, thus resolving any conflicts in the evidence." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996) (citations omitted). "[O]ur appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984) (citations omitted). "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." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted). "Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58-59 (2019) (citation omitted).

III. Discussion

¶ 17 In the case *sub judice*, the trial court's adjudication order was based on finding grounds existed for terminating respondent parents' parental rights pursuant to § 7B-1111(a)(1), (2), and (3) by clear, cogent, and convincing evidence. Specifically, the trial court concluded as a matter of law that respondent parents had: (a) neglected Lilly within the meaning of § 7B-101 and there is a high likelihood of repetition of neglect if Lilly is returned to their care; (b) willfully left Lilly in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made in correcting those conditions which led to Lilly's removal, and respondent parents' inability to provide care is not based upon their poverty; and (c) willfully failed to pay a reasonable portion of the cost of care for Lilly although physically and financially able to do so while Lilly was in DSS custody for a continuous period of six months preceding the filing of the motion to terminate parental rights.

A. Adjudication

¶ 18 **[1]** We first address the third ground for termination, failure to pay a reasonable portion of the cost of care. Pursuant to § 7B-1111(a)(3), a parent's rights can be terminated if the parent willfully fails to pay, for six months preceding the filing of the motion to terminate parental rights, a reasonable portion of the cost of care for the juvenile although

physically and financially able to do so. § 7B-1111(a)(3). DSS filed its motion to terminate parental rights on 29 January 2021, and the relevant six-month period to determine whether respondent parents had the ability to pay their reasonable portion of the cost of care is from 29 July 2020 to 29 January 2021.

> Our Supreme Court has held that a finding that a parent has ability to pay support is essential to termination for nonsupport. However, this Court has further clarified that there is no requirement that the trial court make a finding as to what specific amount of support would have constituted a "reasonable portion" under the circumstances, and therefore that the only requirement is that the trial court make specific findings that a parent was able to pay some amount greater than the amount the parent, in fact, paid during the relevant time period.

In re N.X.A., 254 N.C. App. 670, 676, 803 S.E.2d 244, 248, (*purgandum*), *disc. rev. denied*, 370 N.C. 379, 807 S.E.2d 148 (2017).

¶ 19 Respondent parents selectively challenge several of the trial court's findings of fact as to each ground for termination. Regarding ground three, failure to pay a reasonable portion of the cost of care, they argue the trial court erred by failing to consider "in-kind" contributions they made in lieu of financial support and assert their lack of support was not willful. Respondent father also challenges findings of fact 88, 93 and 100, which indicate during the relevant six-month period, respondent parents provided zero dollars towards the cost of Lilly's care and made a conscious decision not to pay child support.

¶ 20 However, there are a total of 245 remaining unchallenged findings of fact which support the trial court's reasoning. The trial court made many uncontested findings of fact regarding child support which are binding on appeal. Some of those unchallenged findings include but are not limited to the following:

> 80. The Respondent Mother was employed throughout the majority of the life of the foster care case at K & W. During the start of COVID, the mother was laid off but received unemployment compensation.
>
> 81. The Respondent Mother then was employed through Goodwill. That employment was short term as the mother was terminated for stealing. She never

informed the social worker she was terminated or why she was terminated.

82. The Respondent Mother then reported employment at Food Lion. The Respondent Mother testified that she works 30 hours a week at Food Lion. She had provided one paycheck stub from Food Lion which indicates that Respondent Mother works less than twenty hours a week.

83. The Respondent Father has received disability payments through the life of the foster care case. He was briefly employed through K & W.

84. In the dispositional order, the Respondent Parents were ordered to provide child support and instructed on how to get child support established. The mother could work with Child Support Enforcement/IVD. The father could establish a trust account. This was repeated in every review and permanency planning order.

. . .

86. During the relevant six-month period, neither parent made any effort to establish child support payments through the appropriate options.

87. During the relevant six-month period, the mother provided zero dollars towards the cost of care of the juvenile despite having the ability to pay more than zero.

. . .

89. The parents have provided items during visitation such as clothing, toys, diapers and wipes. *There was no prior agreement between the parents and the Alamance County Department of Social Services that these items would be counted towards child support or offset their child support obligation.* In fact, during this period of time, there were *ongoing court orders requiring the parents to pay their reasonable portion of the cost of care of the juvenile.*

90. The mother is able-bodied and has been employed during the course of the foster care case and/or received unemployment benefits.

> 91. The Respondent Mother has willfully failed to pay her reasonable portion for the cost of foster care during the relevant six-month period.
>
> 92. The Respondent Mother has willfully failed to pay her reasonable portion for the cost of foster care during the relevant six-month period.
>
> . . .
>
> 94. In the relevant six-month period prior to filing of the motion to terminate parental rights, the parents paid zero towards the cost of care for [Lilly].
>
> . . .
>
> 97. In March of 2021, the Respondent Mother completed a Voluntary support Agreement. It required her to pay $50.00 a month effective March 1, 2021. The mother has made one payment.
>
> . . .
>
> 99. After filing of the motion to terminate parental rights, the Respondent Father paid $300.00 into a trust account established by the Alamance County Department of Social Services for the benefit of [Lilly].
>
> . . .
>
> 101. Further, during a Child and Family Team Meeting, the Respondent Mother stated that her attorney advised her not to worry about paying child support. This further indicates a deliberate decision by the mother not to pay child support despite a court order requiring such payments.
>
> 102. The Alamance County Department of Social Services has expended funds for the cost of care of the juvenile.

¶ 21 Here, the uncontested findings support the trial court's adjudication finding grounds for termination of parental rights based on failure to pay a reasonable portion of the cost of care. These findings indicate respondent mother was employed throughout most of the life of the case and received unemployment benefits when she lost her job. Respondent father also received disability payments and was briefly employed.

Respondent parents were ordered to establish child support and they failed to do so.

¶ 22 Respondent mother cites *In re J.A.E.W.*, 375 N.C. 112, 117, 846 S.E.2d 268, 271 (2020), for the proposition that a trial court is required to consider "in kind" contributions as a form of support. However, *In re J.A.E.W.* contains no such holding. This argument is premised upon one sentence, "[The respondent father] also did not buy [the juvenile] clothing or other necessities while she was in foster care." *Id.* In context, this statement simply reinforces the undisputed fact that the respondent father in that case failed to make any form of child support payment and failed to make any other contribution to the care of his child while she was in DSS custody. The *In re J.A.E.W.* decision does not require a trial court to consider items or gifts as a form of support.

¶ 23 In this case, the trial court specifically acknowledged respondent parents had provided "in kind" contributions in the form of clothing, toys, diapers, etc., during their visits, but there was no agreement in place that these items would offset their support obligation. It was not error for the trial court to acknowledge these gifts but also determine they did not qualify as court ordered financial support payments for Lilly's care.

¶ 24 Thus, the trial court's adjudication order finding grounds existed for termination of parental rights pursuant to § 7B-1111(a)(3) was based on clear, cogent, and convincing evidence. Where there is sufficient evidence to support one ground of termination for respondent parents' parental rights, it is unnecessary for this Court to address the remaining grounds for termination. *See In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982) ("If either of the three grounds aforesaid is supported by findings of fact based on clear, cogent and convincing evidence, the order appealed from should be affirmed."). Thus, we do not address respondent parents' remaining challenges to the trial court's adjudication pursuant to § 7B-1111(a)(1) and (2) for neglect and willful failure to make reasonable progress.

B. Best Interests Determination

¶ 25 **[2]** Respondent mother has not challenged the trial court's determination that the termination of her parental rights would be in Lilly's best interest. Therefore, we affirm the trial court's termination order with respect to respondent mother. Respondent father does argue the trial court erred by finding it was in Lilly's best interests for his parental rights to be terminated. We address his arguments as follows.

¶ 26 Respondent father challenges findings of fact 12 and 28-31 of the dispositional order and reasserts his prior challenges to the findings of

fact as adopted from the underlying adjudication order. However, most of his arguments do not allege the findings are unsupported by evidence, but that the trial court weighed the evidence improperly. In a termination of parental rights hearing, trial judge determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, the trial judge alone determines the credibility of the witnesses and which inferences to draw and which to reject. *In re Hughes*, 74 N.C. App. 751, 759, 300 S.E.2d 213, 218 (1985).

¶ 27 "After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest." § 7B-1110(a).

> In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

Id.

¶ 28 Here, the trial court properly adjudicated grounds for terminating respondent father's parental rights. The dispositional order clearly states that the trial court "considered all factors as outlined" in § 7B-1110 and includes written findings addressing each of the relevant factors. We further note that these findings are supported by competent evidence in the record. We conclude that the trial court did not abuse its discretion by determining that it was in Lilly's best interest to terminate respondent father's parental rights. *See In re D.M.*, 378 N.C. 435, 440, 2021-NCSC-95, ¶ 11 (discerning no abuse of discretion where the trial court made written findings addressing each of the factors enumerated in § 7B-1110(a) and those findings were supported by competent evidence presented at the termination hearing).

C. Valid Best Interests Order

¶ 29 **[3]** In this case, Judge Bradley Reid Allen, Sr., signed the best interest order as follows: "F. Wilkins by Bradley Reid Allen, Sr., 6/1/21." Respondent parents contend the trial court's order terminating their parental rights was invalid because the presiding trial judge, Frederick B. Wilkins, did not sign the best interests order. We disagree.

¶ 30 North Carolina General Statutes Section 1A-1, Rule 52, governs findings by the trial court in non-jury proceedings. Under Rule 52, the trial court is "required to do three things in writing: (1) To find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising on the facts found; and (3) to *enter judgment accordingly*." *Coggins v. Asheville*, 278 N.C. 428, 434, 180 S.E.2d 149, 153 (1971) (*purgandum*) (emphasis added). Pursuant to § 7B-804, these requirements apply to juvenile proceedings. Here, the presiding judge did not sign the termination of parental rights order upon entry of judgment.

¶ 31 However, Rule 63 provides a procedure to follow when a district court judge is unavailable:

> If by reason of death, sickness or other disability, resignation, retirement, expiration of term, removal from office, *or other reason*, a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, *including entry of judgment*, may be performed:
>
> . . .
>
> (2) In actions in the district court, by the chief judge of the district, or if the chief judge is disabled, by any judge of the district court designated by the Director of the Administrative Office of the Courts.
>
> If the substituted judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or hearing or for any other reason, the judge may, in the judge's discretion, grant a new trial or hearing.

§ 1A-1, Rule 63 (2020) (emphasis added). "The function of a substitute judge under this rule is ministerial rather than judicial." *In re Savage*,

163 N.C. App. 195, 197, 592 S.E.2d 610, 611 (2004) (quotation marks and citations omitted).

¶ 32 Judge Allen did not sign the order in his own name, he signed it on behalf of Judge Wilkins, over a signature block with Judge Wilkins's name typed below. There is no indication in the record that Judge Allen made any substantive determinations in this case, and the written judgment is consistent with Judge Wilkins's oral rendering of judgment. Judge Allen signing the order on behalf of Judge Wilkins was a ministerial act consistent with the plain language of Rule 63.

IV. Conclusion

¶ 33 For the foregoing reasons, we affirm the trial court's adjudication and disposition orders terminating respondent parents' parental rights.

AFFIRMED.

Judges INMAN and ZACHARY concur.

IN RE R.J.P.

No. COA21-796

Filed 21 June 2022

1. Child Abuse, Dependency, and Neglect—guardianship—choice of family members—best interests of child

The trial court did not abuse its discretion by awarding guardianship of a child who was adjudicated neglected to his paternal great aunt and uncle and visitation only to the child's maternal grandparents—rather than granting co-guardianship to both couples as requested by the child's mother—where its unchallenged findings of fact were supported by competent evidence, and where those findings in turn supported the court's conclusion that this arrangement was in the best interests of the child.

2. Child Visitation—permanency planning order—mother denied visitation post-incarceration—abuse of discretion

In a permanency planning proceeding, the trial court abused its discretion by failing, pursuant to N.C.G.S. § 7B-905.1(a), to address a mother's visitation rights with her son upon the mother's then-imminent release from incarceration—after determining that

visitation would not be in the son's best interest while the mother was incarcerated.

Appeal by Respondent-Mother from orders entered 17 September 2021 by Judge Kathryn W. Overby in Alamance County District Court. Heard in the Court of Appeals 10 May 2022.

Jamie L. Hamlett, for Alamance County Department of Social Services, Petitioner-Appellee.

Parker Poe Adams & Bernstein LLP, by Adam C. Setzer, for Guardian ad Litem.

Anné C. Wright, for Mother-Appellant.

WOOD, Judge.

¶ 1 Respondent-Mother ("Mother") appeals from the trial court's orders granting guardianship of her son Ryan[1] to his paternal great aunt and uncle, Maria and Jordan Turner (the "Turners")[2], and granting visitation rights with Ryan to his maternal grandparents, Elly and Charles Palmer (the "Palmers")[3]. On appeal, Mother argues the trial court abused its discretion by 1) denying her visitation with Ryan, and 2) not granting co-guardianship of Ryan to the Turners and Palmers. After a careful review of the record and applicable law, we affirm in part the orders of the trial court and remand in part for an appropriate visitation plan.

I. Factual and Procedural Background

¶ 2 Mother and Father began a romantic relationship, and together, the couple had Ryan on July 22, 2014. In 2014, the Alamance County Department of Social Services ("DSS") received a report of a domestic violence incident between Mother and Father while Ryan was present. During the investigation, DSS became concerned Father was "aggressive in his behaviors towards . . . Mother[.]" DSS was also concerned both parties were engaging in substance abuse. Ultimately, DSS closed

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

2. Pseudonyms are used to protect the identity of the minor child. *See* N.C. R. App. P. 42(b).

3. Pseudonyms are used to protect the identity of the minor child. *See* N.C. R. App. P. 42(b).

the case as Services Recommended when Mother voluntarily returned to a residential treatment program. DSS recommended Mother "complete the full treatment program; seek counseling for domestic violence; and have no further contact with Respondent Father."

¶ 3 Approximately three years later, DSS received another report concerning Ryan. The report alleged Ryan was injured during an automobile accident that occurred because Mother was driving while under the influence of cocaine, marijuana, amphetamines, opiates, and benzos. Mother drove off of a bridge, landing in the water below. Ryan and Mother were able to climb up to safety, but Ryan "suffered a skull fracture, hematoma to the forehead and abrasion to the left upper shoulder."

¶ 4 In response to this report, DSS found the family to be in need of services and transferred the case to In-Home Services in New Hanover County on August 11, 2017. On August 23, 2017, the New Hanover County Department of Social Services ("NHCDSS") received a report regarding Ryan. This report alleged Mother was driving under the influence with Ryan in the car and was giving Ryan Benadryl to make him sleep. A few days later, NHCDSS created an initial plan for Mother to receive Substance Abuse and Mental Health treatment and for Ryan to begin receiving therapy services.

¶ 5 On October 27, 2017, Father notified NHCDSS he was concerned about Mother's behaviors. When NHCDSS spoke with Mother, she admitted to have been using cocaine, heroin, and Percocet in Ryan's presence. Four days later, Mother and Father decided to place Ryan with the Palmers. On November 28, 2017, Mother also moved into the Palmer's home. NHCDSS verified the move the next day, and the In-Home Services case was then transferred back to Alamance County. On August 16, 2018, NHCDSS closed its In-Home Services case.

¶ 6 Eight days later, Alamance County DSS received another report concerning Ryan. This report alleged Mother was under the influence of methamphetamines and driving with Ryan in the vehicle. The report also alleged Mother had assaulted Elly Palmer while Ryan was present. As a result, a safety plan was developed and a 50-B domestic violence protective order was granted against Mother. Meanwhile, Ryan continued to live with the Palmers. After the 50-B protective order expired, Mother moved back in with Elly Palmer. Shortly thereafter, DSS closed the case with services recommended for mental health and substance abuse treatment.

¶ 7 On February 18, 2020, DSS received a new report regarding Ryan. This report alleged Mother was acting erratic, "off her rocker[,]" and was

tearing up the house. Both Father and Ryan were present during this incident. Because of Mother's behavior, Father and Ryan were forced to vacate the house and "did not have a place to stay." The report further alleged DSS had concerns Ryan may have neurological problems but that Mother and Father continued to deny or minimize any potential mental health needs Ryan may have.

¶ 8 On April 20, 2020, DSS determined the family was in need of services and transferred the case to In-Home Services to address 1) Mother's and Father's mental health needs and substance abuse, 2) continuing relationship discord between the parties, and 3) Ryan's mental health needs. Sometime afterwards, Father moved to Wilmington, North Carolina.

¶ 9 On May 5, 2020, the Alamance County Sheriff's Office received a call about a suspicious person walking in the road, staggering, and flashing a flash light outside of the power plant in Graham, North Carolina. Deputy Stone responded to the scene and observed Father staggering and holding a flashlight. Deputy Stone transported Father back to the couple's residence. On the way, Father told Deputy Stone there was a shotgun inside the residence and that Mother was a felon. Upon arrival, Deputy Stone received consent to search the residence and discovered on the floor of the residence an un-locked, loaded shotgun within Ryan's access. Corporal T. Ray and Detective Wood also responded to the residence. Mother was arrested subsequent to the search and charged with possession of a weapon by a felon and child abuse. DSS received a report of this incident the following day and promptly conducted a pre-petition child family team meeting. There, it was agreed Ryan would stay with the Turners. Due to incarceration and the short notice of the meeting, Mother was not present at the meeting.

¶ 10 On May 7, 2020, DSS filed a juvenile petition alleging Ryan to be a neglected juvenile. The trial court entered a nonsecure custody order the same day, placing Ryan with the Turners. The trial court held two additional hearings regarding nonsecure custody of Ryan that same month. Mother remained incarcerated at the time of each hearing. After these hearings, the trial court entered orders continuing Ryan's placement with the Turners. In each order, the trial court found "[t]hat it is not in the best interest of the juvenile to have visitation/contact with Respondent Mother due to her current incarceration."

¶ 11 On July 15, 2020, the trial court conducted an adjudication and disposition hearing. Mother remained incarcerated as of the date of this hearing. By order entered August 4, 2020, the trial court adjudicated Ryan a neglected juvenile and continued his placement with the Turners. The order also contained the following relevant decrees:

> 7. That at this time, it is not in the juvenile's best interest to have visitation with the Mother due to her current incarceration. However, she may write letters and send them to the social worker to review and provide to the juvenile.
>
> 8. That . . . [Mother] may call between 1:00 p.m. – 3:00 p.m. twice a week. . . . [Mother] will be responsible for the cost of telephone calls. Discussion must be age appropriate. Phone contact must be supervised by the . . . [Turners] at a high level of supervision (eyes and ears on). If child gets distressed or upset, the . . . [Turners] can discontinue the telephone calls.
>
> 9. That no discussions of the case should take place with . . . [Ryan]. That if the phone calls are negatively impacting the juvenile's mental health, the calls will no longer be permitted.

¶ 12 Thereafter, Mother was released from incarceration. Meanwhile, Ryan continued to reside with the Turners. Maria Turner stated Ryan was "doing better" at his placement, "learning what 'no' means[]"; however, "some days are more difficult than others in regards to his defiance, but he is adjusting well . . . ."

¶ 13 On October 6, 2020, the trial court entered a review and permanency planning order. The trial court found that Ryan had been diagnosed with "ADHD, Generalized Anxiety Disorder, Oppositional Defiance Disorder and Post-Traumatic Stress Disorder." The trial court continued Ryan's placement with the Turners, ordered a primary plan of reunification with a secondary plan of guardianship, and granted Mother one hour of supervised visitation per week. The Palmers also were granted "unsupervised visitation, to include overnight, and the first and third weekend . . . of the month from 6:00 p.m. on Friday until 6:00 p.m. on Sundays."

¶ 14 On December 23, 2020, the trial court entered another review and permanency planning order that continued Ryan's placement with the Turners, granted the Palmers unsupervised visitations every first and third weekend of each month, and granted Mother one hour of supervised visitation per week. A few months later, DSS filed a report with the trial court stating that Ryan "appears well bonded to each of his parents and his placement providers." Ryan told DSS he enjoyed spending time with Elly Palmer and his parents but, at other times, also stated he does not want to go on the weekend visits to the Palmers' residence.

¶ 15 On June 28, 2021, the trial court entered a review and permanency planning order changing Ryan's primary plan to guardianship with a secondary plan of reunification. Another review hearing was scheduled for July 28, 2021 but continued until August 11, 2021, and DSS and the guardian ad litem filed reports with the trial court on August 11, 2021. DSS reported Ryan stated he "wants to live with his dad or the . . . [Turners] and does not wish to live with . . . [Elly Palmer]." Ryan had, occasionally, refused to visit Mrs. Palmer's residence; however, a DSS social worker observed that Ryan seems to enjoy his visits when he did attend. Elly Palmer informed DSS that she was "on disability due to Clinical Depression" and "takes medication to assist with her depression but feels that she won't be sad anymore if . . . [Ryan] comes to live with her, as it will give her 'something to do.' " The DSS report further detailed various instances during which the Palmers and Turners experienced discord regarding Ryan's visitation, rearing, and transitioning between the Palmers' and Turners' residences. Notwithstanding, DSS and the guardian ad litem both recommended in their reports that the trial court appoint the Palmers and the Turners co-guardians of Ryan.

¶ 16 On August 11, 2021, the trial court held a review and permanency planning hearing. At the time of this hearing, Mother remained incarcerated with a projected release date of November 22, 2021. Ms. Lambert, the supervising social worker, testified at the hearing that there was a lot of animosity between the Palmers and Turners. She reported that the day prior, another social worker spoke with Elly Palmer to review DSS's recommendation of the Palmers' and Turners' co-guardship of Ryan. According to Ms. Lambert, when Elly Palmer heard this recommendation, she became "very upset" and stated DSS "was being inappropriate, that this was the wrong statements." Elly Palmer further told the social worker "we'll just have to pray for them to die" so that she could acquire sole guardianship of Ryan. When the social worker told Elly Palmer these were inappropriate statements, she responded by laughing. Ms. Lambert explained, DSS was "very concerned that was, first of all, an inappropriate response. We were also concerned that maybe there was some emotional instability there, and then, finally, we were concerned that was a very strong indicator that they would not be able to work together as co-parents." Ms. Lambert reported DSS's recommendation changed from the Palmers and Turners having co-guardianship of Ryan to granting the Turners sole guardianship of Ryan. The guardian ad litem agreed with the change in recommendation.

¶ 17 The trial court entered a permanency planning order on September 17, 2021, decreeing,

> 1. That legal and physical guardianship, in accordance with N.C.G.S. § 7B-600, of . . . [Ryan] is granted to . . . [Maria and Jordan Turner].
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> . . .
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> 3. That . . . [Ryan] will primarily reside with the . . . [Turners] with visitation with the . . . [Palmers] every other weekend.
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> . . .
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> 20. That, at this time, due to . . . [Mother's] incarceration, visitation is contrary to the best interest, health and safety of the juvenile. That . . . [Mother] may send cards, letters and other forms of written communication to the juvenile through Mr. . . . [Turner]. That . . . [Mother] is permitted to have a minimum of one telephone call a week with the juvenile that is to be highly supervised by his placement provider. That . . . [Mother] is responsible for cost associated with such communication. These calls shall be at reasonable times not past 9:00 p.m. or before 8:00 a.m. That the phone calls shall not unduly disrupt the juvenile's daily schedule. That all communication shall be age appropriate and the mother shall not make promises to the juvenile.
>
> 21. That during periods of their incarceration, it would not be in the best interest for the juvenile to participate in visitations with the parents due to the limitation of jail visits and current COVID concerns.

The same day, the trial court issued a guardianship short order granting guardianship of Ryan to the Turners. The guardianship short order, likewise, granted guardianship of Ryan to the Turners and allowed the Turners to "disclose this order to third parties in order to show their legal authority over the minor child or otherwise promote and protect the best interests of the minor child[] . . . ." Mother filed a timely notice of appeal from both of these orders.[4]

4. Father did not appeal these orders.

II. Standard of Review

¶ 18 This Court reviews a permanency planning order to determine "whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004) (citing *In re Eckard*, 148 N.C. App. 541, 544, 559 S.E.2d 233, 235 (2002)). The trial court's findings of fact are conclusive on appeal if they are supported by competent evidence. *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991); *see In re J.C.S.*, 164 N.C. App. at 106, 595 S.E.2d at 161; *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003). Whether the trial court's findings of fact support its conclusions of law is reviewed *de novo*. *In re A.S.*, 275 N.C. App. 506, 509, 853 S.E.2d 908, 911 (2020).

¶ 19 "In choosing an appropriate permanent plan . . . the juvenile's best interests are paramount." *In re J.H.*, 244 N.C. App. 255, 269, 780 S.E.2d 228, 238 (2015); *see In re L.G.*, 274 N.C. App. 292, 297, 851 S.E.2d 681, 685 (2020) ("The purpose of a permanency planning hearing is to identify the best permanent plans to achieve a safe, permanent home for the juvenile consistent with the juvenile's best interest." (internal quotation marks omitted)). Although "[w]e review a trial court's determination as to the best interest of the child for an abuse of discretion[,]" *In re J.H.*, 244 N.C. App. at 269, 780 S.E.2d at 238 (quoting *In re D.S.A.*, 181 N.C. App. 715, 720, 641 S.E.2d 18, 22 (2007)), we have also held the best interest determination is a conclusion of law and thus subject to a *de novo* standard of review. *In re Helms*, 127 N.C. App. 505, 510-11, 491 S.E.2d 672, 675-76 (1997).

¶ 20 A trial court's order regarding visitation rights is reviewed for an abuse of discretion. *In re C.M.*, 273 N.C. App. 427, 432, 848 S.E.2d 749, 753 (2020); *see In re I.K.*, 273 N.C. App. 37, 49, 848 S.E.2d 13, 23 (2020), *aff'd*, 377 N.C. 417, 2021-NCSC-60. "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason or upon a showing that the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision." *In re C.M.*, 273 N.C. App. at 432, 848 S.E.2d at 753 (cleaned up) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

III. Discussion

¶ 21 Mother raises several issues on appeal; each will be addressed in turn.

A. Guardianship

¶ 22 **[1]** Initially, Mother contends the trial court abused its discretion by determining it was in Ryan's best interest to appoint the Turners as his sole guardians. We disagree.

1. Findings of Fact

¶ 23 Mother first argues finding of fact number 106 is not supported by clear and convincing evidence. This finding states, Ms. Palmer "is not a safe and appropriate person to have fulltime care and/or decision-making responsibility over the juvenile." At the hearing, Ms. Lambert testified as to Ms. Palmer's reaction and comments after being notified of DSS's recommendation for co-guardianship. "She made statements . . . that the Department was being inappropriate, that this was the wrong statements." Ms. Lambert further testified Ms. Palmer "also made statements that the . . . [Turners] were old and idiots, and . . . we'll just have to pray for them to die so that she can get . . . [Ryan]." Ms. Lambert explained DSS was "very concerned that was, first of all, an inappropriate response. We were also concerned that maybe there was some emotional instability there, and then, finally, we were concerned that that was a very strong indicator that they would not be able to work together as co-parents."

¶ 24 The trial court made the following unchallenged findings of fact relevant to finding of fact number 106:

> 48. . . . [Mrs. Turner] has shared that when . . . [Ryan] was around two years old, she was changing his diaper and Mrs. . . . [Palmer] was at her home and came over and placed her hand over his mouth and nose when he was wiggling around. There is no documentation of this concern being shared with law enforcement or CPS at the time of the incident.
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> . . .
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> 50. Recently[] . . . [Ryan] refused to go to Mrs. . . . [Palmer's] home and did not visit during the week of July 10. It was reported that during the recent attempted transition, . . . [Ryan] refused to go to Mrs. . . . [Palmer's] home and ran around the house, having the adults chase him. Both parties had varying views of the events that took place, but both maintain that . . . [Ryan] refused to go with the . . . [Palmers] and remained at the . . . [Turner's] home. Mrs. . . . [Palmer] stated that Mrs. . . . [Turner] yelled at her that . . . [Ryan] was not going with her. Mrs. . . . [Turner] reported that Mrs. . . . [Palmer] was pulling . . . [Ryan] and trying to physically force him to go with her.

> . . .
>
> 60. On July 22, 2021, SW observed . . . [Ryan's] transition back to the . . . [Turner's] home. When Mrs. . . [Palmer] exited the car, Mrs. . . . [Palmer] stated to SW, "early morning for you"! [sic] SW replied, "I'm just working!" Mrs. . . . [Palmer] asked SW where she worked. This interaction was concerning as Mrs. . . . [Palmer] did not appear to recognize SW, although Mrs. . . . [Palmer] has met with SW multiple times and talks frequently on the phone to SW.
>
> . . .
>
> 65. Mrs. . . . [Palmer] informed SW that she was on disability due to Clinical Depression, stemming from the loss of her two sons. Mrs. . . . [Palmer] stated that she takes medication to assist with her depression but feels that she won't be sad anymore if . . . [Ryan] comes to live with her, as it will give her "something to do." This is an inappropriate reason for a child to live with someone.

Because none of these findings were challenged by Mother, they are binding on appeal. *Isom v. Duncan*, 279 N.C. App. 171, 2021-NCCOA-453, ¶ 1. Therefore, based upon Ms. Lambert's testimony at the hearing, along with the additional findings of fact within the permanency planning order, we conclude competent evidence was presented to support finding of fact number 106.

¶ 25 To the extent Mother attempts to support her argument finding of fact number 106 is not supported by competent evidence by offering alternative evidence, "[f]acts found by the judge are binding upon this court if they are supported by any competent evidence notwithstanding the fact that the appellant has offered evidence to the contrary." *Williams v. Williams*, 261 N.C. 48, 56, 134 S.E.2d 227, 233 (1964) (first citing *Mercer v. Mercer*, 253 N.C. 164, 116 S.E.2d 443 (1960); then citing *Briggs v. Briggs*, 234 N.C. 450, 67 S.E.2d 349 (1951)); *see Heatzig v. MacLean*, 191 N.C. App. 451, 454, 664 S.E.2d 347, 350 (2008). Thus, because we are holding today finding of fact number 106 is supported by competent evidence, we need not address Mother's alternative evidence.

2. Conclusions of Law

¶ 26 Because we hold finding of fact number 106 is supported by competent evidence, and Mother has not challenged any other finding of

fact, we must determine whether the findings of fact support the trial court's conclusion of law. Specifically, Mother contends the trial court's conclusions of law numbers 20 and 24 are not supported by "clear, cogent, and convincing evidence." Conclusion of law number 20 provides, "[t]he current placement is appropriate and in the best interest of the juvenile." Similarly, conclusion of law number 24 states, "[t]hat this Order is in the best interest of the juvenile and consistent with the juvenile's health and safety."

¶ 27 Under N.C. Gen. Stat. § 7B-906.1,

> [t]he court may maintain the juvenile's placement under review or order a different placement, appoint a guardian of the person for the juvenile pursuant to G.S. 7B-600, or order any disposition authorized by G.S. 7B-903, including the authority to place the child in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the *best interests of the juvenile*.

N.C. Gen. Stat. § 7B-906.1(i) (2021) (emphasis added). "[T]he fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody, to wit, [is] that the best interest of the child is the polar star." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984).

¶ 28 As we stated *supra*, we review a permanency planning order's conclusions of law to determine whether they are supported by its findings of fact. *In re J.T.S.*, 268 N.C. App. 61, 67, 834 S.E.2d 637, 642 (2019); *In re J.C.S.*, 164 N.C. App. at 106, 595 S.E.2d at 161. Any unchallenged finding of fact is presumed to be supported by competent evidence and, thus, binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). In addition to the findings of fact stated *supra*, the trial court made the following findings of fact:

> 14. Freddie Omotosho[5] testified and verbally amended the recommendations in the written report to reflect a recommendation of guardianship to the . . . [Turners] only and visitation for the . . . [Palmers]. The change in the recommendation is based [sic] the fact that . . . [Ryan] has been with the . . . [Turners] for over

5. Social Worker Freddie Omotosho was not present at the hearing. Ms. Lambert supervises Mr. Omotosho and assisted with the preparation of DSS's report.

one year, the . . . [Turners] were hesitant to take on permanent care of . . . [Ryan] due to their age but are now willing to provide longer term care and on Ms. . . . [Palmer's] inappropriate reaction to the recommendation that she work with the . . . [Turners], which makes it unlikely the . . . [Turners and Palmers] would be able to work together for the best interest of the juvenile.

. . .

16. The Guardian *ad litem* testified and orally amended her recommendations to be in alignment with the revised, oral recommendations of the social worker.

. . .

33. . . . [Ryan] has continued to reside in the home of his paternal relatives, Mr. and Mrs. . . . [Turner], since coming into care in May 2020.

34. Apart from . . . [Ryan's] reluctant behavior in visiting Mrs. . . . [Palmer], the placement providers report no concerns in the placement home and SW has observed a loving and warm bond between . . . [Ryan] and the placement providers.

. . .

42. SW has been able to observe . . . [Ryan] with his parents, individually, as well as with the placement providers during the life of the case. . . . [Ryan] appears bonded to each of his parents and his placement providers.

43. . . . [Ryan] reports that he enjoys spending time with his parents and with the placement providers.

44. . . . [Ryan] stated that he wants to live with his dad or the . . . [Turners] and does not wish to live with Mrs. . . . [Palmer].

45. Previously, Mrs. . . . [Turner] has stated that given the ages of her and her husband that they cannot commit to permanent placement of . . . [Ryan]. More recently, the . . . [Turners] have stated that they are committed to providing permanence for . . . [Ryan] and wish to be considered as legal guardians.

. . .

52. During this . . . [Child and Family Team meeting], all parties were difficult to keep on track and often focused topics on their indifferences with one another. The facilitator had to redirect multiple times during the meeting.

. . .

58. Mrs. . . . [Palmer] has stated that sometimes . . . [Ryan] does refuse to come to her home but that after he is there, they always have a great time. . . .

67. In the fall of 2020, Mrs. . . . [Palmer] was struggling with managing her depression but as of the spring of 2021, has since become more stable and able to manage her symptoms more effectively. The Department was able to review her records and confirm compliance.

. . .

98. The . . . [Turners] have demonstrated for over one year the ability to meet the needs of . . . [Ryan], financially, emotionally and otherwise.

99. The . . . [Turners] express an understanding of the role and responsibility of guardians and willingness to take on that role.

100. The . . . [Turners and Palmers] have attempted to work together but appear to have difficulty with interactions. This will make it difficult for them to work together to make decisions in the best interests of the juvenile.

. . .

104. When the Department informed Ms. . . . [Palmer] about a change in recommendation to grant joint guardianship, the day prior to this hearing, Ms. . . . [Palmer] stated that she would just have to pray that the . . . [Turners] die. There have been some ongoing concerns about Ms. . . . [Palmer's] mental health. SW Omotosho testified, that her actions regarding the recommendation change appears to be a 'clear

> indicator' that she would not be able to co-parent with the . . . [Turners] successfully.

¶ 29 We conclude these findings of fact support conclusions of law numbers 20 and 24. Accordingly, we hold the trial court did not abuse its discretion by granting sole guardianship to the Turners and granting visitation only to the Palmers.

B. Visitation

¶ 30 **[2]** Mother next contends the trial court abused its discretion in denying her visitation with Ryan. We agree.

¶ 31 As a general rule, a parent has a "natural" and "legal" right to visit with his or her child and this should not be disturbed when awarding custody to another unless the parent's conduct is such that this right is forfeited, or the exercise of this right "would be detrimental to the best interest and welfare of the child." *In re Custody of Stancil*, 10 N.C. App. 545, 551, 179 S.E.2d 844, 849 (1971). Thus, when an order "removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home[, the order] shall provide for visitation that is in the *best interests of the juvenile* consistent with the juvenile's health and safety, including no visitation." N.C. Gen. Stat. § 7B-905.1(a) (2021) (emphasis added); *see also Routten v. Routten*, 374 N.C. 571, 578, 843 S.E.2d 154, 159 (2020) ("[T]he trial court must apply the 'best interest of the child' standard to determine custody and visitation questions . . . ."), *cert. denied*, 141 S. Ct. 958, 208 L. Ed. 2d 495 (2020); *In re Custody of Stancil*, 10 N.C. App. at 552, 179 S.E.2d at 849.

¶ 32 "When the question of visitation rights of a parent arises, the court should determine from the evidence presented whether the parent by some conduct has forfeited the right or whether the exercise of the right would be detrimental to the best interest and welfare of the child." *In re Custody of Council*, 10 N.C. App. at 552, 179 S.E.2d at 849. If the trial court does not find the parent's conduct has forfeited his or her visitation right, or that such right is detrimental to the child's welfare and best interest, it "should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place and conditions under which such visitation rights may be exercised." *Id.*

¶ 33 We pause to note Mother, in her brief, specifically challenges finding of fact number 19, stating "[t]he trial court found that it was contrary to Ryan's best interest and inconsistent with his health and safety to have visitation with Mother. (R p 385, FOF #19). The finding of fact is not supported by clear, cogent, and convincing evidence." Our review of

the record reveals finding of fact number 19 does not address visitation as cited by Mother's brief.[6] Rather, conclusion of law number 19 states, "[t]hat it is contrary to the best interest of the juvenile and inconsistent with the juvenile's health and safety to have visitation with the Respondent Mother." Thus, we presume Mother intended to challenge conclusion of law number 19 and, as such, shall review whether the trial court's order findings of fact support its conclusion of law number 19. *Accord State v. Holland*, 230 N.C. App. 337, 344, 749 S.E.2d 464, 468 (2013)

¶ 34 Here, the trial court found Mother does not remain available to the court, DSS, and guardian ad litem; is not actively participating in or cooperating with the plan, DSS, and guardian ad litem; and is "acting in a manner inconsistent with the health and safety of the juvenile." It furthered that during the review period, the social worker "had very limited contact with . . . [Mother] due to her unknown whereabouts and incarceration[,]" and Mother was "sentenced to 9-20 months for . . . [a] probation revocation." Based upon these findings of fact, we conclude conclusion of law number 19 is supported by the findings of fact.

¶ 35 Here, the trial court ordered the following visitation plan between Mother and Ryan:

> 20. That, at this time, due to . . . [Mother's] incarceration, visitation is contrary to the best interest, health and safety of the juvenile. That . . . [Mother] may send cards, letters and other forms of written communication to the juvenile through Mrs. . . . [Turner]. That . . . [Mother] is permitted to have a minimum of one telephone call a week with the juvenile that is to be highly supervised by his placement provider. That . . . [Mother] is responsible for cost associated with such communication. These calls shall be at reasonable times not past 9:00 p.m. or before 8:00 a.m. That the phone calls shall not unduly disrupt the juvenile's daily schedule. That all communication shall be age appropriate and the mother shall not make promises to the juvenile.
>
> 21. That during periods of their incarceration, it would not be in the best interest for the juvenile to

6. Finding of fact number 19 states, "[t]he court has inquired and no one presents information that the juvenile is a Mexican Minor or American Minor as defined in the Memorandum of Agreement between the Consulate general of Mexico in Raleigh and the Government of the State of North Carolina."

> participate in visitations with the parents due to the limitation of jail visits and current COVID concerns.

Mother does not argue that her visitation should be not suspended while she is incarcerated; rather, she asserts the trial court made no findings regarding her visitation rights after she is released from prison. We agree.

¶ 36 Section 7B-905.1 provides the trial court "shall provide for visitation that is in the best interests of the juvenile . . . ." § 7B-905.1(a)(1). Our General Assembly's use of the language " 'shall' is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error." *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001) (citation omitted). Here, the trial court provided no guidance as to what visitation rights, if any, Mother has with Ryan upon her release from prison.

¶ 37 Indeed, the trial court was aware of Mother's pending release as it found, Mother "was transferred to the NC Women's Correctional Institution and anticipated to be released November 24, 2021." The permanency planning order was entered approximately two months prior to November 24, 2021. Because Mother's release from prison was imminent, the trial court should have provided for a visitation plan after her release that was in Ryan's best interest. We are mindful of that fact that Mother's projected release date will have long passed by the date of this opinion. Therefore, we remand to the trial court for further findings of fact regarding visitation between Mother and Ryan and an appropriate visitation schedule. In making the determination regarding an appropriate visitation schedule, the trial court may conduct a new hearing in order to examine the current circumstances of Ryan and Mother to determine what schedule is in the best interests of Ryan.

IV. Conclusion

¶ 38 For the foregoing reasons, we affirm the orders of the trial court granting guardianship to the Turners. However, we remand the September 17, 2021 permanency planning order to the trial court for further findings of fact and a determination of an appropriate visitation schedule between Mother and Ryan. It is so ordered.

AFFIRMED IN PART AND REMANDED IN PART.

Judges INMAN and ARROWOOD concur.

JAIN v. JAIN

[284 N.C. App. 69, 2022-NCCOA-408]

NEELIMA JAIN, PLAINTIFF
v.
ASHOKKUMAR JAIN, AA BUSINESS PROPERTIES, LLC AND INDIA FOUNDATION, AND KIDZCARE PEDIATRICS PC KIDZ CARE PLAZA CONDOMINIUM OWNERS ASSOCIATION, INC. AND JAIN PROPERTIES, LLC AND JAIN STERLING PROPERTIES, LLC AND 4A PROPERTIES, LLC AND PEDIATRIC FRANCHISING INC., DEFENDANTS

No. COA21-468

Filed 21 June 2022

Child Custody and Support—child's reasonable needs—competent evidence—post-separation support affidavit in separate hearing

An order requiring defendant-father to pay nearly $6,200 per month in child support to plaintiff-mother was vacated and remanded where the findings of fact concerning the child's reasonable needs for shelter, clothing, electricity, and utilities were not supported by competent evidence—and plaintiff-mother's post-separation support (PSS) affidavit, which was introduced in a separate hearing for PSS on the same day but not introduced in the child support hearing, could not be considered competent evidence in support of the findings in the child support order. In addition, the findings concerning the child's reasonable needs did not support the award of child support and gave no indication of any methodology applied in reaching the award.

Appeal by Defendant Ashokkumar Jain from order entered 22 April 2021 by Judge Toni S. King in Cumberland County District Court. Heard in the Court of Appeals 9 February 2022.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III, for Plaintiff-Appellee Neelima Jain.

Adams Burge & Boughman, by Harold Lee Boughman, Jr., for Defendant-Appellant Ashokkumar Jain.

COLLINS, Judge.

¶ 1 Defendant Ashokkumar Jain appeals from an order requiring him to pay $6,196.50 per month in child support to his former wife, Plaintiff Neelima Jain. Defendant argues that the trial court made unsupported findings of fact, failed to make sufficient findings of fact, and erred and

abused its discretion in its award of child support. Because the trial court's findings of fact concerning the minor child's reasonable needs for shelter, clothing, electricity, and utilities were unsupported by competent evidence adduced at the child support hearing, we vacate the order and remand to the trial court.

I. Background

¶ 2 Plaintiff and Defendant married in October 1994, had two children during their marriage, and separated in March 2016. Plaintiff filed this action in May 2017 seeking child support, equitable distribution, alimony, post separation support ("PSS"), and attorneys' fees.[1] Plaintiff and Defendant's older child reached the age of majority before they separated but their younger child, the subject of the child support claim, reached the age of majority during the pendency of this appeal.

¶ 3 On 1 February 2018, the trial court entered an order obligating Defendant to pay Plaintiff $2,370.00 per month for temporary child support for their minor child and $4,000 per month for PSS.

¶ 4 On 20 January 2021, the parties appeared before the trial court to address numerous issues. Plaintiff initially requested, "Administratively, can we proceed with the child support first since it's by testimony?" The trial court answered affirmatively. Defendant noted that he had an oral motion to dismiss PSS review because there was no substantial change in circumstances. The trial court stated that it would hold Defendant's motion until after addressing child support and confirmed that Plaintiff was "going to move forward with the permanent child support" claim. Plaintiff answered yes, and the trial court proceeded to hear Plaintiff's claim for permanent child support. The Exhibits/Evidence Log reflects that the trial court received the following as exhibits during the child support hearing: Defendant's 2019 W-2, Defendant's paystub for the first two weeks of May 2020, statements of Defendant's 2019 K-1 distribution income, a statement of Plaintiff and Defendant's joint BB&T account, a statement acknowledging payment of a First Citizens Bank loan, an insurance policy for a car driven by the minor child, copies of passports for Defendant and the minor child, a Wells Fargo credit card statement, and documentation of travel and basketball expenses for the minor child. After hearing testimony and argument, the trial court stated that it would "have to take this under advisement."

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1. Plaintiff and Defendant have been divorced in a separate proceeding in Cumberland County.

¶ 5 The trial court next held a hearing on motions to modify Defendant's PSS payment.[2] During this hearing, the trial court reminded the parties, "Generally we do the post-separation support by affidavits." The trial court and the parties referred to multiple financial affidavits including two executed by Plaintiff: a Post Separation Support Affidavit filed in September 2020 ("2020 PSS Affidavit") and another Post Separation Support Affidavit filed in July 2017 ("2017 PSS Affidavit"). The trial court marked the 2020 PSS Affidavit, 2017 PSS Affidavit, and other documents as "PSS Exhibits" in the Exhibits/Evidence Log under a separate heading from the exhibits received during the child support hearing. No live testimony was offered during the PSS hearing. At the conclusion of the PSS hearing, the trial court declined to modify Defendant's PSS payment. Immediately thereafter, the trial court rendered an oral ruling on child support. The trial court subsequently addressed issues concerning scheduling, discovery, expert witnesses, and interim equitable distribution.

¶ 6 On 22 April 2021, the trial court entered a Permanent Child Support Order and Interim Equitable Distribution Order ("Child Support Order"). The Child Support Order required Defendant to pay $6,196.50 per month for permanent child support, pay 70% of the minor child's healthcare costs not covered by insurance, provide private health insurance coverage for the minor child, and provide an insured vehicle for the benefit of the minor child. Defendant appealed.

II. Discussion

¶ 7 Defendant argues that the trial court made findings of fact unsupported by evidence properly before the trial court at the child support hearing; failed to make sufficiently specific findings concerning the minor child's reasonable needs; and erred and abused its discretion by ordering Defendant to pay $6,196.50 for child support.

¶ 8 Child support payments "shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." N.C. Gen. Stat. § 50-13.4(c) (2021). Ordinarily, the trial court "shall determine the amount of child support payments by applying the presumptive guidelines[.]" *Id.* However, where "the parents' combined adjusted gross income is more than $30,000 per month ($360,000 per year), the

2. The parties referred to multiple motions pertaining to PSS before the trial court, but those motions were not included in the record for the present appeal.

supporting parent's basic child support obligation cannot be determined by using the child support schedule." Determination of Support in Cases Involving High Combined Income, N.C. Child Support Guidelines (2021).

> [W]here the parties' income exceeds the level set by the Guidelines, the trial court's support order, on a case-by-case basis, must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount. The determination of a child's needs is largely measured by the accustomed standard of living of the child.

Smith v. Smith, 247 N.C. App. 135, 145-46, 786 S.E.2d 12, 21 (2016) (quotation marks and citations omitted). "[O]ur appellate courts have long recognized that a child's reasonable needs are not limited to absolutely necessary items if the parents can afford to pay more to maintain the accustomed standard of living of the child." *Id.* at 146, 786 S.E.2d at 22 (citations omitted).

¶ 9 "[T]o determine the reasonable needs of the child, the trial court must hear evidence and make findings of *specific* fact on the child's actual past expenditures and present reasonable expenses." *Jackson v. Jackson*, 280 N.C. App. 325, 2021-NCCOA-614, ¶ 16 (quotation marks and citation omitted). "These findings must, of course, be based upon competent evidence[.]" *Atwell v. Atwell*, 74 N.C. App. 231, 234, 328 S.E.2d 47, 49 (1985). We review a trial court's child support order for an abuse of discretion. *Jonna v. Yarmada*, 273 N.C. App. 93, 122, 848 S.E.2d 33, 54 (2020).

¶ 10 Here, the trial court made the following pertinent findings of fact in support of its award of $6,196.50 in monthly child support:

> 12. . . . Defendant's gross yearly income for 2019 is $1,945,664.60, giving Defendant a gross monthly income of $162,138.71.
>
> 13. The court has reviewed the financial affidavits, the prior order and findings, and the court further explained that it is taking judicial notice of the findings in prior orders in addition to the evidence presented.
>
> 14. The Court finds the minor child does have reasonable needs with regards to shelter, clothing, electricity and utilities.

15. The minor child also has reasonable needs for food, transportation, subscriptions to gym memberships and other recreational activities that the child was accustomed to when the parties had an intact marriage.

16. The minor child has reasonable expenses to travel to include trips to India at approximately $4,000.00 a ticket per year, trips to different countries of an average cost of $1,500.00 per year, and local trips within the United States at an average yearly cost of approximately $600.00.

17. The court finds the reasonable expenses for shelter for the minor child is approximately $1,850.00, and the minor child does reside with the Plaintiff mother, as well as the utilities expenses incurred in the home.

18. The minor child has a reasonable expense for a vehicle payment for a Nissan Altima. That the minor child previously had a vehicle, a 2020 Honda Civic, that Defendant was paying $434.48 per month, but that vehicle has since been sold. The current vehicle payment for the Altima is approximately $300.00.

19. There is a vehicle insurance premium of $342.80 per month, and that the Court concludes the premium is based on the minor child's maturity and lack of experience in driving.

20. That the minor child does have issues with his knee since he is an avid basketball player. The minor child has been referred to physical therapy for his knee, where there is [a] $70 co-pay for each visit. The minor child needs to go twice a week, but has been going one time per week.

21. The Court will find that the minor child has reasonable expenses that suit his accustomed standard of living of approximately $6,885.00 and therefore the court is going to order said amount.

22. The Court will find that Defendant has the means and ability to pay the child support based on the income that he earns. And the court will enter an order requiring the parties share in the minor child's reasonable expense.

. . . .

> 24. The Court finds the Defendant's share of the minor child's expenses will be 90% which is $6,196.50. . . .

¶ 11 Defendant challenges Finding 14 and Finding 17 as unsupported by competent evidence. We agree. Both Plaintiff and Defendant testified at the child support hearing, but neither testified concerning the minor child's expenses for shelter, clothing, electricity, or utilities. Plaintiff instead argues that values listed in her 2020 PSS Affidavit support the trial court's findings and underscores the trial court's statement that it "reviewed the financial affidavits" prior to making the child support award.[3]

¶ 12 This Court has recognized that parties may introduce affidavits in support of claims for child support. *See Smith*, 247 N.C. App. at 151, 786 S.E.2d at 25 ("Affidavits are acceptable means by which a party can establish" past expenditures for a child); *Row v. Row*, 185 N.C. App. 450, 460, 650 S.E.2d 1, 7 (2007) (holding that the parties' financial affidavits "were competent evidence [] which the trial court was allowed to rely on in determining the cost of raising the parties' children"); *Savani v. Savani*, 102 N.C. App. 496, 502, 403 S.E.2d 900, 904 (1991) ("[A]n affidavit is recognized by this court as a basis of evidence for obtaining support."). However, such affidavits must be properly before the trial court because the trial court is constrained to "determine what pertinent facts are actually established *by the evidence before it*[.]" *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (emphasis added).

¶ 13 In this case, the trial court held a child support hearing and a PSS review hearing on the same day. But, as both the parties and the trial court acknowledged on that day, the child support and PSS hearings were distinct proceedings. The trial court first held the child support hearing, took the issue under advisement, and then heard motions to modify PSS. While the parties and the trial court relied on the PSS Affidavits at the PSS hearing, neither Plaintiff nor Defendant sought to admit either affidavit during the child support hearing. As a result, the affidavits were not before the trial court during the child support hearing and cannot be considered competent evidence in support of the trial court's findings concerning the minor child's reasonable needs.

¶ 14 Plaintiff contends that a "plethora of cases hold that financial affidavits . . . are proper filings from which trial courts may compute child support." While true, none of the cases cited by Plaintiff stand for the

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3. Plaintiff's argument that the trial court's findings of fact are properly supported does not rely on the 2017 PSS Affidavit.

proposition that a financial affidavit relied upon during a different proceeding, and not submitted at the hearing on child support, is sufficient to support findings in an order for permanent child support. *See Koufman v. Koufman*, 330 N.C. 93, 98-99, 408 S.E.2d 729, 731-32 (1991) (holding that the trial court's adjustment of eleven fixed expenses claimed by the plaintiff was supported by plaintiff's affidavit of financial standing, filed with the trial court prior to the completion of the child support hearing); *Smith*, 247 N.C. App. at 151-52, 786 S.E.2d at 25-26 (affirming the trial court's findings of fact because the inconsistency in defendant's testimony explaining her financial affidavits was "only [a] credibility issue[] to be resolved by the trial court" and the "evidence before the court otherwise established [defendant's] expenditures for the relevant time period"); *Savani*, 102 N.C. App. at 501-02, 403 S.E.2d at 903-04 (rejecting "defendant's assertion that plaintiff's affidavit did not constitute evidence of actual expenditures" where plaintiff testified in explanation of the figures in the affidavit); *Byrd v. Byrd*, 62 N.C. App. 438, 440-41, 303 S.E.2d 205, 207-08 (1983) (rejecting plaintiff's argument that findings in the child support order were not sufficiently specific where the trial court "made specific reference to the defendant's affidavit" itemizing the children's expenses "rather than setting forth the specific facts regarding the needs of the children"); *McLeod v. McLeod*, 43 N.C. App. 66, 66-68, 258 S.E.2d 75, 76-77 (1979) (affirming child support and alimony awards where the trial court made findings "[o]n the basis of extended exhibits and testimony," including an affidavit of the wife's expenses, and "[n]o exception was taken from these findings of fact").

¶ 15 Plaintiff characterizes Defendant's argument as a "highly technical evidentiary argument." We recognize that trial courts may hear motions for child support and PSS concurrently, or may hear such motions consecutively with the parties agreeing, explicitly or implicitly, to have the trial court consider all evidence presented for both issues. *See, e.g.*, *Gilmartin v. Gilmartin*, 263 N.C. App. 104, 106-07, 822 S.E.2d 771, 773 (2018) (concluding it was clear from the conduct of the parties that the trial court heard claims for alimony and equitable distribution during the same hearing). But here, the trial court held clearly distinct child support and PSS review hearings on the same day and nothing in the record supports a conclusion that the parties agreed to have the trial court consider all evidence presented at each hearing for both issues. It is far from a technicality, and in fact it is a requirement, that the trial court is bound to "determine what pertinent facts are actually established by the evidence before it[.]" *Coble*, 300 N.C. at 712, 268 S.E.2d at 189.

¶ 16 For the same reasons, we strike Plaintiff's supplement to the record on appeal pursuant to N.C. R. App. P. 9(b)(5)(a), containing (1) an

18 November 2021 affidavit of her trial counsel seeking to explain the proceedings before the trial court, (2) the 2020 PSS Affidavit, and (3) the 2017 PSS Affidavit, and deny Plaintiff's motion to amend the record to incorporate these documents pursuant to N.C. R. App. P. 9(b)(5)(b). *See State v. McGaha*, 274 N.C. App. 232, 238, 851 S.E.2d 659, 663 (2020) (holding that a form which had never been filed with or presented to the trial court "could not supplement the record on appeal pursuant to Rule 9(b)(5)(a)" and "cannot be added to the record on appeal pursuant to Rule 9(b)(5)(b)").

¶ 17 Because the 2020 PSS Affidavit was not introduced during the child support hearing, it is not competent evidence in support of the trial court's findings concerning the minor child's reasonable needs. No other evidence in the record supports the trial court's findings concerning the minor child's reasonable needs for shelter, clothing, electricity, and utilities.

¶ 18 Even if we consider all the findings of fact, including those challenged by Defendant, the findings do not support the trial court's finding of $6,885.00 in reasonable expenses for the minor child and the consequent $6,196.50 award of monthly child support payments. Our Supreme Court has emphasized that in an order for child support,

> [e]vidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble, 300 N.C. at 714, 268 S.E.2d at 190. Here, the trial court found the following specific expenses for the minor child: travel expenses of $4,000 per year for trips to India, $1,500 per year for trips internationally, and $600 per year for trips domestically; shelter expenses of $1,850 per month; a $300 monthly car payment; a $342.80 monthly car insurance premium; and a $70 copay for physical therapy, which the minor child needed to attend twice weekly. These values total only $3,561.13 monthly. While the trial court found that "the minor child does have reasonable needs with regards to . . . clothing, electricity and utilities[,]" as well as "food, transportation, subscriptions to gym memberships and other recreational activities," the trial court did not find what those needs were. Contrary to Plaintiff's suggestion that the trial court's permanent

child support award is supported in part by her testimony that the $2,370 in temporary support was insufficient to meet the minor child's needs, there is no indication that the expenses found by the trial court in the Child Support Order were additional to, and not overlapping with, the expenses reflected in the previous award of temporary child support.

¶ 19 As Defendant argues, "there is no indication of any methodology applied by the trial court" to reach the finding of $6,885 in reasonable expenses for the minor child and the award of $6,196.50 in monthly child support payments. *See Diehl v. Diehl*, 177 N.C. App. 642, 653, 630 S.E.2d 25, 32 (2006) (concluding that it was "impossible to determine on appeal where the figures used by the trial court came from at all" where the trial court found only lump sum values for the children's reasonable needs and there was "no indication of what methodology or facts the trial court considered").

III. Conclusion

¶ 20 The trial court's findings concerning the minor child's reasonable needs for shelter, clothing, electricity, and utilities were unsupported by competent evidence in the record before the trial court in the child support hearing. Additionally, the trial court's findings concerning the minor child's reasonable needs did not support its award of child support. Accordingly, we vacate the Child Support Order and remand to the trial court. "On remand, the trial court, in its discretion, may enter a new order based on the existing record, or may conduct further proceedings including a new evidentiary hearing if necessary." *Kaiser v. Kaiser*, 259 N.C. App. 499, 511, 816 S.E.2d 223, 232 (2018) (citation omitted).

VACATED AND REMANDED.

Judges ZACHARY and CARPENTER concur.

K&S RES., LLC v. GILMORE

[284 N.C. App. 78, 2022-NCCOA-409]

K&S RESOURCES, LLC, PLAINTIFF
v.
JEANETTE DAVIS GILMORE, DEFENDANT

No. COA21-484

Filed 21 June 2022

Statutes of Limitation and Repose—renewal of judgment—amended pursuant to Rule 52(b)—validity of original judgment undisturbed

Plaintiff's action (filed 9 August 2019) attempting to renew a judgment against defendant was time-barred by the applicable ten-year statute of limitations (N.C.G.S. § 1-47(1)) where the limitations period began to accrue on the date when the original judgment was entered (20 July 2009), not on the date when the subsequent amended judgment was entered (29 September 2009, *nunc pro tunc* to 20 July 2009) pursuant to Civil Procedure Rule 52(b), which added twenty paragraphs to the findings and conclusions but did not recalculate damages or otherwise make any changes to the relief afforded to the plaintiff. Further, plaintiff failed to show the existence of any statutory tolling provision affecting the applicable ten-year statute of limitations in the action.

Appeal by defendant from judgment and order entered 1 June 2021 by Judge William A. Wood in Guilford County Superior Court. Heard in the Court of Appeals 8 March 2022.

Brown, Faucher, Peraldo & Benson, PLLC, by Drew Brown, for defendant-appellant.

Gordon Law Offices, by Harry G. Gordon, for plaintiff-appellee.

GORE, Judge.

¶ 1 Defendant Jeanette Davis Gilmore appeals from the trial court's Judgment and Order denying her Motion for Summary Judgment and granting Summary Judgment in favor of plaintiff assignee K&S Resources, LLC. We reverse.

I. Factual and Procedural Background

¶ 2 On 9 August 2019, plaintiff filed its Complaint in this action as "a suit on Judgment." Plaintiff aims to renew a prior amended judgment against

defendant, 08 CVS 7912, filed 29 September 2009 *nunc pro tunc* to 20 July 2009. As an affirmative defense, defendant pled plaintiff's action is barred by the 10-year statute of limitations and repose.

¶ 3 Pertinent to the instant appeal, this Court previously affirmed the trial court's 2009 amended judgment by unpublished opinion in *Henry James Bar-Be-Que v. Gilmore*, No. COA10-729, 2011 N.C. App. LEXIS 617 (Ct. App. Apr. 5, 2011) (unpublished), *disc. rev. denied*, 365 N.C. 206, 710 S.E.2d 17 (N.C. 2011). In the prior action,

> Henry James Bar-Be-Que, Inc., ([the] Plaintiff) filed a complaint on 4 June 2008 seeking to recover damages from Jeanette Davis Gilmore (Defendant) for breach of a commercial lease in the amount of $866,515.64. [The] Plaintiff also sought attorneys' fees in the amount of $129,977.35, as well as costs. This matter was tried before the trial court judge at the 27 April 2009 Civil Session of Superior Court, Guilford County. The trial court entered judgment in favor of [the] Plaintiff on 20 July 2009.

Id. at *1. "Defendant moved to amend the judgment on 30 July 2009, and the trial court entered an amended judgment on 29 September 2009, *nunc pro tunc* 20 July 2009. In its amended judgment, the trial court made additional findings of fact and conclusions of law . . . ." *Id.* at *5.

¶ 4 Both the original judgment filed 20 July 2009, and amended judgment filed 29 September 2009 *nunc pro tunc* 20 July 2009,

> order[ed] that [the] Plaintiff recover (1) the principal sum of $687,298.22, (2) pre-judgment accrued interest in the amount of $303,617.65, and (3) interest at the rate of eight percent per annum from 20 July 2009 until paid. The trial court also ordered Defendant to pay Plaintiff's reasonable attorney's fees in the amount of fifteen percent of the amount owed, from the date the action was commenced, which amount was $127,438.06.

Id. at *1-2. This Court affirmed. *Id.* at *24.

¶ 5 The plaintiff in 08 CVS 7912, Henry James Bar-Be-Que, Inc., proceeded with execution under the amended judgment but was unsuccessful in collecting any amount. On or about 14 April 2016, Henry James Bar-Be-Que, Inc., assigned the 2009 amended judgment to plaintiff K&S

Resources, LLC. The assignment of judgment was duly recorded with the Register of Deeds pursuant to N.C. Gen. Stat. § 1-246.

¶ 6 In the instant appeal, the trial court ultimately heard Cross-Motions for Summary Judgment on 18 May 2021. In an Order and Judgment filed 1 June 2021, the trial court concluded from the record that there is no genuine issue as to any material fact, and that plaintiff is entitled to judgment as a matter of law. The trial court denied defendant's Motion for Summary Judgment, granted Summary Judgment in favor of plaintiff, and awarded plaintiff recovery in the sum of $1,651,471.94 plus additional interest on the principal sum of $687,298.22 at the legal rate of eight percent (8%) per annum from 1 August 2019 until paid, plus the costs of this action.

¶ 7 On 22 June 2021, defendant timely filed notice of appeal.

II. Summary Judgment

¶ 8 On appeal, defendant argues the trial court erred in denying her Motion for Summary Judgment and granting Summary Judgment in favor of plaintiff. Specifically, defendant asserts plaintiff's action is time-barred because the 10-year statute of limitations on the commencement of a new action accrued from the original judgment entered 20 July 2009, and the subsequent amended Judgment, filed 29 September 2009 *nunc pro tunc* 20 July 2009, did not expand or toll the applicable 10-year statute of limitations. Thus, defendant contends, the wrong party prevailed.

A. Standard of Review

¶ 9 "The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted).

B. Statute of Limitations

¶ 10 In this case, plaintiff assignee filed a Complaint in Action to renew a prior judgment against defendant. North Carolina General Statutes § 1-47(1) governs the statute of limitations on the renewal of a prior judgment, for other than real property. The statute provides:

> Within *ten years* an action . . . [u]pon a judgment or decree of any court of the United States, or of any state or territory thereof, *from the date of its entry.* No such action may be brought more than once, or have the effect to continue the lien of the original judgment."

N.C. Gen. Stat. § 1-47(1) (2020) (emphasis added); *see also* § 1-46 (2020) ("The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this Article."). "[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court . . . ." N.C. R. Civ. P. 58.

¶ 11 "The question whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. When a defendant asserts the statute of limitations as an affirmative defense, the burden rests on the plaintiff to prove that his claims were timely filed." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 305, 603 S.E.2d 147, 162 (2004) (citation and quotation marks omitted).

¶ 12 Plaintiff contends the statute of limitations ran from the filing date of the amended judgment, not the original judgment. In the alternative, it argues that assuming the statute of limitations does run from the original judgment, there are multiple statutory tolling provisions that make its Complaint on Judgment timely filed.

¶ 13 After careful examination, we determine the statute of limitations ran from the original judgment, and plaintiff's alternative contention is without merit. Plaintiff filed its complaint after the expiration of the 10-year statute of limitations period, and its action is time-barred.

1. Amended Judgment

¶ 14 Throughout its brief, plaintiff contends defendant filed and prevailed upon a Motion to Alter or Amend Judgment pursuant to Rule 59 of the North Carolina Rules of Civil Procedure. Plaintiff has not identified that Rule 59 Motion anywhere in the record. We do, however, note defendant filed a Motion to Amend Judgment pursuant to Rule 52(b) of the North Carolina Rules of Civil Procedure on 30 July 2009. Furthermore, defendant's notice of appeal and proposed issues on appeal from *Henry James Bar-Be-Que v. Gilmore* are included in the record. Those documents indicate the trial court declined to provide relief pursuant to Rule 52(b) and declined to enter the specific facts and conclusions the defendant requested. Contrary to plaintiff's contention, there is no indication in the record now before us that the trial court altered or amended the original judgment pursuant to Rule 59.

¶ 15 Rule 59(e) and Rule 52(b) are similar mechanisms. A party seeking post-judgment relief may, and often does, file both contemporaneously for consideration by the trial court. *See* N.C. R. Civ. P. 52(b) ("The motion may be made with a motion for a new trial pursuant to Rule 59.").

¶ 16 Rule 52(b) of the North Carolina Rules of Civil Procedure provides that "[u]pon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. However, Rule 52(b) is not intended to provide a forum for the losing party to relitigate aspects of their case. G. Gray Wilson, North Carolina Civil Procedure, Ch. 52, § 52-6 (Matthew Bender) (4th ed. 2021). "The primary purpose of a Rule 52(b) motion is to enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court." *Branch Banking & Tr. Co. v. Home Fed. Sav. & Loan Ass'n*, 85 N.C. App. 187, 198, 354 S.E.2d 541, 548 (1987). "If a trial court has omitted certain essential findings of fact, a motion under Rule 52(b) can correct this oversight and avoid remand by the appellate court for further findings." *Id.* at 198-99, 354 S.E.2d at 548 (citation omitted). "A complete record on appeal, resulting from a Rule 52(b) motion, will provide the appellate court with a better understanding of the trial court's decision, thus promoting the judicial process." *Parrish v. Cole*, 38 N.C. App. 691, 694, 248 S.E.2d 878, 880 (1978).

¶ 17 Rule 59 "is appropriate if the court has failed in the original judgment to afford the relief to which the prevailing party is entitled. A motion under this rule may also be employed by a party who seeks to have an order or judgment vacated in its entirety." G. Gray Wilson, North Carolina Civil Procedure, Ch. 59, § 59-17 (Matthew Bender) (4th ed. 2021). Under Rule 59(e), "[a] motion to alter or amend the judgment" must be based on one of the enumerated grounds in subsection (a). Rule 59(a) provides, in pertinent part:

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

N.C. R. Civ. P. 59(a) (emphasis added).

¶ 18 Thus, where the trial court sits without a jury, and enters an amended judgment pursuant to Rule 59(e), the amended judgment is a *new judgment*. Where the trial court amends a judgment pursuant to Rule 52(b) alone and includes additional findings of fact and conclusions of law without disturbing the ultimate relief afforded to the prevailing party, the validity of the original judgment is undisturbed. An amended judgment entered pursuant to Rule 52(b) includes additional findings of

fact and conclusions of law that supplement, but do not supplant, the original judgment.

¶ 19 Here, defendant filed a Motion to Amend Judgment pursuant to Rule 52(b) on 30 July 2009. Defendant requested the trial court adopt several proposed findings of fact and conclusions of law, and recalculate damages awarded in accordance with and consistent with those requested findings and conclusions. The trial court, in its discretion, elected to add 20 additional paragraphs to its findings of fact and conclusions of law, but declined to enter the specific facts and conclusions requested by defendant. Moreover, it did not recalculate damages, or otherwise make any alteration to the relief afforded to the plaintiff in the original judgment.

¶ 20 The amended judgment filed 29 September 2009, on its face, states "this the 25th day of September, 2009, *nunc pro tunc* to July 20, 2009," and refers to 20 July 2009 as "the date of this Judgment."

> A nunc pro tunc order is a correcting order. The function of an entry nunc pro tunc is to correct the record to reflect a prior ruling made in fact but defectively recorded. A nunc pro tunc order merely recites court actions previously taken, but not properly or adequately recorded. A court may rightfully exercise its power merely to amend or correct the record of the judgment, so as to make the court[']s record speak the truth or to show that which actually occurred, under circumstances which would not at all justify it in exercising its power to vacate the judgment. However, a nunc pro tunc entry may not be used to accomplish something which ought to have been done but was not done.

Rockingham Cnty. DSS ex rel. Walker v. Tate, 202 N.C. App. 747, 752, 689 S.E.2d 913, 917 (2010) (citation omitted).

¶ 21 Additionally, the record contains several printouts from our Civil Case Processing System ("VCAP"), where indexed judgments are abstracted electronically. Under § 1-233:

> Every judgment of the superior or district court, affecting title to real property, or requiring in whole or in part the payment of money, shall be indexed and recorded by the clerk of said superior court on the judgment docket of the court. The docket entry must contain the file number for the case in which the

> judgment was entered, the names of the parties, the address, if known, of each party and against whom judgment is rendered, the relief granted, *the date, hour, and minute of the entry of judgment under G.S. 1A-1, Rule 58*, and the date, hour, and minute of the indexing of the judgment.

§ 1-233 (2020) (emphasis added). Each VCAP document included in the record lists the judgment "clock" date as 20 July 2009. These judgment abstract summaries must, by statute, include the date of entry of the judgment as defined by Rule 58 of our Rules of Civil Procedure. Thus, plaintiff had additional notice through VCAP that 20 July 2009 is the entry date of judgment.

2. Statutory Tolling Provisions

¶ 22 Plaintiff also argues it filed its Complaint on Judgment in a timely fashion because N.C. R. Civ. P. 62(a) and (b), N.C. R. App. P. 3, § 1-234, § 1-15, and § 1-23, all have the effect of tolling the 10-year statute of limitations in § 1-47. Plaintiff's contention is without merit.

¶ 23 First, plaintiff argues that § 1-234 expressly provides a tolling provision for the 10-year statute of limitations period for a judgment. The statute provides, in pertinent part:

> But the time during which the party recovering or owning such judgment shall be, *or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, does not constitute any part of the 10 years aforesaid*, as against the defendant in such judgment . . . .

§ 1-234 (2020) (emphasis added). Thus, plaintiff argues this tolling provision extends to the 10-year statute of limitations for commencement of an action for renewal of a judgment under § 1-47(1).

¶ 24 This Court's decision in *Fisher v. Anderson* is instructive on this issue. 193 N.C. App. 438, 667 S.E.2d 292 (2008). In *Fisher*, the plaintiff assignee filed an action in the trial court to enforce a judgment entered against the defendants pursuant to N.C. Gen. Stat. § 1-47. *Id.* at 438, 667 S.E.2d at 292-93. The trial court denied the plaintiff's motion for summary judgment and granted the defendants' motion to dismiss on grounds that the complaint was filed more than ten years after entry of the judgment. *Id.* at 438-39, 667 S.E.2d at 293. On appeal, the plaintiff argued

Rule 62(a) of the North Carolina Rules of Civil Procedure, when read in conjunction with § 1-234, operated to toll the ten-year statute of limitations in § 1-47(1) by thirty days. *Id.* at 439-40, 667 S.E.2d at 293.

¶ 25 This Court held that because the plaintiff failed to assert a claim within the ten-year statute of limitations, his complaint was properly dismissed. *Id.* at 440, 667 S.E.2d at 294. In reaching our decision, we noted that

> the ten-year period referred to in N.C. Gen. Stat. § 1-234 governs judgment liens on real property. Nothing in the plain language of N.C. Gen. Stat. § 1-234 indicates the limitations on the duration of a judgment lien should apply to the statutory period set forth in N.C. Gen. Stat. § 1-47(1).

Id. at 440, 667 S.E.2d at 294.

¶ 26 Plaintiff also argues N.C. R. Civ. P. 62(a) and (b) expressly stay execution upon a judgment, and these statutory prohibitions upon enforcement of a judgment also toll the 10-year statute of limitations in § 1-47(1). However, in *Fisher*, we also noted that "[n]othing in the plain language of Rule 62(a) indicates the legislature intended the automatic stay from execution to add thirty days to the ten-year statute of limitations on commencing an action to enforce a judgment." 193 N.C. App. at 440, 667 S.E.2d at 294. Similarly, the language in Rule 62(b), also applies to enforcement of an existing judgment, and not to the commencement of an action to renew a judgment under § 1-47(1). *See* N.C. R. Civ. P. 62(b).

¶ 27 Regarding plaintiff's additional arguments that §§ 1-15, 1-23, and N.C. R. App. P. 3, toll or extend the applicable 10-year statute of limitations in this case, the record is devoid of any reference to a stay or injunction on commencement of a new action that would implicate §§ 1-15 or 1-23. Moreover, Rule 3 of the North Carolina Rules of Appellate Procedure provides, in pertinent part, "if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty-day period *for taking appeal is tolled* as to all parties . . . ." N.C. R. App. P. 3(c) (emphasis added). Yet nothing in the plain language of N.C. R. App. P. 3 could be construed to have the effect of also tolling the 10-year statute of limitations on the commencement of a new action under § 1-47(1). Thus, plaintiff has not shown to the satisfaction of this Court the existence of any statutory tolling provision affecting the applicable 10-year statute of limitations in this action.

III. Conclusion

¶ 28 For the foregoing reasons, we reverse the trial court's Judgment and Order denying defendant's Motion for Summary Judgment and granting Summary Judgment in favor of plaintiff.

REVERSED.

Judges CARPENTER and GRIFFIN concur.

JOHN-PAUL SHEBALIN, Plaintiff
v.
THERESA M. SHEBALIN, Defendant

No. COA21-425

Filed 21 June 2022

Appeal and Error—interlocutory orders—order for appointment of parenting coordinator—frivolous appeal—sanctions

Plaintiff-father's appeal from an order for appointment of a parenting coordinator was dismissed as interlocutory where, despite plaintiff's assertion, the order was not a final order; rather, it decreed that appointment of a parenting coordinator was just and necessary but left the appointment of a specific coordinator and other terms to be determined at a later date. Because plaintiff was aware of the interlocutory nature of the order yet chose to pursue a frivolous appeal, the appellate court sua sponte imposed sanctions on him and his attorney.

Appeal by plaintiff from order entered 8 September 2020 by Judge O. David Hall in Durham County District Court. Heard in the Court of Appeals 25 May 2022.

Cordell Law, LLP, by Stephanie Horton, for plaintiff-appellant.

Jonathan McGirt for defendant-appellee.

ARROWOOD, Judge.

¶ 1 John-Paul Shebalin ("plaintiff") appeals from an Order for Appointment of a Parenting Coordinator. Because the order from which plaintiff

appeals is interlocutory, and because we deem this appeal frivolous, we dismiss the appeal and impose sanctions.

I. Background

¶ 2 Theresa M. Shebalin ("defendant") and plaintiff (collectively, the "parties" or "parents") were married on 17 May 2010, shared a child born 15 September 2013, and divorced on 31 March 2016. Because the trial court and the parties agreed that the parties were engaged in "a high conflict case," on 22 July 2016 the trial court filed a "Consent Order Appointing Parenting Coordinator[,]" by which the trial court appointed a parenting coordinator for a term of two years. This parenting coordinator was replaced in 2017, and the second parenting coordinator was later re-appointed for a term of one year expiring 26 September 2019.

¶ 3 On 23 September 2019, defendant filed a Motion for Appointment of Parenting Coordinator due to the continued high conflict nature of the parties' case. On 1 October 2019, plaintiff filed a Reply and Motion to Dismiss.

¶ 4 The matter came on for hearing on 16 July 2020 in Durham County District Court, Judge Hall presiding. Following the hearing, the trial court entered an "Order for Appointment of Parenting Coordinator" on 8 September 2020 (the "2020 Order"). In the 2020 Order, the trial court concluded that "[t]his continues to be a high conflict case" and "the appointment of a [parenting coordinator] is in the best interests of the minor child[.]" Accordingly, the 2020 Order denied plaintiff's Motion to Dismiss, ordered that "[a] Parenting Coordinator shall be appointed for a one[-]year term[,]" and also decreed that the trial court "retains jurisdiction of this matter for the entry of further Orders." Pertinently, the 2020 Order did not appoint a parenting coordinator. On 29 September 2020, plaintiff filed a notice of appeal from the 2020 Order.

¶ 5 On 3 February 2021, the trial court commenced a hearing, held via WebEx, for the purpose of appointing a parenting coordinator following the 2020 Order. Plaintiff, through counsel, objected "to a WebEx hearing on the [parenting coordinator] appointment in general," as well as "to the [parenting coordinator] appointment conference on the basis of the fact that the [2020 Order] has been appealed more specifically."

¶ 6 Defendant's trial counsel responded:

> I just want to make sure that we have the background in place. [The trial court] heard the request, the motion for a [parenting coordinator] in July of last

> year. In September of 2020, [the trial court] signed an order for appointment of a [parenting coordinator].
>
> A [parenting coordinator] was not identified. An order appointment was not conducted. No order has been signed, so it's my position . . . that this is a premature appeal; that it's an impermissible interlocutory appeal.

¶ 7 Having heard these arguments, the trial court honored plaintiff's objection to a hearing conducted via WebEx and continued the hearing until 18 March 2021.

¶ 8 On 18 March 2021, the trial court resumed, in-person, the hearing on the appointment of a parenting coordinator. Prior to the hearing in open court, the trial court "conducted a brief *in camera* conference[,]" where plaintiff's counsel and both defendant's trial and appellate counsel were present. Therein, plaintiff's counsel "contended that the trial court did not have jurisdiction to proceed with appointment of a parenting coordinator, by virtue of [p]laintiff's Notice of Appeal filed on September 29, 2020." In response, both of defendant's trial and appellate counsel "contended that [p]laintiff's pending appeal was impermissibly interlocutory, and therefore that the trial court's jurisdiction continued uninterrupted." "Having heard these contentions, [the trial court] adjourned the *in camera* conference[.]"

¶ 9 After the hearing, the trial court returned and entered on the same day an "Order Appointing Parenting Coordinator" (the "2021 Order"). The 2021 Order, as written, stated the following:

> The Court, on September 7, 2020, entered an Order For Appointment of Parenting Coordinator, which was filed September 8, 2020. Said [2020] Order requires the appointment of a Parenting Coordinator for a one[-]year term. Plaintiff filed Appeal of said [2020] Order, which remains pending. To date, no Order For Appointment of Parenting Coordinator has been entered.

The trial court also found that it had jurisdiction and that, pursuant to the 2020 Order, "appointment of a Parenting Coordinator is necessary to assist the parents in implementing the terms of the existing child custody and parenting time order . . . ."

¶ 10 The trial court appointed a new parenting coordinator for a term of one year from the date of the 2021 Order and provided other details

pertinent to the parenting coordinator's role. The parenting coordinator's term expired 17 March 2022.

¶ 11 After multiple motions for extension of time were granted to both parties, plaintiff filed his appellate brief for his appeal from the 2020 Order on 1 November 2021; pertinently, therein, plaintiff asserts that the 2020 Order is a final order. Defendant filed a Motion to Dismiss Appeal on 17 February 2022, contending that the 2020 Order is interlocutory, an appellate brief on 4 March 2022, and another Motion to Dismiss Appeal, on the basis of mootness, on 20 May 2022.

II. Discussion

¶ 12 Plaintiff presents multiple arguments on appeal; plaintiff also asserts, quite simply, that the 2020 Order "is a final judgment and appeal to this court is proper pursuant to N.C. Gen. Stat. § 7A-27(b)." We disagree. Thus, we limit our review to the interlocutory nature of the 2020 Order and plaintiff's denial thereof.

¶ 13 "[A]ppeal lies of right directly to the Court of Appeals . . . [f]rom any final judgment of a district court in a civil action." N.C. Gen. Stat. § 7A-27(b)(2) (2021). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted). Conversely, "[a]n interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Id.* at 362, 57 S.E.2d at 381 (citation omitted).

¶ 14 The 2020 Order is patently interlocutory. The purpose of the order was to decree that appointment of a parenting coordinator was just and necessary for the matter at issue, that said appointment would occur via another order at a later date, and that the to-be-appointed parenting coordinator would serve for a term of one year. Indeed, the 2020 Order did not dispose of the case, but "le[ft] it for further action by the trial court[,]" *see id.*, laying out a framework that the 2021 Order utilized in appointing a specific parenting coordinator for a term of one year, along with other, lengthy details binding the parties and the new parenting coordinator. This, in fact, is also made clear by the names of the orders themselves—the trial court filed the 2020 Order as the "Order *for Appointment* of Parenting Coordinator" and the 2021 Order as the "Order *Appointing* Parenting Coordinator[.]" (Emphasis added.) Accordingly, there was nothing within the 2020 Order that entitled plaintiff to appeal.

¶ 15 Furthermore, plaintiff was made aware of the interlocutory nature of the 2020 Order on multiple occasions, including during the 3 February 2021 hearing held over WebEx and during the *in camera* conversation immediately preceding the in-person 18 March 2021 hearing.

¶ 16 Despite plaintiff's assertions to the contrary, the 2020 Order is not a final order, and thus we dismiss this appeal as interlocutory. *See* N.C. Gen. Stat. § 7A-27(b)(2).[1] We now address how the frivolous nature of this appeal merits imposing sanctions.

¶ 17 Under our Rules of Appellate Procedure,

> [a] court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:
>
> (1) the appeal was *not well-grounded in fact* and was *not warranted by existing law* or a good faith argument for the extension, modification, or reversal of existing law;
>
> (2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or *needless increase in the cost of litigation*;
>
> (3) a petition, motion, brief, record, or other item filed in the appeal was grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly *disregarded the requirements of a fair presentation of the issues to the appellate court*.

N.C. R. App. P. 34(a) (emphasis added). The appropriate sanctions to a frivolous appeal include:

> (1) dismissal of the appeal;
>
> (2) monetary damages including, but not limited to,
>
> a. single or double costs,

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1. We also note that the culmination of the 2020 Order has come to fruition and long lapsed due to: (1) the issuance of the 2021 Order appointing a parenting coordinator and (2) said parenting coordinator's one-year term having expired in March of this year. Thus, assuming *arguendo* that defendant had a valid argument on appeal, the issue would now be moot.

b. damages occasioned by delay,

c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;

(3) any other sanction deemed just and proper.

N.C. R. App. P. 34(b).

¶ 18 Throughout this case, plaintiff has repeatedly and baselessly asserted that the 2020 Order from which he appeals is a final order, despite the order's interlocutory nature being apparent on its face, multiple admonitions from opposing counsel, and the fact that the sole purpose of the 2020 Order—namely, that of the trial court to appoint a parenting coordinator for a term of one year at a later date—has long since been satisfied.

¶ 19 Plaintiff's improper characterization of the 2020 Order, coupled with his insistence to pursue this frivolous appeal, was "not well-grounded in fact[,]" "was not warranted by existing law[,]" "needless[ly] increase[d] . . . the cost of litigation[,]" and "grossly disregarded the requirements of a fair presentation of the issues" to this Court. *See* N.C. R. App. P. 34(a). Indeed, this Court now receives an appeal devoid of anything for us to review.

¶ 20 We therefore tax both plaintiff in his personal capacity and plaintiff's counsel with double the costs of this appeal, as well as the attorney fees incurred therefrom by defendant in the defense of this appeal. "Pursuant to Rule 34(c), we remand this case to the trial court for a determination of the reasonable amount of attorney fees incurred by defendant in responding to this appeal." *Ritter v. Ritter*, 176 N.C. App. 181, 185, 625 S.E.2d 886, 888-89 (2006).

III. Conclusion

¶ 21 For the foregoing reasons, we dismiss the appeal as interlocutory. Furthermore, because plaintiff pursued a frivolous appeal, we, on our own initiative, impose sanctions on both plaintiff and plaintiff's counsel, remanding for the trial court to determine attorney fees.

DISMISSED AND REMANDED.

Judges MURPHY and CARPENTER concur.

SHROPSHIRE v. SHROPSHIRE

[284 N.C. App. 92, 2022-NCCOA-411]

FREDERICK SHROPSHIRE, PLAINTIFF
v.
SHEYENNE SHROPSHIRE, DEFENDANT

No. COA21-332

Filed 21 June 2022

1. Divorce—equitable distribution—reopening evidence—date-of-trial value of retirement accounts

In an equitable distribution matter, the trial court did not abuse its discretion by sua sponte reopening evidence after the close of the hearing in order to request that plaintiff-husband provide the date-of-trial value of his retirement accounts, where defendant-wife, who appeared pro se, had provided the same information about her own retirement accounts and had raised the issue with the trial court during the hearing. Further, the trial court did not improperly shift the burden of proof by requiring the information from plaintiff-husband where it offered to hold another hearing to give plaintiff-husband the opportunity to be heard and to present evidence regarding the classification and valuation of the retirement accounts—which he declined.

2. Divorce—equitable distribution—evidentiary support—record on appeal

The trial court's equitable distribution order was remanded where the appellate court was unable to determine from the record whether competent evidence existed to support the trial court's findings regarding plaintiff-husband's retirement account or whether plaintiff-husband intentionally omitted the evidence from the record on appeal, which was composed by plaintiff-husband and settled pursuant to Appellate Procedure Rule 11(b).

Appeal by plaintiff from order entered 17 November 2020 by Judge Tracy H. Hewett in Mecklenburg County District Court. Heard in the Court of Appeals 8 March 2022.

Plumides, Romano & Johnson, P.C., by Richard B. Johnson, for Plaintiff-Appellant.

Bratcher Adams Folk, PLLC, by Kalyn Simmons, Brice M. Bratcher, and Jeremy D. Adams, for Defendant-Appellee.

Sheyenne Shropshire, pro se, for Defendant-Appellee.

CARPENTER, Judge.

¶ 1 Frederick Shropshire ("Plaintiff") appeals from a judgment and order for equitable distribution (the "Order"). On appeal, Plaintiff argues the trial court abused its discretion by reopening evidence and requesting he provide evidence of his retirement plans' date of trial values. He further argues the trial court abused its discretion by: (1) making findings of fact and conclusions of law regarding his Fidelity 401(k) Plan[1]; (2) determining that an equal distribution of the marital estate was not equitable; and (3) ordering Plaintiff to pay Sheyenne Shropshire ("Defendant") a lump sum distributive award of $20,000.00. Because the record lacks sufficient evidence regarding Plaintiff's retirement plans to support the trial court's findings of fact, and in turn its conclusions of law, we remand the matter to the trial court to allow for entry of additional findings of fact and conclusions of law consistent with this opinion. Accordingly, we do not reach the remaining issues.

I. Factual & Procedural Background

¶ 2 The record reveals the following: Plaintiff and Defendant married on 15 June 2007, separated on 12 October 2016, and divorced on 25 April 2018. Three children were born of the marriage. Plaintiff initiated the instant action by filing a "Complaint for Child Custody and Motion for Ex-Parte Emergency Child Custody and/or in the Alternative Motion for Temporary Parenting Arrangement" (the "Complaint") on 12 October 2016. On 12 October 2016, the trial court entered a temporary emergency custody order, granting Plaintiff temporary custody of the three minor children.

¶ 3 On 24 October 2016, Defendant filed an answer to Plaintiff's Complaint as well as a motion to set aside the custody order entered 12 October 2016 and a claim for child custody. On 3 January 2017, Defendant filed an amended Answer to the Complaint, which included counterclaims for post-separation support, alimony, child custody, temporary and permanent child support, equitable distribution, and attorney's fees. On 6 March 2017, Plaintiff filed a "Reply, Defenses, and Motion in the Cause for Equitable Distribution, Child Support and Attorney's Fees." On 6 July 2017, the trial court entered an order denying Defendant's claims for post-separation support and attorney's fees.

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1. The record also refers to this retirement plan as the "Disney Savings and Investment Plan."

¶ 4 Following a pre-trial discovery conference on 19 July 2017, the trial court entered an "Initial Pretrial Conference, Scheduling, and Discovery Order in Equitable Distribution Matter," which ordered the parties to submit their equitable distribution affidavits no later than 4 August 2017.

¶ 5 On 2 August 2017, Defendant filed her equitable distribution affidavit, and on 4 August 2017, Plaintiff filed his equitable distribution affidavit. Both parties listed the Plaintiff's and Defendant's retirement plans, including Plaintiff's Fidelity 401(k) Plan, under Part I – Marital Property of the affidavit. Both parties also noted "TBD" under the "date of separation" and "net value" columns pertaining to Plaintiff's two retirement plans. The parties did not list any property under Part II – Divisible Property, of their respective equitable distribution affidavits. On 9 November 2017, the trial court entered a "Status Conference Checklist and Order for Equitable Distribution Matter," which set the equitable distribution hearing for 5 January 2018.

¶ 6 The equitable distribution trial was conducted on 7 August 2018 before the Honorable Tracy H. Hewett, judge presiding. Defendant appeared *pro se* at the hearing. Both parties testified at the hearing, and neither party offered expert witnesses.

¶ 7 On 1 October 2018, Judge Hewett sent an e-mail to Defendant and counsel for Plaintiff advising she would be reopening evidence in the equitable distribution matter to obtain: (1) the date of trial values for Defendant's two investment accounts, including the Fidelity 401(k) Plan, and (2) the value of the parties' marital residence. She also informed the parties that she would schedule another hearing to admit the requested evidence. Alternatively, she would allow the parties to agree "to submit th[e] information 'on paper.' "

¶ 8 In response to the trial court's request, Plaintiff filed an "Objection, Notice of Objection, Exception and Motion to Recuse" on 18 October 2018, in which he objected to Judge Hewett's request for evidence regarding his retirement accounts and sought Judge Hewett's recusal. On the same day, Defendant filed an objection to Plaintiff's motion. On 12 December 2018, the Honorable Chief Judge for Mecklenburg County District Court, Regan Miller, entered an order denying Plaintiff's motion to recuse. Chief Judge Miller found, *inter alia*, "the Court's request for additional documents or evidence prior to the close of all of the evidence can in no way be classified as 'unfair surprise,' and is not grounds for a recusal."

¶ 9 A hearing was held on 9 May 2019 in which the trial court put its requests on the record and allowed the parties an opportunity to put

their objections on the record. The trial court notified the parties that it would withdraw its request for an appraisal of the marital home but was still requesting "the evidence regarding the passive appreciation for [Plaintiff's Fidelity 401(k) Plan]."

¶ 10 Counsel for Plaintiff objected to the reopening of evidence on the ground Plaintiff would be prejudiced since the parties did not identify any divisible property in their equitable distribution affidavits nor did they supplement their affidavits to add such property. Counsel further argued Defendant failed to meet her burden to identify Plaintiff's retirement accounts as divisible property and proffer evidence as to the value of the accounts. The trial court overruled counsel's objections, reasoning Defendant requested the information at the equitable distribution hearing and offered the divisible property value associated with her own retirement plan. At the end of the hearing, the trial court requested the parties bring documentation by 12 May 2019 regarding the value of Plaintiff's retirement plan as of the 7 August 2018 trial.

¶ 11 On 17 November 2020, the trial court entered the Order. Plaintiff timely filed written notice of appeal from the Order.

II. Jurisdiction

¶ 12 This Court has jurisdiction to review the Order pursuant to N.C. Gen. Stat. § 7A-27(c) (2021) and N.C. Gen. Stat. § 50-19.1 (2021).

III. Issues

¶ 13 The issues before the Court are whether: (1) the trial court abused its discretion by reopening evidence after the close of the equitable distribution trial; (2) the trial court abused its discretion by requesting Plaintiff provide the date of trial value of his Fidelity 401(k) Plan; (3) findings of fact 31, 34, 40–43, 55, 57–58, and 60–62 of the Order are supported by competent evidence; (4) the trial court abused its discretion when it determined an equal distribution of the marital estate was not equitable; and (5) the trial court abused its discretion by ordering Plaintiff to make a lump sum $20,000.00 cash distributive award to Defendant.

IV. Reopening the Evidence

¶ 14 **[1]** In his first argument, Plaintiff contends the trial court abused its discretion by reopening evidence after the close of trial. Specifically, Plaintiff maintains the trial court "was operating under the misapprehension of law that Plaintiff-Appellant was obligated to provide the date of trial value of his [Fidelity 401(k)] Plan . . . ." Defendant asserts the trial court acted properly because it "set forth in the record that the evidence

needed to be presented . . . and exercised its discretion to reopen the case in order for the value to be produced." In light of the broad discretion afforded to a trial judge as well as a judge's duty to provide a fair and just trial, we conclude Judge Hewett, as the presiding judge, did not abuse her discretion by reopening evidence on her own initiative.

¶ 15 An "equitable distribution is a three-step process; the trial court must (1) 'determine what is marital [and divisible] property'; (2) 'find the net value of the property'; and (3) 'make an equitable distribution of that property.' " *Cunningham v. Cunningham*, 171 N.C. App. 550, 555, 615 S.E.2d 675, 680 (2005); *see Robinson v. Robinson*, 210 N.C. App. 319, 324, 707 S.E.2d 785, 790 (2011) ("[T]he [trial] court must . . . classify all of the property and make a finding as to the value of all [distributable] property."); *see also* N.C. Gen. Stat. § 50-20 (2021).

¶ 16 Marital property includes "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property . . . ." N.C. Gen. Stat. § 50-20(b)(1). Divisible property includes, *inter alia*, "[p]assive income from marital property received after the date of separation," such as interest or dividends. N.C. Gen. Stat. § 50-20(b)(4). "[A]ll appreciation and diminution in value of marital and divisible property is presumed to be divisible property unless the trial court finds that the change in value is attributable to the postseparation actions of one spouse." *Cheek v. Cheek*, 211 N.C. App. 183, 184, 712 S.E.2d 301, 303 (2011) (citation omitted and emphasis in original). "[M]arital property shall be valued as of the date of the separation of the parties," while "[d]ivisible property . . . shall be valued as of the date of distribution." N.C. Gen. Stat. § 50-21(b) (2021).

¶ 17 On appeal, neither party offers a case or statute that specifically addresses whether the trial court judge may *sua sponte* reopen the evidence in a civil proceeding prior to the entry of judgment, absent a motion by a party or agreement by the parties. After careful review of the relevant law, we see no reason to distinguish between a trial court reopening evidence on its own initiative, and a trial court reopening evidence upon a party's motion. *See*, *e.g.*, *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260 (concluding the trial court did not abuse its discretion by allowing the defendant's motion to reopen evidence two weeks after the original hearing), *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985); *Coburn v. Roanoke Land & Timber Corp.*, 259 N.C. 100, 130 S.E.2d 30 (1963) (affirming the trial court's denial of the plaintiff's request for leave to admit additional evidence).

¶ 18 It is well-established that "[t]he trial court has discretionary power to permit the introduction of additional evidence after a party has rested. Whether the case should be reopened and additional evidence admitted [is] discretionary with the presiding judge." *McCurry v. Painter*, 146 N.C. App. 547, 553, 553 S.E.2d 698, 703 (2001) (citations omitted). "A trial court may even re-open the evidence weeks after holding the original hearing, or "[w]hen the ends of justice require[.]" *In re B.S.O.*, 225 N.C. App. 541, 543, 740 S.E.2d 483, 484 (2013) (citations omitted). Our Supreme Court has considered whether the party affected by the introduction of the evidence would be "surprise[d] or improperly prejudice[d]." *Miller v. Greenwood*, 218 N.C. 146, 150, 10 S.E.2d 708, 711 (1940).

¶ 19 "Because it is discretionary, the trial judge's decision to allow the introduction of additional evidence after a party has rested will not be overturned absent an abuse of that discretion." *McCurry*, 146 N.C. App. at 553, 553 S.E.2d at 703 (citations omitted). An abuse of discretion occurs when the decision to reopen evidence is "manifestly unsupported by reason," or "so arbitrary that it could not have been the result of a reasoned decision." *State v. Mutakbbic*, 317 N.C. 264, 273–74, 345 S.E.2d 154, 158–59 (1986) (citations omitted).

¶ 20 Further, a trial court "has broad discretion to control discovery" because its principal role "is to control the course of the trial as to prevent injustice to any party . . . ." *Capital Res., LLC v. Chelda, Inc.*, 223 N.C. App. 227, 234, 735 S.E.2d 203, 209 (2012) (citations omitted). Additionally, it is the duty of the trial court judge "to see to it that each side has a fair and impartial trial." *Miller*, 218 N.C. at 150, 10 S.E.2d at 711. In doing so, the judge has "discretion to take any action to this end within the law . . . ." *Id.* at 150, 10 S.E.2d at 711.

¶ 21 The North Carolina Rules of Evidence, which afford the trial court discretion, also support the conclusion a trial court may, on its own motion, reopen a case to allow for additional evidence. *See generally* N.C. Gen. Stat. § 8C-1 (2021). We note the rules are to "be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth be ascertained and proceedings justly determined." N.C. Gen. Stat. § 8C-1, Rule 102 (2021). Furthermore, the trial court judge is "empowered to hear any relevant evidence," N.C. Gen. Stat. § 8C-1, Rule 104, cmt. (2021), and is not limited by the rules of evidence in determining "preliminary questions concerning . . . the admissibility of evidence . . . ." N.C. Gen. Stat. § 8C-1, Rule 104 (2021). The trial court has a duty to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . make

the interrogation and presentation effective for the ascertainment of the truth." N.C. Gen. Stat. § 8C-1, Rule 611 (2021). In fact, the trial court has the authority to "appoint witnesses of its own selection," N.C. Gen. Stat. § 8C-1, Rule 706 (2021), including expert witnesses to appraise property in an equitable distribution action. *See Dorton v. Dorton*, 77 N.C. App. 667, 676, 336 S.E.2d 415,422 (1985).

¶ 22 In this case, the trial judge took the equitable distribution matter under advisement at the close of the 7 August 2018 hearing. On 1 October 2018, the trial judge sent an email to Plaintiff's counsel and Defendant, who was not represented by counsel at the time. Judge Hewett sought, *inter alia*, the date of trial values of Plaintiff's two retirement accounts.

¶ 23 A hearing was held on 9 May 2019 regarding the request. The trial court again requested the value of Plaintiff's retirement plans as of the date of trial. The trial court reasoned at the 9 May 2019 hearing that Defendant offered the passive income value on her own retirement account, so she would be prejudiced by Plaintiff not offering the same information on his accounts. Counsel for Plaintiff objected to the reopening of evidence, and the trial court overruled her objection. Thereafter, Plaintiff took the stand and was asked on direct examination if he knew "the amount of [his] retirement [plan as of] August . . . 7th, 2018." He responded, "[n]o." At the end of the hearing, the trial court requested the parties provide documentation to show the values of Plaintiff's retirement accounts by the end of the week—12 May 2019.

¶ 24 In their respective equitable distribution affidavits, both parties listed the retirement accounts as marital property. Moreover, neither party contended in their affidavits that there was divisible property for the trial court to distribute. Based on the affidavits, there is no dispute that Plaintiff's retirement accounts have marital property aspects. *See* N.C. Gen. Stat. § 50-20(b)(1). Nevertheless, Defendant's question to the trial court at the 7 August 2018 hearing raised the issue of whether the retirement plans also include divisible property:

> [Defendant]: You're [sic] honor—and I don't know if you can answer this, but I'm just unsure why, uh, [Plaintiff] contends that the value would be more given [my retirement] statement. They have date of separation, what they felt was the value at $68,000. I don't know why they would value it at $75,000, but you said it only [sic] date of separation. Is that correct?
>
> [Trial court]: Right. And then, there can be, um, the passive—[or] active gain, which is, uh, classified as something else. But, uh—but we can get to that later.

> [Defendant]: Okay. And then, his, uh, second 401k that he started at this job, I don't have a statement from them, so I can't confirm the value . . . .

¶ 25 During Defendant's cross-examination of Plaintiff, the trial court returned to the issue of active and passive gains:

> [Trial court]: All right. Um, let me just make sure I'm clear on one thing right quick, and that is on the—we have the passive gain on [Defendant's]—I don't know if it was termed to 401k. Um, do we have active or passive gain on the TEGNA or the [Fidelity 401(k) Plan] account?
>
> [Counsel for Plaintiff]: Your [sic] asking me or no?
>
> [Trial court]: Yes, ma'am.
>
> [Counsel for Plaintiff]: I'm looking. I don't think I have it. Let me see.

¶ 26 Again, during closing arguments, Defendant raised her concern over Plaintiff's undisclosed passive gains.

> [Defendant]: They have the appreciated value, the passive appreciation for mine, but not theirs, so I—you know, I would hope that you would not count that or count it equitably. I can't—I mean, you can't just list whatever yours was at the date of separation, and whatever mine was, and add this $17,000 to it without adding something to his. I'm sure he could pull it up just like I did on my phone.

¶ 27 In this case, Judge Hewett found that the "ends of justice" and equity required reopening the evidence based on her own action of not returning to Defendant's question of active and passive income at the 7 August 2018 hearing after noting she would. *See In re B.S.O.*, 225 N.C. App. at 543, 740 S.E.2d at 484. Judge Hewett also based her decision to reopen evidence on Plaintiff using Defendant's retirement plan statement to obtain passive gains on her account despite not alleging any divisible property in his equitable distribution affidavit. Plaintiff then refused to offer the same evidence for his retirement accounts. Plaintiff was not "surprise[d]" by the reopening of evidence because the trial court requested the information at the initial equitable distribution hearing. *See Miller*, 218 N.C. at 150, 10 S.E.2d at 711. Chief Judge Miller, the neutral and impartial judge ruling on Plaintiff's motion to recuse Judge

Hewett, also found the request did not create a surprise for Plaintiff. Further, Plaintiff was not "improperly prejudice[d]" by the request because Defendant volunteered the passive gains earned on her own retirement plan, which the trial court would equitably divide between the parties. *See id.* at 150, 10 S.E.2d at 711.

¶ 28 Therefore, the trial judge made a "reasoned decision," *see Mutakbbic*, 317 N.C. at 274, 345 S.E.2d at 159, and did not abuse her discretion by reopening evidence to value Plaintiff's retirement accounts as of the date of trial. *See McCurry*, 146 N.C. App. at 553, 553 S.E.2d at 703.

V. The Trial Court's Request for Evidence Regarding Plaintiff's Retirement Account

¶ 29 In his second argument, Plaintiff contends the trial court abused its discretion by "shifting the burden of proof by ordering Plaintiff-Appellant to provide documentation or evidence of the value of his Fidelity 401(k) [Plan] at the date of trial and failing to give Plaintiff-Appellant the ability to rebut the presumption that it was divisible property." Defendant argues the trial court did not abuse its discretion by requesting information regarding Plaintiff's retirement account because it was necessary to equitably distribute the divisible property. We find Plaintiff's argument unpersuasive.

¶ 30 Here, the trial court judge offered to hold a hearing to allow the parties full opportunity to be heard and to present additional evidence relating to Plaintiff's retirement accounts. As an alternative, the judge allowed the parties to submit documentation if the parties so agreed. Although Plaintiff was given an opportunity—but not ordered—to testify or admit additional evidence at a hearing as to the classification and valuation of property, he declined.

¶ 31 Plaintiff cites to *Miller v. Miller*, 97 N.C. App. 77, 80, 387 S.E.2d 181, 184 (1990) (holding the trial court did not err in failing to classify and distribute a debt where husband failed to meet his burden of proving the debt's value and classification), *Atkins v. Atkins*, 102 N.C. App. 199, 208, 401 S.E.2d 784, 788 (1991) (holding the husband did not satisfy his burden of proving a tract of land was separate property), *Albritton v. Albritton*, 109 N.C. App. 36, 41, 426 S.E.2d 80, 83 (1993) (refusing to remand a case where the "trial court failed to make a specific finding as to the present discount value" of a party's pension plan, and the party did not offer evidence as to the pension plan's value), and *Montague v. Montague*, 238 N.C. App. 61, 68, 767 S.E.2d 71, 76–77 (2014) (holding the trial court did not abuse its discretion by failing to omit a lawnmower from its equitable distribution where the husband did not provide

the requisite evidence), to argue the trial court improperly shifted Defendant's burden of presenting evidence regarding the classification and valuation of Plaintiff's retirement plans to Plaintiff. We disagree.

¶ 32 As discussed above, the trial court did not abuse its discretion by reopening the evidence. The cases on which Plaintiff relies are distinguishable from the instant case where the trial court, on its own motion, reopened the evidence to allow additional information on an item of divisible property. Thus, we cannot conclude the trial court improperly shifted the burden of proof. Although the trial court was under no obligation to request the evidence, it found the evidence was necessary to accurately value marital and divisible property and achieve a fair and just equitable distribution judgment.

VI. Findings of Fact

¶ 33 **[2]** In his third argument, Plaintiff contends findings of fact 31, 34, 40–43, 55, 57–58, and 60–62 of the Order are not supported by the evidence. Defendant argues "the trial court's findings of fact were supported by competent evidence from the record and are detailed enough to not be disturbed on appeal." Defendant further argues it was Plaintiff who provided the information regarding his Fidelity 401(k) Plan to the trial court; thus, he may not challenge the evidence.

¶ 34 We review a judgment entered after a non-jury trial to determine "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Montague*, 238 N.C. App. at 63, 767 S.E.2d at 74. "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *Lund v. Lund*, 244 N.C. App. 279, 287, 779 S.E.2d 175, 181 (2015) (citation omitted). Additionally, competent evidence is "admissible or otherwise relevant." *State v. Bradley*, 2022-NCCOA-163, ¶ 14. We note the record on appeal in this case was settled pursuant to Rule 11(b) of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 11(b).

¶ 35 Under Rule 11(b),

> [i]f the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within thirty days . . . after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other

> parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval of objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

Id.

¶ 36 Here, Plaintiff composed the record on appeal and served the proposed record upon Defendant on 30 April 2021. There is no evidence Defendant objected to, or approved of, the record "within thirty-days . . . after service." *See id.* Therefore, Plaintiff's "proposed record on appeal . . . constitutes *the record on appeal*." *See id.* (emphasis added).

¶ 37 Plaintiff first challenges findings of fact 31 and 34. Finding of fact 31 provides: "During the trial, both parties requested of the other, date of trial values on their respective retirement accounts set out above." Although the transcripts of the 7 August 2018 hearing reveal Defendant asked the trial court about potential passive income on Plaintiff's retirement accounts, and again commented on the subject during her closing argument, there is no evidence she requested *from Plaintiff* the date of trial values of his retirement accounts. Rather, the trial court told Defendant they would return to the issue, and during Defendant's cross examination of Plaintiff, the trial court asked Plaintiff's counsel whether passive or active gains had been earned on Plaintiff's retirement plans. Defendant again raised the issue during her closing argument. Therefore, we conclude finding of fact 31 is not supported by competent evidence. *See Montague*, 238 N.C. App. at 63, 767 S.E.2d at 74.

¶ 38 Finding of fact 34 provides: "When Defendant asked for this information during cross examination, the Court determined this would be provided at a later time during trial and then neglected to return to Defendant and allow the question." The transcripts tend to show Defendant was testifying on *direct examination* regarding marital property and the values she assigned to the property when she asked the trial court why Plaintiff valued her account using the date of trial value. The trial court explained that Plaintiff's valuation concerns passive or active gain and that the court would return to the issues. The finding that the question occurred on *cross examination* is not supported by the competent evidence; however, this error was harmless. *See Hart v. Hart*,

74 N.C. App. 1, 5, 327 S.E.2d 631, 634 (1985). We conclude the remaining findings within finding of fact 34 are supported by competent evidence. *See Montague*, 238 N.C. App. at 63, 767 S.E.2d at 74.

¶ 39 Plaintiff next challenges findings of fact 40, 41, 42, and 43 which provide the following:

> 40. Plaintiff provided information only on the Fidelity 401(k) Plan which showed that on, or about July 16th 2018, and without notice to Defendant/Wife or accountability for post separation increases, Husband withdrew the entirety of the funds from the account, leaving a zero balance on the date of trial.
>
> 41. No evidence was presented showing that the Fidelity 401(k) Plan had been rolled into another 401(k).
>
> 42. The total of the amount withdrawn by Husband from the Fidelity 401(k) Plan, approximately twenty-one (21) days prior to trial, was one hundred ninety-three thousand one hundred seventy-nine dollars and fifty-two cents ($193,179.52), which is thirty four thousand dollars and fifty cents ($34,000.50) more than the amount on the statement provided at trial which showed the date of separation value.
>
> 43. There were no post separation deposits made by Husband, so the passive gain to the Fidelity 401(k) Plan of thirty-four thousand dollars and fifty cents ($34,000,50), is a marital asset to be distributed as such to the Plaintiff.

¶ 40 We are unable to determine from the record before us whether competent evidence exists to support the trial court's findings regarding Plaintiff's Fidelity 401(k) Plan, or whether this evidence was intentionally omitted from the record on appeal. Nonetheless, Defendant did not object to the proposed record on appeal, so it "constitutes the record on appeal." *See* N.C. R. App. P. 11(b). In any event, findings of fact 40, 41, 42, 43 concerning Plaintiff's Fidelity 401(k) Plan are not supported by competent evidence based upon the record on appeal. *See Montague*, 238 N.C. App. at 63, 767 S.E.2d at 74. Because the trial court relied on these unsupported findings to make additional findings on the distribution factors under N.C. Gen. Stat. § 50-20(c) and related conclusions of law, we must remand the matter to the trial court. On remand, the trial

court may hold an evidentiary hearing and, in its discretion, admit additional evidence if it deems necessary as to findings 40, 41, 42, and 43. *See Lund*, 244 N.C. App. at 287, 779 S.E.2d at 181; *Bradley*, 2022-NCCOA-163, ¶ 14. Because we remand the matter, we need not consider Plaintiff's arguments as to the trial court's conclusions of law, its unequal division of property, and its order for Plaintiff to make a distributive award.

REMANDED.

Judges GORE and GRIFFIN concur.

JAY SINGLETON, D.O., AND SINGLETON VISION CENTER, P.A., PLAINTIFFS
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROY COOPER, GOVERNOR OF THE STATE OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY; MANDY COHEN, NORTH CAROLINA SECRETARY OF HEALTH AND HUMAN SERVICES, IN HER OFFICIAL CAPACITY; PHIL BERGER, PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, IN HIS OFFICIAL CAPACITY; AND TIM MOORE, SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. COA21-558

Filed 21 June 2022

1. Hospitals and Other Medical Facilities—certificate of need — as-applied constitutional challenge—procedural due process —jurisdiction

In a declaratory judgment action brought by a doctor and his ophthalmology clinic (plaintiffs) against the Department of Health and Human Services and multiple state government officials (defendants), the trial court lacked subject matter jurisdiction to review plaintiffs' as-applied constitutional challenge in which plaintiffs argued that N.C.G.S. § 131E-175—the law requiring plaintiffs to obtain a certificate of need (CON) in order to perform surgeries at the clinic—violated their procedural due process rights under the state constitution. Specifically, plaintiffs failed—before seeking the court's review—to first exhaust the administrative remedies available to them, such as applying for a CON, or to show that such remedies would have been inadequate. Defendants were permitted to raise this jurisdictional defect on appeal under Appellate Rule 28(c), and because jurisdictional defects may be raised at any time during a legal proceeding.

2. Hospitals and Other Medical Facilities—certificate of need — as-applied constitutional challenge—substantive due process —jurisdiction

In a declaratory judgment action brought by a doctor and his ophthalmology clinic (plaintiffs) against the Department of Health and Human Services and multiple state government officials (defendants), the trial court had subject matter jurisdiction to review plaintiffs' as-applied constitutional challenge in which plaintiffs argued that N.C.G.S. § 131E-175—the law requiring plaintiffs to obtain a certificate of need (CON) in order to perform surgeries at the clinic—violated their substantive due process rights under the state constitution. Unlike plaintiffs' claims asserting procedural due process violations, plaintiffs' substantive due process claim could be brought in a declaratory judgment action in superior court regardless of whether administrative remedies had been exhausted.

3. Hospitals and Other Medical Facilities—certificate of need— as-applied constitutional challenge

In a declaratory judgment action brought by a doctor and his ophthalmology clinic (plaintiffs) against the Department of Health and Human Services and multiple state government officials (defendants), the trial court properly dismissed plaintiffs' as-applied constitutional challenge to N.C.G.S. § 131E-175, which required plaintiffs to obtain a certificate of need (CON) in order to perform surgeries at the clinic. Although recent legal precedent foreclosing a facial challenge to section 131E-175 did not preclude plaintiffs from raising an as-applied challenge to the law, plaintiffs failed to show that section 131E-175 violated their substantive due process rights under the state constitution's Law of the Land Clause.

Appeal by plaintiffs from order entered 11 June 2021 by Judge Michael O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 22 March 2022.

Institute for Justice, by Joshua A. Windham and Renée D. Flaherty, admitted pro hac vice, and Narron Wenzel, P.A., by Benton Sawrey, for plaintiffs-appellants.

Attorney General Joshua H. Stein, by Solicitor General Ryan Y. Park, Assistant Solicitor General Nicholas S. Brod, Assistant Attorney General Derek L. Hunter and Assistant Attorney General John H. Schaeffer, for defendants-appellees.

K&L Gates LLP, by Gary S. Qualls, Susan K. Hackney and Anderson M. Shackelford, for amici curiae Charlotte-Mecklenburg Hospital Authority d/b/a Atrium Health, University Health Systems of Eastern Carolina, Inc. d/b/a Vidant Health, and Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Health System.

Fox Rothschild, by Marcus C. Hewitt and Troy D. Shelton, for amicus curiae Bio-Medical Applications of North Carolina, Inc.

Law Office of B. Tyler Brooks, PLLC, by B. Tyler Brooks and Lusby Law, PA, by Christopher R. Lusby for amicus curiae Certificate of Need Scholars.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, by Kenneth L. Burgess, Matthew F. Fisher, and Iain M. Stauffer for amici curiae NCHA, Inc. d/b/a North Carolina Healthcare Association, North Carolina Healthcare Facilities Association, North Carolina Chapter of the American College of Radiology, Inc., and North Carolina Senior Living Association.

Parker, Poe, Adams, & Bernstein LLP, by Robert A. Leandro for amici curiae Association for Home and Hospice Care of North Carolina and North Carolina Ambulatory Surgical Center.

John Locke Foundation, by Jonathan D. Guze, for amicus intervenor John Locke Foundation.

TYSON, Judge.

¶ 1 Jay Singleton, D.O. and Singleton Vision Center, P.A. (collectively "Plaintiffs") appeal from an order entered, which granted the motion to dismiss by the North Carolina Department of Health and Human Services ("DHHS"); Roy Cooper, in his capacity as Governor of the State of North Carolina; Mandy H. Cohen, in her capacity as Secretary of the North Carolina Department of Health and Human Services; Phillip E. Berger, in his capacity as President *Pro Tempore* of the North Carolina Senate; and, Timothy K. Moore, in his capacity as Speaker of the North Carolina House of Representatives (collectively "Defendants"). We dismiss in part and affirm in part.

I. Background

¶ 2 Jay Singleton, D.O. ("Dr. Singleton") is a board-certified ophthalmologist, licensed as a medical doctor by the North Carolina Medical Board, and practices in New Bern. Dr. Singleton founded Singleton Vision Center, P.A. (the "Center") in 2014 and serves as its President and Principal. The Center is a full-service ophthalmology clinic, which provides routine vision checkups, treatments for infections, and surgery.

¶ 3 Dr. Singleton provides all non-operative patient care and treatments at the Center. Dr. Singleton performs the majority of his outpatient surgeries at Carolina East Medical Center ("Carolina East") in New Bern. Carolina East is the only licensed provider with an operating room certificate of need located in the tri-county planning area of Craven, Jones, and Pamlico Counties. This current single need determination has not been revised for over ten years since 2012.

¶ 4 To perform surgeries at the Center, Dr. Singleton must obtain both a facility license under the Ambulatory Surgical Facility Licensure Act, N.C. Gen. Stat. § 131E-145 *et seq.* (2021) and a Certificate of Need ("CON") under N.C. Gen. Stat. § 131E-175 *et seq.* (2021). DHHS makes determinations of operating room needs each year in the State Medical Facilities Plan to become effective two years later.

¶ 5 The 2021 State Medical Facilities Plan states there is "no need" for new operating room capacity in the Craven, Jones, and Pamlico Counties planning area. The tri-county planning area encompasses an area of approximately 1,814 square miles. Representatives of Carolina East informed Plaintiffs they will oppose any application they submit for an additional operating room CON within the tri-county area.

¶ 6 Plaintiffs filed suit on 22 April 2020, alleging the CON law as applied to them violates the North Carolina Constitution. Plaintiffs sought an injunction preventing Defendants from enforcing the CON law, a declaration the CON law is unconstitutional as applied to them, and to recover nominal damages.

¶ 7 Defendants filed motions to dismiss pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6) on 29 June 2020 and 31 July 2020. Following a hearing, the trial court denied Defendants' Rule 12(b)(1) motion and allowed Defendants' Rule 12(b)(6) motion on 11 June 2021. Plaintiffs appeal the trial court's order granting Defendants' Rule 12(b)(6) motion. Defendants failed to cross-appeal the denial of their 12(b)(1) motion.

II. Jurisdiction

¶ 8 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021). "[T]he issue of subject matter jurisdiction may be raised at any time, even on appeal." *Huntley v. Howard Lisk Co., Inc.*, 154 N.C. App. 698, 700, 573 S.E.2d 233, 235 (2002).

A. Failure to Appeal

¶ 9 **[1]** Defendants argue the trial court lacked subject matter jurisdiction because Plaintiffs failed to exhaust or even attempt to invoke statutory and administrative remedies available to them. This argument was incorporated into Defendants' Rule 12(b)(1) motion to dismiss, which the trial court denied. Defendants were not required to take a cross-appeal of the trial court's order dismissing the case under Rule 12(b)(6) in order to raise arguments under Rule 12(b)(1). Defendants' subject matter jurisdiction arguments fall under N.C. R. App. P. 28(c): "Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment . . . from which appeal has been taken." N.C. R. App. P. 28(c) (2021).

¶ 10 In addition to Rule 28(c), "there are two types of rules governing the manner in which legal claims are pursued in court: jurisdictional rules, which affect a court's power to hear the dispute, and procedural rules, which ensure that the legal system adjudicates the claim in an orderly way." *Tillet v. Town of Kill Devil Hills*, 257 N.C. App. 223, 225, 809 S.E.2d 145, 147 (2017) (citation omitted). This Court further held: "jurisdictional requirements cannot be waived or excused by the court." *Id.* (citation omitted).

¶ 11 "Jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties." *Feldman v. Feldman*, 236 N.C. 731, 734, 73 S.E.2d 865, 867 (1953). Our Supreme Court has long held: "A defect in jurisdiction over the subject matter cannot be cured by waiver, consent, amendment, or otherwise." *Anderson v. Atkinson*, 235 N.C. 300, 301, 69 S.E.2d 603, 604 (1952).

¶ 12 Our Supreme Court further stated: "A lack of jurisdiction or power in the court entering a judgment always avoids the judgment, and a void judgment may be attacked whenever and wherever it is asserted." *State ex rel. Hanson v. Yandle*, 235 N.C. 532, 535, 70 S.E.2d 565, 568 (1952) (citations omitted). "Where a plaintiff has failed to exhaust its administrative remedies, its action brought in the trial court may be dismissed for

lack of subject matter jurisdiction." *Vanwijk v. Prof'l Nursing Servs.*, 213 N.C. App. 407, 410, 713 S.E.2d 766, 768 (2011) (citation omitted).

¶ 13 "So long as the statutory procedures provide effective judicial review of an agency action, courts will require a party to exhaust those remedies." *Flowers v. Blackbeard Sailing Club*, 115 N.C. App. 349, 352, 444 S.E.2d 636, 638 (1994).

¶ 14 Our Supreme Court has also held:

> As a general rule, *where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts. This is especially true where a statute establishes, as here, a procedure whereby matters of regulation and control are first addressed by commissions or agencies particularly qualified for the purpose.* In such a case, the legislature has expressed an intention to give the administrative entity most concerned with a particular matter the first chance to discover and rectify error. *Only after the appropriate agency has developed its own record and factual background upon which its decision must rest should the courts be available to review the sufficiency of its process.* An earlier intercession may be both wasteful and unwarranted. To permit the interruption and cessation of proceedings before a commission by untimely and premature intervention by the courts would completely destroy the efficiency, effectiveness, and purpose of the administrative agencies.

Presnell v. Pell, 298 N.C. 715, 721-22, 260 S.E.2d 611, 615 (1979) (internal citations and quotation marks omitted) (emphasis supplied).

¶ 15 Plaintiffs acknowledge they could have applied for a CON and have sought and challenged any administrative review to invoke or ripen their constitutional procedural due process claims. *See* N.C. Gen. Stat. § 131E-175 *et seq*. Plaintiffs failed to file an application for a CON or to seek or exhaust any administrative remedy from DHHS prior to filing the action at bar. *Id.* Plaintiff has not shown the inadequacy of statutorily available administrative remedies to review and adjudicate his claims to sustain a deprivation of procedural due process. *Id.*; *see Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 272, 620 S.E.2d 873, 879 (2005).

¶ 16 The procedural due process violation:

> is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by the statute[.]

Edward Valves, Inc. v. Wake Cty., 343 N.C. 426, 434, 471 S.E.2d 342, 347 (1996) (citing *Zinermon v. Burch*, 494 U.S. 113, 125-26, 108 L. Ed. 2d 100, 114 (1990)).

¶ 17 Plaintiffs seek to excuse their failure to seek any administrative review and remedy and assert, "a party who seeks to challenge the constitutionality of [the CON law] must bring an action pursuant to . . . the Declaratory Judgment Act" citing *Hospital Group of Western N.C. v. N.C. Dep't of Human Resources*, 76 N.C. App. 265, 268, 332 S.E.2d 748, 751 (1985). However, Plaintiffs omit the sentence preceding the quoted language, which qualifies: "By amending G.S. 131E-188(b), the Legislature has opted to bypass the superior court in a *contested certificate of need case*, and review of a *final agency decision* is properly in this Court." *Id.* (emphasis supplied). No "contested certificate of need case" was ever brought before DHHS, and no "final agency decision" has been entered. *Id.*

¶ 18 Plaintiffs further baldly assert they are not required to seek and exhaust administrative remedies because the statutory and administrative remedies are inadequate, and the administrative agencies do not have jurisdiction to hear their constitutional claims, nor to grant declaratory or injunctive relief. The focus of Plaintiffs' complaint sought a permanent injunction, preventing enforcement of the CON law against Plaintiffs. *See id.*

¶ 19 The remedy Plaintiffs admittedly and essentially seek is for a fact-finding administrative record and decision thereon to be cast aside and a CON to be summarily issued to them by the Court. This we cannot do. *Presnell*, 298 N.C. at 721, 260 S.E.2d at 615 ("where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts"). "Only after the appropriate agency has developed

its own record and factual background upon which its decision must rest should the courts be available to review the sufficiency of its [procedural due] process. An earlier intercession may be both wasteful and unwarranted." *Id.* at 721-22, 260 S.E.2d at 615. Had Plaintiffs sought any administrative review or the procedures were shown to be inadequate, their claim would be ripe for the superior court to exercise jurisdiction over their procedural claims.

¶ 20 Plaintiffs' procedural due process constitutional challenges under both Article I, Section 32 ("No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.") and Article I, Section 34 ("Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.") of the North Carolina Constitution are properly dismissed under Rule 12(b)(1). N.C. Const. art I, §§ 32, 34.

B. Article I, Section 19

¶ 21 **[2]** Plaintiffs also asserted a substantive due process claim under Article I, Section 19 of the North Carolina Constitution. Contrary to the State's adamant assertions otherwise, Plaintiffs correctly assert this substantive violation may be brought in a declaratory judgment claim in superior court, "regardless of whether administrative remedies have been exhausted." *Good Hope Hosp.*, 174 N.C. App. at 272, 620 S.E.2d at 879 (Holding a "[v]iolation of a substantive constitutional right may be the subject of a § 1983 claim, *regardless of whether administrative remedies have been exhausted*, because the violation is complete when the prohibited action is taken.") (citation omitted) (emphasis supplied).

¶ 22 This Court possesses jurisdiction to review the superior court's ruling over Plaintiffs' substantive due process as applied claims under Article I, Section 19 of the North Carolina Constitution. *See id.*

III. Issues

¶ 23 Plaintiffs argue the trial court erred by granting Defendants' Rule 12(b)(6) motion.

IV. Defendants' Rule 12(b)(6) Motion

¶ 24 **[3]** Plaintiffs assert the CON statutes, N.C. Gen. Stat. § 131E-175 *et seq.*, violates Article I, § 19 of the North Carolina Constitution. Plaintiffs' allegations properly assert an as-applied challenge to N.C. Gen. Stat. § 131E-175 *et seq.* "[A]n as-applied challenge represents a party's protest against how a statute was applied in the particular context in which [the party] acted or proposed to act." *Town of Beech Mountain v. Genesis*

Wildlife Sanctuary, Inc., 247 N.C. App. 444, 460, 786 S.E.2d 335, 347 (2016) (citation omitted), *aff'd*, 369 N.C. 722, 799 S.E.2d 611 (2017). "An as-applied challenge contests whether the statute can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable." *State v. Packingham*, 368 N.C. 380, 383, 777 S.E.2d 738, 743 (2015) (citation omitted), *rev'd and remanded on other grounds*, ____U.S. ____, 198 L. Ed. 2d 273 (2017).

A. Standard of Review

¶ 25 This Court's standard of review of a Rule 12(b)(6) motion and ruling is well established. "A Rule 12(b)(6) motion tests the legal sufficiency of the pleading." *Kemp v. Spivey*, 166 N.C. App. 456, 461, 602 S.E.2d 686, 690 (2004) (citation and quotation marks omitted). "When considering a [Rule] 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery." *Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (citation and quotation marks omitted).

¶ 26 "On appeal from a motion to dismiss under Rule 12(b)(6), this Court reviews *de novo* whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted[.]" *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (citation and internal quotation marks omitted) (ellipses in original).

¶ 27 This Court "consider[s] the allegations in the complaint [as] true, construe[s] the complaint liberally, and only reverse[s] the trial court's denial of a motion to dismiss if [the] plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Id.* (citation omitted).

B. Article I, Section 19

¶ 28 The North Carolina Constitution's Law of the Land Clause, provides, *inter alia*: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art I, § 19. The Law of the Land Clause has been held to be the equivalent of the Fourteenth Amendment's Due Process Clause in the Constitution of the United States. *See State v. Collins*, 169 N.C. 323, 324, 84 S.E. 1049, 1050 (1915).

¶ 29 "[A] decision of the United States Supreme Court interpreting the Due Process Clause is persuasive, though not controlling, authority for interpretation of the Law of the Land Clause." *Evans v. Cowan*, 132 N.C.

App. 1, 6, 510 S.E.2d 170, 174 (1999) (citation omitted). Our Supreme Court has expressly "reserved the right to grant Section 19 relief against unreasonable and arbitrary state statutes in circumstances where relief might not be attainable under the Fourteenth Amendment to the United States Constitution." *In re Meads*, 349 N.C. 656, 671, 509 S.E.2d 165, 175 (1998) (citation omitted).

¶ 30 Our Supreme Court held: "The law of the land, like due process of law, serves to limit the state's police power to actions which have a real or substantial relation to the public health, morals, order, safety or general welfare." *Poor Richard's Inc. v. Stone*, 322 N.C. 61, 64, 366 S.E.2d 697, 699 (1988) (internal quotation marks omitted). Contrary to Plaintiffs' counsel's adamant assertions, for almost twenty years, this Court has held "economic rules and regulations do not affect a fundamental right for purposes of due process[.]" *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 537, 571 S.E.2d 52, 60 (2002) (citations omitted).

¶ 31 In *Hope—A Women's Cancer Ctr., P.A. v. State of N.C.*, 203 N.C. App. 593, 603, 693 S.E.2d 673, 680 (2010), this Court articulated a "rational basis" analysis when examining due process challenges to the CON law, which are claimed to be an invalid exercise of the State's police power. Our Court held: "(1) whether there exists a legitimate governmental purpose for the creation of the CON law[;] and[,] (2) whether the means undertaken in the CON law are reasonable in relation to this purpose." *Id.* (citations omitted).

¶ 32 Our Supreme Court held the protections under Article I, Section 19 "have been consistently interpreted to permit the state, through the exercise of its police power, to regulate economic enterprises provided the regulation is rationally related to a proper governmental purpose." *Poor Richard's*, 322 N.C. at 64, 366 S.E.2d at 699.

¶ 33 In enacting the CON law, the General Assembly made voluminous findings of fact, including: "[T]he general welfare and protection of lives, health, and property of the people of this State require that new institutional health services to be offered within this State be subject to review and evaluation as to need, cost of service, accessibility to services, quality of care, feasibility, and other criteria." N.C. Gen. Stat. § 131E-183(a) (2021). This Court previously held this legislative finding is "a legitimate government purpose." *See Hope—A Women's Cancer Ctr., P.A.*, 203 N.C. App. at 603, 693 S.E.2d at 680 (citation omitted).

¶ 34 In *Hope—A Women's Cancer Ctr., P.A.*, this Court examined a facial challenge to the CON law under Article I, Section 19 and held:

> the General Assembly determined that approving the creation or use of new institutional health care services based in part on the need of such service was necessary in order to ensure that all citizens throughout the State had equal access to health care services at a reasonable price, a situation that would not occur if such regulation were not in place.

Id. at 604, 693 S.E.2d at 681.

¶ 35 This Court reasoned that affordable access to necessary health care by North Carolinians "is a legitimate goal, and it is a reasonable belief that this goal would be achieved by allowing approval of new institutional health services only when a need for such services had been determined." *Id.* at 605, 693 S.E.2d at 681. This Court held the CON law prohibiting a provider from expanding services in their practice did not facially violate a provider's due process rights under Article I, Section 19. *Id.* at 606, 693 S.E.2d at 682.

¶ 36 Defendants assert this Court's analysis here is controlled by *Hope—A Women's Cancer Ctr., P.A.* While *Hope* is instructive, contrary to the State's and Defendants' assertions, this Court's prior holding foreclosing a *facial challenge* does not foreclose a future as-applied challenge, nor does that decision control our analysis of Plaintiffs' claims in the complaint.

¶ 37 "A facial challenge is an attack on a statute itself as opposed to a particular application" to an individual litigant. *City of Los Angeles v. Patel*, 576 U.S. 409, 414, 192 L. Ed. 2d 435, 443 (2015). "In a facial challenge, the presumption is that the law is constitutional, and a court may not strike it down if it may be upheld on any reasonable ground." *Affordable Care, Inc. v. N.C. State Bd. Of Dental Exam'rs*, 153 N.C. App. 527, 539, 571 S.E.2d 52, 61 (2002).

¶ 38 Facial challenges are "the most difficult challenge to mount" successfully. *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707 (1987). To mount a successful facial challenge, "a plaintiff must establish that a law is unconstitutional in *all of its applications*." *Patel*, 576 U.S. at 418, 192 L. Ed. 2d at 445 (citation and internal quotation marks omitted) (emphasis supplied).

¶ 39 In contrast, an as-applied challenge attacks "only the decision that applied the ordinance to his or her property, not the ordinance in general." *Town of Beech Mountain*, 247 N.C. App. at 475, 786 S.E.2d at 356. Contrary to the State's assertions at oral argument, a future as-applied

challenge to a statute is not foreclosed and a litigant is not bound by the Court's holding in a prior facial challenge. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). An as-applied challenge asserts that a law, which is otherwise constitutional and enforceable, may be unconstitutional in its application to a particular challenger on a particular set of facts. *Id.*

¶ 40 Plaintiffs and *amicus* assert our Supreme Court's analysis from *In re Certificate of Need for Aston Park Hospital, Inc.*, 282 N.C. 542, 551, 193 S.E.2d 729, 735 (1973) is controlling instead of *Hope—A Women's Cancer Ctr., P.A.*, 203 N.C. App. 593, 693 S.E.2d 673 (2010). In *Aston Park*, our Supreme Court invalidated a prior codification of the CON law because it violated the plaintiff-provider's substantive due process rights. *Aston Park*, 282 N.C. at 551, 193 S.E.2d at 735. The prior CON statute prohibited the issuance of a CON unless it was "necessary to provide new or additional impatient facilities in the area to be served." *Id.* at 545, 193 S.E.2d at 732 (internal quotation marks omitted).

¶ 41 The General Assembly had made limited findings of fact at that time concerning how this prohibition promoted the public welfare. *Id.* at 544, 193 S.E.2d at 731. This Court held no evidence tended to show or suggest market forces and competition would not "lower prices, [create] better service and more efficient management" for healthcare to sustain the prohibition. *Id.* at 549, 193 S.E.2d at 734.

¶ 42 This earlier codification has been amended, enlarged and re-codified to include additional legislative findings to show how the CON law affects the public welfare. The General Assembly has specifically found and emphasized "[t]hat if left to the marketplace to allocate health service facilities and health care services, geographical maldistribution of these facilities and services would occur." N.C. Gen. Stat. § 131E-175(3).

¶ 43 Plaintiffs' asserted deficiencies, which were identified by this Court in *Aston Park*, are no longer present in the current CON law. *Hope—A Women's Cancer Ctr., P.A.*, 203 N.C. App. at 607, 693 S.E.2d at 682 (internal citations and quotation marks omitted). These additional legislative findings do not mean triable issues and challenges are foreclosed, as they may arise and continue to exist in a future plaintiff's as-applied challenge to the CON statute.

¶ 44 While counsel for Defendants clearly and correctly admitted the CON statutes are restrictive, anti-competitive, and create monopolistic policies and powers to the holder, and Plaintiffs correctly assert the CON process is costly and fraught with gross delays, and service needs are not kept current, those challenges can also be asserted before the

General Assembly, Commissions, and against the agency where a factual record can be built.

¶ 45 At least twelve sister states, including New Hampshire, California, Utah, Pennsylvania, and Texas, have re-examined the anti-competitive, monopolistic, and bureaucratic burdens of their CON statutes' health care allocations, and the scarcity created by and delays inherent in that system, and have abolished the entire CON system within their states. National Conference of State Legislatures, *Certificate of Need (CON) State Laws*, https://www.ncsl.org/research/health/con-certificate-of-need-state-laws.aspx (last visited May 15, 2022).

¶ 46 Plaintiffs' complaint has also not asserted a violation of North Carolina's unfair and deceptive trade practices or right to work statutes located in Chapter 75 or Chapter 95 of our General Statutes. *See* N.C. Gen. Stat. § 75.1.1 *et seq*.; N.C. Gen. Stat. § 95-78 (2021) ("The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion.").

¶ 47 Plaintiffs also failed to assert it had sought re-classification of certain surgical and treatment procedures under its medical or other licenses and certifications, which can be safely done at its Center and clinic, without the need for a CON operating room. *See North Carolina State Bd. of Dental Exam'rs v. FTC* 574 U. S. 494, 514, 191 L. Ed. 2d 35, 54 (2015) (State dental board cannot confine teeth whitening to licensed dental offices.).

¶ 48 Advances in lesser and non-invasive procedures and technological treatments develop rapidly and have reduced or eliminated the need for a traditional operating theater and allowed for ambulatory clinical environments for patients. Yael Kopleman, MD, Raymond J. Lanzafame, MD, MBA & Doron Kopelman, MD, *Trends in Evolving Technologies in the Operating Room of the Future*, Journal of the Society of Laparoendoscopic Surgeons vol. 17,2 (2013).

¶ 49 We express no opinion on the potential viability, if any, of claims not alleged in this complaint. The trial court correctly held Plaintiffs' substantive due process allegations, even taken as true and in the light most favorable to them, failed to state a claim upon which relief can be granted. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2021). Plaintiffs' argument is overruled.

V. Conclusion

¶ 50 Absence of subject matter jurisdiction may be raised at any time, this Court possesses no jurisdiction over Plaintiffs' procedural challenges, as alleged and analyzed above. Plaintiffs' appeal is dismissed in part.

¶ 51 Plaintiffs' as-applied challenges in their complaint, taken as true and in the light most favorable to them, fail to state any legally valid cause of action. The trial court did not err in granting Defendants' Rule 12(b)(6) motion to dismiss.

¶ 52 Considering the allegations in the complaint, as applied to Plaintiffs, the CON law does not violate Plaintiffs' rights under the Law of the Land Clause. N.C. Const. art I, § 19. The order of the trial court is affirmed, without prejudice for Plaintiffs to assert claims before DHHS, or otherwise. *It is so ordered.*

DISMISSED IN PART AND AFFIRMED IN PART.

Judges HAMPSON and CARPENTER concur.

STATE OF NORTH CAROLINA, EX REL. ELIZABETH S. BISER, SECRETARY, NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, PLAINTIFF

CAPE FEAR RIVER WATCH, PLAINTIFF-INTERVENOR
v.
THE CHEMOURS COMPANY FC, LLC, DEFENDANT

No. COA21-225

Filed 21 June 2022

Civil Procedure—intervention—timeliness—factors—water pollution litigation

In an environmental action brought by the State arising from defendant chemical company's discharge of per- and polyfluoroalkyl substances (PFAS) into groundwater and the Cape Fear River, the trial court did not abuse its discretion by denying proposed intervenor Cape Fear Public Utility Authority's (CFPUA) motion to intervene as untimely. When CFPUA filed its motion to intervene, the parties had already resolved the State's claims by agreeing to a consent order, which constituted a final judgment; intervention would have been highly prejudicial to the parties by subjecting the matter to relitigation after the years of investigation, analysis, and negotiation involved in reaching the consent order; there were no changed circumstances justifying CFPUA's delay; CFPUA remained able to pursue relief in its federal lawsuit against defendant; and CFPUA had long been aware of the litigation, made comments in multiple instances, conferred with the State party on several occasions, and

repeatedly asserted throughout the proceedings that the State was failing to adequately represent CFPUA's interests.

Appeal by Proposed Intervenor Cape Fear Public Utility Authority from order entered 30 November 2020 by Judge Douglas B. Sasser in Bladen County Superior Court. Heard in the Court of Appeals 15 December 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Francisco J. Benzoni and Assistant Attorney General Asher P. Spiller, for Plaintiff-Appellee State of North Carolina.

Southern Environmental Law Center, by Geoffrey R. Gisler, Jean Y. Zhuang, and Kelly Moser, for Plaintiff-Intervenor-Appellee Cape Fear River Watch.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Joseph A. Ponzi, George W. House, and V. Randall Tinsley, for Proposed Plaintiff-Intervenor-Appellant Cape Fear Public Utility Authority.

Robinson, Bradshaw & Hinson, P.A., by R. Steven DeGeorge, and Wachtell, Lipton, Rosen & Katz, by John F. Savarese, for Defendant-Appellee The Chemours Company FC, LLC.

COLLINS, Judge.

¶ 1 Proposed Intervenor Cape Fear Public Utility Authority ("CFPUA") appeals from the trial court's order denying its 8 September 2020 motion to intervene in this environmental action brought in 2017 by the State of North Carolina against Defendant, The Chemours Company FC, LLC. CFPUA argues that the trial court erred by denying its motion to intervene as untimely, erred by denying intervention as of right, and abused its discretion by denying permissive intervention. Because the trial court did not abuse its discretion by denying CFPUA's motion as untimely, we affirm.

I. Background

¶ 2 Chemours owns the Fayetteville Works facility ("Facility"), a chemical manufacturing plant adjacent to the Cape Fear River in Bladen County, North Carolina. Chemours produces certain per- and polyfluoroalkyl substances ("PFAS"), including a chemical commercially known as GenX, at the Facility. The Facility discharges water into the Cape Fear

River through multiple avenues. CFPUA, a public utility authority which provides potable water to residents of New Hanover County and the City of Wilmington, owns and operates a raw water intake on the Cape Fear River downstream of the Facility.

¶ 3 On 7 September 2017, the State, through the Department of Environmental Quality ("DEQ"), filed a Verified Complaint, Motion for Temporary Restraining Order, and Motion for Preliminary Injunctive Relief against Chemours alleging violations of multiple water quality laws and regulations based on discharges of PFAS from the Facility into groundwater and the Cape Fear River. The State sought a temporary restraining order requiring Chemours to "immediately cease discharging" certain substances "from its manufacturing process into surface waters" and to "continue to prevent the discharge of process wastewater containing GenX into waters of the State." The State also sought preliminary and permanent injunctive relief. The following day, the trial court entered a Partial Consent Order requiring Chemours to continue existing measures to "prevent the discharge of process wastewater containing GenX . . . into waters of the State," immediately prevent the discharge of certain compounds identified in the complaint, and provide certain information to DEQ and the Environmental Protection Agency.

¶ 4 On 16 October 2017, CFPUA sued Chemours in the United States District Court for the Eastern District of North Carolina ("Federal Suit"). *See* Complaint, *Cape Fear Public Utility Authority v. The Chemours Co. FC, LLC*, No. 7:17-cv-195, (E.D.N.C. 2017), E.C.F. No. 1.[1] In the Federal Suit, CFPUA and other regional water suppliers and governmental entities assert claims for public nuisance, private nuisance, trespass to real property, trespass to chattels, negligence, negligence per se, failure to warn, and negligent manufacture against Chemours. Along with the other plaintiffs, CFPUA seeks compensatory damages, punitive damages, and injunctive relief. *See* Amended Master Complaint of Public Water Suppliers at 6-7, 45-54, *Cape Fear Public Utility Authority v. The Chemours Co. FC, LLC*, No. 7:17-cv-195 (E.D.N.C. 2019), E.C.F. No. 75.

¶ 5 The day after filing its Federal Suit, CFPUA moved to intervene in the present action ("First Motion to Intervene"). CFPUA sought to intervene permissively and as of right under N.C. Gen. Stat. § 1A-1, Rule 24. CFPUA asserted that it had "an interest in the injunctive relief granted" in this action "to assure that such relief adequately protects CFPUA's

1. We take judicial notice of CFPUA's filings in the federal court. *See State v. Watson*, 258 N.C. App. 347, 352, 812 S.E.2d 392, 395 (2018) ("[O]ur courts, both trial and appellate, may take judicial notice of documents filed in federal courts.").

interests" and contended that its "ability to obtain relief may be impaired if the State either fails to prevail (in whole or in part) . . . or if the State compromises this underlying action in a manner detrimental to CFPUA." CFPUA also argued that its interests were "not adequately represented by the State" because its Federal Suit asserted "interests unique to a public water supply authority which are not addressed or protected by the relief sought by the State" and the State's failure to provide public notice and opportunity to comment prior to entry of the Partial Consent Order "call[ed] into question whether the State recognize[d] CFPUA's rights."

¶ 6 CFPUA withdrew its First Motion to Intervene on 15 November 2017 after the parties stipulated that the State would provide notice and comment procedures "with respect to any proposed settlement between" the State and Chemours. The parties also stipulated that the Partial Consent Order was "not a final resolution of any claims asserted" by the State.

¶ 7 On 9 April 2018, the State filed an Amended Complaint and Motion for Preliminary Injunctive Relief containing further allegations based on information gathered during further investigation and seeking additional injunctive relief.[2]

¶ 8 The State published notice of a Proposed Consent Order and commenced a public comment period on 26 November 2018. In a 17 December 2018 comment, CFPUA argued that the Proposed Consent Order was "fundamentally flawed in a number of important respects," including that certain remedial provisions "effectively abandon[ed] the downstream users of the Cape Fear River, leaving them to fend for themselves in private litigation." CFPUA protested that the Proposed Consent Order would provide filtration systems for private well owners whose water exceeded a threshold level of contamination with certain PFAS but would not provide comparable relief for downstream users whose water presented the same level of contamination. In an additional comment, CFPUA provided results of "recent PFAS testing at the CFPUA water intake on the Cape Fear River, and of the treated 'finished' water." According to CFPUA, "out of 51 sampling events" of raw and finished water, only 4 fell below the threshold for private well filtration under the Proposed Consent Order.

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2. The requested injunctive relief included requiring Chemours to address air emissions of GenX Compounds, address other sources of GenX Compounds "such that they no longer cause or contribute to any violations of North Carolina's groundwater rules," refrain from discharging process wastewater into the Cape Fear River prior to issuance of a new permit, account for other discharges, and generally "[c]ease and abate all ongoing violations of North Carolina's water and air quality laws."

¶ 9 CFPUA again moved to intervene on 20 December 2018 ("Second Motion to Intervene"). CFPUA alleged in its Second Motion to Intervene that it was unaware the parties were negotiating or had reached a proposed settlement until the Proposed Consent Order was published. CFPUA contended that the Proposed Consent Order did not "account for or seek to remedy the ongoing harms inflicted on CFPUA and its customers." CFPUA set its Second Motion to Intervene for hearing but removed the motion from the calendar on 10 January 2019.

¶ 10 The State moved for the entry of the Revised Proposed Consent Order on 20 February 2019. The State, Chemours, and Cape Fear River Watch, another proposed plaintiff-intervenor,[3] each consented. At a hearing on the Revised Proposed Consent Order, counsel for CFPUA requested the trial court withhold entering the order until CFPUA's Board of Directors considered whether it should withdraw the Second Motion to Intervene. The trial court declined to do so and entered the Revised Proposed Consent Order as a Consent Order on 25 February 2019.

¶ 11 The Consent Order obligates Chemours to undertake compliance measures to address air, groundwater, surface water, and drinking water contamination and imposes monitoring and reporting requirements. In addition, Paragraph 12 of the Consent Order establishes a process for amending the Consent Order "to reduce PFAS contamination in the Cape Fear River and in the raw water intakes of downstream public water utilities on an accelerated basis[.]" Paragraph 12 provides that,

> within six months of entry of this Order, Chemours shall submit to DEQ and Cape Fear River Watch a plan demonstrating the maximum reduction in PFAS loading from the Facility (including loading from contaminated stormwater, non-process wastewater, and groundwater) to surface waters . . . that are economically and technologically feasible, and can be achieved within a two-year period . . . . The plan shall be supported by interim benchmarks to ensure continuous progress in reduction of PFAS loading. If significantly greater reductions can be achieved in a longer implementation period, Chemours may propose, in addition, an implementation period of up to five years supported by interim benchmarks to ensure

3. Cape Fear River Watch is a "§ 501(c)(3) nonprofit public interest organization . . . that engages residents of the Cape Fear watershed through programs to preserve and safeguard the river." Cape Fear River Watch filed a motion to intervene on 12 December 2018.

> continuous progress in reduction of PFAS loading. . . . Chemours shall simultaneously transmit the plan to downstream public water utilities. DEQ will make DEQ staff available to meet with downstream public water utilities to receive input on the plan.

Upon reaching an agreement, the parties were required to file a joint motion to amend the Consent Order "to incorporate any agreed upon reductions as enforceable requirements" of the Consent Order. If the parties were unable to reach an agreement within eight months of entry of the Consent Order, they were permitted to either jointly stipulate to additional time or to "bring any dispute regarding the additional reductions before the Court for resolution."

¶ 12 The Consent Order also released and resolved

> civil and administrative claims for injunctive relief and civil penalties by Plaintiff against Chemours relating to the release of PFAS from the Facility that have been or could have been brought based on information known to DEQ prior to the lodging of the original Proposed Consent Order on November 28, 2018 for past and continuing violations of the following statutes and regulations: the Clean Water Act and regulations promulgated thereunder; the Clean Air Act and regulations promulgated thereunder; and the North Carolina statutes and regulations referenced in the Complaint, the Amended Complaint and the [Notices of Violation] . . . . Furthermore, DEQ agrees that, based on information known to DEQ prior to the lodging of the original Proposed Consent Order on November 28, 2018, this Consent Order addresses and resolves any violation or condition at the Facility insofar as it could serve as the basis for a claim, proceeding, or action pursuant to Section 13.1(a) or (c) of North Carolina Session Law 2018-5.

The Consent Order did not "release[] Chemours from any liability it may have to any third parties arising from Chemours' actions or release[] any claims by any third party, including the claims in" CFPUA's Federal Suit.

¶ 13 Chemours submitted a proposed plan under Paragraph 12 to DEQ on 26 August 2019. CFPUA commented on this submission on 27 September 2019 and met with DEQ to discuss the submission on 30 September 2019. Chemours submitted a revised proposal on 4 November 2019 which

"was made publicly available on DEQ's website." Following negotiations between the parties, the State released a Proposed Addendum to the Consent Order for public comment on 17 August 2020.

¶ 14 CFPUA filed a Renewed and Amended Motion to Intervene on 8 September 2020 ("Third Motion to Intervene"). CFPUA again alleged that the Consent Order, and further alleged that the Proposed Addendum, provided disparate standards for groundwater users near the Facility and surface water users downstream of the Facility. CFPUA therefore sought a declaration that the Consent Order and Proposed Addendum were arbitrary and capricious and an abuse of discretion under the North Carolina Administrative Procedure Act, and denied equal protection in violation of the state and federal constitutions. CFPUA also sought a declaration that the violations alleged by the State in its amended complaint have occurred or are threatened, and the Consent Order and Proposed Addendum failed to abate these violations.

¶ 15 The State moved to enter the Proposed Addendum on 6 October 2020 and filed a corrected motion two days later. The trial court heard CFPUA's Third Motion to Intervene and the motion for entry of the Proposed Addendum on 12 October 2020. The trial court entered the Proposed Addendum as an Addendum to Consent Order Paragraph 12 ("Addendum") following the hearing and an order denying CFPUA's Third Motion to Intervene on 30 November 2020. The trial court concluded that CFPUA's Third Motion to Intervene was untimely and that CFPUA failed to meet the requirements for either permissive intervention or intervention as of right.

¶ 16 CFPUA appealed the denial of its Third Motion to Intervene to this Court.

II. Discussion

¶ 17 CFPUA first argues that the trial court erred by denying its Third Motion to Intervene as untimely.

¶ 18 It is well-established that "[w]hether a motion to intervene is timely is a matter within the sound discretion of the trial court[.]" *Hamilton v. Freeman*, 147 N.C. App. 195, 201, 554 S.E.2d 856, 859 (2001); *see also Malloy v. Cooper*, 195 N.C. App. 747, 750, 673 S.E.2d 783, 786 (2009); *Home Builders Ass'n of Fayetteville N.C. Inc. v. City of Fayetteville*, 170 N.C. App. 625, 630-31, 613 S.E.2d 521, 525 (2005). An abuse of discretion occurs only where the trial court's ruling is "manifestly unsupported by reason" or is "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

¶ 19 Both intervention of right and permissive intervention are governed by N.C. Gen. Stat. § 1A-1, Rule 24, which provides:

> (a) Intervention of right.–Upon timely application anyone shall be permitted to intervene in an action:
>
> (1) When a statute confers an unconditional right to intervene; or
>
> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive intervention.–Upon timely application anyone may be permitted to intervene in an action[:]
>
> (1) When a statute confers a conditional right to intervene; or
>
> (2) When an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or State governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, such officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

N.C. Gen. Stat. § 1A-1, Rule 24 (2020).

¶ 20 A motion to intervene, whether of right or permissively, must be timely. *See id.*; *State ex rel. Easley v. Philip Morris Inc.*, 144 N.C. App. 329, 332, 548 S.E.2d 781, 783 (2001) (citing N.C. Gen. Stat. § 1A-1, Rule 24). "Timeliness is the threshold question to be considered in any motion

for intervention." *State Employees Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 264, 330 S.E.2d 645, 648 (1985) (citation omitted). In determining the timeliness of a motion to intervene, the trial court must consider "(1) the status of the case, (2) the possibility of unfairness or prejudice to the existing parties, (3) the reason for the delay in moving for intervention, (4) the resulting prejudice to the applicant if the motion is denied, and (5) any unusual circumstances." *Procter v. City of Raleigh Bd. of Adjustment*, 133 N.C. App. 181, 183, 514 S.E.2d 745, 746 (1999) (citing *Gentry*, 75 N.C. App. at 264, 330 S.E.2d at 648). "In situations where a judgment has been entered, motions to intervene are granted only upon a finding of 'extraordinary and unusual circumstances' or a 'strong showing of entitlement and justification.' " *Id.* (citing *Gentry*, 75 N.C. App. at 264, 330 S.E.2d at 648).

1. Status of the Case

¶ 21 CFPUA argues that the trial court failed to appropriately assess the first factor bearing on timeliness, the status of the case. CFPUA specifically contends that the trial court erred because the Consent Order "is not a final judgment, and does not constitute a judgment for purposes of the intervention analysis." We disagree.

¶ 22 The trial court addressed this factor as follows:

> This Court entered judgment in this case in the form of a Consent Order on February 25, 2019, over eighteen months ago. CFPUA's delay must be measured from entrance of this Consent Order. CFPUA was fully aware of the Consent Order. In fact, CFPUA was present in Court on the day it was entered. There are no extraordinary or unusual circumstances that justify CFPUA's long delay. Therefore, this factor weighs heavily against CFPUA and is itself a sufficient basis for denial of CFPUA's Third Motion to Intervene.

(Citations omitted).

¶ 23 The Consent Order contains a comprehensive release of

> civil and administrative claims for injunctive relief and civil penalties by Plaintiff against Chemours relating to the release of PFAS from the Facility that have been or could have been brought based on information known to DEQ prior to the lodging of the original Proposed Consent Order on November 28, 2018 for past and continuing violations of the following

> statutes and regulations: the Clean Water Act and regulations promulgated thereunder; the Clean Air Act and regulations promulgated thereunder; and the North Carolina statutes and regulations referenced in the Complaint, the Amended Complaint and the [Notices of Violation] . . . . Furthermore, DEQ agrees that, based on information known to DEQ prior to the lodging of the original Proposed Consent Order on November 28, 2018, this Consent Order addresses and resolves any violation or condition at the Facility insofar as it could serve as the basis for a claim, proceeding, or action pursuant to Section 13.1(a) or (c) of North Carolina Session Law 2018-5.

In consideration of this release, Chemours agreed to be bound by the obligations detailed in the Consent Order. The parties thus resolved the State's claims by agreeing to implement the Consent Order, and the trial court retained jurisdiction only "for the duration of the performance of the terms and provisions of [the] Consent Order to effectuate or enforce compliance with the terms of [the] Consent Order[.]"

¶ 24 Citing to the Consent Order's requirement that the parties develop and implement a plan for toxicity studies of certain PFAS, a provision permitting Chemours to request less frequent sampling for certain wastewater and stormwater sampling after two years, and Paragraph 12, CFPUA argues that the Consent Order is not a final judgment. Though these provisions envision approval and enforcement by the trial court, they do not obviate the Consent Order's resolution of the State's claims and therefore do not diminish the Consent Order's effect as a final judgment. Under the release of claims in the Consent Order, there is to be no further adjudication of the merits of the State's claims. *See Duncan v. Duncan*, 366 N.C. 544, 545, 742 S.E.2d 799, 801 (2013) ("A final judgment generally is one which ends the litigation on the merits." (quotation marks and citation omitted)).

¶ 25 The Consent Order in this case is analogous to the consent decree this Court treated as a final judgment when analyzing the timeliness of a motion to intervene in *State ex rel. Easley v. Philip Morris Inc.* The *Philip Morris* consent decree provided for "the creation of a non-profit corporation to control fifty percent of all monies" received under a settlement agreement, "subject to the North Carolina General Assembly's approval of the creation of the non-profit corporation prior to 15 March 1999." 144 N.C. App. at 330, 548 S.E.2d at 782. Pursuant to the consent decree, the trial court entered a consent order "to create a private

trust to benefit tobacco growers and quota owners in North Carolina and other states" and "retained jurisdiction to interpret, implement, administer and enforce the trust agreement." *Id.* at 331, 548 S.E.2d at 782. Approximately ten months after entry of the consent decree and two and a half months after entry of the consent order, the proposed intervenors sought to intervene "on behalf of all North Carolina taxpayers" and filed a proposed complaint in intervention "alleging numerous constitutional and statutory violations in the implementation" of the consent decree and consent order. *Id.* This Court treated the consent decree as a final judgment although it required further action, including the creation and approval of a non-profit; the trial court retained jurisdiction over future proceedings; and payments were to continue for approximately 25 years. *Id.* at 333-34, 548 S.E.2d at 784.

¶ 26 In the present case, the trial court did not err by treating the Consent Order as a final judgment when assessing the timeliness of CFPUA's Third Motion to Intervene. The trial court therefore did not fail to appropriately assess the status of the case and properly required CFPUA to demonstrate "extraordinary and unusual circumstances" or a "strong showing of entitlement and justification" for intervention. S*ee Gentry*, 75 N.C. App. at 264, 330 S.E.2d at 648.

2. Possible Unfairness or Prejudice to Existing Parties

¶ 27 CFPUA also argues that the trial court abused its discretion by concluding that the risk of unfairness or prejudice to the existing parties weighed against the timeliness of CFPUA's Third Motion to Intervene. The trial court addressed this factor as follows:

> CFPUA asserts that "there is no risk of unfairness or prejudice to the existing parties." The Court disagrees. The Court finds that CFPUA's intervention would be highly prejudicial to the existing parties especially given the extraordinary relief that CFPUA seeks—specifically, a trial and a judgment declaring the Consent Order and the proposed Addendum arbitrary and capricious and unconstitutional. Intervention would set back and significantly delay, or even derail, the parties' extensive efforts to reach settlement and address PFAS contamination from the Facility. Indeed, the Court finds that CFPUA's intervention could delay relief for CFPUA's own customers as well as for the many thousands of North Carolinians who stand to benefit from the numerous

> PFAS reduction measures required in the Consent Order and Addendum. This factor, even taken alone, is sufficient for this Court to deny CFPUA's Third Motion to Intervene.

(Citations omitted).

¶ 28 In its proposed complaint in intervention, CFPUA sought a trial and declaratory judgment that the Consent Order and subsequent Addendum were arbitrary and capricious, unconstitutional, and in violation of DEQ's statutory mandate. Despite the Consent Order's detailed release of the State's claims, CFPUA also sought a declaration that "the statutory and regulatory violations alleged by the State in this action have occurred or are threatened."

¶ 29 The trial court reasoned that CFPUA's intervention for these purposes would subject the numerous remedial matters addressed in the Consent Order and Addendum, which the trial court found were "the product of years of negotiation as well as time-intensive analysis and investigation involving numerous experts across multiple fields of specialty," to relitigation. The trial court did not abuse its discretion by concluding that CFPUA's intervention "would be highly prejudicial to the existing parties" and this factor weighed against the timeliness of CFPUA's intervention. *See Home Builder's Ass'n of Fayetteville*, 170 N.C. App. at 631, 613 S.E.2d at 525 (concluding that intervention "would prejudice the [existing parties] by destroying their settlement"); *see also Charles Schwab & Co. v. McEntee*, 225 N.C. App. 666, 675-76, 739 S.E.2d 863, 869 (2013) (concluding that the trial court did not abuse its discretion by denying permissive intervention where intervention in the estate dispute "might have eradicated the [settlement agreement] and delayed adjudication of the rights of the Named Parties, potentially to the detriment of the creditors and other beneficiaries of the Estate").

¶ 30 CFPUA challenges the trial court's consideration of "how CFPUA's intervention might interfere with the existing parties' settlement negotiations and decisions" as "untethered to any prejudice which was caused by CFPUA's delay." CFPUA argues that instead, the trial court should only have considered prejudice to the parties arising from the period between "the date CFPUA learned DEQ would not protect its interests" and the filing of its Third Motion to Intervene, a period CFPUA contends was just 26 days.

¶ 31 CFPUA now asserts that it was unaware DEQ would not protect its interests until DEQ published the Proposed Addendum on 17 August 2020. However, CFPUA alleged that DEQ had failed to adequately

represent its interests on multiple instances prior to 17 August 2020. In its First Motion to Intervene, filed 17 October 2017, CFPUA alleged that the State had failed to provide notice and an opportunity for comment prior to filing the original complaint or proposing the Consent Order. CFPUA also alleged that the relief sought would not adequately represent "interests unique to a public water supply authority" such as CFPUA. In an April 2018 memorandum in opposition to a motion to dismiss its Federal Suit, CFPUA argued that DEQ's amended complaint did not seek "relief for third-parties who have suffered injury as a result of the contamination." In its Second Motion to Intervene, filed 20 December 2018, CFPUA declared that it was "clear now that CFPUA's interests are not adequately represented by the State in this action." CFPUA further argued that DEQ had "given little attention to CFPUA's interests in pursuing this enforcement action or to advocating or negotiating relief for the harms caused by the pollutant discharges that are adversely impacting downstream users[.]" Additionally, as the trial court determined, the entry of the Consent Order on 25 February 2019 placed CFPUA "on notice regarding the requirements for the Addendum." The trial court found—and CFPUA does not contest—that (1) CFPUA commented on Chemours' initial proposal under Paragraph 12 on 27 September 2019; (2) CFPUA met with DEQ three days later, in part to discuss the proposal; (3) Chemours published a revised proposal for compliance with Paragraph 12 on its website on 4 November 2019; and (4) CFPUA again met with DEQ on 17 July 2020. CFPUA's 27 September 2019 comment criticized the proposed addendum as "fundamentally flawed in a number of important respects."

¶ 32 CFPUA's argument that the trial court considered too broad a period in assessing prejudice to the existing parties because CFPUA did not "learn[] DEQ would not protect its interests" until 17 August 2020, and therefore delayed just 26 days before filing its Third Motion to Intervene, is without merit. *See Philip Morris*, 144 N.C. App. at 333, 584 S.E.2d at 783 (noting that while proposed intervenors contended the plaintiff had "failed to represent their interests throughout the process," "information about the underlying case ha[d] been widely available" in the ten-month period between entry of judgment and the motion to intervene).

3. Reason for Delay in Moving for Intervention

¶ 33 CFPUA also argues that the trial court abused its discretion because it "made no effort to address CFPUA's evidence and argument on the changed circumstances" that led to its Third Motion to Intervene. To the contrary, the trial court rejected CFPUA's explanation that changed

circumstances accounted for its delay in seeking to intervene. In its Third Motion to Intervene, CFPUA argued that the Consent Order was "based on a flawed premise" that "its implementation would result in the continued reduction of PFAS levels in the Cape Fear River." CFPUA contended that data collected after the entry of the Consent Order revealed that "PFAS levels in the Cape Fear River have been variable—not decreasing—and are largely dependent on river flows." Presented with these arguments, the trial court determined that CFPUA had "articulated no legitimate reason for its delay in seeking intervention."

¶ 34 As the trial court noted, the Consent Order put CFPUA on notice of the requirements to which the Addendum had to conform. Paragraph 12 specified that the parties were required to formulate "a plan demonstrating the maximum reductions in PFAS loading from the Facility (including loading from contaminated stormwater, non-process wastewater, and groundwater) to surface waters . . . that are economically and technologically feasible, and can be achieved within a two-year period[.]"

¶ 35 Contrary to CFPUA's argument that changed circumstances justified its delay, the record indicates that CFPUA had a longstanding concern that implementation of the Consent Order would not reduce PFAS levels in the Cape Fear River to its satisfaction. In its Second Motion to Intervene, CFPUA alleged that "even if the [Facility] immediately ceases all emissions and discharges of PFAS pollutants into the Cape Fear River, those pollutants will continue to contaminate the surface water in the Cape Fear River for decades to come (since pollution in the vegetation, soils, and groundwater in a large and unknown radius around the [Facility] and in river sediments will continue to migrate into the river water through groundwater flow and surface run-off)[.]" Similarly, in its Federal Suit, CFPUA alleged that contaminants originating from the Facility would be "re-introduced into the waters of the Cape Fear River and be subject to being transported to CFPUA's water intake and introduced into CFPUA's public water supply system" when "disturbed by the natural processes of the river ecosystem, including the normal use of the river by people and water-craft." *See* Complaint at 22, *Cape Fear Public Utility Authority v. The Chemours Co. FC, LLC*, No. 7:17-cv-195 (E.D.N.C. 2017), E.C.F. No. 1.

¶ 36 The trial court therefore did not abuse its discretion by rejecting CFPUA's changed circumstances theory, determining that CFPUA did not offer a legitimate reason for its delay, and concluding that CFPUA's delay therefore weighed heavily against the timeliness of its Third Motion to Intervene.

4. Prejudice to the Party Seeking to Intervene

¶ 37 CFPUA also challenges the trial court's conclusion that the potential prejudice to CFPUA of denying intervention weighed heavily against the timeliness of CFPUA's intervention.

¶ 38 The trial court addressed this factor as follows:

> First, CFPUA has its own pending litigation against Chemours. As CFPUA acknowledges, the Consent Order and Addendum do not in any way impair CFPUA's efforts to vindicate its interests in its separate federal litigation. To the contrary, the Consent Order expressly provides that Chemours is not released from any liability it may have to any third parties arising from Chemours' actions. Second, with respect to the Consent Order, counsel for CFPUA stated in open court that the Consent Order "address[es] many of the concerns, if not most of the concerns, [CFPUA] initially raised . . . ." Counsel for CFPUA also acknowledged that "the requirements of the order are beneficial to the public." With respect to the Addendum, Chemours is required to achieve maximum feasible reductions of PFAS contributions from residual sources at the Facility to the Cape Fear River on an expedited basis. Downstream communities, including CFPUA and its customers, will be the primary beneficiaries of this accelerated remediation.

(Citations omitted).

¶ 39 CFPUA argues that the trial court's analysis of the potential prejudice to CFPUA "fails to consider the changed circumstances" that it contends led to its Third Motion to Intervene. However, as discussed above, the trial court did not abuse its discretion by rejecting CFPUA's changed circumstances theory.

¶ 40 CFPUA also contends that its Federal Suit will not provide the same relief as direct involvement in this action and is "an inferior means to protect [CFPUA's] interests in prompt and effective remediation of the contamination." The trial court's analysis, however, did not assume that the Federal Suit would provide the same relief as CFPUA's intervention. Instead, the trial court reasoned that CFPUA would remain able to pursue its Federal Suit absent intervention and the implementation of the Consent Order and Addendum would benefit downstream users,

including CFPUA. CFPUA does not challenge the trial court's findings that the Consent Order "contains numerous provisions to substantially reduce PFAS discharges and emissions to the environment from ongoing operations at the Facility," the Addendum "requires measures to substantially reduce PFAS loading to surface water from historic sources including contaminated groundwater and contaminated soils," and such sources are "currently the most significant source[s] of PFAS loading to the Cape Fear River."

¶ 41 The trial court's assessment that the potential prejudice to CFPUA weighed against intervention is not "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *See White*, 312 N.C. at 777, 324 S.E.2d at 833.

5. Unusual Circumstances

¶ 42 CFPUA argues that the trial court abused its discretion in concluding that there are "unusual circumstances that warrant denying CFPUA's [Third Motion to Intervene] as untimely." The trial court addressed this factor as follows:

> [T]he "unusual circumstances" that [CFPUA] lists are unrelated to its long delay and are irrelevant to its failure to timely move for intervention. While extraordinary or unusual circumstances are generally analyzed to support a late motion to intervene, the Court finds that, here, there are unusual circumstances that warrant denying CFPUA's motion to intervene as untimely. Unlike most settlements, both the Consent Order and the Addendum were publicly noticed, allowing CFPUA and other members of the public a chance to be heard on both documents prior to entry by the Court. CFPUA availed itself of this opportunity and commented on both the Consent Order and the Addendum as well as on Chemours' submission describing how it proposed to comply with the requirements of Paragraph 12 of the Consent Order. Moreover, the Consent Order was unusual in that it expressly provided downstream utilities, including CFPUA, with a unique role in the process that led to development of the Addendum. Specifically, the Consent Order required Chemours to share its plan under Paragraph 12 with CFPUA and other utilities and required DEQ to make relevant staff

> available to meet with downstream utilities, including CFPUA, to discuss their comments on Chemours' plan. Finally, the nature of this Addendum also constitutes an unusual circumstance favoring the denial of the motion to intervene. The Addendum addresses an issue of paramount importance to the citizens of North Carolina—the requirement of significant reductions of PFAS loading to surface waters from residual sources at the Facility. Intervention at this stage could delay or derail implementation of measures necessary to achieve these reduction[s]. These unusual circumstances weigh against the timeliness of CFPUA's Third Motion to Intervene.

(Citations omitted).

¶ 43 CFPUA does not challenge the trial court's determination that the notice and comment procedures, CFPUA's involvement under Paragraph 12, and the public benefit of prompt implementation of the Consent Order and Addendum were unusual circumstances weighing against CFPUA's intervention. Instead CFPUA argues, as it did in its Third Motion to Intervene, that "unusual circumstances" existed in DEQ's "consistent, carefully considered unwillingness to confer with CFPUA about the remediation measures that DEQ is considering and that directly impact [CFPUA's] customers." CFPUA suggests that this amounts to "conduct by an existing party that makes it more difficult for potential intervenors to apprehend the need to intervene[.]"

¶ 44 In support of this argument, CFPUA cites *Stallworth v. Monsanto Co.*, 558 F.2d 257 (1977), but *Stallworth* is distinguishable from the present case. There, the plaintiff-employees opposed the defendant-employer's request to notify non-party employees of the suit and "give them a reasonable opportunity to intervene, or be joined as defendants[.]" *Id.* at 260-61. The trial court denied the request to notify the non-party employees and subsequently entered a consent order partially settling the case. *Id.* at 261. The non-party employees "first felt the impact" of the consent order ten days later and filed their motion to intervene "just under one month after the entry of" the order. *Id.* at 261-62. The trial court denied the motion to intervene as untimely, but the Fifth Circuit reversed. *Id.* at 260. The Fifth Circuit reasoned that "[s]ince the plaintiffs urged the district court to make it more difficult for the [non-party employees] to acquire information about the suit early on," the plaintiffs should not "be heard to complain that [the non-party employees] should have known about it or appreciated its significance sooner." *Id.* at 267. The refusal to

permit notification of non-party employees of the pendency and potential impact of the lawsuit "constitute[d] an unusual circumstance which tilt[ed] the scales toward a finding that the" motion to intervene was timely. *Id.*

¶ 45 Here, by contrast, the trial court's unchallenged findings of fact demonstrate that CFPUA has long been aware of this litigation, made comments on multiple instances, and conferred with DEQ on several occasions. Additionally, CFPUA's argument that the State's conduct impeded its ability to apprehend the need to intervene is undercut by CFPUA's repeated assertions, beginning early in the proceedings, that the State failed to adequately protect CFPUA's interests.

¶ 46 The trial court did not abuse its discretion in concluding that the unusual circumstances cited by CFPUA are "unrelated to its long delay and are irrelevant to its failure to timely move for intervention," and to the contrary, "there are unusual circumstances that warrant denying CFPUA's" Third Motion to Intervene as untimely.

III. Conclusion

¶ 47 The trial court did not abuse its discretion in determining that CFPUA's Third Motion to Intervene was untimely. Because "[t]imeliness is the threshold question to be considered in any motion for intervention," *Gentry*, 75 N.C. App. at 264, 330 S.E.2d at 648, we affirm the trial court's order denying CFPUA's Third Motion to Intervene without reaching CFPUA's arguments that the trial court erred by denying intervention as of right and abused its discretion by denying permissive intervention under Rule 24(a) and (b).

AFFIRMED.

Judges DIETZ and ARROWOOD concur.

STATE v. ANTHONY

[284 N.C. App. 135, 2022-NCCOA-414]

STATE OF NORTH CAROLINA
v.
KENNETH RUSSELL ANTHONY, DEFENDANT

No. COA18-1118-3

Filed 21 June 2022

Satellite-Based Monitoring—lifetime—reasonableness—aggravated offender

The trial court's order imposing lifetime satellite-based monitoring (SBM) on defendant upon his release from prison based on his status as an aggravated offender was affirmed where, after considering the totality of the circumstances—including defendant's reduced expectation of privacy due to having to register as a sex offender, the State's legitimate interest in protecting the public and in preventing and solving future sex crimes, and the limited intrusion caused by lifetime SBM for aggravated offenders—the application of SBM was reasonable in defendant's case.

Judge HAMPSON concurring in result only.

Appeal by defendant from order entered on or about 26 April 2018 by Judge Lori I. Hamilton in Superior Court, Rowan County. Heard in the Court of Appeals 8 May 2019, and opinion filed 20 August 2019. Remanded to this Court by order of the North Carolina Supreme Court for further consideration in light of *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019). Opinion filed 17 November 2020. Remanded to this Court by order of the North Carolina Supreme Court for further consideration in light of *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, *State v. Strudwick*, 379 N.C. 94, 2021-NCSC-127, and the General Assembly's recent amendments to the satellite-based monitoring program in 2021 North Carolina Laws S.L. 2021-138 (Sept. 2, 2021, eff. 1 December 2021).

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya M. Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant.

STROUD, Chief Judge.

¶ 1 Defendant Kenneth Russell Anthony appeals a trial court order directing him to enroll in satellite-based monitoring ("SBM") for life following his plea to an aggravated sex offense. We are reviewing Defendant's case for a third time; the North Carolina Supreme Court remanded the case to us to reconsider our holding in light of *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, *State v. Strudwick*, 379 N.C. 94, 2021-NCSC-127, and the General Assembly's recent amendments to the SBM program from Session Law 2021-138, § 18. 2021 North Carolina Laws S.L. 2021-138 (Sept. 2, 2021, eff. 1 December 2021). Based upon these recent Supreme Court rulings and the newly revised statutes applicable to this SBM order, we find the trial court conducted an adequate hearing as to the reasonableness of SBM in Defendant's case and thus we reject his argument the State failed to prove lifetime SBM was reasonable as applied to him. Because we further conclude SBM is reasonable as applied to Defendant after our own *de novo* review, we affirm.

I. Background

¶ 2 As this is the third time this case is before us, we draw on our previous opinions to give the factual background of the case, adding details only as necessary for this current opinion. Our first opinion summarized the underlying facts of the case:

> Defendant entered an *Alford* plea to attempted first-degree sex offense, habitual felon, assault on a female, communicating threats, interfering with emergency communication, first-degree kidnapping, incest, and second-degree forcible rape. Defendant's charges were consolidated into a single judgment and the trial court imposed a sentence of 216 to 320 months. On the same day judgment was entered, Defendant submitted a motion to dismiss the State's petition for SBM. The trial court held a hearing regarding SBM. The trial court denied Defendant's motion and entered an order directing Defendant to submit to lifetime SBM upon his release from prison. Defendant timely appealed the order requiring him to submit to lifetime SBM.

State v. Anthony, 267 N.C. App. 45, 46, 831 S.E.2d 905, 906–07 (2019) ("*Anthony I*").

¶ 3 To expand upon that summary with the facts relevant to this appeal, the plea hearing included a summary of the evidence, to which Defendant had consented. Specifically, the trial court heard summarized

evidence on a previous felony sex offense Defendant had committed, a previous sex offender registry violation, and the factual basis for the two charges to which Defendant pled in this case. The trial court later used the factual basis for these charges to conclude Defendant had committed an aggravated offense that made him eligible for SBM.

¶ 4 As *Anthony I* indicated, the trial court also held a hearing regarding SBM, and Defendant's motion to dismiss the State's petition for it, immediately after the plea hearing. 267 N.C. App. at 46, 831 S.E.2d at 906. Defendant argued in his motion to dismiss SBM was unconstitutional facially and as applied to him under the Fourth Amendment to the United States Constitution and Article I, § 20 of the North Carolina Constitution. In the current appeal, Defendant only argues SBM violates the Fourth Amendment as applied to him.

¶ 5 As part of that argument, Defendant highlighted the Fourth Amendment requires searches to be reasonable and the United States Supreme Court in *Grady v. North Carolina*, 575 U.S. 306, 135 S. Ct. 1368 (2015) ("*Grady I*") (per curiam), held SBM is a search. Thus, the trial court conducted an analysis of reasonableness of SBM as to Defendant and found as follows:

> In this matter, the defendant is already, as a convicted sex offender, required to register as a sex offender. Those registration requirements already impose a burden upon the defendant and the -- the additional burden of satellite-based monitoring would be a slight additional burden or infringement on the defendant's life and liberty. That, in fact, the satellite-based monitoring does not actually curtail the defendant's liberty. It does not require that he be locked up or placed in any sort of detention facility, but rather makes his whereabouts known for the purposes of serving greater governmental interests and legitimate State interests such as protecting society from, in this particular case, a twice convicted sex offender and deterring the conduct of what is, in this case, a twice convicted sex offender.
>
> I will note also that studies show that sex offenders generally have a higher recidivism rate than does the general population of convicted felons, and for that reason -- for that reason and others, the State does have a legitimate State interest and a legitimate concern for the protection of society and the

> deterrence of future conduct. And for those reasons, I will -- that and the fact that I have now made findings of fact sufficient to justify the imposition of satellite-based monitoring will require that the defendant enroll in the satellite-based monitoring program for a period of his natural life, unless monitoring is earlier terminated pursuant to G.S. §14-208.43.

The trial court then denied Defendant's motion to dismiss the State's SBM petition and imposed SBM. As *Anthony I* noted, Defendant then "timely appealed the order requiring him to submit to lifetime SBM." 267 N.C. App. at 46, 831 S.E.2d at 907.

¶ 6 While we explain the nature of our prior rulings in our analysis below, we briefly review the procedural history of Defendant's appeal. Following our opinion reversing the SBM order in *Anthony I*, 267 N.C. App. at 52, 831 S.E.2d at 910, the North Carolina Supreme Court remanded "for reconsideration in light of" *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019) ("*Grady III*"). *State v. Anthony*, No. COA18-1118-2, slip op. at 2, 274 N.C. App. 356 (2020) ("*Anthony II*") (unpublished), *remanded for reconsideration in* 379 N.C. 668, 865 S.E.2d 851 (2021). In *Anthony II*, we again reversed the trial court's order imposing lifetime SBM. *Id.*, slip op. at 6–7. Our Supreme Court remanded again for reconsideration in light of *Hilton*, *Strudwick*, and the legislative changes to the SBM program. 379 N.C. 668, 865 S.E.2d 851. Following the latest remand, we ordered supplemental briefing from each party. We now address Defendant's arguments from that briefing, which again challenges the trial court's order imposing lifetime SBM.

II. Analysis

¶ 7 Defendant argues the trial court erred by imposing SBM because "[t]he State failed to prove that SBM would be a reasonable search as applied to" him. Specifically, Defendant asserts that, just as our first opinion in this case determined, "the State 'presented no evidence as to the reasonableness of SBM,' " so "the order imposing SBM should be reversed." (Quoting *Anthony I*, 267 N.C. App. at 47, 831 S.E.2d at 907.) Defendant also contends the Supreme Court's recent decisions in *Hilton* and *Strudwick* do not impact his argument because they were facial challenges in contrast to his as-applied challenge.

¶ 8 We first address the standard of review. Then, to aid in the understanding of Defendant's arguments, we provide a brief overview of the recent history of SBM litigation and legislation as well as its impact on this case. Finally, we address his argument directly.

A. Standard of Review

¶ 9 We review a trial court order to determine "whether the trial judge's underlying findings of fact are supported by competent evidence, . . . and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Carter*, 2022-NCCOA-262, ¶ 14 (quoting *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008)) (alteration in original). "We review a trial court's determination that SBM is reasonable *de novo*." *Id.* (citing *State v. Gambrell*, 265 N.C. App. 641, 642, 828 S.E.2d 749, 750 (2019)).

B. Brief History of Recent SBM Litigation and Legislation

¶ 10 With that standard of review in mind, we now provide a brief history of recent SBM litigation and how this case fits within that history. This Court's recent opinion in *Carter* provides a helpful overview of the history:

> The Supreme Court of the United States held in *Grady v. North Carolina*, 575 U.S. 306, 135 S. Ct. 1368, 191 L. Ed. 2d 459 (2015) ("*Grady I*"), that the imposition of SBM constitutes a warrantless search under the Fourth Amendment and necessitates an inquiry into reasonableness under the totality of the circumstances. 575 U.S. at 310, 135 S. Ct. at 1371, 191 L. Ed. 2d at 462.

Carter, ¶ 15. *Grady I* served as the basis for Defendant's motion to dismiss the State's SBM petition. And the trial court issued its SBM ruling with *Grady I* as the leading case on the matter.

¶ 11 We also issued our first opinion in this case, *Anthony I*, before the *Grady* case had reached the North Carolina Supreme Court again in *Grady III*. *See Anthony II*, slip op. at 2 (noting the Supreme Court remanded the case "for reconsideration in light of" *Grady III*). As Defendant highlights, we reversed the trial court order in *Anthony I* because "the State presented no evidence supporting the reasonableness of SBM as applied to Defendant." 267 N.C. App. at 46, 831 S.E.2d at 906. In *Anthony I*, we evaluated reasonableness by analyzing: "the defendant's risk of recidivism and the efficacy of SBM to accomplish a reduction of recidivism." *Id.*, 267 N.C. App. at 47, 831 S.E.2d at 907. Our lack-of-evidence holding focused on the second part of that analysis, the State's failure to present any evidence on whether SBM effectively prevents recidivism. *Id.*, 267 N.C. App. at 52, 831 S.E.2d at 910. Notably, our ruling was based on *State v. Grady*, 259 N.C. App. 664, 817 S.E.2d 18

(2018) ("*Grady II*"). *See Anthony I*, 267 N.C. App. at 52, 831 S.E.2d at 910 (including language about being bound by *Grady II*).

¶ 12 *Grady III*, however, changed the way courts analyze reasonableness within the SBM context. Specifically, it replaced the two-pronged analysis used in *Anthony I* with a new set of three factors "to be considered in determining whether SBM is reasonable under the totality of the circumstances." *See Carter*, ¶ 17 (noting this Court used *Grady III* "for guidance as to the scope of the reasonableness analysis" required by *Grady I*). Under *Grady III*, courts had to weigh an offender's privacy interests, SBM's " 'intrusion' " into those interests, and the State's " 'without question legitimate' interest in monitoring sex offenders." *Id.* (quoting *Grady III*, 372 N.C. at 527, 534, 538, 543–44, 831 S.E.2d at 557, 561, 564, 568).

¶ 13 Thus, Defendant's emphasis on our previous determination in *Anthony I* that the State failed to present evidence supporting the reasonableness of SBM overlooks the difference in what reasonableness meant then versus now and thus what type of evidence the State needed to present. In *Anthony I*, we held that the State failed to provide evidence of SBM's efficacy. 267 N.C. App. at 52, 831 S.E.2d at 910. *Grady III* instead explained the State had to show SBM was reasonable under the totality of the circumstances as measured by its three factors. *Carter*, ¶ 17 (citing *Grady III*, 372 N.C. at 527, 534, 538, 543–44, 831 S.E.2d at 557, 561, 564, 568). As explained more below, our Supreme Court's recent cases have made clear the State need not prove SBM's efficacy, only the three factors from *Grady III*. *See Hilton*, ¶ 28 ("Since we have recognized the efficacy of SBM in assisting with the apprehension of offenders and in deterring recidivism, there is no need for the State to prove SBM's efficacy on an individualized basis."); *Hilton*, ¶¶ 19, 29, 32 (laying out three factors for SBM reasonableness analysis that mirror those from *Grady III*). Thus, we reject Defendant's argument our holding on lack of evidence from *Anthony I* has any bearing on our analysis of his argument in this appeal.

¶ 14 Following *Grady III*, the Supreme Court remanded this case to us "for reconsideration in light of" *Grady III*, which led to our opinion in *Anthony II*. *Anthony II*, slip op. at 2. In *Anthony II*, we again determined the State could not establish SBM was reasonable; the State did not prove SBM would be a reasonable search in the distant future when Defendant was released from prison—18 years at the time of the opinion—which was the time when SBM would begin. *Anthony II*, slip op. at 6–7.

¶ 15 Since our decision in *Anthony II*, our Supreme Court has issued two further relevant decisions on SBM, *Hilton* and *Strudwick*. In *Hilton*, the Supreme Court "narrowly construed *Grady III*'s holding" noting *Grady III* " 'left unanswered the question of whether the SBM program is constitutional as applied to sex offenders who are in categories other than that of recidivists who are no longer under State supervision.' " *Carter*, ¶ 18 (quoting *Hilton*, ¶ 2). That includes people such as Defendant who falls under SBM's purview because he committed an aggravated offense. *See Hilton*, ¶ 21 (differentiating between the recidivist and aggravated offense categories in the SBM context). *Hilton* answered the question of the constitutionality of SBM for at least the aggravated offense category by laying out a three-step reasonableness inquiry under the totality of the circumstances, which resembles the inquiry from *Grady III*. *See Hilton*, ¶ 19 ("The first step of our reasonableness inquiry under the totality of the circumstances requires . . . ."). Specifically, courts must analyze: (1) "the legitimacy of the State's interest," (2) "the scope of the privacy interests involved," and (3) "the level of intrusion effected by the imposition of" SBM. *Hilton*, ¶¶ 19, 29, 32. *Hilton* concluded the SBM statute is not unconstitutional for the aggravated offender category because the SBM search is reasonable in that context. *Hilton*, ¶ 36.

¶ 16 *Strudwick* confirmed the three-step reasonableness inquiry. *See Strudwick*, ¶ 20 ("[W]e are bound to apply the instructions which we enunciated in *Grady III*—and further developed in *Hilton*—in order to determine the reasonableness of the trial court's imposition of lifetime SBM in defendant's case." (citing *Hilton*, ¶ 18)). In *Strudwick*, the Supreme Court again concluded lifetime SBM for the defendant was reasonable because the "legitimate and compelling government interest" outweighed "its [SBM's] narrow, tailored intrusion into defendant's expectation of privacy in his person, home, vehicle, and location." *Id.*, ¶ 28.

¶ 17 *Strudwick* included two additional relevant discussions. First, the Supreme Court clarified the reasonableness determination takes place in the present, not the future:

> [T]he State is *not* tasked with the responsibility to demonstrate the reasonableness of a search at its effectuation in the future for which the State is bound to apply in the present; rather, the State *is* tasked under a legislative enactment presumed to be constitutional with the responsibility to demonstrate the reasonableness of a search at its evaluation in the present for which the State is bound to apply for the future effectuation of a search.

Id., ¶ 13 (emphasis in original). *Strudwick* thus makes clear our decision in *Anthony II* cannot stand because it relied on the State's failure to prove reasonableness at the time Defendant will be released from prison. *Anthony II*, slip op. at 6–7.

¶ 18 The second relevant additional aspect of *Strudwick* is its discussion on how to reevaluate SBM orders as time moves forward and circumstances change. *Strudwick*, ¶¶ 15–17. *Strudwick* indicates a defendant could file a petition under Rule 60 of the North Carolina Rules of Civil Procedure on the grounds "it is no longer equitable that the judgment should have prospective application" or "[a]ny other reason justifying relief from the operation of the judgment." *Id.*, ¶ 16 (quoting N.C. Gen. Stat. § 1-1A, Rule 60(b)(5)–(6) (2019)); *see also id.*, ¶ 17 (further explaining how sub-sections (5) and (6) could provide paths to relief). The Supreme Court also noted a defendant could file a petition under North Carolina General Statute § 14-208.43 (2019). *Strudwick*, ¶ 15.

¶ 19 *Strudwick*'s second option of statutory relief still exists, but subsequent statutory changes—the ones we are to consider on remand—have slightly altered the statute and process for defendants already ordered to enroll in SBM at the time of the changes.[1] The General Assembly rewrote § 14-208.43 to focus only on "offender[s] who [are] ordered on or after December 1, 2021, to enroll in satellite-based monitoring" and the means by which they can file a petition to terminate or modify SBM after five years of enrollment. N.C. Gen. Stat. § 14-208.43(a) (eff. 1 Dec. 2021); *see also* S.L. 2021-138 § 18(h) (showing changes made to § 14-208.43). For offenders ordered to enroll in SBM before that date, such as Defendant, the new § 14-208.46 allows them to file a petition to terminate or modify the monitoring. N.C. Gen. Stat. § 14-208.46(a) (2021); *see also* S.L. 2021-138 § 18(i) (showing creation of § 14-208.46). If the offender files the petition before he has been enrolled for 10 years, then "the court shall order the petitioner to remain enrolled in the satellite-based monitoring program for a total of 10 years"; if the offender has been enrolled for at least 10 years already, "the court shall order the petitioner's requirement to enroll in the satellite-based monitoring

1. It is unclear why the Supreme Court mentioned only the old statute and not the statutory changes since the updated statute had already been signed into law by the time *Strudwick* was filed. *Compare Strudwick*, 2021-NCSC-127 (filed 29 October 2021) *with* 2021 North Carolina Laws S.L. 2021-138 (approval date of 2 September 2021). The old law also would not have applied to the defendant in *Strudwick* because it required at least a year of post-release SBM, *Strudwick*, ¶ 15, and the defendant would not be released within a year. *See id.* ¶¶ 3, 7 (explaining the defendant was sentenced to 30 to 43 years in prison in 2017).

program be terminated." N.C. Gen. Stat. § 14-208.46(d)–(e).[2] Combined with a change setting a ten-year maximum on new SBM enrollments, N.C. Gen. Stat. § 14-208.40A(c1), *see also* S.L. 2021-138 § 18(d) (showing changes made to § 14-208.40A), the statutory system now limits SBM to ten years for all offenders.[3]

¶ 20 As a final piece of our review of the recent history of SBM, we address Defendant's argument that *Hilton* and *Strudwick* do not constrain his overall argument because they both "primarily involved facial challenges" and he has an as-applied challenge. In *Grady III*, our Supreme Court explained the distinction between facial and as-applied challenges does not neatly apply to our SBM jurisprudence. *See* 372 N.C. at 546–47, 831 S.E.2d at 569–70 ("[T]he remedy we employ here is neither squarely facial nor as-applied." (citing *Citizens United v. FEC*, 558 U.S. 310, 331, 130 S. Ct. 876 (2010))). Specifically, in *Grady III*, the Supreme Court noted its ruling was as-applied in the sense that it did not apply to "all

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2. The full language of (d) and (e) categorizes petitioners not enrolled "for at least 10 years" versus enrolled "for more than 10 years":

> (d) If the petitioner has not been enrolled in the satellite-based monitoring program for at least 10 years, the court shall order the petitioner to remain enrolled in the satellite-based monitoring program for a total of 10 years.
>
> (e) If the petitioner has been enrolled in the satellite-based monitoring program for more than 10 years, the court shall order the petitioner's requirement to enroll in the satellite-based monitoring program be terminated.

N.C. Gen. Stat. § 14-208.46(d)–(e).

Given (d) indicates courts should only order petitioners to remain enrolled in SBM for 10 years, not more, it appears the General Assembly intended to define two categories of offenders: those not enrolled for at least 10 years and those enrolled for at least 10 years. *See State v. Alexander*, 2022-NCSC-26, ¶ 34 ("The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." (quotations and citation omitted)); *North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Dana*, 379 N.C. 502, 2021-NCSC-161, ¶ 16 ("Legislative intent controls the meaning of a statute." (quotations and citation omitted)).

This Court's recent opinion in *Carter* also recognizes our view without further explanation of the wording in sub-section (e). *See Carter*, ¶ 22 (quoting sub-section (e) as part of a citation supporting the following sentence, "However, during the pendency of this appeal, our legislature amended the SBM statutes, in part, to create an avenue by which [d]efendant may petition a superior court to terminate his monitoring after ten years of enrollment.").

3. *See* Jamie Markham, *Revisions to North Carolina's Satellite-Based Monitoring Law*, UNC School of Government Blog (Oct. 11, 2021), https://nccriminallaw.sog.unc.edu/revisions-to-north-carolinas-satellite-based-monitoring-law/ ("Former lifetime categories are changed to 10 years, and the abuse-of-a-minor category ('conditional' offenders) is capped at 10 years."); *see also id.* (explaining legislative changes in more detail).

of the program's applications" given its limits to a specific category, but the ruling was facial "in that it is not limited to defendant's particular case." *Id.*

¶ 21 *Hilton* and *Strudwick* reflect the difficulty in separating facial from as-applied challenges in the SBM context. The *Hilton* court said it was addressing the constitutionality of the SBM program "as applied to defendants who fall outside" of *Grady III*, which both uses the as-applied language but was not limited to the particular defendant before the court. *Hilton*, ¶¶ 18, 36. Similarly, *Strudwick* involves language related to facial challenges when discussing the timing of the reasonableness determination, *Strudwick*, ¶ 14, and language about applying *Grady III* and *Hilton*'s reasonableness test "in order to determine the reasonableness of the trial court's imposition of lifetime SBM *in defendant's case*." *Id.*, ¶ 20 (emphasis added).

¶ 22 Thus, rather than trying to distinguish between facial and as-applied challenges, our courts' "practice is to examine searches effected by the SBM statute categorically." *Hilton*, ¶ 37 (citing *Grady III*, 372 N.C. at 522, 831 S.E.2d at 553). As this Court has recently clarified, trial courts must still conduct a Fourth Amendment reasonableness analysis, and we review that analysis *de novo*. *Carter*, ¶¶ 20–21. As part of the analysis, reviewing courts are bound by categorical determinations made by the Supreme Court. *See, e.g.*, *id.* ¶ 27 (explaining because the defendant fit within a certain category, this Court "must follow the Supreme Court's holding in *Hilton* that he requires continuous lifetime SBM to protect public safety"). But if the defendant does not fit within one of the categorical determinations already made, a reviewing court's analysis is not constrained in the same way. *See id.*, ¶¶ 24–25 (determining the defendant did not fit into the categories in *Grady III* or *Hilton* so conducting its own analysis based upon the reasoning of those cases). Given this background, we need not determine precisely whether *Hilton* and *Strudwick* made facial or as-applied rulings; we will follow the review framework set out in *Carter*.

C. Reasonableness in this Case

¶ 23 Having reviewed the recent legal changes and determined the impact on our prior opinions in this case, we now conduct the required review as laid out above. First, we evaluate whether the trial court properly considered if monitoring was constitutional under the Fourth Amendment. *Carter*, ¶¶ 20–21. Then we conduct our own *de novo* review of the trial court's determination. *Id.*

1. Trial Court's Reasonableness Inquiry

¶ 24 While *Hilton* proclaims " 'the SBM statute as applied to aggravated offenders is not unconstitutional' because the 'search effected by the imposition of lifetime SBM on the category of aggravated offenders is reasonable under the Fourth Amendment,' " *Carter*, ¶ 18 (quoting *Hilton*, ¶ 36), "trial courts must continue to conduct reasonableness hearings before ordering SBM unless a defendant waives his or her right to a hearing or fails to object to SBM on this basis." *Id.*, ¶ 19 (citing *State v. Ricks*, 378 N.C. 737, 2021-NCSC-116, ¶ 10). Defendant preserved his objection on Fourth Amendment grounds via his motion to dismiss, which he also incorporated into his argument to the trial court at the SBM hearing.

¶ 25 Turning to *Carter* as an example of how to review a trial court's reasonableness hearing, this Court found the trial court "conducted a hearing regarding the facts and applicable law, and weighed the State's interests against [d]efendant's expectation of privacy." *Id.*, ¶ 20. Specifically, the trial court heard testimony concerning: the statutory category authorizing SBM; the defendant's risk assessment; the failure of the defendant's previous sex offender registration to "deter his conduct or protect public safety"; and the defendant's prior sex offender registry violations. *Id.* Because the trial court weighed that against "the State's interest in protecting the public from a recidivist sex offender" and determined SBM was reasonable as applied to the defendant, this Court concluded the trial court's inquiry was appropriate. *Id.* While *Carter* involved a defendant required to enroll in SBM "solely because of his status as a recidivist" and thus focused on recidivism when evaluating the State's interest in public safety, *id.*, ¶¶ 20, 24, its explanation of the type of evidence a trial court should examine still aids our review here.

¶ 26 Here, the SBM hearing immediately followed Defendant entering his *Alford* plea and being sentenced. As part of the *Alford* plea, Defendant consented "to the Court hearing a summary of the evidence." The summary of the evidence included a previous felony sex offense, a sex offender registry violation, and the factual bases for the two charges to which Defendant pled. The summary of the evidence thus provided support for the trial court's Finding Defendant committed an aggravated offense under North Carolina General Statute § 14-208.6(1a) (eff. Dec. 1, 2017) because the second-degree forcible rape and incest conviction included a sexual act using "force or the threat of serious violence." *See* N.C. Gen. Stat. § 14-208.6(1a) (eff. Dec. 1, 2017) (defining "aggravated offense" as a criminal offense that includes, *inter alia*, "engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of

any age through the use of force or the threat of serious violence"). The trial court could also use the summary of the evidence to conduct its reasonableness assessment.

¶ 27 Turning to the reasonableness assessment, the trial court heard no additional evidence during the SBM hearing, only argument from counsel. Although the trial court did not have the benefit of any rulings past *Grady I*, it is still held to the latest standard announced in *Hilton* and *Strudwick*. *See State v. Yancey*, 221 N.C. App. 397, 400 & n.1, 727 S.E.2d 382, 385–86 & n.1 (2012) (applying latest standard in *Miranda* jurisprudence from a case coming after an order on appeal because "new rules of criminal procedure must be applied retroactively 'to all cases, state or federal, pending on direct review or not yet final' " (quoting *State v. Zuniga*, 336 N.C. 508, 511, 444 S.E.2d 443, 445 (1994) (in turn quoting *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 716 (1987)))). Thus, the trial court had to balance: the State's interest; Defendant's privacy interest; and the "level of intrusion effected by the imposition of" SBM. *Hilton*, ¶¶ 19, 29, 32.

¶ 28 The trial court's entire reasonableness analysis was:

> In this matter, the defendant is already, as a convicted sex offender, required to register as a sex offender. Those registration requirements already impose a burden upon the defendant and the -- the additional burden of satellite-based monitoring would be a slight additional burden or infringement on the defendant's life and liberty. That, in fact, the satellite-based monitoring does not actually curtail the defendant's liberty. It does not require that he be locked up or placed in any sort of detention facility, but rather makes his whereabouts known for the purposes of serving greater governmental interests and legitimate State interests such as protecting society from, in this particular case, a twice convicted sex offender and deterring the conduct of what is, in this case, a twice convicted sex offender.
>
> I will note also that studies show that sex offenders generally have a higher recidivism rate than does the general population of convicted felons, and for that reason -- for that reason and others, the State does have a legitimate State interest and a legitimate concern for the protection of society and the deterrence of future conduct. And for those reasons, I

> will -- that and the fact that I have now made findings of fact sufficient to justify the imposition of satellite-based monitoring will require that the defendant enroll in the satellite-based monitoring program for a period of his natural life, unless monitoring is earlier terminated pursuant to G.S. §14-208.43.

¶ 29 The trial court conducted the required reasonableness analysis. At the start, the trial court noted Defendant's status as a registered sex offender imposes burdens, and that discussion addresses his privacy interest. The trial court then discussed "the additional burden of satellite-based monitoring," which addresses the level of intrusion from imposing SBM. Finally, the trial court recounted the State's interest in imposing SBM. Thus, the trial court addressed the three factors it had to balance as part of its reasonableness assessment. *See Hilton*, ¶¶ 19, 29, 32 (recounting the factors).

¶ 30 A comparison to our review in *Carter* also reveals the adequacy of the trial court's reasonableness analysis. As in *Carter*, ¶ 20, the trial court here heard evidence about the statutory category authorizing SBM, namely that Defendant had committed an aggravated offense. The trial court also heard evidence, as in *Carter*, *id.*, about Defendant's previous sex offender registration, which apparently failed to deter his conduct in the instant offenses, as well as evidence he had previously committed sex offender registry violations.

¶ 31 The only difference between the evidence before the trial court in *Carter* and in this case is the lack of information in the record about a risk assessment of Defendant. *See id.* (listing risk assessment as part of evidence before trial court). But that difference does not change our determination the trial court conducted an adequate reasonableness hearing. The statute concerning court-imposed SBM in effect at the time of Defendant's hearing did not require the trial court to order a risk assessment if an offender had committed an aggravated offense, as Defendant did. *See* N.C. Gen. Stat. § 14-208.40A(c) (eff. Dec. 1, 2017) (requiring court to order offender who has committed an aggravated offense to enroll in lifetime SBM with no mention of a risk assessment).[4] Further, the

4. Under the version of § 14-208.40A in effect at the time of Defendant's trial, if the offender did not commit an aggravated offense or fit into one of the other categories in (c), sub-section (d) required the trial court to order a risk assessment if the offender committed an offense involving a minor. N.C. Gen. Stat. § 14-208.40A(d) (eff. Dec. 1, 2017). Further, the current version of § 14-208.40A(c) requires the trial court to order a risk assessment of offenders who have committed an aggravated offense. N.C. Gen. Stat. § 14-208.40A(c) (eff. Dec. 1, 2021).

risk assessment at most could have further justified the State's interest in SBM. But the State already had significant other evidence supporting its interest such as the previous sex offender registration failing to deter the instant offense and the previous sex offender registry violations. As a result, the lack of evidence of a risk assessment of Defendant does not persuade us the outcome here should differ from *Carter*.[5]

¶ 32 We therefore conclude the trial court held an adequate reasonableness hearing as required. *See Carter*, ¶ 19 (explaining trial courts must continue to conduct hearings on the reasonableness of SBM). Further the trial court made adequate findings to support its conclusion SBM was reasonable as applied to Defendant.

2. De Novo Review of Reasonableness Determination

¶ 33 Since we have determined the trial court conducted an adequate reasonableness analysis, we now review *de novo* its determination SBM is reasonable as applied to Defendant. *Carter*, ¶ 21. As part of our *de novo* review, we must evaluate the reasonableness of SBM under the totality of the circumstances considering: (1) the legitimacy of the State's interest; (2) the scope of Defendant's privacy interests; and (3) the intrusion imposed by SBM. *Hilton*, ¶¶ 19, 29, 32.

a. Legitimacy of the State's Interest

¶ 34 We start by considering the State's interest in monitoring Defendant. *Hilton* and *Strudwick* both recognized the dual interests served by SBM imposed on aggravated offenders in "preventing and prosecuting future crimes committed by sex offenders." *Strudwick*, ¶ 26; *see also Hilton*, ¶ 25 ("assisting law enforcement agencies in solving crimes") and ¶ 27 ("protecting the public from aggravated offenders by deterring recidivism"). Our courts have long recognized these dual interests are "both legitimate and compelling," *Strudwick*, ¶ 26, particularly for aggravated offenses. *See Hilton*, ¶ 21 ("[T]he State's interest in protecting the public from aggravated offenders is paramount."). As the Supreme Court made clear in *Hilton*, "after our decision in *Grady III*, the three categories of

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5. Defendant also later brings up the lack of risk assessment when arguing we should remand for the trial court to conduct a risk assessment because the current version of §14-208.40A(c) requires such assessment for all people subject to SBM. However, when making that change, the General Assembly made clear it would only apply to SBM determinations "on or after" 1 December 2021. See S.L. 2021-138 § 18(d) (adding risk assessment provisions to § 14-208.40A(c) as laid out above and in Footnote 4); *id.* § 18(p) (explaining all subsections of § 18 in the session law "appl[y] to [SBM] determinations on or after" 1 December 2021 with the exception of (b), (i), and (o)). Defendant's SBM determination took place on or about 26 April 2018, so the General Assembly clearly did not intend for him to benefit from the changes in the statute. Therefore, we reject Defendant's argument.

offenders who require continuous lifetime SBM to protect public safety are (1) sexually violent predators, (2) aggravated offenders, and (3) adults convicted of statutory rape or a sex offense with a victim under the age of thirteen (adult-child offenders)." *Id.*, ¶ 23 (footnote omitted).

¶ 35 Here, Defendant committed an aggravated offense under N.C. Gen. Stat. § 14-208.6(1a) (eff. Dec. 1, 2017) because the second-degree forcible rape and incest conviction included a sexual act using "force or the threat of serious violence." So under *Hilton*, Defendant requires continuous lifetime SBM to protect public safety. *Hilton*, ¶¶ 21, 23.

¶ 36 Defendant argues his case is distinguishable from *Strudwick* because his offenses "were committed against two known victims in his home" who "identified him to investigators" rather than against a stranger in a public space. He asserts that, as a result, the State's interests in using SBM to solve crimes and for deterrence "are lessened" in his case because SBM would not solve or prevent his crimes.

¶ 37 We reject Defendant's attempt to distinguish from our binding precedent. First, this argument ignores *Hilton*, on which *Strudwick* relied when articulating the State's interest. *Strudwick*, ¶ 26. In *Hilton*, SBM was imposed in a case where the victim in the case was also a victim in a case in which that defendant was previously convicted. *Hilton*, ¶ 6. That situation resembles the situation in Defendant's argument here, as Defendant contends a victim who knows a perpetrator could identify him to investigators, as opposed to a victim who is a "stranger . . . in a public space."

¶ 38 Further, on a broader level, Defendant misconstrues the nature of the State's interest. Defendant assumes the State's interest is in preventing or prosecuting the crime which triggered SBM (or a repeat of the same scenario), but the State's interest is broader. It encompasses all potential future sex crimes. *See, e.g.*, *Hilton*, ¶ 21 (defining interest as "protecting children and others from sexual attacks" without limitation) (quotations, citation, and alterations omitted). Thus, as long as SBM could prevent or solve a future sex crime, regardless of the exact facts of that scenario, the State's interest is served. Since our Supreme Court has concluded that is true for aggravated offenders like Defendant, we conclude the State has a legitimate interest here.

b. Scope of Defendant's Privacy Interest and Intrusion Imposed by SBM

¶ 39 Next we consider the scope of Defendant's privacy interest and the intrusion upon that interest caused by SBM. *Hilton* concluded an

aggravated offender, such as Defendant, "has a diminished expectation of privacy both during and after any period of post-release supervision" because of the "numerous lifetime restrictions that society imposes upon him," especially via the sex offender registration requirements. *Hilton*, ¶¶ 36, 31.

¶ 40 *Hilton* and *Strudwick* also explain the intrusion imposed by SBM. *Hilton* determined "the imposition of lifetime SBM causes only a limited intrusion into that diminished privacy expectation." *Hilton*, ¶ 36. Specifically, *Hilton* noted SBM is less invasive than criminal sanctions or civil commitment. *Id.*, ¶¶ 33, 35. The *Hilton* court also highlighted the similarities of SBM to sex offender registration and the ability of a defendant to petition to be removed from SBM via the mechanism we discussed above. *Id.*, ¶ 34. Relying on these portions of *Hilton*, *Strudwick* likewise concluded "the imposition of lifetime SBM . . . constitutes a pervasive but tempered intrusion upon . . . Fourth Amendment interests." *Strudwick*, ¶ 25 (citing *Hilton*, ¶ 35).

¶ 41 Defendant argues we should not reach the same conclusion as *Hilton* and *Strudwick* on the intrusion into his privacy interests caused by SBM because they failed to consider "two significant privacy interests that are not diminished following post-release supervision." Specifically, he argues our Supreme Court's previous decisions failed to consider SBM "will involve a search of [his] house" and "of the whole of [his] movements for the rest of his life."

¶ 42 We reject Defendant's arguments because *Hilton* and *Strudwick* considered those privacy interests and the intrusions thereupon caused by SBM. As a general note, *Hilton* specifically concluded aggravated offenders have a diminished expectation of privacy "*after any period of post-release supervision*." *Hilton*, ¶ 36 (emphasis added).

¶ 43 As to the search into Defendant's home, *Strudwick* includes an explanation of how *Grady III* determined *State v. Bowditch*, 364 N.C. 335, 700 S.E.2d 1 (2010), "sufficiently incorporate[d] . . . the invasion of a defendant's home" into an evaluation of offenders' expectations of privacy and the impact of SBM thereupon. *Strudwick*, ¶ 22 (citing *Grady III*, 372 N.C. at 532, 831 S.E.2d 542). While the *Strudwick* court noted *Grady III*'s discussions of *Bowditch*'s limitations, it ultimately still relied on *Bowditch* for the idea "that it is constitutionally permissible for the State to treat a sex offender differently than a member of the general population" because of their sex offense conviction. *Strudwick*, ¶ 22 (citing *Hilton*, ¶ 30). Given *Strudwick*'s reliance on *Bowditch* and its emphasis on how *Bowditch* covered a search of offenders' homes, our

Supreme Court has considered SBM effecting a search of the home and found those concerns did not justify finding SBM searches unreasonable for aggravated offenders. If that was not clear enough, *Strudwick* also explicitly said SBM was reasonable given the government interest outweighed SBM's intrusion "into defendant's expectation of privacy in his person, *home*, vehicle, and location. *Strudwick*, ¶ 28 (emphasis added). As a result, we reject Defendant's argument on the search of his house.

¶ 44 *Hilton* and *Strudwick* also considered the search of Defendant's movements for the rest of his life; they scarcely could have avoided it considering such monitoring is inherent in SBM. *See Hilton*, ¶ 35 (minimizing intrusion of "SBM's collection of information regarding physical location and movements"). *Strudwick* also specifically found SBM reasonable even when considering its intrusion into a defendant's "expectation of privacy in his . . . location." *Strudwick*, ¶ 28. *Hilton* emphasized once an offender is unsupervised, "no one regularly monitors the defendant's location, significantly lessening the degree of intrusion." *Hilton*, ¶ 35. Building on that, *Strudwick* recognized using the data tracking offenders' movements for anything other than the State's permissible purpose of preventing and solving crimes "would present an impermissible extension of the scope of the authorized search" that could change the calculus. *See Strudwick*, ¶ 23 (citing *Terry v. Ohio*, 392 U.S. 1, 19–20, 88 S. Ct. 1868 (1968)) (explaining the State has an "ongoing" burden to establish the reasonableness of the search as a result of the possibility of an impermissible extension of the scope of the search). As a result, our Supreme Court has already weighed the search of all an offender's movements for the rest of his life and determined that adequate protections are in place. We therefore reject Defendant's argument *Hilton* and *Strudwick* failed to address the matter.

c. Reasonableness under the Totality of the Circumstances

¶ 45 Examining the reasonableness of SBM under the totality of the circumstances, we weigh the State's legitimate interest in "preventing and prosecuting future crimes committed by sex offenders," *Strudwick*, ¶ 26, against Defendant's "diminished expectation of privacy both during and after any period of post-release supervision," *Hilton*, ¶ 36, and the "limited intrusion" caused by lifetime SBM for aggravated offenders. *Id.* Given *Hilton* and *Strudwick* balanced these factors for aggravated offenders like Defendant, *Hilton*, ¶¶ 36–37, *Strudwick*, ¶ 28, and we have rejected Defendant's arguments trying to differentiate his case from those cases, we conclude after *de novo* review that SBM is reasonable in Defendant's case.

III. Conclusion

¶ 46 We reject Defendant's argument the State failed to present sufficient evidence to the trial court for it to make a determination of the reasonableness of SBM. Following our *de novo* review, we also conclude SBM is reasonable in Defendant's case. Therefore, we affirm the trial court's order imposing lifetime SBM on Defendant. Defendant can, however, petition to terminate or modify the SBM with the superior court in Rowan County, which would be required to terminate the monitoring after 10 years enrolled, under the terms of § 14-208.46.

AFFIRMED.

Judge CARPENTER concurs.

Judge HAMPSON concurs in result only.

STATE OF NORTH CAROLINA
v.
DEREK JACK CHOLON

No. COA21-635

Filed 21 June 2022

Constitutional Law—effective assistance of counsel—implied admission of guilt—elements of sexual offenses

Defense counsel committed a per se *Harbison* violation by admitting in his closing argument that defendant committed sexual acts with a 15-year-old—based on an incriminating statement defendant denied making to law enforcement—after which defendant was found guilty of first-degree statutory sex offense and taking indecent liberties with a minor. However, where the trial court did not make specific findings in its order denying defendant's motion for appropriate relief regarding whether defendant consented in advance to his counsel's strategy, the order was reversed and the matter remanded for a determination on that issue.

Appeal by defendant from order entered 31 March 2021 by Judge Phyllis M. Gorham in Onslow County Superior Court. Heard in the Court of Appeals 10 May 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden William Hayes, for the State.

Joseph P. Lattimore for defendant-appellant.

ARROWOOD, Judge.

¶ 1 Derek Jack Cholon ("defendant") appeals from the trial court's order denying his motion for appropriate relief ("MAR") claiming ineffective assistance of counsel. Defendant contends the trial court erred in concluding that defendant's trial counsel did not concede defendant's guilt without his consent and that trial counsel did not override defendant's autonomy to decide the objective of the defense. For the following reasons, we reverse and remand.

I. Background

¶ 2 On 8 April 2014, an Onslow County grand jury indicted defendant on charges of first-degree statutory sexual offense, crime against nature, and taking indecent liberties with a minor. The indictment alleged that on 6 March 2013 defendant engaged in a sexual act with M.B.,[1] "a person of the age of 15 years." Prior to trial, the State dropped the crime against nature charge and offered defendant a plea agreement with no active prison time. Defendant maintained his innocence and rejected the plea agreement.

¶ 3 The matter came on for trial on 7 July 2015 in Onslow County Superior Court. At trial, the State presented evidence establishing that M.B. was 15 years old, and that defendant was 41 years old at the time of the alleged acts. M.B. testified that he had met defendant through an online dating app,[2] and that, when they met in-person on 6 March 2013, defendant performed oral sex on M.B. Officer Taylor Wright ("Officer Wright") testified that on 6 March 2013, she had "responded to the scene" after receiving a call about "a suspicious vehicle[,]" and found defendant and M.B. According to Officer Wright, defendant initially told her that he and M.B. "were just sitting [in the car] talking[,]" but later told her that "he had performed oral sex on [M.B.], and that they were kissing." Officer Wright arrested defendant and took him to the police station, where he gave a written statement after being *Mirandized*. In

1. The juvenile's initials are used to protect his identity and for ease of reading.

2. M.B. stated that the app required users to be at least 18 years old, and that he had indicated that he was 18 years old on his profile.

the statement, defendant stated that M.B.'s profile "said 18[,]" and that, when M.B. entered defendant's car, defendant "asked him if he is really 19, and he corrected me and said he was 18." Defendant also stated that "[b]efore the police arrived, I gave [M.B.] oral and we kissed."

¶ 4 Defendant filed a motion to suppress defendant's verbal and written statements to police. In his affidavit in support of the motion, defendant swore that, on 6 March 2013, he and M.B. were sitting in his car talking when police arrived. Defendant also averred that he had no recollection of giving a written statement at the police station, indicating that he had hypoglycemia which he believed caused him to "blackout" at the police station. After conducting a *voir dire* of Officer Wright and hearing arguments from both sides, the trial court denied the motion to suppress. Defendant's written statement was admitted into evidence and published to the jury.

¶ 5 During closing statements, defendant's trial counsel stated as follows, in relevant part:

> [M.B.], apparently was, and I don't think otherwise, that on this occasion he was 15 years old. And he was in high school. Those . . . two facts . . . were concealed from [defendant] on this occasion we're talking about. [M.B.] didn't tell him that. He lied.
>
> . . . .
>
> What does [defendant] say? The officer comes back there, Officer Wright comes back there and begins to talk to him and he tells this officer the truth; tells her what happened between the two of them. "I gave him oral, and we were kissing." But now we know that there's more than kissing going on with [M.B.].
>
> . . . .
>
> [Defendant] did not say anything that was not truthful, apparently except, "We were just talking." And when the officers persisted with the asking about what happened, he told them the truth. He didn't lie to them. He wrote it down in a statement, which you read. So here he is. He's looking -- subject to go to prison for such a long time.
>
> . . . .

> I submit to you, ladies and gentlemen, that [defendant] is not entitled to sympathy. He's not entitled to any special treatment more than any other citizen who comes into the court charged with a crime.
>
> When you leave this court building today to go back to your homes and your families, you should feel when you leave here, I've done what's right.
>
> . . . .
>
> We ask you to find him not guilty of these offenses. Thank you.

¶ 6 On 9 July 2015, a jury convicted defendant of first-degree statutory sex offense and taking indecent liberties with a minor. The trial court sentenced defendant to a mitigated-range term of 144 to 233 months imprisonment on the statutory sex offense conviction, and a concurrent 10 to 21 months term on the indecent liberties conviction.

¶ 7 Shortly after the trial, defendant sent a letter to the trial court requesting a review of his trial and a mistrial "on the grounds that [his trial counsel] entered an admission of guilt on my behalf without my permission during his closing statement." Defendant also asserted that he advised his trial counsel of "health conditions which are in the law books as a valid medical condition to overturn a statement of confession and he would not research it."

¶ 8 On 2 March 2016, defendant filed an MAR with this Court alleging that his trial counsel had provided *per se* ineffective assistance of counsel under *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985) by admitting defendant's guilt, without defendant's consent, during closing arguments.

¶ 9 On 7 February 2017, this Court filed an opinion holding that defendant had not established a claim under *Harbison* because defendant's "counsel did not expressly concede [d]efendant's guilt" and "did not admit each element of each offense." *State v. Cholon*, 251 N.C. App. 821, 827, 796 S.E.2d 504, 507 (citation omitted), *review allowed*, *decision vacated*, 370 N.C. 207, 804 S.E.2d 187 (2017). This Court also held that "the record reveals such overwhelming evidence of [d]efendant's guilt that we cannot conclude that but for defense counsel's ineffective assistance, the result of the trial would have been different." *Id.* at 828, 796 S.E.2d at 508. This Court found no error in defendant's trial and denied the MAR. *Id.* at 829, 796 S.E.2d at 509.

¶ 10 On 14 March 2017, defendant petitioned our Supreme Court for discretionary review on the grounds that his trial counsel conceded his guilt during closing argument by admitting to every contested element of both charges. On 28 September 2017, our Supreme Court allowed defendant's petition "for the limited purpose of vacating the decision of the Court of Appeals and remanding to that court with instructions for further remand to the trial court to hold an evidentiary hearing on defendant's motion for appropriate relief in light of . . . relevant authority." *State v. Cholon*, 370 N.C. 207, 804 S.E.2d 187 (2017). The Supreme Court directed the trial court to "enter findings of fact and conclusions of law and determine whether defendant is entitled to relief." *Id.*

¶ 11 On 6 May 2019, the trial court held a hearing on defendant's MAR. At the hearing, the trial court received an affidavit from defendant's trial counsel, but did not receive any other evidence or testimony. Defendant's trial counsel's affidavit averred as follows:

> 11. In my argument to the jury I did not expressly argue the elements of the offenses which [defendant] was charged in the bill of indictments. My argument was intended to draw a sharp contrast between the statements of [defendant] and those made by M.B. Nowhere in my argument did I concede the guilt of [defendant], but in fact, I argued that the jury should find him not guilty.
>
> 12. I did not get permission from [defendant] to make these statements and I did not request that the Court make an inquiry of [defendant] pursuant to *State v. Harbison*.
>
> 13. I was aware of *State v. Harbison*, however, I did not believe that I needed to get [defendant]'s permission to make the statements because I did not believe I was making a full admission to all the elements of the crime.

¶ 12 On 28 May 2019, the trial court entered an order denying defendant's MAR and request for new trial. The trial court concluded that defendant's trial counsel "did not concede each element of either offense, did not claim [d]efendant was guilty, and did not admit to any lesser included offenses." Additionally, the trial court concluded that though "defense counsel conceded that M.B. was 15 years old at the time, he never conceded [d]efendant's age nor did he concede that [d]efendant's action

was willful. Furthermore, . . . defense counsel argued that there was reasonable doubt and that the jury should find [d]efendant not guilty."

¶ 13 On 24 January 2020, defendant filed a Petition for *Writ of Certiorari* ("PWC") with this Court. On 11 February 2020, this Court determined that the 28 May 2019 order "failed to comply with the North Carolina Supreme Court's order entered on 28 September 2017" and allowed the PWC "for the limited purpose of vacating the trial court's order and remanding for an evidentiary hearing."

¶ 14 The trial court conducted an evidentiary hearing on 30 September 2020. The State acknowledged during its opening statement that the trial court was to address defendant's claim that his trial counsel violated his "ability to maintain autonomy over his defense[.]" The trial court heard testimony from defendant and his trial counsel, and received several documentary exhibits, including the trial counsel's affidavit and copies of text messages between defendant and his trial counsel. The trial court took the matter under advisement at the conclusion of the hearing.

¶ 15 On 31 March 2021, the trial court entered an order again denying defendant's MAR. The trial court found that defendant's trial counsel contended "that he asked the jury to find [d]efendant not guilty twice in his closing and that the references to truthfulness were in an attempt to discredit the State's witness, in concert with [d]efendant's preferred trial strategy." The trial court further found that defendant's trial counsel contended "that [d]efendant never told him that [d]efendant did not want to concede that the sexual acts took place."

¶ 16 In its conclusions of law, the trial court recognized *State v. McAllister*, 375 N.C. 455, 847 S.E.2d 711 (2020), which extended the *Harbison* test to include implied admissions of guilt. The trial court concluded that defendant's trial counsel "requested that the jury find [d]efendant not guilty for all charges. Given this difference from *McAllister*, and the Supreme Court's statements about its narrow holding, [d]efendant's case here does not constitute admission of guilt."

¶ 17 On 11 June 2021, defendant filed a PWC with this Court requesting review of the trial court's 31 March 2021 order. On 22 July 2021, this Court allowed the PWC to review the order.

II. Discussion

¶ 18 Defendant contends the court erred in ruling that his trial counsel's closing argument did not amount to a concession of guilt and did not violate defendant's right to autonomy over the objective of the defense.

A. Standard of Review

¶ 19 Upon reviewing a trial court's ruling on an MAR, this Court reviews "to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Matthews*, 358 N.C. 102, 105-106, 591 S.E.2d 535, 538 (2004) (citations and quotation marks omitted). A trial court's conclusions of law in an order denying an MAR are reviewed *de novo*. *State v. Martin*, 244 N.C. App. 727, 734, 781 S.E.2d 339, 344 (2016) (citation omitted).

B. Admission of Guilt

¶ 20 Under the Sixth and Fourteenth Amendments to the United States Constitution, a "defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771, 25 L. Ed. 2d 763, 773 (1970)). Generally, in order to establish ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984).

¶ 21 In some cases, however, there exist "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *State v. Harbison*, 315 N.C. 175, 179, 337 S.E.2d 504, 507 (1985) (citations and quotation marks omitted).

> When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent.

Id. at 180, 337 S.E.2d at 507. Accordingly, "ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Id.*, 337 S.E.2d at 507-508.

¶ 22 In *McAllister*, our Supreme Court considered the application of *Harbison* to an implied concession of guilt. *McAllister*, 375 N.C. at 473, 847 S.E.2d at 722. The defendant in *McAllister* was charged with assault on a female, assault by strangulation, second-degree sexual offense, and second-degree rape. *Id.* at 458-59, 847 S.E.2d at 714. During closing

arguments, the defendant's trial counsel repeatedly asked the jury to find the defendant not guilty of three charged offenses but made no reference to the fourth offense. *Id.* at 460-61, 847 S.E.2d at 715. Specifically, the defendant's trial counsel stated:

> You heard him admit [to police] that things got physical. You heard him admit that he did wrong, God knows he did. They got in some sort of scuffle or a tussle or whatever they want to call it, she got hurt, he felt bad, and he expressed that to detectives. Now, they run with his one admission and say "well, then everything Ms. Leonard—everything else Ms. Leonard said must be true." Because he was being honest, they weren't honest with him.
>
> . . . .
>
> I asked you at the beginning [to] make the State prove their case, make them. Have they? Anything but conjecture and possibility? All I ask is that you put away any feelings you have about the violence that occurred, look at the evidence and think hard. Can you convict this man of rape and sexual offense, assault by strangulation based on what they showed you? You can't. Please find him not guilty.

Id.

¶ 23 The Court held "that a *Harbison* violation is not limited to such instances and that *Harbison* should instead be applied more broadly so as to also encompass situations in which defense counsel impliedly concedes his client's guilt without prior authorization." *Id.* at 473, 847 S.E.2d at 722. The Court noted that the attorney's statements were problematic for several reasons, including that the attorney "attested to the accuracy of the admissions made by [the] defendant in his videotaped statement by informing the jurors that [the] defendant was 'being honest[,]' " as well as by reminding the jury "that [the] defendant had admitted he 'did wrong' during the altercation" and by asking the jury to find the defendant not guilty on three charges, but not the fourth. *Id.* at 474, 847 S.E.2d at 722-23.

¶ 24 "The Court of Appeals majority [in *McAllister I*] applied an overly strict interpretation of *Harbison* here by confining its analysis to (1) whether defense counsel had expressly conceded [the] defendant's guilt of the assault on a female charge; or (2) whether counsel's statements

'checked the box' as to each element of the offense." *Id.* at 475, 847 S.E.2d at 723. Instead, "our inquiry must focus on whether defense counsel admitted [the] defendant's guilt to a charged offense without first obtaining his consent." *Id.* at 476, 847 S.E.2d at 724.

¶ 25 In this case, defendant maintained his innocence throughout trial and rejected a plea agreement prior to trial. Defendant also sought to suppress statements made to the police due to a stated medical condition. It appears that defendant did not, at any time, authorize his trial counsel to admit defendant's guilt or enter a guilty plea; the trial counsel acknowledged the lack of permission in his affidavit. However, during closing arguments, defendant's trial counsel acknowledged that M.B. was 15 years old and that he lied to defendant about his age, apparently in an effort to rebut M.B.'s testimony. The trial counsel further stated that defendant told Officer Wright "the truth" about "what happened between the two of them[;] 'I gave him oral, and we were kissing.' " Prior to this statement, the State presented evidence establishing that M.B. was 15 years old, that defendant was 41 years old, and that they were not lawfully married to each other.

¶ 26 Defendant's trial counsel's statement effectively admitted and established that defendant had, in fact, engaged in a sexual act with M.B., the remaining element to be established for both charges. Significantly, the statement was in reference to an apparent admission by defendant to a law enforcement officer, which defendant denied making. This statement is substantially similar to the statements in *McAllister*, as the trial counsel argued to the jury that defendant was being honest when he spoke with Officer Wright. Although the trial court did acknowledge *McAllister*, we disagree with the conclusion that defendant's trial counsel's request that the jury find defendant not guilty was sufficient to distinguish this case from *McAllister*. Simply asking the jury to find defendant not guilty did not serve to negate the trial counsel's prior statements. More importantly, the trial counsel's statements in this case that he told "this officer the truth" is indistinguishable from the attorney's attestations in *McAllister*.

¶ 27 While recognizing the *McAllister* Court's admonition "that a finding of *Harbison* error based on an implied concession of guilt should be a rare occurrence[,]" *McAllister*, 375 N.C. at 376, 847 S.E.2d at 724, we believe this case presents such a rare occurrence. Although defendant specifically maintained his innocence and filed an affidavit denying that he made incriminating statements to police, his trial counsel stated the opposite during his closing argument.

¶ 28 "[W]hen counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507. Based on the circumstances, we hold that defendant's trial counsel impliedly admitted to defendant's guilt, constituting a per se *Harbison* violation. *McAllister*, 375 N.C. at 475, 847 S.E.2d at 723 ("In cases where . . . defense counsel's statements to the jury cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense, *Harbison* error exists unless the defendant has previously consented to such a trial strategy."). However, since the trial court did not make specific findings regarding whether defendant consented to his trial counsel's statements, the appropriate remedy is to remand to the trial court for an evidentiary hearing. *See McAllister*, 375 N.C. at 477, 847 S.E.2d at 725.

III. Conclusion

¶ 29 For the foregoing reasons, we reverse the trial court's order and remand for an evidentiary hearing to be held as soon as practicable for the sole purpose of determining whether defendant knowingly consented in advance to his trial counsel's admission of guilt to both charged offenses.

REVERSED AND REMANDED.

Judges INMAN and WOOD concur.

STATE v. GRIMES

[284 N.C. App. 162, 2022-NCCOA-416]

STATE OF NORTH CAROLINA
v.
CHRISTOPHER DEMOND GRIMES

No. COA21-663

Filed 21 June 2022

1. Kidnapping—second-degree—removal—for purpose of inflicting serious bodily harm

For purposes of proving second-degree kidnapping, the State presented substantial evidence that defendant intended to cause serious bodily harm to the victim when he started driving his car with the victim sitting in the passenger's seat with her door still open and one leg hanging out. Further, the victim begged to be let out of the car; defendant grabbed the victim repeatedly while driving, attempted to choke her, and continued hitting her after he stopped the car; and defendant then held the victim down and grabbed her around the throat.

2. Criminal Law—jury instructions—second-degree kidnapping —no definition of "serious bodily injury"

The trial court did not plainly err in its instructions to the jury regarding second-degree kidnapping where, although it did not define "serious bodily injury," there was no requirement for the court to do so, and the instructions were given in accordance with the pattern jury instructions.

3. Appeal and Error—preservation of issues—assault on a female —facial constitutional challenge—not raised at trial

Where defendant did not present his challenge to the constitutionality of the offense of assault on a female (N.C.G.S. § 14-33(c)(2)) at trial, he failed to preserve the issue for appellate review, and his request for review pursuant to Appellate Rule 2 was denied.

Appeal by Defendant from judgment entered 20 May 2021[1] by Judge William D. Wolfe in Beaufort County Superior Court. Heard in the Court of Appeals 10 May 2022.

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1. The judgment is not file stamped. Judge William D. Wolfe signed the judgment on 18 May 2021. Handwritten in the top right corner of the judgment is, "Corrected 5-20-21."

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State-Appellee.

Caryn Strickland for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant appeals a judgment entered upon jury verdicts of guilty of second-degree kidnapping and assault on a female. Defendant argues (1) that the trial court erred by denying his motion to dismiss where the State failed to offer evidence of Defendant's intent; (2) that the trial court plainly erred by failing to define serious bodily injury in its jury instructions; and (3) that N.C. Gen. Stat. § 14-33(c)(2), which criminalizes assault on a female by a male person, is facially unconstitutional.

¶ 2 There was no error in the trial court's denial of Defendant's motion to dismiss, and no plain error in the trial court's jury instructions. Defendant's constitutional argument is unpreserved, and we decline to exercise our discretion under Rule 2 to review the statute's constitutionality.

I. Background

¶ 3 The evidence at trial tended to show the following: On the late evening of 7 June 2020, Defendant Christopher Demond Grimes and his girlfriend at the time, Colby Harding ("Ms. Harding"), were at the home they shared in Greenville, North Carolina. The two got into an argument about Defendant's infidelity; the situation escalated and things "got physical." Defendant "smashed [an] ice cube tray over [Ms. Harding's] head and busted [her] head," resulting in cuts and bleeding.

¶ 4 Shortly after this incident, Ms. Harding left the house alone and drove to a relative's home in Chocowinity, North Carolina. Once there, Ms. Harding was texting "back and forth" with Defendant. Defendant asked Ms. Harding if he could come get her, and she said no. Explaining that she did not want to cause "a bunch of fussing and arguing" or "a bunch of drama," Ms. Harding told Defendant that "he could come but [she] wasn't leaving with him."

¶ 5 Later that night, Defendant arrived by car at the house where Ms. Harding was staying.[2] Ms. Harding went out to meet Defendant and the

2. Ms. Harding testified that Defendant arrived around 2:00am or 3:00am. A cousin of Ms. Harding's daughter, Jimmy Stokes, who was at the house that evening, testified that Defendant arrived at 10:00pm or 11:00pm.

couple began arguing. Ms. Harding got into the front seat of Defendant's car. She kept the door open and had one leg hanging out so that she could "try to jump out," if necessary, because she "didn't trust him." She told Defendant "she didn't want to go with him." Defendant "threw the car in reverse" and took off with the door open. When he drove off, the door shut. Ms. Harding managed to open the door and tried to get her legs out of the car while it was still moving. Ms. Harding "begged and pleaded" with Defendant to let her go, but Defendant did not stop. While driving, Defendant had "his hands around [her] neck," had her in a "chokehold," and was choking her with "one arm." According to Ms. Harding, Defendant finally pulled over when he saw the blue lights of a law enforcement vehicle behind him; she stated the entire incident lasted about two or three minutes.

¶ 6 Jimmy Stokes, a cousin of Ms. Harding's daughter, witnessed the entire altercation, and followed Defendant and Ms. Harding in his own car. Mr. Stokes called 911 and related the night's events to the operator. As he followed "two car lengths behind" them, Mr. Stokes saw Ms. Harding "trying to get out" but Defendant kept "grabbing her by the hair." According to Mr. Stokes, Defendant had been driving for about 15 minutes when he stopped and pulled over into a cul-de-sac. Mr. Stokes testified that once Defendant had stopped, Mr. Stokes also stopped behind him. He observed that Ms. Harding "kept trying to get out of the car" but Defendant "grabbed her again, grabbed her by her neck, and he was hitting her." Mr. Stokes stayed on the phone with 911. Once law enforcement arrived a few minutes after Defendant had stopped, Mr. Stokes left the scene and "let [law enforcement] handle it."

¶ 7 Sergeant Jason Buck ("Sgt. Buck") of the Beaufort County Sheriff's Office responded to the incident. Sgt. Buck testified that he received a radio transmission at around 4:40am notifying him that "there was an active assault occurring in a vehicle" and providing the vehicle's approximate location. Sgt. Buck arrived at the scene and initiated a traffic stop. He approached the vehicle and observed Ms. Harding in the passenger seat "very upset, crying." Ms. Harding told Sgt. Buck that the reason she had fled to her relative's house was that "she was scared of [Defendant] and thought he was going to kill her." She told Sgt. Buck that after Defendant stopped, he "held her down and grabbed her around her throat." Sgt. Buck observed that Ms. Harding "had a lot of marks on her arms, her chest area. There was redness around her neck, and she had some marks on her face and on her head." He also observed that she had marks on her neck that were "reddish" or "pinkish," as if "[s]omebody had rubbed on it or grabbed it." Photos of Ms. Harding's

injuries taken by Sgt. Buck were introduced at trial. Because the marks could not be seen very well in photographs, Sgt. Buck demonstrated on himself where he had seen the marks. Sgt. Buck also had interviewed Mr. Stokes, who related to him the evening's events.

¶ 8 Defendant was indicted on 14 September 2020 for first-degree kidnapping and assault on a female. The case came on for trial on 17 May 2021. Defendant did not put on any evidence. At the close of the State's evidence and all the evidence, Defendant moved to dismiss all charges. The trial court denied the motion. The jury convicted Defendant of second-degree kidnapping and assault on a female. The trial court entered judgment and sentenced Defendant to 30 to 48 months' imprisonment. Defendant timely appealed.

II. Discussion

A. Motion to Dismiss

¶ 9 **[1]** Defendant argues that the trial court erred when it denied his motion to dismiss the kidnapping charge for insufficient evidence. Specifically, Defendant argues that the State failed to offer sufficient evidence that Defendant removed Ms. Harding with the specific intent to do serious bodily harm.

1. Standard of Review

¶ 10 "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Golder*, 374 N.C. 238, 250, 839 S.E.2d 782, 790 (2020) (quotation marks and citation omitted).

> In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion. In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. In other words, if the record developed at trial contains substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant

> committed it, the case is for the jury and the motion to dismiss should be denied.

Id. at 249-50, 839 S.E.2d at 790 (brackets, quotation marks, and citations omitted). Further, any contradictions in the evidence are to be resolved in the State's favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

2. Analysis

¶ 11 Pursuant to N.C. Gen. Stat. § 14-39(a)(3), a person is guilty of kidnapping if they "unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . for the purpose of . . . [d]oing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person . . . ." N.C. Gen. Stat. § 14-39(a)(3) (2021).[3]

¶ 12 In the context of kidnapping, serious bodily harm means "physical injury [that] causes great pain or suffering." *See* N.C.P.I.–Crim. 210.25 n.5 (June 2016) ("Serious bodily injury may be defined as 'such physical injury as causes great pain or suffering.' *See S. v. Jones*, 258 N.C. 89 (1962); *S. v. Ferguson*, 261 N.C. 558 (1964)."); *State v. Bonilla*, 209 N.C. App. 576, 585, 706 S.E.2d 288, 295 (2011) (holding that this definition was "clear" and "appropriate" when provided in a jury instruction on kidnapping). "Terrorizing is defined as more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension." *Bonilla*, 209 N.C. App. at 579, 706 S.E.2d at 292 (quotation marks and citations omitted).

¶ 13 When considering the sufficiency of the evidence regarding a defendant's intent to cause serious bodily harm, the question is "whether [the] defendant's actions could show a specific intent on his part to do serious bodily harm to [the victim]." *State v. Washington*, 157 N.C. App. 535, 539, 579 S.E.2d 463, 466 (2003). "A defendant's intent is rarely susceptible to proof by direct evidence; rather, it is shown by his actions and the circumstances surrounding his actions." *State v. Rodriguez*, 192 N.C. App. 178, 187, 664 S.E.2d 654, 660 (2008).

¶ 14 In the instant case, the State presented substantial evidence from which a jury could find that Defendant's intent was to do serious bodily

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3. The offense is kidnapping in the first-degree "[i]f the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted . . . ." N.C. Gen. Stat. § 14-39(b) (2021). The offense is kidnapping in the second-degree "[i]f the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted[.]" *Id.*

harm to Ms. Harding, including testimony from Ms. Harding, Mr. Stokes, and Sgt. Buck showing that: Ms. Harding drove to a relative's house "to get away from [Defendant]" after he struck her in the head with an ice cube tray. Defendant later showed up at the house and the two began arguing. Ms. Harding got in Defendant's car but left the door open and her leg hanging out, in case she needed to jump out. With the passenger door open and Ms. Harding's leg hanging out, Defendant threw the car in reverse and took off. Ms. Harding "begged and pleaded" for him to let her out; but Defendant continued driving. While driving, Defendant grabbed Ms. Harding by the hair, grabbed her around the neck with his hands, and put her in a "chokehold" using his arm. Once Defendant stopped the car, he continued grabbing Ms. Harding's hair and hitting her. He "held her down and grabbed her around the throat."

¶ 15 When viewed in the light most favorable to the State, the evidence of Defendant's "actions and the circumstances surrounding his actions" was sufficient to persuade a rational juror that Defendant removed Ms. Harding for the purpose of doing serious bodily harm. *See Rodriguez*, 192 N.C. App. at 187, 664 S.E.2d at 660.

¶ 16 Defendant contends that "the injuries [Ms.] Harding suffered were not serious bodily [harm] under any possible meaning of that term." However, when considering whether the evidence is sufficient to show that Defendant had the specific intent to do serious bodily harm, the question is "not the extent of physical damage to the victim," *State v. Boozer*, 210 N.C. App. 371, 376, 707 S.E.2d 756, 761 (2011), but "whether [the] defendant's actions could show a specific intent on his part to do serious bodily harm to [the victim]," *Washington*, 157 N.C. App. at 539, 579 S.E.2d at 466 (rejecting defendant's argument that the state failed to provide substantial evidence of specific intent where the victim suffered only minor cuts and bruises, explaining that "the extent of physical damage to [the victim] is not in issue"). The severity of Ms. Harding's injuries is inapposite to the question of Defendant's intent, and Defendant's arguments to the contrary are overruled.

¶ 17 When viewed in the light most favorable to the State, and affording the State every reasonable inference, we conclude that the State presented substantial evidence to show that Defendant removed Ms. Harding for the specific purpose of doing serious bodily harm. *See id.* at 536-37, 540, 579 S.E.2d at 464-66. Defendant's argument is without merit.

B. Jury Instructions

¶ 18 **[2]** Defendant next argues that the trial court plainly erred when it failed to define "serious bodily injury" in its jury instructions. Defendant

argues that specific intent is an essential element of kidnapping, and thus, it is probable that a different outcome would have occurred had the trial court defined "serious bodily injury" in its instructions to the jury.[4]

¶ 19 To show plain error, Defendant must demonstrate that a fundamental error occurred at trial. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice— that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.*

¶ 20 The trial court instructed the jury on first and second degree kidnapping in accordance with pattern jury instruction N.C.P.I.–Crim. 210.25. N.C.P.I.–Crim. 210.25 does not define "serious bodily injury" in the body of the instruction. Footnote 5 to the instruction provides, in pertinent part, "Serious bodily injury may be defined as 'such physical injury as causes great pain or suffering.' *See S. v. Jones*, 258 N.C. 89 (1962); *S. v. Ferguson*, 261 N.C. 558 (1964)." Defendant did not specifically request that the trial court give the definition in the footnote.

¶ 21 This Court has repeatedly held that where a defendant "fails to cite to any caselaw or statute which requires the trial court to define [specific] terms during its jury instruction," the defendant has failed to meet his burden under plain error review to warrant a new trial. *E.g.*, *State v. Wood*, 174 N.C. App. 790, 794, 622 S.E.2d 120, 123 (2005) (where the defendant failed to cite to any authority that required the trial court to define the terms "driving with license revoked," "negligent driving," and "reckless driving," the trial court did not commit plain error in failing to define those terms).

¶ 22 Defendant cites *Bonilla* in support of his argument that "the 'appropriate' instruction would have been that 'serious bodily injury may be defined as such physical injury as causes great pain or suffering.' " *See Bonilla*, 209 N.C. App. at 585, 706 S.E.2d at 295. But *Bonilla* did not address whether the trial court was required to define "serious bodily injury"; rather, in *Bonilla* the trial court provided the definition, and the issue on appeal was whether the provided definition was "clear"

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4. Pattern jury instruction N.C.P.I.–Crim. 210.25 uses the phrase "serious bodily injury" while N.C. Gen. Stat. § 14-39 uses the phrase "serious bodily harm." The phrases are used synonymously in the kidnapping context. *See Bonilla*, 209 N.C. App. at 585, 706 S.E.2d at 295 (holding that the definition of "serious bodily injury" provided in N.C.P.I.–Crim. 210.25, was an appropriate definition for "serious bodily harm"); *Boozer*, 210 N.C. App. at 376-77, 707 S.E.2d at 761-62 (using "harm" and "injury" interchangeably).

and "appropriate." Defendant has not cited to any authority requiring a trial court to define "serious bodily injury" and therefore, Defendant has failed to meet his burden under plain error. Defendant's argument is overruled.

C. Rule 2

¶ 23 **[3]** Finally, Defendant requests this Court to review the constitutionality of the offense of assault on a female, N.C. Gen. Stat. § 14-33(c)(2), which makes it a Class A1 misdemeanor for "a male person at least 18 years of age" to assault a "female." N.C. Gen. Stat. § 14-33(c)(2) (2021). Defendant argues that this statutory subsection discriminates based on sex, and thus, is facially unconstitutional as a violation of the Fourteenth Amendment's equal protection clause.

¶ 24 Defendant concedes that he did not raise this issue at trial and therefore, the issue has not been preserved for appellate review. N.C. R. App. P. 10(a)(1) (2021); *see Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) ("A constitutional issue not raised at trial will generally not be considered for the first time on appeal."). Nonetheless, Defendant requests this Court to exercise its discretion pursuant to Rule 2 of our Rules of Appellate Procedure and review the constitutionality of N.C. Gen. Stat. § 14-33(c)(2). *See* N.C. R. App. P. 2 (providing that an appellate court may "suspend or vary the requirements or provisions of any of these rules" in order to "prevent manifest injustice to a party, or to expedite decision in the public interest"). We decline to exercise our discretion under Rule 2 to review the constitutionality of N.C. Gen. Stat. § 14-33(c)(2).

III. Conclusion

¶ 25 In the light most favorable to the State, the State presented sufficient evidence to show Defendant intended to remove Ms. Harding for the purpose of doing serious bodily harm. Therefore, it was not error for the trial court to deny Defendant's motion to dismiss. Further, the trial court did not plainly err in failing to define "serious bodily injury" in its jury instructions. Finally, we decline to exercise our discretion pursuant to Rule 2 and address Defendant's unpreserved argument that N.C. Gen. Stat. § 14-33(c)(2) unconstitutionally discriminates based on sex. We thus discern no error and no plain error in the judgment of the trial court.

NO ERROR IN PART; NO PLAIN ERROR IN PART.

Chief Judge STROUD and Judge CARPENTER concur.

STATE OF NORTH CAROLINA
v.
JERMAINE LYDELL SANDERS, DEFENDANT

No. COA21-358

Filed 21 June 2022

Drugs—currency seized by local law enforcement—released to federal authorities—jurisdiction

The trial court erred by issuing orders purporting to exercise *in rem* jurisdiction over currency seized from defendant's rental vehicle during a drug investigation, requiring the town police department to return the currency to defendant after the department had relinquished it to federal authorities due to a federal agency's adoption of the case, and holding the department in civil contempt for failure to return the currency to defendant. North Carolina's criminal forfeiture proceedings are based on *in personam*, not *in rem* jurisdiction, and defendant's sole avenue for attempting to retrieve the seized currency was through the federal courts.

Appeal by Town of Mooresville and Mooresville Police Department from orders entered 24 November 2020 by Judge Deborah Brown and 26 January 2021, and 11 February 2021 by Judge Christine Underwood in Iredell County District Court. Appeal dismissed by order entered 20 April 2021 by Judge Christine Underwood. We allowed a petition for writ of certiorari by the Town of Mooresville and the Mooresville Police Department to review orders entered 24 November 2020 by Judge Deborah Brown and 26 January 2021, 11 February 2021, and 20 April 2021 by Judge Christine Underwood in Iredell County District Court. Heard in the Court of Appeals 26 January 2022.

Perry Legal Services, PLLC, by Maria T. Perry, for defendant-appellee.

Cranfill Sumner LLP, by Steven A. Bader and Patrick H. Flanagan, for appellants.

Acting United States Attorney William T. Stetzer, by Assistant United States Attorney J. Seth Johnson, amicus curiae.

Kristi L. Graunke and Leah J. Kang for American Civil Liberties Union of North Carolina Legal Foundation, Inc.; Dawn N. Blagrove and Elizabeth G. Simpson for Emancipate NC, Inc.;

Daryl Atkinson and Whitley Carpenter for Forward Justice; and Laura Holland for North Carolina Justice Center, amici curiae.

MURPHY, Judge.

¶ 1 Judicial proceedings pertaining to criminal seizures of personal property in North Carolina are based on *in personam*, not *in rem*, jurisdiction. These proceedings differ from federal civil forfeiture proceedings, which are based on *in rem* jurisdiction over the property at issue. For this reason, where a federal court adopts a seizure of property by North Carolina law enforcement, federal courts assume exclusive, *in rem* jurisdiction over the seizure, as no state-level *in rem* jurisdiction exists to take priority over the federal exercise of *in rem* jurisdiction; the ordinary rule prioritizing the *in rem* jurisdiction of the first in time to exercise it does not apply unless *in rem* jurisdiction exists in the first place. Here, where the trial court issued orders purporting to exercise *in rem* jurisdiction, it erred. Accordingly, we must vacate the trial court's orders and remand for further proceedings consistent with this opinion.

BACKGROUND

¶ 2 This appeal arises out of a seizure of property belonging to Defendant Jermaine Lydell Sanders by the Mooresville Police Department ("MPD"). On or about 15 November 2020, MPD officers discovered a vehicle in a hotel parking lot matching the description of a vehicle provided by night shift officers. The vehicle, which Defendant was renting, contained $16,761.00 in cash in a plastic bag in the center console. Defendant, who was inside the hotel, fled upon seeing the officers. Meanwhile, the MPD seized the cash.

¶ 3 On 19 November 2020, Defendant appeared through counsel before the Iredell County District Court and filed a *Motion for Personal Property to be Released to Defendant* ("November Motion") arguing the currency's seizure was unlawful. However, the following day, while the November Motion was under consideration, an officer of the United States Department of Homeland Security ("DHS") informed the MPD that, because Defendant was being investigated for money laundering under 18 U.S.C. § 1956, the DHS was "adopting the case." On 23 November 2020, the MPD relinquished the currency to the DHS, and a DHS officer converted the funds into a check payable to United States Customs and Border Protection.

¶ 4 The District Court granted Defendant's November Motion in an order entered 24 November 2020 ("November Order"). Defendant's counsel

promptly notified the MPD of the November Order and attempted to coordinate the return of Defendant's cash; however, the MPD indicated in response that it could not return the cash due to the adoption. Having received this response, Defendant filed a *Verified Motion to Show Cause* on 10 December 2020 briefly describing the foregoing events and alleging, *inter alia*, that the MPD unconstitutionally seized the $16,761.00, "has the financial ability to comply with the [trial] [c]ourt's November [] [O]rder to return [Defendant's] cash[,]" "inexcusably failed to do so[,]" and "is subject to being held in contempt until it complies with the order." In response, the District Court, in an order dated 26 January 2021 ("January Order"), "decreed that the [MPD] will be held in contempt unless a representative from [the MPD] appears in person on [9 February] 2021 . . . to show cause why [it] should not be held in contempt for failure to return funds to [Defendant] as ordered . . . ."

¶ 5 A hearing was held on 9 February 2021 in accordance with the January Order, shortly after which the District Court entered another order ("February Order"). The trial court made the following relevant findings of fact in the February Order:

> 1. On [15 November 2020], the [MPD] seized $16,761.00 in cash as a part of a search of [Defendant's] rental vehicle, in violation of [his] 4th, 5th and 8th Amendment U.S. constitutional rights, as made applicable to the states by the 14th Amendment.
>
> . . . .
>
> 7. This [c]ourt acquired in rem jurisdiction over the cash on [19 November 2020—]the date [Defendant] filed the motion for return of property.
>
> . . . .
>
> 17. The [MPD] is an agency of the Town of Mooresville [("Mooresville")], and it operates under the supervision and control of . . . Mooresville. Together or severally, the said town and [the MPD] have the financial means to comply with the [November Order].
>
> 18. Although Counsel for the [MPD] argued, in defense of not being held in contempt, that . . . Mooresville and the [MPD] are incapable of returning the seized funds because a federal agency has them, this argument has previously been resolved [by the November Order] and is res judicata.

> 19. Furthermore, this argument is meritless in view of . . . Mooresville and [the MPD's] ability to use funds, or to liquidate assets, at their disposal so as to enable them to comply with the subject order by releasing $16,761.00 to [Defendant].
>
> 20. Finally, [the November Order] did not premise release of the amount of $16,761.00 on the [MPD's] ability to effect reversal of its wrongful transfer of a different $16,761.00 to a third party.
>
> 21. The [MPD] may never be able to reverse its unauthorized conduct in attempting to remove from this court's jurisdiction rem over which the court had jurisdiction. However, should said department later be successful in recovering $16,761.00 from federal authorities, it will obviously be entitled to keep those funds to replenish the payment required by [the November Order].
>
> 22. The [c]ourt also takes note that the [MPD] has not filed an appeal of the November . . . Order, nor a motion to set aside the [o]rder.
>
> 23. By its conduct, the [MPD] has willfully failed to comply with [the November Order].
>
> 24. . . . Mooresville and the [MPD] have had 77 days to make arrangements to comply with the [November] Order.
>
> 25. . . . Mooresville, by and through the [MPD], which town also had notice of the November . . . [O]rder, has willfully failed to comply with [the November Order].

Based upon these findings of fact, the District Court "conclude[d] as a matter of law[] [that it had] jurisdiction over the subject matter and parties[,]" that "[t]he failure of . . . Mooresville and the [MPD] to comply with [the November Order was] willful, and [that] . . . Mooresville and the [MPD] have the present ability to comply with the [November] Order." Accordingly, it "decreed that the [MPD] and . . . Mooresville are held in civil contempt of [c]ourt[] and shall purge themselves by returning $16,761.00 to [Defendant] within seven business days of entry of [the] [February] Order . . . ."

¶ 6 On 15 February 2021, Mooresville and the MPD filed a *Notice of Appeal* from the November Order, January Order, and February Order. However, in an order entered 20 April 2021 ("April Order"), the District Court dismissed the appeal on the basis that it was not timely filed and failed to invoke Rule 3 appellate jurisdiction. We allowed Mooresville's and the MPD's petition for writ of certiorari on 7 May 2021 to review the November, January, February, and April Orders.

ANALYSIS

¶ 7 On appeal, Mooresville and the MPD argue that the trial court lacked *in rem* jurisdiction and, as such, erred in issuing the four challenged orders because it was prevented from interfering with the federal courts' exclusive *in rem* jurisdiction.

¶ 8 Under 21 U.S.C. § 881, "[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance" are "subject to forfeiture to the United States . . . ." 21 U.S.C. § 881(a)(6) (2021). Moreover, federal courts "shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress[.]" 28 U.S.C. § 1355 (2021). As such, the determinative question in this case is whether, in light of federal law, the District Court actually possessed the *in rem* jurisdiction on which it purported to base its orders.

¶ 9 *In rem* jurisdiction is a specialized form of personal jurisdiction. *Coastland Corp. v. N.C. Wildlife Res. Comm'n*, 134 N.C. App. 343, 346, 517 S.E.2d 661, 663 (1999). "The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record"; however, "[w]e review *de novo* the issue of whether the trial court's findings of fact support its conclusion of law that [it had] personal jurisdiction over [a] defendant." *Bell v. Mozley*, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011), *disc. rev. denied*, 365 N.C. 574, 724 S.E.2d 529 (2012). Here, because Appellants challenge only whether the trial court possessed *in rem* jurisdiction as a matter of law, we review de novo.

¶ 10 As an initial matter, we note that the existence or nonexistence of *in rem* jurisdiction at the state level in this case is of great import, as a court assuming *in rem* jurisdiction precludes the subsequent exercise of *in rem* jurisdiction by all other courts:

> Where the judgment sought is strictly in personam, for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as res adjudicata in the other. But, if the two suits are in rem or quasi in rem, requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. To avoid unseemly and disastrous conflicts in the administration of our dual judicial system and to protect the judicial processes of the court first assuming jurisdiction, the principle, applicable to both federal and state courts, is established that *the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other*.

Penn General Cas. Co. v. Pennsylvania ex rel. Schnader, 294 U.S. 189, 195, 79 L. Ed. 850, 855 (1935) (citations omitted) (emphasis added). However, contrary to its assertions in the February Order, the District Court never exercised *in rem* jurisdiction over the seized currency.

¶ 11 Unlike the federal government, North Carolina does not have a general-purpose civil forfeiture statute. *See generally* 19 U.S.C. § 1607 (2021). The statute applicable to this case is N.C.G.S. § 90-112, which provides, in relevant part, for the *criminal* forfeiture of "[a]ll money . . . which [is] acquired, used, or intended for use, in selling, purchasing, manufacturing, compounding, processing, delivering, importing, or exporting a controlled substance . . . [.]" N.C.G.S. § 90-112(a)(2) (2021). As a procedural safeguard, forfeitures under N.C.G.S. § 90-112 require

> process issued by any [D]istrict or [S]uperior [C]ourt having jurisdiction over the property except that seizure without such process may be made when[] (1) [t]he seizure is incident to an arrest or a search under a search warrant; [or] (2) [t]he property subject to seizure has been the subject of a prior judgment in favor of the State in a criminal injunction or forfeiture proceeding . . . .

N.C.G.S. § 90-112(b) (2021). While federal civil forfeiture is, quite literally, an action against the property itself,[1] North Carolina does not employ this conceptual framework; instead, our criminal forfeiture proceedings take place under the purview of a defendant's criminal trial. *See, e.g.*, *State v. Johnson*, 124 N.C. App. 462, 478 S.E.2d 16 (1996), *cert. denied*, 345 N.C. 758, 485 S.E.2d 304 (1997).

¶ 12 In *State v. Hill*, we held that criminal forfeiture proceedings are categorically predicated upon *in personam* jurisdiction—one of the many distinguishing factors between North Carolina's criminal forfeiture proceedings and the *in rem* proceedings associated with civil forfeiture. *State v. Hill*, 153 N.C. App. 716, 718, 570 S.E.2d 768, 769 (2002) ("It is important to note that our forfeiture provisions operate *in personam* and that forfeiture normally follows conviction."). Moreover, we previously held that law enforcement may—and, indeed, must—cooperate with federal authorities and permit adoption by the federal government where applicable:

> State and local agencies are allowed to cooperate and assist each other in enforcing the drug laws. [N.C.G.S.] § 90-95.2 (2001). Cooperation by state and local officers with federal agencies is *mandated* by [N.C.G.S.] § 90-113.5 which provides:
>
> > It is *hereby made the duty* of . . . all peace officers within the State, including agents of the North Carolina Department of Justice, and all State's attorneys, to enforce all provisions of this Article [Controlled Substances Act] . . . *and to cooperate with all agencies charged with the enforcement of the laws of the United States*, of this State, and all other States, relating to controlled substances.
>
> [N.C.G.S.] § 90-113.5 (2001) (emphasis added).

Id. at 721, 570 S.E.2d at 771. Here, where Defendant's currency was taken from the vehicle pursuant to N.C.G.S. § 90-112, we are bound by our decision in *Hill* to hold that any challenge to that forfeiture would have necessarily been predicated on *in personam* jurisdiction, not *in rem* jurisdiction.

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1. In federal civil forfeiture proceedings, the "party" opposite the government is—in an exercise of legal fiction—the very item seized. *See, e.g.*, *United States v. $119,000 in U.S. Currency*, 793 F. Supp. 246 (D. Haw. 1992); *United States v. One Black 1999 Ford Crown Victoria LX*, 118 F. Supp. 2d 115 (D. Mass. 2000).

¶ 13 As the trial court never exercised *in rem* jurisdiction, the trial court erred in any legal conclusion in the challenged orders premised on the exercise of *in rem* jurisdiction. In *Hill*, we held that "[o]nce a federal agency has adopted a local seizure, a party may not attempt to thwart the forfeiture by collateral attack in our courts, for at that point exclusive original jurisdiction is vested in the federal court." *Id.* at 722, 570 S.E.2d at 772. The proposition that *in rem* jurisdiction attaches due to the actions of law enforcement stands in clear opposition to *Penn General*, in which the United States Supreme Court held that "the *court* first assuming jurisdiction over the property"—not the executive agents—"may maintain and exercise [*in rem*] jurisdiction to the exclusion of the other"; however, as we are without power to override our prior holdings, *Hill* remains in effect until such time as it may be corrected by our Supreme Court. *Penn General*, 294 U.S. at 195, 79 L. Ed. 2d at 855 (emphasis added); *see also In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Accordingly, under *Hill*, the November Order was issued by a court without *in rem* jurisdiction; and, as the three subsequent orders were premised on the validity of the November Order, those orders are void.[2]

CONCLUSION

¶ 14 We are hamstrung by *Hill*; we must therefore hold that Defendant's sole avenue for retrieving the currency unlawfully seized from him by the MPD is to seek redress from federal authorities. Accordingly, we vacate the trial court's orders and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges DILLON and ZACHARY concur.

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2. With certiorari having been allowed and the underlying orders having been entered in error, any further issues arising from the April Order are moot. *See McVicker v. Bogue Sound Yacht Club, Inc.*, 257 N.C. App. 69, 73, 809 S.E.2d 136, 139–40 (2017) ("A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.").

STATE v. WRIGHT

[284 N.C. App. 178, 2022-NCCOA-418]

STATE OF NORTH CAROLINA
v.
NICODEMUS WRIGHT, DEFENDANT

No. COA20-250

Filed 21 June 2022

1. Sexual Offenders—failure to notify of change of address—subject matter jurisdiction—sufficiency of indictment—essential elements of offense

The trial court had subject matter jurisdiction over a case involving the offense of failure to notify the last registering sheriff of a change of address pursuant to N.C.G.S. § 14-208.11(a)(2) where the indictment sufficiently alleged all essential elements, even if not done so explicitly, by including the factual basis for why defendant was required to register (based on his previous conviction of a reportable offense) and by tracking the statutory language in its statement that defendant willfully violated the registration program by failing to notify the sheriff of a change of address in accordance with statutory requirements.

2. Criminal Law—jury instructions—failure to update address—willfulness

There was no plain error in the trial court's jury instructions on failure to notify the last registered sheriff of a change of address pursuant to N.C.G.S. § 14-208.11(a)(2) where the instructions as a whole explicitly referred to the proper burden of proof as guilty beyond a reasonable doubt and where the instructions regarding willfulness were consistent with the pattern jury instructions. Even if the instructions were unclear, they were not sufficiently prejudicial to impact the jury's verdict.

3. Sexual Offenders—failure to notify change of address—willfulness—sufficiency of evidence

The State presented substantial evidence that defendant's failure to notify the sheriff's office of a change of address as required by N.C.G.S. § 14-208.9(a) was willful, including that defendant was aware of his obligation to update his address and was capable of doing so but that, at a minimum, he did not notify the sheriff's office within three business days of leaving a drug treatment program in another county, even though he did not return to his former address at a men's shelter.

4. Criminal Law—habitual felon status—underlying convictions —sufficiency of evidence

Where the State presented an exhibit listing incident dates and other information pertaining to defendant's prior felony convictions, there was sufficient evidence regarding the date of commission of two previous felony offenses that were used to establish defendant's habitual felon status. The underlying offenses were committed after defendant turned eighteen years old, and there was no overlap where each was committed after defendant pleaded guilty to the previous offense used.

5. Criminal Law—right to allocution—sentencing hearing—denied

Defendant was entitled to a new sentencing hearing for failure to update his address and attaining habitual felon status where the trial court erred by depriving defendant of his right to allocution, pursuant to N.C.G.S. § 15A-1334(b), after defendant expressed his desire to make a statement to the court but was not allowed to do so. Although defendant also asked more than once to be given papers, to which the court responded, "we're not going to do that," defendant clearly invoked his right to be heard but was not asked whether he wanted to make a statement without his papers prior to sentencing.

6. Appeal and Error—civil judgment for attorney fees—no judgment entered—petition for writ of certiorari denied

Defendant's request for a writ of certiorari to review a civil judgment for attorney fees was denied where there was no indication that the civil judgment was filed with the clerk of court.

Appeal by Defendant from judgment entered 18 September 2019 by Judge Michael A. Stone in Wake County Superior Court. Heard in the Court of Appeals 13 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert C. Ennis, for the State.

Daniel J. Dolan for defendant-appellant.

MURPHY, Judge.

¶ 1 An indictment must sufficiently allege all essential elements, or the facts underlying all essential elements, of an offense to put a defendant

on notice as to the offense being charged in order to grant the trial court jurisdiction to hear a felony case. However, an indictment need not follow hyper-technical rules to be valid. Here, the trial court properly recognized the validity of the indictment, which sufficiently alleged the underlying facts essential for each element to apprise Defendant that he was charged with a failure to notify the last registering sheriff of a change of address.

¶ 2 Jury instructions are subject to plain error review when a defendant fails to preserve an alleged instructional error for appellate review, requiring a showing that the alleged error had a probable impact of the jury's verdict as opposed to a possible impact. Here, the trial court did not plainly err in instructing the jury regarding the State's burden of proof as it properly instructed that the State was required to prove all elements beyond a reasonable doubt. Additionally, the trial court did not plainly err in instructing the jury on the elements of failure to notify the last registering sheriff of a change of address, even assuming it erred by not indicating that there must be a *willful* failure to notify the sheriff's office of a change of address, because such an error would not have had a probable impact on the jury's verdict due to the clear, accurate statement of the mens rea requirement immediately prior to the assumed error.

¶ 3 A motion to dismiss for insufficiency of the evidence should be denied if, when viewing the evidence in the light most favorable to the State, there is substantial evidence of each essential element of the offense. Here, there was substantial evidence of each essential element of Defendant's failure to notify the last registering sheriff of a change of address and his attaining habitual felon status.

¶ 4 In non-capital cases, defendants have a statutory right to allocution when they assert that right prior to sentencing. Here, because the trial court denied Defendant his right to allocution after he clearly and repeatedly articulated his desire to exercise this right, we vacate the trial court's sentence and remand for a new sentencing hearing.

¶ 5 Finally, a petition for writ of certiorari is a discretionary writ that should only be allowed when the petition shows merit in the underlying issue. There can be no merit in an appeal regarding an underlying issue when the record does not show the order from which a defendant requests review was actually entered. An order is not considered entered where it has not been filed with the county clerk of court. Here, the civil judgment order for attorney fees for which Defendant seeks our review does not reflect that it was filed with the county clerk of court, and therefore there is no merit to the petition for writ of certiorari. We

deny Defendant's petition for writ of certiorari and dismiss the portion of his appeal related to the civil judgment order for attorney fees.

BACKGROUND

¶ 6 Defendant Nicodemus Wright was convicted of second-degree rape in 2006. In November 2011, following his release from prison, he was required to enroll in the sex offender and public protection registry and required to inform his local sheriff's office of his address in accordance with N.C.G.S. § 14-208.7. In early July 2015, Defendant's registered address was a men's shelter in Raleigh; however, on 9 July 2015, Defendant was taken to a month-long drug treatment program in Goldsboro by his post-release supervisor. Defendant left this program after two days and did not return to the men's shelter. From 11 July 2015, when Defendant left the drug treatment program, until his eventual arrest on 4 August 2015, Defendant did not update his registered address. As a result, Defendant's registered address remained listed as the men's shelter in Raleigh, but he did not stay there at any point after he left the program.

¶ 7 Defendant's former girlfriend, Linda Burt, testified that Defendant began staying at her home two days after his departure from the program, kept his clothes and books at her home during this time period, and was staying with her at the time of his arrest.

¶ 8 Following the State's evidence, Defendant made motions to dismiss on the basis of the indictment being fatally defective and for insufficiency of the evidence. Specifically, Defendant alleged that the indictment failed to state explicitly that he was required to register as a sex offender and to notify the sheriff's office of a move within three days. The indictment read:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the [4 August] 2015, in Wake County, the defendant named above unlawfully, willfully and feloniously did violate the North Carolina Sex Offender and Public Protection Registration Program, by having been convicted in Wake County Superior Court on 18th day of September 2006 of Second[-]Degree Rape, a reportable offense and failing to notify the Sheriff of Wake County of a change of address as required by [N.C.G.S.] § 14-208.9. This act was done in violation of [N.C.G.S.] § 14-208.11(A)(2)[.]

The trial court denied the motions.

¶ 9 Defendant then presented evidence. Defendant testified that he understood his obligation to notify his local sheriff's office of any address change and he had consistently updated his address. Defendant testified on cross-examination that, in 2011, he had acknowledged his understanding of his obligations regarding the registry in writing. Additionally, Defendant testified that the Goldsboro program had registered him in Goldsboro and that he never lived with his girlfriend, instead claiming he stayed in Goldsboro until around 2 August 2015.

¶ 10 Defendant also called his post-release officer to testify. Defendant's post-release officer confirmed that a program officer had indicated that the program was going to notify the Wayne County Sheriff's Office of Defendant's change of address, but he was unaware if this actually occurred. Defendant renewed his motions to dismiss at the conclusion of all evidence, and the trial court again denied the motions. The trial court instructed the jury, and the jury found Defendant guilty of violating the sex offender and public protection registry.

¶ 11 Defendant was then tried for having attained habitual felon status. Two prior convictions for attempted robbery and attempted criminal sale of a controlled substance in the fifth degree from New York were used as the first two underlying felonies, with the third being his second-degree rape conviction in North Carolina. At the conclusion of the State's evidence, Defendant made a motion to dismiss, which the trial court denied. Defendant was found guilty of attaining habitual felon status, and the trial court proceeded to sentencing. At sentencing, the following exchange occurred:

> THE COURT: All right. Stand up, [Defendant]. Anything you want to say?
>
> THE DEFENDANT: Yes. I need – to say what I want to say, I need to get my paperwork.
>
> THE COURT: Well, we're not going to do that. Anything you want to say to me right now before you're sentenced?
>
> THE DEFENDANT: Yes. I asked to get it before I even came out here, and they rushed me and said, "Come on now." Please. I mean, this is my chance to speak to you.
>
> THE COURT: Anything you want to say to me before you're sentenced?
>
> THE DEFENDANT: Yes, I do. I have it right there in –

> THE COURT: All right. Your papers aren't relevant right now. All right. Moving to sentencing, Madam Clerk, it is a class C on the habitual felon status, record level two. The sentence will be in the presumptive range. He's sentenced to a minimum term of 83 months, maximum terms of 112 months active time. He's to receive credit for all pretrial confinement. All right. Good luck to you, [Defendant] . . . .
>
> MS. STROMBOTNE: Sorry, Judge. I didn't mean to interrupt. I would like to enter notice of appeal in open court.
>
> THE COURT: All right. Enter notice of appeal.
>
> THE DEFENDANT: I don't just – I don't get to say anything now to you, Judge?
>
> THE COURT: No.

¶ 12 On 18 September 2019, the trial court imposed an active sentence of 83 to 112 months. The criminal judgment provided for $0.00 in attorney fees. On 25 October 2019, a *Non-Capital Criminal Case Trial Level Fee Application Order for Payment Judgment Against Indigent* was signed by the trial court, purporting to approve a civil judgment for attorney fees in the amount of $3,562.50.

ANALYSIS

¶ 13 On appeal, Defendant argues (A) "[t]he judgment must be vacated because the indictment charging a violation of the sex offender and public protection registry fails to allege three essential elements, depriving the trial court of jurisdiction and violating [Defendant's] right to due process"; (B) "[Defendant] must receive a new trial because the trial court plainly erred by [(1)] failing to instruct the jury as to an element of an offense and [(2)] by misstating an element of an offense"; (C) "[t]he trial court erroneously denied [Defendant's] motion to dismiss the charge of a violation of the sex offender and public protection registry and the charge of attaining habitual felon status because there was not substantial evidence of either charge"; (D) "[t]his case must be remanded for a new sentencing hearing because the trial court deprived [Defendant] of his right to allocution"; and (E) "[t]he trial court erred by ordering [Defendant] to pay attorney[] fees and the attorney appointment fee without affording him notice and an opportunity to be heard."[1]

1. Defendant has also filed a petition for writ of certiorari regarding this issue, which we address in our discussion of this issue.

A. Sufficiency of the Indictment for Failure to Notify the Last Registering Sheriff of a Change of Address

¶ 14 **[1]** Defendant contends the indictment fails to sufficiently allege any of the three essential elements of failure to notify the last registering sheriff of a change of address and the trial court therefore lacked jurisdiction to enter the judgment. The State responds that the Defendant is employing a hyper-technical reading of the indictment and that a plain reading reveals the essential elements are laid out, even if not in the most explicit terms.

> It is well settled that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony. Lack of jurisdiction in the trial court due to a fatally defective indictment requires the appellate court to arrest judgment or vacate any order entered without authority. The issue of subject matter jurisdiction may be raised at any time, even for the first time on appeal. The subject matter jurisdiction of the trial court is a question of law, which this Court reviews *de novo* on appeal.

State v. Barnett, 223 N.C. App. 65, 68, 733 S.E.2d 95, 97-98 (2012) (marks and citations omitted).

¶ 15 "The North Carolina Constitution guarantees that, 'in all criminal prosecutions, every person charged with [a] crime has the right to be informed of the accusation.' " *State v. Williams*, 368 N.C. 620, 623, 781 S.E.2d 268, 270 (2016) (quoting N.C. Const. art. I, § 23). For felonies, this often occurs by indictments, which must contain

> [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C.G.S. § 15A-924(a)(5) (2021). Our Supreme Court has interpreted this statute, holding "that it is not the function of an indictment to bind the hands of the State with technical rules of pleading, and that we are no longer bound by the ancient strict pleading requirements of the common law." *Williams*, 368 N.C. at 623, 781 S.E.2d at 270-71. "Instead, contemporary criminal pleading requirements have been designed to remove from our law unnecessary technicalities which tend to obstruct

justice." *Id.* at 623, 781 S.E.2d at 271 (marks omitted). Our statutes reflect this, providing:

> Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express[es] the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment.

N.C.G.S. § 15-153 (2021).

¶ 16 Our caselaw has elaborated on what indictments must contain based on contemporary standards:

> In order to be valid and thus confer jurisdiction upon the trial court, an indictment charging a statutory offense must allege all of the essential elements of the offense. The indictment is sufficient if it charges the offense in a plain, intelligible and explicit manner. Indictments need only allege the ultimate facts constituting each element of the criminal offense and an indictment couched in the language of the statute is generally sufficient to charge the statutory offense. While an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form. The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words.

Barnett, 223 N.C. App. at 68-69, 733 S.E.2d at 98 (marks and citations omitted).

¶ 17 Here, Defendant challenges his indictment for failure to notify the last registering sheriff of his change of address. This offense is described in N.C.G.S. § 14-208.11(a)(2), which states, in relevant part, "[a] person required by this Article to register who willfully does . . . the following is guilty of a Class F felony: . . . Fails to notify the last registering sheriff of a change of address as required by this Article." N.C.G.S. § 14-208.11(a)(2) (2021). The obligation to notify the last registering sheriff of a change of address appears in N.C.G.S. § 14-208.9(a), which states, in relevant

part, "[i]f a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered." N.C.G.S. § 14-208.9(a) (2021).

¶ 18 Based on these statutes, we have previously held that the three essential elements of the failure to notify the last registering sheriff of a change of address under N.C.G.S. § 14-208.11(a)(2) are "(1) the defendant is a person required to register; (2) the defendant changes his or her address; and (3) the defendant fails to notify the last registering sheriff of the change of address within three business days of the change." *Barnett*, 223 N.C. App. at 69, 733 S.E.2d at 98.

¶ 19 Here, the indictment reads:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the [4 August] 2015, in Wake County, the defendant named above unlawfully, willfully and feloniously did violate the North Carolina Sex Offender and Public Protection Registration Program, by having been convicted in Wake County Superior Court on 18th day of September 2006 of Second[-]Degree Rape, a reportable offense and failing to notify the Sheriff of Wake County of a change of address as required by [N.C.G.S.] § 14-208.9. This act was done in violation of [N.C.G.S.] § 14-208.11(A)(2)[.]

We analyze each of the essential elements separately below.

1. Required to Register

¶ 20 Defendant first contends that, like in *Barnett*, the indictment does not explicitly state Defendant was required to register. The State responds that, unlike the indictment in *Barnett*, the indictment here instead provides the "facts indicating why it would be a crime for Defendant to 'fail to provide written notice or notify the . . . Sheriff's Department [sic] within three business days after a change of address.' " *Id.* at 69, 733 S.E.2d at 98-99. We hold the first element is sufficiently alleged here.

¶ 21 In *Barnett*, we assessed the validity of an indictment that read:

> The jurors for the State upon their oath present that on or about 8 June 2010 and in Gaston County the defendant named above unlawfully, willfully and feloniously did fail to provide written notice or

> notify the Gaston County Sheriff's Department [sic] within three business days after a change of address as required by the North Carolina General Statute 14–208.9.

Id. at 69, 733 S.E.2d at 98. We stated:

> While the indictment substantially tracks the statutory language set forth in [N.C.G.S.] § 14–208.9(a) with respect to the second and third elements of the offense, it makes no reference to the first essential element of the offense, *i.e.*, that Defendant be "a person required to register." *The indictment does not allege that Defendant is a registered sex offender, nor any facts indicating why it would be a crime for Defendant to "fail to provide written notice or notify the Gaston County Sheriff's Department [sic] within three business days after a change of address.*" Moreover, the State's contention that the indictment language "as required by the North Carolina General Statute 14–208.9" was adequate to "put Defendant on notice of the charge[] and [] inform[] him with reasonable certainty the nature of the crime charged" is unavailing, as "it is well established that ' "[m]erely charging in general terms a breach of [a] statute and referring to it in the indictment is not sufficient" ' to cure the failure to charge 'the essentials of the offense' in a plain, intelligible, and explicit manner."

Id. at 69-70, 733 S.E.2d at 98-99 (emphasis added). We ultimately concluded that the indictment was insufficient to confer subject matter jurisdiction on the trial court and vacated the defendant's conviction without prejudice to re-prosecution. *Id.* at 72, 733 S.E.2d at 100.

¶ 22 Although, like in *Barnett*, the indictment here does not explicitly state that Defendant was required to register, the indictment instead provides the factual basis for the requirement that he register—his conviction of the reportable offense of second-degree rape—and therefore is distinguishable from *Barnett* and complies with N.C.G.S. § 15A-924(a)(5) and N.C.G.S. § 15-153. *See State v. Rambert*, 341 N.C. 173, 176, 459 S.E.2d 510, 512 (1995) ("[I]ndictments need only allege the ultimate facts constituting each element of the criminal offense.").

¶ 23 The indictment alleges that Defendant was previously convicted of second-degree rape in 2006 and pleads facts that constitute the

first essential element of failure to notify the last registering sheriff of a change of address—that Defendant was required to register. This satisfies the requirements of our statutes, caselaw, and Constitution.

2. Change of Address

¶ 24 Defendant next contends the indictment must have specifically alleged that Defendant changed his address. The State responds that the indictment necessarily indicates that a change in address occurred. We hold that the indictment here sufficiently alleges the second essential element of failing to register.

¶ 25 In *State v. Reynolds*, we upheld an indictment that did not state the defendant changed his address and instead simply stated:

> [A]s a person required by Article 27A of Chapter 14 of the General Statutes to register as a sex offender, *fail to notify the last registering Sheriff, Graham Atkinson, of an address change* by failing to appear in person and provide written notice of his address after his release from incarceration[.]

State v. Reynolds, 253 N.C. App. 359, 367-68, 800 S.E.2d 702, 708 (2017) (emphasis added), *disc. rev. denied*, 370 N.C. 693, 811 S.E.2d 159 (2018). In *Reynolds*, we upheld the indictment as it "substantially track[ed] the language of . . . the statute under which [the defendant] was charged, thereby providing defendant adequate notice." *Id.* (quoting *Williams*, 368 N.C. at 626, 781 S.E.2d at 273).

¶ 26 Here, like in *Reynolds*, the indictment substantially tracks the language of N.C.G.S. § 14-208.11(a)(2) by stating "the defendant named above unlawfully, willfully and feloniously did violate the North Carolina Sex Offender and Public Protection Registration Program, by . . . *failing to notify the Sheriff of Wake County of a change of address as required by [N.C.G.S.] § 14-208.9*." (Emphasis added). N.C.G.S. § 14-208.11(a)(2) states "[a] person required by this Article to register who willfully does any of the following is guilty of a Class F felony: . . . Fails to notify the last registering sheriff of a change of address as required by this Article." N.C.G.S. § 14-208.11(a)(2) (2021). The indictment sufficiently alleges the second essential element of failure to notify the last registering sheriff of a change of address—that Defendant changed his address—by mirroring the statutory language.

3. Update Address within Three Days

¶ 27 Finally, Defendant contends the indictment fails to indicate that the change in address occurred within three business days. He argues this, in

part, because the change in address is not sufficiently indicted; however, given our holding that the second element is sufficiently alleged, we need not address this portion of Defendant's argument here.

¶ 28 To the extent that Defendant challenges the lack of the inclusion of "three business days" in the indictment, we have previously addressed this issue in *State v. McLamb*, 243 N.C. App. 486, 777 S.E.2d 150 (2015). In *McLamb*, we held:

> [T]he indictment in this case, which alleged "[the] defendant . . . did, as a person required by Article 27A of Chapter 14 of the General Statutes to register, fail[] to notify the last registering sheriff of a change of address in that he moved from 1134 Renfrow Road in Clinton, North Carolina, on or about [18 December] 2012 to 206 Smith Key Lane in Clinton, North Carolina without notifying the Sampson County Sheriff[,]" was couched in the language of the statute and sufficiently alleged the third element of the offense. To hold otherwise would be to subject the indictment to hyper technical scrutiny where in this case, over a period of months, [the] defendant failed to give any notice to the sheriff of his change of address.

Id. at 490, 777 S.E.2d at 152-53. Although Defendant's failure to notify the Wake County Sheriff's Office here did not occur over a period of months, *McLamb's* holding is equally applicable here as Defendant did not update his address for 24 days at the least, which far outlasts the statutory timeframe of three business days. Like the argument in *McLamb*, Defendant's hyper-technical argument fails. Defendant's indictment sufficiently alleged the third essential element of failure to notify the last registering sheriff of a change of address—that Defendant failed to notify the Wake County Sheriff's Office of his change of address within three business days of the change.

¶ 29 As a result, the indictment sufficiently alleged all three essential elements, and the trial court had jurisdiction over the case. While the indictment could have been more explicit as a best practice, the indictment here was sufficient to provide Defendant notice of the charge against him, and we will not subject it to hyper-technical scrutiny. *See Barnett*, 223 N.C. App. at 68, 733 S.E.2d at 98 (marks and citations omitted) ("While an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form.").

B. Plain Error in Jury Instruction

¶ 30 **[2]** Defendant contends the trial court committed plain error in improperly instructing the jury on the elements of failing to update an address when,

> [e]arly in the instruction for the offense of violating the sex offender and public protection registry, the trial court did not instruct the jury that the prosecution had to prove beyond a reasonable doubt that [Defendant] changed his address.

Defendant also contends the trial court erroneously instructed that Defendant must have willfully changed his address rather than willfully failed to report his change of address, when

> [i]n the final mandate, the trial court instructed the jury that if it found beyond a reasonable doubt that "the defendant willfully changed the defendant's address and failed to provide written notice of the defendant's new address in person at the Sheriff's Office no later than three business days after the change of address to the Sheriff's Office in the county with whom the defendant had last registered, it would be [their] duty to return a verdict of guilty."

¶ 31 "Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*." *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29, *disc. rev. denied*, 364 N.C. 327, 700 S.E.2d 926 (2010). "This Court reviews jury instructions contextually and in its entirety." *See State v. Glynn*, 178 N.C. App. 689, 693, 632 S.E.2d 551, 554 (marks omitted), *appeal dismissed*, 360 N.C. 651, 637 S.E.2d 180 (2006). "When reviewed as a whole, isolated portions of a charge will not be held prejudicial when the charge as a whole is correct. The fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal." *Id.* (marks omitted). Generally, "an error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C.G.S. § 15A-1443(a) (2007)). However, we employ a more demanding standard of prejudice when we review an unpreserved issue for plain error:

> [T]he North Carolina plain error standard of review applies only when the alleged error is unpreserved,

> and it requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error. To have an alleged error reviewed under the plain error standard, the defendant must specifically and distinctly contend that the alleged error constitutes plain error. Furthermore, plain error review in North Carolina is normally limited to instructional and evidentiary error.

State v. Lawrence, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (marks and citations omitted); *see also* N.C. R. App. P. 10(a)(4) (2022). Plain error arises when the error is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d. 513 (1982)). "Under the plain error rule, [a] defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

1. Burden of Proof

¶ 32 Here, the first error alleged by Defendant—that the trial court erred in failing to instruct the jury that the prosecution had to prove that Defendant changed his address beyond a reasonable doubt—is undermined by the transcript. The instructional language that Defendant refers to is:

> [D]efendant has been charged with willfully failing to comply with the Sex Offender Registration law. For you to find [] [D]efendant guilty of this offense, *the State must prove three things beyond a reasonable doubt*. First, that [] [D]efendant was a resident of North Carolina. Second, that [] [D]efendant had previously been convicted of a reportable offense for which [] [D]efendant must register. If you find beyond a reasonable doubt that on [18 September 2006], in Wake County Superior Court, [] [D]efendant was convicted of second-degree rape, then this would constitute a reportable offense for which [] [D]efendant must register. And, third, [] [D]efendant willfully failed to provide written notice of a change of address in person at the Sheriff's Office no later than three business days after the change of address

> to the Sheriff's Office in the county with whom the defendant had last registered.

(Emphasis added).

¶ 33 As an initial matter, the instruction provided indicates that all of the elements listed must be proven beyond a reasonable doubt. Additionally, the paragraphs before and after the instruction make abundantly clear that the elements must be proven beyond a reasonable doubt:

> [D]efendant has entered a plea of not guilty. The fact that [] [D]efendant has been indicted and charged is no evidence of guilt. Under our system of justice, when a defendant pleads not guilty, the defendant is not required to prove the defendant's innocence. [] [D]efendant is presumed to be innocent. *The State must prove to you that [] [D]efendant is guilty beyond a reasonable doubt.* A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of [D]efendant's guilt.
>
> . . . .
>
> If you find from the evidence *beyond a reasonable doubt* that on or about the alleged date, [] [D]efendant was a resident of North Carolina, that [] [D]efendant had previously been convicted of a reportable offense for which [] [D]efendant must register, and that [] *[D]efendant willfully changed [] [D]efendant's address* and failed to provide written notice of [] [D]efendant's new address in person at the Sheriff's Office no later than three business days after the change of address to the Sheriff's Office in the county with whom [] [D]efendant had last registered, it would be your duty to return a verdict of guilty. *If you do not so find or have a reasonable doubt* as to one or more of these things, it would be your duty to return a verdict of not guilty.

(Emphases added). In light of the explicit and repeated instructions that the jury must be convinced beyond a reasonable doubt, we find no error,

much less plain error, under Defendant's first argument regarding jury instructions. *See*, *e.g.*, *Glynn*, 178 N.C. App. at 694, 632 S.E.2d at 555 ("Taken as a whole, the trial court's clarifying instructions properly set out the elements of the crime and did not lessen the State's burden of proof. [The] [d]efendant's assignment of error is overruled.").

2. Mens Rea

¶ 34 Defendant's second plain error argument—that the trial court erroneously instructed that Defendant must have willfully changed his address rather than willfully failed to report his change of address—is based on the following instruction[2]:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, [] [D]efendant was a resident of North Carolina, that [] [D]efendant had previously been convicted of a reportable offense for which [] [D]efendant must register, and [] [D]efendant *willfully changed [] [D]efendant's address and failed to provide written notice* of [] [D]efendant's new address in person at the Sheriff's Office no later than three business days after the change of address to the Sheriff's Office in the county with whom [] [D]efendant had last registered, it would be [your] duty to return a verdict of guilty.

(Emphasis added). Defendant contends:

> The final mandate erroneously instructed the jury that [it] must find that [Defendant] willfully changed his address, not that he willfully failed to report his change of address. There is a significant difference between willfully changing an address and failing to report the change, as opposed to changing an address and willfully failing to report the change. The trial court's instruction misstated the *mens rea* requirement that the [General Assembly] has imposed on the offense. The erroneous instructions

2. We note that this portion of the jury instruction verbatim tracks the pattern jury instruction for failure to notify the last registering sheriff of a change of address. *See* N.C.P.I.—Crim. 207.75 (2021). Although pattern jury instructions "have neither the force nor the effect of law, [our Supreme Court has] often approved of jury instructions that are consistent with the pattern instructions." *State v. Walston*, 367 N.C. 721, 731, 766 S.E.2d 312, 318-19 (2014) (marks and citations omitted).

> were confusing and they lowered the State's burden of proof.

¶ 35 If the jury interpreted the instruction in the manner suggested by Defendant,[3] assuming this was an error, such an erroneous instruction did not constitute plain error because it was not sufficiently prejudicial. The immediately preceding portion of the jury instructions provided:

> [D]efendant has been charged with willfully failing to comply with the Sex Offender Registration law. For you to find [] [D]efendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First, that [] [D]efendant was a resident of North Carolina. Second, that [] [D]efendant had previously been convicted of a reportable offense for which [] [D]efendant must register. If you find beyond a reasonable doubt that on [18 September 2006], in Wake County Superior Court, [] [D]efendant was convicted of second-degree rape, then this would constitute a reportable offense for which the defendant must register. *And, third, [] [D]efendant willfully failed to provide written notice* of a change of address in person at the Sheriff's Office no later than three business days after the change of address to the Sheriff's Office in the county with whom [] [D]efendant had last registered.

(Emphasis added). Considering this prior instruction, the jury was informed that the Defendant must have willfully failed to provide written notice of the change of address. *See, e.g.*, *State v. Harris*, 222 N.C. App. 585, 590, 730 S.E.2d 834, 838 ("Both instructions reiterated multiple times that the State must prove that [the] *defendant* was the perpetrator of each of the crimes. Given in connection with the entire jury instruction, the trial court's jury instruction substantively included an instruction regarding identity. [The] [d]efendants cannot show that the trial court's failure to give a separate instruction on identity beyond

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3. We believe that another logical interpretation of this instruction would be for "willfully" to modify both the change of address *and* failure to provide written notice of the new address. If this were how the jury interpreted this language, there would be no prejudicial error as such an interpretation would increase the showing required by the State to attain a conviction. *See State v. Farrar*, 361 N.C. 675, 679, 651 S.E.2d 865, 867 (2007) ("[T]he trial court's charge to the jury in this case [benefited] [the] defendant, because the instructions required the State to prove more elements than those alleged in the indictment. Therefore, there was no prejudicial error in the instructions.").

that included in the armed robbery instruction caused the jury to reach a verdict convicting [the] defendants that it probably would not have reached had a separate instruction been given."), *disc. rev. denied sub nom. State v. Whitaker*, 366 N.C. 413, 736 S.E.2d 175 (2012), *cert. denied*, 569 U.S. 952, 185 L. Ed. 2d 876 (2013). Additionally, we "presume[] that jurors follow the trial court's instructions." *State v. Steen*, 352 N.C. 227, 249, 536 S.E.2d 1, 14 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). Thus, we presume the jury interpreted the allegedly unclear instruction in conjunction with the instruction clearly indicating that Defendant must have willfully failed to provide written notice. When these two portions are read together, the jury instructions required the jury to find a willful failure to provide written notice of a change in address. Even assuming this instruction was erroneous, it was not prejudicial as it was not probable that any lack of clarity as to what "willfully" modified impacted this jury's verdict. Instead, it was resolved by the prior jury instructions.

¶ 36 The trial court did not commit plain error when instructing the jury.

C. Motion to Dismiss for Insufficient Evidence

¶ 37 Defendant contends the trial court also improperly denied his motion to dismiss the charge of failure to notify the last registering sheriff of a change of address because there was insufficient evidence that Defendant willfully failed to notify the Wake County Sheriff's Office of the change in address. Defendant also argues the trial court erred as there was insufficient evidence that Defendant committed two of the underlying felonies used to establish that he attained habitual felon status.

¶ 38 "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon [a] 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 [the] defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any

contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of [the] defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of [the] defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (marks and citation omitted).

1. Sufficient Evidence of Defendant's Failure to Notify the Last Registering Sheriff of a Change of Address

¶ 39 **[3]** Defendant argues the evidence of his willful failure to notify the Wake County Sheriff's Office of his change of address was insufficient because he was involuntarily moved to another county for his drug treatment and had previously willingly complied with the registration requirements. However, the evidence shows, at a minimum, that Defendant willfully failed to update his address following his departure from the drug treatment program within the time provided by the statute.

¶ 40 We have held:

> "Willful" as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law.
>
> The word wil[l]ful, used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing [of] the act purposely and deliberately, indicating a purpose to do it without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent without which one cannot be brought within the meaning of a criminal statute.

State v. Moore, 240 N.C. App. 465, 478, 770 S.E.2d 131, 141 (citation omitted), *disc. rev. denied*, 368 N.C. 353, 776 S.E.2d 854 (2015).

¶ 41 The evidence, in the light most favorable to the State, shows that Defendant was aware of his obligation to update his address,[4] and was capable of updating his address, but did not. In the light most favorable to the State, the evidence indicates that Defendant left the treatment program in Wayne County on 11 July 2019. Defendant was not found at his former address at the men's shelter, and the shelter records reflect that he did not stay there from 11 July 2019 until his arrest on 4 August 2019. Instead, based on the testimony of Defendant's then-girlfriend, it appears Defendant stayed at her home in Wake County starting on 13 July 2019 until the time of his arrest. As a whole, the evidence, when viewed in the light most favorable to the State, makes clear that Defendant did not update the Wake County Sheriff's Office of his change of address from the men's shelter within three business days of his change of address.[5] Furthermore, when viewed in the light most favorable to the State, the evidence shows Defendant understood his obligation to notify his last registered sheriff's office when he moved. Based on these showings, we conclude that Defendant's failure to notify the Wake County Sheriff's Office of his change of address was done "purposely and deliberately, indicating a purpose to do it without authority—careless whether he has the right or not—in violation of law," and was thus willful. *Id.* Accordingly, the trial court did not err.

2. Sufficient Evidence of the Felonies Underlying Defendant Having Attained Habitual Felon Status

¶ 42 **[4]** In terms of the sufficiency of the underlying convictions for Defendant having attained habitual felon status, Defendant argues there was no evidence indicating the date that the first and second prior felonies were committed. Defendant contends this is problematic because it thwarts efforts to determine if there was an overlap between when the felonies occurred or if Defendant was of age. *See* N.C.G.S. § 14-7.1(c) (2021) ("For the purposes of this Article, felonies committed before a person attains the age of 18 years shall not constitute more than one felony. The commission of a second felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the first felony."). The parties dispute whether our caselaw requires this evidence to survive a motion to dismiss. However, assuming—without

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4. This is supported by Defendant's testimony acknowledging his knowledge of this obligation, his signature on forms indicating his obligations to register, and his past conduct in updating his address when he has moved.

5. We note there the relevant time period here is from 13 July 2019 until 4 August 2019.

deciding—the evidence is required, there was evidence, when viewed in the light most favorable to the State, that reflects the date the first and second prior felonies were committed.

¶ 43 The trial court admitted State's Exhibit 7-H, which is a criminal record for Defendant developed from the Division of Criminal Information. This exhibit contains an incident date for each offense included, information regarding the disposition of the case, and information regarding sentencing in the case.[6] For the first two offenses constituting the underlying felonies here—first-degree attempted robbery and fifth-degree attempted criminal sale of a controlled substance—the incident date is represented to be the same as the arrest date. For Defendant's conviction for first-degree attempted robbery, the exhibit shows, in the light most favorable to the State, that Defendant committed the offense on the incident date of 18 December 1995 and pleaded guilty to the offense on 16 October 1997. For Defendant's conviction for fifth-degree attempted criminal sale of a controlled substance, the exhibit shows, in the light most favorable to the State, that Defendant committed the offense on the incident date of 7 April 2000 and pleaded guilty to the offense on 5 July 2001. Finally, for Defendant's conviction for second-degree rape, the exhibit shows, in the light most favorable to the State, that Defendant committed the offense on 3 September 2005[7] and pleaded guilty to the offense on 18 September 2006. State's Exhibit 7-H also contains Defendant's date of birth, 24 May 1975.

¶ 44 Using this information from State's Exhibit 7-H, in the light most favorable to the State, we hold that each underlying felony conviction used to conclude that Defendant attained habitual felon status was committed after Defendant pleaded guilty to the previous offense used. Additionally, we hold that all of the underlying offenses occurred after Defendant had attained the age of eighteen, with the earliest occurring when Defendant was 20 years old.

¶ 45 As a result, when viewed in the light most favorable to the State, there was sufficient evidence of the dates of offenses of these felonies to determine that there was no overlap between the date of the commission of the felonies and the date of the preceding felony's conviction. Also, it appears Defendant had attained the age of 18 years old for all of the

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6. Defendant contends that we do not know what the "incident date" means; however, in the light most favorable to the State, we can reasonably infer that the "incident date" refers to the date the offense was committed.

7. Defendant acknowledges that the State presented sufficient evidence regarding the dates concerning the second-degree rape charge.

underlying offenses. As a result, the evidence underlying the first and second prior felonies was sufficient to survive Defendant's motion to dismiss.

D. Right to Allocution

¶ 46 **[5]** Defendant contends that the trial court improperly deprived him of the right to allocution when the following exchange occurred at sentencing:

> THE COURT: All right. Stand up, [Defendant]. Anything you want to say?
>
> DEFENDANT: Yes. I need -- to say what I want to say, I need to get my paperwork.
>
> THE COURT: Well, we're not going to do that. Anything you want to say to me right now before you're sentenced?
>
> DEFENDANT: Yes. I asked to get it before I even came out here, and they rushed me and said, "Come on now." Please. I mean, this is my chance to speak to you.
>
> THE COURT: Anything you want to say to me before you're sentenced?
>
> DEFENDANT: Yes, I do. I have it right there in --
>
> THE COURT: All right. Your papers aren't relevant right now. All right. Moving to sentencing, Madam Clerk, it is a class C on the habitual felon status, record level two. The sentence will be in the presumptive range. He's sentenced to a minimum term of 83 months, maximum terms of 112 months active time. He's to receive credit for all pretrial confinement. All right. Good luck to you, [Defendant] . . . .
>
> [DEFENSE COUNSEL]: Sorry, Judge. I didn't mean to interrupt. I would like to enter notice of appeal in open court.
>
> THE COURT: All right. Enter notice of appeal.
>
> DEFENDANT: I don't just -- I don't get to say anything now to you, Judge?

THE COURT: No.

¶ 47 N.C.G.S. § 15A-1334(b) reads "[t]he defendant at the hearing may make a statement in his own behalf." N.C.G.S. § 15A-1334(b) (2021). In a past case involving the right to allocution, we have stated:

> [A]llocution, or a defendant's right to make a statement in his own behalf before the pronouncement of a sentence, was a right granted a defendant at common law. The United States Supreme Court has also emphasized the significance of this right, observing that "the most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."
>
> Our appellate cases have held that where defense counsel speaks on the defendant's behalf and the record does not indicate that the defendant asked to be heard, the statute does not require the court to address the defendant and personally invite him or her to make a statement. [N.C. G.S.] § 15A-1334, while permitting a defendant to speak at the sentencing hearing, does not require the trial court to personally address the defendant and ask him if he wishes to make a statement in his own behalf.
>
> However, a trial court's denial of a defendant's request to make a statement prior to being sentenced is reversible error that requires the reviewing court to vacate the defendant's sentence and remand for a new sentencing hearing.

State v. Jones, 253 N.C. App. 789, 797, 802 S.E.2d 518, 523-24 (2017) (quoting *Green v. United States*, 365 U.S. 301, 304, 5 L. Ed. 2d 670, 673 (1961)) (marks and citations omitted); *see also State v. Miller*, 137 N.C. App. 450, 461, 528 S.E.2d 626, 632 (2000) (marks and citations omitted) ("[N.C.G.S.] § 15A-1334(b) expressly gives a non-capital defendant the right to make a statement in his own behalf at his sentencing hearing if the defendant requests to do so prior to the pronouncement of sentence. Because the trial court failed to do so, we must remand these cases for a new sentencing hearing.").

¶ 48 Here, we conclude Defendant's right to allocution was violated. Once the trial court asked Defendant if he had anything to say, Defendant made an unambiguous request to make a statement. Defendant proceeded to

request that he receive his papers, which the trial court refused to allow.[8] In the exchange with the trial court, Defendant had three opportunities to make a statement without the papers; however, each opportunity he spent discussing his desire for his papers.

¶ 49 On this Record, we hold the trial court committed reversible error by denying Defendant his statutory right to allocution. N.C.G.S. § 15A-1334(b) states "[t]he defendant at the hearing may make a statement in his own behalf." N.C.G.S. § 15A-1334(b) (2021). Further, our caselaw unambiguously holds "a trial court's denial of a defendant's request to make a statement prior to being sentenced is reversible error that requires the reviewing court to vacate the defendant's sentence and remand for a new sentencing hearing." *Jones*, 253 N.C. App. at 797, 802 S.E.2d at 524. We have applied the rule to broader circumstances and "have held that a trial court effectively denied a defendant the right to be heard prior to sentencing even when the court did not explicitly forbid the defendant to speak." *Id.* at 798, 802 S.E.2d at 524. In *Jones*, we held:

> Our review of the transcript shows that the trial court was informed that [the] defendant wished to address the court and that the trial court acknowledged this request. However, during [the] defense counsel's presentation, the court indicated that it had already decided how to sentence [the] defendant. After hearing from a detective who had investigated the case, the trial court became impatient, asking if those present expected the court to give [the] defendant 'a merit badge' and accusing them of portraying [the] defendant as 'a choir boy.' Immediately thereafter, the trial court pronounced judgment. We conclude that, on the facts of this case, [the] defendant was denied the opportunity to be heard prior to entry of judgment.

Id. at 802, 802 S.E.2d at 526. Similarly, in *State v. Griffin*, we held:

> [the] defense counsel could have reasonably interpreted the trial judge's statement [that it 'would be a big mistake' to permit the defendant to speak at sentencing] to mean that the defendant would

8. We are unaware of any statute or caselaw that obligates the trial court to permit a defendant to receive papers to aid in a statement to the trial court, and we make no ruling regarding this request.

> receive a longer sentence if he testified. Accordingly, we find that the defendant's right to testify under [N.C.G.S.] § 15A-1334(b) was effectively chilled by the trial judge's comment.

State v. Griffin, 109 N.C. App. 131, 133, 425 S.E.2d 722, 723 (1993).

¶ 50 Like in *Jones* and *Griffin*, we believe this case presents a circumstance justifying remand for a new sentencing hearing, despite the facts here being less egregious. Due to the clear invocation of Defendant's right to allocution, the trial court should have indicated that Defendant was not going to be permitted to receive his papers and clarify whether Defendant was still interested in making a statement without his papers before it proceeded to sentencing. Instead, the trial court summarily indicated "we're not going to do that. Anything you want to say to me right now before you're sentenced?"[9]

¶ 51 We acknowledge that there is caselaw indicating that "[N.C.G.S.] § 15A-1334, while permitting a defendant to speak at the sentencing hearing, does not require the trial court to personally address the defendant and ask him if he wishes to make a statement in his own behalf." *State v. McRae*, 70 N.C. App. 779, 781, 320 S.E.2d 914, 915 (1984), *disc. rev. denied*, 313 N.C. 175, 526 S.E.2d 35 (1985). To some extent, this suggests that if a defendant fails to take advantage of his opportunity to exercise his right to allocution, he waives it. *See also State v. Rankins*, 133 N.C. App. 607, 613, 515 S.E.2d 748, 752 (1999) ("The purpose of allocution is to afford [a] defendant an opportunity to state any further information which the trial court might consider when determining the sentence to be imposed."). However, there is no binding caselaw that holds a defendant waives his right to allocution where there is a clear invocation of the right to allocution and an attempt to make a statement.[10]

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9. The Record does not indicate how much time passed between the trial court's question and pronouncement of Defendant's sentence.

10. The closest our caselaw comes is in *State v. Moseley* and in *State v. Pearson*, an unpublished case. In *Moseley*, the trial court granted the defendant's motion for allocution; but, "when given the opportunity at the appropriate stage of the proceedings, [the] defendant failed to remind the trial court of his wish to allocute." *State v. Moseley*, 338 N.C. 1, 53-54, 449 S.E.2d 412, 444 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995). Our Supreme Court reasoned that "[s]ince [the] defendant does not have a constitutional, statutory, or common law right to allocution [at the conclusion of a capital sentencing proceeding] and since [the] defendant failed to remind the court of his desire to speak to the jury at the appropriate stage of the case, we conclude that there was no error." *Id.* at 54, 449 S.E.2d at 444. This case is distinct from *Moseley* in that Defendant *does* have a

¶ 52 We find *Griffin* and *Jones* to present similar factual scenarios. Ultimately, like in *Griffin* and *Jones*, we conclude the trial court effectively denied Defendant the opportunity to allocute by foreclosing his opportunity without clearly indicating Defendant would only be allowed to make a statement without his papers and inquiring into Defendant's interest in doing so. We vacate Defendant's sentence and remand for a new sentencing hearing. *See Jones*, 253 N.C. App. at 797, 802 S.E.2d at 524.

E. Attorney Fees

¶ 53 **[6]** Defendant argues the trial court improperly entered a civil judgment for attorney fees without notice or opportunity to be heard regarding the fees. However, Defendant did not properly appeal this issue[11] and instead filed a petition for writ of certiorari to seek our review.

¶ 54 We may issue a writ of certiorari "in appropriate circumstances." N.C. R. App. P. 21(a)(1) (2022). A writ of certiorari is discretionary, "to be issued only for good and sufficient cause shown." *State v. Rouson*, 226 N.C. App. 562, 564, 741 S.E.2d 470, 471 (citation omitted), *disc. rev. denied*, 367 N.C. 220, 747 S.E.2d 538 (2013). "A petition for the writ must show merit or that error was probably committed below." *Id.* at 563-64, 741 S.E.2d at 471.

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statutory right to allocution upon invoking it in a non-capital case and Defendant did not fail to assert his right at the appropriate time.

In *Pearson*, we held:

> [The] defendant was given the opportunity to make a statement.
>
> However, rather than address issues related to sentencing, [the] defendant complained about the performance of his attorney. Thus, we conclude that the trial court did not abuse its discretion by refusing to allow [the] defendant to continue his statement.

State v. Pearson, No. COA04-585, 168 N.C. App. 409, 2005 WL 221503, at *3 (2005) (unpublished). In addition to being unpublished, and therefore non-binding, *Pearson* is also distinct from the facts *sub judice*. Defendant did not use his opportunity to complain about something unrelated to his right to allocution; instead, Defendant attempted to gain access to papers that he intended to use to exercise his right to allocution. Indeed, each time Defendant spoke, he indicated his intent to exercise his right to allocution.

In light of the factual differences in *Moseley* and *Pearson*, in addition to *Pearson* being unpublished, we do not find them controlling or persuasive on this issue.

11. On 18 September 2019, Defendant was sentenced and entered oral notice of appeal, with written notice of appeal being entered on 20 September 2019. However, subsequently, the order for attorney fees was entered on 25 October 2019. As a result, Defendant's original notice of appeal did not include the order as it was entered prior to the attorney fees order.

¶ 55 Here, because there are no civil judgments *entered* against him for attorney fees in the Record, we deny Defendant's petition for writ of certiorari and do not reach the underlying issue. "[A] judgment is entered when it is reduced to writing, signed by the judge, and *filed* with the clerk of court[.]" N.C.G.S. § 1A-1, Rule 58 (2017) (emphasis added); *see also In re Thompson*, 232 N.C. App. 224, 228, 754 S.E.2d 168, 171 (2014) ("Because the order was not filed, it was not entered."). Although there is a civil judgment order for attorney fees in the Record, there is no indication it has been filed with the Wake County Clerk of Court. As a result, "[w]e lack subject matter jurisdiction to review an appeal from an order for attorney[] fees not entered as a civil judgment. [A] [d]efendant will not be prejudiced unless and until a civil judgment is entered." *State v. Hutchens*, 272 N.C. App. 156, 160, 846 S.E.2d 306, 310 (2020).

¶ 56 We deny Defendant's petition for writ of certiorari as it is without merit due to the lack of evidence that a judgment was entered against Defendant that he may appeal from. We dismiss the portion of Defendant's appeal regarding the civil judgment for attorney fees.

CONCLUSION

¶ 57 Defendant's indictment sufficiently alleged the essential elements of failure to notify the last registering sheriff of a change of address under N.C.G.S. § 14-208.11(a)(2), bestowing the trial court jurisdiction over the case. Additionally, the trial court did not plainly err in its jury instructions and properly denied Defendant's motions to dismiss. However, the trial court denied Defendant his statutory right to allocution, requiring us to vacate Defendant's sentence and remand for a new sentencing hearing. Finally, we deny Defendant's petition for writ of certiorari and dismiss his argument regarding attorney fees.

NO ERROR IN PART; NO PLAIN ERROR IN PART; VACATED AND REMANDED FOR NEW SENTENCING HEARING IN PART; DISMISSED IN PART.

Judges INMAN and WOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 JUNE 2022)

BROOKLINE HOMES, LLC v. CITY OF MOUNT HOLLY 2022-NCCOA-419 No. 21-514	Gaston (19CVS1163)	Affirmed.
GLEASON v. CHARLOTTE-MECKLENBURG HOSP. AUTH. 2022-NCCOA-420 No. 21-501	Mecklenburg (19CVS2575)	Dismissed in part, affirmed.
IN RE A.M. 2022-NCCOA-421 No. 21-657	Watauga (19JT2)	Affirmed
IN RE K.L. 2022-NCCOA-422 No. 21-798	Wake (20JA174) (20JA175)	Affirmed
IN RE K.E.M. 2022-NCCOA-423 No. 21-594	Wilkes (16JT168) (16JT169)	Affirmed
IN RE N.C.-L.L.S. 2022-NCCOA-424 No. 21-625	Surry (17JT102)	Affirmed
IN RE EST. OF RANDOLPH 2022-NCCOA-425 No. 21-803	McDowell (20E265)	Dismissed
IN RE T.H. 2022-NCCOA-426 No. 21-659	Lincoln (18JT100) (18JT101)	Affirmed
IN RE V.S.D. 2022-NCCOA-427 No. 21-782	Henderson (20JT176)	Affirmed
IN RE G.M.A. 2022-NCCOA-428 No. 21-686	Burke (21JA26) (21JA27) (21JA28)	Affirmed
RUSSE v. YOUNGBLOOD 2022-NCCOA-429 No. 21-799	Henderson (19CVS375)	Affirmed

STATE v. COLE 2022-NCCOA-430 No. 21-522	Brunswick (19CRS52832-33) (19CRS55710)	Reversed
STATE v. COOPER 2022-NCCOA-431 No. 21-598	Pitt (18CRS55893)	No Error in Part; Dismissed without Prejudice in Part
STATE v. FREEMAN 2022-NCCOA-432 No. 22-17	Cabarrus (19CRS50671)	Affirmed.
STATE v. GARCIA 2022-NCCOA-433 No. 21-331	Forsyth (20CRS55284-86)	Affirmed.
STATE v. HARVEY 2022-NCCOA-434 No. 21-203	Alamance (16CRS52715) (16CRS52716) (16CRS52723) (16CRS52724)	No Error
STATE v. LEE 2022-NCCOA-435 No. 21-13	Wake (15CRS227741-42)	No Error
STATE v. O'KELLY 2022-NCCOA-436 No. 20-693-2	Durham (15CRS59450)	Affirmed
STATE v. PRICE 2022-NCCOA-437 No. 22-113	Rutherford (20CRS550)	Other - REMAND FOR CORRECTION OF CLERICAL ERROR
STATE v. ROACH 2022-NCCOA-438 No. 21-517	Greene (16CRS50236-37)	No Error
STATE v. SHADE 2022-NCCOA-439 No. 21-538	Rutherford (18CRS53659) (18CRS702746) (19CRS51585) (19CRS51671) (19CRS701436-37)	Dismissed
STATE v. STACKS 2022-NCCOA-440 No. 21-167	Forsyth (15CRS58026) (19CRS436)	No Error

STEWART v. GOULSTON TECHS., INC. 2022-NCCOA-441 No. 21-642	N.C. Industrial Commission (18-052746)	Affirmed
WRIGHT v. JACKSON 2022-NCCOA-442 No. 21-614	Cumberland (19CVS6776)	Affirmed

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