284 N.C. App.—No. 4 Pages 563-772

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JANUARY 9, 2023

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COURT OF APPEALS

CASES REPORTED

FILED 2 AUGUST 2022

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Notice of appeal—timeliness—certificate of service—actual notice— Plaintiff's notice of appeal from the trial court's order denying plaintiff's motion to dismiss defendant's counterclaims was timely filed where plaintiff did not receive effective service initiating the thirty-day period to file a notice of appeal, and so the thirty-day period began when plaintiff actually received the trial court's denial order in the mail. **Kinsley v. Ace Speedway Racing, Ltd., 665.**

Notice of appeal—wrong appellate court identified—correct court fairly inferred—no prejudice to opposing party—Respondent-mother's appeal from an order terminating her parental rights did not warrant dismissal where, although her notice of appeal incorrectly designated the North Carolina Supreme Court as the court to which appeal was taken, it could be fairly inferred from her filings at the Court of Appeals that that was the court from which she sought relief, and there was no prejudice to the opposing parties who timely responded with their own filings. The Court of Appeals elected in its discretion to treat the purported appeal as a petition for writ of certiorari and granted review. **In re R.A.F., 637.**

demanding that defendants abate further mass gatherings at their racetrack—interfering with defendants' lawful operation of their business and their right to earn a living. Therefore, sovereign immunity could not bar defendants' counterclaim. **Kinsley v. Ace Speedway Racing, Ltd., 665.**

DISCOVERY

Criminal case—motion to inspect, examine, and photograph crime scene—no due process rights violation—In a prosecution for obtaining property by false pretenses and exploitation of an elderly person while in a business relationship, where defendant performed minor home repair work for an elderly woman, lied to her about nonexistent damage to her home, and then charged her thousands of dollars for extra repair work he never performed, the trial court did not violate defendant's federal due process rights by denying his motion to inspect, examine, and photograph the crime scene (the woman's home). First, there is no general constitutional right to discovery in a criminal case. Second, although the North Carolina Supreme Court previously held that a criminal defendant seeking exculpatory evidence had a due process right to inspect a crime scene, defendant's case was distinguishable in that he had first-hand knowledge of the woman's house and the work he performed there, meaning that he did not need to examine the house to find exculpatory evidence. **State v. Joyner, 681.**

EVIDENCE

Admissibility—civil no-contact order—criminal trial involving similar issues—plain error analysis—In a prosecution for obtaining property by false pretenses and exploitation of an elderly person while in a business relationship, where an elderly woman had previously obtained a civil no-contact order against defendant after he charged her thousands of dollars for home repair work he never performed, the trial court did not commit plain error when it admitted the no-contact order into evidence. The court did not violate N.C.G.S. § 1-149 by admitting the order because the State had offered it to show that the issues raised in the no-contact hearing and defendant's criminal trial were the same rather than to prove any fact alleged in the order. Further, even if the court had erred, the State provided ample evidence that defendant committed the charged crimes, and therefore the order's admission did not have a probable impact on the jury's verdict. **State v. Joyner, 681.**

Civil no-contact order—criminal trial on similar issues—no due process violation—In a prosecution for obtaining property by false pretenses and exploitation of an elderly person while in a business relationship, where an elderly woman had previously obtained a civil no-contact order against defendant after he charged her thousands of dollars for home repair work he never performed, the trial court did not violate defendant's due process rights by admitting the no-contact order into evidence, including language in the order stating that the woman "suffered unlawful conduct by the [d]efendant." The order was properly admitted to show that the issues raised in the no-contact hearing and defendant's criminal trial were the same; further, defendant had the opportunity to object to the order's admission at trial, did object, and was overruled. **State v. Joyner, 681.**

Hearsay—criminal trial—unavailable witness' testimony from prior civil hearing—Rule 804(b)(1)—In a prosecution for obtaining property by false pretenses and exploitation of an elderly person while in a business relationship, where an elderly woman had previously obtained a civil no-contact order against defendant

after he charged her thousands of dollars for home repair work he never performed, the trial court properly admitted the woman's testimony from the hearing on the no-contact order under the hearsay exception described in Evidence Rule 804(b)(1). The woman died before defendant's trial, and was therefore "unavailable" for purposes of Rule 804(b)(1); further, her testimony was admissible under the Rule where the no-contact hearing dealt with the same facts and issues raised in defendant's criminal trial, meaning that defendant had an "opportunity and similar motive" to develop her testimony at that hearing by direct, cross, or redirect examination. **State v. Joyner, 681.**

Other crimes, wrongs, or acts—prior sexual assaults of a child—similarity to charged crime—unfair prejudice—In a prosecution for rape of a child and related sexual offenses, the trial court properly admitted testimony under Evidence Rule 404(b) of defendant's prior sexual assaults of a different child. The prior assaults were sufficiently similar to the charged crimes where, in both cases, the victims were middle-school-aged girls of small build; defendant used his position as a middle school teacher to access, exercise authority over, and assault each girl; defendant first encountered both girls at the school during school hours; he sexually assaulted the girls in a similar manner while pulling his pants and underwear half-way down each time; and he used threats to discourage both girls from reporting the assaults. Further, the court gave the appropriate limiting instruction to the jury and did not abuse its discretion in determining that any danger of unfair prejudice did not substantially outweigh the probative value of the testimony. **State v. Pickens, 712.**

LIBEL AND SLANDER

Defamation—news report on assault charge—wrongly linked to defendant's employment as nurse—fair report privilege defense—In a defamation suit brought by plaintiff against a news organization for reporting that plaintiff's arrest for assault was linked to plaintiff's employment as a certified nursing assistant, which plaintiff alleged led to his being fired from his job, the news report met the test of substantial accuracy and was therefore not actionable as defamation under the fair report privilege. The news broadcast was a nearly verbatim recitation of an email response from the sheriff's office stating that the assault charge was related to plaintiff's employment. **Walker v. Wake Cnty. Sheriff's Dep't, 757.**

Defamation—qualified privilege defense—assault charge communicated to media—wrongly linked to defendant's employment as nurse—In a defamation suit brought by plaintiff against defendant (the sheriff's office)—for responding by email to a media inquiry regarding an assault charge against plaintiff, in which defendant wrongly linked the charge to plaintiff's employment as a certified nursing assistant even though the alleged victim was plaintiff's stepfather and not a nursing patient—the trial court improperly granted defendant's motion for judgment on the pleadings where defendant failed to establish that it was entitled to the defense of qualified privilege or public official immunity and where plaintiff sufficiently alleged actual malice by defendant. **Walker v. Wake Cnty. Sheriff's Dep't, 757.**

MEDICAL MALPRACTICE

Rule 9(j) certification—expert—reasonable expectation of qualification—similar specialty and patients—In a medical malpractice action, where a deceased prison inmate's estate (plaintiff) alleged that two doctors and their medical practice provided deficient care to the inmate for pneumonia, the trial court erred in dismissing

N.C. COURT OF APPEALS

2023 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	9 and 23
February	6 and 20
March	6 and 20
April	10 and 24
May	8 and 22
June	5
August	7 and 21
September	4 and 18
October	2, 16, and 30
November	13 and 27
December	None (unless needed)

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

ASHE CNTY. v. ASHE CNTY. PLAN. BD.

[284 N.C. App. 563, 2022-NCCOA-516]

ASHE COUNTY, NORTH CAROLINA, PLAINTIFF
v.
ASHE COUNTY PLANNING BOARD AND APPALACHIAN MATERIALS, LLC, RESPONDENTS

No. COA18-253-2

Filed 2 August 2022

Zoning—permits—asphalt plant—ordinance moratorium—permit choice statutes

An application for a permit to operate an asphalt plant was not complete on the date it was initially submitted, and only became complete when the applicant obtained a state-issued air quality permit several months later, by which point the county board of commissioners had adopted a moratorium on the issuance of any new permits under its local Polluting Industries Development Ordinance. Therefore, the applicant could not avail itself of the permit choice statutes and its application was subject to the moratorium. Further, the proposed plant would have been located within 1,000 feet of two commercial buildings (a quarry and a barn) in violation of the ordinance. Since the application could not have been approved under these circumstances, the trial court's order requiring the county to issue a permit was reversed.

Judge DILLON dissenting.

Appeal by Petitioner from order entered on 30 November 2017 by Judge Susan E. Bray in Ashe County Superior Court. Heard in the Court of Appeals on 3 October 2018. *See Ashe Cnty. v. Ashe Cnty. Plan. Bd.*, 265 N.C. App. 384, 829 S.E.2d 224 (2019). Heard in the Supreme Court on 1 September 2020. Remanded to the Court of Appeals by the Supreme Court on 18 December 2020. *See Ashe Cnty. v. Ashe Cnty. Plan. Bd.*, 376 N.C. 1, 852 S.E.2d 69 (2020). Heard in the Court of Appeals again on 15 April 2021.

Womble Bond Dickinson (US) LLP, by Amy O'Neal and John C. Cooke, for Petitioner-Appellant.

Moffatt & Moffatt, PLLC, by Tyler R. Moffatt, for Respondent-Appellee Appalachian Materials, LLC.

No brief for Respondent-Appellee Ashe County Planning Board.

Law Offices of F. Bryan Brice, Jr., and David E. Sloan, for Blue Ridge Environmental Defense League and Protect Our Fresh Air, amicus curiae.

Teague Campbell Dennis & Gorham, LLP, by Natalia K. Isenberg, for the North Carolina Association of County Commissioners, amicus curiae.

JACKSON, Judge.

¶ 1 A panel of this Court issued an opinion in this case on 21 May 2019, affirming the order of the trial court. *Ashe Cnty. v. Ashe Cnty. Plan. Bd.*, 265 N.C. App. 384, 394, 829 S.E.2d 224, 231 (2019) ("*Ashe Cnty. I*"), *rev'd in part*, 376 N.C. 1, 852 S.E.2d 69 (2020). On 18 December 2020, our Supreme Court reversed in part the prior opinion of this Court, remanding the case to our Court for us to resolve outstanding issues in the appeal in light of the Supreme Court's holding that the primary holding of this Court's prior opinion was erroneous. *Ashe Cnty. v. Ashe Cnty. Plan. Bd.*, 376 N.C. 1, 16, 20-21, 852 S.E.2d 69, 79, 82-83 (2020) ("*Ashe Cnty. II*"). Our Supreme Court's opinion recounts the facts of the case in detail, *id.* at 2-9, 852 S.E.2d at 70-75, so we repeat only those necessary for an understanding of the disposition of the issues that remain.

I. Factual and Procedural Background

¶ 2 In 2015, Ashe County had a land use ordinance called the Polluting Industries Development Ordinance ("PID Ordinance"), which had been in effect for 16 years. The PID Ordinance created a permit system administered by the Ashe County Planning Department with numerous requirements, the most relevant of which were that

> (1) the applicant pay a $500 uniform permit fee;
>
> (2) the applicant have obtained all necessary federal and state permits;
>
> (3) the polluting industry not be located within 1,000 feet of a residential dwelling unit or commercial building; and
>
> (4) the polluting industry not be located within 1,320 feet of a school, daycare, hospital, or nursing home facility.

Ashe Cnty. II, 376 N.C. at 2-3, 852 S.E.2d at 71.

¶ 3 This case is about a permit application submitted under the PID Ordinance that did not meet the second requirement because at the time the application was submitted, the applicant had not yet obtained an air quality permit issued by the North Carolina Department of Environmental Quality ("DEQ") that would have been required for its proposed use of 3.58 acres of land in the County to proceed.

¶ 4 Defendant Appalachian Materials, LLC ("Appalachian Materials") is an asphalt sales and production company that beginning in at least 2015 was interested in operating an asphalt plant in Ashe County. In early June of 2015, Appalachian Materials submitted an application and $500 permit fee under the PID Ordinance to the County's Planning Director to obtain County approval of the proposed plant. While Appalachian Materials had applied for an air quality permit from DEQ at the time it submitted the PID Ordinance application, the air quality permit application was still pending. DEQ issued the air quality permit on 26 February 2016, and Appalachian Materials promptly forwarded the air quality permit to the County's Planning Director to supplement the PID Ordinance application it had submitted the previous June.

¶ 5 In the intervening period—between June 2015 when Appalachian Materials submitted its initial, incomplete PID Ordinance permit application and February 2016 when Appalachian Materials supplemented the application with the required air quality permit issued by DEQ—the political winds had shifted against Appalachian Materials in Ashe County. In response to concerned citizens raising questions about the location of the proposed plant, the Ashe County Board of Commissioners (the "County Board") enacted a moratorium prohibiting the issuance of new PID Ordinance permits on 19 October 2015, which was effective until 19 April 2016. In other words, by the time Appalachian Materials supplemented its application because DEQ had finally issued the air quality permit, the moratorium had taken effect, barring issuance of the PID Ordinance permit until at least 19 April 2016.

¶ 6 On 4 April 2016, the moratorium was extended an additional six months. On 3 October 2016, after the moratorium had lifted, the County Board repealed the PID Ordinance and enacted a new ordinance in its place, the High Impact Land Use Ordinance, which created new and more onerous requirements applicable to permits to operate asphalt plants.

¶ 7 By this point, Appalachian Materials was embroiled in a dispute with the County over when and whether its application for the PID Ordinance permit was complete and whether it had complied with the PID Ordinance and was entitled to issuance of a permit under the less

onerous, now-repealed regulatory regime that had governed at the time the initial, incomplete application was submitted and for the previous 16 years.

¶ 8 The Planning Director denied the application on 20 April 2016, giving three reasons for the decision: (1) a complete application was not submitted before the moratorium went into effect on 15 October 2015; (2) the 3.58 acres was within 1,000 feet of two commercial buildings—a quarry and a barn; and (3) the incomplete application submitted by Appalachian Materials on 29 February 2016 contained material misrepresentations. Based on a comparison of the incomplete PID Ordinance application and the air quality permit application submitted to DEQ, the Planning Director concluded that inconsistencies between the applications proved deceptive intent on the part of Appalachian Materials. Specifically, the air quality permit application submitted to DEQ represented that the annual output of the asphalt plant would be 300,000 tons per year or less, whereas the incomplete PID Ordinance application submitted to the County represented that the annual output of the asphalt plant would be 150,000 tons per year or less. Based on the scale of the output of the proposed plant reflected by the representations in the air quality permit application submitted to DEQ, the Planning Director additionally concluded that Appalachian Materials potentially anticipated using the quarry within 1,000 feet of the proposed plant as part of the operation, which if true, would mean that the proposed plant was within 1,000 feet of *both* commercial buildings *and* residences, neither of which was permitted. Appalachian Materials noted an appeal to the Ashe County Planning Board (the "Planning Board") from the Planning Director's denial.[1]

¶ 9 On appeal to the Planning Board, Appalachian Materials took the position that a 22 June 2015 letter from the Planning Director to Appalachian Materials was a final determination that bound the County to issue the PID Ordinance permit. The letter read as follows:

> I have reviewed the plans you have submitted on behalf of Appalachian Materials LLC for a polluting industries permit. The proposed asphalt plant is located on Glendale School Rd, property identification number 12342-016, with no physical address.
>
> The proposed site does meet[] the requirements of the Ashe County Polluting Industries Ordinance, Chapter

1. A County ordinance authorized the Ashe County Planning Board to act as Ashe County's board of adjustment.

> 159 (see attached checklist). However, the county ordinance *does require that all state and federal permits be in hand prior to a local permit being issued*. We have on file the general NCDENR Stormwater Permit and also the Mining Permit for this site. *Once we have received the NCDENR Air Quality Permit[,] our local permit can be issued for this site.*
>
> If you have any questions regarding this review[,] please let me know.

(Emphasis added.)

¶ 10 Despite the language emphasized above, Appalachian Materials prevailed in its appeal to the Planning Board, and the Planning Board reversed the Planning Director's decision and ordered that a PID Ordinance permit be issued to Appalachian Materials. The County Board then petitioned to Ashe County Superior Court for judicial review of the Planning Board's decision. In the trial court, Appalachian Materials prevailed again, and the court ordered the County Board to issue the permit within ten days. The County Board then noted an appeal to our Court.

¶ 11 In the appeal to our Court, Appalachian Materials prevailed a third time. *Ashe Cnty. I*, 265 N.C. App. at 394, 829 S.E.2d at 231. This Court's prior opinion, which was unanimous, reasoned that the 22 June 2015 letter was not a final determination but that it nonetheless "did have *some* binding effect[,]" and that Appalachian Materials was prejudiced by the letter because it could have sought a variance were it not for the letter. *Id.* at 392-93, 829 S.E.2d at 229-30 (emphasis in original). The Court essentially held that the County Board was estopped from denying that the 22 June 2015 letter was a final determination because the County Board had not appealed from the issuance of the letter to the Planning Board within 30 days (presumably from the date the Planning Director dated the letter rather than the date Appalachian Materials received it, although the prior opinion did not address this detail), even though there was no existing procedure for such an appeal at the time. *Id.* at 392-94, 829 S.E.2d at 229-31.

¶ 12 Our Supreme Court was unpersuaded. In a unanimous opinion, the Court held that the 22 June 2015 letter was not "any sort" of a final determination, "in whole or in part," reversing the holding of this Court based on the estoppel theory. *Ashe Cnty. II*, 376 N.C. at 16, 852 S.E.2d at 79. The Supreme Court was more circumspect about the implications of this holding, however, remanding the case to our Court to determine

(1) "whether Appalachian Materials' application was sufficiently complete at the time that it was submitted to the Planning Director to trigger the application of the permit choice statutes"; (2) "whether the Planning Director was authorized to deny Appalachian Materials' permit application on the basis of the moratorium statute"; (3) "whether the proposed asphalt plant was located within 1,000 feet of a commercial building"; and (4) "whether the Planning Board erred by rejecting the Planning Director's determination that Appalachian Materials' application contained material misrepresentations." *Id.* at 20, 852 S.E.2d at 82.

¶ 13 Striking a deferential tone, the Supreme Court first noted this Court's prior reliance on the 22 June 2015 letter to resolve nearly the entirety of the substance of the appeal and second, "the fact that all of the[] additional issues appear[ed] to . . . be . . . interrelated with the appeal-related issue . . . resolved" by its opinion, concluding that "the Court of Appeals should revisit each of these additional issues and decide them anew without reference to the fact that Ashe County did not appeal the 22 June 2015 letter." *Id.* at 21, 852 S.E.2d at 82. "Although the 22 June 2015 letter did not constitute a final decision triggering the necessity for an appeal," the Court added, "we do not hold that that letter is irrelevant to the making of the necessary determinations on remand, with the parties remaining free to argue any legal significance that the letter may or may not, in their view, have." *Id.* Accordingly, the Court remanded the case to our Court "for reconsideration of each of the[] additional issues[.]" *Id.*

II. Standard of Review

¶ 14 On appeal from the decision of the Planning Board, a body authorized by a local ordinance to act as the County's board of adjustment, the trial court sat as an appellate court, reviewing the Planning Board's decision on a writ of certiorari. *See Dellinger v. Lincoln Cnty.*, 248 N.C. App. 317, 322, 789 S.E.2d 21, 26 (2016). At the time of the Planning Board's decision and the proceeding in Superior Court, former N.C. Gen. Stat. § 160A-388 provided that "[e]very quasi-judicial decision shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A-393." N.C. Gen. Stat. § 160A-388(e2)(2) (2019) (repealed by 2019 S.L. 111 § 2.3) (recodified at N.C. Gen. Stat. § 160D-406(k) (2021)).

> The Superior Court's functions when reviewing the decision of a board sitting as a quasi-judicial body include:
>
> (1) Reviewing the record for errors in law,

> (2) [E]nsuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) [E]nsuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) [E]nsuring that decisions of [the Planning Board] are supported by competent, material and substantial evidence in the whole record, and
>
> (5) [E]nsuring that decisions are not arbitrary and capricious.
>
> . . .
>
> When [an] assignment of error alleges an error of law, *de novo* review is appropriate. Under a *de novo* standard of review, a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance[.]

Thompson v. Union Cnty., 2022-NCCOA-382, ¶ 10-11.

III. Analysis

¶ 15 We review each of the outstanding issues in the order they are listed in our Supreme Court's opinion.

A. The Permit Choice Statutes Do Not Apply Because the Application Was Not Submitted Until After the Moratorium Went into Effect

¶ 16 Based on our Supreme Court's holding that the 22 June 2015 letter was not "any sort" of a final determination, *Ashe Cnty. II*, 376 N.C. at 16, 852 S.E.2d at 79, we hold that the application was complete on 29 February 2016—when Appalachian Materials forwarded the air quality permit issued by DEQ to the Planning Director and demanded that the PID Ordinance permit be issued. In June 2015, Appalachian Materials had not "obtained all necessary federal and state permits[,]" *id.* at 2, 852 S.E.2d at 71, as was required, because DEQ had not issued the air quality permit until 26 February 2016, and this "necessary . . . state permit" was not submitted to the Planning Director by counsel for Appalachian Materials until three days later, on 29 February 2016. As the 22 June 2015 letter from the Planning Director noted, "the county ordinance [] require[d] that all state and federal permits be in hand *prior to a local*

permit being issued." (Emphasis added.) Only after Appalachian Materials supplemented its application with the required air quality permit on 29 February 2016 could the "local [PID Ordinance] permit [] be issued for th[e] site[,]" to quote the 22 June 2015 letter again. However, by that time, the County Board had adopted a moratorium prohibiting the issuance of new PID Ordinance permits.

¶ 17 The permit choice statutes—N.C. Gen. Stat. §§ 143-755, 153A-320.1, and 160A-360.1 on 29 February 2016 and N.C. Gen. Stat. §§ 143-755 and 160D-108 today—provide, in general, that if a land use regulation changes between the time a permit application is "submitted" and the time a permit decision is made, then the applicant may choose which version of the regulation applies.[2] N.C. Gen. Stat. § 143-755(a) (2021). The purpose of these provisions is to protect the investment and reasonable reliance of developers on the decisions of local government regarding "site evaluation, planning, development costs, consultant fees, and related expenses." *Id.* § 160D-108(a). Our General Assembly has found that they "strike an appropriate balance between private expectations and the public interest" by "provid[ing] for the establishment of certain vested rights in order to ensure reasonable certainty, stability, and fairness in the development regulation process, to secure the reasonable expectations of landowners, and to foster cooperation between the public and private sectors in land-use planning and development regulation." *Id.*

¶ 18 However, application of the permit choice statutes to the PID Ordinance application submitted by Appalachian Materials depends on the "permit application [being] submitted" where "a rule or ordinance changes between the time a permit application is submitted and a permit decision is made[.]" N.C. Gen. Stat. § 153A-320.1(a) (2016) (repealed 2020). That is, application of the statutes depends on when the PID Ordinance application was "submitted," and the statutes do not apply unless an application has been submitted *before* the land use regulation changes.

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2. In 2019, the General Assembly enacted "An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State[,]" repealing N.C. Gen. Stat. §§ 150A-320 to 153A-326. 2019 S.L. 111 § 2.2. Session Law 2019-111 consolidated and reorganized the municipal and county land-use planning and development statutes into one Chapter of the General Statutes. *Id.* § 2.1(e). It also made various changes and clarifying amendments, *id.* § 1.1, *et seq.*, and gave persons aggrieved a separate cause of action, distinct from the certiorari statute, which it amended significantly, *id.* §§ 1.7, 1.9 (codified at N.C. Gen. Stat. §§ 160A-393.1, -393). In 2020, the General Assembly enacted Session Law 2020-25, completing the consolidation of the land use statutes into one Chapter of the General Statutes, as directed by Session Law 2019-111. *An Act to Complete the Consolidation of Land-use Provisions into One Chapter of the General Statutes as Directed by S.L. 2019-111, as Recommended by the General Statutes Commission*, 2020 S.L. 25.

¶ 19 We hold that the PID Ordinance permit application submitted by Appalachian Materials was not "submitted" within the meaning of the permit choice statutes until it was complete—on 29 February 2016, when counsel for Appalachian Materials forwarded the air quality permit issued by DEQ on 26 February 2016 to the Planning Director and demanded that the PID Ordinance permit be issued—because only then did the application meet the requirements that "(1) the applicant pay a $500 uniform permit fee; [and] (2) the applicant have obtained all necessary federal and state permits[.]" *Ashe Cnty. II*, 376 N.C. at 2, 852 S.E.2d at 71. Yet, on 29 February 2016, when the application was complete, the relevant land use regulation—the PID Ordinance—had not yet been repealed and replaced by the High Impact Land Use Ordinance, which did not occur until 3 October 2016. Instead, the County Board had adopted a moratorium on the issuance of any new permits under the PID Ordinance. Whether the Planning Director was justified in denying the application on 20 April 2016 that was submitted within the meaning of the permit choice statutes by Appalachian Materials the previous February thus depends on whether the moratorium adopted by the County Board on 19 October 2015 and later extended until 3 October 2016 barred the Planning Director from issuing the permit.

B. The Moratorium Statute Did Not Authorize the Planning Director to Approve the Application

¶ 20 The moratorium statute in effect in February 2016, when Appalachian Materials submitted a complete PID Ordinance application, authorized counties to adopt development moratoria under certain conditions, but exempted from the applicability of these moratoria "development for which substantial expenditures ha[d] already been made in good faith reliance on a *prior* valid administrative or quasi-judicial permit or approval[.]" N.C. Gen. Stat. § 153A-340(h) (2016) (repealed 2020) (emphasis added). The moratorium statute in effect today preserves the exemption contained in former-§ 153A-340(h) from the applicability of these moratoria to "development for which substantial expenditures have already been made in good-faith reliance on a *prior* valid development approval[.]" N.C. Gen. Stat. § 160D-107(c) (2021) (emphasis added). Eliminating any ambiguity about whether the permit choice statutes apply to a permit application that has been submitted but not yet approved before a moratorium goes into effect that prohibits the requested land use, the current moratorium statute goes on to specify that "if a *complete* application for a development approval has been *submitted* prior to the effective date of a moratorium, G.S. 160D-108(b) [i.e., the permit choice rule] applies when permit processing resumes." *Id.* (emphasis added).

¶ 21 In other words, under former-§ 153A-340(h) only "permitted" or "approved" land uses were exempt from the moratorium statute in effect in February 2016—an exemption former-§ 153A-340(h)'s successor statute, § 160D-107(c), both preserves and clarifies in relation to the permit choice statutes, by cross-referencing one of the permit choice statutes in effect today and specifically providing that the permit choice rule applies only to "*complete*[*d*] application[s] for . . . approval[.]" *Id.* § 160D-107(c) (emphasis added). *See also Town of Hazelwood v. Town of Waynesville*, 320 N.C. 89, 95, 357 S.E.2d 686, 689 (1987) ("When the legislature amends an ambiguous statute, the presumption is not that its intent was to change the original act, but merely to clarify that which was previously doubtful." (internal marks and citation omitted)).

¶ 22 We therefore hold that the application by Appalachian Materials submitted within the meaning of the permit choice statutes in February 2016 was not exempt from the moratorium adopted by the County Board on 19 October 2015 because Appalachian Materials never obtained "a *prior* valid administrative or quasi-judicial *permit*" or "*approval*" of the application. *See*, *e.g.*, *Ashe Cnty. II*, 376 N.C. at 19, 852 S.E.2d at 81 ("[*N*]*o part* of the 22 June 2015 letter constituted a final, binding decision[.]" (emphasis in original)). Indeed, Appalachian Materials could not have obtained a permit or approval of the application by October 2015 when the application was not even submitted until four months later, after the outstanding air quality permit was submitted, which completed the application. *See* N.C. Gen. Stat. § 153A-320.1 (2016) ("*If* a rule or ordinance changes between the time a permit application is *submitted* and a permit decision is made, *then* G.S. 143-755 shall apply.") (emphasis added); N.C. Gen. Stat. § 143-755(a) (2021) ("If a development permit applicant submits a permit application for any type of development and a rule or ordinance is amended, . . . between the time the development permit application was submitted and a development permit decision is made, the development permit applicant may choose which adopted version of the rule or ordinance will apply[.]"). *See also id.* § 160D-107(c) ("Notwithstanding the foregoing, if a *complete* application for a development approval has been *submitted prior* to the effective date of a moratorium, G.S. 160D-108(b) applies when permit processing resumes.") (emphasis added); *id.* § 160D-108(b) ("If a land development regulation is amended between the time a development permit application was submitted and a development permit decision is made or if a land development regulation is amended after a development permit decision has been challenged and found to be wrongfully denied or illegal, G.S. 143-755 applies.").

¶ 23 North Carolina General Statute § 153A-340(h) authorized Ashe County, through the County Board, N.C. Gen. Stat. § 153A-340(c1) (2016) (repealed 2020), to "adopt temporary moratoria on any county development approval required by law[,]" with exceptions not applicable here, *id.* § 153A-340(h), and in the absence of any exemption provided by the moratorium statute in effect in February 2016, we hold that under the moratorium approved by the County Board in October 2015, the Planning Director lacked the authority to approve the application.[3]

C. The Proposed Asphalt Plant Was Located within 1,000 Feet of a Commercial Building

¶ 24 As noted above, the Planning Director concluded in the 20 April 2016 denial of the incomplete PID Ordinance application submitted by Appalachian Materials that the 3.58 acres leased by Appalachian Materials for the proposed plant was within 1,000 feet of two commercial buildings—a quarry and a barn—and it was a requirement of the PID Ordinance in effect in February 2016 that permitted polluting industries "*not be* located within 1,000 feet of a residential dwelling unit or commercial building[.]" *Ashe Cnty. II*, 376 N.C. at 2, 852 S.E.2d at 71 (emphasis added). We hold that the record supports the Planning Director's conclusions regarding the location of these commercial buildings, and that the buildings did, in fact, qualify as commercial buildings within the meaning of the PID Ordinance in February 2016. Although any mention of the quarry is conspicuously absent from this Court's prior opinion, even the prior opinion conceded that the evidence was "uncontradicted . . . that the barn was owned by a neighbor who ran a business in which he harvested and sold hay and that he used the barn to store his hay inventory and to store farm equipment used to harvest hay." *Ashe Cnty. I*, 265 N.C. App. at 393, 829 S.E.2d at 230.

¶ 25 Our Supreme Court's reversal of the holding in this Court's prior opinion that the County was estopped from later denying anything the 22 June 2015 letter said repudiates the reasoning in this Court's prior opinion that it was unnecessary to resolve whether the buildings identified in the 20 April 2016 denial qualified as commercial buildings. *See*, *e.g.*, *Ashe Cnty. I*, 265 N.C. App. at 393, 829 S.E.2d at 230 ("[T]he Planning Director made the determination that they were *not* commercial buildings in his June 2015 Letter and [] his determination was binding on the County.")

3. The Planning Director could have held the application in abeyance until the moratorium lifted. Because we hold that Appalachian Materials was not entitled to the benefit of the permit choice statutes based on the time the application was submitted, after the PID Ordinance was repealed, the Planning Director would no longer have had the authority to do anything but deny the application.

(emphasis in original). Based on our Supreme Court's holding that the 22 June 2015 letter was not "any sort" of a final determination, "in whole or in part," *Ashe Cnty. II*, 376 N.C. at 16, 852 S.E.2d at 79, we hold that denial of the application by the Planning Director was required because the proposed plant would have been located within 1,000 feet of not one, but two commercial buildings—a quarry and a barn, *see Ashe Cnty. I*, 265 N.C. App. at 393, 829 S.E.2d at 230 (noting the definition of "business" in a County ordinance as a "commercial trade . . . including but not limited to . . . agricultural . . . and other similar trades or operations").

D. Alleged Material Misrepresentations in the Application Submitted by Appalachian Materials

¶ 26 Because there were two independently sufficient reasons in February 2016 preventing the Planning Director from granting the permit application submitted by Appalachian Materials—a complete version of the application was not submitted until 29 February 2016, after the 15 October 2015 moratorium went into effect, and there were two commercial buildings within 1,000 feet of the 3.58 acres leased by Appalachian Materials where the proposed plant was to be located—we do not reach the issue of whether the alleged material misrepresentations in the PID Ordinance application were, in fact, misrepresentations, and if so, whether they constituted an independent basis for denying the PID Ordinance application submitted by Appalachian Materials.

¶ 27 In general, "we do not make credibility assessments as an appellate court." *State v. Daw*, 277 N.C. App. 240, 268-69, 2021-NCCOA-180 (citation omitted). The reason is that trial courts, unlike our Court, have "the 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[.]" *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (cleaned up).

¶ 28 Nevertheless, we note that the inconsistency between the representation in the incomplete PID Ordinance application and the air quality permit application submitted to DEQ regarding the anticipated output of the proposed plant supports the inference of deceptive intent drawn by the Planning Director: Appalachian Materials obtained an air quality permit from DEQ representing to DEQ that it anticipated operating an asphalt plant in Ashe County producing as much as twice as much asphalt annually as it had represented that it planned to produce to local officials in Ashe County in its PID Ordinance application. On the cold record, it is impossible to determine whether the representation in the PID Ordinance application is false, the representation in the air

quality permit application is false, or whether any false representation in the PID Ordinance application was made knowingly. Yet, the representations could not both be true at the time a complete PID Ordinance application was submitted in February of 2016.

IV. Conclusion

¶ 29 We reverse the order of the trial court requiring Ashe County to issue Appalachian Materials a PID Ordinance permit.

REVERSED.

Chief Judge STROUD concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

¶ 30 I vote to affirm Judge Bray's order, affirming the Planning Board's decision to direct the issuance of the permit to Appalachian Materials ("AM").

¶ 31 I conclude AM is entitled to have its permit application considered under the more developer-friendly version of the County's ordinance in place when AM's application was submitted in June 2015. The fact that AM's application filed with the State for the required air quality permit was pending does not render AM ineligible for protection under our permit choice law.

¶ 32 I further conclude the Planning Board's findings support its conclusion that the barn and quarry located within 1000 feet from AM's proposed operation were not "commercial buildings" under the County ordinance which prohibits the location of asphalt plants within 1000 feet of a commercial building.

¶ 33 Finally, I conclude the Planning Board's findings support its conclusion that AM's permit application should not be denied based on alleged material misrepresentations made by AM in its application.

¶ 34 Accordingly, I respectfully dissent.

I. Background

¶ 35 This matter concerns AM's desire to operate an asphalt plant on land it owns in Ashe County. To have the legal right to do so, AM is required

to obtain a permit from the County as well as an air quality permit from the State.

¶ 36 In June 2015, AM filed its application with Ashe County for the County permit along with the required application fee. At the same time, AM filed its application with the State for the required air quality permit. Shortly after the County application was filed, the County's Planning Director sent a letter to AM stating that AM's proposal appeared to meet the County's Code requirements but that the County permit could not be issued until the State permit was issued.

¶ 37 Four months later, in October 2015, due to political pressure from the some of the County's citizenry regarding AM's proposed plant, the County's elected Board enacted a temporary moratorium on asphalt plant permits.

¶ 38 In February 2016, four months into the moratorium, AM obtained and forwarded the required air quality permit from the State.

¶ 39 But two months later, in April 2016, while the moratorium was still in place, the County's Planning Director denied AM's permit application. The Planning Director articulated three separate reasons for its denial, discussed herein. AM appealed that decision to the County Planning Board, an *unelected* board which essentially serves as a board of adjustments for Ashe County.

¶ 40 In October 2016, while AM's appeal was pending before the Planning Board, the County's *elected* Board of Commissioners lifted the moratorium but enacted a new ordinance under which AM proposed would not qualify for approval.

¶ 41 In December 2016, the County's Planning Board issued its order, reversing the Planning Director's denial and directing the permit be issued. The County's Board of Commissioners, though, disagreeing with the decision of the Planning Board, appealed the Planning Board's decision to superior court.

¶ 42 In November 2017, Superior Court Judge Bray affirmed the Planning Board's decision to direct the permit be issued.

¶ 43 In May 2019, we affirmed as well, but on a narrow legal ground. We held that the County was bound by the June 2015 statements of its Planning Director that AM's proposal met the requirements under the County ordinance.

¶ 44 However, in September 2020, our Supreme Court issued an opinion disagreeing with our conclusion regarding the binding effect of the

Planning Director's initial impressions of AM's application. That Court held that the communications were not binding and remanded the matter for us to consider the other issues raised on appeal.

¶ 45 In this present appeal, the majority concludes the County's Planning Board's decision directing the permit be issued was incorrect and the Planning Director's denial should be reinstated. The majority so concludes based on two of the three independent reasons that were articulated by the Planning Director in his denial letter to AM. The majority takes no position on the third reason. My vote is to affirm Judge Bray and the Planning Board, for the reasoning below.

II. Discussion

A. Permit Choice Law

¶ 46 The majority concludes the Planning Director correctly determined that AM was not entitled to have its application considered under the version of the County's ordinance in place in June 2015, when AM submitted its application and paid its fee, reasoning that AM's application was not complete without the State air quality permit in hand. I disagree with the majority's reading of our permit choice law.

¶ 47 The permit choice law was first enacted by our General Assembly in 2014 and is found in Section 143-755 (entitled "Permit choice") and is cross-referenced in Section 160D-108 (entitled "Permit choice and vested rights") of our General Statutes. Our General Assembly enacted this law to provide that *if* a local government changes its development ordinance between the time a developer applies for a permit and the time a decision is made on that permit application, *then* the developer can choose to have its application decided under the ordinance in place at the time the "applicant submits [its] permit application." N.C. Gen. Stat § 143-755(a) (2015). The General Assembly enacted Section 160D-108 in 2019, recognizing that developers have certain "vested rights" under the common law and by statute at some point in the development process, typically after a permit is issued, which cannot be taken away. The right to have one's application considered under existing law may not be a "vested right" under Section 160D-108. But when it enacted Section 160D-108, our General Assembly reiterated in Section 160D-108 that this statutory right of an applicant was still in place, reiterating that "G.S. 143-755 applies" where "development regulation is amended between the time a development permit application was submitted and [the] decision is made[.]" N.C. Gen. Stat. § 160D-108(b).

¶ 48 The development of land is typically a long process. Our "General Assembly recognizes the reality that local government approval of

development typically follows significant investment by the developer in site evaluation, planning, development costs, consultant fees, and related expenses." N.C. Gen. Stat. § 160D-108(a). Clearly, the elected board in a county has discretion to amend its development regulations for what it believes to be in the public good or in its political interest. Our General Assembly enacted the permit choice laws to "strike a balance" between these realities: A local government should be allowed to amend its ordinances, while at some point of the development process, a developer should have certainty as to the ordinance by which its application will be evaluated. Our General Assembly has defined this point as being the time when the developer "submits a permit application" with the local government. N.C. Gen. Stat. § 143-755.

¶ 49 The phrase "submits a permit application" in Section 143-755 is not defined, nor is there case law construing its meaning.

¶ 50 The majority holds that AM's application was not "submitted" until AM provided proof the State had *approved* the air quality permit, which occurred eight months after AM applied for the County permit: It was not enough that the air quality permit had been submitted and was pending with the State. I disagree for several reasons.

¶ 51 First, there is nothing in Ashe County's 2015 ordinance to suggest that a developer have all required State and Federal permits in hand before it could submit its application for the required County permit. Rather, the ordinance merely requires that an application not be submitted without payment of the required application fee. The ordinance otherwise merely stated that any required State and Federal permits be in hand before the County would *issue* the permit:

> A permit is required from the Planning Department for any polluting industry. A uniform permit fee of $500.00 shall be paid *at the time of the application* for the permit. No permit from the planning department *shall be issued* until the appropriate Federal and State permits have been issued.

Code of Ashe County, § 159.06(A) (2015) (entitled "Permitting Standards"). This language does not even hint that AM's application could not be submitted (allowing the County to begin its due diligence processing the permit) until after the State permit was in hand. The language merely suggests that the County will not *issue* the permit, even if the County is satisfied that the County requirements are met, until the State permit was in hand. To be sure, back and forth between a county and a developer is common during the county's due diligence approval process.

But the fact that a county may ask for additional information during its due diligence does not render the application *not* submitted. And in this case, the record shows that Ashe County accepted and deposited the fee and began its due diligence review.

¶ 52 Second, the language used by our General Assembly in the permit choice laws supports my conclusion that an application may be deemed "submitted" while the State is conducting its due diligence on the required State permit. For example, the permit choice law provides that applications for which the county seeks additional information will generally be reviewed under the version of the ordinance in place when the "incomplete" application was submitted, so long as the applicant is responsive regarding the shortcomings of its application:

> If . . . the applicant fails to respond to comments or provide additional information reasonably requested by the [county] for a period of six consecutive months or more, the application review is discontinued and the development regulations in effect at the time permit processing is resumed apply to the application.

N.C. Gen. Stat. § 143-755(b1)[1]. Also, the "Moratoria" law enacted in conjunction with Section 160D-108 provides that any proposed development "for which a special use permit application *has been accepted as complete*" is generally exempt from any intervening, temporary, permit-issuing moratorium that is adopted. N.C. Gen. Stat. § 160D-107(c) (emphasis added). This "has been accepted as complete" language, however, is not in Section 143-755. Had our General Assembly intended that an application "be accepted as complete" before the permit choice law in Section 143-755 be triggered, that body could have so stated. However, the permit choice law merely requires that the application be "submitted."

¶ 53 Finally, I believe that the majority's interpretation is not in harmony with our General Assembly's intent to provide a sense of certainty for

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1. Subsection (b1) was not added to Section 143-755 until 2019. However, the session law adding that subsection provides that the subsection "clarify[ies] and restate[s] the intent of existing law and appl[ies] to ordinances adopted before, on, and after the effective date." 2019 Session.Law 155, § 3.1.

The County does not argue that the subsection applies based on the State's *eight* month delay in issuing the air quality permit. If such argument had been made and I had concluded that the subsection applied, my vote would have been to remand for the Planning Board to make findings concerning whether the County was reasonable to require the State permit be provided within six months.

the developer in the process. Many developments require permits from more than one level of government. For instance, a development which involves removing an underground storage tank and stabilizing a stream bank might require – in addition to a development permit from the county where the project is located – a permit from the U.S. Army Corps of Engineers (to stabilize the stream) and a permit from our State's Department of Environmental Quality (to remove the storage tank). The majority's interpretation creates an imbalance between the competing interests. For example, assume an ordinance allows for asphalt plants located more than 1000 feet from a school. The county could thwart any attempt by a developer who must spend significant funds prior to seeking the county permit, simply by changing the distance requirement while the developer awaits its air quality permit from the State.

¶ 54 In sum, I do not think the phrase "submits a permit application" should be read in such an anti-development way as, I believe, the majority is reading it. Of course, it should not be read in a pro-development way. Rather, we should read it in a way that achieves the balance intended by our General Assembly. Perhaps an application left almost entirely blank should not be considered "submitted." But where an applicant has filled out the required application (often after much time and expense) sufficient for the county to evaluate the proposal and has paid its application fee, I believe the application is "submitted." The fact that a county might have follow up questions or requests for additional information does not change this result. Such applicant, at this stage, is entitled to the certainty afforded by our General Assembly.

B. Commercial Buildings

¶ 55 I disagree with the majority's holding that the nearby barn and the quarry constitute "commercial buildings" under Ashe County's ordinance.

¶ 56 The Planning Board reversed the Planning Director's determination regarding the character of these buildings. Under the Ashe County Code, the Planning Board conducts a *de novo* review of the Planning Director's findings. Specifically, the Code provides that the Planning Board has the authority to "uphold, modify, or overrule[] in part or in its entirety" any determination made by the Planning Director. Ashe County Code § 153.04(f) (2015). Any finding made by the Planning Board is binding in our review if supported by the evidence in the record.

¶ 57 The term "commercial building" is not defined in the Ashe County Code.

¶ 58 Our Supreme Court instructs that "[t]he basic rule [when construing an ordinance] is to ascertain and effectuate the intention of the municipal legislative body." *Westminster Homes v. Town of Cary Bd. of*

Adj., 354 N.C. 298, 303-04, 554 S.E.2d 634, 638 (2001). The Court further instructs that "[i]ntent is determined according to the same general rules governing statutory construction, that is, by examining (i) language, (ii) spirit, and (iii) goal of the ordinance." *Id.* at 304, 554 S.E.2d at 638. At the same time, the Court "has long held that governmental restrictions on the use of land are construed strictly in favor of the free use of real property." *Morris v. City of Bessemer*, 365 N.C. 152, 157, 712 S.E.2d 868, 871 (2011).

¶ 59 The two buildings at issue here are a quarry shed and a barn.

¶ 60 The quarry is owned by AM's parent. The quarry, itself, is obviously not a "building"; however, AM's parent does maintain a mobile shed as part of the quarry operation. The Planning Board, though, found that AM's parent would have moved the shed if that shed was deemed a "commercial building" and, on that basis, disagreed that the permit should have been denied because of the shed. Alternatively, the Planning Board concluded that the shed was not a "building", finding that the shed, "lacks a foundation, has no footers, and does not have running water." These findings are supported by the evidence. I agree with the Planning Board's interpretation that a movable shed not attached to the land should not be construed as a "building" within the meaning of the Code. In sum, I agree with both alternative reasons of the Planning Board regarding the shed.

¶ 61 The barn presents a closer question. The Planning Board concluded that the barn was not a "commercial building" based on its findings that "[t]he barn is not used to conduct business, is not used in connection with any commercial activity, has no parking or other access for anyone other than the property owner, has no road access, and does not have electricity or air conditioning" and that the "primary aim" for the barn's owners is not for "financial profit." These findings are all supported by the affidavit of the barn's owners (husband and wife).

¶ 62 The Planning Board also found that the County does not list the barn as a commercial building on the property tax card and that the barn is not located within a commercial district.

¶ 63 The owners, however, do state that they use their property for farming (where they also live) and that they do store farm equipment and materials in the barn.

¶ 64 The question then is whether the storing of farm equipment is enough to render the barn a "commercial building" in the context of a use restriction in an ordinance.

¶ 65 The "language" used in the ordinance is the term "commercial building," a term which is not defined. This term could be read broadly to include even a small shed where a teenager might store his lawn mower used sometimes to mow the lawns of neighbors for money. Or the term could be read narrowly to include only those buildings where commerce takes place.

¶ 66 The "spirit" and the "goal" of the Code are not served by construing "commercial building" to include the barn at issue here. For instance, the purpose of the ordinance as stated in the Code is to protect the "health, safety and general welfare" of those in "established residential and commercial areas in Ashe County." Ashe County Code, § 159.02 (2015). Further, the Code describes a "polluting industry" as "an industry which produces objectionable levels of noise, odors, [etc.] that may have an adverse effect on the health, safety or general welfare of the citizens of Ashe County." Ashe County Code, § 159.05. As no one works in the barn. No customers visit the barn. Nothing is stored there that is sold. The barn is not located in an established commercial area.

¶ 67 In sum, the language, spirit, and goal of the ordinance suggests that the barn is not a "commercial building" within the meaning of the ordinance. Alternatively, the term is, at best, ambiguous. There is a reasonable interpretation which would suggest that the barn is a commercial building, in that it stores equipment that is used, at least in part, in the owners' farming business. However, there is a reasonable interpretation which would suggest that the barn is not a commercial building, because it is an agricultural building where no commerce takes place. And based on our Supreme Court's jurisprudence, we must construe this ambiguity in favor of AM. I, therefore, conclude that the Planning Board, based on its findings, got it right concerning the barn.

C. Material Misrepresentation

¶ 68 The Planning Board found that AM did not make any material misrepresentations to the County in its application. The majority does not address this basis offered by the Planning Director when he denied AM the permit. The Planning Board made detail findings to support its ultimate finding on this issue. Given the Planning Board's discretion to substitute its judgment for that of the Planning Director, there is no basis for our Court to reverse the Board's determination on this issue.

III. Conclusion

¶ 69 I agree with the Planning Board's resolution on the issues of law which are before us. And I conclude that the Board's findings support its conclusions and the evidence supports those findings. Accordingly, my vote is to affirm Judge Bray's order.

ASHER v. HUNEYCUTT

[284 N.C. App. 583, 2022-NCCOA-517]

ROBERT ASHER, PLAINTIFF
v.
DAVID HUNEYCUTT, MICHAEL KISER AND TRACY KISER, DEFENDANTS

No. COA21-689

Filed 2 August 2022

1. Premises Liability—negligence per se—house guest fell down stairs—building code violations—actual or constructive knowledge by owner required

In an action for negligence per se, the trial court properly granted summary judgment in favor of defendants—the landlord owners of the house in which plaintiff, a guest of the tenant that lived in the house, was injured after falling down three steps in the garage—because plaintiff did not forecast any evidence that defendants had actual or constructive knowledge that the steps were not in compliance with the applicable building code. The violations were minor, not obvious, and neither a licensed home inspector hired by defendants prior to purchasing the house nor any of defendants' tenants reported any concerns about the steps.

2. Premises Liability—common law negligence—house guest fell down stairs—building code violations—breach of duty to exercise reasonable care

In an action for common law negligence, the trial court properly granted summary judgment in favor of defendants—the landlord owners of the house in which plaintiff, a guest of the tenant living in the house, was injured after falling down three steps in the garage—because plaintiff failed to demonstrate that defendants breached their duty to exercise reasonable care in the maintenance of the house for the protection of lawful visitors. Prior to purchasing the house, defendants hired a licensed home inspector who did not identify any code violations with the steps, other than an issue with the railing that defendants immediately fixed; defendants conducted a visual walkthrough inspection of the premises prior to each time they rented out the house; and none of defendants' tenants reported any concerns regarding the steps.

Appeal by plaintiff from order entered 17 March 2021 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 May 2022.

Green Mistretta Law, PLLC, by Robert A. Smith and Stanley B. Green, for plaintiff-appellant.

No brief filed for defendant-appellee David Huneycutt.

Martineau King PLLC, by Stephen D. Fuller and Joseph W. Fulton, for defendants-appellees Michael Kiser and Tracy Kiser.

ZACHARY, Judge.

¶ 1 Plaintiff Robert Asher appeals from the trial court's order granting Defendants Michael and Tracy Kiser's motion for summary judgment. After careful review, we affirm.

Background

¶ 2 In 2013, Defendants purchased a rental property in Charlotte, North Carolina (the "House"). The House has three points of entry, all of which require the use of steps: the front door has brick steps, the back porch has a set of steps, and the garage has three wooden steps leading into the House (the "Steps").

¶ 3 Prior to purchasing the House, Defendants hired a professional home inspection company to evaluate the condition of the House and identify any potential problems. Although the inspection revealed several items throughout the House that warranted repair, the only issue that the inspector noted concerning the "steps, stairways, balconies and railings" was that "[t]here [wa]s a little play or movement of the handrail for the steps located in the garage." The inspection company recommended that the "handrail be properly tighten[ed] or re-secured[,]" which Defendants did before renting the House to tenants. Defendant Michael Kiser also stained the Steps and the adjacent handrail, but otherwise Defendants made no alterations to the Steps.

¶ 4 Defendants rented the House to the Rushing family from 2013 to 2015. The Rushings reported no issues with the Steps or the handrail during their tenancy, and Sylvia Rushing described the Steps and handrail as "always in stable and safe condition." After the Rushing family moved out in November 2015, Defendants rented the House to David Huneycutt, who lived there for approximately two and a half years. Huneycutt similarly had no complaints regarding the Steps. At his deposition, Defendant Michael Kiser explained that he conducts a visual inspection while walking through the House with new tenants when they first move in, and performs this same walkthrough and visual inspection

process with the tenants upon the termination of a tenancy. Defendant Michael Kiser, like his tenants, also never observed any problem with the Steps.

¶ 5 On 21 May 2016, Plaintiff and his wife attended a graduation party hosted by Huneycutt at the House. Plaintiff's wife had been using a wheelchair for about a year and half at that time; she could only walk short distances due to a surgical procedure on her left foot. Having visited Huneycutt's home before, Plaintiff knew that his wife would need assistance entering and exiting the House. When they arrived, Huneycutt requested that Plaintiff and his wife use the Steps in the garage. Plaintiff's wife walked up the three Steps using only one foot, "which wore her out tremendously." Plaintiff later stated that he "had some concerns" about the condition of the Steps, but he did not voice his reservations that day.

¶ 6 When Plaintiff and his wife were ready to leave, Huneycutt asked that they exit through the garage rather than the front door to avoid disrupting the party. Then, without consulting Plaintiff or Plaintiff's wife, Huneycutt began maneuvering Plaintiff's wife down the Steps; he grabbed the legs of the wheelchair, tilted her back in the chair, and began moving her down one step at a time. Plaintiff, from the top step, grabbed the handles of the wheelchair in an attempt to stop Huneycutt, worried that his wife might get hurt. Upon realizing that he could not stop Huneycutt, Plaintiff grabbed his wife and put his arms around her head and neck, to "protect her from any injury going down the" Steps. When Huneycutt stopped moving the chair, Plaintiff lost his balance and fell down the Steps. He landed on a part of his wife's wheelchair, "and his left eye went into a cavity in the wheelchair brace." As a result of this fall, his optic nerve was severed, and Plaintiff lost all vision in his left eye.

¶ 7 Subsequent inspection by the parties' experts revealed that the Steps did not comply with the applicable provisions of the North Carolina Residential Building Code. Specifically, the variance among the Steps' heights was 1/4-inch greater, the threshold height from the floor was 1/4-inch higher, and the variance between each step's tread depth was 3/8-inches greater than the Code permitted; additionally, at least one tread had a 3.1% slope—1.1% greater than the maximum 2% slope that the Code permitted. *See* N.C. State Building Code, §§ 312.1, 314.2 (1997).[1]

1. The 1997 version of the North Carolina State Building Code is applicable in the instant case, as it was the version of the Code in effect at the time of the House's construction.

¶ 8 On 22 April 2019, Plaintiff and his wife filed a complaint[2] against Defendants and Huneycutt. Plaintiff asserted that Defendants were negligent *per se*, in that they leased a home with steps that violated the Building Code. He also alleged that Defendants were negligent because they breached their common-law duty as landlords to lease the House "in a habitable and reasonably safe condition . . . by failing to install and/or maintain a garage staircase that was reasonable to prevent foreseeable falls."

¶ 9 On 8 July 2019, Defendants filed a motion to dismiss, an answer, and crossclaims against Huneycutt. Defendants generally denied liability and asserted several affirmative defenses, including contributory negligence. On 16 September 2020, Defendants filed a motion for summary judgment.

¶ 10 This matter came on for hearing in Mecklenburg County Superior Court on 11 January 2021. On 17 March 2021, the trial court entered an order granting summary judgment in favor of Defendants, finding that "there is no genuine issue of material fact in dispute as to the claims against" Defendants. Although there remained claims pending against Huneycutt, the trial court certified the case for immediate appeal, stating that "there exists no just reason for delay" and that "this order is entered as a Final Judgment [as to Defendants] pursuant to N.C. R. Civ. P. 54(b)."

¶ 11 Plaintiff timely appealed pursuant to Rule 3(c)(2) of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 3(c)(2). Subsequently, Plaintiff voluntarily dismissed his claims against Huneycutt on 1 July 2021, and Defendants voluntarily dismissed their crossclaims against Huneycutt on 12 July 2021.

Grounds for Appellate Review

¶ 12 This Court chiefly entertains appeals from final judgments. *See* N.C. Gen. Stat. § 7A-27(b)(1)–(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, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). By contrast, "[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. Because an

2. Plaintiff's wife voluntarily dismissed her claims without prejudice on 21 October 2021, and consequently was not a party to this lawsuit at the time of appeal.

interlocutory order is not yet final, with few exceptions, "no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge[.]" *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974).

¶ 13 Nonetheless, an interlocutory order disposing of less than all claims in an action may be immediately appealed if "the order affects some substantial right and will work injury to [the] appellant if not corrected before appeal from final judgment[,]" *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citation omitted); *see also* N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3)(a), or if "the trial court certifies, pursuant to N.C.G.S. § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal[,]" *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009); *see also* N.C. Gen. Stat. § 1A-1, Rule 54(b).

¶ 14 It is well settled that a trial court's "[c]ertification under Rule 54(b) permits an interlocutory appeal from orders that are final as to a specific portion of the case, but which do not dispose of all claims as to all parties." *Duncan v. Duncan*, 366 N.C. 544, 545, 742 S.E.2d 799, 801 (2013). Rule 54(b) provides, in relevant part, that

> [w]hen more than one claim for relief is presented in an action, . . . or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes.

N.C. Gen. Stat. § 1A-1, Rule 54(b). In other words, a proper Rule 54(b) certification of an interlocutory order requires: (1) that the case involve multiple parties or multiple claims; (2) that the challenged order finally resolve at least one claim against at least one party; (3) that the trial court certify that there is no just reason for delaying an appeal of the order; and (4) that the challenged order itself contain this certification. *See id.*

¶ 15 In the instant case, the trial court's order granting summary judgment in favor of Defendants is interlocutory, as it does not resolve all matters before the court. *See Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. Nevertheless, the trial court's Rule 54(b) certification is effective to create jurisdiction in this Court: at the time of the order, the case involved multiple parties (Plaintiff, Huneycutt, and Defendants) with multiple claims and crossclaims; the order on appeal finally resolved all claims

against Defendants (granting summary judgment in Defendants' favor); the trial court certified that "there exists no just reason for delay"; and Plaintiff appealed from the order containing this certification.

¶ 16 Hence, we conclude that this Court has jurisdiction over this matter and proceed to the merits of Plaintiff's appeal.

Discussion

¶ 17 On appeal, Plaintiff argues that the trial court erred by granting summary judgment in favor of Defendants because Plaintiff produced a sufficient forecast of evidence to establish a prima facie case of (1) negligence *per se*, and (2) common-law negligence. Plaintiff also contends that he "produced a sufficient forecast of evidence to surmount Defendants' affirmative defense of contributory negligence."

I. Standard of Review

¶ 18 Summary judgment is properly entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). "[T]he evidence presented to the trial court must be admissible at trial and must be viewed in a light most favorable to the non-moving party." *Patmore v. Town of Chapel Hill*, 233 N.C. App. 133, 136, 757 S.E.2d 302, 304 (citations omitted), *disc. review denied*, 367 N.C. 519, 758 S.E.2d 874 (2014). "If the trial court grants summary judgment, the decision should be affirmed on appeal if there is any ground to support the decision." *Proffitt v. Gosnell*, 257 N.C. App. 148, 151, 809 S.E.2d 200, 204 (2017) (citation omitted).

¶ 19 Appellate courts review "decisions arising from trial court orders granting or denying motions for summary judgment using a de novo standard of review." *Cummings v. Carroll*, 379 N.C. 347, 2021-NCSC-147, ¶ 21. When reviewing de novo, "the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Blackmon v. Tri-Arc Food Sys., Inc.*, 246 N.C. App. 38, 41, 782 S.E.2d 741, 743 (2016) (citation omitted).

¶ 20 The burden of proof governing motions for summary judgment is well established. Initially, the moving party "bears the burden of establishing that there is no triable issue of material fact." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002). The moving party may meet this burden "by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an

essential element of his claim[.]" *Id.* (citation omitted). Once the moving party makes the required showing, "the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a prima facie case at trial[.]" *Cummings*, 379 N.C. 347, 2021-NCSC-147, ¶ 21 (citation and internal quotation marks omitted). A "plaintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, summary judgment is proper." *Frankenmuth Ins. v. City of Hickory*, 235 N.C. App. 31, 34, 760 S.E.2d 98, 101 (2014) (citation omitted).

II. Analysis

A. Negligence per se

¶ 21 **[1]** Plaintiff first argues that the trial court erred by granting summary judgment for Defendants because he forecast evidence sufficient to establish a claim of negligence *per se*, in that Defendants "breached the statutorily prescribed standard of care" by failing to ensure the Steps' compliance with the Building Code. We disagree.

¶ 22 In order to successfully lodge a claim of negligence *per se*, a plaintiff must establish:

> (1) a duty created by a statute or ordinance; (2) that the statute or ordinance was enacted to protect a class of persons which includes the plaintiff; (3) a breach of the statutory duty; (4) that the injury sustained was suffered by an interest which the statute protected; (5) that the injury was of the nature contemplated in the statute; and, (6) that the violation of the statute proximately caused the injury.

Hardin v. York Mem'l Park, 221 N.C. App. 317, 326, 730 S.E.2d 768, 776 (2012) (citation omitted), *disc. review denied*, 366 N.C. 571, 738 S.E.2d 376 (2013).

¶ 23 However, proof that a building's owner violated the State Building Code, without more, is insufficient to establish negligence *per se*. *See Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 415, 395 S.E.2d 112, 114 (1990). Our Supreme Court explained that the building's owner "may not be found negligent *per se* for a violation of the Code unless: (1) the owner knew or should have known of the Code violation; (2) the owner failed to take reasonable steps to remedy the violation; and (3) the violation proximately caused injury or damage." *Id.* Accordingly, the plaintiff must demonstrate the owner's actual or constructive knowledge of the

Code violations. *See id.* at 415, 395 S.E.2d at 114–15 (concluding that summary judgment of the plaintiff's negligence *per se* claim was proper because the "plaintiff made no showing" that the defendants "knew or should have known of the violation of the Code").

¶ 24 Here, Plaintiff's forecast of evidence failed to support an essential element of his negligence *per se* claim—that Defendants "knew or should have known of the Code violation[.]" *Id.* at 415, 395 S.E.2d at 114. Although Plaintiff contends that "a reasonable inspection would have revealed the violations[,]" the record suggests otherwise. At his deposition, Defendant Michael Kiser stated that he was unaware of any safety issues with the Steps prior to Plaintiff's fall. The Steps were present when Defendants purchased the House, and Defendants did not alter them beyond staining the wood. Neither the Rushings nor Huneycutt—former tenants who were intimately familiar with the House—reported any problems with the Steps to Defendants.

¶ 25 Furthermore, the official home inspection conducted in 2013 revealed no problem with the Steps, except that "[t]here [wa]s a little play or movement of the handrail for the steps located in the garage[,]" which Defendants repaired before renting the House to the Rushings. The issues in question were not obvious, violating the Code by fractions of an inch; indeed, Defendants' expert could not visually identify any Code violations with regard to the Steps prior to measuring them. It follows, then, that it is not unreasonable for Defendants, who are neither construction nor carpentry professionals, to fail to notice the modest violations.

¶ 26 Accordingly, although the Steps violated provisions of the Code, *see* N.C. State Building Code, §§ 312.1, 314.2, Plaintiff cannot adequately demonstrate that Defendants "knew or should have known of the Code violation[s,]" *Lamm*, 327 N.C. at 415, 395 S.E.2d at 114. Plaintiff thus cannot establish that Defendants were negligent *per se* by violating the Code. In that Plaintiff's "forecast of evidence fail[ed] to support an essential element of the claim[,]" we conclude that the trial court appropriately granted summary judgment in favor of Defendants under this theory. *Wallen v. Riverside Sports Ctr.*, 173 N.C. App. 408, 411, 618 S.E.2d 858, 861, *disc. rev. dismissed*, 360 N.C. 180, 626 S.E.2d 840 (2005).

B. Common-Law Negligence

¶ 27 **[2]** Plaintiff next argues that the trial court erroneously granted summary judgment in favor of Defendants on Plaintiff's common-law negligence claim because he presented sufficient evidence establishing that Defendants breached their common-law duty of reasonable care.

Plaintiff asserts that because Defendants retained control over the Steps, they had a duty to inspect them and perform any necessary repairs, which Defendants breached, as evidenced by the Steps' noncompliance with the Code.[3] Again, we disagree.

¶ 28 Where a defendant has moved for summary judgment of a common-law negligence claim, the

> plaintiff must establish a prima facie case . . . by showing: (1) that [the] defendant failed to exercise proper care in the performance of a duty owed [to the] plaintiff; (2) the negligent breach of that duty was a proximate cause of [the] plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that [the] plaintiff's injury was probable under the circumstances.

Lavelle v. Schultz, 120 N.C. App. 857, 859–60, 463 S.E.2d 567, 569 (1995), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 715 (1996).

¶ 29 Landowners in particular have a nondelegable "duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998) (eliminating the distinction between licensees and invitees), *reh'g denied*, 350 N.C. 108, 533 S.E.2d 467 (1999). Further, "a landlord is potentially liable for injuries to third persons if he has control of the leased premises. Similarly, a landlord owes a duty to third parties for conditions over which he retained control." *Holcomb v. Colonial Assocs., L.L.C.*, 358 N.C. 501, 508, 597 S.E.2d 710, 715 (citation and internal quotation marks omitted), *reh'g denied*, 359 N.C. 198, 607 S.E.2d 270 (2004).

¶ 30 The landowner's duty of reasonable care owed to lawful visitors

> requires that the landowner not unnecessarily expose a lawful visitor to danger and give warning of hidden hazards of which the landowner has express or implied knowledge. This duty includes an obligation to exercise reasonable care with regard to reasonably

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3. Plaintiff also argues that a "[v]iolation of the Code's standards is strong evidence of common law negligence[,]" citing *Collingwood v. General Electric Real Estate Equities, Inc.*, 324 N.C. 63, 376 S.E.2d 425 (1989). However, the *Collingwood* Court concluded that a landlord's *compliance* with a statutory standard is some evidence of due care; it did not address the converse. 324 N.C. at 68–69, 376 S.E.2d at 428. Here, Plaintiff argues that Defendants' *violation* of the Code definitively demonstrates a breach of duty. Therefore, Plaintiff's reliance on *Collingwood* is misplaced.

> foreseeable injury . . . . [P]remises liability and failure to warn of hidden dangers are claims based on a true negligence standard which focuses attention upon the pertinent issue of whether the landowner acted as a reasonable person would under the circumstances.

Shepard v. Catawba Coll., 270 N.C. App. 53, 64, 838 S.E.2d 478, 486 (2020) (citation omitted). "This duty also requires a landowner . . . to make a reasonable inspection to ascertain the existence of hidden dangers." *McCorkle v. N. Point Chrysler Jeep, Inc.*, 208 N.C. App. 711, 714, 703 S.E.2d 750, 752 (2010).

¶ 31 Therefore, to prove a defendant's negligence in a premises liability case, "a plaintiff must show that the defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence." *Burnham v. S&L Sawmill, Inc.*, 229 N.C. App. 334, 340, 749 S.E.2d 75, 80 (citation and internal quotation marks omitted), *disc. review denied*, 367 N.C. 281, 752 S.E.2d 474 (2013); *see also Harris v. Tri-Arc Food Sys. Inc.*, 165 N.C. App. 495, 500, 598 S.E.2d 644, 648, *disc. review denied*, 359 N.C. 188, 607 S.E.2d 270 (2004).

¶ 32 In *Harris*, the trial court granted summary judgment in favor of the defendant in a negligence action where the ceiling in the defendant's restaurant collapsed on the plaintiff due to a latent construction defect. 165 N.C. App. at 496, 598 S.E.2d at 646. The defendant last had the restaurant's ceiling inspected when the building inspector approved the building for occupancy, as "it was not a part of [the] defendant's procedures to regularly inspect the ceiling." *Id.* at 497, 598 S.E.2d at 646. However, the "defendant was not aware of any defect or condition existent in the construction of the ceiling." *Id.* Thus, although the plaintiff contended that the "defendant failed to conduct a reasonable inspection of the premises[,]" this Court concluded otherwise, reasoning that "the building was inspected and approved for occupancy by the building inspector and [the] plaintiff ha[d] failed to produce any evidence to support her allegation that regular inspections of the ceiling would have been necessary or reasonable under the circumstances." *Id.* at 500, 598 S.E.2d at 648.

¶ 33 In the present case, although Defendants owed a duty of reasonable care to Plaintiff as a lawful visitor on their property, Plaintiff cannot demonstrate that Defendants breached their duty by failing to notice and remedy the Steps' minor Code violations. Plaintiff is correct in his assertion that Defendants retained control over the House and the Steps within it: the lease agreement between Defendants and Huneycutt

provided that Defendants retained the right "to enter the Premises for the purpose of inspecting the Premises . . . [a]nd for the purposes of making any repairs[.]" Consequently, Defendants owed a duty of reasonable care to Plaintiff as a lawful visitor. *See*, *e.g.*, *Holcomb*, 358 N.C. at 508, 597 S.E.2d at 715 (concluding that a landlord-defendant owed a duty to a visitor-plaintiff when a tenant's dog bit the plaintiff, in that the landlord retained control over the dog because the landlord and tenant had "contractually agreed" in the lease that the tenant would remove any pet that the landlord deemed a nuisance).

¶ 34 Having established that Defendants owed Plaintiff a duty of reasonable care in the maintenance of their premises, the dispositive issue is whether Defendants, as landowners, "acted as a reasonable person would under the circumstances." *Shepard*, 270 N.C. App. at 64, 838 S.E.2d at 486 (citation omitted). The facts presented for summary judgment, construed in the light most favorable to Plaintiff, *see Patmore*, 233 N.C. App. at 136, 757 S.E.2d at 304, demonstrate that Defendants acted reasonably.

¶ 35 Plaintiff argues that Defendants breached their duty of reasonable care because they failed to notice "the unreasonably hazardous conditions and Code violations[,]" which "a reasonable inspection would have revealed[.]" In support of this contention, Plaintiff points to his expert's opinion that a person could have discovered the problems with the Steps "us[ing] nothing more than a tape measure or other simple tools to detect them—no specialized equipment or calculations would be needed (with the possible exception of the calculation of tread slope)." Accepting this as true, as we must, Plaintiff nevertheless fails to demonstrate that an owner's failure to measure the width and height of the steps and calculate the tread slope constitutes a breach of the owner's duty "to make a *reasonable* inspection to ascertain the existence of hidden dangers." *McCorkle*, 208 N.C. App. at 714, 703 S.E.2d at 752 (emphasis added).

¶ 36 Rather than measuring the Steps themselves, Defendants relied on a licensed home inspector's expertise and the feedback of those who regularly used the Steps. Before renting the House, Defendants hired a professional home inspection company to evaluate the condition of the House, thereby identifying all problems with the property. The inspector reported only one issue involving the Steps—the loose handrail—and Defendants remedied it swiftly.

¶ 37 Moreover, Defendants never received any complaints from the Rushings or Huneycutt about the Steps, and Sylvia Rushing explicitly stated in her affidavit that she "never had any concerns" about them. Defendant Michael Kiser also visually examined the Steps multiple

times while performing walkthrough inspections in the house before and after changes in tenancy, and he never detected any issues with the Steps. In light of the inspector's report, their tenants' accounts, and their own inspections of the Steps—none of which suggested the presence of the minor Code violations at issue—Defendants had no reason to suspect that the Steps contained "hidden hazards" that required repairs or warnings. *See Shepard*, 270 N.C. App. at 64, 838 S.E.2d at 486 (citation omitted).

¶ 38 Like the restaurant in *Harris*, the House in the case at bar was inspected by a professional inspector. 165 N.C. App. at 497, 598 S.E.2d at 646. And like the defendant in *Harris*, Defendants "w[ere] not aware of any defect or condition existent in the construction of the" Steps. *Id.* Furthermore, "[P]laintiff has failed to produce any evidence to support h[is] allegation" that, absent any reported or identified issues with the Steps, it "would have been necessary or reasonable under the circumstances" for Defendants to measure the Steps after the initial professional home inspection. *Id.* at 500, 598 S.E.2d at 648. Accepting Plaintiff's position would require landowners to double-check the work of their hired professionals, which would unreasonably mandate that landowners perform important safety tasks without the requisite expertise.

¶ 39 Defendants hired a professional inspector, inquired of their tenants about any issues with the property, and performed visual inspections during walkthroughs of the House. Plaintiff has failed to come forward with evidence that Defendants breached their duty "to make a reasonable inspection to ascertain the existence of hidden dangers." *McCorkle*, 208 N.C. App. at 714, 703 S.E.2d at 752. As such, Plaintiff cannot demonstrate that Defendants "negligently failed to correct the condition [of the Steps] after actual or constructive notice of its existence." *Burnham*, 229 N.C. App. at 340, 749 S.E.2d at 80 (citation omitted).

¶ 40 We therefore conclude that the trial court did not err in granting summary judgment in favor of Defendants on this claim. Having so determined, we need not reach Plaintiff's other arguments on appeal.

Conclusion

¶ 41 For the foregoing reasons, we conclude that the trial court did not err by granting summary judgment in favor of Defendants on Plaintiff's claims for negligence *per se* and common-law negligence. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges INMAN and JACKSON concur.

BERENS v. BERENS

[284 N.C. App. 595, 2022-NCCOA-518]

MICHAEL M. BERENS, PLAINTIFF
v.
MELISSA C. BERENS, DEFENDANT

No. COA21-436

Filed 2 August 2022

1. Child Custody and Support—modification—retroactive—payments not past due—prior mandate

Where the trial court retroactively reduced plaintiff-father's child support obligation—based on the fact that one of the parties' children had turned eighteen and graduated from high school—and ordered defendant-mother to pay back to plaintiff-father approximately $41,000, the trial court's order did not violate the plain language of N.C.G.S. § 50-13.10(a) because that section applies only to past-due child support obligations. Furthermore, the trial court did not violate a mandate from a previous Court of Appeals opinion in the matter, which in dicta stated that plaintiff-father "may now" file a motion to modify but did not require him to do so (where he had already filed a motion to modify the temporary child support order).

2. Child Custody and Support—relative ability to provide for children—total monthly income—calculation

The trial court's order modifying plaintiff-father's child support obligation was vacated and remanded as to the portions determining defendant-mother's monthly income where it was unclear from the order and the record how the trial court calculated the total monthly income of defendant, who worked as a real estate broker. Other portions of the order that defendant challenged—not increasing the amount of her reasonable monthly expenses, considering the availability of the children's money contained in their Uniform Transfers to Minors Act accounts to pay for their private school and car insurance, and making certain findings about 529 plans owned by defendant—were affirmed.

Appeal by Plaintiff from order entered 5 January 2021 by Judge Sean P. Smith in Mecklenburg County District Court. Heard in the Court of Appeals 27 April 2022.

James, McElroy & Diehl, P.A., by Gena Graham Morris and Preston O. Odom, III, for Plaintiff-Appellee.

Fox Rothschild LLP, by Troy D. Shelton and Connell and Gelb PLLC by Michelle D. Connell for Defendant-Appellant.

DILLON, Judge.

¶ 1 This appeal is the fifth to our Court in this nine-year old action between these parties concerning the dissolution of their marriage.

¶ 2 This appeal was taken by Defendant Melissa C. Berens ("Mother") from an order (the "2021 Modification Order") entered on 5 January 2021 modifying the obligation of Plaintiff Michael Berens ("Father") to pay child support for the minor children born to the marriage.

I. Background

¶ 3 Father and Mother married in 1989, had six children during the marriage, separated in July 2012, and divorced in December 2014.

¶ 4 In 2013, Father commenced this action, including a claim for child support.

¶ 5 In 2015, the trial court entered a *temporary* child support order, directing Father to pay monthly child support at a certain level.

¶ 6 In May 2017, a trial was held to establish *permanent* child support obligations. At the time of trial, three of the children were still minors. The trial court took the matter under advisement for 14 months, finally entering its permanent child support order in July 2018.

¶ 7 During these 14 months, one of the three minor children turned 18. Accordingly, in May 2018 – two months before the trial court entered its permanent order – Father moved to modify the 2015 temporary order (the order that was still in place), based on the change of circumstance that a child had reached adulthood.

¶ 8 In July 2018, while Father's motion was pending, the trial court entered its permanent order, based on the evidence presented 14 months prior, without taking into account that one of the children had turned 18 years old in the interim. In its 2018 permanent order, the trial court retroactively increased Father's child support obligation from 2013, which required Father to make a lump sum payment to account for the retroactive increase over the previous five years. Both parties appealed the 2018 permanent order, which was the fourth appeal to our Court in this matter.

¶ 9 In January 2020, we issued our opinion in that fourth appeal, affirming the 2018 permanent order. *Berens v. Berens*, 269 N.C. App. 474, 837

S.E.2d 215 (2020) (unpublished) ("*Berens IV*"). On the child support issue, we held, in part, that the trial court did not err by not taking into account that a child had turned 18 while the matter was under advisement, recognizing that "[Father] may now file a motion to modify support in light of another child reaching the age of majority." *Berens IV*, *10.

¶ 10 Eight months later in September 2020, the trial took up Father's May 2018 motion to modify the 2015 *temporary* child support order. On the day of trial, Father filed a supplement to his May 2018 motion to clarify that the order from which he was seeking modification was now the 2018 permanent order.

¶ 11 All the while, Father made the retroactive lump sum payment and continued paying his obligations as directed by the trial court in its July 2018 permanent order.

¶ 12 In January 2021, the trial court entered its 2021 Modification Order, determining that a change of circumstance had indeed occurred in May 2018 when one of the children turned 18 and graduated from high school. Based on this determination, the trial court retroactively reduced Father's child support obligation from June 2018. Thus, the trial court directed Mother to pay back $40,859.28 received from Father since June 2018. Mother timely appealed.

II. Analysis

¶ 13 Mother argues that the trial court erred in two ways, which we address in turn.

A. Modification Order

¶ 14 **[1]** Mother first argues that the trial court had no authority to change the child support payments *retroactively* from June 2018, based on N.C. Gen. Stat. § 50-13.10(a) (2021). She reasons that this statute does not allow a trial court to modify *any* child support obligation which accrued *before* Father filed his modification motion; that Father's motion to modify filed in May 2018 does not qualify as a motion which could trigger the trial court's authority since the motion was to modify the 2015 temporary order which had since been mooted by the 2018 permanent order; and that, therefore, the trial court's authority to modify could not extend to Father's monthly obligation which accrued prior to September 2020, when Father filed his supplemental motion. She concludes that, therefore, we should strike the portion of the 2021 Modification Order which directs her to repay Father $40,859.28 for the "overpayments" he made back to his May 2018 child support payment.

¶ 15 Father essentially argues that his motion to modify filed in May 2018 should be sufficient to trigger Section 50-13.10(a), notwithstanding that the motion was filed before the 2018 permanent order was entered.

¶ 16 We disagree with Mother for two reasons, addressed below.

1. The plain language of Section 50-13.10(a).

¶ 17 First, we so conclude based on a reason not argued by Father: The portion of Section 50-13.10(a) – which prohibits a trial court from retroactively modifying any child support obligation that arose prior to the filing of a motion to modify – does not apply. This statute only applies to "past due" obligations, and Father was not "past due" on any child support obligation.

¶ 18 Prior to the enactment of Section 50-13.10 in 1987, under our common law a trial court had the discretion to "retroactively modify child support arrearages when equitable considerations exist which would create an injustice if modification is not allowed." *Craig v. Craig*, 103 N.C. App. 615, 619, 406 S.E.2d 656, 658 (1991) (citations omitted). In its discretion, a trial court could modify child support obligations accruing before the filing of any motion. Our Supreme Court has essentially recognized this common law authority. Specifically, a case cited in *Craig* for this proposition was affirmed by our Supreme Court; namely, *Gates v. Gates*, 69 N.C. App. 421, 317 S.E.2d 402 (1984), *aff'd per curiam*, 312 N.C. 620, 323 S.E.2d 920 (1985). In *Gates*, we held that a trial court could *retroactively* reduce a parent's child support obligation from the time his minor child turned 18, where no motion had previously been filed, where "it would work an injustice to require [the supporting parent] to pay according to the letter of the [prior] Order[.]" *Id.* at 430, 317 S.E.2d at 408.

¶ 19 In 1987, our General Assembly enacted Section 50-13.10(a), which stripped a trial court of *some* discretion recognized under common law to modify child support obligations accruing prior to the filing of a motion:

> Each past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, or otherwise modified in any way for any reason, in this State or any other state, except that a child support obligation may be modified as otherwise provided by law, and *a vested past due payment is to that extent subject to divestment, if, but only if, a written motion is filed, and due notice is given to all parties*:

> (1) Before the payment is due or
>
> (2) If the moving party is precluded by . . . other compelling reason from filing a motion before the payment is due, then promptly after the moving party is no longer so precluded.

Id. (underline and italics added). The plain language of this statute provides that only "past due" obligations which accrued after the date that the parent seeking modification files and gives notice of his motion may be modified (italicized portion). The statute, though, further provides that a "child support obligation" (without any reference to "past due" obligations) may, otherwise, be modified as "provided by law" (underlined portion), which includes our common law recognized in the precedent from our Court and our Supreme Court cited above.

¶ 20 There is nothing in the record before us which suggests that, at the time the 2021 Modification Order was entered, Father was "past due" in any payment he was required to make under prior orders. Accordingly, even if Father's May 2018 motion was mooted by our affirmance of the 2018 permanent order, the trial court was not prohibited under Section 50-13.10(a) from modifying Father's child support obligation accruing from the time that one of the children was emancipated. And the 2021 Modification Order otherwise supports the retroactive change under our case law: Mother was aware that her child had turned 18 and had graduated high school; Mother was aware in May 2018 that Father was seeking a reduction in his child support obligation based on this change of circumstance; and Mother would not be prejudiced by the retroactive change.

¶ 21 It could be argued that, notwithstanding the plain language of Section 50-13.10, we should consider the stated *purpose* of Section 50-13.10 to strip a trial court's common law authority to modify *any* child support obligation accruing prior to the filing and notice of a motion to modify, whether past due or not. Indeed, our Supreme Court has instructed that "[t]he primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute." *State v. Hooper*, 358 N.C. 122, 125, 591 S.E.2d 514, 516 (2004). But that Court further instructs that "[t]he first step in determining a statute's purpose is to examine the statute's plain language" and that "[w]here the language of the statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Id.* Here, the plain language of the statute only abrogates a trial court's authority with respect to obligations that vested but which have not yet been paid.

¶ 22 It could be argued that our interpretation runs counter to our General Assembly's purpose in enacting Section 50-13.10 in 1987. Specifically, the title of the Act which codified Section 50-13.10 suggests that the Act's purpose was to bring our State into compliance with a federal requirement, enacted by Congress the prior year, in 1986, so that our State would be eligible to receive federal dollars to aid our State's efforts in protecting each child's right to receive support from his/her parents. *See* 42 U.S.C. §§ 651. The 1987 session law enacting Section 50-13.10 is entitled "An Act to Prohibit Retroactive Modification of Past Due Child Support Payments and to Give Vested Past Due Child Support the Judgment Effect *Required by Federal Law*." 1987 N.C. Sess. Laws Ch. 739 (emphasis added).

¶ 23 It is not clear, however, that the plain language of our statute would run afoul of the federal law for which it was adopted. The federal law at issue is known as Bradley Amendment, codified in 42 U.S.C. § 666(a)(9) (1986). This Amendment provides that for a state to receive the federal dollars, it must implement

> (9) Procedures which require that any payment or installment of support under **any child support order** …
>
> > (C) not [be] subject to retroactive modification by such State or by any other State;
> >
> > except that such procedures may permit modification with respect to any period during which there is pending a petition for modification, **but only from the date that notice of such petition has been given**, either directly or through the appropriate agent, to the obligee or (where the obligee is the petitioner) to the obligor.

Id. (emphasis added). It could be argued that the plain language of the Bradley Amendment requires a State desiring federal dollars to prohibit "any" child support obligation accruing prior to the filing of a petition from being modified, whether or not that "payment or installment" has already been paid. Under this interpretation, one might argue that we should then construe Section 50-13.10(a) contrary to its plain language by prohibiting a judge from modifying "any" payment (rather than just "past due" payments) accruing before the filing of the motion.

¶ 24 But there is strong evidence that Congress' *purpose* in enacting the Bradley Amendment was to prevent a participating State from modifying arrearages.[1]

¶ 25 In sum, to construe Section 50-13.10 as preventing trial courts from retroactively modifying even non-past due payments accruing before the filing of a motion, we would have to ignore the plain language of our statute and the purpose of the Bradley Amendment.

2. Mandate Rule

¶ 26 Mother argues that the trial court erred by issuing the Modification Order contrary to certain language in *Berens IV*, which she asserts amounts to a mandate.

¶ 27 Our Court reviews issues regarding the interpretation of its own mandate *de novo*. *State v. Watkins*, 246 N.C. App. 725, 730, 783 S.E.2d 279, 282 (2016).

¶ 28 The mandate rule instructs that "on remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court." *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962) (Parker, J., concurring). The mandate itself is limited to holdings made by this Court in response to issues presented on appeal; any other discussions made within the opinion is *obiter dicta*. *Id.* at 11, 125 S.E.2d at 306.

¶ 29 Mother's argument is mooted by our conclusion that Section 50-13.10's abrogation of a trial court's common law authority only applies to past due obligations. But even if Section 50-13.10 were applicable, the mandate rule did not bar the trial court's consideration of Father's 2018 motion, as that motion was not before our Court in *Berens IV*.

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1. For additional context, the U.S. Senate Report explains "[w]hat the Committee is seeking to prevent is the purposeful noncompliance by the noncustodial parent, because of his hope that his child support obligation will be retroactively forgiven" S. Rep. No. 348, p. 155 (1986). Further, the Congressional Research Service summarizes the Bradley Amendment's purpose as preventing "the retroactive State modification of child support **arrearages**… a state cannot modify **delinquent** child support obligations." Cong. Rsch. Serv., RS20642, The Bradley Amendment: Prohibition Against Retroactive Modification of Child Support Arrearages 1 (2000) (emphasis added). This purpose is appropriately reflected in legislation enacted in other States, which supplement "arrearage" and "due and unpaid" in place of "past due." See Alaska R. Civ. Proc. 90.3 ("Child support arrearage may not be modified retroactively"); and N.D. Cent. Code, 14-08.1-05 ("Any order directing payment or installment of money for the support of a child is, on and after the date it is due and unpaid [and] not subject to retroactive modification").

¶ 30 The language Mother cites in our *Berens IV* opinion states, "[Father] *may now file* a motion to modify support in light of another child reaching the age of majority." This sentence is not a mandate, but rather it is *dicta*.

¶ 31 There was no mandate in *Berens IV* which *required* Father to file a new motion. Accordingly, the trial court did not violate the mandate rule.

B. Sufficiency of the Evidence

¶ 32 **[2]** Mother makes several arguments concerning the trial court's calculation of Father's modified child support obligation.

¶ 33 Child support orders entered by a trial court are accorded substantial deference by appellate courts, and our review is limited to a determination of whether there was a clear abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Under this standard of review, the trial court's ruling "will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 777, 324 S.E.2d at 833.

¶ 34 Also, we note when a trial court is faced with a child support case falling outside the North Carolina Child Support Guidelines,[2] there is not one formula a court must follow to determine the reasonable needs of a child. *Bishop v. Bishop*, 275 N.C. App. 457, 463, 853 S.E.2d 815, 820 (2020). Instead, the judge has the opportunity to consider the interplay of factors of a particular case. *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 867 (1985). "Computing the amount of child support is normally an exercise of sound judicial discretion, requiring the judge to review all of the evidence before him. Absent a clear abuse of discretion, a judge's determination of what is a proper amount of support will not be disturbed on appeal." *Id.* at 69, 326 S.E.2d at 868.

¶ 35 In a case for child support, the trial court must make specific findings and conclusions. *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 708, 188-89 (1980). The purpose of this requirement is to allow a reviewing

2. Child support cases are outside the North Carolina Child Support Guidelines when the parties' incomes are above the income range addressed by the Guidelines or "when the trial court determines deviation from the Guidelines is necessary because 'after considering the evidence, the Court finds by the greater weight of the evidence that the application of the Guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate.' " *Kincheloe v. Kincheloe*, 278 N.C. App. 62, 68-69, 862 S.E.2d 28, 34 (2021) (quoting N.C. Gen. Stat. § 50-13.4(c)).

court to determine from the record whether a judgment and the legal conclusions which underlie it represent a correct application of the law. *Id*.

1. Mother's Reasonable Monthly Needs

¶ 36 Mother argues the trial court erred by not increasing the amount of her reasonable monthly expenses based on evidence that the monthly debt service on her home had greatly increased after she refinanced the mortgage sometime after the 2017 hearing on permanent child support. The trial court, though, found that Mother's decision to refinance was discretionary and unnecessary. As the factfinder, the trial court is the sole judge on credibility. Accordingly, we affirm the trial court's findings and conclusions in this regard.

2. UTMA Accounts

¶ 37 Mother contends the trial court erred by considering the availability of the children's money contained in their UTMA (Uniform Transfers to Minors Act) accounts to pay for the children's private school tuition and car insurance. The trial court provided that "the UTMA account balance in excess of $234,000.00 was considered in removing the claimed monthly expense for the children's Charlotte Latin School tuition and car insurance expenses."

¶ 38 Our General Assembly directs that the trial court calculating child support shall give "due regard to the estates, earnings, conditions, accustomed standard of living *of the child* and the parties" when making its calculations. N.C. Gen. Stat. § 50-13.4(c) (emphasis added).

¶ 39 Here, the children's UTMA accounts were funded largely by Father. The trial court already determined in its 2018 permanent child support order that the children's private school tuition was not to be included within the children's reasonable expenses, as it could be paid from the children's UTMA accounts. And this order was affirmed by our Court in *Berens IV*. We, therefore, conclude that the trial court did not abuse its discretion in its 2021 Modification Order in this regard.

3. 529 Plan Accounts

¶ 40 Mother argues that the trial court erred in making certain findings regarding the 529 Plans *owned by Mother*. Indeed, it is Mother who was awarded the funds in the 529 Plans as part of the equitable distribution of marital assets. She is free to do with the funds in those Plans as she sees fit. Of course, if she chooses to use the funds for something other than the educational expenses of her children, she may owe a tax penalty.

¶ 41 In any event, the trial court did not order Mother to use her funds currently in the 529 Plans to pay for the children's education. And it was otherwise appropriate for the trial court to give due regard to Mother's estate in setting the child support obligations of the parties.

4. Mother's Income

¶ 42 Mother's final contention is that the trial court erred by relying on Father's testimony regarding employment and investment income.

¶ 43 In a child support case falling outside the Guidelines, the trial court must determine the relative ability of the parties to provide for the children. *Smith*, 247 N.C. App. at 145-46, 786 S.E.2d at 21. Any order modifying child support should include specific findings to address each parent's financial position. *Crews v. Paysour*, 261 N.C. App. 557, 564, 821 S.E.2d 469, 474 (2018).

¶ 44 Child support obligations are determined by a party's actual income at the time the order is modified. *Ellis v. Ellis*, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997). "In orders of child support, the court should make findings of specific facts (e.g., incomes, estates) to support a conclusion as to the relative abilities of the parties to provide support." *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468-469, 1978) (quoting N.C. Gen. Stat. § 50-13.4).

¶ 45 The trial court found that the reasonable monthly needs of the minor children to be $4,765.98 and that Father should pay child support of $2,836.64 monthly, or about 60% of these expenses. This makes Mother responsible for $1,929.64 monthly (or about 40%) of these expenses. The trial court found that Mother's monthly income "beginning October 1, 2020 is $17,992.15."

¶ 46 The trial court found that this number included $4,195 in monthly alimony paid to her by Father and $1,570 monthly income based on the trial court's finding that Mother earns 3% interest off her liquid assets. It is unclear from the Modification Order or from the evidence how the trial court arrived at the other $12,237 of monthly income. There was certainly evidence regarding the gross commissions earned by Mother as a real estate broker. However, there was evidence that some of these gross commissions were shared with other brokers and/or the brokerage company Mother worked under. Also, the amount of legitimate business expenses Mother incurred to earn those commissions is unclear. Father argues that his estimate of Mother's gross income was close to that offered in Mother's evidence. But it is clear that Father's estimate failed to take into account the reality that brokers split the brokerage

fee earned on the sale of a home with the brokerage firm they work for and with other brokers. We, therefore, vacate and remand this portion of the trial order establishing the child support obligations from 1 October 2020 going forward. On remand, the trial court is to make findings regarding Mother's other income and, based on those findings, determine the portion of the minor children's reasonable needs she should be responsible for.

III. Conclusion

¶ 47 We vacate the portions of the Modification Order determining Mother's monthly income as of 1 October 2020 and establishing Father's child support obligations from that date going forward. We remand for further findings and conclusions on those issues. On remand, the trial court may, in its discretion, hear additional evidence.

¶ 48 We, otherwise, affirm the remainder of the trial court's Modification Order.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

Judges ZACHARY and MURPHY concur.

GERALDINE M. CROMARTIE, Employee, Plaintiff
v.
GOODYEAR TIRE & RUBBER COMPANY, INC., Employer, LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants

No. COA21-236

Filed 2 August 2022

1. Workers' Compensation—extent of disability—ripeness—maximum medical improvement

In a workers' compensation case, in which a tire manufacturing company (defendant) sought to terminate compensation payments to an employee (plaintiff) after paying her temporary disability benefits for eight years because of a work-related injury, the parties' dispute regarding the extent of plaintiff's disability was ripe for review by the Industrial Commission where competent evidence indicated that plaintiff's injury had reached "maximum medical improvement."

2. Workers' Compensation—total disability—lack of factual findings

After a tire manufacturing company (defendant) paid temporary disability benefits to an employee (plaintiff) for eight years following her work-related injury, the Industrial Commission's order denying defendant's application to terminate those payments was remanded because the Commission failed to make specific factual findings addressing whether plaintiff remained totally disabled—a critical issue affecting her right to continued compensation.

3. Workers' Compensation—disability—entitlement to compensation—suitability of alternative employment

In a workers' compensation case in which a tire manufacturing company (defendant) sought to terminate compensation payments to an employee (plaintiff) after paying her temporary disability for eight years because of a work-related injury and then offering her an alternative position, which she refused, the Industrial Commission—in an order denying defendant's application to terminate the payments—did not err in determining that the alternative position did not constitute "suitable employment" under the Worker's Compensation Act, which provides that an injured employee who refuses "suitable employment" is not entitled to compensation. Competent evidence supported the Commission's finding that the alternative position did not accommodate plaintiff's permanent work restrictions resulting from her injury, and any evidence to the contrary could not be reweighed on appeal.

Appeal by Defendants from opinion and award entered 24 November 2020 and order entered 23 December 2020 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 8 March 2022.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner and David P. Stewart, and Jay A. Gervasi, Jr., for Plaintiff-Appellee.

Young Moore and Henderson, P.A., by Angela Farag Craddock, for Defendants-Appellants.

INMAN, Judge.

¶ 1 A tire manufacturing company and its insurance carrier (collectively, "Defendants") appeal from an order of the Full Commission of the

North Carolina Industrial Commission (the "Full Commission") denying their application to terminate compensation payments to an employee after paying her temporary disability over the last eight years because she sustained an injury to her hand in the course of her employment. Defendants argue the Full Commission: (1) failed to address whether the employee presented competent evidence to support a finding of total disability as a result of her work injury; and (2) erred in concluding the alternative position was not suitable employment for the employee. After careful review of the record and our precedent, we remand the opinion and award of the Full Commission for additional findings.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶ 2 The record below discloses the following:

¶ 3 Plaintiff-Appellee Geraldine M. Cromartie ("Ms. Cromartie") had worked for Defendant-Appellant Goodyear Tire and Rubber Co. ("Goodyear") for over 16 years as a machine operator in Goodyear's tire production facility in Fayetteville, North Carolina when she injured her hand on 30 May 2014. While performing her duties as a machine operator, Ms. Cromartie sustained a severe laceration to her right hand, requiring sutures. She developed a painful raised scar that did not heal.

¶ 4 Ms. Cromartie initially received a medical recommendation to refrain from work until 11 July 2014, so she was placed off-duty and began receiving temporary total disability payments of $904.00 per week. Before her injury, Ms. Cromartie had worked up to 42 hours per week and earned an average weekly wage of $1,413.33. Ms. Cromartie returned to work in her machine operator position on schedule, with no restrictions.

¶ 5 After returning to work, Ms. Cromartie complained of continued pain and swelling from her scar. Goodyear sent Ms. Cromartie to Doctor James Post ("Dr. Post"). Dr. Post noted Ms. Cromartie experienced "knifelike pain" in the back of her right hand when she attempted to grip anything with that hand. He determined Ms. Cromartie had a "right thumb symptomatic hypertrophic scar with distal neuroma formation of the branch of the radial sensory nerve." Dr. Post recommended Ms. Cromartie return to work with restrictions—no lifting anything greater than five pounds and no forceful gripping for four weeks. On 21 July 2014, Goodyear placed Ms. Cromartie out of work because Goodyear could not accommodate her work restrictions. Goodyear reinstated Ms. Cromartie's temporary disability compensation at that time.

¶ 6 Ms. Cromartie returned to Dr. Post for treatment several times in August and September and on 11 September 2014, Dr. Post performed a

scar revision with excision procedure on Ms. Cromartie's right hand. Dr. Post recommended different work restrictions: no lifting anything greater than five pounds and no pushing or pulling greater than 40 pounds.

¶ 7 On 14 October 2014, Ms. Cromartie returned to a restricted duty assignment teaching safety courses at Goodyear to accommodate her work restrictions. On 3 December 2014, Dr. Post modified her work restrictions once more: no lifting greater than 15 pounds and no pushing or pulling greater than 40 pounds. He also ordered that Ms. Cromartie attend physical therapy sessions through 5 January 2015. Ms. Cromartie returned to work light duty on 3 February 2015. As of 3 March 2015, Dr. Post detected no significant improvement in Ms. Cromartie's symptoms, noted a diagnosis of "neuroma," and ordered she complete a functional capacity evaluation ("FCE").

¶ 8 On 14 April 2015, Lauri Jugan, PT, ("Ms. Jugan") conducted an FCE on Ms. Cromartie but was unable to determine Ms. Cromartie's functional capabilities because she had "failed to give maximum voluntary effort." On 21 April 2015, Dr. Post determined Ms. Cromartie had reached maximum medical improvement and rated her right upper extremity seven percent permanent partial disability. Noting the inconclusive FCE, Dr. Post assigned Ms. Cromartie permanent work restrictions of no lifting greater than 20 pounds and no repetitive forceful gripping or grasping. Ms. Cromartie continued working in the light duty position, and Goodyear did not offer her a different permanent position.

¶ 9 In May 2015, Goodyear and Ms. Cromartie entered into a Consent Agreement, approved by the Deputy Commissioner, authorizing a one-time evaluation with plastic surgeon Doctor Anthony DeFranzo ("Dr. DeFranzo") and requiring Ms. Cromartie to engage in a repeat FCE of her hand. Per the agreement, Defendants acknowledged Ms. Cromartie "sustained a compensable injury by accident to her right hand pursuant to [N.C. Gen. Stat. §] 97-18(b)." In August 2015, Dr. DeFranzo evaluated Ms. Cromartie, diagnosed her with complex regional pain syndrome, and suggested sedentary work with no lifting over 10 pounds.

¶ 10 On 30 September 2015, Ms. Jugan repeated the FCE on Ms. Cromartie, and determined, among other things, that Ms. Cromartie's right hand was limited to 20 pounds lifting, 30 pounds pulling, 39 pounds pushing, and 12.5 pounds lifting above the shoulder, demonstrating her capacity for a "[m]edium demand vocation."

¶ 11 On 3 November 2015, Goodyear sent Ms. Cromartie for an independent medical evaluation with Doctor Richard Ramos ("Dr. Ramos"). Dr. Ramos diagnosed her with neuropathic pain of her right hand and

symptoms of complex regional pain syndrome and suggested she would benefit from pain management medication. Goodyear reinstated temporary total disability compensation on 10 November 2015.

¶ 12 Ms. Cromartie continued treatment with Dr. Ramos and Dr. Post over the next two years. In June 2017, Dr. Post reaffirmed he could not offer Ms. Cromartie further medical treatment and maintained the same permanent work restrictions he had previously prescribed. In the same month, Dr. Ramos determined Ms. Cromartie was at maximum medical improvement and released her from his care.

¶ 13 Goodyear's job-matching contractor identified a position in compliance with Dr. Ramos's work restrictions for Ms. Cromartie: "Production Service Truck Carcasses" ("Carcass Trucker"). The position primarily consisted of driving a truck to deliver parts of tires, referred to as "carcasses," to and from building stations and storage over a 12-hour shift. In particular, the position required driving the truck for 12 hours, rarely lifting up to 25 pounds when carcasses fell from the trailer, and 30 pounds of force, which can be split between each hand by 15 pounds lifting and 15 pounds pushing, to replace the truck's battery.

¶ 14 In February 2018, Goodyear requested Dr. Ramos review and approve the position if he agreed the position was within Ms. Cromartie's work restrictions. On 1 March 2018, Dr. Ramos approved the position for Ms. Cromartie, and on 6 March 2018, Goodyear formally offered Ms. Cromartie a job as Carcass Trucker. She refused the offer. On 16 March 2018, Defendants filed a "Form 24 Application to Terminate or Suspend Payment of Compensation" with the Industrial Commission, asserting Ms. Cromartie unjustifiably refused suitable employment.

¶ 15 On 29 March 2018, Ms. Cromartie returned to Dr. DeFranzo, the plastic surgeon who had evaluated her three years earlier, with a Workers' Compensation Medical Status Questionnaire. Dr. DeFranzo assigned permanent restrictions of "light duty" and "sedentary" work that required Ms. Cromartie not to lift more than 10 pounds. On 26 April 2018, the Special Deputy Commissioner denied Defendants' Form 24 application, concluding Ms. Cromartie was justified in refusing the Carcass Trucker position in part because it did not fall within the sedentary work limitations assigned by Dr. DeFranzo. Defendants appealed the order denying suspension of Ms. Cromartie's benefits and contested Ms. Cromartie's disability.

¶ 16 Upon Goodyear's request, on 26 September 2018, Ms. Cromartie underwent an additional examination with Doctor Marshall Kuremsky ("Dr. Kuremsky"). Dr. Kuremsky "subjectively" believed Ms. Cromartie

could return to work without restrictions after confirmation from a third FCE and that she could perform the Carcass Trucker position. Based on Dr. Kuremsky's recommendation, Goodyear again offered Ms. Cromartie the position of Carcass Trucker on 2 October 2018. Ms. Cromartie again refused the position.

¶ 17 One month later, on 5 November 2018, Goodyear approved Ms. Cromartie's application for medical retirement. Ms. Cromartie was eligible for medical retirement because she had already qualified for Social Security Disability.

¶ 18 In February 2019, Defendants' appeal of the Special Deputy Commissioner's order came before the Deputy Commissioner for an evidentiary hearing. The Deputy Commissioner filed an opinion and award on 10 January 2020, concluding that Ms. Cromartie was disabled following her receipt of Social Security Disability benefits and Goodyear's negotiated pension disability plan. The Deputy Commissioner gave "great weight" to the medical opinion of Dr. DeFranzo, compared to the opinions of the other medical experts, and his recommendation that Ms. Cromartie should be limited to sedentary work and concluded the Carcass Trucker position was not suitable employment for Ms. Cromartie. Defendants appealed to the Full Commission.

¶ 19 Following a hearing on 16 June 2020, the Full Commission filed its opinion and award on 24 November 2020. The Full Commission afforded the greatest weight to the expert opinion of treating surgeon Dr. Post and found that (1) Ms. Cromartie had reached maximum medical improvement on 21 April 2015 and (2) her permanent work restrictions were those assigned by Dr. Post on that date, including no lifting over 20 pounds with her right arm and no repetitive forceful gripping or grasping with her right hand. The Full Commission found and then concluded that the Carcass Trucker position "is outside of [Ms. Cromartie]'s permanent restrictions because on its face, without any of the modifications explained . . . , the job requires lifting over 20 pounds." It further concluded the Deputy Commissioner properly denied Defendants' application to terminate compensation payments because Defendants failed to demonstrate Ms. Cromartie "has the ability to earn pre-injury wages in the same employment after reaching maximum medical improvement."

¶ 20 On 4 December 2020, Defendants filed a motion for reconsideration, asserting the Full Commission had failed to enter findings of fact and conclusions of law addressing the issue of whether Ms. Cromartie remained totally disabled. The Full Commission denied Defendants' motion on 23 December 2020. Defendants appeal the Full Commission's

opinion and award and its order denying their motion for reconsideration to this Court.

II. ANALYSIS

A. Standard of Review

¶ 21 In our review of an award from the Full Commission, we are limited to a determination of "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings." *McAuley v. N.C. A&T State Univ.*, 280 N.C. App. 473, 2021-NCCOA-657, ¶ 8 (citation omitted). "As long as the Commission's findings are supported by competent evidence of record, they will not be overturned on appeal." *Rackley v. Coastal Painting*, 153 N.C. App. 469, 472, 570 S.E.2d 121, 124 (2002). The Commission's "conclusions of law are reviewable *de novo*." *Whitfield v. Lab. Corp. of Am.*, 158 N.C. App. 341, 348, 581 S.E.2d 778, 783 (2003) (citation omitted).

¶ 22 "[T]he Workers' Compensation Act should be liberally construed, whenever appropriate, so that benefits will not be denied upon mere technicalities or strained and narrow interpretations of its provisions." *Booth v. Hackney Acquisition Co.*, 270 N.C. App. 648, 653, 842 S.E.2d 171, 175 (2020) (citation omitted).

B. Disability

¶ 23 **[1]** As an initial matter, Ms. Cromartie alleges the issue of her disability is not yet ripe. We disagree.

¶ 24 "[O]nce an injured employee reaches maximum medical improvement, either party can seek a determination of permanent loss of wage-earning capacity." *Pait v. Se. Gen. Hosp.*, 219 N.C. App. 403, 412, 724 S.E.2d 618, 625 (2012) (quotation marks and citation omitted). In *Pait*, this Court held that so long as competent evidence before the Commission indicated that the worker's condition had reached maximum medical improvement, "the parties' dispute as to the extent of plaintiff's disability and defendants' liability therefor was ripe for the Commission's hearing." *Id.*

¶ 25 In Finding of Fact 34, the Full Commission determined that Ms. Cromartie had reached maximum medical improvement more than seven years ago, in April 2015. The issue of Ms. Cromartie's disability became ripe for determination by the Commission on the date she reached maximum medical improvement. *See id.* We now address the merits of Defendants' arguments.

1. Insufficient Findings about Ms. Cromartie's Disability

¶ 26 **[2]** Defendants assert the Full Commission erred in failing to determine Ms. Cromartie's total disability status. We agree and remand this matter to the Commission to make necessary factual findings. The Full Commission, in its discretion, may make additional findings based on the record before it or receive additional evidence.

¶ 27 When reviewing workers' compensation claims, "[t]he Full Commission must make definitive findings to determine the critical issues raised by the evidence[.]" *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 139, 502 S.E.2d 58, 61-62 (1998) (quotation marks and citation omitted). "[W]hile the Commission is not required to make findings as to each fact presented by the evidence, it is required to make specific findings with respect to crucial facts upon which the question of Plaintiff's right to compensation depends." *Powe v. Centerpoint Human Servs.*, 226 N.C. App. 256, 262, 742 S.E.2d 218, 222 (2013) (cleaned up). When "the question of [Plaintiff's] disability affects Plaintiff's right to compensation, the Commission is required to make explicit findings on the existence and extent of that disability when it is in dispute." *Id.* If the Full Commission fails to make specific findings of fact, we must remand the issue to the Commission for a determination. *See Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 708, 599 S.E.2d 508, 513 (2004) (remanding the issue of disability to the Commission "for the purpose of making adequate findings of fact").

¶ 28 Our General Statutes define disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2021). To support an award of disability compensation, an employee must prove:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). An employee may satisfy this burden in one of the following ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work

> related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted). Once the employee has established the existence and extent of disability, the burden shifts to the employer to demonstrate that it has offered the employee suitable employment. *See Smith v. Sealed Air Corp.*, 127 N.C. App. 359, 361, 489 S.E.2d 445, 446-47 (1997).

¶ 29 Defendants compare this case to *Powe*. In *Powe*, the employer acknowledged that a compensable injury occurred and commenced payment of temporary total disability, but the employer disputed "the continuing status of Plaintiff's disability." 226 N.C. App. at 261-62, 742 S.E.2d at 222. Though the issue of disability was before the Full Commission, it made "insufficient factual findings" and "reached no conclusions on the disputed question of disability." *Id.* at 262, 742 S.E.2d at 222. We remanded the case to the Full Commission to enter "explicit findings on the existence and extent of [Plaintiff's] disability." *Id.* at 262, 264, 742 S.E.2d at 222-23.

¶ 30 In this case, like the employer in *Powe*, Goodyear has acknowledged that Ms. Cromartie had suffered a compensable injury and paid her temporary total disability. However, like the employer in *Powe*, throughout "every level" of litigation, *id.* at 262, 742 S.E.2d at 222, Defendants have disputed whether Ms. Cromartie remained totally disabled. Similar to the Full Commission in *Powe*, even though the critical issue of disability was before the Full Commission in this case, the Commission made no findings or conclusions about whether Ms. Cromartie remained disabled.[1] Since the question of Ms. Cromartie's disability affects her right

1. We note that while the Full Commission did not include explicit findings on the existence or extent of Ms. Cromartie's disability, the Deputy Commissioner did include findings and conclusions of law regarding Ms. Cromartie's disability in its decision:

to compensation, the Commission must make express findings about Ms. Cromartie's disability status. *See id.*

¶ 31 We remand to the Full Commission for it to enter "explicit findings on the existence and extent of [Ms. Cromartie's] disability[.]" *Id.*

2. Suitability of Alternative Employment Position

¶ 32 **[3]** Goodyear further asserts the Full Commission erred in determining the Carcass Trucker position was not suitable employment for Ms. Cromartie. We disagree.

¶ 33 We have defined suitable employment as "any job that a claimant is capable of performing considering [her] age, education, physical limitations, vocational skills and experience." *Griffin v. Absolute Fire Control, Inc.*, 269 N.C. App. 193, 200, 837 S.E.2d 420, 425 (2020) (citation omitted). "If an injured employee refuses suitable employment . . . , the employee shall not be entitled to any compensation[.]" N.C. Gen. Stat. § 97-32 (2021). The burden of proof is first on the employer "to show that an employee refused suitable employment." *Wynn v. United Health Servs./Two Rivers Health-Trent Campus*, 214 N.C. App. 69, 74, 716 S.E.2d 373, 379 (2011) (citation omitted). "Once the employer makes this showing, the burden shifts to the employee to show that the refusal was justified." *Id.* (citation omitted).

¶ 34 In its opinion and award, the Full Commission concluded, "Defendant-Employer's Production Service Truck Carcasses position, unless modified in several aspects, is not within Plaintiff's physical limitations. . . . and is therefore not suitable post-MMI employment." We hold the Full Commission's findings support its conclusion about the suitability of the Carcass Trucker position. *See McAuley*, ¶ 8.

¶ 35 Relying on Dr. Post's testimony and giving less weight to the testimony from other doctors, the Full Commission found by a preponderance of the evidence that "[Ms. Cromartie] reached [maximum medical

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> 5. . . . Based on the preponderance of the evidence, the undersigned concludes that Employee has met her burden of proving disability based upon the medical evidence in this as well as the fact that she qualified for Social Security Disability benefits and the defendant-employer's negotiated Pension Disability Plan, based upon the determination that she was "permanently incapacitated" and "totally disabled."

The Deputy Commissioner's findings and conclusions are, however, superseded by the Full Commission's findings and conclusions. *See Jenkins v. Piedmont Aviation Servs.*, 147 N.C. App. 419, 427, 557 S.E.2d 104, 109 (2001) ("The deputy commissioner's findings of fact are not conclusive; only the Full Commission's findings of fact are conclusive." (citation omitted)).

improvement] on April 21, 2015 and her permanent work restrictions are the restrictions assigned by Dr. Post on that date, including no lifting over 20 pounds with her right arm and no repetitive forceful gripping or grasping with her right hand." The Full Commission determined the demands of the Carcass Trucker position exceeded the restrictions prescribed by Dr. Post:

> [T]he Production Service Truck Carcasses position is outside of [Ms. Cromartie]'s permanent restrictions because on its face, without any of the modifications explained by Mr. Murray or Ms. Flantos, the job requires lifting over 20 pounds. Accordingly, the Full Commission further finds that [Goodyear's] March 16, 2018 Form 24 was properly disapproved because the job [Ms. Cromartie] refused was not within her restrictions.

¶ 36 These findings were supported by competent evidence. *See id.* The Carcass Trucker position required 12 hours of driving while gripping the steering wheel, occasionally lifting 25 pounds, and pushing or pulling 30 pounds total. During his testimony, Dr. Ramos noted the requirements of this position did not comply with Ms. Cromartie's permanent work restrictions. Both Dr. DeFranzo and Dr. Post testified that they did not approve the Carcass Trucker position because it did not comply with Ms. Cromartie's permanent work restrictions. Despite Goodyear's plea to the contrary, we cannot reweigh the evidence. *See Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) ("[T]his Court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." (quotation marks and citation omitted)); *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) ("The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." (citation omitted)).

III. CONCLUSION

¶ 37 For the reasons set forth above, we remand to the Full Commission for further findings not inconsistent with this opinion.

REMANDED.

Judges MURPHY and ARROWOOD concur.

GRAY v. E. CAROLINA MED. SERVS., PLLC

[284 N.C. App. 616, 2022-NCCOA-520]

MELVA LOIS BANKS GRAY, AS ADMINISTRATRIX OF THE ESTATE OF STEVEN PHILIP WILSON, PLAINTIFF
v.
EASTERN CAROLINA MEDICAL SERVICES, PLLC, ET AL., DEFENDANTS

No. COA20-898

Filed 2 August 2022

1. Medical Malpractice—Rule 9(j) certification—expert—reasonable expectation of qualification—similar specialty and patients

In a medical malpractice action, where a deceased prison inmate's estate (plaintiff) alleged that two doctors and their medical practice provided deficient care to the inmate for pneumonia, the trial court erred in dismissing plaintiff's complaint for failure to substantively comply with Civil Procedure Rule 9(j) based on factual findings that impermissibly drew inferences against plaintiff and addressed whether plaintiff's Rule 9(j) expert qualified as an expert witness under Evidence Rule 702 rather than whether plaintiff could reasonably have expected her expert to qualify as such. Plaintiff's expert was a pulmonologist, was board certified in internal medicine and pulmonary disease, regularly treated pneumonia patients, and spent the year before the inmate's pneumonia treatment working in a specialty that included caring for pneumonia patients; thus, it was reasonable for plaintiff to expect that her expert qualified as one who practiced in a similar specialty to defendant-doctors—internal medicine practitioners who treated pneumonia patients—and had experience treating similar patients.

2. Nurses—medical malpractice action—Rule 9(j) certification—expert testimony—standard of care for nurses

In a medical malpractice action, where a deceased prison inmate's estate (plaintiff) alleged that five nurses (defendants) provided deficient care to the inmate for pneumonia, the trial court erred in dismissing plaintiff's complaint for failure to substantively comply with Civil Procedure Rule 9(j) based on factual findings that impermissibly drew inferences against plaintiff. Although plaintiff's expert—a pulmonologist who regularly treated pneumonia patients—did not work in the same type of setting as defendants did, the expert had experience supervising and working with nursing staff to treat pneumonia patients while practicing in a similar specialty to defendants; therefore, it was reasonable for plaintiff to

expect that her expert would qualify under Evidence Rule 702 to testify about the applicable standard of care for nurses treating pneumonia patients.

Appeal by Plaintiff from order entered 7 July 2020 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 3 November 2021.

The Duke Law Firm NC, by W. Gregory Duke, for Plaintiff-Appellant.

Batten Lee, PLLC, by Gary Adam Moyers and C. Houston Foppiano, for Defendants-Appellees Eastern Carolina Medical Services, PLLC, and Mark Cervi, M.D.

Walker, Allen, Grice, Ammons, Foy, Klick & McCullough, L.L.P., by Elizabeth P. McCullough, for Defendant-Appellee Gary Leonhardt, M.D.

Huff Powell & Bailey PLLC, by Barrett Johnson and Katherine Hilkey-Boyatt, for Defendants-Appellees Carol Lee Keech, aka Carol Lee Oxendine; Charles Ray Faulkner, R.N.; Kimberly Jordan, R.N.; and Jacqueline Lymon, L.P.N.

Michael, Best, & Friedrich, LLP, by Carrie E. Meigs and Justin G. May, for Defendant-Appellee Donna McLean.

COLLINS, Judge.

¶ 1 Melva Lois Banks Gray ("Plaintiff") brings this action for medical malpractice as Administratrix of the Estate of Steven Philip Wilson. Plaintiff argues that the trial court erred by dismissing her complaint for failure to substantively comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. Because Plaintiff could reasonably have expected her 9(j) expert to qualify as an expert witness under North Carolina Rule of Evidence 702, we reverse the trial court's order and remand for further proceedings.

I. Factual and Procedural History

¶ 2 Plaintiff seeks redress for the allegedly deficient medical care Steven Philip Wilson received while in the custody of the Pitt County Detention Center ("PCDC") between 22 September 2016 and 16 November 2017. Wilson was detained at the PCDC on 22 September 2016. He had been

diagnosed with pneumonia and prescribed antibiotics the week before he was detained. Wilson submitted at least nine Inmate Requests for Sick Call Visits between 23 September 2016 and 10 November 2016. Wilson was experiencing symptoms including coughing with mucus, congestion, fever, wheezing, lethargy, coarse breathing, flushed face, trouble sleeping, back pain, and elevated heart rate. He was prescribed an inhaler, over-the-counter pain medicine, and antibiotics. Wilson told medical staff that he was not feeling better, and progress reports indicate that his condition continued to worsen during those two months.

¶ 3 Wilson was transferred to the Greene County Jail on 10 November 2016. Upon his admission, Wilson had a heavy cough and complained that he was short of breath, winded, and that the left side of his rib cage hurt. He was transported to Lenoir Memorial Hospital on 11 November 2016. At Lenoir Memorial Hospital, Wilson was noted to be in moderate respiratory distress and was diagnosed with acute left-sided empyema and sepsis secondary to left-sided empyema. He was transported to Vidant Medical Center ("Vidant") where he stayed from 11 November 2016 until 16 November 2016.

¶ 4 At Vidant, Wilson was diagnosed with septic shock due to staphylococcus, necrotizing pneumonia, acute respiratory failure, and acute kidney failure. Wilson was intubated, placed on a ventilator, given a tracheostomy, and had his left lung surgically removed. Wilson was discharged from Vidant on 16 December 2016 and incarcerated with the North Carolina Department of Corrections ("NCDC"). He was released from the NCDC on 16 November 2017. Wilson died on 18 October 2018 from an apparently unrelated drug overdose.

¶ 5 Plaintiff commenced this action by filing a complaint on 19 June 2019. Plaintiff named as defendants Eastern Carolina Medical Services ("ECMS") and two physicians, Dr. Gary Leonhardt and Dr. Mark Cervi. PCDC contracted with ECMS to provide medical care to persons detained at PCDC. ECMS was responsible for, among other things, physician services rendered to inmates, and diagnostic examinations, medical treatment, and health care services for inmates. Dr. Leonhardt is a co-founder, owner, and staff physician at ECMS. He specializes in psychiatry and addiction medicine, practices as a general practitioner, and has experience in internal medicine. Dr. Cervi is a co-founder, director, and medical physician at ECMS. He specializes in internal medicine. Dr. Leonhardt and Dr. Cervi provided primary care to individuals detained at PCDC and supervised the ECMS medical staff during the time Wilson was an inmate at PCDC.

¶ 6 Plaintiff also named as defendants the following ECMS nurses who treated Wilson: Donna McLean, a nurse Practitioner ("NP"); Carol Keech, a licensed practical nurse ("LPN"); Charles Faulkner, a registered nurse ("RN"); Kimberly Jordan, an RN; and Jaqueline Lymon, a LPN.

¶ 7 Defendants moved to dismiss the complaint based on Plaintiff's failure to facially comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. Plaintiff filed a voluntary dismissal of that suit on 18 September 2019 and filed a new complaint against the same Defendants on that day. Plaintiff alleged ordinary negligence and professional negligence/medical malpractice resulting in personal injury to Wilson, and sought compensatory and punitive damages.

¶ 8 In her complaint, Plaintiff alleged the following, pursuant to Rule 9(j):

> Plaintiff specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care. In addition, should a Court later determine that the person who has reviewed the medical care and all medical records pertaining to the alleged negligence herein that are available to the Plaintiff after reasonable inquiry, and who is willing to testify that the medical care did not comply with the applicable standard of care, does not meet the requirements of Rule 702 of the North Carolina Rules of Evidence, the Plaintiff will seek to have that person qualified as an expert witness by motion under Rule 702(e) of the North Carolina Rules of Evidence, and Plaintiff moves the Court (as provided in Rule 9(j) of the [North Carolina] Rules of Civil Procedure) that such person be qualified as an expert witness under Rule 702(e) of the [North Carolina] Rules of Evidence.

¶ 9 All Defendants answered and filed motions to dismiss, asserting, in part, that Plaintiff's complaint should be dismissed for failing to comply with Rule 9(j). In response to Defendants' interrogatories, Plaintiff identified William B. Hall, M.D., ("Dr. Hall") as the Rule 9(j) expert who had reviewed the medical care and medical records pertaining to the alleged

negligence at issue, and who was willing to testify that the medical care did not comply with the applicable standard of care.

¶ 10 Dr. Hall is certified by the American Board of Internal Medicine in internal medicine, pulmonary disease, and critical care medicine. According to his curriculum vitae, during the year preceding Wilson's care at PCDC, Dr. Hall served as a pulmonary and critical care physician for UNC Rex Healthcare and the Medical Director at both Rex Pulmonary Specialists and Rex Pulmonary Rehab in Raleigh, North Carolina. According to Plaintiff's response to Dr. Leonhardt's interrogatory, Dr. Hall "engages in the active clinical practice of pulmonology, internal medicine, and general primary care and supervises medical staff on a daily basis." Dr. Hall supervises medical staff, including registered nurses, physician assistants, and certified medical assistants, and is responsible for reviewing patient charts; reviewing his medical staff's work, notes, and proposed plans; and addressing medical concerns raised by his staff.

¶ 11 Defendants deposed Dr. Hall on 6 March 2020 "solely for the purpose of determining his qualifications and whether the plaintiff could have reasonably expected him to qualify pursuant to Rule 9(j)." At the deposition, Dr. Hall testified that after medical school he completed a residency in internal medicine and practiced for one year as a hospitalist–an internal medicine physician who works at a hospital. After that year, he completed a fellowship in pulmonology and critical care medicine and has, since 2010, practiced as a specialist in pulmonary and critical care medicine at REX Pulmonary Specialists and REX Hospital. Dr. Hall testified, "there's a big overlap between the pulmonary and the -- and the internal medicine. . . . I don't usually see people as a primary care physician but I often will do things in my clinic that straddle over from pulmonary into primary care . . . ."

¶ 12 After Dr. Hall's deposition, on 2 April 2020, Dr. Leonhardt filed a second motion to dismiss, again asserting Plaintiff's failure to comply with Rule 9(j). ECMS and Dr. Cervi also filed on 1 June 2020 second motions to dismiss for Plaintiff's failure to comply with Rule 9(j).[1]

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1. Dr. Leonhardt also filed a Motion to Strike on 26 November 2019. Further, ECMS and Dr. Cervi filed a Motion to Dismiss Plaintiff's Claims for Punitive Damages on 17 January 2020. Dr. Leonhardt also filed an Objection and Motion to Strike Portions of Plaintiffs Memorandum of Law in Opposition to Defendants' Motions to Strike and Motions to Dismiss and Select Exhibits and Motion to Strike Affidavit of William B. Hall, M.D., on 19 June 2020.

¶ 13 The trial court held a hearing on 23 June 2020 on the various motions filed by Defendants. The trial courted entered an Order[2] on 7 July 2020 dismissing Plaintiff's complaint with prejudice. Because the statute of limitations as to all Defendants had run at the time of the hearing, the trial court dismissed the matter with prejudice for failure to comply with Rule 9(j). Plaintiff appealed.

II. Discussion

¶ 14 **[1]** Plaintiff first argues that the trial court erred by dismissing her complaint for failure to substantively comply with Rule 9(j). Specifically, Plaintiff argues that the trial court erroneously concluded that Plaintiff could not have reasonably expected Dr. Hall to qualify as an expert witness against Defendants pursuant to Rule 702.

A. Standard of Review

¶ 15 When a complaint that is facially valid under Rule 9(j) is challenged on the basis that the 9(j) certification is not supported by the facts, "the trial court must examine the facts and circumstances known or those which should have been known to the pleader at the time of filing, and to the extent there are reasonable disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage." *Preston v. Movahed*, 374 N.C. 177, 189, 840 S.E.2d 174, 183-84 (2020) (quotation marks and citations omitted).

> "When the trial court determines that reliance on disputed or ambiguous forecasted evidence was not reasonable, the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination."

Moore v. Proper, 366 N.C. 25, 32, 726 S.E.2d 812, 818 (2012) (citation omitted); *see also Preston*, 374 N.C. at 189, 840 S.E.2d at 184. "[B]ecause the

2. The full title of the Order is "Order on Defendant Gary Leonhardt's Motion to Dismiss and Motion to Strike, Second Motion to Dismiss, and Objection and Motion to Strike Portions of Plaintiff's Memorandum of Law in Opposition and Select Exhibits, and Order on Defendants Mark Cervi, M.D. and Eastern Carolina Medical Services, PLLC's Motions to Dismiss and Order on Defendant Donna McLean, D.N.P., F.N.P.-B.C.'s Motion to Dismiss and Order on Defendants Keech/Oxendine; Faulkner; Jordan; and Lymon's Motion to Dismiss."

evidence must be taken in the light most favorable to the plaintiff, the nature of these 'findings,' and the 'competent evidence' that will suffice to support such findings, differs from situations where the trial court sits as a fact-finder." *Preston*, 374 N.C. at 189-90, 840 S.E.2d at 184.

¶ 16 "Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review before filing of the action." *Vaughan v. Mashburn*, 371 N.C. 428, 434, 817 S.E.2d 370, 375 (2018) (quoting *Moore*, 366 N.C. at 31, 726 S.E.2d at 817) (emphasis omitted). The rule provides, in pertinent part:

> Any complaint alleging medical malpractice by a health care provider pursuant to [N.C. Gen. Stat. §] 90-21.11(2)a. in failing to comply with the applicable standard of care under [N.C. Gen. Stat. §] 90-21.12 shall be dismissed unless:
>
> > (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2020).

B. Defendants ECMS, Dr. Leonhardt, and Dr. Cervi

¶ 17 Rule 702(b) of the North Carolina Rules of Evidence provides that a person shall not give expert testimony on the appropriate standard of care in a medical malpractice action unless the person is a licensed health care provider and the person meets the criteria set forth in the following two-pronged test:

> (1) If the party against whom . . . the testimony is offered is a specialist, the expert witness must:
>
> > a. Specialize in the same specialty as the party against whom . . . the testimony is offered; or
> >
> > b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.

> (2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:
>
> > a. The active clinical practice of the same health profession in which the party against whom . . . the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or
> >
> > b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom . . . the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

N.C. Gen. Stat. § 8C-1, Rule 702(b) (2020).[3]

1. Rule 702(b)(1)a.: "Same Specialty"

¶ 18 The trial court found, and Plaintiff does not dispute, that Dr. Hall does not specialize in the same specialty as either Dr. Leonhardt or Dr. Cervi.

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3. We note that, because Dr. Leonhardt and Dr. Cervi were not acting as "specialists" in providing and/or supervising Wilson's treatment, it is not clear that Rule 702(b) should apply to these defendants. Dr. Leonhardt asserts he is a specialist in psychiatry and addiction medicine but—relevant to this case—holds himself out as an internal medicine consultant to PCDC. The trial court found that while Dr. Leonhardt "is a physician and specialist in psychiatry and addiction medicine," his "care as a specialist in psychiatry and addiction medicine was not alleged to be at issue in the complaint." Similarly, Dr. Cervi asserts he is a specialist in internal medicine but—relevant to this case—holds himself out as a primary care or family practice provider. The trial court found that "Dr. Cervi is an internal medicine physician and was providing primary care to inmates at PCDC during the applicable time period," and his "care as a specialist in internal medicine was not alleged to be at issue in the complaint[.]" Because Plaintiff did not raise the issue of the applicability of Rule 702(b) below or on appeal, we will analyze the facts and circumstances relevant to these defendants in light of Rule 702(b).

2. Rule 702(b)(1)b.: "Similar Specialty"

¶ 19 Plaintiff disputes the trial court's finding that Dr. Hall does not practice in a similar specialty as either Dr. Leonhardt or Dr. Cervi.

¶ 20 The test under Rule 9(j) is whether, at the time of filing the complaint it would have been reasonable for Plaintiff to expect Dr. Hall to qualify as an expert, not whether he would actually qualify, under Rule 702. *See Moore*, 366 N.C. at 31, 726 S.E.2d at 817 ("[T]he preliminary, gatekeeping question of whether a proffered expert witness is 'reasonably expected to qualify as an expert witness under Rule 702' is a different inquiry from whether the expert *will actually* qualify under Rule 702." (citing N.C. Gen. Stat. § 1A-1, Rule 9(j)(i))). "[T]he trial court must examine the facts and circumstances known or those which should have been known to the pleader at the time of filing, and to the extent there are reasonable disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage." *Preston*, 374 N.C. at 189, 840 S.E.2d at 183-84 (quotation marks and citations omitted).

¶ 21 Neither the trial court nor Defendant cited specific authority, of which Plaintiff knew or should have known, holding that a physician who is board certified in internal medicine, pulmonary disease medicine, and critical care medicine providing and supervising the care of a pneumonia patient is not practicing in a similar specialty to that of an internist or a general practitioner providing and supervising the care of a pneumonia patient. Furthermore, the trial court's findings of fact impermissibly draw inferences against Plaintiff.

¶ 22 In Finding 4, the trial court found, "Dr. Hall did not form any opinions as to any care Dr. Leonhardt provided as a primary care provider and/or general practitioner at the PCDC." Likewise, in Finding 5, the trial court found, "Dr. Hall [did not] form any opinions as to any care Dr. Cervi provided as an internal medicine specialist at the PCDC." However, Defendants repeatedly objected during Dr. Hall's Rule 9(j) deposition to any questions related to the opinions Dr. Hall formed as outside the scope of the deposition. Thus, Dr. Hall's deposition transcript does not reflect whether Dr. Hall formed any opinions and does not reflect that he had not formed any opinions.

¶ 23 The record evidence shows that Dr. Hall testified that he had been asked to provide opinions on the standard of care for the treatment of a pneumonia patient, the standard of care for the physicians supervising the medical staff, and the standard of care for the medical staff providing that treatment. This is corroborated by Plaintiff's responses to

Defendants' Rule 9(j) interrogatories. Dr. Hall further testified that his preliminary pre-suit review of the records was to review the course of care provided by the entire medical team to treat Wilson's pneumonia and determine whether that care met the standard. Dr. Hall articulated specific criticisms of Dr. Leonhardt's and Dr. Cervi's supervision of Wilson's treatment in his interrogatory answers, including as follows:

> When recurrent tachycardia, recurrent fever, and persistent cough was identified in examinations conducted on Steven Wilson, as a patient with a report of prior pneumonia, Steven Wilson should have received a chest x-ray (which was ordered and later cancelled by Pitt County Detention Center), routine labs, such as a complete blood count, and/or additional antibiotic treatment. Such additional treatment was necessary to determine the extent of Steven Wilson's condition and to prevent the deterioration of Steven Wilson's condition that led to necrotizing pneumonia. The failure of ECMS, ECMS agents, representatives, and/or employees, and Dr. Cervi, and Dr. Leonhardt to properly supervise the medical staff at PCDC, review the records and recurrent health concerns of Steven Wilson; identify the need, scheduling, administering, and coordinating of proper non-emergent and emergency medical care rendered to Steven Wilson; provide proper care during such sick calls to Steven Wilson; identify the need for and coordinate proper diagnostic tests and examinations for Steven Wilson; identify the need for and coordinate the administration of appropriate medications and consultations with specialty physicians for Steven Wilson; and identify the need for and coordinate an inpatient hospitalization for Steven Wilson fell below the standard of care.

Accordingly, Findings 4 and 5 impermissibly draw inferences against Plaintiff.

¶ 24 In Finding 14, the trial court found "Dr. Hall did not practice in a similar specialty as any of the defendants which included within it the primary care of patients during the applicable period." To the extent this constitutes a finding of fact it impermissibly draws inferences against Plaintiff. Dr. Hall testified that although his practice was not a primary care practice, his practice included elements of primary care as part of his treatment of patients.

¶ 25 To the extent this finding is more properly classified as a conclusion of law, it misapplies the law in two ways. First, under Rule 9(j), it is not whether Dr. Hall actually practices in a similar specialty but rather whether it was reasonable for Plaintiff to expect Dr. Hall to qualify as one practicing in a similar specialty. Second, under Rule 702(b)(1)b., the analysis is whether the proffered expert "[s]pecialize[s] in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and ha[s] prior experience treating similar patients." N.C. Gen. Stat. § 8C-1, Rule 702(b)(1)b.

¶ 26 Here, the record reflects the "procedure" at issue is the treatment provided to Wilson for pneumonia and whether the treatment provided, including the supervision of that treatment, met the standard of care. At this preliminary stage, the record reflects that Dr. Leonhardt and Dr. Cervi were physicians holding themselves out as internal medicine practitioners, albeit in a primary care practice. *See Formyduval v. Bunn*, 138 N.C. App. 381, 388, 530 S.E.2d 96, 101 (2000) ("Our case law indicates that a physician who 'holds himself out as a specialist' must be regarded as a specialist, even though not board certified in that specialty." (citations omitted)). In the course of their practice, they engaged in the practice of internal medicine–including, as it relates to this case, as supervising physicians responsible for the course of care for Wilson's pneumonia.

¶ 27 Dr. Hall is board certified in internal medicine, pulmonary disease medicine, and critical care medicine and specializes in pulmonary disease and critical care medicine. Dr. Hall's deposition testimony supports the inference that pulmonary disease medicine and critical medicine are sub-specialties of internal medicine. In his clinical practice, he regularly treats patients with pneumonia. Drawing all reasonable inferences in Plaintiff's favor from these facts, it was reasonable for Plaintiff to expect Dr. Hall, who is board certified in internal medicine and pulmonary disease and who regularly treats pneumonia patients, to be deemed similar in specialty to internal medicine practitioners who provided care for a pneumonia patient. *Cf. Sweatt v. Wong*, 145 N.C. App. 33, 38, 549 S.E.2d 222, 225 (2001) (general surgeon who was board certified in laparoscopic procedures and who practiced as an emergency room physician qualified as an expert against a general surgeon who performed laparoscopic surgery where both engaged in the same diagnostic procedures and the proffered expert had clinical diagnostic practice including with patients showing similar signs and symptoms as decedent); *Trapp v. Maccioli*, 129 N.C. App. 237, 240-41, 497 S.E.2d 708, 710-11 (1998) (reasonable to expect an emergency room physician who performed the same procedure to qualify as an expert against an anesthesiologist for purposes of Rule 9(j)). There is nothing in the record at this stage that would suggest

a pulmonologist would treat pneumonia in any manner different than an internist (or a psychiatrist/addiction specialist/internal medicine consultant) acting as a primary care physician—or even more precisely at this stage, that there would be any reasonable expectation on the part of a plaintiff that there would be any difference.

¶ 28 In Finding 15, the trial court made a finding identical to Finding 14, but with the added proviso that Dr. Hall did not practice "in a similar specialty as any of the defendants which included within it the primary care of patients *in a detention center or correctional setting* during the applicable period." (Emphasis added). Similarly, the trial court found in Finding 22 that "Dr. Hall has never cared for patients *in a detention or correctional setting* and did not care for such inmates during the applicable time period." (Emphasis added) The trial court's order does not explain the significance of this added proviso, but it appears the trial court intended this finding to relate to whether Dr. Hall had "prior experience treating similar patients."

¶ 29 Rule 702(b)(1)b. requires an expert witness who is not in the "same specialty" to have "prior experience treating similar patients" as the party against whom the testimony is offered. A "similar patient" in this context is a patient with similar medical conditions and treatment needs. Rule 9(j) does not require an expert witness to practice in the same, or even similar, setting. Nonetheless, Dr. Hall testified that he has experience treating inmates brought to the hospital for treatment and his practice was to treat them in the same manner as any other patient, notwithstanding the fact they may be handcuffed and under guard.

¶ 30 Moreover, to the extent the trial court's findings conflate the requirements of Rule 702(b) with the "same or similar community" standard of care under N.C. Gen. Stat. § 90-21.12, the relevant community in this case is Pitt County, North Carolina, or similar communities, as evidenced by Dr. Cervi's interrogatory to Dr. Hall:

> Explain in detail any and all opportunities you have had to learn the standard of care applicable to medical professionals or entities operating in Pitt County, North Carolina, or similar communities, and for each "similar community," identify the community and provide the details that make these communities similar.

In response, Dr. Hall verified that he is familiar with the standard of care within Pitt County and medical communities similarly situated to Pitt County, and specifically articulated the basis of his familiarity.

¶ 31 The trial court thus impermissibly drew inferences against Plaintiff by finding that Dr. Hall did not practice in a similar specialty to that of Dr. Leonhardt and Dr. Cervi.

3. Rule 702(b)(2)

¶ 32 Rule 702(b) is conjunctive and requires a proffered expert to meet the requirements laid out in subsections (b)(1) and (b)(2). Rule 702(b)(2)[4] requires an expert witness offering testimony against a specialist to have devoted a majority of their professional time "[d]uring the year immediately preceding the date of the occurrence that is the basis for the action" to "the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients" and/or the "instruction of students in . . . an accredited health professional school or accredited residency or clinical research program in the same specialty" as the party against whom the testimony is offered. N.C. Gen. Stat. § 8C-1, Rule 702(b)(2).

¶ 33 We have already concluded that it was reasonable for Plaintiff to expect Dr. Hall to be deemed similar in specialty to Dr. Leonhardt and Dr. Cervi. As the record shows, Dr. Hall spent the majority of his time since 2010, which includes the year preceding Wilson's care, in active clinical practice as a pulmonologist and critical care medicine specialist. Indeed, as the trial court found, "Dr. Hall is a physician and practices as a pulmonologist and critical care medicine specialist and the majority of his professional time has been spent practicing in those specialties since 2010." Accordingly, Dr. Hall devoted a majority of his professional time during the year immediately preceding the date of Wilson's care to "the active clinical practice of . . . a similar specialty which includes within its specialty the" care of pneumonia patients and has "prior experience treating similar patients." *Id.*

¶ 34 The trial court's conclusion that "Plaintiff could not have reasonably expected Dr. Hall to qualify as an expert witness against [Defendants ECMS, Dr. Leonhardt, and Dr. Cervi] pursuant to Rule 702(b)-(d) based on what she knew or should have known at the time of filing of the Complaint, and therefore, failed to substantively comply with Rule 9(j)" is not supported by the findings or the evidence. The trial court thus erred by dismissing Plaintiff's complaint against Defendants ECMS,

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4. We again note that because Dr. Leonhardt and Dr. Cervi were not acting as "specialists" in providing and/or supervising Wilson's treatment, it is not clear that the more stringent requirements set forth in Rule 702(b)(2)a. and b. apply in this case.

Dr. Leonhardt, and Dr. Cervi for failure to substantively comply with Rule 9(j)(1).

C. Defendants McLean, Keech, Faulkner, Jordan, and Lymon

¶ 35 **[2]** Plaintiff also argues that the trial court erred by dismissing her complaint against nurses McLean, Keech, Faulkner, Jordan, and Lymon for failure to comply with Rule 9(j).

¶ 36 North Carolina Rule of Evidence 702(d) sets forth the conditions a proffered expert must meet to testify to the standard of care against nurses. Rule 702(d) provides:

> Notwithstanding subsection (b) of this section, a physician who qualifies as an expert under subsection (a) of this Rule and who by reason of active clinical practice or instruction of students has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff may give expert testimony in a medical malpractice action with respect to the standard of care of which he is knowledgeable of nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants licensed under Chapter 90 of the General Statutes, or other medical support staff.

N.C. Gen. Stat. § 8C-1, Rule 702(d) (2020).

¶ 37 The trial court found the following facts:

> 17. Dr. Hall did not supervise the primary care of patients provided by FNPs, RNs, and/LPNs during the applicable time period.
>
> 18. Dr. Hall did not know the qualifications of the nurse practitioner he supervised in his private practice of pulmonology.
>
> 19. Dr. Hall admitted that there are different types of nurse practitioners and that the training of nurse practitioners varies by type.
>
> 20. Dr. Hall did not practice family medicine or supervise a nurse practitioner in the practice of family medicine.

> 21. Dr. Hall has never supervised the primary care of patients provided by FNPs, RNs, and/LPNs in a detention or correctional setting, including during the applicable time period.

¶ 38 First, that Dr. Hall did not know the qualifications of the nurse practitioner he supervised and admitted there are different types of nurse practitioners with different training is immaterial to the inquiry before us.[5] The focus of the remainder of the trial court's findings in relation to Dr. Hall's experience supervising nursing staff and nurse practitioners is on the fact Dr. Hall did not practice in a family practice, general primary practice, or specifically in a detention center. The inference—again drawn against Plaintiff—is that these settings are so dissimilar from Dr. Hall's clinical and hospital practices, particularly as it relates to the course of treatment for pneumonia patients, that it would be unreasonable for Plaintiff to expect Dr. Hall to qualify as an expert. Accepting these practices may not be the *same*, there is nothing in the record to support the inference they are not *similar* for purposes of meeting the requirements of Rule 9(j). Defendants point to no authority to support their position that under the circumstances present in this case it would be unreasonable to expect Dr. Hall to qualify as an expert here.

¶ 39 To the contrary, the evidence at this preliminary stage reflects that Dr. Hall has experience regularly supervising nursing staff and working with nurse practitioners and others in both the clinical and hospital setting, including monitoring ongoing treatment of patients as a supervising physician, in addition to his role as the medical director of his clinical practice implementing and monitoring the procedures and overall standard of care. The question under Rule 702(d) is, by reason of his clinical practice, whether Dr. Hall has knowledge of the applicable standard of care for nursing staff and nurse practitioners. The evidence of record at this stage is that in his practice Dr. Hall regularly supervises nursing staff and works in conjunction with nurse practitioners to provide treatment for pulmonary conditions (of which pneumonia is one). Moreover, it is evident from his limited testimony that Dr. Hall, again based on his own clinical experience, is aware of different types of nursing providers and the roles they play in patient care which he oversees. From this, the proper inference to be drawn is that it is reasonable to expect Dr. Hall to qualify as an expert based on his clinical experience in a similar specialty which also includes within that specialty the treatment of pneumonia patients.

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5. Defendants cite no authority requiring a physician to identify specific credentials of individual nursing providers in order to survive dismissal under Rule 9(j).

¶ 40 The trial court's conclusion that "Plaintiff could not have reasonably expected Dr. Hall to qualify as an expert witness against the defendants pursuant to Rule 702(b)-(d) based on what she knew or should have known at the time of filing of the Complaint, and therefore, failed to substantively comply with Rule 9(j)" is not supported by the evidence, the properly drawn inferences in favor of Plaintiff therefrom, or the findings. The trial court thus erred by dismissing Plaintiff's complaint against Defendant nurses McLean, Keech, Faulkner, Jordan, and Lymon for failure to substantively comply with Rule 9(j)(1).

¶ 41 We do not reach Plaintiff's argument that the trial court erred by denying her pending motion to qualify Dr. Hall as an expert under Rule 9(j)(2) and Rule 702(e).

III. Conclusion

¶ 42 For the foregoing reasons, we reverse the trial court's order dismissing Plaintiff's complaint for failure to comply with the provisions of Rule 9(j) of the North Carolina Rules of Civil Procedure and remand to the trial court for further proceedings.

REVERSED AND REMANDED.

Judges HAMPSON and CARPENTER concur.

IN THE MATTER OF A.N.S., JR.

No. COA22-277

Filed 2 August 2022

Termination of Parental Rights—grounds for termination—neglect—father fatally shot child's mother in child's presence

The trial court properly terminated a father's parental rights to his son on the ground of neglect based on unchallenged findings that the father shot and killed the child's mother in the presence of the child and his stepsibling; that the father was subsequently convicted of first-degree murder and sentenced to life imprisonment without the possibility of parole; and that, due to the circumstances in which the child was removed from the father's care, the department of social services did not intend to develop a services agreement with the father.

IN RE A.N.S.

[284 N.C. App. 631, 2022-NCCOA-521]

Appeal by Respondent from order entered 29 December 2021 by Judge William B. Davis in Guilford County District Court. Heard in the Court of Appeals 12 July 2022.

Mercedes O. Chut for Guilford County Department of Health and Human Services.

Ward and Smith, P.A., by Mary V. Cavanagh, for Guardian ad litem.

Mary McCullers Reece for Respondent-Appellant Father.

COLLINS, Judge.

¶ 1 Respondent-Father appeals from the trial court's order terminating his parental rights to his minor child on the grounds on neglect and dependency. We affirm.

I. Background

¶ 2 Father is the biological father of Arthur,[1] a child born in December 2014. On 7 May 2018, Father shot and killed Arthur's mother in Arthur's presence; Father was charged with the first-degree murder of Arthur's mother. On 9 May 2018, based on the fatal shooting of Arthur's mother, the Guilford County Department of Social Services ("DSS") took nonsecure custody of Arthur and his stepsibling.[2] DSS filed a petition alleging Arthur and his stepsibling were abused, dependent, and neglected.

¶ 3 On 8 October 2018, the matter came on for an adjudication hearing; the trial court adjudicated Arthur and his stepsibling abused, neglected, and dependent. The trial court found that both children had witnessed Father fatally shoot Arthur's mother as she attempted to leave the family home while escorted by law enforcement. The trial court moved to the dispositional stage and relieved DSS of the obligation to make reasonable efforts to reunify Arthur with Father and suspended all contact between Father and Arthur. Arthur and his stepsibling were placed with maternal grandparents.

¶ 4 In May 2019, DSS filed a petition to terminate Father's parental rights based on the grounds of neglect and dependency. On 31 January 2020,

1. We use a pseudonym to protect the identity of the minor child. *See* N.C. R. App. P. 42.

2. While Arthur's stepsibling was part of the juvenile proceedings, this appeal does not concern his stepsibling.

Father was convicted of the first-degree murder of Arthur's mother and sentenced to life in prison without the possibility of parole. The hearing on the petition to terminate Father's parental rights was held on 10 May 2021. The trial court terminated Father's rights on the grounds of neglect and dependency and concluded that it was in Arthur's best interests to terminate Father's parental rights. Father timely appealed.

II. Discussion

¶ 5 In a termination of parental rights proceeding, the trial court must adjudicate the existence of any of the grounds for termination alleged in the petition. At the adjudication hearing, the trial court must "take evidence [and] find the facts" necessary to support its determination of whether the alleged grounds for termination exist. N.C. Gen. Stat. § 7B-1109(e) (2019). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5-6, 832 S.E.2d 698, 700 (2019) (citing N.C. Gen. Stat. § 7B-1109(f)).

¶ 6 When reviewing the trial court's adjudication of grounds for termination, we examine whether the trial court's findings of fact "are supported by clear, cogent and convincing evidence and [whether] the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). Any unchallenged findings are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citations omitted). The trial court's conclusions of law are reviewed de novo. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019).

¶ 7 The first ground for termination found by the trial court was neglect under N.C. Gen. Stat. § 7B-1111(a)(1). This subsection allows for parental rights to be terminated if the trial court finds that the parent has neglected their child to such an extent that the child fits the statutory definition of a "neglected juvenile." N.C. Gen. Stat. § 7B-1111(a)(1) (2019). A neglected juvenile is defined, in relevant part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15) (2019).

¶ 8 "[E]vidence of neglect by a parent prior to losing custody of a child – including an adjudication of such neglect – is admissible in subsequent proceedings to terminate parental rights." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984).

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of a likelihood of future neglect by the parent. When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing.

In re R.L.D., 375 N.C. 838, 841, 851 S.E.2d 17, 20 (2020) (ellipses, quotation marks, and citations omitted).

¶ 9 In its termination order, the trial court made the following relevant findings of fact:

> 2. The juveniles have been in the legal and physical custody of the Guilford County Department of Health and Human Services (hereinafter referred to as "the Department") a consolidated county human services agency, pursuant to Court Order continuously since May 7, 2018.
>
> . . . .
>
> 10. The conditions that led to the juveniles coming into custody include but are not limited to domestic violence in the presence of the juveniles; injurious environment; the juveniles witnessing the fatal shooting of their mother by [Father]; [Father] is charged with the mother's murder[.]
>
> 11. The juveniles were adjudicated abused, neglected, and dependent on August 27, 2018.
>
> . . . .
>
> 13. The Department has not developed a service agreement with nor does the Department intend to offer a service agreement to the [Father], due in pertinent part to the egregious circumstances that brought the juveniles into custody whereby [Father] fatally shot and killed the [Mother], in the presence of the juveniles and as ordered by the Court in the Pre-Adjudication, Adjudication and Disposition Order

> dated August 27, 2018, filed on October 8, 2018, which relieved the Department of making reasonable efforts of reunification with [Father]. In addition, [Father] has been charged and convicted of First Degree Murder in regard to the death of the mother, although as of January 31, 2020, the conviction is under appeal. Based on these facts, the Department did not have any services available that could be offered to [Father] in order to correct the conditions that brought the juveniles into custody with the Department.

¶ 10 Based upon these findings, the trial court concluded,

> 18. Grounds exist to terminate the parental rights of [Father], pursuant to N.C.G.S. § 7B-1111(a)(1), given that the parent abused and/or neglected the juveniles, there is ongoing neglect and a likelihood of the repetition of abuse and/or neglect.
>
> > a. [Father's] past abuse and neglect of the juvenile [Arthur] was proven as detailed in the Pre-Adjudication, Adjudication and Disposition Order dated August 27, 2018, filed on October 8, 2018, specifically exposing him to the trauma of domestic violence and the violent death of his mother. [Father's] behavior has deprived his child of contact with his father for the past two years and with his mother for the remainder of his life. His past actions and lack of regard for his child's well-being are indicative of a likelihood of repetition of neglect in the event that custody was returned to him.

¶ 11 Father does not challenge the findings of fact, and they are binding on appeal. *In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58. The findings amply support the trial court's conclusion of law that grounds exist to terminate Father's parental rights for neglecting Arthur. Arthur was removed from Father's care on 7 May 2018 because he watched Father fatally shoot his mother. Arthur was adjudicated abused, neglected, and dependent as a result. Since Arthur's adjudication, Father was convicted of the first-degree murder of Arthur's mother.[3] Furthermore,

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3. Although Father's conviction is pending appeal, a conviction for first-degree murder carries a mandatory sentence of life in prison without parole. N.C. Gen. Stat. § 14-17(a) (2019). Father appealed the trial court's denial of his *Batson* objection, and this

the Department has not and will not develop a service agreement with Father because of the egregious circumstances that brought Arthur into custody. Thus, Father has received no services while Arthur has not been in Father's care, and he will receive none in the future. These facts support the trial court's conclusion that: Father neglected Arthur; there is ongoing neglect; there is a likelihood of the repetition of neglect in that Father did not and likely will "not provide proper care, supervision, or discipline" of Arthur; and Arthur lived and would likely live "in an environment injurious to the juvenile's welfare" were he ever returned to Father's care. *See* N.C. Gen. Stat. § 7B-101(15).

¶ 12 Father argues that "[i]t is clear that the trial court deemed the event that led to the 2018 adjudication to be a sufficient ground for termination in and of itself." We disagree. Not only did the trial court consider Father's murder of Arthur's mother in front of Arthur and the resulting abuse, neglect, and dependency adjudication, the trial court also considered Father's subsequent murder conviction and the fact that Father has not and will not receive any DSS services which are designed to help an offending parent rectify the conditions that caused the child to be removed.

¶ 13 Father also argues that the trial court failed to consider the likelihood that Arthur will never be returned to his Father's care. Father cites *In re C.A.S.*, 231 N.C. App. 514, 753 S.E.2d 743 (2013) (unpublished), to support his argument that Arthur could not be neglected if Father is in prison. In *In re C.A.S.*, our Court reversed termination of parental rights based on abuse where there was "almost no probability of future abuse because father will be incarcerated for at least 15 years" and thus there was "not enough evidence to support the trial court's conclusion that there is a probability of repetition of abuse." *Id.* However, abuse and neglect are different grounds and Father cannot "provide proper care, supervision, or discipline" to Arthur if Father is in prison for life without the possibility of parole. *See* N.C. Gen. Stat. § 7B-101(15).

Court remanded the matter to the trial court for a *Batson* hearing in *State v. Smith*, 2021-NCCOA- 391. Upon remand, the trial court held a *Batson* hearing and denied Father's *Batson* objection; on 12 November 2021, Father appealed the denial of his *Batson* objection to this Court in COA22-307. The record was filed on 13 April 2022 and Father filed his brief on 8 June 2022. We again note that Father does not challenge the trial court's conclusion that he murdered Mother. Moreover, the standard of proof in a criminal trial is guilt beyond a reasonable doubt while the standard of proof in a termination of parental rights case is clear, cogent, and convincing evidence of grounds for termination.

III. Conclusion

¶ 14 The trial court did not err by terminating Father's parental rights based on the ground of neglect. We need not reach Father's argument that the trial court erred by terminating his parental rights based on the ground of dependency. *In re D.W.P.*, 373 N.C. 327, 340, 838 S.E.2d 396, 406 (2020). The trial court's order is affirmed.

AFFIRMED.

Chief Judge STROUD and Judge ARROWOOD concur.

IN THE MATTER OF R.A.F., R.G.F.

No. COA21-754

Filed 2 August 2022

1. Appeal and Error—notice of appeal—wrong appellate court identified—correct court fairly inferred—no prejudice to opposing party

Respondent-mother's appeal from an order terminating her parental rights did not warrant dismissal where, although her notice of appeal incorrectly designated the North Carolina Supreme Court as the court to which appeal was taken, it could be fairly inferred from her filings at the Court of Appeals that that was the court from which she sought relief, and there was no prejudice to the opposing parties who timely responded with their own filings. The Court of Appeals elected in its discretion to treat the purported appeal as a petition for writ of certiorari and granted review.

2. Termination of Parental Rights—parental right to counsel—parent absent from hearing—provisional counsel dismissed—inquiry by trial court

In a private termination of parental rights (TPR) action in which respondent-mother did not appear at the pretrial hearing, the trial court erred by dismissing respondent's provisional counsel on its own motion and proceeding with the adjudication and disposition stages without conducting an adequate inquiry into counsel's efforts to contact respondent or whether respondent had adequate notice of the pretrial and TPR hearing pursuant to N.C.G.S. § 7B-1108.1.

Judge INMAN concurring by separate opinion.

Judge TYSON dissenting.

Appeal by Respondent from order entered 15 July 2021 by Judge Mack Brittain in Henderson County District Court. Heard in the Court of Appeals 26 April 2022.

F.B. Jackson and Associates Law Firm, PLLC by James L. Palmer, for Petitioners-Appellees.

Peter Wood, for Respondent-Appellant.

WOOD, Judge.

¶ 1 Respondent-Mother ("Mother") appeals an order terminating her parental rights to her minor children, R.A.F. ("Ralph") and R.G.F. ("Reggie").[1] On appeal, Mother argues that the trial court abused its discretion when it removed her court-appointed counsel without a proper inquiry under N.C. Gen. Stat § 7B-1108.1 and erred by not appointing a guardian ad litem ("GAL") on behalf of her minor children. After careful review of the record and consideration, we vacate the trial court's order and remand for a new hearing.

I. Factual and Procedural Background

¶ 2 Mother and the children's father ("Father")[2] are the biological parents of Ralph and Reggie, who were born in July 2012 and November 2013, respectively. Since September 6, 2014, Ralph and Reggie have resided continuously with Petitioners ("Petitioners"), who are husband and wife and are step-maternal aunt and uncle to the children. Petitioners are also licensed foster parents. Following the Henderson County Department of Social Services ("DSS") taking custody of Ralph and Reggie pursuant to petitions filed alleging neglect, the trial court, on July 11, 2015, adjudicated both children to be neglected due to housing instability, income instability, and substance abuse by the parents. The children continued in foster care placement and remained with Petitioners. On October 5, 2015, Father was convicted of breaking into a motor vehicle, trespassing, and disturbing the peace and was incarcerated in South Carolina.

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1. We use pseudonyms to protect the children's identities and for ease of reading.

2. Father did not appeal the trial court's orders, and thus is not a party to this action.

¶ 3 At a review and permanency planning hearing on March 9, 2017, the trial court detailed the status of the requirements Mother needed to complete as a prerequisite to regain custody or placement of her children, Ralph and Reggie. In order for reunification to occur, Mother was required to: (1) obtain a substance abuse assessment and complete all recommendations from this assessment; (2) submit to random drug/alcohol screenings; (3) maintain a lifestyle free of controlled substances and alcohol; (4) demonstrate stable income sufficient to meet her family's basic needs; (5) obtain and maintain appropriate and safe housing; (6) not be involved with criminal activity; (7) pay child support; (8) cooperate with and ensure that her children have all medical, dental, developmental, and mental health evaluations and treatments; (9) provide the Social Worker with current contact information and ensure that if such information changes, the Social Worker is notified; and (10) maintain regular contact with her children, including "visiting with the juveniles as frequently as allowed by the Court and demonstrat[ing] the ability to provide appropriate care for the juveniles."

¶ 4 In reviewing these requirements for reunification, the trial court found that Mother had made some progress: she had completed her substance abuse classes; provided the social worker her current address; attended a child family team meeting in March 2017; assisted in scheduling doctor's appointments for her children; was employed full-time since September 2016; paid child support; attended all but three visits with her children; and acted appropriately during the visitations. However, there were several requirements Mother had not fulfilled. The trial court found Mother tested positive for marijuana intermittently during random drug screens conducted between 2015 and 2017; was convicted of possession of marijuana on both February 16, 2016 and April 18, 2016; and did not possess independent housing because she lived with her mother and stepfather.

¶ 5 At this hearing, the trial court granted custody of Ralph and Reggie to Petitioners, terminated the juvenile proceedings, and initiated a civil custody action pursuant to N.C. Gen. Stat. § 7B-911. The trial court found that Mother was "acting in a manner inconsistent with the health or safety of the juveniles," had not made adequate progress within a reasonable time as the children had been in DSS custody for twenty-one months, had not completed her reunification plan, and that the "compliance and actions of the [Mother and Father] are not sufficient to remedy the conditions which led to the juveniles' removal."

¶ 6 On April 3, 2017, the trial court entered a separate child custody order to initiate a civil action for custody. This order granted Mother

unsupervised visitation with her children every other weekend from Friday at 6 pm to Sunday at 5 pm. Mother was also permitted phone calls with her children as mutually agreed upon with Petitioners. The order granted Father one hour of supervised visitation per week upon his release from prison.

¶ 7 Four years later, on April 6, 2021, Petitioners filed petitions for the termination of Mother and Father's parental rights ("TPR"). Petitioners alleged that Mother had willfully neglected her children as she was unable to complete reunification requirements, did not exercise her visitation rights with her children, and did not provide proper care or supervision of her children. Petitioners also alleged that Mother had willfully abandoned her children for at least six months immediately preceding the filing of the petitions. On April 16, 2021, the Henderson County sheriff personally served Mother with the TPR petitions and summonses. On May 12, 2021, Father was served with the TPR summonses and petitions while in custody.

¶ 8 Mother was assigned Ms. Walker as her provisional court-appointed attorney at the time of the filing of the petitions. Mother called Ms. Walker and informed her she wanted to contest the TPR petitions. Ms. Walker filed separate motions for Extension of Time on May 4, 2021 (in 15J27) and on May 7, 2021 (in 15J26). Both motions were granted by the trial court and allowed Mother to file an answer or response to the respective petitions on or by June 9, 2021. Mother did not file an answer or other responsive pleading in either case.

¶ 9 On June 23, 2021, Petitioners filed a Notice of Hearing scheduling a hearing on the TPR petitions for July 15, 2021. A week before the TPR hearing, Mother sent a card to her children in which she wrote that "she was trying her best to get better, and to be better, and that she loved and missed them very much." The envelope listed a return address in Abbeville, South Carolina that was unknown to Petitioners.

¶ 10 Neither Mother nor Father appeared in court at the July 15, 2021 TPR hearing. The trial court conducted a pretrial hearing with Mother's provisional court-appointed attorney present. The trial court asked Ms. Walker if she had been in contact with Mother. Ms. Walker informed the trial court that Mother had contacted her when she was served. Ms. Walker explained that although Mother did not appear for her scheduled office appointment, she had contacted the office to "say she was in a treatment facility" for substance abuse. Ms. Walker further recounted that she spoke with the treatment facility and learned Mother had successfully graduated from the program, but Mother had not been in contact with her since. Ms. Walker stated that she had last heard from

Mother in April 2021. Thereafter, the trial court, on its own motion, released Ms. Walker from representing Mother in the termination action. In the TPR Order, the trial court found that "[t]he provisionally appointed attorneys for [Mother and Father] should be released, despite efforts by the respective attorneys to engage the Respondent parents in the participation of this proceeding."

¶ 11 During the pretrial hearing, the trial court found that all service and notice requirements had been met for Mother and Father. The trial court noted that "the appointment of a Guardian Ad Litem for the child[ren] was not needed or required as neither [Parent] has sought to contest the [TPR] Petition[s]." The court also stated that "there are no issues or pre-trial motions raised by any party" and "no responsive pleading has been submitted by [Mother] (although the court notes that a Motion and Order for extension of time in regards [sic] to the [Mother] appears in the court file[s])."

¶ 12 After the pretrial hearing, the trial court proceeded with the adjudication and disposition stages of the TPR hearing. The trial court heard testimony from one witness, Petitioner wife. Petitioner wife testified the children had lived with her and her husband since September 2014; the children were adjudicated neglected based upon Mother's housing instability, income instability, and substance abuse in 2015; and Mother had not exercised visitations with her children since July 2019. Petitioner wife also testified that Mother does not provide support for her children; is not involved in their education, extracurricular activities, or medical appointments; and had not shown any progress in correcting the conditions that led to her children's removal from her custody. Petitioner wife acknowledged that Mother sent a card to her children that arrived sometime earlier in July.

¶ 13 After this testimony, the court found by clear and convincing evidence that grounds existed to terminate Mother's parental rights based on willful neglect and willful abandonment because: Mother has not exercised her visitation rights with her children, has failed to follow through with telephone calls or visitation with her children, and has not offered any support for her children since July 2019. At the dispositional portion of the TPR hearing, the trial court determined that: (1) a strong bond exists between Petitioners, Reggie, and Ralph; (2) the likelihood Petitioners will adopt the children is high; and (3) it is in the best interests of the children to terminate Mother and Father's parental rights. On July 15, 2021, the trial court entered orders terminating Mother's parental rights to Reggie and Ralph. Mother filed a written notice of appeal on August 13, 2021.

II. Appellate Jurisdiction

¶ 14 **[1]** We note Mother's written notice of appeal was addressed to the "Honorable North Carolina Supreme Court" instead of to this Court. The record before us does not contain a notice of appeal to the North Carolina Court of Appeals. Rule 3(d) of our Rules of Appellate Procedure governs the content of a notice of appeal and provides: "[t]he notice of appeal . . . shall designate the judgment or order from which appeal is taken and the court to which appeal is taken." N.C. R. App. P. 3(d). "In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure" and "failure to follow the requirements thereof requires dismissal of an appeal." *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 790-91 (2011) (first quoting *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000); then quoting *Abels v. Renfro Corp.*, 126 N.C. App. 800, 802, 486 S.E.2d 735, 737 (1997)). Here, Mother failed to specify the Court of Appeals as the "court to which appeal is taken," per Rule 3(d). Notwithstanding, this court has previously held that "[m]istakes by appellants in following all the subparts of Appellate Procedure Rule 3(d) have not always been fatal to an appeal." *Stephenson v. Bartlett*, 177 N.C. App. 239, 242, 628 S.E.2d 442, 444 (2006). In *Stephenson*, we liberally construed the requirements of Rule 3(d) and permitted a plaintiff to proceed with an appeal to this Court, despite designating the North Carolina Supreme Court in its notice of appeal. *Id.* at 243, 628 S.E.2d at 444-45. We held that the plaintiffs' appeal to this Court could be "fairly inferred from plaintiffs' notice of appeal" so that the "notice achieved the functional equivalent of an appeal to this Court" and the defendants were not misled by the plaintiffs' mistake. *Id.* at 243, 628 S.E.2d at 444.

¶ 15 In the instant case, we can reasonably infer from which court Mother has sought relief from the timely filing of her Record on Appeal and her brief with this Court. Petitioners were not prejudiced by Mother's mistake and could reasonably infer Mother's intent as they, too, timely filed their brief with this Court. Therefore, Mother's mistake in failing to specify this Court in her appeal does not warrant dismissal of her appeal.

¶ 16 Additionally, this Court possesses the authority "pursuant to North Carolina Rules of Appellate Procedure 21(a)(1) to 'treat the purported appeal as a petition for writ of certiorari' and grant it in our discretion." *Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2009) (quoting *State v. SanMiguel*, 74 N.C. App. 276, 277-78, 328 S.E.2d 326, 328 (1985)). We elect to do so here and review Mother's claims on their merits. *See Anderson v. Hollifield*, 345 N.C. 480, 484, 480 S.E.2d 661, 664 (1997).

III. Discussion

¶ 17 **[2]** On appeal, Mother first argues the trial court erred by releasing Mother's provisional court-appointed attorney on its own motion without conducting an inquiry into counsel's efforts to reach Mother pursuant to N.C. Gen. Stat. § 7B-1108.1. Second, Mother contends the trial court erred by not appointing a GAL for the children under N.C. Gen. Stat. § 7B-1108(b). Because we hold the issue of the trial court's releasing Mother's provisional court-appointed attorney without inquiring into counsel's attempts to communicate with Mother and whether Mother was given notice of the pre-trial and termination hearings to be dispositive of the outcome in this case, we need not address Mother's second argument.

A. Fundamentally Fair Procedures

¶ 18 Under North Carolina law, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures, with the existence of such procedures being an inherent part of the State's efforts to protect the best interests of the affected children by preventing unnecessary interference with the parent-child relationship." *In re K.M.W.*, 376 N.C. 195, 208, 851 S.E.2d 849, 859 (2020) (quoting *In re Murphy*, 105 N.C. App. 651, 653, 414 S.E.2d 396, 397-98, *aff'd per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992)). In TPR proceedings, parents are entitled to procedural safeguards which provide fundamental fairness, ensuring "a parent's right to counsel and right to adequate notice of such proceedings." *In re K.N.*, 181 N.C. App. 736, 737, 640 S.E.2d 813, 814 (2007); *see* N.C. Gen. Stat. §§ 7B-1101.1, 7B-1106 (2021). In fact, this court has "consistently vacated or remanded TPR orders when questions of 'fundamental fairness' have arisen due to failures to follow [such] basic procedural safeguards." *In re M.G.*, 239 N.C. App. 77, 83, 767 S.E.2d 436, 441 (2015) (citation omitted).

¶ 19 In order to adequately "protect a parent's due process rights in a termination of parental rights proceeding, the General Assembly has created a statutory right to counsel for parents involved in termination proceedings" and a statutory right for parents to be given notice of the termination hearing. *In re K.M.W.*, 376 N.C. 195, 208, 851 S.E.2d 849, 859 (2020); N.C. Gen. Stat. § 7B-1106(a)(1); *In re A.D.S.*, 264 N.C. App. 637, 824 S.E.2d 926, 2019 N.C. App. LEXIS 283 at *10 (2019) (unpublished). Additionally, a parent in a TPR proceeding "has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right." N.C. Gen. Stat. § 7B-1101.1(a) (2021); *In re L.C.*, 181 N.C. App. 278, 282, 638 S.E.2d 638, 641 (2007) ("Parents have a right to counsel in

all proceedings dedicated to the termination of parental rights." (cleaned up)). This Court has stated that, "after making an appearance in a particular case, an attorney may not cease representing a client without '(1) justifiable cause, (2) reasonable notice [to the client], and (3) the permission of the court.' " *In re M.G.*, 239 N.C. App. 77, 83, 767 S.E.2d 436, 440 (alteration in original) (quoting *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 305 (1965)).

¶ 20 "The determination of counsel's motion to withdraw is within the discretion of the trial court, and thus we can reverse the trial court's decision only for abuse of discretion." *Benton v. Mintz*, 97 N.C. App. 583, 587, 389 S.E.2d 410, 412 (1990) (citation omitted). However, "this general rule presupposes that an attorney's withdrawal has been properly investigated and authorized by the court," so that "[w]here an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion" and "must grant the party affected a reasonable continuance or deny the attorney's motion for withdrawal." *Williams and Michael v. Kennamer*, 71 N.C. App. 215, 217, 321 S.E.2d 514, 516 (1984). Therefore, before the trial court allows an attorney to withdraw or relieves an attorney "from any obligation to actively participate in a termination of parental rights proceeding when the parent is absent from a hearing, the trial court must inquire into the efforts made by counsel to contact the parent in order to ensure that the parent's rights are adequately protected." *In re D.E.G.*, 228 N.C. App. 381, 386-87, 747 S.E.2d 280, 284 (2013) (citing *In re S.N.W.*, 204 N.C. App. 556, 561, 698 S.E.2d 76, 79 (2010)).

¶ 21 The record presented for our review demonstrates that Mother was personally served with the TPR petitions and summonses on April 16, 2021 and was assigned Ms. Walker as her court-appointed attorney. After receiving the TPR petitions, Mother informed her attorney that she wanted to contest them. Subsequently, Ms. Walker filed separate motions for Extension of Time on May 4, 2021 (in 15J27) and on May 7, 2021 (in 15J26), which were granted by the trial court. Although Mother did not file an answer or other responsive pleading in either case, the record shows that on June 23, 2021, Petitioners' attorney sent notice of the pretrial hearing and TPR hearing scheduled for July 15, 2021, to Father's provisional attorney, Father, and Mother's provisional attorney, but did not send notice to Mother at her address on file. We can deduce from the record before us that Petitioners' attorney presumed Mother's counsel made an appearance in this case by her filing motions for extensions of time. This presumption provides a possible explanation for why Petitioners' attorney did not serve Mother with notice of the TPR hearing.

¶ 22 Section 7B-1101.1 requires that "[a]t the first hearing after service upon the respondent parent, the court shall dismiss the provisional counsel if the respondent parent: [d]oes not appear at the hearing." N.C. Gen. Stat. § 7B-1101.1(a)(1). This statute presumes that the respondent parent has been given notice of the hearing and, therefore, an opportunity to decide whether to participate in the proceedings. Section 7B-1108.1 details an additional procedure to ensure a parent the fundamental fairness for TPR proceedings: the trial court is required to conduct a pretrial hearing, which may be combined with the adjudicatory hearing on termination. N.C. Gen. Stat. § 7B-1108.1 (2021). At this pretrial hearing, the court is required to "consider the . . . [r]etention or release of provisional counsel," and "[w]hether all summons, service of process, and notice requirements have been met." N.C. Gen. Stat. § 7B-1108.1(a)(1), (3). It is undisputed that Mother did not appear at the July 15, 2021 TPR hearing. However, before relieving Mother's attorney from any obligation to participate in the TPR hearing, the trial court was required to "inquire into the efforts made by counsel to contact [Mother] in order to ensure that the parent's rights are adequately protected." *In re D.E.G.*, 228 N.C. App. at 386-87, 747 S.E.2d at 284.

¶ 23 Here, during the pretrial hearing, the trial court's inquiry consisted solely of asking Mother's attorney, "Ms. Walker, any contact from your client, ma'am?" Ms. Walker reported that Mother made initial contact after service; scheduled an appointment to meet but missed the appointment; and contacted Ms. Walker's office to report she was in a substance abuse treatment facility. Ms. Walker further reported that she had contacted the facility and learned Mother had successfully graduated from the treatment program. At the time of the hearing, Mother had not contacted Ms. Walker since graduating from the treatment program, so that it had been "probably April" since Ms. Walker had heard from Mother.

¶ 24 The record also establishes that the trial court made no inquiries concerning whether Mother had notice of the present TPR hearing as required by section 7B-1108.1(a)(3). A careful review of the record shows the TPR summons was served upon Mother on April 16, 2021, and the July 15 hearing was the first hearing following service of the TPR summonses and petitions on Mother. Notice of the July 15 hearing was filed on June 23, 2021 and was sent to Mother's provisional attorney, Father, and Father's provisional attorney by Petitioners. While it is undisputed Mother did not appear at the hearing, there is no evidence in the record that Mother *knew* about the hearing. In fact, Mother's appellate attorney points out in her brief that "[i]t is unclear if [Mother] understood what time court started." The record shows Petitioners did not mail notice of

the hearing to Mother, and notably, the trial court did not inquire whether Mother's provisional attorney had mailed a copy of the TPR notice of hearing to Mother's address of record.

¶ 25 Upon hearing Ms. Walker's report that it had "been probably April" since she heard from her client, the trial court should have inquired about what efforts Ms. Walker had made to contact Mother and whether Mother was sent notice of the pretrial and TPR hearing by her counsel. The trial court made no extended inquiry of Ms. Walker regarding whether Mother "understood what time court started[,]" whether Ms. Walker had a phone number for Mother, or if Ms. Walker attempted to reach her that day to notify her of the TPR hearing. Thus, there is no indication in the record that Mother learned about the termination hearing from either her attorney or by receipt of a notice of hearing. Although the trial court determined all service and notice requirements had been met and that Mother's provisional attorney should be released, "despite efforts by the respective attorney[] to engage [Mother] in the participation of this proceeding[,]" we hold the trial court erred as these findings were not supported by competent evidence.

¶ 26 We take issue with the dissent's contention that, "[a]s such, even if the purported appeal is properly before this Court, the burden is and remains on Mother to show both the trial court committed reversible error and prejudice she did not invite nor brought about the reasons to forfeit her parental rights. This she has not and cannot do." Our Supreme Court stated in *In re K.M.W.*, "we decline to adopt the . . . suggestion that we require a showing of prejudice as a prerequisite for obtaining an award of appellate relief in cases involving the erroneous deprivation of the right to counsel . . . in termination of parental rights proceedings." 376 N.C. at 213, 851 S.E.2d at 862 (citations omitted). This is because "[a]side from the fact that the effect of such a deprivation upon a parent involved in a termination proceeding can be quite significant, it is simply impossible for a reviewing court to know what difference the availability of counsel might have made in any particular termination proceeding." *Id.* at 213-14, 851 S.E.2d at 862-63. Therefore, Mother is not required to demonstrate prejudice in order to obtain appellate relief based upon a violation of her right to counsel.

¶ 27 We again note that Mother had "no opportunity to present evidence or argument" that she had not received notice of the TPR hearing because she was absent from the hearing and the trial court released Mother's provisional counsel, without adequately inquiring into counsel's efforts to contact Mother regarding the termination hearing date, so that no counsel was present for Mother during the TPR hearing. *In re K.N.*, 181

N.C. App. at 741, 640 S.E.2d at 817. While a parent may waive the right to counsel by non-participation in the termination proceeding, "the record before us raises questions as to whether [Mother] was afforded with the proper procedures to ensure that [her] rights were protected during the termination of [her] parental rights to the minor children." *In re S.N.W.*, 204 N.C. App. at 561, 698 S.E.2d at 79. Because of the trial court's lack of inquiry concerning whether Mother knew about the termination hearing and the efforts made by counsel to communicate with Mother, the trial court committed reversible error by not ensuring that Mother's substantial rights to counsel and to adequate notice of such proceedings were protected. *In re D.E.G.*, 228 N.C. App. at 386-87, 747 S.E.2d at 284; *In re K.N.*, 181 N.C. App. at 737, 640 S.E.2d at 814. Accordingly, we vacate and remand for a new hearing.

IV. Conclusion

¶ 28 For the reasons stated above, we conclude that the failure of the trial court to adequately inquire into Mother's provisional court-appointed attorney's efforts to contact Mother about the TPR hearing "raise questions as to the fundamental fairness of the procedures that led to the termination of [Mother's] parental rights." *In re K.N.*, 181 N.C. App. at 741, 640 S.E.2d at 817. Therefore, we vacate the order terminating Mother's parental rights to her children and remand for a new hearing.

VACATED AND REMANDED.

Judge INMAN concurs by separate opinion.

Judge TYSON dissents by separate opinion.

INMAN, Judge, concurring in the result.

¶ 29 I concur in the majority opinion that the notice of appeal in this matter was not fatally defective because this Court and Appellee could reasonably infer to which court Mother intended to appeal. I also concur in the decision to vacate the trial court's order relieving provisional counsel and terminating Mother's parental rights strictly because the trial court did not make adequate inquiry of counsel's efforts to notify Mother of the continued hearing date. I write separately to note that this case exemplifies the tension between a parent's right to due process and the best interest of a child who has been living with foster parents for more than four years. I do not take lightly the limbo in which children and foster parents are placed in order to protect the rights of parents

whose children have for years been adjudicated abused, neglected, and/or dependent. *See In re R.T.W.*, 359 N.C. 539, 544, 614 S.E.2d 489, 492-93 (2005) (recognizing that the General Assembly crafted our abuse, neglect, and dependency statutes to mediate the "potential tension between parental rights and child welfare"), *superseded by statute on other grounds as recognized by In re A.S.M.R.*, 375 N.C. 539, 542, 850 S.E.2d 319, 321 (2020).

TYSON, Judge, dissenting.

¶ 30 We all agree Mother's appeal is not properly before this Court and is subject to dismissal. N.C. R. App. P. 3(d) ("The notice of appeal . . . shall designate the judgment or order from which appeal is taken and the court to which appeal is taken[.]"). Several binding precedents clearly state: "In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure" and "failure to follow the requirements thereof requires dismissal of an appeal." *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 790-791 (2011) (quoting *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000)); *see also Abels v. Renfro Corp.*, 126 N.C. App. 800, 802, 486 S.E.2d 735, 737 (1997).

¶ 31 No Petition for Writ of Certiorari is pending before this Court. *See* N.C. R. App. P. 21. The majority's opinion asserts the defective notice of appeal together with Mother's arguments in her brief is a *de facto* Petition and "in our discretion" decides to "treat the purported appeal as a petition for writ of certiorari" and address the merits, citing N.C. R. App. P. 21(a)(1). As such, even if the purported appeal is properly before this Court, the burden is and remains on Mother to show both the trial court committed reversible error and prejudice and she did not invite nor brought about the reasons to forfeit her parental rights. This she has not and cannot do. It is not the role of this Court to create an appeal for appellant.

¶ 32 The majority's opinion "takes issue" with this longstanding precedent citing *In re K.M.W.*, 376 N.C. 376 N.C. 195, 208, 851 S.E.2d 849, 859 (2020). *In re K.M.W.* is a wholly inapposite opinion regarding a parent present at a TPR proceeding being required to proceed pro se by the trial court. *Id.* *In re K.M.W.* involves an appeal of right to our Supreme Court, and was based on an objection preserved for appellate review by operation of law. When the mother appeared, without an attorney, and the trial court did not conduct a colloquy, our Supreme Court held

this was reversible error. *Id.* at 215, 851 S.E.2d at 863. Here, Mother never appeared despite being personally served of the proceedings and communications with her counsel. The majority reviews Mother's arguments on a purported PWC. Nothing in the reasoning or holding of *In re K.M.W.* absolves Mother or this Court from long established requirements to grant a PWC or to shift or reduce her burdens on appeal. I respectfully dissent.

I. Jurisdiction

¶ 33 It is axiomatic that if an appellant has not properly given a notice of appeal, this Court is without jurisdiction to hear the appeal. *See State v. McMillian*, 101 N.C. App. 425, 427, 399 S.E.2d 410, 411 (1991). Rule 27(c) of the Rules of Appellate Procedure prohibits this Court from granting defendant an extension of time to file a notice of appeal since compliance with the requirements of Rules 3 and 4(a)(2) are jurisdictional and cannot simply be ignored by this Court. *See O'Neill v. Bank*, 40 N.C. App. 227, 230, 252 S.E.2d 231, 233-34 (1979).

¶ 34 "The writ of *certiorari* may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a). Our Appellate Rules specify the contents of a petition for a writ of certiorari:

> The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

N.C. R. App. P. 21(c).

¶ 35 Our Supreme Court recently reaffirmed the basis and rules for a Court to exercise its discretion to issue a writ of certiorari in *State v. Ricks*: "[T]he petition must show merit or that error was probably committed below. . . . A writ of certiorari is not intended as a substitute for a notice of appeal because such a practice would render meaningless the rules governing the time and manner of noticing appeals." *State v. Ricks*, 378 N.C. 737, 741, 2021-NCSC-116, ¶ 6, 862 S.E.2d 835, 839 (2021) (internal citations and quotation marks omitted).

¶ 36 The admittedly faulty notice of appeal and the contents of Mother's brief clearly do not meet the requirements set forth in Rule 21(c). "The North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal.' " *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005). In order the correct the deficiencies in Mother's purported petition for writ of certiorari, the majority must also invoke the provisions of Rule 2 of the Rules of Appellate Procedure, which it fails to do. N.C. R. App. P. 2.

¶ 37 The authority to invoke Rule 2 and Rule 21 are discretionary. *See State v. McCoy*, 171 N.C. App. 636, 639, 615 S.E.2d 319, 321 (2005) (citations omitted). Mother's arguments do not show "merit or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted). The plurality should decline "to take *two* extraordinary steps" to exercise its discretion to correct *post hoc* defects in a notice of appeal, use Mother's brief as the purported petition for writ of certiorari, to allow it, and fails to invoke Rule 2 to review the merits. *State v. Bishop*, 255 N.C. App. 767, 768, 805 S.E.2d 367, 369 (2017); *see Ricks*, 378 N.C. at 741, 2021-NCSC-116, ¶ 6, 862 S.E.2d at 839. "It is not the role of the appellate courts . . . to create an appeal for an appellant. . . . [T]he Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Viar*, 359 N.C at 402, 610 S.E.2d at 361.

II. Background

¶ 38 Ralph and Reggie were born in July 2012 and November 2013, respectively, and are now ten and eight years old. Ralph and Reggie have resided continuously with Petitioners since 6 September 2014. Petitioners are husband and wife, licensed foster parents, and are step-maternal aunt and uncle to the children.

¶ 39 On 11 July 2015 the trial court adjudicated both children as neglected due to housing instability, income instability, and substance abuse by both parents. After nearly six years, on 5 April 2021, Petitioners filed petitions to terminate Mother's parental rights. The Petitions alleged Mother: (1) had willfully neglected her children; (2) failed to complete reunification requirements; (3) did not exercise her visitation rights; (4) did not provide proper care or supervision; and, (5) had willfully abandoned her children for at least six months immediately prior to the filing of the Petitions.

¶ 40 On 16 April 2021, the Henderson County Sheriff personally served Mother with the TPR petitions and summonses. Ms. Walker had been

appointed as Mother's provisional court-appointed attorney at the time of the filing of the Petitions. Mother knew of her appointed counsel and called Ms. Walker to contest the TPR petitions. Mother's provisional attorney timely filed separate motions for an Extension of Time to Answer on 4 May 2021 and on 7 May 2021. Both motions were granted by the trial court and allowed Mother to file an answer or response to the respective petitions on or by 9 June 2021. Despite this grace, Mother did not provide or file answers nor other responsive pleading to contest either Petition, with which she had been served.

¶ 41 On 23 June 2021, Petitioners filed a Notice of Hearing scheduling a hearing on the TPR petitions for 15 July 2021. Mother's provisional court-appointed attorney was present in court. Mother failed to appear in court at the 15 July 2021 TPR hearing. The trial court asked Ms. Walker in open court whether she had contact with Mother.

¶ 42 Ms. Walker responded Mother had contacted her when she was personally served with the Petitions and Summons. Mother failed to appear for her scheduled office appointment, but had again contacted her office to "say she was in a treatment facility" for substance abuse. Ms. Walker contacted and spoke with the treatment facility Mother had provided and learned Mother had successfully graduated from the program. Ms. Walker stated she had last heard from Mother in April 2021. Mother did not inform counsel of her whereabouts after being discharged from treatment. This was her choice.

¶ 43 A week before the TPR hearing, Mother sent a card to her children at Petitioner's address in which she wrote that "she was trying her best to get better, and to be better, and that she loved and missed them very much." The envelope listed a return address in Abbeville, South Carolina that was previously unknown to either Petitioners or counsel.

¶ 44 During the pretrial hearing, the trial court found that all service and notice requirements had been met. The court noted that "the appointment of a Guardian Ad Litem for the child[ren] was not needed or required as neither Respondent has sought to contest the [TPR] Petition[s]." The court also stated "there are no issues or pre-trial motions raised by any party" and "no responsive pleading has been submitted by Mother (although the court notes that a Motion and Order for extension of time in regards [sic] to the Respondent Mother appears in the court file[s])."

¶ 45 The trial court, on its own motion and in its discretion, released Ms. Walker from continuing to represent Mother in the termination action. In

the TPR Order, the trial court found that "[t]he provisionally appointed attorney[] for [Mother] should be released, despite efforts by . . . attorney[] to engage [Mother] in the participation of this proceeding." These findings are not challenged and are binding upon appeal.

¶ 46 After the pretrial hearing, the court proceeded with the adjudication and disposition stages of the TPR hearing. The court heard testimony from Petitioner wife. She testified both children had lived with her and her husband since September 2014; the children were adjudicated neglected based upon Mother's housing instability, income instability, and substance abuse in 2015; and, Mother had not exercised any visitations with her children since July 2019.

¶ 47 Petitioner wife also testified, and the trial court found, Mother had failed to provide support for her children, is not involved in their education, extracurricular activities, or medical appointments, and failed to make progress in correcting the conditions that led to her children's removal from her custody. Petitioner wife acknowledged Mother had sent the card noted above to children, which had arrived a week earlier.

¶ 48 After this testimony, the court found grounds existed to terminate Mother's parental rights based on willful neglect and willful abandonment by clear and convincing evidence because: Mother has not exercised her visitation rights with her children for years, has failed to follow through with telephone calls or visitation with her children, and has not offered any support for her children since July 2019.

¶ 49 At the dispositional "best interests" portion of the TPR hearing, the trial court determined: (1) a strong bond exists between Petitioners and Reggie and Ralph; (2) the likelihood Petitioners will adopt the children is high; and, (3) it is in the best interests of the children to terminate Mother's parental rights. On 15 July 2021, the trial court entered orders terminating Mother's parental rights to Reggie and Ralph. Mother filed written notice of appeal to the Supreme Court on 13 August 2021.

III. Standard of Review

¶ 50 "The determination of counsel's motion to withdraw is within the discretion of the trial court, and thus we can reverse the trial court's decision only for abuse of discretion." *Benton v. Mintz*, 97 N.C. App. 583, 587, 389 S.E.2d 410, 412 (1990) (citation omitted). The trial court's "best interests" determination is also reviewed for abuse of discretion. *See In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002).

IV. Analysis

¶ 51 Mother was personally served with the TPR petitions and summonses on 16 April 2021 and was aware of appointment of Ms. Walker as her court-appointed attorney. After receiving the petitions, Mother informed Ms. Walker that she wanted to contest the TPR petitions. Ms. Walker scheduled an office appointment, which Mother failed to keep. Ms. Walker filed separate Extension of Time motions for each child on 4 May 2021 and on 7 May 2021, which were granted by the trial court. Mother failed to contact her appointed counsel to file an answer or other responsive pleading in either case. Petitioner's attorney sent notice of the pretrial hearing and TPR hearing on 23 June 2021, scheduled for 15 July 2021, to Ms. Walker who had made an appearance of record in this case by filing motions for an Extension of Time. The plurality opinion correctly notes, "after making an appearance in a particular case, an attorney may not cease representing a client without '(1) justifiable cause, (2) reasonable notice [to the client], and (3) the permission of the court.' " *In re M.G.* , 239 N.C. App. at 83, 767 S.E.2d at 440 (quoting *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 305 (1965)).

¶ 52 A client who fails to keep appointments, does not maintain contact and apprise counsel of means and an address to contact them and absents and secrets themselves is a "justifiable cause" to "cease representing a client." *Id.* There is no dispute Ms. Walker ably and zealously represented Mother within the conduct and constraints Mother imposed and she used reasonable investigations to seek and make contact with Mother. Ms. Walker appeared and was present at the hearing. Her continued representation was ceased with "the permission of the court." *Id.*

¶ 53 At this pretrial hearing, the court is statutorily required to "consider the . . . [r]etention or release of provisional counsel," and "[w]hether all summons, service of process, and notice requirements have been met." N.C. Gen. Stat. § 7B-1108.1 (a)(1), (3) (2021). N.C. Gen. Stat. § 7B-1101.1(a)(1) also requires: "At the first hearing *after service* upon the respondent parent, the court *shall dismiss* the provisional counsel if the respondent parent: [d]oes not appear at the hearing." N.C. Gen. Stat. § 7B-1101.1(a)(1) (emphasis supplied). The trial court found and concluded all service and notice requirements had been met and that Mother's provisional attorney should be released, "despite efforts by the respective attorney[] to engage the Mother . . . in the participation of this proceeding." This finding and conclusion is unchallenged and is binding on appeal.

¶ 54 The issue becomes whether Mother has argued and shown an abuse of discretion and reversible error in the trial court's decision. *Benton*, 97 N.C. App. at 587, 389 S.E.2d at 412. To grant Mother a further extension or a continuance or not also rests within the trial court's discretion. Whether another trial judge could have or even would have reached a different conclusion is not the issue. There is no burden on appeal resting on the Petitioner-appellee or the trial judge. It is solely on the Mother, who is before this Court only by discretionary grace, with no preserved challenges to the trial court's findings or conclusions. *Id.*

V. Conclusion

¶ 55 While a whole panoply of rights and protections for a parent are rightly preserved in the Constitutions and statutes and are available in the trough, you cannot force a recalcitrant and absent parent to partake and drink. As Judge Inman's concurrence correctly notes, courts cannot take "lightly the limbo in which children and foster parents are placed in order to protect the rights of parents whose children have for years been adjudicated abused, neglected, and/or dependent." *See In re R.T.W.*, 359 N.C. 544, 614 S.E.2d 489, 492 (recognizing that the General Assembly crafted our abuse, neglect, and dependency statutes to mediate the "potential tension between parental rights and child welfare").

¶ 56 The trial court's unchallenged findings and conclusions are based upon clear cogent and convincing evidence. Mother has shown no abuse of discretion in the trial court's failure to grant a continuance, further extensions, to release appointed counsel, or in its best interest determinations to terminate Mother's parental rights. Presuming, without agreeing, this appeal is even properly before this Court, the trial court's order is properly affirmed. I respectfully dissent.

IZZY AIR, LLC v. TRIAD AVIATION, INC.

[284 N.C. App. 655, 2022-NCCOA-523]

IZZY AIR, LLC, HUGH TUTTLE, AND LESLIE PAIGE TUTTLE, Plaintiffs
v.
TRIAD AVIATION, INC., Defendant

No. COA21-284

Filed 2 August 2022

Statutes of Limitation and Repose—borrowing provision—out-of-state plaintiffs—cause of action outside of state

In an action arising from the in-flight engine failure of plaintiffs' small aircraft after the engine had been overhauled by defendant, the trial court's order granting defendant's Rule 12(b)(6) motion to dismiss plaintiffs' complaint was affirmed because the borrowing provision of N.C.G.S. § 1-21 required application of South Carolina's three-year statute of limitations and thus barred plaintiffs' unfair and deceptive trade practices (UDTP) claim, where plaintiffs were residents of South Carolina, plaintiffs' lawsuit was filed after South Carolina's three-year statute of limitations had run, and the cause of action arose in South Carolina (under both the most significant relationship test and the lex loci approach).

Appeal by Plaintiffs from order entered 22 December 2020 by Judge John M. Dunlow in Alamance County Superior Court. Heard in the Court of Appeals 12 January 2022.

Crouse Law Offices, PLLC, by James T. Crouse, for Plaintiffs-Appellants.

Cranfill Sumner LLP, by Steven A. Bader, Susan L. Hofer, and Mica N. Worthy, for Defendant-Appellee.

COLLINS, Judge.

¶ 1 Plaintiffs Izzy Air, LLC, Hugh Tuttle, and Leslie Paige Tuttle appeal an order granting Defendant Triad Aviation, Inc.'s, Rule 12(b)(6) motion to dismiss Plaintiffs' complaint. We affirm the trial court's order.

I. Background

¶ 2 Sometime prior to 30 September 2016, Plaintiffs Hugh Tuttle and his wife Leslie Tuttle, residents of South Carolina and the owners of Izzy Air, LLC, a Delaware corporation, hired Defendant, an aircraft maintenance and repair service located in Burlington, North Carolina, to overhaul the

engine of a small aircraft owned and operated by Plaintiffs. Plaintiffs shipped the engine from South Carolina to Defendant's facility in North Carolina where it was repaired, overhauled, inspected, and tested.

¶ 3 Defendant provided Plaintiffs with a Limited Aircraft Engine Warranty ("Warranty") containing the following language pertinent to this appeal:

> TRIAD AVIATION, INC. warrants the . . . aircraft engine to be free from defects in materials and workmanship furnished by TRIAD for a period of one (1) year or 500 hours from the date of the first operation, or 30 days after delivery as follows.
>
> . . . .
>
> 8. This warranty covers only you, the original purchaser and gives you specific rights which vary from state to state. . . . . The work to which this [l]imited warranty applies is deemed to have been accomplished at Burlington, North Carolina, and *in the event of a dispute on this Warranty the laws of the State of North Carolina shall apply*. To exercise your rights under this Limited Warranty, you must give prompt notice to TRIAD by telephone call or letter fully describing such defect or failure.

(Emphasis added).

¶ 4 The Tuttles took the aircraft with the newly-serviced engine out for a flight in South Carolina on 30 September 2016. Hugh Tuttle piloted the plane and Leslie Tuttle was the sole passenger. Shortly after takeoff, the engine began "running rough," and "began cutting in and out." Hugh Tuttle declared an emergency and attempted to land at a nearby airport. Before the Tuttles made it to the airport, the engine failed. Hugh Tuttle was forced to make an emergency landing in a field. The plane was damaged beyond repair and the incident caused Plaintiffs "serious personal and psychological injuries."

¶ 5 Plaintiffs notified Defendant of the engine failure and emergency landing within a reasonable time after the incident and repeatedly notified Defendant thereafter. Despite these notifications and "despite having actual knowledge of the in-flight failure of [the] engine which it had overhauled and a claim made thereupon," Defendant "refused to honor the express warranty it provided on its work and parts supplied for [the] engine."

¶ 6 On 15 September 2020, Plaintiffs filed a second amended complaint against Defendant alleging a single cause of action for violation of North Carolina's Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. §§ 75-1.1 *et seq*. ("UDTP"). Defendant filed a Rule 12(b)(6) motion to dismiss, arguing that South Carolina's statute of limitations applied to Plaintiffs' claim pursuant to North Carolina's borrowing statute, N.C. Gen. Stat. § 1-21, and that Plaintiffs' UDTP claim was time-barred under South Carolina's three-year statute of limitations. After a hearing on Defendant's motion to dismiss, the trial court granted the motion with prejudice by written order entered 22 December 2020. Plaintiffs timely appealed.

II. Discussion

¶ 7 Plaintiffs argue that the trial court erred by granting Defendant's Rule 12(b)(6) motion to dismiss.

A. Standard of Review

¶ 8 "In considering a motion to dismiss under Rule 12(b)(6), the Court must decide whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016) (quotation marks and citations omitted). On appeal, we review de novo a trial court's grant of a motion to dismiss pursuant to Rule 12(b)(6). *Id.*

B. Analysis

¶ 9 The dispositive issue on appeal is whether the borrowing provision of N.C. Gen. Stat. § 1-21 requires application of South Carolina's three-year statute of limitations and thus bars Plaintiffs' UDTP claim.

¶ 10 "Our traditional conflict of laws rule is that matters affecting the substantial rights of the parties are determined by lex loci, the law of the situs of the claim, and remedial or procedural rights are determined by lex fori, the law of the forum." *Boudreau v. Baughman*, 322 N.C. 331, 335, 368 S.E.2d 849, 853-54 (1988). "Ordinary statutes of limitation are clearly procedural, affecting only the remedy directly and not the right to recover." *Id.* at 340, 368 S.E.2d at 857.

¶ 11 However, "[o]ur General Assembly provided a legislative exception to the traditional rule by enacting a statute containing a limited 'borrowing provision.' " *George v. Lowe's Cos.*, 272 N.C. App. 278, 280, 846 S.E.2d 787, 788 (2020) (quoting *Laurent v. USAir, Inc.*, 124 N.C. App. 208, 211, 476 S.E.2d 443, 445 (1996)). "Pursuant to N.C. Gen. Stat. § 1-21, where a

claim arising in another jurisdiction is barred by the laws of that jurisdiction, and the claimant is not a resident of North Carolina, the claim will be barred in North Carolina as well:" *id.*,

> [W]here a cause of action arose outside of this State and is barred by the laws of the jurisdiction in which it arose, no action may be maintained in the courts of this State for the enforcement thereof, except where the cause of action originally accrued in favor of a resident of this State.

N.C. Gen. Stat. § 1-21 (2020). South Carolina Code § 39-5-150 provides that no action under the South Carolina Unfair Trade Practices Act may be brought more than three years after discovery of the unlawful conduct that is the subject of the suit. S.C. Code § 39-5-150 (2020).

¶ 12 In this case, it is undisputed that Plaintiffs were not residents of North Carolina at any relevant time; they were residents of South Carolina. It is also undisputed that Plaintiffs' lawsuit was filed on 15 June 2020, after the three-year statute of limitations for an unfair trade practices claim in South Carolina had run. *See id.* Accordingly, we must only determine whether Plaintiffs' UDTP "cause of action arose outside of this State," N.C. Gen. Stat. § 1-21, such that the borrowing provision applied.

1. Contract's Choice of Law Provision

¶ 13 Plaintiffs argue that because the parties agreed in the Warranty that North Carolina law would apply in the event of a dispute on the Warranty, North Carolina's four-year statute of limitations under N.C. Gen. Stat. § 75-16.2 applies to their UDTP claim; thus, the claim is not time barred. We disagree.

¶ 14 "[P]arties to a business contract may agree in the business contract that North Carolina law shall govern their rights and duties in whole or in part . . . ." N.C. Gen. Stat. § 1G-3 (2020). In this case, the operative portion of the Warranty states, "in the event of a dispute on this Warranty the laws of the State of North Carolina shall apply." By its plain terms, this provision dictates that North Carolina law governs a warranty dispute; this provision does not dictate that North Carolina law governs all litigation between the parties.

¶ 15 As neither an intentional breach of contract nor a breach of warranty, standing alone, is sufficient to maintain a UDTP claim, *Mitchell v. Linville*, 148 N.C. App. 71, 74, 557 S.E.2d 620, 623 (2001), the Warranty's choice-of-law provision does not specifically apply to Plaintiffs' UDTP

claim. Conversely, the provision is not sufficiently broad to encompass Plaintiffs' UDTP claim. *See Lambert v. Navy Fed. Credit Union*, 2019 U.S. Dist. LEXIS 138592, at *17 (E.D. Va. Aug. 14, 2019) (holding that the choice of law language in the parties' contract was "sufficiently broad" to preclude plaintiff's North Carolina UDTP claim). Accordingly, North Carolina law, and specifically its four-year statute of limitations, does not apply to Plaintiffs' UDTP claim by virtue of the terms of the Warranty.

¶ 16 Nonetheless, even if the choice-of-law provision in the Warranty were construed to apply to Plaintiffs' UDTP claim, North Carolina's four-year statute of limitations would not automatically apply. Applying "the laws of the State of North Carolina" to Plaintiffs' UDTP claim would nonetheless necessitate a determination of whether the borrowing provision of N.C. Gen. Stat. § 1-21 requires the application of South Carolina's three-year statute of limitations to Plaintiffs' UDTP claim.

2. Where the Cause of Action Arose

¶ 17 Plaintiffs further argue that "the acts and events that form the basis for Plaintiffs' [UDTP] claim occurred in North Carolina" not South Carolina; because the cause of action did not arise outside of this State, the borrowing statute does not apply. We disagree.

¶ 18 In ascertaining whether Plaintiffs' UDTP action arose outside of this State, we are guided by our Court's choice-of-law analysis in the context of UDTP claims. Our North Carolina Supreme Court has not addressed the proper choice-of-law test for UDTP claims, and there is a split of authority in our Court on the appropriate rule to be applied. *Stetser v. TAP Pharm. Prods. Inc.*, 165 N.C. App. 1, 15, 598 S.E.2d 570, 580 (2004). Under the most significant relationship test, the court looks to "the law of the state having the most significant relationship to the occurrence giving rise to the action." *Andrew Jackson Sales v. Bi-Lo Stores, Inc.*, 68 N.C. App. 222, 225, 314 S.E.2d 797, 799 (1984) (citations omitted). Under the lex loci approach, "[t]he law of the State where the last act occurred giving rise to [the] injury governs [the] Sec. 75-1.1 action." *United Va. Bank v. Air-Lift Assocs.*, 79 N.C. App. 315, 321, 339 S.E.2d 90, 94 (1986) (citation omitted); *see also Shaw v. Lee*, 258 N.C. 609, 610, 129 S.E.2d 288, 289 (1963) (explaining that "the law of the state where the injuries were sustained" governs the claim).

¶ 19 Plaintiffs argue that under both the most significant relationship test and the lex loci choice of law analysis, Plaintiffs have alleged facts sufficient to show that the claim arose in North Carolina and thus, that the borrowing statute does not apply.

¶ 20 Defendant, on the other hand, argues that "[n]o choice of law analysis need be done" because "[o]ur appellate courts have twice applied the borrowing statute to cases involving airplane accidents [and i]n both cases, the courts ruled that the claims arose in the state where the accident occurred." Defendant argues, in the alternative, that lex loci is the proper test to apply but that under either the most significant relationship test or lex loci, Plaintiffs' claim arose in South Carolina.

¶ 21 We disagree with Defendant that no choice of law analysis need be done. As it was undisputed in both *Laurent v. USAir, Inc.* and *Broadfoot v. Everett*, 270 N.C. 429, 154 S.E.2d 522 (1967), cited by Defendant, that the causes of action arose outside of this State, this Court did not analyze where the cause of action arose. We agree with Defendant's analysis, however, that under both the most significant relationship test and the lex loci choice of law analysis, Plaintiffs' claim arose in South Carolina.

¶ 22 Under the most significant relationship test, the individual plaintiffs reside in South Carolina, Plaintiffs shipped the engine to Defendant from South Carolina, the airplane accident occurred in South Carolina, Plaintiffs sustained their injuries in South Carolina, and Plaintiffs' alleged efforts to notify Defendant of the accident occurred in South Carolina. While North Carolina is not without connection to the occurrence giving rise to the action, South Carolina has the more significant relationship.

¶ 23 Under the lex loci approach, Plaintiffs sustained their injuries in South Carolina and the last act giving rise to Plaintiffs' claim occurred in South Carolina when Plaintiffs' airplane engine failed in South Carolina and they were forced to attempt an emergency landing in South Carolina. Thus, under the lex loci approach, Plaintiffs' claim "arose" in South Carolina.

¶ 24 As Plaintiffs' UDTP cause of action arose in South Carolina and Plaintiffs failed to file this action before South Carolina's three-year statute of limitation ran, this failure bars their claim not only in South Carolina, but also in North Carolina, pursuant to N.C. Gen. Stat. § 1-21. *See Stokes v. Wilson & Redding Law Firm*, 72 N.C. App. 107, 113, 323 S.E.2d 470, 475 (1984) ("[A]fter the cause of action has been barred in the jurisdiction where it arose, only a plaintiff, who was a resident of this State at the time the cause of action originally accrued, has the right to maintain an action in the courts of this State." (citation omitted)).

3. Substantial aggravating circumstances

¶ 25 Even if we were to apply North Carolina procedural law, including its four-year statute of limitations, to this claim, Plaintiffs have failed to state a UDTP claim under North Carolina substantive law.

¶ 26 North Carolina's Unfair and Deceptive Trade Practices Act declares as unlawful "unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. § 75-1.1(a) (2020). " '[C]ommerce' includes all business activities[.]" *Id.* § 75-1.1(b) (2020). In order to survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead facts sufficient to show: "(1) an unfair or deceptive act or practice, (2) in or affecting commerce, (3) which proximately caused injury to plaintiffs." *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000) (citing N.C. Gen. Stat. § 75-1.1(a)). "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Walker v. Fleetwood Homes of N.C., Inc.*, 362 N.C. 63, 72, 653 S.E.2d 393, 399 (2007) (citation omitted). "A practice is deceptive if it has the capacity or tendency to deceive." *Id.* (brackets and citation omitted).

¶ 27 "Neither an intentional breach of contract nor a breach of warranty, however, constitutes a violation of Chapter 75." *Mitchell*, 148 N.C. App. at 74, 557 S.E.2d at 623 (citations omitted).

> [A]ctions for unfair or deceptive trade practices are distinct from actions for breach of contract, and a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C. [Gen. Stat.] § 75-1.1. Substantial aggravating circumstances must attend the breach in order to recover under the Act. A violation of Chapter 75 is unlikely to occur during the course of contractual performance, as these types of claims are best resolved by simply determining whether the parties properly fulfilled their contractual duties.

Id. at 75, 557 S.E.2d at 623-24 (quotation marks, brackets, and citations omitted) (holding that plaintiff's allegations regarding defendants' deficient construction of a home and defendants' failure to properly address such deficiencies, "while certainly supportive of the conclusion that defendants breached the implied warranty of habitability, do not indicate 'substantial aggravating circumstances attending the breach' as to transform defendants' actions into a Chapter 75 violation").

¶ 28 In this case, Plaintiffs alleged in pertinent part:

> 5. . . . The engine failure and subsequent forced landing caused serious personal and psychological injuries to Plaintiffs HUGH TUTTLE and PAIGE TUTTLE and caused the total economic loss of aircraft N39686.

. . . .

8. Defendant TRIAD failed to properly overhaul, repair, test, inspect and certify Engine L-5575-61A in accordance with applicable policies, practices, laws and regulations, and in accordance with all warranties and representations, and in violation of the contract between the parties, causing engine L-5575-61A to fail prematurely and without warning, causing the total loss of aircraft N39686. . . .

9. Defendant TRIAD'S acts, and/or omissions, by and through its agents, employees, servants and/or officials, acting within the course and scope of their authority, included failing to comply with standards, practices and FAR's, which are intended to ensure that aircraft engines, including Engine L-5575-61A, and its component parts, are properly overhauled, assembled and tested . . . resulting in damages in excess of Twenty-Five Thousand Dollars ($25,000.00):

. . . .

10. Defendant TRIAD, within a reasonable time after the occurrence and breach complained of, was notified of the failure of the product and its breaches and has been repeatedly so informed since that initial notification. Despite these notifications, TRIAD has refused to honor the express warranty it provided on its work and parts supplied for engine L-5575-61A.

. . . .

14. Defendant TRIAD's acts and practices as alleged in paragraphs 1 through 13 were deceptive and unfair to consumers in North Carolina, and therefore violate N.C. Gen. Stat. § 75-1.1 (a).

15. Defendant TRIAD's unfair and deceptive business practices include, but are not limited to:

a. Misrepresentations regarding the airworthiness, fitness, and merchantability of the overhauled engine it manufactured, in which engine defects and faulty parts were hidden and unknowable, which endangered not only the pilot and

other occupants of N39686 but also unsuspecting persons on the ground;

b. Failing to honor the provisions of its warranties, express and implied, over a lengthy time, despite having actual knowledge of the in-flight failure of engine L-5575-61A which it had overhauled and a claim made thereupon.

c. Unfair in that it offended established public policy as set forth in the Federal Aviation Regulations and general aviation good practices and the laws of North Carolina.

d. Other willful, wanton, reckless, intentional and unscrupulous and wrongful acts as set forth in this Complaint.

16. Plaintiffs IZZY AIR, HUGH TUTTLE and LESLIE PAIGE TUTTLE relied upon the representations made by Defendant TRIAD that Engine L-5575-61A was properly overhauled, airworthy, merchantable, and safe for its intended use, and upon the warranty issued by TRIAD.

17. As a direct and proximate result of the facts set forth in paragraphs 1 through 16 above, Plaintiffs IZZY AIR, HUGH TUTTLE and LESLIE PAIGE TUTTLE have sustained personal and psychological injuries, property and other economic damages in excess of twenty-five thousand dollars ($25,000.00), including, but not limited to, pre-impact fear and terror, bodily injuries, future medical costs, total loss of Aircraft N39686, loss of income, increased insurance costs, increased aircraft operational costs, and other damages as will be demonstrated at the trial of this matter.

¶ 29 Plaintiffs essentially allege that Defendant failed to perform the overhaul of the engine in a workmanlike manner and then failed to honor the provisions of its Warranty.[1] The facts alleged, while arguably

1. Plaintiffs allege facts in their appellate brief in support of their UDTP claim that were not alleged in their Second Amended Complaint. We do not consider facts alleged beyond the four corners of the complaint and the attached Warranty. *See Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, 251 N.C. App. 771, 775, 796 S.E.2d 120, 123

sufficient to state a claim for breach of the Warranty, do not indicate "substantial aggravating circumstances attending the breach as to transform [D]efendants' actions into a Chapter 75 violation." *Mitchell*, 148 N.C. App. at 76, 557 S.E.2d at 624 (quotation marks omitted); *see Walker*, 362 N.C. at 71-72, 653 S.E.2d at 399-400 (concluding that the jury's findings that "defendant failed to perform repairs completely and in a workmanlike and competent manner, and that defendant repeatedly failed to respond promptly to plaintiffs' complaints regarding those repairs" were alone insufficient "to reach conclusions of law required under § 75-1.1 as to whether defendant's actions were deceptive, immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers").

¶ 30 Lacking any allegations of "substantial aggravating circumstances," Plaintiffs have failed to state a claim for unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1.

¶ 31 Citing Rule 15 of our Rules of Civil Procedure, Plaintiffs argue further that they "should be allowed to amend their complaint to cure any defects or conduct discovery to obtain information to support their complaint and overcome any [m]otion [t]o [d]ismiss." However, Plaintiffs have had ample opportunity to file a sufficient complaint and have failed to do so. Plaintiffs' first suit named the wrong party. Plaintiffs then dismissed, re-filed, and amended the complaint twice. Moreover, there was no motion before the trial court to amend the second amended complaint. Accordingly, the trial court did not err by not allowing Plaintiffs to amend their complaint.

4. Equity

¶ 32 Finally, Plaintiffs argue that "equity requires that the court deny application of North Carolina's 'borrowing statute,' " arguing that Defendant induced Plaintiffs to delay filing their claim and thus, caused them to untimely file their action. We disagree.

¶ 33 Plaintiffs failed to plead facts sufficient to support a conclusion that Defendants are equitably estopped from asserting statute of limitations as a defense. *Compare Teague v. Randolph Surgical Assocs., P.A.*, 129 N.C. App. 766, 772, 501 S.E.2d 382, 387 (1998) (holding that defendant's "offer to discuss settlement or possible arbitration was not of such a nature as to reasonably lead plaintiffs to believe that defendants would not assert any defenses they might have, including the statute of limitations,

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(2017) ("At the motion to dismiss stage, the trial court (and this Court) may not consider evidence outside the four corners of the complaint and the attached contract." (citation omitted)).

in the event settlement was not accomplished"), *with Duke Univ. v. Stainback*, 320 N.C. 337, 341, 357 S.E.2d 690, 693 (1987) (holding that "[t]he actions and statements of [defendant's] attorney caused [plaintiff] to reasonably believe that it would receive its payment for services rendered . . . and such belief reasonably caused [plaintiff] to forego pursuing its legal remedy against [defendant]").

¶ 34 Moreover, as explained above, even if we apply North Carolina's statute of limitations, Plaintiffs have failed to state a UDTP claim. Accordingly, the trial court did not err by allowing Defendant's motion to dismiss.

III. Conclusion

¶ 35 The trial court did not err by dismissing Plaintiffs' action for failure to state a claim under Rule 12(b)(6). Accordingly, we affirm the order of the trial court.

AFFIRMED.

Judges MURPHY and CARPENTER concur.

KODY H. KINSLEY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, PLAINTIFF
v.
ACE SPEEDWAY RACING, LTD., AFTER 5 EVENTS, LLC, 1804-1814 GREEN STREET ASSOCIATES LIMITED PARTNERSHIP, JASON TURNER, AND ROBERT TURNER, DEFENDANTS

No. COA21-428

Filed 2 August 2022

1. Appeal and Error—notice of appeal—timeliness—certificate of service—actual notice

Plaintiff's notice of appeal from the trial court's order denying plaintiff's motion to dismiss defendant's counterclaims was timely filed where plaintiff did not receive effective service initiating the thirty-day period to file a notice of appeal, and so the thirty-day period began when plaintiff actually received the trial court's denial order in the mail.

2. Constitutional Law—North Carolina—fruits of their own labor clause—COVID-19 orders—closure of business facilities—sovereign immunity

A racetrack and its owners (defendants) sufficiently pled their counterclaim that the Secretary of the N.C. Department of Health and Human Services (plaintiff) had deprived defendants of their constitutional right to the fruits of their own labor by issuing an order, pursuant to the authority of an executive order that had been issued in response to COVID-19, demanding that defendants abate further mass gatherings at their racetrack—interfering with defendants' lawful operation of their business and their right to earn a living. Therefore, sovereign immunity could not bar defendants' counterclaim.

3. Constitutional Law—North Carolina—equal protection—COVID-19 orders—closure of business facilities—sovereign immunity

A racetrack and its owners (defendants) sufficiently pled their counterclaim that the Secretary of the N.C. Department of Health and Human Services (plaintiff) had deprived defendants of their constitutional right to equal protection by selectively enforcing an executive order prohibiting mass gatherings, which the governor had issued in response to COVID-19, in bad faith for the invidious purpose of silencing defendants' lawful expression of discontent with the governor's actions. Therefore, sovereign immunity could not bar defendants' counterclaim.

Appeal by Plaintiff from order entered 12 January 2021 by Judge John M. Dunlow in Alamance County Superior Court. Heard in the Court of Appeals 8 March 2022.

Solicitor General Ryan Y. Park, by Assistant Solicitor General Nicholas S. Brod and Solicitor General Fellow Zachary W. Ezor, and Attorney General Joshua H. Stein, by Assistant Attorney General John P. Barkley, for Plaintiff-Appellant.

Kitchen Law, PLLC, by S.C. Kitchen, for Defendants-Appellees.

Jeanette K. Doran for amicus curiae North Carolina Institute for Constitutional Law.

GRIFFIN, Judge.

¶ 1 This case makes us consider the use of overwhelming power by the State against the individual liberties of its citizens and how that use of power may be challenged. The people of North Carolina recognized the importance of this balance in ratification of our Constitution in 1868. The challenged act here involves the closing of a business by a cabinet secretary. Plaintiff Kody H. Kinsley,[1] in his official capacity as Secretary of the North Carolina Department of Health and Human Services, issued an order of abatement to close a racetrack. The Secretary issued the abatement order only after the Governor's use of an executive order and his direct request to local law enforcement to close the track failed.

¶ 2 Amidst the onset of the COVID-19 pandemic, the Governor issued executive orders placing restrictions on the rights of the people of North Carolina to gather. The Secretary appeals from the trial court's order denying his motion to dismiss two counterclaims brought by Defendants Ace Speedway Racing, Ltd, its affiliates, and its owners. Ace's counterclaims propose that the Governor's orders were enforced upon them without justification and without equal protection of law. Ace's counterclaims are constitutional claims alleging (1) executive orders issued by the Governor in response to the COVID-19 pandemic were an unlawful infringement on Ace's right to earn a living as guaranteed by our Constitution's fruits of labor clause, and (2) the Secretary's enforcement actions against Ace under the executive order constituted unlawful selective enforcement. The Secretary argues Ace failed to present colorable constitutional claims, and therefore failed to overcome the Secretary's sovereign immunity from suit.

¶ 3 In this appeal, we are asked to decide whether Ace has presented colorable constitutional claims for which our courts could provide a remedy. We hold that Ace pled each of its constitutional claims sufficiently to survive the Secretary's motion to dismiss. We affirm the trial court's order.

I. Factual and Procedural Background

¶ 4 Ace operates ACE Speedway in Alamance County as a racetrack, hosting car races with a maximum audience seating capacity of around 5,000 people. To feasibly host a race and pay its staff of roughly forty-five employees, Ace needs "around a thousand fans" to attend each race.

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1. Secretary Mandy K. Cohen originally filed this appeal in her capacity as Secretary of the North Carolina Department of Health and Human Services. She has since been succeeded by Secretary Kinsley. We substitute Secretary Kinsley as party to this appeal in accordance with N.C. R. App. P. 38(c).

¶ 5 In March 2020, the COVID-19 virus began spreading across the United States. State governments across the country began to impose restrictions on their citizens' right to gather, conduct public activities, and engage in in-person means of commerce. On 20 May 2020, pursuant to emergency directive authority granted by N.C. Gen. Stat. § 166A-19.30, Governor Roy Cooper issued Executive Order 141 decreeing, in relevant part, that "mass gatherings" were temporarily prohibited in North Carolina. Exec. Order No. 141, 34 N.C. Reg. 2360 (May 20, 2020). Order 141 defined "mass gatherings" as "an event or convening that brings together more than ten (10) people indoors or more than twenty-five (25) people outdoors at the same time in a single confined indoor or outdoor space, such as an auditorium, stadium, arena, or meeting hall." *Id.*

¶ 6 The mass gathering prohibition in Order 141 nullified Ace's ability to hold economically feasible racing events at ACE Speedway. On 22 May 2020, the Burlington Times-News published an article featuring statements from Defendant Jason Turner, an owner of ACE Speedway, regarding the restrictions in Order 141 and his plans to nonetheless hold races at ACE Speedway. The article quoted Turner as follows:

> I'm going to race and I'm going to have people in the stands. . . . And unless they can barricade the road, I'm going to do it. The racing community wants to race. They're sick and tired of the politics. People are not scared of something that ain't killing nobody. It may kill .03 percent, but we deal with more than that every day, and I'm not buying it no more.

Ace followed through on Turner's statement and began to hold races during the summer of 2020.

¶ 7 Ace held its first race of the season at ACE Speedway on 23 May 2020. The event drew an audience of approximately 2,550 spectators. On 15 May 2020, a week before the first race, Ace met with local health and safety officials. Ace and the local officials agreed upon health precautions for its events, including contact tracing, temperature screenings, social distancing in common areas, and reduced and distanced audience seating arrangements. With each of its health precautions in place, Ace held races on May 23, May 30, and June 6, hosting over 1,000 spectators at each event.

¶ 8 On 30 May 2020, before that afternoon's race, the Governor's office requested that Alamance County Sheriff Terry Johnson personally ask Ace to stop holding racing events in violation of Order 141. The Sheriff relayed the Governor's message and informed Ace that they could face

sanctions if they did not comply. After Ace held the race on May 30, the Sheriff publicly stated that he would not take any further actions to enforce Order 141. On 5 June 2020, the Governor's office sent a letter to the Sheriff and Ace, once again advising that Ace was conducting racing events in violation of Order 141 and potentially subject to sanctions. Ace held its third race on June 6, the following day.

¶ 9 On 8 June 2020, the Secretary issued an order demanding that Ace abate further mass gatherings at ACE Speedway. This Abatement Order explained that Ace had "operated openly in contradiction of the restrictions and recommendations in [Order 141,]" and, therefore, "immediate action" was necessary to prevent "increased exposure to thousands of people attending races at ACE Speedway, and thousands more who may be exposed to COVID-19 by family members, friends, and neighbors who have attended or will attend races at ACE Speedway." The Abatement Order instructed Ace to close its facilities until the expiration of Order 141, or until such time as Ace developed a plan to host events in full compliance with Order 141's mass gathering restrictions. The Abatement Order also required Ace to "notify the public by 5:00 p.m. on [9 June 2020] that its upcoming races and other events . . . [were] cancelled[,]" and to notify DHHS by 5:00 p.m. on June 9 that it had complied. Ace declined to close its facilities or provide timely notice to the public and DHHS as required by the Abatement Order.

¶ 10 On 10 June 2020, the Secretary filed a complaint, motion for temporary restraining order, and motion for preliminary injunction seeking to enforce the terms of the Abatement Order. On 11 June 2020, Judge D. Thomas Lambeth, Jr., entered an order granting the Secretary's temporary restraining order and "enjoined [Ace] from taking any action to conduct or facilitate a stock car race or other mass gathering at ACE Speedway[.]" On 10 July 2020, following a hearing on the matter, Judge Lambeth entered an order granting the Secretary's motion for preliminary injunction and enjoining Ace "from taking any action prohibited by the Abatement Order[.]"

¶ 11 On 25 August 2020, Ace filed its answer to the Secretary's complaint and its own counterclaims, including the two constitutional claims at issue in this appeal: (1) infringement upon Ace's right to earn a living and (2) selective enforcement of Order 141 against Ace.

¶ 12 On 4 September 2020, the Governor issued Executive Order 163, which replaced Order 141 and loosened Order 141's mass gathering restrictions to allow a total of fifty people in outdoor gatherings. The Secretary voluntarily dismissed his complaint in this matter against Ace

because the terms of the Abatement Order were moot and no longer enforceable as written. Ace did not dismiss its counterclaims.

¶ 13 On 2 December 2020, the Secretary moved to dismiss Ace's counterclaims, arguing that each counterclaim was barred by sovereign immunity from suit. The trial court heard arguments on the justiciability of each claim. In January 2021, Judge John M. Dunlow entered an order (the "Denial Order") denying the Secretary's motion to dismiss each of Ace's constitutional claims.[2] The Secretary filed notice of appeal from the Denial Order on 17 February 2021.

II. Analysis

¶ 14 The matter before us on appeal is whether the trial court erred by denying the Secretary's motion to dismiss Ace's two constitutional counterclaims on grounds of sovereign immunity from suit.

A. Timeliness of Appeal

¶ 15 **[1]** We first address the timeliness of the Secretary's appeal from the denial of his motion to dismiss Ace's counterclaims. Ace moves to dismiss the Secretary's appeal on grounds that the Secretary's notice of appeal was untimely because he failed to comply with the terms of Rule 3(c) of the North Carolina Rules of Appellate Procedure.

¶ 16 "The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) (citation omitted). Rule 3(c) dictates that a party to a civil action "must file and serve a notice of appeal . . . within thirty days after entry of judgment [or order] if the party has been served with a copy of the judgment [or order] within the three-day period [after the order is entered]." N.C. R. App. P. 3(c)(1). Alternatively, if service was not made within three days, the party must file and serve a notice of appeal "within thirty days after service upon the party of a copy of the judgment." N.C. R. App. P. 3(c)(2). Effective service of a court document must include a certificate of service showing "the date and method of service or the date of acceptance of service and shall show the name and service address of each person upon

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2. On 12 November 2020, Ace amended its counterclaims to assert three additional counterclaims. Following the hearing on justiciability, the trial court dismissed each additional counterclaim. Ace does not appeal the dismissal of these three counterclaims.

On 11 February 2021, Ace filed a motion for entry of default judgment against the Secretary. The trial court entered default judgment against the Secretary, but, following a hearing on the matter, allowed the Secretary's motion to set aside default.

whom the paper has been served." N.C. R. Civ. P. 5(b1). In the absence of properly effected service, the thirty-day period within which the party must file its appeal begins to run from the date the party obtained actual notice of the order. *Brown v. Swarn*, 257 N.C. App. 417, 421, 810 S.E.2d 237, 239 (2018) ("[W]here evidence in the record shows that the appellant received actual notice of the [order] more than thirty days before noticing the appeal, the appeal is not timely.").

¶ 17 Here, the record shows that the trial court entered the Denial Order on either 15 or 19 January 2021. The file stamp on the Denial Order is unclear and difficult to read. The record includes a certificate of service for the Denial Order filed on 15 January 2021. However, the trial court determined during the hearing to set aside entry of default against the Secretary that the package mailed to the Secretary containing the Denial Order did not include a copy of the certificate of service. The record does not indicate that the Secretary ever received the certificate of service for the Denial Order. Without a certificate of service, the Secretary never received effective service initiating the thirty-day period to file notice of appeal. Instead, the Secretary received actual notice of the Denial Order when he received the mailed package. Therefore, the thirty-day period to file notice of appeal from the Denial Order was tolled until February 4, only thirteen days before the Secretary filed a timely notice of appeal. This Court has jurisdiction over the Secretary's appeal.

¶ 18 The Secretary moved to dismiss Ace's claims under Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing the basis of sovereign immunity for each. The trial court denied the Secretary's motion in full. Nonetheless, the Secretary's arguments on appeal contend only that Ace failed to adequately plead its constitutional claims. We will therefore consider only whether Ace has properly pled claims for relief under Rule 12(b)(6). N.C. R. Civ. P. 12(b)(6) (allowing a party to defend a claim by contending the claimant "[f]ail[ed] to state a claim upon which relief can be granted").

¶ 19 An appeal from the denial of a motion to dismiss is interlocutory, and ordinarily not ripe for immediate appellate review unless the appeal affects a substantial right. *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). "This Court has consistently held that the denial of a [Rule 12(b)(6)] motion to dismiss based upon the defense of sovereign immunity affects a substantial right and is thus immediately appealable." *Richmond Cnty. Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 586, 739 S.E.2d 566, 568 (2013) (citation, brackets, and

quotation marks omitted). The Secretary's appeal is properly before this Court, and Ace's motion to dismiss the Secretary's appeal is denied.[3]

B. Review of Constitutional Claims and Sovereign Immunity

¶ 20 "This Court reviews a trial court's decision to grant or deny a motion to dismiss based upon the doctrine of sovereign immunity using a de novo standard of review." *State ex rel. Stein v. Kinston Charter Acad.*, 379 N.C. 560, 2021-NCSC-163, ¶ 23. "When reviewing a [Rule 12(b)(6)] motion to dismiss, an appellate court considers whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Deminski on behalf of C.E.D. v. State Bd. of Educ.*, 377 N.C. 406, 2021-NCSC-58, ¶ 12. (citations and quotation marks omitted). North Carolina's rules of pleading require that a complaint "state enough to give the substantive elements of a *legally recognized claim*." *New Hanover Cnty. Bd. of Educ. v. Stein*, 380 N.C. 94, 2022-NCSC-9, ¶ 32.

¶ 21 "As a general rule, the doctrine of governmental, or sovereign[,] immunity bars actions against . . . the state, its counties, and its public officials sued in their official capacity." *Bunch v. Britton*, 253 N.C. App. 659, 666, 802 S.E.2d 462, 469 (2017) (citation omitted). However, our Courts have "held that the doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights of our Constitution." *Id.* (summarizing the North Carolina Supreme Court's holding in *Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 786, 413 S.E.2d 276, 292 (1992). "[W]hen there is a clash between . . . constitutional rights and sovereign immunity, the constitutional rights must prevail." *Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 786, 413 S.E.2d 276, 292 (1992).

> [T]his Court has long held that when public officials invade or threaten to invade the personal or property rights of a citizen in disregard of law, they are not relieved from responsibility by the doctrine of sovereign immunity even though they act or assume to act under the authority and pursuant to the directions of the State.

Id.

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3. The Secretary also filed a petition for writ of certiorari in the event that his appeal was deemed untimely. We dismiss the Secretary's petition as moot.

C. Fruits of Their Labor Clause

¶ 22 **[2]** Ace's first constitutional claim alleges infringement of its "inalienable right to earn a living" under Article I, sections 1 and 19 of the North Carolina Constitution. Article I states:

> Section 1. The equality and rights of persons.
>
> We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, *the enjoyment of the fruits of their own labor*, and the pursuit of happiness.
>
> . . .
>
> Sec. 19. Law of the land; equal protection of the laws.
>
> 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. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

N.C. Const. art. 1, §§ 1, 19 (emphasis added). The right to "enjoyment of the fruits of their own labor" joined the enumeration of each North Carolina citizen's inalienable rights as part of revisions to the Constitution in 1868. *See* N.C. Const. of 1868. The drafters believed that, in the wake of slavery, no man could truly be free in this state without the right to both liberty and to reap the benefits of what he sowed. *See* Albion W. Tourgée, An Appeal to Caesar 244 (1884). North Carolinians have long valued and recognized the dignity of work.

¶ 23 With this in mind, the addition of a right to the fruits of one's labor to the North Carolina Constitution sought to increase the floor of protections granted by similar provisions in the United States federal constitution. U.S. Const. amend. XIV, § 1 (protecting citizens' rights to "life, liberty, or property" with due process of law). Since then, our courts have construed North Carolina citizens' right to the "fruits of their labor" to be synonymous with their "right to earn a living" in whatever occupation they desired. *See State v. Harris*, 216 N.C. 746, 759, 6 S.E.2d 854, 863 (1940) ("[T]he power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in

it"). "The right to work and to earn a livelihood is a property right that cannot be taken away except under the police power of the State in the paramount public interest for reasons of health, safety, morals, or public welfare." *Roller v. Allen*, 245 N.C. 516, 518, 96 S.E.2d 851, 854 (1957). " 'The right to conduct a lawful business or to earn a livelihood is regarded as fundamental.' " *Id.*, 245 N.C. at 518–19, 96 S.E.2d at 584 (citation omitted). "Arbitrary interference with private business and unnecessary restrictions upon lawful occupations are not within the police powers of the State." *State v. Warren*, 252 N.C. 690, 693, 114 S.E.2d 660, 663–64 (1960).

¶ 24 To effectively plead government intrusion on a constitutional right, the claimant's pleadings must show: (1) a state actor violated the claimant individual's constitutional rights; (2) the claim alleged substantively presents a "colorable" constitutional claim; and (3) no adequate state remedy exists apart from a direct claim under the Constitution. *Deminski*, 2021-NCSC-58, ¶¶ 15–18.

¶ 25 Here, Ace's first claim alleged:

> 124. This counterclaim is brought against the [Secretary] in [his] official capacity as [he] was acting at all time relevant hereto as the Secretary of the North Carolina Department of Health and Human Services.
>
> 125. The [Abatement Order] is based on a violation of the Mass Gathering limits imposed by [Order 141] which required [Ace] to cease operating.
>
> 126. [Order 141 and the Abatement Order] deprive [Ace] of [its] inalienable right to earn a living as guaranteed by Art. I, sec. 1 and 19, of the North Carolina Constitution.
>
> . . .
>
> 129. [Order 141] and the [Secretary's Abatement Order] based on [Order 141] are unconstitutional as applied to [Ace] as neither the [Secretary] nor the Governor of the State possess the authority to deprive [Ace] of [its] right to pursue an ordinary vocation and earn a living.
>
> 130. The [Secretary] does not have sovereign immunity as this counterclaim is brought directly

> under the Declaration of Rights of the North Carolina Constitution.
>
> 131. [Ace does] not have an adequate state remedy, and therefore, there is a direct cause of action against the [Secretary] for the violation of [Ace's] rights as guaranteed by Art. I, sec. 1 and 19, of the North Carolina Constitution.

¶ 26 Ace pled that its rights were violated by the Secretary in his official capacity as a state actor. Ace also pled its lack of an alternative, adequate state remedy through which it could seek relief. We agree that Ace has no other avenue to seek relief for the Secretary's allegedly improper enforcement apart from a direct action under the Constitution.

¶ 27 Ace has also pled a colorable, though admittedly novel, claim for government intrusion on its right to earn a living. It is well-established that the fruits of their labor clause applies when our government, most often the legislature, enacts a scheme of legislation or regulation that purports to protect the public from undesirable actors within occupations. *See Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 65, 366 S.E.2d 697, 699 (1988) (concerning legislation regarding manufacture of goods for military use); *Warren*, 252 N.C. at 695, 114 S.E.2d at 665 (1960) (concerning licensure legislation for real estate brokers); *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949) (concerning legislation creating licensure requirements for photographers). Likewise, our courts have more recently held that the clause also applies when a government employer denies a state employee due process with respect to the terms and procedures of his or her employment. *See Mole' v. City of Durham*, 279 N.C. App. 583, 2021-NCCOA-527, ¶ 29, *disc. rev. granted*, *Mole' v. City of Durham*, 868 S.E.2d 851 (N.C. 2022); *Tully v. City of Wilmington*, 370 N.C. 527, 535–36, 810 S.E.2d 208, 215 (2018) ("Article I, Section 1 also applies when a governmental entity acts in an arbitrary and capricious manner toward one of its employees by failing to abide by promotional procedures that the employer itself put in place."). It naturally follows that actions taken by other non-legislative state actors, whether elected officials or unelected bureaucrats, may run afoul of a citizen's right to the fruits of his own labor when they arbitrarily interfere with occupations, professions, or the operation of business.

¶ 28 The core principle behind the fruits of their labor clause is that government " 'may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.' " *Cheek v. City of*

Charlotte, 273 N.C. 293, 296, 160 S.E.2d 18, 21 (1968) (quoting *Lawton v. Stell*, 152 U.S. 133, 137 (1894)). The present case involves enforcement action taken under the authority of an executive order issued by the Governor, rather than laws promulgated by the legislature. The intended purpose of the Governor's order was not to regulate a particular occupation or business enterprise, but the direct and intended purpose of the Abatement Order was to cease the operation of a business. It cannot be denied that the scope and breadth of the Abatement Order restricted or otherwise interfered with the lawful operation of a business serving the public.

¶ 29 The Secretary argues that Ace's first claim should be decided at the 12(b)(6) stage as a matter of law. To this end, the Secretary contends that this Court may take judicial notice of factual data surrounding the COVID-19 pandemic at the time the Abatement Order was issued, which will unequivocally support the Secretary's decisions. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 182, 594 S.E.2d 1, 16 (2004) (stating this Court may consider all matters before the state actor as well as matters of which it may take judicial notice when reviewing constitutionality). We disagree. Ace pled that the Abatement Order was the foundational authorization to force Ace to cease operating its racetrack and that the was Order unconstitutional as applied to Ace. An examination of the facts surrounding the COVID-19 pandemic at a later stage of trial may show that Ace's precautionary measures to manage contact tracing of its attendees; install plexiglass, touchless thermometers, six-feet distance markers, and screening booths; and to initiate vigilant cleaning procedures—all in consult with local health officials—were sufficient to combat the spread of COVID-19 within an open-air racetrack in Alamance County. Presuming these facts in favor of Ace as the non-movant, the reasonableness of an "imminent hazard" as justification for the Secretary's actions can be questioned. We hold that Ace adequately pled that the Secretary, through his Abatement Order, deprived Ace of its constitutional right to the fruits of one's own labor and, therefore, sovereign immunity cannot bar Ace's claim. *Deminski*, 2021-NCSC-58, ¶ 21.

D. Selective Enforcement

¶ 30 **[3]** Ace's second constitutional claim alleges that the Secretary's Abatement Order, levied against Ace and no other speedways, ran afoul of Article 1, section 19's decree that "[n]o person shall be denied the equal protection of the laws[.]" N.C. Const. art. 1, § 19. Through its second claim, Ace once again sufficiently pleads a constitutional challenge to the Secretary's method of enforcing Order 141.

¶ 31 Selective enforcement of the law by the State is barred by an individual's right to equal protection when enforcement is based upon an arbitrary classification. *State v. Garner*, 340 N.C. 573, 588, 459 S.E.2d 718, 725 (1995) (citations omitted). "Such arbitrary classifications include prosecution due to a defendant's decision to exercise his statutory or constitutional rights." *Id.* (citing *United States v. Goodwin*, 457 U.S. 368, ___ (1982)); *Roller*, 245 N.C. at 518, 96 S.E.2d at 854 (stating right to earn a living is a constitutional right). Our Supreme Court has set out the two-part test for selective enforcement as (1) a singling out of the defendant for (2) discriminatory, invidious reasons:

> The generally recognized two-part test to show discriminatory selective prosecution is (1) the defendant must make a *prima facie* showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not; (2) upon satisfying (1) above, he must demonstrate that the discriminatory selection for prosecution was invidious and done in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

State v. Howard, 78 N.C. App. 262, 266–67, 337 S.E.2d 598, 601–02 (1985) (citations omitted). "Mere laxity in enforcement does not satisfy the elements of a claim of selective or discriminatory enforcement in violation of the equal protection clause." *Grace Baptist Church of Oxford v. City of Oxford*, 320 N.C. 439, 445, 358 S.E.2d 372, 376 (1987). Rather, the claimant must show that a state actor applied the law with "a pattern of conscious discrimination" evidencing administration "with an evil eye and an unequal hand." *Id.* (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886)) (some citations omitted).

¶ 32 Ace's claim alleged:

> 136. Many speedways in addition to ACE Speedway have been conducting races with fans in attendance without any enforcement action by the [Secretary].
>
> 137. [Ace was] singled out by the Governor for enforcement after comments . . . made by Defendant Robert Turner[] were made public.
>
> 138. The Governor took the unusual step of having a letter sent to the Sheriff of Alamance County directing him to take action against [Ace].

> 139. [Ace is] informed and believe that no other [s]peedway has been the subject of an Order of Abatement of Imminent Hazard by the [Secretary].
>
> 140. [Ace is] informed and believe[s] that the [Abatement Order] was issued by the [Secretary] . . . due to the statements of Defendant Robert Turner and not because a true Imminent Hazard exists.
>
> 141. The issuance of the [Abatement Order] violates the equal protection rights of [Ace] as guaranteed by Article I, Section 19 of the North Carolina Constitution.
>
> 142. The [Secretary] does not have sovereign immunity as this counterclaim is brought directly under the Declaration of Rights of the North Carolina Constitution.
>
> 143. [Ace does] not have an adequate state remedy, and therefore, there is a direct cause of action against the [Secretary] for the violation of [Ace's] rights as guaranteed by Art. I, sec. 19, of the North Carolina Constitution.

¶ 33 Ace once again pleads that its rights were violated by the Secretary in his official capacity as a state actor, and that it has no avenue for redress other than an action under the Constitution.

¶ 34 With respect to whether Ace's substantive claim is colorable, the Secretary argues that Ace failed to plead both (1) that it was "singled out" for prosecution while "similarly situated" to other raceways, and (2) that the Secretary acted invidiously in "bad faith." The Secretary's argument places special emphasis on Ace's failure to track specific language in pleading its claim. We have held that a party need not use magic words to plead the substantive elements of its claim. *See Feltman v. City of Wilson*, 238 N.C. App. 246, 253–54, 767 S.E.2d 615, 621 (2014); *see also State v. Dale*, 245 N.C. App. 497, 504, 783 S.E.2d 222, 227 (2016) ("This notice pleading has replaced the use of 'magic words' and allows for a less exacting standard, so long as the defendant is properly advised of the charge against him or her."). A pleading is sufficient "if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may

need to prepare for trial." *Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E.2d 161, 167 (1970) ("Under the 'notice theory' of pleading contemplated by [N.C. R. Civ P.] 8(a)(1), detailed fact-pleading is no longer required.").

¶ 35 The Secretary's argument fails. Ace pled "enough to give the substantive elements of a *legally recognized claim*" for selective enforcement. *See Stein*, 2022-NCSC-9, ¶ 32. Ace effectively pled that it was among a class of "many speedways" that similarly conducted races with fans in attendance during the period where such actions were banned by Order 141. Ace further pled that Governor Cooper and the Secretary "singled out" Ace for enforcement by directing the Sheriff to take action against Ace and, when that failed, by issuing the Abatement Order against Ace alone. Finally, Ace's complaint pled its belief that it was singled out for enforcement in response to Defendant Turner's statements to the press "and not because a true Imminent Hazard exist[ed,]" as the Secretary asserted in the Abatement Order. These pleadings, taken as true, sufficiently allege bad faith enforcement of Order 141 against Ace alone.

¶ 36 The Secretary contends that Ace's pled discriminatory reason for his enforcement of Order 141—retaliation for statements made to the press critiquing Order 141—is insufficient to plead selective enforcement. The Secretary cites *State v. Davis*, 96 N.C. App. 545, 550, 386 S.E.2d 743, 745 (1989), for support. In *Davis*, following his conviction for tax-related offenses, the defendant argued on appeal that he was selectively prosecuted based upon "invidious discrimination" because he belonged to a political group that routinely and openly protested personal income tax laws. *Id.* at 548–49, 386 S.E.2d at 744. This Court ruled that the defendant's evidence at trial failed to show more than a tenuous relationship between his association with the anti-tax political group and the State's decision to prosecute him instead of any number of other citizens who failed to file their tax returns. Therefore, the defendant could not show he was "singled out" for prosecution. *Id.* at 549, 386 S.E.2d at 744–45.

¶ 37 Further, and most relevant to the present case, the Court held that the defendant presented "a feckless argument that the statutes he was charged under [were] unconstitutional as applied to him because selection for his prosecution was impermissibly based on an attempt to suppress his first amendment right of free speech." *Id.* at 549, 386 S.E.2d at 745. Even assuming that the defendant was singled out for his vocal protest of income taxes, the Court found no invidiousness or bad faith because "such prosecutions, predicated in part upon a potential deterrent effect, serve a legitimate interest in promoting more general tax compliance." *Id.* at 550, 386 S.E.2d at 745.

¶ 38 The facts of *Davis* are similar to the facts of the present case. Ace pleads that it was selected for enforcement by the Secretary because its owner was outspokenly critical of Order 141. The Secretary asserts that Ace must fail for the same reason the defendant's argument failed in *Davis*: regardless of possible alternative reasons for enforcement, singling out outspoken individuals has a strong deterrent effect upon those who are similarly situated and choose similar courses of action.

¶ 39 The present case must be distinguished from *Davis* based upon the relevant stage of the proceedings. The Court in *Davis* reached its holding following appellate review of evidence admitted during a full trial, and after determining that any effort to reduce the defendant's speech was, at most, an equal and alternative purpose to deterrence of criminal conduct. Here, we are tasked only with determining whether Ace has sufficiently pled the substantive elements of its claim. Ace has pled that the Secretary acted based solely upon an effort to silence its opposition to Order 141, and not based upon any alternative, legitimate state interest. The resolution of this question is not before us at this time. Ace has sufficiently pled that the Secretary singled its racetrack out for enforcement in bad faith for the invidious purpose of silencing its lawful expression of discontent with the Governor's actions. Therefore, sovereign immunity cannot bar Ace's claim.

III. Conclusion

¶ 40 We hold that Ace pled colorable claims for infringement of its right to earn a living and for selective enforcement of the Governor's orders sufficient to survive the Secretary's motion to dismiss.

AFFIRMED.

Judges CARPENTER and GORE concur.

STATE v. JOYNER

[284 N.C. App. 681, 2022-NCCOA-525]

STATE OF NORTH CAROLINA
v.
RANDALL LEE JOYNER

No. COA21-83

Filed 2 August 2022

1. Constitutional Law—Confrontation Clause—criminal trial—unavailable witness' testimony from prior civil hearing—implicit waiver

In a prosecution for obtaining property by false pretenses and exploitation of an elderly person while in a business relationship, where an elderly woman (who died before defendant's criminal trial) had previously obtained a civil no-contact order against defendant after he charged her thousands of dollars for home repair work he never performed, the trial court did not violate defendant's right to confront his accuser under the Confrontation Clause by admitting the woman's testimony from the hearing on the no-contact order, along with the order itself. Defendant had a meaningful opportunity to cross-examine the woman at the civil hearing on the same facts and issues raised in his criminal trial, but because he implicitly waived that opportunity by choosing not to appear at the hearing, he could not now allege a confrontation rights violation.

2. Evidence—hearsay—criminal trial—unavailable witness' testimony from prior civil hearing—Rule 804(b)(1)

In a prosecution for obtaining property by false pretenses and exploitation of an elderly person while in a business relationship, where an elderly woman had previously obtained a civil no-contact order against defendant after he charged her thousands of dollars for home repair work he never performed, the trial court properly admitted the woman's testimony from the hearing on the no-contact order under the hearsay exception described in Evidence Rule 804(b)(1). The woman died before defendant's trial, and was therefore "unavailable" for purposes of Rule 804(b)(1); further, her testimony was admissible under the Rule where the no-contact hearing dealt with the same facts and issues raised in defendant's criminal trial, meaning that defendant had an "opportunity and similar motive" to develop her testimony at that hearing by direct, cross, or redirect examination.

3. Evidence—admissibility—civil no-contact order—criminal trial involving similar issues—plain error analysis

In a prosecution for obtaining property by false pretenses and exploitation of an elderly person while in a business relationship, where an elderly woman had previously obtained a civil no-contact order against defendant after he charged her thousands of dollars for home repair work he never performed, the trial court did not commit plain error when it admitted the no-contact order into evidence. The court did not violate N.C.G.S. § 1-149 by admitting the order because the State had offered it to show that the issues raised in the no-contact hearing and defendant's criminal trial were the same rather than to prove any fact alleged in the order. Further, even if the court had erred, the State provided ample evidence that defendant committed the charged crimes, and therefore the order's admission did not have a probable impact on the jury's verdict.

4. Evidence—civil no-contact order—criminal trial on similar issues—no due process violation

In a prosecution for obtaining property by false pretenses and exploitation of an elderly person while in a business relationship, where an elderly woman had previously obtained a civil no-contact order against defendant after he charged her thousands of dollars for home repair work he never performed, the trial court did not violate defendant's due process rights by admitting the no-contact order into evidence, including language in the order stating that the woman "suffered unlawful conduct by the [d]efendant." The order was properly admitted to show that the issues raised in the no-contact hearing and defendant's criminal trial were the same; further, defendant had the opportunity to object to the order's admission at trial, did object, and was overruled.

5. Discovery—criminal case—motion to inspect, examine, and photograph crime scene—no due process rights violation

In a prosecution for obtaining property by false pretenses and exploitation of an elderly person while in a business relationship, where defendant performed minor home repair work for an elderly woman, lied to her about nonexistent damage to her home, and then charged her thousands of dollars for extra repair work he never performed, the trial court did not violate defendant's federal due process rights by denying his motion to inspect, examine, and photograph the crime scene (the woman's home). First, there is no general constitutional right to discovery in a criminal case. Second, although the North Carolina Supreme Court previously held that a

criminal defendant seeking exculpatory evidence had a due process right to inspect a crime scene, defendant's case was distinguishable in that he had first-hand knowledge of the woman's house and the work he performed there, meaning that he did not need to examine the house to find exculpatory evidence.

Appeal by Defendant from judgments entered 5 February 2020 by Judge Leonard L. Wiggins in Edgecombe County Superior Court. Heard in the Court of Appeals 30 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Llogan R. Walters, for the State.

Jason Christopher Yoder, for the Defendant.

WOOD, Judge.

¶ 1 Randall Joyner ("Defendant") appeals from judgments for conviction of obtaining property by false pretenses and exploitation of a disabled or elderly person while in a business relationship. On appeal, Defendant argues the trial court erred 1) by admitting Margaret Meeks's ("Meeks") former testimony and a no-contact order into evidence and 2) by denying his motion to allow him to inspect, examine, and photograph the crime scene. After a careful review of the record and applicable law, we discern no error.

I. Factual and Procedural Background

¶ 2 On November 10, 2018, Defendant approached Meeks at her home and offered to perform home improvement work. At the time, Meeks was 88 years of age and lived alone. Meeks agreed and hired Defendant to do some painting and to clean out the gutters at her home. Defendant began work the same day. Defendant said he saw "something laying in the gutter" which appeared to be rotten wood. Defendant took pictures and showed both the pictures and the "rotten wood" to Meeks, explaining to her that she needed to have her roof repaired. After seeing the photos and rotten wood, Meeks hired Defendant to repair her roof.

¶ 3 That same day, Defendant presented Meeks with a "Contractors Invoice" itemizing the needed roof work, totaling $1,500.00. The "Description of Work Performed" section of the invoice, stated, in relevant parts:

[1.] Remove shingles on left front of home.

> [2.] Remove drip edge on left front of home.
>
> [3.] Remove rotten sheeting on left front of home.
>
> [4.] Remove shingles in valley on left front of home.
>
> . . .
>
> [5.] Install new shingles where removed.
>
> [6.] Install new sheeting where removed.

Meeks paid $750.00 upfront towards the invoice.

¶ 4 After Defendant had finished working on her roof, Meeks contacted Defendant again, requesting him to return to her home to fix an issue with her toilet. Upon arrival, Defendant inspected Meeks's toilet. He concluded the toilet was broken and was causing water damage underneath her house. At the time, Defendant did not have a plumber's license. On November 13, 2018, Defendant presented a second invoice to Meeks for the proposed work on her bathroom in the amount of $2,200.00. Under its "Description of Work Performed" section, Defendant represented that he would:

> [1.] Remove installation where needed under bathroom.
>
> [2.] Disconnect and remove leaking plumbing pipe.
>
> [3.] Cut and install plywood subfloor under bathroom where needed.
>
> . . .
>
> [5.] Install new sewer line where removed.
>
> [6.] Install new installation under bathroom[.]

Meeks paid the full amount of the second invoice to Defendant up front, and he left Meeks's home to obtain construction materials for the second project.

¶ 5 Officer D.L. Bailey of the Tarboro Police Department ("Officer Bailey") was monitoring traffic that afternoon in the vicinity of Meeks's home. Officer Bailey recognized and performed a routine license plate check on Defendant's vehicle. Officer Bailey concluded Defendant "wasn't operating on an active license" and initiated a traffic stop. During the traffic stop, Defendant explained he was doing repair work in the area, at the end of Brandon Avenue. Officer Bailey did not have any knowledge about who specifically lived in the area of Brandon

Avenue but was aware it was "predominantly an elderly neighborhood." After Officer Bailey finished Defendant's traffic stop, he looked into Defendant's criminal history and discovered Defendant had previous charges for obtaining property by false pretenses, defrauding the elderly, and breaking and entering.

¶ 6 Because of Defendant's criminal history and his statement to Officer Bailey that he was working on repairs to a house at the end of Brandon Avenue, Officer Bailey decided to visit the house and inquire about the work Defendant was performing. During his inquiry, Meeks told Officer Bailey that Defendant had been performing roof and flooring work for her. Meeks also stated she was "not really able to tell what's going on . . . [and] just paid the bills."

¶ 7 After speaking with Meeks, Officer Bailey contacted the town's building inspector Alan Davis ("Davis"), to get a professional opinion about whether Defendant had performed the work as represented to Meeks. That same day, Davis came to Meeks's house and inspected underneath her house. Davis did not discover "any rot on the structural [area of the house or], the floor joist[,] . . . [and] did not see anything wrong with the water lines, the supply or drain waste." Furthermore, Davis flushed Meeks's toilet and "didn't see any water leaking . . . or anything . . . that would suggest a water leak." Defendant returned to Meeks's house during Officer Bailey's investigation and was taken into custody.

¶ 8 After Defendant was taken into custody, Meeks asked Wayne Scott, later qualified by the trial court as an expert in roofing repair and insulation, to inspect the roof of her house. Scott reported that he did not see any evidence new shingles had been installed, rotten wood had been removed, or any work had been done to prevent damage. Although Scott did observe minimal work had been performed on Meeks's roof, he estimated the value of the work to be $300.00.

¶ 9 On November 16, 2018, Defendant's mother went to Meeks's home, presented a pre-drafted affidavit, and had Meeks sign it. This pre-drafted affidavit stated:

> This statement is in reference to the work I hired Mr. Randall L. Joyner to do. Mr. Joyner cleaned my gutters. Mr. Joyner kindly informed me of some rotten wood that he noticed on my roof. Mr. Joyner showed me the rotten wood that he was referring to. I asked Mr. Joyner to fix it. Mr. Joyner and I agreed on a price. I saw the rotten wood that Mr. Joyner removed

> and I saw the new wood he replaced along with my shingles.

The pre-drafted affidavit Defendant's mother presented to Meeks misspelled her name as "Weeks." The pre-drafted affidavit was subsequently notarized.

¶ 10 On January 14, 2019, Defendant was indicted for obtaining property by false pretenses and exploitation of an older adult or disabled adult while in a business relationship. Afterwards, Meeks filed an action for a civil no-contact order against Defendant. Defendant was properly served with a complaint for and a notice of the hearing for the civil no-contact order but chose not to appear. Defendant's attorney noted that Defendant "didn't really care" that the court had conducted the no-contact order hearing in Defendant's absence. On March 11, 2019, the district court entered a civil no-contact order against Defendant, prohibiting him from communicating with Meeks. On September 16 and September 23, 2020, Defendant filed motions with the trial court seeking permission to inspect Meeks's property. The trial court denied Defendant's motions on October 1, 2019. Seven days later, on October 8, 2019, Meeks passed away. Thereafter, the trial court entered an order permitting Meeks's testimony from the hearing for the civil no-contact order to be admitted at Defendant's criminal trial.

¶ 11 Defendant's criminal trial was held February 3 to February 5, 2020. The jury found Defendant guilty of obtaining property by false pretenses and exploitation of an older adult by a person in a business relationship. The trial court imposed an active sentence of 15 to 27 months for the offense of obtaining property by false pretenses and 15 to 27 months for exploitation of an older adult by a person in a business relationship upon Defendant to be served consecutively. Defendant gave notice of appeal in open court.

II. Discussion

¶ 12 Defendant raises multiple issues on appeal; each will be addressed in turn.

A. Confrontation Clause

¶ 13 **[1]** Defendant first argues the trial court erred by admitting Meeks's former testimony from the civil court hearing on the no-contact order and the no-contact order because it violated his constitutional right to cross-examine and confront his accuser. We disagree.

¶ 14 We review an alleged violation of a defendant's constitutional right to confrontation *de novo*. *State v. Glenn*, 220 N.C. App. 23, 25, 725 S.E.2d

58, 60–61 (2012); *see State v. Hurt*, 208 N.C. App. 1, 6, 702 S.E.2d 82, 87 (2010). "Under a *de novo* review, the Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 92, 614 S.E.2d 351, 353 (2005) (internal brackets omitted) (citing *In re Greens of Pine Glen*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

¶ 15 The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; *see Pointer v. Texas*, 380 U.S. 400, 405, 85 S. Ct. 1065, 1068, 13 L. Ed. 2d 923, 927 (1965) ("[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."). Courts have generally acknowledged "an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant." *Barber v. Page*, 390 U.S. 719, 722, 88 S. Ct. 1318, 1320, 20 L. Ed. 2d 255, 258 (1968); *see Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369, 158 L. Ed. 2d 177, 197 (2004) ("Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."); *State v. Graham*, 303 N.C. 521, 523, 279 S.E.2d 588, 590 (1981); *State v. Tate*, 187 N.C. App. 593, 600, 653 S.E.2d 892, 897 (2007).

¶ 16 When determining if prior testimony is admissible as an exception to the Confrontation Clause, we look to see "(1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant." *State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217 (2004) (citation omitted); *see State v. Brigman*, 171 N.C. App. 305, 309, 615 S.E.2d 21, 23 (2005).

¶ 17 Defendant does not dispute Meeks's prior testimony "was testimonial in nature" or that the "the declarant was unavailable." *Clark*, 165 N.C. App. at 283, 598 S.E.2d at 217. Instead, he simply argues he did not have a meaningful opportunity to cross-examine Meeks because the only issue presented at the no-contact hearing was whether Defendant had been stalking Meeks, not the criminal charges at issue in this case. We disagree with Defendant's argument.

¶ 18 In examining the third prong of the *Clark* test, we note the "main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Davis v. Alaska*, 415 U.S. 308,

315–16, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347, 353 (1974) (emphasis omitted); *accord State v. Jones*, 89 N.C. App. 584, 587, 367 S.E.2d 139, 142 (1988), *overruled in part on other grounds by State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000). In *State v. Ross*, we addressed whether the defendant had a meaningful opportunity to cross-examine a witness at a probable cause hearing when the various charges against the defendant had yet to be joined. *State v. Ross*, 216 N.C. App. 337, 345, 720 S.E.2d 403, 408 (2011). We held the trial court did not err by admitting the witness's testimony because the charges addressed at the probable cause hearing were the same as those on which the jury ultimately found the defendant guilty. *Id.* at 345–46, 720 S.E.2d at 409. In other words, the defendant's "motive to cross-examine" the witness at the probable cause hearing was the "same as his motive at trial." *Id.* at 345, 720 S.E.2d at 409.

¶ 19 Therefore, when the trial court provides a defendant with the opportunity to cross-examine a witness, and the defendant in turn waives this opportunity, he may not later argue his right to confrontation has been violated. *See Brookhart v. Janis*, 384 U.S. 1, 4, 86 S. Ct. 1245, 1247, 16 L. Ed. 2d 314, 317 (1966); *State v. Moore*, 275 N.C. 198, 209, 166 S.E.2d 652, 660 (1969); *State v. Harris*, 181 N.C. 600, 605, 107 S.E. 466, 468 (1921). For a waiver of one's right to confrontation to be effective, it "must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.' " *Brookhart*, 384 U.S. at 4, 86 S. Ct. at 1247, 16 L. Ed. 2d at 317 (quotation omitted). A defendant may waive his right to confrontation expressly or may waive his right implicitly by conduct.

¶ 20 Justice Alito's concurrence in the recent case of *Hemphill v. New York* provides several examples of ways in which a defendant can impliedly waive his right to confrontation. A defendant may impliedly waive his right when he "engages in a course of conduct that is incompatible with a demand to confront adverse witnesses" such as by being "disorderly, disruptive, and disrespectful of the court." *Hemphill v. New York*, 142 S. Ct. 681, 694, 211 L. Ed. 2d 534, 549 (2022) (Alito, J., concurring) (quoting *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 1060, 25 L. Ed. 2d 353, 359 (1970)). A defendant may impliedly waive his right when he "fail[s] to object to the offending evidence." *Id.* (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 314, n. 3, 129 S. Ct. 2527, 2534, 174 L. Ed. 2d 314, 323 (2009)); *see also State v. Calhoun*, 189 N.C. App. 166, 168, 657 S.E.2d 424, 426 (2008). Further, a defendant may impliedly waive his right when he introduces incomplete evidence that opposing counsel may further develop under the evidentiary rule of completeness regardless of the evidence's testimonial nature. *Hemphill*, 142 S. Ct. at 695, 211 L. Ed. 2d at 549. In any of these examples, the defendant would not need

to make an explicit waiver of his rights. Instead, "the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford." *Id.* at 694, 211 L. Ed. 2d at 549 (quoting *Berghuis v. Thompkins*, 560 U.S. 370, 385, 130 S. Ct. 2250, 2262, 176 L. Ed. 2d 1098, 1113 (2010)).

¶ 21 The same is true when a defendant chooses not to cross-examine a witness. It is important to remember that the *Crawford* test may be met by merely providing the defendant an *opportunity* to cross-examine the accusing witness. *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 294, 88 L. Ed. 2d 15, 19 (1985). To hold otherwise, "defendants could require exclusion of prior [testimonial] statements . . . by refusing to cross-examine" witnesses who would not later be available. Christopher B. Mueller, *Cross-Examination Earlier or Later: When is it Enough to Satisfy Crawford?*, 19 Regent U. L. Rev., 319, 334 (2007). A defendant may have a legitimate, tactical reason for not wanting to cross-examine a witness or not attending a hearing. Yet, even then, if a defendant chooses not to cross-examine a witness but has been provided an opportunity to do so, the defendant's right to confront his accuser is preserved, and *Crawford* is not transgressed. *See generally* Kenneth H. Hanson, *Waiver of Constitutional Right of Confrontation*, 39 J. Crim. L. & Criminology, 55, 57 (1948) ("Since the accused was afforded but failed to take advantage of an opportunity to meet the witnesses who testified against him, he had waived his constitutional privilege.").

¶ 22 Here, Defendant was properly served with notice of the hearing on the civil no-contact order but did not "care" to appear at the hearing. The no-contact order demonstrates that the same issues presented at the hearing were the issues subsequently presented at Defendant's criminal trial. These are the same issues and facts from which the jury ultimately found Defendant guilty of obtaining property by false pretenses and exploitation of an elderly person while in a business relationship in his criminal trial. As such, Defendant's "motive to cross-examine" Meeks at the no-contact hearing "would have been the same as his motive at trial." *Ross*, 216 N.C. App. at 345, 720 S.E.2d at 409. Thus, Defendant was provided with a meaningful opportunity to cross-examine Meeks at the hearing on the civil no contact order. He chose not to cross-examine Meeks when he did not attend the hearing. He may not now allege a violation of his right to confrontation. He has impliedly waived that right. Therefore, we adopt the reasoning of Justice Alito in *Hemphill* and hold the trial court did not violate Defendant's right to confrontation when it allowed Meeks's prior testimony and the no-contact order into evidence.

B. Hearsay

¶ 23 **[2]** Defendant next contends Meeks's prior statements were inadmissible hearsay under N.C. Gen. Stat. § 8C-1, Rule 804(b)(1). "This Court reviews a trial court's ruling on the admission of evidence over a party's hearsay objection *de novo*." *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015) (citing *State v. Miller*, 197 N.C. App. 78, 87, 676 S.E.2d 546, 552 (2009)); *see State v. Castaneda*, 215 N.C. App. 144, 147, 715 S.E.2d 290, 293 (2011). "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2021). Generally, hearsay is inadmissible at trial unless an exception to Rule 801(c) applies. *Hicks*, 243 N.C. App. at 639, 777 S.E.2d at 348.

¶ 24 Such a hearsay exception exists when a declarant is unavailable. N.C. Gen. Stat. § 8C-1, Rule 804 (2021). A witness is considered "unavailable" if the witness is "unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity." N.C. Gen. Stat. § 8C-1, Rule 804(a)(4). An unavailable witness's former testimony is admissible when the testimony was

> given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

N. C. Gen. Stat. § 8C-1, Rule 804(b)(1).

¶ 25 In the present case, Meeks was unavailable under Rule 804(a)(4) because she died prior to Defendant's criminal trial. Concerning Rule 804(b)(1), as our analysis above indicates, the no-contact hearing dealt with the same issues and facts that were the subject of Defendant's criminal trial. Because of this, Defendant had a similar opportunity to ask Meeks questions regarding the facts and issues that were the subject of his criminal trial at the civil hearing. Thus, we conclude Defendant had "a similar motive to develop [Meeks's] testimony by direct, cross, or redirect examination" at the civil hearing on the no-contact order as he would have possessed at the criminal trial. N.C. Gen. Stat. § 8C-1, Rule 804(b)(1). Accordingly, we hold the trial court did not violate Rule 804(b)(1) by admitting Meeks's prior testimony at trial.

C. N.C. Gen. Stat § 1-149

¶ 26 **[3]** Defendant next contends the trial court's admission of the no-contact order violated N.C. Gen. Stat. § 1-149. We disagree.

¶ 27 Defendant concedes he did not object to the admission of the no-contact order under N.C. Gen. Stat. § 1-149 and therefore waived his right to appeal pursuant to N.C. Gen. Stat. § 1-149. *State v. Young* 368 N.C. 188, 209, 775 S.E.2d 291, 305 (2015) ("[W]e hold that . . . N.C.G.S. § 1-149 is not a 'mandatory' statute the violation of which is cognizable on appeal despite the absence of an objection in the trial court."). Because Defendant waived his right to appeal this argument, we must analyze his argument under the plain error standard of review. *See State v. Koke*, 264 N.C. App. 101, 107, 824 S.E.2d 887, 891 (2019) ("Where a defendant fails to preserve errors at trial, this Court reviews any alleged errors under plain error review."). "For error to constitute plain error, a 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.* (cleaned up); *see also State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

¶ 28 In relevant parts, N.C. Gen. Stat. § 1-149 states, "No pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it." N.C. Gen. Stat. § 1-149 (2021). N.C. Gen. Stat. § 1-149 is not solely limited to the contents of a pleading. *Young*, 368 N.C. at 205, 775 S.E.2d at 302. Rather, our Supreme Court has "reviewed the admissibility of any evidence relating to civil pleadings or judgments utilizing the standard set out in N.C.G.S. § 1-149." *Id.* Thus, as a general rule, Section 1-149 "requires the exclusion of any evidence relating to the allegations and determinations made in the course of civil litigation 'as proof of a fact admitted or alleged in it.' " *Id.* at 205, 775 S.E.2d at 302 (quoting N.C. Gen. Stat. § 1-149 (2013)).

¶ 29 Notwithstanding this, a party is not completely barred from seeking to admit a civil judgment in a criminal case because "a party's decision to seek the admission of a civil judgment in a criminal case does not 'necessarily use the pleading as proof of any fact therein alleged.' " *Id.* at 208, 775 S.E.2d at 304 (quoting *State v. McNair*, 226 N.C. 462, 464, 38 S.E.2d 514, 516 (1946)). Instead, the extent to which a civil pleading is admissible at a criminal trial "hinges on the purpose for which the challenged evidence is offered." *Id.* (citation omitted). Thus, the ultimate question before a trial court is whether the civil pleading is "relevant for

some purpose other than proving the same facts found, admitted, or alleged in the civil proceeding in question." *Id.* at 207, 775 S.E.2d at 304.

¶ 30 In the present case, the trial court admitted the no-contact order at Defendant's criminal trial and permitted the witness to read the following portion aloud:

> The plaintiff has suffered unlawful conduct by the defendant in that: The defendant performed work without being hired then had plaintiff pay him with checks . . . under duress. Defendant has been charged with felonies related to the actions. Victim lives alone at the end of a street. She was born in 1930 and has difficulty hearing. The defendant has previously contacted the victim. . . . The defendant is not to be within 500 feet of . . . . The defendant is to have no communication with the victim by any means to include telephonic, social media, and third parties.

After the trial court admitted the no-contact order into evidence, the State asked questions pertaining to Meeks's prior testimony to illustrate that the issues addressed in the civil hearing on the no-contact order were similar to the issues before the trial court. *See McNair*, 226 N.C. at 464, 38 S.E.2d at 516 ("To offer an allegation in a pleading simply as evidence of its existence, or that it was made, is not necessarily to use the pleading as proof of any fact therein alleged."). Accordingly, we hold the trial court did not violate N.C. Gen. Stat. § 1-149 by admitting the no-contact order.

¶ 31 Assuming *arguendo* the admission of the no-contact order violated N.C. Gen. Stat. § 1-149, this error nonetheless does not rise to the level of plain error. Davis testified there were no issues with rot damage or the water line and there was no evidence of water leaks underneath Meeks's house. Scott inspected Meeks's roof and testified Defendant did not perform the roof work he represented to Meeks. Specifically, Scott testified he found no evidence that new shingles were installed, rotten wood was removed, or of any work being done to prevent damage. Scott concluded the value of the work Defendant had performed on Meeks's roof was $300.00, not $1,500.00 as charged by Defendant. Moreover, Defendant was not licensed to perform the plumbing work he had undertaken. He also had a prior judgment entered against him for obtaining property by false pretenses, which the trial court allowed into evidence over his objection. The trial court also received into evidence Meeks's former testimony and the body camera footage from Officer Bailey's investigation.

¶ 32 We conclude, after a careful review of the record, the admission of the no-contact order did not have a probable impact on the jury's determination of Defendant's guilt. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. The trial court did not commit plain error by admitting the no-contact order.

D. Due Process

¶ 33 **[4]** Next, Defendant argues the trial court violated his due process rights by admitting the no-contact order when it contained the phrase "[t]he plaintiff has suffered *unlawful conduct* by the [d]efendant . . . ." We are unpersuaded.

¶ 34 The Due Process Clause prohibits any state from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. An individual must be afforded due process when "a State seeks to deprive [him or her] of a protected liberty or property interest." *Wake Cnty. ex rel. Carrington v. Townes*, 53 N.C. App. 649, 650, 281 S.E.2d 765, 767 (1981). "[T]he touchstone of due process is the presence of fundamental fairness in any judicial proceeding adversely affecting the interests of an individual." *Id.* at 651, 281 S.E.2d at 767. When determining whether a defendant's due process rights were violated, we apply a *de novo* standard of review. *Stetser v. TAP Pharm. Prods., Inc.*, 165 N.C. App. 1, 14, 598 S.E.2d 570, 579 (2004).

¶ 35 We find no evidence here tending to indicate that the admission of the no-contact order violated Defendant's due process rights. Defendant had the opportunity to object to the admission of the no-contact order, did object to its entry at trial, and subsequently was overruled. As discussed *supra*, the no-contact order was introduced to establish that the issues from the no-contact hearing mirrored those in Defendant's criminal trial. Therefore, we hold the trial court did not violate Defendant's due process rights by admitting the no-contact order.

E. Constitutional Right to Inspect and Photograph the Crime Scene

¶ 36 **[5]** Lastly, Defendant argues the trial court violated his due process rights under the Sixth and Fourteenth Amendments of the United States Constitution by denying his motion to inspect, photograph, and examine the crime scene. We disagree.

¶ 37 The United States Supreme Court has established "[t]here is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 846, 51 L. Ed. 2d. 30, 42 (1977); *accord State v. Cook*, 362 N.C. 285, 290, 661 S.E.2d 874, 877 (2008). As

such, "a state does not violate the Due Process Clause of the Federal Constitution when it fails to grant pretrial disclosure of material relevant to defense preparation but not exculpatory." *State v. Cunningham*, 108 N.C. App. 185, 195, 423 S.E.2d 802, 808 (1992) (citation omitted). In North Carolina, a defendant's right to discovery is conferred by our general statutes, and, thus, "[c]onstitutional rights are not implicated in determining whether the State complied with these discovery statutes." *Cook*, 362 N.C. at 290, 661 S.E.2d at 877.

¶ 38 Defendant only alleges his Sixth and Fourteenth Amendment rights were violated. Because Defendant did not allege a violation of any North Carolina statutes, we need not address this issue on appeal.

¶ 39 Although we are bound by federal courts' decisions regarding the Due Process Clause, *see Cunningham*, 108 N.C. App. at 195, 423 S.E.2d at 808, in *State v. Brown*, our Supreme Court held a criminal defendant has a due process right to inspect the crime scene under limited circumstances. *State v. Brown*, 306 N.C. 151, 165, 293 S.E.2d 569, 579 (1982). In *Brown*, the defendant murdered a mother and daughter. When the bodies were discovered, the police promptly secured, cordoned off, and controlled the crime scene. *Id.* at 163, 293 S.E.2d at 578. The defendant made "pre-trial discovery motions and motions . . . during trial" to "search for exculpatory evidence[,]" but the trial court denied each motion. *Id.* at 162–63, 293 S.E.2d 577–78. The defendant ultimately received the death penalty for both murders. *Id.* at 161, 293 S.E.2d at 577. On appeal, our Supreme Court held that denying the defendant an opportunity to undertake a limited inspection of the premise under police supervision was "a denial of fundamental fairness and due process." *Id.* at 163–64, 293 S.E.2d at 578. Notwithstanding, the Court emphasized, "[O]ur holding is limited to the particular facts of this case and our holding is in no way to be construed to mean that police or prosecution have any obligation to preserve a crime scene for the benefit of a defendant's inspection." *Id.* at 164, 293 S.E.2d at 578.

¶ 40 Defendant relies heavily on *Brown* in his brief. However, the facts in this case are distinguishable from those in *Brown*. Unlike the defendant in *Brown*, Defendant was convicted of obtaining property by false pretenses and exploitation of an older adult while in a business relationship. Moreover, while the defendant in *Brown* requested to search the crime scene in an attempt to find exculpatory evidence, Defendant did the repair work in question here himself. Consequently, Defendant had first-hand knowledge of the work he performed on Meeks's house and did not need to examine the house in order to find exculpatory evidence. Because of these factors and because our Supreme Court clearly stated

the holding in *Brown* "is limited to the particular facts" of that case, we decline to extend the holding in *Brown* to this case. *Id.* Defendant did not have a constitutional right to examine Meeks's house. Thus, we hold the trial court did not err by denying Defendant's motion to inspect, examine, and photograph the house.

III. Conclusion

¶ 41 For the foregoing reasons, we hold the trial court did not err by admitting Meeks's former testimony, admitting the no-contact order, or denying Defendant's motion to inspect, examine, and photograph Meeks's house. We hold defendant received a fair trial, free from error.

NO ERROR.

Judges DIETZ and MURPHY concur.

STATE OF NORTH CAROLINA
v.
WILLIAM McDOUGALD

No. COA21-286

Filed 2 August 2022

1. Sentencing—violent habitual felon status—mandatory life without parole—predicate juvenile-age conviction—effective assistance of counsel

Where defendant received a mandatory sentence of life without parole (LWOP) for attaining violent habitual felon status—based on prior convictions that included a kidnapping he committed when he was sixteen years old—and sixteen years later filed a motion for appropriate relief, the trial court did not err by determining that defendant had received effective assistance of counsel. Defendant failed to overcome the strong presumption that his trial counsel's performance was reasonable, and evidence showed that counsel met with him months before trial to discuss the State's plea offer and that defendant understood at the time of trial that he was facing LWOP. Further, even assuming counsel's performance was deficient, there was no prejudice because no evidence suggested that defendant would have accepted the plea deal.

2. Sentencing—violent habitual felon status—mandatory life without parole—predicate juvenile-age conviction—Eighth Amendment

Where defendant received a mandatory sentence of life without parole (LWOP) for attaining violent habitual felon status—based on prior convictions that included a kidnapping he committed when he was sixteen years old—and later filed a motion for appropriate relief, the trial court did not err by determining that the use of defendant's juvenile-age conviction as a predicate offense for violent habitual felon status was permissible under the Eighth Amendment. The recidivist statute did not punish defendant for his juvenile-age offense; rather, it mandated an enhanced punishment for his latest crime, which was committed when he was an adult.

3. Sentencing—violent habitual felon status—life without parole—proportionality—Eighth Amendment

Defendant's mandatory sentence of life without parole for attaining violent habitual felon status—based on his latest conviction, for second-degree kidnapping—was not disproportionate under the Eighth Amendment, in accordance with longstanding precedent.

Appeal by Defendant from Order entered 26 November 2019 by Judge C. Winston Gilchrist in Harnett County Superior Court. Heard in the Court of Appeals 8 February 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State.

Christopher J. Heaney for defendant-appellant.

Juvenile Law Center, by Marsha L. Levick, Aryn Williams-Vann, Katrina L. Goodjoint, and Riya Saha Shah, and Phillips Black, Inc., by John R. Mills, for amici curiae.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 William McDougald (Defendant) appeals from an Order denying his Motion for Appropriate Relief (MAR). Relevant to this appeal, the Record before us tends to reflect the following:

¶ 2 On 12 October 2001, a jury returned a verdict finding Defendant guilty of second-degree kidnapping, misdemeanor breaking or entering,

and assault on a female. Defendant had two prior convictions including: a guilty plea to second-degree kidnapping, a class E felony, with judgment entered on 16 May 1984 when Defendant was sixteen years old; and a no contest plea to one count of second-degree sexual offense (class H felony), two counts of common law robbery (class D felonies), and one count of armed robbery (a class D felony) with judgment entered on 1 February 1988. Due to these prior felonies, a jury found Defendant guilty of violent habitual felon status on 14 November 2001. On the same day, as required by the violent habitual felon statute, the trial court imposed the mandatory sentence of life without parole (LWOP). Defendant appealed from the Judgment and this Court found no error by Opinion entered on 20 May 2008. *See State v. McDougald*, 190 N.C. App. 675, 661 S.E.2d 789 (2008) (unpublished).

¶ 3 Subsequently, on 26 June 2017, Defendant filed a MAR in Harnett County Superior Court asserting the mandatory sentence of LWOP for violent habitual felons, as applied to him, violated Defendant's Eighth Amendment rights where one of the predicate violent felony convictions was obtained when Defendant was a juvenile and that the LWOP sentence was disproportionate. On 22 May 2018, Defendant amended his MAR to also include claims of ineffective assistance of trial counsel during plea negotiations and ineffective assistance of appellate counsel. Defendant requested the trial court to vacate his convictions for second-degree kidnapping and violent habitual felon status.

¶ 4 On 9 August 2019, the trial court held a hearing on the MAR including both the Eighth Amendment and ineffective assistance of counsel claims. Prior to the hearing, the parties stipulated the trial court could determine the Eighth Amendment claims as a matter of law without the introduction of evidence. Defendant elected to abandon his claim for ineffective assistance of appellate counsel during the hearing.

¶ 5 In support of his ineffective assistance of trial counsel claim, Defendant called Mark Key (Key), his trial attorney, to testify. Key testified Defendant's file was destroyed as part of a routine purge, and to prepare for this hearing, Key tried to remember "as much as I could" by reviewing the trial transcript and the time sheet Key kept during Defendant's trial. Based on this time sheet from 2001, Key testified he visited Defendant on 25 April 2001 and told Defendant the prosecutor was offering a plea deal in which Defendant would serve a sentence of approximately twelve to thirteen years. At the time of this meeting, Defendant had not yet been indicted for violent habitual felon status; however, the charge was pending. Key testified he did not explain or mention the mandatory punishment of LWOP for the pending violent

habitual felon status charge during this meeting. Defendant rejected the plea deal. Thereafter, the State obtained a superseding indictment for violent habitual felon status on 14 May 2001. Key testified he did not meet with Defendant to discuss the potential consequences of a conviction for violent habitual felon status until the morning of the trial on the substantive felonies, 1 October 2001. At this time, Key told Defendant there was a potential punishment of LWOP depending on the outcome of the trial but was "not sure [he] told [Defendant] it was mandatory [LWOP]." Key admitted Defendant might not have understood what he meant.

¶ 6 Defendant also called Attorney Michael G. Howell (Howell) who had almost twenty years of experience representing clients facing the death penalty and LWOP in North Carolina. Howell testified Key's performance was "deficient" because Key failed to "fully explain[] to [Defendant] on 25 April 2001 the full ramifications of the plea offer and the rejection of it[,]" including exposure to mandatory LWOP sentence.

¶ 7 On 26 November 2010, the trial court entered an Order denying the MAR. The Order makes the following relevant Findings of Fact:

> 11. On October 1, 2001, Defendant stated during a colloquy with Judge Bowen before trial began that Mr. Key "on several occasions he [Key] brought-he told me that the DA brought up . . . habitual felony charges on me."
>
> 12. Defendant further stated during the same colloquy, "First time I seen him (Mr. Key) when I got down here to Superior Court, second time, third time, and fourth time I seen him when I was offered a plea bargain."
>
> 13. Defendant further stated on the record on October 1, "Then I came back here, which was today and [Key tells me] . . . If you don't go to trial you can take the plea bargain for thirteen years and a half . . . ."
>
> 14. Defendant also stated on the record on October 1, "I'm already facing my life with no parole in prison."
>
> 15. At no time during his colloquy with the court on October 1st did Defendant express a desire to accept the plea offer of thirteen and one-half years which had been tendered by the State. There is no credible evidence before the court that Defendant expressed

to anyone, including his lawyer or the court, at any time prior to his conviction and final sentencing that he wished to accept such plea offer or any plea offer that was made by the State.

19. On November 14, 2001 the trial court denied Defendant's Motion to Dismiss indictment. Judge Bowen found in the order denying the Motion to Dismiss that "defendant and [his[counsel were well aware of the Violent Habitual Felon indictment . . . far in advance of the trial of the underlying felony" on October 1, 2001.

23. Eighteen years have passed since the events at issue. Mr. Key did not have a perfect or complete recollection of all his statements to his client.

25. The Defendant was informed that he was subject to a sentence of life without parole. The credible evidence does not establish the Defendant was not informed by Mr. Key well in advance of the first day of his trial, October 1, 2001, that he faced a mandatory sentence of life imprisonment without parole as a violent habitual felon.

27. The credible evidence does not establish that Defendant lacked a full and informed understanding well in advance of October 1, 2001, of the impact of the violent habitual felon charge, of its potential consequences and of the consequences of rejecting the plea arrangement which had been offered by the State. The credible evidence does not establish that the defense counsel failed to fully, timely, and competently advise Defendant on these issues. The credible evidence does not establish that defense counsel's representation was objectively unreasonable in any way.

28. The prior convictions used to establish Defendant's status as a violent habitual felon were as follows: (1) Second Degree Kidnapping, date of offense March 14, 1984, conviction date May 16, 1984 and (2) Second Degree Sexual Offense, offense date November 3, 1987 and conviction date February 1, 1988.

> 29. Defendant's date of birth was February 24, 1968. Defendant was sixteen years of age at the time he committed and was convicted of the predicate offense of Second Degree Kidnapping in 1984. Defendant was over the age of eighteen when convicted of the second predicate felony of Second Degree Sexual offense in 1988.
>
> 33. The credible evidence does not establish that the frequency, content or timing of attorney Mark Key's communications with Defendant were objectively unreasonable. The credible evidence does not establish that the methods Mr. Key used to communicate with Defendant about his case were objectively unreasonable.
>
> 34. The credible evidence does not demonstrate a reasonable probability that but for any error or insufficiency in the frequency, timing, content or methods of communication used by attorney Key with Defendant that the outcome of the case would have been any different or that Defendant would have accepted a plea to a sentence of less than life without parole.

The Order also makes the following relevant Conclusions of Law:

> 2. Defendant's sentence of life without parole was not imposed for conduct committed before Defendant was eighteen years of age in violation of *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 132 S. Ct. 2455 (2012), or *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Defendant's sentence did not violate the constitutional prohibitions against mandatory sentences of life without parole for juveniles. Defendant's sentence is therefore not unconstitutional as applied to the Defendant.
>
> 3. No inference of disproportionality arises from a comparison of the gravity of the offense and the severity of the sentence in question.
>
> 4. As applied to Defendant, a sentence of life without parole is not grossly disproportionate to the conduct punished.

> 5. Defendant's sentence does not violate the Eighth Amendment to the Constitution of the United States.
>
> 7. Defendant has failed to prove, by a preponderance of the evidence, that the performance of his trial counsel, Mark Key, was objectively unreasonable or deficient.
>
> 8. In addition, and in the alternative, the Defendant has failed to establish that there is a reasonable probability that but for any unprofessional error committed by Mr. Key the result of the proceeding would have been any different.
>
> 9. There is no reasonable probability that Defendant would have accepted the plea offer made by the State but for any unprofessional error by attorney Key.

¶ 8 On 20 November 2020, Defendant filed a Petition for Writ of Certiorari in this Court seeking review of the 26 November 2019 Order denying his MAR. This Court allowed Defendant's Petition for Writ of Certiorari in an Order entered 6 January 2021 to permit appellate review of the trial court's Order.

Issues

¶ 9 The issues on appeal are whether: (I) the trial court erred in concluding Key acted reasonably and without prejudice during plea negotiations; (II) the trial court erred in upholding a mandatory LWOP sentence that relies, in part, on a conviction for a violent felony committed while Defendant was a juvenile; and (III) the trial court erred in concluding Defendant's sentence is not disproportionate.

Analysis

¶ 10 This Court reviews a trial court's order denying a MAR 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. Hyman*, 371 N.C. 363, 382, 817 S.E.2d 157, 169 (2018) (quotation marks and citation omitted). "[T]he trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quotation marks and citation omitted). Unchallenged findings of fact are "presumed to be supported by competent evidence and are binding on appeal." *Hyman*, 371 N.C. at 382, 817 S.E.2d at 169. We review

conclusions of law de novo. *Id.* Under de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (quotation marks and citations omitted).

I. Ineffective Assistance of Counsel

¶ 11 **[1]** Defendant contends the trial court erred by concluding Key acted reasonably during plea negotiations and by concluding Key's conduct did not prejudice Defendant and, therefore, did not provide Defendant ineffective assistance of counsel. To prevail on a claim for ineffective assistance of counsel, a defendant must satisfy a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Banks, 367 N.C. 652, 655, 766 S.E.2d 334, 337 (2014) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). *See also Hill v. Lockhart*, 474 U.S. 52, 57, 88 L. Ed. 2d 203, 209 (1985) (applying the two-part *Strickland* test to ineffective-assistance claims arising out of the plea process).

A. Reasonableness of Key's Performance

¶ 12 Defendant contends Key's testimony, his contemporaneous timesheet, Defendant's affidavit, and the trial transcript, shows Key did not adequately inform Defendant he was subject to mandatory LWOP prior to the morning of 1 October 2001, and a reasonable attorney would have explained the potential consequences of rejecting the plea deal prior to the morning before trial on the underlying felony. Thus, Defendant contends Key's performance was constitutionally deficient.

¶ 13 In the context of pleas, "deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness." *Hill*, 474 U.S. at 57, 88 L. Ed. 2d at 209 (citing *Wiggins v. Smith*, 539 U.S. 510, 521, 156 L. Ed. 2d 471, 484 (2003)). "An attorney's failure to inform his client of a plea bargain offers amounts to ineffective assistance unless counsel effectively proves that he did inform his client of the offer or provides an adequate explanation for not

advising his client of the offer." *State v. Simmons*, 65 N.C. App. 294, 299, 309 S.E.2d 493, 497 (1983). Moreover, "[a] defense attorney in a criminal case has a duty to advise his client fully on whether a particular plea to a charge is desirable, but the ultimate decision on what plea to enter remains exclusively with the client." *Id.*

¶ 14 Nevertheless, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694-695. Moreover, "because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and defendants have the burden of overcoming this presumption. *Id.*

¶ 15 Here, the trial court's Findings indicate Defendant failed to meet his burden to overcome the "strong presumption" Key's performance was reasonable. For example, the trial court found: the evidence did not establish Defendant lacked a full and informed understanding well in advance of trial of the impact of the violent habitual felon charge including its potential consequences and the consequences of rejecting the plea deal; the evidence did not establish Key failed to fully, timely, and competently advise Defendant of the desirability of the plea deal; and the evidence did not establish Key's performance was objectively unreasonable in any way. Moreover, although Howell testified that a reasonable attorney would have informed Defendant he was facing mandatory LWOP, Key could not remember whether "[he] told [Defendant] it was mandatory [LWOP]" and was not sure Defendant understood the full ramifications. Indeed, Key's incomplete or imperfect recollection of all his statements to his client in addition to the passage of eighteen years and the destruction of Key's case file including a complete record of written communications with Defendant and file notes¬—as found by the trial court—prevented the trial court from "reconstruct[ing] the circumstances of counsel's challenged conduct and [] evaluat[ing] the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694-695.

¶ 16 Furthermore, a review of the Record shows Key met with Defendant on 25 April 2001, before the trial on 1 October 2001, to discuss the plea offer with Defendant, and at the very least, informed Defendant he was facing the potential of LWOP depending on the outcome of the trial. Indeed, Defendant acknowledged he knew he was "facing my life with no parole in prison" in discussions with the trial court on 1 October 2001. Thus,

the evidence supports the trial court's Findings that Defendant was informed of the plea deal before trial, knew of the possibility of LWOP, and Key fully, timely, and competently advised Defendant of the desirability of the plea deal. Based on these Findings, the trial court did not err by determining Key's performance was not objectively unreasonable.

B. Prejudicial Effect of Key's Performance

¶ 17 Since the trial court properly concluded Key's performance was not objectively unreasonable, we do not need to reach the issue of whether Key's performance was prejudicial. *See State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985) (quoting *Strickland*, 466 U.S. at 697, 80 L. Ed. 2d at 690) ("[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one."). Nevertheless, for purposes of reviewing each of the arguments presented upon Defendant's MAR, and assuming arguendo Key's performance was constitutionally deficient, Defendant also contends the evidence—as reflected in Key's testimony and Defendant's affidavit—establishes that if Key had ensured Defendant "understood [the] violent habitual felon status and its mandatory punishment, he would have taken [the] plea . . ." Thus, Defendant argues the trial court erred in concluding, in the alternative, Key's performance did not otherwise prejudice Defendant.

¶ 18 "The second, or 'prejudice,' requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 58-59, 88 L. Ed. 2d at 210. To show prejudice from ineffective assistance of counsel where a plea offer has been rejected,

> defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. *Cf. Glover v. United States*, 531 U.S. 198, 203, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001)

("[A]ny amount of [additional] jail time has Sixth Amendment significance").

Missouri v. Frye, 566 U.S. 134, 147, 182 L. Ed. 2d 379, 392 (2012). Moreover, "[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Lee v. United States*, 137 S. Ct. 1958, 1967, 198 L. Ed. 2d 476, 487 (2017). "Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.*

¶ 19 Here, the trial court found Defendant never expressed to anyone a desire to accept the plea deal; knew he faced a sentence of LWOP, but still declined to accept a plea bargain; and the evidence did not demonstrate a reasonable probability Defendant would have accepted a plea. Thus, evidence in the Record supports the trial court's Findings. In turn, those Findings support the determination Defendant had not established he was prejudiced by Key's allegedly deficient performance. Therefore, the trial did not err in concluding Defendant failed to establish his ineffective assistance of counsel claim. *See Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826. Consequently, the trial court did not err in denying Defendant's MAR based on a claim of ineffective assistance of counsel.

II. Application of the Violent Habitual Felon Status Law

¶ 20 **[2]** Defendant contends the application of the violent habitual felon status law—and specifically its mandatory LWOP sentence—violates the prohibition against cruel and unusual punishment contained in the Eighth Amendment of the United States Constitution. Specifically, Defendant contends the trial court's reliance on an offense committed while Defendant was under the age of eighteen as a predicate offense in sentencing Defendant to mandatory LWOP violates the constitutional constraints embodied in *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), which prohibits the imposition of mandatory LWOP sentences on juvenile offenders.

¶ 21 The Eighth Amendment to the United States Constitution states "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted[,]" U.S. Const. amend. VIII, and is made applicable to the States by the Fourteenth Amendment. *Id.* amend. XIV. The Constitution of North Carolina similarly states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." N.C. Const. art. I, § 27. "To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society." *Graham v. Florida*,

560 U.S. 48, 58, 176 L. Ed. 2d 825, 835 (2010). "The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances." *Id*. However, generally punishments are "challenged not as inherently barbaric but as disproportionate to the crime." *Id*. Indeed, "the basic precept of justice [is] that punishment for crime should be graduated and proportioned to the offense." *Kennedy v. Louisiana*, 554 U.S. 407, 419, 171 L. Ed. 2d 525, 538 (citations and quotations omitted), *opinion modified on denial of reh'g*, 554 U.S. 945, 171 L. Ed. 2d 932 (2008).

> The Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.

Graham, 560 U.S. at 59, 176 L. Ed. 2d at 836.

¶ 22 Generally, the second line of analysis is applied in the death penalty context; however, the Supreme Court applied a categorical ban on mandatory sentences of LWOP for juvenile offenders in *Graham* and *Miller*. The Court reasoned this categorical rule was necessary because "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471, 183 L. Ed. 2d at 418. Moreover, "because juveniles have diminished culpability and greater prospects for reform . . . they are less deserving of the most severe punishments." *Id*. (quoting *Graham*, 560 U.S. at 68, 176 L. Ed. 2d at 841). Thus, the *Miller* Court held mandatory LWOP for juveniles was violative of the Eighth Amendment as

> [i]t prevents taking into account the family and home environment that surrounds [the juvenile]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. . . . Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. *See*, *e.g.*, *Graham*, 560 U.S., at 78, 130 S. Ct. 2011, 176 L. Ed. 2d 825 ("[T]he features that distinguish juveniles from adults also put them at a

> significant disadvantage in criminal proceedings"); *J.D.B. v. N.C.*, 564 U.S. 261, 269, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) (discussing children's responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Id. at 477–478, 183 L. Ed. 2d at 423. Nevertheless, the *Miller* Court did not preclude a sentence of LWOP for juveniles so long as the court considers a youthful offender's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences" before imposing a LWOP sentence. *Id.*

¶ 23 Here, Defendant asserts a categorical challenge to the sentencing practice of using juvenile convictions as a predicate offense for violent habitual felon status. Categorical challenges are subject to the following analysis:

> The Court first considers objective indicia of society's standards, as expressed in legislative enactments and state practice to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.

Graham, 560 U.S. at 61, 176 L. Ed. 2d at 837 (quotation marks and citations omitted).

¶ 24 North Carolina defines a violent habitual felon as "any person who has been convicted of two violent felonies . . . . '[C]onvicted' means the person has been adjudged guilty of or has entered a plea of guilty or no contest to the violent felony charge, and judgment has been entered thereon . . . ." N.C. Gen. Stat. § 14-7.7(a) (2021). "For purposes of this Article, 'violent felony' includes . . . Class A through E felonies." N.C. Gen. Stat. § 14-7.7(b)(1) (2021).

> A person who is convicted of a violent felony and of being a violent habitual felon must, upon conviction (except where the death penalty is imposed), be sentenced to life imprisonment without parole. . . . The

> sentencing judge may not suspend the sentence and may not place the person sentenced on probation.

N.C. Gen. Stat. § 14-7.12 (2021). This Court upheld the constitutionality of this legislation—colloquially known as the three-strikes law—more than twenty years ago in *State v. Mason*. *See State v. Mason*, 126 N.C. App. 318, 321, 484 S.E.2d 818, 820 (1997) (concluding the reasoning in *State v. Todd*, 313 N.C. 110, 118, 326 S.E.2d 249, 253 (1985), affirming the constitutionality of the habitual felon statute, N.C. Gen. Stat. §§ 14-7.1 through 14-7.6, "equally applies to the violent habitual felon statute."), *cert. denied*, 354 N.C. 72, 553 S.E.2d 208 (2001). In *State v. Todd*, our Supreme Court determined the habitual felon law does not deny a defendant due process and equal protection, freedom from ex post facto laws, freedom from cruel and unusual punishment, and freedom from double jeopardy because "these challenges have been addressed and rejected by the United States Supreme Court." *State v. Todd*, 313 N.C. 110, 117, 326 S.E.2d 249, 253 (1985). Indeed, the United States Supreme Court has repeatedly held recidivist laws do not violate the Eighth Amendment because:

> the enhanced punishment imposed for the later offense 'is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.' *Gryger v. Burke*, 334 U.S. 728, 732, 92 L. Ed. 1683, 68 S. Ct. 1256 (1948). *See also Spencer v. Texas*, 385 U.S. 554, 560, 17 L. Ed. 2d 606, 87 S. Ct. 648 (1967); *Oyler v. Boles*, 368 U.S. 448, 451, 7 L. Ed. 2d 446, 82 S. Ct. 501 (1962); *Moore v. Missouri*, 159 U.S. 673, 677, 40 L. Ed. 301, 16 S. Ct. 179 (1895) (under a recidivist statute, 'the accused is not again punished for the first offence' because " 'the punishment is for the last offence committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself' ").

Witte v. United States, 515 U.S. 389, 400, 132 L. Ed. 2d 351, 364 (1995).

¶ 25 Moreover, although the question of whether a juvenile-age conviction may count towards a three-strikes law that mandates a sentence of LWOP appears to be an issue of first impression in our state, a review of laws in other jurisdictions reveals North Carolina was not alone in its enactment of such a law. Indeed, between 1993 and 1995, twenty-four

states enacted 'three strikes and you're out' laws with most of these laws mandating life sentences without the possibility of release. *See* John Clark et al., U.S. Dep't of Justice, NCJ 165369, Three Strikes and You're Out: A Review of State Legislation 1 (Research in Brief 1997). Courts in several of these states have recognized the counting of juvenile-age convictions as "strikes" where the defendant was charged and/or tried as an adult[1] even when the punishment under the three-strikes law is mandatory LWOP. *See*, *e.g.*, *State v. Ryan*, 249 N.J. 581, 600–601, 268 A.3d 313, 322 (N.J. 2022); *McDuffey v. State*, 286 So. 3d 364 (Fla. 1st DCA 2019); *Wilson v. State*, 2017 Ark. 217, 521 S.W.3d 123, 128 (Ark. 2017); *Vickers v. State*, 117 A.3d 516, 519–20 (Del. 2015); *State v. Standard*, 351 S.C. 199, 569 S.E.2d 325, 326, 328–29 (S.C. 2002); *State v. Teas*, 10 Wn. App. 2d 111, 447 P.3d 606, 619–20 (Wash. Ct. App. 2019), *review denied*, 195 Wn. 2d 1008, 460 P.3d 182 (Wash. 2020); *Commonwealth v. Lawson*, 2014 PA Super 68, 90 A.3d 1, 6-8 (Pa. Super. Ct. 2014). *Cf.* Tenn. Code Ann. § 40-35-120(e)(3) (providing that juvenile-age convictions in adult court count as predicate offenses so long as the conviction resulted in a custodial sentence).

¶ 26 In permitting juvenile-age convictions to count towards three strikes laws, these courts have concluded the reasoning of *Miller* is inapplicable in the case of an adult who commits a third violent felony. *See*, *e.g.*, *Ryan*, 249 N.J. at 601, 268 A.3d at 322. In support of this conclusion, these courts generally rely on the basic principle embodied in United States Supreme Court precedent that under recidivist statutes, the defendant is not punished for the first offense, but rather the punishment is a "stiffened penalty for the latest crime, which was considered to be an

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1. The separate issue of whether a juvenile delinquency adjudication may be used as a predicate offense under a "Three Strikes Law" is more unsettled with the majority of jurisdictions preventing the use of juvenile adjudications in calculating prior offenses because juveniles in juvenile court have their cases adjudicated without a jury. Thus, these state courts reason, counting these offenses towards violent habitual felon status implicates *Apprendi*. *See Vanesch v. State*, 343 Ark. 381, 390, 37 S.W.3d 196, 2001 (Ark. 2001) (disallowing juvenile delinquency adjudications as predicate offenses for state's three strikes law); *Fletcher v. State*, 409 A.2d 1254, 1256 (Del. 1979) (same); *Paige v. Gaffney*, 207 Kan. 170, 170, 483 P.2d 494, 495 (Kan. 1971) (same); *State v. Brown*, 879 So. 2d 1276, 1288-90 (La. 2004) (same); *Commonwealth v. Thomas*, 1999 PA Super 301, ¶ 2, 743 A.2d 460, 461 (Pa. Super. Ct. 1999) (same); *State v. Ellis*, 345 S.C. 175, 179, 547 S.E.2d 490, 492 (S.C. 2001) (same); *State v. Maxey*, 2003 WI App 94, ¶ 14, 663 N.W.2d 811, 814 (Wis. Ct. App. 2003) (same). *But see People v. Davis*, 15 Cal. 4th 1096, 1100, 938 P.2d 938, 940–42 (Cal. 1997) (allowing juvenile adjudications to count as strikes under the state's three strikes law); *Williams v. State*, 994 So. 2d 337, 339–40 (Fl. Ct. App. 2008) (same); *Lindsay v. State*, 102 S.W.3d 223, 226–27 (Tex. Ct. App. 2003) (same). Nevertheless, this issue is not before us and we do not decide it.

aggravated offense because it is a repetitive one." *See, e.g.*, *id.* (quoting *Witte*, 515 U.S. at 400, 132 L. Ed. 2d at 364 (1995)).

¶ 27 Here, applying these general principles as found in United States Supreme Court precedent, North Carolina Supreme Court precedent, and in the persuasive precedent from other jurisdictions, the application of the violent habitual felon statute to Defendant's conviction of second-degree kidnapping, committed when Defendant was thirty-three years old, did not increase or enhance the sentence Defendant received for his prior second-degree kidnapping conviction, committed when Defendant was sixteen. Rather, the violent habitual felon statute, and resulting LWOP sentence, applied only to the last conviction for second-degree kidnapping. *See State v. Wolfe*, 157 N.C. App. 22, 37, 577 S.E.2d 655, 665 (2003) ("Because defendant's violent habitual felon status will only enhance his punishment for the second-degree murder conviction in the instant case, and not his punishment for the underlying voluntary manslaughter felony, there is no violation of the ex post facto clauses."). As the Fourth Circuit explained in addressing whether violent felony convictions as a juvenile could be used towards a sentencing enhancement under the federal Armed Career Criminal Act:

> In this case, Defendant is not being punished for a crime he committed as a juvenile, because sentence enhancements do not themselves constitute punishment for the prior criminal convictions that trigger them. *See Rodriquez*, 553 U.S. at 385–86, 128 S. Ct. 1783. Instead, Defendant is being punished for the recent offense he committed at thirty-three, an age unquestionably sufficient to render him responsible for his actions. Accordingly, *Miller*'s concerns about juveniles' diminished culpability and increased capacity for reform do not apply here.

United States v. Hunter, 735 F.3d 172, 176 (4th Cir. 2013).

¶ 28 Indeed, in this case, the trial court relied on these very principles in concluding: "Defendant's sentence of [LWOP] was not imposed for conduct committed before Defendant was eighteen years of age in violation of *Graham* . . ., *Miller* . . . or *Montgomery* . . . ." Thus, consistent with this analysis, the trial court correctly further determined "Defendant's sentence did not violate the constitutional prohibitions against mandatory sentences of [LWOP] for juveniles." Therefore, the trial court, in turn, did not err by ultimately concluding "Defendant's sentence is therefore not unconstitutional as applied to Defendant." Consequently, the trial court did not err by denying Defendant's MAR on this ground.

III. Disproportionality of Mandatory Life Without Parole

¶ 29 **[3]** Defendant finally contends the trial court erred in concluding Defendant's LWOP sentence is not disproportionate under the Eighth Amendment.

> Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

State v. Ysaguire, 309 N.C. 780, 786, 309 S.E.2d 436, 440–441 (1983). Moreover, "[o]nly in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *Id*. Indeed, our Court has previously "determined that the General Assembly 'acted within permissible bounds in enacting legislation designed to identify habitual criminals and to authorize enhanced punishment as provided.' " *Mason*, 126 N.C. App. at 321, 484 S.E.2d at 820 (quoting *Todd*, 313 N.C. at 118, 326 S.E.2d at 253). Thus, in accordance with our decision in *Mason*, the trial court did not err in concluding Defendant's sentence of LWOP for second-degree kidnapping is not disproportionate under the Eighth Amendment. Therefore, the trial court did not err in denying Defendant's MAR on this basis.

Conclusion

¶ 30 Accordingly, for the foregoing reasons, the trial court's Order denying Defendant's MAR is affirmed.

AFFIRMED.

Judges GORE and WOOD concur.

STATE OF NORTH CAROLINA
v.
TROY LOGAN PICKENS

No. COA20-515

Filed 2 August 2022

1. Evidence—other crimes, wrongs, or acts—prior sexual assaults of a child—similarity to charged crime—unfair prejudice

In a prosecution for rape of a child and related sexual offenses, the trial court properly admitted testimony under Evidence Rule 404(b) of defendant's prior sexual assaults of a different child. The prior assaults were sufficiently similar to the charged crimes where, in both cases, the victims were middle-school-aged girls of small build; defendant used his position as a middle school teacher to access, exercise authority over, and assault each girl; defendant first encountered both girls at the school during school hours; he sexually assaulted the girls in a similar manner while pulling his pants and underwear half-way down each time; and he used threats to discourage both girls from reporting the assaults. Further, the court gave the appropriate limiting instruction to the jury and did not abuse its discretion in determining that any danger of unfair prejudice did not substantially outweigh the probative value of the testimony.

2. Sentencing—improper consideration—defendant's exercise of right to demand jury trial

After defendant was convicted of raping a child and other related sexual offenses, his sentences were vacated and remanded for re-sentencing because the record indicated that the trial court, in deciding to impose consecutive sentences, improperly considered defendant's exercise of his constitutional right to demand a trial by jury. Specifically, the court mentioned during the sentencing hearing defendant's choice to plead not guilty right before announcing that it would impose consecutive active prison terms.

Judge MURPHY dissenting.

Appeal by Defendant from judgments entered 1 November 2019 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 19 October 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sherri Horner Lawrence, for the State-Appellee.

Michael E. Casterline for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Troy Logan Pickens appeals from judgments entered upon jury verdicts of guilty of one count of first-degree rape of a child and two counts of first-degree sexual offense with a child. Defendant argues that the trial court erred by admitting certain Rule 404(b) evidence and erred in sentencing. We find no error in the admission of the challenged evidence. We conclude that the trial court improperly considered Defendant's exercise of his constitutional right to demand a trial by jury in deciding to impose consecutive sentences. Defendant's convictions remain undisturbed, and the matter is remanded to the trial court for resentencing.

I. Procedural History and Factual Background

¶ 2 Defendant was indicted on one count of first-degree rape of a child and two counts of first-degree sexual offense with a child. The State filed a pretrial notice of Rule 404(b) evidence, giving notice to Defendant "of the State's intent to introduce at the trial of the above cases evidence of other crimes, wrongs, or acts as evidence of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake, entrapment or accident." Defendant filed a motion in limine "to preclude the State from introducing any evidence that the Defendant committed sexual assault in Durham, North Carolina."

¶ 3 The trial began on 21 October 2019. At trial, relevant evidence tended to show that on 1 July 2015, Defendant was hired as the chorus teacher at Durant Middle School in Raleigh. At the end of July, eleven-year- old Ellen began sixth grade at that school. Ellen[1] was around 4'10" tall, weighed between 60-65 pounds, and "had not yet reached puberty[.]"

A. Ellen's Testimony

¶ 4 While Ellen attended Durant Middle School, she would leave during class around lunchtime each day, walk through the school to get a dose of her prescribed Ritalin from the school nurse, and return to class.

1. We use pseudonyms to protect the identity of both juvenile witnesses in this case. *See* N.C. R. App. P. 42(b).

One day, a month or two after she had started the school year, she saw Defendant while she was walking in the sixth-grade hallway to get her medication. She knew who Defendant was because some of her friends had chorus with him, but she did not have him as a teacher. He motioned her over. She asked him, "What do you need?" Defendant replied, "Be quiet." He grabbed the back of her shirt and walked her into an empty restroom. He took her into the handicapped stall at the end of the restroom and told her to take her clothes off. He then unbuttoned his pants and told her to touch his penis. When she did not do so, he grabbed her hand and put it on his penis. He then told her to stroke it and moved her hand. He threatened to hurt her or her family if she told. After five minutes or less, she left the restroom and went back to class.

¶ 5 The next time Ellen encountered Defendant in the hallway, he grabbed her again by her shirt and her ponytail, and the same series of events occurred in the same bathroom stall: he forced her to undress and stroke his penis, and he threatened her if she told. Then he told her to bend over the toilet. She felt pressure as he tried twice to put his penis in her vagina before telling her she was too small. He then put his penis in her anus.

¶ 6 The next time Ellen encountered Defendant in the hallway, he took her into the handicapped stall, told her to undress and stroke his penis, and then told her to defecate in the toilet. After she did, he told her to pick her feces out of the toilet. Saying, "Open up you filthy slut," he put her feces in her mouth. Feces were also smeared on the wall of the stall. He told her to bend over and had anal intercourse. He also touched her chest and her vagina.

¶ 7 This sequence of events happened every other day for a couple of weeks. Ellen described him cussing under his breath and muttering "whore" and "slut." She also described occasions when Defendant had forced her to perform fellatio. She once tried to stop him and he threw her, slamming her leg against the toilet. When each episode was over, Ellen would wash her hands, rinse out her mouth, and go back to class.

B. Kathleen's 404(b) Testimony

¶ 8 The State called Kathleen as a Rule 404(b) witness. After voir dire of Kathleen, the trial court orally denied Defendant's motion to exclude Kathleen's testimony.

¶ 9 Kathleen testified before the jury, essentially as she had in voir dire, as follows: Defendant had been her chorus teacher at Neal Middle School in Durham when Kathleen was in the seventh grade. One day,

she and her classmates had been watching a movie in Defendant's class. When it was time to leave and everyone was getting up to go, Defendant came over to her, put his hands on her waist, and moved them down towards her bottom. It made her uncomfortable, and she ran out of the classroom.

¶ 10 In the eighth grade, she again took chorus from Defendant. He wanted her to participate in an extracurricular performance which required practice at a different school. She did not want to be involved because none of her friends were participating, but Defendant called her mother, and her mother told him Kathleen would participate. Kathleen's mother had a medical condition, so Defendant volunteered to give Kathleen rides to the practice.

¶ 11 On 2 February 2015, the day after Kathleen turned 14, she was riding to the final practice with Defendant. He told her he needed to stop at his apartment, and he told her to come inside with him. They sat on his couch and watched a cartoon while they ate. After putting the dishes in the sink, he came back and touched her leg. Kathleen asked him not to touch her. He continued touching her leg, then pulled her up by her left arm and pulled her into his bedroom as she resisted. Kathleen – who was then 5' 2" tall and weighed 100 pounds – testified that he threw her down on the bed. As she lay on her back, Defendant took off her pants and underwear, pulled his own pants half-way down, then put his penis into her vagina. She asked him to stop and was crying, but he did not stop. After a few minutes, he moved away from Kathleen and went into the bathroom.

¶ 12 Kathleen put her clothes on. When Defendant came back into the room, he apologized to her and told her that if she told anyone, it would happen again. He then took her to practice and later gave her a ride home.

¶ 13 At the conclusion of the trial for sexually assaulting Ellen, Defendant was found guilty on all charges.

II. Analysis

A. Rule 404(b) Evidence

¶ 14 **[1]** Defendant argues that the trial court erred in admitting Kathleen's testimony under Rule 404(b) because it was not similar to the crime charged and was unduly prejudicial.

¶ 15 The trial court's determination as to whether the evidence of other crimes, wrongs, or acts falls within the scope of Rule 404(b) is a question

of law, which we review de novo on appeal. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

¶ 16 Under North Carolina Rule of Evidence 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019). Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* "Generally, Rule 404 acts as a gatekeeper against 'character evidence,' " *State v. Pabon*, 380 N.C. 241, 2022-NCSC-16, ¶ 60 (quoting N.C. Gen. Stat. § 8C-1, Rule 404(a)), and evidence admitted under Rule 404(b) "should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused," *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002) (citation omitted).

¶ 17 Notwithstanding this important protective role, our North Carolina Supreme Court has repeatedly held that "Rule 404(b) state[s] a clear general rule of inclusion." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990); *see Al-Bayyinah*, 356 N.C. at 153-54, 567 S.E.2d at 122 (quoting *Coffey* for this same proposition). Accordingly, relevant evidence of a defendant's past crimes, wrongs, or acts is generally admissible for any one or more of the purposes enumerated in Rule 404(b)'s non-exhaustive list, "subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *Coffey*, 326 N.C. at 278-79, 389 S.E.2d at 54 (emphasis in original); *see Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159 (noting that Rule 404(b)'s list "is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime" (quotation marks and citation omitted)).

¶ 18 "[T]he rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity." *Al-Bayyinah*, 356 N.C. at 154, 567 S.E.2d at 123 (citations omitted). Prior acts are sufficiently similar under Rule 404(b) "if there are some unusual facts present in both crimes that would indicate that the same person committed them." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (quotation marks and citation omitted). "While these similarities must be specific enough to distinguish the acts from any generalized commission of the crime, 'we do not require that they rise to the level of the unique and bizarre.' " *Pabon*, 380 N.C. 241, 2022-NCSC-16, ¶ 63 (quoting *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 156) (brackets omitted).

¶ 19 Regarding temporal proximity, "a greater lapse in time between the prior and present acts generally indicate[s] a weaker case for admissibility under Rule 404(b)," *id.*, but "remoteness for purposes of 404(b) must be considered in light of the specific facts of each case[,] . . . [and t]he purpose underlying the evidence also affects the analysis." *Id.* (quotation marks, citations, brackets, and ellipsis omitted). "Evidence of a prior bad act generally is admissible under Rule 404(b) if it constitutes substantial evidence tending to support a reasonable finding by the jury that the defendant committed the similar act." *Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123 (quotation marks, emphasis, and citations omitted).

¶ 20 "With respect to prior sexual offenses, we have been very liberal in permitting the State to present such evidence to prove any relevant fact not prohibited by Rule 404(b)." *State v. White*, 331 N.C. 604, 612, 419 S.E.2d 557, 561 (1992). As our Supreme Court noted,

> our decisions, both before and after the adoption of Rule 404(b), have been "markedly liberal" in holding evidence of prior sex offenses "admissible for one or more of the purposes listed [in Rule 404(b)] . . . ."

Coffey, 326 N.C. at 279, 389 S.E.2d at 54 (quoting 1 Henry Brandis, Jr., Brandis on North Carolina Evidence § 92 (3d ed. 1988)).

¶ 21 In this case, the assaults of Ellen took place in or around August or September of 2015 and the alleged assault of Kathleen took place in February of 2015. Defendant does not contest that this six-to-seven month time frame does not meet the temporal proximity requirement under Rule 404(b). Therefore, the sole issue before this Court is whether the 404(b) evidence was sufficiently similar to the acts at issue.

¶ 22 Here, the sexual assaults described by Ellen and the alleged sexual assault described by Kathleen contained key similarities. Most significantly, in both cases, Defendant used his position as a middle school teacher to gain access to, exercise authority over, and ultimately assault diminutive, middle-school-aged girls. In both cases, Defendant first encountered the girl during school hours inside the middle school where he worked as a choral teacher. Ellen and Kathleen were both middle school students and were similar in age when they were assaulted: Ellen was 11 years old, and Kathleen had just turned 14 years old. The girls were similar in build when they were assaulted: Ellen was around 4'10" tall and weighed approximately 60-65 pounds while Kathleen was 5'2" tall and weighed 100 pounds. In each case, Defendant grabbed the girl and pulled her to the isolated area where he assaulted her. Defendant

also ignored each girl's tears. Also, in each case, Defendant pulled his pants and underwear half-way down. Defendant similarly sexually assaulted each girl: Defendant attempted to put his penis in Ellen's vagina but, when he was not able to, he put his penis in her anus. Defendant put his penis in Kathleen's vagina. Each assault lasted a brief period of time. In each case, Defendant used threats after the sexual assault to discourage reporting. Based on all these points of commonality, we conclude that Kathleen's testimony was sufficiently similar to the offenses charged to be relevant and admissible for the proper purpose of showing Defendant's intent, motive, plan, and design. *See State v. Houseright*, 220 N.C. App. 495, 500, 725 S.E.2d 445, 449 (2012) (404(b) witness's testimony as to her sexual encounter with defendant "was admissible for the purpose of showing defendant's plan or intent to engage in sexual activity with young girls" where the 404(b) witness testified that defendant engaged in sexual conduct with her when she was 13 or 14 years old; the indictments alleged that defendant engaged in sexual activity with the victim over a period of years when she was 13 to 15 years old; and defendant's conduct with the 404(b) witness took place within the same time period as the offenses alleged in the indictments); *State v. Smith*, 152 N.C. App. 514, 527, 568 S.E.2d 289, 297-98 (2002) (404(b) witness's testimony was "relevant to show absence of mistake and a common plan or scheme, specifically that defendant took advantage of young girls in situations where he had parental or adult responsibility for them. . . . [and] was also admitted to show defendant's unnatural attraction to young girls" where defendant was charged with sexual misconduct with a 12-year-old which consisted of rubbing her breast and digitally penetrating her vagina, and the 404(b) witness testified that when she was 15 years old, defendant had sexual intercourse with her and performed oral sex on her without her consent).

¶ 23 To be sure, there are differences between the acts and their attendant circumstances. However, "[o]ur case law is clear that near identical circumstances are not required[;] rather, the incidents need only share 'some unusual facts' that go to a purpose other than propensity for the evidence to be admissible." *Beckelheimer*, 366 N.C. at 132, 726 S.E.2d at 160 (citations omitted).

¶ 24 In his brief, Defendant analogizes this case to *State v. Watts*, 246 N.C. App. 737, 783 S.E.2d 266 (2016), *modified in part and aff'd by* 370 N.C. 39, 802 S.E.2d 905 (2017), where a divided panel of this Court awarded a new trial, holding that the trial court erred by admitting certain 404(b) evidence. However, contrary to Defendant's assertion, our North Carolina Supreme Court did not affirm *Watts* based on the Court

of Appeals' majority's analysis and conclusion. Instead, the Supreme Court modified the Court of Appeals' majority opinion and affirmed the decision to award a new trial based on the trial court's failure to deliver a limiting instruction concerning the admitted 404(b) evidence. 370 N.C. at 41, 802 S.E.2d at 907.

¶ 25 In *Watts*, the Court of Appeals' majority held that evidence of a prior sexual assault was inadmissible in the sexual assault case before it under Rule 404(b) where "both instances involved the sexual assault of minors, the minors were alone at the time of the assaults, [the] defendant was an acquaintance of the minors, [the] defendant used force, and [the] defendant threatened to kill each minor and the minors' families." 246 N.C. App. at 747, 783 S.E.2d at 273. The majority found "these similarities [were not] unusual to the crimes charged" and held "the [] differences are significant and undermine the findings of similarity by the trial court." *Id.* at 747-48, 783 S.E.2d at 273-74.

¶ 26 Upon the State's appeal to the Supreme Court, the Supreme Court, on its own motion, ordered the parties to "submit supplemental briefs addressing the issues of whether the trial court erred by failing to deliver a limiting instruction concerning the testimony delivered by [the 404(b) witness] pursuant to N.C.G.S. § 8C-1, Rule 404(b) and, if so, whether any error that the trial court may have committed constituted prejudicial error or plain error, depending upon the position taken by the party." *State v. Watts*, No. 132A16, 2017 N.C. LEXIS 1028 (2017) (unpublished). In its opinion modifying and affirming the lower appellate court, the Supreme Court held:

> Our General Statutes provide that "when evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, *shall* restrict the evidence to its proper scope and instruct the jury accordingly." N.C.G.S. § 8C-1, Rule 105 (2015) (emphasis added). "Failure to give the requested instruction must be held prejudicial error for which [a] defendant is entitled to a new trial." *State v. Norkett*, 269 N.C. 679, 681, 153 S.E.2d 362, 363 (1967); *cf. State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991) (failure to give a limiting instruction not requested by a defendant is not reviewable on appeal); *State v. Jones*, 322 N.C. 406, 368 S.E.2d 844 (1988) (same). Accordingly, because defendant was prejudiced by the trial court's failure to give the requested limiting instruction, we affirm, as modified

> herein, the opinion of the Court of Appeals that reversed defendant's convictions and remanded the matter to the trial court for a new trial.

370 N.C. at 41, 802 S.E.2d at 907. Consequently, the Supreme Court impliedly, if not explicitly, held that the challenged 404(b) evidence was admissible.

¶ 27 In the present case, the unusual facts present in both the sexual assaults described by Ellen and the alleged sexual assault described by Kathleen are even more marked than the unusual facts present in *Watts*. Accordingly, the Rule 404(b) evidence was sufficiently similar and not too remote in time and the trial court did not err by admitting it.

B. Rule 403

¶ 28 As the trial court did not err under Rule 404(b) by admitting the challenged evidence, we must review the trial court's Rule 403 determination for abuse of discretion. *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008).

¶ 29 Pursuant to Rule 403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2019). It is well settled "[w]hile all evidence offered against a party involves some prejudicial effect, the fact that evidence is prejudicial does not mean that it is necessarily unfairly prejudicial." *State v. Rainey*, 198 N.C. App. 427, 433, 680 S.E.2d 760, 766 (2009) (citations omitted). Rather, "[t]he meaning of 'unfair prejudice' in the context of Rule 403 is an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *Id.* (quotation marks and citation omitted). Furthermore, "[t]he party who asserts that evidence was improperly admitted usually has the burden to show the error and that he was prejudiced by its admission." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001) (quotation marks and citation omitted). Thus, Defendant must carry the burden of proving the evidence was unfairly prejudicial.

¶ 30 Here "a review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to defendant and was careful to give a proper limiting instruction to the jury." *State v. Hipps*, 348 N.C. 377, 406, 501 S.E.2d 625, 642 (1998). The trial court first heard Kathleen's testimony outside the presence of the jury, then heard arguments from

the attorneys and ruled on its admissibility, stating that "the probative value of the evidence outweighs any undue prejudice that is caused by the admission of these acts[.]" Moreover, the trial court gave the appropriate limiting instruction. Given the similarities between Ellen's and Kathleen's accounts, and the trial court's careful handling of the process, we conclude that it was not an abuse of discretion for the trial court to determine that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. *Whaley*, 362 N.C. at 160, 655 S.E.2d at 390. The trial court thus properly admitted the 404(b) evidence here.

C. Sentencing

¶ 31 **[2]** Defendant next argues that the trial court considered impermissible factors before imposing consecutive sentences.

> A sentence within statutory limits is "presumed to be regular." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). Where the record, however, reveals the trial court considered an improper matter in determining the severity of the sentence, the presumption of regularity is overcome. *Id.* It is improper for the trial court, in sentencing a defendant, to consider the defendant's decision to insist on a jury trial. *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990). Where it can be reasonably inferred the sentence imposed on a defendant was based, even in part, on the defendant's insistence on a jury trial, the defendant is entitled to a new sentencing hearing. *Id.*

State v. Peterson, 154 N.C. App. 515, 517, 571 S.E.2d 883, 885 (2002).

¶ 32 At the sentencing hearing, the trial court addressed those in the court room, and specifically Defendant, in part, as follows:

> It would be difficult for an adult to come in here and testify in front of God and the country about what those two girls came in here and testified about. It would be embarrassing. It would be embarrassing to testify about consensual sex in front of a jury or a bunch of strangers. *And in truth, they get traumatized again by being here, but it's absolutely necessary when a defendant pleads not guilty. They didn't have a choice and you, Mr. Pickens, had a choice.*

(Emphasis added). Immediately after this statement, the trial court sentenced Defendant to three consecutive active prison terms of 300 to 420 months.

¶ 33 We conclude that it is apparent from the trial court's remarks that the trial court improperly considered Defendant's exercise of his constitutional right to demand a trial by jury. As the trial court's decision to impose three consecutive sentences was, at least partially, based on Defendant's decision to plead not guilty, this case must be remanded for re-sentencing. *State v. Hueto*, 195 N.C. App. 67, 78, 671 S.E.2d 62, 69 (2009) (citing *Boone*, 293 N.C. at 711-13, 239 S.E.2d at 465 (1977)).

¶ 34 In reaching this result, we are cognizant that a trial court may, in its discretion, impose consecutive sentences. *See* N.C. Gen. Stat. § 15A-1340.15(a) (2019) ("This Article does not prohibit the imposition of consecutive sentences."). Indeed, "[t]he trial judge may have sentenced defendant quite fairly in the case at bar[.]" *Boone*, 293 N.C. at 712, 239 S.E.2d at 465 (quotation marks omitted). Nonetheless, we also conclude there is a clear inference that a greater sentence was imposed because Defendant did not plead guilty. *See id.* We vacate Defendant's sentence and remand to the trial court for resentencing.

III. Conclusion

¶ 35 We find no error in the admission of the challenged Rule 404(b) evidence. We conclude that the trial court improperly considered Defendant's exercise of his constitutional right to demand a trial by jury in deciding to impose three consecutive sentences. We vacate Defendant's sentence and remand to the trial court for resentencing.

NO ERROR IN PART; VACATED AND REMANDED FOR RESENTENCING.

Judge ZACHARY concurs.

Judge MURPHY dissents by separate opinion.

MURPHY, Judge, dissenting.

¶ 36 While I do not disagree with the Majority's analysis of the Rule 403 or resentencing issues in ¶¶ 28-34, those issues would be rendered moot by my resolution of the Rule 404(b) issue. I would hold that the trial court erred in admitting evidence of a prior sexual assault under Rule 404(b) and that Defendant was prejudiced to the degree required for him

to be entitled to a new trial, and I would not reach the remaining issues. Therefore, I respectfully dissent.

¶ 37 Rule 404(b) allows a jury to consider evidence of prior bad acts when the evidence is admitted for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of mistake, entrapment, or accident. However, before applying Rule 404(b), the prior bad act must be shown to be sufficiently similar and in sufficient temporal proximity to the offense charged. Here, the trial court erred by admitting evidence of Defendant's alleged prior sexual assault of a minor where it was not sufficiently similar to the sexual assault for which Defendant was on trial.

BACKGROUND

¶ 38 Defendant Troy Logan Pickens was indicted for first-degree rape of a child and two counts of sexual offense with a child by an adult based on allegations of the victim, Cindy.[1] At the time of the alleged offenses, Defendant was a chorus teacher at Cindy's middle school.

¶ 39 Prior to trial, on 4 October 2019, the State filed a notice of intent to offer Rule 404(b) evidence, prompting Defendant to file a motion in limine in response on 11 October 2019. Correctly assuming the State was referring to a prior allegation that Defendant sexually assaulted Wilma, a former student in Defendant's chorus class, in 2015, Defendant argued that the differences between the crimes were so significant as to make the Rule 404(b) evidence inadmissible. Defendant further argued that, even if the evidence had probative value, the probative value would be far outweighed by the danger of unfair prejudice, confusing the issues, and misleading the jury, necessitating exclusion under Rule 403.

¶ 40 On 21 October 2019, the trial court denied Defendant's motion to exclude the State's proffered Rule 404(b) evidence. The trial court did not issue an order with explicit findings of fact or conclusions of law; instead, the trial court orally ruled on Defendant's motion in limine regarding the Rule 404(b) evidence, stating:

> Well, I don't know that the -- I think the temporal proximity in this case exists. I think that this -- the fact that he was a teacher on both of these occasions, even though he wasn't a teacher of one of the -- well, the victim in this case, that it was the fact that

1. Pseudonyms are used for all relevant persons throughout this opinion to protect the identities of the juveniles and for ease of reading.

> he was a teacher that gave him access to the victim in each case, the fact that he or it's alleged that on each case he grabbed the girls by one arm and pulled them where he wanted to go, that he -- that both these girls, by their description, seem to be girls who were relatively small in stature and, therefore, to some extent, physically helpless and that they are sufficiently similar so as to be admissible and that they -- the probative value of the evidence outweighs any undue prejudice that is caused by the admission of these acts, and they certainly are relevant, and they do tend to indicate evidence of intent, motive, plan, and design, and that, therefore, this Court finds that they are admissible in the trial of this case, and, therefore, the motion to prohibit that admissibility of this evidence is denied, and the exception is noted for the record.

A. Assaults of Cindy

¶ 41 According to the testimony at trial, in July 2015, Cindy began middle school at eleven years old. While in school, Cindy took daily prescription medication around lunch time that the staff members at Cindy's middle school were authorized to administer. She typically took her medication around 12:10 p.m. Defendant had a planning period from 12:15 p.m. to 1:00 p.m.

¶ 42 According to Cindy's testimony, about one to two months into the school year, she saw Defendant in the hallway when she was out of her class to take her medication. Defendant motioned for Cindy to approach him, told her "[b]e quiet," grabbed the back of her shirt, and took her to a handicapped stall inside the sixth-grade girls' restroom. Defendant told Cindy to take off her clothes, he unbuttoned his pants, and told her to stroke his penis. At some point, Defendant stopped and Cindy left the bathroom to go back to class. Defendant threatened to hurt Cindy or her family if she told anyone about the incident. As a whole, this encounter occurred over the course of five minutes or less.

¶ 43 Cindy also testified about another assault with Defendant that occurred after she saw him again in the hallway. Defendant again grabbed Cindy by the back of her shirt—and, this time, also by her ponytail—and took her to the handicapped stall of the bathroom. He told her to get undressed again, pulled his pants down partially, made her stroke his penis, told Cindy to bend over and tried to put his penis in Cindy's vagina

twice. Defendant stated something along the lines of "you're too small" and "I thought this would be a problem," then put his penis in Cindy's anus. This encounter occurred over the span of about five minutes.

¶ 44 Cindy testified that on another day, Defendant stopped Cindy in the hallway on the way to get her medication and again took her to the bathroom. This time, Defendant instructed Cindy to defecate in the toilet, pick up the feces, and then Defendant put the feces in Cindy's mouth while saying "you filthy slut." He again threatened to hurt her family if she did not comply. Either Defendant or Cindy smeared feces on the wall in the process, and Defendant again put his penis in Cindy's anus. Defendant also touched Cindy's chest and vagina with his hand. This occurred over five to seven minutes.

¶ 45 According to Cindy's testimony, she would see Defendant in the hallway every other day.[2] She testified that Defendant continued to sexually assault Cindy, including one occasion when Cindy tried to resist and Defendant threw her into the wall or toilet and another occasion where Defendant hit her across the face. Defendant allegedly sexually assaulted Cindy repeatedly over the course of a couple weeks, with multiple instances of Defendant calling Cindy a "whore" or "slut," Defendant making Cindy put his penis in her mouth, Defendant putting his penis in Cindy's anus, and Defendant making Cindy eat her feces. At the time of these incidents, Cindy was shorter than five feet tall, and was "pretty small."[3]

¶ 46 Almost two years later, in April 2017, Cindy first reported these incidents to a third party when she text messaged her mother something along the lines of "Mom, [Defendant] hurt me, touched me in ways that he shouldn't have." Cindy told her mother at this time because one of her friends had stated that Defendant had been arrested for hurting another girl and she had confirmed Defendant's arrest on Google.

B. Assault of Wilma

¶ 47 Additionally, at Defendant's trial for sexually assaulting Cindy, Wilma, a former student of Defendant, testified that Defendant sexually

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2. Based on the testimony, it is unclear if the sexual assaults occurred every other day.

3. To help gauge the meaning of "pretty small," later testimony reflects that, in the aftermath of the sexual assault, when Cindy was twelve years old, she developed severe food aversions and was eventually admitted to a hospital for treatment related to Avoidant Restrictive Food Intake Disorder. At the time of her admission, she weighed about fifty-nine pounds and was four feet ten inches tall.

assaulted her in 2015, when she was fourteen years old. Her testimony regarding the sexual assault was admitted as Rule 404(b) evidence over Defendant's objections, and a limiting instruction was given prior to the testimony describing the sexual assault.[4] According to Wilma's testimony, starting in seventh grade, at another middle school, Wilma had been in chorus class with Defendant as her teacher. Defendant took particular interest in Wilma and three of her friends as they were good singers. Near the end of seventh grade, after watching a movie in the classroom and while students were getting up and leaving the classroom, Defendant placed his hands on Wilma's waist and moved them down towards her buttocks. In response, Wilma ran out of the room.

¶ 48 Wilma took chorus with Defendant in eighth grade as well. That year, Defendant asked Wilma to join a singing and dancing performance held at a local high school. Wilma indicated she was not interested, but Defendant called Wilma's mother. Her mother, believing that Wilma was interested in participating, told Defendant that Wilma would participate. The practices for the performance took place at the high school, and Defendant arranged with Wilma's mother to drive Wilma from the middle school to the high school. No other students joined Defendant and Wilma on their drives to the high school.

¶ 49 Wilma testified that, in 2015, while Defendant was driving her to the last practice at the high school, he stopped by his apartment because he said he wanted to change clothes. Initially, Wilma indicated she would stay in the car, but Defendant encouraged her to come up to the apartment. Once in the apartment, Defendant made himself and Wilma a sandwich, and Wilma watched television on the couch. After they finished eating, Defendant began to touch Wilma's thigh, to which Wilma

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4. The limiting instruction stated:

> When evidence has been received tending to show that at an earlier time, [] [D]efendant may have done or participated in other crimes, wrongs, or acts, this evidence may not be considered by you as proof of the character of [] [D]efendant in order to show that he acted in conformity therewith.
>
> If you believe [] [D]efendant committed or participated in these other crimes, wrongs, or acts, you may consider them for one purpose only, and that is whether they constitute proof of one or more of the following things: Motive, opportunity, intent, plan, scheme, or system as to the charges against him in this case. You may not consider them for any other purpose and you may not convict [] [D]efendant of the crimes charged because of any evidence he participated in or committed any other crimes, wrongs, or acts at an earlier time.

responded by moving his hand and asking him not to do so. Defendant continued to touch her thigh, then pulled Wilma by her arm into his bedroom, where he threw Wilma onto the bed, removed her pants and underwear, pulled his pants down, and put his penis in her vagina. When asked how long this lasted, Wilma testified "it wasn't long." After Defendant stopped, he went to the bathroom and, upon returning to the bedroom, apologized to Wilma and "said that if [she were] to tell anyone, it would happen again."[5]

C. Sentencing

¶ 50 Following the conclusion of the trial for sexually assaulting Cindy, Defendant was found guilty on all charges.

¶ 51 At the sentencing hearing, the trial court stated:

> To say the facts of this case are egregious is putting it mildly. The facts of this case are among the worst I've ever seen, and I've seen a lot of cases, thousands as a prosecutor, thousands as a judge. One of the things that one has to understand -- I was thinking about this earlier -- is that children the age of 11, unless they are really in an usual environment, have no idea about sex acts. They just don't. I mean, I'm sure – I've seen girls who were pregnant at that age, but they shouldn't have been, but were raped. They weren't consensual acts.
>
> The Legislature did something several years ago when they enacted this structured sentencing that I totally agreed with and I advocated for for ten years before they did it, and that was to make -- send a clear message that there was a difference between a violent crime and crimes against -- and nonviolent crimes, crimes against property, because the effect is totally different. I mean, just seeing these children testify in this case was just evidence to anyone who opened their eyes who had listened to it as to how damaged these children were by their experience. I don't -- given the number of women out here in the world, I don't understand why some people choose

5. At the time, Wilma was fourteen years old, weighed one hundred pounds, and was five feet two inches tall.

> underage girls, but it's wrong. It's morally wrong. It's legally wrong, and there's no justification for it.
>
> It would be difficult for an adult to come in here and testify in front of God and the country about what those two girls came in here and testified about. It would be embarrassing. It would be embarrassing to testify about consensual sex in front of a jury or a bunch of strangers. And in truth, they get traumatized again by being here, but it's absolutely necessary when a defendant pleads not guilty. They didn't have a choice and you, Mr. Pickens, had a choice.
>
> All right. If you'll stand up, Mr. Pickens. I assume this was a B1 felony in 2015. In this case, [] [D]efendant, Troy Logan Pickens, having been convicted by a jury -- found guilty by a jury in count one, guilty of first-degree rape of a child, the Court makes no findings in aggravation or mitigation because the prison time -- prison sentence is required by law under 14-27.23.

Immediately after these statements, the trial court sentenced Defendant to three consecutive active sentences of 300 to 420 months. Defendant timely appealed.

ANALYSIS

¶ 52 On appeal, Defendant argues "[t]he trial court erred in admitting testimony under Rule 404(b) which was not similar to the crime charged and was unfairly prejudicial." He also argues he "is entitled to a new sentencing hearing because the trial court considered impermissible factors before imposing consecutive sentences." The trial court committed prejudicial error in admitting the challenged testimony under Rule 404(b). As a result, I do not address the sentencing issue, and would vacate the judgement and remand for a new trial.

A. Rule 404(b) Evidence

¶ 53 Defendant contends the trial court erred by admitting Rule 404(b) evidence regarding his prior sexual assault as the events were not sufficiently similar and the probative value of the evidence was outweighed by the prejudice to Defendant under Rule 403. I would resolve this challenge on the basis of Rule 404(b) and, as a result, do not reach the Rule 403 issue.

¶ 54 Our Supreme Court has held:

> Though this Court has not used the term de novo to describe its own review of 404(b) evidence, we have consistently engaged in a fact-based inquiry under Rule 404(b) while applying an abuse of discretion standard to the subsequent balancing of probative value and unfair prejudice under Rule 403. For the purpose of clarity, we now explicitly hold that when analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 158-59 (2012) (citation omitted).

¶ 55 Rule 404(b) establishes that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (2021). Rule 404(b)

> state[s] a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged. Thus, even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also is relevant for some

> purpose *other than* to show that [the] defendant has the propensity for the type of conduct for which he is being tried.

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (marks and citation omitted). "Though it is a rule of inclusion, Rule 404(b) is still constrained by the requirements of similarity and temporal proximity." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (marks and citation omitted). Additionally, "North Carolina courts have been consistently liberal in admitting evidence of similar sex offenses in trials on sexual crime charges." *State v. Jacob*, 113 N.C. App. 605, 608, 439 S.E.2d 812, 813 (1994).

¶ 56 As Defendant has only challenged the Rule 404(b) evidence on the basis of similarity, I address only similarity and not temporal proximity. *See* N.C. R. App. P. 28(a) (2022) ("Issues not presented and discussed in a party's brief are deemed abandoned."). Additionally, I address only "the purposes identified by the trial court below in admitting the testimony into the evidence at trial"—in this case, intent, motive, plan, and design.[6] *State v. Watts*, 246 N.C. App. 737, 745, 783 S.E.2d 266, 272 (2016), *aff'd as modified per curiam*, 370 N.C. 39, 802 S.E.2d 905 (2017) (refusing to address purposes that the trial court did not identify for the admissibility of Rule 404(b) evidence).

1. Similarity

¶ 57 Our Supreme Court has held:

> Under Rule 404(b) a prior act or crime is "similar" if there are some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both. However, it is not necessary that the similarities between the two situations rise to the level of the unique and bizarre. Rather, the similarities simply must tend to support a reasonable inference that the same person committed both the earlier and later acts.

State v. Stager, 329 N.C. 278, 304, 406 S.E.2d 876, 890-91 (1991) (marks and citations omitted). Our Supreme Court has also previously found a

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6. I note that, although the trial court denied the motion in limine and allowed the Rule 404(b) evidence for the purposes of intent, motive, plan, and design, the trial court's limiting instruction mentioned the purposes of motive, opportunity, intent, plan, scheme, or system. I rely on the purposes articulated in the trial court's ruling on the motion in limine.

prior act not to be sufficiently similar where the only similarities between the prior act and the crime charged were common to most occurrences of that type of crime. *See State v. Al-Bayyinah*, 356 N.C. 150, 155, 567 S.E.2d 120, 123 (2002) ("The [S]tate failed to show, however, that sufficient similarities existed between the [prior] robberies and the present robbery and murder beyond those characteristics inherent to most armed robberies, i.e., use of a weapon, a demand for money, immediate flight."); *see also Watts*, 246 N.C. App. at 747, 783 S.E.2d at 273 ("Like our Supreme Court in *Al–Bayyinah*, we do not find these similarities[—that both instances involved the sexual assault of minors, the minors were alone at the time of the assaults, [the] defendant was an acquaintance of the minors, [the] defendant used force, and [the] defendant threatened to kill each minor and the minors' families—]unusual to the crimes charged. Moreover, we think the trial court's broad labelling of the similarities disguises significant differences in the sexual assaults.").

¶ 58 In *Watts*, we addressed the similarity between two alleged sexual assaults of minors by an adult defendant. *Watts*, 246 N.C. App. at 747-48, 783 S.E.2d at 273-74. The trial court had allowed Rule 404(b) evidence of a prior sexual assault where "both instances involved the sexual assault of minors, the minors were alone at the time of the assaults, [the] defendant was an acquaintance of the minors, [the] defendant used force, and [the] defendant threatened to kill each minor and the minors' families." *Id.* at 747, 783 S.E.2d at 273. However, we found "these similarities [were not] unusual to the crimes charged" and held "the [] differences are significant and undermine the findings of similarity by the trial court." *Id.* at 747-48, 783 S.E.2d at 273-74. The relevant differences included a six-year difference in the age of the minors; the circumstances of the sexual assaults differing significantly, with one occurring where the minor requested to stay with the defendant and was taken to his home with consent of the minor's mother and the other occurring by forcible entry into the minor's apartment; the relationships differing significantly, where one minor viewed the defendant like a grandfather and the other minor knew the defendant but did not have a close relationship with him; and the method differing significantly, with the defendant using a razor knife in one sexual assault and strangulation without the use of a weapon in the other. *Id.* We went on to grant the defendant a new trial as the lack of similarity between the events rendered the trial court's admission of the Rule 404(b) evidence erroneous. *Id.*

¶ 59 I find *Watts* to be controlling on the facts *sub judice*. Here, regarding similarity, the trial court stated:

> I think that this -- the fact that he was a teacher on both of these occasions, even though he wasn't a teacher of one of the -- well, the victim in this case, that it was the fact that he was a teacher that gave him access to the victim in each case, the fact that he or it's alleged that on each case he grabbed the girls by one arm and pulled them where he wanted to go, that he -- that both these girls, by their description, seem to be girls who were relatively small in stature and, therefore, to some extent, physically helpless and that they are sufficiently similar so as to be admissible . . . .

¶ 60 Although I find the differences between the alleged sexual assaults to be more significant for the Rule 404(b) purposes under which the evidence was admitted, the trial court correctly identified some general similarities between these events.[7] First, Defendant had access to and authority over Cindy and Wilma by virtue of Defendant's career as a teacher. Second, Cindy and Wilma were middle school aged girls.[8] Third, Defendant did not fully remove his pants during the sexual assaults. Fourth, the sexual assaults occurred over a short period of time. Fifth, in both instances, at least some of the acts occurred at a middle school. Sixth, Wilma and Cindy were both of relatively small stature.[9] Although

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7. Similarities common to most instances of the offense that were present here include the use of threats after the sexual assaults to discourage reporting, that Defendant was in control during each sexual assault, that Defendant attempted to put his penis in Cindy's vagina and Defendant put his penis in Wilma's vagina, that Defendant removed Cindy and Wilma's pants and underwear, and that Defendant used force to take Cindy and Wilma to a more private location where the sexual assault took place. As a result of these aspects being common to sexual assaults in general, I do not find that they rendered this offense and the prior act sufficiently similar. *See Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123.

I also note that, if there were something unusual to any of these aspects, such as the *content* of a threat or the *manner* that Cindy and Wilma's clothes were removed, those similarities could contribute to there being an unusual similarity. However, here, there were no unusual similarities of this kind between the sexual assaults.

8. Cindy was eleven and Wilma was fourteen. This difference in age is arguably sufficient to constitute a difference rather than a similarity. Indeed, it is not uncommon for an eleven-year-old child to be characterized as elementary school aged rather than middle school aged.

9. There is not clear evidence on what Cindy's approximate height and weight were at the time of the sexual assault. If we were to use Cindy's height and weight about eight months after the alleged sexual assault, there would have been a four-inch height difference and potentially as much as a forty-pound weight difference between Cindy and Wilma at the times of the sexual assaults. This also could more properly constitute a difference.

these similarities could contribute to a conclusion of unusual similarity in another case when considered in conjunction with other supporting similarities, I do not believe that these facts reflect an unusual similarity such that they evidence a similar intent, motive, plan, or design under these circumstances.

¶ 61 Instead, under *Watts*, I believe these features are insufficient to establish unusual similarity. In *Watts*, the similarities referred to by the trial court concerned general characteristics of the crimes that, although meaningful, were held insufficient to establish an unusual similarity between the events, especially where "the trial court's broad labelling of the similarities disguise[d] significant differences in the sexual assaults." *Watts*, 246 N.C. App. at 747, 783 S.E.2d at 273. Here, considering the general nature of the similarities identified by the trial court, along with the significant differences between the sexual assaults, the trial court erred in finding there was an unusual similarity justifying the admittance of the Rule 404(b) evidence to show a similar intent, motive, plan, or design.

¶ 62 The specifics of the alleged assaults were remarkably distinct. First, the way Defendant knew Wilma and Cindy differed—Defendant knew Wilma by virtue of being her chorus teacher for seventh and eighth grade, whereas Defendant did not know Cindy prior to sexually assaulting her.

¶ 63 Second, the manner in which the sexual assaults were brought about differed. Defendant manufactured the opportunity to isolate Wilma and sexually assault her by inviting her to participate in a performance, then following up with her mother knowing she did not intend to participate and offering to drive her. Defendant's opportunity to sexually assault Cindy was incidental, with Cindy already walking to get her medication daily around noon.

¶ 64 Third, the progression of the actions differed significantly. Defendant's attempted grooming behavior began by getting to know Wilma through the chorus class and showing a preference for her, then inappropriately touching her waist, then creating an opportunity for him to spend time alone with her, and then sexually assaulting her. With Cindy, Defendant immediately sexually assaulted her by making her undress and touch his penis, then progressed to more extreme actions. Defendant's interactions with Cindy *began* with sexual assault, whereas those with Wilma *escalated* to sexual assault.

¶ 65 Fourth, the locations of the actions committed differed significantly. Although Defendant touched Wilma's waist at school, Defendant

sexually assaulted her at his home in a bed. With Cindy, the sexual assaults occurred exclusively in a school bathroom. It is important that Defendant did not sexually assault Wilma at the school, as there is a significant methodological difference between a single sexual assault in a private place and repeated sexual assaults in a public restroom.

¶ 66 Fifth, the actions alleged widely differed. With Wilma, Defendant groped her legs and forcibly put his penis in her vagina. With Cindy, Defendant made her touch his penis, touched her breasts and vagina, attempted to put his penis in her vagina, forced her to put his penis in her mouth, made her defecate and eat her feces, and put his penis in her anus.

¶ 67 Finally, the frequency of the actions significantly differed. With Wilma, there were two instances of inappropriate conduct and one instance of sexual assault. With Cindy, the sexual assaults recurred over the course of a couple weeks, occurring at least five times and potentially occurring as often as every other day during this time period.[10]

¶ 68 The differences between Defendant's sexual assaults on Wilma and Cindy significantly undermine a finding that the events were sufficiently similar to show Defendant's intent, motive, plan, and design. Indeed, the plan or design for these events significantly differed in that Defendant's sexual assault on Wilma resulted from gradually escalating attempted grooming behavior towards a student in his class, ending in a single incidence of sexual assault outside of the school, whereas his sexual assault on Cindy resulted from a sudden attack on a student unknown to Defendant that recurred at the school over the course of two weeks with increasing depravity. Furthermore, the extreme differences between the specific acts that Defendant committed during the sexual assaults demonstrates there was not a similar intent, motive, plan, or design. The only similarity in Defendant's intent or motive would be in the general purpose to sexually assault a middle school aged girl, which does not alone rise to the level of an unusual similarity.

¶ 69 "Comparing the alleged prior sexual assault to the alleged sexual assault for which [the] defendant is now on trial, [I would] hold the above differences are significant and undermine the findings of similarity by the trial court." *Watts*, 246 N.C. App. at 748, 783 S.E.2d at 274. The prior bad act was not sufficiently similar to the Defendant's alleged actions for which he was on trial. As a result, the trial court erred by admitting

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10. Cindy testified to the specific details of at least five separate instances of sexual assault.

Wilma's testimony under Rule 404(b) as it was not sufficiently similar and was only relevant to show "[D]efendant's character or propensity to commit a sexual assault [on a minor]." *Watts*, 246 N.C. App. at 748, 783 S.E.2d at 274.

2. Prejudice

¶ 70 I must also consider whether this error was prejudicial. A preserved error is prejudicial "when 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." N.C.G.S. § 15A-1443(a) (2021). I conclude there is a reasonable possibility that the jury would have reached a different verdict if this evidence had not been admitted. There were no witnesses to Defendant's sexual assaults of Cindy, and there was no physical evidence of Defendant's guilt. As a result, the credibility of Cindy's testimony was essential to the jury's guilty verdict. Furthermore, there was evidence that might undermine Cindy's testimony, such as her assertion that she was using crutches due to an injury caused by Defendant when she met with the principal of her school, which was undermined by her mother's denial of Cindy having used crutches that day; accusations that the principal of the middle school yelled at her, called her vulgar names, and broke her wrist, which were undermined by the counselor who was present for the whole meeting; expert evidence that Cindy "scored extremely high on confusion between reality and imagining things"; and Cindy's parents' suspicions of a prior sexual trauma.

¶ 71 In light of the facts of this case, the erroneous admission of Defendant's alleged sexual assault on Wilma created a reasonable possibility that the jury would have reached a different verdict if this evidence had not been admitted. The erroneous admission of the Rule 404(b) evidence was prejudicial to Defendant. Defendant is entitled to a new trial, and I would not reach Defendant's other arguments on appeal. *See Watts*, 246 N.C. App. at 748, 783 S.E.2d at 274 (granting a new trial where we held Rule 404(b) evidence was improperly admitted and was prejudicial, and noting that our holding disposed of the case on appeal).

CONCLUSION

¶ 72 The trial court committed prejudicial error by admitting evidence of a prior sexual assault under Rule 404(b), entitling Defendant to a new trial.

STATE OF NORTH CAROLINA
v.
RODNEY RANDELL WENTZ

No. COA22-125

Filed 2 August 2022

Sentencing—plea agreement—sentence different from plea agreement—right to withdraw guilty plea

The trial court erred by imposing a sentence inconsistent with defendant's plea agreement without informing defendant of his right to withdraw his guilty plea pursuant to N.C.G.S. § 15A-1024, where the plea agreement contained a specific, consolidated sentence for multiple convictions in the presumptive range of 77-105 months but the trial court entered two separate, consecutive sentences (of 77-105 months and 67-93 months).

Appeal by Defendant from judgment entered 5 September 2019 by Judge J. Carlton Cole in Pasquotank County Superior Court. Heard in the Court of Appeals 10 May 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Defendant Rodney Randell Wentz ("Defendant") appeals the trial court's denial of his motion to withdraw his guilty plea pursuant to N.C. Gen. Stat. § 15A-1024, alleging that the sentence imposed by the trial court was inconsistent with the sentence outlined in his plea agreement with the State. After careful review, we vacate the trial court's judgment and remand for further proceedings.

I. Factual and Procedural Background

¶ 2 Between February 5 and February 19, 2019, Defendant and his daughter[1] committed three break-ins and stole several items including

1. Defendant's daughter is not the subject of this appeal.

watches, televisions, jewelry, money, a safe, a wallet, and a 9-millimeter handgun magazine from several residences in Elizabeth City, North Carolina. Investigators determined Defendant and his daughter were staying at a local hotel, searched their room, and found a .22 caliber Gecado revolver among Defendant's belongings. Police also recovered several of the items stolen during the break-ins from Defendant's vehicle.

¶ 3 On April 22, 2019, a grand jury returned indictments charging Defendant with three counts each of breaking and entering, larceny after breaking and entering, possession of stolen goods, and one count each of larceny of a firearm, possession of a stolen firearm, possession of a firearm by a felon, and being a habitual felon due to three prior felony convictions.

¶ 4 On September 5, 2019, Defendant entered into a plea agreement with the State. Defendant agreed to enter an *Alford* plea to one count of possession of a firearm by a felon, three counts of felony breaking and entering, and to admit his status as a habitual felon. In exchange, the State agreed to dismiss the remaining charges. Additionally, the plea agreement stated: "The State does not oppose consolidating the offenses for sentencing. The Defendant is to receive an active sentence in the ~~aggrivated~~ [sic] range. The State will dismiss the related charges." Beneath the stricken word "aggrivated [sic]" was handwritten, "Presumptive 77-105 months."

¶ 5 On September 5, 2019, the parties brought their negotiated plea agreement before the trial court. The trial court read aloud the plea agreement and Defendant stated he understood, accepted, and entered the plea voluntarily, fully understanding what he was doing. After hearing the State's factual basis for the charges, the trial court turned to sentencing. The trial court noted, "the plea agreement says the State does not oppose the Court consolidating the offenses, but I'm not inclined to do that. What I would do is sentence him separately [for the Class C and Class D felonies]." Upon the trial court's statement, Defendant made a motion to withdraw the plea, contending he had "entered into this plea with the expectation that he would receive a sentence of 77 to 105 months."

¶ 6 In response, the trial court stated the plea agreement did not reflect Defendant's interpretation of it because the language provided that "the State does not oppose the matters being consolidated." The trial court determined that it would not consolidate the matters and that it was in its discretion to allow Defendant to withdraw his plea prior to entering sentence. The trial court observed,

> [i]f at the time of sentencing, the judge decides to impose a sentence other than that provided for in the negotiated plea arrangement, the defendant must be allowed to withdraw his or her plea[2] . . . . However, the Court may allow the defendant to withdraw a guilty plea prior to sentencing for a fair and just reason. I'm not inclined to allow him to withdraw it . . . .

After denying Defendant's motion to withdraw the guilty plea, the trial court sentenced him to 77 to 105 months for the charge of possession of a firearm by a felon, followed by 67 to 93 months for the three breaking and entering convictions. Defendant received 188 days of credit for time served awaiting trial. Defendant gave oral notice of appeal.

II. Appellate Jurisdiction

¶ 7 Pursuant to N.C. Gen. Stat. § 15A-1444(e) and our decision in *State v. Dickens*, Defendant is entitled to appellate review of the denial of his motion to withdraw his *Alford* plea as a matter of right. N.C. Gen. Stat. § 15A-1444(e) (2019); *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1980).

III. Analysis

¶ 8 Defendant's sole argument on appeal is that the trial court violated N.C. Gen. Stat. § 15A-1024 and erred in imposing a sentence inconsistent with the sentence set out in Defendant's plea agreement without allowing Defendant to withdraw his *Alford* plea. We agree.

1. Standard of Review

¶ 9 As noted in *State v. Wall*, to determine "whether there was any proper reason for the trial court to have granted defendant's motion to withdraw his plea after a sentence is imposed, we look to the statutory provisions governing such a motion. Our General Assembly has created a clear right for a defendant to withdraw a plea at the time sentence is imposed if that sentence differs from that contained in the plea agreement" through N.C. Gen. Stat. § 15A-1024. 167 N.C. App. 312, 314, 605 S.E.2d 205, 207 (2014).

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2. We note that the trial court is reciting the first sentence of N.C. Gen. Stat. § 15A-1024 (2019).

2. N.C. Gen. Stat. § 15A-1024's Application to the Plea Agreement

¶ 10 "Although a plea agreement occurs in the context of a criminal proceeding, it remains contractual in nature." *State v. Rodriguez*, 111 N.C. App. 141, 144, 431 S.E.2d 788, 790 (1993) (citation omitted). A plea agreement "is markedly different from an ordinary commercial contract" as it involves the waiver of fundamental constitutional rights, including the right to a jury trial. *State v. Blackwell*, 135 N.C. App. 729, 731, 522 S.E.2d 313, 315 (1999). Due to the serious contractual nature of a plea bargain, a "constant factor [in the plea-bargaining process] is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Rodriguez*, 111 N.C. App. at 144, 431 S.E.2d at 790 (quoting *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427, 433 (1971)). Due process mandates strict adherence to any plea agreement to ensure "the defendant [receives] what is reasonably due in the circumstances." *Id.*

¶ 11 "There is no absolute right to have a tendered guilty plea accepted" by the trial court. *State v. Wallace*, 345 N.C. 462, 465, 480 S.E.2d 673, 675 (1997). The trial court judge may initially accept "a plea arrangement when it is presented to him[,] . . . [hear] the evidence[,] and at the time for sentencing [determine] that a sentence different from that provided for in the plea arrangement must be imposed." *State v. Williams*, 291 N.C. 442, 446, 230 S.E.2d 515, 517-18 (1976).

¶ 12 To ensure a defendant receives the benefit of a plea bargain, N.C. Gen. Stat. § 15A-1024 provides that a defendant must be informed and permitted to withdraw his plea when the sentence imposed by the trial court differs from what was agreed to under the terms of the plea agreement:

> If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

N.C. Gen. Stat. § 15A-1024; *State v. Marsh*, 265 N.C. App. 652, 654, 829 S.E.2d 245, 247 (2019). Once a trial court decides to impose a different sentence, the trial court should: (1) inform the defendant of the decision to impose a sentence other than that provided in the plea agreement;

(2) inform the defendant that he can withdraw his plea; and (3) if the defendant chooses to withdraw his plea, grant a continuance until the next session of court. *State v. Rhodes*, 163 N.C. App. 191, 195, 592 S.E.2d 731, 733 (2004). "Where a court fails to inform a defendant of [his] right to withdraw a guilty plea pursuant to N.C. Gen. Stat. § 15A-1024, the sentence must be vacated, and the case remanded for re-sentencing." *State v. Carriker*, 180 N.C. App. 470, 471, 637 S.E.2d 557, 558 (2006) (citing *Rhodes*, 163 N.C. App. at 195, 592 S.E.2d at 733). This Court's "precedent is clear that *any* change by the trial judge in the sentence that was agreed upon by the defendant and the State . . . requires the judge to give the defendant an opportunity to withdraw his guilty plea." *Marsh*, 265 N.C. App. at 655, 829 S.E.2d at 247 (emphasis added).

¶ 13 The State contends that the trial court's sentencing was not inconsistent with the plea agreement because the plea agreement's plain language does not require Defendant's offenses to be consolidated for sentencing. The State argues the plea agreement's language, "the State does not oppose consolidating the offenses for sentencing," possesses a similar effect as the plea agreement in *State v. Blount*. 209 N.C. App. 340, 346, 703 S.E.2d 921, 926 (2011). In *Blount*, the plea agreement between the State and defendant included the following language: "The State shall not object to punishment in the mitigated range of punishment." *Id.* This court determined that the terms of the plea agreement did not "provide for a mitigated-range sentence — only that the State would 'not object' to such a sentence." *Id.* We held there was "no agreed-upon sentence" between defendant and the State "for the trial court to reject." *Id.* Drawing a parallel between the plea agreement in *Blount* and the plea agreement here, the State contends that it agreeing "not to oppose a particular sentence did not compel the trial court to impose that sentence." However, the plea agreement in this case is distinguishable from that in *Blount*.

¶ 14 Because a plea agreement involves a waiver of fundamental constitutional rights, "the right to due process and basic contract principles require strict adherence" to the terms of the agreement. *Rodriguez*, 111 N.C. App. at 145, 431 S.E.2d at 790. Furthermore, "this strict adherence 'require[s] holding the [State] to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements.' " *Blackwell*, 135 N.C. App. at 731, 522 S.E.2d at 315 (quoting *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986)). Thus, "when a prosecutor fails to fulfill promises made to the defendant in negotiating a plea bargain, the defendant's constitutional rights have been violated and he

is entitled to relief." *Rodriguez*, 111 N.C. App. at 145, 431 S.E.2d at 790 (quoting *Northeast Motor Co. v. N.C. State Board of Alcoholic Control*, 35 N.C. App. 536, 538, 241 S.E.2d 727, 729 (1978)).

¶ 15 In this case, the plea agreement includes a specific, agreed-upon sentence between Defendant and the State: "The Defendant is to receive an active sentence in the ~~aggrivated~~ [sic] range," a sentence intended to be in the presumptive range of "77-105 months." Defendant "quite reasonably interpreted this to mean that the State promised" that in exchange for his *Alford* plea, he would receive an active sentence in the presumptive range of "77-105 months." *See Blackwell*, 135 N.C. App. at 731, 522 S.E.2d at 315. Thus, the plea agreement laid out an agreed-upon sentence for the trial court to either accept or reject. *See Blount*, 209 N.C. App. at 346, 703 S.E.2d at 926.

¶ 16 The State's argument focuses on the plea agreement's language of "[t]he State does not oppose" to justify the trial court's discretion in not consolidating Defendant's convictions into one judgment. The State contends that this choice of words in the plea agreement placed Defendant "on notice that consolidation was not guaranteed." However, the strict adherence to the plea agreement requires construing any ambiguities in the agreement against the State as its drafter. *Blackwell*, 135 N.C. App. at 731, 522 S.E.2d at 315 (quoting *Harvey*, 791 F.2d at 300). When reading the provisions of the plea agreement together "as a whole", it was reasonable for Defendant to rely upon the consolidation of his offenses for sentencing as part of the inducement for Defendant's *Alford* plea. *See Rodriguez*, 111 N.C. App. at 144, 431 S.E.2d at 790. Simply put, Defendant did not waive his constitutional rights and bargain for the State's interpretation of the plea agreement. Moreover, a "defendant should not be forced to anticipate loopholes that the State might create in its own promises." *Blackwell*, 135 N.C. App. at 731, 522 S.E.2d at 315.

¶ 17 At sentencing, the trial court clearly articulated its discretion to impose something other than a consolidation of Defendant's sentences. While the trial court sentenced Defendant to 77 to 105 months for the charge of possession of a firearm by a felon, it imposed an alternative sentence of 67 to 93 months for the three breaking and entering convictions and ordered both sentences to run consecutively.

¶ 18 In *State v. Carriker*, this Court held that the trial court erred by denying the defendant's motion to withdraw her plea after ordering the defendant to surrender her nursing license, a sentence that was not included in the plea agreement. 180 N.C. App. at 471, 637 S.E.2d at 558. Here, as in *Carriker*, the trial court imposed an additional sentence from

that specified in the plea agreement. *Id.* The trial court's subsequent sentencing of 67 to 93 months was contrary to the inducement Defendant bargained for in his plea agreement with the State. Our Court has held that *any* change by the trial court in the sentence that was agreed upon by the defendant and the State requires the trial court judge to give the defendant an opportunity to withdraw his guilty plea. *Marsh*, 265 N.C. App. at 655, 829 S.E.2d at 247. The record before us reveals the trial court "failed to inform defendant of [his] right to withdraw [his] plea after determining to impose a sentence other than as provided in the plea arrangement." *Carriker*, 180 N.C. App. at 471, 637 S.E.2d at 558; *Wall*, 167 N.C. App. at 317, 605 S.E. 2d at 209. In fact, the trial court denied Defendant's motion to withdraw his plea.

¶ 19 We conclude the two separate sentences imposed by the trial court are different from the presumptive sentence of 77-105 months that Defendant bargained for in his plea agreement. *Marsh*, 265 N.C. App. at 656, 829 S.E.2d at 248; *see State v. Russell*, 153 N.C. App. 508, 509, 570 S.E.2d 245, 247 (2002) ("A plea agreement is treated as contractual in nature[.]"). Because the trial court denied Defendant his right to withdraw his guilty plea as required by N.C. Gen. Stat. § 15A-1024, we vacate and remand to the trial court for proceedings not inconsistent with the statute. *Carriker*, 180 N.C. App. at 471, 637 S.E.2d at 558.

IV. Conclusion

¶ 20 For the reasons stated, we hold the trial court was required to inform Defendant of his right to withdraw his guilty plea pursuant to N.C. Gen. Stat. § 15A-1024. Accordingly, we vacate the trial court's judgment and remand this matter for further proceedings. Because Defendant was entitled to withdraw his plea once the trial court imposed a sentence inconsistent with the plea agreement, on remand, we conclude Defendant is no longer bound by the plea agreement. *Marsh*, 265 N.C. App. at 656, 829 S.E.2d at 248.

VACATED AND REMANDED.

Judges INMAN and ARROWOOD concur.

VISIBLE PROPERTIES, LLC, PETITIONER
v.
THE VILLAGE OF CLEMMONS, RESPONDENT

No. COA21-398

Filed 2 August 2022

1. Zoning—billboards—digital—off-premises—harmonization of ordinance provisions—free use of property

Petitioner's proposed digital billboard was not prohibited by local zoning ordinances where, after the appellate court harmonized the numerous applicable zoning provisions and construed ambiguous provisions in favor of the free use of property, the sign-specific regulation controlled the permissible locations of off-premises signs and did not prohibit the proposed billboard on the property where petitioner sought to install it.

2. Zoning—billboards—digital—no special definitions—ambiguous—free use of property

Petitioner's proposed digital billboard—which would display a static image that would change every six to eight seconds to a different image—was not prohibited by local zoning ordinances where provisions prohibiting "moving and flashing signs" and "electronic message boards," for which no special definitions were provided in the ordinance, were ambiguous and therefore had to be construed in favor of the free use of property.

Appeal by petitioner from order entered 23 December 2020 by Judge Eric Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 23 February 2022.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus, Jonathan H. Dunlap, and Brian D. Gulden, for petitioner-appellant.

Blanco Tackabery & Matamoros, P.A., by Elliot A. Fus and Chad A. Archer, for respondent-appellee.

DIETZ, Judge.

¶ 1 Visible Properties, LLC wants to erect a digital billboard on property bordering a highway in Clemmons. The zoning board of adjustment

denied Visible's request on the ground that the zoning ordinances did not permit digital billboards. The trial court, on certiorari review, affirmed.

¶ 2 Our task on appeal is to determine if the zoning board and the trial court properly interpreted the language of the ordinances.

¶ 3 This is not as easy as it sounds. Determining which zoning provisions apply requires so much cross-referencing it is almost dizzying. There is a general provision that permits off-premises signs such as billboards on the property at issue; a separate overlay district regulation that, by omission, does not permit off-premises signs on the property; and a sign-specific ordinance that permits off-premises signs on the property and states that it supersedes other regulations concerning signs. Then, there is a separate provision stating that, in the event of a conflict among different provisions, the most restrictive provision prevails.

¶ 4 Similarly, the zoning ordinances prohibit "moving and flashing signs" and "electronic message boards." But, in light of the examples of "moving and flashing signs" in the ordinance, and the descriptions of billboards in other portions of the ordinance as either "signs" or "billboards" (not "message boards"), there are reasonable interpretations of these provisions that both cover the type of digital billboard proposed by Visible, and that do not.

¶ 5 In the end, we are guided by two overarching principles governing construction of zoning ordinances—first, that we should strive to harmonize provisions and avoid conflicts whenever possible; and second, that we should construe ambiguous provisions in favor of the free use of property. Applying those principles here, we hold that the sign-specific regulation controls the permissible locations of signs and permits Visible's proposed billboard on the property. We further hold that the prohibitions on "moving and flashing signs" and "electronic message boards" are open to multiple reasonable interpretations, are therefore ambiguous, and must be construed in favor of Visible's proposed use of the property. We therefore reverse the trial court's order and remand for entry of an order reversing the Board of Adjustment's decision.

Facts and Procedural History

¶ 6 Visible Properties, LLC is a North Carolina company that owns and operates outdoor advertising signs and billboards throughout the state.

¶ 7 In June 2019, Visible applied to the Village of Clemmons for a zoning permit to construct a billboard with digital technology at 2558 Lewisville-Clemmons Road. The permit requested construction of a "10' x 30' Outdoor Advertising Structure with Digital changeable copy"

that would be categorized as a "Ground (off premises freestanding)" sign. The proposed digital billboard would not contain any moving or scrolling text or images, nor any flashing lights or images, but would change the static image displayed on the billboard every six to eight seconds using digital technology.

¶ 8 Officials with the Village of Clemmons denied the permit on the grounds that "the structure is a 'Sign, Ground (Off-Premises),' which is not listed as a permitted use in the South Overlay District in which the Property is located" and that the structure is prohibited by the sign regulations regarding "moving and flashing signs" and "electronic message boards."

¶ 9 Visible appealed to the Clemmons Zoning Board of Adjustment. The Board met in December 2019 and conducted an evidentiary hearing where it considered the application materials, testimony, and evidence presented. In January 2020, the Board entered a written decision affirming the staff decision to reject Visible's permit application. Visible petitioned for a writ of certiorari, which the trial court granted. In December 2020, the trial court affirmed the Board of Adjustment's decision. Visible timely appealed.

Analysis

¶ 10 Visible challenges the trial court's legal determination that the proposed digital billboard was prohibited by various provisions of the zoning ordinances. In this type of administrative review, challenging the interpretation of zoning ordinances, the trial court sits as an appellate court and reviews this legal question *de novo*. *Fort v. Cty. of Cumberland*, 235 N.C. App. 541, 548, 761 S.E.2d 744, 749 (2014). On appeal, this Court also applies a *de novo* standard of review and examines whether the trial court committed an "error of law in interpreting and applying the municipal ordinance." *Four Seasons Mgmt. Servs., Inc. v. Town of Wrightsville Beach*, 205 N.C. App. 65, 76, 695 S.E.2d 456, 463 (2010).

¶ 11 Zoning ordinances are interpreted "to ascertain and effectuate the intent of the legislative body." *Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 138, 431 S.E.2d 183, 187 (1993). "The rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances." *Four Seasons Mgmt. Servs.*, 205 N.C. App. at 76, 695 S.E.2d at 463. But, as discussed in more detail below, when there is ambiguity in a zoning regulation, there is a special rule of construction requiring the ambiguous language to be "construed in favor of the free use of real property." *Morris Commc'ns Corp. v. City of Bessemer*, 365 N.C. 152, 157, 712 S.E.2d 868, 871 (2011).

I. Permitted uses at the property location

¶ 12 **[1]** Visible first challenges the trial court's determination that the zoning ordinances prohibited the use of off-premises signs on the property at issue in this case. Specifically, the trial court determined that a provision creating the "Lewisville Clemmons Road (South Overlay District)"—an overlay district in which this property is located—did not permit off-premises signs. Moreover, the trial court determined that, to the extent other provisions in the ordinances permitted off-premises signs on the property, the "Conflicting Provisions" section of the ordinances required the court to apply "the more restrictive limitation or requirements," which in this case is the overlay district provision.

¶ 13 To address this argument, we must examine the series of use restrictions, corresponding tables, and numerous cross-references that address the use of off-premises signs on property within the Village of Clemmons.

¶ 14 We begin with the general provision of the ordinances governing permissible uses of property. This general provision is found in Section B.2-4 and is titled "Permitted Uses." The first section of this general provision is entitled "Table B.2.6" and explains that the corresponding table "displays the principal uses allowed in each zoning district and references use conditions." Village of Clemmons, N.C., Unified Development Ordinances, § B.2-4.1 (UDO).

¶ 15 Table B.2.6 is included in the ordinances following this section. In a grid format, the table lists particular uses of property and then indicates whether that use is permitted in each zoning district.

¶ 16 Under the heading "Business and Personal Services" in Table B.2.6, there is an entry for "Signs, Off-Premises." UDO, Table B.2.6. This entry indicates that off-premises signs generally are permissible in the zoning district in which this property is located. This entry in the table also references a separate use condition located in Section B.2-5.67. That subsection, titled "Signs, Off-Premises," then cross-references another section, discussed below, stating that "All signs must comply with the provisions of Section B.3-2." UDO, § B.2-5.67.

¶ 17 A later subsection of the ordinances states that these general provisions in Table B.2.6 may be subject to additional restrictions in other subsections, including two that are relevant to our analysis—a section governing overlay districts and the section, referenced above, governing signs:

> **2-4.5 OTHER DEVELOPMENT REQUIREMENTS OF THE ZONING ORDINANCE**
>
> (A) Additional Development Requirements. In addition to the regulation of uses pursuant to Section B.2-4 and the use conditions of Section B.2-5, the following additional development requirements of this Ordinance may apply to specific properties and situations.
>
> . . .
>
> (2) Section B.2-1.6 Regulations for Overlay and Special Purpose Districts
>
> . . .
>
> (6) Section B.3-2 Sign Regulations

Id. § B.2-4.5.

¶ 18 We begin with the first of these two additional development requirements, concerning overlay and special purpose districts. This provision creates a special district referred to as "Lewisville Clemmons Road (South Overlay District)." *Id.* § B.2-1.6(E). This overlay district includes the property at issue in this case.

¶ 19 In an introductory section titled "Vision," this overlay district provision explains that it is intended "to promote the redevelopment of the area into a mixed use commercial/office/residential." *Id.* § B.2-1.6(E)(A). This provision further explains that it is "intended to foster development that improves traffic/safety, intensifies land use and economic value, to promote a mix of uses, to enhance the livability of the area, to enhance pedestrian connections, parking conditions, and to foster high-quality buildings and public spaces that help create and sustain long-term economic vitality." *Id.*

¶ 20 Another provision in the Lewisville Clemmons Road (South Overlay District) section states that its "standards apply to sites (including principal and accessory buildings) that are within the Lewisville-Clemmons Road Corridor Overlay district unless otherwise specified herein, and apply to all permitted uses allowed within the district." *Id.* § B.2-1.6(E)(C).

¶ 21 Finally, for purposes of this appeal, the operative provision of the Lewisville Clemmons Road (South Overlay District) section lists the permissible uses of property in the overlay district. *Id.* § B.2-1.6(E)(D). In a section titled "Permitted Uses," the ordinance states that the "overlay

district provisions apply to any base zoning district set forth in this chapter that exists within the defined overlay area." *Id.*

¶ 22 The provision then includes a list of use categories corresponding to some (but not all) of the use categories listed in Table B.2.6, discussed above. Within those use categories, this provision again lists some, but not all, of the particular uses listed under those categories in Table B.2.6. Relevant to this case, the "Permitted Uses" provision includes the "Business and Personal Services" category. This is the use category from Table B.2.6 (the general use provision) that addressed the use of off-premises signs. In this more specific overlay provision, the Business and Personal Services category lists *some* uses contained in Table B.2.6 under that category heading, but does not list "Signs, Off-Premises" as a permitted use:

> The overlay district provisions apply to any base zoning district set forth in this chapter that exists within the defined overlay area. The following permitted uses are allowed for this proposed geographic area by use category:
>
> . . .
>
> 3. **Business and Personal Services.** Banking and Financial Services, Bed and Breakfast, Building Contractors General, Car Wash, Funeral Home, Health Services Misc., Hotel/Motel, Kennel, Medical Lab, Medical Offices, Motor Vehicle, Leasing/Rental, Repair/Maintenance, Body/Paint Shop, Office Misc., Professional Office, Service Personal, Services, Business A/B, Veterinary Services

Id. § B.2-1.6(E)(D)(3).

¶ 23 Finally, we address the last, and most specific, of the relevant provisions—the additional development requirements contained in Section B.3-2 that govern signs. This provision contains lengthy rules specific to various forms of signs and lists their permitted uses and locations:

> **3-2 SIGN REGULATIONS**
>
> **(B) Permitted Signs**
>
> . . .
>
> **(2) Application of Table of Permitted Districts for Signs.** *The following signs shall be permitted*

> *in the zoning districts as indicated in Table B.3.6*, and shall comply with all regulations of the applicable district *unless otherwise regulated by specific regulations of this section.*
>
> . . .
>
> **(C) Off-Premises Ground Signs**
>
> **(1) Zoning Districts.** *Ground signs (off-premises) are permitted only in the districts as shown in Table B.3.6 and only along designated roads which are not identified as view corridors listed in Section B.3-2.1(C)(2).*
>
> **(2) View Corridors.** *No off-premises sign shall be permitted in any view corridor as described below* [Table B.3.7 titled "View Corridors"] and shown on the View Corridor Map located in the office of the Planning Board.

Id. § B.3-2.1(B)(2), (C) (emphasis added).

¶ 24 Importantly, this sign provision operates differently from other portions of the ordinances governing uses of property. Specifically, as the emphasized language above indicates, this sign provision contains its own, more specific restrictions for where signs may be located and states that these more specific restrictions, where applicable, supersede other portions of the ordinances.

¶ 25 These more specific restrictions take two forms relevant to this case. First, Table B.3.6, which accompanies and is referenced by this "Sign Regulations" ordinance, includes a category for "Off-Premises Signs" and indicates that off-premises signs are permitted only in specific zoning districts. The property at issue in this case is located in a zoning district where off-premises signs are permitted under this table.

¶ 26 Second, Table B.3.7, which also accompanies and is referenced by this "Sign Regulations" ordinance, contains a list of the "view corridors" mentioned in this subsection of the ordinance. These view corridors are specific areas of various streets and highways where off-premises signs are prohibited despite otherwise being permitted in the more general table, Table B.3.6. Importantly, there are portions of Lewisville-Clemmons Road, on which this property is located, that are in these view corridors. But this particular property is not in a view corridor and thus off-premises signs are permitted on the property under both Table B.3.6 and Table B.3.7.

¶ 27 After walking through this dizzying sequence of provisions, tables, and internal cross-refences, we are left with this: A general provision that permits off-premises signs on this property; a more specific overlay provision that supersedes the general (or "base zoning district") regulations and, by omission, does not permit off-premises signs on this property; and an even more specific sign provision that permits off-premises signs on this property and further states that, where something is "regulated by specific regulations of this section" those specific regulations supersede other regulations of the applicable district.

¶ 28 In defending the Board of Adjustment's ruling, the Village of Clemmons contends that the overlay district provision should control because, at best, these three provisions are conflicting. The Village points to a separate section of the zoning ordinances establishing a rule of construction for conflicting provisions. It provides that where "a conflict exists between any limitations or requirements in this Ordinance, the more restrictive limitation or requirements shall prevail." *Id.* § B.1-7.1. Thus, the Village argues, the conflict between these provisions must be resolved by applying the most restrictive zoning requirements within the conflicting provisions, which is the overlay district provision that prohibits off-premises signs on the property.

¶ 29 We agree that our State's case law approves of this sort of rule-of-construction language and that, if we determined there is a conflict among different provisions of the ordinance, we must apply this rule of construction in favor of the most restrictive provision. *See Westminster Homes Inc. v. Town of Cary*, 354 N.C. 298, 305–06, 554 S.E.2d 634, 639 (2001).

¶ 30 But we cannot reach that step unless we first determine that there is a conflict. And, in examining that question, we are guided by two common law principles governing interpretation of zoning ordinances. First, when interpreting provisions of a law that are all part of the same regulatory scheme, we should strive to find a reasonable interpretation "so as to harmonize them" rather than interpreting them to create an irreconcilable conflict. *McIntyre v. McIntyre*, 341 N.C. 629, 634, 461 S.E.2d 745, 749 (1995). In other words, even in the presence of this conflicting provisions criteria in the ordinances, we will first seek a reasonable interpretation that has no internal conflicts because we must presume that the drafters would not intend to create regulations that are internally inconsistent and conflicting. *See Taylor v. Robinson*, 131 N.C. App. 337, 338–39, 508 S.E.2d 289, 291 (1998).

¶ 31 Second, when interpreting zoning regulations, which are "in derogation of common law rights," and faced with more than one reasonable

interpretation of the regulations, we should choose the reasonable interpretation that favors "the free use of property." *Cumulus Broad., LLC v. Hoke Cty. Bd. of Comm'rs*, 180 N.C. App. 424, 427, 638 S.E.2d 12, 15 (2006).

¶ 32 With these common law principles in mind, we hold that there is a reasonable interpretation of these provisions that harmonizes them to avoid conflicts. We adopt that interpretation, consistent with the principle that laws should not be construed to be conflicting when there is a reasonable interpretation that contains no internal conflicts. *McIntyre*, 341 N.C. at 634, 461 S.E.2d at 749. Under that interpretation, the specific, express limitation on off-premises signs contained in the Sign Regulations portion of the ordinance supersedes the other two ordinances and controls the use of off-premises signs on this property. UDO § B.3-2.1. This is so both because these sign-specific rules directly apply to the use at issue and because these sign-specific rules state that other zoning restrictions do not apply if the use is "regulated by specific regulations of this section." *Id.*

¶ 33 Under these sign-specific regulations, off-premises signs are permitted at the property on which Visible desires to install its digital billboard. We therefore reject the Village of Clemmons's argument and hold that the trial court erred by affirming the Board of Adjustment's determination that the off-premises sign was precluded by the zoning regulations in the Lewisville Clemmons Road (South Overlay District) provision.

II. Prohibited signs regulation

¶ 34 **[2]** We next turn to the alternative ground on which the Board of Adjustment relied, concerning the permissible types of off-premises signs.

¶ 35 Visible applied for approval of a digital billboard described as an "outdoor advertising structure with digital changeable copy." The digital billboard would display a static image like a traditional billboard, without any moving or scrolling images, video, blinking or flashing lights, or other animation. But, unlike a traditional billboard, the static image displayed on the billboard would change every six to eight seconds to a different image. Thus, the digital billboard would be capable of rotating through a series of different images over time.

¶ 36 The Village of Clemmons contends that this type of digital billboard is prohibited by two provisions of the Sign Regulations section of the ordinance, one addressing "Moving and Flashing Signs" and the other addressing "Electronic message boards." These two prohibitions are found in Section B.3-2.1(A)(3) of the Village's zoning ordinances:

3-2.1 SIGN REGULATIONS

(A) General Requirements

. . .

(3) Prohibited Signs. The following signs or use of signs is prohibited.

(a) Flashing Lights. Signs displaying intermittent or flashing lights similar to those used in governmental traffic signals or used by police, fire, ambulance, or other emergency vehicles.

(b) Use of Warning Words or Symbology. Signs using the words stop, danger, or any other word, phrase, symbol, or character similar to terms used in a public safety warning or traffic signs.

(c) Temporary, Nonpermanent Signs. Temporary, nonpermanent signs, including over-head streamers, are not permitted in any zoning district, unless otherwise specified in these regulations.

(d) Moving and Flashing Signs (excludes electronic time, temperature, and electronic fuel pricing). Moving and flashing signs, excluding electronic time, temperature, and message signs, are not permitted in any zoning district. This includes pennants, streamers, banners, spinners, propellers, discs, any other moving objects; strings of lights outlining sales areas, architectural features, or property lines; beacons, spots, searchlights, or reflectors visible from adjacent property or rights-of-way.

(e) Exterior exposed neon signs are prohibited.

(f) Electronic message boards are prohibited.

UDO, § B.3-2.1(A)(3) (emphasis added).

¶ 37 As noted above, when interpreting these provisions, we apply the same principles of construction used to interpret statutes. *Morris Commc'ns Corp.*, 365 N.C. at 157, 712 S.E.2d at 872. The terms "Moving and Flashing Signs" and "Electronic message boards" are not given special definitions in the ordinance and we therefore assume that the

drafters "intended to give them their ordinary meaning determined according to the context in which those words are ordinarily used." *Id.*

¶ 38 We begin with the provision addressing "Moving and Flashing Signs." The parties present two fully contradictory interpretations of this provision, both based on what (in that party's view) is the plain and ordinary meaning of the words used in the provision. The Village of Clemmons contends that Visible's digital billboard unquestionably is a "Moving and Flashing Sign" because the static image would change frequently and thus, by its nature, "moves" in the sense that the image displayed on the sign changes to something else.

¶ 39 The Village also argues that this is the only logical interpretation of the provision, in light of the exclusion of electronic time, temperature, and message boards contained in the provision, because if "moving and flashing" only referred to "scrolling text, animation or blinking like 'Rudolph's nose' " and not "a sign that electronically changes its content on a periodic basis," then there would be no need to separately exclude electronic time, temperature, and message signs—signs that, like digital billboards, typically do not move or flash, but instead change their image over time to reflect the updated information.

¶ 40 There are a number of problems with the Village's argument. First, in ordinary English usage, moving means "marked by or capable of movement" and flashing means "to give off light suddenly or in transient bursts." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003). Neither of these adjectives squarely describe Visible's proposed digital billboard, which is not capable of movement and has no sudden or transient display of lights.

¶ 41 Second, the exclusion of "electronic time, temperature, and message signs" does not compel an interpretation that includes digital billboards within the definition of moving and flashing signs. Likewise, a contrary interpretation does not render this exclusion superfluous. After all, there could be categories of electronic time, temperature, and message signs that have images in motion (a ticking clock) or are flashing (an electronic sign flashing the phrase "slow down") that the drafters reasonably intended to exempt from this prohibition.

¶ 42 Indeed, another provision in the sign ordinances permits "electronic digital fuel pricing" signs at convenience stores but states that "electronic prices shall not be allowed to flash, blink or move at any time." UDO, § B.3-2.1(G)(3). Notably, this provision recognizes that the terms "moving" and "changing" are different, because the provision then explains that the "digital technology shall solely be used to display the

numerical price of fuel and shall only be *changed* when the price of fuel is modified." *Id.* (emphasis added). This demonstrates that the drafters understood some electronic signs can contain moving or flashing features and that "moving" or "flashing" is this context is not the same as the information on the sign changing over time.

¶ 43 Finally, there are specific examples listed after the general term "Moving and Flashing Signs" and all of these examples—things such as pennants, banners, spinners, beacons, spotlights, and searchlights—are capable of either physically moving or shining light in a sudden or intermittent way. This reinforces the notion that the words "moving" and "flashing" are used in their ordinary meaning. *See Jeffries v. Cty. of Harnett*, 259 N.C. App. 473, 493, 817 S.E.2d 36, 49 (2018).

¶ 44 To be sure, we are not suggesting that it is *unreasonable* to interpret the prohibition on "Moving and Flashing Signs" as applying to a digital billboard like the one proposed by Visible. But that interpretation is not the *only* reasonable one. Visible also asserts an alternative, reasonable interpretation of this provision—one in which a digital billboard capable of changing its static image is not considered a moving or flashing sign and instead, in ordinary English usage, would be described as something else, such as a digital sign or electronic sign, or perhaps, more specifically, a digital or electronic sign capable of changing the information displayed over time.

¶ 45 When there are two or more reasonable interpretations of a law, the law is ambiguous. *JVC Enters., LLC v. City of Concord*, 376 N.C. 782, 2021-NCSC-14, ¶ 10. And, as discussed above, when that ambiguous law is a zoning regulation, we should adopt the reasonable interpretation that favors "the free use of property." *Cumulus Broad.*, 180 N.C. App. at 427, 638 S.E.2d at 15. Accordingly, we reject the Village of Clemmons's argument and hold that the trial court erred by affirming the Board of Adjustment's determination that the proposed digital billboard was prohibited because it unambiguously fell within the definition of a "Moving and Flashing Sign" under the zoning ordinances.

¶ 46 We next turn to the provision prohibiting "Electronic message boards." Again, the phrase "Electronic message board" is not defined in the ordinance. And unlike the prohibition on "Moving and Flashing Signs," this provision contains no explanatory context. The Village of Clemmons correctly contends that Visible's proposed digital billboard is "electronic." The Village also correctly asserts that the ordinary meaning of a "message board" is a "a board or sign on which messages or notices are displayed." *Merriam-Webster's Collegiate Dictionary* (11th

ed. 2003). Combining these two definitions, the Village asserts that any electronic sign displaying any form of message—including any form of electronic billboard—unambiguously fits the definition of an "Electronic message board."

¶ 47 There are several problems with this argument. First, the ordinance contains a definition of the word "sign." That definition is essentially the same as this broad definition of message board advanced by the Village:

> **SIGN.** Any form of publicity which is visible from any public way, directing attention to an individual, business, commodity, service, activity, or product, by means of words, lettering, parts of letters, figures, numerals, phrases, sentences, emblems, devices, designs, trade names or trademarks, or other pictorial matter designed to convey such information . . .

UDO, § A.1-3.

¶ 48 Throughout the zoning ordinances, a board on which a message is displayed is consistently referred to as a "sign" or a "billboard." *See generally*, UDO, § A.1-3 (defining "sign"); UDO, § B.2-5.70 (prohibiting "signs" and "billboards" on transmission towers); UDO, § B.3-2.1 (providing use criteria for "off-premises signs"). Thus, if the intent of this provision was to prohibit all digital signs and billboards, one would expect the drafters to use the term "sign" or "billboard," not a separate term—"message board"—that is undefined and appears nowhere else in the ordinance.

¶ 49 Moreover, in ordinary English usage, one would not look at a looming roadside billboard and describe it as a "message board." It is a sign or a billboard. Similarly, in ordinary usage, there is a narrower category of signs that could be described as "electronic message boards"—things such as the mobile electronic signs seen near road construction, or the digital message boards often affixed beneath a business's name or logo and listing business hours or product offerings. Visible included an example of this type of electronic message board in the record. In ordinary English usage, one would not describe these types of electronic message boards as "billboards."

¶ 50 Simply put, this provision, too, has more than one reasonable interpretation. It is ambiguous. As with the "Moving and Flashing Signs" provision, we must resolve this ambiguity in favor of the reasonable interpretation that permits the free use of property. *Cumulus Broad.*, 180 N.C. App. at 427, 638 S.E.2d at 15. Accordingly, we again reject the Village

of Clemmons's argument and hold that the trial court erred by affirming the Board of Adjustment's determination that the proposed digital billboard was prohibited because it unambiguously fell within the definition of an "Electronic message board" under the zoning ordinances.

¶ 51 We conclude by noting that our holding today does not impact the authority of municipalities, through zoning ordinances, to restrict or prohibit digital billboards like the one proposed by Visible. But the drafters of zoning ordinances that restrict property rights have a responsibility to provide clear rules on which property owners can rely. This is so because zoning regulations are not intended to be a system of murky, ambiguous rules where the permitted uses of property ultimately depend on the interpretive discretion of government bureaucrats.

¶ 52 Here, for example, the zoning ordinances could include a prohibition on "digital billboards" or "electronic billboards," terms that are widely used and readily understood, or more specifically prohibit digital or electronic billboards that change the displayed information over time. Similarly, the ordinances could include within the overlay district regulations a statement that those rules supersede any other regulations otherwise applicable within the overlay district, including the sign regulations.

¶ 53 The convoluted, conflicting, ambiguous provisions at issue in this case did not do so and instead yielded competing reasonable interpretations. When that occurs, we will resolve this interpretive competition in favor of the free use of property.

Conclusion

¶ 54 We reverse the trial court's order and remand this matter for entry of an order reversing the Board of Adjustment's decision.

REVERSED AND REMANDED.

Judges DILLON and GRIFFIN concur.

WALKER v. WAKE CNTY. SHERIFF'S DEP'T

[284 N.C. App. 757, 2022-NCCOA-530]

WESLEY WALKER, PLAINTIFF
v.
WAKE COUNTY SHERIFF'S DEPARTMENT; GERALD M. BAKER, IN HIS OFFICIAL CAPACITY AS WAKE COUNTY SHERIFF; ERIC CURRY (INDIVIDUALLY); WESTERN SURETY COMPANY; WTVD, INC., WTVD TELEVISION, LLC; SHANE DEITERT, DEFENDANTS

No. COA21-661

Filed 2 August 2022

1. Libel and Slander—defamation—qualified privilege defense—assault charge communicated to media—wrongly linked to defendant's employment as nurse

In a defamation suit brought by plaintiff against defendant (the sheriff's office)—for responding by email to a media inquiry regarding an assault charge against plaintiff, in which defendant wrongly linked the charge to plaintiff's employment as a certified nursing assistant even though the alleged victim was plaintiff's stepfather and not a nursing patient—the trial court improperly granted defendant's motion for judgment on the pleadings where defendant failed to establish that it was entitled to the defense of qualified privilege or public official immunity and where plaintiff sufficiently alleged actual malice by defendant.

2. Libel and Slander—defamation—news report on assault charge—wrongly linked to defendant's employment as nurse—fair report privilege defense

In a defamation suit brought by plaintiff against a news organization for reporting that plaintiff's arrest for assault was linked to plaintiff's employment as a certified nursing assistant, which plaintiff alleged led to his being fired from his job, the news report met the test of substantial accuracy and was therefore not actionable as defamation under the fair report privilege. The news broadcast was a nearly verbatim recitation of an email response from the sheriff's office stating that the assault charge was related to plaintiff's employment.

Appeal by Plaintiff from orders entered 25 November 2020 and 7 May 2021 by Judge Vince M. Rozier, Jr., in Wake County Superior Court. Heard in the Court of Appeals 10 May 2022.

John M. Kirby for Plaintiff-Appellant.

Essex Richards, P.A., by Jonathan E. Buchan and Natalie D. Potter, for Defendants-Appellees WTVD, Inc., WTVD Television, LLC, and Shane Deitert.

Poyner Spruill LLP, by J. Nicholas Ellis, for Defendants-Appellees Gerald M. Baker, Eric Curry, and Western Surety Company.

COLLINS, Judge.

¶ 1 Plaintiff appeals from the trial court's orders discontinuing his defamation action against Wake County Sheriff Gerald M. Baker, Wake County Sheriff's Office Public Information Officer Eric Curry, and Western Surety Company ("Sheriff Defendants")[1] and WTVD, Inc., WTVD Television, LLC, and Shane Deitert ("WTVD Defendants"). Plaintiff argues that Sheriff Defendants were not entitled to the defense of qualified privilege and WTVD Defendants were not entitled to the defense of fair report privilege. We reverse the trial court's order granting judgment on the pleadings in favor of Sheriff Defendants and affirm the trial court's order dismissing Plaintiff's claims against WTVD Defendants.

I. Background

¶ 2 On 26 March 2019, a magistrate issued a warrant for Plaintiff's arrest upon finding probable cause that Plaintiff "unlawfully and willfully did assault and strike Darry L. Chavis by striking the victim in the face with a close [sic] fist." (Original capitalization omitted). Plaintiff was arrested pursuant to this warrant on 14 August 2019. At the time, Plaintiff was employed as a certified nursing assistant with Capital Nursing in Raleigh.

¶ 3 At 7:08 a.m. the next morning, Ed Crump, an employee of defendants WTVD, Inc., and WTVD Television, LLC, emailed Curry. Crump wrote in the subject line, "Assault case…" and wrote in the body, "Just asking for a quick check to make sure this charge isn't related to this guy's job. He lists his employer as Capital Nursing. I'm guessing it's domestic but if it's related to a client from Capital Nursing I'm interested in more details." Crump also included a copy of the online record for Plaintiff's arrest. Curry responded at 11:38 a.m., "Related to his employer."

¶ 4 During the 6:00 p.m. news that evening, WTVD broadcast the following report:

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1. Plaintiff voluntarily dismissed the action against the Wake County Sheriff's Office prior to entry of the orders on appeal.

> New at 6:00 a Wake County man who works with the elderly is facing an assault charge. Wesley Walker works for Capital Nursing. According to the warrant Walker hit the victim in the face with a closed fist.
>
> The Sheriff's Office telling us the charge is related to his job. We've reached out to Capital Nursing but so far they have refused to comment.

¶ 5 Plaintiff brought this defamation suit on 13 August 2020, alleging in pertinent part:

> 10. On or about August 15, 2019, the Defendant Eric Curry, as an employee of the Defendant Wake County Sheriff's Department, published information regarding the Plaintiff to the WTVD Defendants, consisting of an allegation that the Plaintiff was charged criminally with assaulting a resident of Capital Nursing and/or of assaulting a person in connection with the Plaintiff's employment with Capital Nursing, and reported that the alleged victim was a Mr. Darry Chavis.
>
> 11. Upon information and belief, Defendant Shane Deitert, employed by the WTVD Defendants attempted to investigate this false allegation.
>
> 12. Upon information and belief, Defendant Deitert called Capital Nursing and spoke with a staff member of Capital Nursing regarding this allegation.
>
> 13. Upon information and belief, said staff at Capital Nursing informed Defendant Deitert that there was no resident by the name of Darry Chavis at Capital Nursing and that this incident did not occur at Capital Nursing.
>
> 14. Upon information and belief, Defendant Deitert then sent a message to Capital Nursing through the Capital Nursing website, but Capital Nursing does not constantly monitor messages sent through its website and this email was not detected by Capital Nursing until the evening of August 15, 2019.
>
> 15. Shane Deitert specifically notified the Plaintiff's employer that the Plaintiff has "been charged with striking a patient, Darry L Chavis."

16. Neither Shane Deitert nor any other persons employed by Defendant WTVD attempted to contact the Plaintiff to confirm the allegations.

17. Upon information and belief, Shane Deitert, acting in concert with others employed at WTVD, made a decision to publish this unfounded allegation and instructed and directed others to publish these unfounded allegations.

18. On August 15, 2019, during the 6:00 pm newscast, the WTVD Defendants, by and through their employees including but not limited to Shane Deitert, published a story on the widely broadcast local news program, alleging that the Plaintiff, "who works with the elderly," was charged with assault, consisting of hitting a victim in the face with a closed fist, and that the charge was related to the Plaintiff's job and that the Plaintiff assaulted a resident with a closed fist.

. . . .

28. As a direct result of this false broadcast, the Plaintiff lost his job with Capital Nursing.

. . . .

31. The reality is that Darry Chavis is the Plaintiff's step-father, and Mr. Chavis filed false, fraudulent and malicious charges against the Plaintiff.

32. Although the charges by Darry Chavis were wholly false, and have been dismissed, they had absolutely nothing to do with the Plaintiff's employment with Capital Nursing, nothing to do with the Plaintiff's profession, and nothing to do with any residents of Capital Nursing.

33. The story as published by the Defendants contains not only false and defamatory statements, but contains nefarious and defamatory innuendo and suggestion (including but not limited to that the Plaintiff works with the elderly, clearly suggesting that the Plaintiff assaulted an elderly patient and/or that the Plaintiff was a threat to elderly patients).

34. The false information published by the Defendants directly affected the Plaintiff and pertained to the Plaintiff in his profession, in that they alleged that this incident occurred in connection with the Plaintiff's employment, and it is highly defamatory to allege that a CNA, entrusted with the care of elderly, disabled, and/or feeble patient[s], would commit an assault in connection with his employment as a CNA.

35. The aforementioned statements of the Defendants were defamatory and impugned the Plaintiff's character and impugned the Plaintiff's trade and profession in ways including but not limited to the safety of patients under the Plaintiff's care.

36. The Plaintiff's reputation has been damaged as a result of the Defendants' defamatory and unfair conduct described herein.

37. The Defendants Capitol Broadcasting [sic] and Deitert were negligent in their handling, reporting, investigation and publication of the aforementioned story in that they failed to adequately investigate said report; ignored information from Capital Nursing which directly refuted the allegations, failed to adequately investigate the allegations with the Plaintiff and with Capital Nursing; failed to contact the Plaintiff to obtain his version of events; failed to postpone airing of the story until the story could be properly verified, especially in view of the gravity of the allegations and the lack of any emergent conditions warranting release of the story prior to adequate confirmation and that the Plaintiff is not a public figure; failed to investigate and/or contact the alleged victim (Darry Chavis), which would have revealed that the Plaintiff and the alleged victim were related and that these allegations did not pertain to the Plaintiff's employment; transmitted an inquiry to Capital Nursing through its website knowing that said means of contacting a nursing facility would not yield a prompt response; failed to adhere to journalistic standards; chose to run this story for its sensational appeal in order to increase ratings, while

ignoring the negative impact of this story on the Plaintiff; and in other particulars to be adduced in discovery and through trial.

38. The statements of the Defendants, that the Plaintiff had committed an infamous crime, tends to impeach, prejudice, discredit and reflect unfavorably upon the Plaintiff in his trade or profession, and tends to subject the Plaintiff to ridicule, contempt or disgrace.

39. The Defendants wrote and caused to be printed false and defamatory statements pertaining to the Plaintiff.

40. The Defendants published these statements.

41. These statements were false.

42. The Defendants intended the statements to charge the Plaintiff with having committed an infamous crime, to impeach the Plaintiff in his trade and profession, and to subject the Plaintiff to ridicule, contempt and disgrace.

43. The persons other than the Plaintiff to whom the statements were published reasonably understood the statement to charge the Plaintiff with having committed an infamous crime, to impeach the Plaintiff in his trade and profession, and to subject the Plaintiff to ridicule, contempt and disgrace.

44. At the time of the publication, the Defendants knew the statements were false and/or failed to exercise ordinary care in order to determine whether the statements were false.

¶ 6 Sheriff Defendants answered and moved to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted under N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), (2), and (6). Sheriff Defendants alleged that Curry's email to Crump was absolutely and qualifiedly privileged and that governmental immunity, public official immunity, and Plaintiff's own negligent, intentional, and willful or wanton conduct barred Plaintiff's claims. Sheriff Defendants subsequently moved for judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c).

¶ 7 WTVD Defendants moved to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6). WTVD Defendants contended that the alleged defamatory statement was protected by the fair report privilege because it "was a substantially accurate summary of a written statement by a government official[.]"

¶ 8 The trial court entered separate orders granting WTVD Defendants' motion to dismiss for failure to state a claim on 25 November 2020 ("WTVD Order") and Sheriff Defendants' motion for judgment on the pleadings on 7 May 2021 ("Sheriff's Order"). In the Sheriff's Order, the trial court concluded that the claims against Sheriff Defendants should be dismissed because "the statements of Curry alleged in the Complaint are protected by qualified privilege[.]"

¶ 9 Plaintiff appealed both orders to this Court.

II. Discussion

A. Sheriff's Order

¶ 10 **[1]** Plaintiff first argues that the trial court erred by granting Sheriff Defendants' motion for judgment on the pleadings because they are not entitled to the defense of qualified privilege.

¶ 11 "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." N.C. Gen. Stat. § 1A-1, Rule 12(c) (2021). "Judgment on the pleadings is a summary procedure and the judgment is final." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citation omitted). "Therefore, each motion under Rule 12(c) must be carefully scrutinized lest the nonmoving party be precluded from a full and fair hearing on the merits." *Id.* A party seeking judgment on the pleadings must show that "no material issue of fact[] exists and that [the party] is clearly entitled to judgment" as a matter of law. *Id.* (citation omitted) In considering a motion for judgment on the pleadings, the

> court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Id. (citations omitted). "Judgments on the pleadings are disfavored in law." *Bigelow v. Town of Chapel Hill*, 227 N.C. App. 1, 3, 745 S.E.2d 316, 319 (2013) (quotation marks and citations omitted). This Court reviews a trial court's order granting a motion for judgment on the pleadings de novo. *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005).

¶ 12 Generally, "to recover for defamation, a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 897 (2002) (citation omitted).

1. Qualified Privilege

¶ 13 "Qualified privilege is a defense for a defamatory publication[.]" *Clark v. Brown*, 99 N.C. App. 255, 262, 393 S.E.2d 134, 138 (1990).

> A defamatory statement is qualifiedly privileged when made (1) on subject matter (a) in which the declarant has an interest, or (b) in reference to which the declarant has a right or duty, (2) to a person having a corresponding interest, right or duty, (3) on a privileged occasion, and (4) in a manner and under circumstances fairly warranted by the occasion and duty, right or interest.

Id. (citation omitted). Furthermore, "the defense of privilege is based upon the premise that some information, although defamatory, is of sufficient public or social interest to entitle the individual disseminating the information to protection against an action" for defamation. *Boston v. Webb*, 73 N.C. App. 457, 461, 326 S.E.2d 104, 106 (1985).

¶ 14 Sheriff Defendants have failed to establish that, based solely on the pleadings and as a matter of law, qualified privilege precludes liability for Curry's email to Crump. The pleadings do not establish that Curry's email was made on a privileged occasion or that Curry's email, although defamatory, was of "sufficient public or social interest" to entitle Curry to protection against Plaintiff's defamation action. *See id.* (holding that dismissal pursuant to Rule 12(b)(6) was improper where "the public's interest in the matter . . . remain[ed] to be determined"). Furthermore, the pleadings do not establish that the circumstances warranted Curry to communicate that the assault charge against Plaintiff was related to Plaintiff's employer in the manner Curry did–with no context or supporting detail, just hours after Crump's inquiry. *See id.* (holding that

dismissal pursuant to Rule 12(b)(6) was improper where the defendant's "right to relay [the information] as he did remain[ed] to be determined").

¶ 15 Sheriff Defendants cite *Averitt v. Rozier*, 119 N.C. App. 216, 458 S.E.2d 26 (1995), as an example of a case in which qualified privilege applied. However, Sheriff Defendants do not explain how *Averitt* is similar to the present case, and we find no relevant similarities. In *Averitt*, this Court held that statements made by a sheriff's detective to a potential witness and an alleged victim during an ongoing criminal investigation were protected by the qualified privilege and affirmed summary judgment in the detective's favor. *Id.* at 219-20, 458 S.E.2d at 29. The facts in the present case are quite dissimilar from those in *Averitt*, and Sheriff Defendants have failed to demonstrate their entitlement to judgment as a matter of law on the defense of qualified privilege at this early stage. Judgment on the pleadings was improper.

¶ 16 Additionally, even assuming arguendo that qualified privilege applies, Plaintiff has alleged actual malice sufficient to defeat Sheriff Defendants' motion for judgment on the pleadings. "[A] qualified privilege may be lost by proof of actual malice on the part of the defendant." *Long v. Vertical Techs., Inc.*, 113 N.C. App. 598, 602, 439 S.E.2d 797, 800 (1994); *see also Averitt*, 119 N.C. App. at 219, 458 S.E.2d at 29 ("If the plaintiff cannot show actual malice, the qualified privilege becomes an absolute privilege, and there can be no recovery even though the statement was false."). This inquiry is sometimes described as whether the declarant lost the qualified privilege by abusing it. *See, e.g.*, *Harris v. Procter & Gamble Mfg. Co.*, 102 N.C. App. 329, 331, 401 S.E.2d 849, 850 (1991) ("Even though a qualified privilege may provide a defense to a defamation action, if this privilege is found to be abused, it ceases to exist."). In a qualified privilege case,

> [a]ctual malice may be proven by evidence of ill-will or personal hostility on the part of the declarant . . . or by a showing that the declarant published the defamatory statement with knowledge that it was false, with reckless disregard for the truth or with a high degree of awareness of its probable falsity.

Clark, 99 N.C. App. at 263, 393 S.E.2d at 138 (quoting *Kwan-Sa You v. Roe*, 97 N.C. App. 1, 12, 387 S.E.2d 188, 193 (1990)).

¶ 17 Here, Plaintiff alleged that Curry

> published information regarding the Plaintiff to the WTVD Defendants, consisting of an allegation that

> the Plaintiff was charged criminally with assaulting a resident of Capital Nursing and/or of assaulting a person in connection with the Plaintiff's employment with Capital Nursing, and reported that the alleged victim was a Mr. Darry Chavis.

Plaintiff alleged that this information was false; that Sheriff Defendants "intended the statements to charge the Plaintiff with having committed an infamous crime, to impeach the Plaintiff in his trade and profession, and to subject the Plaintiff to ridicule, contempt and disgrace"; and that "[Sheriff] Defendants knew the statements were false . . . ." In reviewing Sheriff Defendants' motion for judgment on the pleadings, we must take these allegations as true and construe them in the light most favorable to Plaintiff. *See Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499. Doing so, Plaintiff has alleged actual malice sufficient to defeat Sheriff Defendants' motion for judgment on the pleadings asserting the defense of qualified privilege.

2. Public Official Immunity

¶ 18 Though the trial court granted judgment on the pleadings based on the qualified privilege, Sheriff Defendants argue that, in the alternative, the Sheriff's Order should be affirmed because Plaintiff's claim against Curry is barred by the doctrine of public official immunity. We address this argument as Sheriff Defendants raised it below and "[i]f the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

¶ 19 "Public official immunity precludes a suit against a public official in his individual capacity and protects him from liability as long as the public official 'lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption[.]' " *Green v. Howell*, 274 N.C. App. 158, 165, 851 S.E.2d 673, 679 (2020) (quoting *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976)). "A[] [public] employee, on the other hand, is personally liable for negligence in the performance of his or her duties proximately causing an injury." *Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999) (quotation marks and citations omitted).

¶ 20 Our Supreme Court has "recognized several basic distinctions between a public official and a public employee, including: (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official

exercises discretion, while public employees perform ministerial duties." *Id.* (citations omitted). "[A] defendant seeking to establish public official immunity must demonstrate that all three of [these] factors are present." *McCullers v. Lewis*, 265 N.C. App. 216, 222, 828 S.E.2d 524, 532 (2019) (citation omitted); *see also Baznik v. FCA US, LLC*, 280 N.C. App. 139, 2021-NCCOA-583, ¶ 6 (same).

¶ 21 Sheriff Defendants contend that Curry, as Public Information Officer for the Wake County Sheriff's Office, is a public official. In their appellate brief in support of this argument, Sheriff Defendants characterize Curry's position as follows:

> Curry serves as the chief spokesman for the Sheriff Baker. He manages relationships with members of the media and the county's communication partners, maintains media accounts of the sheriff's office, creates press releases for its events, and handles public records requests received from the media and other members of the public. These are not ministerial tasks but rather discretionary acts involving personal deliberation, decision-making, and exercising judgment.

Sheriff Defendants argue that these qualities demonstrate that Curry exercises both discretion and a portion of the sovereign power. However, the pleadings do not support Sheriff Defendants' assertions regarding the nature of Curry's position and its duties.

¶ 22 These assertions might be appropriately considered if presented in an affidavit in support of a motion for summary judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 56(b) (2022) (providing that a "party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof"). But for the purpose of the instant motion for judgment on the pleadings, Sheriff Defendants have failed to show that, regarding the issue of public official immunity, no material issue of fact exists and that they are entitled to judgment as a matter of law. *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499.

B. WTVD Defendants' Motion to Dismiss

¶ 23 **[2]** Plaintiff next argues that the trial court erred by granting WTVD Defendants' motion to dismiss. Plaintiff argues that WTVD Defendants are not entitled to the fair report privilege.

¶ 24 A Rule 12(b)(6) motion to dismiss "tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must

be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). "[T]he well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (quotation marks and citation omitted). "A motion to dismiss pursuant to Rule 12(b)(6) should not be granted unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Isenhour*, 350 N.C. at 604-05, 517 S.E.2d at 124 (quotation marks, emphasis, and citation omitted). We review a trial court's order granting a Rule 12(b)(6) motion to dismiss de novo. *USA Trouser, S.A. de C.V. v. Williams*, 258 N.C. App. 192, 195, 812 S.E.2d 373, 376 (2018).[2]

¶ 25 The fair report privilege "exists to protect the media from charges of defamation." *LaComb v. Jacksonville Daily News Co.*, 142 N.C. App. 511, 512, 543 S.E.2d 219, 220 (2001).

> Courts in other jurisdictions have articulated the privilege protecting the media when reporting on official arrests:
>
> > Recovery is further foreclosed by the privilege a newspaper enjoys to publish reports of the arrest of persons and the charges upon which the arrests are based, as well as other matters involving violations of the law. This privilege remains intact so long as the publication is confined to a substantially accurate statement of the facts and does not comment upon or infer probable guilt of the person arrested.
>
> Substantial accuracy is therefore the test to apply when a plaintiff alleges defamation against a member of the media reporting on a matter of public interest, such as an arrest.

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2. Though the WTVD Order states that the trial court considered exhibits filed by WTVD Defendants, WTVD Defendants' motion was not converted into a motion for summary judgment because each of the exhibits was a document referenced in Plaintiff's complaint. *See Holton v. Holton*, 258 N.C. App. 408, 419, 813 S.E.2d 649, 657 (2018) ("[A] document that is the subject of a plaintiff's action that he or she specifically refers to in the complaint may be attached as an exhibit by the defendant and properly considered by the trial court without converting a Rule 12(b)(6) motion into one of summary judgment.").

Id. at 513, 543 S.E.2d at 221 (quoting *Piracci v. Hearst Corporation*, 263 F. Supp. 511, 514 (D. Md. 1966)). The substantial accuracy test "does not require absolute accuracy in reporting. It does impose the word substantial on the accuracy, fairness and completeness. It is sufficient if [the statement] conveys to the persons who read it a substantially correct account of the proceedings." *Desmond v. News & Observer Publ'g Co.*, 241 N.C. App. 10, 26, 772 S.E.2d 128, 140 (2015) (quotation marks, brackets, and citation omitted).

¶ 26 Here, WTVD's 15 August 2019 broadcast stated that Plaintiff was "facing an assault charge," "[a]ccording to the warrant [Plaintiff] hit the victim in the face with a closed fist," and "[t]he Sheriff's Office telling us the charge is related to [Plaintiff's] job." This broadcast was not merely substantially accurate, it was an almost verbatim recitation of information in the arrest warrant and Curry's email to Crump. The warrant for Plaintiff's arrest charged Plaintiff with committing simple assault for "unlawfully and willfully . . . assault[ing] and strik[ing] Darry L. Chavis by striking the victim in the face with a close [sic] fist." (Original capitalization omitted). When Crump inquired whether this charge was related to Plaintiff's employment with Capital Nursing, Curry responded, "Related to his employer."

¶ 27 Plaintiff contends that the broadcast was not "substantially accurate" because Crump's initial email to Curry indicated that WTVD "had some awareness that the assault charge may not be related to" Plaintiff's employment. Plaintiff underscores that on the morning of 15 August, Crump wrote to Curry, "I'm guessing it's domestic but if it's related to a client from Capital Nursing I'm interested in more details." But Curry responded that the charge was related to Plaintiff's employer, and that evening WTVD accurately reported that "[t]he Sheriff's Office telling us the charge is related to [Plaintiff's] job." Crump's initial belief that the charge may have been unrelated to Plaintiff's employment does not defeat the application of the fair report privilege. *See Orso v. Goldberg*, 665 A.2d 786, 789 (N.J. App. Div. 1995) (stating that the fair report privilege "protect[s] the media publisher even though the publisher does not personally believe the defamatory words he reports to be true").

¶ 28 Plaintiff also asserts that the fair report privilege is inapplicable because Curry's email was "an extremely flimsy basis on which to report that the Plaintiff assaulted a resident" at Capital Nursing. While we agree that Curry's email was an extremely flimsy basis upon which to make a report, contrary to Plaintiff's assertion, WTVD Defendants did not report that Plaintiff had assaulted a resident at Capital Nursing. Instead, WTVD Defendants accurately reported the charge as described

in the warrant and Curry's statement that the charge was related to Plaintiff's employer.

¶ 29 Lastly, Plaintiff argues that the fair report privilege is inapplicable because WTVD "had positive information that the assault charge was not related to the Plaintiff's employment." Plaintiff contends that this information consists of statements by an agent for Capital Nursing "that (1) there was no resident by the name of Darry Chavis at Capital Nursing and (2) that this incident did not occur at Capital Nursing." Plaintiff's argument is unavailing because the substantial accuracy test requires us to consider whether WTVD's reporting was accurate by comparison to the warrant and Curry's email, not by comparison to the events as they transpired. *See LaComb*, 142 N.C. App. at 514, 543 S.E.2d at 221 (determining whether a newspaper article was substantially accurate by reference to the relevant arrest warrants); *see also Yohe v. Nugent*, 321 F.3d 35, 44 (1st Cir. 2003) ("To qualify as 'fair and accurate' for purposes of the fair report privilege, an article reporting an official statement need only give a 'rough-and-ready' summary of the official's report; it is not necessary that the article provide an accurate recounting of the events that actually transpired."); *Oparaugo v. Watts*, 884 A.2d 63, 82 n.14 (D.C. 2005) (substantial accuracy "is judged by comparing the publisher's report with the official record"); *Goss v. Houston Cmty. Newspapers*, 252 S.W.3d 652, 655 (Tex. App. 2008) ("[T]he accuracy of the publication is determined not by comparing it to the actual facts but to the law enforcement statement upon which the publication is based.").

¶ 30 Because WTVD's broadcast satisfied the substantial accuracy test, it is not actionable as defamation under the fair report privilege. The trial court did not err by granting WTVD Defendants' motion to dismiss.

III. Conclusion

¶ 31 Sheriff Defendants have not demonstrated that the qualified privilege they assert defeats Plaintiff's defamation claim as a matter of law. Accordingly, the trial court erred by granting Sheriff Defendants' motion for judgment on the pleadings. Because the fair report privilege applied to WTVD's broadcast, the trial court did not err in dismissing Plaintiff's claims against WTVD Defendants.

REVERSED AND REMANDED IN PART; AFFIRMED IN PART.

Judges ARROWOOD and HAMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 AUGUST 2022)

CLEAN N DRY, INC. v. EDWARDS 2022-NCCOA-531 No. 21-771	Johnston (20CVS3321)	Affirmed
HILL v. DURRETT 2022-NCCOA-532 No. 21-460	Mecklenburg (17CVD1275)	Affirmed
IN RE D.C. 2022-NCCOA-533 No. 22-145	Durham (11JT111) (11JT112) (17JT91) (17JT92)	Affirmed
IN RE D.E.G. 2022-NCCOA-534 No. 22-159	Onslow (21JT64)	Affirmed
IN RE D.L.B. 2022-NCCOA-535 No. 22-140	Guilford (18JT17) (18JT18)	Affirmed
IN RE F.C.H. 2022-NCCOA-536 No. 22-72	Guilford (20JT641)	Reversed
IN RE J.M.L. 2022-NCCOA-537 No. 22-182	Gaston (20JT102) (20JT103)	Affirmed
IN RE J.T. 2022-NCCOA-538 No. 22-177	Forsyth (19JT107)	Affirmed
IN RE L.C. 2022-NCCOA-539 No. 22-12	Mecklenburg (18JT577) (18JT578)	Affirmed.
IN RE N.G. 2022-NCCOA-540 No. 21-764	Pender (20JA21)	Affirmed in Part, Vacated in Part, and Remanded
IN RE P.A.B. 2022-NCCOA-541 No. 22-44	Person (19J27)	Vacated and Remanded

IN RE S.S. 2022-NCCOA-542 No. 21-705	Mecklenburg (18JT410)	Affirmed
IN RE T.M. 2022-NCCOA-543 No. 21-676	Stokes (19JA92) (19JT92)	Affirmed in part, Vacated in part, and Remanded
SMITH v. GREENWALD 2022-NCCOA-544 No. 21-802	Wake (20CVD9071)	Dismissed
STATE v. CHRISTENSON 2022-NCCOA-545 No. 21-723	Madison (19CRS50136)	No Error
STATE v. SCHALOW 2022-NCCOA-546 No. 19-215-2	Henderson (16CRS901-907) (18CRS133-138)	No Error

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