285 N.C. App.—No. 1 Pages 1-248

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

FEBRUARY 22, 2023

MAILING ADDRESS: The Judicial Department
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OF
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[1]Died 18 October 2022.

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COURT OF APPEALS

CASES REPORTED

FILED 16 AUGUST 2022

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ALIENATION OF AFFECTIONS

Criminal conversation—unidentified lover—summary judgment—evidence of post-separation conduct—corroborative of pre-separation conduct—After plaintiff's wife admitted to having sexual intercourse with an unidentified coworker while still married to plaintiff, the trial court erred in granting summary judgment for defendant on plaintiff's alienation of affection and criminal conversation claims where the circumstantial evidence—viewed in the light most favorable to plaintiff—was sufficient for a jury to infer that defendant was the coworker at issue, including evidence that defendant and plaintiff's wife were coworkers, maintained a friendship and communicated frequently during plaintiff's marriage, and began openly dating less than four months after plaintiff and his wife separated. Importantly, it was permissible for plaintiff to meet his burden of production at the summary judgment phase by using evidence of defendant's post-separation conduct (his dating relationship with plaintiff's wife) to corroborate evidence of any pre-separation acts (the extramarital affair between plaintiff's wife and the unidentified coworker). **Beavers v. McMican, 31.**

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Abandonment of issues—necessary reasons or arguments—prejudice—On appeal from the trial court's domestic violence protective order (DVPO) issued against defendant in favor of his ex-wife, defendant's Rule 404(b) argument that the trial court erred by considering a prior DVPO issued against him in favor of his sister was deemed abandoned because defendant failed to argue—as necessary to prevail on appeal—that the alleged error prejudiced him. **Keenan v. Keenan, 133.**

Interlocutory orders—motion to dismiss denied—not immediately appealable—certiorari—judicial efficiency—Where the trial court denied defendants' motions to dismiss in a medical malpractice action based upon the statute of limitations, although the trial court's interlocutory order was not immediately appealable, the Court of Appeals granted defendants' petition for a writ of certiorari to review the order because interlocutory review of this dispositive question of law would be more efficient than deferring the issue until final judgment at the trial level, and it would prevent unnecessary delay in the administration of justice. **Morris v. Rodeberg, 143.**

Interlocutory orders—motions to dismiss—multiple defendants—final judgment—In an action filed by a county board of education against four companies that worked on the development of a public high school, the trial court's interlocutory order dismissing with prejudice all claims against two defendants—and certifying that portion of the order for immediate review pursuant to Civil Procedure Rule 54(b)—constituted a final judgment, and therefore the appellate court had jurisdiction to hear the appeal. However, the portion of trial court's interlocutory order denying the other two defendants' motions to dismiss did not constitute a final judgment, and it did not affect a substantial right because it was an adverse determination on those defendants' statute of repose defenses, and therefore the appellate court dismissed their appeals. **Gaston Cnty. Bd. of Educ. v. Shelco, LLC, 80.**

Jurisdiction to hear appeal—late notice of appeal—waiver by appellee—The Court of Appeals had jurisdiction to hear plaintiff's appeal from the trial court's order granting defendant's motion to dismiss where plaintiff filed his notice of appeal more than four months after entry of the trial court's order (which would normally be untimely pursuant to Appellate Rule 3(c)), because defendant failed to argue that the appeal was untimely or to offer proof of actual notice—indeed, defendant conceded that "Plaintiff timely appealed." **Blaylock v. AKG N. Am., 72.**

Preservation of issues—admissibility of evidence—timing of objection—plain error review—In a first-degree murder prosecution, defendant failed to preserve for appellate review his objection to the admission of evidence—specifically, expert testimony regarding the locations of the victim's and defendant's cell phones before and after the victim's death—where defendant's counsel filed a motion in limine to exclude the testimony and objected to the testimony at voir dire outside the jury's presence but did not object at the time the testimony was actually introduced at trial. Consequently, defendant was entitled only to plain error review of his challenge on appeal. **State v. McIver, 205.**

Preservation of issues—constitutional challenge to Habitual Felon Act—not raised at trial—In a prosecution for multiple charges arising from an armed robbery, defendant failed to preserve for appellate review his argument that his sentences under the Habitual Felon Act violated his federal and state constitutional rights to be free from cruel and unusual punishment, where he did not raise the argument before the trial court. **State v. Williams, 215.**

been improperly terminated for default—since, although the terms of the parties' subcontracts provided for the award of the "actual direct cost" of the subcontract work, there was no evidence of such cost in the record and an equitable remedy estimating that cost was both authorized by state law and not unequivocally precluded by the subcontracts' terms. The subcontracts explicitly adopted the rules of the American Arbitration Association, which allowed for the grant of equitable remedies. **R.E.M. Constr., Inc. v. Cleveland Constr., Inc., 167.**

CONSTITUTIONAL LAW

Due process—presumption of innocence—video of defendant in shackles—harmless error—There was no prejudicial error in a prosecution for multiple charges arising from an armed robbery, where defendant argued on appeal that the trial court violated his constitutional due process right to the presumption of innocence by permitting the jury to view a video showing him in shackles during a police interrogation. Even if the court had erred in admitting the video into evidence, defendant could not show prejudice because the court gave a limiting instruction to the jury directing them not to make any inferences about defendant's guilt or innocence based on the shackling and because overwhelming evidence of defendant's guilt existed beyond the video. **State v. Williams, 215.**

CRIMINAL LAW

Courtroom restraints—statutory authority—mandatory factual findings—inapplicable to video of shackled defendant—In a prosecution for multiple charges arising from an armed robbery, where the trial court permitted the jury to view a video showing defendant in shackles during a police interrogation, defendant's argument that the court failed to make mandatory factual findings under N.C.G.S. § 15A-1031 regarding whether defendant needed to be restrained during police questioning (and instead simply took "the prosecutor's word" for it) lacked merit and was rejected on appeal. Section 15A-1031 addresses a trial judge's authority to subject a defendant to "physical restraint in the courtroom;" defendant was not physically restrained in the courtroom, and therefore the statute did not apply. **State v. Williams, 215.**

Effective assistance of counsel—conflict of interest—no adverse effect on performance—prejudice not otherwise shown—In a prosecution for multiple charges arising from an armed robbery, where the trial court failed to adequately inquire into a potential conflict of interest that defendant's attorney carried from previously representing one of the State's witnesses, who happened to be one of the robbery victims, defendant was still not entitled to a new trial because he could neither show that an "actual conflict of interest" adversely affected his counsel's performance (the record showed that defense counsel objected to the State's main evidence in the case, repeatedly impeached the witness's credibility during cross-examination, and had objectively sound strategic reasons for not questioning the witness about his mental health history and his deal with the State to testify) nor otherwise show prejudice where he was acquitted of the most serious charges he faced at trial, including attempted first-degree murder. **State v. Williams, 215.**

DOMESTIC VIOLENCE

Protective order—fear of continued harassment—single act—legitimate purpose—mowing lawn—The trial court did not err by granting plaintiff's petition

controlled, as the subsection regarding medical malpractice actions, and according to its plain language the three-year statute of limitations that ordinarily applied to medical malpractice actions applied here because plaintiff did not fall within the exception for minors for whom the limitations period expires before they reach the age of ten. **Morris v. Rodeberg, 143.**

Minor plaintiff—as-applied constitutional challenge—rational basis review—In a medical malpractice action in which plaintiff was a minor at the time his claim accrued, assuming without deciding that plaintiff's as-applied constitutional challenge to N.C.G.S. § 1-17(c) was properly before the trial court and preserved for appellate review, the Court of Appeals held that his challenge lacked merit because statutes of limitations do not affect any fundamental right and therefore are not subject to strict scrutiny—rather, rational basis review applied. Because plaintiff failed to argue or cite any authority to demonstrate that subsection 1-17(c) did not pass rational basis review, his constitutional challenge was rejected. **Morris v. Rodeberg, 143.**

Statutes of repose—Rule 12(b)(6) dismissal—no burden on plaintiff—facts alleged in complaint—defective retaining wall—In an action filed by a county board of education arising from defendants' work on an allegedly defective retaining wall, the trial court erred by granting defendants' Rule 12(b)(6) motions to dismiss based on the statute of repose where the facts alleged in the complaint did not conclusively show that it was not filed within the applicable statute of repose—because plaintiff did not allege both the date when defendants performed their last "specific last act" and the date of the "substantial completion of the improvement" pursuant to N.C.G.S. § 1-50(a)(5)(a). Plaintiff had no burden at the pleading stage to allege facts showing that its complaint was filed within the statute of repose. **Gaston Cnty. Bd. of Educ. v. Shelco, LLC, 80.**

TERMINATION OF PARENTAL RIGHTS

Best interests of the child—dispositional factors—bond between parent and child—The trial court did not abuse its discretion in terminating a mother's parental rights to her daughter after considering the statutory factors regarding the best interests of the child contained in N.C.G.S. § 7B-1110, where its finding that there was no bond between the mother and her daughter was supported by competent evidence and was not the sole factor supporting the conclusion that termination was in the child's best interests. **In re H.B., 1.**

Grounds for termination—failure to make reasonable progress—findings of fact—unsupported by evidence—The trial court improperly terminated a father's parental rights in his daughter for failure to make reasonable progress to correct the conditions leading to the child's removal (N.C.G.S. § 7B-1111(a)(2)), where several of the court's key factual findings were unsupported by the evidence, which showed that—although the father did not fully satisfy all elements of his family services case plan—he made adequate progress toward each element where he obtained stable full-time employment, suitable housing, and reliable transportation (by purchasing a vehicle and taking the necessary steps to have his driver's license reinstated); acted appropriately during visits with his daughter, which he attended more consistently after moving across the state to be closer to her; took parenting classes and signed up for additional classes on his own initiative; completed substance abuse and mental health assessments; made efforts to schedule therapy sessions that accommodated

his work schedule; and submitted to multiple drug tests, all of which came out negative or inconclusive. **In re A.D., 88.**

Grounds for termination—failure to make reasonable progress—minimally sufficient findings—The trial court's order contained minimally sufficient findings to support its conclusion that a mother's parental rights to her daughter were subject to termination due to the mother's failure to make reasonable progress in correcting the conditions that led to the child's removal from the home. The trial court's finding that the mother willfully left her daughter for a specified period of time in the custody of the department of social services (DSS) without making reasonable progress was based on competent evidence regarding the inadequacy of the mother's efforts, including the underlying juvenile file, of which the court took judicial notice, and corroborating documentary evidence submitted by DSS and testimony from social workers and the GAL district administrator. **In re H.B., 1.**

Grounds for termination—failure to pay a reasonable portion of the cost of care—evidence of income but not of amount—The trial court did not err by terminating respondent-father's parental rights in his children on the grounds of failure to pay a reasonable portion of the cost of care (N.C.G.S. § 7B-1111(a)(3)) where the trial court's findings that respondent was employed yet paid nothing in support while his children were in foster care were supported by clear and convincing evidence, in the form of a social worker's testimony that, during the determinative time period, respondent provided zero financial support despite reporting that he was earning some income—even though respondent did not specify the amount he was receiving. **In re A.C., 114.**

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	11 (tentative)

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

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

IN THE MATTER OF H.B.

No. COA21-760

Filed 16 August 2022

1. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—minimally sufficient findings

The trial court's order contained minimally sufficient findings to support its conclusion that a mother's parental rights to her daughter were subject to termination due to the mother's failure to make reasonable progress in correcting the conditions that led to the child's removal from the home. The trial court's finding that the mother willfully left her daughter for a specified period of time in the custody of the department of social services (DSS) without making reasonable progress was based on competent evidence regarding the inadequacy of the mother's efforts, including the underlying juvenile file, of which the court took judicial notice, and corroborating documentary evidence submitted by DSS and testimony from social workers and the GAL district administrator.

2. Termination of Parental Rights—best interests of the child—dispositional factors—bond between parent and child

The trial court did not abuse its discretion in terminating a mother's parental rights to her daughter after considering the statutory factors regarding the best interests of the child contained in N.C.G.S. § 7B-1110, where its finding that there was no bond between the mother and her daughter was supported by competent evidence

and was not the sole factor supporting the conclusion that termination was in the child's best interests.

Judge WOOD dissenting.

Appeal by respondent-mother from order entered 19 August 2021 by Judge Vanessa E. Burton in Robeson County District Court. Heard in the Court of Appeals 10 May 2022.

J. Edward Yeager, Jr., for the petitioner-appellee Robeson County Department of Social Services.

Benjamin J. Kull for the respondent-appellant mother.

North Carolina Administrative Office of the Courts, by Matthew D. Wunsche, for the Guardian ad Litem.

ARROWOOD, Judge.

¶ 1 Respondent-mother ("mother") appeals from the trial court's order terminating her parental rights with respect to the minor child, "H.B."[1] For the following reasons, we affirm the trial court.

I. Background

¶ 2 H.B. was born on 13 March 2015. On the same day, the Robeson County Department of Social Services ("DSS") received a Child Protective Services report ("CPS report") "alleging neglect due to substance abuse." On 30 April 2015, "a staffing decision was made for services not recommended and the case was closed." Two other CPS reports followed throughout the years regarding mother's care for H.B., both of which were swiftly closed via staffing decisions.

¶ 3 On 1 May 2019, DSS received a CPS report "alleging substance abuse" when mother gave birth to H.B.'s younger brother, "A.L.,"[2] who was born premature at 27 weeks and whose "meconium tested positive for cocaine and marijuana." DSS also learned that A.L. was transferred "from Scotland Memorial Hospital to North East Hospital in Concord, North Carolina"; that mother did not have her own residence, but lived with her grandmother; that mother "did not have any supplies for" A.L.;

1. Initials are used throughout to protect the identity of the minor child.

2. *See* footnote 1, *supra*.

that mother had not visited A.L. while he was hospitalized; that, according to mother, "a home assessment could not be completed at her residence because other people living in the residence had issues"; that H.B.'s father was deceased; and that H.B. lived with her paternal grandmother ("Ms. Bullard"). Mother admitted to DSS that "she smoked marijuana, but denied cocaine use." However, mother then admitted to using "cocaine once 'due to [A.L.'s father] beating and knocking on her[.]' " Mother agreed to complete a substance abuse assessment.

¶ 4 On 14 May 2019, an employee with "Premier Behavioral" informed DSS that mother "was receiving services through Premier" and "would be attending substance abuse classes"; however, mother "had not completed a substance abuse assessment at this time due to not having active Medicaid in Robeson County."

¶ 5 On 16 May 2019, DSS made a home visit at Ms. Bullard's home. There, DSS observed H.B.'s paternal great-grandmother, who was also present, "yell for [H.B.] to come from behind the home to meet with [DSS,]" as well as "several children in the yard cussing, playing with cross bows, and throwing bricks."

¶ 6 On 23 May 2019, DSS "attempted to transport [mother] to the child and family team meeting, but [mother] did not make herself available." "While in [mother]'s neighborhood," the DSS social worker assigned to mother's case "saw [mother] walking down a trail and called out to her multiple times, but [mother] ignored worker's attempts and got out of worker's sight."

¶ 7 On 6 June 2019, DSS made another home visit to Ms. Bullard's home. "Ms. Bullard had to yell for [H.B.] outside the residence in order to locate her so [H.B.] could come in the home to visit with [DSS]." DSS learned that H.B. had lived with Ms. Bullard "for much of her life[,]" and that mother "gives Ms. Bullard a little money and sometimes buys [H.B.] some clothes, but not on a consistent basis."

¶ 8 On the same day, mother informed DSS that she had last used cocaine the previous week. Mother was living "in a mobile home with no electricity" at the time. Mother also admitted "to being diagnosed with bi-polar disorder and is not currently receiving services for her mental health."

¶ 9 On 8 June 2019, DSS had "a discussion" with Ms. Bullard regarding her "supervision of her grandchildren." Specifically, the DSS social worker assigned to mother's case informed Ms. Bullard that she had "observed the children playing in the road[,]" that there was no adult supervising the children, and that the social worker had once "had to

completely stop her car to avoid hitting a small female child," whom she later learned was H.B. herself. On 10 June 2019, DSS learned that mother had "only attended two classes . . . at Premier Behavioral and that [she] was not compliant."

¶ 10 DSS filed a juvenile petition on 11 June 2019, alleging that H.B. was neglected, due to her living "in an environment injurious to [her] welfare[,]" and dependent, due to her need of "assistance or placement because [she] has no parent, guardian, or custodian responsible for [her] care or supervision." The trial court returned an order for nonsecure custody for H.B., as well as A.L., on the same day, scheduling a hearing for continued nonsecure custody for the following day. The trial court rendered orders for the continued placement of H.B. and A.L. in the nonsecure custody of DSS on 12 June 2019 and then again on 26 June 2019, both of which were filed on 15 August 2019.

¶ 11 On 24 July 2019, mother entered into a "Family Services Agreement[,]" in which she "agreed to address housing, employment, parenting, to complete a Mental Health assessment, and a Substance Abuse assessment."

¶ 12 The matters came on for adjudication and disposition on 12 September 2019. On adjudication, after making findings of fact consistent with the above facts, the trial court concluded that H.B. and A.L. were neglected pursuant to N.C. Gen. Stat. § 7B-101(15) and ordered for both children to remain in the legal custody of DSS pending disposition. On disposition, the trial court found that both H.B. and A.L. had been placed in a licensed foster home. The trial court also found that mother had not made herself available to DSS to develop "a Family Services Case Plan" and that DSS had been unable to contact mother since 20 August 2019. The trial court then stated it relied on and accepted into evidence DSS's "Court Report" and "Family Reunification Assessment," "the North Carolina Permanency Planning Review & Family Services Agreement," and the Guardian ad Litem's "Court Report[.]"

¶ 13 The trial court concluded that it was "in the best interest of the children that their custody remain[ ] with [DSS]" and that DSS "continue to work on efforts of reunification in this matter." Accordingly, the trial court ordered for the legal and physical custody of H.B. and A.L. to remain with DSS, for DSS to continue to work on reunification efforts, and for DSS to "develop a plan" with Ms. Bullard. Both orders on adjudication and disposition were filed on 23 October 2019.

¶ 14 On 25 March 2020, the trial court filed a review hearing order, ordering for H.B. and A.L. to remain in the custody of DSS. Following a hearing held on 14 May 2020, the trial court entered a permanency

planning order, providing for the continued custody of H.B. and A.L. with DSS, and setting the primary plan for reunification with a concurrent plan for adoption. The trial court also noted that there was an open investigation at the time involving Ms. Bullard, "due to another child in her care testing positive for cocaine." Pending the results from this investigation, H.B. was to be placed back into Ms. Bullard's home.

¶ 15 Following a 10 June 2020 hearing, the trial court entered another permanency planning order on 1 July 2020, in which it found that H.B. had been adjudicated neglected in 2019, that mother had failed to make herself available to DSS, follow through on her Family Services Case Plan, or visit H.B. and A.L. consistently, that DSS was investigating Ms. Bullard, and that the child in Ms. Bullard's care who had tested positive for cocaine no longer resided with her. Then the trial court ordered, among other things, that H.B. remain in DSS's custody, that H.B. be placed back into Ms. Bullard's home, that mother's visitation with her children be "reduced to once a month" with a 48-hour notice requirement, and that DSS pursue termination of mother's parental rights with respect to A.L.

¶ 16 H.B. was once again removed from Ms. Bullard's home on 8 July 2020, where she was found "outside unsupervised with a black eye, and was also dirty." "A CPS referral was called on Ms. Bullard and Scotland County DSS substantiated injurious environment on Ms. Bullard." On 11 March 2021, mother's parental rights with respect to A.L. were officially terminated.

¶ 17 DSS filed a petition for termination of parental rights with respect to H.B. on 5 April 2021. DSS alleged, in pertinent part, the following:

> 3. The child, [H.B.,] is currently residing in a licensed foster home, under the supervision, direction and custody of [DSS].
>
> 4. The child, [H.B.], is currently in the custody of [DSS], pursuant to a Non-Secure Custody Order entered on June 11, 2019.
>
> 5. That on [September 12, 2019],[3] the Court adjudicated the child, [H.B.,] as a neglected juvenile in accordance with N.C.G.S. 7B-101 (15).
>
> . . . .

3. As illustrated in paragraph 22 of this opinion, DSS's petition was amended during the termination hearing because it had erroneously listed "September 18, 2019" as the date of the adjudication hearing.

11. The parental rights of the Respondent mother . . . is [sic] subject to termination by the Court pursuant to N.C.G.S[.] 7B-111 in that:

    a. The mother has willfully left the minor child in placement outside of the home for more than twelve (12) months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting the conditions that led to the child's removal in that the mother failed to comply with her family services case plan; and

    b. The mother has neglected the child within the meaning of N.C.G.S[.] 7B-101, pursuant to the prior adjudication of neglect in the underlying juvenile court file; and

    c. The mother has willfully failed to pay a reasonable portion of the costs of the child's care for a continuous period of six months immediately preceding the filing of the petition, although physically and financially able to do so.

. . . .

13. The Respondent Mother . . . is subject to termination of her parental rights pursuant to N.C.G.S. 7B-1111.

. . . .

15. Termination of Respondent's parental rights is in the best interest and welfare of the minor child.

¶ 18 DSS included as exhibits H.B.'s birth certificate, the permanency planning order filed 1 July 2020, an affidavit of status as to H.B., and an additional, extensive affidavit detailing DSS's dealings with mother since H.B.'s birth. The second affidavit, particularly, consisted of a 14-page, 156-paragraph, detailed timeline of events beginning on 13 March 2015, when DSS made its first contact with mother, through 11 March 2021, when, among other things, the trial court ordered for H.B.'s primary plan to be shifted to adoption with a concurrent plan of reunification. This timeline captures, in addition to the forementioned facts, mother's

repeated failure to present herself to visitations conducted at DSS and DSS's multiple, failed attempts to reach mother either in-person or over the phone.

¶ 19 The matter came on for termination hearing on 28 July 2021, following a pre-trial order entered 1 July 2021. The trial court heard testimony from DSS foster care social worker Lataysha Carmichael ("Ms. Carmichael") during the adjudication phase, and then from adoption social worker Chandra McKoy ("Ms. McKoy") and Guardian ad Litem District Administrator Amy Hall ("Ms. Hall") during disposition.

¶ 20 Ms. Carmichael testified that DSS "initially got involved with [H.B.]" due to a "referral" following A.L.'s diagnosis as "substance affected" at birth, and that H.B. had been "in care since June of 2019." Ms. Carmichael testified that mother had not "done anything to complete a plan that would reunite the family" nor "paid any reasonable portion of the costs associated with the care for the child in the period of the six months prior to filing this petition[.]"

¶ 21 Ms. Carmichael stated that, between June 2019 and March 2021, mother never provided DSS proof of having submitted herself to a substance abuse assessment, of having acquired suitable housing of her own, or of being employed. Ms. Carmichael also stated that mother had made "a verbal communication to [her] that she was attending Positive Progress" for mental health and parenting services; however, when Ms. Carmichael spoke with "Positive Progress," she learned that it "had no record of [mother]." Ms. Carmichael stated that mother had not consistently presented herself to visitations at DSS.

¶ 22 Following Ms. Carmichael's testimony, counsel for DSS moved to amend its petition to reflect that the date of the adjudication hearing was 12 September 2019, and not 18 September 2019, as was originally provided in the petition. The trial court granted DSS's motion without objection.

¶ 23 The trial court made its oral rendition on adjudication, stating, in pertinent part:

> The Court further finds that this matter came before the Court on a petition for neglect; that the minor was found and adjudicated a neglected juvenile on September 12, 2019, as a result of improper care and substance abuse issues as determined by the Court on said date; that the minor has been in custody of [DSS].

> The Court further finds that the mother had a care plan, failed to complete the care plan, failed to make any payments for the costs of the care of the minor child, failed to make any efforts to improve her status so that the child could be removed from the custody of [DSS].
>
> . . . .
>
> Court further finds that this juvenile has been in at least on three occasions in the care of at least two separate parties: July 8, 2020, until now in the care of [foster parents] Arthur and Jessie Kelly; June 10, 2020, until July 7, 2020, the care of [Ms.] Bullard; and June the 11th, 2019, through June 9, 2020, in the care again of Arthur and Jessie Kelly.
>
> The Court has taken judicial notice of the file, reviewed the exhibits admitted today, A, B, C and D, adopts the efforts made by [DSS] not to proceed in a motion for termination of parental rights.

Specifically, DSS's Exhibits A, B, C, and D were the same four exhibits DSS had included in its petition for termination of parental rights: H.B.'s birth certificate, the permanency planning order filed 1 July 2020, an affidavit of status as to H.B., and the 14-page affidavit.

¶ 24 The trial court continued:

> Further finding that the juvenile has been outside of the mother's home for more than 12 months without any showing of any reasonable efforts of the mother to change those circumstances, again, based upon the inaction of the mother, that the juvenile was a neglected child.
>
> Court finds that there is sufficient evidence to proceed and find that it's in the best interest and welfare of the minor child that the parental rights be terminated and we proceed to disposition at this point.

¶ 25 At disposition, Ms. McKoy testified that she had been assigned to mother's case in March 2021, "once . . . the focus was shifted to adoption[.]" Ms. McKoy stated that mother had "initiated services at several providers[,]" but "hasn't followed through." According to Ms. McKoy, mother "was supposed to be getting a job at Waffle House," which "f[e]ll through[,]"

and was "currently living with her boyfriend." Ms. McKoy testified that H.B. was doing "very well" in her "prospective adoptive placement."

¶ 26 Lastly, Ms. Hall asked the trial court to find that grounds existed by which to terminate mother's parental rights, that said grounds were "proven by clear, cogent[,] and convincing evidence," that termination of mother's parental rights was in the best interest of H.B., that H.B. should remain in the "legal physical custody" of DSS, that visitation should be terminated, and that DSS should "continue with the plan of adoption . . . ."

¶ 27 The trial court made its oral rendition on disposition, stating, in pertinent part:

> That the mother was assigned a case plan requiring her to work several services, that she failed to do so and complete any service;
>
> That the mother did not follow through with providers and that mother specifically admits that the most recent providers . . . indicated they couldn't work with her because she had failed to continue previously with their services when she signed up.
>
> The Court finds that there is not a significant relationship with the child and parent because the parent has not cared for the child, has failed to visit consistently with the child during the time that the child was in the care and legal custody of [DSS].
>
> The Court finds that the child has a bond and a relationship with the prospective adoptive parents, has been living with them for essentially two years;
>
> That the mother . . . has previously been before [DSS] on an additional . . . petition for termination of parental rights which was granted; that the minor child [A.L.] resides in the home that . . . [H.B.] currently lives in and so they are biological siblings living together.
>
> . . . .
>
> The Court further finds that the period of time that [H.B.] has been separated from her mother and unknown father, based upon the past neglect and the likelihood of repetition of that neglect, based upon the history of the mother and her care or lack of care for her children, as well as the fact that the mother

> was willing to allow her child to remain in the custody of [DSS] without working her plan or making any progress, reasonable progress, to correct her situation so that the child could be returned back to her;
>
> The Court finds that today there has not been any change in the circumstances except for the mother continues with the pattern at the last minute during a hearing suggesting that there is an alternative but her history of failing to follow through, the Court finds that any efforts at this point would not be in the best interest of the minor child [H.B.].
>
> The Court finds that the lack of progress by [mother] was willful and that she had the ability at a minimum to participate in the counseling services set up by [DSS] and to work her plan but she failed to do so, and it was by her own inaction that the child remained in the custody of [DSS].
>
> As a result, the Court finds that it is in the best interest of the minor child [H.B.] that the petition for the termination of parental rights be granted; that the legal and physical custody of [H.B.] will remain with [DSS] continuing with the plan of adoption; terminate any visitation with the biological mother . . . .

¶ 28 The trial court entered a signed, written order on 19 August 2021. The trial court made the following findings of fact with respect to H.B. and mother:

> *Based on the evidence* presented by the parties, as well as *review of the Court record*, the Court makes the following findings, *based on clear, cogent and convincing evidence*:
>
> 1. The name of the juvenile is [H.B.], as evidenced by the child's Birth Certificate attached to the filed Petition, which is to be made part of this paragraph as if fully set forth herein.
>
> 2. The child, [H.B.], currently resides in a licensed foster home, under the supervision, direction and custody of [DSS].

3. . . . . [Mother] was served with a copy of the Petition to Terminate Parental Rights on April 8, 2021. [Mother] had notice of this proceeding today.

. . . .

5. That a Juvenile Petition and Non-Secure Custody Order were filed regarding the minor child, on June 11, 2019.

6. On September 12, 2019, the Court adjudicated the child, [H.B.], as a neglected juvenile pursuant to N.C.G.S. 7B-101 (15).

7. *That the Court takes judicial notice of the underlying Juvenile File 19JA173* and [DSS]'s efforts to work with the Respondent mother . . . .

8. The mother . . . has willfully left the child in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. There is a high likelihood that the neglect would continue.

10.[4] The mother . . . has neglected the juvenile in that the juvenile lives in an environment injurious to the juveniles' [sic] welfare.

11. The mother . . . failed to pay a reasonable portion of the costs of the children's [sic] care for a continuous period of six months immediately preceding the filing of the petition, although physically and financially able to do so.

12. The parental rights with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home.

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4. The trial court's order skips number 9 in its list of findings of fact.

. . . .

14. As such, and *based on clear, cogent and convincing evidence*, grounds exist to terminate the parental rights of the Respondent mother . . . .

15. The Court *relies on and accepts into evidence the Timeline*, marked DSS Exhibit '__" [sic], in making these findings and finds the said report to both [sic] credible and reliable.

(Emphasis added.)

¶ 29 DSS's "Timeline" noted in paragraph 15 of the trial court's findings consisted of a two-page, 18-paragraph timeline of events beginning 1 March 2021, when mother's case was assigned to Ms. McKoy, through 19 July 2021, nine days before the termination of parental rights hearing. This timeline illustrated, among other things, the following: that mother had completed a mental health assessment in January 2021, but, as of 2 March 2021, had failed to present herself to a follow-up appointment "to begin services"; that mother had repeatedly failed to present herself for scheduled visits in April 2021; that during a "PPR meeting" held on 3 June 2021, for which mother was absent, the "[t]eam recommended to continue with plan of adoption, continue to monitor placement and continue to pursue" termination of parental rights; that on 9 June 2021 mother had reported being "clean for 8 days"; that mother failed to show up on 15 June 2021 for a substance and mental health assessment; that mother had failed to show up for family visits on 7 and 19 July 2021; and that on 19 July 2021 mother informed Ms. McKoy over the phone that she had yet to secure employment.

¶ 30 The trial court concluded that grounds existed to terminate mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111, stating:

a. The juvenile has been placed in the custody of [DSS] for a continuous period of six months next preceding the filing of the Petition, and

b. *The Respondent mother . . . has willfully left the child in the legal and physical custody of [DSS] from June 11, 2019 until the present, for over 12 months* without making reasonable progress to correct the conditions that led to the removal of the child; and

> c. The Respondent mother . . . has neglected the juvenile in that the juvenile live[s] in an environment injurious to the juveniles' [sic] welfare; and
>
> d. The Respondent mother . . . has willfully failed to pay a reasonable portion of the costs of the child's care for a continuous period of six months immediately preceding the filing of the petition, although physically and financially able to do so; and
>
> e. The parental rights of the parnet [sic] with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home . . . .

(Emphasis added.)

¶ 31 On disposition, the trial court made the following findings of fact by clear, cogent, and convincing evidence:

> 1. That grounds for termination of parental rights exist under N.C.G.S. 7B-1111, et seq. and it is in the best interest of the minor child that the parental rights of the child's mother . . . should be terminated.
>
> . . . .
>
> 3. The minor child has been in the care of [DSS] since June 11, 2019.
>
> 4. At the time the child . . . came into care, [she was] four years old. Today, the child . . . is six years old.
>
> 5. The minor child, [H.B.], is currently residing in a licensed foster home of Arthur and Jessie Kelly and said placement is appropriate. The child . . . is doing well in the home of Arthur and Jessie Kelly and the child is thriving in their home. The child . . . is very well bonded to Arthur and Jessie Kelly and she calls them "mama and daddy".
>
> 6. The permanent plan for this child is adoption.

7. Based on the foregoing, the likelihood of adoption is extremely high.

8. That there is no bond between the minor child and the Respondent mother . . . .

9. That Termination of Parental Rights of the Respondent mother . . . and the Respondent unknown father will help achieve the permanent plan for the minor child . . . .

10. The Court relies on and accepts into evidence the GAL Report, marked Exhibit "A", in making these findings and finds the said report to be both credible and reliable.

¶ 32 The trial court ordered for the termination of mother's parental rights and all visitation with respect to H.B. Mother filed notice of appeal on 15 September 2021.

II. Discussion

¶ 33 On appeal, mother argues that: the trial court erred by allowing "a mid-hearing motion to amend the termination petition to add a claim under N.C. Gen. Stat. § 7B-1111(a)(9)"; the trial court erred by making "no substantive findings of fact to support any of the termination grounds"; and the trial court abused its discretion "by basing its best interest determination on an unsupported finding of fact regarding the parent-child bond." We first address whether the trial court's findings of fact were sufficient to support its conclusions of law.

A. Adjudication

¶ 34 **[1]** "We review a trial court's adjudication to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re J.S.*, 377 N.C. 73, 2021-NCSC-28, ¶ 16 (citation and quotation marks omitted). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *Id.* (citation and quotation marks omitted). "The trial court's findings of fact that are supported by clear, cogent, and convincing evidence are deemed conclusive even when some evidence supports contrary findings." *In re D.D.M.*, 2022-NCSC-34, ¶ 9 (citation omitted).

¶ 35 "In termination of parental rights proceedings, the trial court's finding of *any* one of the . . . enumerated grounds is sufficient to support a termination." *In re N.T.U.*, 234 N.C. App. 722, 733, 760 S.E.2d 49,

57 (2014) (citation and quotation marks omitted) (emphasis added). "Thus, on appeal, if we determine that any one of the statutory grounds enumerated in § 7B-1111(a) is supported by findings of fact based on competent evidence, we need not address the remaining grounds." *Id.* (citation omitted). Accordingly, we limit our review to N.C. Gen. Stat. § 7B-1111(a)(2) ("subsection (a)(2)").

¶ 36 Under subsection (a)(2), a trial court "may terminate the parental rights upon a finding" that:

> [t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile.

N.C. Gen. Stat. § 7B-1111(a)(2) (2021).

¶ 37 "[A] trial court may take judicial notice of findings of fact made in prior orders . . . because where a judge sits without a jury, the trial court is presumed to have disregarded any incompetent evidence and relied upon the competent evidence." *In re A.C.*, 2021-NCSC-91, ¶ 17 (citation omitted). "On the other hand, however, the trial court may not rely solely on prior court orders and reports and must, instead, receive some oral testimony at the hearing and make an independent determination regarding the evidence presented." *Id.* (citation and quotation marks omitted).

¶ 38 Mother does not dispute any of the trial court's findings of fact—including, namely, the finding that H.B. spent more than twelve months outside of mother's home and care. Although the trial court's findings are bare-boned and disordered, the trial court clearly identifies the grounds upon which to terminate mother's parental rights pursuant to subsection (a)(2): that mother "has willfully left [H.B.] in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of [H.B.]."

¶ 39 The trial court also makes a purported conclusion of law, which is better characterized as a finding of fact, in paragraph 3, subsection b, that reads: "The Respondent mother . . . has *willfully left the child in the legal and physical custody of [DSS] from June 11, 2019 until the present*, for over 12 months without making reasonable progress to

correct the conditions that led to the removal of the child[.]" (Emphasis added.) *See Dunevant v. Dunevant*, 142 N.C. App. 169, 173, 542 S.E.2d 242, 245 (2001) ("Findings of fact are statements of what happened in space and time. . . . [A] pronouncement by the trial court which does not require the employment of legal principles will be treated as a finding of fact, regardless of how it is denominated in the court's order." (citations and quotation marks omitted)).

¶ 40 The trial court took judicial notice "of the underlying Juvenile File 19JA173 and [DSS]'s efforts to work with Respondent mother," "relie[d] and accept[ed] into evidence the Timeline" submitted by DSS, and heard testimony from DSS social worker Ms. Carmichael, foster care social worker Ms. McKoy, and Guardian ad Litem District Administrator Ms. Hall. *See In re A.C.*, ¶ 18 ("Although the trial court did take judicial notice of the record in the underlying neglect and dependency proceeding and incorporated 'that file and any findings of fact therefrom within the [adjudication] order,' it did not rely solely upon these materials in determining that respondent-mother's parental rights in Arty were subject to termination. Instead, the trial court also received oral testimony during the termination hearing . . . ." (alteration in original)).

¶ 41 As we observed above, the underlying Juvenile File 19JA173, by its very nature, provides a thorough illustration of DSS's dealings with mother from H.B.'s birth, culminating in the permanency planning order on 12 May 2021, by which the trial court allowed DSS to "focus its efforts on the plan of adoption" for H.B. DSS's "Timeline" depicted DSS's dealings from March through mid-July 2019, detailing mother's repeated failure to follow through on her appointments and scheduled visits, all the while H.B. continued to live outside of mother's care. Witness testimony at the termination hearing corroborated the evidence provided by "the underlying Juvenile File" and DSS's "Timeline[.]"

¶ 42 All of this evidence taken together showed exactly what the trial court found, and more: that mother had willfully left [H.B.,] who was six years old by the time of the termination hearing, "in the legal and physical custody of [DSS] from June 11, 2019 until the present[ ] for over 12 months"; that H.B. had already spent most of her life living outside of mother's care, either in the precarious home of Ms. Bullard or in foster placement, by the time DSS became involved with the family; that H.B.'s living arrangements had been "injurious" to her welfare; that mother had "willfully failed to pay a reasonable portion of the costs of the child's care for a continuous period of six months immediately preceding the filing of the petition"; that H.B. had been adjudicated neglected; that mother's "parental rights with respect to another child[,]" A.L., "ha[d]

been terminated involuntarily"; that mother "lacks the ability or willingness to establish a safe home"; that mother had repeatedly failed to follow through on her case plan; that DSS had repeatedly attempted to make contact with mother; and that mother had not made any progress toward bringing H.B. back into her care.

¶ 43 Though the trial court's findings of fact are unartfully drafted, this is not a close case. Furthermore, the fact that the trial court's oral rendition and written order do not precisely mirror each other is of no moment. *See Oltmanns v. Oltmanns*, 241 N.C. App. 326, 330, 773 S.E.2d 347, 351 (2015) ("Although the written entry of judgment is the controlling event for purposes of appellate review, rendition is not irrelevant. . . . A trial court has an affirmative duty to enter a written order reflecting any judgment which has been orally rendered; failure to enter a written order deprives the parties of the ability to have appellate review." (citation omitted)). The order sufficiently, albeit minimally, supports the trial court's conclusion that mother's parental rights with respect to H.B. should be terminated pursuant to subsection (a)(2).

B. Disposition

¶ 44 **[2]** "The [trial] court's assessment of a juvenile's best interest at the dispositional stage is reviewed only for abuse of discretion." *In re C.S.*, 380 N.C. 709, 2022-NCSC-33, ¶ 13 (citation and quotation marks omitted) (alteration in original). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation and quotation marks omitted) (alteration in original).

¶ 45 Per N.C. Gen. Stat. § 7B-1110,

> [a]fter an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.

> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2021).

¶ 46 "Although the statute requires the trial court to consider each of the statutory factors, the trial court is only required to make written findings regarding those factors that are relevant." *In re C.S.*, ¶ 19 (citation omitted). "A factor is relevant if there is conflicting evidence concerning that factor." *Id.* (citation omitted). "If supported by the evidence received during the termination hearing or not specifically challenged on appeal, the trial court's dispositional findings are binding on appeal." *Id.* (citation omitted).

¶ 47 Mother argues the trial court abused its discretion because it "found that 'there is no bond between' " H.B. and herself. Specifically, mother states that the trial court "based its ultimate best interest determination on the flawed belief that there was 'no bond' of any kind between [mother] and [H.B.]" and that, "[b]y basing such a critical determination on such a clearly flawed belief, the [trial] court necessarily abused its discretion." Because mother only challenges the trial court's finding of a lack of bond, all other findings are binding. *See id.*

¶ 48 First, as is apparent from N.C. Gen. Stat. § 7B-1110, mother's argument that the finding of the presence of a parental bond is a dispositive factor on disposition is unsupported by law. *See In re A.H.F.S.*, 375 N.C. 503, 514, 850 S.E.2d 308, 317-18 (2020) ("[A]lthough the trial court found that Charley was strongly bonded to respondents, this Court has recognized that the bond between parent and child is just one of the factors to be considered under N.C.G.S. § 7B-1110(a), and the trial court is permitted to give greater weight to other factors." (citation and quotation marks omitted)).

¶ 49 Indeed, the Guardian ad Litem's court report ("GAL report") stated: "Even though [H.B.] has been in foster care for over two years, she still has a bond with her mother. She loves and misses her." The GAL report also provided that H.B. was doing very well in her foster placement, that

she was bonded to her foster parents, that likelihood for adoption was excellent, that she was living with her sibling A.L. in the same foster placement, that A.L. also had a plan for adoption, that mother's parental rights as to A.L. had been terminated by the same trial court on 11 March 2021, and that mother had "signed a case plan on 7/24/19 agreeing to address substance use, mental health, parenting, housing and employment[,]" on which she had "failed to make any progress" for about two years. Accordingly, the GAL report recommended that the trial court find that it was in H.B.'s best interests to terminate mother's parental rights.

¶ 50 The trial court's written findings of fact stated that there was no bond between H.B. and mother. The trial court provided more context to this finding during its oral rendition, stating: "The Court finds that there is not a significant relationship with the child and parent because the parent has not cared for the child, has failed to visit consistently with the child during the time that the child was in the care and legal custody of [DSS]." Not only is this reasoning supported by the record, the GAL report, and other evidence, but it is also not inconsistent with how our appellate courts have accepted a finding of a lack of bond between respondent-parent and child. *See*, *e.g.*, *In re K.A.M.A.*, 379 N.C. 424, 2021-NCSC-152, ¶ 16 ("Due to respondent's failure to visit, Kenneth had no bond with respondent."); *In re C.J.C.*, 374 N.C. 42, 47, 839 S.E.2d 742, 746 (2020) ("[T]he Respondent/father has been minimally involved even prior to the filing of this Petition. Therefore, he essentially has no bond at all with the child.").

¶ 51 The record shows that the trial court sufficiently considered and made findings of fact, bolstered by the GAL report, regarding the multiple, required factors set out by N.C. Gen. Stat. § 7B-1110, namely: H.B.'s age, her high likelihood of adoption, her lack of bond with mother, that termination of mother's parental rights should aid in the accomplishment of H.B.'s adoption, and the good relationship between H.B. and her prospective adoptive parents. See N.C. Gen. Stat. § 7B-1110(a). Accordingly, we hold the trial court did not abuse its discretion.[5]

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5. Mother's additional contention, that the trial court erred by allowing DSS to amend its petition mid-hearing, is of no moment. The amendment at issue did not deprive mother of notice of possible ground for termination, but rather allowed the petition to correct a minor error and reflect the evidence. *See In re B.L.H.*, 190 N.C. App. 142, 147, 660 S.E.2d 255, 258, ("[W]here a respondent lacks notice of a possible ground for termination, it is error for the trial court to conclude such a ground exists." (citations omitted)), *aff'd*, 362 N.C. 674, 669 S.E.2d 320 (2008). Furthermore, mother did not object to DSS's motion. Accordingly, we find that this was not reversible error.

III. Conclusion

¶ 52 For the foregoing reasons, we affirm the trial court's termination of mother's parental rights.

AFFIRMED.

Judge INMAN concurs.

Judge WOOD dissents by separate opinion.

WOOD, Judge, dissenting.

¶ 53 The trial court failed to make the necessary, substantive findings of fact to support its conclusions of law that grounds existed under N.C. Gen. Stat. § 7B-1111 to terminate Mother's parental rights to H.B. The order of the trial court should be vacated and remanded for the trial court to make further findings of fact to support its conclusions of law that grounds existed to terminate Mother's parental rights. I respectfully dissent.

I. Factual and Procedural Background

¶ 54 On August 19, 2021, the trial court entered an order terminating Mother's parental rights to H.B. In the adjudication, the trial court made 14 findings of fact:

> 1. The name of the juvenile is . . . [H.B.], as evidenced by the child's Birth Certificate attached to the filed Petition, which is to be made part of this paragraph as if fully set forth herein.
>
> 2. The child, . . . [H.B.], currently resides in a licensed foster home, under the supervision, direction and custody of the Robeson County Department of Social Services.
>
> 3. The mother of the child is . . . [Mother]. . . . [Mother] was served with a copy of the Petition to Terminate Parental Rights on April 8, 2021. . . . [Mother] had notice of this proceeding today.
>
> 4. That there is no father listed on the child's birth certificate. That an unknown father was served by process of publication.

5. That a Juvenile Petition and Non-Secure Custody Order were filed regarding the minor child, on June 11, 2019.

6. On September 12, 2019, the Court adjudicated the child, . . . [H.B.], as a neglected juvenile pursuant to N.C.G.S. 7B-101 (15).

7. That the Court takes judicial notice of the underlying Juvenile File 19JA173 and the Department's efforts to work with the Respondent mother[] . . . the Respondent Unknown father of the child, . . . [A.L.].

8. The mother, . . . [Mother] has willfully left the child in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. There is a high likelihood that the neglect would continue.

10. [sic] The mother, . . . [Mother] has neglected the juvenile in that the juvenile lives in an environment injurious to the juveniles' welfare.

11. The mother, . . . [Mother, failed to pay a reasonable portion of the costs of the children's care for a continuous period of six months immediately preceding the filing of the petition, although physically and financially able to do so.

12. The parental rights with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home.

13. That the unknown father, has willfully left the child in foster care for more than twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made in correcting the conditions that led to the child's removal; has failed to file an affidavit of paternity in a central registry maintained by the Department of Health and Humans Services; legitimated the juvenile pursuant to provisions of G.S.

> 49-10, G.S. 49-12.1, or filed a petition for this specific purpose; legitimated the juvenile by marriage to the mother of the juvenile; has not provided substantial financial support or consistent care with respect to the juvenile and mother; has not established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.
>
> 14. As such, and based on clear, cogent and convincing evidence, grounds exist to terminate the parental rights of the Respondent mother[] . . . and the Respondent unknown father.
>
> 15. The Court relies on and accepts into evidence the Timeline, marked DSS Exhibit '__", [sic] in making these findings and finds the said report to [sic] both credible and reliable.

¶ 55 Additionally, the trial court made 10 findings of fact in the dispositional portion of its order. One of these findings, finding of fact number 8, stated, "[t]hat there is no bond between the minor child and the Respondent mother." The trial court then terminated Mother's parental rights to H.B. Mother filed a timely notice of appeal.

II. Standard of Review

¶ 56 A proceeding to terminate parental rights consists of two stages, an adjudicatory stage followed by a dispositional stage. *In re A.A.M.*, 379 N.C. 167, 2021-NCSC-129, ¶ 14; *Bolick v. Brizendine* (*In re D.R.B.*), 182 N.C. App. 733, 735, 643 S.E.2d 77, 79 (2007). At the adjudicatory stage, the petitioner must show by "clear, cogent, and convincing evidence" "any ground for termination alleged under N.C.G.S. § 7B-1111(a)" exists. *In re A.A.M.*, at ¶ 14 (citing N.C. Gen. Stat. § 7B-1109(e)-(f) (2019)). During this stage, "the trial court must 'take evidence, find the facts, and . . . adjudicate the existence or nonexistence of any of the circumstances set forth in [N.C.G.S. §] 7B-1111 which authorize the termination of parental rights of the respondent.' " *In re B.O.A.*, 372 N.C. 372, 379-80, 831 S.E.2d 305, 310 (2019) (quoting N.C. Gen. Stat. § 7B-1109(e)). If a petitioner successfully shows the existence of any of the enumerated grounds under N.C. Gen. Stat. § 7B-1111, the trial court then proceeds to the dispositional stage. *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 5 (2004). At the dispositional stage, the trial court must determine "whether it is in the best interests of the child to terminate the parental rights." *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 615 (1997) (citation omitted); *see In re N.C.E.*, 379 N.C. 283, 2021-NCSC-141, ¶ 12.

¶ 57 On appeal, our appellate courts must determine whether the trial court's findings of fact are supported by "clear and convincing evidence," *In re W.K.*, 376 N.C. 269, 277, 852 S.E.2d 83, 89-90 (2020), and "whether those findings support the trial court's conclusions of law." *In re B.O.A.*, 372 N.C. at 379, 831 S.E.2d at 310 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)); *see In re Shepard*, 162 N.C. App. at 221, 591 S.E.2d at 6. "The issue of whether a trial court's findings of fact support its conclusions of law is reviewed de novo." *In re J.S.*, 374 N.C. 811, 814, 845 S.E.2d 66, 71 (2020). We review the trial court's determination at the dispositional stage as to the child's best interest for abuse of discretion. *In re N.C.E.*, 379 N.C. 283, 2021-NCSC-141 ¶ 13. "Under this standard, we defer to the trial court's decision unless it is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Id.* (internal quotation marks omitted) (quoting *In re J.J.B.*, 374 N.C. 787, 791, 845 S.E.2d 1, 4 (2020)).

III. Discussion

A. Substantive Findings of Fact

¶ 58 Mother asserts the trial court made no substantive finding of fact to support its ultimate conclusions of law that four separate grounds existed under N.C. Gen. Stat. § 7B-1111 to terminate her parental rights to H.B. I agree.

¶ 59 In an adjudicatory hearing for termination of parental rights, the trial court must "take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent." N.C. Gen. Stat. § 7B-1109(e) (2021). As the majority opinion above explains, "[i]n termination of parental rights proceedings, the trial court's 'finding of any one of the . . . enumerated grounds is sufficient to support a termination.' " *In re N.T.U.*, 234 N.C. App. 722, 733, 760 S.E.2d 49, 57 (2014) (quoting *In re J.M.W.*, 179 N.C. App. 788, 791, 635 S.E.2d 916, 918-19 (2006)). Notwithstanding this, when entering its judgment to terminate parental rights, the trial court must 1) "find the facts *specifically*," 2) "state separately its conclusions of law thereon," and 3) "direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, R. 52(a)(1) (emphasis added); *see In re Anderson*, 151 N.C. App. 94, 96, 564 S.E.2d 599, 601-02 (2002); *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982), *superseded by statute on other grounds*, N.C. Gen. Stat. § 50-13.4(f)(9) (2021).

¶ 60 In other words, "the trial court's factual findings must be more than a recitation of allegations. They must be the '*specific* ultimate facts . . .

sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence.' " *In re Anderson*, 151 N.C. App. at 97, 564 S.E.2d at 602 (emphasis added) (quoting *Montgomery v. Montgomery*, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977)); *see In the Matter of: B.F.N. and C.L.N.*, 2022-NCSC-68, ¶ 15 ("The trial court is under a duty to find the facts specially and state separately its conclusions of law thereon, regardless of whether the court is granting or denying a petition to terminate parental rights."). "Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts." *Id.* (quotation omitted); *see Quick*, 305 N.C. at 451, 290 S.E.2d at 657 ("[A] proper finding of facts requires a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment.").

¶ 61 In *In re Anderson*, we addressed the interplay between an adjudication order, N.C. Gen. Stat. § 7B-1109, and Rule 52. There, the respondent contended the trial court erred by concluding grounds existed under N.C. Gen. Stat. § 7B-1111 to terminate his parental rights. *In re Anderson*, 151 N.C. App. at 96, 564 S.E.2d at 601. On appeal, we reviewed the trial court's order on adjudication and found it only possessed three findings of fact. *Id.* at 97, 564 S.E.2d at 602. We concluded these findings of fact were insufficient because "[t]wo merely recite[d] that DSS filed a petition and that service was proper on [the parties]" and the third finding of fact was a "mere recitation[] of allegations." *Id.* We further held "[e]ven if the factual findings here did not merely recite allegations, they remain insufficient to support the conclusions of law that grounds exist for termination." *Id.*

¶ 62 Notably, the majority's opinion discusses the trial court's oral adjudication of H.B.; however, a trial court's oral adjudication at trial does not constitute a judgment. *See Dabbondanza v. Hansley*, 249 N.C. App. 18, 21, 791 S.E.2d 116, 119 (2016); *Spears v. Spears*, 245 N.C. App. 260, 286, 784 S.E.2d 485, 502 (2016) ("The announcement of an order in court merely constitutes rendition of the order, not its entry."). In its oral adjudication, the trial court included DSS's exhibits A, B, C, and D which was comprised of H.B.'s birth certificate, the July 1, 2020 permanency planning order, an affidavit status of H.B., and an affidavit prepared by DSS. Notwithstanding, this oral rendition is not a final order as it was not "reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, R. 58. Even if a trial court enters an oral ruling, "a trial court's oral findings are subject to change before the final written order is entered." *In re E.D.H.*, 2022-NCSC-70, ¶ 19 (quoting *In*

re A.U.D., 373 N.C. 3, 9-10 (2019); *see In re L.G.A.*, 277 N.C. App. 46, 54, 2021-NCCOA-137, ¶ 22 ("[T]he written, signed, and filed order may not have exactly the same provisions as announced at the conclusion of the hearing."). While the trial court is "not required to make detailed findings of fact in open court," *In re T.M.*, 180 N.C. App. 539, 549, 638 S.E.2d 236, 242 (2006), the same is not true for written orders. After the trial court enters an oral rendition, it is the responsibility of the trial court to ensure that the written order comports to the findings and rulings of the trial court, regardless of whom drafts the written order.

¶ 63 Here, the court made numerous oral findings that were not contained in the written order; however, since the trial court retains the authority to change its ruling prior to entry of the written order, we cannot presume that the trial court was still confident in its finding made during its oral rendition at the time the written order was signed and filed. Upon review, then, we cannot mend the trial court's shortcomings in drafting the order with our own investigation of that court's previous statements. Because the trial court's oral adjudication is not a judgment, this Court's review must be limited to the trial court's written order for the purpose of this appeal. *See id.*; *Spears*, 245 N.C. App. at 286, 784 S.E.2d at 502; *Oltmanns v. Oltmanns*, 241 N.C. App. 326, 330, 773 S.E.2d 347, 351 (2015).

¶ 64 Here, the majority's opinion concludes,

> [T]he trial court clearly identifies the grounds upon which to terminate mother's parental rights pursuant to subsection (a)(2): that mother "has willfully left [H.B.] in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of [H.B.]."

By so concluding, the majority disregards the trial court's failure to "find the facts" specifically, and thus has failed to fulfil its fact-finding duty. The first six findings of fact merely recite the juvenile's name, location of the child's current residence, that service was proper upon Mother and father, that DSS filed a petition and non-secure custody order, and that H.B. was adjudicated neglected. *See In re Anderson*, 151 N.C. App. at 97, 564 S.E.2d at 602. These first six findings are not "ultimate facts required by Rule 52(a) to support the trial court's conclusions of law, but rather are mere recitations of" the jurisdictional posture of the trial court and procedure of this case. *Id.* (internal quotation marks omitted). Although finding of fact number 7 found by the trial court took judicial notice of

the underlying case file, it fails to make a specific ultimate finding of fact. *See id.*; *Quick*, 305 N.C. at 451, 290 S.E.2d at 657.

¶ 65 Moreover, findings of fact numbers 8, 10, 11, and 12 are mere recitations of the statutory language of N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (9). N.C. Gen. Stat. § 7B-1111 provides,

> [t]he court may terminate the parental rights upon a finding of one or more of the following:
>
> (1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be . . . a neglected juvenile within the meaning of G.S. 7B-101. [*See* N.C. Gen. Stat. § 7B-101(15)(e) (2021) (stating a juvenile is neglected when the caretaker "[c]reates or allows to be created a living environment that is injurious to the juvenile's welfare").]
>
> (2) The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.
>
> (3) The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.
>
> . . .
>
> (9) The parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home.

N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (9) (2021).

¶ 66 Finding of fact number 8 mirrors the language of N.C. Gen. Stat. § 7B-1111(a)(2), stating

> [t]he mother, . . . [Mother], has willfully left the child in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. There is a high likelihood that the neglect would continue.

Likewise, finding of fact number 10 copies the language of N.C. Gen. Stat. §§ 7B-1111 and 7B-101(15)(e), providing, "[t]he mother, . . . [Mother] has neglected the juvenile and the juvenile lives in an environment injurious to the juveniles' welfare." Finding of fact number 11 also copies the language of N.C. Gen. Stat. § 7B-1111(a)(3), stating, "[t]he mother, . . . [Mother] failed to pay a reasonable portion of the costs of the children's care for a continuous period of six months immediately preceding the filing of the petition, although physically and financially able to do so." Finally, finding of fact number 12 is a recitation of N.C. Gen. Stat. § 7B-1111(a)(9): "The parental rights with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home."

¶ 67 Because findings of fact numbers 8, 10, 11, and 12 are merely recitations of the statutory language of N.C. Gen. Stat. § 7B-1111, the trial court failed to "find the facts specifically." N.C. Gen. Stat. § 1A-1, R. 52(a)(1). In other words, by copying the statutory language of N.C. Gen. Stat. § 7B-1111, these findings of facts are not ultimate findings of fact because they are not "the final resulting effect reached by processes of logical reasoning from the evidentiary facts." *In re Anderson*, 151 N.C. App. at 97, 564 S.E.2d at 602 (quotation omitted). Therefore, findings of fact numbers 8, 10, 11, and 12 are insufficient to support the trial court's judgment.

¶ 68 Finally, findings of fact numbers 13, 14, and 15 are also insufficient to support the termination of Mother's rights to H.B. Finding of fact number 13 concerns the unknown father and thus is not applicable to Mother. Finding of fact number 14 is more properly categorized as a conclusion of law than a finding of fact. A conclusion of law is "any determination requiring the exercise of judgment, or the application of legal principles." *China Grove 152, LLC v. Town of China Grove*, 242 N.C. App. 1, 6, 773 S.E.2d 566, 569 (2015) (*In re Helms*, 127 N.C. App.

505, 510, 491 S.E.2d 672, 675 (1997)). Finding of fact number 14 provides, "[a]s such, and based on clear, cogent and convincing evidence, grounds exist to terminate the parental rights of the Respondent mother[] . . . and the Respondent unknown father." This determination requires the trial court judge to exercise her judgment and determine "clear, cogent and convincing" evidence existed so as to terminate Mother's rights to H.B. Accordingly, although finding of fact number 14 is labeled as a finding of fact, it is "more properly classified [as] a conclusion of law." *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675. Lastly, finding of fact number 15 states "[t]he Court relies on and accepts into evidence the Timeline, marked DSS Exhibit '__', [sic] in making these findings and finds the said report to be [sic] both credible and reliable." This finding does not state what information in the Timeline the trial court relied on and fails to identify for this court what the DSS Exhibit's identification number is.

¶ 69 Based on the foregoing, the trial court's findings of fact were wholly insufficient for an appellate court to determine "whether the trial court correctly exercised its function to find facts and apply the law thereto." *In the Matter of: B.F.N. and C.L.N.*, at ¶ 15 (quotation omitted). Although the majority notes "the trial court's findings are bare-boned and disordered," their subsequent affirmation of the trial court's judgment disregards the trial court's duty to make specific findings of facts. This duty is not to be taken lightly, especially in a case such as the one *sub judice* where a parent's constitutional right to his or her child is involved. The trial court erred by failing to make specific findings of fact in this case to support its termination of Mother's parental rights to H.B. Thus, I would vacate and remand the judgment of the trial court for further findings of fact.

B. Best Interests at Disposition

¶ 70 Mother contends the disposition's finding of fact number 8 is not supported by competent evidence, and thus the trial court abused its discretion by basing its best interest determination on this fact. This finding provides, "there is no bond between the minor child and the Respondent mother." After a careful review of the record, there is no evidence in the record to support this finding of fact. Rather, DSS' witness at the hearing, Chandra McKoy, testified H.B. recognized Mother and appeared happy to see her when visits did occur. Furthermore, the guardian ad litem's report to the court reported "[e]ven though . . . [H.B.] has been in foster care for over two years, she still has a bond with her mother. She loves and misses her."

¶ 71 Despite this testimony and guardian ad litem report, the majority concludes the trial court nonetheless scraped together additional considerations to support the trial court's inability to find a sufficient bond between mother and child. The trial court could have inferred a lack of bond, the majority argues, from other passages within the guardian ad litem's report. These passages show that H.B. was adapting well to foster care, that Mother's parental rights as to another child had already been terminated, and that Mother was not progressing well with drug rehabilitation. While these observations may have been true and useful for other factual findings, none support the finding at issue. The lack of a mother's bond with her child cannot reasonably be determined from evidence that merely shows the child is doing well in foster care, the mother's rights as to another child have already been adjudicated, or the mother struggles with substance abuse.

¶ 72 The majority cites to other cases where we have upheld orders finding a lack of bond between parent and child. In all of these cases, though, the trial court relied upon evidence related to the parent-child relationship to arrive at its finding. In *In re K.A.M.A.*, the trial court based its finding upon "the lack of visits" from the parent. 379 N.C. 424, 2021-NCSC-152, ¶ 16. In *In re C.J.C.*, the trial court based its finding upon the parent being "minimally involved." 374 N.C. 42, 47, 839 S.E.2d 742, 746 (2020). In this case, no such evidence of the lack of parent-child relationship is present. These cases are thus distinguishable.

¶ 73 Instead, we should look to cases like *In re R.G.L.* where our Supreme Court held that

> although there is no testimony specifically concerning the bond between respondent and Robert, contrary to finding of fact 55 that there was "absolutely no bond at all between [Robert] and his parents," the social worker testified a bond existed "between the child and mom." We hold the evidence does not support the challenged portions of findings of fact 32 and 55.

¶ 74 379 N.C. 452, 2021-NCSC-155, ¶ 28. Similarly, the social worker in this case testified that Mother's visitations went well and the guardian ad litem's report explicitly states that there existed a bond between Mother and H.B. As such, the trial court here erred by making finding of fact number 8 as the evidence does not support the challenged finding of fact.

C. Additional Ground for Termination

¶ 75 Mother next argues the trial court committed reversible error by allowing DSS to amend the petition and add a claim under N.C. Gen. Stat. § 7B-1111(a)(9) during the termination hearing. *See* N.C. Gen. Stat. § 7B-1111(a)(9) (2021) ("The parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home."). This court has repeatedly held a trial court may not grant a motion to amend a petition to terminate a parent's parental rights during a termination hearing. *In re G.B.R.*, 220 N.C. App. 309, 314, 725 S.E.2d 387, 390 (2012); *In re B.L.H.*, 190 N.C. App. 142, 146, 660 S.E.2d 255, 257 (2008), *aff'd per curiam*, 362 N.C. 674, 669 S.E.2d 320 (2008). As such, the trial court erred by allowing such amendment.

IV. Conclusion

¶ 76 Our appellate case law and Rule 52 of North Carolina Civil Procedure requires a trial court to make specific findings of fact. The trial court made no substantive findings of fact in this case. Without specific findings of fact to support the trial court's conclusions of law that grounds existed to terminate Mother's parental right to H.B. under N.C. Gen. Stat. § 7B-1111, we are left with insufficient facts from which to determine whether the trial court's judgment is adequately supported by competent evidence. As such, the trial court failed to fulfill its fact-finding duty. Thus, the judgment of the trial court should be vacated and remanded for further findings of fact, and I respectfully dissent.

BEAVERS v. McMICAN

[285 N.C. App. 31, 2022-NCCOA-547]

DAVID BEAVERS, PLAINTIFF
v.
JOHN MCMICAN, DEFENDANT

No. COA21-85

Filed 16 August 2022

1. Appeal and Error—Rule 11(c) supplement—depositions—neither proffered to nor considered by trial court

When reviewing plaintiff's appeal from an order granting summary judgment for defendant in an alienation of affection and criminal conversation case, the Court of Appeals declined to consider two depositions (of the parties' respective ex-wives) that plaintiff had filed as an Appellate Rule 11(c) supplement to the record on appeal. Although both parties referenced the depositions during the summary judgment hearing, neither deposition had been certified at that time, and the trial court later confirmed in an amended summary judgment order that it did not consider either deposition when reaching its ruling; therefore, the depositions were never "before the trial court" for purposes of Rule 11(c) and could not be considered on appeal.

2. Alienation of Affections—criminal conversation—unidentified lover—summary judgment—evidence of post-separation conduct—corroborative of pre-separation conduct

After plaintiff's wife admitted to having sexual intercourse with an unidentified coworker while still married to plaintiff, the trial court erred in granting summary judgment for defendant on plaintiff's alienation of affection and criminal conversation claims where the circumstantial evidence—viewed in the light most favorable to plaintiff—was sufficient for a jury to infer that defendant was the coworker at issue, including evidence that defendant and plaintiff's wife were coworkers, maintained a friendship and communicated frequently during plaintiff's marriage, and began openly dating less than four months after plaintiff and his wife separated. Importantly, it was permissible for plaintiff to meet his burden of production at the summary judgment phase by using evidence of defendant's post-separation conduct (his dating relationship with plaintiff's wife) to corroborate evidence of any pre-separation acts (the extramarital affair between plaintiff's wife and the unidentified coworker).

Judge DILLON concurring with a separate opinion.

Judge JACKSON dissenting.

Appeal by Plaintiff from an order entered 14 October 2020 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 5 October 2021.

Matheson and Associates, PLLC, by John R. Szymankiewicz, for plaintiff-appellant.

Shannon Poore for defendant-appellee.

MURPHY, Judge.

¶ 1 We will not consider documents on appeal that were not before the trial court for its consideration of summary judgment. Here, although both parties at a hearing verbally referenced the contents of two depositions, the certifications of which were pending, we do not consider the depositions in determining whether the trial court erred because they were not proffered to or considered by the trial court.

¶ 2 A trial court errs in granting a movant's motion for summary judgment where there exists evidence on the record that, when viewed in the light most favorable to the nonmoving party, could support each element of the alleged offense. With respect to alienation of affection and criminal conversation claims, acts by a defendant occurring after a plaintiff and former spouse have permanently separated may only be used to satisfy that plaintiff's burden of production for purposes of summary judgment insofar as they corroborate acts that occurred prior to separation. Here, where acts by an unknown party satisfied Plaintiff's burden of production with respect to the final elements of alienation of affection and criminal conversation and other evidence—including, in part, post-separation conduct—tended to show the unknown party was Defendant, Plaintiff satisfied his burden of production. Accordingly, the trial court erred in granting Defendant's motion for summary judgment.

BACKGROUND

¶ 3 This action was initiated on 13 December 2018 when Plaintiff David Beavers filed a civil complaint in Wake County Superior Court asserting claims for alienation of affection and criminal conversation against his ex-wife's alleged paramour, Defendant John McMican. The relevant facts of this case, detailed below, are not in dispute.

¶ 4 Plaintiff and his ex-wife, Alison Beavers, married on 23 October 2004. On 18 January 2016, Plaintiff discovered texts on Alison's phone

in which she had sent nude pictures to a person identified as "Bestie." Alongside the pictures, Alison and "Bestie" had exchanged messages appearing to reference an instance of sexual intercourse that had occurred prior to the exchange of messages and pictures. At the time, Plaintiff did not look at the number associated with the contact information or otherwise take steps to discover the identity of "Bestie."

¶ 5 Upon discovering the exchange, Plaintiff briefly confronted Alison, then left his and Alison's home to stay with his parents. Upon Plaintiff's return several days later, he and Alison had a conversation about the affair. Alison explained to Plaintiff that she had engaged in sexual acts with the person identified as "Bestie" but that the two did not have sexual intercourse. Alison further professed that her paramour's name was "Dustin," one of her co-workers.

¶ 6 Several more weeks passed, and Plaintiff, skeptical of Alison's story during the first conversation, accused Alison of engaging in sexual intercourse with another man. Alison, in response, told Plaintiff she *had* engaged in sexual intercourse with someone from her workplace; however, she did not specify it was the person she had previously identified as "Dustin." Plaintiff never discovered Dustin's identity, and he suspected that, based on the absence of any "Dustin" in Alison's contacts, "Dustin" was a pseudonym. Plaintiff and Alison permanently separated on 16 December 2016.

¶ 7 Three and one-half months later, on 1 April 2017, Alison openly began dating Defendant, one of her co-workers. The two had known one another through work since the Summer of 2011. The Record indicates they had a close relationship, exchanging ninety-eight texts and calls in October of 2016 alone, as well as interacting via phone and Facebook numerous times outside of that month. While the two admittedly became both romantically and sexually involved upon beginning their relationship, no direct evidence of romantic involvement between Alison and Defendant exists before the start of their relationship in April 2017, and both have expressly disavowed being romantically involved prior to that time.

¶ 8 On 13 December 2018, Plaintiff sued Defendant on theories of alienation of affection and criminal conversation. Defendant, in turn, filed a *Motion for Summary Judgment*, arguing Plaintiff presented insufficient evidence of at least one element of both offenses.[1] The trial court conducted a hearing on Defendant's motion on 17 August 2020, during

1. The primarily disputed elements of both offenses are discussed in the analysis section of this opinion. *See infra* at ¶¶ 18-20, 25.

which both parties referenced, without objection, recent depositions of Alison and Defendant's ex-wife, Jessica McMican. However, neither deposition was certified until 20 August 2020, three days later. The trial court entered an order on 12 October 2020 granting Defendant's *Motion for Summary Judgment*, and Plaintiff timely appealed.

¶ 9 On appeal, Plaintiff submitted a supplement pursuant to Rule 11(c) of the Rules of Appellate Procedure containing, *inter alia*, the depositions of Alison and Jessica discussed by counsel during the hearing. We entered an order to the trial court on 23 November 2021 inquiring which, if either, of the depositions the trial court considered in granting Defendant's *Motion for Summary Judgment*; and, in response, the trial court filed an *Amended Order Granting Defendant's Motion for Summary Judgment* on 3 March 2022 confirming it considered neither of the two depositions.

ANALYSIS

¶ 10 On appeal, Plaintiff contends the trial court erred in granting Defendant's *Motion for Summary Judgment* with respect to his criminal conversation and alienation of affection claims. First, however, Defendant argues that the documents in Plaintiff's Rule 11(c) supplement are not properly before us. Accordingly, we first address whether Plaintiff's proffered supplement is properly before us under Rule 11(c), then we address whether the trial court erred in granting Defendant's *Motion for Summary Judgment*.

A. Rule 11(c) Supplement

¶ 11 **[1]** Defendant contends that, under Rule 11(c) of our Rules of Appellate Procedure, "[t]he purported evidence contained in the Rule 11(c) supplement should not be considered on appeal as some evidence was not presented to the trial court for consideration . . . and other evidence contained in the supplement is irrelevant."

¶ 12 Rule 11(c) states, in relevant part, as follows:

> Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate.
>
> . . . .

> If a party requests that an item be included in the record on appeal but not all other parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the printed record on appeal in a volume captioned "Rule 11(c) Supplement to the Printed Record on Appeal," along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to these rules; *provided that any item not filed, served, submitted for consideration, or admitted, or for which no offer of proof was tendered, shall not be included.*

N.C. R. App. P. 11 (2021) (emphasis added); *see also Hoisington v. ZT-Winston-Salem Assocs.*, 133 N.C. App. 485, 490, 516 S.E.2d 176, 180 (1999) (remarking that, when reviewing a trial court's decision to grant or deny summary judgment, "[w]e may only consider the pleadings and other filings that were before the trial court"), *appeal dismissed*, 351 N.C. 342, 525 S.E.2d 173 (2000).

¶ 13 Here, the trial court conducted its hearing on Defendant's *Motion for Summary Judgment* on 17 August 2020. The Rule 11(c) supplement contains two depositions that were not certified until 20 August 2020, three days later. The trial court confirmed in its *Amended Order Granting Defendant's Motion for Summary Judgment* that it considered neither of these depositions when evaluating whether to grant Defendant's *Motion for Summary Judgment*. Accordingly, neither deposition informs our review on appeal.

¶ 14 As to the remaining arguments concerning the Rule 11(c) supplement's role in our review, Defendant's contentions concern the *persuasive* relevance of the evidence to our determination, not whether the evidence is properly before us on appeal. As there exist no other indications in the Record or in the parties' arguments that our considering the remainder of the evidence in Plaintiff's Rule 11(c) supplement is improper, it will inform our review insofar as it is relevant.

B. Defendant's *Motion for Summary Judgment*

¶ 15 **[2]** Rule 56(c) of our Rules of Civil Procedure provides that summary judgment is appropriate "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.G.S. § 1A-1,

Rule 56 (2021). "Summary judgment is appropriate when the moving party establishes the lack of any triable issue of fact"; and, in determining whether any such triable issue exists, "[a]ll facts asserted by the nonmoving party are taken as true and viewed in the light most favorable to that party." *Wells Fargo Bank, N.A. v. Stocks*, 378 N.C. 342, 2021-NCSC-90, ¶ 13 (marks and citations omitted).

¶ 16 Despite its frequent invocation, "[s]ummary judgment 'is an extreme remedy and should be awarded only where the truth is quite clear.' " *Willis v. Town of Beaufort*, 143 N.C. App. 106, 108, 544 S.E.2d 600, 603 (quoting *Lee v. Shor*, 10 N.C. App. 231, 233, 178 S.E.2d 101, 103 (1970)), *disc. rev. denied*, 354 N.C. 371, 555 S.E.2d 280 (2001). It should only be granted in cases where a court is confident that "no person shall be deprived of a trial on a genuine disputed factual issue." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 682, 565 S.E.2d 140, 146 (2002) (citations omitted). "[T]he fundamental purpose of a summary judgment motion . . . is to allow a litigant to 'test' the extent to which the allegations in which a particular claim has been couched have adequate evidentiary support." *Prouse v. Bituminous Cas. Corp.*, 222 N.C. App. 111, 116, 730 S.E.2d 239, 242-43 (2012). Accordingly, courts may grant a motion for summary judgment only in those instances where a party

> meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim.

Lowe v. Bradford, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations and internal quotation marks omitted). "Our standard of review of an appeal from summary judgment is de novo[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

¶ 17 Here, Plaintiff's complaint alleged both alienation of affection and criminal conversation. We address both in turn.

¶ 18 In order to establish a claim for alienation of affection, a plaintiff must show that "(1) there was a marriage with love and affection existing between the [plaintiff] and [his or her spouse]; (2) that love and affection was alienated; and (3) the malicious acts of the defendant produced the loss of that love and affection." *Nunn v. Allen*, 154 N.C. App. 523, 533, 574 S.E.2d 35, 41-42 (2002) (marks and citations omitted), *disc. rev. denied*, 356 N.C. 675, 577 S.E.2d 630 (2003). As there is no meaningful contention that evidence sufficient to survive a motion for summary

judgment did not exist with respect to the first two elements,[2] we devote the bulk of our analysis to whether "the malicious acts of [] [D]efendant produced the loss of that love and affection." *Id.* at 533, 574 S.E.2d at 42.

¶ 19 As to the third element of alienation of affection, "[a] malicious act has been loosely defined to include any intentional conduct that would probably affect the marital relationship." *Rodriguez v. Lemus*, 257 N.C. App. 493, 495, 810 S.E.2d 1, 3 (citations omitted), *disc. rev. denied*, 371 N.C. 447, 817 S.E.2d 201 (2018). However, the exact definitional contours of a "malicious act" are irrelevant for purposes of this appeal[3] because "[m]alice is conclusively presumed by a showing that the defendant engaged in sexual intercourse with the plaintiff's spouse." *Id.* at 495-96, 810 S.E.2d at 3. As the evidence supporting the first element of alienation of affection in this case consists, in primary part, of a series of text messages indicating Alison engaged in sexual intercourse with "Bestie," an admission by Alison that she engaged in sexual acts with "Bestie" and that "Bestie" was a man named "Dustin," and a separate admission by Alison indicating she had engaged in sexual intercourse with an unnamed person, whether the behavior at issue qualified as a "malicious act" would be conclusively presumed in the affirmative, provided sufficient evidence exists that any paramour referenced was actually Defendant.

¶ 20 As Plaintiff testified during his deposition, he relied primarily on "put[ting] two and two together" in support of his contention that one

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2. At minimum, Plaintiff met his burden of production with respect to the first two elements through his verified complaint:

> 4. Prior to [18 January 2016], Plaintiff and [Alison] had a good and loving marriage. Plaintiff was a dutiful spouse and provided a comfortable home and environment for his wife.
>
> . . . .
>
> 14. . . . [T]he genuine love and affection that existed between [] Plaintiff and [Alison] was lost and destroyed . . . .

This verified complaint qualifies as an affidavit for production purposes. *See Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) (citations omitted) ("A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.").

3. Setting aside evidence concerning extramarital sex acts, Plaintiff's proffered evidence of Defendant's pre-separation acts consisted entirely of phone and Facebook contact, the specifics of which are unknown. Whatever subjective insecurity this behavior may have induced in Plaintiff, we do not believe evidence of this type of contact, without more, "would probably affect the marital relationship" so as to be relevant to our alienation of affection analysis. *Id.*

or more of the parties sexually involved with Alison prior to their separation was actually Defendant. Evidence supporting this identification includes phone and Facebook contact between Alison and Defendant during her and Plaintiff's marriage, the existence of their friendship at work, and the fact that they openly had a romantic and sexual relationship less than four months from the separation date of Alison and Plaintiff's more than decade-long marriage. Plaintiff argues this evidence is sufficient to have survived Defendant's *Motion to Dismiss*; however, Defendant argues this evidence is insufficient for a jury to find that he engaged in sexual intercourse with Alison prior to their separation.

¶ 21 At the heart of the parties' arguments lies a disagreement about the proper role of evidence concerning post-separation conduct with respect to alienation of affection claims; and, more specifically, the scope of our recent holding in *Rodriguez v. Lemus*. In *Rodriguez*, we held that, in cases involving alienation of affection, "evidence of post-separation conduct may be used to corroborate evidence of pre-separation conduct and can support claims for alienation of affection and criminal conversation, so long as the evidence of pre-separation conduct is sufficient to give rise to more than mere conjecture." *Id.* at 498, 810 S.E.2d at 5. In that case, which involved a challenge to the sufficiency of the evidence to support a trial court's findings of fact during a bench trial,[4] *id.* at 495, 810 S.E.2d at 3, we held the evidence was sufficient to support the trial court's findings where

> [the] [p]laintiff's evidence of pre-separation conduct included[] (1) phone records showing 120 contacts between [the] [d]efendant and [the] [p]laintiff's spouse in a one-month period, all at times when

4. While we are mindful of the discrepancy in scrutiny between our review of a trial court's grant or denial of summary judgment—which is subject to de novo review—and our review of a trial court's findings of fact on appeal from a bench trial—which we review for competent evidence on the record—the two are, for purposes of our analysis, functionally interchangeable in this case. *See id.* at 495, 810 S.E.2d at 3 (citations omitted) ("[W]e are strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence . . . ."); *Jones*, 362 N.C. at 573, 669 S.E.2d at 576 ("Our standard of review of an appeal from summary judgment is de novo[.]"). The nature of our review of a trial court's grant or denial of summary judgment, though de novo, requires us to view the nonmovant's evidence "in the light most favorable to that party," examining only whether they have support on the record. *Stocks*, 378 N.C. 342, 2021-NCSC-90, ¶ 13 (marks and citations omitted). Where, as in *Rodriguez*, the trial court finds a plaintiff's evidence persuasive during a bench trial, our review for competent evidence on the record is nearly identical to our review of whether a plaintiff met her burden of production for purposes of summary judgment. Accordingly, our analysis in *Rodriguez* directly informs our analysis in this case despite the nominal differences in procedural posture.

> [the plaintiff's spouse] was away from home; (2) two hotel charges on [the spouse's] credit card bill; (3) a third hotel receipt dated 21 March 2012 and information from the third hotel that [the spouse] was there with a woman; and (4) social media postings by [the] [d]efendant and [the plaintiff's spouse] which [the] [p]laintiff interpreted as their initials used as a code between them.

Id. at 498, 810 S.E.2d at 5. Plaintiff argues that, under *Rodriguez*, Defendant's established, post-separation sexual relationship with Alison properly demonstrates Defendant was involved in the sexual encounters referenced in Alison's messages and confessions. Meanwhile, Defendant argues that the pre-separation conduct amounts to "mere conjecture," rendering Defendant's post-separation conduct irrelevant for purposes of whether Plaintiff's evidence was sufficient to withstand a motion for summary judgment. *Id.*

¶ 22 Defendant's argument implicitly—and incorrectly—narrows the scope of our holding in *Rodriguez*. The *Rodriguez* principle was articulated in response to the question of whether factfinders could consider evidence of post-separation *at all* after our General Assembly enacted N.C.G.S. § 52-13, which provides that "[n]o act of [a] defendant shall give rise to a cause of action for alienation of affection or criminal conversation that occurs after the plaintiff and the plaintiff's spouse physically separate with the intent of either the plaintiff or plaintiff's spouse that the physical separation remain permanent." N.C.G.S. § 52-13(a) (2021); *see also id.* at 497, 810 S.E.2d at 4 ("[C]laims of alienation of affection and criminal conversation arising after the effective date of [N.C.G.S. §] 52-13 cannot be sustained without evidence of pre-separation acts satisfying the elements of these respective torts. What is less clear is whether evidence of post-separation acts is admissible to support an inference of pre-separation acts constituting alienation of affection or criminal conversation."). In other words, N.C.G.S. § 52-13 prevents defendants in cases involving criminal conversation and alienation of affection from being held liable for acts taking place after two spouses have separated, and *Rodriguez* effectuates that policy by ensuring that, if a factfinder considers evidence of post-separation conduct, it does so only insofar as it contextualizes pre-separation conduct.

¶ 23 Defendant, in arguing post-separation conduct cannot inform whether Plaintiff's evidence was sufficient to withstand his *Motion for Summary Judgment*, implies that, under *Rodriguez*, corroborating evidence is only available when Defendant has already been identified

as the actor in one or more independently sufficient instances of pre-separation conduct. No such limitation exists. Plaintiff presented evidence that his ex-wife engaged in sexual intercourse with at least one third party. To hold that Defendant's post-separation conduct with Plaintiff's ex-wife cannot inform the sufficiency of Plaintiff's evidence insofar as it indicates Defendant may have been "Bestie"—or, if a different person, the man she referenced in the second conversation—would ignore the reality that direct, contemporaneous evidence of adultery is almost never available. *See In re Est. of Trogdon*, 330 N.C. 143, 148, 409 S.E.2d 897, 900 (1991) ("Adultery is nearly always proved by circumstantial evidence."). Accordingly, to the extent Plaintiff's evidence of Defendant's post-separation conduct informs our understanding of the identities of "Bestie," "Dustin," or another professed paramour, it properly informs our review of the trial court's *Amended Order Granting Defendant's Motion for Summary Judgment*.

¶ 24 Having clarified the scope of *Rodriguez*, we must now determine whether Plaintiff presented evidence which, when taken as true and viewed in the light most favorable to him, could demonstrate that "the malicious acts of [] [D]efendant produced [a] loss of [] love and affection." *Nunn*, 154 N.C. App. at 533, 574 S.E.2d at 42; *Stocks*, 378 N.C. 342, 2021-NCSC-90, ¶ 13. We hold that he did. The evidence of a friendship and frequent contact between Alison and Defendant that existed prior to the relationship, as well as their romantic and sexual relationship after separation, while not sufficient for a jury to conclude the final element of alienation of affection had been met on its own, could convince a jury that Defendant was "Bestie"—or, if different, the person with whom she admitted she had engaged in sexual intercourse. Accordingly, the trial court erred in granting Defendant's *Motion for Summary Judgment* with respect to Plaintiff's claim for alienation of affection.

¶ 25 Likewise, Plaintiff's evidence, when taken as true and viewed in the light most favorable to him, *Stocks*, 378 N.C. 342, 2021-NCSC-90, ¶ 13, demonstrates that Defendant was liable for criminal conversation. "To withstand [a] defendant's motion for summary judgment on [a] claim of criminal conversation, [a] plaintiff must present evidence demonstrating: '(1) marriage between the spouses and (2) sexual intercourse between [the] defendant and [the] plaintiff's spouse during the marriage.' " *Coachman v. Gould*, 122 N.C. App. 443, 446, 470 S.E.2d 560, 563 (1996) (quoting *Chappell v. Redding*, 67 N.C. App. 397, 401, 313 S.E.2d 239, 241, *disc. rev. denied*, 311 N.C. 399, 319 S.E.2d 268 (1984)). Here, as in the alienation of affection claim, there is no meaningful dispute as to whether Plaintiff and Alison were married; and, also as in the alienation

of affection claim, Alison's admission that she had engaged in sexual intercourse with a third party, together with her friendship, contacts, and future romantic and sexual relationship with Defendant, would allow a jury to find Defendant had engaged in sexual intercourse with Alison prior to her and Plaintiff's separation.[5]

¶ 26 Accordingly, the trial court also erred in granting Defendant's *Motion for Summary Judgment* with respect to Plaintiff's claim for criminal conversation.

CONCLUSION

¶ 27 In alienation of affection and criminal conversation cases, a plaintiff's evidence of a defendant's conduct occurring after a plaintiff and his or her ex-spouse separate constitutes viable corroborative evidence for purposes of satisfying the burden of production where the identity of a pre-separation extramarital sexual partner is unknown. Accordingly, here, the trial court erred in granting Defendant's *Motion for Summary Judgment*.

REVERSED AND REMANDED.

Judge DILLON concurs with a separate opinion.

Judge JACKSON dissents with a separate opinion.

DILLON, Judge, concurring.

¶ 28 I fully concur in the majority opinion. Plaintiff David Beavers forecasted sufficient evidence to survive summary judgment on his claims against Defendant for alienation of affection and criminal conversation, so called "heartbalm" torts. Admittedly, there was no *direct* evidence before the trial court that David's wife, Alison, and Defendant were engaging in an affair involving sexual intercourse prior to David and Alison's separation. However, there was evidence that, shortly before their separation, Alison admitted to her husband having an affair with a married co-worker, though she would not identify who the co-worker was. And the *circumstantial* evidence forecasted by David, when viewed in the

5. We note that the separation restriction in N.C.G.S. § 52-13 also applies to criminal conversation. *See* N.C.G.S. § 52-13(a) (2021) (emphasis added) ("No act of [a] defendant shall give rise to a cause of action for alienation of affection *or criminal conversation* that occurs after the plaintiff and the plaintiff's spouse physically separate with the intent of either the plaintiff or plaintiff's spouse that the physical separation remain permanent.").

light most favorable to him, was sufficient for a jury to infer that Alison's affair was with Defendant. This circumstantial evidence showed the following occurred during the year leading up to David and Alison's separation:

¶ 29 As of January 2016, eleven months before they separated, David and Alison had been happily married for much of their eleven years together. Three children were born to the marriage. But that month, David discovered that Alison had sent sexually charged messages and seductive selfies to a married co-worker she refused to identify. Defendant and Alison were co-workers. During 2016, Alison spent some nights and weekends away from David, often being cryptic about where she was going or whom she was with. Defendant admitted going on overnight business trips in 2016. Defendant met with Alison multiple times outside of work prior to Alison and David's separation. In July 2016, David found a receipt from a hotel where Alison had stayed. Defendant and Alison spoke on the phone on one occasion in July 2016 late at night, just prior to midnight. During a week in October 2016, a few months before David and Alison separated, Defendant and Alison exchanged 98 text messages. David and Alison separated in December 2016; Defendant and his wife separated shortly thereafter. By April 2017, Defendant and Alison were openly dating and had sexual intercourse before David and Alison's divorce became final.

¶ 30 As judges, we should not allow our general opinions about heartbalm torts to interfere with our duty to fairly evaluate evidence when determining whether a plaintiff is entitled to have her claims involving these torts heard by a jury.

¶ 31 I write separately to address our dissenting colleague's concern (and the concern in some circles identified in his dissenting opinion) that North Carolina still recognizes claims for alienation of affection and criminal conversation.

¶ 32 Many argue that North Carolina should abolish heartbalm torts because of its misogynistic origins. Indeed, the right to seek damages from a third party who interferes with a marital relationship was originally only available to married men. This right was not available to married women, as a wife was considered in a way the property of her husband. But most rights we all enjoy today used to be enjoyed only by some. Throughout history, we have responded to these injustices by *extending* these rights to be enjoyed by more groups, not by eliminating them.

¶ 33 For instance, under the common law, a married woman lacked the capacity to enter contracts. *Sanderlin v. Sanderlin*, 122 N.C. 1, 2, 29 S.E. 55, 55 (1898) ("At common law the contract of a married woman was

void."). However, recognizing the right to contract is a good thing, rather than doing away with this right altogether, the right to contract has been extended to almost all, including married women.

¶ 34 Also, under the common law, married women had very limited property rights. *See Bass v. Paquin*, 140 N.C. 83, 87, 52 S.E. 410, 412 (1905) ("Prior to 1848, we find no [North Carolina] statute interfering with or limiting the common law right and power of the husband over his wife's property."). However, recognizing the right to own/control property to be a good thing, rather than eliminating this right altogether, property rights have been extended to married women.

¶ 35 "The right to vote is one of the most cherished rights in our system of government[.]" *Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759,762 (2009). It used to be that most people, including married women, could not vote. Again, recognizing the right to vote is a good thing, rather than further restricting voting rights, the right to vote has been extended to most citizens, including married women.

¶ 36 Our Supreme Court recognizes the "tangible and intangible benefits resulting from the loving bond of the marital relationship." *Nicholson v. Hugh Chatham*, 300 N.C. 295, 302, 266 S.E.2d 818, 822 (1980). Indeed, the United States Supreme Court recognizes that "marriage is 'one of the vital personal rights essential to the orderly pursuit of happiness by free [people].' " *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015) (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

¶ 37 Recognizing the benefits one receives from a good marriage relationship, our Supreme Court has stated that the basis of an alienation of affection action "is the [plaintiff's] loss of the society, affection, and assistance of [the plaintiff's spouse]." *Ross v. Dean*, 192 N.C. 556, 135 S.E. 348, 349 (1926) (suit by husband). As was done in other jurisdictions, North Carolina extended the right to sue for this loss to married women. *See Brown v. Brown*, 121 N.C. 8, 27 S.E. 998 (1897) (extending this right to wives to sue for this loss). More recently, some jurisdictions have done an about-face and have abolished the right of individuals to sue for this loss altogether. But there is a strong argument why we should not follow suit, considering the other injuries for which we allow people to seek redress, many involving less harmful conduct and harm to less significant relationships.

¶ 38 For instance, we already allow a plaintiff to recover for the loss of "society, affection, and companionship" of his/her spouse when that loss is caused by the mere *negligence* of a third party, whose negligence act results in the death or severe injury to the plaintiff's spouse. *Nicholson*,

300 N.C. at 302, 266 S,E,2d at 822 (recognizing claim for "loss of consortium"). Interestingly, under our common law, only a husband could sue for loss of consortium, as his wife "was regarded as little more than a chattel in the eyes of the law." *Id.*, at 298, 266 S.E.2d at 820. But rather than eliminating the right to seek a loss of consortium claim based on this history, we now recognize the loss suffered by a married woman when she loses the benefits of her marriage due to the negligence of a third party is equally compensable. *Id.* at 297, 266 S.E.2d at 819 ("[T]he essence of consortium today has become a mutual right of a husband and wife to the society, companionship, comfort and affection of one another.").

¶ 39 I am not aware of any move to abolish loss of consortium claims. How much more should a married person be able to recover for this same loss (society, affection, companionship) when caused by the wrongful/malicious acts of a third party?

¶ 40 Further, I note that we recognize torts against third parties who wrongfully/maliciously interfere relationships which most would consider less significant than a marriage relationship.

¶ 41 For instance, if I enter a *contractual* relationship with someone to buy her car and if a third party convinces the seller to breach her contract with me, our law recognizes my right to recover any resulting damage. I have the right to sue that third party for interfering with my contractual relationship. *See Beverage Sys. v. Associated Bev.*, 368 N.C. 693, 784 S.E.2d 457 (2016) (recognizing "tortious interference with contract" claim).

¶ 42 Even if I only have a *potential* contractual relationship to buy the car, our law recognizes that I have suffered compensable damages when a third party acts out of malice in talking the seller out of entering a contract with me. *See Owens v. Pepsi Cola*, 330 N.C. 666, 412 S.E.2d 636 (1992) (recognizing claim for "tortious interference with prospective economic advantage").

¶ 43 In a non-commercial setting, our law allows me to sue a third party who acts out of malice to prevent another from creating a valid will which would have included me as a beneficiary. *See Bohannon v. Wachovia*, 210 N.C. 679, 188 S.E. 390 (1936) (recognizing claim for "tortious interference with an expected inheritance").

¶ 44 These torts have long been recognized, and I am not aware of any movement to take away the right to seek damages for these civil wrongs. How much more should we continue to recognize the right of individuals

to seek damages from those who out of malice interfere with one of the most important relationships in society?

¶ 45 I acknowledge that there is a concern in retaining heartbalm torts based on the occasional large jury verdict. But we value the role of juries in our society to use their judgment to evaluate the value of compensable harm, within legal parameters. If the size of jury awards is perceived as a problem, the better answer may be a type of tort reform to hold down "runaway" verdicts, rather than abolishing the right for married persons to seek damages at all for the tremendous harm done to them and their families by third parties acting wrongfully/maliciously.

¶ 46 The harm caused by criminal conversation – which merely requires a showing that a third party committed adultery with the plaintiff's spouse, without any requirement to show that the adultery caused the affections of the cheating spouse to be alienated – causes a different harm. Unlike with alienation of affection, a third party can be held liable for criminal conversation even where the cheating spouse instigated the contact.

¶ 47 However, most married persons have an expectation of fidelity within the marriage. *Malecek v. Williams*, 255 N.C. App. 300, 304, 804 S.E.2d 592, 596 (2017) (analyzing the constitutionality of North Carolina's heartbalm torts). And a plaintiff suffers harm when this expectation is not realized. It may be that a cheating spouse and third party should not be held *criminally* liable for adultery. Indeed, such prosecutions are essentially non-existent, and many courts have held such criminal laws to be unconstitutional. However, just because one should not be held criminally responsible does not necessarily mean that *civil* liability cannot be imposed, as with other torts that do not involve criminal conduct. Cheating spouses already suffer from a civil standpoint for their adulterous behavior: a cheating spouse who is a supporting spouse is liable for alimony; and a cheating spouse who is a dependent spouse loses any right to receive alimony. N.C. Gen. Stat. § 50-16.3(a).

¶ 48 "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were." *Obergefell*, 576 U.S. at 681. Under our common law, the right to seek redress from a jury of his peers for the loss of the benefits of this most profound of relationships used to reside solely with men. But, as with other rights, our State has progressed by extending this right to women. I see no reason why we should regress.

JACKSON, Judge, dissenting.

¶ 49 I would hold summary judgment for Defendant was proper in that Plaintiff had utterly failed to produce one single genuine issue of material fact as to the identity of his wife's paramour and would therefore affirm the order of the trial court. Additionally, on a more fundamental level, the torts of alienation of affection and criminal conversation have been outdated for over a hundred years and it is past time that these torts be abolished. I wish to take this opportunity to explain in detail why.

¶ 50 For all the reasons below, I respectfully dissent.

I. The Torts of Alienation of Affection and Criminal Conversation Should be Abolished

¶ 51 In the latter half of the 19th century, every state in the nation, apart from Louisiana, recognized a husband's right of action to bring alienation of affection and criminal conversation claims. William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for A New Career*, 33 Ariz. St. L.J. 985, 1005 (2001) ("Corbett"). By the 1980s, even with the ability of wives to bring the same causes of action due to the passage of Married Women's Property Acts, most states had limited the torts significantly or abolished them entirely. *Id*. at 1009-10. Today, alienation of affection remains a viable tort claim in only four states besides North Carolina—Hawaii, Mississippi, South Dakota, and Utah—and criminal conversation in only three other states—Hawaii, Kansas, and Maine.[1] *See* H. Hunter Bruton, Note, *The Questionable Constitutionality of Curtailing Cuckolding: Alienation-of-Affection and Criminal-Conversation Torts*, 65 Duke L.J. 755, 760-61 (2016).

¶ 52 Despite the overwhelming disfavor of these claims nationally, these torts are alive and well in North Carolina, regrettably in my view. Practitioners estimate approximately 200 alienation of affection lawsuits are filed each year. Meghann Mollerus, *Alienation of Affection: Yes, You Can Sue Your Marriage's Homewrecker*, WFMY News 2 (Feb. 12, 2019, 9:28 AM) https://www.wfmynews2.com/article/home/ alienation-of-affection-yes-you-can-sue-your-marriage-homewrecker/83-1b416ffc-4665-4763-82d6-bb73c40c32d4. Furthermore, over the past two decades the damages awards have become enormous. Amongst the notable

1. Although it has not been expressly abolished in New Mexico, the New Mexico Supreme Court disfavors claims for alienation of affection and even stated as long ago as 1978 that the tort goes against the best interest of the people and should be abolished. *Thompson v. Chapman*, 93 N.M. 356, 358, 600 P.2d 302, 304 (1978).

verdicts between 1998 and 2018 were seven jury awards of $1 million or more, including a $9 million award in 2010, four jury awards between $100,000 and $750,000, and three bench awards between $5 million and $30 million. G. Edgar Parker, *Tort Claims for Alienation of Affections and Criminal Conversation are Alive and Well in North Carolina*, N.C. State Bar J., Summer 2019, at 20-21. These torts continue to be used despite repeated legislative attempts to abolish them. Jean M. Cary & Sharon Scudder, *Breaking Up Is Hard To Do: North Carolina Refuses to End Its Relationship with Heart Balm Torts*, 4 Elon L. Rev. 1, 16-19 (2012) ("Cary & Scudder").

¶ 53 Additionally, prominent stakeholders in the North Carolina legal community have long called for the end of the so-called heart balm torts. In 1998—almost twenty-five years ago—the North Carolina Association of Women Attorneys adopted a resolution calling for the elimination of the torts. The resolution's recitals typify the reasons the torts should be abolished:

> WHEREAS the origin of the torts, alienation of affection and criminal conversation is the anachronistic philosophy that women were property; and
>
> WHEREAS this philosophy is inconsistent with the sound principle that women are full and equal partners in marriage; and
>
> WHEREAS these torts are inconsistent with North Carolina's public policy embodied in its laws of no fault divorce; and
>
> WHEREAS, the litigation of these torts contributes to the conflict between marital partners and has a detrimental impact on the family.

Annual Meeting Resolutions, North Carolina Association of Women Attorneys, https://www.ncawa.org/assets/docs/ncawa-annual-meeting-resolutions-through-2018.pdf (last accessed 20 July 2022). In the early 2000s, the Family Law Section of the North Carolina Bar Association began actively advocating for the legislative repeal of the torts. Cary & Scudder, *supra* at 16.

¶ 54 Our Court even judicially abolished the torts in 1984, *Cannon v. Miller*, 71 N.C. App. 460, 497, 322 S.E.2d 780, 804 (1984), only to have the decision vacated just two months later by our Supreme Court in a four-sentence order, 313 N.C. 324, 327 S.E.2d 888 (1985). There was no analysis in the Supreme Court's order. All the reasons for abolishing the

torts articulated by our Court in *Cannon* remain true today and *many* of these reasons have only become *more* compelling over the last 36 years. Our Supreme Court deserves another opportunity to correct this wrong.

A. The Concept of Women as Property Inherent in the Claims of Alienation of Affection and Criminal Conversation Is Wrong, and Inconsistent with Modern Law

¶ 55 Alienation of affection and criminal conversation are common law torts rooted in the antiquated idea that women, when married, are the personal property of their husbands. Legal recognition and validation of these rights gave husbands "an action against a third party when that person abducted her, seduced her, beat her, or 'stole' her affections"—in other words, a lawsuit for stealing a woman from a man that through marriage the law regarded the man to own, as though the woman were livestock or worse. 1 Suzanne Reynolds, *Reynolds on North Carolina Family Law* § 3.12 (6th ed. 2020) ("Reynolds"); *see also Barbee v. Armstead*, 32 N.C. (10 Ired.) 530 (1849). This action, in its early incarnation known as a suit for enticement, allowed a husband to recover for the loss of his wife's services from a third person who had enticed or separated the wife away from the husband, regardless of whether the wife had herself *consented* to leave. *See* Reynolds, *supra* § 3.12; *Cannon v. Miller*, 71 N.C. App. at 471, 322 S.E.2d at 789. While enticement as such is no longer recognized in North Carolina, or any other state, the iniquitous spirit of the tort is alive and flourishing in the claims of alienation of affection and criminal conversation still recognized today in North Carolina. Reynolds, *supra*, § 3.12; *see also* Jennifer E. McDougal, Comment, *Legislating Morality: The Actions for Alienation of Affections and Criminal Conversation in North Carolina*, 33 Wake Forest L. Rev. 163, 164 (1998) ("McDougal").

¶ 56 It has been said that "[t]he gravamen of the . . . cause of action [for alienation of affection] is the deprivation of the husband of his conjugal right to the society, affection, and assistance of his wife[.]" *Cottle v. Johnson*, 179 N.C. 426, 428, 102 S.E 769, 770 (1920). In other words, "the action seeks recompense for the loss of consortium[.]" Reynolds, *supra*, § 3.13. Between spouses, "consortium" is a legal euphemism for sex. *Consortium*, Black's Law Dictionary (11th ed. 2019). The right of a husband to recover for the loss of consortium from his wife was based on the shameful legal recognition and validation of the wife as chattel owned by the husband. *Cannon*, 71 N.C. App. at 473, 322 S.E.2d at 790. If a third party interfered with the service of a man's chattel, such as a servant or a slave, that man had an action for trespass. *Id.* Applying this concept to the marital relationship, if a third party interfered with

a wife providing her services—her society, companionship, and sexual relations—to her husband, then the husband had a cause of action. *Id.* In terms that unfortunately were characteristically common at the time, the North Carolina Supreme Court described this reality in a 1921 opinion, explaining:

> At common law the husband could maintain an action for the injuries sustained by his wife for the same reason that he could maintain an account for injuries to his horse, his slave, or any other property; that is to say, by reason of the fact that the wife was his chattel. This was usually presented in the euphemism that "by reason of the unity of marriage" such actions could be maintained by the husband.

Hipp v. E.I. Dupont De Nemours & Co., 182 N.C. 9, 12, 108 S.E. 318, 319 (1921), *overruled by Hinnant v. Tide Water Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925).

¶ 57 Prior to the enactment of Married Women's Property Acts, only husbands had a property interest in their wives and therefore only a husband could recover for the loss of consortium. McDougal, *supra*, at 165. In *Hipp*, our Supreme Court frankly noted the reason that a woman had no corresponding property interest in a man to whom she was married by referencing Blackstone's Commentaries:

> We may observe that in these relative injuries notice is only taken of the wrong done to the superior of the parties (husband) injured by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior (the wife) by such injuries is totally unregarded. One reason for this may be this: *That the inferior hath no kind of property in the company, care or assistance of the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury.*

182 N.C. at 13, 108 S.E. at 319 (quoting 3 Blackstone's Commentaries, 143) (emphasis added).

¶ 58 By the end of the 1800s, every state had enacted laws known as Married Women's Property Acts that removed some of the legal disabilities of married women and granted them most of the same de jure rights as their husbands—primarily, rights to "acquire, own, and transfer

property, make contracts, be employed and keep their earnings, sue, and be sued." McDougal, *supra*, at 165 n.13. As the inferior party was now at least nominally on somewhat more equal footing with the so-called superior party, the North Carolina Supreme Court decided in 1897 that women could also bring an action for alienation of affection against their husbands, *see Brown v. Brown*, 121 N.C. 8, 27 S.E. 998 (1897), and by 1925 went as far as to hold that the same was true for the tort of criminal conversation, *see Hinnant*, 189 N.C. at 126, 126 S.E. at 309-10.

¶ 59 Today, proponents of the torts often argue that the archaic origins of the torts do not matter and the fact that women today enjoy the right to assert claims on an equal basis with men, along with other rationales—such as disincentivizing adultery and promoting the stability of the nuclear family for the purpose of childrearing—justify the continued existence of the torts. *See* Lance McMillan, *Adultery as Tort*, 90 N.C. L. Rev. 1987, 1999 (2012) ("McMillan"); Corbett, *supra* at 1015. Yet the ability of both husbands and wives to bring an action for alienation of affection and criminal conversation does not resolve, abrogate, or otherwise eliminate the offensive and outdated concept underpinning the torts—that through marriage, a spouse becomes the property of the other spouse.

¶ 60 A person cannot be the property of another person. A wife is not property, and a husband is not property. For the most part, the law stopped recognizing and validating this concept over 100 years ago. That it has not stopped doing so in North Carolina in 2022 through the continued recognition of the validity of the torts of alienation of affection and criminal conversation is shameful and a wrong that we should right today. If spouses are not property of one another, they cannot be stolen—nor can their love or affection be stolen. *See* McDougal, *supra* at 181-83. The law must not validate the idea that sex is something a person can owe another person—and by extension, something that a third person could possibly steal—regardless of whether the two people have been joined in the legal union we know as marriage. "[T]he promise of sexual fidelity is simply not a possession that can be taken away by a third party without the permission of the participating spouse." Cary & Scudder, *supra* at 14. As the Washington Court of Appeals summarized when abolishing criminal conversation: "The love and affection of a human being who is devoted to another human being is not susceptible to theft. There are simply too many intangibles which defy the concept that love is property." *Irwin v. Coluccio*, 32 Wash. App. 510, 515, 648 P.2d 458, 461 (1982). Love is not property.

¶ 61 By extension, if a person is not the property of another person—nor is their love or their affection—then that person cannot be compensated

for the loss of this property because it was not property in the first place. In abolishing alienation of affection in 1981, the Supreme Court of Iowa explained: "We certainly do not do so because of any changing views on promiscuous sexual conduct. It is merely and simply because the plaintiffs in such suits do not deserve to recover for the loss of or injury to 'property' which they do not, and cannot, own." *Fundermann v. Mickelson*, 304 N.W.2d 790, 794 (Iowa 1981). The same should be true in North Carolina.

¶ 62 Furthermore, any suggestion that the concept that women are the property of their husbands is not, or is no longer, the basis for the torts of alienation of affections and criminal conversation is false, or worse—dishonest. Our Court explained as much almost 40 years ago in *Cannon v. Miller*: "The[se] [] actions have never fully shaken free from their property-based origins, as evidenced by fact that the consent of the participating spouse to the offending conduct, or even his or her initiation of it, will not bar the suit." 71 N.C. App. at 492, 322 S.E.2d at 801. In other words, the lack of consent as a defense means the law treats spouses as property that can be taken from one another rather than as fully autonomous and equal moral persons who can make their own voluntary choices, including the choice to engage in an extramarital relationship with a third person—whether or not the relationship is sexual.

¶ 63 Participation in extramarital relationships, sexual or not, may be wrong, and society may rightly disapprove of such behavior; however, disincentivizing people from choosing to engage in these relationships by treating a person as the property of another person is wrong and has no place in our world or society today. The Married Women Property Acts were supposed to dispose of the legal treatment of women as the property of men they had married—and of course, the law has *never* regarded husbands as the personal property of their wives. The fact that the consent of a spouse remains unavailable to a third party to the marriage as a defense to a claim belies any argument that the torts are not or are no longer fundamentally sexist, wrong, and based on the concept that women are the property of men they marry. *See* 1 Lloyd T. Kelso, *North Carolina Family Law Practice* § 5.9 (2022).

¶ 64 The fact these torts inherently treat people and their love, affection, and society as *property* makes them fundamentally different than torts that allow for the compensation of interference in contractual relationships. A party to a contract can sue a third-party for tortious interference with the contract because the party has *contractual* rights to the subject of the contract, *not inherent property rights* to the subject of the contract. "[P]roperty is about a person's right to a thing, and contract

is about promises to transfer those rights from one person to another." Blake Rohrbacher, Note, *More Equal Than Others: Defending Property-Contract Parity in Bankruptcy*, 114 Yale L.J. 1099, 1103 (2005). To justify the existence of the heartbalm torts on the basis that we allow for the compensation of interference in contractual relationships would be to view marriage as a contractual relationship in which spouses confer to one another a property right in themselves and their services. Ultimately, either view of marriage advanced by the justifications of these torts—as two people who are the property of one another or two people who contracted to exchange their companionship and services with one another—undermines the idea of a marriage as a *commitment* between two individuals who freely and joyfully promise to love, cherish, and honor one another till death do them part.

¶ 65 The existence of these torts today is indefensible. As the Missouri Supreme Court observed almost 20 years when it finally judicially abolished the tort of alienation of affection in Missouri, "[w]hen the reason for a rule of law disappears, so to[o] should the rule. . . . The original property concepts justifying the tort are inconsistent with modern law." *Helsel v. Noellsch*, 107 S.W.3d 231, 233 (Mo. 2003) (en banc) (internal citation omitted).

B. Alienation of Affection and Criminal Conversation Do Not Actually Serve the Purposes Stipulated as Modern Justifications for their Continued Existence

¶ 66 The modern justifications for these heartbalm torts, "providing a remedy for injuries of a highly sensitive nature while discouraging intentional disruptions of families[,]" McDougal, *supra* at 182 (citation omitted), simply do not remedy the poisonous origins of the torts. This would be true even if alienation of affection and criminal conversation actually "fulfill[ed] their purposes of protecting marriages and the family, compensating the plaintiff for an actual loss, and deterring undesirable behavior." *Id*. at 183 (internal marks omitted). The reality, however, is that the torts fail to serve these purposes, and lack any adequate modern justification for existence.

¶ 67 Proponents of these torts often argue that they act as a deterrent to people contemplating an extramarital affair—that a potential third party will pause and consider the potential financial repercussions before becoming involved with a married person. Corbett, *supra* at 1016-17. The subtext of this argument is that society cannot rely on individual moral decision making and thus a financial disincentive is needed to prevent extramarital affairs. The effectiveness of any such deterrent, however,

requires that the existence of the disincentive is common knowledge. If a third party does not know they could be sued for participating in an affair with a married person, then the torts have no deterrent effect whatsoever. And there is not public knowledge of the continued viability of the torts in North Carolina today. *See, e.g.*, Cary & Scudder, *supra* at 21 ("[M]any people in North Carolina do not know that they can be sued for having intercourse with a person who is married, and even if they do know, they may not be aware of the true marital status of the person they are seducing. . . . [P]eople who are not lawyers are often surprised to find out that spouses can sue the third party for monetary damages as a result of an extramarital affair.") (internal marks omitted). This lack of public awareness continues despite the media attention multi-million-dollar verdicts generate.

¶ 68 Marriages are not preserved by the torts, nor are families protected by them. No credible empirical evidence suggesting otherwise exists. These torts do not dissuade third parties from engaging in an affair with a married person. Between 2019 and 2020, the last period prior to the increased stress of the pandemic for which data is available, North Carolina tied for the 16th highest divorce rate amongst 45 states. *Divorce Rates by State*: 2019-2020, Ctrs. for Disease Control and Prevention, https://www.cdc.gov/nchs/pressroom/sosmap/divorce_states/divorce_rates.htm (last accessed 25 July 2022). Amongst the other states where alienation of affection remains a viable cause of action, Mississippi and Utah are tied for the sixth highest divorce rate, and South Dakota is tied for the 22nd highest divorce rate. *Id.*

¶ 69 The ultimate irony of the justification that these torts help preserve marriages or protect families is that the initiation of a lawsuit almost certainly pushes a struggling marriage past the point of reconciliation. McDougal, *supra* at 183. The Court in *Cannon v. Miller* put it thusly: "[G]ranting that the marriage relation is deserving of society's protection, the efficacy of the actions as a 'preservative' has never been documented. Rather, the very institution of the lawsuit would seem likely to destroy any remaining marital harmony through the notoriety of marital failure and the stresses of litigation." 71 N.C. App. at 492, 322 S.E.2d at 800-01.

¶ 70 Similarly, the existence of these torts likely harms families and their ability to heal and move forward. Particularly examining the impact of protracted litigation on children, two authors explained:

> If children are involved in a marriage that ends in the shadow of adultery, then protecting the emotional

> stability of the children also provides a strong reason why criminal conversation and alienation of affection should be abolished.
>
> One author argues that the civil adversarial system in family law already greatly increases harm to children who are subjected to divorce by encouraging competition and power struggles between parents at the expense of the child, and that the time for litigation must be limited for the benefit of the children.
>
> To minimize the negative impact upon children involved in divorce, parents must minimize the involvement of the legal system and lengthy litigation following divorce, rather than increase the causes of action filed against the spouse or an alleged paramour. In working out the details of ending a marriage, families are better served by avoiding a situation where one spouse is pitted against the other because children suffer greater harm when they are expected to choose sides between two parents.

Cary & Scudder, *supra* at 25 (footnotes and internal marks omitted). To a certain extent, forgiveness "is required in order for a betrayed spouse to move forward into healthy relationships" and such forgiveness can, in part, be obtained by relinquishing the right or desire to punish the betraying spouse. *Id.* at 24.

¶ 71 Stripped of the proffered modern justifications, the only reasons that remain for the continued existence of the torts is the antiquated and immoral concept that a person can be the property of another person because they are married, which as discussed *infra*, has no place in our world. Continued recognition of the torts is indefensible. They should be abolished by our Court today.

II. Analyzing the Case *Sub Judice*

¶ 72 Notwithstanding my belief that alienation of affection and criminal conversation should be abolished by our Court today, I would hold that the trial court did not err in granting Defendant's motion for summary judgment and that the order of the trial court should be affirmed. First, the *Rodriguez v. Lemus*, 257 N.C. App. 493, 810 S.E.2d 1 (2018), opinion upon which Plaintiff relies was wrongly decided. The legislative history of N.C. Gen. Stat. § 52-13(a) demonstrates that the General Assembly intended for it to make an inference by the jury of pre-separation

conduct from evidence of post-separation conduct impossible. Second, even applying *Rodriguez*, I would hold that the proffered evidence of post-separation conduct in this case is insufficient to support an inference that it was Defendant who engaged in tortious pre-separation conduct with Plaintiff's wife. Any conclusion to that effect by a jury would be based on nothing more than mere conjecture.

A. *Rodriguez* Was Wrongly Decided

¶ 73 As the *Rodriguez* Court highlighted, "[i]n 2009, the General Assembly codified alienation of affection and criminal conversation in a statute specifically limiting these torts to arise only from acts committed prior to a couple's separation[.]" 257 N.C. App. at 496, 810 S.E.2d at 4. The new section added to Chapter 52 of the North Carolina General Statutes provides in relevant part: "No act of the defendant shall give rise to a cause of action for alienation of affection or criminal conversation that occurs after the plaintiff and the plaintiff's spouse physically separate with the intent of either the plaintiff or plaintiff's spouse that the physical separation remain permanent." N.C. Gen. Stat. § 52-13(a) (2021). The Court in *Rodriguez* reasoned that the effect of this section is that claims of alienation of affection and criminal conversation "cannot be sustained without evidence of pre-separation acts satisfying the elements of these respective torts." 257 N.C. App. at 497, 810 S.E.2d at 4.

¶ 74 The Court in *Rodriguez* went on to state that it was "less clear [] whether evidence of post-separation acts is admissible to support an inference of pre-separation acts constituting alienation of affection or criminal conversation." *Id.* This is essentially a question of statutory interpretation since N.C. Gen. Stat. § 52-13 dictates that liability only attaches to pre-separation conduct.

¶ 75 "The principal goal of statutory construction is to accomplish the legislative intent. The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (internal marks and citations omitted).

¶ 76 Here, the plain language of N.C. Gen. Stat. § 52-13 does not give a clear and unambiguous answer to the question posited by the *Rodriguez* Court and therefore the next step is to refer to the statute's legislative history. *See, e.g.*, *Wells Fargo Bank, N.A. v. Am. Nat'l Bank & Tr. Co.*, 250 N.C. App. 280, 286, 791 S.E.2d 906, 911 (2016) ("When this Court is called upon to interpret a statute, we must examine the text, consult the canons of statutory construction, and consider any relevant legislative

history, regardless of whether the parties adequately referenced these sources of statutory construction in their briefs. To do otherwise would permit the parties, through omission in their briefs, to steer our interpretation of the law in violation of the axiomatic rule that while litigants can stipulate to the facts in a case, no party can stipulate to what the law is. That is for the court to decide.")

¶ 77 The relevant legislative history of N.C. Gen. Stat. § 52-13 is as follows:

¶ 78 During the 2009 legislative session, a bill was introduced in the North Carolina House of Representatives to amend Chapter 52 of the General Statutes, by adding a new section delineating procedures in causes of action for alienation of affection and criminal conversation. H.B. 1110, Gen. Assemb., Sess. 2009 (N.C.) (Filed), https://www.ncleg.gov/Sessions/2009/Bills/House/PDF/H1110v0.pdf. After the bill was debated and passed its second reading in the House, an amendment was introduced on the House floor to add the following provision:

> Nothing herein shall prevent a court from considering incidents of post-separation acts by defendant as corroborating evidence supporting other evidence that defendant committed acts during the marriage and prior to the date of separation which would give rise to a cause of action for alienation of affection or criminal conversation.

H.B. 1110, Gen. Assemb., Sess. 2009 (N.C.) (A3), https://webservices.ncleg.gov/ ViewBillDocument/2009/827/0/A3.

¶ 79 This proposed amendment was intended to align the treatment of post-separation evidence in alienation of affection and criminal conversation cases with that of the existing statutory treatment of post-separation marital misconduct as a factor in post-separation support and alimony decisions. Indeed, the post-separation support statute provided, as it still does today, the following:

> Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as *corroborating* evidence supporting *other* evidence that marital misconduct occurred during the marriage and prior to the date of separation.

N.C. Gen. Stat. § 50-16.2A(e) (2009) (emphasis added). The alimony statute included, as it still does today, an identical provision when listing marital misconduct of either spouse as a relevant factor the trial court should consider in determining the amount, duration, and manner of payment of alimony. N.C. Gen. Stat. § 50-16.3A(b)(1) (2009).

¶ 80 Crucially, the proposed amendment failed. Accordingly, the *Rodriguez* holding permitting the use of post-separation conduct evidence to support findings or inferences of pre-separation misconduct is fundamentally inconsistent with the legislative intent behind N.C. Gen. Stat. § 52-13(a).

¶ 81 I note here that my above analysis does not run afoul of our Supreme Court's guidance regarding the use of legislative intent where there is a failure to act on behalf of the legislature. In *North Carolina Department of Corrections v. North Carolina Medical Board*, 363 N.C. 189, 675 S.E.2d 641 (2009), our Supreme Court delineated the following:

> First, this Court has previously recognized the rule "that ordinarily the intent of the legislature is indicated by its actions, and not by its failure to act." *Styers v. Phillips*, 277 N.C. 460, 472-73, 178 S.E.2d 583, 589-91 (1971) (" 'Courts can find the intent of the legislature only in the acts which are in fact passed, and not in those which are never voted upon in Congress, but which are simply proposed in committee.' " (quoting *United States v. Allen*, 179 F. 13, 19 (8th Cir. 1910), *aff'd as modified on other grounds by Goat v. United States*, 224 U.S. 458 (1912), *and by Deming Inv. Co. v. United States*, 224 U.S. 471 (1912))). That a legislature declined to enact a statute with specific language does not indicate the legislature intended the exact opposite. *Id.* at 472, 178 S.E.2d at 589 (declining " 'to attribute any such attitude to the Legislature' " and noting that a party's argument as to why a bill failed to pass " 'can be nothing more than conjecture' " and " '[m]any other reasons for legislative inaction readily suggest themselves' " (quoting *Moore v. Bd. of Chosen Freeholders*, 76 N.J. Super. 396, 404, 184 A.2d 748, 752, *modified on other grounds*, 39 N.J. 26, 186 A.2d 676 (1962))). Finally, "[i]n determining legislative intent, this Court does not look to the record of the internal deliberations of committees of the legislature considering proposed legislation." *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 657, 403 S.E.2d 291, 295 (1991).

Id. at 202, 675 S.E.2d at 650.

¶ 82 Here, the proposed amendment was voted on by the entire North Carolina House of Representatives and the bill was voted on and passed

by the General Assembly. This is not the case of a legislature failing to pass a bill or a bill that never left committee. Rather, the North Carolina House of Representatives had the opportunity to permit the use of post-separation evidence to corroborate pre-separation conduct and voted not to allow the use of such evidence in civil actions for alienation of affection and criminal conversation. By looking at the failed amendment, I am drawing on legislative history more substantial than the internal deliberations of a committee or, as another example, the testimony by a member of the legislature about a bill that failed to pass, as was the case in *Styers v. Phillips*, 277 N.C. 460, 178 S.E.2d 583, which our Supreme Court cited when outlining the rule that it is actions and not inactions that indicate the intent of the legislature.

¶ 83 Furthermore, a failed amendment to a later-enacted bill is exactly the type of legislative history our Court should draw on when interpreting an ambiguous statute. After all, legislative history is defined both as "[t]he proceedings leading to the enactment of a statute, including hearings, committee reports, and floor debates[,]" *Legislative History*, Black's Law Dictionary (11th ed. 2019), and "the textual, political, and archival record of a statute or bill as it moves from idea to draft to bill, then through the process of introduction or sponsorship, committee review, debate, amendment, voting, passage to the other chamber for a similar process, reconciliation if needed, executive treatment and, if needed, legislative response[,]" *Legislative History*, The Wolters Kluwer Bouvier Law Dictionary (Desk ed. 2012).

B. Even Applying *Rodriguez*, I Would Hold That Summary Judgment Was Proper

¶ 84 Ultimately, although *Rodriguez* conflicts with the legislative intent behind N.C. Gen. Stat. § 52-13(a), our Court is bound by its holding per our Supreme Court's directive in *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), that a panel of this Court cannot overrule a previous panel's decision. However, even applying *Rodriguez* to the case at bar, I would hold that summary judgment was proper and affirm the trial court because Plaintiff did not produce any evidence of pre-separation conduct that evidence of post-separation conduct can properly corroborate to give rise to more than mere conjecture.

1. Alienation of Affection Claim

¶ 85 "To establish a claim for alienation of affections, plaintiff's evidence must prove: (1) plaintiff and [his wife] were happily married and a genuine love and affection existed between them; (2) the love and affection was alienated and destroyed; and (3) the wrongful and malicious acts of

defendant produced the alienation of affections." *Darnell v. Rupplin*, 91 N.C. App. 349, 350, 371 S.E.2d 743, 745 (1988) (internal marks and citation omitted). "The plaintiff does not have to prove that his spouse had no affection for anyone else[,] . . . he only has to prove that his spouse had some genuine love and affection for him and that love and affection was lost as a result of defendant's wrongdoing." *Brown v. Hurley*, 124 N.C. App. 377, 380-81, 477 S.E.2d 234, 237 (1996) (emphasis in original). Furthermore, "[o]ne is not liable for merely becoming the object of the affections that are alienated from a spouse. There must be active participation, initiative or encouragement on the part of the defendant in causing one spouse's loss of the other spouse's affections for liability to arise." *Peake v. Shirley*, 109 N.C. App. 591, 594, 427 S.E.2d 885, 887 (1993).

¶ 86 As the majority notes, the issue here is with element three of Plaintiff's alienation of affection claim. Plaintiff has failed to produce any direct evidence *identifying Defendant* as the individual with whom Plaintiff's wife had an extramarital affair and sexual intercourse with prior to Plaintiff and his wife's separation on 16 December 2016. Assuming arguendo that evidence of an affair prior to Plaintiff and his wife separating equates to evidence of wrongful and malicious acts that alienated the affections of Plaintiff's wife, I would hold that the post-separation evidence Plaintiff produced about the relationship between his wife and Defendant that he argues corroborates the pre-separation evidence of marital misconduct gives rise to nothing more than conjecture. Even under *Rodriguez*, this evidence does not support Plaintiff's claims:

> [E]vidence of post-separation conduct may be used to corroborate evidence of pre-separation conduct and can support claims for alienation of affection and criminal conversation, *so long as the evidence of pre-separation conduct is sufficient to give rise to more than mere conjecture*.

257 N.C. App. at 498, 810 S.E.2d at 5 (emphasis added).

¶ 87 Specifically, I disagree with Plaintiff's argument that the fact his wife and Defendant began a relationship in April 2017 following their separation in December 2016 is sufficient post-separation evidence to conclude that it was in fact *Defendant* who Plaintiff's wife was having an affair with prior to their separation. Plaintiff's argument is nothing more than conjecture.

¶ 88 First, beyond Plaintiff's wife's own admission, there is no contemporaneous, pre-separation evidence of an affair. Instead, Plaintiff alleges that in January 2016 he viewed sexually explicit text messages on his

wife's phone being exchanged with a contact labeled "Bestie." These text messages though are not a part of the record and apparently have not been produced in discovery, nor has the *phone number* linked to the "Bestie" contact, or the "Bestie" contact itself. Plaintiff has every incentive in this case to provide this evidence and as yet has not supplied it. Without more, concluding that Defendant was "Bestie" based on the post-separation evidence in the record would be to reach a conclusion based on nothing more than an accusation. The simple existence of the "Bestie" contact in Plaintiff's wife's phone does not equate to pre-separation evidence of *Defendant* being the individual on the other end of the "Bestie" contact—this pre-separation evidence gives rise to nothing more than mere conjecture.

¶ 89 Second, in January 2016 when Plaintiff's wife admitted to having an affair and sexual intercourse with another individual, Plaintiff's wife offered two possibilities: that the affair was with someone named Dustin or with a co-worker. Plaintiff searched for a "Dustin" within his wife's social media accounts and could find nothing, but Plaintiff did not try and ascertain whether there was a "Dustin" working at Merck Durham, where Plaintiff's wife worked. Plaintiff's wife also told Plaintiff at one point that the co-worker she had an affair with moved to Atlanta, which Plaintiff believed to the point he objected to his wife taking a girls' weekend trip to Atlanta. Plaintiff himself suspected his wife potentially had an affair during their marriage with an individual named Jonathan Hartman because Mr. Hartman's wife sent Plaintiff's wife a message about interfering with the Hartmans' marriage. Therefore, the fact that Plaintiff's wife and Plaintiff himself identified persons other than Defendant as men Plaintiff's wife might have had an affair with indicates in part that Plaintiff's assertion that Defendant was Plaintiff's wife's paramour was no more than mere conjecture.

¶ 90 Third, Plaintiff has alleged several actions by Defendant or his wife as evidence of pre-separation conduct that could be corroborated by evidence of post-separation conduct to support his claims. There was no evidence properly before the trial court, however, of a number of these actions, specifically that Plaintiff's wife altered her appearance at work, that Plaintiff's wife and Defendant ate lunch together at work, that Defendant gave Plaintiff's wife a gift, and that Defendant joined the same gym as Plaintiff's wife.[2] Defendant did admit to seeing Plaintiff's wife

2. Plaintiff identified these actions from the depositions of Plaintiff's wife and Defendant's wife, which are contained in the Rule 11(c) supplement to the record. Per Part A of the majority's opinion in which I concur, these depositions were not certified until after the summary judgment hearing, were not considered by the trial court in granting

outside of the workplace in 2016 and earlier in his interrogatories, but only during group business lunches and on two or three occasions in the context of birthday or farewell dinners attended by other co-workers.

¶ 91 When considering other evidence that is a part of the record, during his deposition, Plaintiff could not recall how many solo vacations his wife took prior to January 2016, when they occurred, or where she went. Following the admission of an affair, Plaintiff's wife would occasionally stay the night at a female co-worker's house, and Plaintiff admitted that she told him the name of this co-worker. Plaintiff never gathered any information to verify his wife's location before or after the admission of the affair. Furthermore, Plaintiff could not identify any third parties who could provide information about when his wife met with someone to have an affair or who witnessed his wife having inappropriate interactions with other men.

¶ 92 Additionally, in his sworn interrogatories, Defendant stated that his relationship with Plaintiff's wife became romantic on 1 April 2017 after they had a daytime date picking strawberries, they had sex for the first time on 6 April 2017 after dinner at his apartment, which was also the first time Plaintiff's wife stayed overnight at Defendant's apartment, and the first time he stayed at Plaintiff's wife's apartment was in late summer or fall of 2017.

¶ 93 Altogether, the discovery that Plaintiff gathered included: (1) Defendant's phone records from September 2015 to February 2017 supplied by Verizon Wireless and Defendant's wife; (2) one set of 37 interrogatories completed by Defendant in which he detailed in part the times he saw Plaintiff's wife outside of work prior to their divorce; (3) one set of 24 requests for admission completed by Defendant; (4) text messages between Plaintiff and his wife from April to July 2018; and (5) Defendant's Facebook records ranging from September 2014 to April 2018. Plaintiff's discovery was expansive, and no direct evidence was produced that identified Defendant as Plaintiff's wife's paramour, let alone any circumstantial evidence of pre-separation conduct that could be corroborated by evidence of post-separation conduct.

¶ 94 That all of Plaintiff's pre-separation and post-separation evidence amounts to nothing more than mere conjecture is highlighted by Plaintiff himself in his deposition:

Defendant's motion for summary judgment, and therefore neither one informs this Court's review on appeal.

> Q. I think the last question I asked was how did you come to the conclusion that [Defendant] was the paramour?
>
> A. So in the spring of 2017, she told me that she was dating someone that she worked with.
>
> Q. Okay.
>
> A. *And I put two and two together.*
>
> Q. What do you mean when you say you put two and two together?
>
> A. Well, she was having an affair. She had already told me she was having an affair with someone she worked with. And then she told me that she was dating only a few months after our separation.

(Emphasis added.)

¶ 95 Even considering the evidence in the light most favorable to Plaintiff as the nonmoving party, I would hold that Defendant met his burden of proving Plaintiff cannot produce evidence to support the third element of his alienation of affection claim, especially given that under *Rodriguez*, the type of evidence being proffered gives rise to nothing more than mere conjecture.

2. Criminal Conversation Claim

¶ 96 To establish a claim for criminal conversation, plaintiff's evidence must establish "the actual marriage between the spouses and sexual intercourse between defendant and the plaintiff's spouse during the coverture." *Brown*, 124 N.C. App. at 380, 477 S.E.2d at 237. Additionally, in a case

> [w]here adultery is sought to be proved by circumstantial evidence, resort to the opportunity and inclination doctrine is usually made. Under this doctrine, adultery is presumed if the following can be shown: (1) the adulterous disposition, or inclination, of the parties; and (2) the opportunity created to satisfy their mutual adulterous inclinations.

In re Estate of Trogdon, 330 N.C. 143, 148, 409 S.E.2d 897, 900 (1991) (internal citations omitted). Evidence of sexual intercourse must rise above mere conjecture and "if a plaintiff can show opportunity and inclination, it follows that such evidence will tend to support a conclusion that more than 'mere conjecture' exists to prove sexual intercourse by

the parties." *Coachman v. Gould*, 122 N.C. App. 443, 447, 470 S.E.2d 560, 563 (1996).

¶ 97 The issue here is with element two of Plaintiff's criminal conversation claim. Again, Plaintiff has failed to produce any direct evidence *identifying Defendant* as the individual with whom Plaintiff's wife had sexual intercourse with prior to Plaintiff and his wife separating. Plaintiff relies on the same post-separation evidence he argues corroborates the same pre-separation evidence conduct for this claim as he did his alienation of affection claim. Accordingly, for all of the reasons delineated supra, I would hold that the evidence does not rise above mere conjecture.

¶ 98 Particularly given that criminal conversation acts almost as a strict liability tort, a plaintiff must produce evidence that *the named defendant* had an adulterous inclination or disposition and had the opportunity to act in satisfaction of this adulterous inclination. Here, Plaintiff has produced no evidence either post-separation or pre-separation that rises above merely conjecturing that Defendant has such an inclination. Similarly, Plaintiff has produced no evidence either post-separation or pre-separation of Defendant's opportunity to act on his adulterous inclinations. The times Plaintiff demonstrated that Plaintiff's wife and Defendant were together prior to the separation occurred at work or in the setting of work gatherings—all spaces where other people were present. The only other pre-separation evidence that even touches on opportunity is Plaintiff's testimony in his deposition that his wife took solo vacations. Plaintiff, however, provided no evidence of when or where these vacations took place, let alone evidence that Defendant was present at these vacations or even away from his own home during the same timeframes.

¶ 99 Therefore, even considering the evidence in the light most favorable to Plaintiff as the nonmoving party, I would hold that Defendant met his burden of proving Plaintiff cannot produce evidence to support the second element of his criminal conversation claim, and the evidence offered only gives rise to mere conjecture of sexual intercourse between Defendant and Plaintiff's wife.

III. Conclusion

¶ 100 Plaintiff's allegations for both claims lack adequate evidentiary support. Mere conjecture is insufficient to withstand summary judgment. As Defendant met his burden of showing that Plaintiff cannot produce evidence to support the third element of his alienation of affections claim and the second element of his criminal conversations claim, I would hold that the trial court properly granted Defendant's motion for summary judgment and would therefore affirm the order of the trial court.

BIGGS v. BROOKS

[285 N.C. App. 64, 2022-NCCOA-548]

LISA BIGGS, Individually and as Administrator,
ESTATE OF KELWIN BIGGS, Plaintiffs
v.
DARYL BROOKS, NATHANIEL BROOKS, SR., KYLE OLLIS, Individually, and
BOULEVARD PRE-OWNED, INC., Defendants

No. COA21-653

Filed 16 August 2022

1. Negligence—fatal car accident—proof of ownership theory of liability—no agency relationship between vehicle's legal owner and driver

Where a used car dealer unintentionally remained the legal owner of a vehicle after its sale—despite processing the sale and title transfer paperwork and relinquishing authority and control over the vehicle to the buyer's relative who drove the car off the lot—due to the title transfer being rejected by the Division of Motor Vehicles because of a missing piece of information, the dealer was not liable for negligence under a proof of ownership theory for a fatal accident two months later where there was undisputed evidence that no agency relationship existed between the dealer and the buyer's relative (who was driving the car while impaired and with a suspended license at the time of the accident).

2. Negligence—fatal car accident—negligent entrustment theory of liability—legal owner did not have control or authority over vehicle

Where a used car dealer unintentionally remained the legal owner of a vehicle after its sale—despite processing the sale and title transfer paperwork and relinquishing authority and control over the vehicle to the buyer's relative who drove it off the lot—due to the title transfer being rejected by the Department of Motor Vehicles because of a missing piece of information, the dealer was not liable for a fatal accident that occurred two months later under a negligent entrustment theory where there was undisputed evidence that, at the time of the accident, the buyer's relative (who drove the car while impaired and with a suspended license) was entrusted with the car by the buyer, not the dealer.

Appeal by plaintiff from order entered 4 May 2017 by Judge W. Osmond Smith, III, in Durham County Superior Court. Heard in the Court of Appeals 27 April 2022.

Couch & Associates, PC, by Finesse G. Couch and C. Destine A. Couch, for plaintiff-appellant.

Sue, Anderson & Bordman, LLP, by Stephanie W. Anderson, for defendants-appellees.

DIETZ, Judge.

¶ 1 In January 2015, Boulevard Pre-Owned, Inc., a used car business, sold a 1995 Camaro to Nathaniel Brooks. Nathaniel Brooks and Boulevard executed a bill of sale; signed and notarized title transfer forms; and executed various other documents typically accompanying the sale of an automobile, such as insurance and registration paperwork. After executing this paperwork, an adult relative of Nathaniel Brooks, Daryl Brooks, arrived at the dealership and drove the Camaro off the lot.

¶ 2 Shortly after the sale, the North Carolina Division of Motor Vehicles rejected the title transfer paperwork because Boulevard had misplaced its copy of Nathaniel Brooks's driver's license. Boulevard tried unsuccessfully to contact Nathaniel Brooks multiple times between January and March 2015 to obtain a replacement copy.

¶ 3 Later in March 2015, Daryl Brooks was driving the Camaro while impaired and caused a serious automobile accident that led to the death of Kelwin Biggs.

¶ 4 Lisa Biggs, individually and as the representative of Kelwin Biggs, brought claims for negligence and negligent entrustment against Boulevard and its owner, Kyle Ollis. Biggs relied on a statute, N.C. Gen. Stat. § 20-71.1, providing that proof of ownership of a motor vehicle—in this case the title and registration that had not yet been transferred to Nathaniel Brooks—was *prima facie* evidence that the motor vehicle was being operated with the authority, consent, and knowledge of Boulevard, the owner, and "being operated by and under the control of a person for whose conduct the owner was legally responsible."

¶ 5 The trial court granted summary judgment for Boulevard and Ollis on these negligence claims. Following entry of final judgment against other parties in the case, Biggs appealed.

¶ 6 We affirm. As explained below, Boulevard and Ollis presented undisputed evidence that Boulevard relinquished authority and control over the Camaro when it completed the sale and released the Camaro to the buyer. Under controlling precedent from this Court, because Biggs did

not forecast any evidence that rebutted Boulevard's evidence and created a genuine issue of material fact on this issue, Boulevard and Ollis were entitled to judgment as a matter of law on these negligence claims. We therefore affirm the trial court's summary judgment order.

Facts and Procedural History

¶ 7 Defendant Boulevard Pre-Owned, Inc. is a used car dealership. Defendant Kyle Ollis is the president and owner of Boulevard.

¶ 8 In January 2015, Boulevard sold a used 1995 Chevrolet Camaro to Nathaniel Brooks. At the time of the sale, the parties executed a bill of sale; signed and notarized reassignment of title paperwork on the form required by the North Carolina Division of Motor Vehicles; and signed various other paperwork typically accompanying an automobile sale such as an arbitration agreement governing the sale, and insurance and vehicle registration paperwork.

¶ 9 Following the sale, Daryl Brooks—who is an adult, younger relative of Nathaniel Brooks according to the record—arrived at the dealership and picked up the Camaro.

¶ 10 Although the parties undisputedly intended to transfer title of the Camaro as part of this sale, that transfer did not happen. When Boulevard submitted the title transfer paperwork to the Division of Motor Vehicles, Boulevard misplaced its copy of Nathaniel Brooks's driver's license, and the DMV rejected the title transfer for insufficient documentation. From late January through early March, Boulevard called Nathaniel Brooks eight times seeking a replacement copy of his driver's license but never heard back.

¶ 11 Two months after the sale, on 11 March 2015, Daryl Brooks was driving the Camaro. He was impaired at the time. At a speed of approximately 80 miles per hour, Brooks collided with the back of a vehicle occupied by Lisa and Kelwin Biggs. The crash pushed the Biggs's vehicle into oncoming traffic and Kelwin Biggs suffered fatal injuries.

¶ 12 At the time of the collision, Daryl Brooks was driving with a suspended license due to earlier offenses of driving while impaired, driving while license revoked, and failure to appear.

¶ 13 As part of the crash investigation, the State notified Boulevard that a vehicle still titled and registered with the company had been involved in an accident. The DMV's License and Theft Bureau later investigated and cited Boulevard for failure to timely deliver title as part of the sale.

¶ 14 After obtaining a copy of Nathaniel Brooks's driver's license, DMV ultimately transferred title of the Camaro to Nathaniel Brooks in late April 2015, long after the collision involving the Camaro.

¶ 15 Lisa Biggs, individually and as representative of her husband's estate, sued Boulevard and its owner, Kyle Ollis, for negligence, negligent entrustment, emotional distress, gross negligence, and punitive damages. Biggs also brought claims against both Daryl Brooks and Nathaniel Brooks.

¶ 16 At summary judgment, the trial court dismissed all claims against Boulevard and Ollis. Biggs sought to immediately appeal that ruling, but this Court dismissed that interlocutory appeal for lack of jurisdiction. *Biggs v. Brooks*, 261 N.C. App. 773, 818 S.E.2d 643 (2018) (unpublished).

¶ 17 The case against the remaining defendants was stayed repeatedly over the next several years because of Daryl Brooks's pending criminal trial. In 2017, Brooks was convicted and sentenced for second degree murder and other related offenses in connection with the crash.

¶ 18 Following exhaustion of the criminal appeal process, the civil case against Daryl Brooks proceeded to trial. After the trial court entered judgment finding Daryl Brooks liable for wrongful death in causing the fatal collision, the court conducted a bench trial on compensatory and punitive damages and awarded $10,000,000 in damages.

¶ 19 In June 2021, following entry of final judgment on all remaining claims in this case, Biggs appealed the trial court's May 2017 order granting summary judgment in favor of Boulevard and Kyle Ollis.

Analysis

¶ 20 Biggs challenges the trial court's order granting summary judgment in favor of Defendants Boulevard Pre-Owned, Inc. and Kyle Ollis. We review that order *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

¶ 21 Summary judgment is proper when "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. R. Civ. P. 56(c). To survive a motion for summary judgment, the non-movant must forecast sufficient evidence to create a genuine issue of material fact on all essential elements of the asserted claims. *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992).

I. Agency theory of liability

¶ 22 **[1]** We begin by addressing the various negligence claims that depend on an agency relationship between Daryl Brooks and Boulevard Pre-Owned, Inc.

¶ 23 Biggs asserts that Boulevard is liable for Daryl Brooks's negligence under an agency theory that stems from a statutory provision governing ownership of motor vehicles. By law, proof of ownership of a motor vehicle at the time of a collision is *prima facie* evidence that the motor vehicle was being operated with the authority, consent, and knowledge of the owner and "being operated by and under the control of a person for whose conduct the owner was legally responsible":

> (a) In all actions to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be prima facie evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose.
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> (b) Proof of the registration of a motor vehicle in the name of any person, firm, or corporation, shall for the purpose of any such action, be prima facie evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment.

N.C. Gen. Stat. § 20-71.1.

¶ 24 "The purpose of the section is to facilitate proof of ownership and agency where a vehicle is operated by one other than the owner." *Winston v. Brodie*, 134 N.C. App. 260, 266, 517 S.E.2d 203, 207 (1999). Proof of ownership under Section 20-71.1 "creates a *prima facie* case of agency that permits, but does not compel a finding for plaintiff." *Id.* Importantly, Section 20-71.1 is "a rule of evidence and not substantive law." *Id.* This means that the plaintiff "continues to carry the burden of proving an agency relationship between the driver and owner at the time of the driver's negligence." *Id.* The defendant "at no point carries the burden of proof." *Id.*

¶ 25 As a result, when a plaintiff relies on proof of ownership through this statute, "the defendant may offer positive, contradicting evidence which, if believed, would establish the absence of an agency relationship." *Id.* This contradictory evidence entitles the defendant to "a peremptory instruction that if the jury does believe the contrary evidence, it must find for defendant on the agency issue." *Id.* In other words, when the defendant presents evidence contradicting this statutory agency principle, the "statutory presumption is not weighed against defendant's evidence by the trier of facts." *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 756, 325 S.E.2d 223, 228 (1985). Instead, the plaintiff must present affirmative evidence supporting the agency theory. *Id.*

¶ 26 This, in turn, means that, at the summary judgment stage, when a defendant forecasts undisputed evidence that rebuts the agency relationship described by Section 20-71.1, the plaintiff must forecast at least some evidence, beyond the statute itself, that creates a genuine issue of material fact on this question. *See Thompson v. Three Guys Furniture Co.*, 122 N.C. App. 340, 345, 469 S.E.2d 583, 586 (1996). The plaintiff cannot rely solely on the statute in the face of undisputed counter-evidence, because the statutory provision alone cannot be weighed against competing evidence at trial. *DeArmon*, 312 N.C. at 756, 325 S.E.2d at 228.

¶ 27 So, for example, in *Thompson*, this Court held that summary judgment for the defendant was inappropriate after the defendant presented evidence refuting an agency relationship because "plaintiff has submitted affidavits pursuant to Rule 56(e), and thus has presented evidence *in addition to* the *prima facie* showing of agency provided by G.S. § 20–71.1." *Thompson*, 122 N.C. App. at 345, 469 S.E.2d at 586 (emphasis added). Without that affidavit, raising credibility questions with defendant's own evidence, the statute alone would have been insufficient to survive summary judgment. *Id.*

¶ 28 Here, the unique facts of this case make it one of the rare cases where there are no genuine issues of fact, and thus the trial court properly entered summary judgment in favor of the defendants. It is undisputed that, on 8 January 2015, Nathaniel Brooks and Boulevard Pre-Owned, Inc. signed various documents collectively representing the sale and intended transfer of ownership of the Camaro from Boulevard to Nathaniel Brooks. These included a bill of sale for a total purchase price of $7,500 signed by both Brooks and Boulevard; a dealer's reassignment of title on the form issued by the North Carolina Division of Motor Vehicles, signed and notarized by both Brooks and Boulevard; vehicle registration information necessary to register the vehicle in Brooks's name; and various other fully executed paperwork that often accompanies the purchase

of an automobile, such as an arbitration agreement concerning the sale transaction, and various loan and insurance paperwork.

¶ 29 Boulevard and Kyle Ollis also submitted an affidavit from Ollis describing the sale of the Camaro to Nathaniel Brooks on 8 January 2015 and testifying that Daryl Brooks had no connection to Boulevard and was not an employee or agent of Boulevard at any time.

¶ 30 This undisputed evidence demonstrates, as a matter of law, that there was no agency relationship between Boulevard and Daryl Brooks. Although the formal transfer of title to the Camaro did not occur because Boulevard misplaced its copy of Nathaniel Brooks's driver's license—and thus was unable to complete the title transfer through the DMV—Boulevard relinquished authority and control over the Camaro when it completed the sale and released the Camaro to the buyer. Accordingly, the trial court properly entered summary judgment in favor of Boulevard and Ollis on all claims that depended on the agency theory of liability.[1]

II. Negligent entrustment theory

¶ 31 **[2]** We next examine the negligent entrustment claim. Biggs contends that she forecast sufficient evidence of the direct negligence of Boulevard based on the company's negligent entrustment of the Camaro to Daryl Brooks, who had a suspended license and a history of driving while impaired.

¶ 32 "Negligent entrustment occurs when the owner of an automobile entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver who is likely to cause injury to others in its use." *Thompson*, 122 N.C. App. at 346, 469 S.E.2d at 586–87.

¶ 33 There are two fatal flaws with this negligent entrustment theory. First, as explained above, undisputed evidence demonstrates that Boulevard relinquished authority and control over the Camaro when it completed the sale and title transfer paperwork on 8 January 2015, and that Daryl Brooks, when he drove the Camaro off Boulevard's lot, was doing so on behalf of his relative, Nathaniel Brooks, who was the buyer

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1. Biggs also argues that under "North Carolina General Statutes § 20-279.21(b)(2), the owner of the vehicle is liable for the negligent conduct of the driver where the victim's damages were 'caused by an accident and resulting from the ownership, maintenance or use of' the owner's vehicle."

Section 20-279.21 is not a liability provision; it is an insurance coverage provision. Biggs did not raise this insurance coverage issue in the trial court and cannot assert it for the first time on appeal. N.C. R. App. P. 10. We therefore reject this argument as unpreserved.

of the Camaro and now had authority and control over the vehicle. Thus, the undisputed evidence demonstrates that it was not Boulevard who entrusted Daryl Brooks with the use of the Camaro at that time, but instead Nathaniel Brooks, who had recently purchased the vehicle.

¶ 34 Moreover, the collision at issue in this case did not occur when Daryl Brooks drove the Camaro off Boulevard's lot following the sale. It occurred more than two months later, on 11 March 2015. There is no evidence in the record that Boulevard entrusted Daryl Brooks with the use of the Camaro—over which it relinquished authority and control two months earlier—at the time of the collision. Accordingly, the trial court did not err in granting summary judgment in favor of Boulevard and Ollis on the negligent entrustment claim as well.

III. Remaining claims, legal theories, and requests for damages

¶ 35 Having determined that the trial court properly entered summary judgment in favor of Boulevard and Ollis on all of Biggs's negligence and negligent entrustment claims, we need not address Biggs's other arguments on appeal—including issues of piercing the corporate veil and the award of costs—because these issues necessarily depended on rejection of the trial court's summary judgment ruling on the negligence claims. We therefore affirm the trial court's order in its entirety.

Conclusion

We affirm the trial court's order.

AFFIRMED.

Judges GRIFFIN and JACKSON concur.

GARY W. BLAYLOCK, PLAINTIFF
v.
AKG NORTH AMERICA, DEFENDANT

No. COA21-607

Filed 16 August 2022

1. Appeal and Error—jurisdiction to hear appeal—late notice of appeal—waiver by appellee

The Court of Appeals had jurisdiction to hear plaintiff's appeal from the trial court's order granting defendant's motion to dismiss where plaintiff filed his notice of appeal more than four months after entry of the trial court's order (which would normally be untimely pursuant to Appellate Rule 3(c)), because defendant failed to argue that the appeal was untimely or to offer proof of actual notice—indeed, defendant conceded that "Plaintiff timely appealed."

2. Jurisdiction—personal—lack of service—general appearance—removal to federal court

In a civil action filed by plaintiff against his former employer, the trial court did not err by dismissing plaintiff's claims for lack of personal jurisdiction based on plaintiff's failure to properly serve defendant with process where, by statute, defendant's filings requesting extensions of time did not constitute general appearances and where defendant's removal of the case to federal court (and filing of the required notice in the state court) also did not constitute a general appearance.

Appeal by Plaintiff from order entered 11 December 2020 by Judge John M. Dunlow in Alamance County Superior Court. Heard in the Court of Appeals 22 March 2022.

Gary Blaylock, Plaintiff-Appellant, pro se.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Zebulon D. Anderson and David R. Ortiz, for Defendant-Appellee.

JACKSON, Judge.

¶ 1 Plaintiff, Gary Blaylock, appeals from an order granting Defendant AKG North America, Inc.'s motions to dismiss under North Carolina Rules of Civil Procedure 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6). After careful review, we affirm.

I. Background

¶ 2 Gary Blaylock ("Plaintiff") was hired by AKG North America ("Defendant") in 2017. Plaintiff alleges that Defendant fired him for repeatedly complaining about the "sexual harassment, hostile work environment, and absence of Supervisors [sic] attempt to resolve the issues."

¶ 3 On 18 December 2019, Plaintiff filed his original complaint in Alamance County Superior Court and the summons was issued that day. On 23 December 2019, Plaintiff's attempt to serve Defendant failed when the Alamance County Sheriff returned the summons, noting that Defendant had not been served because "[t]he address given is in Orange Co[unty]." Thereafter, in the nearly 12 months this case was pending, Plaintiff never properly served Defendant. On 17 January 2020, Defendant removed the action to the Middle District of North Carolina based on federal claims alleged in Plaintiff's complaint, filing notices of removal in both the state and federal courts. In the notice of removal before the federal court, Defendant raised, *inter alia*, that Plaintiff had not effected service of process.

¶ 4 After removal, on 7 February 2020, Defendant sought an extension of time to answer or otherwise respond to the Complaint, explaining that it had not been served by Plaintiff. Plaintiff, however, filed a motion to remand the action back to state court. Defendant sought a second extension of time on 5 March 2020, again explaining that it had not yet been served by Plaintiff. Thereafter, Defendant filed a brief in opposition to Plaintiff's motion to remand, arguing that removal was proper for the reasons stated in its notice of removal, namely the federal claims in Plaintiff's complaint. However, in a hearing before the federal court, Plaintiff "disavow[ed] any reliance whatsoever on federal law in his Complaint," and the motion to remand was granted.

¶ 5 On 5 August 2020, Plaintiff mailed the complaint and summons to Defendant's litigation counsel, and the complaint was received by counsel on 10 August 2020. However, on 7 August 2020, Defendant had filed a motion to dismiss the original complaint under Rule 12(b). In response to this motion, Plaintiff amended his complaint on 12 August 2020. Defendant's litigation counsel received this amended complaint at some point between 12 August and 18 August 2020.[1] On 8 September 2020, Defendant filed a motion to dismiss the amended complaint on the same Rule 12(b) grounds.

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1. The certificate of service in the amended complaint indicates it was served by hand on 12 August, but Defendant alleges that its litigation counsel received the amended complaint by email on 17 August and by certified mail on 18 August 2020.

¶ 6 On 8 December 2020, a hearing was conducted on Defendant's motion to dismiss. Plaintiff filed a motion to amend his complaint again that same morning, but the trial court informed Plaintiff that the motion was not properly before the court. Defendant's counsel told the trial court that Plaintiff was on notice of the defective service because Defendant raised the absence of service in its filings, including in both motions for extension of time and the notice of removal in federal court, and "at all times we've made it clear to Mr. Blaylock and the Court . . . that there hasn't been service[.]" After hearing from both parties, on 11 December 2020, the trial court granted Defendant's motion to dismiss under Rules 12(b)(2), 12(b)(4), and 12(b)(5), and under 12(b)(6) as an "additional and independent basis for dismissal[.]"

¶ 7 Plaintiff appealed to this Court on 16 April 2021.

II. Jurisdiction

¶ 8 **[1]** We must first address whether we have jurisdiction to hear this appeal. Although Plaintiff's notice of appeal was filed greater than four months after the trial court's order was entered, which ordinarily would be untimely under North Carolina Rule of Appellate Procedure 3(c), the record on appeal does not indicate the date the order was served or contain a certificate of service.

¶ 9 It is true that "[t]he appellant has the burden to see that all necessary papers are before the appellate court." *Ribble v. Ribble*, 180 N.C. App. 341, 342, 637 S.E.2d 239, 240 (2006) (internal quotation and citation omitted). However, in similar circumstances, we have held that "where there is no certificate of service in the record showing *when* appellant was served with the trial court judgment, *appellee* must show that appellant received actual notice of the judgment more than thirty days before filing notice of appeal in order to warrant dismissal of the appeal." *In re Duvall*, 268 N.C. App. 14, 17, 834 S.E.2d 177, 180 (2019) (internal marks and citation omitted). Therefore, "unless the appellee argues that the appeal is untimely, and offers proof of actual notice, we may not dismiss." *Id.* (internal quotation and citation omitted). Here, Defendant-Appellee fails to argue the appeal is untimely or offer proof of actual notice. In fact, Defendant concedes that "Plaintiff timely appealed." Therefore, Defendant has waived Plaintiff's failure to include proof of service in the record, and this appeal is properly before us.

III. Discussion

¶ 10 Plaintiff argues that the trial court erred by (1) dismissing his claims for lack of personal jurisdiction, (2) dismissing his claims for failure to state a claim, (3) ruling on the merits of his claims after finding no

personal jurisdiction, (4) dismissing his complaint without considering lesser remedies, and (5) not allowing him to amend his complaint a second time. Because we hold that the trial court properly concluded that it did not have personal jurisdiction over Defendant and was required to dismiss the action, we need not address Defendant's other arguments.

A. Standard of Review

¶ 11 "This Court reviews questions of law implicated by a motion to dismiss for insufficiency of service of process *de novo*." *Patton v. Vogel*, 267 N.C. App. 254, 256, 833 S.E.2d 198, 201 (2019) (cleaned up). "On a motion to dismiss for insufficiency of process where the trial court enters an order without making findings of fact, our review is limited to determining whether, as a matter of law, the manner of service of process was correct." *Id.* at 257, 833 S.E.2d at 201 (internal quotation and citation omitted).

B. Dismissal for Lack of Personal Jurisdiction

¶ 12 **[2]** Plaintiff first argues that the trial court erred by dismissing his claims for lack of personal jurisdiction because personal jurisdiction was present and this argument was waived by Defendant. We disagree.

¶ 13 "Absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed." *Stewart v. Shipley*, 264 N.C. App. 241, 244, 825 S.E.2d 684, 686 (2019) (internal quotation and citation omitted). The methods for proper service of process are established by Rule 4 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, R. 4 (2021). A corporation may be served by mail or delivery to an officer, director, managing agent, or authorized service agent. *Id.* § 1A-1, R. 4(j)(6). Rule 4 must be "strictly enforced[,]" *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996), and "actual notice" cannot cure insufficient service of process, *Shipley*, 264 N.C. App. at 244, 825 S.E.2d at 686 ("While a defective service of process may give the defending party sufficient and actual notice of the proceedings, such actual notice does not give the court jurisdiction over the party.") (internal quotation and citation omitted)).

¶ 14 Plaintiff repeatedly admits that Defendant was not timely served in his brief.[2] Plaintiff takes the position that Defendant, who was unserved and therefore not required to respond to the suit, waived this

2. Plaintiff's brief contains the following: "AKG NORTH AMERICA . . . was not served[;]" "Defendant, AKG, had not been served[;]" and "[t]here is no indication that the Defendant was at any point brought into the action through service of process prior to removal; instead, it appears that the Defendant learned of its possible involvement through other means."

jurisdictional argument by appearing and filing motions in court. Specifically, Plaintiff argues that because Defendant (1) removed the case to federal court and (2) "sought and was granted two extensions of time, there must be a submission to the jurisdiction of the court in order for the court to grant any motion filed by the unserved Defendant[.]" We disagree with Plaintiff's position that that the filing of *any* motion or notice in court constitutes a waiver of service of process and consent to the court's jurisdiction.

¶ 15 Our General Statutes provide:

> A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person:
>
> (1) Who makes a general appearance in an action; provided, that obtaining an extension of time within which to answer or otherwise plead shall not be considered a general appearance[.]

N.C. Gen. Stat. § 1-75.7(1) (2021). Therefore, if a defendant makes a "general appearance," the trial court has personal jurisdiction, even if service of process was defective. *Alexiou v. O.R.I.P., Ltd.*, 36 N.C. App. 246, 247, 243 S.E.2d 412, 413, *cert. denied*, 295 N.C. 465, 246 S.E.2d 215 (1978). Here, as an initial matter and notwithstanding the fact that the motions were filed in federal court, Plaintiff's argument that filing for extensions of time constitutes a general appearance is expressly contradicted by the statute. Therefore, whether Defendant's removal of the case to federal court constituted a general appearance is primarily at issue.

¶ 16 Our "[c]ourts have interpreted the concept of 'general appearance' liberally." *Woods v. Billy's Auto.*, 174 N.C. App. 808, 813, 622 S.E.2d 193, 197 (2005). "[I]f the defendant by motion or otherwise invokes the adjudicatory powers of the court in any other matter not directly related to the questions of jurisdiction, he has made a general appearance and has submitted himself to the jurisdiction of the court whether he intended to or not." *Swenson v. Thibaut*, 39 N.C. App. 77, 89, 250 S.E.2d 279, 288 (1978). *See also Simms v. Mason's Stores, Inc.*, 285 N.C. 145, 151, 203 S.E.2d 769, 773 (1974) (holding that that if a party "invoked the judgment of the court for any [] purpose [other than contesting service of process,] he made a general appearance and by so doing he submitted himself to the jurisdiction of the court") (subsequently amended by statute in N.C. Gen. Stat § 1-75.7(1) to allow for extensions of time). "In short, an appearance for any purpose other than to question the jurisdiction of the court is general." *Billy's Auto.*, 174 N.C. App. at 813, 622 S.E.2d

at 197 (internal marks and citation omitted). *See also In re Blalock*, 233 N.C. 493, 504, 64 S.E.2d 848, 856 (1951) ("[A] general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person.").

¶ 17 In order to constitute a general appearance, "[t]he appearance must be for a purpose in the cause, not a collateral purpose." *Bullard v. Bader*, 117 N.C. App. 299, 301, 450 S.E.2d 757, 759 (1994) ("The court will examine whether the defendant asked for or received some relief in the cause, participated in some step taken therein, or somehow became an actor in the cause.") (citation omitted). In cases where this Court has found a general appearance, typically, the lower court's discretion was invoked by the moving party or the court's authority was assented to without objection. *See*, *e.g.*, *Barnes v. Wells*, 165 N.C. App. 575, 579-580, 599 S.E.2d 585, 588-589 (2004) (collecting cases); *Bumgardner v. Bumgardner*, 113 N.C. App. 314, 319, 438 S.E.2d 471, 474 (1994) (holding that the defendant generally appeared by participating in a divorce hearing, represented by counsel, without objection); *Bullard*, 117 N.C. App. at 301-02, 450 S.E.2d at 759 (holding that the defendant made a general appearance by submitting financial documents and a letter in a child support case because "Defendant submitted these documents for a purpose in the cause, and by so doing sought affirmative relief from the court on the issues of child support and visitation"); *Humphrey v. Sinnott*, 84 N.C. App. 263, 265, 352 S.E.2d 443, 445 (1987) (holding that the defendant's motion to transfer venue before asserting jurisdictional defenses "necessarily invoked the adjudicatory and discretionary power of the court as to the relief which he requested[,]" thereby constituting a general appearance). *But see Ryals v. Hall-Lane Moving & Storage Co.*, 122 N.C. App. 242, 248, 468 S.E.2d 600, 604 (1996) (holding where the defendants "promptly alerted plaintiff to the jurisdictional problems" in their answer and then "engaged in discovery[,]" "[l]aw nor equity permits such actions alone to be considered a general appearance" and the plaintiff "had ample opportunity to cure any jurisdictional defects and was not unfairly prejudiced by defendants' actions").

¶ 18 The parties do not point to any binding North Carolina precedent, nor have we found any, addressing whether removal to federal court is a general appearance. This is therefore an issue of first impression.

¶ 19 "Removal" is a federal process that allows a state civil action to be removed to a federal district court if it has original jurisdiction. 28 U.S.C. § 1441(a) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be

removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."). Therefore, removal of a state action to a federal court is necessarily a question of jurisdiction.

¶ 20 Importantly, under the federal statute, defendants can remove a case to federal court by their own election, if the case could have been filed in federal court to begin with, and therefore, state courts do not actually exercise any discretion or adjudicatory authority in determining whether a case is removed to federal court or not. Once a defendant files a notice of removal with the state court, all further proceedings take place in federal court. *See* N.C. Gen. Stat. § 1A-1, R. 12(a)(2) (2021) ("Upon the filing in a district court of the United States of a petition for the removal of a civil action or proceeding from a court in this State and the filing of a copy of the petition in the State court, the State court shall proceed no further therein unless and until the case is remanded."). *See also* 28 U.S.C. § 1446(d) ("Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.").

¶ 21 Because the right of removal is governed by federal statute, the federal court determines if original jurisdiction has been properly established by the defendant. *See Kerley v. Standard Oil Co.*, 224 N.C. 465, 466, 31 S.E.2d 438, 439 (1944) ("The Federal Courts have final authority in matters of removal[.]"). *See also Comm. of Road Improvement v. St. Louis Sw. Ry. Co.*, 257 U.S. 547, 557-58 (1922) ("The question of removal under the federal statute is one for the consideration of the federal court. It is not concluded by the view of a state court as to what is a suit within the statute."); *Carden v. Owle Constr., LLC*, 218 N.C. App. 179, 183, 720 S.E.2d 825, 828 (2012) ("Removal of an action from a state court to a federal court is governed by federal law. The determination of whether a case is removable is a determination left to the federal court.").

¶ 22 Therefore, a North Carolina trial court does not exercise any adjudicatory or discretionary power when presented with a notice of removal. Consequently, filing such notice cannot constitute a "general appearance" by a defendant. Because we conclude that Defendant's filing of a notice removal was not a general appearance, we reject Plaintiff's argument that service of process defects were waived by Defendant.

¶ 23 Plaintiff next argues that, even if service of process was not waived by Defendant, he eventually cured the defect in service by serving Defendant's litigation counsel. We disagree.

¶ 24 As described above, Plaintiff did not serve Defendant properly after filing the original complaint on 18 December 2019. The Sheriff returned the summons to Plaintiff on 23 December 2019, noting that Defendant was not served. After the case was remanded to state court, Plaintiff had a third-party mail the summons[3] and complaint to Defendant's litigation counsel on 5 August 2020, nearly eight months after the complaint was filed. Thereafter, Plaintiff amended his complaint on 12 August 2020 and served the amended complaint upon Defendant's litigation counsel on or around 12 August 2020. Plaintiff does not cite any binding authority to support his argument that Defendant's litigation counsel was authorized to accept service on behalf of Defendant. Nonetheless, even assuming Defendant's litigation counsel was a proper party upon which to effectuate service on the corporation, Plaintiff's argument is fruitless. Plaintiff's second attempt to serve the original complaint to Defendant's counsel was well beyond the time allotted to serve process or seek an extension under Rule 4(d). Therefore, Plaintiff failed to serve Defendant and then subsequently failed to cure the defective service in a timely manner.

C. Dismissal for Failure to State a Claim

¶ 25 Because we affirm the trial court's dismissal for lack of personal jurisdiction and improper service of process pursuant to Rules 12(b)(2) and (b)(5), conclusions of the trial court that were separate and independent bases for dismissing Plaintiff's claims, we need not address whether dismissal was also proper under Defendant's Rule 12(b)(6) argument.

IV. Conclusion

¶ 26 Because Defendant was never properly served with service of process and did not generally appear before the trial court, the trial court properly concluded that it did not have personal jurisdiction over Defendant and was thereby required to dismiss the action. The trial court's order is therefore affirmed.

AFFIRMED.

Chief Judge STROUD and Judge HAMPSON concur.

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3. Nothing in the record indicates whether the original summons was ever reissued.

GASTON COUNTY BOARD OF EDUCATION, PLAINTIFF
v.
SHELCO, LLC, S&ME, INC., BOOMERANG DESIGN, P.A. (F/K/A MBAJ ARCHITECTURE, INC.), AND CAMPCO ENGINEERING, INC., DEFENDANTS / CROSSCLAIM AND THIRD-PARTY PLAINTIFF
v.
HOOPAUGH GRADING COMPANY, LLC; HART WALL AND PAVER SYSTEMS, INC.; WORLDWIDE ENGINEERING, INC.; AND LINCOLN HARRIS, LLC, THIRD-PARTY DEFENDANTS

No. COA21-618

Filed 16 August 2022

1. Appeal and Error—interlocutory orders—motions to dismiss—multiple defendants—final judgment

In an action filed by a county board of education against four companies that worked on the development of a public high school, the trial court's interlocutory order dismissing with prejudice all claims against two defendants—and certifying that portion of the order for immediate review pursuant to Civil Procedure Rule 54(b)—constituted a final judgment, and therefore the appellate court had jurisdiction to hear the appeal. However, the portion of trial court's interlocutory order denying the other two defendants' motions to dismiss did not constitute a final judgment, and it did not affect a substantial right because it was an adverse determination on those defendants' statute of repose defenses, and therefore the appellate court dismissed their appeals.

2. Statutes of Limitation and Repose—statutes of repose—Rule 12(b)(6) dismissal—no burden on plaintiff—facts alleged in complaint—defective retaining wall

In an action filed by a county board of education arising from defendants' work on an allegedly defective retaining wall, the trial court erred by granting defendants' Rule 12(b)(6) motions to dismiss based on the statute of repose where the facts alleged in the complaint did not conclusively show that it was not filed within the applicable statute of repose—because plaintiff did not allege both the date when defendants performed their last "specific last act" and the date of the "substantial completion of the improvement" pursuant to N.C.G.S. § 1-50(a)(5)(a). Plaintiff had no burden at the pleading stage to allege facts showing that its complaint was filed within the statute of repose.

GASTON CNTY. BD. OF EDUC. v. SHELCO, LLC

[285 N.C. App. 80, 2022-NCCOA-550]

Appeal by Plaintiff and appeal by two of the Defendants, both from an order entered 13 May 2021 by Judge Athena F. Brooks in Gaston County Superior Court. Heard in the Court of Appeals 24 May 2022.

Tharrington Smith, L.L.P., by Patricia Ryan Robinson, Rod Malone and Colin A. Shive for the Plaintiff-Appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by Gerald A. Stein, II, Tyler A. Stull and M. Duane Jones for Defendant-Appellant (Shelco).

Parker Poe Adams & Bernstein LLP, by Collier R. Marsh and Daniel K. Knight, for Defendant-Appellant (Boomerang).

Ragsdale Liggett PLLC, by Sandra Mitterling Schilder and Amie C. Sivon, for Defendant-Appellee (S&ME).

Rosenwood, Rose & Litwak, PLLC by Nancy S. Litwak and Carl J. Burchette for Defendant-Appellee (Campco).

DILLON, Judge.

¶ 1 The four Defendants each moved to dismiss Plaintiff's claims based on the applicable statute of repose. The trial court granted the motions to dismiss filed by two of the Defendants. Plaintiff appeals from those portions of the order.

¶ 2 The trial court, however, denied the motions to dismiss filed by the other two Defendants. These two Defendants appeal from those portions of the order.

¶ 3 In its order, the trial court also allowed in part and denied in part Plaintiff's motion to amend its complaint to allege the existence of an agreement to toll the statute of repose for 18 months.

I. Background

¶ 4 Plaintiff, a county board of education, filed this action against four companies who worked on the development of a public high school. This appeal concerns primarily the motions to dismiss filed by Defendants pursuant to Rule 12(b)(6) of our Rules of Civil Procedure. Accordingly, for our review, we must accept the allegations pleaded in Plaintiff's complaint as true. *See Arnesen v. Rivers Edge*, 368 N.C. 440, 441, 781 S.E.2d 1, 3 (2015). Our review is therefore confined to the allegations in the complaint, which include the following:

¶ 5 Sometime prior to 2009, Plaintiff announced plans to develop a new public high school ("the Project"). To that end, Plaintiff entered separate contracts with three of the Defendants: Shelco, LLC, ("Contractor"); S&ME, Inc. ("Engineer"); and Boomerang Designs, P.A., ("Architect"). Architect entered a contract with the fourth Defendant, Campco Engineering, Inc., ("Subcontractor").

¶ 6 The Project included, in part, the construction of reinforced soil slopes and retaining walls (collectively the "Retaining Walls") around the proposed high school's athletic complex. Around 2011, construction of the Retaining Walls was completed. In 2012, Plaintiff became aware that portions of the Retaining Walls had cracked.

¶ 7 On 15 May 2013, Plaintiff, Contractor, and Architect "signed a certificate of substantial completion" for the *entire Project*. By signing the certificate, Contractor and Architect represented that the Project (including the Retaining Walls) was essentially completed. Engineer and Subcontractor did not sign the certificate.

¶ 8 In the fall of 2018, Plaintiff, along with Contractor, Engineer, Architect and Subcontractor (along with some third-party defendants) executed a tolling agreement (the "Tolling Agreement") at Plaintiff's request with a stated effective date of 1 March 2019 until 15 September 2020.

¶ 9 Then in November 2020, Plaintiff filed suit against all four Defendants, alleging that the Retaining Walls were defective. Defendants answered and moved to dismiss pursuant to Rule 12(b)(6), based in part on the six-year statute of repose. Plaintiff then moved to amend its complaint to allege that all parties had entered the Tolling Agreement, effective 1 March 2019 to 15 September 2020.

¶ 10 After a hearing on all motions, the trial court entered its order (1) allowing Subcontractor's and Engineer's respective Rule 12(b)(6) motions to dismiss based on the statute of repose (and dismissing Plaintiff's motion to amend as to its claims against Subcontractor and Engineer, as moot); and (2) denying Contractor's and Architect's respective Rule 12(b)(6) motions to dismiss based on the statute of repose (allowing Plaintiff's motion to amend its complaint as to its claims against Contractor and Architect). The trial court reasoned that the May 2013 certificate executed by Plaintiff, Contractor, and Architect, paired with the Tolling Agreement, placed Plaintiff's claims against Contractor and Architect within the 6-year statute of repose. However, since Engineer and Subcontractor did not sign the 2013 certificate, the Tolling Agreement would not place Plaintiff's claims against them within the statute of repose.

¶ 11 Plaintiff appealed the Rule 12(b)(6) dismissals and denial of its motion to amend its complaint regarding its claims against Engineer and Subcontractor. Contractor and Architect appealed the denial of Rule 12(b)(6) motions on Plaintiff's claims against them.

II. Appellate Jurisdiction

¶ 12 **[1]** This appeal is from an interlocutory order, as that order did not entirely dispose of the case. *Stanford v. Paris*, 364 N.C. 306, 311, 698 S.E.2d 37, 40 (2010). Appeals from interlocutory orders are only allowed in limited circumstances. *Id.* at 311, 698 S.E.2d at 40. Rule 54(b) of our Rules of Civil Procedure allows an immediate appeal from an interlocutory order from any part of an order which constitutes a "final judgment as to one or more but fewer that all the claims or parties[,]" so long as the trial court in its judgment determines "there is no just reason for delay" in taking the appeal. N.C. Gen. Stat. § 1A-1, Rule 54(b).

¶ 13 Here, the trial court's order constitutes a final judgment with respect to Subcontractor and Engineer, as the order dismisses all claims against these Defendants with prejudice. Additionally, the trial court certified its order dismissing these claims for immediate review under Rule 54(b), determining "there was no just reason for delay." Accordingly, we have jurisdiction to consider Plaintiff's appeal of the portion of the trial court's order allowing Subcontractor's and Engineer's respective motions to dismiss and mooting its motion to amend with respect to these Defendants.

¶ 14 However, there has been no final judgment with respect to Plaintiff's claims against Contractor and Architect. Rule 54(b), therefore, does not provide an avenue for immediate review of the portion of the trial court's order denying these Defendants' respective motions to dismiss. Further, we have held that an adverse determination regarding a defendant's statute of repose defense does not affect a substantial right. *Lee v. Baxter*, 147 N.C. App. 517, 520, 556 S.E.2d 36, 38 (2001). Accordingly, we dismiss these Defendants' appeals.

III. Analysis

¶ 15 **[2]** We now address the merits of Plaintiff's appeal concerning the trial court's dismissal of its claims against Subcontractor and Engineer. We review Rule 12(b)(6) dismissals *de novo*. *Arnesen*. 368 N.C. at 448, 781 S.E.2d at 8.

¶ 16 In its ruling, the trial court relied on the six-year statute of repose found in N.C. Gen. Stat. § 1-50(a)(5)(a) (2017) in deciding to grant dismissal as to Defendants Engineer and Subcontractor. This statute of

repose provides that "[n]o action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from *the later of*

> [1] the specific last act or omission of the defendant giving rise to the cause of action or
>
> [2] substantial completion of the improvement . . . or specified area or portion thereof (in accordance with the contract[.]"

Id. (emphasis added).

¶ 17 It is Plaintiff who "has the burden of *proving* that a statute of repose does not defeat the claim." *Head v. Gould Killian*, 371 N.C. 2, 11, 812 S.E.2d 831, 838 (2018) (emphasis added). Accordingly, Plaintiff would have the burden *at a Rule 56 summary judgment* hearing to provide evidence that (s)he filed her claim within the applicable statute of repose. *See Id.* at 12, 812 S.E.2d at 839.

¶ 18 However, as explained below, based on our jurisprudence, a plaintiff has no burden at the pleading stage to allege facts showing that its complaint was filed within the applicable statute of repose. That is, it is generally inappropriate to grant a defendant's Rule 12(b)(6) motion to dismiss a complaint merely because it failed to *allege* facts showing that it was filed within the applicable statute of repose. A Rule 12(b)(6) dismissal based on the statute of repose would only be appropriate if the complaint otherwise alleges facts *conclusively* showing that it was not filed within the applicable statute of repose. And, here, since Plaintiff did not allege both the dates when any Defendant performed its last "specific last act" and the "substantial completion of the improvement," dismissal here was inappropriate.

¶ 19 In 1994, our Supreme Court reiterated its long-standing rule that "[a] statute of limitations or repose defense may be raised by way of a motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (1994) (citations omitted).

¶ 20 Three years later in 1997, our Supreme Court adopted an opinion in a dissent from our Court explaining that a Rule 12(b)(6) dismissal is inappropriate where based on a plaintiff's simple failure to plead facts showing that its complaint was filed within the statute of repose. Specifically, the Supreme Court reversed the opinion from our Court "[f]or the *reasons* stated in the dissenting opinion by Judge Greene[.]" *Richland Run v. CHC Durham*, 346 N.C. 170, 484 S.E.2d 527 (1997) (emphasis added).

¶ 21 In *Richland*, the trial court granted a defendant's Rule 12(b)(6) motion but considered other evidence concerning some of the defendant's arguments. The trial court made two holdings. First, the trial court held that *the complaint itself* failed to allege facts showing it had been filed within the statute of repose. Second, the trial court, *considering evidence outside the complaint*, determined that the complaint should be dismissed on an alternate basis unrelated to the statute of repose. Our Court affirmed both holdings. Judge Greene, however, dissented.

¶ 22 Judge Greene reasoned that the complaint should not have been dismissed "on the basis that the plaintiff failed to specifically plead compliance with the applicable statute of repose [being G.S. 1-50(a)(5)]." *Richland Run v. CHC Durham*, 123 N.C. App. 345, 352, 473 S.E.2d 649, 654 (1996) (J. Greene dissenting). Judge Greene explained that, while a plaintiff has the burden *to prove* compliance with the statute of repose, there is no requirement that a plaintiff *plead* facts in the complaint showing that its claim was filed within the statute of repose:

> Our courts have repeatedly held that the plaintiff has the burden of *proving* the condition precedent that its cause of action is brought within the applicable statute of repose. I do not read Rule 9(c) [regarding the pleading of conditions precedent] as requiring the *pleading* of conditions precedent.

Id.

¶ 23 We note that, as our Supreme Court has explained, statutes of *limitations* and statutes of *repose* are different: where statutes of limitations "are clearly procedural, affecting the remedy directly and not the right to recover[,] [t]he statute of repose . . . acts as a condition precedent to the action itself[.]" *Boudreau v. Baughman*, 322 N.C. 331, 340, 368 S.E.2d 849, 857 (1988). Indeed, Rule 8 of our Rules of Civil Procedure recognizes that a failure to file within the applicable statute of limitations is an affirmative defense which must be pleaded. Failing to file within the applicable statute of repose, however, is not listed as an affirmative defense in Rule 8 but rather is considered a "condition precedent" under Rule 9(c).[1]

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1. Judge Greene also noted that "even if Rule 9(c) is construed to require pleading a condition precedent, [I conclude that the complaint's] allegations sufficiently comply with Rule 9." *Id.* at 353, 473 S.E.2d at 654. This reason is clearly *dicta*, as he expressly determined that Rule 9(c) did not require pleading facts to show that the complaint was filed within the statute of repose.

¶ 24 In any event, Judge Greene further held that the trial court should not have dismissed the complaint based on the court's alternate reason which was unrelated to the statute of repose. *Richland*, 123 N.C. App. at 353, 473 S.E.2d at 654.

¶ 25 We conclude that *both* holdings by Judge Greene were necessary to support his dissent. Since dismissal would have been proper under either theory advanced by the defendants and relied upon by the trial court, Judge Greene had to disagree on *both* points to reach his conclusion that the trial court's order should be reversed. Therefore, our Supreme Court necessarily adopted *both* of Judge Greene's reasons in reversing our Court's decision.[2]

¶ 26 Here, Plaintiff did not allege any date when substantial completion occurred. Therefore, a 12(b)(6) dismissal was inappropriate.

¶ 27 "Substantial completion" is defined as "that degree of completion of a project, improvement *or specified area or portion thereof* (*in accordance with the contract* . . .) upon attainment of which the owner can use the same for the purpose for which it was intended. The date of substantial completion may be established by written agreement." N.C. Gen. Stat.§ 1-50(a)5.c. (emphasis added).

¶ 28 The question before us is whether Plaintiff alleged an act, along with the date the act was performed, which would constitute "substantial completion" as contemplated under Section 1-50(a)5.c. Defendants argue that the completion of the Retaining Walls, which Plaintiff alleged occurred in 2011, constituted the act of substantial completion. Defendants essentially argue that we need not look to when the entire improvement, e.g., the Project, was substantially completed. Rather, we are to look to when the "specified area or portion thereof," i.e., the Retaining Walls, were substantially completed.

¶ 29 Neither party cites a North Carolina case which provides a clear guide on how to interpret the definition of "substantial completion" for a project that has several components. The plain language of the statute suggests that the date of substantial completion occurs with respect to a particular contractor when the part of the improvement the contractor was hired to provide services for has reached "a degree of completion"

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2. Even if *either* holding could have supported Judge Greene's resolution of the case, both holdings would still be binding. As our Supreme Court has recognized, "where a case actually presents two or more points, any one of which is sufficient to support [a] decision, but the reviewing Court decides all points, the decision becomes a precedent in respect to every point decided[.]" *Hayes v. Wilmington*, 243 N.C. 525, 537, 91 S.E.2d 673, 682 (1956).

where "the owner can use the same for the purpose for which it was intended." *Id*. For instance, when an owner contracts with a company to build the foundation of a house, the statute of repose begins when the foundation is completed such that the owner can contract with someone else to build the frame, etc. The entire house need not be complete for the statute of repose to run against the contractor hired to build the foundation. Of course, if one contractor is hired to build the entire house, then the statute of repose to sue the contractor for laying a bad foundation would not start until the entire house was completed, as the contractor contracted to build the entire house. This interpretation was followed by the Supreme Court of South Carolina considering a statute – S.C. Code Ann. § 15-3-630 – which provides a definition of "substantial completion" identical to the definition found in Section 1-50(a)5.c. *See Lawrence v. General Panel*, 425 S.C. 398, 822 S.E.2d 800 (2019).

¶ 30 Turning to the complaint at issue, Plaintiff alleged that it entered a contract with Defendant Engineer "to provide geotechnical engineering service for the Project." There is no allegation that Engineer was hired just to perform services for the Retaining Wall only. Further, there is no allegation when the entire Project was substantially completed. Finally, there is no allegation that the date was "established by written agreement" between Plaintiff and Engineer. N.C. Gen. Stat. § 1-50(a)5.c. That is, though Plaintiff alleges it had executed a "certificate of substantial agreement" with Contractor and Architect on 15 May 2013, there is no allegation that Engineer was a party to that "certificate," much less that by signing the certificate Plaintiff was agreeing that the project was substantially completed as of 15 May 2013. Accordingly, we hold that the trial court erred in granting Engineer's Rule 12(b)(6) motion to dismiss.

¶ 31 Regarding the claims against the Subcontractor, Plaintiff merely alleged that Subcontractor "was the civil engineering subcontractor to Architect[,]" without any allegation that Subcontractor was hired to work on the Retaining Wall alone. Additionally, Subcontractor was not a party to the certificate of substantial completion discussed in the preceding paragraph. Plaintiff entered into a contract with Architect "to provide architectural [and other] services for the 'Project.' " Accordingly, we hold that the trial court erred in granting Subcontractor's Rule 12(b)(6) motion, *based on the statute of repose*.[3]

¶ 32 Finally, we vacate the trial court's dismissal of Plaintiff's motion to amend its complaint against Engineer and Subcontractor. The trial court

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3. Because Defendants failed to raise any other ground for dismissal, we express no opinion as to whether they would be entitled to dismissal on some other ground.

so ruled based on its conclusion that the motion was moot, based on its erroneous grant of Engineer's and Subcontractor's respective motions to dismiss. On remand, the trial court should exercise its discretion on Plaintiff's motion. We note, though, even if Plaintiff's motion is denied, all parties are free to offer evidence concerning this agreement at a hearing on a motion for summary judgment.

III. Conclusion

¶ 33 We reverse the trial court's grant of Engineer's and Subcontractor's respective motions to dismiss under Rule 12(b)(6) based on the statute of repose. We vacate the trial court's dismissal of Plaintiff's motion to amend with respect to Engineer and Subcontractor. We dismiss the appeals of Contractor and Architect for lack of appellate jurisdiction.

REVERSED IN PART, VACATED IN PART, DISMISSED IN PART & REMANDED.

Chief Judge STROUD and Judge GRIFFIN concur.

IN THE MATTER OF A.D.

No. COA22-118

Filed 16 August 2022

Termination of Parental Rights—grounds for termination—failure to make reasonable progress—findings of fact—unsupported by evidence

The trial court improperly terminated a father's parental rights in his daughter for failure to make reasonable progress to correct the conditions leading to the child's removal (N.C.G.S. § 7B-1111(a)(2)), where several of the court's key factual findings were unsupported by the evidence, which showed that—although the father did not fully satisfy all elements of his family services case plan—he made adequate progress toward each element where he obtained stable full-time employment, suitable housing, and reliable transportation (by purchasing a vehicle and taking the necessary steps to have his driver's license reinstated); acted appropriately during visits with his daughter, which he attended more consistently after moving across the state to be closer to her; took parenting classes and signed up for additional classes on his own initiative; completed

substance abuse and mental health assessments; made efforts to schedule therapy sessions that accommodated his work schedule; and submitted to multiple drug tests, all of which came out negative or inconclusive.

Appeal by Respondent from an order entered 13 September 2021 by Judge David V. Byrd in Ashe County District Court. Heard in the Court of Appeals 8 June 2022.

Peter Wood, for the Respondent-Appellant.

Reeves, DiVenere, Wright, Attorneys at Law, by Anné C. Wright, for Ashe County Department of Social Services, Petitioner-Appellee.

Paul W. Freeman, Jr. and Matthew D. Wunsche, for the Guardian ad Litem.

WOOD, Judge.

¶ 1 Respondent-Father ("Father") appeals an order terminating his parental rights to his minor child, A.D. ("Allison")[1], on the ground of willful failure to make reasonable progress to correct the conditions that led to his child's removal from his care. *See* N.C. Gen. Stat. § 7B-1111(a)(2) (2021). Because we hold the evidence does not support all the findings of fact and the findings of fact do not support the trial court's conclusion that grounds existed to terminate Father's parental rights, we reverse the order of the trial court.

I. Factual and Procedural Background

¶ 2 Respondent-Mother ("Mother")[2] gave birth to Allison on August 5, 2019. Mother was unmarried at the time of Allison's birth. Before Allison was born, Mother was in a relationship with Father for approximately three or four months prior to becoming pregnant and for one or two months after learning she was pregnant. According to Mother, the relationship ended due to Mother's concerns that Father suffered from mental health issues and what she described as aggressiveness. Mother told Father that she was pregnant prior to Allison's birth and contacted him from the hospital after giving birth.

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1. We use pseudonyms to protect the child's identity and for ease of reading.

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

¶ 3 Seven days after Allison's birth, Ashe County Department of Social Services ("DSS") filed a petition alleging Allison to be neglected because the child tested positive for barbiturates at birth and Mother tested positive for amphetamines for which she was not prescribed. Mother admitted to using amphetamines and smoking methamphetamine during her pregnancy. The petition did not list a father for Allison. DSS was awarded non-secure custody of Allison. Two days later, at a hearing for continued non-secure custody, Mother testified that Allison's father may be Father or another individual, and subsequently, the trial court ordered Father to submit to DNA testing. On this same day, Mother provided DSS with a phone number to reach Father, but the phone number was disconnected. DSS was later able to locate Father through other means and served Father with an order to submit to DNA testing on September 12, 2019 while he was in the custody of the Rowan County Jail. According to Ms. Charity Ballou ("Ms. Ballou"), the foster care social worker assigned to work with Allison, DSS did not make contact with Father until mid to late October 2019. Father completed DNA testing on November 4, 2019. On November 8, 2019, Allison was adjudicated neglected based upon Mother's substance abuse. The order did not contain any findings relating to the putative father of the child. On November 21, 2019, Father received his paternity test results, which concluded the probability of Father's paternity was 99.99%.

¶ 4 During the January 10, 2020 review hearing, paternity for Allison was established. The trial court granted Father supervised, bi-weekly, one-hour visits with Allison. At the time of the hearing, Father lived with his girlfriend and her parents in Rockwell; was employed with Premier Heating and Air in Rowan County; and did not hold a valid driver's license but did have a vehicle.[3] The trial court found that "[a]t this point [Father] is not participating in a family service case plan and has just recently become involved in the child's life." The trial court concluded that the best primary permanent plan of care for Allison was reunification with a secondary plan of adoption. On January 23, 2020, Father entered into a family service case plan with DSS and agreed to: maintain steady employment, obtain stable housing and transportation, communicate with DSS, take parenting classes, and attend visits with Allison.

¶ 5 At a permanency planning review hearing on February 28, 2020, the trial court found that Father was living in Rockwell, North Carolina

3. We take judicial notice that the distance between Father's residence in Rowan County and Allison's foster placement in Ashe County was approximately 105 miles.

with his girlfriend[4], but was attempting to relocate to Ashe County to live near Allison, including applying for employment in that county at Nations Inn and construction jobs. The court also found that Father did not have a valid driver's license; was working with a day labor company part-time in Rowan County; had made himself available to the court, DSS, and GAL; and had signed up for a parenting program in Rowan County. In terms of visitation, the trial court found that Father had difficulty attending his visits with Allison because of lack of transportation and had attended three visits at the time of the hearing. The trial court modified Father's supervised visitation to occur once per week for one hour and ordered reasonable efforts towards reunification with Mother and Father be made to eliminate the need for Allison's placement in foster care.

¶ 6 Father's case plan was later amended in March 2020. DSS communicated with Father to discuss "some ongoing concerns, based on collateral information that there was potentially some substance use and mental health issues." Subsequently, Father agreed to take a substance use assessment through Daymark, follow any resulting recommendations, and submit to random urine drug screens.[5] DSS then made referrals to different Daymark locations based upon the counties in which he was living between March and December 2020: namely, Rowan County, Ashe County, and Watauga County.

¶ 7 On May 16, 2020, Father entered into an agreement to pay child support for Allison in the amount of $50 per month and $25 per month towards arrears owed beginning June 1, 2020.

¶ 8 At a May 22, 2020 permanency plan review hearing, two months into the pandemic, the trial court found that Father continued to live in Rockwell at his girlfriend's parent's residence. In terms of his employment, the trial court found that he was currently unemployed but seeking employment, having previously "worked for the Coffee House Restaurant (1-2 weeks), a day labor company, [and] more recently for McDonald's (for 3-4 weeks)." Father was living off the stimulus payments, due to the COVID-19 pandemic, he and his girlfriend received. The court found that Father had 1) paid all fines to have his driver's license restored; 2) completed parenting classes and obtained certification of

4. The record refers to Father's girlfriend as his wife. Father and girlfriend never married.

5. We note that other than in the trial court's TPR order, the family service case plan's requirement for Father to submit to random urine drug screens does not appear in any DSS report or prior order of the trial court.

his completion along with his girlfriend; and 3) made himself available to the court, DSS, and GAL. Because Father resided with his girlfriend and her family, the trial court found she too needed to enter into a family service case plan with DSS. The trial court also found that since the beginning of the COVID-19 pandemic, Father had participated in weekly supervised video conference calls with his daughter via Zoom, which had gone well, and had sent Easter presents to his daughter. The trial court determined that Father was participating and cooperating with the family service case plan and continued the primary permanent plan of care being reunification with a secondary permanent plan of care being adoption. Shortly after the review hearing, in approximately June or July 2020, Father ended his relationship with his girlfriend because he did not feel that she was on "the same page . . . as far as . . . providing for [Allison] and assisting [him] and [his] efforts to have [Allison] in [his] life."

¶ 9 A permanency plan review hearing was held on September 11, 2020. At the time of the hearing, Father lived at the Hospitality House located in Boone, North Carolina, and "for a period of time had to stay in a tent on the grounds of the Hospitality House due to COVID-19 restrictions." Father resubmitted an application to HUD for housing allowances, opened a bank account, and saved money for housing. In terms of employment, the court found that Father had worked for a construction company in Boone for approximately two months. Father also received advice and help from the Director of the Hospitality House to build a support network. At the time, Father was on probation for larceny and was required to pay probation fees. The court also found that transportation was a barrier for Father and "[i]t would be easier for him to visit [Allison] every other week rather than once weekly." Father would not be eligible to apply for reinstatement of his driver's license until November 2020. From July 21, 2020 until August 6, 2020, Father was incarcerated.

¶ 10 On August 24, 2020, Father submitted to a drug screen, which according to the court, "was inconclusive due to the creatinine level being lower than normal. This could be due to kidney failure, or he tampered with the drug screen." A substance abuse assessment for Father was scheduled on August 26, 2020, but he did attend that appointment or a second appointment.

¶ 11 After the May 2020 hearing, Father attended five (one in June, two in July, and two in August) of the ten scheduled visits with Allison between the May and September hearings. According to Father, he and Allison bonded during these visits and having his daughter "helped him to want

to do better." Father was also under order to pay child support, and accordingly, paid $300 towards his child support obligation on the day of the hearing. Ms. Ballou testified that during this period of time, there were "times where phone numbers would change, where we were unable to make contact, but overall, I would say that [Father] has been – at least once per month I have been able to somehow make contact with him." Ms. Ballou further reported that during this time, "there have been times in which he has been difficult to locate or that there have been many attempts made to get that one contact in per month and then there have been other months where he has been very communicative where I have -- I would say -- regular contact with him." The court changed the primary permanent plan of care for Allison to adoption, with a secondary plan of care of reunification with her parents.

¶ 12 On December 9, 2020, DSS filed a petition to terminate Father's and Mother's parental rights to Allison. The petition, as it pertained to Father, stated that: Allison was adjudicated as neglected; Father failed to pay child support and willfully left Allison in placement outside of the home for more than twelve months without showing to the satisfaction of the court that reasonable progress was made; the trial court at no time had determined that Father was capable of providing a safe and stable home for Allison; and the trial court never approved unsupervised visitations between Allison and Father.

¶ 13 On February 5, 2021, Mother relinquished her parental rights to Allison. The trial court conducted the hearing on DSS's petition to terminate Father's parental rights on May 3, 2021.

¶ 14 At the termination hearing, Ms. Ballou testified that Father's communication with DSS was sporadic, there had been times in which Father was difficult to locate as he moved frequently and allegedly had issues with his phones being disconnected, but that she was somehow able to contact him once per month. Ms. Ballou reported that while Father was supposed to maintain contact with her on a weekly basis, keep her informed of any changes in his residence or contact information, and notify her of changes in his employment, he only did so "[a]t times, but not at others."

¶ 15 According to Ms. Ballou, since Allison entered the care of DSS, Father had lived at eight different addresses, although not all of them had been verified by DSS. At the time of the January 10, 2020 review hearing, Father and his girlfriend were living in Rowan County and staying with his girlfriend's parents. At the February 28, 2020 permanency planning hearing, it was determined that Father and his girlfriend had

moved to Watauga County and lived at a homeless shelter. Shortly after, Father lived in a hotel room paid for by DSS, and DSS purchased a tent for Father. In May 2020, Father lived at the Hospitality House in Watauga County. Father was incarcerated briefly from July to August 2020 and remained on supervised probation until January 2021. After his release from incarceration, and upon receiving HUD assistance, Father began renting a two-bedroom, single bathroom home on February 15, 2021, for a one-year lease period. At the time of the termination hearing, Father still resided at the rental home. Ms. Ballou testified that the home was well-kept; well stocked with food; and included a room for Allison set up with provisions such as clothes, diapers, wipes, shoes, toys, a highchair, and a stroller.

¶ 16 The trial court found that Father "has had various jobs but is currently self-employed working for his neighbor." When Father's case plan was developed on January 23, 2020, Father engaged in odd jobs such as in construction and general labor, but never provided verification of employment to DSS. Ms. Ballou testified that in the Spring of 2020, DSS helped Father obtain employment at a local restaurant, but he worked there only for two or three days. In May 2020, Father reported he was working odd jobs that provided him with some income. In July 2020, Father found a full-time job working construction, was able to save money for housing, and opened a bank account. Father's income for the year of 2020 was $3,400.00. At the time of the termination hearing, Father was self-employed, working for his neighbor doing jobs in carpentry and construction. Ms. Ballou testified Father furnished verification of his employment the week before the termination hearing and provided nine bank deposit slips for jobs worked from December 2020 to March 2021. At the termination hearing, Father testified that he earned approximately $1,000 a week and had no difficulty paying his house rent, which was $450 per month after the $200 HUD monthly assistance.

¶ 17 As required by his case plan, Father completed a parenting program in May 2020. In terms of visitation, the trial court found that Father was approved to have two supervised visitations per month with Allison, for two hours at a time. However, at a hearing on September 11, 2020, Father requested that the visits be reduced to once per month due to his work schedule, but that change was not implemented. The trial court found that since visitation began in January 2020, Father only missed a total of seven visits during the time Allison was in foster care. Ms. Ballou clarified during the termination hearing that these "missed" visits were primarily early in the case and that his visits had become more stable over time. At a May 22, 2020 permanency planning review hearing, the

trial court found that since the COVID-19 pandemic, he had participated in weekly video conference calls via Zoom with Allison, which had gone well.

¶ 18 Since the September 11, 2020 permanency planning review hearing, Ms. Ballou testified that Father has been consistent in making his visits with Allison, "has been appropriate in his interactions" with his daughter, and since December, has provided food and other small gifts for Allison during the visits. Father testified, and Ms. Ballou confirmed, that he has been in contact with the Children's Council in Boone to learn about what would be developmentally appropriate for Allison's age group and "how to become a better father." Father also testified that he signed up for two additional parenting classes through the Children's Council, which were to start in Fall 2021.

¶ 19 In accordance with his case plan, Father paid the necessary fees to restore his driver's license on March 24, 2021. Pursuant to Father's parenting plan regarding issues of substance abuse and mental health, Ms. Ballou stated she first made a referral for Father's mental health and substance abuse assessment in March 2020. Referrals were requested for Father in three different counties based upon where he resided throughout the life of the case so as to make assessments and any follow-ups more convenient for him. Father completed a virtual assessment on December 29, 2020. When asked at the termination hearing why Father took nine months to complete the assessment, Father testified that: "It's been a hard past year or so" as the COVID-19 pandemic occurred during this time which affected scheduling and transportation. Father at times lacked proper transportation; was on probation during part of this period of time; "was having to take off work quite a bit and, unfortunately, it did take some time to get the assessment from Daymark"; underwent a learning process in emailing documentation to Daymark; experienced "some phone technology issues"; and had his phones disappear or break due to his line of work.

¶ 20 As a result of the assessment, Father was diagnosed with borderline personality disorder, and it was recommended that he engage in individual therapy and DBT[6] group therapy weekly. Ms. Ballou testified

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6. Dialectical Behavioral Therapy or DBT is an "evidence-based treatment that brings together cognitive-behavioral strategies and acceptance-validation strategies to help individuals with intense emotional suffering and dysfunctional behaviors" and has been used in the treatment of "substance abuse, disordered eating, anger, depression, anxiety, and interpersonal difficulties." *Dialectical Behavioral Therapy*, UNC Sch. of Soc. Work, https://cls.unc.edu/upcoming-programs-2016-2017/clinical-lecture-institutes/dbt/ (last visited July 7, 2022).

that Father attended a therapy session on January 4, 2021. While Father signed up for three group sessions in April 2021, he was a "no-show" for all sessions. Father was requested to submit to five drug screens and submitted to two of them. One of these tests was negative and the other was inconclusive. Father did not take three of the drug screens because, when DSS asked Father at visitations with Allison to take them, he stated, "he could not stay or his ride could not wait long enough for him to submit to a screen." At the termination hearing, Ms. Ballou testified that because Father did not reside in Ashe County, it was difficult to find locations "to have him go on in and screen. So, there have not been very many tests requested due to that fact."

¶ 21 Father's counsel questioned Ms. Ballou regarding her knowledge of a letter written by Father's former probation officer which was previously submitted at a February 12, 2021 hearing.[7] The letter in question stated that Father had submitted to two drug screens on December 21, 2020 and January 20, 2021, and both results were negative.

¶ 22 In the termination order, the trial court found that Allison remained in the care and custody of DSS continuously since August 12, 2019, and at the time of the termination hearing, had been in the care and custody of DSS for approximately 21 months. The trial court also found that although Father had made some progress on his case plan, his progress "has not been adequate to meet the needs standing in his way to provide proper and adequate care for [Allison]." Therefore, the trial court concluded grounds existed for the termination of Father's parental rights based on Father willfully leaving Allison in foster care or placement outside the home for more than 12 months "without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of [Allison]." At disposition, the court further concluded that it was in Allison's best interests to terminate Father's parental rights. The termination order was entered on September 13, 2021, and Father entered written notice of appeal on September 23, 2021.

II. Discussion

¶ 23 Father's sole contention on appeal is that the trial court committed prejudicial error by terminating his parental rights on the ground of willfully leaving Allison in foster care, when this is not supported by clear, cogent, and convincing evidence. We agree.

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7. The record before us does not contain a copy of the February 12, 2021 permanency planning review hearing. However, this review hearing and the evidence that was submitted therein is consistently referred to in the TPR hearing's transcripts.

A. Standard of Review

¶ 24 Termination of parental rights actions consist of a two-stage process: adjudication and disposition. N.C. Gen. Stat. §§ 7B-1109, 7B-1110 (2021); *In re A.U.D.*, 373 N.C. 3, 5, 832 S.E.2d 698, 700 (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."[8] *In re A.U.D.*, 373 N.C. at 5, 832 S.E.2d at 700 (quoting N.C. Gen. Stat. § 7B-1109(f)). We review a trial court's adjudication that grounds exist to terminate parental rights to determine "whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings support the trial court's conclusions of law." *In re A.B.C.*, 374 N.C. 752, 760, 844 S.E.2d 902, 908 (2020) (citation omitted). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (cleaned up). "Clear, cogent, and convincing evidence is evidence which should fully convince." *North Carolina State Bar v. Talford*, 147 N.C. App. 581, 587, 556 S.E.2d 344, 349 (2001) (cleaned up), *aff'd as modified*, 356 N.C. 626, 576 S.E.2d 305 (2003).

¶ 25 In making this determination, "[u]nchallenged findings are deemed to be supported by the evidence and are binding on appeal." *In re K.N.K.*, 374 N.C. 50, 53, 839 S.E. 2d 735, 738 (2020) (cleaned up). We are bound by the trial court's findings "where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984) (citations omitted). "On appeal, this Court may not reweigh the evidence or assess credibility." *In re K.G.W.*, 250 N.C. App. 62, 67, 791 S.E.2d 540, 543 (2016) (citing *Kelly v. Duke Univ.*, 190 N.C. App. 733, 738-39, 661 S.E.2d 745, 748 (2008)). Additionally, we review "only those findings necessary to support the trial court's determination that grounds existed to terminate [Father's] parental rights." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58-59 (2019) (citation omitted).

¶ 26 Pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), a trial court may terminate parental rights upon a finding that "[t]he parent has willfully left

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8. While this Court reviews a trial court's conclusion that grounds exist to terminate parental rights under N.C. Gen. Stat. § 7B-1111(a) to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law, *In re M.P.M.*, 243 N.C. App. 41, 45, 776 S.E.2d 687, 690 (2015), the statute specifies that the burden in termination proceedings "is on the petitioner or movant to prove the facts justifying the termination by clear and convincing evidence." N.C. Gen. Stat. § 7B-1111(b).

the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2); *In re A.M.*, 377 N.C. 220, 2021-NCSC-42, ¶ 16.

¶ 27 A finding that a parent acted willfully for purposes of section 7B-1111(a)(2) "does not require a showing of fault by the parent. A [Father's] prolonged inability to improve [his] situation, despite some efforts in that direction, will support a finding of willfulness regardless of [his] good intentions, and will support a finding of lack of progress sufficient to warrant termination of parental rights." *In re B.J.H.*, 378 N.C. 524, 2021-NCSC-103, ¶ 12 (quoting *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020)). A "finding of willfulness is not precluded even if the [Father] has made some efforts to regain custody of the children." *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995) (citation omitted). Although Allison was removed from Mother's home and placed in custody before Father's paternity was established, we have previously determined that in order for a parent to avoid the termination of his or her parental rights under § 7B-1111(a)(2), the parent is required to "make reasonable progress under the circumstances towards correcting those conditions that led to the child being placed in [DSS] custody, irrespective of whoever's fault it was that the child was placed in [DSS] custody in the first place." *In re A.W.*, 237 N.C. App. 209, 217, 765 S.E.2d 111, 115-16 (2014) (cleaned up).

¶ 28 To assess the reasonableness of Father's progress in correcting the conditions that led to Allison's placement into DSS custody, Father's progress is evaluated "for the duration leading up to the hearing on the motion or petition to terminate parental rights." *In re A.C.F.*, 176 N.C. App. 520, 528, 626 S.E.2d 729, 735 (2006). "[A] trial court has ample authority to determine that a parent's 'extremely limited progress' in correcting the conditions leading to removal adequately supports a determination that a parent's parental rights in a particular child are subject to termination" pursuant to section 7B-1111(a)(2). *In re B.O.A.*, 372 N.C. 372, 385, 831 S.E.2d 305, 314 (2019) (citation omitted).

¶ 29 Our Supreme Court has held "parental compliance with a judicially adopted case plan is *relevant* in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2)" provided that "as long as a particular case plan provision addresses an issue that, directly or indirectly, contributed to causing the juvenile's removal from the parental home, the extent to which a parent has reasonably complied with the case plan provision is, at minimum, relevant to the determination"

of whether that parent's parental rights are subject to termination for failure to make reasonable progress. *Id.* at 384-85, 831 S.E.2d at 313-14 (emphasis added).

¶ 30 Although Father was not a member of the child's home at the time of removal, it was appropriate for DSS to require Father to complete a family service case plan so that the child could be returned to a parent once conditions inhibiting reunification were met. Accordingly, we look at Father's progress in correcting the conditions which resulted in Allison being placed in DSS custody. *In re A.W.*, 237 N.C. App. at 217, 765 S.E.2d at 115-16.

B. Challenged Findings of Fact

¶ 31 Father challenges the trial court's finding of fact 10, and challenges 16 of the 42 sub-findings contained therein. Father contends the trial court's findings are unsupported by competent evidence and leave out crucial information that directly affected whether Father had made reasonable progress. The trial court made the following contested findings:

> 10. The Court finds as a fact [Father] willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile.
>
> In support thereof the Court finds as a fact that:
>
> . . .
>
> g). [Father] at no time sought paternity or custody of [Allison].
>
> h). [Mother] was very honest with the Department as to the possible fathers and provided a telephone number for [Father]. Social Worker Ballou made multiple phone calls, mailings and emails to [Father].
>
> . . .
>
> k). A court order was entered August 14, 2019, for [an individual] and [Father] to submit to DNA testing. [Father] was served with the Order to submit to DNA testing on September 12, 2019 but did not complete the testing until November 4, 2019; the results indicated the probability of paternity as 99.99%.

p). Initially [Father] was residing in Rowan County with his "wife" and her family. He had no drivers [sic] license and worked odd jobs. Later he admitted they were not married; and their relationship ended in June or July 2020.

q). While in Rockwell, NC and living with his significant other the Department sent referrals for [Father] to have an assessment at the Rowan County Daymark.

. . .

y). Although a part of the family service case plan [Father] did not participate in a mental health/substance abuse assessment until December 29, 2020

z). [Father] admittedly has had difficulty with being criticized and feeling as if he is being judged. There are times he has an intense anger. Over the years he has had difficulty in relationships with others. He struggles with impulsive behaviors.

. . .

dd). [Father] has had various jobs but is currently self-employed working for his neighbor. His income for the year of 2020 was $3,400.00.

ee). [Father] is approved to have supervised visitation twice monthly for two hours. He has requested once monthly visits and gave the reason it is hard for him to get off work. [Father] has missed seven visits with [Allison] since visitation began in January 2020. Transportation to/from visits has been offered and/or provided. Gas cards have been provided to [Father] to assist with the expense of traveling to/from visits.

. . .

ii). [Father] has had inconsistent communication with the Department. There was a period of time in the spring of 2020 and 2021 that there was little if any communication. . . .

kk). [Father] made no effort to determine paternity or establish a relationship with his daughter. Upon the [trial court] entering an order for paternity testing to

be conducted [Father] did not submit to the test until November 2019.

ll). The Court finds that [Father's] progress has not been adequate to meet the needs standing in his way to provide proper and adequate care for [Allison].

. . .

nn). Substance use was the reason [Allison] came into foster care; [Father] has not attended mental health or substance use therapy as recommended by his assessments.

. . .

pp). [Father] has failed to comply with all but the most minimal requirements of his family service case plan. The limited progress made is not reasonable.

qq). Although [Father] knew prior to and after the child's birth that he might be the child's father, he did not make himself available for possible placement of the child when the child was placed in DSS custody. Indeed, he made no such efforts until the child was six months old and had been in DSS custody for all but 7 days of her life.

rr). [Father] previously denied having any relationship with the child's mother. It was only after the results of paternity testing were revealed that [Father] admitted to such a relationship.

1. Sub-findings of Fact 10(g) and 10(kk)

¶ 32 Father challenges sub-finding 10(g) that states, "[Father] at no time sought paternity or custody of [Allison]" and argues that this finding was misleading and incomplete. Father also contests a similar finding, finding of fact 10(kk), which states: "[Father] made no effort to determine paternity or establish a relationship with his daughter. Upon the [trial court] entering an order for paternity testing to be conducted [Father] did not submit to the test until November 2019." Father argues that this finding is misleading.

¶ 33 It is undisputed Mother told Father she was pregnant; according to Mother's testimony, Father was present when Mother's pregnancy test results were revealed. Father was aware that Allison's delivery was

successful when Mother contacted him from the hospital. However, according to sub-finding 10(c), Mother named two individuals as the possible father of Allison, with one being Father. Father testified at the termination hearing that when Mother contacted him from the hospital, he was unsure if Allison was "[his] child or if it was somebody else's child" and if Allison "was even at risk of not being born" because of Mother's lifestyle. The evidence shows that after Mother testified of Father's possible paternity at an August 12, 2019 hearing, DSS attempted to contact Father through several methods but was unable to reach him because the phone number Mother provided was disconnected. Once DSS made contact with Father in mid to late October 2019, Father completed DNA testing on November 4, 2019. According to Father, he did not know Allison was his daughter until he received the results from the DNA testing on November 21, 2019. The evidence and the undisputed findings of fact demonstrate that Father sought paternity once he was contacted by DSS to undergo a DNA test for Allison and did so in November 2019.

¶ 34 As to the issue of custody and establishing a relationship with Allison, we hold the trial court's findings are unsupported by the record evidence. Once adjudicated as Allison's biological father, Father entered into a family service case plan on January 23, 2020, in order to pursue custody, be "reunif[ied]," and provide a safe, permanent home for his daughter. Ample record evidence demonstrates Father put forth great effort to establish a relationship with his daughter by moving across the state to be closer to her. Ms. Ballou's testimony tended to show Father has been consistent in his visits with Allison since the September 11, 2020 hearing, and during visitations, Father talks, plays, brings gifts, and acts appropriately with his daughter. Further, Father ended the relationship with his girlfriend to be reunited with his daughter. Father also obtained employment; successfully navigated the administrative process of having his driver's license reinstated; attended every permanency planning review hearing; and purchased a vehicle. Finally, Father obtained safe and appropriate housing, which included a room for Allison in his home and made some child support and arrearage payments. Therefore, we hold sub-findings of fact 10(g) and 10(kk) are not supported by clear and convincing evidence.

2. Sub-finding of Fact 10(h)

¶ 35 Next, Father contends that sub-finding of fact 10(h) was "not necessarily wrong, but . . . incomplete" because the sub-finding leaves out that he was homeless, difficult to track down, and only had a remote

possibility of being Allison's father. Sub-finding of fact 10(h) states, "[Mother] was very honest with the Department as to the possible fathers and provided a telephone number for [Father]. Social Worker Ballou made multiple phone calls, mailings and emails to [Father]." We are unpersuaded by this argument.

¶ 36 The record demonstrates that Father's housing instability contributed to the difficulty in reaching him. Father testified that at the time he entered into a family service case plan he was seeking housing. Further, Father testified he was served with the order to obtain DNA testing while in the Rowan County jail. Ms. Ballou's testimony further confirmed that DSS tried several methods, manners, and times to contact Father without success. Mother's testimony indicated the possibility that Father might not have been Allison's father and that she provided a telephone number purported to be Father's to DSS. Therefore, we hold the trial court's sub-finding of fact 10(h) is supported by clear and convincing evidence.

3. Sub-finding of Fact 10(k)

¶ 37 Next, Father contends that sub-finding of fact 10(k) left out "crucial information" and that "[t]he [trial court's] finding makes it seem as if [Father] was trying to avoid taking the test and was denying paternity." Sub-finding of fact 10(k) states:

> A court order was entered August 14, 2019, for [an individual] and [Father] to submit to DNA testing. [Father] was served with the Order to submit to DNA testing on September 12, 2019 but did not complete the testing until November 4, 2019; the results indicated the probability of paternity as 99.99%.

In his brief, Father argues that the "crucial information" alleged to have been omitted by the trial court's finding was that: Father stayed in contact with DSS so that together they arranged for a paternity test; Father lacked the resources to arrange for the test on his own; "[i]t appears that [Father] took the test at his first opportunity"; and DSS had difficulty locating him. We disagree.

¶ 38 Record evidence tends to show on August 14, 2019, Father and another individual were ordered to submit to DNA testing to establish paternity for Allison. Father's testimony at the hearing established that he was served with the order for a paternity test on September 12, 2019. Ms. Ballou's testimony confirmed Father completed the testing on November 4, 2019. The test results indicated that Father's probability of paternity

was 99.99% and Father was officially established to be Allison's father at the January 10, 2020 review hearing. It appears that Father takes issue with just three words: "but did not" in the trial court's sub-finding of fact 10(k). While the word "and," substituted for the words "but did not," may well cast a softer impression, the chronology of events remains unchanged. We hold sub-finding of fact 10(k) is supported by clear and convincing evidence.

4. Sub-findings of Fact 10(p), 10(q), and 10(y)

¶ 39 Next, Father contends the trial court left out crucial pieces of information in sub-findings of fact 10(p), 10(q), and 10(y). Sub-finding of fact 10(p) states that when Father first became involved in this case, he resided in Rowan County "with his 'wife' and her family" at which point "[h]e had no drivers [sic] license and worked odd jobs. Later he admitted they were not married; and their relationship ended in June or July 2020." In contesting this sub-finding, we note that Father's brief does not cite to any authority supporting his theory or point to any evidence in the record that would establish that the trial court's sub-finding has omitted crucial information. Therefore, under Rule 28(b)(6) of North Carolina Rules of Appellate Procedure, this argument is deemed abandoned. N.C. R. App. P. 28(b)(6).

¶ 40 Concerning sub-findings of fact 10(q) and 10(y), Father contends that "[t]his entire situation took place during a pandemic" and many services were unavailable, causing scheduling appointments to be difficult while offices shut down and providers transitioned to working from home. Although Father's contentions are true, the record shows Ms. Ballou made referrals for Father to have a mental health and substance abuse assessment at Daymark, located in Rowan County, because Father was living there at the time. Therefore, sub-finding of fact 10(q) is supported by clear and convincing evidence in the record.

¶ 41 Regarding sub-finding of fact 10(y), Father argues that his efforts with substance abuse treatment included attending Celebrate Recovery, a faith-based support group. Father also argues that he completed a substance abuse assessment and complied with the assessment's recommendations when he was placed on supervised probation and ordered to so comply. Finally, Father contends that the disputed sub-finding does not address whether he has a current substance abuse problem.

¶ 42 According to a letter written by Father's probation officer, Father was ordered to complete a substance abuse assessment after being placed on supervised probation on February 21, 2020 for a misdemeanor larceny. Father completed the substance abuse assessment on November 24,

2020 through the TASC program.[9] Father's completion of the substance abuse assessment was also confirmed by a letter from a TASC care manager. To the extent that this sub-finding of fact implies that Father did not complete the substance abuse program until December 29, 2020, it is not supported by evidence and therefore, we disregard this specific portion of that sub-finding of fact. As to Father's participation in a mental health assessment, Father's testimony at the hearing confirmed that he did not take the assessment until the end of December 2020. Related to Father's mental health assessment, we hold that the portion of this sub-finding of fact relating to Father's mental health assessment is supported by the record evidence.

5. Sub-finding of Fact 10(z)

¶ 43 Next, Father contends sub-finding of fact 10(z) is unsupported. It states: "[F]ather admittedly has had difficulty with being criticized and feeling as if he is being judged. There are times he has an intense anger. Over the years he has had difficulty in relationships with others. He struggles with impulsive behaviors." Father contends this sub-finding "mentions no specific dates, and it is unclear how this finding applies to the twelve-month period before the filing of the termination petition." Despite Father's contentions with this sub-finding, the record demonstrates that Father's family service case plan was amended to include a mental health assessment and Father was to follow any resulting recommendations therefrom. Additionally, an undisputed finding indicates that Father and Mother's relationship ended due to Father's aggressiveness and Mother's concerns that Father had mental health issues. In determining Father's compliance with his case plan, there is a reasonable inference that the trial court would consider the status of Father's mental health.

¶ 44 The record also demonstrates that the trial court's sub-finding of fact is primarily based upon Father's testimony at the termination hearing. At the hearing, Father testified that "it is definitely an uncomfortable feeling that I get sometimes when I feel put on the spot, or judged, or -- but it is something I have been able to work on and certainly something that I have been more tolerable for in the past years[.]" Additionally,

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9. The North Carolina Treatment Accountability for Safer Communities Network or TASC "provides services to people with substance abuse or mental health problems who are involved in the criminal justice system." *Treatment Accountability for Safer Communities*, N.C. Dep't of Health & Hum. Servs., https://www.ncdhhs.gov/assistance/mental-health-substance-abuse/treatment-accountability-for-safer-communities (last visited July 7, 2022).

Father testified that in the past, he had "some hard times developing healthy relationships and long-lasting relationships, but that is definitely something that has been improving in the last couple of years[.]" Father also stated that acting impulsively "has been an issue in [his] past, . . . that is something [he is] definitely aware of . . . [i]t is something [he] will probably work on and deal with for the rest of [his] life" and he is seeking help for it. While the sub-finding does not mention specific dates, it reflects that Father's behaviors have occurred in the past and are issues that are presently improving. Based upon the undisputed findings and the record, we uphold the trial court's sub-finding as it is supported by clear and convincing evidence.

6. Sub-finding of Fact 10(dd)

¶ 45 Next, Father contests sub-finding of fact 10(dd), which states: "[Father] has had various jobs but is currently self-employed working for his neighbor. His income for the year of 2020 was $3,400.00." Father contends this sub-finding excludes information about his progress since moving to Watauga County, as he secured full-time employment in mid-2020 and makes approximately $1,000 per week. Father's argument is in substance directed at the trial court's determination of the credibility of the evidence presented at the termination hearing and the weighing of such evidence. *See In re P.A.*, 241 N.C. App. 53, 57, 772 S.E.2d 240, 244 (2015). At the termination hearing, Ms. Ballou testified that throughout the duration of Father's family service case plan, Father worked "odd jobs," working mostly construction and general labor. For a short period of time, Father obtained employment at a Coffee House in West Jefferson. Father's testimony also demonstrated that he has "a full-time gig" and has "been doing carpentry and construction." In terms of working in construction, Father testified that he works for himself and can be hired by many employers. For example, Father explained one of his employers is "a home builder that lives right across the street" from him. Further, Ms. Ballou testified that Father provided a copy of a 1099-NEC and a W-2 form, indicating an income of approximately $3,400 for the year 2020. Father testified he had not received proof of all of his income statements for taxes, and that he had more income in 2020 than what was indicated. However, at the time of the termination hearing, $3,400 was the income amount for 2020 that could be verified by documentation.

¶ 46 We note that it is "the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." *In re S.C.R.*, 198 N.C. App. 525, 531-32, 679 S.E.2d 905, 909 (2009) (citation omitted). While the

trial court's termination order did not include the extent of Father's detailed employment history or Father's recent income, the "trial court is not required to make findings of fact on all the evidence presented, nor state every option it considered." *In re E.S.*, 378 N.C. 8, 2021-NCSC-72, ¶ 22 (quoting *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005)). The trial court made a "brief, pertinent, and definite finding[]" about one of the matters at issue, which is supported by evidence in the record. *In re J.A.A.*, 175 N.C. App. at 75, 623 S.E.2d at 51.

7. Sub-finding of Fact 10(ee)

¶ 47 Next, Father challenges sub-finding of fact 10(ee) in which the trial court found that:

> [F]ather is approved to have supervised visitation twice monthly for two hours. He has requested once monthly visits and gave the reason it is hard for him to get off work. [Father] has missed seven visits with [Allison] since visitation began in January 2020. Transportation to/from visits has been offered and/or provided. Gas cards have been provided to [Father] to assist with the expense of traveling to/from visits.

Father argues that this sub-finding of fact relies upon old information as most of Father's missed visits were in "early 2020 when he was homeless, without a driver's license, and living across the state." Father argues that since moving to Watauga County, his visitation record has been consistent, and he stopped missing visits over a year before the termination hearing.

¶ 48 First, the order from the September 11, 2020 permanency planning review hearing indicates that Father was approved to have supervised visitation with Allison for two hours every two weeks. Ms. Ballou's testimony at the hearing illustrates it was recommended that Father have monthly visits with Allison and that Father desired his visitations to be reduced because "it was difficult to take off work as well as secure transportation to those visits." Although the trial court's findings do not indicate at what point in time Father missed seven visits with Allison since his visitation began in January 2020, the record accurately reflects this number of missed visitations. The trial court considered a previous permanency planning review order which states DSS "has transported [Allison] to Boone once for visitation and has offered to assist [Father] with transportation to and from visits." Ms. Ballou's testimony also demonstrated that transportation played a factor in Father attending his visitations, but that DSS did provide transportation for Father a few

times. Accordingly, there was clear and convincing evidence to support sub-finding of fact 10(ee).

8. Sub-finding of Fact 10(ii)

¶ 49 Next, Father contends that the trial court's sub-finding of fact 10(ii) is misleading. It states that Father "has had inconsistent communication with [DSS]. There was a period of time in the spring of 2020 and 2021 that there was little if any communication." We disagree.

¶ 50 At the hearing, Ms. Ballou testified to Father's inconsistent communication, explaining that as a part of his case plan, he was expected to contact her on a weekly basis. Ms. Ballou described their communication as "sporadic" during the time of the February 28, 2020 hearing and around the time of September 2020. Ms. Ballou elaborated that her communication with Father was

> [a]t some points better than others, but there certainly were times where phone numbers would change, where we were unable to make contact, but overall, I would say that he has been -- at least once per month I have been able to somehow make contact with him. But certainly, there have been times in which he has been difficult to locate or that there have been many attempts made to get that one contact in per month and then there have been other months where he has been very communicative where I have -- I would say -- regular contact with him.

Accordingly, there was clear and convincing evidence to support the trial court's finding of Father's inconsistent communication with DSS.

9. Sub-findings of Fact 10(ll) and 10(pp)

¶ 51 Next, Father challenges sub-finding of fact 10(ll) as misleading. It states that "[t]he [trial court] finds that [Father's] progress has not been adequate to meet the needs standing in his way to provide proper and adequate care for [Allison]." Father contests sub-finding of fact 10(pp), which states: "[Father] has failed to comply with all but the most minimal requirements of his family service case plan. The limited progress made is not reasonable." Father argues that this finding is vague, does not provide dates, and does not reference the progress Father made. We agree.

¶ 52 Based upon the evidence before us, Father's progress has been adequate to address those elements in his family service case plan which would prevent him from providing care to Allison. During the course of

Father's family service case plan, Father completed parenting classes in May 2020 and has continued efforts in learning "how to become a better father" by communicating with the Children's Council in Boone and signing up for additional parenting classes. Father also moved across the state to be closer to his daughter, facing homelessness to do so.

¶ 53 The record demonstrates that Father's career is in the construction industry and that he has consistently worked with employers on a contractual basis during the course of his family service case plan. According to Father, he obtained full-time employment in construction several months before the termination hearing by working for his neighbor. This employment was verified by a letter from his neighbor. The record also illustrates that Father obtained appropriate and permanent housing in February 2021, has a one-year lease on the home, is able to pay the monthly rent for the home, and has prepared a room for his daughter to live with him. The record shows that his driver's license was restored to him in March 2021 and that he purchased a vehicle in May 2021.

¶ 54 As to the substance abuse and mental health requirements in Father's case plan, Ms. Ballou testified Father's case plan was amended in March 2020 because of "some ongoing concerns, based on collateral information that there was potentially some substance use and mental health issues." Yet these allegations of "ongoing concerns" were never explained in her testimony or noted in previous court orders, notes from DSS or GAL, or at the termination hearing. Nonetheless, Father addressed the added requirements in his amended case plan. Father took a substance abuse assessment in November 2020 and a combined mental health and substance abuse assessment through Daymark in late December 2020. According to a letter from a TASC Care Manager, Father completed two drug screens on December 21, 2020 and January 20, 2021, which were both negative. Father also joined Celebrate Recovery, a weekly faith-based recovery group, which was recommended to him by TASC services. A Celebrate Recovery group leader confirmed Father had attended group sessions since November 2020. The TASC Care Manager's letter further stated, "[t]hroughout [Father's] time in TASC it became apparent that he has taken his pursuit of a healthy, substance free lifestyle very seriously" and has "willingly engaged in services to learn skills and tools to benefit him and support him each day." We note that there is no evidence of a positive drug screen throughout the pendency of this case.

¶ 55 In terms of mental health, Father was diagnosed with borderline personality disorder, and it was recommended that he engage in individual therapy and DBT group therapy weekly. Ms. Ballou's testimony showed Father attended one therapy session and signed up for three

group sessions during the month of April 2021 but did not attend any sessions. Father testified he had been in communication with a DBT therapy leader in Watauga County and had been given "other outlets as far as finding DBT therapy that would be . . . conducive to [his] work schedule, she just found something for [him] and [he had] been communicating to her by email." Father's testimony also indicated he is aware of his impulsive behavior and is seeking help for it through attending the Celebrate Recovery classes, church, and Bible studies. Based on Father's progress in seeking help and addressing DSS's concerns regarding his unsubstantiated mental health and substance abuse issues and his sufficient progress in addressing the other elements of his case plan, we hold the trial court's sub-findings of fact 10(ll) and 10(pp) are not supported by clear and convincing evidence.

10. Sub-finding of Fact 10(nn)

¶ 56 Next, Father contends that the trial court's sub-finding 10(nn) was misleading. It states, "[s]ubstance use was the reason [Allison] came into foster care; [Father] has not attended mental health or substance use therapy as recommended by his assessments[.]" Father argues that substance abuse was a reason for Allison's removal from Mother, not Father, and that this finding is inaccurate because Father successfully complied with the "substance abuse and mental health requirements" as a condition of his probation. The record demonstrates that Mother's substance abuse was one of the reasons why Allison was placed into foster care, and we agree with Father that Allison was placed into foster care because of *Mother's* substance abuse, not his own. However, despite Father not living with Allison at the time she was placed into foster care, Father's case plan was amended in March 2020 to include a substance abuse assessment requirement and that he follow any recommended treatments therefrom. Father's probation conditions also required him to take a substance abuse assessment through TASC services. After this assessment with TASC, Father's treatment recommendation was to go to TASC care management and attend MRT[10] weekly. TASC services then referred Father to Daymark Recovery, who recommended him to SADBT weekly group meetings and Celebrate Recovery meetings. Based upon these assessments and recommendations, Father pursued several treatment options to address his alleged mental health and substance

10. MRT or Moral Reconation Therapy is described as a "cognitive-behavioral treatment system that leads to enhanced moral reasoning, better decision making, and more appropriate behavior." *About MRT*, MRT-Moral Reconation Therapy®, http://www.moral-reconation-therapy.com/about.html (last visited July 7, 2022).

abuse issues by attending Celebrate Recovery meetings weekly, going to TASC care management monthly, and purchasing a MRT book on his own initiative, all of which he was able to verify to the court.

¶ 57 To the extent that sub-finding of fact 10(nn) states that Father has not attended mental health or substance abuse therapy as recommended by his assessments, we hold it to be unsupported by clear and convincing evidence and overrule the sub-finding.

11. Sub-findings of Fact 10(qq) and 10(rr)

¶ 58 Finally, Father challenges sub-findings of fact 10(qq) and 10(rr) and argues that they were misleading and omitted information. Finding of fact 10(qq) states:

> [a]lthough [Father] knew prior to and after the child's birth that he might be the child's father, he did not make himself available for possible placement of the child when the child was placed in DSS custody. Indeed, he made no such efforts until the child was six months old and had been in DSS custody for all but 7 days of her life.

Sub-finding of fact 10(rr) states that Father "previously denied having any relationship with the child's mother. It was only after the results of paternity testing were revealed that [Father] admitted to such a relationship."

¶ 59 According to Mother's testimony at the termination hearing, upon learning she was pregnant, Father desired her to move with him to Statesville and told her he would visit her during the pregnancy. Father testified he was not certain he was the father of the child because Mother "was involved with several other men." In fact, Mother's testimony shows she was not certain who Allison's father was and initially gave the name of another individual as the putative father. The results of the November 2019 paternity test resolved this uncertainty. The record reflects that after Mother contacted Father to inform him of Allison's birth, Father did not receive further news concerning Allison until September 12, 2019, when he was served with an order to submit to a DNA test. The record is devoid of any evidence tending to demonstrate Father knew of Allison's removal from Mother or her placement in DSS custody prior to DSS informing him. Likewise, while the record shows Mother contacted Father at the time of Allison's birth, there is no record evidence indicating that she informed Father of Allison's placement into DSS custody as a result of Mother testing positive for drugs at birth.

¶ 60 Additionally, there is no evidence in the record to support the trial court's finding that Father previously had denied having any kind of relationship with Mother. After DSS contacted Father in mid to late October 2019, Father took a paternity test on November 4, 2019. There is no indication that Father refused to take the paternity test or ever denied that he was in a relationship with Mother. Further, there was no testimony to support this finding. Therefore, we hold that the trial court lacked sufficient evidence to support its sub-findings of fact 10(qq) and 10(rr).

C. Grounds to Terminate Parental Rights

¶ 61 Finally, Father contends the trial court erred by concluding that grounds existed to terminate his parental rights based upon his willfully leaving Allison in a placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress "under the circumstances has been made in correcting those conditions which led to the removal" of Allison pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). We agree.

¶ 62 Although Allison remained in foster care for 21 months, we hold that the trial court's findings do not support the conclusion of law that Father has failed to make reasonable progress "under the circumstances . . . in correcting those conditions which led to the removal" of Allison.

¶ 63 Looking at the requirements of Father's family service case plan, the evidence tends to show that Father made sufficient progress in meeting each element. The trial court found Father completed his parenting classes in May 2020, and Ms. Ballou testified that Father continued to pursue opportunities to improve his parenting skills, even beyond his case plan requirement, through the Children's Council in Boone. Father's case plan required visitations with Allison. To have a relationship with Allison and to be able to have visitations with her, Father moved across the state to be closer to his daughter. Ms. Ballou testified that while Father missed some visits early on, his visits had become consistent over time. Further, Ms. Ballou's testimony tended to show that since the September 11, 2020 hearing, Father has been consistent in his visits with Allison; and during visitations, Father talks, plays, brings gifts, and acts appropriately with his daughter.

¶ 64 Father's case plan also required him to obtain stable employment and suitable housing. The record evidence shows Father obtained full-time employment in his field of construction several months before the termination hearing. The record also demonstrates Father obtained appropriate and permanent housing in February 2021, signed a one-year

lease, and had consistently paid his monthly rent. Father was also required to obtain reliable transportation. The record shows Father took the necessary steps and paid all fees to have his driver's license reinstated in March 2021. Father purchased a vehicle in May 2021.

¶ 65 Concerning the substance abuse and mental health requirements in Father's case plan, Father took a substance abuse assessment in November 2020 and a combined mental health and substance abuse assessment in late December 2020. Father was diagnosed with borderline personality disorder, and it was recommended that he engage in individual therapy and DBT group therapy. It is true that Father attended only one therapy session and signed up for three group sessions during the month of April 2021 but did not attend any sessions. However, Father has taken steps to register for DBT therapy by communicating with a DBT therapy leader who is assisting him in finding a session conducive to his work schedule. Father submitted to a number of drug tests, all of which were either negative or inconclusive. Further, Father's probation conditions also required him to take a substance abuse assessment through TASC services and comply with the recommendations, which he successfully completed.

¶ 66 After addressing the requirements of Father's case plan and the progress he has made with each one, we note a "parent's failure to fully satisfy all elements of the case plan goals is not the equivalent of a lack of reasonable progress." *In re J.S.L.*, 177 N.C. App. 151, 163, 628 S.E.2d 387, 394 (2006) (citation omitted). While Father has not met every required element in his case plan, certainly, "perfection is not required to reach the 'reasonable' standard." *In re S.D.*, 243 N.C. App. 65, 73, 776 S.E.2d 862, 867 (2015). As noted above, some portions of the trial court's findings of fact are not supported by the evidence, "and although they are just portions of the findings, they are findings on the pivotal issues." *In re S.D.*, 243 N.C. App. 65, 73, 776 S.E.2d 862, 867 (2015). When we consider the many ways Father complied with his case plan in order to correct the conditions that led to Allison's placement into custody, together with the findings of the trial court we overruled, we hold that the remaining findings of fact do not support the conclusion of law that Father has failed to make reasonable progress in correcting the conditions which led to Allison's removal and do not warrant the termination of his parental rights.

III. Conclusion

¶ 67 We hold that competent evidence in the record shows Father made reasonable progress in correcting the conditions which led to Allison

being removed from her home and placed in DSS custody. While Father has not fully satisfied all elements of his case plan, he has *not* shown "a prolonged inability to improve [his] situation," which would warrant terminating his parental rights to Allison. *In re B.J.H.*, ¶ 12. Therefore, we conclude that the trial court's findings are not supported by clear and convincing evidence and the trial court erred in concluding that grounds existed to terminate Father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). Accordingly, we reverse the trial court's order terminating Father's parental rights to his minor child.

REVERSED.

Judges DIETZ and MURPHY concur.

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

No. COA21-576

Filed 16 August 2022

Termination of Parental Rights—grounds for termination—failure to pay a reasonable portion of the cost of care—evidence of income but not of amount

The trial court did not err by terminating respondent-father's parental rights in his children on the grounds of failure to pay a reasonable portion of the cost of care (N.C.G.S. § 7B-1111(a)(3)) where the trial court's findings that respondent was employed yet paid nothing in support while his children were in foster care were supported by clear and convincing evidence, in the form of a social worker's testimony that, during the determinative time period, respondent provided zero financial support despite reporting that he was earning some income—even though respondent did not specify the amount he was receiving.

Appeal by Respondent-Father from order entered 15 June 2021 by Judge Lori Christian in Wake County District Court. Heard in the Court of Appeals 5 April 2022.

Mary Boyce Wells for petitioner-appellee Wake County Health and Human Services.

IN RE A.C.

[285 N.C. App. 114, 2022-NCCOA-552]

Anné C. Wright for respondent-appellant father.

Stam Law Firm, PLLC, by R. Daniel Gibson, for guardian ad litem.

MURPHY, Judge.

¶ 1 An adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order. Where evidence at trial demonstrated that Respondent-Father, Isaac,[1] had the ability to pay some amount of the cost of the care for his children while in foster care but paid nothing during the six-month period immediately preceding the filing of the petition, the trial court had adequate grounds to terminate parental rights even though Isaac was incarcerated for a portion of that time period and the amount of income disclosed was unspecified.

BACKGROUND

¶ 2 On 18 March 2019, Wake County Health and Human Services[2] ("WCHHS") filed petitions alleging that Debby and Florence were neglected juveniles. Debby and Florence had been living with family members since at least 2018 due to their parents' substance abuse issues. WCHHS attempted to work with the family as early as September 2018. However, Isaac "refused to comply with recommended substance abuse treatment" and "random drug screens." Nonsecure custody was granted to WCHHS on 29 March 2019. In an order entered 22 May 2019, the children were adjudicated to be "neglected as defined by N.C.G.S. §[ ]7B-101(15) in that the children do not receive proper care and supervision from the parents and live in an environment injurious to their welfare."

¶ 3 As part of the adjudication order, Isaac was required to "enter into and comply with the Out of Home Family Services Agreement." The Out of Home Family Services Agreement required Isaac to:

> a. [Follow a] [v]isitation agreement.
>
> b. Obtain and maintain housing appropriate for himself and his children.

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1. Pseudonyms are used for all relevant persons throughout this opinion to protect the identities of the juveniles and for ease of reading.

2. Wake County Human Services became Wake County Health and Human Services effective 1 July 2021.

> c. Obtain and maintain legal income sufficient to meet the needs of himself and his children.
>
> d. Refrain from use of illegal or impairing substances and submit to random drug screens.
>
> e. Refrain from all criminal activity and comply with current criminal court requirements.
>
> f. Complete a psychological evaluation and comply with recommendations.
>
> g. Complete a parenting education program approved by [WCHHS] and demonstrate skills learned.
>
> h. Maintain regular contact with the social worker at [WCHHS], notifying [WCHHS] of any change in situation or circumstances within five business days[.]

¶ 4 After entering the Out of Home Family Services Agreement, Isaac consistently failed to meet his obligations. After the first permanency planning hearing, held 20 August 2019, the trial court found that Isaac had "failed to engage in services," "refused to comply with multiple requested drug screens," inconsistently contacted WCHHS and visited with his children, and had "pending criminal charges." After a second permanency planning hearing, held 10 February 2020, the trial court once again found Isaac "failed to significantly comply with his case plan." Finally, after a third permanency planning hearing, held 3 August 2020, the trial court found yet again that Isaac "failed to significantly comply with his case plan." Moreover, later in August 2020, Isaac tested positive for morphine. Isaac was incarcerated in July 2020 and again from 1 September 2020 until 4 December 2020 for probation violations.

¶ 5 WCHHS filed a motion to terminate parental rights on 15 October 2020. A hearing on the motion was held on 3 February 2021 and 1 March 2021. The trial court terminated both parents' parental rights, concluding (I) "[Isaac] willfully left the children in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the [trial] [c]ourt that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the children"; (II) "[Isaac] neglected the children within the meaning of [N.C.G.S. § 7B-101]"; and (III)

> [t]he children have been placed in the custody of [WCHHS] and [Isaac has] for a continuous period of six months immediately preceding the filing of the

> motion willfully failed to pay a reasonable portion of the cost of care for the children although physically and financially able to do so.

Isaac timely filed a *Notice of Appeal*.[3]

ANALYSIS

¶ 6 On appeal, Isaac contests all three of the trial court's grounds for terminating parental rights pursuant to N.C.G.S. § 7B-1111(a).

> However, an adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order. Therefore, if [the reviewing court] upholds the trial court's order in which it concludes that a particular ground for termination exists, then [it] need not review any remaining grounds.

In re J.S., 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (citations omitted); *see also In re J.M.*, 373 N.C. 352, 356, 838 S.E.2d 173, 176 (2020). Here, as one of the trial court's three conclusions is sufficient to terminate Isaac's parental rights, we limit our review to whether the trial court erred in concluding that

> [t]he children have been placed in the custody of [WCHHS] and the parents have for a continuous period of six months immediately preceding the filing of the motion willfully failed to pay a reasonable portion of the cost of care for the children although physically and financially able to do so.

¶ 7 N.C.G.S. § 7B-1111(a)(3) provides for the termination of parental rights when

> [t]he juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

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3. Only Isaac appealed from the trial court's order. As Respondent-Mother did not appeal from the trial court's order, the order as it pertains to her remains undisturbed.

N.C.G.S. § 7B-1111(a)(3) (2021).[4] "We review a trial court's adjudication under N.C.G.S. § 7B-1111 to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re J.M.*, 373 N.C. at 357, 838 S.E.2d at 176 (marks omitted). "The issue of whether a trial court's findings of fact support its conclusions of law is reviewed de novo." *In re J.S.*, 374 N.C. at 814, 845 S.E.2d at 71.

¶ 8 Here, Isaac contests several aspects of the trial court's conclusion that he willfully failed to pay a reasonable portion of the cost of the children's care during the six months at issue. First, he argues the trial court could not consider some of the evidence at trial—namely, the report of the guardian ad litem ("GAL")—because it was not offered or admitted at the termination hearing. Second, Isaac argues the trial court's findings that he was employed and paid nothing in child support were not themselves sufficient to justify termination of his parental rights under N.C.G.S. § 7B-1111(a)(3) because the trial court did not make a finding regarding the specific amount he earned during the statutory time period. Finally, he argues "[t]he only evidence regarding [Isaac's] employment during [the statutory] time period was that[,] between [Isaac's] July and September incarcerations, he told [WCHHS] that he was waiting on his first job from a temporary employment agency." None of these contentions are meritorious.

¶ 9 As to the first contention, Isaac asserts that the trial court could not consider the GAL report because it was not offered or admitted at the termination hearing. However, the trial court did not need to consider the GAL report to make its finding. The trial court had other "clear, cogent and convincing evidence" concerning Isaac's employment and income before it. *In re J.M.*, 373 N.C. at 357, 838 S.E.2d at 176. At trial, a WCHHS employee testified:

> [COUNTY ATTORNEY:] [WCHHS employee], has he reported to you working anywhere or making any kind of income in 2020?
>
> [WCHHS EMPLOYEE:] So, yes. He—when he was out in between his July and September incarcerations, he reported working at another temporary agency.

4. In this case, the motion to terminate Isaac's parental rights was filed on 15 October 2020, making the relevant time period in relation to N.C.G.S. § 7B-1111(a)(3) 15 April 2020 to 15 October 2020.

[COUNTY ATTORNEY:] Okay. And did he say what his approximate income was or how much—how frequently he was paid? Did he give you any of those details?

[WCHHS EMPLOYEE:] He did not. He said he was waiting to get his first job. But he was—he was employed by the temporary agency. When he and I talked—because he was only about for—about five weeks, he said he had been hired by the temporary agency.

[COUNTY ATTORNEY:] Okay. So he was reporting some income, he just wasn't telling you what it was?

[WCHHS EMPLOYEE:] That's correct.

[COUNTY ATTORNEY:] And that was during the six-month period prior to the filing of the TPR motion; is that right?

[WCHHS EMPLOYEE:] Yes, ma'am.

[COUNTY ATTORNEY:] All right. And, [WCHHS employee], what does it cost per month for Wake County to care for the children?

[WCHHS EMPLOYEE:] So currently we are paying the current caregivers a half four [sic] payment because they're in the process of being licensed. So [Debby], it's $237.50 for the half four [sic] payment.

[COUNTY ATTORNEY:] And for [Florence]?

[WCHHS EMPLOYEE:] Her half four [sic] payment is $290.50.

[COUNTY ATTORNEY:] Okay. [Have the parents] provided any kind of financial support to the agency or offered any payments to the agency while the children have been in foster care?

[WCHHS EMPLOYEE:] The only thing I can find in the record is, is [Respondent-Mother] reported giving [the previous caretaker] a hundred dollars on [6 June 2019].

[COUNTY ATTORNEY:] [6 June 2019]. And that was the only thing that you're aware of?

> [WCHHS EMPLOYEE:] That's the only thing I can see in the file that—as far as monetary. She did give [Florence] $20 on her birthday. But that was to [Florence] as a birthday gift.
>
> [COUNTY ATTORNEY:] Okay. But, I mean, separate from the file, [WCHHS employee], you've been the foster care social worker since January 2020. Has either parent provided any other financial support to the kids—or provided any other portion of the cost of care?
>
> [WCHHS EMPLOYEE:] No, no child support or direct payment to myself or to [the foster parent], as far as financial support directly, like money.

The testimony from the WCHHS employee, which was not objected to at trial, established that Isaac had earned income during the requisite period without any need for the trial court to refer to the GAL report. We need not consider whether the trial court's review of the GAL report was error because the trial court's finding is supported by other clear and convincing evidence.

¶ 10 Isaac also argues the trial court's findings that he was employed and paid nothing in child support were not themselves sufficient to justify termination of his parental rights under N.C.G.S. § 7B-1111(a)(3) because the trial court did not make a finding regarding the amount he earned during the statutory time period. Isaac is mistaken. "The issue of whether a trial court's findings of fact support its conclusions of law is reviewed de novo." *In re J.S.*, 374 N.C. at 814, 845 S.E.2d at 71. When a trial court finds that a respondent-parent had the ability to pay some amount toward the cost of care of his or her children while in the custody of social services but he or she paid nothing, the trial court is permitted to conclude that this was a willful failure to pay a reasonable portion of the cost of care under N.C.G.S. § 7B-1111(a)(3). *In re J.M.*, 373 N.C. at 359-60, 838 S.E.2d at 178. Evidence of a failure to pay any portion of the cost of care while earning some amount of income is sufficient to conclude that a parent did not pay a reasonable portion of the cost of care. *Id.* at 359, 838 S.E.2d at 178.

¶ 11 Isaac cites *In re Faircloth*, 161 N.C. App 523, 588 S.E.2d 561 (2003), for the proposition that a finding of a parent having been employed and a finding of a parent having paid nothing in child support are not sufficient to show N.C.G.S. § 7B-1111(a)(3) has been met. However, *In re Faircloth* is distinguishable from the case at hand because, in that case,

the trial court had failed to specifically address the parent's employment during the relevant time frame defined by N.C.G.S. § 7B-1111(a)(3). *In re Faircloth*, 161 N.C. App. at 526, 588 S.E.2d. 561 at 564. The evidence in *In re Faircloth* "did not specifically address whether [the mother] was employed at *any* time [during the six months immediately preceding the filing of the motion.]" *Id.* (emphasis added). Here, while the trial court noted that Isaac's incarceration impacted his employment within the statutory period, there is evidence in the Record specifically addressing Isaac's employment and income at some point during the statutory time period when he was not incarcerated:

> [COUNTY ATTORNEY:] Okay. So he was reporting some income, he just wasn't telling you what it was?
>
> [WCHHS EMPLOYEE:] That's correct.
>
> [COUNTY ATTORNEY:] And that was during the six-month period prior to the filing of the TPR motion; is that right?
>
> [WCHHS EMPLOYEE:] Yes, ma'am.

Isaac reported earning some income during the six-month period by working jobs for a temporary agency, as was his custom both before and after being incarcerated. The evidence before the trial court in this case specifically addressed the statutory time period, unlike in *In re Faircloth*. Isaac's attempt to use *In re Faircloth* to avoid financial responsibility for his children because he was incarcerated during a portion of the six-month period has no merit when the evidence supports that Isaac was earning income during a portion of the same period while he was not incarcerated.

¶ 12 Finally, as to Isaac's third contention—that "[t]he only evidence regarding [Isaac's] employment during this time period was that[,] between [Isaac's] July and September incarcerations, he told [WCHHS] that he was waiting on his first job from a temporary employment agency"—the evidence at trial contravenes this position. The testimony from the WCHHS employee at the adjudication hearing, *supra* at ¶ 9, provided clear and convincing evidence that supports the trial court's findings that Isaac was employed at some point within the six months preceding the filing of the motion for termination of parental rights and had failed to contribute anything to the financial care of the children even though Isaac had been incarcerated for part of the statutory time period. Furthermore, Isaac had reported earning some income, and there was evidence demonstrating that Isaac worked for a temporary

agency before going to prison in July 2020, worked for another temporary agency afterward, and worked for his father's company in 2019.[5] Although Isaac was not reporting his specific earnings, the trial court had evidence before it that Isaac was employed and earning income in some capacity. Even assuming Isaac's statement made in between his incarcerations about waiting for a job from the temporary agency contradicts the evidence presented by the WCHHS employee about Isaac earning income, "the trial court was not bound to find respondent's evidence to be credible or give it more weight than any other evidence[.]" *In re K.G.W.*, 250 N.C. App. 62, 66, 791 S.E.2d 540, 543 (2016).

¶ 13 Isaac's incarcerations and failure to report a specific amount of income were certainly evidence for the trial court to consider regarding his ability to pay, but they were not the only evidence before the trial court from which it could have determined whether his failure to pay a reasonable portion of his children's care was willful. "We note that it is within the trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial." *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25, *reh'g denied*, 337 N.C. 807, 449 S.E.2d 750 (1994); *see also In re D.E.M.*, 254 N.C. App. 401, 403, 802 S.E.2d 766, 769 (2017) ("It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony."), *aff'd per curiam*, 370 N.C. 463, 809 S.E.2d 567 (2018). The trial court considered the evidence regarding Isaac's incarcerations. Isaac was incarcerated in July of 2020 and again from September 2020 to December 2020. The trial court recognized there was a disruption of his employment due to his incarcerations:

> With regards to [Isaac], he has worked for different labor finder organizations. And, again, the [c]ourt recognizes there was a period of time in which he was

5. We note that it was appropriate for the trial court to consider Isaac's physical and financial ability in the near past to determine that Isaac had the ability to provide more than zero dollars toward the care of the children within the six-month time period. *See In re A.P.W.*, 378 N.C. 405, 2021-NCSC-93, ¶¶ 44-45 (finding respondent-mother's nonpayment of a support agreement during the six-month period to be willful where she had "demonstrated an ability to work by multiple reported periods of employment"). In *In re A.P.W.*, the trial court noted: "The [respondent-mother's] employment status is unclear. She has reported work at Lydall, Van Heusen, the Candle Company, and Tyson." *Id.* at ¶ 21. The record in *In re A.P.W.* demonstrates that the respondent-mother had reported working at Van Heusen in March 2018, at Lydall in January 2018, and at Candle Company at an unspecified time before August 2018. The petition to terminate parental rights in that case was filed in April 2019.

> incarcerated and he could not have worked during that time. But the evidence is that he provided zero toward the cost of the children.

The trial court was not required to find that Isaac worked throughout the entire six-month period. The trial court's finding that Isaac had the ability to pay something toward the cost of care for his children within the six-month period but paid nothing was sufficient to terminate his parental rights. *See In re J.M.*, 373 N.C. at 359-60, 838 S.E.2d at 178 ("Here, the trial court's findings establish [the] respondent-mother had the ability to pay some amount toward the cost of care for her children while they were in DSS custody but paid nothing. These findings support its conclusion that grounds exist to terminate [the] respondent-mother's parental rights to the children pursuant to N.C.G.S. § 7B-1111(a)(3)."). Although more detailed findings on a parent's ability to pay would generally be helpful in appellate review, the trial court is under no obligation to make specific findings on the amount a parent earns when the evidence demonstrates a discrepancy between his or her ability to pay and the actual amount paid towards the care of the children while in foster care during the six-month period. *See id.* The trial court's findings of fact support its conclusion of law.

CONCLUSION

¶ 14 The trial court properly concluded it had grounds to terminate Isaac's parental rights under N.C.G.S. § 7B-1111(a)(3) for a willful failure "to pay a reasonable portion of the cost of care for the children although physically and financially able to do so." The trial court's conclusion is supported by its finding that Isaac was employed during the six-month period but did not provide any reasonable portion of the cost of the children's care. This finding is supported by the evidence. Based on what Isaac had reported to her, the WCHHS employee testified that he had earned an unspecified amount of income within the six months preceding WCHHS filing the petition to terminate parental rights. Since this N.C.G.S. § 7B-1111(a) ground adjudicated by the trial court is supported by the evidence, there is no need to review any remaining grounds. *See id.* at 356, 838 S.E.2d at 176 ("[O]nly one ground is needed to terminate parental rights . . . .").

¶ 15 Isaac does not separately contest the trial court's determination at the dispositional stage of the termination proceeding that terminating his parental rights is in the children's best interest on appeal, so we

need not consider it.[6] Accordingly, we affirm the termination orders as to Isaac.

AFFIRMED.

Judges GORE and GRIFFIN concur.

ESTATE OF KIE LANDON JOHNSON, BY AND THROUGH WILLIAM JOHNSON AND MONA ELLISON, ADMINISTRATORS OF THE ESTATE, PLAINTIFFS
v.
GUILFORD COUNTY BOARD OF EDUCATION, DEFENDANT

OLIVIA BROWN, BY AND THROUGH HER GUARDIAN AD LITEM, EMILY HOEPFL, AND EMILY HOEPFL, INDIVIDUALLY, PLAINTIFFS
v.
GUILFORD COUNTY BOARD OF EDUCATION, DEFENDANT

No. COA21-630

Filed 16 August 2022

Negligence—sudden emergency—intoxicated driver in wrong lane—school bus—no contribution to emergency

Where an intoxicated driver traveled into an oncoming lane of traffic and crashed into a school bus, killing the intoxicated driver's passenger, the appellate court affirmed the decision of the Industrial Commission applying the doctrine of sudden emergency and concluding that the school bus driver did not act negligently in her attempt to avoid the collision. The doctrine applied because the bus driver had fewer than five seconds to act after realizing that the oncoming vehicle would not correct its path, and the bus driver did not contribute to or cause the emergency—despite plaintiff's argument that the bus driver should have maneuvered to the right (into a ditch) rather than to the left (although the bus remained fully within its own lane).

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6. "After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2021). However, the trial court's conclusion as to best interests at disposition must be challenged separately. *In re A.P.W.*, 378 N.C. 405, 2021-NCSC-93, ¶ 46. As Isaac did not contest these conclusions, we do not address them here.

EST. OF JOHNSON v. GUILFORD CNTY. SCH. BD.

[285 N.C. App. 124, 2022-NCCOA-553]

Appeal by Plaintiffs from decision and order entered 10 June 2021 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 10 May 2022.

Frazier, Hill & Fury, R.L.L.P., by Torin L. Fury, and R. Steve Bowden & Associate, P.C., by Edward P. Yount, for Plaintiffs-Appellants.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Carl Newman, for Defendant-Appellee.

INMAN, Judge.

¶ 1 This appeal arises out of a head-on collision between a car and a school bus on a rural road, which killed one passenger and injured others. Plaintiffs contend the Commission erred in concluding: (1) the bus driver was not negligent by application of the doctrine of sudden emergency; and (2) Plaintiffs failed to establish the bus driver had the last clear chance to avoid the collision. After careful review, we affirm the decision and order of the Commission.

I. FACTUAL & PROCEDURAL HISTORY

¶ 2 The record below tends to show the following:

¶ 3 On 26 August 2015, at approximately 4:30 p.m., Lakeisha Miller ("Ms. Miller") was driving a Guilford County school bus north on Knox Road, a two-lane road divided by a double yellow, no-passing center line in a rural part of Guilford County, when Jacob Larkin ("Mr. Larkin"), an 18-year-old high school student, drove in the wrong direction in Ms. Miller's lane and crashed his Toyota Camry head-on into the bus. The collision killed one of the car's passengers, Kie Johnson, and injured Mr. Larkin, the car's remaining passengers, including Olivia Brown, and Ms. Miller. At the time of the collision, Ms. Miller had one minor passenger on the bus. Mr. Larkin was impaired from a mixture of marijuana and Xanax, "was driving erratically," and had been "reckless" before the crash.

¶ 4 When Ms. Miller first saw Mr. Larkin's vehicle traveling toward her in the wrong lane, she immediately took her foot off the gas pedal and slowed down to allow him to return to the correct lane. She sounded the bus's horn twice to alert the driver. As the car approached, Ms. Miller noticed that the driver was slumped over in the driver's seat and appeared to be reaching down, looking at the floor of his car. The shoulder of the road to the bus's right was wide and grassy but sloped down into

a ditch. Ms. Miller considered turning right to avoid a collision but was worried the bus would overturn in the uneven ditch or crash into the fence running parallel to the road on the right. She could see there was no traffic behind Mr. Larkin, so "at the last minute," she maneuvered the bus left—toward the oncoming lane of traffic that the approaching car should have been in—to avoid the collision.

¶ 5 Ms. Miller had driven buses for Guilford County Schools for approximately ten years. She had obtained her commercial driver's license in 2005, completed the State's requisite training courses for school bus traffic and safety, and renewed her certification every few years. North Carolina school bus drivers are trained that when an approaching driver is in the wrong lane, that driver's natural response will be to return to his or her correct lane if the driver realizes what has happened and it may be best to move right. The instruction "Steering to Avoid A Crash" further provides: "Top heavy vehicles such as school buses may turn over . . . . If something is blocking your path, the best direction to steer will depend on the situation . . . . If the shoulder is clear, going right may be best." Knox Road was on Ms. Miller's regular route for two to three years, and she had driven the road at least one hundred times, if not more.

¶ 6 On 11 April and 23 July 2018, Plaintiffs, administrators of Kie Johnson's estate and guardian for Olivia Brown, respectively, filed claims against the Guilford County Board of Education (the "Board") for $1,000,000 in damages under the Tort Claims Act with the North Carolina Industrial Commission. Plaintiffs alleged: (1) Ms. Miller's maneuver of the school bus was not sufficient to avoid colliding with Mr. Larkin's vehicle; and (2) Ms. Miller was negligent when she failed to recognize the danger of Mr. Larkin's oncoming car, honk her horn to warn Mr. Larkin, maintain proper control of the school bus, maintain a proper lookout, and crossed left of center while operating the Board's bus. The Board denied all allegations of negligence and raised defenses of (1) contributory negligence, (2) intervening, superseding, and criminal acts of Mr. Larkin, (3) intervening and superseding negligence and acts of the surviving car passengers, and third parties, and (4) the sudden emergency doctrine.

¶ 7 The matter was bifurcated on the issues of liability and damages, and these consolidated claims came on for trial before a Deputy Commissioner on 17 June 2019. The Deputy Commissioner denied Plaintiffs' claims and Plaintiffs appealed to the Full Commission (the "Commission").

¶ 8 Reviewing the evidence, the Commission concluded Ms. Miller's evasive actions were proper and lawful because the bus was not left

of the center yellow lines at the point of impact and, even if it was, Mr. Larkin's oncoming car was an obstruction that permitted Ms. Miller to deviate from the right lane of traffic. The Commission concluded Ms. Miller's actions were further insulated from liability under the doctrine of sudden emergency, and she "did not breach a duty of care owed to Plaintiffs." Even if Ms. Miller was negligent, the Commission alternatively concluded Plaintiffs were barred from recovery because they were contributorily negligent for "ignor[ing] unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety" and failing to leave Mr. Larkin's car when they had the opportunity prior to the collision. Finally, the Commission concluded that the Board was not liable under the doctrine of last clear chance because Plaintiffs "failed to prove that Ms. Miller was negligent in the operation of her school bus" and "that Ms. Miller, by the exercise of reasonable care, 'failed or refused to use every reasonable means' at her command to avoid the impending injury." Plaintiffs appeal.

II. ANALYSIS

A. Standard of Review

¶ 9 We review the Commission's decision under the Tort Claims Act " 'for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them.' " *Simmons v. Columbus Cty. Bd. of Educ.*, 171 N.C. App. 725, 727-28, 615 S.E.2d 69, 72 (2005) (quoting N.C. Gen. Stat. § 143-293 (2003)). "As long as there is competent evidence in support of the Commission's decision, it does not matter that there is evidence supporting a contrary finding." *Id.* at 728, 615 S.E.2d at 72 (citation omitted). "Under the Tort Claims Act, when considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision." *Fennell v. N.C. Dep't of Crime Control & Pub. Safety*, 145 N.C. App. 584, 589, 551 S.E.2d 486, 490 (2001) (quotation marks and citation omitted).

¶ 10 Where the Commission's factual findings are unchallenged, they are binding on appeal. *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 423, 760 S.E.2d 732, 738 (2014). "In addition, findings of fact to which error is assigned but which are not argued in the brief are deemed abandoned." *Strezinski v. City of Greensboro*, 187 N.C. App. 703, 706, 654 S.E.2d 263, 265 (2007) (citation omitted).

B. The Doctrine of Sudden Emergency

¶ 11 Plaintiffs assert two challenges to the Commission's application of the sudden emergency doctrine: (1) Ms. Miller contributed to the sudden emergency by failing to exercise due care when she accelerated towards the collision and swerved left, in violation of her training; and (2) the oncoming collision did not require Ms. Miller to act instantly by swerving. Neither argument is persuasive.

¶ 12 Plaintiffs have not challenged any of the Commission's findings of fact, so they are binding on this Court. *See Medlin*, 367 N.C. at 423, 760 S.E.2d at 738. Further, though Plaintiffs' proposed issues on appeal included challenges to findings 38 and 39, their brief does not challenge whether either finding is supported by competent evidence. Therefore, they have abandoned any challenge to these findings. *See Strezinski*, 187 N.C. App. at 706, 654 S.E.2d at 265.

¶ 13 We consider, based on the binding findings of fact and applicable law, whether the Commission erred in applying the doctrine of sudden emergency. *See Simmons*, 171 N.C. App. at 727, 615 S.E.2d at 72. For the reasons explained below, we affirm the Commission.

1. The emergency compelled Ms. Miller to act instantly.

¶ 14 Our courts have defined an emergency situation "as that which compels one to act instantly to avoid a collision or injury." *Keith v. Polier*, 109 N.C. App. 94, 98, 425 S.E.2d 723, 726 (1993) (cleaned up).

¶ 15 Plaintiffs contend the emergency did not require Ms. Miller to act instantly because she had between 10.9 and 15.6 seconds to react from the moment she first observed Mr. Larkin's vehicle in her lane until the point of impact. In its decision and order, the Commission explicitly considered the timing of the collision and described an accident reconstruction expert's testimony on this issue: "Ms. Miller had *10.9 to 15.6 seconds to first perceive and react*, slow the bus to a stop, and then accelerate to impact speed[,]" and she "had 5 seconds from slowing the bus to the point of impact." (Emphasis added). The Commission further found that Ms. Miller had "less than five seconds" to act after realizing that the oncoming vehicle would not correct its path:

> 38. . . . . When it became apparent that Mr. Larkin was slumped over the steering wheel and Mr. Larkin would not return his vehicle to the proper lane, *Ms. Miller* had less than five seconds to choose to either (1) steer right and risk overturning the school

> bus in the ditch with her student passenger, or (2) steer left into the empty lane.

We are bound by the Commission's unchallenged findings, *Medlin*, 367 N.C. at 423, 760 S.E.2d at 738, and we will not reweigh the evidence, *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) ("[O]n appeal, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight." (quotation marks and citation omitted)). *See also Simmons*, 171 N.C. App. at 728, 615 S.E.2d at 72.

¶ 16 Our Court has held that reacting in less than five seconds qualifies as acting "instantly" to avoid injury for the purposes of the sudden emergency doctrine. *See, e.g.*, *Schaefer v. Wickstead*, 88 N.C. App. 468, 471-72, 363 S.E.2d 653, 655 (1988) (holding an instruction on the doctrine of sudden emergency was warranted when the defendant had between 4.55 and 5.5 seconds to avoid hitting a pedestrian with his vehicle).

¶ 17 The decisions Plaintiffs cite—*Keith v. Polier*, 109 N.C. App. 94, 425 S.E.2d 723 (1993), and *Colvin v. Badgett*, 120 N.C. App. 810, 463 S.E.2d 778 (1995)—are factually distinguishable. In *Keith*, we held the defendant was not entitled to the benefit of an instruction on the sudden emergency doctrine because the alleged emergency was not sudden where he rear-ended a car stopped at a traffic signal, 109 N.C. App. at 99-100, 425 S.E.2d at 726-27, and, in *Colvin*, we held that the driver's "fear and apprehension upon seeing his sister-in-law's truck on the side of the road, while understandable, did not give rise to a situation where he had to act instantly to avoid injury to himself or another" to warrant a jury instruction on the doctrine of sudden emergency, 120 N.C. App. at 812, 463 S.E.2d at 780.

¶ 18 The Commission properly concluded the emergency, created by Mr. Larkin driving in the wrong lane of travel, compelled Ms. Miller to act instantly, in less than five seconds, to avoid a head-on collision. *See Schaefer*, 88 N.C. App. at 471-72, 363 S.E.2d at 655.

2. Ms. Miller did not contribute to or cause the sudden emergency.

¶ 19 "The doctrine of sudden emergency applies when a defendant is confronted with an emergency situation *not of his own making* and requires [a] defendant only to act as a reasonable person would react to similar emergency circumstances." *Weston v. Daniels*, 114 N.C. App. 418, 420, 442 S.E.2d 67, 71 (1994) (citation omitted) (emphasis added). But a defendant shall not be "held liable for failure to act as a calm, detached reflection at a later date would dictate." *Id.* (citation omitted).

¶ 20 As an initial matter, the Board contends Plaintiffs have waived review of this challenge to the application of the sudden emergency doctrine—that Ms. Miller is not entitled to the defense because her negligence caused or contributed to the sudden emergency—because they did not present the specific challenge to the Commission on appeal from the Deputy Commissioner's decision and order. Assuming without deciding whether Plaintiffs preserved this issue for our review, we hold the Commission correctly concluded Ms. Miller's actions are insulated from liability under the doctrine of sudden emergency.

¶ 21 Plaintiffs disregard the Commission's binding findings that Ms. Miller did not cross the center, yellow line and that she acted reasonably in maneuvering the bus to the left:

> 23. . . . . The school bus is fully in its appropriate lane, angled slightly to the left, with its front left tire slightly over the nearest double yellow line but not across the second yellow line. Thus, based on the simulation, the point of impact is within Ms. Miller's lane of traffic with the front right of Mr. Larkin's car striking the front right of the school bus.
>
> 38. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds . . . that Ms. Miller, at the time, had to make an immediate decision when confronted with an impending collision. The Full Commission finds that, given the relatively short window of time in which she had to react, Ms. Miller acted reasonably in her evasive maneuvers to avoid a collision with Mr. Larkin's vehicle. . . . Ms. Miller assessed what she thought was the best course of action based on her years of experience as a driver, her training, and familiarity with her school bus route. While it may be best to move the school bus right when a vehicle drifts into the path of a school bus, training materials acknowledge that there are times when going right is not possible. The Full Commission finds that Ms. Miller acted reasonably when she drove to the left in an attempt to avoid the collision with Mr. Larkin's car.
>
> 39. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that even if Ms. Miller's school bus crossed the

> double yellow line prior to the collision, doing so was reasonable given that Ms. Miller was attempting to avoid Mr. Larkin's vehicle.

These findings support the Commission's legal conclusion that Ms. Miller's actions are insulated from liability under the doctrine of sudden emergency. *See Fennell*, 145 N.C. App. at 589, 551 S.E.2d at 490.

¶ 22 Plaintiffs compare this case to several cases where a driver was precluded from invoking the sudden emergency doctrine because of their own negligence—for failure to travel at a safe speed, maintain control, or keep a proper lookout—because it contributed to the emergency. *See, e.g.*, *Goins v. Time Warner Cable Se., LLC*, 258 N.C. App. 234, 238-40, 812 S.E.2d 723, 727-28 (2018) (cyclists were traveling too fast and failed to keep proper lookout for downed utility line in the roadway); *Sobczak v. Vorholt*, 181 N.C. App. 629, 639, 640 S.E.2d 805, 812 (2007) (driver was "on notice of a potential encounter with ice" in snowy conditions); *Gupton v. McCombs*, 74 N.C. App. 547, 549-50, 328 S.E.2d 886, 888 (1985) (driver "failed to keep a vigilant lookout for the [pedestrian]" and sound her horn); *White v. Greer*, 55 N.C. App. 450, 454, 285 S.E.2d 848, 851-52 (1982) (motorcyclist failed to avoid a car turning left in the oncoming lane). Those cases are inapposite because, throughout the sequence of this collision, Ms. Miller drove the bus at a reasonable speed, maintained control of the bus, and kept a lookout for Mr. Larkin's vehicle and her surroundings.

¶ 23 In this case, Mr. Larkin created an emergency by traveling in the wrong lane toward a head-on collision with the school bus. *See, e.g.*, *Casey v. Fredrickson Motor Express Corp.*, 97 N.C. App. 49, 56, 387 S.E.2d 177, 181 (1990) (holding evidence of an oncoming vehicle in the wrong lane of travel was sufficient to warrant a jury instruction on the sudden emergency doctrine). And Ms. Miller's subsequent actions did not contribute to or cause the sudden emergency. *See Weston*, 114 N.C. App. at 420, 442 S.E.2d at 71. When Ms. Miller first saw Mr. Larkin's vehicle in her lane, she immediately slowed the bus and honked her horn to warn the driver. Because Mr. Larkin did not return to the correct lane and Ms. Miller was concerned about the slope on the right shoulder of the roadway as well as the safety of the bus's remaining passenger, she accelerated to the left in her lane to avoid a collision. Ms. Miller did not cross the yellow line and school bus safety training materials "acknowledge that there are times when going right is not possible." She cannot be held liable "for failure to act as a calm, detached" accident reconstruction expert with the benefit of hindsight. *Id.* (citation omitted).

¶ 24 Since Ms. Miller was compelled to act instantly and her actions did not contribute to the creation of the emergency, we hold the Commission appropriately applied the doctrine of sudden emergency and concluded the Board, through the actions of its employee Ms. Miller, was not negligent.

¶ 25 Because we affirm the Commission's conclusion that Ms. Miller was not negligent and Plaintiffs do not challenge the Commission's alternative conclusion that Plaintiffs' claims were further barred based on their own contributory negligence, we need not address Plaintiffs' remaining argument about the doctrine of last clear chance. *See Wray v. Hughes*, 44 N.C. App. 678, 684-85, 262 S.E.2d 307, 311 (1980) ("[W]here there is no evidence that [a] defendant failed to keep a reasonable lookout in the direction of travel or that a person exercising a proper lookout would have been able in the exercise of reasonable care to avoid the collision, the last clear chance doctrine does not apply." (citations omitted)).

III. CONCLUSION

¶ 26 For the reasons outlined above, we affirm the decision and order of the Commission.

AFFIRMED.

Judges ARROWOOD and WOOD concur.

KEENAN v. KEENAN

[285 N.C. App. 133, 2022-NCCOA-554]

MEGAN KEENAN, PLAINTIFF
v.
JASON KEENAN, DEFENDANT

No. COA21-579

Filed 16 August 2022

1. Domestic Violence—protective order—fear of continued harassment—single act—legitimate purpose—mowing lawn

The trial court did not err by granting plaintiff's petition for a domestic violence protective order (DVPO) and denying defendant's motion to dismiss for insufficiency of the evidence where defendant mowed plaintiff's lawn even though plaintiff warned him ahead of time not to do so and told him to leave at the time he trespassed on her property to mow. The trial court did not err by using defendant's single act of mowing plaintiff's lawn as the basis for the DVPO, and it did not err by finding that his conduct in mowing plaintiff's lawn did not serve a legitimate purpose.

2. Appeal and Error—abandonment of issues—necessary reasons or arguments—prejudice

On appeal from the trial court's domestic violence protective order (DVPO) issued against defendant in favor of his ex-wife, defendant's Rule 404(b) argument that the trial court erred by considering a prior DVPO issued against him in favor of his sister was deemed abandoned because defendant failed to argue—as necessary to prevail on appeal—that the alleged error prejudiced him.

3. Domestic Violence—protective order—prior DVPO—relevance—considered alongside current act

In a hearing on plaintiff's petition for a domestic violence protective order (DVPO) against defendant, the trial court did not err by considering a prior DVPO issued against defendant in favor of plaintiff where the prior DVPO was relevant and was considered alongside defendant's current act of trespassing on plaintiff's property to mow her lawn.

Appeal by Defendant from order entered 7 May 2021 by Judge Resson Faircloth in Johnston County District Court. Heard in the Court of Appeals 22 March 2022.

Walker Kiger, PLLC, by David "Steven" Walker, for plaintiff-appellee.

The Law Office of Robert L. Schupp, PLLC, by Robert L. Schupp, for defendant-appellant.

MURPHY, Judge.

¶ 1 In accordance with N.C.G.S. § 50B-3, "[i]f [a] court . . . finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence." N.C.G.S. § 50B-3(a) (2021). "Domestic violence," for purposes of N.C.G.S. § 50B-3, includes "[p]lacing the [party seeking a domestic violence protective order] or a member of [his or her] family or household in fear of imminent serious bodily injury or continued harassment, as defined in [N.C.G.S. §] 14-277.3A, that rises to such a level as to inflict substantial emotional distress[.]" N.C.G.S. § 50B-1(a)(2) (2021). Placing a person in fear of continued harassment does not require multiple acts by a defendant. Here, where Defendant challenges a domestic violence protective order ("DVPO") entered against him by specifically arguing the trial court was required to find he committed two or more acts as the basis for the alleged error, the trial court did not err, as a single act was sufficient for it to grant Plaintiff a domestic violence protective order.

¶ 2 However, a defendant's act does not constitute "continued harassment" if it served a legitimate purpose. Whether an act served a legitimate purpose is a determination reserved for the finder of fact; thus, when reviewing the trial court's determination on the issue of legitimate purpose, we uphold its determination as long as "there was competent evidence to support the trial court's findings of fact." *Stancill v. Stancill*, 241 N.C. App. 529, 531, 773 S.E.2d 890, 892 (2015). In this case, there was competent evidence that the only purpose of Defendant's conduct was to harass Plaintiff; and, as such, the trial court did not err in determining Defendant's act did not serve a legitimate purpose.

¶ 3 In challenging the admissibility of allegedly improper character evidence under Rule 404(b), a defendant must show the admission of that evidence created probable prejudice in the factfinder's determination at trial. Here, where Defendant makes no attempt to show he was prejudiced by an alleged evidentiary error, that issue is deemed abandoned in accordance with Rule 28(b)(6) of our Rules of Appellate Procedure.

¶ 4 In determining whether to issue a DVPO, the trial court's consideration of a prior DVPO entered against the defendant is permissible as long as it otherwise constitutes relevant evidence under Rule 401 and is considered alongside at least one current, specific act. Here, where the trial court considered a prior DVPO alongside evidence of a specific

act by Defendant and the prior DVPO was relevant to contextualize Plaintiff's emotional response to his current act, the trial court did not err in considering the prior DVPO.

BACKGROUND

¶ 5 This appeal arises out of a *Complaint and Motion for Domestic Violence Protective Order* filed by Plaintiff on 18 August 2020 alleging Defendant, her ex-husband, came to her house "to cut [her] grass" on 17 August 2020 after she repeatedly told him he did not have permission to do so and he refused to leave after Plaintiff asked him to leave several times. Plaintiff indicated she was "very afraid" of Defendant, as he had a history of physically, emotionally, and verbally abusing her, was "showing [a] progression of unstable behavior[,]" and sent her text messages, including sexual ones, despite being asked to stop.

¶ 6 The trial court issued a temporary *ex parte* DVPO on 18 August 2020, adopting by reference the facts as alleged in Plaintiff's complaint. Then, after several continuances, the trial court held a hearing on 7 May 2021 to determine whether a permanent DVPO was warranted. Plaintiff testified about the 17 August 2020 incident and also introduced text messages between her and Defendant from 16 August 2020 and 17 August 2020. The testimony and text messages demonstrated that Defendant came to Plaintiff's house, began cutting her grass, and refused to leave on 17 August 2020, despite at least three requests by Plaintiff on 16 August 2020 that he not come and four requests on 17 August 2020 that he leave. Plaintiff testified she did not need or allow Defendant to come and cut her grass because she had arranged for Defendant's brother to do so, which she communicated to Defendant. She also testified that Defendant's presence on 17 August 2020 made her "nervous" and gave her a "panic attack." Finally, in addition to testifying about the August 2020 incident, Plaintiff introduced a prior consent DVPO against Defendant issued for her protection on 14 October 2016, which expired in September 2019 after two extensions, and text messages from Defendant during April 2020, including unsolicited sexual messages, which corroborated the allegations in her complaint. At the close of Plaintiff's evidence, Defendant moved to dismiss, and the trial court denied his motion.

¶ 7 Defendant, for his part, did not contradict Plaintiff's account of the August 2020 incident at the hearing; rather, he testified and presented evidence that Plaintiff's lawn was overgrown and that he ignored Plaintiff's requests and cut the grass "to protect [his] kids and their best interests and their health and well-being." Regarding the April 2020 text messages, Defendant acknowledged that he understood "[Plaintiff] doesn't

want [him] sending those type[s] [of] messages to her" and testified he had stopped doing so. Plaintiff cross-examined Defendant about another prior DVPO against him, one issued for his sister's protection. Plaintiff did not introduce this DVPO into evidence, but she showed Defendant a copy and questioned him about it. Defendant objected to these questions, first on relevancy grounds and then on the grounds that the DVPO constituted impermissible character evidence. *See generally* N.C.G.S. § 8C-1, Rule 401 (2021); N.C.G.S. § 8C-1, Rule 403 (2021); N.C.G.S. § 8C-1, Rule 404 (2021). The trial court, however, overruled both objections. At the close of all evidence, Defendant renewed his motion to dismiss for insufficiency of the evidence, but the trial court, again, denied his motion.

¶ 8 At the close of the hearing, the trial court granted Plaintiff a permanent DVPO; and, on 18 May 2021, Defendant appealed.

ANALYSIS

¶ 9 On appeal, Defendant argues that "the trial court erred in denying Defendant's motion[s] to dismiss for insufficiency of the evidence"; that "the trial court erred in granting Plaintiff's petition for a domestic violence protective order"; and that "the trial court erred in admitting . . . prior domestic violence protective order[s] entered against Defendant . . . ." However, as Defendant's arguments with respect to both his motions to dismiss and the granting of the DVPO revolve entirely around two blanket arguments about the interpretation of N.C.G.S. § 50B-1—namely, that a DVPO "requires two or more acts in order for a defendant to have engaged in [domestic violence]" and that "Defendant's acts served a legitimate purpose"—we review these underlying arguments in order to resolve both the motion to dismiss and DVPO arguments simultaneously, then proceed to consider the character evidence issue. Neither blanket argument by Defendant is meritorious, and the trial court did not err in considering evidence of Defendant's prior DVPOs. We affirm.

A. Multiple Acts Not Required for Chapter 50B

¶10 **[1]** "We review issues of statutory construction *de novo*." *In re Ivey*, 257 N.C. App. 622, 627, 810 S.E.2d 740, 744 (2018). Under N.C.G.S. § 50B-3, "[i]f [a] court . . . finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence." N.C.G.S. § 50B-3(a) (2021). For purposes of issuing a DVPO,

> [d]omestic violence means the commission of one or more of the following acts upon an aggrieved party

> or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:
>
> (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
>
> (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in [N.C.G.S. §] 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
>
> (3) Committing any act defined in [N.C.G.S. §] 14-27.21 through [N.C.G.S. §] 14-27.33.

N.C.G.S. § 50B-1(a) (2021). Specifically at issue in this case is whether Defendant "[placed] the aggrieved party . . . in fear of imminent serious bodily injury or continued harassment, as defined in [N.C.G.S. §] 14-277.3A, that rises to such a level as to inflict substantial emotional distress[,]" as this was the primary basis for the DVPO. *Id.*

¶ 11 Defendant argues that the phrasing "fear of imminent serious bodily injury or continued harassment, as defined in [N.C.G.S. §] 14-277.3A" incorporates not only N.C.G.S. § 14-277.3A(b)(2)'s definition of "harassment," but also N.C.G.S. § 14-277.3A(b)(1)'s definition of "[c]ourse of conduct." *See generally* N.C.G.S. § 14-277.3A(b) (2021). Under this argument, "harassment," for purposes of N.C.G.S. § 50B-1, would require a "[c]ourse of conduct," which is defined as

> [t]wo or more acts, including, but not limited to, acts in which the [defendant] directly, indirectly, or through third parties, by any action, method, device, or means, is in the presence of, or follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

N.C.G.S. § 14-277.3A(b)(1) (2021). This definitional requirement, Defendant suggests, would accompany the definition of "harassment" in N.C.G.S. § 14-277.3A(b)(2), which describes the covered acts as

> [k]nowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions,

> answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.

N.C.G.S. § 14-277.3A(b)(2) (2021).

¶ 12 However, we are not persuaded that N.C.G.S. § 50B-1(a) contemplates only the behaviors falling at the intersection of these two descriptions; rather, in accordance with the plain language of the statute, the definition N.C.G.S. § 50B-1 imports from N.C.G.S. § 14-277.3A is that of "*harassment*," exclusive of any further definitions discussed in N.C.G.S. § 14-277.3A. *See* N.C.G.S. § 50B-1(a)(2) (2021) (emphasis added) (referring to "harassment, as defined in [N.C.G.S. §] 14-277.3A"). Generally speaking, N.C.G.S. § 14-277.3A is not a harassment statute, but a stalking statute; its subsections, including those defining harassment, do so to elaborate on the definition of "stalking." *See generally* N.C.G.S. § 14-277.3A (2021). In other words, "harassment, as defined in [N.C.G.S. §] 14-277.3A[,]" does not refer to the *whole* statute, as a reference to stalking would, but instead refers to an individual subpart dedicated to "harassment" within a broader, section-wide definition of "stalking." N.C.G.S. § 50B-1(a)(2) (2021). Thus, the statutory definition incorporated is limited to that of "harassment" in N.C.G.S. § 14-277.3A(b)(2). This interpretation finds ample support in our caselaw. *See*, *e.g.*, *Kennedy v. Morgan*, 221 N.C. App. 219, 222, 726 S.E.2d 193, 195 (2012) (quoting N.C.G.S. § 14-277.3A(b)(2) (2011)) ("Chapter 50B does not define 'harassment,' but [N.C.G.S.] § 50B-1(a)(2) refers to [N.C.G.S.] § 14-277.3A which defines 'harassment' as 'knowing conduct directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.' "); *Martin v. Martin*, 266 N.C. App. 296, 307, 832 S.E.2d 191, 200 (2019) (referring to N.C.G.S. § 14-277.3A's definition of "harassment" while ignoring its definition of "course of conduct" and the overall definition of "stalking"); *Bunting v. Bunting*, 266 N.C. App. 243, 250, 832 S.E.2d 183, 188 (2019) (same); *Thomas v. Williams*, 242 N.C. App. 236, 243-44, 773 S.E.2d 900, 905 (2015) (same); *Stancill*, 241 N.C. App. at 541, 773 S.E.2d at 898 (same).

¶ 13 As N.C.G.S. § 50B-1(a)(2) imports only the definition of "harassment" from N.C.G.S. § 14-277.3A and not "[c]ourse of conduct," more than one act is not required for a trial court to find domestic violence has occurred and issue a DVPO. Instead,

> a conclusion of law that an act of domestic violence has occurred require[s] evidence and findings of

> the following: (1) [the] [d]efendant "has or has had a personal relationship," as defined by [N.C.G.S. §] 50B-1(b), with [the] plaintiff; (2) [the] defendant committed *one or more acts* upon [the] plaintiff or "a minor child residing with or in the custody of" [the] plaintiff; (3) the *act or acts* of [the] defendant placed [the] plaintiff "or a member of her family or household in fear of imminent serious bodily injury *or* continued harassment, as defined in [N.C.G.S. §] 14-277.3A;" and (4) the fear "rises to such a level as to inflict substantial emotional distress."

Kennedy, 221 N.C. App. at 222, 726 S.E.2d at 195 (emphases added) (footnote omitted) (quoting N.C.G.S. § 50B-1(a)(2) (2011)). The trial court, therefore, did not err in using only one act by Defendant as the basis for its DVPO.

B. Legitimate Purpose of Defendant's Act

¶ 14 Defendant further argues that the act supporting the DVPO—mowing Plaintiff's grass against her repeated requests, both on the day of his appearance and the day before, that he not come—served a legitimate purpose and, therefore, could not serve as the basis for a DVPO. The act in question, Defendant argues, could not have "[placed] the aggrieved party . . . in fear of imminent serious bodily injury or continued harassment," N.C.G.S. § 50B-1(a)(2) (2021), because acts that serve a legitimate purpose cannot amount to harassment under N.C.G.S. § 14-277.3A(b)(2).

¶ 15 Despite the language of N.C.G.S. § 50B-1 only indicating that a defendant's act or acts may support a DVPO if they "placed the aggrieved party . . . *in fear of* . . . *continued* harassment," N.C.G.S. § 50B-1(a)(2) (2021) (emphasis added), we have consistently required the act itself to constitute harassment for the DVPO to issue on that basis. *See*, *e.g.*, *Bunting*, 266 N.C. App. at 250-51, 832 S.E.2d at 188-89 (examining whether a defendant's acts supporting a DVPO qualified as harassment). Thus, "to support a conclusion of law that an act of domestic violence has occurred due to 'harassment,' . . . [the] defendant's acts [must] (1) [be] knowing, (2) [be] 'directed at a specific person,' . . . (3) torment[], terrorize[], or terrif[y] the person, . . . and (4) serve[] no legitimate purpose." *Kennedy*, 221 N.C. App. at 222, 726 S.E.2d at 195-96 (quoting N.C.G.S. § 14-277.3A(b)(2) (2011)). However, when conducting this inquiry, "we defer to the trial court's assessment of [the parties'] credibility and its resulting determination [of whether the conduct served a] legitimate purpose" rather than heeding a defendant's own characterization of the

conduct. *Stancill*, 241 N.C. App. at 543, 773 S.E.2d at 899. Contrary to Defendant's suggestion, "[w]hether conduct served a legitimate purpose is a factual inquiry," not a legal question subject to de novo review on appeal. *Bunting*, 266 N.C. App. at 250, 832 S.E.2d at 188.

¶ 16 "We review both an *ex parte* DVPO and a DVPO to determine whether there was competent evidence to support the trial court's findings of fact[.]" *Stancill*, 241 N.C. App. at 531, 773 S.E.2d at 892 (mark omitted). Here, the trial court was presented with evidence that Defendant, after being warned not to mow Plaintiff's lawn the day before and being told to leave day-of, trespassed on Plaintiff's property and mowed her lawn. These events provide an adequate basis for a finder of fact—here, the trial court—to conclude Defendant's actions were taken to "torment[], terrorize[], or terrif[y]" Plaintiff rather than for a "legitimate purpose." N.C.G.S. § 14-277.3A(b)(2) (2021). Whatever persuasive value Defendant's characterization of the events may have—that his actions served the legitimate purpose of mowing Plaintiff's lawn and were directed at Plaintiff's lawn rather than Plaintiff—they do not establish that his actions were somehow legitimate as a matter of law or negate competing interpretations of his conduct. Indeed, the ability to torment a person while ostensibly targeting a nearby object makes conduct of this type especially appealing to a passive-aggressive harasser, producing the intended effect while maintaining deniability. This very phenomenon underscores the importance of the factfinder's credibility determination. Here, where the finder of fact determined that Defendant's conduct did not serve a legitimate purpose, we will not undermine that determination by speculating over a cold Record. *See Coble v. Coble*, 300 N.C. 708, 712-13, 268 S.E.2d 185, 189 (1980) ("The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal.").

¶ 17 As the trial court was not required to find Defendant committed multiple acts and properly found as a matter of fact that Defendant's conduct did not serve a legitimate purpose, the trial court neither erred in denying Defendant's motion to dismiss nor in granting Plaintiff's DVPO.

C. Prior DVPO Concerning Defendant's Sister

¶ 18 **[2]** Defendant further argues the trial court erred when it considered prior DVPOs issued against him concerning his sister. Defendant argues the order should not have been admitted at trial because it constituted inadmissible character evidence under Rule 404(b) of our Rules of Evidence. *See* N.C.G.S. § 8C-1, Rule 404(b) (2021) ("Evidence 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."). As Defendant properly objected at trial, ordinarily, we would "review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

¶ 19 However, "evidentiary errors are considered harmless unless a different result would have been reached at trial. The burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred." *Keller v. Deerfield Episcopal Ret. Cmty., Inc.*, 271 N.C. App. 618, 635, 845 S.E.2d 156, 167, *disc. rev. denied*, 376 N.C. 544, 851 S.E.2d 372 (2020). Defendant makes no argument that he was prejudiced by the trial court's consideration of the prior DVPO concerning his sister.[1] Without such an argument, Defendant cannot show the trial court erred in entering the current DVPO.

¶ 20 We have previously held that, when an issue raised by an appellant "is missing necessary reasons or arguments" without which he cannot prevail on appeal, that issue is deemed abandoned. *State v. Patterson*, 269 N.C. App. 640, 645, 839 S.E.2d 68, 72, *disc. rev. denied*, 375 N.C. 491, 847 S.E.2d 886 (2020); *see also* N.C. R. App. P. 28(b)(6) (2022) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Here, where Defendant was required to show prejudice and did not attempt to do so, he has abandoned his Rule 404(b) argument on appeal.

D. Prior DVPO Concerning Plaintiff

¶ 21 **[3]** Finally, Defendant argues the trial court erred in considering, over a relevancy objection at trial, a prior DVPO entered against him concerning Plaintiff. Defendant argues consideration of this prior DVPO was improper because, under *Kennedy*, "a general history of abuse is not an act of domestic violence." "We review relevancy determinations by the trial court de novo . . . ." *State v. Triplett*, 368 N.C. 172, 175, 775 S.E.2d 805, 807 (2015); *see also* N.C.G.S. § 8C-1, Rule 401 (2021) (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

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1. Indeed, the argument appears to quite literally be incomplete, with the final sentence ending in the middle of a subordinate clause.

¶ 22 Defendant's contention appears to be that, under *Kennedy*, the trial court's reliance, in any part, on the prior DVPO concerning Plaintiff constitutes reversible error. However, *Kennedy* is inapposite with respect to relevancy. Our remark in *Kennedy* that "a vague finding of a general history of abuse is not a finding of an act of domestic violence" was made in the context of a challenge to the sufficiency of the evidence at trial, not a challenge to the admissibility of the evidence. *Kennedy*, 221 N.C. App. at 223, 726 S.E.2d at 196 (marks omitted). This distinction is evident from *Kennedy*'s express contemplation that a trial court *may* consider a prior DVPO as long as it is not the sole consideration leading to the entry of the current DVPO. *See id.* (marks omitted) ("[W]e appreciate that a history of abuse may at times be quite relevant to the trial court's determination as to whether a recent act constitutes domestic violence[.]").

¶ 23 Reviewing the trial court's admission of the prior DVPO concerning Plaintiff, then, we have no difficulty determining that the trial court did not err. The prior DVPO, at minimum, would demonstrate to the finder of fact whether Plaintiff was placed "in fear of imminent serious bodily injury or continued harassment[] . . . that rises to such a level as to inflict substantial emotional distress" by contextualizing Plaintiff's emotional response to Defendant trespassing on her property. N.C.G.S. § 50B-1(a)(2) (2021). Moreover, a detailed sense of the relationship dynamic between Plaintiff and Defendant would assist the finder of fact in determining Defendant's state of mind when evaluating whether Defendant's actions served a legitimate purpose. As such, the trial court did not err in admitting the prior DVPO concerning Plaintiff.

CONCLUSION

¶ 24 Defendant's blanket arguments that the trial court was required to find he engaged in a course of conduct and that his acts served a legitimate purpose as a matter of law are both without legal support. Moreover, Defendant has not argued he was prejudiced by the trial court's consideration of allegedly inadmissible evidence, and the trial court did not otherwise err in considering prior DVPOs issued against him.

AFFIRMED IN PART; DISMISSED IN PART.

Judges INMAN and GRIFFIN concur.

MORRIS v. RODEBERG

[285 N.C. App. 143, 2022-NCCOA-555]

FREEDOM MORRIS, PLAINTIFF
v.
DAVID RODEBERG, M.D., INDIVIDUALLY AND IN HIS INDIVIDUAL CAPACITY, AND PITT COUNTY MEMORIAL HOSPITAL, INCORPORATED D/B/A VIDANT MEDICAL CENTER, DEFENDANTS

No. COA21-378

Filed 16 August 2022

1. Appeal and Error—interlocutory orders—motion to dismiss denied—not immediately appealable—certiorari—judicial efficiency

Where the trial court denied defendants' motions to dismiss in a medical malpractice action based upon the statute of limitations, although the trial court's interlocutory order was not immediately appealable, the Court of Appeals granted defendants' petition for a writ of certiorari to review the order because interlocutory review of this dispositive question of law would be more efficient than deferring the issue until final judgment at the trial level, and it would prevent unnecessary delay in the administration of justice.

2. Statutes of Limitation and Repose—medical malpractice—minor plaintiff—thirteen years old at time of accrual of claim—ordinary three-year limitations period

A medical malpractice action alleging that defendants negligently performed plaintiff's appendectomy was time-barred by the statute of limitations where plaintiff's action accrued at the time of the appendectomy, when he was thirteen years old, and he filed his complaint more than five years later (before he reached the age of nineteen). N.C.G.S. § 1-17(c) controlled, as the subsection regarding medical malpractice actions, and according to its plain language the three-year statute of limitations that ordinarily applied to medical malpractice actions applied here because plaintiff did not fall within the exception for minors for whom the limitations period expires before they reach the age of ten.

3. Statutes of Limitation and Repose—minor plaintiff—as-applied constitutional challenge—rational basis review

In a medical malpractice action in which plaintiff was a minor at the time his claim accrued, assuming without deciding that plaintiff's as-applied constitutional challenge to N.C.G.S. § 1-17(c) was properly before the trial court and preserved for appellate review, the Court of Appeals held that his challenge lacked merit because

statutes of limitations do not affect any fundamental right and therefore are not subject to strict scrutiny—rather, rational basis review applied. Because plaintiff failed to argue or cite any authority to demonstrate that subsection 1-17(c) did not pass rational basis review, his constitutional challenge was rejected.

Judge HAMPSON dissenting.

Appeal by defendants from order entered 16 March 2021 by Judge J. Carlton Cole in Pitt County Superior Court. Heard in the Court of Appeals 8 February 2022.

Cranfill Sumner LLP, by Steven A. Bader and Colleen N. Shea, for defendant-appellant Pitt County Memorial Hospital Incorporated, et al.

Ellis & Winters LLP, by Alex J. Hagan, Michelle A. Liguori, and Robert L. Barry, for defendant-appellant David Rodeberg, M.D.

Oxendine Barnes & Associates PLLC, by Ryan D. Oxendine, James A. Barnes, IV, and Spencer S. Fritts, for plaintiff-appellee.

Roberts & Stevens, PA, by David C. Hawisher, for Amicus Curiae North Carolina Association of Defense Attorneys.

GORE, Judge.

¶ 1 Plaintiff Freedom Morris initiated this medical malpractice action against Dr. Rodeberg and Vidant Hospital (collectively, "defendants"). Defendants filed Motions to Dismiss plaintiff's Complaint as time-barred under N.C. Gen. Stat. § 1-17(c). The trial court entered a written order denying defendants' motions, and defendants appealed. Upon review, we reverse.

I. Factual and Procedural Background

¶ 2 On 23 February 2015, plaintiff presented to the Emergency Department at Vidant Medical Center with complaints of right-sided abdominal pain. Plaintiff was evaluated by the pediatric surgery team, and an abdominal ultrasound confirmed acute appendicitis. Plaintiff was a thirteen-year-old minor at the time, and his mother was present with him.

¶ 3 The following day, on 24 February 2015, plaintiff underwent a laparoscopic appendectomy—a minimally invasive surgery to remove the appendix through several small incisions, rather than one large incision. Dr. Rodeberg, the chief of pediatric surgery at Vidant Hospital, performed the surgery.

¶ 4 Plaintiff alleges that Dr. Rodeberg negligently performed the appendectomy by failing to remove the entire appendix and properly irrigate the operative site. After the initial surgery, plaintiff developed an infection and underwent two additional surgeries. Plaintiff was released from the hospital on 20 March 2015.

¶ 5 On 14 September 2020, plaintiff filed the instant lawsuit against defendants, alleging medical malpractice claims arising from defendants' care and treatment of plaintiff's appendicitis. Plaintiff alleged that Dr. Rodeberg breached the standard of care in performing the appendectomy, and that Vidant Hospital was negligent and vicariously liable for Dr. Rodeberg's conduct.

¶ 6 In his Complaint, plaintiff specifically alleged, "The statute of limitations has not expired prior to the filing of this civil action; more specifically, this action is being brought prior to the one year statute of limitations provided by N.C.G.S. § 1-17(b), as [plaintiff] was a minor until November 28, 2019." On 12 and 16 November 2020, defendants filed Motions to Dismiss under Rule 12(b)(6), alleging N.C. Gen. Stat. § 1-17(c) applied, and the statute of limitations on plaintiff's claim ran three years after plaintiff's surgery while he was still a minor.

¶ 7 In response to defendants' Motions to Dismiss, plaintiff submitted a brief for the trial court's consideration, arguing that:

> 1. The statute of limitations for Plaintiff's causes of action had not run by the filing of Plaintiff's Complaint because Plaintiff's Complaint was filed prior to him turning nineteen years of age and thus was timely under N.C. Gen. Stat. § 1-17(b); and
>
> 2. Defendants' strained interpretation of Subsection 1-17(c) would violate the Equal Protection Clause of the United States and North Carolina Constitutions as applied to Plaintiff.

¶ 8 On 15 February 2021, Superior Court Judge J. Carlton Cole heard defendants' Motions to Dismiss. At the outset of the hearing, counsel for defendants noted the parties agreed that plaintiff's action accrued in

February 2015, when the appendectomy was performed. Counsel for defendants argued that, based on the February 2015 accrual date, plaintiff's age of thirteen at the time of accrual, and the fact that the Complaint was filed in September of 2020—more than five years later—the complaint should be dismissed pursuant to the plain language of sections 1-17(c) and 1-15(c), which provided a three-year statute of limitations.

¶ 9 Plaintiff argued subsection (c) of § 1-17 did not apply to medical malpractice actions involving minors over the age of ten at the time of accrual of the action. Instead, subsection (b) of § 1-17 applied. Plaintiff also contended, if subsection (c) applied, it was unconstitutional as applied to plaintiff. Specifically, he argued defendants' statutory interpretation violated his Equal Protection rights because it treated minors differently, based on whether they were under or over the age of ten at the time of accrual of the action.

¶ 10 Defendants contended plaintiff's constitutional argument was a facial challenge to subsection (c) of § 1-17. Further, defendants asserted this argument was not properly before the trial court because it was not raised in plaintiff's Complaint, and because only a three-judge panel of the Superior Court of Wake County could determine that a North Carolina statute is unconstitutional.

¶ 11 On 15 March 2021, the trial court entered an Order denying defendants' Motions to Dismiss. The Order did not specify on which grounds the trial court based its ruling, stating only that defendants brought their Motions "under N.C. Gen. Stat. §§ 1-15(c), 1-17(c), and 1-52." The trial court did not rule on plaintiff's constitutional argument. Fifteen days later, on 31 March 2021, Judge Cole retired from the bench. On 5 April 2021, defendants filed their Joint Notice of Appeal to this Court from Judge Cole's Order Denying Defendants' Motions to Dismiss entered 16 March 2021.

II. Appellate Jurisdiction

¶ 12 **[1]** "Orders denying motions to dismiss based upon the statute of limitations are interlocutory and not immediately appealable." *Nello L. Teer Co. v. N.C. DOT*, 175 N.C. App. 705, 711, 625 S.E.2d 135, 139 (2006). However, there are at least two routes by which a party may obtain immediate review of an interlocutory order or judgment. First, if the order or judgment is final as to some but not all the claims or parties, and the trial court certifies there is no reason for delay. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2021). Second, an interlocutory order can be immediately appealed under §§ 1-277(a) and 7A-27(b)(3)(a) if the trial court's

decision deprives the appellant of a substantial right which would be lost absent immediate review. §§ 1-277(a), 7A-27(b)(3)(a) (2021).

¶ 13 Here, defendants assert the trial court's Order affects a substantial right because Judge Cole retired shortly after denying their motions to dismiss, thereby depriving them of an opportunity to bring a motion for reconsideration. Defendants cite generally to our well-established rule "that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (citation omitted).

¶ 14 While not explicitly argued by either party, it is unclear why N.C. R. Civ. P. 63 does not afford relief to an aggrieved party under these circumstances. "This Court has interpreted the language of Rule 63 to statutorily authorize a substitute judge to reconsider an order entered by a judge who has since retired." *Springs v. City of Charlotte*, 222 N.C. App. 132, 135, 730 S.E.2d 803, 805 (2012) (citations omitted). Additionally, fifteen days passed from entry of the trial court's Order and Judge Cole's retirement. For more than two weeks, defendants did not seek reconsideration of that Order under N.C. R. Civ. P. 54(b). After Judge Cole had retired, defendants did not seek reconsideration by another trial judge pursuant to N.C. R. Civ. P. 63. Regardless, it is unnecessary to determine whether the trial court's Order is appealable as a matter of right pursuant to §§ 1-277(a) and 7A-27(b)(3)(a), and we make no such holding here, since we elect to assert jurisdiction over this matter on other grounds. *See Hill v. StubHub, Inc.*, 219 N.C. App. 227, 232, 727 S.E.2d 550, 554 (2012).

¶ 15 Defendants also filed a petition for writ of *certiorari* pursuant to N.C. R. App. P. 21 asking this Court to permit review in the event we determine that the trial court's Order is not immediately appealable. This Court may issue a writ of *certiorari* in "appropriate circumstances" to permit review of a trial court's order "when no right of appeal from an interlocutory order exists." N.C. R. App. P. 21(a). For the writ to issue, the petitioner has the burden of showing "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). Defendants argue there are three reasons the writ should issue: (1) the trial court's denial of their Motions to Dismiss presents a pure question of law that is fully developed for this Court's review; (2) the trial court's failure to apply the three-year statute

of limitations in § 1-17(c) was clearly erroneous; and (3) they have no avenue for seeking reconsideration in the trial division.

¶ 16 It is true that the mere fact that an interlocutory appeal could resolve the litigation is not enough to justify a grant of *certiorari*. *See Newcomb v. Cnty. of Carteret*, 207 N.C. App. 527, 553, 701 S.E.2d 325, 344 (2010). However, when interlocutory review of a dispositive question of law would be more efficient than deferring the issue until final judgment at the trial level, review by *certiorari* is appropriate. This Court has previously granted our writ of *certiorari* to review purely legal questions in cases where we have determined that "the administration of justice will best be served by granting defendants' petition." *Reid v. Cole*, 187 N.C. App. 261, 264, 652 S.E.2d 718, 720 (2007) (citation omitted); *see also Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 872 (1983) (affirming this Court's grant of *certiorari* to review the denial of a motion for summary judgment where "[t]he issue is strictly a legal one and its resolution is not dependent on further factual development . . . [and] the issue of the applicability and interpretation of th[e] statute is squarely presented . . . ."); *Valentine v. Solosko*, 270 N.C. App. 812, 814-15, 842 S.E.2d 621, 624 (2020) (granting *certiorari* to review the trial court's denial of a motion to dismiss where judicial economy would be best served by reviewing the interlocutory order); *Harco Nat'l Ins. Co. v. Grant Thornton LLP*, 206 N.C. App. 687, 691, 698 S.E.2d 719, 722 (2010) (granting *certiorari* to review the trial court's denial of a motion for summary judgment brought on an outcome determinative choice of law issue).

¶ 17 In the case *sub judice*, defendants have demonstrated interlocutory review would promote the interest of public policy by preventing unnecessary delay in the administration of justice. Accordingly, in the exercise of our discretion, we issue our writ of *certiorari* and review defendants' appeal on the merits.

III. Statute of Limitations

¶ 18 **[2]** A trial court's interpretation of a statute of limitations is an issue of law that is reviewed de novo on appeal. *Goetz v. N.C. Dep't of Health & Human Servs.*, 203 N.C. App. 421, 425, 692 S.E.2d 395, 398 (2010).

¶ 19 The parties dispute whether subsection (b) or subsection (c) of § 1-17 applies to this medical malpractice action filed by a minor. Plaintiff contends subsection (b) controls and argues his claim is not time-barred because he filed suit prior to turning nineteen years of age. Plaintiff further contends subsection (c) only applies to minors under the age of ten years old.

¶ 20 Defendants assert the statute of limitations as a complete bar to plaintiff's claim. Defendants argue the plain language of subsection (c) provides a three-year limitations period for accrual of a medical malpractice claim for a minor over the age of ten. We conclude that § 1-17(c) controls, and plaintiff's suit is untimely.

¶ 21 Section 1-17 has three relevant subsections. Subsection (a) is the general tolling provision, which allows a person who is under a disability at the time the cause of action accrued to file suit within three years after the disability is removed. A person under the age of 18 years is under a disability for the purpose of this section. § 1-17(a)(1).

¶ 22 Subsection (b) applies to professional malpractice actions if the plaintiff is a minor. The text of § 1-17(b), provided in full:

> Notwithstanding the provisions of subsection (a) of this section, and *except as otherwise provided in subsection (c) of this section*, an action on behalf of a minor for malpractice arising out of the performance of or failure to perform *professional services* shall be commenced within the limitations of time specified in G.S. 1-15(c), except that if those time limitations expire before the minor attains the full age of 19 years, the action may be brought before the minor attains the full age of 19 years.

§ 1-17(b) (emphasis added).

¶ 23 Subsection (c) is narrower and apples to medical malpractice actions. The plain language of § 1-17(c) provides, in pertinent part:

> *Notwithstanding the provisions of subsection (a) and (b) of this section*, an action on behalf of a minor for injuries alleged to have resulted from malpractice arising out of a *health care provider's performance* of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1-15(c), except as follows:
>
> (1) If the time limitations specified in G.S. 1-15(c) expire before the minor attains the full age of 10 years, the action may be brought any time before the minor attains the full age of 10 years.
>
> . . . .

§ 1-17(c)(1) (emphasis added).[1] Under subsection (c), a plaintiff who is older than age seven when his medical malpractice cause of action accrued does not receive any extension to the statute of limitations.

¶ 24 "The cardinal principle of statutory construction is that the intent of the legislature is controlling." *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989) (quotation marks and citation omitted).

> Just as a more specific statute will prevail over a general one, a specific provision of a statute ordinarily will prevail over a more general provision in that same statute. Moreover, just as it "is true *a fortiori*" that a specific statute prevails over a general one "when the special act is later in point of time," the later addition of a specific provision to a pre-existing more general statute indicates the General Assembly's most recent intent.

LexisNexis Risk Data Mgmt. v. N.C. Admin. Office of the Courts, 368 N.C. 180, 187, 775 S.E.2d 651, 656 (2015) (internal citations omitted).

¶ 25 In *King v. Albemarle Hosp. Auth.*, our Supreme Court was tasked with interpreting and applying § 1-17(b), prior to the addition of subsection (c). 370 N.C. 467, 470-71, 809 S.E.2d 847, 849 (2018). The Court observed that, "Section 1-17(b) . . . reduces the standard three-year statute of limitations, after a plaintiff reaches the age of majority, to one year by requiring a filing before the age of nineteen." *Id.* at 471, 809 S.E.2d at 850. The Court elaborated upon the General Assembly's amendment to this section in 2011, which "reduce[d] the minor's age from nineteen to ten years . . . *thus further narrowing the time period for a minor to pursue a medical malpractice claim*." *Id.* at 471 n.2, 809 S.E.2d at 850 n.2 (emphasis added). This specific footnote on the application of § 1-17(c) was not necessary to the decision and is therefore nonbinding *dicta*. Nonetheless, this commentary by our Supreme Court is a relevant guideline for our instant task of interpreting the application of subsection (c) to medical malpractice cases brought by a minor.

¶ 26 Subsection (c) is a narrower and later addition to the statute. It applies to a subset of claims to which § 1-17(b) also applies, specifically medical malpractice as opposed to a more general professional malpractice. It provides that, despite the provisions in subsections (a) and (b),

1. Subsections (c)(2) and (c)(3) are omitted as they are not applicable in this case.

in a medical malpractice action on behalf of a minor, the usual § 1-15(c) statute of limitations applies. Except, if the statute of limitations expires before the minor turns ten years old, then it is extended until the minor's tenth birthday. Under § 1-15(c), the statute of limitations for a medical malpractice action is three years (plus an additional year under the latent discovery rule). § 1-15(c).

¶ 27 Subsection 1-17(c) controls the applicable statute of limitations in this case. Plaintiff was over the age of ten at the time of accrual of his claim. Thus, the three-year statute of limitations that ordinarily governs medical malpractice actions applies. Plaintiff's lawsuit is untimely because his medical malpractice action accrued when he was thirteen years old, and he filed suit five years later.

IV. As-Applied Constitutional Challenge

¶ 28 **[3]** In the alternative, plaintiff raises an as-applied constitutional challenge to § 1-17(c). He argues § 1-17(c), as-applied, violates the Equal Protection Clause of both the United States and North Carolina Constitutions because it does not pass strict scrutiny review.

¶ 29 Assuming, without deciding, that plaintiff's constitutional challenge to § 1-17(c) was properly before the trial court and preserved for appellate review, his argument lacks merit.

¶ 30 "Strict scrutiny applies only when a regulation classifies persons on the basis of certain suspect characteristics or infringes the ability of some persons to exercise a *fundamental* right." *DOT v. Rowe*, 353 N.C. 671, 676, 549 S.E.2d 203, 208 (2001) (citation omitted) (emphasis added). Plaintiff asserts subsection 1-17(c) runs counter to the "fundamental" right provided by Article I, Section 18 of the North Carolina Constitution. That article provides that "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18.

¶ 31 Plaintiff contends subsection (c) creates a separate class of medical-malpractice plaintiffs over the age of ten but less than fifteen years who—unless appointed a guardian ad litem, adjudicated abused or neglected juveniles, or placed in the custody of the State—are subject to a three-year statute of limitations and thus will always be barred from bringing their claims upon reaching the age of majority.

¶ 32 However, plaintiff acknowledges § 1-17(c) is a statute of limitation; it does not bar his suit. "Statutes of limitation represent a public policy about the privilege to litigate. Their shelter has never been regarded as

what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual." *G. D. Searle & Co. v. Cohn*, 455 U.S. 404, 408, 71 L. Ed. 2d 250, 256 (1982) (*purgandum*). "Persons with malpractice claims are not a suspect class and a classification so as to shorten the statute of limitations as to them does not affect a fundamental interest. This classification is not inherently suspect." *Hohn v. Slate*, 48 N.C. App. 624, 626, 269 S.E.2d 307, 308 (1980) (citation omitted).

¶ 33 Thus, statutes of limitation do not affect a fundamental right and are not subject to strict scrutiny analysis. Intermediate scrutiny attaches to other classifications, including gender and illegitimacy. *Rowe*, 353 N.C. at 675, 549 S.E.2d at 207. All other classifications, including age-based discrimination, receive rational-basis scrutiny. *Id.* Under rational-basis review, "the party challenging the regulation must show that it bears no rational relationship to any legitimate government interest." *Id.*

¶ 34 In *Hohn*, this Court heard a similar equal protection challenge to an earlier version of § 1-17, wherein the plaintiff argued § 1-17(b) "create[d] an arbitrary class and there is no rational basis for this distinction." 48 N.C. App. at 626, 269 S.E.2d at 308. We flatly rejected that argument. *Id.*

¶ 35 In this case, plaintiff offers no argument and cites no authority to demonstrate that § 1-17(c) does not pass rational-basis review. Accordingly, his as-applied constitutional challenge is without merit.

V. Conclusion

¶ 36 For the foregoing reasons, the trial court erred by denying defendants' Motions to Dismiss the Complaint as time-barred under § 1-17(c). We reverse.

REVERSED.

Judge WOOD concurs.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.

¶ 37 At the outset, I completely agree with the majority that this appeal is interlocutory and does not impact any substantial right of Defendants that would be lost absent immediate appeal. I would, however, also deny the Petition for Writ of Certiorari in the exercise of judicial restraint; thereby allowing the litigation to proceed apace and obviating the need

for this Court to wade into a question of first impression involving novel statutory interpretation and to reach—in the first instance—a constitutional question we might otherwise judiciously avoid at this stage or, potentially, altogether in this litigation. All the trial court did here was deny Defendants' pre-answer Motions to Dismiss. The trial court's Order does not finally rule on the application of the Statute of Limitations nor does it finally rule on the constitutionality of Section 1–17(c) as applied to Plaintiff in this case. Nevertheless, the majority of this panel voted in favor of allowing the Petition, and reaches the merits of this case. On those merits, I respectfully dissent from the Opinion of the Court.

I.

¶ 38 The majority's thoughtful and concise statutory analysis here focuses narrowly on the language of N.C. Gen. Stat. § 1–17(c). However, in a manner consistent with our prior precedent, the proper approach is to read Section 1–17(c) *in pari materia* with Section 1–15(c) and then, in turn, Sections 1–17(a) and (b). *Cf. Osborne by Williams v. Annie Penn Mem'l Hosp., Inc.*, 95 N.C. App. 96, 101, 381 S.E.2d 794, 797 (1989) ("In the case at bar, we are called upon to interpret the language of G.S. 1–17(b), and to determine its applicability to the statute of limitations covering malpractice actions as set forth in G.S. 1–15(c). The very language of G.S. 1–17(b) requires that these two statutes be construed *in pari materia*.").

¶ 39 Indeed, as in *Osborne*, the very language of N.C. Gen. Stat. § 1–17(c) requires these statutes to be read together:

> Notwithstanding the provisions of subsection (a) and (b) of this section, an action on behalf of a minor for injuries alleged to have resulted from malpractice arising out of a health care provider's performance of or failure to perform professional services *shall be commenced within the limitations of time specified in G.S. 1–15(c)*, except as follows:
>
> (1) If the time limitations specified in G.S. 1–15(c) expire before the minor attains the full age of 10 years, the action may be brought any time before the minor attains the full age of 10 years.
>
> (2) If the time limitations in G.S. 1–15(c) have expired and before a minor reaches the full age of 18 years a court has entered judgment or consent order under the provisions of Chapter 7B of the

> General Statutes finding that said minor is an abused or neglected juvenile as defined in G.S. 7B–101, the medical malpractice action shall be commenced within three years from the date of such judgment or consent order, or before the minor attains the full age of 10 years, whichever is later.
>
> (3) If the time limitations in G.S. 1–15(c) have expired and a minor is in legal custody of the State, a county, or an approved child placing agency as defined in G.S. 131D–10.2, the medical malpractice action shall be commenced within one year after the minor is no longer in such legal custody, or before the minor attains the full age of 10 years, whichever is later.

N.C. Gen. Stat. § 1–17(c) (2021) (emphasis added).

¶ 40 By its own plain terms, Section 1-15(c) provides:

> *Except where otherwise provided by statute*, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action: Provided further, that where damages are sought by reason of a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in

> the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action.

N.C. Gen. Stat. § 1–15(c) (2021) (emphasis added). If Section 1–15(c) is to be faithfully applied, it must be applied as a whole—not merely in piecemeal—in order to effectuate the intent of the General Assembly. As such, any and every application of Section 1–15(c) by its very terms requires a determination of whether another statutory exception applies.

¶ 41 Section 1–17 is, of course, a statutory exception to Section 1–15(c). *See* N.C. Gen. Stat. § 1–17 (2021). *King v. Albemarle Hosp. Auth.*, 370 N.C. 467, 470, 809 S.E.2d 847, 849 (2018) ("Section 1–17 tolls certain statutes of limitation periods while a plaintiff is under a legal disability, such as minority, that impairs her ability to bring a claim in a timely fashion."). The *King* Court examined the interplay of these statutes as applicable to that case.

¶ 42 "[U]nder subsection 1–17(a), a minor plaintiff who continues under the disability of minority, upon reaching the age of eighteen, has a three-year statute of limitations to bring a claim based on a general tort." *Id.* at 471, 809 S.E.2d at 849-50 (citing N.C. Gen. Stat. § 1–17(a)(1)). "Whereas the tolling provision of subsection (a) focuses on general torts, the tolling provision of subsection (b) specifically addresses professional negligence claims, including medical malpractice. As with general torts, when a medical malpractice claim accrues while a plaintiff is a minor, N.C.G.S. § 1–17(b) tolls the standard three-year statute of limitations provided by N.C.G.S. § 1–15(c)." *Id.* at 471, 809 S.E.2d at 850 (citation omitted).

¶ 43 "Section 1–17(b), however, reduces the standard three-year statute of limitations, after a plaintiff reaches the age of majority, to one year by requiring a filing before the age of nineteen." *Id.* "Thus, a minor plaintiff who continues under that status until age eighteen has one year to file her claim." *Id.* The Court explained: "The language of 'Notwithstanding the provisions of subsection (a)' refers to this reduced time period to bring an action. Like subsection (a), subsection (b) still allows the minor to reach adulthood before requiring her to pursue her medical malpractice claim, assuming her disability is otherwise uninterrupted." *Id.* at 471–72, 809 S.E.2d at 850 (citations omitted).

¶ 44 In this case, it then follows that Section 1–17(c) is itself an exception to the general rule applicable to minors injured by professional negligence set forth in Section 1–17(b). Indeed, Section 1–17(b), as amended, makes this express. N.C. Gen. Stat. § 1–17(b) ("Notwithstanding the provisions of subsection (a) of this section, *and except as otherwise provided in subsection (c)* of this section . . ." (emphasis added)). As such, Section 1–17(b) remains generally applicable unless one of the exceptions under Section 1–17(c) applies. As in Section 1–17(b), the language in Section 1–17(c) of "Notwithstanding the provisions of subsection (a) and (b) of this section" references the reduced time period to bring an action in the three instances to which subsection (c) is applicable.

¶ 45 Relevant to this case, is the first instance in which 1–17(c) applies:

> an action on behalf of a minor for injuries alleged to have resulted from malpractice arising out of a health care provider's performance of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1–15(c), except as follows:
>
> (1) If the time limitations specified in G.S. 1–15(c) expire before the minor attains the full age of 10 years, the action may be brought any time before the minor attains the full age of 10 years.

N.C. Gen. Stat. § 1–17(c)(1). By its terms, and using language similar to Section 1–17(b), Section 1–17(c)(1) provides that (A) in medical malpractice cases involving a minor Section 1–15(c) remains generally applicable, except when (B) the general statute of limitations under Section 1–15(c) would begin to run before the minor attains the age of seven, in which case the expiration of the statute of limitations is delayed until the minor attains the age of ten.

¶ 46 Thus, Section 1–17(c)(1) targets only those very young children who are injured by alleged medical negligence requiring them to bring suit by age ten. Other minor plaintiffs remain governed by the terms of Section 1–15(c). With respect to those other minor plaintiffs not governed by 1–17(c)(1), Section 1–15(c), in general provides, for a three-year statute of limitations running from the accrual of the claim "Except where otherwise provided by statute . . . ." Section 1–17(b) remains such a statutory exception. Reading Sections 1–15(c) and 1–17(b) and (c) *in pari materia*—as we must—if the narrow statutory exceptions found in 1–17(c) to Section 1–15(c) do not apply to a minor plaintiff, then Section 1-17(b) applies where the statute of limitations would otherwise

expire and provides "a minor plaintiff who continues under that status until age eighteen has one year to file her claim." *King*, 370 N.C. at 471, 809 S.E.2d at 850. Thus, read together, these statutes operate to provide a minor injured by alleged medical negligence until the age of nineteen to bring suit, unless the action accrues before the minor turns seven, in which case, the minor has until age ten to bring suit.

¶ 47 This analysis is consistent with the purpose of statutes of limitation and the interplay with the tolling provisions of Section 1–17 articulated by our Supreme Court. "The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time." *King*, 370 N.C. at 470, 809 S.E.2d at 849 (citations omitted). However:

> [b]alanced against the disadvantage of stale claims as protected by the statute of limitations is the problem that individuals under certain disabilities are unable to appreciate the nature of potential legal claims and take the appropriate action. Section 1–17 tolls certain statutes of limitation periods while a plaintiff is under a legal disability, such as minority, that impairs her ability to bring a claim in a timely fashion.

Id.

¶ 48 Reading Section 1–17(c)(1) as depriving child victims—without the aid of a Guardian ad litem—of alleged medical negligence of any tolling provision beyond the age of ten for filing a claim for damages personal to them results in untenable result of forcing minors to have to bring lawsuits when they remain legally "unable to appreciate the nature of potential legal claims" and unable to "take the appropriate action" impairing their ability to bring a timely claim. *See id.* On the other hand, reading Section 1–17(c)(1) in conjunction with 1–17(b) preserves the statutory protections of minors by tolling the statute of limitations but carves out a limited exception for claims involving alleged malpractice when a child is very young. It could be supposed that this would balance the need to preserve the rights of minors against forcing medical professionals to defend against stale claims. For example, prior to Section 1–17(c), an infant injured at birth would arguably have had almost twenty years to bring a lawsuit for personal claims arising from alleged medical negligence. One can imagine the difficulty of defending such a claim after the passage of so many years, "for '[w]ith the passage of time, memories fade or fail altogether, witnesses die or move away, [and] evidence is lost or destroyed.' " *King*, 370 N.C. at 470, 809 S.E.2d at 849. Such concerns

are lessened when the minor is thirteen, fourteen, or fifteen. As such, a common-sense plain reading of these statutes reflects a legislative intent to preserve the tolling provisions for minors but to limit the tolling for claims occurring when the minor is very young to balance against stale claims and loss of evidence prejudicing medical defendants.[1]

¶ 49 Applying this proper interpretation of the statutes to the facts of this case is a simple exercise. Defendants contend this action accrued when Plaintiff was thirteen years old. On its face, because the statute of limitations did not expire before Plaintiff turned ten, Section 1–17(c)(1) does not apply. Instead, Section 1–15(c) read *in pari materia* with Section 1–17(b) applies to Plaintiff's professional malpractice claim. As such, Plaintiff was required to bring this lawsuit before reaching age nineteen. The Complaint in this case alleges Plaintiff brought this action prior to attaining the age of nineteen. Thus, Plaintiff's Complaint on its face does not reflect the statute of limitations had expired creating a bar to Plaintiff's claim. Therefore, the Complaint states a claim upon which relief might be granted. Consequently, the trial court did not err in denying Defendants' Motions to Dismiss. Accordingly, the trial court's Order should be affirmed.

II.

¶ 50 Even if the interpretation and application of Section 1–17(b) and (c) *in pari materia* with Section 1–15(c) set forth in Part I of this dissent is not correct and the majority's interpretation holds, the correct result is still to affirm the trial court's interlocutory Order denying Defendants' Motions to Dismiss. This is so because Plaintiff has raised, in the alternative, the colorable argument if Section 1–17(c) did operate to require Plaintiff to bring suit as a sixteen year old, while still under a legal disability and legally unable to do so, that as applied to Plaintiff, such an application of the statute would violate his federal and state constitutional right to equal protection of the laws including by depriving him of the fundamental right under the North Carolina Constitution that: "All

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1. Although not directly at issue in this case, this same interpretation applies to the other two instances found in Section 1–17(c)(2) and (3). Notably, unlike subsection (c)(1) both of these subsections apply when the "time of limitations have expired". Subsection (c)(2) operates to extend the tolling provisions for up to three years after entry of an abuse or neglect adjudication even if the statute of limitations has otherwise expired. Subsection (c)(3) extends the tolling provisions while a minor is in custody of the State, County DSS, or other approved child placement agency and provides an additional year to file suit after such custody is relinquished. By its terms, subsection (c)(3) would also seem to require a minor injured by medical malpractice to file suit at the very latest by the time they reach 19, consistent with Section 1–17(b).

courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. Art. I, Sec. 18.

¶ 51 Again, the trial court's Order is not a final determination of whether Section 1–17(c) is unconstitutional as applied to Plaintiff. It merely allowed the litigation to proceed. This litigation would include permitting the parties to develop the factual and legal bases supporting or opposing Plaintiff's as-applied challenge to the extent it even needed to be reached. At this preliminary 12(b)(6) stage, reaching the merits of Plaintiff's as-applied challenge prior to the development of the facts applicable to Plaintiff's claim is inappropriate. Indeed, in the absence of those facts, the majority embarks on what is effectively a facial constitutional analysis without any analysis of how the statute applies to Plaintiff. This facial analysis is also improper in the absence of a facial challenge to the statute first considered by a three-judge panel of the Superior Court. The trial court, here, properly denied Defendants' Motions to Dismiss and should be affirmed.

NORTH CAROLINA FARM BUREAU
MUTUAL INSURANCE COMPANY, INC., Plaintiff
v.
MATTHEW BRYAN HEBERT, Defendant

No. COA22-82

Filed 16 August 2022

Motor Vehicles—insurance—underinsured motorist coverage—interpolicy stacking—multiple claimant exception

In a declaratory judgment action to determine the underinsured motorist (UIM) coverage available to defendant, who sought to recover under his own policy (as owner of the car in which he was riding as a passenger at the time of a two-car accident) and his parents' policy, the trial court properly granted judgment on the pleadings for defendant, thereby allowing him to recover under both policies. Since the multiple claimant exception of the Financial Responsibility Act (N.C.G.S. § 20-279.21(b)(4)) did not apply, defendant was not prevented from stacking multiple UIM policies.

Judge ARROWOOD dissenting.

Appeal by plaintiff from order entered 21 December 2021 by Judge Vince M. Rozier, Jr. in Wake County Superior Court. Heard in the Court of Appeals 25 May 2022.

William F. Lipscomb for plaintiff-appellant.

Law Offices of James Scott Farrin, by Preston W. Lesley, for defendant-appellee.

GORE, Judge.

¶ 1 North Carolina Farm Bureau Mutual Insurance Company, Inc. ("plaintiff") appeals from the Order Denying Plaintiff's Motion for Judgment on the Pleadings and Granting Judgment on the Pleadings for Defendant. We affirm.

I. Background

¶ 2 On 21 October 2020, Matthew Bryan Hebert was a passenger in his 2004 Chevrolet car. Sincere Corbett was driving Mr. Hebert's 2004 Chevrolet east on highway N.C. 42 in Johnston County, North Carolina. Jamal Direll Hicks, Jr. and Chase Everette Hawley were also passengers in Mr. Hebert's 2004 Chevrolet. Mr. Hebert's 2004 Chevrolet collided with a vehicle owned and operated by William Rayvoin Coats. Mr. Corbett and Mr. Hicks were killed in the collision. Mr. Hebert, Mr. Hawley, and Mr. Coats sustained significant injuries.

¶ 3 Mr. Hebert's vehicle was covered by a personal auto insurance policy issued by plaintiff to Mr. Hebert ("Mr. Hebert's policy"). Mr. Hebert's policy provided bodily injury liability coverage of $50,000 per person / $100,000 per accident, and underinsured motorists ("UIM") coverage of $50,000 per person / $100,000 per accident. Plaintiff tendered the $100,000 per accident limit of the liability coverage for Mr. Hebert's policy to the four claimants. The claimants agreed to divide the $100,000 per accident limit as follows:

Matthew Bryan Hebert	$ 100.00
The Estate of Jamal Direll Hicks, Jr.	$ 49,500.00
Chase Everette Hawley	$ 49,500.00
William Rayvoin Coats	$ 900.00

¶ 4 On 21 October 2020, Mr. Hebert also qualified as an insured of the UIM coverage of a personal auto policy issued by plaintiff to Mr. Hebert's parents, Bryan J. Hebert and Kristie M. Hebert ("the parents' policy"). The parents' policy provides UIM coverage of $100,000 per person / $300,000 per accident and medical payments coverage of $2,000.

¶ 5 On 29 July 2021, plaintiff filed a Complaint for Declaratory Judgment. In its complaint, plaintiff alleged that the UIM coverage of Mr. Hebert's policy does not apply to Mr. Hebert's claim because Mr. Hebert's 2004 Chevrolet is not an underinsured motor vehicle for Mr. Hebert's claim under his policy. Plaintiff also alleged that the "multiple claimant exception" to the definition of underinsured motor vehicle, found in N.C. Gen. Stat. § 20-279.21(b)(4), does not apply to Mr. Hebert's claim under the parents' policy because Mr. Hebert's 2004 Chevrolet was not insured under the liability coverage of the parents' policy. Plaintiff alleged that the amount of UIM coverage available to Mr. Hebert under the parents' policy is $99,900 ($100,000 per person UIM limit minus $100 from Mr. Hebert's liability coverage). Plaintiff sought declaratory relief requesting the trial court enter judgment declaring the only insurance coverage Mr. Hebert is entitled to recover from plaintiff related to the 21 October 2020 collision is the $99,900 UIM coverage from the parents' policy.

¶ 6 On 15 September 2021, Mr. Hebert filed his Answer. Mr. Hebert's Answer alleges that the 2004 Chevrolet is an underinsured motor vehicle as defined by North Carolina's Financial Responsibility Act. Mr. Hebert admitted that the 2004 Chevrolet satisfied the definition of an underinsured motor vehicle under the parents' policy but denied plaintiff's claims that the multiple claimant exception does not apply to his claim.

¶ 7 Plaintiff moved for judgment on the pleadings. On 21 December 2021, the trial court denied plaintiff's Motion for Judgment on the Pleadings. The trial court concluded that Mr. Hebert's policy does provide UIM coverage for Mr. Hebert's claim and entered Judgment on the Pleadings in favor of Mr. Hebert. Plaintiff filed a timely Notice of Appeal on 28 December 2021.

II. Discussion

¶ 8 We review *de novo* a trial court's order granting judgment on the pleadings. *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016) (citation omitted). In considering a motion for judgment on the pleadings,

> 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. As with a motion to dismiss, the trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. A Rule 12(c) movant must show that the complaint fails to allege facts sufficient to state a cause of action or admits facts which constitute a complete legal bar to a cause of action.

Id. at 51-52, 790 S.E.2d at 659-60 (cleaned up).

¶ 9 On appeal, plaintiff argues that the trial court erred in denying plaintiff's Motion for Judgment on the Pleadings, granting Judgment on the Pleadings for Mr. Hebert, and declaring that Mr. Hebert's policy provides UIM coverage for Mr. Hebert's claim. More specifically, plaintiff argues that the 2004 Amendment to N.C. Gen. Stat. § 20-279.21(b)(4) (commonly referred to as the multiple claimant exception) prevents Mr. Hebert's 2004 Chevrolet from being an underinsured vehicle for Mr. Hebert's claim under his own policy that insured that vehicle because the UIM limits of Mr. Hebert's policy are not greater than the bodily injury liability limits of his policy.

¶ 10 Section 20-279.21(b)(4) defines an underinsured motor vehicle as follows:

> An "underinsured motor vehicle," as described in subdivision (3) of this subsection, includes an "underinsured highway vehicle," which means a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.

N.C. Gen. Stat. § 20-279.21(b)(4) (2021). The 2004 Amendment/multiple claimant exception reads as follows:

> For purposes of an underinsured motorist claim asserted by a person injured in an accident where more than one person is injured, a highway vehicle will also be an "underinsured highway vehicle" if the total amount actually paid to that person under all bodily injury liability bonds and insurance policies

> applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy. Notwithstanding the immediately preceding sentence, a highway vehicle shall not be an "underinsured motor vehicle" for purposes of an underinsured motorist claim under an owner's policy insuring that vehicle unless the owner's policy insuring that vehicle provides underinsured motorist coverage with limits that are greater than that policy's injury liability limits.

N.C. Gen. Stat. § 20-279.21(b)(4). Plaintiff contends that the second sentence of the 2004 Amendment prevents Mr. Hebert's vehicle from being an underinsured motor vehicle for Mr. Hebert's claim under his own policy that insured the 2004 Chevrolet, because the UIM limits of Mr. Hebert's policy are not greater than the bodily injury liability limits of his policy.

¶ 11 Our analysis is guided by the "avowed purpose" of the Financial Responsibility Act, which is:

> to compensate the innocent victims of financially irresponsible motorists. The Act is remedial in nature and is to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished. The purpose of the Act, we have said, is best served when every provision of the Act is interpreted to provide the innocent victim with the fullest possible protection.

Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 573-74, 573 S.E.2d 118, 120 (2002) (cleaned up). In liberally construing the Act, this Court has declined to apply the multiple claimant exception in a way which would reduce compensation to innocent victims and conflict with the avowed purpose of the Act. *Nationwide Affinity Ins. Co. of Am. v. Le Bei*, 259 N.C. App. 626, 634, 816 S.E.2d 251, 257 (2018).

¶ 12 The Financial Responsibility Act permits interpolicy stacking of UIM coverage to calculate the "applicable limits of underinsured motorist coverage for the vehicle involved in the accident." *N.C. Farm Bureau Mut. Ins. Co. v. Bost*, 126 N.C. App. 50-51, 483 S.E.2d 452, 458 (1997). "After stacking, the parties use the stacked amount to determine if the tortfeasor's vehicle is an underinsured highway vehicle, under N.C. Gen.

Stat. § 20-279.21(b)(4)." *Le Bei*, 259 N.C. App. at 630, 816 S.E.2d at 254 (citing *Bost*, 126 N.C. App. at 51, 483 S.E.2d at 458).

¶ 13 This Court has held that the multiple claimant exception is not triggered "simply because there were two injuries in an accident." *Integon Nat'l Ins. Co. v. Maurizzo*, 240 N.C. App. 38, 44, 769 S.E.2d 415, 420 (2015). Instead, the Court limited the exception's applicability to "when the amount paid to an individual claimant is less than the claimant's limits of UIM coverage after liability payments to multiple claimants." *Id.* at 44, 769 S.E.2d at 420-21.

¶ 14 Additionally, in *Le Bei*, this Court interpreted the multiple claimant exception in a manner that would not limit the recovery of innocent occupants of a tortfeasor's vehicle. *See Le Bei*, 259 N.C. App. at 634, 816 S.E.2d at 257. In the case *sub judice*, plaintiff contends *Le Bei* was decided incorrectly.

¶ 15 In *Le Bei*, an individual was driving their vehicle with five passengers in the vehicle. *Id.* at 627, 816 S.E.2d at 252. The driver maintained an insurance policy with liability limits of $50,000 per person / $100,000 per accident and UIM coverage with limits of $50,000 per person / $100,000 per accident. *Id.* at 627, 816 S.E.2d at 253. The driver's reckless driving resulted in an accident with two other vehicles. *Id.* Two of the passengers suffered personal injuries from the accident and the other three passengers died because of their injuries suffered in the accident. *Id.* The plaintiff insurance company distributed the $100,000 liability insurance between the estates of the deceased passengers and the drivers of the two additional vehicles involved in the accident. *Id.* The plaintiff in *Le Bei* claimed that the passengers were not able to recover the difference between the amounts received under the liability coverage and the per person limits of the UIM coverage due to the multiple claimant exception in N.C. Gen. Stat. § 20-279.21(b)(4). This Court, in following relevant precedent, held that the multiple claimant exception did not apply, and the deceased claimants were entitled to recover UIM coverage from their own policies and UIM coverage from the tortfeasor's policy. *Id.* at 634, 816 S.E.2d at 251.

¶ 16 The case *sub judice* presents a similar factual scenario to *Le Bei*, in that a plaintiff insurance company is arguing that the multiple claimant exception prevents an innocent occupant of a vehicle driven by the tortfeasor from stacking and recovering UIM coverage from multiple insurance policies. In following this Court's precedent, we hold that Mr. Hebert is entitled to stack insurance policies and the multiple claimant exception does not apply to the present case.

¶ 17 Because we hold the multiple claimant exception does not apply, the trial court properly held Mr. Herbert is entitled to recover UIM coverage from his insurance policy and the parents' insurance policy. Accordingly, the trial court properly granted Judgment on the Pleadings in favor of Mr. Hebert and properly denied plaintiff's Motion for Judgment on the Pleadings.

AFFIRMED.

Judge WOOD concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

¶ 18 I respectfully dissent from the majority's holding that the multiple claimant exception does not apply. This case concerns defendant's underinsured motorist claim under his own policy, and accordingly I would hold that the multiple claimant exception applies, and that defendant's vehicle does not qualify as an "underinsured motor vehicle" as defined by N.C. Gen. Stat. § 20-279.21(b)(4).

¶ 19 The statute defines an "underinsured motor [or highway] vehicle" in two categories. The first definition includes highway vehicles where "the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy." N.C. Gen. Stat. § 20-279.21(b)(4) (2021). In this case, defendant's insurance policy provided bodily injury liability coverage of $50,000 per person and $100,000 per accident, with equal coverage limits of underinsured motorist coverage. Accordingly, because the sum of liability limits for bodily injury was equal to the applicable limits of underinsured motorist coverage for the vehicle involved and defendant's policy, defendant's vehicle does not qualify as an underinsured motor vehicle under the first definition.

¶ 20 The second definition, also referred to as the multiple claimant exception, provides that, in accidents with more than one person injured, a highway vehicle is underinsured "if the total amount actually paid to the person under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident

and insured under the owner's policy." N.C. Gen. Stat. § 20-279.21(b)(4). However, a vehicle is not included in this definition "unless *the owner's policy* insuring that vehicle provides underinsured motorist coverage with limits that are *greater than that policy's* bodily injury liability limits." *Id.* (emphasis added).

¶ 21 This case concerns defendant's underinsured motorist claim under his own policy. Pursuant to the second sentence of the multiple claimant exception, in an uninsured motorist claim under an owner's policy, the owner's underinsured motorist coverage limits must be "greater than that policy's bodily injury liability limits." Defendant's policy for that vehicle, however, provided underinsured motorist coverage with limits that were equal to that policy's bodily injury liability limits.

¶ 22 Although the majority holds that defendant's vehicle qualifies as an underinsured motor vehicle after inter-policy stacking with his parents' policy limits, I believe the multiple claimant exception applies and that defendant was not entitled to stack insurance policies. The General Assembly contemplated underinsured motorist claims under an owner's policy and specifically confined the limit coverage comparison to the owner's policy. N.C. Gen. Stat. § 20-279.21(b)(4) ("Notwithstanding the immediately preceding sentence, a highway vehicle shall not be an 'underinsured motor vehicle' *for purposes of an underinsured motorist claim under an owner's policy insuring that vehicle* unless *the owner's policy insuring that vehicle* provides underinsured motorist coverage with limits that are greater *than that policy's* injury liability limits." (emphasis added)). Because this case involves an underinsured motorist claim under the owner's policy insuring the vehicle involved in the accident, the statute requires a comparison of coverage limits within that policy.

¶ 23 Additionally, I believe this case is distinguishable from *Nationwide Affinity Ins. Co. of Am. v. Le Bei*, which the majority cites as a "similar factual scenario." In *Le Bei*, several passengers were injured or killed in a multi-vehicle accident and subsequently brought underinsured motorist claims under the tortfeasor's policy. *Nationwide Affinity Ins. Co. of Am. v. Le Bei*, 259 N.C. App. 626, 627, 816 S.E.2d 251, 253 (2018). None of the claimants were the owner of the vehicle, nor were the claims under their own policies. *Id.* at 627, 816 S.E.2d at 252-53. This Court held that the multiple claimant exception did not apply and that the defendants were permitted to recover underinsured motorist coverage under the driver's policy. *Id.* at 634, 816 S.E.2d at 257.

¶ 24 Although this case is similar in that defendant was a passenger at the time of the accident, he was a passenger in his own vehicle and has brought a claim under his own policy for that vehicle, not under the tortfeasor's policy. Because defendant was the owner of the vehicle and brought an underinsured motorist claim under his own policy, I believe the second sentence of the multiple claimant exception applies and that the trial court was not permitted to stack defendant's policy limits with the limits of his parents' policy. Although inter-policy stacking is generally permitted as part of the statute's "avowed purpose" of compensating "the innocent victims of financially irresponsible motorists[,]" *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 573, 573 S.E.2d 118, 120 (2002) (citation and quotation marks omitted), considering multiple insurance policies in this particular type of claim is impermissible pursuant to the statute. I believe *Le Bei* is factually distinct and not controlling in this case.

¶ 25 Because this case involves an underinsured motorist claim under the owner's policy, the statute, specifically the second sentence of the multiple claimant exception, must be strictly applied here. For the foregoing reasons, I would reverse the trial court's order and I respectfully dissent.

R.E.M. CONSTRUCTION, INC., PLAINTIFF
v.
CLEVELAND CONSTRUCTION, INC.; MHG ASHEVILLE TR, LLC; ASHEVILLE ARRAS RESIDENCES, LLC; AND FEDERAL INSURANCE COMPANY; DEFENDANTS,
AND
UNITED STATES SURETY COMPANY, INTERVENOR

No. COA21-781

Filed 16 August 2022

Arbitration and Mediation—motion to confirm arbitration award—amount of damages—authority to grant equitable relief

In a dispute between a construction company (defendant) and a subcontractor (plaintiff), the arbitration panel did not exceed its authority by fashioning an equitable remedy to compensate plaintiff subcontractor—who had been improperly terminated for default—since, although the terms of the parties' subcontracts provided for the award of the "actual direct cost" of the subcontract work, there was no evidence of such cost in the record and an equitable

remedy estimating that cost was both authorized by state law and not unequivocally precluded by the subcontracts' terms. The subcontracts explicitly adopted the rules of the American Arbitration Association, which allowed for the grant of equitable remedies.

Appeal by defendant Cleveland Construction, Inc., from judgment and order entered 10 September 2021 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 24 May 2022.

Erwin, Capitano & Moss, P.A., by Fenton T. Erwin, Jr., and Erin C. Huegel, for plaintiff-appellee R.E.M. Construction, Inc.

Chamberlain Hrdlicka White Williams & Aughtry, by Seth R. Price, pro hac vice, and Hamilton Stephens Steele + Martin, PLLC, by Tracy T. James and Carmela E. Mastrianni, for defendant-appellant Cleveland Construction, Inc.

Everett Gaskins Hancock LLP, by James M. Hash, and Thompson Law Group, LLC, by Kelley Herrin, pro hac vice, for intervenor-appellee.

ZACHARY, Judge.

¶ 1 Defendant Cleveland Construction, Inc., ("CCI") appeals from the trial court's judgment and order (1) granting the motion of Plaintiff R.E.M. Construction, Inc., ("REM") to confirm the arbitration panel's award, and (2) denying CCI's motion to modify or, in the alternative, to partially vacate the panel's award. After careful consideration, we affirm.

Background

¶ 2 This appeal arises out of an arbitration proceeding following CCI's termination of REM from a construction project in Asheville. CCI's appeal presents a narrow question of law concerning the arbitration panel's award of damages to REM. On appeal, CCI does not challenge the panel's conclusions that (1) CCI did not properly terminate REM for default under the terms of the parties' subcontracts, and (2) REM was "entitled to monetary compensation from CCI[.]" Instead, CCI argues that the panel exceeded its authority by awarding damages that were not permissible under the express terms of the parties' subcontracts, and that the trial court thus erred by confirming the panel's award. As CCI does not contest the panel's conclusions regarding the merits of REM's claims, we recite only those facts pertinent to the present dispute concerning the award of damages.

¶ 3 On 29 August 2017, CCI entered into a pair of substantially identical subcontracts ("the Subcontracts") with REM for work on the "exterior envelope" of a nineteen-story building in Asheville. Intervenor United States Surety Company ("USSC") issued performance bonds dated 25 January 2018 for both of the Subcontracts. REM began work in November 2017, but between May and September 2018 the project suffered several problems and resultant delays. On 5 October 2018, CCI terminated REM for default and notified USSC of the termination.

¶ 4 On 3 April 2019, REM filed suit against Defendants CCI, MHG Asheville TR, LLC, and Asheville Arras Residences, LLC in Buncombe County Superior Court.[1] CCI elected to arbitrate REM's claims pursuant to the terms of the Subcontracts, each of which provides in pertinent part that "[a]ny controversy or claim of . . . [REM] against [CCI] shall, at the option of [CCI], be resolved by arbitration pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association in effect on the date on which the demand for arbitration is made." Accordingly, on 3 May 2019, CCI filed a motion to stay pending arbitration alongside its motion to dismiss. On 26 June 2019, the trial court entered an order staying proceedings pending the arbitration.

¶ 5 A panel of arbitrators confirmed by the American Arbitration Association ("AAA") and approved by the parties heard this matter. On 15 March 2021, the panel issued its award, determining in pertinent part "that CCI did not properly terminate REM for default; . . . and REM shall be entitled to monetary compensation from CCI in accordance with the terms of" the Subcontracts. To calculate the amount of the damage award, the panel first looked to the terms of the Subcontracts:

> 73. As stated above, the termination for default by [CCI] against REM was improper. In a case of an improper termination, the contract provides in Article 31.8 as follows:
>
> > "If after termination it is determined that, for any reason, [REM] was not in default or that [REM] is not properly terminated for default, then such termination shall have been deemed to be for the convenience of [CCI] and [REM] shall be entitled to the *actual direct cost* of all Subcontract Work

1. On 26 June 2019, the trial court entered an order allowing Plaintiff to amend its complaint to bring claims against additional Defendant Federal Insurance Company. Defendants MHG Asheville TR, LLC, Asheville Arras Residences, LLC, and Federal Insurance Company are not involved in the present appeal.

> satisfactorily performed and materials furnished prior to notification of termination. [REM] shall not be entitled to compensation for profit and overhead. [REM] shall not be entitled to compensation for work not performed or materials not furnished. [REM] shall *not be entitled to recover exemplary, special or consequential damages, or anticipated profit* on account of such termination or on account of [CCI's] breach of the subcontract agreement."

(Emphases added.)

¶ 6 The panel then reviewed the record, but found insufficient evidence on which to base a calculation of the "actual direct cost" to which REM was entitled under the Subcontracts. As such, the panel determined that it would fashion an equitable remedy pursuant to the AAA rules:

> 74. The contractual starting point for determining the damages or compensation for REM is the actual direct cost of all Subcontract Work prior to October 5, 2018. The problem is that there is no evidence of "actual direct cost" of all work. There was little evidence of the job costs of REM presented to the Panel.
>
> 75. It is unfair to deny any compensation to REM as a result of the improper termination of its subcontracts with [CCI]. Therefore, the Panel develops an equitable remedy pursuant to the AAA Rules. Specifically, Rule R-48 (a) of the Construction Industry Rules of the AAA states, "The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, equitable relief and specific performance of a contract."

¶ 7 Therefore, the panel set out to estimate REM's "actual direct cost" under Article 31.8 of the Subcontracts. The panel examined the evidence in the record to determine "the amount of the contract funds earned by REM at the time of termination." The panel identified a document provided by CCI as "the best source for contract funds earned by REM through September 30, 2018" and calculated a total of $211,151.00 in earnings for that period. Then, recognizing that this amount "d[id] not include the work of REM performed from October 1-5, 2018[,]" the panel

determined that "the labor and equipment, including demobilization for October 1-5, 2018, is $25,000.00." Ultimately, the panel concluded that "REM is entitled to a total of $236,151.00 for contract work performed on this project." The panel added $926.00 for technical violations of the North Carolina Prompt Pay Act to its total award, and ordered that CCI pay the administrative costs and fees of arbitration as well as prejudgment interest; the panel rejected REM's other claims for additional payment and compensation.

¶ 8 Upon request from CCI, the panel entered a modified award on 30 April 2021, correcting a computation in the amount of prejudgment interest. Although CCI also "complain[ed] about the [p]anel's reliance" on the document that the panel used to calculate REM's actual direct cost when determining the damage award, the panel declined to otherwise modify its award.

¶ 9 The parties then returned to the trial court, where they filed a series of motions. On 10 May 2021, REM filed a motion to confirm the award. On 24 May 2021, USSC filed a motion to intervene and to modify the award. On 1 June 2021, CCI filed motions to lift the stay and to modify or, alternatively, to partially vacate the award. The matter came on for hearing on 12 July 2021 in Buncombe County Superior Court. On 10 September 2021, the trial court entered its judgment and order, in which it: (1) lifted the stay; (2) allowed USSC to intervene; (3) denied CCI's motion to modify or, alternatively, partially vacate the award; (4) granted REM's motion to confirm the award; and (5) entered judgment confirming the award. CCI timely filed notice of appeal.

Discussion

¶ 10 As stated above, CCI does not challenge the merits of the panel's conclusions that (1) CCI did not properly terminate REM for default under the terms of the Subcontracts, and (2) REM was "entitled to monetary compensation[.]" Further, CCI notes that it does not contest the award of costs and fees of arbitration and has already reimbursed REM for that amount.

¶ 11 Instead, CCI argues that the trial court erred by denying its motion to modify or, alternatively, to partially vacate the award because the panel "improperly applied Rule 48 of the AAA Construction Industry Rules . . . to award [REM] money to which it was not entitled." Alternatively, CCI argues that the trial court should have vacated the panel's award "because the panel manifestly disregarded the law." We disagree.

I. Standard of Review

¶ 12 "Since this appeal arises from a decision on a motion to confirm an arbitration award, we first note that a strong policy supports upholding arbitration awards." *WMS, Inc. v. Weaver*, 166 N.C. App. 352, 357, 602 S.E.2d 706, 709 (citation and internal quotation marks omitted), *disc. review denied*, 359 N.C. 197, 608 S.E.2d 330 (2004). "Judicial review of an arbitration award is confined to a determination of whether there exists one of the specific grounds for vacation of an award" under the Revised Uniform Arbitration Act, N.C. Gen. Stat. § 1-569.1 *et seq.* (2021). *Dalenko v. Peden Gen. Contr'rs, Inc.*, 197 N.C. App. 115, 125, 676 S.E.2d 625, 632 (2009) (citation omitted), *notice of appeal dismissed*, 363 N.C. 801, 690 S.E.2d 534, *cert. denied*, 363 N.C. 854, 694 S.E.2d 202 (2010).

¶ 13 "[E]rrors of law or fact or erroneous decisions of matters submitted to arbitration are not sufficient to invalidate an arbitration award fairly and honestly made." *Carteret Cty. v. United Contr'rs of Kinston, Inc.*, 120 N.C. App. 336, 346, 462 S.E.2d 816, 823 (1995), *petition for disc. review withdrawn*, 343 N.C. 121, 471 S.E.2d 65 (1996).

> An award is intended to settle the matter in controversy, and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award, it opens the door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus[,] arbitration instead of ending would tend to increase litigation.

Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 236, 321 S.E.2d 872, 880 (1984) (citation omitted). Accordingly, "[i]f the dispute is within the scope of the arbitration agreement, then the court must confirm the award unless one of the statutory grounds for vacating or modifying the award exists." *United Contr'rs*, 120 N.C. App. at 346, 462 S.E.2d at 823.

II. Analysis

¶ 14 CCI argues that the trial court should have vacated the panel's award of damages under N.C. Gen. Stat. § 1-569.23(a)(4), which provides that a trial court may vacate an arbitration award where "[a]n arbitrator exceeded the arbitrator's powers[.]" N.C. Gen. Stat. § 1-569.23(a)(4). CCI contends that the panel "exceeded its authority by electing to fashion an award outside of what was contemplated in the negotiated contract" when it applied AAA Rule 48 to "develop[ ] an equitable remedy" where

there was "no evidence of 'actual direct cost' of all work" in the record before the panel.

¶ 15 In light of the strong public policy that "supports upholding arbitration awards[,]" *Weaver*, 166 N.C. App. at 357, 602 S.E.2d at 709 (citation omitted), this Court has recognized with regard to the award of remedies that "an arbitrator does not exceed his powers if (1) state law allows the remedy for the specified cause of action, and (2) the arbitration contract does not unequivocally preclude it[,]" *id.* at 359, 602 S.E.2d at 711.[2] In the present case, state law unquestionably allows for the equitable remedy fashioned by the panel. *See* N.C. Gen. Stat. § 1-569.21(c) ("[A]n arbitrator may order any remedies the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that a remedy could not or would not be granted by the court is not a ground for . . . vacating an award under G.S. 1-569.23."). Thus, the issue presented here is whether the Subcontracts "unequivocally preclude[d]" the panel's award. *Weaver*, 166 N.C. App. at 359, 602 S.E.2d at 711.

¶ 16 Each of the Subcontracts provides, in pertinent part, that "[a]ny controversy or claim of . . . [REM] against [CCI] shall, at the option of [CCI], be resolved by arbitration pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association in effect on the date on which the demand for arbitration is made." AAA Rule 48(a), as quoted by the panel in its award, provides that "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, equitable relief and specific performance of a contract." The Subcontracts do not explicitly preclude the equitable remedy that the panel fashioned; rather, they expressly vest the arbitration panel with broad discretion to craft equitable remedies through the specific adoption of the AAA Rules, including Rule 48(a). Hence, in estimating the "actual direct cost" incurred by REM pursuant to Article 31.8 of the Subcontracts, the panel did not exceed the vast equitable powers with which it was endowed by the parties.

¶ 17 Notably, CCI does not directly argue on appeal that the Subcontracts explicitly precluded the equitable remedy fashioned by the panel. Instead, CCI offers a series of arguments otherwise attacking the panel's

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2. Although *Weaver* concerned arguments under the Federal Arbitration Act, the applicable federal and state provisions both allow a trial court to vacate an award where, *inter alia*, the arbitrators exceeded their powers. *Compare* 9 U.S.C. § 10(a)(4) (2018), *with* N.C. Gen. Stat. § 1-569.23(a)(4).

equitable authority, including: (1) that "Rule 48(a) is an equitable remedy that is not applicable in this context"; (2) that even if Rule 48(a) were applicable, the relief designed by the panel was not "within the scope of the agreement of the parties" as required by Rule 48(a); and (3) that "Rule 48(a) does not allow an arbitration panel to award monetary damages in direct contradiction of the governing contract's terms" and that "[t]o hold otherwise would be to eviscerate the central concept underlying all arbitrations: that the arbitrators derive their powers from the parties' contract and are thus limited to awarding relief within the scope of that contract." These arguments are unpersuasive.

¶ 18 Although CCI asserts that the panel's award of monetary damages was in "direct contradiction of the [Subcontracts'] terms[,]" we again note that the Subcontracts themselves do not contain any express limitation that would preclude the panel's award. The Subcontracts provide that, in the event that CCI improperly terminated REM for default, REM would not be entitled to "compensation for profit and overhead"; "compensation for work not performed or materials not furnished"; or "exemplary, special or consequential damages, or anticipated profit[.]" But the Subcontracts explicitly state that REM "shall be entitled to the actual direct cost of all Subcontract Work satisfactorily performed and materials furnished prior to notification of termination." And AAA Rule 48(a), which the Subcontracts specifically adopt, authorizes the arbitration panel to "grant *any remedy* or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, *including*, but not limited to, *equitable relief*[.]" (Emphases added).

¶ 19 In its equitable award, the arbitration panel did not provide REM with any of the forms of compensation prohibited by the Subcontracts. In fact, it expressly constrained its calculation of equitable relief—authorized by Rule 48(a)—to an approximation of "the amount of the contract funds earned by REM at the time of termination" and rejected REM's claims for "additional payment or compensation." Therefore, the arbitration panel's estimation of REM's "actual direct cost" was properly calculated to be consistent with the Subcontracts' terms.

¶ 20 At its essence, the sole source of CCI's complaints on appeal is that the panel estimated an approximate "amount of the contract funds earned by REM at the time of termination" when REM had not submitted any evidence to that effect, based on the panel's statement that it would be "unfair to deny any compensation to REM" under the circumstances presented. However, CCI cannot point to any provision in the Subcontracts that forbids the panel from (1) awarding this equitable relief—which, again, was explicitly authorized by Rule 48(a) and not

specifically precluded by the terms of the Subcontracts—and thus (2) estimating the "actual direct cost" to which REM was entitled based on evidence in the record before it, regardless of which party provided that evidence. "[T]he parties could have—but did not—write into the contract a limiting provision" forbidding the arbitration panel from fashioning this specific remedy. *Faison & Gillespie v. Lorant*, 187 N.C. App. 567, 577, 654 S.E.2d 47, 54 (2007) (citation omitted).

¶ 21 We conclude that in the case at bar the arbitration panel did not "act[ ] contrary to the express authority conferred on them by statute and by the language of the parties' private arbitration agreement." *Id.* at 575, 654 S.E.2d at 52. "In making [its] award the arbitrat[ion panel] construed the contract, as it was [its] right and duty to do. [It] added nothing to the agreement. Instead, [it] based [its] conclusions on a permissible construction of the written instrument." *Id.* at 577, 654 S.E.2d at 54 (citation omitted). Because the arbitration panel did not exceed the authority afforded it by the parties in the Subcontracts, the trial court did not err by confirming the award.

¶ 22 Lastly, CCI contends that "the panel's award should be vacated because the panel manifestly disregarded the law." CCI maintains that the panel acted in manifest disregard of the law by declining to apply the parties' subcontracts as written in calculating its damages award.

¶ 23 "To establish manifest disregard, a party must demonstrate: (1) the disputed legal principle is clearly defined and is not subject to reasonable debate; and (2) the arbitrator refused to apply that legal principle." *Warfield v. Icon Advisers, Inc.*, 26 F.4th 666, 669–70 (4th Cir.) (citation and internal quotation marks omitted), *reh'g and reh'g en banc denied*, 2022 U.S. App. LEXIS 7583 (2022).

¶ 24 The "manifest disregard" analysis has been adopted by other jurisdictions, but has not been employed by the North Carolina courts; indeed, the federal circuit courts of appeal are split as to whether the "manifest disregard" ground is viable as a matter of federal law. *See id.* at 669–70 n.3. However, CCI asks this Court to adopt an arbitrator's "manifest disregard of the law" as an additional, non-statutory ground for vacating an arbitrator's award.

¶ 25 In that we have already determined that the arbitration panel here did not "act[ ] contrary to the express authority conferred on them by statute and by the language of the parties' private arbitration agreement[,]" *Faison*, 187 N.C. App. at 575, 654 S.E.2d at 52, we need not accept CCI's invitation to adopt this alternative analysis, *see In re Fifth Third Bank, Nat. Ass'n*, 216 N.C. App. 482, 488, 716 S.E.2d 850, 855 (2011)

(concluding that, because the appellant "fail[ed] to demonstrate that the Arbitrator either 'manifestly disregarded the law' or 'dispensed his own brand of industrial justice,' . . . we need not determine the extent, if any, to which 'manifest disregard of the law' remains a valid non-statutory basis for vacating an arbitration award" under the Federal Arbitration Act).

Conclusion

¶ 26 For the foregoing reasons, we conclude that the trial court did not err in denying CCI's motion to modify or, alternatively, to partially vacate the award. The trial court's judgment and order confirming the arbitration award is affirmed.

AFFIRMED.

Judges INMAN and JACKSON concur.

JENNIFER SNIPES, PLAINTIFF
v.
TITLEMAX OF VIRGINIA, INC., DEFENDANT

No. COA21-374

Filed 16 August 2022

1. Arbitration and Mediation—arbitration award—vacatur—where arbitrator exceeds delegated powers—"essence of the contract" doctrine

In a legal dispute between parties to a car loan agreement, in which plaintiff-borrower alleged that the agreement's terms violated the North Carolina Consumer Finance Act (NCCFA), the trial court properly vacated an arbitration award issued in plaintiff's favor on grounds that the award failed to draw its essence from the loan agreement where the arbitrator disregarded the agreement's plain and unambiguous choice-of-law provision favoring Virginia law and instead applied North Carolina law—specifically, the NCCFA—to resolve plaintiff's claims. Under § 10(a)(4) of the Federal Arbitration Act (permitting vacatur of arbitration awards where "the arbitrators exceeded their powers"), an arbitrator's failure to draw from the "essence of a contract" is a valid ground on which to vacate an arbitration award, and therefore plaintiff's argument that the court impermissibly reviewed the award de novo was meritless.

2. Arbitration and Mediation—Federal Arbitration Act—vacatur of award—dismissal of underlying case—improper

In a legal dispute between parties to a car loan agreement, in which the trial court properly vacated an arbitration award issued in plaintiff-borrower's favor, the court erred by subsequently dismissing all of plaintiff's claims with prejudice where the Federal Arbitration Act (FAA) did not authorize the court to do so. Rather, the FAA provides that if a trial court vacates an award, it may either—in its discretion—order a rehearing by the arbitrator or decide the issues originally referred to the arbitrator.

Appeal by plaintiff from order entered 24 March 2021 by Judge Caroline Pemberton in District Court, Guilford County. Heard in the Court of Appeals 11 January 2022.

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

Troutman Pepper Hamilton Sanders, LLP, by Jason D. Evans and William J. Farley III, for defendant-appellee.

STROUD, Chief Judge.

¶ 1 Plaintiff, Jennifer Snipes, appeals from an order vacating an arbitration award in her favor and dismissing her claims against Defendant, TitleMax of Virginia. Because the trial court properly reviewed the arbitrator's award based on the essence of the contract doctrine and, upon *de novo* review, properly found the arbitrator's award did not draw its essence from the parties' contract, we affirm the *vacatur* of the arbitrator's award. But because the trial court could not dismiss Plaintiff's claims based on its *vacatur* of the arbitrator's award, we remand for the trial court, in its discretion, to either direct a rehearing by the arbitrator or decide the issues originally sent to the arbitrator.

I. Background

¶ 2 This case arises out of a "Motor Vehicle Title Loan Agreement" between Plaintiff and Defendant from August 2016 in which Plaintiff received a loan of just under $2,500 secured by title to her vehicle with an interest rate and fees of approximately 144%. While Plaintiff lives in North Carolina, she traveled to Virginia, where Defendant is based, to enter into the Loan Agreement. The Loan Agreement contains two provisions pertinent to this appeal. A provision entitled "Governing Law,

Assignment and Amendment" provides, in relevant part, "This Loan Agreement shall be governed by the laws of the State of Virginia, except that the Waiver of Jury Trial and Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1–16 ('FAA')."

¶ 3 The "Waiver of Jury Trial and Arbitration Provision" provides for an arbitrator to "issue a final and binding decision" on any dispute that arises under the Loan Agreement, with the term "dispute" being "given the broadest possible meaning and includ[ing], without limitation" *inter alia* "all federal or state law claims, disputes or controversies, arising from or relating directly or indirectly to th[e] Loan Agreement." (Capitalization altered.)

¶ 4 On 14 January 2019, Plaintiff filed a complaint against Defendant arising out of the Loan Agreement. Specifically, Plaintiff alleged the Loan Agreement violated "the North Carolina Consumer Finance Act, North Carolina usury statutes, and the North Carolina Unfair and Deceptive Trade Practices Act." "Plaintiff also sought punitive damages." Pursuant to the Loan Agreement's arbitration provision, Plaintiff included a motion to compel arbitration in her complaint explaining she filed the action "to toll the application of the statute of limitations." In response, Defendant filed a motion to dismiss the case for improper venue under North Carolina Rule of Civil Procedure 12(b)(3), N.C. Gen. Stat. § 1A-1, Rule 12(b)(3) (2019), on the grounds Plaintiff did not live in the county where the case was filed and Defendant did not have an office there.

¶ 5 On 22 May 2019, the trial court entered an order denying Defendant's motion to dismiss, granting Plaintiff's motion to compel arbitration, and staying litigation "pending completion of the arbitration ordered." The parties then "arbitrated their dispute on the papers" they had submitted "without an evidentiary hearing."

¶ 6 On 16 November 2020, the arbitrator issued an award in favor of Plaintiff for approximately $12,800—representing treble damages. In the award, the arbitrator explained he had to choose between applying Virginia law and applying North Carolina law to the dispute as well as the importance of the difference between those two options:

> This case involves the extension of a loan to Claimant, a North Carolina resident, secured by an automobile titled in North Carolina, where the loan documents were signed in Respondent's office in Virginia. The loan carried an interest rate of nearly 150%, a rate that clearly violates the North Carolina Consumer Finance Act (the "CFA"), but that is arguably not

> illegal in Virginia. The question to be resolved is whether the language of the CFA applies to the transaction at issue here.

Despite this recognition, the arbitration award never mentioned the Loan Agreement's express Virginia choice of law provision. The arbitration award exclusively focuses on North Carolina's Consumer Finance Act in its primary analysis before also discussing an argument Defendant made based on the Commerce Clause of the United States Constitution and addressing damages and fees.

¶ 7 The same day the arbitrator entered his award, Plaintiff filed a motion to confirm the arbitration award and enter judgment. On 15 February 2021, Defendant filed a motion to vacate the arbitration award. In its motion, Defendant argued the trial court should vacate the arbitration award for two reasons: (1) because the award "strayed both from the interpretation and application of the agreement" in that it *inter alia* "refus[ed] to enforce the parties' valid choice-of-law provision" and (2) because the arbitrator "showed a manifest disregard for the law" by refusing to enforce the choice-of-law provision and by ignoring "a well-established principle of constitutional law," the Commerce Clause. As part of its prayer for relief in its motion to vacate, Defendant also asked the trial court to dismiss Plaintiff's claims and enter judgment on its behalf.

¶ 8 On 24 March 2021, the trial court entered an order "granting Defendant's motion to vacate [the] arbitration award and denying Plaintiff's motion to confirm [the] arbitration award." (Capitalization altered.) After making Findings of Fact on the procedural history of the case, the trial court made Conclusions of Law explaining how it could only vacate an arbitration award on limited grounds including manifest disregard of law and an award failing to draw its essence from the parties' agreement. Applying those doctrines to the arbitration award, the trial court concluded the Loan Agreement "contains an unambiguous, valid, and enforceable choice-of-law provision confirming that Virginia law applies" and the arbitration award "demonstrated a manifest disregard of the law" and "fail[ed] to draw its essence from the Loan Agreement" by ignoring the choice of law provision favoring Virginia law and instead applying North Carolina law. As a result, the trial court granted Defendant's motion to vacate the arbitration award and denied Plaintiff's motion to confirm the arbitration award. Based on its decision to vacate the arbitration award, the trial court also dismissed Plaintiff's claims stating: "Plaintiff's claims against Defendant are hereby dismissed with prejudice."

¶ 9 On 20 April 2021, Plaintiff filed a written notice of appeal from the trial court's order.

II. Analysis

¶ 10 **[1]** Plaintiff contends the trial court erred by "granting Defendant-Appellee's motion to vacate [the] arbitration award" and by "denying Plaintiff-Appellant's motion to confirm [the] arbitration award." (Capitalization altered.) As both parties agree, these two arguments are two sides of the same coin because under the Federal Arbitration Act ("FAA")[1] a court "must" confirm an arbitration award "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11" of the Act. 9 U.S.C. § 9. We first provide background on the law governing *vacatur* under the FAA to help situate the parties' specific arguments on the trial court's order vacating the arbitrator's award.

¶ 11 "The FAA declares a liberal policy favoring arbitration," such that "[j]udicial review of an arbitration award is severely limited in order to encourage the use of arbitration and in turn avoid expensive and lengthy litigation." *See Carpenter v. Brooks*, 139 N.C. App. 745, 750–51, 534 S.E.2d 641, 645 (2000) (citing *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 74 L. Ed. 2d 765 (1983)) (including "liberal policy" quote immediately before listing FAA grounds for vacating an arbitration award); *First Union Securities, Inc. v. Lorelli*, 168 N.C. App. 398, 399–400, 607 S.E.2d 674, 676 (2005) (including other quote immediately after listing FAA grounds for *vacatur*). This policy favoring arbitration by limiting judicial review manifests in two ways. First, "under the FAA, an arbitration award is presumed valid, and the party seeking to vacate it must shoulder the burden of proving the grounds for attacking its validity." *First Union*, 168 N.C. App. at 400, 607 S.E.2d at 676 (quoting *Carpenter*, 139 N.C. App. at 751, 534 S.E.2d at 646) (internal quotations, citations, and alterations omitted).

¶ 12 Second, the FAA limits *vacatur* of arbitration awards to the situations listed in § 10 of the statute. *See Carpenter*, 139 N.C. App. at 750–51,

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1. The FAA governs this case because the title loan between Plaintiff and Defendant specifies the arbitration clause "is governed by the" FAA. *See In re Fifth Third Bank, Nat. Ass'n*, 216 N.C. App. 482, 487, 716 S.E.2d 850, 854 (2011) (explaining the FAA governed because the arbitration clause of the promissory note in question stated the FAA would "apply to the construction, interpretation, and enforcement of this arbitration provision" (quotations omitted)). As the Supreme Court of the United States has explained, state courts have a "prominent role in arbitral enforcement" under the FAA. *See Badgerow v. Walters*, ___ U.S. ____, _____, 212 L. Ed. 2d 355, 363 (2022) (quotations and citation omitted) (stating as part of an analysis on how the FAA does not provide independent jurisdiction for "applications to confirm, vacate, or modify arbitral awards (under Sections 9 through 11)").

534 S.E.2d at 645–46 (explaining "[u]nder the FAA, arbitration awards may be vacated only in limited situations" before listing the grounds in § 10). Specifically, § 10(a) limits *vacatur* to the following situations:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10. "The text of the FAA" and the "national policy favoring arbitration with just the limited [judicial] review needed to maintain arbitration's essential virtue of resolving disputes straight away" in turn "compel[] a reading of the §[] 10 . . . categories as exclusive." *In re Fifth Third Bank*, 216 N.C. App. at 487, 716 S.E.2d at 854 (alterations from original omitted and own alterations added) (quoting *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588, 170 L. Ed. 2d 254, 265 (2008)).

¶ 13 The exclusivity of the § 10(a) categories does not require a party seeking *vacatur* of an arbitration award or a court vacating such an award to cite the specific language of the section; rather courts have at times read other doctrines into § 10's specific text. For example, the Supreme Court of the United States recognized the essence of the contract doctrine fits within § 10(a)(4)'s provision for *vacatur* when the "arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4); *see Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569–70, 186 L. Ed. 2d 113, 119–20 (2013) (explaining a court can overturn the arbitrator's determination under § 10(a)(4) only when the arbitrator exceeded his contractually delegated authority by issuing an award based on his own policy determinations rather than "drawing its essence from the contract" (quoting *Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17*, 531 U.S. 57, 62, 148 L. Ed. 2d 354 (2000) (alterations omitted))).

¶ 14 The essence of the contract doctrine pre-existed *Hall Street Associates's* declaration § 10's categories were exclusive. *See Eastern Associated Coal Corp.*, 531 U.S. at 62, 148 L. Ed. 2d at 360 (a case from 2000 stating, "[A]n arbitrator's award must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice." (quotations and citations omitted)). But, post-*Hall Street Associates*, the doctrine was incorporated into one of the categories within § 10(a). *See Oxford Health Plans*, 569 U.S. at 569–70, 186 L. Ed. 2d at 119–20 (laying out the essence of the contract doctrine as part of determining "the arbitrator did not exceed his powers" under § 10(a)(4) (alterations omitted)).

¶ 15 Not all pre-existing doctrines necessarily survived *Hall Street Associates*, however. For example, before *Hall Street Associates*, courts would vacate arbitration awards when the arbitrator "manifestly disregarded the law." *See In re Fifth Third*, 216 N.C. App. at 487–89, 716 S.E.2d at 854–55 (quoting Fourth Circuit case *Three S Delaware, Inc. v. DataQuick Information Systems, Inc.*, 492 F.3d 520, 529 (4th Cir. 2007), to explain manifest disregard of the law after recognizing appellant only cited cases from before *Hall Street Associates*). As this Court has recognized, "the United States Supreme Court has 'not decided whether manifest disregard survives the decision in *Hall Street Associates* . . . .' " *In re Fifth Third Bank*, 216 N.C. App. at 487–88, 716 S.E.2d at 854 (alterations from original omitted) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3, 176 L. Ed. 2d 605, 616 n.3 (2010)); *see also Wachovia Securities, LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012) (noting a federal circuit court split on the issue because the Fourth Circuit considers manifest disregard still in existence in contrast to the Fifth and Eleventh Circuits).[2]

¶ 16 With this background on the FAA and the limited grounds on which it allows judicial review, we now return to Plaintiff-Appellant's specific arguments. Plaintiff argues three grounds on which we should reverse the trial court's decision to vacate the arbitration award: (1) "the trial court impermissibly conducted a *de novo* review" of the award; (2) "the essence of the contract doctrine does not apply" such that the trial court could not have vacated the award on that ground; and (3) the arbitrator

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2. We cite *Wachovia Securities* on the circuit-split issue only for ease of reference because the trial court relied on it in its order vacating the arbitration award here. For a discussion of the circuit split more broadly, *see generally* Stuart M. Boyarsky, *The Uncertain Status of the Manifest Disregard Standard One Decade After* Hall Street, 123 Dick. L. Rev. 167, 187–205 (2018) (recounting *Hall Street Associates* and the ensuing circuit split with decision from each circuit).

"did not commit a manifest disregard of law" as the trial court found.[3] (Capitalization altered.)

¶ 17 We first address Plaintiff's argument the trial court "impermissibly conducted a *de novo* review" because if the manner of the trial court's review was wrong, we must reverse. *See First Union Securities*, 168 N.C. App. at 400, 607 S.E.2d at 676 ("Judicial review of an arbitration award is severely limited . . . ."). Given the trial court's order rests on two independent grounds of essence of the contract and manifest disregard, we can proceed on either basis. Given our courts and the Supreme Court of the United States have thus far declined to answer whether manifest disregard survived *Hall Street Associates*, *see In re Fifth Third Bank*, 216 N.C. App. at 487–88, 716 S.E.2d at 854–55 (explaining the U.S. Supreme Court has not decided the matter before declining to determine whether manifest disregard is still valid), we will address the trial court's "essence of the contract" grounds first and only proceed to "manifest disregard" if the trial court erred by vacating the arbitrator's award on the basis of the essence of the contract doctrine.

A. Applicable Law and Standard of Review

¶ 18 Before addressing the trial court's review of the arbitrator's award, we first examine the applicable law and our standard of review of the trial court's decision.

¶ 19 When reviewing orders based on federal statutes such as the FAA, we look to a mix of state and federal court decisions. As this Court explained in *In re Fifth Third Bank*:

> According to well-established law, when an "action is brought under [a] Federal statute . . . in so far as it has been construed by the Supreme Court of the United States, we are bound by that construction." *Dooley v. R.R.*, 163 N.C. 454, 457–58, 79 S.E. 970, 971 (1913). However, "North Carolina appellate courts are not bound, as to matters of federal law, by decisions of federal courts other than the United States Supreme

3. Plaintiff also includes a sub-section arguing the arbitrator "had no obligation to further explain his rejection of [Defendant]'s choice-of-law provision" in the award such that the lack of explanation "certainly was no basis on which the trial court could properly vacate" the award. The trial court's order included a Conclusion of Law explaining "[t]he arbitrator demonstrated a manifest disregard of the law by ignoring and refusing to enforce the unambiguous choice-of-law provision in the Loan Agreement." As a result, the further explanation argument best fits within Plaintiff's broader manifest disregard of law argument.

> Court." *Enoch v. Inman*, 164 N.C. App. 415, 420–21, 596 S.E.2d 361, 365 (2004) (citing *Security Mills v. Trust Co.*, 281 N.C. 525, 529, 189 S.E.2d 266, 269 (1972)). Even so, despite the fact that they are " 'not binding on North Carolina's courts, the holdings and underlying rationale of decisions rendered by lower federal courts may be considered persuasive authority in interpreting a federal statute.' " *McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 488 n. 4, 687 S.E.2d 690, 695 n. 4 (2009) (quoting *Security Mills*, 281 N.C. at 529, 189 S.E.2d at 269), *disc. review denied*, 364 N.C. 241, 698 S.E.2d 400 (2010).

216 N.C. App. at 488–89, 716 S.E.2d at 855. Of course, we are also bound by decisions of our Supreme Court and by prior panels of this Court. *See, e.g.*, *In re O.D.S.*, 247 N.C. App. 711, 721–22, 786 S.E.2d 410, 417 (2016) ("One panel of this Court cannot overrule a prior panel of this Court, or our Supreme Court." (citing *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989))).

¶ 20 Turning to "the standard of review of the trial court's vacatur of [an] arbitration award," it "is the same as for any other order in that we accept findings of fact that are not clearly erroneous and review conclusions of law *de novo*." *Carpenter*, 139 N.C. App. at 750, 534 S.E.2d at 645 (quotations and citation omitted).

B. Trial Court's Review

¶ 21 Plaintiff first argues "the trial court impermissibly conducted a *de novo* review of" the arbitration award. (Capitalization altered.) Specifically, Plaintiff argues "[t]he transcript of the proceedings demonstrates" the trial judge "simply misunderstood the role of the court in connection with a request for the confirmation of an arbitration award" in that she "impermissibly substituted her judgment for that of" the arbitrator.

¶ 22 We reject Plaintiff's argument because it improperly focuses on the hearing rather than the written order. "The trial judge's comments during the hearing as to . . . law are not controlling; the written court order as entered is controlling." *Fayetteville Publishing Co. v. Advanced Internet Technologies, Inc.*, 192 N.C. App. 419, 425, 665 S.E.2d 518, 522 (2008) (citing *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 215, 580 S.E.2d 732, 737 (2003), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004)). Thus, all the trial judge's comments to which Plaintiff

points here are not controlling; we only review the entered written order vacating the arbitrator's award.

¶ 23 Turning to the written order, Plaintiff does not demonstrate the trial court impermissibly conducted a *de novo* review. As laid out above, "[u]nder the FAA, arbitration awards may be vacated only in limited situations." *Carpenter*, 139 N.C. App. at 750, 534 S.E.2d at 645. The trial court's written order lists two alternative bases for vacating the arbitration award: (1) "the award fails to draw its essence from the Loan Agreement" and (2) the arbitrator "demonstrated a manifest disregard of the law." We have already explained essence of the contract is an acceptable grounds for review as the Supreme Court of the United States has determined it falls within § 10(a)(4) of the FAA. *See Oxford Health Plans*, 569 U.S. at 569–70, 186 L. Ed. 2d at 119–20 (laying out the essence of the contract doctrine as part of determining "the arbitrator did not exceed his powers" under § 10(a)(4)). Thus, on at least one of the alternative grounds, the trial court's review was proper.

¶ 24 If at least one of the grounds for review was proper and with the uncertainty around the continued existence of manifest disregard, we would not need to address the propriety of the trial court's review on that ground. First, we can consider whether to uphold the trial court's order based on the essence of the contract doctrine. Second, even if we cannot uphold the order based on essence of the contract grounds, we could determine the order needs to be reversed because, presuming *arguendo* manifest disregard is still a valid ground, Defendant failed to show a manifest disregard below. *See In re Fifth Third Bank*, 216 N.C. App. at 488, 716 S.E.2d at 855 (concluding party failed to demonstrate manifest disregard of the law such that the court did not need to "determine the extent, if any, to which 'manifest disregard of the law' remains a valid non-statutory basis for vacating an arbitration award"). Thus, only if we first determine the trial court improperly applied essence of the contract but correctly applied manifest disregard do we need to determine whether the trial court properly reviewed for manifest disregard. Only in that scenario would the existence of manifest disregard be dispositive such that we have to address the question the Supreme Court of the United States and this Court have avoided. *In re Fifth Third Bank*, 216 N.C. App. at 487–88, 716 S.E.2d at 854–55. We first evaluate the essence of the contract ground.

C. Essence of the Contract

¶ 25 Plaintiff argues the trial court's *vacatur* of the arbitration award based on the essence of the contract doctrine "is erroneous in two

regards." First, Plaintiff argues the doctrine does not apply because she did "not assert[] any breach of contract claims." Second, she contends even if it applies, the award "is, at a minimum, rationally inferable from material terms contained in the parties' loan agreement."

¶ 26 As noted, essence of the contract is a doctrine that fits with the FAA provision allowing for *vacatur* where the arbitrators "exceeded their powers." 9 U.S.C. § 10(a)(4); *see Oxford Health Plans*, 569 U.S. at 569–70, 186 L. Ed. 2d at 119–20 (explaining a court can overturn the arbitrator's determination under § 10(a)(4) only when the arbitrator exceeded his contractually delegated authority by issuing an award based on his own policy determinations rather than "drawing its essence from the contract" (quoting *Eastern Associated Coal*, 531 U.S. at 62, 148 L. Ed. 2d 354)). The bar for an arbitrator's award drawing its essence from a contract is low; the arbitrator need only be " 'arguably construing or applying the contract.' " *See Eastern Associated Coal*, 531 U.S. at 62, 148 L. Ed. 2d at 360 (explaining as long as the arbitrator is doing that, "the fact that 'a court is convinced he committed serious error does not suffice to overturn his decisions.' " (quoting *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38, 98 L. Ed. 2d 286 (1987)); *see also Oxford Health Plans*, 569 U.S. at 573, 186 L. Ed. 2d at 122 ("Under § 10(a)(4), the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all.").

¶ 27 As an example of this low bar, in *Oxford Health Plans*, when the arbitrator explained "his . . . decision was 'concerned solely with the parties' intent as evidenced by the words' " of the relevant contract clause and performed a "textual analysis," the Supreme Court of the United States found the arbitrator was construing the contract "focusing, per usual, on its language." 569 U.S. at 570–71, 186 L. Ed. 2d at 120–21. As a result, "to overturn his decision, [the Court] would have to rely on a finding that he misapprehended the parties' intent," but "§ 10(a)(4) bars that course: It permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly." *Id.*, 569 U.S. at 571–72, 186 L. Ed. 2d at 121.

¶ 28 The United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") has also expanded upon the essence of the contract doctrine in a persuasive manner. It has clarified *vacatur* is appropriate for "an award that contravenes the plain and unambiguous terms of the" contract. *See Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 237 (4th Cir. 2006) (citing *United Paperworkers Int'l Union*, 484 U.S. at 38, 98 L. Ed. 2d 286) (explaining the "deferential" standard of review of arbitration

awards "does not require" affirming such an award). In other words, a court can vacate an arbitration award on the grounds it fails to draw its essence from the contract "when an arbitrator has disregarded or modified unambiguous contract provisions or based an award upon his own personal notions of right and wrong." *Three S Delaware*, 492 F.3d at 528 (citing *Patten*, 441 F.3d at 235).

¶ 29 For example, in *Patten*, the Fourth Circuit considered an issue of the timeliness of the arbitration demand when the governing agreement "contained no explicit time limitation." 441 F.3d at 236. The Fourth Circuit found the arbitrator's award "failed to draw its essence from the governing arbitration agreement" because the arbitrator's imposition of a one-year limitations period "contradicted the plain and unambiguous terms" of the agreement. *Id.* at 236–37. While that example covers interpreting the scope of arbitration, the essence of the contract doctrine extends to other provisions as well. *E.g.*, *MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849, 861–62 (4th Cir. 2010) (applying doctrine to aspects of contract related to "damages claim").

¶ 30 Here, the trial court vacated on essence of the contract grounds by explaining: "Additionally, the award fails to draw its essence from the Loan Agreement as the application of North Carolina law is inconsistent with the plain language of the Loan Agreement stating that Virginia law applies." In a section on "Governing Law, Assignment and Amendment," the Loan Agreement states: "This Loan Agreement shall be governed by the laws of the State of Virginia, except that the Waiver of Jury Trial and Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1–16 ('FAA')." Thus, a "plain and unambiguous term[]" of the contract provides Virginia law applies. *Patten*, 441 F.3d at 237.

¶ 31 The arbitration award recognized the arbitrator needed to decide whether to apply North Carolina law or Virginia law and explained the differences between the two:

> This case involves the extension of a loan to Claimant, a North Carolina resident, secured by an automobile titled in North Carolina, where the loan documents were signed in Respondent's office in Virginia. The loan carried an interest rate of nearly 150%, a rate that clearly violates the North Carolina Consumer Finance Act (the "CFA"), but that is arguably not illegal in Virginia. The question to be resolved is whether the language of the CFA applies to the transaction at issue here.

¶ 32 Despite this recognition, the arbitration award never considers or even mentions the Loan Agreement's Virginia choice of law provision. Instead, the arbitration award exclusively focuses on North Carolina's Consumer Finance Act in its primary analysis. Thus, as in *Patten*, *vacatur* is appropriate here because the arbitration award "contradicted the plain and unambiguous terms" of the Loan Agreement. *Patten*, 441 F.3d at 236. The arbitrator here did not construe the governing contract "at all." *See Oxford Health Plans*, 569 U.S. at 573, 186 L. Ed. 2d at 122 ("Under § 10(a)(4), the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all."). As such, the arbitration award does not draw its essence from the contract and therefore the arbitrator exceeded his power. *See id.*, 569 U.S. at 569–70, 186 L. Ed. 2d at 119–20 (explaining a court can overturn the arbitrator's determination under § 10(a)(4) when the award does not "draw[] its essence from the contract"). As a result, the trial court properly vacated the arbitrator's award.

¶ 33 Plaintiff first argues "the essence of the contract doctrine does not apply" because she did not assert "any breach of contract claims." (Capitalization altered.) First, this statement has no basis when looking at Fourth Circuit precedent we found persuasive above. *E.g.*, *MCI Constructors*, 610 F.3d at 852, 861–62 (applying essence of the contract doctrine in case where complaint alleged claims including negligent misrepresentation and wrongful termination). *Patten* is one of the cases applying essence of the contract doctrine when the claims were not all contractual in nature, *see* 441 F.3d at 232, 236–37 (applying doctrine when underlying claims submitted to arbitration included age discrimination and wrongful termination), and Plaintiff cites *Patten* a page later in her own briefing on essence of the contract doctrine.

¶ 34 Second, the only case law authority Plaintiff cites to support this proposition is a "Memorandum Opinion and Order" from the United States District Court for the Middle District of North Carolina ("Middle District") in *Strange et al. v. Select Management Resources, LLC et al.*, No. 1:19-cv-00321 (M.D.N.C. 2021). (Capitalization altered.) According to the copy of *Strange et al.* included in the addendum to Plaintiff's brief, when the Middle District was analyzing a party's argument the arbitrator refused to apply a choice of law provision, it was reviewing on the grounds of manifest disregard of the law, not essence of the contract. Thus, we reject Plaintiff's unsupported assertion that essence of the contract doctrine only applies to contract claims.

¶ 35 Plaintiff's other argument is that even if the essence of the contract doctrine does apply, the arbitrator's award is "at a minimum, rationally

inferable from material terms contained in the parties' loan agreement." (Citing *Patten*, 441 F.3d at 235.) Plaintiff is correct that "[a]n arbitration award fails to draw its essence from the agreement only when the result is not 'rationally inferable from the contract.' " *Patten*, 441 F.3d at 235 (quoting *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 n.5 (4th Cir. 1998). But *Patten* itself defeats Plaintiff's argument. In *Patten*, when the arbitrator's award "disregarded the plain and unambiguous language of the" governing contract, the Fourth Circuit found "[t]he arbitrator's ruling . . . resulted in an award that, in the language of *Apex Plumbing*, simply was 'not rationally inferable from the contract.' " *Id.* at 235–37 (quoting *Apex Plumbing*, 142 F.3d at 193 n.5). While Plaintiff points to a portion of the Loan Agreement relating to the interest rate and possession of title taking place at the NCDMV, that does not cure the arbitrator's failure to mention the choice of law provision when choice of law was the question he recognized he had to answer. Because the arbitrator's award "disregarded the plain and unambiguous language of the" Loan Agreement requiring application of Virginia law, the award "simply was 'not rationally inferable from the contract.' " *Id.* at 235–37. Therefore, the arbitrator's award failed to draw its essence from the Loan Agreement.

¶ 36 The issue before us is solely "Whether the trial court erred by granting Defendant-Appellee's Motion to Vacate [the] Arbitration Award." We conclude the trial court did not err in granting that motion because the arbitrator's lack of mention or consideration of the Loan Agreement's choice of law provision means his award does not draw its essence from the parties' contract containing that provision, and a failure to draw from the essence of the contract is a valid ground on which to vacate an arbitration award.

¶ 37 Therefore, after *de novo* review, we affirm the trial court's order vacating the arbitration award. Because we affirm, the trial court's *vacatur* order on essence of the contract grounds, we do not need to address its alternative ground of manifest disregard. Also, as we explained above, because we affirm the trial court's order granting Defendant's motion to vacate the arbitration award, we also affirm its order denying Plaintiff's motion to confirm the arbitration award. *See* 9 U.S.C. § 9 (explaining a court "must grant" an order confirming an arbitration award "unless the award is vacated . . .").

III. Trial Court's Dismissal

¶ 38 **[2]** After vacating the arbitration award, the trial court also dismissed the case saying, "Plaintiff's claims against Defendant are hereby dismissed

with prejudice." The trial court's use of the word "hereby" indicates its dismissal of Plaintiff's claims turns on its decision to vacate the arbitration award. While the trial court properly vacated the arbitration award as we have explained above, the FAA does not allow it to then dismiss the action. The FAA explains, "If an award is vacated . . . the court may, in its discretion, direct a rehearing by the arbitrators."[4] 9 U.S.C. § 10(b). The United States Supreme Court has explained if a court, in its discretion, chooses not to " 'direct a rehearing by the arbitrators' " then the court "must . . . decide the question that was originally referred to the" arbitrators. *See Stolt-Nielsen*, 559 U.S. at 677, 176 L. Ed. 2d at 619 (quoting 9 U.S.C. § 10(b)) (so explaining in terms of its own review after vacating an arbitration panel's award). Therefore, a court cannot dismiss a case following *vacatur* of an arbitration award under the FAA. As a result, we remand to the trial court to, in its discretion, choose between " 'direct[ing] a rehearing by the arbitrator[]' " or "decid[ing] the question that was originally referred" to the arbitrator. *Stolt-Nielsen*, 559 U.S. at 677, 176 L. Ed. 2d at 619 (quoting 9 U.S.C. § 10(b)).

IV. Conclusion

¶ 39 We hold the trial court properly reviewed to determine whether the award drew its essence from the Loan Agreement and did not err in vacating the arbitrator's award and, based on our *de novo* review, properly concluded the award did not. Because we affirm based on the essence of the contract doctrine, we do not reach the trial court's alternative ground for *vacatur*, i.e. manifest disregard. Given we affirm the trial court's order vacating the arbitrator's award, we also affirm its order denying Plaintiff's motion to confirm the award. The trial court, however, could not dismiss the case in reliance on its *vacatur* of the arbitration award. We remand for the trial court, in its discretion, to either direct a rehearing by the arbitrator or decide for itself the issues originally sent to the arbitrator.

AFFIRMED AND REMANDED.

Judges TYSON and GORE concur.

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4. The omitted portion of § 10(b) restricts the trial court's ability to direct a rehearing to situations where "the time within which the agreement required the award to be made has not expired." 9 U.S.C. §10(b). That restriction does not apply here because the arbitration provisions of the Loan Agreement do not include a "time within which" the award has to be made.

STATE v. GORDON

[285 N.C. App. 191, 2022-NCCOA-559]

STATE OF NORTH CAROLINA
v.
AARON LEE GORDON

No. COA17-1077-3

Filed 16 August 2022

Satellite-Based Monitoring—lifetime—imposition after lengthy prison term—aggravated offender—reasonableness

The imposition of lifetime satellite-based monitoring (SBM) on an aggravated offender—to be imposed upon the completion of his fifteen- to twenty-year sentence for statutory rape, indecent liberties with a child, and other charges—was affirmed as a reasonable search under the Fourth Amendment given the limited intrusion into the diminished privacy expectation of aggravated offenders when weighed against the State's paramount interest in protecting the public—especially children—from sex crimes and the efficacy of SBM in promoting that interest. Further, the State was not required to demonstrate the reasonableness of SBM at the time of its effectuation in the future; rather, the State was required to show reasonableness at the time in which it requested the imposition of SBM (i.e. at sentencing).

Appeal by defendant from order entered 13 February 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Originally heard in the Court of Appeals 22 March 2018, with opinion issued 4 September 2018. On 4 September 2019, the North Carolina Supreme Court allowed the State's petition for discretionary review for the limited purpose of remanding to this Court for reconsideration in light of the Supreme Court's decision in *State v. Grady* (*Grady III*), 372 N.C. 509, 831 S.E.2d 542 (2019). Upon remand, this Court issued its opinion on 17 March 2020. On 14 December 2021, the Supreme Court allowed the State's petition for discretionary review for the limited purpose of remanding to this Court for reconsideration in light of the Supreme Court's decisions in *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, and *State v. Strudwick*, 379 N.C. 94, 2021-NCSC-127, as well as the North Carolina General Assembly's 2021 amendments to the satellite-based monitoring program.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.

ZACHARY, Judge.

¶ 1 In accordance with our Supreme Court's recent decisions in *State v. Hilton* and *State v. Strudwick*, and in light of the 2021 amendments to North Carolina's satellite-based monitoring statutes, we affirm the trial court's order imposing satellite-based monitoring for the remainder of Defendant's natural life following his release from incarceration.

Background

¶ 2 In February 2017, Defendant pleaded guilty to statutory rape, second-degree rape, taking indecent liberties with a child, assault by strangulation, and first-degree kidnapping. Defendant was sentenced to 190 to 288 months' imprisonment and ordered to submit to lifetime sex-offender registration. After determining that Defendant was convicted of an "aggravated offense,"[1] and conducting an extensive satellite-based monitoring hearing, the trial court ordered that Defendant enroll in the satellite-based monitoring program for the remainder of his natural life upon his release from prison in 15 to 20 years.

¶ 3 Defendant timely appealed the trial court's satellite-based monitoring order. Relying heavily on *Grady v. North Carolina* (*Grady I*), 575 U.S. 306, 191 L. Ed. 2d 459 (2015), and *State v. Grady* (*Grady II*), 259 N.C. App. 664, 817 S.E.2d 18 (2018), *aff'd as modified*, 372 N.C. 509, 831 S.E.2d 542 (2019), this Court held that the State failed to meet its burden of showing that the implementation of satellite-based monitoring of Defendant will be a reasonable search when executed in 15 to 20 years. *See State v. Gordon* (*Gordon I*), 261 N.C. App. 247, 260, 820 S.E.2d 339, 349 (2018), *remanded*, 372 N.C. 722, 839 S.E.2d 840 (2019). Accordingly, we vacated the trial court's order mandating Defendant's lifetime enrollment in satellite-based monitoring following his eventual release from imprisonment, and remanded "with instructions for the trial court to dismiss the State's application for satellite-based monitoring without prejudice to the State's ability to reapply." *Id.* at 261, 820 S.E.2d at 349.

¶ 4 On 4 September 2019, the Supreme Court allowed the State's petition for discretionary review for the limited purpose of remanding to this Court for reconsideration in light of the Supreme Court's decision in *Grady III*. Upon reconsideration, we concluded that the *Grady III*

1. An "aggravated offense" is "[a]ny criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old." N.C. Gen. Stat. § 14-208.6(1a) (2021).

analysis did not alter our earlier determination that the State had failed to meet its burden of establishing that lifetime satellite-based monitoring following Defendant's eventual release from prison would constitute a reasonable search. *See State v. Gordon* (*Gordon II*), 270 N.C. App. 468, 477, 840 S.E.2d 907, 914 (2020), *remanded*, 379 N.C. 670, 865 S.E.2d 852 (2021). Therefore, we reversed the trial court's satellite-based monitoring order. *See id.*

¶ 5 On 14 December 2021, the Supreme Court allowed the State's petition for discretionary review for the limited purpose of remanding the case to this Court for reconsideration in light of the Supreme Court's decisions in *State v. Hilton* and *State v. Strudwick*, as well as the North Carolina General Assembly's amendments to the satellite-based monitoring program, which became effective on 1 December 2021, *see* An Act . . . to Address Constitutional Issues with Satellite-Based Monitoring . . . , S.L. 2021-138, § 18, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2021-138.pdf. Upon reconsideration, we affirm the trial court's order mandating satellite-based monitoring.

Discussion

¶ 6 After this appeal's remand from our Supreme Court, the parties submitted supplemental briefings addressing the impact of *Hilton*, *Strudwick*, and the 2021 amendments to the satellite-based monitoring program on the issues raised in the present case. Defendant maintains that despite these jurisprudential developments, the satellite-based monitoring regime is unconstitutional because satellite-based monitoring is not a reasonable search, as he is unlikely to reoffend. However, for the reasons explained below, we affirm the trial court's imposition of satellite-based monitoring.

I. Developments in Satellite-Based Monitoring Jurisprudence

¶ 7 The United States Supreme Court held in *Grady I* that the imposition of satellite-based monitoring constitutes a warrantless search under the Fourth Amendment, requiring an inquiry into the reasonableness of the search under the totality of the circumstances. 575 U.S. at 310, 191 L. Ed. 2d at 462.

¶ 8 After *Grady I*, our Supreme Court considered whether mandatory lifetime satellite-based monitoring based solely on the defendant's status as a recidivist[2] sex offender "is reasonable when its intrusion on the

2. An offender is a "recidivist" if he or she "has a prior conviction for an offense that is described" as a "reportable conviction" in N.C. Gen. Stat. § 14-208.6(4). N.C. Gen. Stat. § 14-208.6(2b).

individual's Fourth Amendment interests is balanced against its promotion of legitimate governmental interests." *Grady III*, 372 N.C. at 527, 831 S.E.2d at 557 (citation and internal quotation marks omitted). The Court concluded that for recidivist offenders, "a mandatory, continuous, nonconsensual search by lifetime satellite-based monitoring" violated the Fourth Amendment. *Id.* at 545, 831 S.E.2d at 568.

¶ 9 Our Supreme Court next addressed the constitutionality of the satellite-based monitoring regime as applied to aggravated offenders, and concluded that the satellite-based monitoring "statute as applied to aggravated offenders is not unconstitutional" because the "search effected by the imposition of lifetime [satellite-based monitoring] on the category of aggravated offenders is reasonable under the Fourth Amendment." *Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶ 36. As the Court explained, the lifetime satellite-based monitoring of aggravated offenders is reasonable under the totality of the circumstances, given the program's "limited intrusion into [the] diminished privacy expectation" of aggravated offenders, *id.*, when weighed against the State's "paramount interest in protecting the public—especially children—by monitoring certain sex offenders after their release[,]" *id.* ¶ 19, which the Court determined is manifestly furthered by the satellite-based monitoring regime, *id.* ¶¶ 26–27. Indeed, the Court explicitly "recognized the efficacy of [satellite-based monitoring] in assisting with the apprehension of offenders and in deterring recidivism," and concluded that therefore "there is no need for the State to prove [satellite-based monitoring]'s efficacy on an individualized basis." *Id.* ¶ 28.

¶ 10 Following *Hilton*, the Supreme Court analyzed the necessity of assessing the *future* reasonableness of the imposition of satellite-based monitoring on an aggravated offender, where the offender is sentenced to serve a lengthy prison term prior to the anticipated imposition of satellite-based monitoring. *See Strudwick*, 379 N.C. 94, 2021-NCSC-127. In *Strudwick*, the trial court sentenced the defendant to a minimum of thirty years in prison. *Id.* ¶ 7. The trial court also ordered that the defendant, as an aggravated offender, enroll in lifetime satellite-based monitoring for the remainder of his natural life upon his release from imprisonment. *Id.* ¶ 9. Our Supreme Court clarified that "the State is *not* tasked with the responsibility to demonstrate the reasonableness of a search at its effectuation in the future for which the State is bound to apply in the present"; instead, the State need only "demonstrate the reasonableness of a search at its evaluation in the present for which the State is bound to apply for future effectuation of a search." *Id.* ¶ 13. With regard to the reasonableness of the search of the defendant, an

aggravated offender, the Court ultimately concluded that "the lifetime [satellite-based monitoring] program is constitutional due to its promotion of the legitimate and compelling governmental interest which outweighs its narrow, tailored intrusion into [the] defendant's expectation of privacy in his person, home, vehicle, and location." *Id.* ¶ 28.

¶ 11 Shortly after the Supreme Court's issuance of its decisions in *Hilton* and *Strudwick*, the General Assembly's amendments to the satellite-based monitoring program became effective. *See* S.L. 2021-138, § 18(p). Among other revisions, these amendments changed the maximum term of enrollment in satellite-based monitoring from lifetime to ten years, and provided that any offender who was ordered to enroll in satellite-based monitoring for a term longer than ten years may petition for termination or modification of the offender's enrollment. *Id.* § 18(d)–(e), (*i*); *see* N.C. Gen. Stat. § 14-208.46(a), (d)–(e). "If the offender files the petition before he has been enrolled for 10 years, then 'the court shall order the petitioner to remain enrolled in the satellite-based monitoring program for a total of 10 years[,]' " *State v. Anthony*, 2022-NCCOA-414, ¶ 19 (quoting N.C. Gen. Stat. § 14-208.46(d)); however, "if the offender has been enrolled for at least 10 years already, 'the court shall order the petitioner's requirement to enroll in the satellite-based monitoring program be terminated[,]' " *id.* (quoting N.C. Gen. Stat. § 14-208.46(e)).

¶ 12 The General Assembly also codified its "[l]egislative finding of efficacy" of satellite-based monitoring, expressly "recogniz[ing] that the GPS monitoring program is an effective tool to deter criminal behavior among sex offenders." S.L. 2021-138, § 18(a); *see* N.C. Gen. Stat. § 14-208.39.

¶ 13 With these developments in mind, we evaluate the reasonableness of the trial court's imposition of lifetime satellite-based monitoring on Defendant in the instant case.

II. Analysis

¶ 14 Defendant argues that this Court should reverse the trial court's satellite-based monitoring order because the satellite-based monitoring regime is unconstitutional. Specifically, Defendant asserts that at his satellite-based monitoring hearing, "the State's evidence was that [Defendant] was unlikely to reoffend. A warrantless search of this magnitude cannot be reasonable as applied to someone who does not present the risk used to justify the search against a facial challenge." In light of *Hilton*, *Strudwick*, and the 2021 amendments to the satellite-based monitoring program, we disagree.

¶ 15 "As in cases challenging pre-trial searches as violating the Fourth Amendment, trial courts must . . . conduct reasonableness hearings before ordering [satellite-based monitoring] unless a defendant waives his or her right to a hearing or fails to object to [satellite-based monitoring] on this basis." *State v. Carter*, 2022-NCCOA-262, ¶ 19. This reasonableness inquiry requires a balancing of competing interests. *See Grady I*, 575 U.S. at 310, 191 L. Ed. 2d at 462 ("The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations.").

¶ 16 "Whether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Samson v. California*, 547 U.S. 843, 848, 165 L. Ed. 2d 250, 256 (2006) (citation and internal quotation marks omitted). Our Supreme Court has described this "reasonableness" test as "a three-pronged inquiry into (1) the nature of the . . . defendant's privacy interest itself, (2) the character of the intrusion effected" by lifetime satellite-based monitoring, and (3) "the nature and purpose of the search where we consider[ ] the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it." *Strudwick*, 379 N.C. 94, 2021-NCSC-127, ¶ 19 (citations and internal quotation marks omitted).

¶ 17 As a preliminary matter, we note that Defendant's status as an aggravated offender is not challenged. Moreover, it is clear that the trial court conducted a thorough reasonableness hearing. Consequently, we review de novo the trial court's "determination [that satellite-based monitoring] is reasonable as applied to Defendant." *Anthony*, 2022-NCCOA-414, ¶ 33. As part of de novo review, "we evaluate the reasonableness of [satellite-based monitoring] under the totality of the circumstances considering: (1) the legitimacy of the State's interest; (2) the scope of Defendant's privacy interests; and (3) the intrusion imposed by" satellite-based monitoring. *Id.* (citing *Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶¶ 19, 29, 32).

¶ 18 In determining "the legitimacy of the State's interest" in the imposition of satellite-based monitoring, *id.*, we examine "the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it[,]" *Strudwick*, 379 N.C. 94, 2021-NCSC-127, ¶ 19 (citation omitted). As our Supreme Court explained, the purposes underlying satellite-based monitoring of aggravated offenders—"assisting law enforcement agencies in solving crimes" and "protecting

the public from aggravated offenders by deterring recidivism[,]" *Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶¶ 25, 27—are "of paramount importance," *id.* ¶ 42. Although in the case at bar Defendant argues that "the State's evidence . . . that [he] was unlikely to reoffend" renders unreasonable, and therefore unconstitutional, the imposition of satellite-based monitoring, our Supreme Court and General Assembly have recognized satellite-based monitoring's efficacy as a matter of law; thus, "there is no need for the State to prove [satellite-based monitoring]'s efficacy on an individualized basis." *Id.* ¶ 28; *see* N.C. Gen. Stat. § 14-208.39. Moreover, the State need not "demonstrate the reasonableness of a search at its effectuation in the future for which the State is bound to apply in the present[.]" *Strudwick*, 379 N.C. 94, 2021-NCSC-127, ¶ 13. Therefore, this factor weighs in favor of finding the imposition of lifetime satellite-based monitoring here to be reasonable.

¶ 19 We next evaluate "the scope of Defendant's privacy interests[.]" *Anthony*, 2022-NCCOA-414, ¶ 33. Our Supreme Court has established that "the imposition of lifetime [satellite-based monitoring] causes only a limited intrusion into [the] diminished privacy expectation" of all aggravated offenders. *Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶ 36. Like the defendant in *Hilton*, Defendant is an aggravated offender; consequently, his expectation of privacy is diminished. *Id.* ("[A]n aggravated offender has a diminished expectation of privacy both during and after any period of post-release supervision as shown by the numerous lifetime restrictions that society imposes upon him."). Hence, this factor supports the conclusion that the imposition of lifetime satellite-based monitoring on Defendant was reasonable.

¶ 20 Finally, we assess the "intrusion imposed by" lifetime satellite-based monitoring upon Defendant's diminished privacy interest. *Anthony*, 2022-NCCOA-414, ¶ 33. As our Supreme Court first determined in *Hilton* and reinforced in *Strudwick*, the search effected by satellite-based monitoring presents a "narrow, tailored intrusion into [the] defendant's expectation of privacy in his person, home, vehicle, and location" when the defendant is an aggravated offender. *Strudwick*, 379 N.C. 94, 2021-NCSC-127, ¶ 28; *see Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶ 36. Thus, this factor suggests that the imposition of lifetime satellite-based monitoring in this case was reasonable.

¶ 21 Accordingly, in considering the totality of the circumstances, we weigh the State's significant interest in protecting the public and the recognized efficacy of satellite-based monitoring in promoting that interest, *Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶¶ 22–23, 28, against the "incremental intrusion" of lifetime satellite-based monitoring into Defendant's

"diminished expectation of privacy" as an aggravated offender, *id.* ¶ 35. After careful consideration of these factors in light of *Hilton*, *Strudwick*, and the 2021 amendments to the satellite-based monitoring program, we conclude that the search of Defendant as imposed is reasonable and therefore withstands Fourth Amendment scrutiny.

Conclusion

¶ 22 Under the totality of the circumstances, the imposition of lifetime satellite-based monitoring following Defendant's conviction for an aggravated offense does not constitute an unreasonable search under the Fourth Amendment. *See id.* ¶ 12; *Strudwick*, 379 N.C. 94, 2021-NCSC-127, ¶ 28. Accordingly, we affirm the trial court's order imposing lifetime satellite-based monitoring following Defendant's release from incarceration.

AFFIRMED.

Judges DIETZ and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
DEREK EDWIN HIGHSMITH, DEFENDANT

No. COA21-593

Filed 16 August 2022

1. Search and Seizure—sufficiency of findings and conclusions—marijuana—similarity to hemp—totality of circumstances

In denying defendant's motion to suppress, the trial court made sufficient findings and conclusions regarding the seizure of marijuana from a vehicle in which defendant was a passenger, despite defendant's novel argument that, because illegal marijuana and legal hemp look and smell the same, the appearance and scent of a marijuana-like substance alone cannot provide probable cause. Under the totality of the circumstances—where officers found a vacuum-sealed bag of what appeared to be marijuana hidden under a seat, digital scales, more than one thousand dollars of cash, and a flip cell phone, and where defendant did not claim that the substance was hemp—the trial court properly concluded that defendant's Fourth Amendment rights were not violated by the seizure.

2. Drugs—felony possession of marijuana—jury instructions—actual knowledge—plain error analysis

In a prosecution for felony possession of marijuana, the trial court did not commit plain error by not providing a jury instruction ex mero motu on actual knowledge where, in light of the totality of the circumstances—in which officers found a vacuum-sealed bag of marijuana hidden under one of the vehicle's seats, digital scales, more than one thousand dollars of cash, and a flip cell phone—the absence of an actual knowledge instruction did not have a probable impact on the jury's finding that defendant was guilty. For the same reason, even assuming trial counsel rendered deficient performance by failing to request the instruction, defendant failed to establish that he received ineffective assistance of counsel.

Appeal by Defendant from judgments entered 16 March 2021 by Judge Henry L. Stevens, IV, in Duplin County Superior Court. Heard in the Court of Appeals 10 May 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott Stroud, for the State.

Joseph P. Lattimore for Defendant-Appellant.

INMAN, Judge.

¶ 1 On 23 July 2018, Defendant Derek Edwin Highsmith ("Defendant") was charged with one count each of felony possession of marijuana, possession with intent to manufacture, sell and deliver marijuana, and possession of marijuana paraphernalia.

¶ 2 The recent emergence of hemp—another plant that looks and smells the same as illegal marijuana but is legal in North Carolina—to the North Carolina market has brought about speculation and discussion surrounding the ability of law enforcement to use the sight and scent traditionally associated with marijuana as a basis to establish probable cause for a warrantless search or seizure.[1] Defendant argues that given the

1. *See, e.g.*, *Omar Al-Hendy, Smokable Hemp in North Carolina: Gone for Good? An Analysis of the Constitutionality of the North Carolina Farm Act of 2019*, 10 Wake Forest J.L. & Pol'y 371, 371-72 (2020) ("Law enforcement must now satisfy a stronger burden to establish probable cause because both hemp and marijuana look and smell the same."); Robert M. Bloom & Dana L. Walsh, *The Fourth Amendment Fetches Fido: New Approaches to Dog Sniffs*, 48 Wake Forest L. Rev. 1271, 1285 (2013) ("[S]tudies indicate that drug-detection dogs do not alert to the illegal substances themselves, but to

shared appearance and scent of marijuana and hemp, the sight or scent alone cannot support a finding of probable cause to seize a substance that appears to be marijuana.

¶ 3 For the following reasons, we conclude Defendant has failed to demonstrate reversible error.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶ 4 On 31 August 2017, Detective Mobley and Lieutenant Smith of the Duplin County Sheriff's Office witnessed a vehicle leave a residence after receiving numerous complaints of narcotics being sold there. The officers followed the vehicle, noted it had a broken brake light, and observed the vehicle illegally cross a yellow line. The officers initiated a stop of the vehicle.

¶ 5 Defendant was sitting in the vehicle's front passenger seat. The officers quickly recognized Defendant from past encounters and arrests involving marijuana, and at that point contacted a nearby K-9 unit to investigate the vehicle.

¶ 6 Meanwhile, Detective Mobley approached Defendant's side of the vehicle and immediately noticed a box of ammunition sitting behind Defendant in the rear passenger seat. The officers spoke separately with Defendant and the driver of the vehicle, who gave inconsistent stories about where they were headed and from where they were coming. The officers further noted the vehicle was not registered to any occupant of the vehicle, which Lieutenant Smith testified at Defendant's suppression hearing was "part of the criminal indicators that we observe as to a third-party vehicle."

¶ 7 When the K-9 unit arrived, the dog sniffed the exterior of the vehicle and alerted to the possible presence of drugs. Defendant was removed from the vehicle and the officers searched the vehicle. The officers located what they believed to be marijuana in a vacuum-sealed bag underneath the passenger seat. Officers also found on Defendant's person cash totaling $1,200.00, along with "a digital scale commonly used to weigh out narcotics or drug paraphernalia" and a flip cellphone.

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byproducts of the drug. . . . Thus, a dog merely detects what it has been conditioned to detect, which could be a lawful scent. This is noticeable in the case of discerning marijuana and hashish from objects that have similar smells, such as hemp products[.]").

¶ 8 Detective Mobley testified Defendant "stated that the marijuana and the other items found inside of the vehicle were his[.]"[2] Defendant did not mention anything about hemp or otherwise lead the detectives to believe he was referring to legal hemp instead of illicit marijuana. The officers seized the items, which were sent to the State Crime Lab for analysis. Lab results subsequently confirmed the officers' suspicions that the seized substance consisted of 211.28 grams of illicit marijuana.

¶ 9 Defendant was indicted for felony possession with intent to sell, manufacture, or deliver a controlled substance, felony possession of a controlled substance, possession of marijuana and drug paraphernalia, manufacture of a controlled substance, and attaining the status of habitual felon.

¶ 10 Defendant filed a motion to suppress, challenging the lawfulness of the search and subsequent seizure of the marijuana. Defendant premised his argument on the emerging industry of legal hemp, indistinguishable by either sight or smell from marijuana. Defendant argued at the hearing that a K-9 alert standing alone cannot support probable cause when legalized hemp is widely available. Because marijuana and hemp are indistinguishable, Defendant argued, an unlawful seizure would first be needed in order to perform testing to confirm the substance was marijuana. The K-9 alert therefore could not support the warrantless search, and the ensuing evidence recovered should be suppressed, as the result of both an illegal search and an illegal seizure following the search.[3]

¶ 11 The State argued the existence of legal hemp does not change the analysis that a K-9 alert can support probable cause. The prosecutor explained that because the K-9 alert was not the only factor giving rise to the officers' probable cause to believe Defendant was engaged in criminal activity, this is "a K-9 sniff *plus*" case. (Emphasis added). Other factors cited by the prosecutor were the inconsistent statements made to officers by Defendant and the driver of the vehicle, the fact that neither the driver nor Defendant was the registered owner of the vehicle, and the officers' knowledge of Defendant's prior arrests related to marijuana.

¶ 12 The trial court denied Defendant's motion to suppress by order entered 8 February 2021. The trial court concluded that "K-9 Mindy's

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2. It is unclear from the record whether Defendant had himself used the term "marijuana" when speaking with the officers or whether the officer was summarizing Defendant's statement regarding what later was confirmed to be marijuana.

3. On appeal Defendant does not argue that the search of the vehicle was unsupported by probable cause but limits his argument to the seizure of the marijuana found during the search.

positive alert for narcotics at the SUV, along with other factors in evidence, provided the officers on the scene with sufficient facts to find probable cause to conduct a warrantless search of the inside of the vehicle."

¶ 13 Defendant's case came on for jury trial on 15 March 2021. The jury returned a guilty verdict against Defendant on one count of felony possession of marijuana in excess of one-and-one-half ounces. Defendant subsequently pled guilty to attaining habitual felon status. The trial court sentenced Defendant to 33 to 52 months in prison. Defendant gave proper oral notice of appeal to this Court.

¶ 14 On appeal, Defendant "specifically and distinctly" contends that the trial court denying his motion to suppress and subsequently admitting the contraband into evidence amounted to plain error. N.C. R. App. P. 10(a)(4) (2022).

II. ANALYSIS

¶ 15 On appeal, Defendant argues that the trial court erred by failing to make adequate findings of fact and conclusions of law regarding the seizure of the marijuana. He also argues the trial court committed plain error in failing to instruct the jury that the State must prove Defendant had actual knowledge that the plastic bag contained marijuana and not hemp. Finally, Defendant argues he received ineffective assistance of counsel because his trial counsel did not request the instruction on actual knowledge.

A. Defendant's Motion to Suppress

¶ 16 **[1]** Defendant does not argue on appeal that the search of the vehicle was unconstitutional. Instead, he argues the trial court failed to make adequate findings of fact and conclusions of law regarding the seizure of the marijuana found during the search, given the difficulty of distinguishing legal hemp from illegal marijuana. We disagree.

¶ 17 The Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution prohibit unreasonable searches and seizures and apply to "brief investigatory detentions such as those involved in the stopping of a vehicle." *State v. Downing*, 169 N.C. App. 790, 794, 613 S.E.2d 35, 38 (2005) (citation and quotation marks omitted). However, "[i]t is a well-established rule that a search warrant is not required before a lawful search based on probable cause of a motor vehicle in a public roadway . . . may take place." *Id.* at 795-96, 613 S.E.2d at 39. This probable cause standard is met where the totality of "the facts and circumstances within the

officers' knowledge and of which they had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *State v. Zuniga*, 312 N.C. 251, 261, 322 S.E.2d 140, 146 (1984) (brackets and quotation marks omitted).

¶ 18 "The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Faulk*, 256 N.C. App. 255, 263, 807 S.E.2d 623, 628-29 (2017). Findings of fact are upheld if supported by competent evidence, and conclusions of law are reviewed *de novo*. *Id.* at 262, 807 S.E.2d at 629. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.*

> When ruling on a motion to suppress following a hearing, the judge must set forth in the record his findings of facts and conclusions of law. While [the] statute has been interpreted by the North Carolina Supreme Court to require findings of fact only when there is a material conflict in the evidence, our Court has explained that it is still the trial court's responsibility to make the conclusions of law.

Id. at 262-63, 807 S.E.2d at 629 (cleaned up); *see also* N.C. Gen. Stat. § 15A-977(f) (2021).

¶ 19 Defendant argues that the trial court's conclusions address only the legality of the search of the vehicle, and not the legality of the seizure of the marijuana found during the search. Defendant overlooks Conclusion of Law 7, which explicitly states that Defendant's "rights against unreasonable detentions, searches *and seizures* . . . have not been violated." Defendant also argues that the trial court's findings of fact were insufficient to support its holding that the seizure of the marijuana was constitutional. When ruling on a motion to suppress, the trial court must "make the findings of fact necessary to decide the motion." *State v. Bartlett*, 368 N.C. 309, 314, 776 S.E.2d 672, 675 (2015).

¶ 20 The trial court found that the officer's search revealed not only marijuana, but also additional items including a digital scale, over one thousand dollars in folds of money, ammunition, and a flip cellphone. Under the totality of the circumstances: a vacuum-sealed bag of what appeared to be marijuana, hidden under the seat and found with these items, without any evidence that Defendant claimed to the officers the substance was legal hemp, the officers' suspicions were bolstered, amounting to

probable cause to believe the substance at issue was in fact illicit marijuana and not hemp. The trial court therefore did not err in concluding that Defendant's Fourth Amendment rights were not violated.

B. Jury Instructions

¶ 21 **[2]** We also reject Defendant's argument that the trial court plainly erred in failing to provide a jury instruction on actual knowledge. Plain error exists when the defendant demonstrates "that a fundamental error occurred at trial." *Id.* at 518, 723 S.E.2d at 334. "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.* (quotation marks omitted). "In the absence of such impact, relief is unavailable to a defendant who has not objected." *State v. Inman*, 174 N.C. App. 567, 573, 621 S.E.2d 306, 311 (2005).

¶ 22 "Felonious possession of a controlled substance has two essential elements. The substance must be possessed and the substance must be knowingly possessed." *State v. Galaviz-Torres*, 368 N.C. 44, 48, 772 S.E.2d 434, 437 (2015) (citation omitted). "[W]hen the defendant denies having knowledge of the controlled substance that he has been charged with possessing . . . , the existence of the requisite guilty knowledge becomes a determinative issue of fact about which the trial court must instruct the jury." *Id.* at 49, 772 S.E.2d at 437 (quotation marks omitted).

¶ 23 Here, the same facts supporting the trial court's denial of Defendant's motion to suppress also reveal there is no support in the record for his argument that the trial court erred—much less plainly erred—in failing to instruct the jury *ex mero motu* on actual knowledge. Given the above circumstances under which the contraband was found—*e.g.*, its location and packaging with the scale, ammunition, and cash, all of which were before the jury—we cannot conclude that the absence of an actual knowledge instruction had a probable impact on the jury's verdict. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

C. Ineffective Assistance of Counsel

¶ 24 Finally, Defendant maintains he also received ineffective assistance of counsel because his trial counsel failed to request an actual knowledge instruction. *See State v. Lane*, 271 N.C. App. 307, 314, 844 S.E.2d 32, 39 (2020) (explaining that the prejudice prong of the ineffective assistance of counsel claim "is something less than that required under plain error"). Even assuming deficient performance in failing to request the instruction, and for the same reasoning based on the totality of the evidence stated above, we hold Defendant cannot show a "reasonable probability that, but for counsel's unprofessional errors, the result of

the proceeding would have been different." *Id.* at 313-14, 844 S.E.2d at 39 (explaining that "under the reasonable probability standard the likelihood of a different result must be substantial, not just conceivable") (cleaned up).

III. CONCLUSION

¶ 25 We conclude the trial court did not err in denying Defendant's motion to suppress or failing to instruct the jury on actual knowledge, and Defendant has failed to establish that he received ineffective assistance of counsel.

NO ERROR.

Judges ARROWOOD and WOOD concur.

STATE OF NORTH CAROLINA
v.
AKEEM DEVONTE McIVER, Defendant

No. COA22-107

Filed 16 August 2022

1 Appeal and Error—preservation of issues—admissibility of evidence—timing of objection—plain error review

In a first-degree murder prosecution, defendant failed to preserve for appellate review his objection to the admission of evidence—specifically, expert testimony regarding the locations of the victim's and defendant's cell phones before and after the victim's death—where defendant's counsel filed a motion in limine to exclude the testimony and objected to the testimony at voir dire outside the jury's presence but did not object at the time the testimony was actually introduced at trial. Consequently, defendant was entitled only to plain error review of his challenge on appeal.

2. Homicide—first-degree—evidence locating victim's and defendant's cell phones—jury instruction on flight—no plain error

The trial court in a first-degree murder prosecution did not commit plain error when it allowed an expert to testify about the locations of the victim's and defendant's cell phones before and after the victim's death and when it instructed the jury on flight. Even if the court had erred, any error could not have had a probable impact

on the jury's verdict given the ample evidence of defendant's guilt: namely, the testimony of a friend who drove defendant and another man to the victim's house, heard gunshots a few minutes later from the direction defendant had walked, and saw the other man hand a gun to defendant as they reentered the car; and testimony from the victim's mother, who also heard gunshots coming from her daughter's house, saw defendant and the other man run away from the house and drive away, and found her daughter lying on the sidewalk in front of the house.

Appeal by Defendant from judgment entered 16 July 2021 by Judge Gale M. Adams in Cumberland County Superior Court. Heard in the Court of Appeals 8 June 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph L. Hyde, for the State.

Glover & Petersen, P.A., by James R. Glover, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Akeem Devonte McIver ("Defendant") appeals his conviction of first degree murder. On appeal, Defendant argues the trial court erred or plainly erred by 1) allowing an expert to testify about the location of Nakeshia Washington's ("Washington") and his cell phones, and 2) instructing the jury on flight. After a careful review of the record and applicable law, we conclude Defendant received a fair trial free from error.

I. Factual and Procedural Background

¶ 2 On the evening of July 16, 2018, Antonio Johnson ("Johnson") visited Defendant at Defendant's house. Johnson drove his girlfriend's white Dodge Charger, which she permitted him to use while she worked a 12 hour shift at the hospital. When Johnson arrived at Defendant's house, Defendant entered the Dodge Charger, sat in the car, and asked Johnson to drive him to visit Alkeen Hair ("Hair").

¶ 3 Defendant and Johnson arrived at Hair's residence around 8:00 p.m. Defendant, Johnson, and Hair talked for a few minutes and then Hair asked Johnson to drive him to Cattail, a location across the river. Johnson agreed and drove Defendant and Hair to Cattail. Approximately one hour later, Hair asked Johnson if he could "take him to go get some weed." Hair offered to give Johnson gas money and some weed for driving him. Johnson agreed, and the three men got back into the Dodge

Charger with Johnson driving, Defendant sitting in the front seat, and Hair sitting in the back.

¶ 4 Hair directed Johnson to Washington's house to get the marijuana. Washington lived in a house owned by her mother, Vickey McArthur ("McArthur"), on Slater Avenue in Fayetteville, North Carolina. The house was located across the street from McArthur. Washington was known to sell marijuana in mason jars from this residence and had just received a new shipment of marijuana. When Defendant, Johnson, and Hair arrived at Washington's house, Hair directed Johnson not to park directly in front of the house, because Washington "don't [sic] like just anybody pulling up in front of the house . . . ." Johnson parked a "[c]ouple hundred yards[]" from Washington's house. Defendant and Hair exited the car around 9:40 p.m.

¶ 5 Washington was on the phone with a friend when they arrived. While they were speaking, Washington began saying, "who is it, who is it[]" followed by several gun shots before the phone call was terminated.

¶ 6 McArthur was at home that evening. At approximately 9:45 p.m., McArthur heard gunshots she believed to be coming from her daughter's house. She stepped outside to find the source of the sound, looked towards Washington's house, and saw two men leaving Washington's porch. According to McArthur, one man was "a dark-skinned tall male, male or boy, with dreads, blue jeans, white sneakers, hair hat on, blue jeans." McArthur realized she had seen this man "several mornings" at Washington's house. At trial, McArthur identified Defendant as the man she had seen leaving her daughter's porch that night. As McArthur approached her daughter's house, she simultaneously heard one of the men, later identified as Hair, say "Hurry up. Come on 'cause she gonna call the police[]" and saw Washington lying on the sidewalk in front of her house. McArthur saw Defendant and Hair run away from Washington's house, enter a white Dodge Charger, and drive away towards Murchison Road. Another neighbor also observed two black males fleeing the scene with one holding "a cellphone that was glowing." McArthur immediately dialed 911 and attempted to flag down a police officer. McArthur had purchased an iPhone for Washington prior to the date of the shooting but did not see the iPhone in Washington's house after the shooting occurred.

¶ 7 Meanwhile, Johnson, who had waited in the Dodge Charger, heard gunshots coming from "the direction that . . . [Defendant and Hair] walked in." He "turned the car on and slowly crept around the corner." Hair then ran up to the Dodge Charger and got into the back seat while

holding a mason jar of weed. Approximately ten seconds later Defendant also got into the Dodge Charger. Johnson then "pulled off kind of fast" from the scene towards Murchison Road.

¶ 8 Hair directed Johnson to drive to Hair's girlfriend's trailer which was located across the river. On the way there, Hair pulled out a loaded gun and handed it to Defendant, who then placed the gun in the Dodge Charger's console. According to Johnson, Defendant kept asking Hair, "[w]hat the f*** you got going on? What type time you on?" over and over.[1] The three men drove for about ten to twenty minutes, reached Johnson's girlfriend's trailer, and went inside to smoke marijuana from the mason jar Hair had acquired from Washington's house. They stayed there for about an hour and then Johnson drove Hair and Defendant back to their houses before returning to his own house.

¶ 9 Meanwhile, McArthur got the attention of Officer Percy Evans ("Officer Evans") of the Fayetteville Police Department who was patrolling the area. McArthur told Officer Evans that Washington had been shot, and Officer Evans then ran over to Washington and saw her lying on the ground, bleeding from her mouth. Officer Evans immediately called for Emergency Medical Services ("EMS"), the fire department, and police back up, and he attempted to administer first aid. EMS arrived and declared Washington was "deceased on scene." Diana Engel, ("Engel"), a forensic technician, photographed the scene and collected evidence at Washington's house that same evening.

¶ 10 Fayetteville Police Department Homicide detectives arrived on the scene; and after obtaining a search warrant, began an investigation. Inside Washington's house, Detectives determined that the gunshots had been fired within the entrance to Washington's house and gathered several spent 9mm and .40 shell casings. However, Washington's iPhone was not located during their search of the property.

¶ 11 Johnson continued to drive around in the white Dodge Charger while his girlfriend was at work. After noticing that police officers were asking questions about the Dodge Charger, he attempted to conceal it within a wood-lined area behind an apartment complex on Caledonia Drive. Police officers ultimately found the Dodge Charger where Johnson had attempted to conceal it.

¶ 12 On July 16, 2018, Defendant was indicted for first degree murder and robbery with a dangerous weapon. On June 28, 2021, Defendant filed a

1. At trial, Johnson explained "[w]hat type time you on?" means "what you got going through your mind, like what's going on with you?"

motion *in limine* to exclude evidence of the GeoTime Report and the testimony of investigative assistant William Potter ("Potter") asserting it lacks proper evidentiary foundation, uses multiple cell towers, contains prejudicial hearsay, and contains conclusory references and statements.

¶ 13 This case came on for jury trial from July 12 to July 16, 2021. At trial, Potter, an investigative assistant with the homicide unit of Fayetteville Police Department, testified on behalf of the State. When the State tendered Potter as an expert in cell phone analytics, Defendant's counsel was allowed to *voir dire* outside of the presence of the jury. After *voir dire* and still outside the presence of the jury, Defense counsel objected to Potter being accepted by the trial court as an expert. The trial court overruled Defendant's objection and accepted Potter as an expert. Potter testified he used GeoTime, based off the call record of Johnson's and Washington's cell phones, to plot the respective locations of their phones at various points of time before and after the shooting. Defense counsel did not object to Potter's testimony during examination or in the presence of the jury. At the end of Potter's testimony and cross-examination, the court stated, in the presence of the jury, "put it on the record so that it is in front of the jury that the objection was overruled as to Mr. Potter being tendered and accepted as an expert."

¶ 14 The jury found Defendant guilty of first-degree murder and robbery with a dangerous weapon. The court sentenced Defendant to life imprisonment without parole for his first-degree murder conviction and arrested judgment on the charge of robbery with a dangerous weapon. Defendant gave oral notice of appeal in open court.

II. Discussion

¶ 15 Defendant raises several issues on appeal; each will be addressed in turn.

A. Expert's Testimony

¶ 16 Defendant first contends the trial court erred by allowing Potter's testimony regarding the location of Washington's and Johnson's cell phones alleging it was based on hearsay because the call detail records were never produced nor authenticated as accurate or confirmed as belonging to Washington and Johnson. We disagree.

1. Standard of Review

¶ 17 **[1]** As an initial matter, Defendant contends the motion *in limine* and oral objection at the trial are sufficient to preserve his first issue for appellate review. Alternatively, Defendant contends we should review

Potter's testimony under a plain error standard of review. The State, in turn, argues Defendant altogether failed to preserve his first issue.

¶ 18 The North Carolina Appellate Rules of Procedure provide, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1); *see State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) ("[T]he appellate courts of this state will not review a trial court's decision to admit evidence unless there has been a timely objection.").

¶ 19 Defendant first raises this issue concerning Potter's testimony in his motion *in limine*. It is firmly established that a "motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence." *State v. Hill*, 347 N.C. 275, 293, 493 S.E.2d 264, 274 (1997) (internal quotation marks omitted) (quoting *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845 (1995)); *see Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 620, 504 S.E.2d 102, 105 (1998). Rather, "[r]ulings on these motions . . . are merely preliminary and subject to change during the course of trial, depending upon the actual evidence offered at trial and thus an objection to an order granting or denying the motion 'is insufficient to preserve for appeal the question of the admissibility of the evidence.' " *Hill*, 347 N.C. at 293, 493 S.E.2d at 274 (quoting *T&T Dev. Co. v. Southern Nat'l Bank*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 349 (1997)).

¶ 20 In order for an objection to admission of evidence to be considered timely it "must be made 'at the time it is actually introduced at trial.' " *Ray*, 364 N.C. at 277, 697 S.E.2d at 322 (quoting *State v. Thibodeaux*, 352 N.C. 570, 581, 532 S.E.2d 797, 806 (2000)). Thus, "to preserve for appeal matters underlying a motion in limine, the movant must make at least a general objection when the evidence is offered at trial." *Beaver v. Hampton*, 106 N.C. App. 172, 177, 416 S.E.2d 8, 11 (1992), *aff'd in part and vacated in part on other grounds*, 333 N.C. 455, 427 S.E.2d 317 (1993); *see Hill*, 347 N.C. at 293, 493 S.E.2d at 274 ("A party objecting to an order granting or denying a motion *in limine*, in order to preserve the evidentiary issue for appeal, is required to object to the evidence at the time it is offered at the trial (where the motion was denied) or attempt to introduce the evidence at the trial (where the motion was granted.")); *Thibodeaux*, 352 N.C. at 581, 532 S.E.2d at 806. Such objections may not be made "*only* during a hearing out of the jury's presence prior to the actual introduction of the testimony." *Ray*, 364 N.C. at 277, 697 S.E.2d at 322 (emphasis added).

¶ 21 The record before us demonstrates Defendant renewed his objection to Potter's testimony during *voir dire* outside of the presence of the jury. Our Supreme Court addressed a similar issue in *State v. Ray*. There, the prosecutor informed the trial court judge outside the presence of the jury he intended to conduct a line of questioning concerning the defendant's prior conduct to prove motive and intent. *Id*. at 275, 697 S.E.2d at 321-22. Defense counsel objected at the hearing but did not object once the jury returned and the State proceeded with its line of questioning. *Id*. at 276, 692 S.E.2d at 321. Our Supreme Court held the defendant failed to preserve this issue for appellate review because he "objected to the State's forecast of the evidence, but did not then subsequently object when the evidence was 'actually introduced at trial.' " *Id*. at 277, 697 S.E.2d at 322 (quoting *Thibodeaux*, 352 N.C. at 581, 532 S.E.2d at 806).

¶ 22 This court addressed the issue in the case *sub judice* more recently in *State v. Williams*. In *Williams*, defense counsel first objected to evidence of a prior incident before jury selection, but the trial court judge deferred its ruling until the State presented its evidence. *State v. Williams*, 253 N.C. App. 606, 612, 801 S.E.2d 169, 173 (2017), *rev'd in part and remanded*, 370 N.C. 526, 809 S.E.2d 581 (2018). When the witness began to testify about the circumstances surrounding the prior incident, the trial court took a recess, during which defense counsel reminded the trial court judge about his objection. *Id*. The session then resumed and a *voir dire* of the witness was conducted. *Id*. Ultimately, the trial court judge ruled the testimony was admissible, but defense counsel requested an exception for the record which was granted by the trial court judge. *Id*. at 612-13, 801 S.E.2d at 173. Defense counsel, however, failed to object once the jury returned and the witness testified about the incident. *Id*. at 613, 801 S.E.2d at 173-74. The majority held it "would be fundamentally unfair to fault defendant on appeal" and proceeded to review for prejudicial error. *Id*. at 613, 801 S.E.2d at 174. Judge Dillon dissented, arguing the appropriate standard of review was plain error as "[o]ur Supreme Court has held that a defendant who objects during a forecast of evidence outside the presence of the jury does not preserve the objection *unless he objects when the testimony is offered into evidence in the jury's presence*." *Id*. at 620, 801 S.E.2d at 178 (Dillon, J. dissenting). On appeal, our Supreme Court reversed "for reasons stated in the dissenting opinion." *State v. Williams*, 370 N.C. 526, 809 S.E.2d 581 (2018) (order).

¶ 23 In this case, Defendant's objection to the admission of Potter's testimony regarding the location of Johnson's and Washington's cell phones was proffered only outside of the jury's presence. The trial

court noted Defendant's objection, but only after Potter's testimony and cross-examination had concluded. Thus, an objection, if any, was not made "contemporaneous[ly] with the time . . . [Potter's] testimony . . . [was being] offered into evidence." *Thibodeaux*, 352 N.C. at 582, 532 S.E.2d at 806. We conclude Defendant merely "objected to the State's forecast of the evidence, but did not then subsequently object when the evidence was 'actually introduced at trial.' " *Ray*, 364 N.C. at 277, 697 S.E.2d at 322 (quoting *Thibodeaux*, 352 N.C. at 581, 532 S.E.2d at 806). Defendant failed to properly preserve his objection for appeal.

¶ 24 Our Supreme Court has "been clear on this point[,]" *Williams*, 253 N.C. App. at 621, 801 S.E.2d at 178 (Dillon, J. dissenting), and "we are bound by our Supreme Court's holding." *State v. Shepherd*, 156 N.C. App. 69, 72, 575 S.E.2d 776, 778 (2003); *see also In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act etc.*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Therefore, we hold the proper standard of review is plain error.

2. Analysis

¶ 25 **[2]** On appeal, Defendant argues the admission of Potter's testimony rises to the level of plain error. We disagree.

¶ 26 As a general rule, the plain error standard of review is applied when a defendant fails to preserve an error at trial. *See* N.C. R. App. P. 10(a)(4); *see State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). A defendant has a heavier burden to show the alleged error rises to the level of plain error. *Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330. Appellate courts must only apply the plain error rule where,

> after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

Id. at 516-517, 723 S.E.2d at 333 (cleaned up) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). To determine whether an unpreserved error was prejudicial, an appellate court must "examine[] the entire record to determine if the . . . error had a probable impact on the jury's finding of guilt." *Id.* at 517, 723 S.E.2d at 334 (cleaned up) (quoting *Odom*, 307 N.C. at 661, 300 S.E.2d at 379).

¶ 27 Defendant is unable to meet the required burden of proof to show his alleged error was plain error. In the case *sub judice*, there was sufficient evidence presented at trial from which the jury could deduce Defendant committed the crimes of first-degree murder and robbery with a dangerous weapon. The jury heard testimony from Johnson that he drove Defendant to Washington's house, saw Defendant exit the car, and then heard the sound of gunshots approximately five minutes later from the direction Defendant had walked. He explained he observed Defendant get back into the Dodge Charger; frantically ask Hair "[w]hat the f*** you got going on? What type time you on?"; and then receive a gun from Hair. Likewise, McArthur testified she heard gunshots coming from Washington's house and saw two men leaving Washington's front porch. McArthur told the jury she recognized Defendant because she had previously seen him "several mornings" at Washington's house. McArthur further explained that she saw Washington lying in front of the front porch of the house and overheard Hair saying, "[h]urry up. Come on 'cause she gonna call the police." Furthermore, McArthur testified she had purchased an iPhone for Washington but did not see it at her daughter's house after the shooting occurred. Engel corroborated McArthur's testimony, testifying she did not see Washington's iPhone during the search of her house.

¶ 28 In light of this evidence, we cannot say Potter's testimony had a "probable impact on the jury's finding of guilt[,]" was a "fundamental error[,]" "amount[ed] to a denial of a fundamental right" for Defendant, "resulted in a miscarriage of justice[,]" denied Defendant a fair trial, or "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 516-17, 723 S.E.2d at 333 (emphasis omitted) (quotations omitted).

B. Jury Instruction

¶ 29 Next, Defendant argues the trial court plainly erred on instructing the jury on flight because there was insufficient evidence presented to demonstrate he took steps to avoid apprehension. We disagree.

¶ 30 Under Rule 10 of our North Carolina Rules of Appellate Procedure, "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict." N.C. R. App. P. 10(a)(2). Defendant concedes he did not object to the challenged jury instruction. Additionally, the State asserts Defendant may have even invited his own error when he assisted with the drafting of the jury instruction and expressed satisfaction with the result. If true, we would be prohibited from reversing for plain error. *State v. McPhail*, 329 N.C. 636, 643, 406, S.E.2d 591, 596 (1991). Nevertheless, as we explain below, Defendant would not be afforded reversal under plain error review even if the error was uninvited.

¶ 31 Applying the principles of law as discussed *supra*, we hold ample evidence exists to support the jury's finding Defendant guilty of first-degree murder. First, Johnson testified he drove Defendant and Hair to Washington's house and shortly thereafter heard gunshots from "the direction that . . . [Defendant and Hair] walked." Johnson then saw Defendant get back into the white Dodge Charger, observed Hair pull out a gun, and hand it to Defendant while Defendant repeated "[w]hat the f*** you got going on? What type time you on?" Moreover, McArthur stated at trial she heard gunshots coming from Washington's house, stepped outside to investigate the noise, and observed two men leaving Washington's porch, one of which she recognized as Defendant. As McArthur approached Washington's house, she observed Defendant and the other man run away and get into a white Dodge Charger, and she observed Washington lying on the sidewalk.

¶ 32 In light of these testimonies and record evidence, we conclude the trial court's jury instruction on flight did not have "a probable impact on the jury's finding of" Defendant's guilt. *Lawrence*, 365 N.C. at 517, 723 S.E.2d at 334 (emphasis omitted) (quotation omitted). Therefore, we hold Defendant has not met his burden of proving the trial court committed plain error by instructing the jury on flight.

III. Conclusion

¶ 33 For the foregoing reasons, we hold Defendant has failed to meet his burden to show that the trial court committed plain error by allowing Potter's testimony or by giving the jury instruction on flight. Therefore, we conclude Defendant received a fair trial free from error.

NO ERROR.

Judges DIETZ and MURPHY concur.

STATE v. WILLIAMS

[285 N.C. App. 215, 2022-NCCOA-562]

STATE OF NORTH CAROLINA
v.
SERGIO MONTRELL WILLIAMS AND KENDRIC DESHAWN PERSON, DEFENDANTS

No. COA20-859

Filed 16 August 2022

1. Appeal and Error—preservation of issues—constitutional objection to evidence—apparent from context

In a prosecution for multiple charges arising from an armed robbery, defendant preserved for appellate review his argument that the trial court violated his constitutional due process right to the presumption of innocence by permitting the jury to view a video showing him in shackles during a police interrogation. Although defendant's constitutional argument was not immediately apparent from his initial objection at trial (that the video was "substantially prejudicial"), it became apparent where defense counsel requested a curative instruction clarifying that the jurors are "not to make any inference from the fact that he's in those chains," and where the court subsequently instructed the jury not to make any inferences about defendant's guilt or innocence based on the shackling.

2. Constitutional Law—due process—presumption of innocence—video of defendant in shackles—harmless error

There was no prejudicial error in a prosecution for multiple charges arising from an armed robbery, where defendant argued on appeal that the trial court violated his constitutional due process right to the presumption of innocence by permitting the jury to view a video showing him in shackles during a police interrogation. Even if the court had erred in admitting the video into evidence, defendant could not show prejudice because the court gave a limiting instruction to the jury directing them not to make any inferences about defendant's guilt or innocence based on the shackling and because overwhelming evidence of defendant's guilt existed beyond the video.

3. Criminal Law—courtroom restraints—statutory authority—mandatory factual findings—inapplicable to video of shackled defendant

In a prosecution for multiple charges arising from an armed robbery, where the trial court permitted the jury to view a video showing defendant in shackles during a police interrogation, defendant's argument that the court failed to make mandatory factual findings

under N.C.G.S. § 15A-1031 regarding whether defendant needed to be restrained during police questioning (and instead simply took "the prosecutor's word" for it) lacked merit and was rejected on appeal. Section 15A-1031 addresses a trial judge's authority to subject a defendant to "physical restraint in the courtroom;" defendant was not physically restrained in the courtroom, and therefore the statute did not apply.

4. Appeal and Error—preservation of issues—constitutional challenge to Habitual Felon Act—not raised at trial

In a prosecution for multiple charges arising from an armed robbery, defendant failed to preserve for appellate review his argument that his sentences under the Habitual Felon Act violated his federal and state constitutional rights to be free from cruel and unusual punishment, where he did not raise the argument before the trial court.

5. Criminal Law—effective assistance of counsel—conflict of interest—no adverse effect on performance—prejudice not otherwise shown

In a prosecution for multiple charges arising from an armed robbery, where the trial court failed to adequately inquire into a potential conflict of interest that defendant's attorney carried from previously representing one of the State's witnesses, who happened to be one of the robbery victims, defendant was still not entitled to a new trial because he could neither show that an "actual conflict of interest" adversely affected his counsel's performance (the record showed that defense counsel objected to the State's main evidence in the case, repeatedly impeached the witness's credibility during cross-examination, and had objectively sound strategic reasons for not questioning the witness about his mental health history and his deal with the State to testify) nor otherwise show prejudice where he was acquitted of the most serious charges he faced at trial, including attempted first-degree murder.

6. Judges—improper delegation of statutory authority—introduction of criminal case to jury—impermissible expression of opinion—no prejudice shown

In a prosecution for multiple charges arising from an armed robbery, where the trial court improperly delegated to the prosecutor its statutory obligation under N.C.G.S. § 15A-1213 to introduce the case to the jury, defendant's argument that the court's error constituted an improper intimation as to his guilt was rejected on appeal because defendant could not show the error prejudiced him where the trial court instructed the jury on the presiding judge's

impartiality—saying the jury must not infer from what the judge did or said that the evidence is to be believed or disbelieved or that a fact has been proved or disproved—and where the jury acquitted defendant of the most serious charges he faced at trial, including attempted first-degree murder.

Appeal by defendants from judgments entered on or about 14 January 2020 by Judge J. Carlton Cole in Superior Court, Edgecombe County. Heard in the Court of Appeals 30 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorneys General Erika N. Jones and Yvonne B. Ricci, for the State.

Daniel J. Dolan for defendant-appellant Sergio Montrell Williams.

Anne Bleyman for defendant-appellant Kendric Deshawn Person.

STROUD, Chief Judge.

¶ 1 Defendants Sergio Montrell Williams and Kendric Deshawn Person were jointly tried and appeal from judgments for robbery with a dangerous weapon and felon in possession of a firearm. While only Defendant Williams properly appealed by entering his notice of appeal, we grant Defendant Person's petition for writ of certiorari.

¶ 2 On appeal, Defendant Person argues (1) the trial court denied him the right to the presumption of innocence in violation of his constitutional due process rights and North Carolina General Statute § 15A-1031 (2019) when it allowed the jury to watch a video in which he was shackled and (2) his sentences under North Carolina's Habitual Felon Act, North Carolina General Statute §§ 14-7.1–7.6 (2019), violate his federal and state constitutional rights to be free from cruel and unusual punishment. Because the trial court gave a limiting instruction that the jury should not infer Defendant Person's guilt or innocence from watching the video and because overwhelming evidence of his guilt existed beyond the video, we conclude any error in relation to the video was not prejudicial, and we further determine § 15A-1031 does not apply. Because Defendant Person failed to raise his habitual felon status sentencing argument before the trial court, we conclude he has not preserved it for our review.

¶ 3 Turning to his appeal, Defendant Williams argues the trial court erred because (1) it failed to adequately investigate a potential conflict

of interest his attorney carried from previously representing a witness for the State and (2) it intimated an opinion as to Defendant Williams's guilt by delegating a statutory obligation under North Carolina General Statute § 15A-1213 to the prosecutor. Because Defendant Williams cannot show any conflict of interest adversely affected his attorney's performance such that we would presume prejudice and cannot show any prejudice, we find no prejudicial error as to his first argument. After reviewing the totality of the circumstances, we also reject Defendant Williams's argument that the trial court delegated its duties under § 15A-1213 to the prosecutor, as he cannot show prejudice. As a result, we determine the trial court did not commit prejudicial error.

I. Background

¶ 4 The State's evidence tended to show that on 6 February 2019, Taron Battle ("Mr. Battle"), his friend Brandon Deans, and his nephew Tyrell Battle went to JMS Food Mart and Grill in Rocky Mount to purchase cigars for smoking marijuana. Mr. Battle drove them to JMS in his silver Pontiac Grand Prix. Prior to going to JMS, all three individuals consumed alcohol and various drugs. While at JMS, two men approached Mr. Battle and Mr. Deans seeking to purchase marijuana. These two men were described as "a slender, brown-skinned guy with dreads in his head" and "a heavyset, kind of stocky guy." Defendant Williams was later identified as the "heavyset" individual and Defendant Person as the slender individual with "dreads in his head." Mr. Battle and Mr. Deans told Defendants they did not want to sell their marijuana.

¶ 5 Mr. Battle then entered JMS to purchase the cigars. Upon leaving JMS, he noticed Defendant Person had entered his car and was in the backseat negotiating the sale of marijuana with Mr. Battle's nephew. Defendant Person then handed a pint-sized mason jar containing marijuana to Defendant Williams through the car window. Defendant Williams then said "you-all trying to play me" and drew his gun. Defendant Person also drew his gun. Mr. Battle drew his gun in response. At this time, Tyrell Battle got out of the Pontiac and ran away. Defendant Person then took Mr. Dean's gun from the seat beside Mr. Deans and got out of the car to join Defendant Williams in taking Mr. Battle's gun. Defendants Williams and Person then left the scene together.

¶ 6 After the Defendants left, Mr. Battle and Mr. Deans drove around to look for Tyrell. While they were driving around the area, a "dark-colored car, like a sedan" slammed on the brakes in front of Mr. Battle's car, causing Mr. Battle to rear end the car. Mr. Deans identified the vehicle as a black Nissan Sentra. Defendants Williams and Person then leaned

out the windows of the Nissan and opened fire on Mr. Battle and Mr. Deans. Mr. Battle followed the Nissan attempting to "do a pit maneuver" or otherwise knock the Nissan out of the way. At some point both cars stopped, and Defendants Williams and Person left their car while they continued to fire upon Mr. Battle and Mr. Deans.

¶ 7 One of the bullets struck Mr. Battle in the chest passing near his heart and puncturing his lung. Because Mr. Battle had been shot, Mr. Deans took over driving and drove Mr. Battle to the hospital. At the hospital, Detective Woods of the Rocky Mount Police Department interviewed Mr. Battle, and Mr. Battle told Detective Woods that he would not be able to identify the shooters if he saw them again. But Mr. Battle gave Detective Woods descriptions of the shooters, although at trial he could not recall the details. Due to his injuries, Mr. Battle was then airlifted to another hospital.

¶ 8 Detective Woods also interviewed Mr. Deans at the initial hospital. Mr. Deans told Detective Woods he drove Mr. Battle to the hospital following a "robbery that went bad" at JMS. Mr. Deans described the shooters as "a light-skinned black male with dreads, [with] unknown tattoos on [his] face" and "a dark-skinned male, heavyset, wearing a white tee shirt and blue and red shorts." Officers then took Mr. Deans to the police department, and he later identified Defendant Williams in an eight-person photo lineup with eighty percent certainty.

¶ 9 On the same evening, Rocky Mount Police Department officers responded directly to JMS after receiving a report of shots fired. Officer Kuhn reviewed surveillance footage from JMS security cameras and noticed one of the suspects was wearing a white shirt, black shorts, red sneakers, and a GPS ankle monitor. Officer Kuhn used BI Total Access, a GPS ankle monitoring program, and determined Defendant Williams was at JMS around the time of the shooting. Officer Kuhn located a booking photo of Defendant Williams and visually confirmed that Defendant Williams was the same person in the surveillance video. Using BI Total Access, officers located Defendant Williams and took him into custody. Defendant Williams was wearing the same shirt and shoes observed in the surveillance video.

¶ 10 Detective Woods then interviewed Defendant Williams at the police department. During the interview, Defendant Williams was wearing the same clothing described by Mr. Deans and seen in the surveillance video. Defendant Williams confessed he was at JMS and took the guns from Mr. Battle and Mr. Deans, but Defendant Williams never admitted to the shooting.

¶ 11 Defendant Person was apprehended approximately one month after the robbery and shooting. After his arrest, Defendant Person admitted to being at the JMS the night of 6 February 2019, but never admitted to participating in the shooting.

¶ 12 Based on these events, both Defendant Williams and Defendant Person were indicted on numerous charges. On or about 10 June 2019, Defendant Williams was indicted on: assault with a deadly weapon and attempted first degree murder on Mr. Deans; attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury on Mr. Battle; possession of firearm by a felon; discharge of a weapon into occupied property inflicting serious bodily injury on Mr. Battle; and robbery with a dangerous weapon. On or about the same day, Defendant Person was indicted on: attempted first degree murder on Mr. Deans; attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury on Mr. Battle; robbery with a dangerous weapon; discharge of a weapon into occupied property inflicting serious bodily injury on Mr. Battle; discharge of a firearm into an occupied vehicle while in operation; possession of firearm by a felon; and habitual felon status.

¶ 13 On or about 21 October 2019, the State filed superseding indictments against both Defendants. Defendant Williams was indicted on: discharge of a weapon into occupied property inflicting serious bodily injury on Mr. Battle; robbery with a dangerous weapon on both Mr. Battle and Mr. Deans; and discharge of a weapon into an occupied vehicle while in operation on both Mr. Battle and Mr. Deans. Defendant Person was indicted on the same charges except for discharge of a weapon into an occupied vehicle.

¶ 14 These charges came for trial starting 6 January 2020. During trial, the State presented evidence as recounted above. During the course of trial, on or about 13 and 14 January 2020, the State dismissed Defendant Williams's charges of assault with a deadly weapon and discharge of a firearm into an occupied vehicle while in operation. Neither of the Defendants presented evidence at trial.

¶ 15 The jury found Defendant Williams guilty of possession of a firearm by a felon and robbery with a dangerous weapon as to Mr. Battle but acquitted Defendant Williams of the attempted first degree murder as to Mr. Battle and as to Mr. Deans, assault with a deadly weapon with intent to kill inflicting serious injury and its lesser included offense as to Mr. Battle, discharge of a weapon in a vehicle while in operation causing serious bodily injury as to Mr. Battle, and robbery with a dangerous

weapon as to Mr. Deans. Pursuant to the not guilty verdicts, on or about 14 January 2020, the trial judge entered documents entitled "Judgment/ Order or Other Disposition" noting Defendant Williams was found not guilty by the jury on both counts of attempted first degree murder and the assault with a deadly weapon charge.

¶ 16 As to Defendant Person, the jury found him guilty of robbery with a dangerous weapon as to both Mr. Battle and Mr. Deans, and possession of a firearm by a felon. The jury acquitted Defendant Person on the charges of: attempted first degree murder as to Mr. Deans and as to Mr. Battle, assault with a deadly weapon with intent to kill inflicting serious injury and its lesser included offense as to Mr. Battle, discharge of a weapon in a vehicle while in operation causing serious bodily injury as to Mr. Battle, and discharge of a firearm into an occupied vehicle while in operation. Pursuant to the not guilty verdicts, on or about 14 January 2020, the trial judge entered documents entitled "Judgment/ Order or Other Disposition" noting Defendant Person was found not guilty by the jury on both counts of attempted first degree murder, the assault with a deadly weapon charge, and the discharge of a firearm into occupied vehicle while in operation charge. Following these jury verdicts, also on or about 14 January 2020, Defendant Person also stipulated to three prior felony convictions and pled guilty to habitual felon status.

¶ 17 The trial court entered judgment and sentenced both Defendants on or about 14 January 2020. Defendant Williams was sentenced to 97 to 129 months on the robbery with a dangerous weapon charge and 19 to 32 months on the possession of a firearm by a felon charge to start "at the expiration of the sentence imposed" for the robbery conviction. As enhanced by his habitual felon status, Defendant Person was sentenced to 96 to 128 months on the two charges of robbery with a dangerous weapon and to 96 to 128 months on the possession of a firearm by a felon charge, again to start "at the expiration of the sentence imposed" for the robbery convictions. Defendant Williams gave notice of appeal in open court.

II. Defendant Person's Petition for Writ of Certiorari

¶ 18 Defendant Person did not enter either an oral or written notice of appeal from the judgments entered by the trial court. Defendant Person requests we consider an appeal from the judgment via a petition for writ of certiorari, due to his counsel's failure to properly appeal the judgment. At trial, the following exchange occurred after the trial court orally announced the judgments:

THE COURT: Yes, sir. Anything further, Mr. Williams?

> [DEFENDANT WILLIAMS'S TRIAL COUNSEL]: Other than, Your Honor, would respectfully would [sic] enter notice of appeal.
>
> THE COURT: Okay.
>
> [DEFENDANT WILLIAMS'S TRIAL COUNSEL]: I would ask that my representation be limited to this trial.
>
> THE COURT: I will take care of it. Madam Clerk, *as to both of these young men*, note their appeals and [Counsel for both Defendants] are relieved of any further obligation to represent them and it's ordered that the appellate defender's office be assigned to represent them in their appeals.

(Emphasis added.) Defendant Person's trial counsel did not object to the court's statement and did not enter a notice of appeal for Defendant Person, and Appellate Entries were created for both Defendants. The State simply notes the issue is in this Court's discretion. In our discretion, we allow Defendant Person's petition for certiorari. *See generally* N.C. R. App. P. 21; *see*, *e.g.*, *State v. Gardner*, 225 N.C. App. 161, 165, 736 S.E.2d 826, 829 (2013) ("We have also held that where a defendant has lost his right of appeal through no fault of his own, but rather as a result of the actions of counsel, failure to issue a writ of *certiorari* would be manifestly unjust. We are persuaded that [the defendant] lost her right of appeal through no fault of her own, but rather because of an error on the part of trial counsel. Thus, we exercise our discretion and grant *certiorari*." (citation omitted)).

III. Defendant Person's Appeal

¶ 19 Defendant Person argues the trial court erred as to two issues. First, he argues "the trial court denied . . . his right to the presumption of innocence when he was presented to the jury as an obviously bad and dangerous individual whose guilt was a foregone conclusion" when "the jury was permitted to view [him] in shackles" in a video of his police interrogation. (Capitalization altered.) Second, he contends sentencing him under the North Carolina Habitual Felon Act, North Carolina General Statutes §§ 14-7.1 *et. seq.*, violated his federal and state constitutional "rights to be free of cruel and unusual punishment." (Capitalization altered.) We hold the trial court committed no prejudicial error with respect to the first issue and Defendant Person failed to preserve the second issue for appellate review.

A. Presumption of Innocence

¶ 20 Defendant Person first argues the trial court denied his right to the presumption of innocence—protected as part of his due process rights—because it allowed the prosecution to play for the jury a video interrogation in which Defendant Person was shackled, although he acknowledges the trial court gave "a limiting instruction that the jury was not to make any inferences about his guilt or innocence." Defendant Person also contends the trial court's ruling allowing the jury to view the video in which he is shackled involved "an improper delegation of the trial court's mandatory statutory authority." Specifically, he contends the trial court did not follow North Carolina General Statute § 15A-1031, which Defendant acknowledges addresses when a trial judge "may order a defendant be restrained at trial," because the trial court "took the prosecutor's word" police needed to shackle Defendant Person in the video and improperly delegated to the prosecutor the trial court's required findings of fact and final order on the topic.

¶ 21 The State responds Defendant Person "failed to preserve the issue for appellate review" before making a variety of arguments on the merits. We first address the preservation issue before reaching the merits.

1. Preservation of Presumption of Innocence Issue

¶ 22 **[1]** We first address the preservation issue acknowledged by Defendant Person and argued by the State. Defendant Person first argues the video was played over his objections and that he renewed his objection at the close of evidence, thereby preserving the issue for appellate review. He then argues the alleged constitutional violation was apparent from the context given his objections and motions. In the alternative, Defendant Person argues this Court should exercise its authority pursuant to Rule 2 to suspend the Rules of Appellate Procedure and allow review of Defendant Person's claim to prevent manifest injustice to a party. The State responds all objections at trial were based on non-constitutional grounds and any constitutional argument has been waived.

¶ 23 "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). As a result, "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the reviewing court." *State v. Spence*, 237 N.C. App. 367, 369, 764 S.E.2d 670, 674 (2014) (quoting *State v. Ellis*, 205 N.C. App. 650, 654, 696 S.E.2d 536, 539

(2010)). "[E]ven constitutional challenges are subject to the same strictures of Rule 10(a)(1)." *State v. Bursell*, 372 N.C. 196, 199, 827 S.E.2d 302, 305 (2019).

¶ 24 As the language of Rule 10(a)(1) implies, *see* N.C. R. App. P. 10(a)(1) (requiring a party state the specific grounds if they "were not apparent from the context"), in the context of constitutional rights, "a defendant must voice his objection at trial such that it is apparent from the circumstances that his objection was based on the violation of a constitutional right." *Spence*, 237 N.C. App. at 370, 764 S.E.2d at 674. For example, in *Spence*, this Court held the defendant preserved an argument based on his constitutional right to a public trial because it was "apparent from the context" his attorney objected "in direct response to the trial court's ruling to remove all bystanders from the courtroom—a decision that directly implicate[d]" that right. *Id.*, 237 N.C. App. at 371, 764 S.E.2d at 674–75.

¶ 25 Here, Defendant Person's attorney first brought up the issue of Defendant Person being shackled in a video of his police interview during a motions conference held in the middle of jury selection. Defendant Person's attorney specifically argued the interview should be excluded for being "substantial[ly] prejudic[ial]":

> And it certainly would be our position that him being shackled like that would create a substantial prejudice towards him by the jury or certainly a potential of that prejudice as to why he was so dramatically chained during the interview and we would think that would create a prejudice to the jury about him and we would request that you exclude the video for that reason.

¶ 26 From this argument alone, it is a close call whether the constitutional presumption of innocence basis of the objection "is apparent from the circumstances." *See Spence*, 237 N.C. App. at 370, 764 S.E.2d at 674. On the one hand, as Defendant Person argues, one of the main problems with the jury seeing a defendant in shackles is "it tends to create prejudice in the minds of the jurors by suggesting that the defendant is an obviously bad and dangerous person whose guilt is a foregone conclusion" such that "it so infringes upon the presumption of innocence that it interferes with a fair and just decision of the question of guilt or innocence." *See State v. Tolley*, 290 N.C. 349, 366, 226 S.E.2d 353, 367 (1976) (quotations, citations, and alterations omitted) (explaining in the context of a jury seeing a defendant shackled at trial). Thus, the defense

attorney's reference to substantial prejudice could be enough because the decision to allow the jury to view a video with Defendant Person in shackles would necessarily implicate the right to a presumption of innocence; the prejudice of the shackles could scarcely refer to anything else.

¶ 27 On the other hand, as the State points out, Defendant Person's attorney did not mention the constitution and the trial court also made a statement indicating it thought the statement about prejudice was a reference to Rule of Evidence 403. N.C. Gen. Stat. § 8C-1, Rule 403 (2019). Specifically, in denying Defendant Person's motion at that time, the trial court ruled:

> That the Court in its discretion would deny the motion based on the 401 and 403 analysis and also having been informed that at that time the defendant was considered a flight risk and note Mr. Sperati's exception to the Court's ruling. And, Mr. Clark, if you'll prepare an order with those findings and whatever is necessary to support the Court's decision.

Based on the record before us, it does not appear any written order on this objection was ever prepared. Although a written order is not required for this type of ruling, in this instance a written order would likely have clarified the legal basis for the objection and the trial court's rationale for its ruling, perhaps eliminating the need for this issue to be raised on appeal. Without such written order, the trial court's oral ruling leaves a question of whether the constitutional basis of Defendant Person's objection was apparent from the context because it appears the trial court did not address any constitutional basis for the objection.

¶ 28 Moving beyond the initial objection, Defendant Person preserved this issue as seen by the subsequent curative instruction. Shortly after the trial court made its ruling, Defendant Person's attorney requested the trial court give "a curative instruction right before the video is played to the jury, that they're not to make any inference from the fact that he's in those chains" and the trial court agreed to do so. The jury could only make one inference from the shackling that would need to be cured: "that the defendant is an obviously bad and dangerous person whose guilt is a foregone conclusion." *Tolley*, 290 N.C. at 366, 226 S.E.2d at 367. As such, the request for a curative instruction supports Defendant Person's argument that he was making an objection on constitutional grounds.

¶ 29 The trial court's actual curative instruction to the jury when the video interview was about to be played further supports our interpretation of the curative instruction. The trial court specifically mentioned

the jury should not "make any inferences about [Defendant Person's] guilt or innocence" based on the shackling:

> Ladies and gentlemen of the jury, you're about to witness an interview of Mr. Kendric Person conducted by Detective Thompson. In this video, you'll see that Mr. Person is in handcuffs on both and leg irons.
>
> You are not to make any inferences about his guilt or innocence based on the - - him being in handcuffs and leg irons. Thank you. You may continue.

Thus, the trial court ultimately addressed Defendant Person's objection to the video of the interview showing him in shackles as based on his constitutional right to a presumption of innocence.

¶ 30 Because the constitutional due process and presumption of innocence basis of Defendant Person's objection is apparent from the context, we hold he properly preserved this issue for our review. *See Spence*, 237 N.C. App. at 371, 764 S.E.2d at 674–75 (holding the defendant preserved an issue for appeal when the basis of the objection was "apparent from the context"). Since we hold Defendant Person preserved this issue, we do not need to reach his Rule 2 argument.

2. Merits of Presumption of Innocence Issue

¶ 31 **[2]** Having determined Defendant Person properly preserved his presumption of the innocence issue, we now turn to the merits. Specifically, Defendant Person contends the trial court violated his right to a presumption of innocence because it allowed the State to play a video of a police interview in which he was shackled.

¶ 32 Beginning with the standard of review, Defendant Person argues because the shackling issue "involves alleged violations of constitutional rights" we should review it de novo. But both our Courts and the United States Supreme Court have long said trial court rulings on physical restraints on a defendant in the context of the due process right to presumption of innocence are reviewed for abuse of discretion. *See State v. Lee*, 218 N.C. App. 42, 48–49, 720 S.E.2d 884, 890 (2012) ("In reviewing the propriety of physical restraints in a particular case, 'the test on appeal is whether, under all of the circumstances, the trial court abused its discretion.' " (quoting *Tolley*, 290 N.C. at 369, 226 S.E.2d at 369); *Deck v. Missouri*, 544 U.S. 622, 629, 125 S. Ct. 2007, 2012 (2005) ("[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its

discretion, that they are justified by a state interest specific to a particular trial."). "Abuse of discretion occurs only where the trial court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Gray*, 337 N.C. 772, 776, 448 S.E.2d 794, 797 (1994) (quotations and citation omitted).

¶ 33 In making his argument, Defendant Person only cites cases involving shackling the defendant in the courtroom at trial. *See Tolley*, 290 N.C. at 363, 226 S.E.2d at 365 ("Defendant contends that this action by the trial judge rendered his trial fundamentally unfair, in that his appearance before the jury while shackled with leg irons during the entire course of his three-day trial destroyed the presumption of innocence to which he was entitled until proven guilty beyond a reasonable doubt."); *State v. Sellers*, 245 N.C. App. 556, 558, 782 S.E.2d 86, 88 (2016) ("Defendant contends the trial court violated N.C. Gen.[ ]Stat. § 15A–1031 by allowing him to appear before the jury in leg shackles, and failing to issue a limiting instruction."). Defendant Person does not cite nor have we found any binding precedent addressing a defendant appearing in shackles in a video played for the jury at trial.

¶ 34 We need not decide whether our case law on the jury viewing a defendant in shackles or other restraints extends to watching a video where the defendant is restrained because, even assuming *arguendo* it does, Defendant Person cannot show prejudice. In evaluating prejudice in cases on the presumption of innocence and restraints on the defendant, we have looked at both any limiting instruction the trial court gave and the strength of the evidence against the defendant. *See Lee*, 218 N.C. App. at 51–52, 720 S.E.2d at 891 (finding harmless error because "the trial court clearly and emphatically instructed the jury not to consider [the] defendant's restraints" and "given the overwhelming evidence against [the] defendant"); *State v. Thomas*, 134 N.C. App. 560, 570, 518 S.E.2d 222, 229 (1999) (concluding the defendant was not prejudiced because "the State offered overwhelming evidence" to support the conviction).

¶ 35 Here, the trial court explicitly instructed the jury to not "make any inferences about [Defendant Person's] guilt or innocence" based on his restraints in the video:

> Ladies and gentlemen of the jury, you're about to witness an interview of Mr. Kendric Person conducted by Detective Thompson. In this video, you'll see that Mr. Person is in handcuffs on both and leg irons.

> You are not to make any inferences about his guilt or innocence based on the - - him being in handcuffs and leg irons. Thank you. You may continue.

"The law presumes that jurors follow the court's instructions." *State v. Jackson*, 235 N.C. App. 384, 394 n.5, 761 S.E.2d 724, 732 n.5 (2014) (quoting *State v. Tirado*, 358 N.C. 551, 581, 599 S.E.2d 515, 535 (2004)). Thus, we presume the jurors did not make any inferences about Defendant Person's guilt based on his appearing in restraints in the video.

¶ 36 Even if they had made such inferences, Defendant Person could still not show prejudice because of the overwhelming evidence against him. Defendant Person matched the description Mr. Battle and Mr. Dean gave of the people who took their guns, and Mr. Dean identified him in court testimony as one of those people. Further, the incident at the store was captured on security footage, and police identified Defendant Person in the video. Thus, the State presented overwhelming evidence of Defendant Person's guilt.

¶ 37 As a result, assuming *arguendo* the precedents surrounding the jury viewing a defendant in shackles or other restraints at trial extend to watching a video where the defendant is restrained, we conclude Defendant Person cannot show prejudice from any alleged error. Therefore, we reject his arguments.

3. North Carolina General Statute § 15A-1031

¶ 38 **[3]** Finally on the issue of the video of the interview showing Defendant Person shackled, Defendant Person argues the trial court failed to make mandatory findings of fact under North Carolina General Statute § 15A-1031. The State responds "by its plain language N.C.G.S. § 15A-1031 does not apply since this statute only applies when the trial court itself makes the difficult determination that a defendant needs to be restrained in the courtroom." Before we address any failure to follow § 15A-1031, we therefore first need to determine if it applies at all. While in a similar context above we were reluctant to determine the reach of the constitutional rule, we do not have the same hesitancy in addressing statutory questions as compared to constitutional ones. *See State v. Wallace*, 49 N.C. App. 475, 484–86, 271 S.E.2d 760, 766 (1980) (explaining, "A constitutional question will not be passed upon if there is also present some other ground upon which the case may be decided" before settling the issue on appeal on statutory rather than constitutional grounds); *see also State ex rel. Utilities Com'n v. Public Staff-North Carolina Utilities Com'n*, 123 N.C. App. 43, 51, 472 S.E.2d 193, 199 (1996) ("[A]n appellate court will not consider constitutional questions, such as a violation of

due process, when they are 'not necessary to the decision of the precise controversy presented in the litigation before it.' " (quoting *Nicholson v. Education Assistance Authority*, 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969))).

¶ 39 Since the question of whether § 15A-1031 applies is a question of statutory interpretation, we review it de novo on appeal. *State v. Jamison*, 234 N.C. App. 231, 238, 758 S.E.2d 666, 671 (2014) ("Issues of statutory construction are questions of law, reviewed de novo on appeal." (quoting *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010))). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Id.* (quoting *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008)).

¶ 40 Section 15A-1031 provides:

> A trial judge may order a defendant or witness subjected to *physical restraint in the courtroom* when the judge finds the restraint to be reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons. If the judge orders a defendant or witness restrained, he must:
>
> > (1) Enter in the record out of the presence of the jury and in the presence of the person to be restrained and his counsel, if any, the reasons for his action; and
> >
> > (2) Give the restrained person an opportunity to object; and
> >
> > (3) Unless the defendant or his attorney objects, instruct the jurors that the restraint is not to be considered in weighing evidence or determining the issue of guilt.
>
> If the restrained person controverts the stated reasons for restraint, the judge must conduct a hearing and make findings of fact.

N.C. Gen. Stat. § 15A-1031 (2019) (emphasis added). The plain language of the statute thus clearly applies only to "physical restraint in the courtroom." *Id.* And we are bound by the plain language of the statute. *See State v. Alonzo*, 373 N.C. 437, 440, 838 S.E.2d 354, 356 (2020) ("Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its

plain meaning." (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990))). Since Defendant Person was not physically restrained in the courtroom, the statute does not apply.

¶ 41 Because, based on our de novo review of the statutory interpretation question, § 15A-1031 does not apply, we reject Defendant Person's argument based on it and find the trial court did not err under the statute.

B. Habitual Felon and Cruel and Unusual Punishment

¶ 42 **[4]** Defendant Person next argues that his sentences under North Carolina's Habitual Felon Act, North Carolina General Statute §§ 14-7.1–7.6 (2019), "violate[] his [federal and state] constitutional right to be free of cruel and unusual punishment." (Citing U.S. Const. Amends. VIII, XIV; N.C. Const. Art. I, §§ 19, 27.) Specifically, Defendant Person argues proportionality is an "importan[t]" concept as part of the "right to be free of cruel and unusual punishment" and "[s]entences under the Habitual Felon Act are excessive and grossly disproportionate to those under Structured Sentencing alone." Defendant Person acknowledges "this Court has previously upheld the statutory scheme against an identical challenge," but "raises this issue in brief to urge the Court to re-examine its prior holdings" in light of the fact "most of the rulings relied on by this Court to uphold the Habitual Felon Act against constitutional challenges predate higher authority decisions of the United States Supreme Court reaffirming the importance of . . . proportionality." He also raises the issue "so as not to be considered to have abandoned these claims under" North Carolina Rule of Appellate Procedure 28(b)(6).

¶ 43 The State initially argues Defendant Person failed to preserve this argument because "Defendant Person did not raise this issue at the trial level." Defendant Person admits he did not raise the issue below saying he "is mindful that constitutional arguments not raised at trial will not be considered for the first time on appeal." (Citing *State v. Lloyd*, 354 N.C. 76, 86–87, 552 S.E.2d 586, 607 (2001).) Our review of the record also does not reveal any time when this issue was mentioned below. Under Rule of Appellate Procedure 10(a)(1), Defendant Person has failed to preserve the issue for appeal because he did not present it to the trial court.

¶ 44 Defendant argues, however, this Court " will review constitutional arguments related to sentencing for the first time on appeal" and then contends "[t]he proportionality protections afforded by the Eighth Amendment demand that this case be reviewed on its own merits without regard for whether the sentence was objected to on these grounds in the court below." The two cases on which Defendant relies for this argument, *State v. Clifton*, 158 N.C. App. 88, 580 S.E.2d 40 (2003), and

State v. Hensley, 156 N.C. App. 634, 577 S.E.2d 417 (2003), do not support his argument. While both cases address proportionality challenges to habitual felon sentences, *Clifton*, 158 N.C. App. at 91–96, 580 S.E.2d at 42–46, *Hensley*, 156 N.C. App. at 638–39, 577 S.E.2d at 421, neither case addresses whether the arguments were raised for the first time on appeal let alone says this Court will undertake such a review. Thus, we reject Defendant's argument.

¶ 45 Because Defendant Person did not properly raise this argument before the trial court, we hold he did not preserve it for appellate review and therefore do not address it.

IV. Defendant Williams's Appeal

¶ 46 Defendant Williams contends the trial court erred as to two issues: (1) "failing to conduct an adequate and complete inquiry into" his attorney's conflict of interest, and (2) "intimat[ing] an opinion by instructing the prosecutor, in the presence of prospective jurors, to inform the prospective jurors as to the charges, victims, and dates of offenses." (Capitalization altered.) We hold the trial court committed no prejudicial error with respect to either issue.

A. Attorney Conflict of Interest

¶ 47 **[5]** Defendant Williams alleges his trial counsel "had an actual conflict of interest that adversely affected his performance" during trial. Specifically, he argues his trial counsel had a conflict because his trial counsel "previously represented" Taron Battle, "one of the two alleged victims in this case" who was also "one of the State's main witnesses." Because "[t]he court was on notice" of the conflict, it was "required to conduct an adequate and complete inquiry sufficient to address" the conflict, including ensuring Defendant Williams (1) was "fully advised of the facts of any potential or actual conflict," (2) "fully understood the consequences of any potential or actual conflict," and (3) only made a waiver "of his right to conflict-free representation . . . knowingly, intelligently, and voluntarily." Defendant Williams alleges "the trial court failed to completely and adequately determine the extent of the conflict of interest and failed to completely and adequately inform the [D]efendant of the consequences of any potential conflict of interest" such that "any alleged waiver of" his right to counsel "was not knowingly, intelligently, and voluntarily made." He also argues his attorney had "an actual conflict of interest" that prevented his attorney from "seek[ing] to vigorously cross-examine Mr. Battle," the prosecution witness in question. Defendant Williams contends he is therefore "entitled

to a new trial or, alternatively," remand to the trial court "for an adequate and complete inquiry" into the issue of his attorney's conflict of interest.

¶ 48 "A defendant in a criminal proceeding has the right to effective assistance of counsel under both the federal and state constitutions." *State v. Choudhry*, 365 N.C. 215, 219, 717 S.E.2d 348, 352 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063–64 (1984); *State v. Braswell*, 312 N.C. 553, 561–63, 324 S.E.2d 241, 247–48 (1985)). A defendant's "right to effective assistance of counsel includes the 'right to representation that is free from conflicts of interest.' " *State v. Bruton*, 344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996) (quoting *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 1103 (1981)). "A conflict of interest arises where 'the representation of one client will be directly adverse to another client' or 'the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.' " *State v. Lynch*, 275 N.C. App. 296, 299, 852 S.E.2d 924, 927 (2020) (quoting N.C. R. Pro. Conduct 1.7(a) (2019)). Our courts apply the same analysis whether the conflict issue arises because of current or former clients. *See State v. Phillips*, 365 N.C. 103, 120–21, 711 S.E.2d 122, 137 (2011) (stating the same test is used "[w]hen issues involving successive or simultaneous representation of clients in related matters have arisen before" our courts and then citing cases where "[d]efense counsel previously represented in a different case a witness testifying for the State in the case at bar" and where "[o]ne attorney represented codefendants at same trial" (citing *State v. Murrell*, 362 N.C. 375, 405, 665 S.E.2d 61, 81 (2008) (witness) and *Bruton*, 344 N.C. at 391, 474 S.E.2d at 343 (codefendants))). Here, the alleged conflict came from a former client of Defendant Williams's attorney, Mr. Battle, the victim and a witness for the State.

¶ 49 Turning to the specific analysis of such conflicts, our Courts analyze ineffective assistance of counsel claims based on conflicts under *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708 (1980), rather than employ the standard ineffective assistance of counsel analysis under *Strickland*. *Phillips*, 365 N.C. at 120–21, 711 S.E.2d at 137. The *Sullivan*[1] and *Strickland* standards differ on whether the defendant always must show prejudice to be entitled to relief; under *Strickland*, a defendant must show prejudice, but under *Sullivan* a defendant who shows an

1. *Sullivan* refers to *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708. S*ee Choudhry*, 365 N.C. at 219–20, 717 S.E.2d at 352 (using *Sullivan* as the short name for that case instead of *Cuyler*).

actual conflict of interest "may not be required to demonstrate prejudice." *Choudhry*, 365 N.C. at 219, 717 S.E.2d at 352.

¶ 50 The test of whether to apply *Sullivan*—and not require a showing of prejudice—or *Strickland*—with a required showing of prejudice—focuses on "the level of notice given to the trial court and the action taken by that court" in regard to the conflict issue. *Id.* "[W]hen the court 'knows or reasonably should know' of 'a particular conflict,' that court must inquire" into the conflict. *Id.*, 365 N.C. at 220, 717 S.E.2d at 352 (quoting *Sullivan*, 446 U.S. at 346–47, 100 S. Ct. at 1717). If the trial court fails to inquire into the conflict or "the trial court's inquiry is inadequate or incomplete," reversal is automatic only if the defendant objected to the conflict issue at trial. *Id.*, 365 N.C. at 220, 224, 717 S.E.2d at 352, 355. If the defendant did not object to the conflict issue and the trial court failed to adequately conduct the required inquiry, "prejudice will be presumed" under *Sullivan* "only if a defendant can establish on appeal that 'an actual conflict of interest adversely affected his lawyer's performance.' " *Id.* (quoting *Sullivan*, 446 U.S. at 350, 100 S. Ct. at 1719). "However, if [a] defendant is unable to establish an actual conflict causing an adverse effect, he must show that he was prejudiced in order to obtain relief." *Id.*, 365 N.C. at 224, 717 S.E.2d at 355.

¶ 51 Thus, in reviewing the alleged conflict issue, we employ a multi-step test. First, we ask whether the trial court had notice of the conflict such that it was required to inquire into the conflict. *Id.*, 365 N.C. at 219–20, 717 S.E.2d at 352. Second, we determine whether the trial court conducted an adequate inquiry into the conflict. *Id.*, 365 N.C. at 220, 224, 717 S.E.2d at 352, 355. If the trial court conducted an adequate inquiry, our review ends. *See State v. Yelton*, 87 N.C. App. 554, 557–59 361 S.E.2d 753, 756–57 (1987) (linking the adequacy of the trial court's inquiry with whether a defendant has made a "knowing, intelligent and voluntary waiver" of their rights to be free from conflicted counsel such that either the record reflects a knowing, intelligent, and voluntary waiver of any conflict or "an actual conflict of interest exists" without such waiver such that "the attorney must be disqualified"). But if the trial court did not conduct an adequate inquiry, we third consider whether the defendant objected to the conflict issue at trial; if the defendant objected to the conflict, we must reverse. *See Choudhry*, 365 N.C. at 220, 224, 717 S.E.2d at 352, 355 (explaining "prejudice is presumed" if a defendant objected and was not given the opportunity to show the dangers of the potential conflict through a trial court inquiry). If, however, the defendant did not object to the conflict, we move to the fourth step and determine whether the defendant can establish "an actual conflict of interest adversely affected

his lawyer's performance." *Id.* If a defendant can establish such adverse performance, we presume prejudice. *Id.* If a defendant cannot establish adverse performance, we move to the fifth and final step and determine whether the defendant can show prejudice and thus obtain relief. *Id.*, 365 N.C. at 224, 717 S.E.2d at 355. We now walk through this test to determine if Defendant Williams has made an adequate showing to obtain relief.

¶ 52 First, we look at whether the trial court was on notice of the potential conflict. *Id.*, 365 N.C. at 219–20, 717 S.E.2d at 352. The trial court is on notice if it "knows or reasonably should know of a particular conflict." *Id.*, 365 N.C. at 220, 717 S.E.2d at 352. For example, in *State v. Mims*, this Court found the following statement from the State was sufficient to put the trial court on notice of a potential conflict:

> [THE STATE]: I want to be clear Your Honor brought this up with defense counsel now he has mentioned what the defense is. Mr. Chavis [whom the defendant claimed she was protecting when she admitted to drug possession] is presently charged with heroin offenses as well, is represented by counsel's boss. I want to make sure this is not a conflict of interest. They're going to be using the defense.

180 N.C. App. 403, 410–11, 637 S.E.2d 244, 248–49 (2006) (first alteration in original). Similarly, in *Choudhry*, our Supreme Court determined the court was on notice when a party, again the State, told the trial court there was a potential conflict and explained the basis for that conflict—in that case the fact that the defendant's counsel had previously represented a prosecution witness. 365 N.C. at 220–22, 717 S.E.2d at 353.

¶ 53 Turning to the facts here, Defendant Williams's counsel put the trial court on sufficient notice of the potential conflict. Specifically, he explained on the record the basis for the potential conflict:

> MR. MOORE/DEFENDANT WILLIAMS: Judge, a couple of things I want to touch on from Mr. Clark talking about just then. But I think, first, just want to make the Court aware, and I need to do this on the record in front of my client, the mind is a crazy thing.
>
> You don't realize I've been preparing to cross-examine Mr. Battle for a couple of months now and when I walked in the courtroom and I've seen videotapes, I immediately knew him today. I did not realize that I knew him.

> I represented him about seven years ago he said and I've spoken to him. He said I represented him about seven years ago. His uncle and I were in a hunting club together. I have not had any contact with him in years, I'm assuming.
>
> I probably haven't seen him in six or seven years. I've informed Mr. Williams of that. I don't see that there's any sort of conflict with the two. I felt like I needed to get it on the record.

Defense counsel's summary of the basis for the conflict contains a level of detail similar to *Choudhry*, 365 N.C. at 220–21, 717 S.E.2d at 353, and greater than *Mims*, 180 N.C. App. at 410–11, 637 S.E.2d at 248–49, so it put the trial court on notice.

¶ 54 Moving to the second step, we ask whether the trial court conducted an adequate inquiry into the conflict. *Choudhry*, 365 N.C. at 220, 224, 717 S.E.2d at 352, 355. The goal of this inquiry is twofold. First, it aims to protect a defendant's right to conflict free counsel. *See Yelton*, 87 N.C. App. at 557, 361 S.E.2d at 756 ("Foremost in the court's inquiry must be the preservation of the accused's constitutional rights. The hearing by the trial court must ensure that the defendants are aware of these rights and that any waiver is a knowing, intelligent and voluntary waiver."). Second, it "avoid[s] the appearance of impropriety" and thereby preserves public confidence in the courts. *See State v. Shores*, 102 N.C. App. 473, 475, 402 S.E.2d 162, 163 (1991) (explaining " 'courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them' " before going on to describe the inquiry as important to "avoiding the appearance of impropriety" (quoting *Wheat v. United States*, 486 U.S. 153, 160, 108 S. Ct. 1692 (1988)).

¶ 55 Turning to its nature, "the inquiry must be adequate 'to determine whether there exists such a conflict of interest that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment.' " *Lynch*, 275 N.C. App. at 299, 852 S.E.2d at 927 (quoting *Mims*, 180 N.C. App. at 409, 637 S.E.2d at 248). As a result, "the trial court is responsible for ensuring that the defendant fully understands the consequences of a potential or actual conflict." *Choudhry*, 365 N.C. at 223, 717 S.E.2d at 354. In ensuring such full understanding, the trial court has the discretion to decide "whether a full-blown evidentiary proceeding is necessary or whether some other form of inquiry is sufficient." *Lynch*, 275 N.C. App. at 299, 852 S.E.2d at 927 (citing *Choudhry*, 365 N.C. at 223, 717 S.E.2d at 354).

¶ 56 In *Choudhry*, our Supreme Court conducted a detailed review of the trial court's inquiry. 365 N.C. at 221–24, 717 S.E.2d at 353–55. The trial court there "informed [the] defendant directly" about his attorney's previous representation of a witness for the State and asked the defendant whether he "had any concerns about [his attorney's] ability appropriately to represent him, if he was satisfied with [his attorney's] representation, and if he desired to have [his attorney] continue to represent him." *Id.*, 365 N.C. at 224, 717 S.E.2d at 354. But our Supreme Court still concluded the inquiry was inadequate because "the trial court did not specifically explain the limitations that the conflict imposed on defense counsel's ability to question" the State's witness about her conviction in the case defense counsel had previously represented her during "nor did defense counsel indicate he had given [the] defendant such an explanation." *Id.*, 365 N.C. at 224, 717 S.E.2d at 355. Thus, the trial court had not fulfilled its responsibility to ensure the defendant had a "sufficient understanding of the implications" of the conflict "to ensure a knowing, intelligent, and voluntary waiver of the potential conflict of interest." *Id.*

¶ 57 Here, the trial court's inquiry resembled the inquiry in *Choudhry*. The trial court ensured Defendant Williams knew about the conflict by asking him if he had heard what his attorney said regarding the potential conflict—as we recounted above—to which Defendant Williams responded he had. The trial court then confirmed Defendant Williams was "prepared to waive any conflict of interest that may have arisen as a result of" his attorney's previous representation of Mr. Battle and was "still prepared to move forward with [his attorney] representing" him to which Defendant Williams responded he was. Finally, the trial court asked, "Do you have any questions about anything I've said or anything that Mr. Moore [Defendant Williams's attorney] has said?" to which Defendant Williams responded, "No, I think we have an understanding," referring to Defendant Williams and his attorney.

¶ 58 Notably absent from the trial court's inquiry were any questions to ensure Defendant Williams had a "sufficient understanding of the implications" of the conflict "to ensure a knowing, intelligent, and voluntary waiver of the potential conflict of interest." *Choudhry*, 365 N.C. at 224, 717 S.E.2d at 355. Because the trial court did not ensure Defendant Williams had such an understanding, it did not conduct an adequate inquiry.

¶ 59 Turning to the third step in our review, we consider whether Defendant Williams objected to the conflict issue at trial. *See id.*, 365 N.C. at 220, 717 S.E.2d at 352 (explaining the importance of an objection to the determination of whether prejudice is presumed or not). For

example, in *Choudhry*, our Supreme Court determined "no party objected" when the prosecutor had raised the issue but the defendant's attorney denied there was a conflict and said he was not even sure it needed to be addressed. *Id.*, 365 N.C. at 220–21, 717 S.E.2d at 353. By contrast, in *Lynch*, this Court found the defendant properly objected because he "consistently articulated his worry that he was not receiving a fair trial." 275 N.C. App. at 301, 852 S.E.2d at 928. Here, Defendant Williams did not object to the potential conflict. First, similar to *Choudhry*, Defendant Williams's attorney told the trial court, "I don't see that there's any sort of conflict with the two." 365 N.C. at 221, 717 S.E.2d at 353. Further, when the trial court asked Defendant Williams about the potential conflict, he said he and his attorney "ha[d] an understanding." That language indicates Defendant Williams did not have any concern about the potential conflict.

¶ 60 Moving on to the fourth step in our review, we must consider whether Defendant Williams can establish "an actual conflict of interest adversely affected his lawyer's performance." *Id.*, 365 N.C. at 220, 224, 717 S.E.2d at 352, 355. The required inquiry is fact specific and considers whether "objectively sound strategic reasons" can justify defense counsel's choices. *See id.*, 365 N.C. at 225–26, 717 S.E.2d at 355–56 (walking through defense counsel's "vigor[ous]" cross examination of the witness who he had previously represented on various topics before rejecting the defendant's argument about the impact of not cross examining the witness on the prior charge based on sound strategy); *see also State v. Walls*, 342 N.C. 1, 40–41, 463 S.E.2d 738, 758 (1995) (assuming *arguendo* a conflict of interest, explaining why the defendant had not shown an adverse effect on representation by recounting objections during direct and "a detailed and thorough cross-examination").

¶ 61 For example, in *Choudhry*, our Supreme Court found no adverse effect where defense counsel cross examined the witness he previously represented on topics including: the witness cooperating to get out of jail; inconsistencies between the witness's testimony at trial and statements to police; and the "rancorous and volatile" relationship between the witness and the defendant characterized by "spiteful and vindictive" actions towards the defendant. 365 N.C. at 225–26, 717 S.E.2d at 355–56. The *Choudhry* Court also noted how defense counsel's decision not to cross examine the witness on the charge for which he had previously represented her was an "objectively sound strategic" decision because the defendant was also implicated in that crime and asking about it on cross examination "could have opened the door for redirect examination by the State relating to any role [the] defendant may have played." *Id.*, 365 N.C. at 226, 717 S.E.2d at 356.

¶ 62 By contrast, in *State v. James*, this Court found an "overlap of representation prior to and at the time of trial" of the defendant and a State witness adversely affected the lawyer's performance such that prejudice was presumed. 111 N.C. App. 785, 790–91, 433 S.E.2d 755, 758 (1993). Specifically, this Court explained the conflict "affected counsel's ability to effectively impeach the credibility" of the witness because defense counsel never explored a potential plea agreement on cross examination of the witness he represented, in contrast to exploring it with another witness. *Id.*

¶ 63 Here, we conclude Defendant Williams has failed to establish any conflict his attorney had through his previous representation of Mr. Battle adversely affected the attorney's representation of Defendant Williams. First, during direct examination, Defendant Williams's attorney objected to two key aspects of the State's case. Defense counsel initially objected when the State sought to introduce video evidence of the robbery itself. Second, Defendant Williams's attorney objected when the prosecutor sought to lead Mr. Battle into giving a better description of the people accused of robbing him by asking: "You don't remember him asking you about any tattoos or marks or anything like that?" Both these objections sought to undermine the State's attempts to have Mr. Battle identify Defendant Williams as one of his assailants, a fact the State must prove to get a conviction in any case. *C.f. State v. Privette*, 218 N.C. App. 459, 470–71, 721 S.E.2d 299, 308 (2012) (explaining to overcome a motion to dismiss for insufficient evidence, "the State must present substantial evidence of (1) each essential element of the charged offense and (2) defendant's being the perpetrator of such offense" (quotations, citation, and alterations omitted)). These objections during direct examination thus support finding no adverse effect. *See Walls*, 342 N.C. at 41, 463 S.E.2d at 758 (concluding the defendant "failed to carry his burden of showing that an actual conflict of interest adversely affected his lawyers' performance" in part because "[t]he record show[ed] that defense counsel objected to several lines of questioning during" the witness in question's direct examination).

¶ 64 Turning to his cross examination of Mr. Battle, the counsel for Defendant Williams took numerous steps to undermine Mr. Battle's credibility and call into question his testimony. *See Choudhry*, 365 N.C. at 225–26, 717 S.E.2d at 355–56 (finding no adverse effect because of "vigor[ous]" cross examination). First, he repeatedly called into question Mr. Battle's motives for testifying by highlighting Mr. Battle had his charge for possession of a firearm by a felon dropped in exchange for testimony, which helped Mr. Battle avoid "significant" prison time. As part of this testimony, Defendant Williams's attorney asked Mr. Battle

about his past felony convictions, which our Supreme Court has recognized has the purpose of "impeach[ing] the witness's credibility." *E.g. State v. Ross*, 329 N.C. 108, 119, 405 S.E.2d 158, 165 (1991) (emphasis removed). This line of questioning culminated on re-cross with Defendant Williams's counsel asking, "Would you be testifying here today if you were going to prison?" to which Mr. Battle responded, "No, sir."

¶ 65 In other parts of the cross examination, Defendant Williams's counsel sought to undermine Mr. Battle's credibility through numerous different lines of questioning. First, under questioning, Mr. Battle admitted on cross that on the night of the incident, he was under the effect of numerous drugs and of alcohol such that he had "impaired judgment." Further, Defendant Williams's counsel asked Mr. Battle about mental health issues, any medication he received for such issues, and whether he was taking that medication on the night of the incident. Finally, Defendant Williams's attorney repeatedly asked Mr. Battle about inconsistencies in his statements to the police, his statements to the prosecutor in preparation for trial, and his testimony at trial. While all these lines of questions could undermine Mr. Battle's credibility, the questions regarding inconsistencies are particularly significant because the *Choudhry* Court highlighted a line of questioning using the same strategy in finding the attorney's performance was not adversely affected there. 365 N.C. at 225, 717 S.E.2d at 355.

¶ 66 Defendant Williams contends his trial counsel's performance was adversely affected because of a lack of vigor around Mr. Battle's "deal to testify" and "history of mental health issues." Specifically as to the "deal to testify" component, Defendant Williams faults his trial counsel for not having Mr. Battle "read the entire memorandum of understanding to the jury." As explained above, Defendant Williams's attorney questioned Mr. Battle repeatedly about the contents of the memorandum of understanding, and Defendant Williams does not make clear what additional impact reading the entire memorandum would have had. Further, the standard underpinning our review of the impact on trial counsel's performance is whether trial counsel had an "objectively sound strategic" reason for his actions. *Id.*, 365 N.C. at 226, 717 S.E.2d at 356. Here, reading the entire memorandum of understanding to the jury may have diluted the effect of the deal; the key features and incentives of the deal could have been lost absent trial counsel's focused questioning. Thus, there was an objectively sound strategic reason to not read the whole memorandum of understanding for the jury.

¶ 67 Defendant Williams's arguments on the vigor or lack thereof in his attorney's cross examination of Mr. Battle on mental health issues also

fail for the same reason; his trial counsel's strategy reflects objectively sound strategic decisions. Vigorous cross examination does not necessarily require the most aggressive questioning possible; in other words, trial counsel can have sound strategic reasons for constraining some aspects of cross examination. For example, here, more aggressive cross examination on Mr. Battle's mental health issue may have engendered the jury's sympathy for Mr. Battle.

¶ 68 Turning to Defendant Williams's specific contentions on the mental health issues, all of them focus on his attorney's argument to the trial court about what it should allow him to examine with Mr. Battle regarding his mental health. In addition to the above reasons, we note Defendant Person's attorney—who was not affected by any potential conflict—said "Same argument, Your Honor" after Defendant Williams's attorney made his arguments about examining Mr. Battle on mental health issues. Defendant Person's attorney not seeking to examine further on the mental health issues shows the same decision of Defendant Williams's attorney was not driven by his past representation of Mr. Battle. Thus, Defendant Williams cannot show his attorney's performance was adversely affected by any conflict arising from his past representation of Mr. Battle, and, thus, prejudice is not presumed. *See id.*, 365 N.C. at 220, 224, 717 S.E.2d at 352, 355 (explaining prejudice is not presumed if an attorney's performance is not adversely affected by the conflict).[2]

¶ 69 Finally, because prejudice is not presumed, we ask whether Defendant Williams can show prejudice and obtain relief through that means. *Id.*, 365 N.C. at 224, 717 S.E.2d at 355. The prejudice inquiry closely follows the adverse effect inquiry because often the same facts answer both questions. *See id.*, 365 N.C. at 226, 717 S.E.2d at 356 (finding no adverse effect before immediately finding no prejudice). Thus, here since we have found no adverse effect on the performance of Defendant Williams's trial counsel because of his past representation of Mr. Battle, we also find Defendant Williams has failed to show prejudice. To the contrary, Defendant Williams was acquitted of the most serious charges

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2. Defendant Williams argues one potential remedy would be to remand to the trial court for "an adequate and complete inquiry." Because the record is clear and allows us to determine any conflict did not adversely affect the performance of Defendant Williams's counsel, we need not remand. *See James*, 111 N.C. App. at 791, 433 S.E.2d at 759 (not requiring remand where adverse effect was "clear[]" on the face of the record); *Mims*, 180 N.C. App. at 411, 637 S.E.2d at 249 (remanding when "unable to determine from the face of the record whether an actual conflict of interest adversely affected" defense counsel's performance).

he faced at trial, which suggests the representation by his attorney was quite effective indeed.

¶ 70 As a result, we conclude Defendant Williams has failed to show prejudicial error arising from his attorney's past representation of Mr. Battle and overrule his argument on these grounds.

B. Trial Court Implying an Opinion on the Case in the Presence of Prospective Jurors

¶ 71 **[6]** Defendant Williams next argues the trial court "prejudicially erred when it intimated an opinion" on the case in the presence of prospective jurors. (Capitalization altered.) Specifically, he asserts the trial court erred when, instead of personally informing the prospective jurors of all aspects of the case, it directed the prosecutor to inform prospective jurors of the charges, victims, and dates of offense in violation of North Carolina General Statute § 15A-1213. Defendant Williams contends the judge directing the prosecutor to inform the jury "could have led prospective jurors to reasonably infer . . . that the prosecutor and the prosecutor's evidence should be given great weight, that the prosecutor's witnesses were credible, or that the defendant should be found guilty." We agree this was error, but Defendant Williams was not prejudiced by this error.

¶ 72 While Defendant Williams did not object to the trial court's action, this issue was automatically preserved for appellate review because Section 15A-1213 both "requires a specific act by a trial judge," and "leaves no doubt that the legislature intended to place the responsibility on the judge presiding at the trial[.]" *See State v. Austin*, 378 N.C. 272, 2021-NCSC-87, ¶ 13 (alteration in original) (quoting *In re E.D.*, 372 N.C. 111, 121, 827 S.E.2d 450, 457 (2019)) (discussing automatic preservation by statute in the context of North Carolina General Statutes §§ 15A-1222 and -1232, which are also part of the same subchapter—on trial procedure in superior court—of Chapter 15A as Section 15A-1213). Here, Section 15A-1213 states "*the judge* must" undertake the following specific acts: "identify the parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense of which the defendant has given pretrial notice . . . ." N.C. Gen. Stat. § 15A-1213 (2019) (emphasis added).

¶ 73 Because this alleged statutory violation is properly preserved, we review for prejudicial error under North Carolina General

Statute § 15A-1443(a). *Austin*, ¶ 15. North Carolina General Statute § 15A-1443(a) states:

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States 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. The burden of showing such prejudice under this subsection is upon the defendant. . . . .

N.C. Gen. Stat. § 15A-1443(a) (2019). Where a defendant alleges an error is an improper expression of judicial opinion, here via Section 15A-1443(a), this Court utilizes a totality of the circumstances test to determine whether the trial court impermissibly expressed an opinion. *See State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995).

¶ 74 North Carolina General Statute § 15A-1213 requires presiding judges to "identify the parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense[s]." N.C. Gen. Stat. § 15A-1213. "The judge may not read the pleadings to the jury." *Id.* Section 15A-1213 is designed "to avoid giving jurors a distorted view of the case through use of the stilted language of indictments and other pleadings." *State v. Brunson*, 120 N.C. App. 571, 575–76, 463 S.E.2d 417, 419 (1995) (quotations and citations omitted).

¶ 75 In the present case, the trial court informed the prospective jurors of only a portion of the requirements of Section 15A-1213. The court first informed the prospective jurors of the parties and their respective counsel. The trial court then delegated some requirements of Section 15A-1213 to the prosecutor and asked the prosecutor to read the charges, victims, and date of offense as to both Defendants. The judge then informed the jury as to the Defendants' pleas. Defendant Williams argues that the judge's failure to personally inform the jurors of every component under Section 15A-1213 amounted to prejudicial error warranting a new trial. The State argues "the spirit of the statute was satisfied by orienting the jurors to the case" but "concedes that the trial court did violate" North Carolina General Statute § 15A-1213 by delegating a portion of the requirements to the prosecutor.

¶ 76 While the trial court certainly erred in delegating its responsibilities under Section 15A-1213, Defendant Williams was not prejudiced by this

delegation. Defendant Williams's argument that this delegation could have led prospective jurors to infer that the judge believed the prosecutor's case was stronger—whether that be in the quality of the prosecutor's evidence, the credibility of the prosecutor's witnesses, or generally that the Defendant was guilty—is not compelling. "[I]n a criminal case it is only when the jury may reasonably infer from the evidence before it that the trial judge's action intimated an opinion as to a factual issue, the defendant's guilt, the weight of the evidence or a witness's credibility that prejudicial error results." *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). "Whether the judge's comments, questions or actions constitute reversible error is a question to be considered in light of the factors and circumstances disclosed by the record, the burden of showing prejudice being upon the defendant." *Id.* For a defendant to show prejudice, he must demonstrate a "reasonable possibility," absent the error, that "a different result would have been reached at the trial." N.C. Gen. Stat. § 15A-1443(a) (2019).

¶ 77 This Court has not addressed the specific issue of a judge's failure to comply with Section 15A-1213 by not personally informing prospective jurors about a case. However, the State highlights a recent case from this Court, *State v. Grappo*, for an example of when a defendant is not prejudiced by a trial court failing to comply with a statutory obligation. (Citing 271 N.C. App. 487, 845 S.E.2d 437 (2020).) We find *Grappo* illustrative. In *Grappo*, the trial court erred because it failed to personally instruct the jury and instead delegated a portion of the jury instructions to the courtroom clerk in violation of North Carolina General Statutes §§ 15A-1231 and -1232. *Id.*, 271 N.C. App. at 492, 845 S.E.2d at 440–41. Despite recognizing the "*momentous*," "foundational," and constitutionally important nature of some of the delegated jury instructions, *id.*, 271 N.C. App. at 492–93, 845 S.E.2d at 441 (quotations and citations omitted; emphasis in original), this Court ultimately held no prejudicial error occurred because the defendant did not show "that the inferred expression of [an] opinion 'had a prejudicial effect on the result of the trial' necessary to elevate it from a harmless error to a prejudicial one." *Id.*, 271 N.C. App. at 493–94, 845 S.E.2d at 441–42 (quoting *Larrimore*, 340 N.C. at 155, 456 S.E.2d at 808). Specifically, the *Grappo* Court highlighted how, applying *Blackstock*'s totality of the circumstances test, "various portions of the record undercut a conclusion of prejudicial effect" and then summarized those portions. *Id.*, 271 N.C. App. at 494, 845 S.E.2d at 442.

¶ 78 Similar to *Grappo*, Defendant Williams has not shown the trial judge delegating the introduction of the case to the prosecutor "had a

prejudicial effect on the trial necessary to elevate it from a harmless error to a prejudicial one." *Id.*, 271 N.C. App. at 493–94, 845 S.E.2d at 442 (quotation and citation omitted); *see also id.*, 271 N.C. App. at 494, 845 S.E.2d at 442 ("Mindful of the totality of the circumstances test applicable in this case, various portions of the record undercut a conclusion of prejudicial effect." (citation omitted)). Notably, the trial court remedied any prejudicial effect of its delegation by instructing the jury on the presiding judge's impartiality.

¶ 79 During its final jury instructions, the trial court expressly told the jury:

> The law requires the presiding judge to be impartial. You should not infer from anything that I have done or said that the evidence is to be believed or disbelieved, that a fact has been proved or what your findings ought to be. It is your duty to find the facts and render a verdict reflecting the truth.

"The law presumes that jurors follow the court's instructions." *Tirado*, 358 N.C. at 581, 599 S.E.2d at 535; *see also Grappo*, 271 N.C. App. at 494, 845 S.E.2d at 442 (relying on the presumption jurors follow the trial court's instructions to help show no prejudice because the trial court instructed the jurors in a way that corrected its error). Moreover, this Court has previously held a trial court can correct misstatements in its earlier remarks to the jury when it gives them final jury instructions. *See Brunson*, 120 N.C. App. at 576, 463 S.E.2d at 420 (finding no reversible error despite determining the trial court's preliminary remarks included a misstatement because the trial court correctly stated the law during final jury instructions). Here, therefore, we presume the jurors followed the court's instructions and that the trial court's statement during final jury instructions could correct any earlier misimpression it could have left on the jurors. With those presumptions in mind, the jurors would not have gone into the jury room thinking the judge had implied any opinion by having the prosecutor give part of the case overview; the jury instructions explicitly told them not to make such inferences. Since the jurors would know to not make such inferences when going into deliberations, it could not have impacted their verdict, thereby undercutting any prejudice claim.

¶ 80 Further undercutting any claim of prejudice, although the prosecutor read all the charges, victims, and dates of offenses to the jury, here, the jury acquitted Defendant Williams of the more serious charges of

attempted first degree murder as to Mr. Battle and as to Mr. Deans, assault with a deadly weapon with intent to kill inflicting serious injury and its lesser included offense as to Mr. Battle, discharge of a weapon in a vehicle while in operation causing serious bodily injury as to Mr. Battle, and robbery with a dangerous weapon as to Mr. Deans and convicted him only of possession of a firearm by a felon and robbery with a dangerous weapon as to Mr. Battle. We cannot discern any prejudice to Defendant Williams from this technical violation of North Carolina General Statute § 15A-1213 where the jury clearly considered each charge separately, as it should, and acquitted him of several of the charges, even though the prosecutor read all of them.

¶ 81 After reviewing the totality of the circumstances, Defendant Williams has failed his burden of proving prejudice. Thus, the trial court's improper delegation of its § 15A-1213 duty to the prosecutor did not constitute reversible error.

V. Conclusion

¶ 82 We conclude neither Defendant Person nor Defendant Williams can show prejudicial error. Assuming *arguendo*, the trial court erred in showing the jury the video of Defendant Person in shackles, it did not prejudicially err because it gave a limiting instruction and because of the other overwhelming evidence of Defendant Person's guilt. Defendant Person failed to preserve his other argument concerning his sentencing as a habitual felon. Turning to his appeal, Defendant Williams failed to show his attorney's performance was adversely affected by any conflict such that we cannot presume prejudice, and he also failed to show any prejudice. Defendant Williams also failed to show prejudice arising from the trial court delegating its statutory duty to inform the jury about the case under § 15A-1213.

NO PREJUDICIAL ERROR.

Judges HAMPSON and GORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 AUGUST 2022)

IN RE K.S. 2022-NCCOA-390 No. 20-271-2	Cumberland (19JA211)	Affirmed.
ALSTON v. COOKE 2022-NCCOA-563 No. 21-655	Vance (21CVD485)	Affirmed
BROOKSIDE PARK AFFORDABLE, LLC v. HART 2022-NCCOA-564 No. 21-680	Moore (21CVD209)	Reversed and Remanded
HERRON v. TOWN OF JAMESTOWN 2022-NCCOA-566 No. 21-605	Guilford (20CVS4259)	Affirmed
IN RE A.D-D. 2022-NCCOA-567 No. 21-615	Durham (16JA171-173)	Affirmed
IN RE A.R. 2022-NCCOA-568 No. 22-155	Mecklenburg (19JT415) (19JT416)	Affirmed
IN RE E.B. 2022-NCCOA-569 No. 21-621	Ashe (21JA6)	APPEAL DISMISSED; PETITION FOR WRIT OF CERTIORARI DENIED.
IN RE E.L.G. 2022-NCCOA-570 No. 22-139	Wake (20JT45)	Affirmed
IN RE H.K.Q. 2022-NCCOA-571 No. 21-739	Affirmed (12SPC337)	Granville
IN RE H.S. 2022-NCCOA-572 No. 21-726	Wilson (19JA30) (20JA53) (20JA54) (21CVD686)	Vacated in part, Reversed and Remanded in part

IN RE M.M.H. 2022-NCCOA-573 No. 22-25	Surry (19JT62)	Affirmed
IN RE N.C. 2022-NCCOA-574 No. 22-161	Alleghany (19JT13)	Affirmed
IN RE Z.R.F.D. 2022-NCCOA-575 No. 21-602	Haywood (17JA38) (17JA39) (17JA40)	Affirmed
MOZELEY v. CITY OF CHARLOTTE 2022-NCCOA-576 No. 21-712	Mecklenburg (20CVS13103)	Affirmed
RIOPELLE v. RIOPELLE 2022-NCCOA-577 No. 22-18	Cabarrus (13CVD179)	Affirmed
SALTER v. SALTER 2022-NCCOA-578 No. 21-201	Cleveland (17CVD1379)	Affirmed in Part, Reversed in Part, and Remanded
STATE v. EVERETT 2022-NCCOA-579 No. 21-596	Pitt (20CRS55579)	Affirmed in Part; Vacated and Remanded in Part
STATE v. HARDY 2022-NCCOA-580 No. 21-603	Randolph (18CRS51503) (18CRS51505)	No Error
STATE v. KUHL 2022-NCCOA-581 No. 21-751	Surry (19CRS51921) (19CRS847)	No Plain Error
STATE v. LEE 2022-NCCOA-582 No. 21-711	Burke (19CRS52866) (19CRS943)	Affirmed in Part; Vacated in Part and Remanded
STATE v. McNEIL 2022-NCCOA-583 No. 21-629	Edgecombe (19CRS52075)	No Error
STATE v. PARHAM 2022-NCCOA-584 No. 21-728	Granville (18CRS50800)	Affirmed
STATE v. PRICE 2022-NCCOA-585 No. 22-65	Rutherford (19CRS51114)	Affirmed

STATE v. RESER 2022-NCCOA-586 No. 20-695	Onslow (18CRS053675)	No Error
TOWN OF NAGS HEAD v. BUDLONG ENTERS., INC. 2022-NCCOA-587 No. 21-22	Dare (11CVS250)	Affirmed

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