287 N.C. App.—No. 1 Pages 1-221

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JUNE 29, 2023

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

DONNA S. STROUD

Judges

CHRIS DILLON
RICHARD D. DIETZ[1]
JOHN M. TYSON
LUCY INMAN[2]
VALERIE J. ZACHARY
HUNTER MURPHY
JOHN S. ARROWOOD
ALLEGRA K. COLLINS
TOBIAS S. HAMPSON

JEFFERY K. CARPENTER
APRIL C. WOOD
W. FRED GORE
JEFFERSON G. GRIFFIN
DARREN JACKSON[3]
JULEE T. FLOOD[4]
MICHAEL J. STADING[5]
ALLISON J. RIGGS[6]

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN
LINDA M. McGEE

Former Judges

J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
WILLIS P. WHICHARD
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON

ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS
WENDY M. ENOCHS
ANN MARIE CALABRIA
RICHARD A. ELMORE
MARK A. DAVIS
ROBERT N. HUNTER, JR.
WANDA G. BRYANT
PHIL BERGER, JR.
REUBEN F. YOUNG
CHRISTOPHER BROOK

[1]Resigned 31 December 2022. [2]Term ended 31 December 2022. [3]Term ended 31 December 2022. [4]Sworn in 1 January 2023.
[5]Sworn in 1 January 2023. [6]Sworn in 1 January 2023.

Clerk
EUGENE H. SOAR

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Executive Director
Jonathan Harris

Director
David Alan Lagos

Staff Attorneys
Michael W. Rodgers
Lauren T. Ennis
Caroline Koo Lindsey
Ross D. Wilfley
Hannah R. Murphy
J. Eric James
Megan Shook

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Andrew Heath[7]
Ryan S. Boyce[8]

Assistant Director
David F. Hoke[9]
Ragan R. Oakley[10]

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen
Jennifer C. Peterson
Niccolle C. Hernandez

[7]Resigned 3 April 2023. [8]Appointed 4 April 2023. [9]Retired 31 December 2022. [10]Appointed 13 January 2023.

COURT OF APPEALS

CASES REPORTED

FILED 20 DECEMBER 2022

CASES REPORTED WITHOUT PUBLISHED OPINIONS

companies) under-billed for statutorily-required 911 service charges, where plaintiff's failure to properly and timely serve all of defendants with the notice of appeal was a non-jurisdictional violation of Appellate Rule 3 that did not frustrate the appellate court's review or the adversarial process, plaintiff's petition for writ of certiorari was granted. **N.C. ex rel. Expert Discovery, LLC v AT&T Corp., 75.**

Preservation of issues—argument abandoned—no legal support—Plaintiff's challenge to the trial court's dismissal of his claims for breach of fiduciary duty, fraud, and misappropriation of marital funds pursuant to Civil Procedure Rule 12(b)(1) was deemed abandoned where plaintiff made a bare assertion of error on appeal but failed to state any reason or argument or to cite any legal authority in support of his assertion. **Moschos v. Moschos, 162.**

ATTORNEY FEES

Custody action—visitation rights—award against intervenor grandparents—In a child custody action in which the paternal grandparents intervened and successfully secured visitation rights, the trial court's attorney fees award—holding intervenor grandparents responsible for all of respondent mother's attorney fees, including those associated with claims to which intervenors were not parties—was vacated for a second time. The trial court, which failed to follow the mandate of the appellate court on remand, was once again directed to make findings of fact delineating the amount of fees reasonably incurred by respondent as a result of intervenors' visitation action (as opposed to those incurred by respondent as a result of claims made by the child's father for custody and support). **Sullivan v. Woody, 199.**

Custody action—visitation rights—successful appeal by intervenor grandparents—associated fees—In a child custody action in which intervenor paternal grandparents successfully appealed an attorney fees award after securing visitation rights, where the appellate court vacated the trial court's attorney fees award regarding the visitation litigation for the second time, the trial court's additional award of attorney fees associated with intervenors' appeal was also vacated. Intervenors lawfully asserted their statutory right to visitation with their grandchild as well as their right to appeal the erroneous attorney fees award, and the trial court's entry of an additional award constituted an improper sanction under N.C.G.S. § 50-13.6. Pursuant to Appellate Procedure Rule 34, attorney fees incurred in defending an appeal may be awarded only by an appellate court. **Sullivan v. Woody, 199.**

CONSPIRACY

Civil—business dispute between shareholders—diversion of business to new entity—based on viable underlying claims—In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that defendants (the other two shareholders) committed civil conspiracy—by planning to leave the corporation, setting up a new business entity, and moving corporate assets to the new business, thereby excluding plaintiff and his interests as a shareholder—the trial court improperly granted summary judgment to defendants. Where the conspiracy claim was premised on viable underlying claims (breach of fiduciary duty, unjust enrichment, and unfair and deceptive trade practices) that the appellate court determined had been improperly dismissed by the trial court, summary judgment was not appropriate. **Duffy v. Camp, 46.**

CONVERSION

Corporate assets—contracts, orders, payments—not tangible—In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that defendants (the other two shareholders) converted corporate assets when they left the existing corporation to form a new business entity and diverted contracts, orders, and payments to the new business, as well as contacting existing customers about moving over to the new business, the trial court properly granted summary judgment to defendants because the property listed by plaintiff consisted of business opportunities, expectancy interests, and contract rights that were not subject to a conversion claim. To the extent plaintiff's allegations about payments and billing could be considered to involve tangible assets, plaintiff failed to identify specific sums in order to support his claim. **Duffy v. Camp, 46.**

CORPORATIONS

Breach of fiduciary duty—by chief executive officer—evidence of resignation—genuine issue of material fact—In a business dispute in which plaintiff (one of three shareholders of a corporation), asserted that defendant (one of the other shareholders who also served as the corporation's chief executive officer) had breached his fiduciary duties of loyalty and due care to the corporation, the trial court improperly granted summary judgment to defendant. There were genuine issues of material fact regarding the timing and nature of defendant's severance from the corporation, which would determine when his fiduciary duties as an officer ceased and thus whether his activities in contacting existing clients about moving to a newly formed business constituted a breach of those duties. **Duffy v. Camp, 46.**

Breach of fiduciary duty—by majority shareholders—no domination and control over minority shareholder—no fiduciary relationship—In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that he was a minority shareholder and that defendants (the other two shareholders) owed him a fiduciary duty based on their majority shareholder status but that they breached that duty by forming a new business entity similarly named to the old one and signing new contracts with existing clients, the trial court properly granted summary judgment to defendants because plaintiff failed to demonstrate that defendants were controlling shareholders who exerted domination and influence over him. **Duffy v. Camp, 46.**

Claims asserted by shareholder and officer—direct versus derivative claims—In a business dispute in which plaintiff, who was one of three shareholders in a corporation and who also served as an officer, filed a complaint against the other two shareholders asserting multiple claims both as an individual and derivatively—including breach of fiduciary duty, common-law trademark infringement and conversion—plaintiff was not entitled to assert his claims in his individual name because shareholders in general may not bring individual actions unless either of two exceptions apply, neither one of which applied in this case. Where the appellate court determined that the trial court should not have granted summary judgment to defendants on all claims, the trial court was directed on remand to consider plaintiff's surviving claims as a derivative suit. **Duffy v. Camp, 46.**

Common-law trademark infringement—new business—similar name—likelihood of confusion—In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that defendants (the other two shareholders) committed common law trademark infringement by leaving the corporation, named CampSight Strategic Communications, Inc., and forming a new entity with the name

FORGERY

Uttering forged instrument—obtaining property by false pretenses—no variance between indictments and evidence—In a trial for uttering a forged instrument and obtaining property by false pretenses—based on defendant having signed his ex-wife's name to her check in order to deposit it into his personal bank account—there was no fatal variance between the indictments and the evidence where the State presented evidence supporting each material element of both offenses. **State v. Mackey, 1.**

FRAUD

N.C. False Claims Act—under-billing of 911 service charges—first-to-file rule—similar claims raised in other states—no bar in this state—In an exceptional case brought under the North Carolina False Claims Act, in which plaintiff asserted—as a relator on behalf of the State in a qui tam action—that defendants (multiple telecommunications companies) under-billed and under-remitted the 911 service charges required by N.C.G.S. § 143B-1403, the trial court improperly relied on the first-to-file rule as a basis for granting defendants' motion to dismiss the action. The rule, which bars another relator's suit if an already-pending suit involves related claims, was inapplicable in this case because, although similar claims had been brought in other states, those out-of-state suits did not involve claims made pursuant to the North Carolina False Claims Act, nor were any of those actions served on the State of North Carolina. **N.C. ex rel. Expert Discovery, LLC v AT&T Corp., 75.**

GUARDIAN AND WARD

Incompetent spouse—guardian's authority—to cause legal separation—equitable distribution claim—In a case involving an elderly husband and wife who were both experiencing cognitive decline, where the clerk of superior court adjudicated the wife as incompetent and appointed her a general guardian, who then separated the wife from her husband and placed her in an assisted living facility, the general guardian lacked the authority to cause a legal separation on behalf of the incompetent wife for the purpose of bringing an equitable distribution claim. Therefore, the trial court lacked subject matter jurisdiction to hear the equitable distribution claim and should have dismissed the action pursuant to Civil Procedure Rule 12(b)(1). **Dillree v. Dillree, 33.**

HOMICIDE

Second-degree murder—malice—jury verdict—sentencing—Defendant was properly sentenced as a B1 felon for second-degree murder even though the jury indicated on the verdict sheet that it found all three forms of malice to support defendant's conviction—actual malice (a B1 felony), "condition of mind" malice (a B1 felony), and "depraved-heart" malice (a B2 felony)—because, since the jury found that the evidence supported the first two forms of malice, the depraved-heart malice was not necessary to the conviction and therefore defendant was not entitled to be sentenced as a Class B2 felon. Further, where the language of N.C.G.S. § 14-17(b) was clear and unambiguous, defendant was not entitled to the rule of lenity. **State v. Monroe, 177.**

UNFAIR TRADE PRACTICES

Business dispute between shareholders—diversion of business to new entity—summary judgment improper—In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that defendants (the other two shareholders) were liable to him for unfair and deceptive trade practices pursuant to N.C.G.S. § 75-1.1—on the basis that they diverted business to their newly formed business entity, including directing clients to stop making payments to the corporation for completed work—the trial court improperly granted summary judgment to defendants. Plaintiff sufficiently alleged that defendants interrupted the commercial relationship between the corporation and its clients, an activity which was "in or affecting commerce" for purposes of the statute. **Duffy v. Camp, 46.**

UNJUST ENRICHMENT

Business dispute between shareholders—diversion of business to new entity—genuine issue of material fact—In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that defendants (the other two shareholders) were liable to him for unjust enrichment—on the basis that they instructed clients to stop making payments or billing the corporation for completed work, they altered contracts to divert business to their newly formed entity, and they instructed clients to cancel existing purchase orders with the corporation—the trial court improperly granted summary judgment to defendants. Where defendants denied plaintiff's allegations in their responses to his interrogatories, a genuine issue of material fact existed regarding plaintiff's claim. **Duffy v. Camp, 46.**

WILLS

Caveat proceeding—undue influence—no forecast of evidence—In a caveat proceeding brought by decedent's son in which he alleged that the propounder—a friend of decedent's to whom decedent left his entire estate—obtained the will through undue influence and duress while decedent was physically and mentally weakened, the trial court properly granted summary judgment for the propounder because the caveator failed to set forth specific facts to establish a genuine issue of material fact as to whether the propounder exerted fraudulent influence on decedent to procure the will. **Paxton v. Owen, 167.**

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 (if needed)

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

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA
v.
NIKITA V. MACKEY

No. COA22-348

Filed 20 December 2022

1. Indictment and Information—uttering forged instrument—obtaining property by false pretenses—facially valid

The indictments charging defendant with uttering a forged instrument and obtaining property by false pretenses—based on defendant having signed his ex-wife's name to her check in order to deposit it into his personal bank account—were facially valid where they asserted each necessary element of both offenses.

2. Forgery—uttering forged instrument—obtaining property by false pretenses—no variance between indictments and evidence

In a trial for uttering a forged instrument and obtaining property by false pretenses—based on defendant having signed his ex-wife's name to her check in order to deposit it into his personal bank account—there was no fatal variance between the indictments and the evidence where the State presented evidence supporting each material element of both offenses.

3. Criminal Law—recordation—private bench conferences—no request

In a trial for uttering a forged instrument and obtaining property by false pretenses, the trial court did not violate defendant's right to recordation under N.C.G.S. § 15A-1241 by failing to record several

private bench conferences between the trial judge and the attorneys where defendant never requested that the subject matter of the bench conference conversations be reconstructed for the record.

Appeal by defendant from judgment entered 4 June 2021 by Judge William Anderson Long, Jr., in Cabarrus County Superior Court. Heard in the Court of Appeals 19 October 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Kayla D. Britt, for the State.

Shawn R. Evans for the defendant-appellant.

TYSON, Judge.

¶ 1 Nikita V. Mackey, a disbarred lawyer, ("Defendant") appeals from the judgment entered upon the jury's verdict from his two felony convictions of uttering a forged instrument and obtaining property by false pretenses. Our review discloses no error.

I. Background

¶ 2 Defendant married Yvette Stewart in September 2016. The couple separated two years later and divorced in 2021. Defendant and Stewart always maintained separate bank accounts, even while married. After the separation, Stewart moved to Tennessee and took her vehicle with her.

¶ 3 Stewart's vehicle needed repairs in March 2019. After Stewart had paid for the repairs, she realized her vehicle was still under a third-party maintenance warranty. She sought a reimbursement from the company issuing the warranty. The company agreed to reimburse Stewart in the amount of $1,200.92.

¶ 4 Stewart waited for the check, but it never arrived. She contacted the warranty company to inquire about her reimbursement. During that conversation, the company informed Stewart the check had been issued to Stewart as payee, mailed to Defendant's address, and the check had been deposited into a bank. Stewart asked for more information. The company sent her a copy of the cancelled check. Upon examination, she noticed the check issued in her name had been signed. She recognized her name, signed in Defendant's handwriting, on the endorsement line.

¶ 5 Stewart sought a replacement check because she believed Defendant had forged her signature. The company informed Stewart

they could not issue another check unless she notified law enforcement. Stewart reported the incident and provided handwriting samples to the Charlotte-Mecklenburg Police Department.

¶ 6 The officer in charge of investigating Stewart's claim subpoenaed the bank for all records related to the check. Bank records revealed Defendant had deposited the check into his personal bank account on 18 June 2019. Video footage from the bank also showed Defendant visiting the bank on the same day the check was deposited.

¶ 7 Defendant was charged with uttering a forged instrument, obtaining property by false pretenses, and forgery of an instrument on 2 March 2020. At trial, the State entered the bank records and video footage into evidence. On 4 June 2021, a jury found Defendant guilty of obtaining property by false pretenses and of uttering a forged instrument. The jury failed to reach a unanimous verdict regarding forgery of an instrument after questioning the definition of the words "infer" and "forgery" as used in the jury's instructions. Defendant moved for a mistrial. The court granted Defendant's motion regarding the forgery charge.

¶ 8 The trial court consolidated the remaining two convictions into one judgment. Defendant was sentenced as a level I offender and received an active sentence of 5 to 15 months, followed by 24 months of supervised probation. Defendant filed a timely notice of appeal on 9 June 2021.

II. Issues

¶ 9 Defendant argues: (1) the indictments for uttering a forged instrument and obtaining property by false pretenses are fatally defective; (2) a fatal variance exists between the indictments for uttering and obtaining property by false pretenses and the evidence entered at trial; and, (3) he is entitled to a new trial because eighteen bench conversations were omitted from the transcript despite the trial judge ordering a complete recordation.

III. Fatal Defect

¶ 10 **[1]** Defendant argues the indictments for uttering a forged instrument and obtaining property by false pretenses contained a fatal defect.

A. Standard of Review

¶ 11 Trial courts do not possess jurisdiction over a criminal defendant without a valid bill of indictment. *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (citation omitted). "[W]hen a fatal defect is present in the indictment charging the offense, a motion in arrest of judgment may be made at any time in any court having jurisdiction over the

matter, even if raised for the first time on appeal." *State v. Phillips*, 162 N.C. App. 719, 720, 592 S.E.2d 272, 273 (2004) (citation and internal quotation marks omitted).

B. Analysis

¶ 12 An indictment "is fatally defective if it fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Ellis*, 368 N.C. 342, 344, 776 S.E.2d 675, 677 (2015) (citation and quotation marks omitted).

¶ 13 "The essential elements of the crime of uttering a forged check are (1) the offer of a forged check to another, (2) with knowledge that the check is false, and (3) with the intent to defraud or injure another." *State v. Conley*, 220 N.C. App. 50, 60, 724 S.E.2d 163, 170 (2012) (citation and internal quotation marks omitted).

¶ 14 "The elements of obtaining property by false pretenses are (1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *Id.* (citation and internal quotation marks omitted).

¶ 15 The indictment charging Defendant with uttering a forged check provided:

> [T]he defendant named above unlawfully, willfully, and feloniously did utter, publish, pass, and deliver as true to SunTrust Bank a falsely made and forged check #072993 written by Caregard warranty service, made out to Yvette Stewart for the amount of $1,200.92. The defendant acted for [the] sake of gain and with the intent to injure and defraud and with the knowledge that the instrument was falsely made and forged.

¶ 16 The indictment charging Defendant with obtaining property by false pretenses provided:

> [T]he defendant named above unlawfully, willfully, and feloniously did knowingly and designedly, with the intent to cheat and defraud, obtain $1,200.92 US currency from SunTrust Bank by means of a false pretense which was calculated to deceive and did deceive. The false pretense consisted of the following: the defendant passed a forged check in order to obtain the funds.

¶ 17 The indictments included the necessary elements for the crimes of uttering a forged check and obtaining property by false pretenses. *Conley*, 220 N.C. App. at 60, 724 S.E.2d at 170. Defendant's argument is without merit and overruled.

IV. Fatal Variance

¶ 18 **[2]** Defendant argues the State's evidence at trial fatally varied from the indictment for the charge of obtaining property by false pretenses because "the indictment erroneously alleged that the check itself was a forgery in direct contradiction to all evidence presented." According to Defendant, the "evidence showed at best that [Defendant] presented a check which may have contained a forged endorsement."

¶ 19 Defendant also argues the State's evidence presented at trial fatally varied from the indictment charging him with uttering a forged check. Defendant asserts the "uttering indictment drafted and obtained by the State is based on the first part of N.C. Gen. Stat. § 14-120[,] which deals with forged and counterfeit instruments," yet the "evidence presented at trial was in reference to the second part of N.C. Gen. Stat. § 14-120 regarding false, forged or counterfeited endorsements."

A. Standard of Review

¶ 20 Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure delineates the procedures for preserving errors on appeal:

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

N.C. R. App. P. 10(a)(1) (emphasis supplied).

¶ 21 Rule 10(a)(1) thus requires a defendant to "preserve the right to appeal a fatal variance." *State v. Mason*, 222 N.C. App. 223, 226, 730 S.E.2d 795, 798 (2012) (first citing *State v. Pickens*, 346 N.C. 628, 645, 488 S.E.2d 162, 172 (1997) ("Regarding the alleged variance between the indictment and the evidence at trial, defendant based his motions at trial solely on the ground of insufficient evidence and thus has failed to preserve this argument for appellate review."); then citing *State v. Roman*, 203 N.C. App. 730, 731-32, 692 S.E.2d 431, 433 (2010); and then citing N.C. R. App. P. 10(a)(1)).

¶ 22 Our state courts have recognized consistent application of the rules of appellate procedure is paramount. *See State v. Hart*, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007) ("Fundamental fairness and the predictable operation of the courts for which our Rules of Appellate Procedure were designed depend upon the consistent exercise of this authority."); *see also State v. Ricks*, 378 N.C. 737, 741, 2021-NCSC-116, ¶ 6, 862 S.E.2d 835, 839 (2021) (explaining how suspending certain rules of appellate procedure, such as requiring timely filing of a notice of appeal, "would render meaningless the rules governing the time and manner of noticing appeals") (citation omitted).

¶ 23 Our Supreme Court, nevertheless, has held a defendant's motion to dismiss at the close of the state's evidence and renewed again at the close of all the evidence "*preserves all issues related to sufficiency of the State's evidence*" arguments for appellate review. *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020) (emphasis supplied) ("Because our case law places an affirmative duty upon the trial court to examine the sufficiency of the evidence against the accused for every element of each crime charged, . . . under Rule 10(a)(3), a defendant's motion to dismiss preserves all issues related to sufficiency of the State's evidence for appellate review.").

¶ 24 Post-*Golder*, our Supreme Court has not affirmatively held whether a general motion to dismiss preserves a defendant's fatal variance objection for appeal as a "sufficiency of the State's evidence" objection under *Golder*. *Id.*; *State v. Smith*, 375 N.C. 224, 228, 846 S.E.2d 492, 494 (2020) (explaining this Court in *State v. Smith*, 258 N.C. App. 698, 812 S.E.2d 205 (2018), "concluded [ ] defendant's *fatal variance argument was not preserved* because it was not expressly presented to the trial court[,]" while also acknowledging this Court had reached its decision before our Supreme Court issued *Golder*) (emphasis supplied) (citation omitted). The Supreme Court in *Smith*, "assum[ed] without deciding that defendant's fatal variance argument was preserved[.]" *Id.* at 231, 846 S.E.2d at 496.

¶ 25 Since *Smith* and *Golder*, criminal defendants before this Court assert "the Supreme Court in *Golder* [had] 'assumed without deciding' that 'issues concerning fatal variance are preserved by a general motion to dismiss.' " *See State v. Brantley-Phillips*, 278 N.C. App. 279, 286, 2021-NCCOA-307, ¶ 21, 862 S.E.2d 416, 422 (2021). In *Brantley-Phillips*, this Court explained:

> Although *Golder* did not address this specific question, our Court has noted, in light of *Golder*: "any fatal

> variance argument is, essentially, an argument regarding the sufficiency of the State's evidence." *State v. Gettleman*, 275 N.C. App. 260, 271, 853 S.E.2d 447, 454 (2020) (citation omitted). We further reasoned: "[o]ur Supreme Court made [it] clear in *Golder* that 'moving to dismiss at the proper time . . . preserves all issues related to the sufficiency of the evidence for appellate review.' " *Id.* (quoting *Golder*, 374 N.C. at 249, 839 S.E.2d at 790). Specifically, in *Gettleman* we determined the defendant failed to preserve an argument that the jury instructions and indictment in that case created a fatal variance precisely because the Defendant failed to move to dismiss the charge in question. *Id.* Here, unlike in *Gettleman*, Defendant did timely move to dismiss all charges, and thus, under the rationale of *Gettleman*, it would appear Defendant did preserve this argument. *See id. Without so deciding, and for purposes of review of this case*, we employ de novo review. *See id.*

Id. at 287, ¶ 22, 862 S.E.2d at 422 (emphasis supplied).

¶ 26 Here, Defendant did not mention the words "fatal," "defective," or "variance" in his motion to dismiss, to provide the trial court with notice of any purported error at the close of the State's evidence. Defendant moved to dismiss at the close of the State's evidence, and again at the close of all the evidence. In accordance with *Brantley-Phillips*, we again presume "[w]ithout so deciding, and for purposes of review of this case," Defendant's generic motion to dismiss for "*sufficiency of the evidence*" preserved his fatal variance objections. *Id.* (emphasis supplied).

B. Analysis

> A motion to dismiss for a variance is in order when the prosecution fails to offer sufficient evidence the defendant committed the offense charged. A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged.
>
> In order to prevail on such a motion, the defendant must show a fatal variance between the offense charged and the proof as to the gist of the offense.

Pickens, 346 N.C. at 646, 488 S.E.2d at 172 (citations, quotation marks, and alterations omitted).

¶ 27 "In order for a variance to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged." *State v. Tarlton*, 279 N.C. App. 249, 253, 2021-NCCOA-458, ¶ 12, 864 S.E.2d 810, 813 (2021) (quoting *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002)).

¶ 28 Here, the State offered substantial and sufficient evidence of each material element of both charges. The State tendered evidence Stewart never received the check issued to her as payee, and it was mailed to Defendant's residence. Stewart testified she recognized Defendant's handwriting forging her name on the endorsement line. The State also entered into evidence bank records indicating Defendant had deposited the check into his sole personal account. Video footage showed Defendant entering the bank on the same day the check was deposited into his account.

¶ 29 Viewing the evidence in the light most favorable to the State and all inferences thereon, the evidence presented at trial did not fatally vary from the essential elements or "gist" of the indictments charging Defendant with uttering a forged check and obtaining property by false pretenses. *Conley*, 220 N.C. App. at 60, 724 S.E.2d at 170; *Pickens*, 346 N.C. at 645, 488 S.E.2d at 172; *Tarlton*, 279 N.C. App. at 253, ¶ 12, 864 S.E.2d at 813. Defendant's argument is without merit and is overruled.

V. Recordation

¶ 30 **[3]** Criminal defendants have a statutory right to recordation of their trial. N.C. Gen. Stat. § 15A-1241 provides:

> (a) The trial judge must require that the reporter make a true, complete, and accurate record of all statements from the bench and all other proceedings except:
>
> (1) Selection of the jury in noncapital cases;
>
> (2) Opening statements and final arguments of counsel to the jury; and
>
> (3) Arguments of counsel on questions of law.
>
> . . .
>
> (c) When a party makes an objection to unrecorded statements or other conduct in the presence of the jury, *upon motion of either party* the judge must

> reconstruct for the record, as accurately as possible, the matter to which objection was made.

N.C. Gen. Stat. § 15A-1241 (2021) (emphasis supplied).

¶ 31 Our Supreme Court in *State v. Cummings* contrasts the disparate treatment of statements made in open court before a jury and those made in private bench conferences under N.C. Gen. Stat. § 15A-1241. 332 N.C. 487, 498, 422 S.E.2d 692, 698 (1992). The Court in *Cummings* concluded N.C. Gen. Stat. § 15A-1241 "appears to be designed to ensure that any statement by the trial judge, in open court and within earshot of jurors or others present in the courtroom, be available for appellate review." *Id.*

¶ 32 Statements made in private bench conferences, however, are only required to be transcribed if "either party requests that the subject matter of a private bench conference be put on the record for possible appellate review." *Id.* If a party requests a bench conference to be transcribed per N.C. Gen. Stat. § 15A-1241, "the trial judge should comply by reconstructing, as accurately as possible, the matter discussed." *Id.* (citing N.C. Gen. Stat. § 15A-1241(c)).

¶ 33 "This Court has repeatedly held that [N.C. Gen. Stat. §] 15A–1241 does not require recordation of 'private bench conferences between trial judges and attorneys.' " *State v. Blakeney*, 352 N.C. 287, 307, 531 S.E.2d 799, 814 (2000) (first quoting *Cummings*, 332 N.C. at 497, 422 S.E.2d at 697; then citing *State v. Speller*, 345 N.C. 600, 605, 481 S.E.2d 284, 287 (1997)). In *Blakeney*, the defendant argued the "unrecorded bench conferences violated his statutory right to recordation under [N.C. Gen. Stat.] § 15A[-]1241 and deprived him of his constitutional right to due process by rendering appellate review impossible." *Id.* at 306, 531 S.E.2d at 814. Our Supreme Court held the trial court did not err by failing to record the bench conferences because the "defendant never requested that the subject matter of a bench conference be reconstructed for the record." *Id.* at 307, 531 S.E.2d at 814.

¶ 34 Defendant asserts the trial court had ordered a complete recordation. This assertion is unfounded. The transcript shows Defendant only requested a complete recordation of the *voir dire* of an expert witness. Here, the trial court did not err for the same reasons our Supreme Court held the trial court did not err in *Blakeney*: Defendant "never requested that the subject matter of a bench conference be reconstructed for the record." *Blakeney*, 352 N.C. at 307, 531 S.E.2d at 814. Defendant's argument is without merit.

VI. Conclusion

¶ 35 Defendant has failed to show a fatal defect existed in his indictments for uttering a forged check and obtaining property by false pretenses. Each of the indictments alleged the "essential and necessary elements of the offense[s]." *Ellis*, 368 N.C. at 344, 776 S.E.2d at 677.

¶ 36 Presuming without holding Defendant's fatal variance argument was preserved by his blanket motion to dismiss, Defendant failed to demonstrate a fatal variance between his indictments and the evidence presented at trial. *Brantley-Phillips*, 278 N.C. App. at 287, ¶ 22, 862 S.E.2d at 422. Any purported variance between the indictment and the evidence at trial was "not material, and is therefore not fatal, [as] it d[id] not involve an essential element of the crime charged." *Tarlton*, 279 N.C. App. at 253, ¶ 12, 864 S.E.2d at 813.

¶ 37 Defendant has also failed to show the trial court committed plain error by failing, in the absence of a request, to make a complete recordation of the eighteen bench conference conversations. Defendant never requested the trial court to reconstruct the bench conversations for the record, despite asking the trial court to make a complete recordation of the *voir dire* of an expert witness at another point during the trial.

¶ 38 Defendant received a fair trial, free from prejudicial errors he preserved and argued on appeal. We find no error in the jury's verdicts or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges ZACHARY and HAMPSON concur.

AUTRY v. BILL CLARK HOMES, LLC

[287 N.C. App. 11, 2022-NCCOA-833]

JACKIE W. AUTRY, SHARON J. AUTRY, ROBERT BLACKWELL, CARL B. CAREY, DANIEL DENSTON, ROBERT GRAHAM, LORI L. MONEYMAKER, JAMES JONES, JENNI H. JONES, JASON P. HERRING, CINDY P. HERRING, JASON R. LAMBERT AS ADMINISTRATOR OF THE ESTATE OF CHARLES R. LAMBERT, RONNIE S. NORTON, JR., JOYCE M. NORTON, MARTIN B. TAYLOR, MATTI McMURRAY AND JESSICA L. WAGGONER, Plaintiffs

v.

BILL CLARK HOMES, LLC, BILL CLARK HOMES OF WILMINGTON, LLC, BILL CLARK HOMES OF GREENVILLE, LLC, BILL CLARK CONSTRUCTION COMPANY, INC., AND WILLIAM H. CLARK, Defendants

No. COA22-293

Filed 20 December 2022

Statutes of Limitation and Repose—negligence—improvement to real property—drainage pipe—six-year limitation—from date of substantial completion

Plaintiff homeowners' negligence claim against subdivision developers for an alleged failure to maintain an off-premises drainage pipe (which plaintiffs alleged resulted in flooding after a hurricane) was barred by the six-year statute of repose in N.C.G.S. § 1-50(a)(5)(b) where plaintiffs' complaint was filed more than ten years after the pipe was substantially completed and where plaintiffs provided no support for any of the statutory exceptions to the time limit.

Appeal by Plaintiffs from order entered 21 June 2021 by Judge R. Kent Harrell and from order entered 24 November 2021 by Judge Phyllis Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 7 September 2022.

Reiss & Nutt, PLLC, by Kyle J. Nutt, for Plaintiffs-Appellants.

McAngus Goudelock & Courie, by Jeffery I. Stoddard and Walt Rapp, and Hamlet & Associates, PLLC, by H. Mark Hamlet and Suzanne E. Brown, for Defendants-Appellees.

COLLINS, Judge.

¶ 1 This appeal stems from a negligence action filed by Plaintiffs, subdivision homeowners, against Defendants, subdivision developers, alleging that Defendants' failure to maintain a drainage pipe that extended beyond the subdivision boundaries resulted in property damage due to

flooding from Hurricane Florence. Plaintiffs appeal from orders granting Defendants summary judgment on Plaintiffs' claims for negligence and punitive damages.[1] Plaintiffs argue that the trial court[2] erred by granting Defendants summary judgment on Plaintiffs' negligence claim because Defendants owed both a statutory and common-law duty to maintain the off-premises drainage pipe. Plaintiffs argue that the trial court erred by granting Defendants summary judgment on Plaintiffs' punitive damages claim because the trial court applied the wrong standard when evaluating Defendants' motion for summary judgment, and because a genuine issue of material fact exists as to whether Defendants' failure to maintain the off-premises drainage pipe was "willful or wanton conduct" as defined in N.C. Gen. Stat. § 1D-5.

¶ 2 Because Plaintiffs filed their complaint more than six years after the off-premises drainage pipe was substantially completed, the statute of repose bars Plaintiffs' negligence claim, and summary judgment was proper. Additionally, because Plaintiffs' negligence claim is barred, we do not address Plaintiffs' arguments regarding their punitive damages claim. The trial court's orders are affirmed.

I. Factual Background

¶ 3 The record evidence, viewed in the light most favorable to Plaintiffs, indicates that the following series of events took place between 1994 and 2018:

¶ 4 In October 1994, Defendants applied to the North Carolina Department of Environment, Health, and Natural Resources ("DENR")[3] for a stormwater permit for Tidalholm Subdivision in New Hanover County. The application included a description of the subdivision; a proposed plan for managing stormwater runoff in eleven vegetated swales and one pond, located between lots 129 and 130; a certification that certain restrictions would be included in the recorded deeds limiting the allowable built-upon area; and a stormwater maintenance plan indicating that "[i]t shall be the responsibility of the Tidalholm Home Owners

1. Plaintiffs label their claims "Negligence" and "Gross Negligence/Willful and Wanton Conduct/Punitive Damages."

2. Plaintiffs appeal from separate orders entered by two different superior court judges. We refer to the judges collectively as the trial court.

3. The Department's health functions were removed in 1997 and it became known as the North Carolina Department of Natural Resources. In 2015, the Department's name was changed to the Department of Environmental Quality, as it is now known. At all relevant times the Department was titled DENR.

Association to provide [certain enumerated] inspections and maintenance of the stormwater systems[.]"

¶ 5 DENR approved Defendants' application and issued a certification of compliance in December 1994 that stated:

> Based on our review of the project plans and specifications, we have determined that the Tidalholm Subdivision stormwater control system complies with the Stormwater Regulations set forth in Title 15A NCAC 2H.1003(a)(3) and (i).
>
> . . . .
>
> Any modification of the plans submitted to this Office or further development of this contiguous project will require an additional Stormwater Submittal/ Modification and approval prior to initiation of construction . . . . Modifications include but are not limited to; project name changes, transfer of ownership, redesign of built-upon surfaces, addition of built-upon surfaces, redesign or further subdivision of the project area.
>
> This certification shall be effective from the date of issuance until rescinded. The project shall be constructed and maintained in accordance with the plans and specifications approved by the Wilmington Regional Office.

¶ 6 In December 1995, Tidalholm Homeowners Association, Inc. ("Tidalholm HOA"), filed articles of incorporation with the North Carolina Secretary of State. Pursuant to these articles, "the specific purposes for which it is formed are to provide for maintenance, preservation and architectural control of the residence Lots and Common Area" of Tidalholm Subdivision, to "exercise all of the powers and privileges and to perform all of the duties and obligations of the Association as set forth in that certain Declaration of Covenants, Conditions and Restrictions," and to "maintain . . . real or personal property in connection with the affairs of the Association[.]" However, because Tidalholm HOA was incorporated after Defendants submitted the stormwater permit application, Tidalholm HOA did not assume the responsibilities under the certificate of compliance.

¶ 7 In July 1999, a Tidalholm Subdivision resident experienced flooding and hired an architect to investigate the issue. After completing his investigation, the architect wrote a letter to Defendants stating:

> After reviewing the documents, maps, and the pictures of this area, [my firm] has come to the conclusion that the problem of the flooding comes from the thirty foot (30') drainage ditch behind lot 128. This drainage ditch needs to be dredged so the storm water detention discharge pipe can do its job.

¶ 8 In November 1999, DENR performed a compliance inspection at Tidalholm Subdivision and found the project in violation of the certification of compliance issued in 1994. DENR sent a letter to Defendants stating that the swales and pond had not been properly maintained in various ways, and that "[t]he recorded deed restrictions for this development have not been received by this Office." The letter did not mention a drainage ditch behind lot 128. DENR directed Defendants to "[p]rovide a written 'Plan of Action' which outlines the actions you will take to correct the violation(s) and a time frame for completion of those actions, on or before December 17, 1999."

¶ 9 DENR performed another compliance inspection in April 2000 and found the project in violation of the 1994 certification of compliance. DENR sent a letter to Defendants noting, among other things, that "the recent flooding problems at the detention pond in Tidalholm [are attributable to] a high water table, however, the offsite drainage area into the detention pond has been found to be well in excess of the 600,000 square feet accounted for in [the original] design calculations." DENR directed Defendants to "[p]rovide a written 'Plan of Action' which outlines the actions [Defendants] will take to correct the violations and a time frame for completion of those actions, on or before May 18, 2000[,]" and reminded Defendants that "offsite runoff must either be routed around the system or accounted for in the design of the pond."

¶ 10 By letter dated 5 May 2000, Defendants acknowledged receipt of letters dated 11[4] and 18 April 2000 indicating violations of the certification of compliance and requested additional time to develop a plan of action. Defendants submitted a Stormwater Management Permit Application Form in July 2000, seeking to modify their 1994 permit. Among the proposed modifications included the installation of a weir box under Lipscomb Drive and a reinforced concrete bypass pipe between lots 127 and 128 of the subdivision. Defendants' plan did not show the bypass pipe extending beyond Tidalholm Subdivision boundaries. By letter dated 28 August 2000, DENR acknowledged receipt of Defendants' application and responded, in part:

---

4. An 11 April letter is not in the record.

> Because of the as-built condition, the bypass as proposed is acceptable. The permit to be issued will reserve the right to address the offsite situation again if the check dams in the ditches in [a neighboring subdivision] are removed or if the ditches are piped, or if complaints regarding flooding problems are received.

However, because the application was incomplete, DENR required additional information, including copies of the recorded deed restrictions, to continue its review.

¶ 11 In November 2000, DENR notified Defendants by letter that the recorded deed restrictions for lots sold between 1995 and 1999 did not include language limiting the built-upon area of the subdivision lots, as the 1994 certification of compliance required. DENR directed Defendants to remedy the recorded deed restrictions and reminded Defendants to record the required restrictions prior to selling lots in the future. By 2016, Defendants had yet to correct the recorded deed restrictions.

¶ 12 Meanwhile, the developers of Kirkwood at Arrondale ("Kirkwood"), an adjacent subdivision, were developing stormwater management plans to be approved by the North Carolina Department of Transportation ("NCDOT").[5] As part of this work, engineers for Kirkwood met with Defendants, and, in December 2001, submitted proposed plans to NCDOT. The plans depicted the weir box and bypass pipe that Defendants had proposed as well as a connection from the bypass pipe to a drainage pipe that extended beyond Tidalholm Subdivision boundaries and into a wooded ravine behind lot 128.

¶ 13 In August 2003, engineers for Kirkwood sent letters to the residents of Tidalholm Subdivision lots 127 and 128 stating:

> As part of an agreement between the developers for Kirkwood at Arrondale subdivision and the North Carolina Department of Transportation, we will be installing a stormwater discharge pipe through an existing easement along your southern and western property line. This line will provide drainage relief during major storm events. Please note the work should commence within the next 30 days and be completed within 30 days thereafter. . . .

---

5. Kirkwood dealt with NCDOT rather than DENR because part of the subdivision's stormwater discharged through public streets.

The project was completed by 2007. The completed project included a drainage pipe that extends beyond Tidalholm Subdivision boundaries and terminates in a wooded ravine behind lot 128 on property owned by Armstrong Developers, Inc., a now dissolved corporation.

¶ 14 In September 2016, upon discovering that the stormwater permit had not been transferred to Tidalholm HOA in 1994, Defendants submitted to DENR a stormwater permit ownership change form to change ownership of the stormwater permit from Defendants to Tidalholm HOA and Tidalholm Village Homeowner's Association, Inc. ("Tidalholm Village HOA").[6] Ownership of the permit was not successfully transferred until 9 October 2019. In September 2018, Hurricane Florence struck Wilmington, and Plaintiffs' homes experienced severe flooding. An engineer for New Hanover County investigated the flooding and discovered that the drainage pipe in the wooded ravine behind Tidalholm Subdivision lot 128 "was approximately 80% blocked." The engineer believed the blockage to be "the cause of the flooding experienced in the Tidalholm neighborhood . . . ."

II. Procedural History

¶ 15 Plaintiffs filed a complaint against Defendants on 4 December 2019 asserting claims for negligence and punitive damages. Defendants answered in February 2021 and joined Tidalholm HOA and Tidalholm Village HOA as third-party defendants. On 1 June 2021, Defendants filed a motion for partial summary judgment, requesting that the court dismiss Plaintiffs' punitive damages claim. After reviewing the forecast of evidence and hearing arguments, the trial court entered partial summary judgment in favor of Defendants on that claim.

¶ 16 Defendants voluntarily dismissed their third-party complaint in July and filed an amended motion for summary judgment in September on Plaintiffs' remaining negligence claim. After reviewing the forecast of evidence and hearing arguments, the trial court granted summary judgment in favor of Defendants and dismissed Plaintiffs' complaint. Plaintiffs timely appealed both orders.

III. Discussion

¶ 17 Plaintiffs argue that the trial court erred by granting summary judgment to Defendants on Plaintiffs' claims for negligence and punitive damages.

---

6. Articles of incorporation for Tidalholm Village HOA are not in the record. However, the record indicates that Tidalholm HOA was responsible for lots 1-49 of Tidalholm Subdivision, and Tidalholm Village HOA was responsible for lots 50-137.

A. Standard of Review

¶ 18 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. Gen. Stat. § 1A-1, Rule 56(c) (2021). "A genuine issue of material fact is one that can be maintained by substantial evidence." *Curlee v. Johnson*, 377 N.C. 97, 2021-NCSC-32, ¶ 11 (quotation marks and citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference[.]" *Ussery v. Branch Banking & Tr.*, 368 N.C. 325, 335, 777 S.E.2d 272, 278-79 (2015) (quotation marks and citations omitted).

¶ 19 We review a trial court's order granting summary judgment de novo, taking the evidence in the light most favorable to the non-moving party. *Da Silva v. WakeMed*, 375 N.C. 1, 10, 846 S.E.2d 634, 640-41 (2020). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quotation marks and citation omitted).

B. Negligence

¶ 20 Plaintiffs argue that the trial court erred by granting Defendants summary judgment on Plaintiffs' negligence claim. Specifically, Plaintiffs argue that Defendants owed both a statutory and common-law duty to maintain the drainage pipe that extended beyond Tidalholm Subdivision boundaries. Defendants dispute that they owed a duty to Plaintiffs and argue that, even if a duty was owed to Plaintiffs, the statute of repose bars Plaintiffs' claims.

¶ 21 The applicable statute of repose provides, "No 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 the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement." N.C. Gen. Stat. § 1-50(a)(5)(a) (2021).

> For purposes of this subdivision, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:
>
> . . . .
>
> 5. Actions in contract or in tort or otherwise;

. . . .

> 9. Actions against . . . any person who develops real property or who performs or furnishes the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.

N.C. Gen. Stat. § 1-50(a)(5)(b) (2021). The statute of repose "serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue[.]" *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985) (citations omitted). "If the action is not brought within the specified period, the plaintiff literally has no cause of action." *Hargett v. Holland*, 337 N.C. 651, 655, 447 S.E.2d 784, 787 (1994) (quotation marks, emphasis, and citations omitted). "Summary judgment is proper if the pleadings or proof show without contradiction that the statute of repose has expired." *Glens of Ironduff Prop. Owners Ass'n v. Daly*, 224 N.C. App. 217, 220, 735 S.E.2d 445, 447 (2012) (quotation marks and citation omitted).

¶ 22 Effectively, a statute of repose "creates an additional element of the claim itself which must be satisfied in order for the claim to be maintained." *Hargett*, 337 N.C. at 654, 447 S.E.2d at 787 (citation omitted). Thus, a plaintiff has the burden of showing that they brought the action within six years of either (1) the substantial completion of the improvement or (2) the specific last act or omission of defendant giving rise to the cause of action. *See Nolan v. Paramount Homes, Inc.*, 135 N.C. App. 73, 76, 518 S.E.2d 789, 791 (1999) (citation omitted).

1. Substantial Completion

¶ 23 An improvement is substantially complete when it becomes fit for the purpose for which it was intended. *See* N.C. Gen. Stat. § 1-50(a)(5)(c) (2021). The record evidence indicates that Defendants developed a plan to install a weir box and a concrete bypass pipe between lots 127 and 128 in July 2000. By December 2001, the plan had been amended to include a drainage pipe that extended beyond Tidalholm Subdivision boundaries. A 2003 letter to the residents of Tidalholm Subdivision lots 127 and 128 indicated that a project would take place near the end of the year that included installation of the weir box and bypass pipe. The weir box, bypass pipe, and off-premises drainage pipe were installed by 2007, more than ten years before Plaintiffs filed their complaint and well outside the six-year period of repose.

2. Last Act or Omission

¶ 24 This Court has interpreted the phrase "the later of the last act or omission or date of substantial completion" in N.C. Gen. Stat. § 1-50(a)(5)(a) to mean "the date at which time the party (contractor, builder, etc.) has completed performance of the improvement contract." *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 241, 515 S.E.2d 445, 450 (1999). In the absence of an improvement contract, this Court has "no basis for determining that the 'last act' . . . occurred later than the date of substantial completion." *Trillium Ridge Condo. Ass'n v. Trillium Links & Vill., LLC*, 236 N.C. App. 478, 495, 764 S.E.2d 203, 215 (2014).

¶ 25 In *Monson*, plaintiff sued defendant Paramount Homes, Inc. ("Paramount") in 1996 for defective construction of a home built in 1990. 133 N.C. App. at 235, 515 S.E.2d at 446. In 1997, Paramount filed a third-party complaint against Carolina Builders Corporation ("CBC") who had provided the original windows and doors for the home and had repaired them in 1994 at plaintiff's request. *Id.* at 236, 515 S.E.2d at 446. Paramount's third-party complaint was dismissed as outside the applicable period of repose because the home was completed in 1990. *Id.* at 236, 515 S.E.2d at 447. Paramount appealed, arguing that CBC's 1994 repairs were completed pursuant to a warranty and qualified as a last act or omission. *Id.*

¶ 26 This Court rejected Paramount's argument stating, "Assuming *arguendo* that a continuing duty of repair existed pursuant to a warranty [to plaintiff], no evidence indicates that CBC had a continuing duty to repair under the improvement contract with Paramount." *Id.* at 239, 515 S.E.2d at 448. This Court reasoned that "[t]o allow the statute of repose to toll or start running anew each time a repair is made would subject a defendant to potential open-ended liability for an indefinite period of time, defeating the very purpose of statutes of repose such as N.C. Gen. Stat. § 1-50(5)." *Id.* at 240, 515 S.E.2d at 449 (citation omitted). Accordingly, this Court held that, although "[a] duty to complete performance may occur after the date of substantial completion, . . . a repair does not qualify as a last act under N.C. Gen. Stat. § 1-50(5) unless it is required under the improvement contract by agreement of the parties." *Id.* at 241, 515 S.E.2d at 450 (quotation marks omitted).

¶ 27 In *Trillium Ridge*, defendant developer contracted to construct homes in a condominium development in 2003. 236 N.C. App. at 484, 764 S.E.2d at 208. In 2010, extensive water damage was discovered and attributed to defects in the original construction of the buildings. *Id.* at 485, 764 S.E.2d at 209. Plaintiff condominium association sued defendant

in 2011 and attempted to avoid the statute of repose by arguing that defendant's last act occurred in 2006 when defendant repaired a resident's deck. *Id.* at 485, 494, 764 S.E.2d at 209, 215. Plaintiff did not produce the original construction contract but argued that the repairs "might have been required as part of the original contract . . . ." *Id.* at 495, 764 S.E.2d at 215. This Court rejected plaintiff's argument, stating that, without the contract, "we have no basis for determining that the 'last act' . . . occurred later than the date of substantial completion[,]" and pointing out that plaintiff "has the burden of showing that he or she brought the action within six years of . . . the specific last act or omission of defendant giving rise to the cause of action." *Id.* at 495, 764 S.E.2d at 215 (quotation marks and citation omitted).

¶ 28 Here, Plaintiffs have not produced a contract related to the off-premises drainage pipe, let alone one that confers maintenance responsibilities on Defendants. Plaintiffs point out that a maintenance plan was required for Defendants to obtain a stormwater permit from DENR. However, Defendants' application for a stormwater permit and the resulting permit issued by DENR to Defendants cannot be construed to be a contract for construction of the off-premises drainage pipe between Plaintiffs and Defendants. Accordingly, the date of substantial completion must be used to determine whether the statute of repose bars Plaintiffs' claim.

3. Exceptions to the Statute of Repose

a. Actual Possession or Control

¶ 29 Plaintiffs rely on N.C. Gen. Stat. § 1-50(a)(5)(d) to argue that the statute of repose is not applicable here because Defendants had a maintenance obligation.

¶ 30 Subsection 1-50(a)(5)(d) provides:

> The limitation prescribed by this subdivision shall not be asserted as a defense by any person in actual possession or control, as owner, tenant or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event such person in actual possession or control either knew, or ought reasonably to have known, of the defective or unsafe condition.

N.C. Gen. Stat. § 1-50(a)(5)(d) (2021).

¶ 31 This subsection applies specifically to defendants in actual possession or control of the defective or unsafe condition. Nothing in the subsection indicates that it applies to instances of maintenance obligations generally, and Plaintiffs make no argument to support their position. Additionally, although Plaintiffs' complaint alleges that in September 2018 Defendants were in actual possession or control of the off-premises drainage pipe, the record evidence does not support Plaintiffs' allegation and Plaintiffs have provided no support for this allegation on appeal.

b. Willful or Wanton Negligence

¶ 32 Plaintiffs also argue that the statute of repose is not applicable here because Defendants' conduct was willful or wanton. *See* N.C. Gen. Stat. § 1-50(a)(5)(e) (2021) ("The limitation prescribed by this subdivision shall not be asserted as a defense by any person who shall have been guilty of . . . willful or wanton negligence . . . in developing real property . . . or construction of an improvement to real property, or a repair to an improvement to real property . . . ."). " 'Willful or wanton conduct' means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. 'Willful or wanton conduct' means more than gross negligence." N.C. Gen. Stat. § 1D-5(7) (2021).

¶ 33 The record evidence, viewed in the light most favorable to Plaintiffs, does not support the conclusion that Defendants' conduct was willful or wanton. Defendants proposed a plan for managing stormwater runoff in eleven vegetated swales and one pond, located between lots 129 and 130, that received a certification of compliance from DENR in 1994. In 1999, an architect hired by a subdivision resident sent a letter to Defendants stating that the drainage ditch behind lot 128 needed to be dredged to alleviate flooding in the subdivision. In 1999 and 2000, DENR notified Defendants that Tidalholm Subdivision was in violation of its certification of compliance because the off-site drainage exceeded Defendants' original calculations, the swales and detention pond had not been properly maintained in various ways, and the recorded deed restrictions for the subdivision had not been received. DENR directed Defendants to develop a plan to correct the violations.

¶ 34 Defendants developed and submitted a plan to resolve the violations, which included the installation of a weir box and a concrete bypass pipe between lots 127 and 128. DENR stated that Defendants' plan as proposed was acceptable; that plan did not show the bypass pipe extending beyond Tidalholm Subdivision boundaries. Meanwhile,

engineers for Kirkwood met with Defendants to develop and submit stormwater management plans to be approved by NCDOT. The plans submitted to NCDOT included the weir box and bypass pipe between lots 127 and 128, as well as the drainage pipe that extended beyond Tidalholm Subdivision boundaries. Although the plans submitted by Kirkwood to NCDOT did not match Defendants' plan that DENR found acceptable, Defendants did not notify DENR of the change.

¶ 35 This evidence shows that Defendants were responsive to DENR's notices of violations but failed to notify DENR that the plans changed due to coordination with a neighboring subdivision. It does not support the conclusion that Defendants' conduct was in "conscious and intentional disregard of and indifference to the rights and safety of others," or that Defendants knew their conduct was "reasonably likely to result in injury, damage, or other harm." N.C. Gen. Stat. § 1D-5(7).

¶ 36 Plaintiffs also argue that Defendants' continued failure to include the required deed restrictions, along with their failure to transfer the stormwater permit to Tidalholm HOA and Tidalholm Village HOA, "is evidence that [Defendants] deliberately chose not to discharge their duties in violation of the law and in reckless disregard of the Plaintiffs' rights." Even if these failures are viewed as an intentional disregard for regulatory requirements, Plaintiffs have forecast no evidence indicating that these administrative failures were "reasonably likely to result in injury, damage, or other harm." *Id.*

¶ 37 According to DENR's November 2000 letter to Defendants, the consequence for failing to include the required deed restrictions was that "the subdivision cannot be considered as maintaining a low density[;]" the letter makes no mention that the deed restrictions are necessary for safety reasons. Although Defendants' conduct, viewed in the light most favorable to Plaintiffs, could demonstrate an intentional disregard of and indifference to DENR's regulations, it does not demonstrate an "intentional disregard of and indifference to the rights and safety of others." *Id.*

¶ 38 Because the record evidence indicates that the off-premises drainage pipe was substantially completed in 2007, far more than six years before Plaintiffs filed their complaint, and because no exception to the statute of repose applies, the "pleadings or proof show without contradiction that the statute of repose has expired," and summary judgment was properly granted. *Glens of Ironduff*, 224 N.C. App. at 220, 735 S.E.2d at 447.

C. Punitive Damages

¶ 39 Plaintiffs also argue that the trial court erred by granting Defendants summary judgment on Plaintiffs' claim for punitive damages. Specifically, Plaintiffs argue that the trial court applied the wrong standard when evaluating Defendants' motion for summary judgment on this claim, and that the forecast of evidence could support an award of punitive damages.

¶ 40 Punitive damages may only be awarded "when a cause of action otherwise exists in which at least nominal damages are recoverable by the plaintiff." *Shugar v. Guill*, 304 N.C. 332, 335, 283 S.E.2d 507, 509 (1981) (citation omitted). Because Plaintiffs' negligence claim is barred by the statute of repose, Plaintiffs may not recover punitive damages. Accordingly, we do not address Plaintiffs' arguments.

IV. Conclusion

¶ 41 Because the record shows proof without contradiction that the drainage pipe that extended beyond Tidalholm Subdivision boundaries was substantially completed more than six years before Plaintiffs filed their complaint, Plaintiffs' complaint is barred by the statute of repose. The trial court's orders are affirmed.

AFFIRMED.

Judges DIETZ and CARPENTER concur.

DEVORE v. SAMUEL

[287 N.C. App. 24, 2022-NCCOA-834]

FRED W. DEVORE, III AS GUARDIAN AD LITEM FOR AZARIA HORTON, A MINOR, PLAINTIFF
v.
CHARLES LAMONTE SAMUEL, JR., STACY V. SAMUEL, KINDERCARE EDUCATION, LLC AND KINDERCARE LEARNING CENTERS, LLC, DEFENDANTS

KINDERCARE EDUCATION, LLC AND KINDERCARE LEARNING CENTERS, LLC, DEFENDANTS/THIRD-PARTY PLAINTIFFS
v.
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, AND KEYERA GORDON, THIRD-PARTY DEFENDANTS

No. COA22-305

Filed 20 December 2022

1. Immunity—school bus negligence court proceeding—joinder of local school board as third-party defendant—limited waiver—Industrial Commission only

In a school bus negligence case, in which one of the defendants (an afterschool childcare center) filed a third-party complaint against the local school board in order to pursue claims of contribution and indemnity, there was no merit to defendant's assertion that N.C.G.S. § 143-300.1 (regarding the liability of local school boards in school bus negligence cases) operated to give the local school board the same status as the State Board of Education such that it could be joined as a third-party defendant under Civil Procedure Rule 14 and N.C.G.S. § 1B-1(h) in a court proceeding. Section 143-300.1 provides for a limited waiver of governmental immunity to permit these types of claims only in the Industrial Commission. Therefore, the trial court erred by denying the local school board's motion to dismiss and its order of denial was reversed.

2. Immunity—governmental—waiver—local school board—purchase of excess liability insurance

In a school bus negligence case, in which one of the defendants (an afterschool childcare center) filed a third-party complaint against the local school board in order to pursue claims of contribution and indemnity, where the school board's purchase of excess liability coverage did not constitute a waiver of its immunity—based on the terms of the insurance policy, including an express statement that the board did not intend to waive its immunity—any reliance on this theory of waiver by the trial court when it denied the board's motion to dismiss was in error.

DEVORE v. SAMUEL

[287 N.C. App. 24, 2022-NCCOA-834]

Appeal by third-party defendant from order entered 7 January 2022 by Judge Jesse Caldwell, IV, in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 October 2022.

Shumaker, Loop & Kendrick, LLP, by Steven A. Meckler and Daniel R. Hansen, for third-party plaintiffs-appellees.

J. Melissa Woods and Hope A. Root for third-party defendant-appellant Charlotte-Mecklenburg Board of Education.

DIETZ, Judge.

¶ 1 This case presents an issue of first impression concerning the waiver of governmental immunity for local school boards in school bus negligence cases. As explained below, we hold that the limited waiver of governmental immunity in these bus negligence cases does not permit a defendant to join a local school board as a third-party defendant in a court proceeding on claims of indemnity or contribution.

¶ 2 Although our State's case law permits parties to join the State and state agencies in these third-party proceedings, the applicable statutes and rules do not unambiguously permit joinder of local governmental entities. Accordingly, applying the principle that we must strictly construe these immunity provisions against waiver, we hold that these indemnification and contribution claims are permissible only in the Industrial Commission.

Facts and Procedural History

¶ 3 In June 2018, a Charlotte-Mecklenburg Schools bus dropped off an elementary school student at an afterschool childcare center operated by Defendants KinderCare Education, LLC, and KinderCare Learning Centers, LLC (collectively, "KinderCare"). As the child crossed the street to the KinderCare center, Defendant Charles Samuel struck the child with his SUV.

¶ 4 Plaintiff brought this negligence action on behalf of the injured child against a number of defendants, including KinderCare. Plaintiff did not assert claims against the school bus driver or the Charlotte-Mecklenburg Board of Education, who employed the bus driver. KinderCare later filed a third-party complaint against the Charlotte-Mecklenburg Board of Education and the bus driver, alleging claims for contribution and indemnity.

¶ 5 The school board moved to dismiss on the ground that the third-party claims were barred by governmental immunity. After a hearing, the trial court denied the motion. The school board timely appealed. Although the trial court's order is interlocutory, we possess appellate jurisdiction because the challenged order concerns an issue of governmental immunity. *Ballard v. Shelley*, 257 N.C. App. 561, 564, 811 S.E.2d 603, 605 (2018).

Analysis

¶ 6 "Counties and other municipalities, as governmental agencies, enjoy the protections of governmental immunity." *Ballard v. Shelley*, 257 N.C. App. 561, 564, 811 S.E.2d 603, 606 (2018). This governmental immunity applies to a local school board because it "is a governmental agency, and is therefore not liable in a tort or negligence action except to the extent that it has waived its governmental immunity pursuant to statutory authority." *Magana v. Charlotte-Mecklenburg Bd. of Educ.*, 183 N.C. App. 146, 148, 645 S.E.2d 91, 92 (2007).

¶ 7 We review claims of governmental immunity *de novo*. *Wray v. City of Greensboro*, 370 N.C. 41, 47, 802 S.E.2d 894, 898 (2017). Waivers of governmental immunity "may not be lightly inferred" and statutes purportedly waiving this immunity "must be strictly construed." *Guthrie v. N. Carolina State Ports Auth.*, 307 N.C. 522, 537–38, 299 S.E.2d 618, 627 (1983); *Magana*, 183 N.C. App. at 149, 645 S.E.2d at 92.

I. Waiver of immunity for indemnity/contribution claims

¶ 8 **[1]** We begin by examining KinderCare's argument that the school board may be joined as a third party in this court proceeding because a series of statutes waive the school board's governmental immunity for this type of third-party claim in the court system.

¶ 9 Importantly, the parties do not dispute that KinderCare's third-party claims could be asserted against the school board in the Industrial Commission under the Tort Claims Act. In other words, this dispute is not about whether governmental immunity totally bars these claims. Instead, the issue is whether the school board's statutory waiver of immunity is limited to claims in the Industrial Commission, or whether it is broader and applies to third-party claims asserted in court.

¶ 10 To understand KinderCare's argument, we must first examine the series of statutes and rules on which it is based. We begin with Rule 14 of the North Carolina Rules of Civil Procedure. Rule 14 "permits a defendant in the State courts to sue a person not a party to the action who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant." *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 329,

293 S.E.2d 182, 185 (1982). Subsection (c) of the rule provides that, notwithstanding the Tort Claims Act, the State of North Carolina and state agencies may be joined as third parties in tort actions:

> Rule applicable to State of North Carolina. – Notwithstanding the provisions of the Tort Claims Act, the State of North Carolina may be made a third party under subsection (a) or a third-party defendant under subsection (b) in any tort action. In such cases, the same rules governing liability and the limits of liability of the State and its agencies shall apply as is provided for in the Tort Claims Act.

N.C. Gen. Stat. § 1A-1, Rule 14(c).

¶ 11 Similarly, the Uniform Contribution Among Tort-Feasors Act states that the right to contribution "shall apply to tort claims against the State. However, in such cases, the same rules governing liability and the limits of liability shall apply to the State and its agencies as in cases heard before the Industrial Commission." N.C. Gen. Stat. § 1B-1(h).

¶ 12 Our Supreme Court has interpreted Rule 14 and N.C. Gen. Stat. § 1B-1(h) as a waiver of sovereign immunity that permits the State to "be joined as a third-party defendant, whether in an action for contribution or in an action for indemnification, in the State courts," subject to the limitations set out in those provisions. *Teachy*, 306 N.C. at 332, 293 S.E.2d at 187. In other words, *Teachy* interpreted these rules as expanding the limited waiver in the Tort Claims Act—one which requires the claims to be brought in the Industrial Commission—to permit third party claims in court proceedings.

¶ 13 Thus, as the parties acknowledge, the *State* and *state agencies* can be joined as third-party defendants in court proceedings for claims of contribution or indemnification under *Teachy*. The critical question in this appeal is whether a *local school board* likewise may be joined in these court proceedings.

¶ 14 It is well settled that a local school board is not "the State of North Carolina" for ordinary legal purposes. There is a difference between the State and state agencies—which possess sovereign immunity—and local government entities such as local school boards—which possess only governmental immunity, not sovereign immunity. *See*, *e.g.*, *State ex rel. Stein v. Kinston Charter Acad.*, 379 N.C. 560, 2021-NCSC-163, ¶¶ 22, 26 (distinguishing between state agencies and local governmental school entities).

¶ 15 But KinderCare points to a provision of the Tort Claims Act governing claims "against county and city boards of education for accidents involving school buses or school transportation service vehicles." N.C. Gen. Stat. § 143-300.1. In Section 143-300.1, the General Assembly provided that the liability of a local school board in school bus negligence cases "shall be the same in all respects" as a similar claim against the State Board of Education:

> Claims against county and city boards of education for accidents involving school buses or school transportation service vehicles.
>
> (a) The North Carolina Industrial Commission shall have jurisdiction to hear and determine tort claims against any county board of education or any city board of education [for school bus negligence] when:
>
> (1) The driver is an employee of the county or city administrative unit of which that board is the governing body, and the driver is paid or authorized to be paid by that administrative unit . . .
>
> . . . *The liability of such county or city board of education*, the defenses which may be asserted against such claim by such board, the amount of damages which may be awarded to the claimant, and the procedure for filing, hearing and determining such claim, the right of appeal from such determination, the effect of such appeal, and the procedure for taking, hearing and determining such appeal *shall be the same in all respects as is provided in this Article with respect to tort claims against the State Board of Education* except as hereinafter provided.

N.C. Gen. Stat. § 143-300.1 (emphasis added).

¶ 16 KinderCare relies on this statutory language to assert that "the process for determining a local school board's liability for negligent school-bus operation" must be "undertaken just as it would be if the local board were the State Board of Education." It follows, according to KinderCare, that for purposes of school bus negligence claims, a local school board is the State Board of Education. And, because the State Board of Education is a state agency, KinderCare further argues that the

local school board in this case can be joined as a third-party defendant under Rule 14 and N.C. Gen. Stat. § 1B-1(h) even though those provisions only apply to the State and state agencies.

¶ 17 The flaw in this argument is that the statute does not actually say that, in school bus negligence cases, a local school board is considered the State Board of Education. Instead, the statute explains that a local school board's *liability*, together with other aspects of the case such as the "amount of damages," the "procedure for filing, hearing and determining such claim," and "the right of appeal from such determination," shall be the same as provided "with respect to tort claims against the State Board of Education." N.C. Gen. Stat. § 143-300.1.

¶ 18 This language suggests that the General Assembly understood these local school boards are *not* the State Board of Education. But because these local entities now employ most bus drivers, the State chose to waive these local entities' governmental immunity, as it did with the State Board of Education's sovereign immunity, and to apply the same framework for suits against these local entities that apply if the school bus driver were employed by the State Board of Education. This waiver, though, is a limited one. Section 143-300.1 requires the claim to be brought in the Industrial Commission and does not (at least, on its own) permit a school bus negligence claim to be brought in the court system.

¶ 19 As noted above, in interpreting this provision, and the corresponding provisions of Rule 14 and N.C. Gen. Stat. § 1B-1(h), we are governed by the well-settled rule that waiver of governmental immunity "may not be lightly inferred" and that statutes purporting to waive this immunity "must be strictly construed." *Guthrie*, 307 N.C. at 537–38, 299 S.E.2d at 627; *Magana*, 183 N.C. App. at 149, 645 S.E.2d at 92. Applying this principle here, we hold that the language of N.C. Gen. Stat. § 143-300.1 does not unambiguously provide that local school boards are considered a state agency (that is, considered the State Board of Education) for purposes of third-party actions under Rule 14 and N.C. Gen. Stat. § 1B-1(h). Strictly construing Section 143-300.1, it is a limited waiver that permits these claims only in the Industrial Commission.

¶ 20 This result stems not only from the plain language of N.C. Gen. Stat. § 143-300.1, but also the fact that it was enacted by the General Assembly *before* Rule 14 and N.C. Gen. Stat. § 1B-1(h)—meaning the legislature could not have crafted this language with the intent to permit local school boards to be joined in third party actions under these later-enacted statutes. Moreover, when the legislature enacted Rule 14 and N.C. Gen. Stat. § 1B-1(h), it chose not to include school boards or

other local governmental entities in the language of these provisions, instead limiting them to the State and state agencies.

¶ 21 This result is reinforced by the Supreme Court's holding in *Teachy*. There, the Supreme Court acknowledged that "there exists in North Carolina a common law right to indemnification of a passively negligent tort-feasor from an actively negligent tort-feasor." *Teachy*, 306 N.C. at 332, 293 S.E.2d at 186–87. The Court further observed that the "right to indemnification arises out of a tort claim, the State's immunity to which was abrogated by the Tort Claims Act." *Id.* at 332, 293 S.E.2d at 187.

¶ 22 Thus, the Court held, because the State waived immunity for tort claims, it had also waived immunity for corresponding third-party indemnification and contribution claims. But, importantly, the Court went on to observe that the "only controversy is whether the State courts are *the proper forum* for such actions." *Id.* (emphasis added). The Court made this observation because, ordinarily, tort claims against the State can be brought *only* in the Industrial Commission.

¶ 23 Simply put, the ultimate holding in *Teachy*—that the third-party claims against the State could be asserted in the court system—is governed by two factors: (1) that the Tort Claims Act waives immunity for the State and state agencies for tort claims, and (2) that because of this waiver of immunity, the express reference to the State in the language of Rule 14 and N.C. Gen. Stat. § 1B-1(h) authorizes litigants to join the State and its agencies as third parties in claims of contribution or indemnity sounding in tort.

¶ 24 With school bus negligence claims against local school boards, by contrast, we have only the first of these two factors—the waiver of immunity under the Tort Claims Act. The second factor—an express statutory authorization to pursue the claim outside the Industrial Commission—does not exist. Without that statutory authorization, *Teachy* and its progeny do not permit these claims to be brought in any forum other than the Industrial Commission.

¶ 25 We acknowledge that our strict construction of these provisions means KinderCare must assert its contribution and indemnity claims against the school board in the Industrial Commission. That will create a second, parallel proceeding and consume judicial resources that could be spared if the school board were joined as a third party in this action. But this Court has no authority to expand the limited waiver of immunity enacted by the General Assembly, which confines these claims to the Industrial Commission. Strictly construing these provisions, as we must, local school boards are not "the State" for purposes of Rule 14 and

N.C. Gen. Stat. § 1B-1(h). If this result is not intended, then the General Assembly can amend N.C. Gen. Stat. § 143-300.1, or amend Rule 14 and N.C. Gen. Stat. § 1B-1(h), to clarify that these third-party claims against local school boards may be brought in a court proceeding as well.

¶ 26 In sum, we hold that the limited waiver of governmental immunity for school bus negligence claims against local school boards applies only to claims brought in the Industrial Commission. To the extent the trial court relied on this theory of waiver to deny the school board's motion to dismiss, the ruling was error.

II. Waiver of immunity through purchase of insurance

¶ 27 **[2]** KinderCare also argues that the school board waived its governmental immunity through the purchase of insurance.

¶ 28 Under N.C. Gen. Stat. § 115C-42, "local boards can elect to waive their governmental immunity from tort actions in North Carolina's superior courts by purchasing liability insurance." *Martinez v. Wake Cty. Bd. of Educ.*, 258 N.C. App. 466, 471, 813 S.E.2d 658, 662 (2018). The waiver of immunity through liability insurance applies only to the extent that the school board "is indemnified by the insurance contract from liability for the acts alleged." *Hinson v. City of Greensboro*, 232 N.C. App. 204, 210, 753 S.E.2d 822, 827 (2014). "If the liability policy, by its plain terms, does not provide coverage for the alleged acts, then the policy does not waive governmental immunity." *Ballard*, 257 N.C. App. at 565, 811 S.E.2d at 606. As with other claims of waiver, when this Court "examines policy provisions allegedly waiving governmental immunity, we must strictly construe the provision against waiver." *Id.*; *Magana*, 183 N.C. App. at 149, 645 S.E.2d at 92.

¶ 29 Here, the school board purchased an excess liability policy that applies above the school board's $1,000,000 self-insured retention. The policy expressly states that it provides no coverage unless the school board first becomes liable for, and pays, the full amount of the self-insured retention. The policy further states that "this policy is not intended by the Insured to waive its governmental immunity" and that "this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defenses are asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable."

¶ 30 As KinderCare acknowledges, this Court repeatedly has held that this type of excess liability coverage does not waive governmental immunity. *See, e.g.*, *Magana*, 183 N.C. App. at 148–49, 645 S.E.2d at 92–93;

Doe v. Charlotte-Mecklenburg Bd. of Educ., 222 N.C. App. 359, 731 S.E.2d 245 (2012). KinderCare asserted in its appellee's brief that our Supreme Court has never addressed this question and that this Court's precedent "are ripe for overturning as illogical, against public policy, and unfair to every family with public-school-aged children." At oral argument, KinderCare further explained that it sought to preserve this argument for further review in the Supreme Court.

¶ 31 We must follow *Magana* and its progeny as these cases are indistinguishable and controlling. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). Thus, to the extent that the trial court relied on this theory of waiver to deny the school board's motion to dismiss, the ruling was error. We acknowledge that KinderCare has preserved its challenge to this line of cases should it seek further appellate review on this issue.

¶ 32 Having concluded that there was no basis in the record before us to find a waiver of the school board's governmental immunity for these third-party claims in the court system, we reverse the trial court's order and remand for entry of an order granting the school board's motion to dismiss.

Conclusion

¶ 33 We reverse the trial court's order and remand for entry of an order granting the Charlotte-Mecklenburg Board of Education's motion to dismiss.

REVERSED AND REMANDED.

Judges CARPENTER and GRIFFIN concur.

DILLREE v. DILLREE

[287 N.C. App. 33, 2022-NCCOA-835]

VERONICA JANE DILLREE, BY AND THROUGH HER GENERAL GUARDIAN, EMILY TOBIAS, PLAINTIFF
v.
HARRY DILLREE, AND HIS ATTORNEY-IN-FACT, LISA WILCOX, DEFENDANTS

No. COA22-423

Filed 20 December 2022

Guardian and Ward—incompetent spouse—guardian's authority —to cause legal separation—equitable distribution claim

In a case involving an elderly husband and wife who were both experiencing cognitive decline, where the clerk of superior court adjudicated the wife as incompetent and appointed her a general guardian, who then separated the wife from her husband and placed her in an assisted living facility, the general guardian lacked the authority to cause a legal separation on behalf of the incompetent wife for the purpose of bringing an equitable distribution claim. Therefore, the trial court lacked subject matter jurisdiction to hear the equitable distribution claim and should have dismissed the action pursuant to Civil Procedure Rule 12(b)(1).

Appeal by Defendants-Appellants from orders entered 1 November 2021 by Judge Warren McSweeney in Moore County District Court. Heard in the Court of Appeals 15 November 2022.

Wilson, Reives, Silverman & Doran, PLLC, by Jonathan Silverman, for Plaintiff-Appellee.

Wyrick Robbins Yates & Ponton LLP, by Charles W. Clanton, K. Edward Greene, and Jessica B. Heffner, for Defendants-Appellants.

INMAN, Judge.

¶ 1 This appeal presents an issue not previously decided by this Court: whether a general guardian has the power to cause a legal separation on behalf of an incompetent spouse for the purpose of bringing an equitable distribution claim. Construing our General Statutes and applying precedent from the divorce context, we hold a guardian is not so authorized.

I. FACTUAL & PROCEDURAL BACKGROUND

¶ 2 The record tends to show the following:

¶ 3 Defendant-Appellant Harry Dillree and Jane Dillree, originally college sweethearts in the 1950s, eventually married in the 1980s, after both had children from previous marriages. For decades, the Dillrees had a loving marriage: they shared common interests, golfed and travelled together, and were affectionate toward each other. The couple owned and lived in a home in Pinehurst, North Carolina, and Mr. Dillree retired early so he could spend more time with his wife.

A. Ms. Dillrees' Mental Decline and Guardianship Proceedings

¶ 4 In 2014, Ms. Dillree was diagnosed with Alzheimer's disease. As her condition deteriorated, Mr. Dillree stepped away from his hobbies to care for her. According to Mr. Dillree's adult daughter, Defendant-Appellant Laura Wilcox, the Dillrees' relationship remained loving during this time and neither of them indicated they wanted to leave the marriage. Ms. Wilcox never saw verbal or physical abuse or any other indication the two were unhappy.

¶ 5 However, in January 2017, one of Ms. Dillree's adult daughters, Susan Allen, observed Mr. Dillree making disparaging comments to Ms. Dillree because of her condition. On 19 January 2017, Ms. Dillree's other adult daughter, Valerie Hunter, filed with the Moore County Clerk of Superior Court a petition to declare Ms. Dillree incompetent. The petition, accompanied by a letter from Ms. Dillree's treating physician, alleged that Mr. Dillree was incapable of providing his wife with proper care because he failed to administer her Alzheimer's medication, fed her once a day at most, and neglected to take her to medical appointments, in part because of his own cognitive decline. It further alleged that Mr. Dillree was verbally and physically abusive toward Ms. Dillree. The clerk appointed a guardian *ad litem* to investigate the allegations in the petition and to represent Ms. Dillree's interest in the proceeding. The guardian *ad litem* visited the Dillrees' home that afternoon, spoke with both Mr. and Ms. Dillree, and filed an affidavit with the clerk reporting her observations.

¶ 6 The next day, on the pretense of taking them out for lunch, Ms. Hunter drove the Dillrees to the Moore County Courthouse to appear for a hearing on the motion. The clerk adjudicated Ms. Dillree incompetent and appointed Plaintiff-Appellee Emily Tobias as the interim guardian of Ms. Dillree's person and estate. Ms. Tobias took custody of Ms. Dillree immediately following the hearing.

¶ 7 Ms. Dillree was initially hospitalized and then transferred to a care facility to ensure her well-being and to keep her physically separate from Mr. Dillree. Ms. Tobias determined the separation was necessary, in part, because Ms. Dillree did not have the capacity to consent to sex

with her husband but expressed that she enjoyed sexual activity with him. By the end of the month, Ms. Tobias had Ms. Dillree transferred to Penick Village, an assisted living facility with a memory care unit in Pinehurst. The Dillrees have lived apart since then.

¶ 8 In March 2017, the trial court appointed Ms. Tobias as her general guardian. The order found that Ms. Dillree's "medical and mental condition requires more care, attention, and safety control than her 80-year-old husband is capable of providing without professional assistance," that the Dillrees "have substantial financial assets, but it is not in the best interests of [Ms. Dillree] to dissolve all of her assets for division into a Guardianship account," and that the general guardian shall approve visitation schedules for Mr. Dillree with Ms. Dillree at Penick Village in accord with her "best interests" and "wishes." Ms. Dillree has not been restored to competency, and she has remained at Penick Village.

B. Mr. Dillree's Mental Decline

¶ 9 Mr. Dillree became distraught after his wife's removal from their marital home, and his mental condition deteriorated. Ms. Tobias allowed Mr. Dillree limited visits with his wife for one to two hours at a time despite his requests to spend the day with her. Mr. Dillree's behavior made Penick Village staff and visitors uncomfortable, and he threatened to harm staff if they did not let him see his wife. He was then prohibited from the facility. In April 2018, after Mr. Dillree told his neuropsychologist about a plan to kidnap his wife from Penick Village, he was involuntarily committed to a psychiatric facility and a petition was filed by Penick Village staff to have him declared incompetent.

¶ 10 In exchange for dismissal of the involuntary commitment and incompetency proceedings, Ms. Wilcox moved her father to a care facility in Libertyville, Illinois where she lives. Mr. Dillree has since then been diagnosed with Alzheimer's disease, and Ms. Wilcox was appointed his guardian to represent his interests in this litigation. Mr. Dillree, through counsel, requested that Ms. Dillree be moved to the same facility or area so that they could be together or near each other. Ms. Tobias did not respond. In January 2019, and again in November 2019, counsel for Mr. Dillree filed motions to alter the guardianship and to have Ms. Dillree moved to Illinois. The trial court denied each of those motions.

C. Disputes Regarding Mr. Dillree's Financial Support of Ms. Dillree

¶ 11 The parties disagree about Mr. Dillree's financial support of his wife and her care since she was removed from their home.

¶ 12 In the four years between January 2017 and January 2021, Ms. Tobias had received a total of $1,090,803 for Ms. Dillree's benefit from various sources, including approximately $7,000 per month in proceeds from a long-term care insurance policy.

¶ 13 Years before the Dillrees' cognitive decline, they had planned their estates together, with each being the beneficiary of the other's separate will and trust. But in July 2017, a few months after Ms. Dillree was deemed incompetent, Mr. Dillree amended the Declaration of the Harry D. Dillree Trust to remove Ms. Dillree as the beneficiary and Ms. Allen, her daughter, as a co-trustee.

¶ 14 In August 2020, while preparing tax returns, Ms. Tobias learned of a Morgan Stanley account jointly owned by Mr. and Ms. Dillree worth over four million dollars. She asked Mr. Dillree's attorney to evenly divide and distribute funds in the account. One month later, the parties agreed via e-mail that Mr. Dillree would pay $15,000 per month for Ms. Dillree's 24-hour care as well as guardian fees then accrued in the amount of $77,000, and Ms. Tobias would not pursue distribution of funds from the joint brokerage account.

¶ 15 In addition to the jointly titled Morgan Stanley account, Ms. Dillree and Mr. Dillree each hold separate brokerage accounts in trust in values exceeding $8,000,000. Because of Mr. and Ms. Dillree's incapacity, their respective children are now successor trustees of their trusts. Ms. Tobias contends the brokerage accounts held by these trusts constitute marital and divisible property subject to equitable distribution. Since entry of the orders appealed from, the trial court has allowed joinder of the Harry D. Dillree Trust and the Veronica Jane Dillree Trust to this action.

D. Equitable Distribution Proceeding

¶ 16 In January 2021, four years after Ms. Dillree was adjudicated incompetent and removed from the marital home, Ms. Tobias filed a complaint on behalf of Ms. Dillree against Mr. Dillree and his attorney-in-fact and daughter, Ms. Wilcox (collectively "Defendants-Appellants"), seeking, pursuant to N.C. Gen. Stat. §§ 50-20, 50-22 (2021), interim distribution of marital property, equitable distribution, and injunctive relief. The trial court entered a temporary restraining order ("TRO") to enjoin and restrain Defendants-Appellants from engaging in any conduct that would cause the disappearance, waste, or conversion of the Dillrees' joint Morgan Stanley brokerage account. One month later, the trial court entered orders continuing and modifying the TRO to allow Defendants-Appellants to spend funds necessary to care for Mr. Dillree.

¶ 17 In March 2021, Defendants-Appellants filed motions to dismiss the complaint pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6), for lack of subject matter jurisdiction, standing, and failure to state a claim upon which relief can be granted. Ms. Tobias, Ms. Allen, Ms. Wilcox, a staff member at Penick Village, and Nolan Hill, a close family friend, testified at the hearing on the motions. The trial court took the matter under advisement, and in November 2021 denied both motions to dismiss. Defendants-Appellants filed timely written notice of appeal.

II. ANALYSIS

A. Appellate Jurisdiction

¶ 18 "Interim equitable distribution orders are by nature preliminary to entry of a final equitable distribution judgment and thus are interlocutory." *Hunter v. Hunter*, 126 N.C. App. 705, 707, 486 S.E.2d 244, 245 (1997) (citing *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). Pursuant to our General Statutes, however, a party may appeal from an interlocutory order that affects a substantial right. N.C. Gen. Stat. § 7A-27(b)(3)a. (2021). "A substantial right is a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right." *Estate of Redden v. Redden*, 179 N.C. App. 113, 116, 632 S.E.2d 794, 797 (2006) (citation and quotation marks omitted). "[T]he right itself must be substantial and the deprivation of that substantial right must potentially work injury to [appellant] if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citation omitted). The appellant has the burden to establish that a substantial right will be affected unless the appellant is allowed immediate appeal from an interlocutory order. *McConnell v. McConnell*, 151 N.C. App. 622, 625, 566 S.E.2d 801, 804 (2002).

¶ 19 Defendants-Appellants acknowledge their appeal is interlocutory in nature, but they allege the trial court's restraining orders and injunction affect a substantial right and work injury to them in several ways: (1) the orders deprive them of their right to freely manage and use the property in the joint brokerage account; (2) Plaintiff-Appellee's other pending motions for joinder of both spouses' trusts and interim distribution would require Defendants-Appellants to pay and deplete assets in the fund; (3) the pending motion for attorney's fees would require a not insignificant payment; (4) payment of statutory guardian fees, up to five percent of assets, would constitute burdensome litigation costs; (5) the

orders create the possibility of inconsistent verdicts; and (6) the orders interfere with Mr. Dillree's constitutional right to marry.

¶ 20 In the alternative, Defendants-Appellants request we exercise our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure to reach the merits of this appeal. Rule 2 allows this Court to suspend its rules "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest[.]" N.C. R. App. P. 2 (2022). Plaintiff-Appellee does not object to this Court reaching the issues presented in this interlocutory appeal to promote judicial economy and ensure an expeditious resolution of this case. Plaintiff-Appellee also notes the trial court certified this matter as affecting a substantial right pursuant to Section 7A-27(b)(3)a., but that certification does not appear in the record on appeal.

¶ 21 Because, as explained below, Defendants-Appellants' challenge to the trial court's subject matter jurisdiction is meritorious and our decision will result in final resolution of this matter and is in the public interest, we invoke Rule 2 to hear this appeal.

B. 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction

¶ 22 Defendants-Appellants contend the trial court erred in denying their 12(b)(1) motion to dismiss for lack of subject matter jurisdiction because Mr. and Ms. Dillree never legally separated, and, if they did, Ms. Dillree's guardian did not have the authority to cause the separation. Our General Statutes and precedent support reversing the trial court's denial of Defendant's motion to dismiss on this ground.

1. Standard of Review

¶ 23 The plaintiff bears the burden of demonstrating subject matter jurisdiction. *Harper v. City of Asheville*, 160 N.C. App. 209, 217, 585 S.E.2d 240, 245 (2003). We review a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction *de novo*. *Morgan-McCoart v. Matchette*, 244 N.C. App. 643, 645, 781 S.E.2d 809, 811 (2016). On *de novo* review of a 12(b)(1) motion for lack of subject matter jurisdiction, this Court "considers the matter anew," including matters outside the pleadings, "and freely substitutes its own judgment for that of the trial court." *Bradford v. Bradford*, 279 N.C. App. 109, 2021-NCCOA-447, ¶ 9 (2021) (citation omitted). Statutory construction is also a question of law reviewed *de novo* on appeal. *Id.*

2. Equitable Distribution & Separation Law

¶ 24 A party may file an equitable distribution claim at any time after a husband and wife begin living separate and apart from each other. N.C. Gen. Stat. § 50-21(a) (2021). *See also id.* § 50-20(k) ("The rights of the parties to an equitable distribution of marital property and divisible property are a species of common ownership, the rights of respective parties vesting at the time of the parties' separation."). A trial court does not have subject matter jurisdiction over an equitable distribution claim before the date of separation. *See Standridge v. Standridge*, 259 N.C. App. 834, 836-38, 817 S.E.2d 463, 465-66 (2018) (vacating an order for equitable distribution because both parties raised a claim for equitable distribution prior to the date of separation).

¶ 25 The same test employed to determine the date of separation in divorce proceedings applies in the equitable distribution context. *Hall v. Hall*, 88 N.C. App. 297, 299, 363 S.E.2d 189, 191 (1987). Separation "begins on the date the parties physically separate *with the requisite intention that the separation remain permanent*[.]" *Bruce v. Bruce*, 79 N.C. App. 579, 582, 339 S.E.2d 855, 858 (1986) (emphasis added). Living separate and apart "implies the living apart for such a period in such a manner that those in the neighborhood may see that the husband and wife are not living together." *Dudley v. Dudley*, 225 N.C. 83, 86, 33 S.E.2d 489, 491 (1945) (quotation marks and citations omitted). "When the parties objectively have held themselves out as man and wife and the evidence is not conflicting, we need not consider the subjective intent of the parties." *Schultz v. Schultz*, 107 N.C. App. 366, 373, 420 S.E.2d 186, 190 (1992). However, if the evidence is conflicting, the trial court must consider subjective intent. *See id.* at 372, 420 S.E.2d at 190; *Byers v. Byers*, 222 N.C. 298, 304, 22 S.E.2d 902, 906 (1942) ("There must be at least an intention on the part of one of the parties to cease cohabitation, and this must be shown to have existed at the time alleged as the beginning of the separation period[.]").

a. At best, there is conflicting evidence of a public showing that the Dillrees were legally separated.

¶ 26 Defendants-Appellants contend Finding of Fact 35, that "there has been a public showing of separation between the Dillrees" based on specified events occurring after Ms. Dillree was adjudicated incompetent, is unsupported by the evidence and amounts to legal error. Although Ms. Tobias had custody of Ms. Dillree's person as her guardian as of 20 January 2017 and ultimately removed Ms. Dillree from the marital

home, Defendants-Appellants argue this physical separation did not establish a legal separation for the purposes of equitable distribution.

¶ 27 Though neither party addressed the nature of Finding 35 in their appellate briefs, at oral argument, counsel for Defendants-Appellants contended the determination that the parties held themselves out as separated is a conclusion of law, based on a summary of findings in the trial court's order. To the extent the trial court applied legal principles to the facts, its determination is a mixed question of law and fact, fully reviewable on appeal. *Hinton v. Hinton*, 250 N.C. App. 340, 347, 792 S.E.2d 202, 206 (2016).

¶ 28 Our Court has concluded that living under different roofs and ceasing sexual relations do not, absent other evidence, constitute a separation. *Lin v. Lin*, 108 N.C. App. 772, 775-76, 425 S.E.2d 9, 10-11 (1993). Further, there is no separation "when the association between [spouses] has been of such character as to induce others who observe them to regard them as living together in the ordinary acceptation of that descriptive phrase." *In re Estate of Adamee*, 291 N.C. 386, 392, 230 S.E.2d 541, 546 (1976).

¶ 29 The trial court's order appointing Ms. Tobias as general guardian provided visitation for Mr. Dillree with Ms. Dillree at Penick Village in accordance with her "best interests" and "wishes." Ms. Tobias testified that she physically separated the Dillrees because Mr. Dillree could no longer provide proper care for Ms. Dillree and Ms. Dillree was unable to consent to sex as an incompetent person. No evidence in the record reflects that, prior to commencing this action, Ms. Tobias indicated the Dillrees were legally separated. Nolan Hill, a close friend of the couple, testified that Mr. Dillree became upset and sad when he could not visit his wife, and Mr. Hill did not understand the Dillrees to be legally separated.

¶ 30 Plaintiff-Appellee cites several other of the trial court's findings to support the conclusion that there has been a public showing of the Dillrees' separation. She enumerates the following examples listed in Finding 35: (1) Mr. Dillree changed his estate plans; (2) counsel negotiated Ms. Dillree's financial support; and (3) the "proceedings between Mr. Dillree and those acting on Ms. Dillree's behalf" were adversarial in nature. It is not apparent from the record that any member of the public, including those in the Dillrees' community, knew this information, much less that either Mr. or Ms. Dillree brought it to anyone else's attention. Plaintiff-Appellee has cited no legal authority to support the trial court's determination based on the evidence of record.

¶ 31 Because, at best, there is conflicting evidence about whether the Dillrees objectively held themselves out as legally separated while they were physically separated as a result of their guardianships and medical conditions, we must consider the subjective intent of the parties. *See Schultz*, 107 N.C. App. at 372, 420 S.E.2d at 190.

b. A guardian may not substitute subjective intent for an incompetent spouse and cause a separation for purposes of equitable distribution.

¶ 32 Defendants-Appellants argue: (1) there is no evidence Ms. Dillree formed the subjective intent to permanently separate from Mr. Dillree before she was adjudicated incompetent; and (2) Ms. Tobias, as Ms. Dillree's guardian, does not have the statutory authority to cause a marital separation for the purposes of equitable distribution on behalf of Ms. Dillree. Construing our General Statutes together and applying our precedent, we agree.

¶ 33 Ms. Tobias testified that she physically separated the Dillrees because Mr. Dillree could no longer provide proper care for Ms. Dillree and because she could not consent to sexual activity: "[Mr. Dillree]'s behavior was such that we needed to keep her safe. . . Issues developed from the interim hearing where she was unable to give consent and she didn't recognize him, and so we had to keep him physically separate from her as far as a marital sexual nature." Staff from Penick Village echoed Ms. Tobias' concern. Ms. Tobias further testified Ms. Dillree had "no capacity to participate in a decision" about her placement. In March 2017, two months after Ms. Dillree was removed from the marital home, the trial court found that her "current medical and mental condition requires more care, attention, and safety control than her 80-year-old husband is capable of providing without professional assistance." The guardian *ad litem* report detailed Ms. Dillree's cognitive difficulties. Because Ms. Dillree was deemed incompetent, she could not form the requisite subjective intent to separate from Mr. Dillree for purposes of equitable distribution. *See Moody v. Moody*, 253 N.C. 752, 757, 117 S.E.2d 724, 727 (1961) (holding a husband was not capable of forming the requisite intent to separate for a divorce based on mutual consent because he was "not then rational" after a serious brain injury); *Hall*, 88 N.C. App. at 299, 363 S.E.2d at 191.

¶ 34 It is well settled that general guardians are prohibited from maintaining an action for *divorce* on behalf of an incompetent person based on a year-long separation. *Freeman v. Freeman*, 34 N.C. App. 301, 304, 237 S.E.2d 857, 859 (1977) ("The majority rule that a suit for divorce is

so personal and volitional that it cannot be maintained by a guardian on behalf of an incompetent is sound."). Chapter 50 of our General Statutes has incorporated this general prohibition: "a guardian appointed in accordance with Chapter 35A of the General Statutes . . . may commence, defend, maintain, arbitrate, mediate, or settle any action authorized by this Chapter on behalf of an incompetent spouse. However, only a competent spouse may commence an action for absolute divorce." N.C. Gen. Stat. § 50-22 (2021). Subsection 50-21(a) of Chapter 50 sets forth the general procedures for equitable distribution: "At any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed and adjudicated[.]" However, neither this statute nor any other expressly grants a guardian the power to cause a separation for the purposes of equitable distribution or divorce.

¶ 35 Chapter 35A of our General Statutes provides for incompetency and guardianship. A general guardian is "[a] guardian of both the estate and the person." N.C. Gen. Stat. § 35A-1202(7) (2021). A guardian of the person is "appointed solely for the purpose of performing duties relating to the care, custody, and control of a ward." *Id.* § 35A-1202(10). Section 35A-1241 confers the guardian of the person the power to take custody of the person of the ward and to establish the place of abode of the ward. § 35A-1241(a)(1)-(2). A guardian of the estate, by contrast, is "appointed solely for the purpose of managing the property, estate, and business affairs of a ward." § 35A-1202(9). A general guardian or guardian of the estate has the "power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest," to include: taking possession of the ward's estate; maintaining any appropriate action to recover possession of the ward's property; completing performance of contracts; and continuing any business venture entered into by the ward. § 35A-1251(1),(3),(4),(15).

¶ 36 Interpreting Chapters 50 and 35A to discern a guardian's authority relative to domestic relations law, we are guided by several canons of statutory construction. First, and perhaps most instructive, "[w]hen multiple statutes address a single matter or subject, they must be construed together, *in pari materia*, to determine the legislature's intent. Statutes *in pari materia* must be harmonized, to give effect, if possible, to all provisions without destroying the meaning of the statutes involved." *DTH Media Corp. v. Folt*, 374 N.C. 292, 300, 841 S.E.2d 251, 257 (2020) (citations and quotation marks omitted). While separate chapters

of our General Statutes, Sections 50-22 and 35A-1241, 35A-1251 address the same subject matter—the authority of a guardian to act on behalf of an incompetent person—and Section 50-22 explicitly cross-references Chapter 35A. Interpreting Section 50-22 to prohibit a guardian from causing a separation for purposes of equitable distribution does not otherwise limit the guardian's powers under Sections 35A-1241 and 35A-1251 to maintain an action to recover possession of the ward's property. The Legislature did not provide a mechanism in Chapter 50 for a guardian to seek the incompetent person's assets.

¶ 37 Second, our Legislature is presumed to have full knowledge of prior and existing law. *Polaroid Corp. v. Offerman*, 349 N.C. 290, 303, 507 S.E.2d 284, 294 (1998) *abrogated on other grounds by Lenox, Inc. v. Tolson*, 353 N.C. 659, 548 S.E.2d 513 (2001). Relevant here, at the time it enacted Section 50-22 and the prohibition of a guardian filing for absolute divorce on behalf of an incompetent person, in particular, we presume the General Assembly was aware of our precedents that: (1) an incompetent spouse is not capable of forming the requisite intent to separate for a divorce, *Moody*, 253 N.C. at 757, 117 S.E.2d at 727; (2) the separation requirement for divorce is the same for purposes of equitable distribution, *Hall*, 88 N.C. App. at 299, 363 S.E.2d at 191; (3) separation begins at the time of physical separation where one party has formed the intent for the separation to be permanent, *Bruce*, 79 N.C. App. at 582, 339 S.E.2d at 858; and (4) the trial court does not have subject matter jurisdiction over a claim for equitable distribution if it is filed prior to the date of separation, *Standridge*, 259 N.C. App. at 836, 817 S.E.2d at 465.

¶ 38 Next, "words must be given their common and ordinary meaning, nothing else appearing." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202-03 (1974) (citation omitted). Subsection 35A-1251(3) authorizes a guardian "to *maintain* any appropriate action or proceeding to recover possession of any of the ward's property, to determine the title thereto, or to recover damages for any injury done to any of the ward's property[.]" (Emphasis added). Chapter 35A does not define the term "maintain" in its definitions section. *See* § 35A-1202 (providing definitions for the Subchapter). Merriam-Webster's Dictionary defines "maintain" as "to keep in an *existing state*," "to preserve," or "to continue." We interpret "maintain" in the context of Subsection 35A-1251(3), alongside Section 50-22, to authorize a guardian to continue an action for equitable distribution only when the claim already exists at the time the guardianship is formed, not after. In other words, pursuant to Section 50-22, a guardian would be authorized to bring an action for equitable distribution on behalf of an incompetent person who had been

legally separated prior to incompetency. And a general guardian would be authorized to bring suit for equitable distribution where the other, presumably competent, spouse caused the physical separation with the requisite intent, because subject matter jurisdiction existed prior to the guardianship, so long as the guardian does not allege intent on behalf of the incompetent spouse.

¶ 39 A fourth canon of statutory construction helps us determine whether Chapter 35A or 50 ultimately governs the issue before us. "When two statutes deal with the same subject matter the statute which is addressed to a specific aspect of the subject matter takes precedence over the statute which is general in application unless the General Assembly intended to make the general statute controlling." *In re Greene*, 297 N.C. 305, 310, 255 S.E.2d 142, 146 (1979). Because Section 50-22 applies specifically to divorce and alimony "action[s] on behalf of an incompetent," it "takes precedence over" the general powers granted to guardians under Sections 35A-1251 and 35A-1241. *See id.*

¶ 40 The legislative history of Chapter 50 further bolsters our reading of the statutes that a general guardian lacks the authority to cause marital separation on behalf of an incompetent spouse. Section 50-22 was amended in 2009 to: (1) expand the persons authorized to maintain an action authorized by Chapter 50 to attorneys-in-fact, any guardian appointed under Chapter 35A, and guardians *ad litem;* and (2) remove a provision that the trial court may order equitable distribution on behalf of an incompetent spouse without entering a decree of divorce after the parties have been separated for one year. 2009 N.C. Sess. Laws 366, ch. 224, § 1.

¶ 41 Our interpretation is also consistent with precedent holding that a guardian may not substitute his or her intent for that of an incompetent person as to the disposition of property. *See, e.g.*, *Grant v. Banks*, 270 N.C. 473, 485, 155 S.E.2d 87, 95-96 (1967) (holding a guardian or trustee is without power to rewrite or alter provisions of the will of his ward, such as by commingling funds, so as to destroy the testamentary intent of the testator); *Tighe v. Michal*, 41 N.C. App. 15, 22, 254 S.E.2d 538, 544 (1979) (holding a person ceases to be able to form testamentary intent when a person becomes mentally incompetent).

¶ 42 Plaintiff-Appellee contends that the Legislature could have limited a guardian's ability to pursue equitable distribution or divorce from bed and board pursuant to N.C. Gen. Stat. § 50-7 (2021) on behalf of an incompetent spouse in the same manner it did for absolute divorce pursuant to Section 50-22, had it so intended. But Section 50-7 does not

require the intent necessary for absolute divorce and equitable distribution. As a policy matter, she argues adopting Defendants-Appellants' interpretation of the statutes would "render a [g]eneral [g]uardian's right to maintain an equitable distribution action meaningless to protect her ward's estate [under Chapter 35A] if the guardian could not determine whether her ward was separated." Plaintiff-Appellee relies on an unpublished decision from this Court, *In re: Estate of Lisk*, 250 N.C. App. 507, 793 S.E.2d 286 (2016) (unpublished), in which the *trial court* determined a guardian of the person had legal authority to, and did, cause a marital separation on behalf of an incompetent spouse, to further justify Ms. Tobias' action in this case. But the guardian's authority to cause the separation was not challenged on appeal. *Lisk* is neither binding nor persuasive.

¶ 43 As with divorce, the decision to legally separate from one's spouse for equitable distribution, is deeply "personal and volitional," *Freeman*, 34 N.C. App. at 304, 237 S.E.2d at 859. Based on the plain language of the divorce and guardian provisions and considering the legislative history of Section 50-22, we hold a general guardian lacks the authority to cause a legal separation on behalf of an incompetent spouse for purposes of equitable distribution. Because the guardian could not create a marital separation, Mr. and Ms. Dillree were not legally separated, so the trial court was without subject matter jurisdiction to hear the equitable distribution claim. *See Standridge*, 259 N.C. App. at 836, 817 S.E.2d at 465 ("Where a claim for equitable distribution is filed prior to the date of separation, the trial court does not have subject matter jurisdiction over the claim.") (citing *Atkinson v. Atkinson*, 132 N.C. App. 82, 90, 510 S.E.2d 178, 182 (1999) (J. Greene, dissenting)); N.C. Gen. Stat. § 1A-1, Rule 12(h)(3) (2021) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); § 50-21(a); § 50-20(k). Thus, we reverse the trial court's denial of Defendants-Appellants' motion to dismiss for lack of subject matter jurisdiction and remand for the trial court to dismiss Plaintiff-Appellee's complaint with prejudice.

¶ 44 Our decision shall not be construed to limit, in any way, a guardian's statutory authority to *physically* separate an incompetent person from their spouse where it is in the incompetent person's best interest. *See* § 35A-1241(a)(1)-(2). And, our decision notwithstanding, general guardians are not altogether foreclosed from accessing marital assets on behalf of an incompetent spouse. For example, a guardian may petition the trial court for a constructive trust. *See generally Bowen v. Darden*, 241 N.C. 11, 13-14, 84 S.E.2d 289, 292 (1954) ("[A] constructive trust ordinarily

arises out of the existence of fraud, actual or presumptive—usually involving the violation of a confidential or fiduciary relation—in view of which equity transfers the beneficial title to some person other than the holder of the legal title."). A guardian may also seek a charging order for the distribution of payments for the incompetent person's health care. *See*, *e.g.*, *McVicker v. McVicker*, 234 N.C. App. 478, 762 S.E.2d 533 (2014) (unpublished) (concluding "a charging order was one, but not the sole, remedy available to plaintiff to enforce the distributive award"). Finally, in the event of spousal abuse, a guardian unequivocally has the authority to take custody of the incompetent person, as Ms. Tobias has done in this case. *See* § 35A-1241(a)(1)-(2).

III. CONCLUSION

¶ 45 Based on the foregoing reasons, we reverse the trial court's orders denying Defendants-Appellants' motions to dismiss because the trial court was without subject matter jurisdiction.

REVERSED.

Judges ARROWOOD and CARPENTER concur.

MATTHEW DUFFY, IN HIS INDIVIDUAL CAPACITY AND, ALTERNATIVELY, IN HIS CAPACITY AS OFFICER AND SHAREHOLDER OF CAMPSIGHT STRATEGIC COMMUNICATIONS, INC., PLAINTIFF

v.

JON CAMP AND AMY SCHUSSLER A/K/A AMY JOHNSON, IN THEIR INDIVIDUAL CAPACITIES, AND CAMPSIGHT STRATEGIES, LLC, DEFENDANTS

CAMPSIGHT STRATEGIC COMMUNICATIONS, INC., NOMINAL DEFENDANT

No. COA22-185

Filed 20 December 2022

1. Corporations—claims asserted by shareholder and officer—direct versus derivative claims

In a business dispute in which plaintiff, who was one of three shareholders in a corporation and who also served as an officer, filed a complaint against the other two shareholders asserting multiple claims both as an individual and derivatively—including breach of fiduciary duty, common-law trademark infringement and conversion—plaintiff was not entitled to assert his claims in his individual name because shareholders in general may not bring

individual actions unless either of two exceptions apply, neither one of which applied in this case. Where the appellate court determined that the trial court should not have granted summary judgment to defendants on all claims, the trial court was directed on remand to consider plaintiff's surviving claims as a derivative suit.

2. Corporations—breach of fiduciary duty—by chief executive officer—evidence of resignation—genuine issue of material fact

In a business dispute in which plaintiff (one of three shareholders of a corporation), asserted that defendant (one of the other shareholders who also served as the corporation's chief executive officer) had breached his fiduciary duties of loyalty and due care to the corporation, the trial court improperly granted summary judgment to defendant. There were genuine issues of material fact regarding the timing and nature of defendant's severance from the corporation, which would determine when his fiduciary duties as an officer ceased and thus whether his activities in contacting existing clients about moving to a newly formed business constituted a breach of those duties.

3. Corporations—breach of fiduciary duty—by majority shareholders—no domination and control over minority shareholder—no fiduciary relationship

In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that he was a minority shareholder and that defendants (the other two shareholders) owed him a fiduciary duty based on their majority shareholder status but that they breached that duty by forming a new business entity similarly named to the old one and signing new contracts with existing clients, the trial court properly granted summary judgment to defendants because plaintiff failed to demonstrate that defendants were controlling shareholders who exerted domination and influence over him.

4. Corporations—common-law trademark infringement—new business—similar name—likelihood of confusion

In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that defendants (the other two shareholders) committed common law trademark infringement by leaving the corporation, named CampSight Strategic Communications, Inc., and forming a new entity with the name CampSight Strategies, LLC, the trial court properly granted summary judgment in favor of defendants where plaintiff presented no evidence that defendants' actions likely produced actual confusion among customers.

5. Conversion—corporate assets—contracts, orders, payments —not tangible

In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that defendants (the other two shareholders) converted corporate assets when they left the existing corporation to form a new business entity and diverted contracts, orders, and payments to the new business, as well as contacting existing customers about moving over to the new business, the trial court properly granted summary judgment to defendants because the property listed by plaintiff consisted of business opportunities, expectancy interests, and contract rights that were not subject to a conversion claim. To the extent plaintiff's allegations about payments and billing could be considered to involve tangible assets, plaintiff failed to identify specific sums in order to support his claim.

6. Unjust Enrichment—business dispute between shareholders—diversion of business to new entity—genuine issue of material fact

In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that defendants (the other two shareholders) were liable to him for unjust enrichment—on the basis that they instructed clients to stop making payments or billing the corporation for completed work, they altered contracts to divert business to their newly formed entity, and they instructed clients to cancel existing purchase orders with the corporation—the trial court improperly granted summary judgment to defendants. Where defendants denied plaintiff's allegations in their responses to his interrogatories, a genuine issue of material fact existed regarding plaintiff's claim.

7. Unfair Trade Practices—business dispute between shareholders—diversion of business to new entity—summary judgment improper

In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that defendants (the other two shareholders) were liable to him for unfair and deceptive trade practices pursuant to N.C.G.S. § 75-1.1—on the basis that they diverted business to their newly formed business entity, including directing clients to stop making payments to the corporation for completed work—the trial court improperly granted summary judgment to defendants. Plaintiff sufficiently alleged that defendants interrupted the commercial relationship between the corporation and its clients, an activity which was "in or affecting commerce" for purposes of the statute.

8. Conspiracy—civil—business dispute between shareholders—diversion of business to new entity—based on viable underlying claims

In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that defendants (the other two shareholders) committed civil conspiracy—by planning to leave the corporation, setting up a new business entity, and moving corporate assets to the new business, thereby excluding plaintiff and his interests as a shareholder—the trial court improperly granted summary judgment to defendants. Where the conspiracy claim was premised on viable underlying claims (breach of fiduciary duty, unjust enrichment, and unfair and deceptive trade practices) that the appellate court determined had been improperly dismissed by the trial court, summary judgment was not appropriate.

Appeal by plaintiff from order entered 18 November 2021 by Judge Vince M. Rozier, Jr., in Wake County Superior Court. Heard in the Court of Appeals 23 August 2022.

Miller Monroe & Plyler, PLLC, by Robert B. Rader, III, and Jason A. Miller, for plaintiff-appellant.

Stubbs & Perdue, P.A., by Laurie B. Biggs, for defendants-appellees Jon Camp, Amy Johnson, and CampSight Strategies, LLC.

ZACHARY, Judge.

¶ 1 Plaintiff Matthew Duffy appeals from the trial court's order denying his motion for summary judgment and granting summary judgment in favor of Defendants Jon Camp, Amy Johnson, and CampSight Strategies, LLC. After careful review, we affirm in part, reverse in part, and remand.

I. Background

¶ 2 In January 2018, Duffy, Camp, and Johnson formed CampSight Strategic Communications, Inc. ("the Corporation"), with each owning an equal share of the Corporation. Although the shareholders never executed corporate bylaws or a shareholder agreement, Camp acted as the Corporation's CEO and Duffy acted as its COO, "as reflected in the [Corporation]'s filings with the North Carolina Secretary of State." The shareholders also decided that Duffy and Camp would equally split the net profits of the Corporation; although Johnson had an ownership stake, she was not employed by and did not receive wages from the Corporation.

¶ 3 About six months to a year after the Corporation was formed, Camp concluded that Duffy "was not performing his job duties." On 27 February 2020, Camp met with Duffy and informed him that Camp no longer wished to be in business with him. Following this meeting, Camp sent Duffy an email restating "the options [Camp] proposed":

> 1. You stay on as a CampSight employee. I either pay you a $40k/yr salary with incentives or a flat $50k/yr salary. Incentives would be a percentage of business brought in. No healthcare, unfortunately. I agree to take the full tax hit for 2020.
>
> 2. You fire up Duffy Media and I hire you on as a contractor. We keep working together on projects, with pay.. [sic] TBD. Could be hourly. Could be we split projects 50/50 like we, [sic] been doing. Could be you wind up lead in the job and pay me. Here, too, I'll take the 2020 tax hit.
>
> 3. We go our separate ways. You either just leave me CampSight or we dissolve it and wish each other well.

¶ 4 From that day on, Duffy was no longer involved in the day-to-day operations of the Corporation. Communication between the parties ceased for a few weeks; Camp asserts that during this time he nonetheless "repeatedly requested" that Duffy share his "intentions and interests regarding continuing work for the [Corporation] or for direction on the [Corporation]'s future." On 19 March 2020, Duffy's counsel sent Camp and Johnson a letter addressing their actions and "requesting an amicable resolution of Duffy's ownership interest in" the Corporation.

¶ 5 The next day, Camp began notifying the Corporation's clients that he "decided to start working under a new LLC[,]" and once he obtained an IRS Employer Identification Number for CampSight Strategies, LLC ("the New Entity"), he began sharing it with the clients as well. Camp also informed the clients that they would need to execute new contracts with the New Entity, and in response to one client's question about canceling purchase orders from the Corporation, Camp replied: "That would be great. Thanks." Camp additionally instructed the client that the "end date of the previous contract" was 1 March 2020. Camp and Johnson officially formed the New Entity on 2 April 2020.

¶ 6 On 29 April 2020, Duffy demanded in writing that the Corporation, Camp, and Johnson take immediate action against the New Entity to

recover damages for violations of the Corporation's rights and to seek any necessary emergency injunctive relief. *See* N.C. Gen. Stat. § 55-7-42 (2021) (requiring that a shareholder make a written demand upon a corporation as a prerequisite to the filing of a derivative proceeding). Defendants rejected Duffy's demand by letter dated 4 June 2020.

¶ 7 On 21 August 2020, Duffy filed a verified complaint, alleging: (1) breach of fiduciary duty (by Camp as to the Corporation, and by Camp and Johnson "as majority shareholders" as to Duffy "as minority shareholder"); (2) common-law tradename infringement; (3) conversion of corporate assets and opportunities; (4) constructive trust and accounting; (5) civil conspiracy; (6) unjust enrichment; and (7) unfair and deceptive trade practices.[1] Duffy also requested injunctive relief with regard to the tradename infringement claim, and asserted a *Meiselman* claim[2] seeking involuntary dissolution of the Corporation or a mandatory buyout of his minority ownership interest. In the event that the trial court determined that one or more of the previous claims could not be asserted by Duffy in his individual capacity, in the alternative, Duffy asserted all claims derivatively.

¶ 8 On 26 October 2020, Defendants filed their unverified answer, denying Duffy's claims and raising affirmative defenses together with counterclaims for: (1) conversion; (2) breach of fiduciary duty; (3) constructive trust and accounting; and (4) unjust enrichment. On 4 January 2021, Duffy filed his unverified reply to Defendants' counterclaims, generally denying the allegations and setting forth various affirmative defenses.

¶ 9 After conducting discovery, Defendants filed a motion for summary judgment along with a memorandum of law in support of their motion on 1 October 2021. On 14 October 2021, Duffy filed a motion for summary judgment, followed by a memorandum of law in support of his motion. The parties' motions for summary judgment came on for hearing in Wake County Superior Court on 17 November 2021. The next day,

---

1. We note that, although Duffy requested that the trial court impose a constructive trust and order an accounting as a separate claim in his complaint, "a constructive trust is a remedy, not a cause of action, and is merely a procedural device by which a court of equity may rectify certain wrongs." *Musselwhite v. Cheshire*, 266 N.C. App. 166, 181, 831 S.E.2d 367, 378 (2019) (citation and internal quotation marks omitted). Similarly, "[a]n accounting is an equitable remedy sometimes pled in claims of breach of fiduciary duty." *Burgess v. Burgess*, 205 N.C. App. 325, 333, 698 S.E.2d 666, 672 (2010). Accordingly, there is no separate claim for a "constructive trust and accounting" to address; nonetheless, on remand the trial court may elect to impose a constructive trust and order an accounting in the exercise of its equitable power.

2. *Meiselman v. Meiselman*, 309 N.C. 279, 300–01, 307 S.E.2d 551, 564 (1983).

the trial court entered an order granting Defendants' motion, denying Duffy's motion, and dismissing all claims against Defendants with prejudice. Defendants' counterclaims remained pending.

¶ 10 The trial court certified its order as a final judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), determining that "there is no just reason for delay." Duffy timely filed notice of appeal.

II. Appellate Jurisdiction

¶ 11 "Not every judgment or order of the Superior Court is appealable . . . . Indeed, an appeal can be taken only from such judgments and orders as are designated by the statute regulating the right of appeal." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). This Court principally entertains appeals from final judgments. *See* N.C. Gen. Stat. § 7A-27(b)(1)–(2). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey*, 231 N.C. at 361–62, 57 S.E.2d at 381. By contrast, "[a]n interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Id.* at 362, 57 S.E.2d at 381. Because an interlocutory order is not yet final, with few exceptions, "no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge[.]" *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974).

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

¶ 13 "Certification under Rule 54(b) permits an interlocutory appeal from orders that are final as to a specific portion of the case, but which do not dispose of all claims as to all parties." *Duncan v. Duncan*, 366 N.C. 544, 545, 742 S.E.2d 799, 801 (2013). Rule 54(b) provides, in relevant part:

> When more than one claim for relief is presented in an action, . . . or when multiple parties are involved,

> the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes.

N.C. Gen. Stat. § 1A-1, Rule 54(b).

¶ 14 Thus, proper certification of an interlocutory order pursuant to Rule 54(b) requires:

> (1) that the case involve multiple parties or multiple claims; (2) that the challenged order finally resolve at least one claim against at least one party; (3) that the trial court certify that there is no just reason for delaying an appeal of the order; and (4) that the challenged order itself contain this certification.

Asher v. Huneycutt, 2022-NCCOA-517, ¶ 14.

¶ 15 In the instant case, the trial court's order granting summary judgment in favor of Defendants is interlocutory, as it resolved all claims against Defendants but did not dispose of Defendants' counterclaims against Duffy. *See Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. Nevertheless, the trial court's Rule 54(b) certification is effective to vest jurisdiction in this Court: at the time of the order, the case involved multiple parties with multiple claims and counterclaims; the order on appeal finally resolved all claims against Defendants; the trial court certified that "there is no just reason for delay"; and Duffy appealed from the order containing this certification. *See Asher*, ¶ 14.

¶ 16 Accordingly, this Court has jurisdiction over Duffy's appeal, and we proceed to the merits of his arguments.

III. Discussion

¶ 17 On appeal, Duffy argues that the trial court erred by granting Defendants' motion for summary judgment and denying his motion for summary judgment. For the following reasons, we reverse the trial court's entry of summary judgment in favor of Defendants with respect to Duffy's derivative claims of: (1) Camp's breach of fiduciary duty to the Corporation; (2) unjust enrichment; (3) unfair and deceptive trade practices; and (4) civil conspiracy. We affirm the trial court's grant of summary judgment on the remaining claims and remand to the trial court for further proceedings.

A. Standard of Review

¶ 18 The "standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and internal quotation marks omitted).

> When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial.

Id. (citation and internal quotation marks omitted).

B. Analysis

¶ 19 Duffy contends that the trial court erred by granting Defendants' motion for summary judgment and denying his motion for summary judgment. We address the trial court's ruling as to each of Duffy's claims in turn.

1. Direct or Derivative Claims

¶ 20 **[1]** As an initial matter, we note that Duffy has "asserted, in the alternative," each claim "of the [c]omplaint on the [Corporation]'s behalf against Camp, Johnson, and the New Entity"; that is, Duffy has alternatively asserted derivative claims.[3] "A derivative proceeding is a civil action brought by a shareholder in the right of a corporation, while an individual action is one a shareholder brings to enforce a right which belongs to him personally." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 395, 537 S.E.2d 248, 253 (2000) (citation and internal quotation marks omitted), *disc. review denied*, 353 N.C. 378, 547 S.E.2d 14 (2001); *accord* N.C. Gen. Stat. § 55-7-40.1. "It is not always easy to distinguish between a right of the corporation and a right belonging to an individual shareholder. The same wrongful conduct can give rise to both derivative and direct individual claims, for which courts have sometimes allowed shareholders to maintain derivative and direct

3. It is undisputed that Duffy has "complied with all applicable statutory requirements and conditions precedent" and "has proper standing to assert derivative claims on behalf of" the Corporation. *See* N.C. Gen. Stat. §§ 55-7-40 to -42.

actions simultaneously." *Norman*, 140 N.C. App. at 395, 537 S.E.2d at 253 (citation and internal quotation marks omitted).

¶ 21 "As a general rule, shareholders have no right to bring actions in their individual names to enforce causes of action accruing to the corporation, but must assert such claims derivatively . . . ." *Id.* (citation and internal quotation marks omitted); *see also Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 612, 821 S.E.2d 729, 734 (2018) ("[S]hareholders generally may not bring individual actions to recover what they consider their share of the damages suffered by a corporation." (citation omitted)), *reh'g denied*, 372 N.C. 53, 822 S.E.2d 648 (2019). "There are two exceptions to this general rule: shareholders may bring an individual action when (1) the wrongdoer owed them a special duty or (2) they suffered a personal injury distinct from the injury sustained by the corporation itself." *Corwin*, 371 N.C. at 612, 821 S.E.2d at 734 (citation and internal quotation marks omitted).

¶ 22 "The first exception applies when the wrongdoer owes a duty that is personal" to the plaintiff as a shareholder, "separate and distinct from the duty" that the defendant owes to the corporation, "such as a fiduciary duty owed to the stockholders." *Id.* (citation and internal quotation marks omitted). For the reasons discussed in Section III.B.2.b below, Defendants Camp and Johnson, as majority shareholders, did not owe a special fiduciary duty to Duffy as minority shareholder. Accordingly, Duffy may not avail himself of this exception to the general rule.

¶ 23 "The second . . . exception applies when a plaintiff suffers an injury that is distinct from the injury suffered by the corporation itself." *Id.* at 612, 821 S.E.2d at 735 (citation and internal quotation marks omitted). As discussed below, this exception does not apply to any of the claims for which summary judgment was inappropriate. Therefore, on remand, the trial court is to consider Duffy's surviving claims as comprising a derivative action, rather than an individual suit.

2. Fiduciary Duty

¶ 24 Duffy first argues that Camp and Johnson breached their fiduciary duties: Camp breached the fiduciary duty that he owed to the Corporation, and Camp and Johnson, as "majority shareholders," breached the fiduciary duty that they owed to Duffy, as the "minority shareholder." The legal and factual issues at play in each of these two claims differ.

a. Camp's Fiduciary Duty to the Corporation

¶ 25 **[2]** There is no dispute that Camp, as the Corporation's CEO, owed fiduciary duties of loyalty and due care to the Corporation. Duffy contends

that "Camp breached his fiduciary duties of loyalty and due care when he contacted existing clients of the [Corporation] . . . to divert certain business of the [Corporation] to the benefit of himself and the New Entity." Notably, however, Duffy "alleges no breach of fiduciary duty owed to him personally in his capacity as a shareholder" and consequently, "the claim is entirely derivative[.]" *Allen v. Ferrera*, 141 N.C. App. 284, 292, 540 S.E.2d 761, 767 (2000).

¶ 26 Under the North Carolina Business Corporation Act, a corporate officer with discretionary authority must discharge his duties:

> (1) In good faith;
>
> (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (3) In a manner he reasonably believes to be in the best interests of the corporation.

N.C. Gen. Stat. § 55-8-42(a); *see also Seraph Garrison, LLC v. Garrison*, 247 N.C. App. 115, 119, 787 S.E.2d 398, 403 (2016). "[C]orporate directors and officers act in a fiduciary capacity in the sense that they owe the corporation the duties of loyalty and due care." *Seraph Garrison*, 247 N.C. App. at 119, 787 S.E.2d at 403. Section 55-8-42(a)(3) "codifies the requirement that an officer always discharge the responsibilities of the office with undivided loyalty to the corporation. The corporate law duty of loyalty also imposes an affirmative obligation: a fiduciary must strive to advance the best interests of the corporation." *Id.* at 120, 787 S.E.2d at 403–04 (citation and internal quotation marks omitted).

¶ 27 Camp raises several arguments in his defense; principally, he argues that his fiduciary duty to the Corporation ceased prior to the conduct of which Duffy complains. Camp offers two points in time at which he contends that his fiduciary duty to the Corporation ceased: (1) when he resigned as an officer of the Corporation as a result of the 27 February 2020 meeting; and (2) when Duffy retained counsel. However, when viewed in the light most favorable to Duffy under our standard of review, *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576, genuine issues of material fact exist as to whether and when Camp's fiduciary duty to the Corporation ceased.

¶ 28 As to the meeting, Camp asserts that "[i]t is undisputed that on February 27, 2020, Camp met with Duffy and told him he no longer wished to be in business with him, and that three options for moving forward with the business were presented, including closing down"

the Corporation. Duffy maintains that this establishes merely that "Camp sought to terminate his relationship with Duffy" rather than the Corporation. As Duffy explains, "[t]he meeting pertained to Camp's proposed termination of Duffy as an owner of the [Corporation], not Camp's termination of himself as an officer of the [Corporation]." Moreover, Duffy notes that, in their brief on appeal, Defendants assert only that "the undisputed facts show that Camp sought to terminate his relationship *with Duffy*[.]" (Emphasis added). Indeed, in their reply to Duffy's interrogatories, Defendants explained:

> Defendant Camp spoke with [Duffy] on February [27], 2020 about options for moving forward with the [Corporation] – either closing down the [Corporation] and they would go their separate ways or changing the structure of the [Corporation], whereby [Duffy] would be a salaried employee at a rate of $50,000.00. [Duffy] never responded. As a result, [Defendant] Camp established a new company to continue earning a living.

¶ 29 The options that Camp presented to Duffy suggest that Camp would remain in some official capacity with the Corporation, rather than evidence Camp's resignation:

> 1. You stay on as a CampSight employee. I either pay you a $40k/yr salary with incentives or a flat $50k/yr salary. Incentives would be a percentage of business brought in. No healthcare, unfortunately. I agree to take the full tax hit for 2020.
>
> 2. You fire up Duffy Media and I hire you on as a contractor. We keep working together on projects, with pay.. [sic] TBD. Could be hourly. Could be we split projects 50/50 like we, [sic] been doing. Could be you wind up lead in the job and pay me. Here, too, I'll take the 2020 tax hit.
>
> 3. We go our separate ways. You either just leave me CampSight or we dissolve it and wish each other well.

¶ 30 On appeal, Camp asserts that he "believed he had terminated his duties with the [Corporation] by resigning when Duffy failed to respond to him." However, as Duffy correctly observes, "the only mention of any resignation in the record is a single allegation" found in Defendants'

unverified answer, in which Defendants allege that Camp intended his cessation of "all activities on behalf of" the Corporation to be "his own resignation from" the Corporation. This assertion is not otherwise supported by the record on appeal. To the extent that the trial court relied on this allegation, raised only in Defendants' unverified pleading, this was improper. *See 21st Mtge. Corp. v. Douglas Home Ctr., Inc.*, 187 N.C. App. 770, 775, 655 S.E.2d 423, 425–26 (2007) (reversing and remanding the trial court's grant of the defendants' motion for summary judgment "based on the [defendants'] unverified pleading").

¶ 31 Thus, viewed in the light most favorable to Duffy, *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576, the record does not contain sufficient evidence to definitively establish that Camp had resigned his position as an officer of the Corporation, thereby terminating any fiduciary duty to the Corporation.

¶ 32 Camp further alleges that his fiduciary duty to the Corporation ceased when Duffy hired counsel after the 27 February meeting. Defendants cite *Piedmont Institute of Pain Management v. Staton Foundation*, 157 N.C. App. 577, 581 S.E.2d 68, *disc. review denied*, 357 N.C. 507, 587 S.E.2d 672 (2003), for the proposition that it is "well established that fiduciary relationships usually terminate when a party hires counsel because of the adversarial relationship that exists between the parties." In *Piedmont*, this Court affirmed summary judgment where the nonmovant-beneficiaries did "not present[ ] any evidence creating a genuine issue of material of fact with respect to the absence of the adversarial nature of their relationship with [the movant-trustee] during the relevant time[.]" 157 N.C. App. at 583–84, 581 S.E.2d at 73.

¶ 33 The North Carolina Business Court has distinguished *Piedmont* and other non-corporate cases that similarly determined that a fiduciary duty was terminated when one party hired counsel.[4] In *RCJJ, LLC v. RCWIL Enterprises, LLC*, the Business Court noted that the adversarial-relationship reasoning of those non-corporate cases does not readily extend to cases involving fiduciary relationships arising in the "corporate fiduciary setting":

---

4. Although "[t]he North Carolina Business Court is a special Superior Court, the decisions of which have no precedential value in North Carolina[,]" *Bottom v. Bailey*, 238 N.C. App. 202, 212, 767 S.E.2d 883, 889 (2014) (citation and internal quotation marks omitted), this Court has recognized that "the Business Court exists solely to hear complex business cases, and as such [we] are respectful of its opinions" to the extent that they may prove to be persuasive authority, *Goldstein v. Am. Steel Span, Inc.*, 181 N.C. App. 534, 536 n.2, 640 S.E.2d 740, 742 n.2 (2007).

> [W]hile a trustee owes a fiduciary duty directly to the beneficiary, and spouses owe a duty to one another, a manager owes a fiduciary duty not to the other member or members with whom he may be in an adverse negotiation, but to the LLC. This makes the reasoning behind those cases relieving a trustee or spouse of fiduciary duties when engaged in adversarial negotiations an uneasy fit in the corporate fiduciary setting.

2016 NCBC 44, ¶ 37, 2016 WL 3850403, at *9 (N.C. Super. June 20, 2016). The *RCJJ* Court's examples of spousal and trustee-beneficiary fiduciary duties are consonant with our Supreme Court's recognition that the "characteristics of a fiduciary relationship are readily apparent, for example, in the relationship of spouses . . . and trustee and beneficiary[.]" *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014) (citations omitted).

¶ 34 Furthermore, in *Piedmont* (but unlike the case at bar), there was no dispute that the movant-appellee "had repudiated his fiduciary duties." 157 N.C. App. at 583, 581 S.E.2d at 73. In *RCJJ*, the Business Court found it "significant . . . that the cases holding that a fiduciary duty can be extinguished in an adversarial setting . . . did not hold that the fiduciary was relieved of his duties merely because the parties had retained attorneys or were negotiating over a separation of interests." 2016 NCBC 44, ¶ 38, 2016 WL 3850403, at *10. The Business Court thus focused on the nature of the relationship between the parties as a more critical factor than the mere retention of counsel in analyzing the termination of a corporate fiduciary's duties:

> Allowing a manager of a limited liability company to be relieved of his fiduciary duties upon entering into adverse negotiations for the sale of his interests in the company would be inconsistent with the nature of those duties. In addition, the appellate decisions do not support the conclusion that the commencement of adversarial negotiations and retention of attorneys relieves a fiduciary of his duties *as a matter of law*. Rather, *there must be a change in the nature of the relationship between the parties* that establishes that *the parties no longer are in a relationship of confidence and trust*, and that fiduciary duties have been repudiated.

Id. ¶ 40, 2016 WL 3850403, at *10 (emphases added).

¶ 35 We find this analysis persuasive in the corporate setting presented in the instant case. Accordingly, Camp's reliance on *Piedmont* in support of his contention that his fiduciary duty ceased *as a matter of law* upon Duffy's retention of counsel is misplaced.

¶ 36 Our appellate courts do not appear to have yet addressed this question; the Business Court in *RCJJ* described it as an issue of first impression. *Id.* ¶ 35, 2016 WL 3850403, at *8. Nonetheless, we need not resolve this question because here, the issue of whether Camp's fiduciary duty to the Corporation ceased—and, if so, when—presents a mixed question of law and fact, for which summary judgment would only be appropriate "if there are no genuine issues of material fact." *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 81, 712 S.E.2d 221, 226 (2011).

¶ 37 In the case at bar, there *are* genuine issues of material fact: if, and when, there was "a change in the nature of the relationship between the parties that establishe[d] that the parties no longer [we]re in a relationship of confidence and trust," and whether "fiduciary duties ha[d] been repudiated." *RCJJ*, 2016 NCBC 44, ¶ 40, 2016 WL 3850403, at *10.

¶ 38 Further, assuming, *arguendo*, that an adversarial relationship existed at the time of the 19 March letter from Duffy's counsel, Duffy observes that the adversarial relationship would have been between Duffy, Camp, and Johnson as shareholders, and not between Camp and the Corporation. Duffy retained counsel to represent him, in his individual capacity, rather than to represent the interests of the Corporation. Therefore, Duffy's retention of counsel to resolve the issue of compensation for his ownership stake in the Corporation cannot, in and of itself, support Defendants' adversarial-relationship argument.

¶ 39 In sum, summary judgment is inappropriate on Duffy's derivative claim that Camp breached his fiduciary duty to the Corporation because Camp has not shown that his fiduciary duty ceased as a matter of law either (1) as a result of the 27 February meeting, or (2) upon Duffy's retention of counsel. Accordingly, the trial court's order must be reversed as to this derivative claim.

b. Camp's and Johnson's Fiduciary Duty to Duffy

¶ 40 **[3]** Duffy also argues that Camp and Johnson, as the "majority shareholders of the closely[ ]held" Corporation, owed a fiduciary duty to Duffy, as the minority shareholder. We disagree.

¶ 41 It is axiomatic that "[f]or a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). Our appellate

courts have defined a fiduciary relationship "as one in which there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence[.]" *Id.* (citation and internal quotation marks omitted). This definition "extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and *resulting domination and influence on the other*." *Id.* at 651, 548 S.E.2d at 707–08 (citation omitted).

¶ 42 "North Carolina recognizes two types of fiduciary relationships: *de jure*, or those imposed by operation of law, and *de facto*, or those arising from the particular facts and circumstances constituting and surrounding the relationship." *Hager v. Smithfield E. Health Holdings, LLC*, 264 N.C. App. 350, 355, 826 S.E.2d 567, 571, *disc. review denied*, 373 N.C. 253, 835 S.E.2d 446 (2019). There is no allegation of a *de jure* fiduciary relationship between Duffy, Camp, and Johnson, so we must determine whether "the particular facts and circumstances constituting and surrounding the[ir] relationship" as the three shareholders of the Corporation gave rise to a *de facto* fiduciary relationship. *Id.*

¶ 43 "As a general rule, shareholders do not owe a fiduciary duty to each other or to the corporation. However[,] this rule is not without exception. In North Carolina, it is well established that a controlling shareholder owes a fiduciary duty to minority shareholders." *Freese v. Smith*, 110 N.C. App. 28, 37, 428 S.E.2d 841, 847 (1993) (citation omitted). "Once a minority shareholder challenges the actions of the majority, the burden shifts to the majority to establish the fairness and good faith of its actions." *Id.*

¶ 44 The circumstances under which multiple minority shareholders combine into majority or controlling shareholders for the purposes of this *de facto* fiduciary duty rule is something of an open question in North Carolina. *See Corwin*, 371 N.C. at 616, 821 S.E.2d at 737 ("This Court has never held that a *minority* stockholder owes fiduciary duties to other stockholders, but it has also never held that a minority stockholder *cannot* owe fiduciary duties to other stockholders."). The determinative issue is what facts are necessary to elevate the simple majority vote of the minority shareholders in a closely held corporation into a situation of "*domination and influence*" over the outvoted minority shareholder. *Dalton*, 353 N.C. at 651, 548 S.E.2d at 708 (citation omitted).

¶ 45 Duffy relies in part on *Norman* for the proposition that "majority shareholders in a close corporation owe a 'special duty' and obligation of good faith to minority shareholders[,]" and hence that Camp and Johnson

owed a fiduciary duty to Duffy. 140 N.C. App. at 407, 537 S.E.2d at 260. *Norman* is inapposite to our analysis of this issue for several reasons.

¶ 46 First, *Norman* arrived at this Court not on a motion for summary judgment—as in the present case—but rather upon the trial court's grant of the defendants' motion to dismiss. *Id.* at 394, 537 S.E.2d at 252. As regards the issue of whether Duffy has shown a genuine issue of material fact concerning whether Camp and Johnson combined into controlling shareholders, this diminishes *Norman*'s value as precedent because "the standard under which orders granting or denying summary judgment motions and the standard under which orders granting or denying dismissal motions are reviewed are not the same[.]" *Prouse v. Bituminous Cas. Corp.*, 222 N.C. App. 111, 116, 730 S.E.2d 239, 242 (2012), *appeal withdrawn*, 366 N.C. 571, 737 S.E.2d 381 (2013). "[T]he essential difference between the manner in which the two types of issues are reviewed on appeal stems from the scope of the factual information that a reviewing court is entitled to consider . . . ." *Id.* Unlike a motion to dismiss, which tests the sufficiency of the facts as pleaded by the nonmovant against the applicable law, "the 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." *Id.* at 116, 730 S.E.2d at 242–43 (citation and internal quotation marks omitted); *see also Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972) ("[T]he real purpose of summary judgment is to go beyond or to pierce the pleadings and determine whether there is a genuine issue of material fact.").

¶ 47 Additionally, the specific facts presented in *Norman* weaken its precedential value as concerns this issue. The closely held corporation in *Norman* was "a family[-]owned poultry business[,]" and the plaintiffs and individual defendants were all "related to founder Nash Johnson by either blood or marriage." *Norman*, 140 N.C. App. at 393, 537 S.E.2d at 252. This is significant because, as the *Norman* Court explained, "[w]hen the close relationships between the shareholders in a 'family' or closely held corporation tragically break down, the majority shareholders are obviously in a position to exclude the minority shareholders from management decisions, leaving the minority shareholders with few remedies." *Id.* at 404, 537 S.E.2d at 258. As the *Norman* Court observed, N.C. Gen. Stat. § 55-14-30 "allows shareholders to seek dissolution of a corporation and liquidation of its assets when corporate assets are being misapplied or wasted," but "such relief is *not available to shareholders who wish to retain their interests in a family business*[.]" *Id.* at 405, 537 S.E.2d at 259 (emphasis added) (citation and internal quotation marks omitted).

¶ 48 The relationship between the shareholders of the Corporation in the present case is emphatically dissimilar to the relationships in the "family business" described in *Norman*. Further unlike the instant case, the minority-shareholder-plaintiffs in *Norman* neither invited the majority-shareholder-defendants to purchase their shares, nor did the plaintiffs seek involuntary dissolution of the family business, facts which informed this Court's decision to recognize their individual claims for breach of fiduciary duty. *Id*. Here, Duffy invited Camp and Johnson to negotiate "an amicable resolution of Duffy's ownership interest in" the Corporation, and he asserted a *Meiselman* claim in his complaint, seeking either involuntary dissolution of the Corporation or a mandatory buyout of his minority ownership interest. We thus conclude that *Norman* is inapplicable to the issue before us.

¶ 49 Duffy also relies on *Loy v. Lorm Corp.*, in which this Court reversed the trial court's entry of summary judgment and allowed a minority shareholder to pursue relief against three fellow shareholders who together held a majority interest, served as corporate "directors and officers[,]" were "firmly in control" of the corporation, and had common interests stemming from their related, jointly owned business. 52 N.C. App. 428, 431, 278 S.E.2d 897, 900 (1981). However, the three minority-shareholder-defendants in *Loy* effectively conceded that they collectively owed the minority-shareholder-plaintiff a fiduciary duty as a group of majority shareholders, and instead challenged on appeal the plaintiff's showing that they breached that duty. *Id*. at 432–33, 278 S.E.2d at 901. This Court therefore did not have the opportunity in *Loy* to address the circumstances under which a group of minority shareholders may effectively combine into a controlling majority, thereby giving rise to a *de facto* fiduciary duty to the remaining minority.

¶ 50 Although our appellate courts have not squarely addressed the standard that a plaintiff must meet in a case such as this, in which two minority shareholders are alleged to have effectively become a controlling majority such that a *de facto* fiduciary duty arises, we note that the Business Court has repeatedly "refused to impose a fiduciary duty on *minority* members that exercise their voting rights by joining together to outvote a third member." *Vanguard Pai Lung, LLC v. Moody*, 2019 NCBC 38, ¶ 40, 2019 WL 2526461, at *7 (N.C. Super. June 19, 2019) (collecting cases). "These decisions underscore the obvious difference between backing a majority coalition and exercising majority control as of right. In the latter situation, it is the imbalance of power inherent in the relationship between majority and minority members that gives rise to a fiduciary duty." *Id*. ¶ 41, 2019 WL 2526461, at *7.

¶ 51 We find this reasoning persuasive and applicable to the case at bar. As Defendants argued in their memorandum of law in support of their motion for summary judgment: "The reason for this rule is simple — any shareholder on the losing side of any issue or vote could simply claim the prevailing shareholders were collectively 'majority shareholders' negating any and every corporate action taken by a majority."

¶ 52 Thus, it appears that the few cases in which a group of minority shareholders were treated collectively as controlling or majority shareholders can be distinguished from the present case, as Duffy has not shown that Camp and Johnson assumed a position of "domination and influence" over him as the minority shareholder. *Dalton*, 353 N.C. at 651, 548 S.E.2d at 708 (emphasis omitted) (citation omitted). Duffy supports his allegation of Camp and Johnson's control by reference to Defendants' interrogatory responses, indicating that they "decided that the manner in which the [Corporation] was operated would need to change" and "made a final decision that they could no longer partner with" Duffy. However, a single decision is insufficient to elevate this from a simple case of one minority shareholder being outvoted by two other minority shareholders—albeit in a vote of great importance to the complaining minority—into a situation of such "domination and influence" over the minority shareholder (Duffy) by the controlling shareholders (Camp and Johnson), *id.* (emphasis omitted) (citation omitted), that "the imbalance of power inherent in the relationship between majority and minority" gave rise to a fiduciary duty prior to that vote, *Vanguard Pai Lung*, 2019 NCBC 38, ¶ 41, 2019 WL 2526461, at *7.

¶ 53 Defendants also make persuasive arguments concerning the extent to which Camp and Johnson may be treated as individuals in analyzing their supposed fiduciary duties to Duffy as minority shareholder. With regard to Johnson, Defendants argue that the trial court's order should be affirmed in that "Duffy put forward no evidence that Johnson ever acted as a controlling shareholder." As Defendants observe, at deposition, Duffy "repeatedly acknowledged that Johnson had no responsibilities on behalf of the [Corporation], held no title, 'wasn't active', and did not participate in financial decisions." (Citations omitted). Duffy explained during his deposition that he and Camp generally served as the "ultimate decision-makers" for the Corporation, with Johnson "[o]ccasionally" participating "in these discussions, but not usually." It is evident that Johnson did not exercise control over, much less dominate, the Corporation or its affairs. Summary judgment therefore was proper as to Johnson on this claim.

¶ 54 With regard to Camp's fiduciary duty to Duffy, Defendants assert that Camp and Duffy "made all of the decisions about the [Corporation]

together" and Duffy's "testimony that they made decisions together shows they each had an equal amount of control over" the Corporation. Defendants also observe that "Duffy has not pointed to any evidence of Camp acting on behalf of the [Corporation] without Duffy's involvement, a lack of control over [the Corporation's] affairs, or domination by Camp over the [Corporation]'s decision making." Accordingly, summary judgment was also appropriate as to Camp on this claim.

¶ 55 In short, summary judgment was improper on Duffy's claim that Camp breached his fiduciary duty to the Corporation, but was proper on the controlling shareholder theory advanced by Duffy against Camp and Johnson collectively and individually.

3. Tradename Infringement

¶ 56 **[4]** We next address Duffy's claim of common-law tradename infringement. Our Supreme Court has explained that "[t]he fundamental question in cases of trade-mark or unfair competition . . . is whether the public is being misled and deceived[.]" *Carolina Aniline & Extract Co. v. Ray*, 221 N.C. 269, 273, 20 S.E.2d 59, 61 (1942) (citation omitted). If so, and if the cause is that "a defendant is in effect taking . . . advantage of the [goodwill] and business reputation that a complainant has built up through service or advertising or in any manner regarded as lawful and proper[,]" then the plaintiff may pursue a claim for common-law tradename infringement. *Id.* at 273, 20 S.E.2d at 61–62 (citation omitted).

¶ 57 "A common law claim for trademark infringement under North Carolina law is analyzed under essentially the same standards as a federal Lanham Act claim regarding an unregistered trademark." *Johnson & Morris PLLC v. Abdelbaky & Boes, PLLC*, 2016 NCBC 76, ¶ 13, 2016 WL 5923662, at *4 (N.C. Super. Oct. 11, 2016). "A trademark includes any word, name, symbol, or device used by an individual to identify and distinguish his goods from those manufactured or sold by others and to indicate the source of the goods." *George & Co. LLC v. Imagination Entm't Ltd.*, 575 F.3d 383, 392 (4th Cir. 2009) (citation and internal quotation marks omitted). "To establish trademark infringement, a plaintiff must prove that it owns a valid and protectable mark, and that the defendant's use of a reproduction, counterfeit, copy, or colorable imitation of that mark creates a likelihood of confusion." *Id.* at 393 (citation and internal quotation marks omitted). In the present case, the latter requirement concerning the likelihood of confusion is dispositive.

¶ 58 "A likelihood of confusion exists if the defendant's actual practice is likely to produce confusion in the minds of consumers about the origin of the goods or services in question." *Id.* (citation and internal quotation

marks omitted). To assess whether such confusion exists, appellate courts "look to how the two parties actually use their marks in the marketplace to determine whether the defendant's use is likely to cause confusion." *Id.* (citation omitted). The United States Court of Appeals for the Fourth Circuit examines nine factors to determine likelihood-of-confusion in trademark infringement cases:

> (1) the strength or distinctiveness of the plaintiff's mark as actually used in the marketplace; (2) the similarity of the two marks to consumers; (3) the similarity of the goods or services that the marks identify; (4) the similarity of the facilities used by the markholders; (5) the similarity of advertising used by the markholders; (6) the defendant's intent; (7) actual confusion; (8) the quality of the defendant's product; and (9) the sophistication of the consuming public.

Id. (citations omitted). However, "[n]ot all of these factors are of equal importance, nor are they always relevant in any given case." *Id.* (citations and internal quotation marks omitted).

¶ 59 Of these factors, "evidence of actual confusion is often paramount in the likelihood of confusion analysis." *Id.* (citations and internal quotation marks omitted). "Actual confusion can be demonstrated by both anecdotal and survey evidence. Evidence of only a small number of instances of actual confusion may be dismissed as *de minimis*." *Id.* at 398 (citations omitted).

¶ 60 In the instant case, Duffy has offered no evidence that Defendants' actual practice likely produced confusion among customers. Duffy explains that "the mark at issue is 'Campsight' and a variation of the word 'strategy,' specifically 'Campsight Strategic' as used by the [Corporation] and 'CampSight Strategies' as used by the New Entity, Camp, and Johnson." However, as Defendants note, Duffy "presented no survey or other expert testimony" and "presented no anecdotal evidence of third parties expressing confusion." Duffy makes arguments regarding Defendants' "brazen intent . . . to dupe the certain clients of the [Corporation] into thinking the New Entity was an extension and continuation of" the Corporation and offers examples of the "deceptive language and means" by which Defendants allegedly did this, yet offers scant evidence that Defendants' actual practice likely produced confusion among customers.

¶ 61 Duffy references several emails that Defendants sent to the Corporation's clients in order to illustrate "Camp's deceptive

description of the New Entity and its relationship to" the Corporation but, as Defendants note, "these emails only show that Camp was using the name CampSight, and not the third party's response to the use of the tradename." Defendants explain that the emails illustrate that, rather than using deceptive means, "Camp was not attempting to mislead anyone about his relationship with Duffy or the [Corporation] going forward."

¶ 62 Most conclusively for our analysis, however, is Duffy's deposition testimony, which belies his attempt to show actual confusion:

> Q Okay, and have you talked with anyone since the February meeting about the use of the name CampSight or CampSight Strategies?
>
> A Aside from my counsel, no.
>
> Q Okay, have you talked with clients about CampSight Strategies or the CampSight name?
>
> A No.
>
> Q Have you talked with anyone in the industry or potential clients about the use of the name CampSight or CampSight Strategies?
>
> A Not that I recall, no.
>
> Q Have you used, you personally or you through a new corporation, used either of those names since the February meeting?
>
> A No.
>
> Q Okay, has anyone reached out to you and said, oh, I saw this – I saw [Defendant Camp]'s new company CampSight Strategies, and I thought that was CampSight Strategic Communications?
>
> A Not that I recall, no.

¶ 63 Duffy's testimony that he was unaware of any actual confusion undercuts this "most important factor" of the likelihood-of-confusion analysis. *Id.* Further, there is no significant evidence of customer confusion, or the likelihood of confusion, sufficient to overcome this shortcoming as a matter of law. Accordingly, the trial court's grant of summary judgment on Duffy's tradename infringement claim is affirmed.

¶ 64 Duffy also sought injunctive relief in connection with his tradename infringement claim. "The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (citation omitted). "The first stage of the inquiry is . . . whether [the] plaintiff is able to show likelihood of success on the merits." *Id.* at 401, 302 S.E.2d at 760. As we have already discussed, Duffy is unable to show that he is likely to succeed on the merits of his tradename infringement claim. Accordingly, the trial court properly denied Duffy's request for a preliminary injunction, and the trial court's order is affirmed as to this issue as well.

4. Conversion

¶ 65 **[5]** Additionally, Duffy advances a claim for conversion of corporate assets and opportunities. "[T]he tort of conversion is well defined as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012) (citation and internal quotation marks omitted). "There are, in effect, two essential elements of a conversion claim: ownership in the plaintiff and wrongful possession or conversion by the defendant." *Id.* Importantly, "only goods and personal property are properly the subjects of a claim for conversion. . . . [I]ntangible interests such as business opportunities and expectancy interests" are not "subject to a conversion claim." *Norman*, 140 N.C. App. at 414, 537 S.E.2d at 264.

¶ 66 Duffy contends that "existing contracts, orders, payments, and assets of the [Corporation] were diverted to and for the benefit of the New Entity, Camp, and Johnson." Defendants respond that these assets are either "business opportunities and expectancy interests," which are not subject to conversion, *id.*, or "contract rights," which are similarly intangible, *Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co.*, 141 N.C. App. 569, 583, 541 S.E.2d 157, 166 (2000), *disc. review denied*, 353 N.C. 370, 547 S.E.2d 433 (2001), and therefore not subject to conversion. To the extent that the property that Duffy alleges was misappropriated includes business opportunities, expectancy interests, and contract rights, summary judgment was appropriate.

¶ 67 We also note that Duffy specifically alleges that "Camp contacted existing clients of the [Corporation], providing them with the New Entity's financial information, and instruct[ed] said clients to refrain from certain payments and billing to the [Corporation] until the New

Entity's information [wa]s in place." Duffy further contends that "Camp instruct[ed] that certain completed work be placed under new contracts benefiting the New Entity" and "that existing purchase orders of the [Corporation] be cance[l]ed." To the extent that these allegations could be construed—in the light most favorable to Duffy, *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576—as concerning assets beyond ordinary "business opportunities and expectancy interests[,]" *Norman*, 140 N.C. App. at 414, 537 S.E.2d at 264, and instead concerning actual, tangible funds diverted from the Corporation to the New Entity, summary judgment was still appropriate as Duffy has failed to identify specific sums that were allegedly converted, *see Variety Wholesalers*, 365 N.C. at 528, 723 S.E.2d at 750 ("[T]he general rule is that money may be the subject of an action for conversion only when it is capable of being identified and described." (citation and internal quotation marks omitted)); *see also*, *e.g.*, *Wake Cty. v. Hotels.com*, *LP*, 235 N.C. App. 633, 653, 762 S.E.2d 477, 490 (affirming the trial court's dismissal of Wake County's conversion claim over "a category of monies allegedly owed" where the county failed to establish "the funds' specific source, specific amount, and specific destination"), *disc. review denied*, 367 N.C. 799, ___ S.E.2d ___ (2014).

¶ 68 For these reasons, in sum, Duffy has not demonstrated that Defendants wrongfully possessed any Corporation assets that "are properly the subjects of a claim for conversion." *Norman*, 140 N.C. App. at 414, 537 S.E.2d at 264. Thus, the trial court's grant of summary judgment on Duffy's conversion claim is affirmed.

5. Unjust Enrichment

¶ 69 **[6]** Duffy next asserts a claim of unjust enrichment against Defendants. To make out a claim for unjust enrichment, the claimant "must allege that property or benefits were conferred on a defendant under circumstances which give rise to a legal or equitable obligation on the part of the defendant to account for the benefits received, but that the defendant has failed to make restitution for the property or benefits." *Id.* at 417, 537 S.E.2d at 266.

¶ 70 In *Norman*, this Court reversed the trial court's grant of a motion to dismiss and revived an unjust enrichment claim where the plaintiff "allege[d] that the defendants breached their fiduciary duties and received benefits for which they have not paid, thereby injuring the [c]ompany and depriving it of such benefits." *Id.* This aptly describes Duffy's claims in the present case: Duffy argues that "existing business belonging legitimately to the [Corporation] was diverted to the benefit and profit

of Camp, Johnson, and the New Entity." Duffy reiterates his allegations that Camp instructed clients to refrain from making certain payments or billing the Corporation for completed work, altered existing contracts with the Corporation to divert business to the New Entity, and instructed clients to cancel existing purchase orders with the Corporation.

¶ 71 In addition to those allegations on behalf of the Corporation, Duffy contends that in his individual capacity he "was entitled to share proportionately in such business and assets but was prevented." However, as stated above, "shareholders generally may not bring individual actions to recover what they consider their share of the damages suffered by a corporation." *Corwin*, 371 N.C. at 612, 821 S.E.2d at 734 (citation omitted). Here, Duffy's asserted direct injury—his proportionate share of the "business and assets" allegedly diverted to the New Entity—is merely his share of the injury suffered by the Corporation. Duffy has thus failed to demonstrate that he "suffer[ed] an injury that is distinct from the injury suffered by the corporation itself" as to this claim, *id.* at 612, 821 S.E.2d at 735 (citation and internal quotation marks omitted), and the claim he advances for unjust enrichment may only proceed derivatively, *see Norman*, 140 N.C. App. at 395, 537 S.E.2d at 253.

¶ 72 In his first set of interrogatories, Duffy asked Defendants to "[i]dentify, with specificity, any and all assets, contracts, clients, customers, property, and/or business opportunities diverted, transferred, and/or assigned to the New Entity from the [Corporation] from April 2, 2020 to present." Defendants answered: "None." Duffy also asked Defendants to "[e]xplain in detail what has occurred with the 2020 work contracts between the [Corporation] and its clients and/or customers since February 28, 2020." Defendants answered:

> In January 2020, the [Corporation] had three pending contracts. Each contract had an agreed upon hourly rate, but work was only to be performed on an as needed basis or project basis when requested by the client. Any requested work in January or February 2020 was performed by Mr. Camp and paid to the [Corporation]. None of the contracts were long term contracts and none of the contracts were exclusive to the [Corporation] as clients could use any service provider other than the [Corporation] without breaching the terms of the contract. If the client never asked for additional services to be performed, then the [Corporation] was not entitled to any compensation. [One client] contract had a defined project

> for about $8,000.00 of work. Mr. Camp performed this work at the request of [the client] and [the client] paid approximately $8,000 to [the New Entity].
>
> When Mr. Duffy made it clear he intended to leave the [Corporation], Defendant Camp informed the [Corporation]'s three ongoing clients that the [Corporation] could no longer do business with them. Defendant Camp informed each of them that he and Mr. Duffy would no longer be partners, and that he could not, in good conscience, continue working for them. Each client indicated an interest in having Defendant Camp continue the video and advisement services. Defendant Camp advised each client that he would have to establish a new entity and contract to continue to work for them.

¶ 73 Defendants' denial of Duffy's allegations in their discovery responses demonstrates that there exists a genuine issue of material fact, thus rendering summary judgment inappropriate as to this claim as well. See *In re Will of Jones*, 362 N.C. at 577, 669 S.E.2d at 578 ("[M]uch of the deposition testimony and affidavits is open to competing interpretations. Given our standard of review, however, we view this evidence in the light most favorable to [the plaintiff] and find that he has forecast sufficient facts" to survive summary judgment.). The trial court's order is reversed with respect to Duffy's derivative unjust enrichment claim.

6. Unfair and Deceptive Trade Practices

¶ 74 **[7]** Duffy also raises a claim against Defendants for unfair and deceptive trade practices. Duffy argues that "Defendants' conduct at issue [wa]s unfair and deceptive" in that Defendants "deceptively diverted existing business of the [Corporation] to the New Entity and carried on said business through the New Entity."

¶ 75 To recover under North Carolina's Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1, "a plaintiff must establish that: (1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff[,]" *Nobel v. Foxmoor Grp., LLC*, 380 N.C. 116, 2022-NCSC-10, ¶ 11 (citation and internal quotation marks omitted).

¶ 76 Subsection 75-1.1(b) provides that, "[f]or purposes of this section, 'commerce' includes all business activities, however denominated,

but does not include professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75-1.1(b). With respect to this definition of "commerce," our Supreme Court has repeatedly held that the "internal operations of a single business . . . are not business activities within the General Assembly's intended meaning of the term." *White v. Thompson*, 364 N.C. 47, 52, 691 S.E.2d 676, 679 (2010). "As a result, any unfair or deceptive conduct contained solely within a single business is not covered by the Act." *Id.* at 53, 691 S.E.2d at 680. "The determination of whether an act or practice is in or affects commerce is one of law." *J. M. Westall & Co. v. Windswept View of Asheville, Inc.*, 97 N.C. App. 71, 75, 387 S.E.2d 67, 69, *disc. review denied*, 327 N.C. 139, 394 S.E.2d 175 (1990).

¶ 77 Defendants argue that summary judgment was appropriate as to this claim because "the entire dispute in this case centers around the internal operations of the [Corporation], and more specifically, the desire of certain parties to no longer be in business together." However, Defendants' characterization is incorrect; Duffy's allegations focus heavily on the various clients to whom services had been and were to be rendered, as well as on the New Entity as a beneficiary of the alleged unfair and deceptive acts. Where "there are multiple companies . . . involved," this Court has concluded that an individual defendant's interruption of the commercial relationship between those companies is "in or affecting commerce" and may properly constitute an unfair or deceptive act or practice under § 75-1.1. *Songwooyarn Trading Co. v. Sox Eleven, Inc.*, 213 N.C. App. 49, 57, 714 S.E.2d 162, 168, *disc. review denied*, 365 N.C. 360, 718 S.E.2d 396 (2011).

¶ 78 Therefore, summary judgment was inappropriate with respect to Duffy's unfair and deceptive trade practices claim, and the trial court's order is reversed as to this claim. Moreover, as with Duffy's unjust enrichment claim, discussed above, Duffy does not allege that he "suffer[ed] an injury that is distinct from the injury suffered by the corporation itself" as to this claim. *Corwin*, 371 N.C. at 612, 821 S.E.2d at 735 (citation and internal quotation marks omitted). Accordingly, this claim must proceed derivatively. *See Norman*, 140 N.C. App. at 395, 537 S.E.2d at 253.

7. Civil Conspiracy

¶ 79 **[8]** Finally, Duffy also asserts a claim against Camp and Johnson for civil conspiracy.

¶ 80 The elements of civil conspiracy are well established:

> A claim for damages resulting from a conspiracy exists where there is an agreement between two or

> more persons to do an unlawful act or to do a lawful act in an unlawful way, and, as a result of acts done in furtherance of, and pursuant to, the agreement, damage occurs to the plaintiff. In such a case, all of the conspirators are liable, jointly and severally, for the act of any one of them done in furtherance of the agreement.

Fox v. Wilson, 85 N.C. App. 292, 301, 354 S.E.2d 737, 743 (1987) (citations omitted).

¶ 81 In addition, it is equally "well established that there is not a separate civil action for civil conspiracy in North Carolina. Instead, civil conspiracy is premised on the underlying act." *Piraino Bros., LLC v. Atl. Fin. Grp., Inc.*, 211 N.C. App. 343, 350, 712 S.E.2d 328, 333 (citations and internal quotation marks omitted), *disc. review denied*, 365 N.C. 357, 718 S.E.2d 391 (2011). Accordingly, recovery in a civil conspiracy claim "must be on the basis of sufficiently alleged wrongful overt acts. The charge of conspiracy itself does nothing more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under proper circumstances the acts and conduct of one might be admissible against all." *Shope v. Boyer*, 268 N.C. 401, 405, 150 S.E.2d 771, 773–74 (1966).

¶ 82 Here, Duffy argues that "the conspiracy is Camp and Johnson's plan to form the New Entity, move the [Corporation]'s assets and business to the New Entity, and thereafter carry on the [Corporation]'s business through the New Entity so as to . . . exclude Duffy and his interests as a shareholder." He additionally alleges that "in February and March of 2020, Camp and Johnson 'decided the manner in which the [Corporation] was operated would need to change' and 'made a final decision that they could no longer partner' with [Duffy]."

¶ 83 Defendants respond that Duffy cannot "use the same alleged acts to form both the basis of a claim for conspiracy to commit certain torts and the basis of claims for those torts." *Jones v. City of Greensboro*, 51 N.C. App. 571, 584, 277 S.E.2d 562, 571 (1981), *overruled on other grounds by Fowler v. Valencourt*, 334 N.C. 345, 435 S.E.2d 530 (1993). However, the import of Duffy's conspiracy claim appears to be that, through an action for damages resulting from a conspiracy, he may recover "jointly and severally . . . for the act of any [conspirator] done in furtherance of the agreement." *Fox*, 85 N.C. App. at 301, 354 S.E.2d at 743. This would entitle Duffy to recover damages, jointly and severally, from Johnson and the Corporation as well as Camp for *the conspiracy* to commit the base tort, for which only Camp may be liable.

¶ 84 We have concluded that summary judgment is inappropriate as to Duffy's derivative claims for: (1) Camp's breach of fiduciary duty to the Corporation; (2) unjust enrichment; and (3) unfair and deceptive trade practices. So too is summary judgment inappropriate on the corresponding conspiracy claim, to the extent that Duffy can show on remand that Defendants allegedly conspired to commit any of the underlying claims.

8. Claim Abandoned on Appeal

¶ 85 Duffy makes no argument on appeal that the trial court erred by granting summary judgment on his *Meiselman* claim. Therefore, this issue is deemed abandoned. N.C.R. App. P. 28(b)(6); *see, e.g.*, *Wilkerson v. Duke Univ.*, 229 N.C. App. 670, 679, 748 S.E.2d 154, 161 (2013).

IV. Conclusion

¶ 86 For the foregoing reasons, the trial court properly granted summary judgment with respect to all of Duffy's individual claims, as well as his derivative claims for: (1) breach of fiduciary duty that Camp and Johnson, as controlling shareholders, owed him, as a minority shareholder; (2) tradename infringement and Duffy's concomitant request for injunctive relief relating to that claim; and (3) conversion. We affirm the trial court's order as to those claims, as well as the *Meiselman* claim that was abandoned on appeal.

¶ 87 Summary judgment was inappropriate concerning Duffy's remaining derivative claims: (1) Camp's breach of fiduciary duty to the Corporation; (2) unjust enrichment; (3) unfair and deceptive trade practices; and (4) civil conspiracy. The trial court's order granting summary judgment in favor of Defendants is reversed as to these claims. We remand to the trial court for further proceedings on these surviving derivative claims.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Chief Judge STROUD and Judge DIETZ concur.

N.C. EX REL. EXPERT DISCOVERY, LLC v. AT&T CORP.

[287 N.C. App. 75, 2022-NCCOA-837]

NORTH CAROLINA, EX REL. EXPERT DISCOVERY, LLC, BRINGING THIS ACTION ON BEHALF OF THE STATE OF NORTH CAROLINA, PLAINTIFF

v.

AT&T CORP.; BELLSOUTH COMMUNICATION SYSTEMS, LLC; TELEPORT COMMUNICATIONS AMERICA, LLC; BELLSOUTH TELECOMMUNICATIONS, LLC; CAROLINA TELEPHONE AND TELEGRAPH COMPANY, LLC; CENTRAL TELEPHONE COMPANY; CENTURYLINK COMMUNICATIONS, LLC; MEBTEL, INC.; LEVEL 3 COMMUNICATIONS, LLC; TELCOVE OPERATIONS, LLC; TW TELECOM OF NORTH CAROLINA, L.P.; GLOBAL CROSSING LOCAL SERVICES, INC.; TIME WARNER CABLE INFORMATION SERVICES (NORTH CAROLINA), LLC; FRONTIER COMMUNICATIONS ONLINE AND LONG DISTANCE INC.; GLOBAL CROSSING TELECOMMUNICATIONS, INC. (FORMERLY D/B/A FRONTIER COMMUNICATIONS SERVICES INC.); CITIZENS TELEPHONE COMPANY; MCIMETRO ACCESS TRANSMISSION SERVICES CORP.; VERIZON SOUTH, INC.; NORTH STATE COMMUNICATIONS, LLC.; CHARTER COMMUNICATIONS, INC.; CHARTER COMMUNICATIONS (NC), LLC; CHARTER FIBERLINK NC-CCO, LLC; AND YMAX COMMUNICATIONS CORP., DEFENDANTS

No. COA21-671

Filed 20 December 2022

1. Appeal and Error—petition for writ of certiorari—defective service of notice of appeal—writ allowed

In a case brought under the North Carolina False Claims Act, in which plaintiff asserted on behalf of the State that defendants (multiple telecommunications companies) under-billed for statutorily-required 911 service charges, where plaintiff's failure to properly and timely serve all of defendants with the notice of appeal was a non-jurisdictional violation of Appellate Rule 3 that did not frustrate the appellate court's review or the adversarial process, plaintiff's petition for writ of certiorari was granted.

2. Fraud—N.C. False Claims Act—under-billing of 911 service charges—first-to-file rule—similar claims raised in other states—no bar in this state

In an exceptional case brought under the North Carolina False Claims Act, in which plaintiff asserted—as a relator on behalf of the State in a qui tam action—that defendants (multiple telecommunications companies) under-billed and under-remitted the 911 service charges required by N.C.G.S. § 143B-1403, the trial court improperly relied on the first-to-file rule as a basis for granting defendants' motion to dismiss the action. The rule, which bars another relator's suit if an already-pending suit involves related claims, was inapplicable in this case because, although similar claims had been brought in other states, those out-of-state suits did not involve claims made

pursuant to the North Carolina False Claims Act, nor were any of those actions served on the State of North Carolina.

3. Statutes—911 Fund—claim of under-billing of 911 service charges—section 143B-1403—amendment providing immunity—retroactivity

In an exceptional case brought under the North Carolina False Claims Act, in which plaintiff asserted—as a relator on behalf of the State in a qui tam action—that defendants (multiple telecommunications companies) under-billed for 911 service charges, the trial court properly granted defendants' motion to dismiss for failure to state a claim for relief after determining that a 2018 amendment to the 911 statute (N.C.G.S. § 143B-1403), which was made after plaintiff filed its complaint, was a clarifying amendment that applied retroactively and that served to provide immunity to service providers (such as defendants) from liability for billing or remitting 911 service charges that differed from what was required under the current 911 statutes.

Appeal by Plaintiff from an order entered 19 April 2021 by Judge Stephan R. Futrell in Wake County Superior Court. Heard in the Court of Appeals 25 May 2022.

Fox Rothschild LLP, by Robert H. Edmunds, Jr. and Kip D. Nelson; Higgins Benjamin, PLLC, by Robert N. Hunter, Jr. and Robert G. McIver; and Rabon Law Firm, PLLC, by Charles H. Rabon, Jr., for Plaintiff-Appellant.

Kilpatrick Townsend & Stockton LLP, by Joseph S. Dowdy; Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., by Scott H. Angstreich, pro hac vice; Parker Poe Adams & Bernstein LLP, by Richard S. Glaser, Jr. and Nana Asante-Smith; Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Jim W. Phillips, Jr. and Kimberly M. Marston; Burns, Day & Presnell, P.A., by Daniel C. Higgins; Morgan Lewis & Bockius LLP, by Michael Muller; and Robinson, Bradshaw & Hinson, P.A., by Gregory L. Skidmore and Fitz E. Barringer, for the Defendants-Appellees.

WOOD, Judge.

¶ 1 Expert Discovery, LLC ("Plaintiff") appeals from the order granting "Defendants' Joint Motion to Dismiss for Failure to State a Claim under N.C. Gen. Stat. 1A-1, Rule 12(b)(6)" and denying "the 2016 Defendants'

Motion to Dismiss for Failure to State a Claim and Lack of Subject Matter Jurisdiction under N.C. Gen. Stat. 1A-1, Rule 12(b)(6) and 12(b)(1)." For the reasons stated below, we affirm in part and reverse in part the trial court's order.

I. Factual and Procedural Background

¶ 2 During an emergency, North Carolina's 911 system connects individuals to Police, Fire, and Emergency Medical Services public resources, and a state agency, the 911 Board, oversees it. North Carolina funds its 911 system services by service charges levied on telephone customers. In 1989, our General Assembly enacted a 911 statute to fund North Carolina's 911 system which permitted cities and counties to impose a monthly "911 charge" on each outgoing local telephone access line. 1989 N.C. Sess. Law 587, § 62A-4(a). This statute requires telephone service providers in each local area to collect and remit the service charges monthly to the 911 Board. *Id.*, § 62A-5, -6. The 911 Board then distributes the collected 911 funds to the State's many 911 call centers.

¶ 3 Since 1989, North Carolina's 911 statute has undergone several revisions. In 2007, the General Assembly revised it to impose a single, statewide 911 service charge that applied uniformly to all types of voice communications services, including wireless and Voice over Internet Protocol ("VoIP"). The "911 charge" was imposed "on each active voice communications service connection . . . *capable of accessing the 911 system*." An Act to Modernize and Improve the Administration of the State's 911 System Through a Statewide 911 Board, by Ensuring that all Voice Services Contribute to the 911 System and by Providing Parity in the Quality of Service and the Level of 911 Charges Across Voice Communications Service Providers, 2007 N.C. Sess. Law 383, § 1(a) ("H.B. 1755"). A "[v]oice communications service connection" is defined to include "[e]ach telephone number assigned to a residential or commercial subscriber by a voice communications service provider, without regard to technology deployed." *Id.*, § 62A-40(21). In 2015, the General Assembly revised the 911 statute, so that a 911 service charge was "imposed on each active communications service connection that *provides access to the 911 system* through a voice communications service." 2015 N.C. Sess. Law 261, § 4(c) ("H.B. 730").

¶ 4 In 2018, the General Assembly again amended the 911 statute through two separate bills enacted within weeks of each other. In the first bill titled, "Current Operations Appropriations Act of 2018," our legislators addressed a section of N.C. Gen. Stat. § 143B-1403. The bill stated:

> SECTION 37.4(a) [N.C. Gen. Stat. §] 143B-1403(a) reads as rewritten:
>
> § 143B-1403. Service charge for 911 service.
>
> (a) Charge Imposed. - A monthly 911 service charge is imposed on each active communications service connection that provides access to the 911 system through a voice communications service. The service charge for service other than prepaid wireless telecommunications service is seventy cents (70[cents]) or a lower amount set by the 911 Board under subsection (d) of this section. The service charge is payable by the subscriber to the provider of the voice communications service. The provider may list the service charge separately from other charges on the bill. Partial payments made by a subscriber are applied first to the amount the subscriber owes the provider for the voice communications service. If a subscriber is capable of making more than one simultaneous outbound 911 call though its communications service connections, then the total number of 911 service charges billed to the subscriber shall be (i) for CMRS providers, an amount equal to the number of CMRS connections and (ii) for all other communications service providers, an amount equal to the total number of simultaneous outbound 911 calls the subscriber can make using the North Carolina telephone numbers or trunks billed to their account.

2018 N.C. Sess. Law 5, § 37.4(a) ("S.B. 99") (emphasis supplied to indicate proposed added text). Thus, S.B. 99 added language that explained how 911 charges should be calculated when a customer "is capable of making more than one simultaneous outbound 911 call through its communications service connections." *Id.*

¶ 5 Further, the General Assembly provided relief from liability for providers and customers with earlier billing practices that may have departed from the above-mentioned rule:

> SECTION 37.4(b) For any services for which a bill is rendered prior to 180 days following the effective date of this section, no subscriber or communications service provider shall be liable to any person or entity for billing or remitting a different number

> of 911 service charges than is required by Part 10 of Article 15 of Chapter 143B of the General Statutes.

Id. § 37.4(b). A few weeks later, the General Assembly produced another bill, titled "An Act to Make Technical, Clarifying, and other Modifications to the Current Operations Appropriations Act of 2018 and to Create the Legislative Commission on the Fair Treatment of College Student-Athletes." 2018 N.C. Sess. Law 97 ("S.B. 335"). In this latter bill, the General Assembly again addressed the 911 Act. S.B. 335 stated:

> SECTION 10.3. If Senate Bill 99, 2017 Regular Session, becomes law, then Section 37.4(b), as enacted by that act, reads as rewritten:
>
> SECTION 37.4(b) For any services for which a bill is or has been rendered at any time prior to 180 days following the effective date of this section, whether under [N.C. Gen. Stat. §] 143B-1403 or its predecessors as previously codified, no subscriber or communications service provider shall be liable to any person or entity for billing or remitting a different number of 911 service charges than is required by Part 10 of Article 15 of Chapter 143B of the General ~~Statutes~~ Statutes, as clarified by subsection (a) of this section. Subsection (a) of this section is intended as a clarification of existing law.

Id., § 10.3 (emphasis supplied to indicate proposed added text). On 12 June 2018, the "Current Operations Appropriations Act of 2018" was enacted. The latter bill, which made "Technical, Clarifying, and other Modifications to the Current Operations Appropriations Act of 2018," was enacted on 26 June 2018.

¶ 6 Expert Discovery, LLC is a limited liability company organized and operating under the laws of Alabama, with its principal place of business in Huntsville, Alabama. Its president, Roger Schneider, purports to have thirty-five years of experience with high profile technology and telecommunication initiatives. Mr. Schneider has organized and utilized other entities across the country in order to bring suit against telecommunication providers for alleged underbilling for 911 service charges.

¶ 7 In October 2014, Plaintiff, on behalf of the State of North Carolina, filed a *qui tam* complaint[1] under seal pursuant to N.C. Gen. Stat. § 1-605,

1. "*Qui tam* actions are those 'brought *under a statute* that allows a private person to sue for a penalty, part of which the government or some specified public institution will

North Carolina's False Claims Act. Plaintiff alleged several telecommunication companies "that provide voice communication services within the State of North Carolina" ("Defendants") had "violated the North Carolina False Claims Act by knowingly failing to adequately remit monthly 911 service charges to the State of North Carolina." Plaintiff argued that (1) North Carolina's 911 statute required that the prescribed monthly 911 service charge "[be] imposed on *each telephone* number—as opposed to the number of phone lines"; (2) the legislation places the responsibility for collecting and remitting the 911 surcharges upon the telecommunication companies; and (3) "Defendants routinely do not charge the correct amount of 911 service charges or do not charge 911 service charges at all" because "rather than charging 911 fees by telephone *number*, many of the Defendants instead are routinely charging 911 fees by the number of *lines*, particularly when the number of telephone numbers is greater than the number of lines." Plaintiff contended that this practice results in significant under-payment of 911 service charge fees to the State and thereby harms the State of North Carolina, "its citizens, and other subscribers who are forced to pay more than their fair share to support and sustain the 911 System." In 2014, Plaintiff's first complaint, named five companies as Defendants and 10 "yet-to-be-identified" "fictitiously named corporations." At the time Plaintiff filed its first complaint, Mr. Schneider controlled entities having seven pending "false claims" actions in other states.

¶ 8 On 5 August 2016, Plaintiff amended its complaint to add additional Defendants and to "reflect the most significant evidence gathered to date" to further support its allegations against Defendants. Plaintiff argued that its research and analysis demonstrate that "Defendants' under-collection and under-remittance of 911 service charges is widespread and systemic and is not limited to certain service providers, to certain subscribers, or to certain periods of time." On 20 March 2020, Plaintiff amended its complaint a second time, alleging that "Defendants knowingly and routinely under-billed and under-remitted the 911 service charges required by law between 2008 and 2018 within the State of North Carolina." Again, Plaintiff alleged that Defendants "did not assess or remit one charge per telephone number capable of accessing 911 for their multi-line business customers" and for VoIP service and that Defendants "assessed and remitted one 911 charge for the number of calls a customer could place simultaneously," instead of by charging for each individual telephone number as required by statute. Plaintiff

---

receive.' " *Fuller v. Easley*, 145 N.C. App. 391, 397, 553 S.E.2d 43, 47 (2001) (emphasis in original) (quoting *Qui tam action*, Black's Law Dictionary (7th ed. 1998)).

argued that Defendants billed their customers fewer charges than would be due if charges were billed based on those customers' assigned telephone numbers.

¶ 9 On 3 June 2020, the State of North Carolina notified the trial court it was declining to take over Plaintiff's *qui tam* action "at this time," referred the court to N.C. Gen. Stat. § 1-609(f) and noted that "the action may be dismissed only if the court and Attorney General have given written consent to the dismissal and the reasons for consenting." The State requested (1) that the case be unsealed and (2) the court "solicit the written consent of the State . . . before ruling or granting its approval," if either party proposed that "this action or any claims therein be dismissed, settled, or otherwise discontinued." On 24 June 2020, the trial court entered an order to unseal Plaintiff's second amended complaint and the State's notice declining to take over the action. The trial court further ordered that "[s]hould the *qui tam* Plaintiff or the Defendants propose that this action or any claims be dismissed, settled, or otherwise discontinued, the Court will solicit the written consent of the State of North Carolina before ruling or granting its approval."

¶ 10 On 7 August 2020, Plaintiff filed a notice of voluntary dismissal of its claims against Defendants of the Frontier parent company and its subsidiaries.[2] On or about 24 August 2020, the State consented to the dismissal of these Defendants. On 2 October 2020, the remaining Defendants filed a Consent Motion to designate the case as Exceptional under Rule 2.1 of the General Rules of Practice, and on 18 November 2020, Chief Justice Beasley designated the case as Exceptional and appointed Judge Futrell to preside.

¶ 11 In January 2021, Defendants filed two motions to dismiss Plaintiff's second amended complaint. The first motion ("Joint Motion") was brought pursuant to Rule 12(b)(6). The Joint Motion raised five grounds for dismissal of Plaintiff's second amended complaint: (1) the 2018 Amendment to North Carolina's 911 statute expressly released the State's claims Plaintiff sought to bring on its behalf; (2) pending suits alleged similar violations of the relevant state or local False Claims Act and triggered provision of the first-to-file bar under the North Carolina False Claims Act; (3) Plaintiff's complaint failed to state a claim under the Act; (4) the complaint alleged that Defendants complied with the 911 statute as clarified by the General Assembly; and (5) any claims concerning acts

2. We note that Defendants' motion explained Plaintiff filed a notice of voluntary dismissal of its claims against Frontier Communications of America, Inc., Frontier Communications of the Carolinas, LLC, Frontier Communications Online and Long Distance Inc., and Global Crossing Telecommunications, Inc. on or about 7 August 2020.

transpiring before 1 January 2010 should be dismissed because they preceded the North Carolina False Claims Act's effective date.

¶ 12 A smaller group of Defendants, including ten who were newly added in 2016, ("2016 Defendants") filed a separate motion to dismiss under Rules 12(b)(1) and 12(b)(6). This motion stated that the newly added Defendants also "join[ed]" the Joint Motion, which they "incorporated" into their own motion "in full." With respect to their Rule 12(b)(1) motion, the 2016 Defendants argued Plaintiff previously engaged in 911 statute litigation across the country, which was highly publicized. Due to news coverage of Plaintiff's previous litigation efforts in other states, the 2016 Defendants contended that Plaintiff's current claims were based on public disclosures, so that Plaintiff did not qualify as the original source of these disclosures. According to the 2016 Defendants, the public disclosure bar in North Carolina's False Claims Act prevented the trial court from possessing subject matter jurisdiction over Plaintiff's claims, such that the claims should be dismissed in their entirety.

¶ 13 On 29 March 2021, the trial court conducted a hearing on the Defendants' motions, and by order entered 19 April 2021, dismissed Plaintiff's complaint for lack of subject matter jurisdiction. The trial court concluded that Defendants' Joint Motion regarding the first-to-file bar "is substantively jurisdictional despite its label as a 12(b)(6) motion" and "treat[ed] it as a Rule 12(b)(1) motion." The trial court also ruled that the North Carolina False Claims Act's "first-to-file bar removes subject matter jurisdiction from this [trial court] due to the earlier-filed actions in other jurisdictions that allege the same material elements of fraud." The trial court further determined that dismissal of Plaintiff's complaint was also warranted because "in laws enacted in 2018, the General Assembly expressly declared that Defendants would not be liable for the under-billing and under-remitting of 911 charges as alleged in Plaintiff-Relator's complaint." Although the trial court denied the 2016 Defendants' motion to dismiss for failure to state a claim and lack of subject matter jurisdiction, the trial court held that, in the alternative, if the "first-to-file bar did not remove this Court's jurisdiction, Defendants' Joint Motion to Dismiss for Failure to State a Claim is granted, and Plaintiff-Relator's [c]omplaint is hereby dismissed with prejudice." Plaintiff filed notice of appeal on 17 May 2021.

II. Analysis

A. Petition for Writ of Certiorari

¶ 14 **[1]** Plaintiff filed a conditional petition for writ of certiorari due to a defect in the service of its notice of appeal on all Defendants to the

action, and as a precaution should its appeal be considered interlocutory.[3] Plaintiff's counsel filed a notice of appeal of the 19 April 2021 order on 17 May 2021; however, the notice was not mailed to all Defendants' counsels at that time. According to Defendants, counsel for AT&T, North State, and Citizens did not receive service or actual notice of the appeal within the 30-day period, pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 3(c)(1). On 16 June 2021, those Defendants who had not been properly served moved to dismiss the appeal. The remaining Defendants also moved to dismiss the appeal based on Plaintiff's failure to comply with Rule 3 on 23 June 2021. During the interim, Plaintiff obtained an extension of time to settle the record of appeal. On 21 July 2021, the trial court denied Defendants' joint motions to dismiss based on the factors test in *Dogwood Development & Management Co. v. White Oak Transportation Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008). It is clear that Defendants did not appeal the trial court's denial of these motions. The record further reflects Defendants filed their response to Plaintiff's petition for writ of certiorari on 23 March 2022, the same day they filed their brief with this Court.

¶ 15 Plaintiff's petition for writ of certiorari contends that its service error is non-jurisdictional and does not constitute a basis for dismissal of its appeal. " '[R]ules of procedure are necessary . . . in order to enable the courts properly to discharge their dut[y]' of resolving disputes." *Id.* at 193, 657 S.E.2d at 362 (quoting *Pruitt v. Wood*, 199 N.C. 788, 790, 156 S.E. 126, 127 (1930)). However, "noncompliance with the appellate rules does not, ipso facto, mandate dismissal of an appeal . . . . Whether and how a court may excuse noncompliance with the rules depends on the nature of the default." *Id.* at 194, 657 S.E.2d at 363 (internal citation omitted).

¶ 16 Rule 3 of our Rules of Appellate Procedure provides that

> [a]ny party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon *all other parties* within the time prescribed by subdivision (c) of this rule.

---

3. We take judicial notice that at oral argument before this Court, counsel for the parties clarified that there are no pending claims as to this action before the trial court. Therefore, this appeal is not interlocutory.

N.C. R. App. P. 3(a) (emphasis added). Hence, the plain language of Rule 3(a) provides that "all other parties" must be served with a copy of the notice of appeal. N.C. R. App. P. 3(a). The record reflects Plaintiff failed to comply with Rule 3 and that Defendants objected and requested dismissal of Plaintiff's appeal, so as not to waive the lack of service. Therefore, we consider whether the appeal must be dismissed pursuant to the factors in *Dogwood*. *See Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 102, 693 S.E.2d 684, 689 (2010).

¶ 17 If failure to comply with Rule 3 creates "[a] jurisdictional default[,]" we are required "to dismiss the appeal." *Dogwood Dev. & Mgmt. Co.*, 362 N.C. at 197, 657 S.E.2d at 365. However, "[i]t is the *filing* of the notice of appeal that confers jurisdiction upon this Court, not the *service* of the notice of appeal." *State v. Golder*, 257 N.C. App. 803, 804, 809 S.E.2d 502, 504 (2018) (citation omitted), *aff'd as modified* 374 N.C. 238, 839 S.E.2d 782 (2020). In *Lee*, this Court noted that where a notice of appeal is properly and timely filed, but not served upon *all* parties, this violation of Rule 3 is a non-jurisdictional defect. 204 N.C. App. 96, 102, 693 S.E.2d 684, 689 (2010).

¶ 18 *Dogwood* held that a non-jurisdictional failure to comply with appellate rules "normally should not lead to dismissal of the appeal." *Dogwood Dev. & Mgmt. Co.*, 362 N.C. at 198, 657 S.E.2d at 365 (citations omitted). Neither should dismissal be considered unless the noncompliance is a "substantial failure" to comply with the rules or a "gross violation" of the rules. *Id.* at 199, 657 S.E.2d at 366. This Court is required to make a "fact-specific inquiry into the particular circumstances of each case," mindful of the need to enforce the rules as uniformly as possible. *Id.* at 199-200, 657 S.E.2d at 366 (citations omitted). Dismissal is appropriate only for the "most egregious instances of non-jurisdictional default." *Id.* at 200, 657 S.E.2d at 366 (citations omitted). To determine the severity of an appellate rule violation, this Court considers: "[(1)] whether and to what extent the noncompliance impairs the court's task of review[, (2)] . . . whether and to what extent review on the merits would frustrate the adversarial process . . . . [, and (3)] [t]he court may also consider the number of rules violated." *Id.* at 200, 657 S.E.2d at 366-67 (citations omitted).

¶ 19 Looking to this Court's analysis in *State v. Jenkins* and its application of *Dogwood*, our review is not impaired by Defendant's noncompliance with Rule 3(a). *State v. Jenkins*, 273 N.C. App. 145, 150, 848 S.E.2d 245, 249 (2020). As in *Jenkins*, the position of the parties on appeal is known by the timely filing of their briefs with this Court. We hold Plaintiff's violation of Rule 3 did not frustrate the adversarial process. *Id.* at 150,

848 S.E.2d at 249. Further, this case is distinguishable from *Lee*, as the unserved defendants were later "informed of the fact that there was an appeal which affect[ed] their interests." *Lee*, 204 N.C. App. at 103, 693 S.E.2d at 690. While some Defendants initially were not served with the notice of appeal, these Defendants were informed of it and were able to timely respond by filing and serving a joint motion to dismiss the appeal on 16 June 2021. Therefore, Plaintiff's conditional petition for writ of certiorari is granted.

B. Standard of Review

¶ 20 When reviewing a trial court's ruling on a Rule 12 dismissal, this Court reviews the matter *de novo*. *Suarez ex rel. Nordan v. Am. Ramp Co.*, 266 N.C. App. 604, 610, 831 S.E.2d 885, 890 (2019). In determining whether a trial court correctly decided to dismiss a complaint for failure to state a claim pursuant to Rule 12(b)(6), we examine "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013) (citation omitted). In conducting the required analysis, "the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Davis v. Hulsing Enters., LLC*, 370 N.C. 455, 457, 810 S.E.2d 203, 205 (2018) (citation omitted). Our Supreme Court has long held "it is clear that judicial notice can be used in rulings on . . . motions to dismiss for failure to state a claim." *Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 641, 256 S.E.2d 692, 696 (1979). Additionally, a motion to dismiss for lack of subject-matter jurisdiction is not viewed in the same manner as a motion to dismiss for failure to state a claim upon which relief can be granted. In such cases, matters outside the pleadings may be considered and weighed by the court in determining the existence of jurisdiction. *Tart v. Walker*, 38 N.C. App. 500, 502, 248 S.E.2d 736, 737 (1978).

C. The North Carolina False Claims Act and the First-to-File Rule.

¶ 21 **[2]** Plaintiff first argues that the trial court erred in granting Defendants' motion to dismiss because the False Claims Act's "first-to-file bar removes subject matter jurisdiction" from the trial court. Plaintiff contends the trial court erred in dismissing its action because the first-to-file rule is not jurisdictional and does not apply to actions brought under different state statutes, as none of the other *qui tam* actions were served on the State of North Carolina. We agree.

¶ 22 The North Carolina False Claims Act was created "to ensure that public funds are spent in the manner for which they were intended instead of being misappropriated, misspent, or misused." *State ex rel. Stein v. Kinston Charter Acad.*, 379 N.C. 560, 2021-NCSC-163, ¶ 43. North Carolina's False Claims Act creates an incentive for private actors with actual knowledge of fraudulent behavior to bring what are known as "*qui tam*" actions, by which the relator (that is, the private actor) shares in any recovery if it or the government successfully litigates or settles a claim that the relator initially brought. N.C. Gen. Stat. § 1-610 (2014). The purpose of the *qui tam* action is to expose "fraud that the government itself cannot easily uncover by encouraging private parties to report fraudulent conduct." *Mason v. Health Mgmt. Assocs., LLC*, 421 F. Supp. 3d 237, 243 (W.D.N.C. 2019) (citation omitted). Accordingly, any "person" who "[k]nowingly presents or causes to be presented a false or fraudulent claim for payment or approval" or who "[k]nowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim" shall be "liable to the State for three times the amount of damages that the State sustains because of the act of that person." N.C. Gen. Stat. § 1-607(a)(1)-(2) (2014).

¶ 23 Although the North Carolina False Claims Act was not enacted until 2009, *qui tam* practice has long been supported by the public policy of this State. *See, e.g.*, *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 2021-NCSC-6, ¶¶ 26-27, 33 (noting that "relator" actions have long been a part of North Carolina practice); *State v. Maultsby*, 139 N.C. 583, 584, 51 S.E. 956, 956 (1905) (explaining that the "legislative power to authorize *qui tam* actions" is "immemorial"). Further, our Supreme Court delineated that our state's False Claims Act is required to be "read consistently with the federal False Claims Act." *State ex rel. Stein*, ¶ 39. Like the federal False Claims Act, North Carolina's False Claims Act contains provisions "to prevent parasitic lawsuits based on previously disclosed fraud," including the "first-to-file" bar. *United States ex rel. Beauchamp v. Academi Training Ctr.*, 816 F.3d 37, 39 (4th Cir. 2016). The first-to-file bar precludes another relator's suit "if there is already a separate, pending lawsuit that involves related claims." *United States ex rel. Banigan v. PharMerica, Inc.*, 950 F.3d 134, 142 n.8 (1st Cir. 2020).

¶ 24 As of 2014, our State's first-to-file bar statute outlined:

> When a person brings an action under this subsection, the federal False Claims Act, 31 U.S.C. § 3729 et seq., or any similar provision of law in any other state, no person other than the State may intervene or

> bring a related action based on the facts underlying the pending action; provided, however, that nothing in this subdivision prohibits a person from amending a pending action in another jurisdiction to allege a claim under this subsection.

N.C. Gen. Stat. § 1-608(b)(5) (2014). When a case triggers the first-to-file bar, the later-filed case must be dismissed, rather than stayed. Once all earlier-filed cases conclude, the first-to-file bar will not prevent the re-filing of the dismissed claims as new actions. *See, e.g.*, *United States ex rel. Shea v. Cellco P'ship*, 863 F.3d 923, 928-30 (D.C. Cir. 2017). Consequently, the first-to-file bar does not require the exact same facts to be alleged in the later-filed case. Rather, this court must determine "whether the [subsequent complaint] alleges a fraudulent scheme the government already would be equipped to investigate based on the [prior complaint.]" *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1209 (D.C. Cir. 2011).

¶ 25 Neither North Carolina's legislature nor courts have yet answered the question of whether a first-to-file claim is jurisdictional. Generally, federal courts have held first-to-file claims under the federal False Claims Act are *non*-jurisdictional. *In re Plavix Mktg., Sales Pracs. & Prods. Liab. Litig.*, 974 F.3d 228, 232 (3d Cir. 2020); *United States ex rel. Hanks v. United States*, 961 F.3d 131, 137 (2d Cir. 2020). We need not determine today the jurisdictional nature of first-to-file claims in North Carolina because we conclude the first-to-file rule is inapplicable to the case *sub judice*.

¶ 26 While we may take judicial notice of exhibits within the record that are pertinent to Mr. Schneider's pending cases across the country,[4] the first-to-file rule does not serve as a bar to claims, "based on

---

4. For example, when Plaintiff filed this case in October 2014, affiliates of Plaintiff previously had filed seven cases alleging that telephone service companies failed to bill their customers all 911 charges owed, and thereby violated the relevant state or local False Claims Act. These cases are as follows:

New Jersey: *New Jersey ex rel. Phone Recovery Servs., LLC v. Verizon New Jersey, Inc.*, No. L-2257-13 (Mercer Cnty. Super. Ct.). Initial complaint filed in October 2013.

Massachusetts: *Massachusetts ex rel. Phone Recovery Servs., LLC v. Verizon of New England, Inc.*, No. 15-00783-BLSI (Suffolk Cnty. Super. Ct.). Initial complaint filed in January 2014.

New York: *New York ex rel. Phone Admin. Servs. Inc. v. Verizon New York Inc.*, No. 100329/2014 (Sup. Ct., N.Y. Cnty.). Initial complaint filed on 20 March 2014.

District of Columbia: *District of Columbia ex rel. Phone Recovery Servs., LLC v. Verizon Washington DC, Inc.*, No. 14-0002277 (D.C. Super. Ct.). Initial complaint filed in April 2014.

different material facts" and "separate regulations." *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1131 (9th Cir. 2015). Although Plaintiff's complaints, both here and in other states, allege claims under various states' False Claims Acts, the underlying allegations of fraud in the complaints do not, in fact, allege violations under the same statutes. Because these claims are based on "separate regulations," the first-to-file rule does not serve as a bar to the action before us. *Id.* Plaintiff argues Defendants violated *North Carolina* law by failing to collect and remit the proper amount of 911 service fees owed to the *North Carolina* 911 Board. There are no identical lawsuits to Plaintiff's claim, as none of the other pending complaints have asserted a claim under *North Carolina's* False Claims Act. A false claims action in North Carolina based on a violation of North Carolina's 911 statute is not barred by a pending false claims action in Iowa brought under Iowa's law. Indeed, claims are not barred when they "exist completely independent of one another." *Id.*

¶ 27 Additionally, one purpose of the first-to-file rule is "to give preclusive effect to the *qui tam* action that presented enough material information for the government to launch an investigation." *United States ex rel. Lee v. N. Adult Daily Health Care Ctr.*, 174 F. Supp. 3d 696, 705 (E.D.N.Y. 2016). The first-to-file bar provides an incentive to relators to "promptly alert the government to the essential facts of a fraudulent scheme." *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 24 (1st Cir. 2009) (cleaned up). Here, none of the other pending *qui tam* actions cited by Defendants were served on the State of North Carolina. North Carolina was never alerted to or placed on notice of any fraudulent schemes committed against it by these previous, out of state, complaints. Plaintiff asserts North Carolina government is not "solely responsible for monitoring every piece of litigation in every state—even if that litigation were under seal. The law makes no such absurd demand." We agree and therefore hold that the first-to-file rule does not apply to the facts of this case, as out-of-state claims do not place the State of North Carolina on notice of the type of fraudulent scheme that Plaintiff has alleged. *See United States ex rel. Harris v. Lockheed Martin Corp.*, 905 F. Supp. 2d 1343, 1350 (N.D. Ga. 2012).

Illinois: *Illinois ex rel. Phone Recovery Servs. of Illinois, LLC v. Ameritech Illinois Metro, Inc.*, No. 14-L-5238 (Cook Cnty. Cir. Ct.), on remand No. 19-L-6803. Initial complaint filed in May 2014.

Minnesota: *Minnesota ex rel. Phone Recovery Servs., LLC v. CenturyLink, Inc.*, No. 62-CV-14-3768 (Ramsey Cnty. Dist. Ct.). Initial complaint filed in May 2014.

Iowa: *Iowa ex rel. Phone Recovery Servs. v. AT&T Inc.*, No. CVCV047928 (Polk Cnty. Dist. Ct.). Initial petition filed in May 2014.

D. Retroactive Application of Legislation.

¶ 28 **[3]** Next, Plaintiff contends that the trial court incorrectly concluded Plaintiff's complaint failed to state a claim because "in laws enacted in 2018," "the General Assembly expressly declared that Defendants would not be liable for the under-billing and under-remitting of 911 charges." Plaintiff argues the trial court's alternative basis for dismissing its second amended complaint was erroneous due to "a misreading of the [General Assembly's] 2018 legislation—a misreading with constitutional implications." We disagree.

¶ 29 The General Assembly enacted S.B. 99 in 2018, amending language in N.C. Gen. Stat. § 143B-1403(a) to provide that if a customer "is capable of making more than one simultaneous outbound 911 call through its communications service connections," then the total number of monthly 911 service charges billed to the customer is assessed by "an amount equal to the total number of simultaneous outbound 911 calls the subscriber can make using the North Carolina telephone numbers or trunks billed to their account." 2018 N.C. Sess. Law 5, § 37.4(a). Therefore, monthly 911 service charges would not be assessed on a per-telephone-number basis. Further, S.B. 335 provides additional clarification regarding the application of N.C. Gen. Stat. § 143B-1403(a). The enacted provision states:

> For any services for which a bill is or has been rendered at any time prior to 180 days following the effective date of this section, whether under [N.C. Gen. Stat. §] 143B-1403 or its predecessors as previously codified, no subscriber or communications service provider shall be liable to any person or entity for billing or remitting a different number of 911 service charges than is required by Part 10 of Article 15 of Chapter 143B of the General ~~Statutes~~ Statutes, as clarified by subsection (a) of this section. Subsection (a) of this section is intended as a clarification of existing law.

2018 N.C. Sess. Law 97, § 10.3 (emphasis supplied to indicate added text).

¶ 30 Defendants argue that the above language in S.B. 335 applies retroactively, and that the immunity granted thereby forecloses Plaintiff's claim, irrespective of it having been filed prior to the statute taking effect. Plaintiff contends "the law does not support such a broad reach."

¶ 31 A retroactive law is one which "is made to affect acts or transactions occurring before it came into effect." *Ashley v. Brown*, 198 N.C.

369, 372, 151 S.E. 725, 727 (1930) (citation omitted). "[A] statute is presumed to have prospective effect only and should not be construed to have a retroactive application unless such an intent is clearly expressed or arises by necessary implication from the terms of the legislation." *State v. Green*, 350 N.C. 400, 404, 514 S.E.2d 724, 727 (1999) (citation omitted). "The primary endeavor of courts in construing a statute is to give effect to legislative intent." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 276-77 (2005) (citations omitted). A court ascertains legislative intent by looking "first to the language of the statute itself." *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993). Courts "will not adjudge an act of the General Assembly unconstitutional unless it is clearly so." *Hobbs v. Cty. of Moore*, 267 N.C. 665, 671, 149 S.E.2d 1, 5 (1966) (citation omitted); *Bolick v. Am. Barmag Corp.*, 306 N.C. 364, 371, 293 S.E.2d 415, 420 (1982) ("When a statute would have the effect of destroying a vested right if it were applied retroactively, it will be viewed as operating prospectively only." (citation omitted)). However, "[i]f the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *Beck*, 359 N.C. at 614, 614 S.E.2d at 277 (citing *Fowler*, 334 N.C. at 348, 435 S.E.2d at 532). Where a statute's retroactive application is "clear beyond any reasonable doubt," the reviewing court must apply it retroactively or strike it as unconstitutional. *See Kornegay v. City of Goldsboro*, 180 N.C. 441, 445, 105 S.E. 187, 189 (1920).

¶ 32 Although S.B. 335 does not expressly state that the provision is to apply "retroactively," the bill utilizes the phrases "has been," "at any time," and "its predecessors as previously codified" to indicate the General Assembly's intention for the 911 service charges immunity to be applied to phone bills generated before the Act's enactment. It is clear that phone bills "rendered" under the 911 statute's "predecessors" would necessarily have been sent before the Act took effect in 2018. We also note that the General Assembly specifically added the underscored language to the initial version of S.B. 99, § 37.4(b) to ensure that immunity from 911 service charges applied irrespective of when the service provider billed its customer (inserting "or has been" and "at any time"), and under both the current 911 statute and its past versions (adding "whether under" and "or its predecessors as previously codified"). Thus, the unambiguous language added to section 37.4(b) "clearly purports to apply retroactively to cases arising before and after the passage" of the 2018 legislation. *Wallace v. Greystar Real Estate Partners, LLC*, 2022 U.S. Dist. LEXIS 32760, at *10 (M.D.N.C. Feb. 24, 2022) (unpublished). By its plain language, the 2018 session laws purport to apply retroactively to this case. Therefore, we must give effect to the 2018 legislation's plain meaning unless doing so would be unconstitutional.

¶ 33 Plaintiff contends that even if the legislation is arguably retroactive, its application to pending litigation would unconstitutionally infringe on its vested rights and impair its contractual rights. Specifically, Plaintiff argues that the False Claims Act "grants the relator status as an injured party and then assigns it the right to litigate the claim on behalf of the government," so that the "relator's contractual rights thus vest when it brings the claim." Moreover, Plaintiff alleges that by "bringing this action and making a jury demand," it invoked additional constitutional rights. Plaintiff's arguments are misplaced.

¶ 34 A statute will not be applied retroactively if it "will interfere with rights which had vested or liabilities which had accrued at the time it took effect." *Fogleman v. D&J Equip. Rental, Inc.*, 111 N.C. App. 228, 232, 431 S.E.2d 849, 851 (1993) (citation omitted). A vested right is a right "which is otherwise secured, established, and immune from further legal metamorphosis." *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980). Thus, "a lawfully entered judgment is a vested right." *Bowen v. Mabry*, 154 N.C. App. 734, 736, 572 S.E.2d 809, 811 (2002) (citing *Dellinger v. Bollinger*, 242 N.C. 696, 698, 89 S.E.2d 592, 593 (1955)).

¶ 35 Our Supreme Court has "recognized a presumption that a state statute 'is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.' " *N.C. Ass'n of Educators, Inc. v. State*, 368 N.C. 777, 786, 786 S.E.2d 255, 262 (2016) (quoting *Dodge v. Bd. of Educ.*, 302 U.S. 74, 79, 58 S. Ct. 98, 100, 82 L. Ed. 57, 62 (1937)). "This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state." *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466, 105 S. Ct. 1441, 1451, 84 L. Ed. 432, 446 (1985) (citation omitted). Accordingly, "to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body." *Id.* Consistent with this presumption, our Supreme Court held that "[a] statute providing a penalty creates no contract between the State and the common informer, even if he acts under the permission given him to sue." *Dyer v. Ellington*, 126 N.C. 941, 945, 36 S.E. 177, 178 (1900).

Such is the case here. Plaintiff is unable to carry its burden of overcoming this presumption as the North Carolina False Claims Act does not create a contractual right for a relator. A relator does not accept the State's offer by filing suit, and thereby enter into a unilateral contract with the government. While Plaintiff is correct that "a *qui tam* relator, is in effect, suing as a partial assignee" on behalf of a government,

Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 773 n.4, 120 S. Ct. 1858, 1863, 146 L. Ed. 2d 836, 846 (2000), treating a *qui tam* provision as "a unilateral contract offer would also be inconsistent with the history of *qui tam* provisions." *Brooks v. Dunlop Mfg. Inc.*, 702 F.3d 624, 632 (Fed. Cir. 2012). As a Federal Circuit Court of Appeals has noted, "federal courts have consistently recognized that amendments to *qui tam* statutes that interfere with a relator's pending action do not 'deprive him of rights guaranteed by the Constitution.' " *Id.* (quoting *United State ex rel. Rodriguez v. Weekly Publ'n, Inc.*, 144 F.2d 186, 188 (2d Cir. 1944)). That is to say, "a *qui tam* plaintiff has no vested right and his privilege of conducting the suit on behalf of the United States and sharing in the proceeds of any judgment recovered, is an award of statutory creation, which, prior to final judgment, is wholly within the control of Congress." *Brooks*, 702 F.3d at 632 (cleaned up).

¶ 36 The Supreme Court of the United States also noted that a "*qui tam* relator has suffered no such invasion [of a legally protected right]—indeed, the 'right' he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails." *Vt. Agency of Natural Res.*, 529 U.S. at 773, 120 S. Ct. at 1862, 146 L. Ed. 2d at 845. North Carolina law comports such that as in *Dyer*, our Supreme Court stated:

> An informer has no natural right to the penalty, but only such right as is given to him by the strict letter of the statute . . . . He has in a certain sense an inchoate right when he brings his suit, . . . but he has no *vested* right to the penalty until judgment.

126 N.C. 941, 944-45, 36 S.E. 177, 178 (1900). An inchoate right is "a mere personal power or privilege, solely created by statute, reflecting the existing public policy and [is] subject to change or withdrawal at the pleasure of the Legislature at any time before its exercise." *Pinkham v. Unborn Child. of Jather Pinkham*, 227 N.C. 72, 79, 40 S.E. 2d 690, 696 (1946); *Williams v. Atlantic Coast Line R.R. Co.*, 153 N.C. 360, 364, 69 S.E. 402, 403 (1910). If judgment has not already been entered, generally, "a right created solely by the statute may be taken away by its repeal or by new legislation." *Bass v. Weinstein Mgmt. Co.*, 2021 U.S. Dist. LEXIS 169793, at *7 (M.D.N.C. Sept. 8, 2021) (unpublished) (quoting *Pinkham*, 227 N.C. at 78, 40 S.E.2d at 694). We hold Plaintiff's assertion of having vested rights to its claim, whether contractual or otherwise, fails.

¶ 38 Finally, Plaintiff attempts to categorize the 2018 session laws as a repealing statute. Plaintiff cites case law to argue that its action, "having

been brought before the repealing statute was enacted, is plainly not affected by it" because if the General Assembly "had meant otherwise, it would have inserted, as it always does when such is the intent, the words 'and this shall apply to pending suits.' " *City of Wilmington v. Cronly*, 122 N.C. 388, 391, 30 S.E. 9, 11 (1898). Plaintiff asserts the general rule that "[w]here the statute is simply repealed and no allusion is made to pending actions, the inchoate rights therein acquired are not interfered with, but may be prosecuted to final recovery." *Williams*, 153 N.C. at 365, 69 S.E. at 403 (citation omitted).

¶ 39 However, Plaintiff's argument is inapposite to the case at bar because the 2018 Amendment is not a repeal, but "an absolute and express remission of [a] penalty" that the General Assembly has the right to destroy. *Dyer*, 126 N.C. at 944, 36 S.E. at 178. Just as in *Dyer*, the enacted 2018 legislation is "an act of amnesty or pardon," *id.*, which specifically released all subscribers or communications service providers from liability "to any person or entity for billing or remitting a different number of 911 service charges" than required by the current 911 statutes. 2018 N.C. Sess. Law 97, § 10.3. While it is true that S.B. 335 does not utilize "pending" language, in *Dyer*, our Supreme Court determined that the Act's language stating that the defendants "are hereby released from any and all penalties" was specific enough to indicate "to whom and to what the act was intended to apply." *Dyer*, 126 N.C. at 944, 36 S.E. at 178. Here, the language in S.B. 335 is comparable to the Act in *Dyer*, as the provision unambiguously releases (1) all subscribers or communications service providers (to whom the act was intended to apply) from (2) any person or entity for billing or paying a different 911 service charge amount than required by the "Part 10 of Article 15 of Chapter 143B" of North Carolina's General Statutes (to what the act was intended to apply) (3) during the period for which a bill is or has been rendered at any time prior to 180 days following the enactment of this section (the relevant time period the Act's "amnesty" was intended to apply to). Therefore, we conclude that the language of S.B. 335 is unambiguous regarding "to whom and to what the act was intended to apply."

¶ 40 We further reject Plaintiff's categorization of the 2018 Amendment as "repealing" because S.B. 335 serves as a clarification of existing law. By enacting the 2018 Act to Make Technical, Clarifying, and Other Modifications to the Current Operations Appropriations Act of 2018, the General Assembly made clear its intention. In the first bill, the General Assembly expressly added that a customer "capable of making more than one simultaneous outbound 911 call . . . shall be" billed 911 charges "equal to the total number of simultaneous outbound 911 calls" that a

customer can make. 2018 N.C. Sess. Law 5, § 37.4(a). In the second legislation, the General Assembly's intent is made manifest where § 10.3 states N.C. Gen. Stat. § 143B-1403(a), as amended by S.B. 99, "is intended as a clarification of existing law." 2018 N.C. Sess. Law 97, § 10.3. Thus, our General Assembly provided "further insight into the way in which the legislature intended the law to apply from its original enactment." *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 9, 727 S.E.2d 675, 681 (2012). Therefore, as a "clarifying amendment," the language added in § 37.4(a) applies not only to "cases brought after [its] effective date[]," but also "to *all cases pending* before the courts when the amendment is adopted, regardless of whether the underlying claim arose before or after the effective date of the amendment." *Id.* (emphasis added) (citations omitted). As such, Plaintiff's arguments concerning the legislation's lack of explicit "pending" language fails.

III. Conclusion

¶ 41 After careful review of the record and applicable law, we affirm the judgment of the trial court, granting Defendants' motion to dismiss. Although the trial court erred in granting Defendants' first-to-file argument from their Joint Motion to Dismiss, because the first-to-file rule does not apply in this case, we affirm the judgment as the trial court correctly determined the 2018 Amendment to the 911 statute applies retroactively to Plaintiff's claim. Due to the retroactive application of the Amendment, we conclude the trial court correctly granted Defendants' Joint Motion to Dismiss for Failure to State a Claim.

AFFIRMED.

Judges ARROWOOD and CARPENTER concur.

IN RE ADOPTION OF B.M.T.

[287 N.C. App. 95, 2022-NCCOA-838]

IN THE MATTER OF THE ADOPTION OF B.M.T., A MINOR.

No. COA22-377

Filed 20 December 2022

Adoption—father's consent—required—reasonable and consistent payments for support—tangible support

The trial court's order concluding that respondent-father's consent would be required before his infant daughter could be adopted by petitioners—with whom the mother had placed the infant for the purpose of adoption without the father's knowledge or consent shortly after her birth—was affirmed. The challenged findings of fact, which for the most part concerned the father's support of the mother and baby during the determinative time period, were supported by competent evidence in the form of receipts, bank statements, telephone records, and the father's testimony. The father provided reasonable and consistent payments in support of the mother and baby in accordance with his financial means pursuant to N.C.G.S. § 48-3-601, both during and after the pregnancy term, including tangible support such as food, clothing, transportation, and baby supplies, and also including the preparation of his home for the baby with a bed, toys, and baby clothing; therefore, with the other statutory requirements being unchallenged, the father's consent was required for the daughter's adoption.

Appeal by Petitioners from Order entered 16 September 2021 by Judge Teresa H. Vincent in Guilford County Superior Court. Heard in the Court of Appeals 1 November 2022.

Manning, Fulton, & Skinner, P.A., by Michael S. Harrell, for petitioners-appellants.

Lindley Law Firm, PLLC, by Kathryn S. Lindley, for respondent-appellee.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Petitioners—the prospective adoptive parents of Layla[1]—appeal from the trial court's Order entered 16 September 2021, requiring

1. A pseudonym is used for the minor child designated in the caption as B.M.T.

Respondent-Father's (Respondent) consent for Layla to be adopted by Petitioners. The Record before us tends to reflect the following:

¶ 2 Respondent is the biological father of Layla. Respondent and Layla's biological mother (Mother) were involved in a romantic relationship at the time of Layla's conception. Respondent and Mother continued their relationship during Mother's pregnancy, and Respondent provided Mother with food, clothing, cash, transportation, personal items, and housing during the pregnancy. Without Respondent's knowledge or consent, Mother placed Layla with Petitioners for the purpose of adoption on 13 June 2019. On 20 June 2019, Respondent and Mother executed a Voluntary Acknowledgement of Paternity with the State of Tennessee. Subsequently, Respondent's name was added to Layla's birth certificate, and Layla's surname was changed to the surname of Respondent.

¶ 3 Petitioners filed a Petition to adopt Layla on 27 June 2019. Petitioners served Respondent with a Notice of Filing Petition for Adoption on or about 10 August 2019. Respondent objected to the adoption on 16 August 2019, requesting custody of Layla and claiming paternity. Further, Respondent stated he was "able and willing to raise and care for [his] child in every way possible." On 27 August 2019, Petitioners filed a Motion to find Respondent's consent not required, stating Mother consistently reported the identity of the biological father as "unknown" and "the unknown birth father's consent is statutorily unnecessary pursuant to [N.C. Gen. Stat.] §§ 48-3-601 and 48-3-603." On 19 April 2021, the matter proceeded to trial in Guilford County District Court. During the trial, Respondent testified Mother often stayed with him at his home during the pregnancy, and he also provided Mother with food, transportation, and maternity clothing. Respondent testified he offered Mother financial support on numerous occasions, which she sometimes accepted and sometimes refused. Additionally, at trial, Respondent presented a document he created entitled "Pregnancy Care Expense Report". Respondent testified the Report does not include all of the support he provided to Mother and the minor child, but the Report was created from the bank statements and receipts in his possession, all of which pre-dated the 27 June 2019 statutory deadline. The Respondent also presented itemized receipts detailing baby items and supplies he purchased for Mother and the minor child.

¶ 4 On 16 September 2021, the trial court entered an Order concluding Respondent's consent to the minor child's adoption is required pursuant to N.C. Gen. Stat. § 48-3-601. The trial court's Findings of Fact are, in relevant part, as follows:

13. The Respondent father provided reasonable and consistent support of the minor child by providing the following:

a. Infant car seat for the minor child.

b. Significant number of meals for the biological mother during her pregnancy.

c. Maternity clothes for the biological mother.

d. Baby clothes and supplies.

e. Diapers.

f. Respondent attended doctor's visits with the biological mother[.]

g. Respondent provided meals for biological mother and formula for [the] child after the birth of the child.

h. Cash of some amount (sometimes the biological mother accepted and sometimes she refused it).

. . . .

15. From August 2018 to July 2019, the Respondent spent $1,698.66 on or in support of the biological mother and the minor child for transportation, food from a variety of restaurants, personal items and baby supplies, and Uber and Lyft transportation.

16. Both Petitioner and Respondent provided child support worksheets which show that child support would have been approximately $350.00 per month after the birth of the child pursuant to N.C. Child Support Guidelines. Between May 17th and June 1st of 2019, Respondent spent $521.34 at Walmart for baby formula, a baby crib, car seat, bouncer, diapers, socks, and other baby supplies.

. . . .

20. Respondent made his home ready for the minor child with bed, toys, and clothes; further he showed his home and the child's items to his sister by video chat.

. . . .

> 23. At the time the minor child was placed with Petitioners, Respondent resided at his own apartment and with his mother in Memphis, Tennessee; further his mother has since died, and he now lives with his fiancé in Mississippi approximately fifteen . . . minutes from his prior home.

¶ 5 Based on these Findings, the trial court made the following Conclusion of Law: "Respondent's consent shall be required in order for the minor child . . . to be legally adopted." Petitioners timely filed written Notice of Appeal on 13 October 2021.

Issues

¶ 6 The dispositive issues on appeal are: (I) whether the trial court's Findings of Fact are supported by competent evidence; and (II) whether the trial court erred in concluding Respondent's consent was required for the adoption of the minor child.

Analysis

¶ 7 Adoption proceedings are "heard by the court without a jury." N.C. Gen. Stat. § 48-2-202 (2021). "Our scope of review, when the Court plays such a dual role, is to determine whether there was competent evidence to support its findings of fact and whether its conclusions of law were proper in light of such facts." *In re Adoption of Cunningham*, 151 N.C. App. 410, 412-13, 567 S.E.2d 153, 155 (2002) (citation and quotation marks omitted). "This Court is bound to uphold the trial court's findings of fact if they are supported by competent evidence, even if there is evidence to the contrary." *In re Adoption of Shuler*, 162 N.C. App. 328, 330, 590 S.E.2d 458, 460 (2004) (citing *In re Adoption of Byrd*, 137 N.C. App. 623, 529 S.E.2d 465 (2000), *aff'd on other grounds*, 354 N.C. 188, 552 S.E.2d 142 (2001)). "[I]n reviewing the evidence, we defer to the trial court's determination of witnesses' credibility and the weight to be given their testimony." *Id.* at 331, 590 S.E.2d at 460 (citing *Leak v. Leak*, 129 N.C. App. 142, 150, 497 S.E.2d 702, 706, *disc. review denied*, 348 N.C.498, 510 S.E.2d 385 (1998)).

I. Challenged Findings of Fact

¶ 8 Petitioners contend Findings 13, 15, 16, and 23 are not supported by competent evidence and are, thus, not binding on this Court. We disagree.

¶ 9 At Petitioners' request, Respondent produced numerous documents, including receipts, credit and/or debit card statements, and telephone

records in his possession to demonstrate he provided consistent and reasonable support within his financial means to both Mother and the minor child. These documents, which were presented at trial, as well as Respondent's testimony, support the challenged Findings. As such, the trial court properly exercised its inherent discretion in weighing and considering all competent evidence before making its Findings of Fact. Respondent testified as to the facts found in Findings 13, 15, 16, and 23, and while Petitioners contend Respondent's testimony is not credible evidence to support the challenged Findings, it is not the duty of this Court to reweigh the credibility of Respondent's testimony. *See In re J.T.C.*, 273 N.C. App. 66, 70, 847 S.E.2d 452, 456 (2020) (quoting *Smith v. Smith*, 89 N.C. App. 232, 235, 365 S.E.2d 688, 691 (1988) (citation omitted)) (" 'Credibility, contradictions, and discrepancies in the evidence are matters to be resolved by the trier of fact, here the trial judge, and the trier of fact may accept or reject the testimony of any witness.' "). Thus, because the Findings are supported by competent evidence, these Findings are binding on appeal.

II. Respondent's Reasonable and Consistent Support

¶ 10 Next, Petitioners contend the trial court erred in finding Respondent provided "reasonable and consistent payments", requiring Respondent's consent to Layla's adoption. Chapter 48 of our General Statutes governs adoption proceedings in North Carolina. Section 48-3-601 requires a man "who may or may not be the biological father" to consent to the adoption of a minor child if he:

> 4. Before the earlier of the filing of the petition . . . has acknowledged his paternity of the minor and
>
> . . . .
>
> II. Has provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support, and has regularly visited or communicated, or attempted to visit or communicate with the biological mother during or after the term of pregnancy, or with the minor, or with both[.]

N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) (2021). Because Petitioners concede Respondent has satisfied both the acknowledgment and

communication requirements, we limit our analysis to whether Respondent provided reasonable and consistent payments for the support of the Mother, minor child, or both.

¶ 11 Respondent must present competent evidence to demonstrate: "(1) he provided payments for the support of the biological mother, minor child, or both; (2) such payments were reasonable in light of his financial means; and (3) such payments were made consistently." *In re Adoption of C.H.M.*, 371 N.C. 22, 29-30, 812 S.E.2d 804, 809-10 (2018).

¶ 12 Petitioners contend the trial court erred in concluding Respondent provided reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both. We disagree.

¶ 13 Although "support" required under N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) is not expressly defined, our Supreme Court has stated: " 'support' is best understood within the context of the statute as actual, real and tangible support, and that attempts or offers of support do not suffice." *In re Adoption of Byrd*, 354 N.C. 188, 196, 552 S.E.2d 142, 148 (2001). However, " '[s]o long as the father makes reasonable and consistent payments *for* the support of mother or child, the mother's refusal to accept assistance cannot defeat his paternal interest.' " *C.H.M.*, 371 N.C. at 30, 812 S.E.2d at 810 (quoting *In re Adoption of Anderson*, 360 N.C. 271, 279, 624 S.E.2d 626, 630 (2006)).

¶ 14 In *Byrd*, the respondent-father delivered a $100 money order and baby clothes to a third party for the benefit of the biological mother and child, but the biological mother did not receive the items until after the adoption petition had been filed. *Byrd*, 354 N.C. at 191, 552 S.E.2d at 145. Further, the Court also emphasized *tangible* support is required under N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II). *Id.* at 196-97, 552 S.E.2d at 148. Thus, the Court concluded the respondent's consent to the adoption of the minor child was not required because "respondent never provided tangible support within his financial means to mother or child at any time during the relevant period before the filing of the adoption petition." *Id.* at 197, 552 S.E.2d at 148.

¶ 15 In *Anderson*, the Supreme Court noted the importance of a "payment record" to establish a putative father made reasonable and consistent payments. 360 N.C. at 279, 624 S.E.2d at 630-31. There, the respondent-father presented evidence he made various offers of financial support to the biological mother, but the mother refused to accept his assistance. *Id.* at 278-79, 624 S.E.2d at 630. As such, the respondent never actually provided any payments or support to the mother or the

minor child. *Id.* at 279, 624 S.E.2d at 630. Thus, the Court concluded respondent's consent to the minor child's adoption was not required because "[b]y doing nothing more than sporadically offering support to [mother], respondent left the support prong of N.C. [Gen. Stat. §] 48-3-601 unsatisfied." *Id.* at 279, 624 S.E.2d at 631.

¶ 16 In *C.H.M.*, the Supreme Court emphasized "the importance of a verifiable payment record to establish that a putative father made reasonable and consistent payments." *C.H.M.*, 371 N.C. at 31, 812 S.E.2d at 811 (citing *Anderson*, 360 N.C. at 278, 624 S.E.2d at 630). In that case, the respondent-father neither purchased any baby items for the minor child nor provided any monetary payments for the minor child's support. *Id.* at 24, 812 S.E.2d at 806. Instead, the respondent presented evidence of a lockbox where he had placed money "for the support of the minor child." *Id.* at 25, 812 S.E.2d at 807. However, the Court concluded the respondent's evidence was insufficient to demonstrate the respondent complied with the statutory support payment requirements. *Id.* at 32, 812 S.E.2d at 811. In so concluding, the Court reasoned the respondent failed to demonstrate the money placed in the lockbox constituted "reasonable and consistent payments" prior to the filing of the petition for adoption as the "respondent presented comingled financial evidence" and did not know how much money was placed in the lockbox at any relevant time. *Id.*

¶ 17 In the case *sub judice*, Respondent, as distinguished from the respondents in *Byrd*, *Anderson*, and *C.H.M.*, provided actual, *tangible* support in the form of food, clothing, transportation, and baby supplies for the benefit of both Mother and Layla, as opposed to mere offers of support. Further, unlike the respondent in *Anderson*, who offered evidence of "sporadic" offers of support to the biological mother, here, Respondent provided documentation in the form of receipts, bank statements, and a self-created "Pregnancy Care Expense Report" as evidence of the tangible support he provided Mother and Layla. Here, Respondent provided what the trial court found to be consistent and reasonable within his financial means: tangible items—a car seat, a crib, baby clothing, diapers, formula, and other baby supplies—for the support of the minor child. Further, Respondent not only provided support to the minor child, but he also provided support to Mother throughout her pregnancy and after Layla's birth. Moreover, unlike the respondents in *Byrd*, *Anderson*, and *C.H.M.*, here, Respondent also prepared his own home for the minor child with a bed, toys, and baby clothing. The Court in *Anderson* suggested the "respondent could have supplied the requisite support [by] . . . opening a bank account or establishing a trust fund

. . . in accordance with his financial resources[,]" 360 N.C. at 279, 624 S.E.2d at 630-631; however, while opening a bank account or establishing a trust fund may satisfy the support requirement of N.C. Gen. Stat. § 48-3-601, that is merely one way to satisfy the statutory requirement.

¶ 18 Indeed, as expressly stated in the statute, the support required by Section 48-3-601 may include "tangible means of support[.]" N.C. Gen. Stat. § 48-3-601(b)(4)(II). As such, the instant case is distinguishable from *Byrd*, *Anderson*, and *C.H.M* as Respondent actually provided *tangible* support to both the biological mother and the minor child during and after the pregnancy term. Moreover, Respondent provided this tangible support prior to the statutory deadline—27 June 2019, when the Petitioners filed the Petition for Layla's adoption. *See In re Adoption of K.A.R.*, 205 N.C. App. 611, 617, 696 S.E.2d 757, 762 (2010) ("[T]he bright-line requirement—that the support contemplated by the statute must be provided prior to the filing of petition—found to absent in *Byrd* and *Anderson*, distinguishes this case.").[2]

¶ 19 Thus, the trial court did not err in finding Respondent provided, in accordance with his financial means, reasonable and consistent payments for the support of both Mother and Layla. Therefore, the trial court also did not err in determining Respondent satisfied the statutory requirements of N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II). Consequently, the trial court properly concluded Respondent's consent was required in order for Layla to be legally adopted.

Conclusion

¶ 20 Accordingly, for the foregoing reasons, we affirm the trial court's Order concluding Respondent's consent is required for the minor child to be legally adopted.

AFFIRMED.

Chief Judge STROUD and Judge JACKSON concur.

---

2. We acknowledge Petitioners' argument that *K.A.R.* was overruled sub silentio by our Supreme Court in *C.H.M.* However, the applicability of *K.A.R.* was clearly at issue in *C.H.M.*, as illustrated by the dissent in that case. While the majority in *C.H.M.*, by omitting discussion of our decision in *K.A.R.* clearly found *K.A.R.* unpersuasive and inapplicable to the facts of *C.H.M.*, it also did not expressly overrule *K.A.R.* despite the opportunity and authority to do so. We further note the Supreme Court denied discretionary review in *K.A.R.* As such, we decline to conclude *K.A.R.* is overruled, and it retains precedential value in this Court. *See also In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

IN RE E.B.

[287 N.C. App. 103, 2022-NCCOA-839]

IN THE MATTER OF E.B. AAU/MPU WARDS GRANVILLE COUNTY

No. COA21-694

Filed 20 December 2022

Mental Illness—involuntary commitment—dangerous to self—psychotic and delusional

The trial court's order requiring respondent, who was suffering from psychosis and delusions, to be involuntarily committed for ninety days was affirmed where the trial court's findings—that respondent posed a significant danger to herself due to her noncompliance with medication, lack of stable housing, and lack of insight into her condition—were supported by clear, cogent, and convincing evidence in the record and in turn supported the conclusion that respondent should be involuntarily committed.

Judge INMAN concurring in result only by separate opinion.

Appeal by respondent from order entered 4 March 2021 by Judge John H. Stultz in Granville County District Court. Heard in the Court of Appeals 9 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General John Tillery, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah Hall Love, for respondent-appellant.

TYSON, Judge.

¶ 1 E.B. ("Respondent") appeals from an order requiring 90 days of inpatient commitment as being mentally ill and being dangerous to self. We affirm.

I. Background

¶ 2 Dr. Gary Pohl ("Petitioner") a state employee who is employed at Central Regional Hospital signed and filed a petition seeking Respondent's involuntary commitment on 21 January 2021, opining she "has a very extensive history of severe mental illness," was "noncompliant with medication and she is currently very psychotic," and was experiencing "paranoid delusions." Respondent underwent a first

examination the following day, with the physician-examiner, Dr. Barbara Mattox, MD, who opined Respondent was "dangerous to herself or others." The examiner specifically noted Respondent believed: (1) someone had implanted tracking devices into her ears, vagina, and uterus; (2) she had undergone genital mutilation; and, (3) that a "snake filled with cocaine" was inside of her gastrointestinal tract.

¶ 3 The trial court ordered Respondent to inpatient involuntary commitment for 30 days, based upon the report and findings "she cannot take care of her physical and medical needs outside of Central Regional Hospital at this time. [Respondent] would cease to take medications if released leading to her decompensation."

¶ 4 Dr. Justin Gettings, Respondent's treating physician, completed another examination on 25 February 2021 and opined Respondent was still dangerous to herself. According to his examination, Dr. Gettings concluded Respondent "remained psychotic and delusional. She believes she has cocaine filled snakes and retained fetal products in her uterus. . . . At present[,] [Respondent] represents a danger to herself if discharged in her current condition."

¶ 5 A re-hearing on Respondent's continued involuntary commitment was held on 4 March 2021. Dr. Gettings testified for the State, and opined Respondent currently suffers from "schizoaffective disorder, bipolar type." He further opined Respondent continued to and would be a danger to herself if discharged. He based his opinion upon observations, despite treatment with medication, Respondent "continue[s] to have persistent delusions that . . . pose a danger to her and make her unsafe to return to the community at this time." Specifically, Dr. Gettings testified:

> [W]hen [Respondent] initially presented, [she] had a delusion that she'd actually had something retained in her uterus. So the content of what has been retained has changed over time, but it's varied from either a cocaine-filled snake—she's mentioned that she has retained fetal product from a prior abortion.
>
> I was worried initially, during the initial part of her admission, that she was actually doing self-examinations of her utero-genital region which could pose potentially a physical danger to herself. . . . [E]ven as recently as this morning, [Respondent] was advocating that she still has retained material in her uterus.

> The second delusion that has been very prominent is that [she] continues to endorse that she's the owner of the Pepsi Cola Company. She stated that she had sole ownership of this product and is owed distributions—financial distributions from the sale of this product. . . . These delusions have remained persistent in spite of treatment.
>
> Third . . . , she has a lot of concern and questioning about the credentials of people involved in her care. . . . [S]he has questioned credentials of some of my colleagues.
>
> She's also questioned the credentials of attorneys that are representing her in a custody case in Durham County. She's told me multiple times that she's had those individuals disbarred. [Respondent] has a history of filing, you know, litigation against folks in Durham County related to that custody battle and getting restraining orders.
>
> I'm bringing all this up because I worry that, if she's in a position in the community where she questions the credentials of professionals, including, you know, potentially police or people that are representing her in civil matters, it could put her at risk and danger to herself.
>
> So those are the three main areas.

¶ 6 When asked by the State whether Respondent might injure herself while engaging in self-examinations of her genitalia and uterus if released, Dr. Gettings responded: "I mean—on a very concrete fashion, yes. I would worry just with, you know, it's an odd delusion . . . . Yes." Dr. Gettings further asserted his opinion it is reasonably probable Respondent would suffer physical debilitation, if immediately released because "she engages in poor self-care, tenuous housing which definitely put[s] her at risk to herself." He also opined, "if we don't have her fully—fully treated and fully at her baseline, she has a high risk of decompensating and requiring repeat or further hospitalization in the future."

¶ 7 Respondent's counsel elicited expert testimony and competent evidence tending to show she had previously lived independently, was compliant with the hospital's rules, has engaged in treatment, and was improving in her condition. Dr. Gettings responded and opined, "I don't

believe she's at her baseline, and that formulation is coming from reviewing past medical records. . . . I do think that there is potentially room for ongoing improvement."

¶ 8 When asked what steps have been taken to try and accommodate Respondent's future discharge, Dr. Gettings asserted "she's essentially homeless," and caregivers had pursued lodging through a transitional housing program. That housing program placed Respondent's application on hold because "the people who organize that program have very significant concerns about [Respondent's] stability and ability to sort of live independently."

¶ 9 Respondent was also sworn, testified, and asserted she would be able to find immediate employment and she had enough money to pay for lodging in short-stay hotels. She testified to continuing to have an obstruction in her gastrointestinal tract and/or uterus despite contrary medical tests, examinations, and treatment revealing no such presence or obstruction.

¶ 10 Respondent also denied needing medication: "Pretty much all of my pills and stuff that was ordered by [Dr. Gettings]. . . . I don't see the problem with me. I see the problem with staff and the billing error. . . . I see, you know, me being consistently held back." While Respondent stated she took laxatives multiple times a day to treat the purported obstructions and blockages, Dr. Gettings did not testify to that effect.

¶ 11 The trial court found and concluded Respondent was mentally ill and dangerous to herself and required further involuntary commitment:

> she suffers from a mental illness, which is schizoaffective disorder. . . . [S]he is currently in possession of a delusion, that there is something retained within her body and . . . that there are other items that are inside of her body that are causing a blockage. The Court finds that these complaints have been medically checked out (sic) and are continuing to be evidence of a delusion. The Court finds that she has persisted in this delusion and that the delusion has changed in nature from a cocaine-filled snake to fetal material to now a blockage in her gastro-intestinal tract that has resulted in her need for high doses of laxatives.
>
> The Court finds that this type of behavior is likely to cause physical self-injury if not stabilized by medication. The Court finds that she does not have adequate

> insight into her mental health issues. She has indicated that she does not need medication.
>
> . . . .
>
> She has been unable to maintain safe, stable housing and that, without this stable housing coupled with her—her own testimony about how she arrived at Central Regional Hospital is incredible, and therefore, that [she] would pose a significant debilitation if she were outside of this hospitalization.

¶ 12 The trial court found Respondent's asserted gastrointestinal or uterine blockage(s) were found to be non-existent and Respondent's "delusional thinking puts [her] at risk for self-inflicted injury due to attemtps [sic] to remove an internal iobstruction [sic]." The Court also found that Respondent's "[n]on-compliance of medication, the lack of stable housing and lack of insight into her condition, taken together, pose a[] serious risk of rapid decompensation if in the community. She therefore poses a significant danger to herself." The trial court concluded and ordered Respondent to be involuntarily committed for 90 days on 4 March 2021, and expressly incorporated Dr. Gettings' report into its oral findings. Respondent appealed.

II. Jurisdiction

¶ 13 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(2) and 122C-272 (2021). "When the challenged order may form the basis for future commitment or may cause other collateral legal consequences for the respondent, an appeal of that order is not moot." *In re Webber*, 201 N.C. App. 212, 217, 689 S.E.2d 468, 472-73 (2009). This appeal is properly before this Court "notwithstanding the fact that the period of [Respondent's] involuntary commitment has ended." *In re Whatley*, 224 N.C. App. 267, 270, 736 S.E.2d 527, 529 (2012) (citation omitted).

III. Issues

¶ 14 Respondent asserts the evidence and the trial court's findings are inadequate to support the conclusions of being mentally ill and of being dangerous to herself. She claims the evidence and findings fail to draw the requisite "nexus between past conduct and future danger" required to make and sustain such a conclusion. *In re J.P.S.*, 264 N.C. App. 58, 63, 823 S.E.2d 917, 921 (2019) ("Although the trial court need not say the magic words 'reasonable probability of future harm,' it must draw a nexus between past conduct and future danger.") (citation omitted)).

IV. Analysis

A. Standard of Review

¶ 15 Respondent, like all individuals before the district court and this Court, is presumed to be sane and is entitled to her liberty and right to be free of restraint. *See* N.C. Const. art. I, § 19 ("No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land."); *Sane*, *Black's Law Dictionary* (11th ed. 2019) ("Having a relatively sound and healthy mind; capable of reason and of distinguishing right from wrong."); *Olmstead v. United States*, 277 U.S. 438, 478, 72 L. Ed. 944, 956 (1928) (Brandis, J., dissenting) (The founders "conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men."). The State's burden of proof to deprive Respondent of her liberty demands competent and relevant evidence and findings of fact to be based upon clear, cogent, and convincing evidence at the involuntary commitment hearing. This Court reviews an involuntary commitment order "to determine whether the ultimate finding concerning the respondent's danger to self or others is supported by the court's underlying findings, and whether those underlying findings, in turn, are supported by competent evidence." *In re W.R.D.*, 248 N.C. App. 512, 515, 790 S.E.2d 344, 347 (2016) (citation omitted).

¶ 16 On issues of admission and credibility of the evidence this Court does "not consider whether the evidence of respondent's mental illness and dangerousness was clear, cogent and convincing," *In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980), as that "is for the trier of fact to determine." *In re Underwood*, 38 N.C. App. 344, 347, 247 S.E.2d 778, 781 (1978).

¶ 17 The trial court's conclusions of law to involuntarily commit and deprive Respondent of her liberty must be supported by its findings of fact and supporting evidence on each required statutory element and those conclusions are reviewed *de novo* on appeal. *Id*. The State's *quantum* of evidence must meet and sustain its burden of proof. *See* N.C. Gen. Stat. § 122C-268(j) (2021); *Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951) ("Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law.") (citations omitted)). Our colleague's separate opinion misstates this Court's duty and role to review conclusions of law. If this Court were to adopt the separate opinion's standard of review, the logical conclusion of that standard deprives Respondent

of *any* effective appellate review. *In re Duvall*, 268 N.C. App. 14, 18, 834 S.E.2d 177, 181 (2019); *see* N.C. Gen. Stat. § 7A-32(c) (2021) ("The Court of Appeals has jurisdiction . . . to supervise and control the proceedings of any of the trial courts of the General Court of Justice[.]").

B. Dangerousness to Self

¶ 18 A respondent may be found to be dangerous to herself under the requirements of the statute if, "[w]ithin the relevant past," she has demonstrated the following:

> I. The individual would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of the individual's daily responsibilities and social relations, or to satisfy the individual's need for nourishment, personal or medical care, shelter, or self-protection and safety.
>
> II. There is a reasonable probability of the individual's suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself or herself.

N.C. Gen. Stat. § 122C-3(11)(a)(1) (2021).

¶ 19 Here, the trial court's order finds and concludes Respondent's involuntary commitment is required, and it concluded Respondent's "[n]on-compliance [with] medication, the lack of stable housing and lack of insight into her condition, taken together, pose a [ ] serious risk of rapid decompensation if in the community. She therefore poses a significant danger to herself."

¶ 20 Because these findings are supported by creditable relevant evidence, the trial court concluded State-Petitioner had met its burden of proof under the statute. Since findings of fact support the trial court's conclusion of involuntary commitment of Respondent, we affirm the trial court's order, and we need not address Respondent's other argument concerning whether involuntary commitment is proper based on any danger to herself posed by injurious self-examination.

1. Inability to Satisfy Healthcare Needs

¶ 21 In challenging the trial court's determination that she is unable to adequately provide for her own medical care, Respondent first argues that "it was undisputed that [she] *voluntarily* arrived at Central Regi[o]nal Hospital seeking medical care." Presuming this fact is true, this assertion misses the mark in two respects:

¶ 22 First, the trial court expressly found Respondent's testimony not credible in its recitation of the oral findings, which were later incorporated into the written commitment order. We do not "second-guess" the trial court's evaluation of Respondent's and the other properly admitted witnesses' credibility. *See In re A.B.C.*, 374 N.C. 752, 761, 844 S.E.2d 902, 909 (2020) (noting in a juvenile case that when the trial court sits and hears testimony as a finder of fact, "it is not the role of this Court to second-guess the trial court's credibility determination") (citation omitted).

¶ 23 Second, Respondent testified she had voluntarily sought medical care for a uterine or gastrointestinal blockage, a condition the expert treating physicians addressed in their testimony and which the trial court found to be non-existent and a subject of Respondent's persistent delusions. These unchallenged findings are binding upon appeal. *In re Moore*, 234 N.C. App. 37, 43, 758 S.E.2d 33, 37 (2014).

¶ 24 These delusions, recounted in the physicians' testimony and the trial court's findings, became evident when Respondent testified, she has no mental health issues, does not need medication for mental illness, and requires copious amounts of laxatives on a daily basis to treat her asserted uterine or gastrointestinal blockages and obstruction(s). To the extent Respondent presented and sought, and continued to seek, medical treatment, the tests showed she did so for an imagined ailment, the physicians testified, and the trial court found does not exist, and Respondent is in denial and neglect of ongoing diagnosed mental illness(es). The trial court's supported findings and its conclusions thereon disclose Respondent, "in the relevant past," has acted in a way that demonstrates a present inability to provide for her medical care, as is required by N.C. Gen. Stat. § 122C-3(11)(a)(1)(I) (2021).

2. Inability to Satisfy Need for Shelter

¶ 25 Respondent challenges the trial court's finding that Respondent "lacks stable housing." Respondent correctly and rightly points out that she had previously lived in an apartment and at several hotels prior to her initial commitment. Dr. Gettings testified from hearsay "what I

understand, that [Respondent's] condo is in a state of disarray to such a severe level that she was not able to continue inhabiting that housing which has then, in turn, led to her living in short-stay hotels. That's—those are not—you know, she's essentially homeless."

¶ 26 Dr. Gettings further testified his attempts to qualify Respondent for a transitional living program was "put on hold," because of "very significant concerns about [Respondent]'s stability and ability to sort of live independently[.]" These portions of Dr. Gettings' testimony were elicited on cross-examination without objection, and any objections thereto are waived. *See In re A.J.D.*, 283 N.C. 1, 7, 2022-NCCOA-258, ¶ 17, 871 S.E.2d 575, 578 (2022) ("[A] review of the Record reveals Respondent did not object to the admission of Dr. Zarzar's testimony on any basis, including impermissible hearsay. As such, Respondent failed to preserve this issue for appellate review." (citing *In re F.G.J.*, 200 N.C. App. 681, 693, 684 S.E.2d 745, 753-54 (2009)); *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007) ("Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." (citation omitted)).

¶ 27 While Respondent's testimony concerning her housing contradicted Dr. Gettings' hearsay assertions, his testimony supports the trial court's finding and conclusion that Respondent "lacks stable housing." The trial court resolves conflicts in the evidence and determines whether Dr. Gettings' testimony was creditable. *In re J.C.D.*, 265 N.C. App. 441, 448, 828 S.E.2d 186, 191-92 (2019). The record contains a finding, assertedly based upon "clear, cogent and convincing" evidence, that Respondent is unable to adequately meet her needs for shelter within the relevant past pursuant to N.C. Gen. Stat. § 122C-3(11)(a)(1)(I). *Collins*, 49 N.C. App. at 246, 271 S.E.2d at 74. Even if unsupported, other properly supported facts support the trial court's conclusion.

3. Reasonable Probability of Serious Physical Debilitation in Near Future

¶ 28 Respondent argues the trial court failed to make adequate findings to support a conclusion that a reasonable probability exists of her serious physical debilitation in the near future. She asserts no finding disclosing such probable harm and "[t]here was simply no evidence that, even if [Respondent] refused to take mental health medication upon discharge, . . . her failure to take the medication would create a serious health risk in the near future."

¶ 29 The trial court expressly found Respondent was presently unable to meet her health and housing needs, and when "taken together, pose[s]

serious risk of rapid decompensation if in the community." This Court has upheld conclusions of the need for involuntary commitments for dangerousness-to-self based on substantially similar findings. *See In re Moore*, 234 N.C. App. at 44-45, 758 S.E.2d at 38 ("The trial court found that respondent 'is at a high risk of decompensation if released and without medication,' and that Dr. Fahs thought respondent, if released, would 'relapse by the end of [the] football season.' The trial court's findings indicated respondent was a danger to himself in the future. The trial court properly found that respondent is a danger to himself because there is a reasonable possibility that he will suffer serious physical debilitation in the near future.").

¶ 30 Further, the trial court's finding that Respondent is at "serious risk of *rapid* decompensation" satisfies N.C. Gen. Stat. § 122C-3(11)(a)(1)(II)'s requirement of a temporal finding of "reasonable possibility" of "serious physical debilitation *in the near future*." *Id.* (emphasis supplied).

¶ 31 The trial court's finding and conclusion of a reasonable probability of serious physical debilitation exists "in the near future" is also supported by other evidence. *Id.* When asked by the State if "it's reasonably probable in the near future, if she's discharged with her delusions, that she could suffer physical debilitations," Dr. Gettings testified "I do [sic]. . . . I would worry that, if we don't have her fully—fully treated and fully at her baseline, she has a high risk of decompensating and requiring repeat or further hospitalization in the future."

¶ 32 The trial court also incorporated Dr. Gettings' report into its order, which states Respondent "has remained psychotic and delusional . . . [and] *at present* represents a danger to herself if discharged in her current condition." (emphasis supplied). The trial court's conclusion that Respondent is at risk of rapid decompensation due to her inability to manage her medical and immediate housing needs is supported by findings of fact based upon clear, cogent, and convincing evidence in the record.

V. Conclusion

¶ 33 The trial court could order the involuntarily commitment of Respondent, if Petitioner met its burden of proof by clear, cogent, and convincing evidence to prove she was unable to care for her health or need for shelter in the relevant past and of a reasonable possibility of physical debilitation in the near future. N.C. Gen. Stat. § 122C-3(11)(a)(1)(I)-(II).

¶ 34 The trial court found Respondent's "[n]on-compliance with medication, the lack of stable housing and lack of insight into her condition, taken together, pose a[ ] serious risk of rapid decompensation if in the community. She therefore poses a significant danger to herself."

¶ 35 These findings are supported by clear, cogent, and convincing evidence. The trial court's findings of fact and conclusions of law of Respondent being mentally ill and being dangerous to herself is supported by evidence in the record. The trial court's order is affirmed. *It is so ordered*.

AFFIRMED.

Judge GORE concurs.

Judge INMAN concurs in result only by separate opinion.

INMAN, Judge, concurring in the result.

¶ 36 I agree with the majority that the trial court's involuntary commitment order should be affirmed, but I respectfully disagree with the standard of review it employs in resolving this appeal. Under the proper standard applicable to involuntary commitment orders, competent record evidence supports the trial court's findings of fact, and those findings of fact support the ultimate finding of dangerousness to self. Applying this well-established framework, I concur in the result.

¶ 37 To order an individual's involuntary inpatient commitment, "the [trial] court shall *find* by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self . . . or dangerous to others . . . . The court shall record the facts that support its *findings*." N.C. Gen. Stat. § 122C-268(j) (2021) (emphasis added). Consistent with the statute's language, dangerousness to self has long been (and remains) understood as an ultimate finding of fact. *See In re Hogan*, 32 N.C. App. 429, 433, 232 S.E.2d 492, 494 (1977) ("Whether a person is mentally ill . . . and whether he is imminently dangerous to himself or others, present questions of fact."); *In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980) ("To enter the commitment order the trial court was required to *ultimately find two distinct facts*, *i.e.*, that the respondent was mentally ill and was dangerous to himself or to others." (emphasis added) (citation omitted)); *In re A.J.D.*, 2022-NCCOA-258, ¶ 15 ("Findings of mental illness and dangerousness to self are ultimate findings of fact." (citation and quotation marks omitted)).

¶ 38 Though occasionally difficult to differentiate, ultimate findings of fact are distinct from both evidentiary facts and conclusions of law:

> There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts.
>
> . . . .
>
> Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law.

Woodard v. Mordecai, 234 N.C. 463, 470-72, 67 S.E.2d 639, 644-45 (1951) (citations omitted).

¶ 39 Consistent with the above distinctions between ultimate findings of fact and conclusions of law, this Court held more than four decades ago that ultimate findings of mental illness and dangerousness are *not* to be treated or analyzed as conclusions of law. *Hogan*, 32 N.C. App. at 433, 232 S.E.2d 492 at 494 ("In the order appealed from in the present case the court purported to make these determinations [of mental illness and dangerousness] as 'matters of law.' We will ignore the incorrect designation and treat the court's conclusions as findings of the ultimate facts required by [the then-applicable involuntary commitment statute].").

¶ 40 In *In re Whatley*, this Court equated, without authority and in passing, ultimate findings of mental illness and dangerousness with conclusions of law. 224 N.C. App. 267, 271, 736 S.E.2d 527, 530 (2012) ("The trial court must also record the facts that support its 'ultimate findings,' i.e., conclusions of law, that the respondent is mentally ill and dangerous to himself or others."). To the extent that this statement in *Whatley* amounts to more than mere *dicta*, it is in direct conflict with: (1) *Woodard*'s distinction between ultimate findings and conclusions of

law, 234 N.C. at 470-72, 67 S.E.2d at 644-45; (2) undisturbed precedents establishing mental illness and dangerousness as ultimate findings of fact, *Hogan*, 32 N.C. App. at 433, 232 S.E.2d 492 at 494; and (3) the applicable statute requiring the trial court to "find" a respondent mentally ill and dangerous in order to involuntarily commit her, N.C. Gen. Stat. § 122C-268(j). Because one panel of this Court cannot overrule another and we are required to follow our Supreme Court's precedents, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), *Whatley*'s conflation of ultimate findings of mental illness and dangerousness with conclusions of law is not binding.

¶ 41 When an appellant challenges the trial court's ultimate finding of dangerousness in an involuntary commitment order, our longstanding standard of review is straightforward: "We review the trial court's commitment order to determine whether the ultimate finding concerning the respondent's danger to self or others is supported by the court's underlying findings, and whether those underlying findings, in turn, are supported by competent evidence." *In re W.R.D.*, 248 N.C. App. 512, 515, 790 S.E.2d 344, 347 (2016). I can find no published decision before or after *Hogan* purporting to apply *de novo* review to ultimate findings of mental illness and dangerousness, and we have explicitly rejected that standard in at least one unpublished decision of this Court. *See In re E.L.*, 268 N.C. App. 323, 834 S.E.2d 189, 2019 WL 5726811, *1 (unpublished) (refusing, based on *Hogan*, to apply the *de novo* standard urged by an appellant to ultimate findings of mental illness and dangerousness).

¶ 42 Our review in applying the competent evidence standard is not unfettered. "It is for the trier of fact to determine whether evidence offered in a particular case is clear, cogent, and convincing. *Our function on appeal is simply to determine whether there was any competent evidence to support the factual findings made.*" *In re Underwood*, 38 N.C. App. 344, 347-48, 247 S.E.2d 778, 781 (1978) (emphasis added) (citations omitted). "*We do not consider* whether the evidence of respondent's mental illness and dangerousness was clear, cogent and convincing. It is for the trier of fact to determine whether the competent evidence offered in a particular case met the burden of proof." *Collins*, 49 N.C. App. at 246, 271 S.E.2d at 74 (emphasis added) (citing *Underwood*, 38 N.C. App. at 347, 247 S.E.2d at 781).

¶ 43 The majority recognizes some of the caselaw concerning the proper standard of review while deviating from precedents in key respects. Its assertions that the ultimate findings of mental illness and dangerousness to self are conclusions of law and that the involuntary commitment thereunder is subject to *de novo* review ignores prior decisions

establishing: (1) mental illness and dangerousness as ultimate findings rather than legal conclusions, *Hogan*, 32 N.C. App. at 433, 232 S.E.2d 492 at 494; and (2) the proper standard of review applicable to those ultimate findings, *see, e.g.*, *W.R.D.*, 248 N.C. App. at 515, 790 S.E.2d at 347.

¶ 44 In supporting its assertion of *de novo* review, the majority misstates the standard applied in *Underwood*. That decision treats dangerousness as an ultimate finding and does not employ *de novo* review:

> Our function on appeal is simply to determine whether there was any competent evidence to support the factual findings made. . . . [T]he petitioner's testimony furnished competent evidence to support the trial court's factual findings . . . . These factual findings in turn furnished ample support for the court's ultimate findings that respondent was mentally ill and imminently dangerous to self or others . . . .

38 N.C. App. at 347-48, 247 S.E.2d at 781. Relatedly, I disagree with the majority's repeated misnomer of the trial court's ultimate findings in this case as legal "conclusions."

¶ 45 The majority's claim that the well-established standard of review set forth in this concurring opinion "deprives Respondent of any effective appellate review, including constitutional claims . . . and issues of statutory interpretation and application," ignores the more than forty years of caselaw reviewing *and reversing* involuntary commitment orders under precisely this standard. *See e.g.*, *Hogan*, 32 N.C. App. at 434, 232 S.E.2d at 495 (reversing an involuntary commitment order because the underlying findings were unsupported by competent evidence and did not support the ultimate findings). Respondent has not challenged the constitutionality of her involuntary commitment, and she has not presented any argument concerning statutory interpretation. Nor has she requested *de novo* review. Instead, her brief simply asks that we employ the exact standard applied in decades of caselaw and in this concurring opinion.

¶ 46 I similarly decline to adopt the majority's several assertions that the trial court's "findings are supported by clear, cogent and convincing evidence," as such judgments on the weight of the evidence are beyond this Court's purview. *See id.* at 347-48, 247 S.E.2d at 781; *Collins*, 49 N.C. App. at 246, 271 S.E.2d at 74. Stated simply, because this Court is not authorized to consider whether evidence is clear, cogent, and convincing, we should not purport to decide that issue.

¶ 47 Even though I believe the majority applies the wrong standard of review, I reach the same result applying the correct standard. The evidence recited in the majority opinion is competent to support the trial court's evidentiary findings that Respondent is unable to manage her own medical and housing needs and is at rapid risk of decompensation if released. Those evidentiary findings, in turn, support the trial court's ultimate finding that Respondent is dangerous to herself. I therefore concur in the result affirming the trial court's order.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY HERBERT C. MORETZ DATED APRIL 11, 2001. RECORDED IN BOOK 745, PAGE 62, LEE COUNTY REGISTRY, BY EDDIE S. WINSTEAD, III, SUBSTITUTE TRUSTEE

No. COA22-172

Filed 20 December 2022

Appeal and Error—appellate rule violations—gross and substantial—dismissal warranted

Respondent's numerous appellate rule violations, both jurisdictional and nonjurisdictional—particularly her counsel's failure to include the order appealed from in the record on appeal and to timely serve the proposed record—constituted gross and substantial violations warranting dismissal of her appeal from an order of foreclosure. Other violations that impaired appellate review included the failure to file the transcript and all the evidence presented to the trial court, failure to serve and/or provide proof of service on several filings, and failure to include necessary sections of the appellate brief.

Appeal by Respondent from an order entered 4 May 2021 by Judge J. Stanley Carmical in Lee County Superior Court. Heard in the Court of Appeals 4 October 2022.

Elizabeth Myrick Boone and Sanford Law Group, by Eddie Winstead, for Appellee Eddie S. Winstead, III, Substitute Trustee.

The Key Law Office, by Mark A. Key, for Respondent-Appellant Amanda Tillman.

INMAN, Judge.

¶ 1 Amanda Tillman ("Respondent") appeals from an order foreclosing on her home pursuant to an unpaid promissory note and unsatisfied deed of trust executed by the property's prior owner. Also pending before this Court are several motions, including: (1) a motion by Appellee Eddie S. Winstead, III, as Substitute Trustee (the "Trustee"), to dismiss the appeal for numerous gross and substantial appellate rule violations; (2) two motions by Respondent to amend the record to include the order from which she appeals; and (3) a motion to strike Respondent's motions to amend and her responses to the motion to dismiss. After careful review, we grant the Trustee's motion to dismiss Respondent's appeal in light of the gross and substantial appellate rule violations evident in the record. We dismiss the remaining motions as moot.

I. FACTUAL AND PROCEDURAL HISTORY

A. Underlying Facts and the Foreclosure Proceeding

¶ 2 Respondent was bequeathed a home in Lee County through a codicil to the Last Will and Testament of Herbert Moretz ("Decedent"). That property was subject to a 2001 deed of trust in favor of Sanford Financial, LLC, who also held a promissory note secured by the deed of trust evincing a $123,000 debt owed by Decedent. Decedent never repaid the loan.

¶ 3 Sanford Financial, LLC was originally incorporated in 2000 by organizer and registered agent Robert L. Underwood. The registered office was located in Raleigh. In 2005, Mr. Underwood filed articles of dissolution with the written consent of all members, who are unknown.

¶ 4 On 4 February 2020, Zachary M. Moretz filed articles of organization for another Sanford Financial, LLC with the Secretary of State. Zachary Moretz was listed as the registered agent, and the company's registered office was located in Concord. The limited documents in the record do not disclose whether the new Sanford Financial, LLC is related to the previously dissolved entity of the same name, nor does the limited record show a transfer of Decedent's obligation to the new entity.

¶ 5 The new Sanford Financial served a notice of default on Decedent's estate on 28 August 2020. The estate failed to cure the default, so Sanford Financial pursued foreclosure. The foreclosure was heard before the clerk of superior court, who entered an order for foreclosure on 10 March 2021. Respondent appealed that order to Superior Court, though no notice of that appeal appears in the record.

¶ 6 The Superior Court heard Respondent's appeal on 19 April 2021. No transcript of the hearing has been filed with this Court, and the record

on appeal only includes three of at least seven exhibits introduced at trial. The trial court entered an order of foreclosure on 4 May 2021, but that order is also absent from the record on appeal.

B. Respondent's Notice of Appeal and Subsequent Trial Court Motions

¶ 7 Respondent filed a notice of appeal from the Superior Court's order on 12 May 2021. The certificate of service attached to the notice of appeal is irregular, as it states it was served on 6 May 2021 and signed by counsel four days later on 10 May 2021.

¶ 8 On 14 May 2021, Respondent filed a motion to stay the order of foreclosure, which was heard remotely on 3 June 2021 due to Respondent's counsel's positive COVID test. The trial court set an appeal bond at $20,000 and directed Respondent to prepare and serve a written order. Respondent's counsel was hospitalized following the hearing and continued to experience serious health complications. No order granting the stay was prepared and entered until December 2021, and no bond was posted prior to that date.

¶ 9 Respondent was required to serve the proposed record on appeal by 20 September 2021 under N.C. R. App. P. 11(b) (2021),[1] as the transcript of proceedings was delivered on 5 August 2021. On 7 September 2021, Respondent filed a motion for extension of time to serve the proposed record up to and including 1 October 2021. The motion was never noticed or calendared for hearing. On 15 November 2021, approximately six weeks after the deadline for Respondent to serve a proposed record, the Trustee moved in the trial court to dismiss the appeal pursuant to N.C. R. App. P. 25(a) (2021). That motion was heard on 1 December 2021, at which time the trial court *sua sponte*, under an unspecified plenary power "to prevent manifest injustice," elected to hold the motion to dismiss in abeyance and extend Respondent's deadline to serve the proposed record to 15 December 2021.

¶ 10 Respondent served the proposed record on 15 December 2021, and the trial court subsequently denied the Trustee's motion to dismiss the appeal. On 26 January 2022, the Trustee noticed an appeal of the denial of his motion to dismiss the appeal.[2] The parties agreed to settle the record on 20 February 2022, and the final record was filed on 2 March 2022.

---

1. Because this appeal was filed in 2021, all subsequent references to the North Carolina Rules of Appellate Procedure are to the version effective 1 January 2021.

2. The Trustee would later voluntarily dismiss his appeal on 1 April 2022.

The stipulation settling the record on appeal is signed by the parties but is undated, and the certificate of service for the record itself is irregular in that it is both unsigned and undated.

C. Court of Appeals Proceedings

¶ 11 With the appeal docketed and the record filed, Respondent had until 1 April 2022 to file her brief under N.C. R. App. P. 13(a)(1). Respondent failed to do so. On 1 and 4 April 2022, Respondent's counsel emailed Trustee's counsel regarding an extension but never filed such a motion with the Court.

¶ 12 On 25 April 2022, Trustee's appellate counsel moved to dismiss the appeal for Respondent's failure to file an appellant brief. On 3 May 2022, Respondent's counsel responded to the motion, asserting that he had intended to file a motion for an extension but that his assistant, as attested in an affidavit attached to the response, inadvertently failed to do so and misinformed him that it had been filed. Respondent's counsel also filed on that date, 24 days after the expiration of Respondent's deadline to file an appellant brief, a motion for extension of time to file that brief. This Court denied the Trustee's motion to dismiss the appeal and granted Respondent's motion for extension of time, giving Respondent until 23 May 2022 to file a brief with this Court.

¶ 13 Respondent filed her brief with this Court on 23 May 2022. However, the brief omitted a table of authorities, issues presented page, standard of review section, and attorney signature as required by N.C. R. App. P. 28(b)(1), (2), and (6).

¶ 14 The Trustee again moved this Court to dismiss the appeal on 22 June 2022 for failure to comply with the appellate rules. The motion asserts the following appellate rule violations:

(1) Failure to timely serve the proposed record on appeal under N.C. R. App. P. 11.

(2) Failure to secure a proper extension of time to serve the proposed record under N.C. R. App. P. 11 and 27, asserting that Judge Gilchrist lacked authority to grant such an extension after expiration of the time for service.

(3) Failure to timely file the record on appeal under N.C. R. App. P. 12.

(4) Failure to serve the record and demonstrate service through a proper certificate of service under N.C. R. App. P. 26.

(5) Failure to include the order appealed from in the record under N.C. R. App. P. 9.

(6) Failure to include all documents necessary to the disposition of the appeal as required by N.C. R. App. P. 9.

(7) Failure to execute a proper certificate of service for the notice of appeal as contemplated by N.C. R. App. P. 3 and 26.

(8) Failure to comply with the stay and bond provisions of N.C. R. App. P. 8.

(9) Failure to file an appellate information statement as required by N.C. R. App. P. 41.

(10) Failure to file the transcript as required by N.C. R. App. P. 7.

(11) Failure to comply with various provisions of N.C. R. App. P. 28 in the composition of the appellant brief.

¶ 15 Respondent's counsel responded to the second motion to dismiss the appeal on 12 July 2022. He did not dispute the irregularities in the certificates of service appearing in the record, he conceded his failure to include the order appealed from in the record on appeal, and he acknowledged untimely filing the appellate information statement. He likewise admitted his noncompliance with the briefing requirements of the Rules, ascribing this deficiency to his assistant.

¶ 16 At no point did Respondent's counsel address the failure to file the trial transcript with this Court, and the response itself contains several irregularities, namely: (1) the certificate of service states that it was served via email on 3 May 2022; and (2) the response refers to several exhibits, none of which is attached to or included in the filing. Respondent denied the remainder of the alleged rule violations.

¶ 17 Respondent filed with this Court a second response to the Trustee's motion to dismiss on 13 July 2022, a day late under N.C. R. App. P. 10(a). This response is largely identical to the first response, but also includes a corrected Respondent's brief and two emails: one referenced in the body of both responses, and one that appears irrelevant to this appeal. As with the first response, the second response omitted several exhibits or attachments referenced therein. The certificate of service again includes an irregular service date of 3 May 2022, and it also incorrectly certifies that the second response was filed on 12 July 2022.

¶ 18 On 15 July 2022, Respondent's counsel filed with this Court two substantively identical motions to amend the record. Both seek to add

the superior court's foreclosure order to the record on appeal. The motions also include a 16 May 2022 email from Respondent's counsel to the Trustee's appellate counsel acknowledging that there are other "necessary missing documents from the record on appeal," namely (1) Respondent's notice of appeal from the clerk's order to superior court, and (2) any pleadings showing the substitution of the Trustee. However, none of these additional documents is included or referenced in Respondent's motion to amend the record on appeal. The certificates of service for these motions state that they were served on the Trustee and his counsel via email on 15 July 2022.

¶ 19 On 27 July 2022, Trustee's counsel filed with this Court a motion to strike the 13 July 2022 response to the second motion to dismiss as untimely and unserved, asserting that it was never emailed as asserted in the certificates of service. The motion further asserts that Respondent's motions to amend were never served via email as claimed in their certificates of service. Respondent filed no response to this motion.

II. ANALYSIS

¶ 20 Appellate rule violations fall into three categories: (1) waivers arising at trial; (2) jurisdictional defects; and (3) non-jurisdictional defects. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 194, 657 S.E.2d 361, 363 (2008). Jurisdictional defects mandate dismissal, *id.* at 197, 657 S.E.2d at 365, while non-jurisdictional defects subject an appeal to dismissal if they are "gross" or "substantial," *id.* at 199, 657 S.E.2d at 366-67. This Court identifies gross or substantial violations by examining (1) "whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would frustrate the adversarial process," *id.* at 200, 657 S.E.2d at 366-67; and (2) "the number of rules violated," *id.* at 200, 657 S.E.2d at 367.

A. Specific Rule Violations

¶ 21 Reviewing the parties' motions and responses, including Respondent's admitted errors, it is apparent that Respondent's counsel has violated several appellate rules. The following violations, at a minimum, are evident on the face of the record:

(1) Failure to include the order appealed from under N.C. R. App. P. 9(a)(1)h.;

(2) Numerous failures to serve and/or include proper proof of service on several filings, including the notice of appeal, as required by N.C. R. App. P. 3(e), 26(b), 26(d), and/or 37(a);

(3) Failure to timely file an appellate information statement as required by N.C. R. App. P. 41;

(4) Failure to file the transcript as required by N.C. R. App. P. 7(f) and 9(c)(3)b.;

(5) Failure to comply with various provisions of N.C. R. App. P. 28 in the composition of the appellate brief;

(6) Failure to include in the record those materials required by N.C. R. App. 9(a)(1)e., g., i., and j.; and

(7) Filing a response to an appellate motion out-of-time in violation of N.C. R. App. P. 37(a).

Beyond these specific rule violations, Respondent's duplicative responses to the pending motion to dismiss fail to include all of the exhibits and attachments the responses reference.

¶ 22 Respondent's counsel also failed to timely serve the proposed record on appeal notwithstanding the trial court's order attempting to extend the service period. A motion to extend an expired deadline under the appellate rules "must be in writing and with notice to all other parties and may be allowed only after all other parties have had an opportunity to be heard." N.C. R. App. P. 27(d). Respondent's counsel filed no such written motion; while Respondent did move to extend the initial proposed record deadline in writing from 20 September to 1 October 2021, her counsel did not serve a notice or otherwise arrange for a hearing on that motion. When the trial court addressed the matter *sua sponte* in December 2021, in the absence of a written motion, it had no authority to extend the appellate deadline, so its order doing so is void. *See Cadle Co. v. Buyna*, 185 N.C. App. 148, 151, 647 S.E.2d 461, 464 (2007) (holding a trial court lacked authority to extend the time for serving a proposed record on oral motion after said time expired). Respondent points to no rule or caselaw demonstrating the validity of the trial court's order in the face of N.C. R. App. P. 27(d) and *Cadle Co.*, and we therefore hold that the proposed record in this case was not timely filed as required by N.C. R. App. P. 11(b).

B. The Above Violations Are Gross, Substantial, and Warrant Dismissal.

¶ 23 The first violation identified above—Respondent's counsel's failure to include the order appealed from in the record on appeal—is a jurisdictional defect that mandates dismissal. *State v. McMillian*, 101 N.C. App. 425, 427, 399 S.E.2d 410, 411 (1991). While Respondent's counsel

has moved to correct this defect, it nonetheless constitutes a violation to be considered in determining whether the additional rule violations are so gross and substantial as to warrant dismissal. Indeed, those other rule violations meet that standard.

¶ 24 For example, Respondent's counsel's failure to timely serve the proposed record, standing alone, may warrant dismissal. *See Webb v. McKeel*, 132 N.C. App. 817, 818, 513 S.E.2d 596, 597-98 (1999) (dismissing appeal for failure to timely serve proposed record on appeal). *But see Powell v. City of Newton*, 200 N.C. App. 342, 350, 684 S.E.2d 55, 61 (2009) (holding under those facts that failure to timely serve proposed record on appeal was not so egregious as to warrant dismissal).

¶ 25 Respondent's counsel's other rule violations render the record inadequate to resolve the appeal and frustrate appellate review. N.C. R. App. P. 9(a)'s various subparts collectively provide that the record must include all pleadings, documents, and evidence necessary to dispose of the appeal, which may include the trial transcript if designated by the appellant. Here, Respondent designated the use of the trial transcript and relies on the testimony in said transcript for the arguments presented in her brief. But Respondent's counsel ultimately failed to file the transcript with this Court—even after the error was pointed out by the Trustee in his motion to dismiss—as is required by N.C. R. App. P. 7 and 9(c)(3)b. Presuming underlying merit to Respondent's contention that the evidence below does not show that the current Sanford Financial, LLC is the actual holder of the note being foreclosed upon, her counsel's failure to file the transcript and include all evidence presented to the trial court in the printed record on appeal renders this Court unable to conclusively review the issue. That failure also frustrates the ability of the Trustee to respond to those arguments with citations to the record evidence and transcript. These non-jurisdictional violations impair our appellate function and the adversarial process. When coupled with Respondent's other numerous violations of the appellate rules, this violation rises to the level of gross and substantial non-jurisdictional defects to warrant dismissal. *Dogwood*, 362 N.C. at 199-200, 657 S.E.2d at 366-67.

¶ 26 Respondent's counsel's responses to these alleged non-jurisdictional rule violations do not dissuade us from holding dismissal to be appropriate here. He first argues that the Trustee's motion to dismiss should not be granted because it does not include an affidavit or certified docket entries as required by N. C. R. App. P. 25(a). This argument misses the mark because the Trustee's motion arises under N.C. R. App P. 25(b), which imposes no such requirement for a motion to dismiss an appeal for appellate rule violations.

¶ 27 Counsel's remaining arguments are equally unavailing. Several of them rely on exhibits and attachments, which are missing from the filed responses. Counsel asserts that his non-licensed assistant is responsible for several rule violations, but he, as counsel of record and not his paralegal, is responsible for the preparation, signing, service, and filing of materials with this Court under the North Carolina Rules of Appellate Procedure. *See, e.g.*, N.C. R. App. P. 3(d) (requiring a notice of appeal to be "signed by counsel of record . . . or by any such party not represented by counsel of record"). His related claim that the Trustee shares some blame or fault for the inadequate record on appeal is likewise misplaced, as the appellant "b[ears] the burden of proceeding and of ensuring that the record on appeal and verbatim transcript [is] complete, properly settled, in correct form, and filed with the appropriate appellate court by the applicable deadlines." *State v. Berryman*, 360 N.C. 209, 217, 624 S.E.2d 350, 356 (2006).

III. CONCLUSION

¶ 28 "The appellate courts of this state have long and consistently held that the rules of appellate practice . . . are mandatory and that failure to follow these rules will subject an appeal to dismissal." *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999) (citations omitted). Here, Respondent's counsel failed to abide by many of our rules, both jurisdictional and non-jurisdictional. Even when any jurisdictional failures are set aside, the remaining rule violations are numerous, impair appellate review, and frustrate the adversarial process. Dismissal of the appeal is proper under these circumstances. *Dogwood*, 362 N.C. at 200, 657 S.E.2d at 367. We grant the Trustee's motion to dismiss Respondent's appeal pursuant to N.C. R. App. P. 25(b). We dismiss the remaining motions as moot.

DISMISSED.

Judges TYSON and COLLINS concur.

IN RE McCLATCHY CO., LLC

[287 N.C. App. 126, 2022-NCCOA-841]

IN THE MATTER OF THE McCLATCHY COMPANY, LLC, D/B/A "THE NEWS & OBSERVER;" CAROLINA PUBLIC PRESS, INC., D/B/A "CAROLINA PUBLIC PRESS;" CAPITOL BROADCASTING COMPANY, INCORPORATED, D/B/A "WRAL-TV;" LEE ENTERPRISES, D/B/A "THE NEWS & RECORD;" HEARST PROPERTIES, INC., D/B/A "WXII;" GANNETT CO., INC., D/B/A "THE BURLINGTON TIMES NEWS;" MACKENZIE WILKES, JOHN NORCROSS, AND GRACE TERRY, OF ELON NEWS NETWORK, PETITIONERS

No. COA21-716

Filed 20 December 2022

Public Records—law enforcement agency recordings—media request—statutory findings—redaction—trial court's discretion

The trial court's order requiring the release of all custodial law enforcement agency recordings requested by media petitioners pursuant to N.C.G.S. § 132-1.4A(g), related to a protest march, was vacated and remanded for additional findings of fact where the trial court failed to make required statutory findings to show under which statutory category petitioners were entitled to the release of the recordings. In anticipation of remand, the appellate court also considered additional arguments raised by the law enforcement agency, further concluding that the trial court abused its discretion by not redacting irrelevant recordings and erred by failing to exercise its discretion.

Judge ARROWOOD dissenting.

Appeal by respondent from order entered 15 June 2021 by Judge Andrew H. Hanford in Alamance County Superior Court. Heard in the Court of Appeals 7 June 2022.

Envisage Law, by Adam P. Banks and Anthony J. Biller, for respondent-appellant.

Stevens Martin Vaughn & Tadych, PLLC, by Michael J. Tadych, Hugh Stevens, C. Amanda Martin, and Elizabeth J. Soja, for petitioners-appellees.

TYSON, Judge.

¶ 1 The Graham Police Department ("GPD") appeals from the trial court's order authorizing and ordering the release of all custodial law enforcement agency recordings petitioned by media Petitioners pursuant

to N.C. Gen. Stat. § 132-1.4A(g) (2021). We vacate the order and remand for additional findings of fact.

I. Background

¶ 2 A group of people participated in a "I am Change" march in Graham on 31 October 2020. The organizers of the march secured a permit to march, but were not authorized to close and were instructed not to block the public streets of Graham for the march. When marchers refused to clear an intersection of streets following multiple requests, GPD deployed Oleoresin Capsicum ("pepper spray") canisters to clear the street.

¶ 3 The marchers moved to the grounds of the Historic Alamance County Courthouse. Speeches were given by organizers and designated speakers. Before the speeches were concluded, GPD officers and sheriff's deputies discovered a gas-powered generator providing electricity for a sound system. The generator was operating within two feet of a gas container, in violation of the fire code. Officers attempted to disconnect the generator, but attendees resisted the officers' efforts. The event was declared to be unsafe, dispersal orders were issued, but went unheeded. GPD officers and Alamance County Sheriff's deputies arrested 23 protesters.

¶ 4 The McClatchy Company, LLC, d/b/a The News and Observer Publishing Co., filed an amended petition in Alamance County Superior Court seeking release of custodial law enforcement agency recordings under N.C. Gen. Stat. § 132-1.4A(g) on 2 March 2021. Joining as petitioners were: Carolina Public Press, Inc., d/b/a Carolina Public Press; Capitol Broadcasting Company, Incorporated, d/b/a WRAL-TV; Lee Enterprises, d/b/a News & Record of Greensboro; Hearst Properties, d/b/a WXII; Gannett Co., Inc., d/b/a/ The Burlington Times-News; and Mackenzie Wilkes, John Norcross, and Grace Terry of the Elon News Network (collectively with The McClatchy Company, LLC ("Petitioners").

¶ 5 Petitioners sought from the Alamance County Sheriff ("ACS") and GPD (collectively "Respondents') to:

> release of all law enforcement and other recordings leading up to, during and after the "I am Change" march in Graham, NC, occurring on 31 October 2020 from the time the first contact was made with marchers, spectators or media on that date until the last member of law enforcement left the scene. Petitioners' requests include, but are not limited to,

> recordings from all body worn cameras, dashboard cameras, hand-held recording devices of any kind, drones/unmanned aerial vehicles, stationary cameras, or any other video or audio recording device operated by or on behalf of a law enforcement agency or law enforcement agency personnel as defined by G.S. 1[32]-1.4A(a)(6) when carrying out law enforcement responsibilities at the time of first contact, at the courthouse and around Court Square.

¶ 6 The matter was scheduled for hearing on 8 March 2021. Respondents moved for a continuance, which was allowed. The hearing was rescheduled for 26 April 2021. The trial court also filed an "Order to Provide Custodial Law Enforcement Agency Recording for In-Camera Review", which required Respondents to provide the trial court with a copy of the petitioned recordings "on or before" 12 April 2021 "along with a list of all law enforcement personnel whose image or voice is in the recording[.]"

¶ 7 Respondents were also required to give notice of the petition and hearing "to any law enforcement agency personnel whose image or voice was shown or captured in the recording and to the head of that person's employing law enforcement agency[,]" and to provide the trial court and petitioners' counsel "with a list identifying those portions of the requested recordings to which law enforcement objects to release and all bases for those objections upon provision of the subject recordings for in camera review".

¶ 8 Neither ACS nor GPD appealed this order. ACS submitted its recordings for in-camera review on 18 March 2021. ACS did not file any objections with its submission. GPD submitted its recordings after obtaining an extension of time on 23 April 2021.

¶ 9 GPD listed the following objections to release of the petitioned recordings: (1) "pursuant to N.C.G.S. § 132-1.4A(g)(1)[,]" on the basis of lack of a compelling public interest, since the events at issue had occurred "more than 6 months ago" and were "no longer 'newsworthy' "; (2) "pursuant to N.C.G.S. § 132-1.4A(g)(3)[,]" because petitioners did not seek to " 'obtain evidence to determine legal issues in a current or potential court proceeding' "; (3) "pursuant to N.C.G.S. § 132-1.4A(g)(5)[,]" because the "expansive nature of [p]etitioner[s'] request ensures extraneous footage of march participants will be released[,]" creating "the risk of harm to 'reputation' or 'safety' of protest participants"; and (5) "pursuant to N.C.G.S. § 132-1.4A(g)(6)[,]" on the basis that "such release creates a threat to the 'fair, impartial, and orderly administration of

justice[ ]' " because the "enclosed CLE Recordings contain footage of all individuals arrested by GPD on October 31, 2020." Respondent-GPD also objected to the release of specific footage depicting specific individuals, who were then facing criminal charges following their arrests on 31 October 2020.

¶ 10 The trial court conducted an in-camera review of the submitted recordings between 21-28 May 2021 and scheduled a hearing for 10 June 2021. At the hearing, Respondents argued the following objections against release of the petitioned recordings: (1) law enforcement recordings "are not public records" under N.C. Gen. Stat. § 132-1.4A; (2) "only personal representatives have an absolute right to . . . access . . . these videos"; (3) "[t]he burden [is] slightly less" for "authorized individuals to obtain access to the video[,]" whereas the burden under subsection "g" of the statute "is a bit higher"; (4) the trial court, "in its discretion, can place any sort of additional restriction on top of the release" of such recordings; (6) the matter was no longer newsworthy; (7) the footage sought was available elsewhere; (8) petitioners' request was not specific, but rather "a generic request for all video"; (9) release of the recordings may affect the privacy interests of the individuals depicted therein; (10) there were criminal cases still pending following the 31 October 2020 events; (11) the recordings captured "extraneous footage"; (12) "these videos are available" "for any criminal proceeding" and that petitioners had "not obtained . . . consent" from the individuals depicted therein to release the footage; (13) release of the petitioned recordings could "reveal information regarding a person that is of a highly sensitive . . . nature" and "may harm the reputation or jeopardize the safety of a person"; (14) "these videos could create a serious threat to the fair and impartial and orderly administration of justice"; and, (15) "releasing this video now interrupts the fair and orderly discovery process" of an ongoing federal lawsuit.

¶ 11 At the close of all arguments, the trial court stated the following:

> I will inform everyone that this Court has given this decision great consideration and has not taken this decision lightly in any way. And I'll refer you to Alamance CV 271 (sic).
>
> . . . .
>
> The Court having considered the applicability of all the standards of G.S. 132[ ]-1.4A(g), has determined the following: That the release of the information is necessary to advance a compelling public interest.

The Court finds that there is a compelling public interest in the accountability and transparency of law enforcement officers and that this factor weighs in favor of release.

No. 2, The recording contains information that is otherwise confidential or exempt from disclosure or release under state or federal law. This Court finds this factor is not relevant and does not impact the Court's decision.

No. 3, The person requesting release is seeking to obtain evidence to determine legal issues in a current or potential court proceeding. The Court finds this factor is not relevant and does not impact this decision.

No. 4, Release would reveal information regarding a person that is of a highly sensitive and personal nature. This Court finds that this factor weighs against release.

No. 5, That release may harm the reputation or jeopardize the safety of a person. This Court finds this factor also to weigh against release.

No. 6, That release would create a serious threat to the fair and orderly administration of justice. This court finds that this factor does weigh in favor of release.

No. 7, Confidentiality is necessary to protect an active internal criminal investigation or potential internal or criminal investigation. This Court finds this factor is not relevant and does not impact the Court's decision.

No. 8, There is good cause shown to release all portions of the recording. This Court finds that the photos and the recordings speak for themselves, and *this Court does not have the authority to [c]ensor this information absent a legitimate or compelling state interest* not to do so. Most importantly this Court gives great weight to transparency and public accountability with regard to police action and considers a failure to release this information to possibly

> undermine the public interest and confidence in the administration of justice.
>
> In light of the foregoing findings of fact, the Court concludes that the media is authorized to the release of all of the photos and recordings. It is therefore ordered that this petition is granted. *That the custodial law enforcement agencies involved shall release all photos and custodial law enforcement recordings* to the media and that's the order of the Court.

(emphasis supplied).

¶ 12 The trial court filed its written "Order on Petition for Release of Custodial Law Enforcement Agency Recording" on 15 June 2021. The order contains determinations consistent with the court's rendering in open court regarding "the applicability of all of the standards in G.S. 132-1.4A(g)[.]" The trial court found:

> The photos/recordings speak for themselves. *This Court does not have the authority to censor the photos/recordings* absent a compelling governmental interest and none was shown. This Court gives great weight to transparency and public accountability of police action and failure to release the photos/recordings would undermine the public trust and confidence in the administration of justice.

(emphasis supplied).

¶ 13 The trial court ordered Respondents to release "ALL recordings and photographs as indicated on the submissions made to the Court by the custodial law enforcement agencies and without redaction or alteration on or before 2:00 p.m. on Friday June 25, 2021."

¶ 14 GPD appealed the 15 June 2021 "Order on Petition for Release of Custodial Law Enforcement Agency Recording" on 23 June 2021. GPD filed a "Motion for Stay of Order Directing Release of Custodial Law Enforcement Recording Pending Appeal" on 25 June 2021, which was amended on 30 June 2021. Petitioners filed a Motion to Show Cause on 6 July 2021. The trial court granted GPD's motion to stay the 15 June 2021 order and denied Petitioners' Motion to Show Cause. GPD appeals.

II. Jurisdiction

¶ 15 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issue

¶ 16 GPD argues Petitioners' petition was overly broad under N.C. Gen. Stat. § 132-1.4A (2021); the trial court improperly imposed a *de-facto* burden and then shifted it onto Respondents; the trial court misapplied the law and imposed the incorrect legal standard in ordering the unredacted release of all portions of all videos and recordings; the trial court abused its discretion in failing to take reasonable steps to protect against the release of information of a highly sensitive personal nature; and, the trial court frustrated the legislative intent behind N.C. Gen. Stat. § 132-1.4A.

IV. Standard of Review

¶ 17 N.C. Gen. Stat. § 132-1.4A(g) provides: "The [trial] court *shall release only those portions of the recording that are relevant to the person's request*, and may place any conditions or restrictions on the release of the recording that the court, in its discretion, deems appropriate." N.C. Gen. Stat. § 132-1.4A(g) (emphasis supplied). The statute mandates express limitations on the release of otherwise non-public and non-personnel records, specifying courts "shall release only those portions . . . relevant," and further provides the trial court "may place any conditions or restrictions on the release." *Id.*

V. Analysis

¶ 18 To analyze the parties' arguments, an examination of N.C. Gen. Stat. § 132-1.4A is required. "The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citation omitted). "The best indicia of that intent are the [plain] language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted). "[S]tatutes *in pari materia* must be read in context with each other." *Cedar Creek Enters. v. Dep't of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976) (citation omitted).

¶ 19 "When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself[.]" *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010) (citation omitted). "Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible." *Taylor v. Robinson*, 131 N.C. App. 337, 338, 508 S.E.2d 289, 291 (1998) (internal citations, quotation marks, and ellipses omitted).

¶ 20 Further, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (internal quotation marks omitted) (quoting *Mazda Motors v. Sw. Motors*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979)).

¶ 21 Release of law enforcement photos and recordings is strictly limited by statute and are neither public records subject to uncontrolled release nor personnel records under our General Statutes. N.C. Gen. Stat. § 132-1.4A(b).

¶ 22 N.C. Gen. Stat. § 132-1.4A(c) provides the limited categories of persons who are authorized to seek release of the law enforcement recordings and records:

> (c) Disclosure; General. — Recordings in the custody of a law enforcement agency *shall be disclosed only as provided by this section*. Recordings depicting a death or serious bodily injury shall only be disclosed as provided in subsections (b1) through (b3) of this section.
>
> A person requesting disclosure of a recording must make a written request to the head of the custodial law enforcement agency that states the date and approximate time of the activity captured in the recording or otherwise identifies the activity with reasonable particularity sufficient to identify the recording to which the request refers.
>
> The head of the custodial law enforcement *agency may only disclose a recording to the following*:
>
> > (1) A person whose image or voice is in the recording.
> >
> > (2) A personal representative of an adult person whose image or voice is in the recording, if the adult person has consented to the disclosure.
> >
> > (3) A personal representative of a minor or of an adult person under lawful guardianship whose image or voice is in the recording.
> >
> > (4) A personal representative of a deceased person whose image or voice is in the recording.

> (5) A personal representative of an adult person who is incapacitated and unable to provide consent to disclosure.
>
> *When disclosing the recording, the law enforcement agency shall disclose only those portions of the recording that are relevant to* the person's request. *A person who receives* disclosure pursuant to this subsection *shall not record or copy the recording.*

N.C. Gen. Stat. § 132-1.4A(c) (2021) (emphasis supplied).

¶ 23 The release of recordings in the custody of a law enforcement agency under any section sequentially requires the petitioning party to show it qualifies and the trial court to so find the basis of that qualification under N.C. Gen. Stat. § 132-1.4A(c). *See* N.C. Gen. Stat. § 132-1.4A(f) ("Notwithstanding the provisions of subsection (g) of this section, *a person authorized to receive disclosure pursuant to subsection (c) of this section*, or the custodial law enforcement agency, may petition the superior court in any county where any portion of the recording was made for an order releasing the recording to a person authorized to receive disclosure. . . . *If the court determines that the person to whom release of the recording is requested is a person authorized to receive disclosure pursuant to subsection (c) of this section, the court shall consider the standards set out in subsection (g) of this section and any other standards the court deems relevant in determining whether to order the release of all or a portion of the recording.*") (emphasis supplied).

¶ 24 The restrictions and qualifications required to release under N.C. Gen. Stat. § 132-1.4A(c) are re-stated in the AOC-CV-271 Form, upon which the trial court entered its judgment. The trial court *failed to check any of the boxes on* Petitioners' eligibility or relevance and failed to make any oral findings of eligibility to release on the transcript in open court. In the absence of threshold eligibility and statutorily-required findings, the order of the trial court is vacated, and the cause is remanded for additional findings of fact and conclusions of law consistent with the statute and this opinion.

¶ 25 We address additional arguments raised by GPD, because they are likely to occur on remand. GPD argues the trial court erred by not acting to avoid the release of "information of a highly sensitive personal nature." The trial court, while analyzing each standard of potential harm laid out by the statute, concluded under the fourth and fifth standards of N.C. Gen. Stat. § 132-1.4A(g)—"[r]elease would reveal information

regarding a person that is of a highly sensitive and personal nature" and "release may harm the reputation or jeopardize the safety of a person"—*weighed against* the release of the petitioned recordings. The statute limits the trial court's discretion in analyzing the standards laid out therein and in determining, as a result of that analysis, whether to release any, all, or some or none of the petitioned recordings. Petitioner is entitled to release of law enforcement recordings, only after the trial court's finding the statutory category applicable to the petition.

¶ 26 The trial court stated in open court, at the close of its eight-standard analysis: "[T]his Court does not have the authority to [c]ensor this information absent a legitimate or compelling state interest not to do so." The trial court also stated in the June Order: "This Court does not have the authority to censor the photos/recordings absent a compelling governmental interest and none was shown." This notion flips the express restrictions and application of the statute on its head.

¶ 27 N.C. Gen. Stat. § 132-1.4A(g) provides: "*The court shall release only those portions of the recording that are relevant to the person's request*, and *may place any conditions or restrictions* on the release of the recording that the court, in its discretion, deems appropriate." N.C. Gen. Stat. § 132-1.4A(g) (emphasis supplied).

¶ 28 This duty by the trial court was further-reiterated in *In re Custodial Law Enforcement Recording Sought by City of Greensboro*, in which this Court concluded a trial court "did not abuse its discretion in initially placing and later refusing to modify a restriction on release of body-cam footage" under N.C. Gen. Stat. § 132-1.4A(g). 266 N.C. App. 473, 479, 833 S.E.2d 1, 4 (2019).

¶ 29 The trial court erred by failing to make the required statutory findings. It is also clear from the record the court misapplied the statute and precedents by failing to exercise its discretion. "A court does not exercise its discretion when it believes it has no discretion or acts as a matter of law." *State v. Maness*, 363 N.C. 261, 278, 677 S.E.2d 796, 807 (2009) (citation omitted). Petitioner carries and maintains the burden of eligibility, specificity, and relevance under the statute. Respondents have no burden on remand. *See* N.C. Gen. Stat. § 132-1.4A(c).

VI. Conclusion

¶ 30 The trial court failed to make required statutory findings to show under which statutory category Petitioner is entitled to release any of non-public and non-personnel law enforcement recordings records relevant to its request. The trial court also abused its discretion by not

redacting irrelevant recordings and in authorizing the immediate and unrestricted release of all of law enforcement recordings requested in the 15 June 2021 order. The trial court also erred by stating and concluding "it has no discretion" under the statute. *Maness*, 363 N.C. at 278, 677 S.E.2d at 807.

¶ 31 The order appealed from is vacated and this cause is remanded for additional findings of facts and conclusions of law consistent with the statute and this opinion. The 13 July 2021 stay the trial court entered remains in effect pending final resolution. *It is so ordered.*

VACATED AND REMANDED.

Judge GORE concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

¶ 32 I dissent from the majority opinion vacating and remanding the trial court's order allowing for the release of custodial law enforcement agency ("CLEA") recordings petitioned by a group of media companies ("petitioners"). Specifically, the majority misconstrues the plain language of the statute at issue, N.C. Gen. Stat. § 132-1.4A, in such a way that if allowed to stand it would foreclose members of the media from ever filing a successful petition for the release of any CLEA recording in the future. Because I believe this was never the intent of the statute and is not supported by the plain language of the statue, I dissent. For all the following reasons, I would affirm the trial court's order.

I. Background

¶ 33 The factual preamble of this case is widely known, as the events at issue made local, national, and international headlines.[1] Accordingly, I find it important for our opinion to provide details as to what has led to this appeal.

¶ 34 On Saturday, 31 October 2020, the last day of early voting in the 2020 U.S. general elections, a group of approximately 200 people participated in a march to the polls, dubbed the "I Am Change" march, in Graham,

1. Indeed, as the record on appeal provides, these events were covered not only by *The News & Observer*, *WRAL*, *WXII12*, *The Times News*, and *Elon News Network*, but also by *The Washington Post* and *Newsweek*.

North Carolina. The march was secured with a permit and organized by Reverend Greg Drumwright ("Rev. Drumwright"), a Greensboro pastor and organizer. Also participating were then mayor of Burlington Ian Baltutis, two candidates for local office, and a number of elderly citizens and children. "With marchers walking by two's and three's, the procession snaked through neighborhoods on sidewalks and road shoulders, past one polling place and toward the early-voting site that had been the planned endpoint of Saturday's march."

¶ 35 "At one point, the marchers held a moment of silence in the street in honor of George Floyd, the Black man killed while in police custody in Minneapolis earlier th[at] summer." Then, "law-enforcement officers in riot gear and gas masks insisted demonstrators move off the street and clear county property, despite [the] permit authorizing their presence." "[D]eputies and police officers used pepper spray on the crowd and began arresting people." "Several children in the crowd were affected by the pepper spray."

¶ 36 "The crowd then moved" to a historic courthouse located in Court Square, "where speeches were being given." "But before speeches concluded, Alamance County sheriff's deputies began dismantling the sound system and telling the crowd to disperse." Deputies stated "that the permit had been revoked[,]" but "didn't give the crowd a reason for demanding that they disperse" or for the permit revocation. It would later be reported that the "generator and gas can" at issue "were forbidden under the terms of the event permit."

¶ 37 "Deputies arrested several organizers who refused to disperse, and Graham officers forced everyone out of Court Square, including bystanders, with additional pepper spray." "Both the police department and the sheriff's office have said their use of force was justified." According to the Graham Police Department's community engagement and diversity coordinator, "[w]hen deputies tried to disconnect the sound equipment, an officer was assaulted, and the officer deployed her pepper spray as she fell to the ground." At this point, she contends, marchers were " 'pulling and shoving' officers, who then used more pepper spray to get the crowd to disperse."

¶ 38 By the end of the day on 31 October 2020, "[a]t least 12 people were arrested[,]" including Rev. Drumwright, who would later face felony charges. "Most people were charged with failing to disperse on command." One woman "was charged with misdemeanor riot after she began to sing a freedom song into a megaphone outside the county jail, and a man was charged with attempting to stop officers from arresting her."

The News & Observer reported "[n]one of the arrest records provided to reporters described an assault on an officer."

¶ 39 "The event garnered international media attention and led to two federal lawsuits[,]" one of which was commenced by Rev. Drumwright and "allege[d] voter intimidation and coercion by law enforcement." In the aftermath of this event, "national experts on policing mass demonstrations condemned the way Graham police and Alamance County sheriff's deputies handled the 'I Am Change' march," finding "[t]he use of pepper spray against a group that included children and older people" to be " 'stunning[.]' "

¶ 40 The majority otherwise correctly characterizes the procedural posture of this case. Indeed, on 2 March 2021, petitioners filed an amended petition under N.C. Gen. Stat. § 132-1.4A(g) in Alamance County Superior Court, seeking from the Alamance County Sheriff ("respondent-ACS") and the Graham Police Department ("respondent-GPD") (collectively "respondents") the "release of all law enforcement and other recordings leading up to, during and after the 'I am Change' march in Graham, NC, occurring on 31 October 2020 from the time the first contact was made with marchers, spectators or media on that date until the last member of law enforcement left the scene."

¶ 41 Thereafter, among other events, the trial court filed an "Order to Provide Custodial Law Enforcement Agency Recording for In-Camera Review" (the "March Order"), respondent-GPD provided an assortment of written objections to the petition, the trial court conducted an in-camera review of the CLEA recordings at issue, and a hearing was held on 10 June 2021, where respondents raised another assortment of objections to the petition.

¶ 42 At the close of all arguments, the trial court stated the following:

> I will inform everyone that this Court has given this decision great consideration and has not taken this decision lightly in any way. And I'll refer you to Alamance CV 271.
>
> . . . .
>
> The Court having considered the applicability of all the standards of G.S. 132[ ]-1.4A(g), has determined the following: That the release of the information is necessary to advance a compelling public interest. The Court finds that there is a compelling public interest in the accountability and transparency of law

> enforcement officers and that this factor weighs in favor of release.
>
> No. 2, The recording contains information that is otherwise confidential or exempt from disclosure or release under state or federal law. This Court finds this factor is not relevant and does not impact the Court's decision.
>
> No. 3, The person requesting release is seeking to obtain evidence to determine legal issues in a current or potential court proceeding. The Court finds this factor is not relevant and does not impact this decision.
>
> No. 4, Release would reveal information regarding a person that is of a highly sensitive and personal nature. This Court finds that this factor weighs against release.
>
> No. 5, That release may harm the reputation or jeopardize the safety of a person. This Court finds this factor also to weigh against release.
>
> No. 6, That release would create a serious threat to the fair and orderly administration of justice. This court finds that this factor does weigh in favor of release.
>
> No. 7, Confidentiality is necessary to protect an active internal criminal investigation or potential internal or criminal investigation. This Court finds this factor is not relevant and does not impact the Court's decision.

¶ 43 Additionally, the trial court made the following statement as to the eighth factors of its analysis:

> No. 8, There is good cause shown to release all portions of the recording. This Court finds that the photos and the recordings speak for themselves, and this Court does not have the authority to [c]ensor this information absent a legitimate or compelling state interest not to do so. Most importantly this Court gives great weight to transparency and public accountability with regard to police action and considers a failure to release this information to possibly

> undermine the public interest and confidence in the administration of justice.

The trial court then ordered the release "of all photos and recordings."

¶ 44 The trial court filed a written "Order on Petition for Release of Custodial Law Enforcement Agency Recording" on 15 June 2021 (the "June Order"), in which it made determinations consistent with its ruling in open court and added:

> The photos/recordings speak for themselves. This Court does not have the authority to censor the photos/recordings absent a compelling governmental interest and none was shown. This Court gives great weight to transparency and public accountability of police action and failure to release the photos/recordings would undermine the public trust and confidence in the administration of justice.

Accordingly, the trial court ordered for respondents to release "ALL recordings and photographs as indicated on the submissions made to the Court by the custodial law enforcement agencies and without redaction or alteration on or before 2:00 p.m. on Friday, June 25, 2021."

¶ 45 On 23 June 2021, respondent-GPD gave notice of appeal from the June Order. Pertinently, this appeal made no mention of the March Order. Respondent-GPD filed a "Motion for Stay of Order Directing Release of Custodial Law Enforcement Recording Pending Appeal" on 25 June 2021, which it amended on 30 June 2021 and filed along with a memorandum in support of the motion. In this memorandum, respondent-GPD argued, among other things, that the trial court had "mistakenly placed the burden of providing a compelling public interest on the custodial law enforcement agency." Both respondents filed a joint motion to amend the June Order on 6 July 2021. Petitioners filed a Motion to Show Cause also on 6 July 2021. On 13 July 2021, the trial court granted respondent-GPD's motion to stay the June Order, denied respondents' motion to amend the June Order, and denied petitioners' Motion to Show Cause. Respondent-ACS did not appeal.

II. Discussion

¶ 46 On appeal, respondent-GPD argues: that petitioners' petition was overly broad under N.C. Gen. Stat. § 132-1.4A; that the trial court "improperly imposed de-facto burden shifting" onto respondents; that the trial court "misapplied the law and imposed the incorrect standard . . . [i]n ordering the unredacted release of all portions of all videos"; that

the trial court "erred and abused its discretion in failing to take reasonable steps to protect against the release of information of a highly sensitive personal nature"; that the trial court abused its discretion by releasing irrelevant and extraneous footage; and that, in abusing its discretion, the trial court "frustrated the legislative intent behind [N.C. Gen. Stat. §] 132-1.4A."

A. Jurisdiction

¶ 47 As a preliminary matter, the majority fails to address a jurisdictional issue presented by this appeal. Respondent-GPD appealed from the June Order and designated its appeal accordingly. In this appeal, respondent-GPD makes no mention of the March Order. However, in its appellate brief, respondent-GPD raises arguments—specifically, that the trial court erred by engaging in "de-facto burden shifting" and that the trial court frustrated the legislative intent of N.C. Gen. Stat. § 132-1.4A—it had not argued in relation to the June Order. Rather, these arguments appeared in respondent-GPD's submission of the petitioned recordings, which related to the March Order, and in its amended motion for staying the June Order, which, by its very nature, followed the June Order.

¶ 48 Under our Rules of Appellate Procedure, any notice of appeal:

> shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

N.C. R. App. P. 3(d).

¶ 49 "The appellant's compliance with the jurisdictional rules governing the taking of an appeal is the linchpin that connects the appellate division with the trial division and confers upon the appellate court the authority to act in a particular case." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 364-65 (2008) (citations omitted). "A jurisdictional default, therefore, precludes the appellate court from acting in any manner other than to dismiss the appeal." *Id.* at 197, 657 S.E.2d at 365 (citations omitted).

¶ 50 Because part of respondent-GPD's appeal is defective under our Rules of Appellate Procedure, and those defects are jurisdictional in nature, I would have dismissed the arguments regarding burden shifting and frustration of legislative purpose and proceeded with reviewing respondent-GPD's remaining arguments on appeal. *See id.*

B. Standard of Review

¶ 51 As an additional preliminary matter, the majority fails to address the fact that, among its appellate arguments, respondent-GPD also claims that the appropriate standard of review in this case is *de novo*. This is incorrect.

¶ 52 The statute at issue itself expressly states: "The [trial] court shall release only those portions of the recording that are relevant to the person's request, and may place any conditions or restrictions on the release of the recording that the court, *in its discretion*, deems appropriate." N.C. Gen. Stat. § 132-1.4A(g) (2021) (emphasis added). Accordingly, this Court would review for abuse of discretion.

¶ 53 Having eliminated some of respondent-GPD's arguments for failure to comply with our Rules of Appellate Procedure, the only remaining arguments this Court should have reviewed may be summed as follows: whether the trial court abused *its discretion* in releasing all the petitioned footage, "extraneous" footage, or footage containing "information of a highly sensitive personal nature."

C. N.C. Gen. Stat. § 132-1.4A

¶ 54 The majority correctly cites the following: "The best indicia of [legislative] intent are the [plain] language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citation omitted). "When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself[.]" *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010). However, what the majority fails to do is to actually apply this precedent; as a result of this failure, the majority misconstrues the plain language of N.C. Gen. Stat. § 132-1.4A, with avoidable and unnecessary results.

¶ 55 The majority contends that "[t]he release of recordings in the custody of a law enforcement agency under any section sequentially requires the petitioning party to show it qualifies and the trial court to so find the basis of that qualification under N.C. Gen. Stat. § 132-1.4A(c)." This is simply not correct.

¶ 56 Subsection (c) of N.C. Gen. Stat. § 132-1.4A, which addresses disclosure of CLEA recordings, reads as follows:

> (c) *Disclosure*; General.--Recordings in the custody of a law enforcement agency shall be *disclosed* only as provided by this section. . . .

> A person requesting *disclosure* of a recording must make a written request to the head of the custodial law enforcement agency that states the date and approximate time of the activity captured in the recording or otherwise identifies the activity with reasonable particularity sufficient to identify the recording to which the request refers.
>
> The head of the custodial law enforcement agency *may only disclose* a recording to the following:
>
> (1) A person whose image or voice is in the recording.
>
> (2) A personal representative of an adult person whose image or voice is in the recording, if the adult person has consented to the disclosure.
>
> (3) A personal representative of a minor or of an adult person under lawful guardianship whose image or voice is in the recording.
>
> (4) A personal representative of a deceased person whose image or voice is in the recording.
>
> (5) A personal representative of an adult person who is incapacitated and unable to provide consent to disclosure.

N.C. Gen. Stat. § 132-1.4A(c) (emphasis added). In summary, subsection (c) of the statute provides a list of those persons entitled to *disclosure* of CLEA recordings, which is separate and distinct from *release* of said recordings. This distinction is further emphasized by the existence and contents of subsections (f) and (g).

¶ 57 Subsection (f) reads as follows:

> (f) *Release* of Recordings *to Certain Persons*; *Expedited Process*.--Notwithstanding the provisions of subsection (g) of this section, *a person authorized to receive disclosure pursuant to subsection (c) of this section*, or the custodial law enforcement agency, *may petition the superior court in any county where any portion of the recording was made for an order releasing the recording to a person authorized to*

> *receive disclosure*. . . . If the petitioner is a person authorized to receive disclosure, notice and an opportunity to be heard shall be given to the head of the custodial law enforcement agency. Petitions filed pursuant to this subsection shall be set down for hearing as soon as practicable and shall be accorded priority by the court.
>
> *The court shall first determine if the person to whom release of the recording is requested is a person authorized to receive disclosure pursuant to subsection (c) of this section. . . . If the court determines that the person is not authorized to receive disclosure pursuant to subsection (c) of this section*, there shall be no right of appeal and *the petitioner may file an action for release pursuant to subsection (g) of this section*.

N.C. Gen. Stat. § 132-1.4A(f) (emphasis added). In summary, subsection (f) addresses how a person who is entitled to *disclosure* of CLEA recordings under subsection (c) would go about petitioning for the *release* thereof, and also states how all other persons excluded by subsection (c) are provided a separate means to file an action for release, articulated by subsection (g).

¶ 58 Subsection (g) of the statute addresses exactly how any other person or entity excluded by subsection (c) would go about petitioning for the release of CLEA recordings; it speaks for itself and reads, in pertinent part, as follows:

> (g) *Release of Recordings; General*; Court Order Required.--Recordings in the custody of a law enforcement agency shall only be released pursuant to court order. Any custodial law enforcement agency or any person requesting release of a recording may file an action in the superior court in any county where any portion of the recording was made for an order releasing the recording.

N.C. Gen. Stat. § 132-1.4A(g) (emphasis added).

¶ 59 Though the statute is long-winded, it is not complex. The statute plainly distinguishes between those persons who are entitled to

disclosure of CLEA recordings, and those who are not; a person who is entitled to disclosure under subsection (c) may petition for release under subsection (f); all other persons excluded by subsection (c) may petition for release under subsection (g).

¶ 60 Indeed, such distinction, which the majority either ignores or fails to perceive, is plainly summarized in each subsection header: "Disclosure; General" for subsection (c); "Release of Recordings to Certain Persons; Expedited Process" for subsection (f); and "Release of Recording; General" for subsection (g).

¶ 61 This plain reading of N.C. Gen. Stat. § 132-1.4A was further reiterated by this Court in *In re Custodial Law Enforcement Recording Sought by City of Greensboro*, a case which the majority cites, in the following statement:

> Our General Assembly has provided that police body-cam footage is neither a public nor a personnel record, [under] N.C. Gen. Stat. § 132-1.4A(b) . . . , and that only those depicted in the video and their personal representatives have an absolute right to view the footage, [under] N.C. Gen. Stat. § 132-1.4A(c) . . . . *The General Assembly also provided that anyone else wanting to view police body-cam footage may not do so unless that individual obtains a court order*[,] [under] N.C. Gen. Stat. § 132-1.4A(g) . . . .

Matter of Custodial L. Enf't Recording Sought by City of Greensboro, 266 N.C. App. 473, 475, 833 S.E.2d 1, 2 (2019) (emphasis added) (citing N.C. Gen. Stat. § 132-1.4A(b), (c), (g) (2016)).

¶ 62 Here, petitioners do not fall within any of the enumerated categories of persons entitled to disclosure as a matter of right provided by subsection (c) of the statute. *See* N.C. Gen. Stat. § 132-1.4A(c). This, however, does not categorically bar petitioners from being able to seek, and possibly obtain, release of CLEA recordings. Rather, petitioners must obtain a court order. N.C. Gen. Stat. § 132-1.4A(g). That is precisely what petitioners have done here: because they were not entitled to disclosure as a matter of right, they petitioned the trial court under subsection (g) in hopes of a favorable order. Accordingly, the majority's contention that the case should be remanded due to an "absence of statutorily-required findings" is incorrect, as it wrongly applies the requirements for identifying whether a petitioner is a person enumerated by subsection (c) to these petitioners.

¶ 63 The majority also suggests that a literal reading of the plain language of N.C. Gen. Stat. § 132-1.4A may lead to "absurd results[.]" *See State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citation and quotation marks omitted). Rather, it is the majority's unique interpretation of the statute that has led to an absurd result. Indeed, the majority's mischaracterization, and subsequent misapplication, of the plain language of N.C. Gen. Stat. § 132-1.4A wholly ignores subsection (g); as a result, the majority would have it so that those limited persons entitled to disclosure under subsection (c) would also be the only persons entitled to release.

¶ 64 The majority's interpretation of N.C. Gen. Stat. § 132-1.4A is not only unfounded, but it is also unrequested. At no point throughout this entire proceeding has respondent-GPD argued that petitioners are excluded, by statute, from petitioning for the release of CLEA recordings or that the trial court should have made a determination as to whether petitioners constituted persons entitled to disclosure under subsection (c). Indeed, it is so obvious from the plain reading of the statute that subsection (c) does not apply to petitioners that it should go without saying. In other words, the issue was never raised, and was thus unpreserved for appeal. N.C. R. App. P. 10(a)(1). Instead, the majority has taken upon itself, *sua sponte*, the task of both arguing and concluding this line of reasoning, something this Court is historically prohibited from doing. *See id.*

¶ 65 Most importantly and poignantly, however, is that the consequence of the majority's reasoning is dangerous: such an interpretation of N.C. Gen. Stat. § 132-1.4A would ensure that members of the media would *never* be allowed to petition the superior court for release of CLEA recordings, let alone obtain them via court order. I see no support in the statute for such a draconian result.

D. Abuse of Discretion

¶ 66 The majority contends that the N.C. Gen. Stat. § 132-1.4A "limits the trial court's discretion in analyzing the standards laid out therein and in determining, as a result of that analysis, whether to release any, all, or some or [sic] none of the petitioned recordings." Setting aside the incorrect depiction of the trial court's discretion as "limited," this statement again, misconstrues the plain language of the statute.

¶ 67 N.C. Gen. Stat. § 132-1.4A(g) provides:

> The request for release must state the date and approximate time of the activity captured in the

recording, or otherwise identify the activity with reasonable particularity sufficient to identify the recording to which the action refers. The court may conduct an in-camera review of the recording. *In determining whether to order the release of all or a portion of the recording, in addition to any other standards the court deems relevant, the court shall consider the applicability of all of the following standards*:

(1) Release is necessary to advance a compelling public interest.

(2) The recording contains information that is otherwise confidential or exempt from disclosure or release under State or federal law.

(3) The person requesting release is seeking to obtain evidence to determine legal issues in a current or potential court proceeding.

(4) Release would reveal information regarding a person that is of a highly sensitive personal nature.

(5) Release may harm the reputation or jeopardize the safety of a person.

(6) Release would create a serious threat to the fair, impartial, and orderly administration of justice.

(7) Confidentiality is necessary to protect either an active or inactive internal or criminal investigation or potential internal or criminal investigation.

(8) There is good cause shown to release all portions of a recording.

The court shall release only those portions of the recording that are relevant to the person's request, and may place any conditions or restrictions on the release of the recording that the court, in its discretion, deems appropriate.

N.C. Gen. Stat. § 132-1.4A(g) (emphasis added). The statute speaks clearly: it requires the trial court to consider eight factors and allows it to consider any additional factors of its own making.

¶ 68 The majority takes issue with the fact that the trial court stated in its ruling that the fourth and fifth statutory factors "weighed against"

releasing the CLEA recordings to petitioners, and thus concluded that petitioners are "entitled to release only after finding the statutory category that is applicable to the petition." This statement is not only incorrect, but misconstrues both the statute and the trial court's discretion.

¶ 69 First, the trial court does not have limited discretion. Rather, subsection (g) of the statute provides mandatory factors for the trial court to consider in its analysis, and also allows for the trial court to exercise its discretion in considering additional factors of its own making. Second, nowhere within the plain language of subsection (g) does the statute state that a finding that one or two factors weigh against the release of CLEA recordings is in itself determinative; nor, in fact, does the majority opinion explain away its conclusion.

¶ 70 Indeed, here, during the hearing, the trial court walked through each of the eight standards laid out by the statute with careful consideration. In so doing, the trial court determined whether the specific standard was relevant to the case *sub judice*, and, if so, whether it weighed in favor of or against release of the petitioned CLEA recordings. The trial court also "deem[ed] [it] relevant" to consider "other standards[,]" *see id.*, as permitted by the statute, by giving "great weight to transparency and public accountability with regard to police action" and in "consider[ing] a failure to release this information to possibly undermine the public interest and confidence in the administration of justice." Having considered all these standards, the trial court ultimately concluded, in its discretion, to authorize the release of all the petitioned CLEA recordings. Accordingly, the trial court did not abuse its discretion in authorizing the release of all the requested recordings to petitioners.

E. Authority of the Trial Court

¶ 71 The majority agrees with respondent-GPD's contention that the trial court misapprehended the law and applied an incorrect standard when it stated that it had no authority to censor the recordings absent a compelling government interest. Indeed, the trial court stated in open court, at the close of its eight-standard analysis: "[T]his Court does not have the authority to [c]ensor this information absent a legitimate or compelling state interest not to do so." The trial court also stated in the June Order: "This Court does not have the authority to censor the photos/recordings absent a compelling governmental interest and none was shown."

¶ 72 N.C. Gen. Stat. § 132-1.4A(g) provides: "The court shall release only those portions of the recording that are relevant to the person's request, and may place any conditions or restrictions on the release of the recording that the court, in its discretion, deems appropriate." *Id.*

The majority construes this portion of the statute to mean that it could never be possible for all petitioned CLEA recordings to be relevant to a petitioner's request. However, not only does the majority fail to explain this interpretation in its opinion, but such an interpretation goes against both the plain language of the statute and the plain significance of a trial court's discretion. Indeed, subsection (g) clearly states that the trial court is permitted, and not required, to "place any conditions or restriction on the release" that it, "*in its discretion*, deems appropriate." *Id.* (emphasis added).

¶ 73 Although the trial court may have made an inartful statement as to the controlling law, it is clear from the record that it did not misapply that same law. Our Supreme Court encountered a similar circumstance in *State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 336 N.C. 657, 446 S.E.2d 332 (1994) There, the Carolina Utility Customers Association ("CUCA") argued, among other things, that the Utilities Commission (the "Commission") had "misapprehended the scope of its discretion under N.C.G.S. § 62-158 in making the decision to grant or deny Public Service Company's petition" to establish a natural gas expansion fund. *Id.* at 664, 446 S.E.2d at 337. The Commission had stated in its order, " '[o]nce we have found unserved areas that are otherwise infeasible to serve, . . . the General Assembly intends for the Commission to exercise limited discretion as to whether a fund should be created for that particular natural gas utility.' " *Id.* (alterations in original). "CUCA argue[d] that the Commission in fact had wide discretion to determine whether to authorize the establishment of an expansion fund . . . and that the Commission's refusal to exercise its full discretion caused its failure to address CUCA's legal and factual position." *Id.* at 664-65, 446 S.E.2d at 337. "Furthermore, CUCA contend[ed] that the order should be reversed because it constitutes a Commission decision based upon a misinterpretation of applicable law." *Id.* at 665, 446 S.E.2d at 337 (citation omitted).

¶ 74 The Supreme Court disagreed, finding that "the record d[id] not indicate that the Commission viewed itself as without discretion to grant or deny the petition. The Commission in fact stated that it was to exercise 'limited discretion,' as opposed to no discretion whatsoever." *Id.* In fact, the Commission had "held a hearing on the matter and received testimony from numerous witnesses who were either in favor of or opposed to the creation of the expansion fund." *Id.* "After doing so, the Commission issued an order that included extensive findings of fact" and "concluded that 'the creation of an expansion fund for the [Public Service] Company is in the public interest.' " *Id.* "In order to implement

[N.C. Gen. Stat. § 62-158], the Commission adopted Commission Rule R6-82," which set out "limitations . . . in keeping with the language of the enabling statute, N.C.G.S. § 62-158." *Id.* at 666, 446 S.E.2d at 337-38. "The plain language of this rule indicates that the Commission had a proper view of its discretion in making a determination of whether to authorize the creation of an expansion fund[.]" *Id.* at 666, 446 S.E.2d at 338. Thus, the Supreme Court concluded "that the Commission did not act under a misapprehension of applicable law and that it granted the petition and established the expansion fund pursuant to a proper interpretation of its authority and discretion to do so." *Id.*

¶ 75 In the case *sub judice*, N.C. Gen. Stat. § 132-1.4A expressly allows for a trial court to release all or a portion of any sought recording; setting conditions or redacting said recording is permitted, but not mandated. The trial court analyzed each statutory standard with careful consideration and, based on its detailed analysis, concluded that the only acceptable outcome was to order for the release of all of the petitioned CLEA recordings. Furthermore, the very fact that the trial court considered additional standards—namely, transparency and public accountability—in its analysis, as allowed by statute, indicates that it exercised its discretion scrupulously. Thus, the trial court "did not act under a misapprehension of applicable law" and filed its order "pursuant to a proper interpretation of its authority and discretion to do so." *See id.*

¶ 76 In summary, the majority's contention that the trial court's release of all petitioned CLEA recordings could only have been a result of a misapplication of the law is of no moment, as the trial court behaved scrupulously and the controlling statute plainly allows for this outcome.

III. Conclusion

¶ 77 For the foregoing reasons, because the majority has misconstrued and misinterpreted the unambiguous and plain language of N.C. Gen. Stat. § 132-1.4A and has consequently misapplied the statute to this appeal, I dissent from the majority opinion and would affirm.

LACKEY v. CITY OF BURLINGTON

[287 N.C. App. 151, 2022-NCCOA-842]

CINDY LACKEY AND JOHN LACKEY, PLAINTIFFS
v.
CITY OF BURLINGTON, DEFENDANTS

No. COA22-117

Filed 20 December 2022

1. Adverse Possession—prescriptive period—tacking on prior owner's possession—hostile possession—alleyway—failure to state a claim

The trial court properly dismissed plaintiffs' complaint pursuant to Civil Procedure Rule 12(b)(6) for failure to state a claim where plaintiffs claimed that they owned an alleyway abutting their property through adverse possession but failed to allege facts supporting the elements of adverse possession. Plaintiffs could not meet the 20-year prescriptive period by tacking their alleged possession of the alleyway on to the possession by the prior owner where the deed did not actually convey the prior owner's interest in the allegedly adversely possessed alleyway. Furthermore, plaintiffs' alleged possession of the alleyway was not hostile because plaintiffs received permission from the city to use the alleyway for a garden, orchard, and low fence. Finally, to the extent plaintiffs attempted to claim adverse possession against the other subdivision lot owners (all of whom, together with plaintiffs, owned the alleyway until the city accepted the alleyway for public use, as dedicated in the subdivision plat, in 2020), the complaint established that plaintiffs' possession was neither hostile nor exclusive.

2. Estoppel—equitable—dedication of property—acceptance by city—statements prior to acceptance

The trial court properly dismissed plaintiffs' complaint pursuant to Civil Procedure Rule 12(b)(6) for failure to state a claim that the City of Burlington should be equitably estopped from accepting the dedication of an alleyway abutting plaintiffs' property where, according to plaintiffs' allegations, the city annexed the subdivision in which the alleyway was located in 2003 and the city council voted to accept the alleyway for public use (as dedicated in the subdivision plat) in 2020. None of the city's actions were tantamount to a formal rejection of any offer of dedication—including, as plaintiffs argued, the city's statement in 2002 that it did not own the alleyway and the city's statement in 2012 that plaintiffs, along with the other owners of the lots in their subdivision, owned the alleyway.

LACKEY v. CITY OF BURLINGTON

[287 N.C. App. 151, 2022-NCCOA-842]

Appeal by Plaintiffs from Order entered 26 July 2021 by Judge Mark A. Sternlicht in Alamance County Superior Court. Heard in the Court of Appeals 8 September 2022.

Blanco Tackabery & Matamoros, P.A., by Henry O. Hilston, Peter J. Juran, and Chad A. Archer, for plaintiffs-appellants.

Hartzog Law Group, LLP, by Dan M. Hartzog, Jr. and Katherine Barber-Jones, and David R. Huffman, for defendant-appellee.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Cindy Lackey and John Lackey (Plaintiffs) commenced this action on 4 January 2021 by filing a Complaint against the City of Burlington (the City) asserting claims for Declaratory Judgment, Trespass, and Injunctive Relief to Abate a Nuisance arising from Plaintiffs' contention they acquired ownership of an alleyway abutting their property through adverse possession and/or that the City was estopped from accepting a dedication of the alleyway to public use. In response, the City moved to Dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 26 July 2021, the trial court granted the City's Motion to Dismiss. Plaintiffs now appeal from the trial court's Order dismissing their Complaint with prejudice. The Record on Appeal—including the allegations in Plaintiffs' Complaint and the documentary exhibits attached thereto[1]—reflects the following:

¶ 2 On 26 July 1956, Carlton and Etta Day (the Days) subdivided a tract of land in Alamance County into seventeen residential lots known as the Rockford Acres Subdivision. The seventeen lots were designated Lots A through Q, as shown on the Rockford Acres Subdivision Plat (The Rockford Plat). The Rockford Plat proposed two streets within the subdivision, including Hawthorne Lane, running in a generally east to west direction and terminating into a dead-end alleyway located between Lots B and C (the Alleyway). (R p.8, 23) The Alleyway is the contested land in the case before us. The Rockford Plat contained the following dedication language:

---

1. *See Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 642, 599 S.E.2d 410, 412 (2004) ("Since the exhibits to the complaint were expressly incorporated by reference in the complaint, they were properly considered in connection with the motion to dismiss as part of the pleadings." (citation omitted)).

> THE STREETS ON THIS PLAT WILL BE DEDICATED TO THE LOT OWNERS AND NOT TO THE GENERAL PUBLIC, EXCEPT WHEN DEDICATION REQUESTED AND ACCEPTED BY CITY OF BURLINGTON - FOR THE GENERAL PUBLIC.

At the time the Rockford Plat was recorded, the Alleyway was located outside the City limits in Alamance County.

¶ 3 On 2 April 1957, the Days conveyed Lots A and B in the Rockford Acres Subdivision to Otis and Barbara Lackey (the Elder Lackeys) via a Warranty Deed. This Deed contained the following dedication language:

> The streets appearing on the above described plat are dedicated for the benefit of all lot owners who purchase lots in reliance upon said plat. In addition, the grantors herein expressly reserve the right for themselves and their transferees to dedicate at any time said streets, or any part thereof, to the general public.
>
> This property is conveyed subject to, and with the benefits of, all of the provisions and restrictions contained in that indenture executed by Carlton Day and wife on 15 March 1957[.]

¶ 4 On 12 December 1963, the Elder Lackeys purchased property behind Lot B from a private landowner. On 27 April 1978, the Elder Lackeys purchased an additional lot from a neighboring developer, Collins & Young, Inc., behind the now-larger Lot B. Lot B and these additional lots shared a contiguous border with the Alleyway. That year, Collins & Young, Inc. also constructed, and Defendant accepted the maintenance of, a sewer line under the contested land.

¶ 5 On 16 October 1997, the Elder Lackeys recorded a document entitled "Final Plat Property of R. Otis Lackey and wife, Barbara C. Lackey" (the Final Plat). The Final Plat re-divided and renamed Lot A and the now-larger Lot B to Lots 1 and 2, respectively. The Final Plat contained the following language of dedication:

> I, (we) hereby certify that I (we) am (are) the owner(s) of the property, shown and described hereon, which was conveyed to me (us) by deed as recorded in deed book SEE, page MAP, and that I (we) hereby acknowledge this plat and allotment to be my (our) free act and deed and do hereby dedicate to public

> use as streets, rights-of-way, and easements forever, all areas so shown or indicated on said plat.

The Final Plat denotes Hawthorne Lane, including the Alleyway, as a public right-of-way. On 13 August 2002, the Elder Lackeys conveyed Lot 2, as shown on the Final Plat, to Plaintiffs by General Warranty Deed. This conveyance was made "subject to easements, rights of way, and restrictive covenants, if any, appearing of record in the Alamance County Registry."

¶ 6 Plaintiffs allege, upon information and belief, the City annexed the Rockford Subdivision—including Plaintiffs' Lots and the Alleyway—in 2003. Plaintiffs further allege in 2003, the basement of their residence flooded because of inadequate drainage from the Alleyway. Plaintiffs inquired of the State, County, and City and were allegedly informed none of these governmental entities claimed ownership of the Alleyway or were responsible for the flooding.

¶ 7 In 2004, Plaintiffs allege they contacted the City to schedule a public discussion regarding Plaintiffs' claim to the Alleyway. City Representatives informed Plaintiffs that if they withdrew their proposed discussion from the agenda, the City would deal with the drainage issue, and Plaintiffs would be permitted to maintain a garden, orchard, and low fence on the Alleyway. Plaintiffs withdrew their request and constructed a garden, orchard, and low fence on the Alleyway. By 2005, the City had not taken steps to improve drainage on the Alleyway or undertaken other maintenance Plaintiffs alleged was promised by the City in 2004. Plaintiffs again contacted the City with their concerns about the drainage issue, and the City improved the drainage situation on the Alleyway.

¶ 8 On 29 November 2012, Plaintiffs also received title to Lot 1 via General Warranty Deed.[2] That same year, Plaintiffs allege, the City performed a title search on the Alleyway and informed Plaintiffs they, along with the other owners of the seventeen lots shown on the Rockford Plat, owned the rights to the Alleyway. Plaintiffs sought the other lot owners to relinquish their ownership rights in the Alleyway. However, Plaintiffs only received approval from owners of fourteen of the seventeen lots. Subsequently, on 5 March 2020, the City Council voted to accept the Alleyway for public use as dedicated in both the 1956 Rockford Plat and the 1997 Final Plat.

---

2. Plaintiffs allege the Elder Lackeys conveyed Lot 1 via this Deed, however, the Deed attached to the Complaint reflects the property was conveyed only by Barbara Lackey. Ultimately, this conveyance is immaterial to the issues in the case at hand.

¶ 9 Plaintiffs' Complaint sought Declaratory Judgments that: Plaintiffs were the owners of the Alleyway; the City was equitably estopped from claiming the Alleyway; and the City was barred from claiming the Alleyway by operation of the Doctrine of Laches. The Complaint also sought injunctive relief against the City to enjoin the City's alleged trespass on the Alleyway and to abate the alleged nuisance resulting from the City's acceptance of the Alleyway for public use. The City filed a Motion to Dismiss on 26 April 2021 asserting Plaintiffs' Complaint should be dismissed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief may be granted. The trial court granted the City's Motion to Dismiss and entered its Order on 26 July 2021 dismissing Plaintiffs' Complaint with prejudice. Plaintiffs timely filed written Notice of Appeal on 18 August 2021.

Issues

¶ 10 The two issues raised by Plaintiffs on appeal to this Court are whether the trial court erred by dismissing their Complaint for failure to state a claim upon which relief may be granted based on Plaintiffs' allegations: (I) Plaintiffs own the Alleyway through adverse possession; and (II) the City should be estopped from accepting dedication of the Alleyway.

Analysis

¶ 11 A Rule 12(b)(6) motion to dismiss "tests the legal sufficiency of the complaint." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citing *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970)). "The Motion to Dismiss will be allowed only when the Complaint affirmatively shows that plaintiff has no cause of action." *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 439, 206 S.E.2d 178, 182 (1974). "The Motion [to Dismiss] is seldom an appropriate pleading in actions for declaratory judgments, and will not be allowed simply because the plaintiff may not be able to prevail." *Id.* "[The Motion to Dismiss] is allowed only when the record clearly shows that there is no basis for declaratory relief as when the complaint does not allege an actual, genuine existing controversy." *Id.*

¶ 12 "When considering a 12(b)(6) motion to dismiss, the trial court need only look to *the face of the complaint* to determine whether it reveals an insurmountable bar to plaintiff's recovery." *Locus v. Fayetteville State Univ.*, 102 N.C. App. 522, 527, 402 S.E.2d 862, 866 (1991) (emphasis in original). Documents attached to and incorporated into a complaint are properly considered as part of a Rule 12(b)(6) motion to dismiss. *Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 642,

599 S.E.2d 410, 412 (2004). A Rule 12(b)(6) dismissal is proper where "the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

¶ 13 On appeal of a Rule 12(b)(6) motion to dismiss, this Court conducts "a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673, 674 (2003); *see also Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) ("Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." (citation and quotation marks omitted)). As such, this Court also views the allegations in the complaint in the light most favorable to the non-moving party. *Donovan v. Fiumara*, 114 N.C. App. 524, 526, 442 S.E.2d 572, 574 (1994) (citation omitted). Further, this Court considers "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory[.]" *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citation omitted).

I. Adverse Possession

¶ 14 **[1]** Plaintiffs first argue the trial court erred in dismissing their claim of ownership of the Alleyway on the basis of adverse possession. In their briefing to this Court, however, Plaintiffs fail to identify specific factual allegations in their Complaint that support their claim. Instead, Plaintiffs assert in conclusory fashion that they "clearly pleaded" each of the elements of adverse possession were met. We disagree. Plaintiffs' Complaint fails to allege facts supporting the elements of adverse possession or to demonstrate on its face an insurmountable bar to relief on that basis in several respects.

¶ 15 In North Carolina, "[t]o acquire title to land by adverse possession, the claimant must show actual, open, hostile, exclusive, and continuous possession of the land claimed for the prescriptive period (seven years or twenty years) under known and visible lines and boundaries." *Merrick v. Peterson*, 143 N.C. App. 656, 663, 548 S.E.2d 171, 176 (2001). The prescriptive period for a party claiming adverse possession under color of title is seven years. N.C. Gen. Stat. § 1-38 (2021). The prescriptive period for a person claiming adverse possession without color of title is twenty years. N.C. Gen. Stat. § 1-40 (2021).

¶ 16 First, Plaintiffs' Complaint demonstrates on its face Plaintiffs fail to meet the prescriptive period to establish their continuous possession of the Alleyway. As an initial matter, it is not expressly alleged in the Complaint on what basis Plaintiffs assert adverse possession—that is, whether they claim adverse possession under color of title or without color of title. Plaintiffs also offer no guidance on what prescriptive period applies in their briefing. Nevertheless, Plaintiffs—both in their Complaint and in briefing—appear to accept the premise they are required to meet the 20-year prescriptive period for adverse possession without color of title. Plaintiffs' Complaint affirmatively shows Plaintiffs' alleged possession of property alone cannot meet the 20-year period. Plaintiffs' Complaint alleges Plaintiffs did not acquire their interest in the adjoining Lot 2 from the Elder Lackeys until 2002 and did not begin using the Alleyway for their garden, orchard, and low fence until 2004.

¶ 17 Rather, Plaintiffs' claim for adverse possession relies on their allegation Plaintiffs "and their predecessors in interests possessed the [Alleyway] for far longer than the twenty-year (20) statutory period for adverse possession, which period began running in 1956 and 1997[.]" In this respect, Plaintiffs effectively argue they should be permitted to "tack" their alleged possession of the Alleyway on to the possession of the Elder Lackeys. While it appears the general rule applied in other states is to permit such tacking of possession to establish adverse possession, North Carolina has adopted a minority position. *See Cole v. Bonaparte's Retreat Prop. Owners' Ass'n*, 259 N.C. App. 27, 35, 815 S.E.2d 403, 409 (2018).[3] Under North Carolina law, a party may only tack their possession on to that of a prior owner where the prior owner actually conveys their interest in the allegedly adversely possessed property. *Id.* at 34, 815 S.E.2d at 409. If ownership is passed through a deed that does not include the allegedly adversely possessed property, the new owner may not tack the prior possession on to their own because, under North Carolina law, "privity through a deed does not extend beyond the property described therein." *Id.* at 36, 815 S.E.2d at 410.

¶ 18 In this case, Plaintiffs' Complaint—including the conveyances from the Elder Lackeys to Plaintiffs—reflect the Elder Lackeys did not convey any interest in the Alleyway to Plaintiffs, and thus, Plaintiffs may not tack their possession of the Alleyway on to that of the Lackeys. Plaintiffs obtained Lot 2 adjoining the Alleyway from the Lackeys in 2002. The

---

3. It should be observed Plaintiffs cited *Cole* in support of their adverse possession argument in their briefing to this Court. However, Plaintiffs failed to present any argument on this rather crucial discussion in *Cole*, which is central to Plaintiffs' argument.

General Warranty Deed makes no conveyance of the Alleyway. Indeed, that deed makes express reference to the 1997 Final Plat, which, itself, expressly shows the Alleyway as a public right-of-way. The deed also expressly makes the conveyance subject to any rights-of-way shown on the public record. As such, Plaintiffs, even on the allegations of their Complaint, are not permitted to tack their ownership on to that of the Elder Lackeys to establish Plaintiffs' continuous possession of the Alleyway to meet the 20-year prescriptive period.

¶ 19 Second, Plaintiffs' Complaint also alleges facts revealing that their alleged possession of the Alleyway was not hostile. " 'A 'hostile' use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right.' " *Daniel v. Wray*, 158 N.C. App. 161, 172, 580 S.E.2d 711, 719 (2003) (quoting *Dulin v. Faires*, 266 N.C. 257, 261, 145 S.E.2d 873, 875 (1966)). "However, the hostility requirement is not met if the possessor's use of the disputed land is permissive." *Jones v. Miles*, 189 N.C. App. 289, 292–93, 658 S.E.2d 23, 26 (2008); *see also New Covenant Worship Ctr. v. Wright*, 166 N.C. App. 96, 104, 601 S.E.2d 245, 251-52 (2004) (hostility requirement not satisfied because the possessor's use of the disputed property was permissive); *McManus v. Kluttz*, 165 N.C. App. 564, 573-74, 599 S.E.2d 438, 446 (2004) (hostility requirement satisfied because the possessor's use of the disputed property was not permissive).

¶ 20 Here, Plaintiffs' allegations show their use of the Alleyway was done with permission of the City and, thus, was not hostile to the City's ownership rights in the Alleyway. Plaintiffs alleged they approached the City about the Alleyway in 2004 and were given permission by the City to use the Alleyway property for a garden, orchard, and low fence and that the City would repair the drainage from the Alleyway into Plaintiffs' property. Indeed, in 2005, Plaintiffs again requested the City repair the drainage issue from the Alleyway and there is no allegation Plaintiffs ever reasserted any claim of ownership over the Alleyway inconsistent with their permissive use. *Jones*, 189 N.C. App. at 294, 658 S.E.2d at 27 ("true owner's grant of permission will defeat a possessor's hostile use if the possessor takes no further action to reassert [their] claim over the land").

¶ 21 Third, to the extent Plaintiffs attempt to claim adverse possession of the Alleyway as against the other Rockford Acres lot owners, Plaintiffs' Complaint establishes Plaintiffs' possession was neither hostile nor exclusive.[4] Plaintiffs' Complaint alleges that in 2012, following the City's

4. The other Rockford Acres lot owners are not parties to this action.

own title search, Plaintiffs unsuccessfully sought the other lot owners to relinquish their rights in the Alleyway. As such, their claim of ownership or possession of the Alleyway was not exclusive. Further, Plaintiffs' acknowledgement of the other lot owners' continuing rights in the property defeats any hostility of Plaintiffs' possession. *See New Covenant Worship Ctr.*, 166 N.C. App. at 103-04, 601 S.E.2d at 251-52.

¶ 22 Thus, Plaintiffs' Complaint reveals facts representing an insurmountable bar to their claim for adverse possession of the Alleyway and demonstrates Plaintiffs are not entitled to declaratory relief on this basis. Therefore, Plaintiffs' Complaint fails to state a claim for adverse possession of the Alleyway upon which relief may be granted. Consequently, the trial court did not err by dismissing Plaintiffs' claims arising in adverse possession pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

II. Equitable Estoppel

¶ 23 **[2]** In their second argument, Plaintiffs contend their Complaint alleged a claim the City should be equitably estopped from accepting the dedication of the Alleyway. At the outset, Plaintiffs—in their reply briefing—concede they make no claim there was any statutory withdrawal of the dedication of the Alleyway or of Hawthorne Lane more generally under N.C. Gen. Stat. § 136-96 (2021). Plaintiffs' argument that the City should no longer be permitted to accept dedication of the Alleyway in particular rests solely on their allegations of estoppel.

¶ 24 Specifically, Plaintiffs contend the allegations in their Complaint are akin to the facts in *Lee v. Walker*, 234 N.C. 687, 68 S.E.2d 664 (1952). There, a property owner subdivided a tract of land as shown on a map entitled a Map of Vineland, including lots, blocks, alleys, streets, and avenues. *Id.* at 697, 68 S.E.2d at 671. The name of Vineland was later changed to Southern Pines, and an identical map was recorded. *Id.* Southern Pines was later chartered by the General Assembly as the Town of Southern Pines. *Id.* The Town Charter required the Town Commissioners to "provide for repairing the streets, sidewalks and alleys and cause the same to be kept clean and in good order[.]" *Id.* at 690, 68 S.E.2d at 666. In response, the Town passed and recorded a resolution "to the effect that the town did thereby relinquish 'all right and title that the town may have in the alleyways and parks within each square or block within the town forever[.]' " *Id.* After this resolution, the Town regularly approved building permits that encroached on alleyways in the Town. The plaintiff in *Lee* applied for a building permit from the Town of Southern Pines. The Town denied the permit request on the basis it would require closing an

alley on the property which the Town claimed was public. *Id.* at 689, 68 S.E.2d at 665. The North Carolina Supreme Court ultimately held the Town was estopped from asserting any right to the alleyway at issue in that case. *Id.* at 697, 68 S.E.2d at 671. Importantly, the Supreme Court observed: "the action of the Board [passing the resolution relinquishing the Town's rights in alleyways] was tantamount to a formal rejection of the offer of dedication and was so construed and regarded by the Town of Southern Pines, the original dedicator and his successors in title for more than fifty-eight years prior to the time this controversy arose." *Id.* at 696, 68 S.E.2d at 670. The Court also noted the Town had routinely treated alleyways as private property and assessed taxes on them as such and assessed owners for the pro rata cost of paving the alleys. *Id.*

¶ 25 The allegations in Plaintiffs' Complaint are, however, distinguishable from the facts of *Lee*. Here, there is no allegation the City ever enacted any formal resolution or took action to relinquish any right in the Alleyway. Rather, Plaintiffs point to allegations that in 2002, they inquired of the City as to the ownership of the Alleyway from the City, and the City responded it did not own the Alleyway. Plaintiffs' Complaint also alleges upon information and belief, however, the City did not annex the property, including the Alleyway, into City limits until 2003. Subsequently, in 2004 and again in 2005, the Complaint alleges the City agreed to undertake maintenance on the Alleyway to improve drainage on Plaintiffs' property and permitted Plaintiffs to operate a garden in the Alleyway. These actions are not "tantamount to a formal rejection of any offer of dedication." *Id.* The same is true of the 2012 title search by the City, after which the City informed Plaintiffs they would need to obtain relinquishment from the other lot owners to the Alleyway. This was not "tantamount to a formal rejection of any offer of dedication" by the City, but, in fact, an acknowledgement of the dedication in the Rockford Plat from 1956 which dedicated the Alleyway to the use of the lot owners until the City accepted dedication of the Alleyway for public use. There is likewise no allegation that the City has otherwise treated the Alleyway as private property by taxing the property or requiring Plaintiffs to pay the cost of any improvements or maintenance on the Alleyway. Furthermore, there is no allegation in the Complaint that the City's actions in this regard are inconsistent with any prior action. Moreover, there is no allegation the City acquiesced to the Alleyway being included or conveyed as private property. Again, to the contrary, the 1997 Final Plat referenced in the deeds from the Elder Lackeys to Plaintiffs expressly identifies the Alleyway as a public right-of-way. *See City of Salisbury v. Barnhardt*, 249 N.C. 549, 556, 107 S.E.2d 297, 302

(1959) (" 'to constitute an estoppel against the public the acts relied on must be such as to work a fraud or injustice if the public is not held to be estopped. Obviously, one who knowingly encroaches upon a highway is not within the protection of the rule. If the boundaries are fixed by a recorded map, subsequent purchasers of lots abutting thereon are charged with notice thereof, and the fact that they purchase under the impression that a fence encroaching on the street is on the boundary line thereof will not affect the public rights, provided the municipality has done nothing to mislead them.' " (quoting 25 Am. Jur. 413, Highways, § 115)).

¶ 26 Thus, the allegations in Plaintiffs' Complaint are insufficient to establish a claim that the City should be estopped from accepting dedication of the Alleyway under *Lee*. Therefore, Plaintiffs have failed to state a claim for declaratory relief upon which relief may be granted on their theory of equitable estoppel. Consequently, the trial court did not err by granting the City's Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

Conclusion

¶ 27 Accordingly, for the foregoing reasons, we affirm the trial court's 26 July 2021 Order granting the City's Motion to Dismiss pursuant to Rule 12(b)(6) dismissing Plaintiffs' claims with prejudice.

AFFIRMED.

Judges COLLINS and JACKSON concur.

STERGIOS MOSCHOS
v.
SUSAN MOSCHOS

No. COA22-455

Filed 20 December 2022

1. Appeal and Error—preservation of issues—argument abandoned—no legal support

Plaintiff's challenge to the trial court's dismissal of his claims for breach of fiduciary duty, fraud, and misappropriation of marital funds pursuant to Civil Procedure Rule 12(b)(1) was deemed abandoned where plaintiff made a bare assertion of error on appeal but failed to state any reason or argument or to cite any legal authority in support of his assertion.

2. Emotional Distress—intentional infliction—identification of emotional or mental condition—sufficiency of allegations

The trial court properly dismissed plaintiff's claim for intentional infliction of emotional distress pursuant to Civil Procedure Rule 12(b)(6) where plaintiff's allegations failed to identify a severe and disabling emotional or mental condition generally recognized and diagnosed by professionals trained to do so and failed to allege sufficient facts concerning the type, manner, or degree of severe emotional distress he allegedly experienced.

Appeal by Plaintiff from order entered 11 January 2022 by Judge Richard Allen Baddour, Jr., in Orange County Superior Court. Heard in the Court of Appeals 16 November 2022.

Law Offices of Hayes Hofler, P.A., by R. Hayes Hofler, III, for Plaintiff-Appellant.

Coleman, Gledhill, Hargrave, Merritt, & Rainsford, P.C., by James Rainford, for Defendant-Appellee.

COLLINS, Judge.

¶ 1 Plaintiff Stergios Moschos appeals from the trial court's order dismissing his claims against Defendant Susan Moschos for breach of fiduciary duty, fraud, and misappropriation of marital assets under Rules of Civil Procedure 12(b)(1) and 12(b)(6), and his claim for intentional

infliction of emotional distress under Rule 12(b)(6). Plaintiff has abandoned his argument that the trial court erred by dismissing his claims under Rule 12(b)(1), and the trial court did not err by granting Defendant's motion to dismiss Plaintiff's intentional infliction of emotion distress claim under Rule 12(b)(6). Accordingly, we affirm the trial court's order.

I. Procedural History and Factual Background

¶ 2 Soon after Plaintiff and Defendant were married in 2006, they opened a joint bank account and agreed that Defendant would pay the parties' expenses from the joint account. The parties began depositing their employment income into the joint account, and Defendant paid the couple's expenses from the account. In May 2016, after accepting a new job, Defendant opened and began depositing her paychecks into a separate bank account. At the time of separation, the bank account had a balance of $60,262.

¶ 3 In the fall of 2018, after Defendant continuously expressed dissatisfaction in their marriage, Plaintiff proposed they rehabilitate their marriage by starting new careers in a warmer location. In early 2019, Plaintiff accepted a job interview in Tampa, Florida, and he was invited for a second round of interviews scheduled for 30 April 2019.

¶ 4 On 22 April 2019, Defendant texted Plaintiff, "I am very sorry but our marriage is not working for me any longer. I am moving out. I left you a letter. . . ." Defendant left a one-page typed letter, which stated in part:

> I do NOT want to fight with you. We can smoothly separate if we are both reasonable. I would be fine with splitting our savings and if you are respectful toward me (e.g. not screaming, swearing, name calling), I will not ask for alimony or half your retirement. Condo in Boston is totally yours. I see no need to get attorneys – we can both be respectful and peaceful, even if we are both hurting.
>
> . . . I will file separation paperwork, and, in a year, we can divorce. North Carolina is a no-fault state, so we really don't need to go to court (it would only end in my benefit). I will get the accounts changed so I won't have access to your paycheck. I will continue to get mail but leave yours in the box until my address is changed.
>
> . . . .

> I have considered this at length, for a long time and honestly don't believe we can be a loving couple again. I thank you for the many good years we had together. . . .

¶ 5 The parties agreed that Defendant would relinquish control of their joint account into which Plaintiff had deposited his income during their 13 years of marriage. Before relinquishing control of the account, Defendant withdrew $55,000 one month prior to their separation; paid a deposit for a new apartment the day after she left him; and withdrew approximately $6,690 to lower the balance remaining on her student loan. When Plaintiff discovered that Defendant had withdrawn $55,000 from their joint account,

> he texted to her his frustration and remorse that he had trusted her with managing the financial accounts. She texted him back: "Do you know how lucky you are in [my] not getting alimony and half you(*sic*) retirement. No more comments about finances." When he texted her, "Yes, I am lucky that you are reasonable," she responded, "All good."

On 27 April 2019, Defendant texted Plaintiff that she would complete the separation agreement which would memorialize her promise not to pursue him for alimony and half his retirement. Several days later, Defendant texted Plaintiff and said,

> So, bad news. My attorney said I'm stupid not to take a settlement, especially since I followed your career. I'm willing to be fair and still don't want alimony. Do you want me to draw up a proposal or would you like to have your attorney do so?

When Plaintiff responded that he would like to draw up a proposal consistent with her previous promise not to pursue him for alimony and half his retirement, she responded:

> F**k off, dude. You're getting off easy and you have plenty of earning potential. This can be cheap and easy or long and expensive. I didn't realize how foolish I was being until everybody told me so I have absolutely every right to alimony as well so you're better off just to suck it up and move on. You have 500k in retirement. I'll take 300k if we go to a mediator, write it up, and settle fast.

Defendant filed an action for absolute divorce a year after their separation, which was granted. Defendant also filed an action for equitable distribution, seeking over half of Plaintiff's retirement assets.

¶ 6 On 8 January 2021, Plaintiff sued for breach of fiduciary duty, fraud, defamation, intentional infliction of emotional distress, and misappropriation of marital funds. Defendant moved to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of Civil Procedure. Plaintiff later voluntarily dismissed his defamation claim. After a hearing, the trial court granted Defendant's motions to dismiss the remaining claims.

II. Discussion

¶ 7 **[1]** Plaintiff asserts that "[t]he trial court erred in granting Defendant's motions to dismiss the complaint" and recites the applicable standard of review of an order granting a motion to dismiss under Rules 12(b)(1) and 12(b)(6). However, Plaintiff states no reason or argument, and cites no legal authority, in support of his assertion that the trial court erred by dismissing the breach of fiduciary duty, fraud, and misappropriation of marital funds claims under Rule 12(b)(1). Accordingly, any challenge to the trial court's dismissal of those claims under Rule 12(b)(1) is deemed abandoned. *See* N.C. R. App. P. 28(a) (2022); N.C. R. App. P. 28(b)(6) (2022). The trial court's order dismissing the breach of fiduciary duty, fraud, and misappropriation of marital funds claims under Rule 12(b)(1) is thus affirmed, and we need not address Plaintiff's argument that the trial court erred by dismissing those claims under Rule 12(b)(6).

¶ 8 **[2]** As the trial court did not dismiss the intentional infliction of emotional distress claim under Rule 12(b)(1), we address Plaintiff's argument that the trial court erred by dismissing that claim under Rule 12(b)(6).

¶ 9 In ruling on a motion to dismiss for failure to state a claim, the allegations of fact are taken as true. *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 351, 416 S.E.2d 166, 168 (1992). Dismissal is proper when (1) the complaint on its face reveals that no law supports plaintiff's claim, (2) the complaint reveals on its face that some fact essential to plaintiff's claim is missing, and (3) when some fact disclosed in the complaint defeats the plaintiff's claim. *Schloss Outdoor Advert. Co. v. City of Charlotte*, 50 N.C. App. 150, 152, 272 S.E.2d 920, 922 (1980). We review an order allowing a motion to dismiss for failure to state a claim upon which relief can be granted de novo. *Halterman v. Halterman*, 276 N.C. App. 66, 2021-NCCOA-38, ¶ 10.

¶ 10 "To state a claim for intentional infliction of emotional distress, a plaintiff must allege: (1) extreme and outrageous conduct (2) which is intended to cause and does cause (3) severe emotional distress to another." *Clark v. Clark*, 280 N.C. App. 403, 2021-NCCOA-653, ¶ 37 (internal quotation marks and citation omitted). "Extreme and outrageous conduct is defined as conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Norton v. Scotland Mem'l Hosp., Inc.*, 250 N.C. App. 392, 397, 793 S.E.2d 703, 708 (2016) (internal quotation marks and citation omitted).

¶ 11 Severe emotional distress has been defined as "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). Allegations that fail to identify a severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so are not sufficient. *See Pierce v. Atl. Grp., Inc.*, 219 N.C. App. 19, 32, 724 S.E.2d 568, 577 (2012) (concluding plaintiff's allegation of "serious on and off the job stress, severely affecting his relationship with his wife and family members" was insufficient to allege severe emotional distress in the context of a claim for negligent or intentional infliction of emotional distress); *cf. Zenobile v. McKecuen*, 144 N.C. App. 104, 111, 548 S.E.2d 756, 760 (2001) (reversing dismissal of plaintiff's claim for negligent and intentional infliction of emotional distress where she alleged extreme emotional distress consisting of "anxiety disorder, depression, and post-traumatic stress disorder"). Moreover, without factual allegations regarding the type, manner, or degree of severe emotional distress a plaintiff claims to have experienced, a plaintiff's complaint fails to sufficiently allege severe emotional distress. *Cauley v. Bean*, 282 N.C. App. 443, 2022-NCCOA-202, ¶¶ 21-22, *disc. review denied*, 871 S.E.2d 281 (2022) (affirming dismissal of negligent infliction of emotional distress claim where "[t]he only allegations in Plaintiff's complaint regarding her emotional distress are that Defendant's actions 'proximately caused the negligent infliction of emotional distress of [P]laintiff' and that '[P]laintiff suffered severe emotional distress' ").

¶ 12 Here, Plaintiff alleges that he suffered severe emotional distress from Defendant's "sudden abandonment" of him. In support of this contention, Plaintiff alleges that he was "stunned[,] . . . utterly distraught[,] . . . and had to undertake psychological treatment as a result

of [Defendant]'s conduct." These allegations fail to identify a severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so, and fail to allege sufficient facts concerning the type, manner, or degree of severe emotional distress Plaintiff claims to have experienced. Accordingly, Plaintiff failed to allege that he suffered severe emotional distress due to Defendant's conduct. As Plaintiff fails to allege a necessary element of intentional infliction of emotional distress, this claim was properly dismissed under Rule 12(b)(6).

III. Conclusion

¶ 13 Plaintiff abandoned any argument that the trial court erred by dismissing the breach of fiduciary duty, fraud, and misappropriation of marital assets claims under Rule 12(b)(1). Plaintiff failed to state a claim for intentional infliction of emotional distress, and the trial court did not err by dismissing that claim under Rule 12(b)(6). Accordingly, the trial court's order is affirmed.

AFFIRMED.

Judges DIETZ and MURPHY concur.

IN THE MATTER OF THE ESTATE OF CARLTON MARION PAXTON

TERRY CARLTON PAXTON, Caveator
v.
BERLIS ROBERT OWEN, Propounder

No. COA22-186

Filed 20 December 2022

Wills—caveat proceeding—undue influence—no forecast of evidence

In a caveat proceeding brought by decedent's son in which he alleged that the propounder—a friend of decedent's to whom decedent left his entire estate—obtained the will through undue influence and duress while decedent was physically and mentally weakened, the trial court properly granted summary judgment for the propounder because the caveator failed to set forth specific facts to establish a genuine issue of material fact as to whether the

propounder exerted fraudulent influence on decedent to procure the will.

Appeal by Terry Carlton Paxton from Order entered 6 September 2021 by Judge Mark E. Powell in Transylvania County Superior Court. Heard in the Court of Appeals 1 November 2022.

Donald H. Barton for caveator-appellant.

Whitfield-Cargile Law, PLLC, by Davis A. Whitfield-Cargile, for propounder-appellee.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Terry Carlton Paxton (Caveator) appeals from an Order entered in favor of Berlis Robert Owen (Propounder) on 15 September 2021 granting Propounder's Motion for Summary Judgment. The Record before us tends to reflect the following:

¶ 2 Carlton Marion Paxton (Testator) executed two wills[1] during his lifetime, both of which expressly excluded Caveator from inheriting any of his estate. Testator passed away on 15 September 2019. Propounder offered Testator's Last Will and Testament (Will), dated 3 March 2019, for probate on 9 September 2019. The Will included the following statement: "My son, Terry Carlton Paxton, has been specifically excluded from inheriting any of my estate for reasons known to him." The Will left Testator's entire estate to Propounder, who Testator described in the Will as "my friend[.]"

¶ 3 On 16 September 2019, Caveator, son of Testator, filed a Caveat seeking to invalidate Testator's Will on the grounds of undue influence. Caveator alleged, in relevant part:

> 4. That the typed document dated March 3, 2019, a copy of which is attached as Exhibit "A", is not the Last Will and Testatment [sic] of Carlton Marion Paxton.

---

1. The earliest will in the Record, dated 29 May 1990, left Testator's entire estate to Testator's brother, Edward Clinton Paxton. The 1990 Will expressly provided: "My son, Terry Carlton Paxton, has been specifically excluded from inheriting any of my estate for reasons known to him."

> 5. As this Caveator is informed and believes, and upon such information and belief avers, the execution of said typed document and the signature of the said Carlton Marion Paxton thereto was obtained by Berlis Robert Owen, et[] al. through undue and improper influence and duress upon the said Carlton Marion Paxton.
>
> 6. At the time of the purported execution of said typed document by the said Carlton Marion Paxton, he, the said, Carlton Marion Paxton, was by reason of age, disease, and both mental and physical weakness and infirmity not capable of executing a last will and testament, which condition existed and continued until the death of the said Carlton Marion Paxton.

¶ 4 On 10 October 2019, Propounder filed a Motion to Dismiss the caveat proceeding pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. The trial court denied the Motion to Dismiss on 1 November 2019.

¶ 5 On 12 July 2021, Propounder filed a Motion for Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. A hearing on Propounder's Motion for Summary Judgment was held on 4 August 2021. On the morning of the hearing, Caveator filed and served an Affidavit in Opposition of Motion for Summary Judgment signed by Keith Eades (Eades), a nephew of Testator. Eades's affidavit expressed concern for Testator's mental and physical health, stating he "was very concerned for [Testator's] wellbeing, feeling like [Testator] did not have long to live."

¶ 6 On 15 September 2021, the trial court entered its Order granting Summary Judgment in favor of Propounder, concluding:

> The affidavit of Mr. Eades and the deposition testimony of the Caveator do not offer a forecast of facts sufficient to put the question of capacity, undue influence[,] or duress before the jury. Because the Caveator has made no forecast of evidence to submit the question of undue influence or duress to the jury, the Court concludes as a matter of law that the propounded will was not the product of undue influence or duress.

Caveator timely filed written Notice of Appeal on 13 October 2021.

Issue

¶ 7 The dispositive issue on appeal is whether the trial court erred in granting summary judgment in favor of Propounder.[2]

Analysis

¶ 8 "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). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021). "A party moving for summary judgment may prevail if it 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 omitted). "If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so." *Id.* (citations omitted). "If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to 'set forth *specific facts* showing that there is a genuine issue for trial.' " *Id.* at 369-70, 289 S.E.2d at 366 (quoting N.C. Gen. Stat. § 1A-1, Rule 56(e) (2021) (emphasis added)). "The non-moving party 'may not rest upon the mere allegations of his pleadings.' " *Id.* Additionally, conclusory statements of opinion "as opposed to statements of fact, are not properly considered on a motion for summary judgment." *In re Whitaker*, 144 N.C. App. 295, 299, 547 S.E.2d 853, 857 (2001).

¶ 9 On appeal, Caveator advances the argument the trial court erred in granting Summary Judgment in favor of Propounder because there was a genuine issue of material fact as to whether Testator's Will was the product of undue influence.[3]

¶ 10 "In the context of a will caveat, '[u]ndue influence is more than mere persuasion, because a person may be influenced to do an act which is

---

2. Caveator makes an additional and very summary argument that the trial court erred by including Findings of Fact in its Order at the Summary Judgment stage, which the trial court described as undisputed facts. Given our disposition in this case, it is not necessary to address Caveator's argument on this issue.

3. Caveator does not challenge the trial court's conclusion Testator had the requisite mental capacity to execute the Will.

nevertheless his voluntary action.' " *In re Will of Sechrest*, 140 N.C. App. 464, 468, 537 S.E.2d 511, 515 (2000) (alteration in original) (quoting *In re Will of Buck*, 130 N.C. App. 408, 413, 503 S.E.2d 126, 130 (1998), *aff'd*, 350 N.C. 621, 516 S.E.2d 858 (1999)). "The influence necessary to nullify a testamentary instrument is the fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result." *Whitaker*, 144 N.C. App. at 300, 547 S.E.2d at 857-58 (citations and quotation marks omitted). "The four general elements of undue influence are: (1) decedent is subject to influence, (2) beneficiary has an opportunity to exert influence, (3) beneficiary has a disposition to exert influence, and (4) the resulting will indicates undue influence." *In re Will of Smith*, 158 N.C. App. 722, 726, 582 S.E.2d 356, 359 (2003) (citation omitted).

¶ 11 The North Carolina Supreme Court has acknowledged:

> It is impossible to set forth all the various combinations of facts and circumstances that are sufficient to make out a case of undue influence because the possibilities are as limitless as the imagination of the adroit and the cunning. The very nature of undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty.

In re Andrews, 299 N.C. 52, 54-55, 261 S.E.2d 198, 200 (1980) (citation omitted). Undue influence "is 'generally proved by a number of facts, each one of which standing alone may have little weight, but taken collectively may satisfy a rational mind of its existence.' " *In re Will of Mueller*, 170 N.C. 28, 29, 86 S.E. 719 (1915) (quoting *In re Will of Everett*, 153 N.C. 83, 87, 68 S.E. 924, 925 (1910)). Our Courts have identified several factors that may be relevant in determining whether a will was procured under undue influence over the testator, including:

> "1. Old age and physical and mental weakness.
>
> 2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.
>
> 3. That others have little or no opportunity to see him.
>
> 4. That the will is different from and revokes a prior will.

> 5. That it is made in favor of one with whom there are no ties of blood.
>
> 6. That it disinherits the natural objects of his bounty.
>
> 7. That the beneficiary has procured its execution."

Andrews, 299 N.C. at 55, 261 S.E.2d at 200 (quoting *Mueller*, 170 N.C. at 30, 86 S.E. at 720 (1915)). Although the caveator is not required to demonstrate the existence of every factor to prove undue influence, the caveator must establish a *prima facie* case. *See id.* at 55, 261 S.E.2d at 200 ("[T]he burden of proving undue influence is on the caveator and he must present sufficient evidence to make out a *prima facie* case in order to take the case to the jury."). In summary:

> For influence to be undue, "there must be something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an expression of the wishes of the maker, but rather the expression of the will of another. It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing [her] to make a will which [she] otherwise would not have made."

In re Will of Campbell, 155 N.C. App. 441, 455, 573 S.E.2d 550, 560 (2002) (alterations in original) (quoting *In re Will of Prince*, 109 N.C. App. 58, 61, 425 S.E.2d 711, 713-14 (1993) (citations omitted)).

¶ 12 In the case *sub judice*, Caveator alleges the existence of undue influence based on the following physical and mental conditions: Testator was seventy-nine years of age, suffering from poor health; Testator was on oxygen twenty-four hours a day, seven days a week; Testator suffered from chronic obstructive pulmonary disease; Testator was on a suprapubic catheter; and Testator was severely depressed. Caveator also points to the following testimony to support the existence of undue influence: Testator executed a prior will not naming Propounder as his beneficiary and Testator "expressed a strong desire that his property remain in the Paxton family[.]" In further support of this argument, Caveator notes Propounder "was not a relative, but a neighbor and caretaker, who assisted in the procuring of the Will in which he was named as beneficiary."

¶ 13 In briefing on appeal to this Court, Caveator makes arguments as to the existence of physical and mental weakness relevant to undue

influence; however, Caveator fails to explain or point to any evidence in the Record as to how these factors resulted in undue influence in the case at hand. Specifically, Caveator contends Propounder "had both the opportunity to exert influence over [Testator] and his active role in procuring the execution of the Will in his favor was indicative of his disposition to exert influence over [Testator]." Without presenting specific facts demonstrating the Will was executed as a result of Propounder's fraudulent and overpowering influence over Testator, Caveator's allegation of undue influence is just that: a mere allegation unsupported by any forecast of evidence. *See Whitaker*, 144 N.C. App. at 302, 547 S.E.2d at 858 ("[C]onclusory statements of opinion are not evidence properly considered on a motion for summary judgment.").

¶ 14 Thus, as the trial court recognized, Caveator has failed to set forth specific facts demonstrating Propounder procured the execution of the Will or exerted undue influence over Testator. Therefore, Caveator failed to carry his burden of establishing the existence of a genuine issue of material fact as to whether Testator's Will was the product of undue influence. Consequently, the trial court did not err in granting Summary Judgment in favor of Propounder.

Conclusion

¶ 15 Accordingly, for the foregoing reasons, we affirm the trial court's Order granting Summary Judgment to Propounder.

AFFIRMED.

Chief Judge STROUD and Judge JACKSON concur.

STATE OF NORTH CAROLINA
v.
THOMAS MICHAEL ADAMS, DEFENDANT

No. COA22-588

Filed 20 December 2022

Motor Vehicles—driving while impaired—sentencing—transfer from supervised to unsupervised probation—passage of time—statutory authority

In sentencing defendant for driving while impaired, the trial court exceeded its statutory authority under N.C.G.S. § 20-179(r) by conditioning defendant's transfer from supervised to unsupervised probation upon the passage of a certain amount of time, regardless of whether he had performed his community service; paid his court fines, costs, and fees; and obtained a substance abuse assessment.

Appeal by Defendant from judgment entered 12 January 2022 by Judge Jesse B. Caldwell, IV, in Gaston County Superior Court. Heard in the Court of Appeals 30 November 2022.

Attorney General Joshua H. Stein, by Assistant Attorney Kindelle McCullen and Special Deputy Attorney General Martin T. McCracken, for the State.

Patterson Harkavy LLP, by Christopher A. Brook, for the Defendant.

JACKSON, Judge.

¶ 1 Thomas Michael Adams ("Defendant") appeals from judgment entered after he pleaded guilty to driving while impaired. We vacate and remand for resentencing.

I. Background

¶ 2 Defendant was cited for driving while impaired on 4 December 2019. He pleaded guilty on 12 January 2022.

¶ 3 At sentencing, the court found one factor in aggravation – Defendant's blood alcohol content was more than .15 at the time of the offense – and one factor in mitigation – a safe driving record. The court concluded that the factors balanced each other out, and sentenced Defendant to 120 days' imprisonment. The court then suspended this sentence for

18 months of supervised probation. The court went on to impose a special condition of probation that Defendant perform 48 hours of community service, pay court costs, fines, and fees, and obtain a substance abuse assessment within 60 days. The court further stipulated that if Defendant was in full compliance with the terms of his probation within 12 months, his sentence of supervised probation could be changed to unsupervised probation.

II. Jurisdiction

¶ 4 Defendant did not notice an appeal from the judgment, and there is no right of appeal from a judgment entered upon a guilty plea. N.C. Gen. Stat. § 15A-1444(e) (2021). Defendant has therefore petitioned our Court for certiorari to review the judgment, citing *State v. Killette*, 381 N.C. 686, 690-91, 2022-NCSC-80 ¶ 15, in which our Supreme Court recently reaffirmed our authority to issue the writ of certiorari to review a judgment entered upon a guilty plea. In the exercise of our discretion, we issue the writ of certiorari here, and reach the merits of Defendant's appeal.

III. Analysis

¶ 5 Defendant argues that the sentence imposed by the sentencing court violated N.C. Gen. Stat. § 20-179(r), in that it required him to remain on supervised probation for at least 12 months, even if before that time he had performed his required community service, paid court costs, fines, and fees, and obtained a substance abuse assessment. We agree.

A. Standard of Review

¶ 6 When a defendant asserts that a "sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law[,]" the issue is automatically preserved for appellate review, regardless of whether an objection was raised in the trial court. N.C. Gen. Stat. § 15A-1446(d)(18) (2021). "Alleged statutory errors are questions of law reviewed de novo on appeal." *State v. Porter*, 282 N.C. App. 351, 352, 2022-NCCOA-166 ¶ 5 (2022) (internal marks and citation omitted).

B. The Sentencing Court's Special Condition of Probation Was Unauthorized

¶ 7 North Carolina General Statute § 20-179(r) provides that when a judge determines that a defendant who has been convicted of driving while impaired

> should be placed on supervised probation, the judge shall authorize the probation officer to modify the defendant's probation by placing the defendant on unsupervised probation upon the completion by the defendant of the following conditions of the suspended sentence:
>
> (1) [c]ommunity service;
>
> . . .
>
> [(2)] [p]ayment of any fines, court costs, and fees; or
>
> [(3)] [a]ny combination of these conditions.

N.C. Gen. Stat. § 20-179(r) (2021). Notably, the statute does not authorize a sentencing court to condition an offender's transfer from supervised to unsupervised probation upon the passage of a certain amount of time.

¶ 8 Yet the sentencing court here purported to sentence Defendant to 12 months of supervised probation, regardless of whether he had performed the required community service, paid his court fines, costs, and fees, and obtained a substance abuse assessment before 12 months had elapsed. This was not a sentence authorized by N.C. Gen. Stat. § 20-179(r), and the sentencing court erred by imposing this special condition of probation. We therefore remand the case for resentencing.

IV. Conclusion

¶ 9 Because the lower court sentenced Defendant to a special condition of probation that exceeded the court's statutory authority under N.C. Gen. Stat. § 20-179(r), we vacate the court's judgment and remand the case for resentencing.

VACATED AND REMANDED.

Judges ARROWOOD and COLLINS concur.

STATE v. MONROE

[287 N.C. App. 177, 2022-NCCOA-846]

STATE OF NORTH CAROLINA
v.
AUSBAN MONROE, III, DEFENDANT

No. COA20-839

Filed 20 December 2022

Homicide—second-degree murder—malice—jury verdict—sentencing

Defendant was properly sentenced as a B1 felon for second-degree murder even though the jury indicated on the verdict sheet that it found all three forms of malice to support defendant's conviction—actual malice (a B1 felony), "condition of mind" malice (a B1 felony), and "depraved-heart" malice (a B2 felony)—because, since the jury found that the evidence supported the first two forms of malice, the depraved-heart malice was not necessary to the conviction and therefore defendant was not entitled to be sentenced as a Class B2 felon. Further, where the language of N.C.G.S. § 14-17(b) was clear and unambiguous, defendant was not entitled to the rule of lenity.

Judge HAMPSON concurring in result only.

Appeal by Defendant from judgment entered 29 January 2020 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 20 October 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Steven Armstrong, for the State.

Michael E. Casterline for Defendant-Appellant.

JACKSON, Judge.

¶ 1 Defendant Ausban Monroe, III, ("Defendant") appeals from his conviction for second-degree murder. For the reasons detailed below, we hold that the trial court did not err.

I. Background

¶ 2 Early in the morning on 15 October 2017, Lazarus Hohn attended a house party on New Market Way in Raleigh, North Carolina, with several friends. Relatively soon after arriving at the party, Mr. Hohn and

two of his friends, Khalid Al-Najjar and Jamie Reyes, became involved in an altercation with another individual, Victor Benitez, outside the front of the house. Mr. Benitez ended up on the ground. After the fight was over, Mr. Hohn, Mr. Al-Najjar, and Mr. Reyes walked to the complex's parking lot to leave. As they approached their car, Defendant and one of his friends entered the parking lot on foot. Mr. Benitez had informed Defendant, who was attending the same house party, about the altercation in front of the home and that he felt that it had been an unfair fight. Defendant, already heavily intoxicated at that point, decided to seek out Mr. Hohn, Mr. Al-Najjar, and Mr. Reyes to confront them. Once in the parking lot, Defendant pulled out a gun and began pointing it between the three friends, asking who had fought Mr. Benitez. Defendant had purchased the gun on the street, and testimony at trial revealed that it had been stolen from the original owner's home. Defendant testified that he purchased the gun and kept it on him for protection.

¶ 3 Mr. Hohn stepped forward in response to Defendant's question and answered that he had been the one to fight Mr. Benitez. Defendant then pointed the gun at Mr. Hohn, and Mr. Hohn attempted to hit the gun away from him. Defendant and Mr. Hohn started fighting, while Mr. Reyes started fighting with the other individual who had accompanied Defendant to the parking lot. Mr. Al-Najjar testified at trial that he attempted to grab the gun from Defendant during the fight and that it was "going everywhere." As Defendant and Mr. Hohn were fighting, the gun that Defendant was holding fired, and Mr. Hohn fell to the ground, having been shot in the chest. Mr. Al-Najjar threw Defendant to the ground and grabbed the gun. He then discarded the gun and applied pressure to Mr. Hohn's wound with his shirt. Defendant and his friend left the scene.

¶ 4 Paramedics arrived and determined that Mr. Hohn had a single gunshot wound and did not have a pulse or other signs of life. Mr. Hohn was transported to Wake County Medical Center and was pronounced dead shortly after arriving.

¶ 5 Defendant was arrested and, on 6 November 2017, was indicted on one count of first-degree murder. Defendant was tried by jury at the 21 January 2020 Criminal Session of Wake County Superior Court. At the close of the evidence, the trial court instructed the jury on first-degree murder, second-degree murder, and involuntary manslaughter.

¶ 6 With respect to second-degree murder, the trial court instructed the jury that, if they found Defendant guilty of second-degree murder, they should indicate on the verdict form which theory or theories of malice they found. The verdict form itself listed three theories of malice:

(1) malice meaning hatred, ill will, or spite; (2) malice defined as condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict serious bodily harm which proximately results in another's death; and (3) malice that arises when an act which is inherently dangerous to human life is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.

¶ 7 During deliberations, the jury asked for clarification on malice and second-degree murder. The trial court repeated its prior second-degree murder instructions.

¶ 8 On 29 January 2020, the jury returned a verdict finding Defendant guilty of second-degree murder. The jury answered "yes" on the form as to whether they found each of the three theories of malice, finding all three present. The trial court sentenced Defendant for second-degree murder as a Class B1 to a minimum of 240 months to a maximum of 300 months active incarceration. Defendant objected to the B1 classification, contending that a B2 classification was appropriate.

¶ 9 Defendant orally noticed appeal.

II. Analysis

¶ 10 Defendant argues on appeal that he is entitled to be resentenced as a Class B2 felon because N.C. Gen. Stat. § 14-17(b) is ambiguous as to how a defendant should be sentenced when the jury finds that the evidence supports multiple theories of malice that do not all carry the same sentence.

A. Standard of Review

¶ 11 "The standard of review relating to the sentence imposed by the trial court is whether the sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Fortney*, 201 N.C. App. 662, 669, 687 S.E.2d 518, 524 (2010). "We review *de novo* whether the sentence imposed was authorized by the jury's verdict." *State v. Lail*, 251 N.C. App. 463, 471, 795 S.E.2d 401, 408 (2016).

B. Rule of Lenity

¶ 12 Defendant contends that he is entitled to the application of the rule of lenity, and therefore that he should be sentenced as Class B2 rather than Class B1 for his second-degree murder conviction. We disagree.

¶ 13 "The rule of lenity forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature

has not clearly stated such an intention." *State v. Conley*, 374 N.C. 209, 212, 839 S.E.2d 805, 807 (2020) (internal quotations omitted). This rule is only applicable to ambiguous criminal statutes. *State v. Cates*, 154 N.C. App. 737, 740, 573 S.E.2d 208, 210 (2002).

¶ 14 For example, in *State v. Smith*, our Supreme Court held that a statute which prohibited the dissemination of "any obscene writing, picture, record or other representation or embodiment of the obscene" was ambiguous. 323 N.C. 439, 444, 373 S.E.2d 435, 438 (1988). Because the use of the word "any" could be reasonably construed as referring to either a single item or multiple items, the Court applied the rule of lenity and held that the defendant could only be convicted of one violation of that statute, even where there were multiple items seized. *Id.*

¶ 15 Similarly, in *Conley*, our Supreme Court held that the prohibition contained in N.C. Gen. Stat. § 14-269.2(b) on the possession or carrying of "any gun, rifle, pistol, or other firearm" on educational property was ambiguous and prohibited conviction for multiple violations where the defendant had several firearms in his possession on school grounds. *Conley*, 374 N.C. at 214, 839 S.E.2d at 808.

¶ 16 "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs. & Div. of Med. Assistance, N.C. Dep't of Health and Human Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006). The statute at issue here is our sentencing scheme for second-degree murder, specifically N.C. Gen. Stat. § 14-17(b).

¶ 17 "Second-degree murder is defined as (1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation." *State v. Arrington*, 371 N.C. 518, 523, 819 S.E.2d 329, 332 (2018). North Carolina recognizes three forms of malice: (1) "actual malice, meaning hatred, ill-will or spite"; (2) "that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification"; and (3) "an inherently dangerous act done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief." *Id.* (internal citations and quotations omitted). The third theory of malice is often referred to as "depraved heart" malice. *Lail*, 251 N.C. App. at 464, 795 S.E.2d at 404.

¶ 18 North Carolina General Statute § 14-17 was amended in 2012, and, in relevant part, currently reads:

> (b) A murder other than described in subsection (a) or (a1) of this section or in G.S. 14-23.2 shall be deemed second degree murder. Any person who commits second degree murder shall be punished as a Class B1 felon, except that a person who commits second degree murder shall be punished as a Class B2 felon in either of the following circumstances:
>
> (1) The malice *necessary* to prove second degree murder is based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.
>
> . . . .

(emphasis added).

¶ 19 Defendant contends that this statute is ambiguous as to how a trial court should sentence a defendant that is found guilty of second-degree murder under multiple theories of malice, and therefore the rule of lenity prohibits the trial court from sentencing him at the higher Class B1 range. We disagree.

¶ 20 The key term contained in N.C. Gen. Stat. § 14-17(b) is that for a defendant to be entitled to sentencing as a Class B2, the malice *necessary* to prove second-degree murder must be "based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief[]," i.e. depraved heart malice. The word "necessary" has a plain and routinely used meaning in our law. According to Black's Law Dictionary, it means "needed for some purpose or reason; essential." *Necessary*, Black's Law Dictionary (11th ed. 2019). A "necessary element" of an offense is one that is required to support a conviction. *See State v. Ledwell*, 171 N.C. App. 328, 329, 614 S.E.2d 412, 413 (2005). A "necessary witness" is one whose testimony is "relevant, material, and *unobtainable by other means*." *See State v. Smith*, 230 N.C. App. 387, 391, 749 S.E.2d 507, 510 (2013) (emphasis added) (discussing Rule 3.7(a) of the North Carolina Rules of Professional conduct).

¶ 21 We hold that the language of N.C. Gen. Stat. § 14-17(b) is clear and without ambiguity. It is apparent from the statute that a defendant is only entitled to be sentenced as a Class B2 if the malice that is essential

or required for the defendant to be convicted of second-degree murder is depraved heart malice. If the jury finds that the evidence supports either, or both, of the other two forms of malice in addition to depraved heart malice, then a finding of depraved heart malice is not necessary to convict the defendant of second-degree murder, and he is not entitled to sentencing as a Class B2 and will instead be sentenced as a Class B1.

¶ 22 Here, a finding of depraved heart malice was not necessary or essential for the jury to convict Defendant of second-degree murder. Defendant concedes that the jury verdict itself was not ambiguous and does not challenge its finding of all three theories of malice beyond a reasonable doubt. A second-degree murder conviction predicated on a malice theory other than depraved heart malice is sentenced as a Class B1. The jury not only found that the evidence supported depraved heart malice, but that it also supported the other two theories of malice. If the jury had found that the evidence did not support depraved heart malice, Defendant still would have been convicted of second-degree murder under the other two theories. A finding of depraved heart malice was therefore not necessary to his conviction and Defendant was appropriately sentenced as a Class B1 felon.

¶ 23 Defendant relies on our prior decision in *State v. Mosley*, 256 N.C. App. 148, 806 S.E.2d 365 (2017), for his contention that the jury's verdict finding all three forms of malice present in his case requires a sentence in the Class B2 range. *Mosley* is inapplicable under the circumstances of this case.

¶ 24 In *Mosley*, we found that where there was evidence presented at trial that would have supported a second-degree murder conviction on more than one theory of malice, and because those theories of malice carry different sentences, the jury's general finding of unspecified malice was ambiguous. *Id.* at 153, 806 S.E.2d at 369. The trial court had provided the jury with a general verdict form that did not specify which potential forms of malice the jury could find. *Id.* at 149, 806 S.E.2d at 367. When the jury returned a guilty verdict for second-degree murder, the trial court had no way of knowing under which theory of malice that verdict resulted from, and therefore was unable to properly sentence the defendant. *Id.* at 153, 806 S.E.2d at 369. We recommended that:

> In order to avoid such ambiguity in the future, we recommend two actions. First, the second degree murder instructions contained as a lesser included offense in N.C.P.I.—Crim. 206.13 should be expanded to explain all the theories of malice that can support a verdict

> of second degree murder, as set forth in N.C.P.I.—Crim. 206.30A. Secondly, when there is evidence to support more than one theory of malice for second degree murder, the trial court should present a special verdict form that requires the jury to specify the theory of malice found to support a second degree murder conviction.

Id.

¶ 25 The trial court in this case did provide the jury with instructions that explained all three theories of malice, in addition to providing a verdict form that required the jury to specify the theory of malice that they found supported a second-degree murder conviction. Further, Defendant does not challenge the jury verdict here as ambiguous. Therefore, the issues we identified in *Mosley* were not present in this case.

¶ 26 We note that this Court recently decided a similar issue where the jury was presented with, and selected, all three categories of malice on the verdict form for second-degree murder in *State v. Borum*, 274 N.C. App. 249, 849 S.E.2d 367 (2020). However, our Supreme Court granted a petition for discretionary review and petition for writ of supersedeas in *Borum*, in addition to a temporary stay. *State v. Borum*, 867 S.E.2d 667 (N.C. 2022). *Borum* is still pending at our Supreme Court and therefore it is not controlling on our decision here. *See State v. Hutchens*, 272 N.C. App. 156, 161, 846 S.E.2d 306, 311 (2020).

¶ 27 We hold that N.C. Gen. Stat. § 14-17(b) is not ambiguous, and therefore Defendant is not entitled to the application of the rule of lenity. The statute is clear that only where a finding of depraved heart malice is necessary to the conviction of second-degree murder will a defendant be entitled to sentencing as a Class B2 felon. Because the jury here explicitly found that the evidence supported other theories of malice in addition to depraved heart malice, Defendant was properly sentenced as a Class B1 felon.

III. Conclusion

¶ 28 For the aforementioned reasons, we hold that the trial court did not err in sentencing Defendant as a Class B1 felon.

NO ERROR.

Judge CARPENTER concurs.

Judge HAMPSON concurs in result only.

STATE OF NORTH CAROLINA
v.
KEVIN MARCELL SCARBORO

No. COA22-354

Filed 20 December 2022

Sexual Offenses—unanimity of verdict—jury instructions—definition of "sexual act"—disjunctive instructions

In a prosecution for numerous sex offenses against multiple child victims, there was no plain error in the trial court's jury instructions—to which defendant did not object—when it defined "sexual act" to include various alternative acts, not all of which were supported by the evidence. Although defendant argued that the disjunctive instruction improperly allowed for a non-unanimous verdict, he was unable to demonstrate prejudice where the instructions in their entirety were consistent with statutory language and pattern jury instructions and where the victims' testimony provided overwhelming evidence of defendant's guilt.

Appeal by Defendant from judgment entered 10 September 2021 by Judge Wayland J. Sermons, Jr., in Currituck County Superior Court. Heard in the Court of Appeals 30 November 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary L. Lucasse, for the State-Appellee.

Mark Montgomery for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Kevin Marcell Scarboro appeals from judgment entered upon jury verdicts of guilty of the following: five counts of second-degree rape, one count of statutory rape of a child by an adult, three counts of statutory sexual offense with a child by an adult, two counts of statutory rape of a child 15 years or younger, three counts of statutory sexual offense with a child 15 years or younger, fourteen counts of sexual activity by a substitute parent, and sixteen counts of indecent liberties with a child. This appeal only involves Defendant's convictions for statutory sexual offense with a child by an adult and statutory sexual offense with a child 15 years or younger with two of three victims. Defendant argues that the trial court erroneously defined sexual act in its jury instructions

which allowed the jury to convict Defendant of sexual offenses not supported by the evidence. Although Defendant has failed to properly preserve this issue for appellate review, we elect in our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure to review the issue and conclude that the trial court did not plainly err in its jury instruction defining sexual act.

I. Procedural History and Factual Background

¶ 2 Defendant was indicted for multiple counts of second-degree rape, statutory rape of a child by an adult, statutory sexual offense with a child by an adult, statutory rape of a child 15 years or younger, statutory sexual offense with a child 15 years or younger, sexual activity by a substitute parent, and indecent liberties with a child. The case proceeded to trial, and the evidence tended to show the following: R.P., K.P., and M.P.[1] were Defendant's stepchildren. R.P. testified that, beginning when she was approximately ten years old, Defendant began regularly touching her vagina with his hands and mouth, and he would also touch his penis to her buttocks while rocking back and forth. K.P. testified that, beginning when she was approximately eight years old, Defendant began touching her vagina, and it became "almost an everyday occurrence" that Defendant would use his fingers, mouth, or sex toys on her vagina. At one point, Defendant also had sexual intercourse with K.P. M.P. testified that it was "pretty much a daily occurrence" for Defendant to touch her vagina with his hands and his mouth, and, after taking her virginity at fifteen years old, it "ended up progressing to an almost daily occurrence" for Defendant to have sexual intercourse with her. The jury was shown video recordings of two interviews Defendant gave after his arrest, during which he described what he did with R.P. and K.P. as "touching, pointing out, showing them, licking." Defendant said that he would "show" R.P. with his hand because she would get tired of using hers, and that he tried using his mouth on her, but she said she liked the hand better. Defendant admitted that this happened with R.P. around ten times over the course of a few months and said that the last time he had sexual contact with M.P. was the week that he got arrested. Defendant ended his first interview by stating that "[w]hatever my girls told you, man . . . I would never contradict my girls. They don't lie."

¶ 3 During the jury charge conference, Defendant did not object to the trial court's proposed jury instructions, nor did he request any additional instructions. Likewise, after jury instructions were given but before the

1. Pseudonyms are used to protect the identity of the child victims.

jury began deliberating, the trial court asked Defendant whether there were any additions or corrections to the jury charge and Defendant responded, "No, Your Honor." The jury convicted Defendant on all charges, and Defendant was sentenced to multiple extensive consecutive prison terms. Defendant timely appealed.

II. Discussion

¶ 4 Defendant contends that "[t]he trial court erred in instructing the jury that it could convict [Defendant] of sexual offense against R.P. and M.P. based on acts not supported by the evidence" by defining sexual act to include penetration, cunnilingus, or fellatio where there was no evidence of fellatio or vaginal penetration as to R.P. and no evidence of fellatio as to M.P. (capitalization altered).

¶ 5 Our appellate rules make clear that "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]" N.C. R. App. P. 10(a)(1) (2021). Moreover, "[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. 10(a)(2) (2021). Where a defendant properly objects at trial to jury instructions, a defendant's arguments "challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). "[A]n error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a)).

¶ 6 Unpreserved issues relating to jury instructions in criminal cases may nevertheless be reviewed for plain error where "the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4) (2021).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error

> will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quotation marks and citations omitted). Where a defendant fails to specifically and distinctly contend that the jury instruction amounted to plain error, he is not entitled to appellate review under this rule. *State v. Smith*, 269 N.C. App. 100, 105, 837 S.E.2d 166, 169 (2019) (citation omitted).

¶ 7 In this case, Defendant did not object at trial to the jury instruction he now challenges. Furthermore, Defendant fails to "specifically and distinctly" contend that the jury instruction amounted to plain error. N.C. R. App. P. 10(a)(4). Defendant asserts that the standard of review is, in its entirety, as follows: "Arguments challenging a trial court's decision regarding jury instructions are reviewed *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466 (2019)." Defendant's standard of review is incomplete and incorrect, and Defendant fails to assert the plain error standard anywhere in his brief.

¶ 8 In the last paragraph of his argument, Defendant asserts,

> The jury was out for only 34 minutes. It returned to the courtroom with 44 guilty verdicts. It is beyond belief that it "deliberated" and reached unanimity on each of those 44 charges in that time. It is *probable* that, had it been required to be unanimous as to each verdict, it would not have been able to. Even under the traditional plain error standard, the convictions of [Defendant] for sexual offense as to R.P. and M.P. must be vacated.

(emphasis added). Yet, in his conclusion immediately following, Defendant asserts error under the preserved standard: "There is a *reasonable likelihood* that [Defendant] was convicted of at least three counts of first-degree sexual offense based on sex acts not in evidence. Even under the recently adopted plain error standard, those convictions should be set aside." (emphasis added).

¶ 9 While Defendant includes the term "plain error" at the end of his brief, Defendant fails to assert that the standard of review is plain error and ultimately fails to apply the plain error standard. Accordingly, Defendant's argument is not properly before this Court. *State v. Grooms*, 353 N.C. 50, 66, 540 S.E.2d 713, 723 (2000) ("[W]hile defendant's assignment of error includes plain error as an alternative, he does not specifically argue in his brief that there is plain error in the instant case.

Accordingly, defendant's argument is not properly before this Court."). Nonetheless, we elect in our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure to review the issue.

¶ 10 Defendant's sole argument on appeal is that "[t]he trial court erred in instructing the jury that it could convict [Defendant] of sexual offense against R.P. and M.P. based on acts not supported by the evidence." (capitalization altered). Specifically, Defendant argues that the trial court allowed for nonunanimous verdicts by "not requiring the jury to set out the three specific acts it unanimously found that [Defendant] committed as to each complainant," and because of this, "there is no way to determine whether one or more jurors convicted [Defendant]" of acts "not supported by the evidence."

¶ 11 A defendant is guilty of statutory sexual offense with a child by an adult and statutory sexual offense with a person who is 15 years of age or younger if certain statutory age requirements are met and the defendant engages in a "sexual act" with the victim. *See* N.C. Gen. Stat. § 14-27.28 (2018); N.C. Gen. Stat. § 14-27.30 (2018). The term "sexual act" is defined by statute as: "Cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body." N.C. Gen. Stat. § 14-27.20(4) (2018).

¶ 12 "The statutory definition of 'sexual act' does not create disparate offenses, rather it enumerates the methods by which the single wrong of engaging in a sexual act with a child may be shown." *State v. Petty*, 132 N.C. App. 453, 462, 512 S.E.2d 428, 434 (1999). Where the trial court instructs the jury disjunctively as to various alternative acts which will establish an element of the offense, the requirement of unanimity is satisfied. *State v. Walters*, 368 N.C. 749, 753, 782 S.E.2d 505, 507-08 (2016). "In this type of case, the focus is on the intent or purpose of the defendant instead of his conduct." *Id.* at 753-54, 782 S.E.2d at 508 (quoting *State v. Bell*, 359 N.C. 1, 30, 603 S.E.2d 93, 113 (2004)).

¶ 13 However, "a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973) (citations omitted). "When reviewing the jury instruction for plain error the instruction must be reviewed as a whole, in its entirety." *State v. Clagon*, 207 N.C. App. 346, 352, 700 S.E.2d 89, 93 (2010) (citation omitted). Where the trial court instructs the jury disjunctively as to various alternative acts which will establish an element of the offense, but one or more of those acts is not supported by the evidence, it is not per se plain error. *See*

State v. Boyd, 366 N.C. 548, 742 S.E.2d 798 (2013) (reversing per curiam for the reasons stated in 222 N.C. App. 160, 167-68, 730 S.E.2d 193, 198 (2012) (Stroud, J., dissenting)). "Rather, under *Boyd*, a reviewing court is to determine whether a disjunctive jury instruction constituted reversible error, without being required in every case to assume that the jury relied on the inappropriate [act]." *State v. Martinez*, 253 N.C. App. 574, 582, 801 S.E.2d 356, 361 (2017)[2] (concluding that the defendant "failed to meet his burden of showing that the trial court's inclusion of 'analingus' in the jury instruction had any *probable* impact on the jury's verdict[,]" because the victim "was clear in her testimony regarding the occasions where fellatio and anal intercourse had occurred").

¶ 14 In this case, the trial court instructed the jury,

> As you know, the defendant is charged with multiple offenses which involve three alleged victims. He is also charged with the same offense against all three alleged victims and as well charged with different offenses against the alleged victims. You will consider each offense separately.
>
> For the purpose of instruction to you on these offenses, the Court will provide the file numbers and count numbers used on the verdict sheets that apply to the alleged victims. In addition, the verdict sheets are grouped according to each defendant (sic), in three separate groups with their initials under the file numbers on the verdict sheets. Again, you will for all offenses consider the evidence separately, consider those offenses separately from the others.
>
> . . . .
>
> You must be unanimous in your decision. All 12 jurors must agree.

Then, consistent with the statute and pattern jury instructions, the trial court instructed the jury, in relevant part, that

> [a] sexual act means any penetration, however slight, by any object into the genital opening of a person's

---

2. Defendant asks this Court to reconsider *Martinez*. We may not do so. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

> body. A sexual act means cunnilingus, which is any touching, however slight, by the lips or tongue of one person to any part of the female sex organ of another, or fellatio, which is any touching by the lips or tongue of one person on the male sex organ o[f] another, or any penetration, however slight, by an object into the genital opening of a person's body.

The trial court instructed the jury that it could find Defendant guilty of statutory sexual offense with a child by an adult and statutory sexual offense with a child 15 years or younger if, in addition to the other required elements, it found that Defendant had engaged in either penetration, cunnilingus, or fellatio with the victims. The jury was not required to make specific findings regarding which sexual acts Defendant committed, *State v. Carrigan*, 161 N.C. App. 256, 263, 589 S.E.2d 134, 139 (2003), and the trial court's instruction satisfied the unanimity requirement. *Walters*, 368 N.C. at 753, 782 S.E.2d at 508.

¶ 15 Even assuming arguendo that the jury instructions included an act or acts not supported by the evidence, Defendant has failed to meet his burden of showing that the inclusion of "fellatio" as to R.P. and M.P., and the inclusion of "vaginal penetration" as to R.P., had a probable impact on the jury's finding that Defendant was guilty.

¶ 16 R.P. testified that Defendant "would take off my underwear and shorts . . . [and] touch me with his hands and mouth." R.P. testified that after the first time Defendant used his mouth on her vagina, it happened "[a] few more times[.]" R.P. also testified that Defendant began touching her vagina with his hand "like everyday of the week." M.P. testified that it was "pretty much a daily occurrence" for Defendant to touch the inside and outside of her genitals with his hands and mouth. In his interview, Defendant classified what happened with R.P. and K.P. as "touching, pointing out, showing them, licking[,]" and admitted that this happened with R.P. around ten times over a period of a few months. Defendant also stated that he had sexual encounters with M.P., which continued until the week he was arrested. Defendant was charged with only three counts of statutory sexual offense with a child by an adult and three counts of statutory sexual offense with a child 15 years or younger despite the uncontroverted evidence that these acts occurred far more often. Given the overwhelming evidence that Defendant routinely committed sexual acts upon R.P. and M.P., and considering the jury instruction as a whole, *Clagon*, 207 N.C. App. at 352, 700 S.E.2d at 93, Defendant has failed to show that the trial court's instruction on the definition of sexual act had a probable impact on the jury's finding that Defendant was guilty

of statutory sexual offense with a child by an adult and statutory sexual offense with a person who is 15 years of age or younger. Thus, the trial court did not plainly err. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

III. Conclusion

¶ 17 The trial court did not err by including disjunctive acts in its definition of sexual act, and the jury was not required to make specific findings regarding which sexual acts Defendant committed. Even assuming arguendo that the jury instructions included acts not supported by the evidence, Defendant has failed to show prejudice. Accordingly, we discern no plain error in the trial court's jury instruction defining sexual act.

NO PLAIN ERROR.

Judges ARROWOOD and JACKSON concur.

STATE OF NORTH CAROLINA
v.
JERMELLE LEVAR SMITH

No. COA22-257

Filed 20 December 2022

Evidence—video recording of drug transaction—date and time stamp—computer-generated record—not hearsay

In a prosecution for multiple drug offenses, there was no plain error in the admission of a video recording (without sound) of a drug buy between two confidential informants and defendant that had a date and time stamp visible, which defendant contended constituted inadmissible hearsay of the non-testifying informant. The date and time stamps were computer-generated records that were automatically created without any human input; therefore, the informant who wore the recording device was not a declarant and the stamps were not hearsay. In addition, the deputy who activated the recording device testified at trial about the date and time stamps.

Judge GRIFFIN concurring in result only.

Appeal by Defendant from judgments entered 27 October 2021 by Judge Imelda J. Pate in Sampson County Superior Court. Heard in the Court of Appeals 5 October 2022.

Epstein Sherlin PLLC by Drew Nelson, for Defendant-Appellant.

Attorney General Joshua H. Stein by Assistant Attorney General Stacey A. Phipps, for the State.

WOOD, Judge.

¶ 1 Defendant Jermelle Levar Smith ("Defendant") appeals from judgments entered upon a jury verdict of guilty of three counts of trafficking opium or heroin, one count of possession with the intent to sale or deliver oxycodone, and one count of selling or delivering a Schedule II controlled substance. Defendant contends that the trial court erred by allowing the jury to view video recorded by a non-testifying confidential informant without first redacting the date and time-stamp from the video. For the reasons below, we conclude Defendant received a fair trial free from error.

I. Factual and Procedural Background

¶ 2 On 23 February 2018, the Sampson County Sheriff's Office conducted an undercover drug operation involving Defendant. Deputy Alphus Fann, Jr., ("Deputy Fann"), a 12-year veteran of the Sheriff's department, lead the operation and Deputy Crystal Gore ("Deputy Gore"), a 16-year law enforcement officer, assisted. The deputies utilized two confidential informants, Mr. Figueroa and Mr. Cruz, ("collectively, informants"), to conduct the purchasing of a controlled substance from Defendant. Figueroa had previous drug charges.

¶ 3 On the day of the undercover operation and prior to arriving at the location where the transaction would occur, the deputies provided Figueroa with buy money and outfitted Cruz with a watch featuring an internal video camera. Deputy Fann checked the device to ensure there was not data already on it and verified it was blank. The watch operates like a flash drive and connects to a computer via a USB plug so the recordings can be downloaded. A video recording can be deleted by the wearer of the device, but it cannot be edited or altered. Before leaving for the location where they would be meeting Defendant, the deputies searched both informants and their vehicle for weapons and drugs.

¶ 4 During the transaction, the deputies continued to surveil the informants from nearby. The video recording taken by the watch worn by Cruz showed the following: the informants entered a home, engaged Defendant, and subsequently exchanged money in return for a baggie containing eleven white pills. Once this transaction was completed, the

informants returned the watch and the pills to the awaiting deputies and were searched again.

¶ 5 Thereafter, Deputy Fann downloaded the watch's video recording to his work computer located at the Sheriff's office and erased it from the device to prepare it for use by another officer. On 25 February 2019, the State Crime Lab confirmed that the newly purchased pills contained oxycodone. The following day, Deputy Fann reviewed the video and recognized Defendant, with whom he had prior "dealings." The video recording displayed a time-stamp with the date of 23 February 2018 and utilized military time to indicate when the recording occurred. The time-stamp remained on the bottom of the screen throughout the entire video.

¶ 6 On 9 September 2019, Defendant was indicted for three counts of trafficking opium or heroin, one count of possession with the intent to sell or deliver oxycodone, and one count of selling or delivering oxycodone, a Schedule II controlled substance. The matters were joined for trial, and a jury trial was conducted from 25 through 27 October 2021. During pretrial motions, the State reported to the trial court that its confidential informants were unavailable to testify, as Mr. Figueroa was "believed to be out of the country" and Mr. Cruz had an outstanding warrant for his arrest and could not be located.

¶ 7 During jury selection, the State informed the trial court he had learned Mr. Figueroa contacted Deputy Fann that afternoon and reported that he, the informant, was currently in Duplin County. After discussing this issue with the trial court, the State explained that he planned to move forward without calling Mr. Figueroa as a witness. Defendant's trial counsel stated she had no objection to that approach.

¶ 8 During Deputy Fann's testimony, the State sought to introduce into evidence the video recording taken from the watch, which captured the transaction between Defendant and the informants. Defendant's trial counsel objected to the introduction of the video on the basis that the recording contained statements by the unavailable confidential informants and such statements were inadmissible hearsay. *Voir dire* was conducted outside the presence of the jury and subsequently, the trial court overruled Defendant's objection and allowed the video recording portion of the exhibit to be played for the jury without audio. Defendant's trial counsel renewed her objection to its admission. The State introduced additional exhibits which were still-frame images from the video. Each image also featured the same date and time-stamp text as that on the video recording.

¶ 9 Defendant was convicted of three counts of trafficking opium or heroin, with a consolidated sentence of seventy to ninety-three months, and one count of possession with intent to sale or deliver oxycodone and one count of selling or delivering a Schedule II controlled substance with a consolidated sentence of seventeen to thirty months. The trial court ordered both sentences to run consecutively. Defendant gave oral notice of appeal on 27 October 2021.

II. Appellate Jurisdiction

¶ 10 Defendant failed to comply with Rule 7 of our Rules of Appellate Procedure and filed a petition for writ of certiorari with this Court. According to Rule 7(b), an appellant is required to serve the documentation concerning his transcript order within fourteen days of giving notice of appeal. N.C. R. App. P. 7(b). Here, the trial court appointed an appellant defender. Defendant's appellant counsel filed his notice of appearance on 24 January 2022, more than fourteen days after Defendant's trial counsel entered oral notice of appeal at the conclusion of his jury trial. Appellant counsel ordered the production of the transcript that same day, and the record indicates the trial transcript was produced on 27 January 2022 and delivered prior to the 31 January 2022 deadline set by the Appellate Entries. Defendant's failure to comply with Rule 7(b) did not delay or prejudice the State. Therefore, in our discretion, we grant Defendant's petition for writ of certiorari.

III. Discussion

A. Standard of Review

¶ 11 While Defendant's trial counsel objected to the State introducing the watch's video recording on the basis of a hearsay objection, her objection did not address the date and time-stamp appearing on the recording. Instead, Defendant's counsel objected as follows:

> Although it's a DVD that purports to be an audio and video regarding the two confidential informants, it still contains alleged statements made by these individuals who are not here and cannot be cross-examined, but their statements that are contained on this audio and video CD would be attempted to be introduced into evidence as to what was said and what occurred on that occasion, and that's definitely the definition of hearsay. More importantly, they're not available for the defense to be able to cross-examine them on the issue of whether or not it is, in fact, true or not.

Although Defendant's trial counsel did not make an objection as to the date and time-stamp theory as a violation of hearsay, an appellate court may review "unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). In accordance with Rule 10 of our Rules of Appellate Procedure, "an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10. Here, Defendant's brief specifically and distinctly asserts the trial court's admission of the State's exhibits amounted to plain error. Therefore, we review the admissibility of the State's evidence for plain error.

¶ 12 Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 103 S. Ct. 381, 74 L. Ed. 2d. 513 (1982)). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993). "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." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and internal quotation marks omitted); *see State v. Santillan*, 259 N.C. App. 394, 401, 815 S.E.2d 690, 695 (2018) (holding a prerequisite to a plain error analysis requires the appellate court to first find prejudice against the defendant, meaning "the error had a probable impact on the jury's finding that the defendant was guilty."). Defendant has the burden to prove that the trial court committed plain error. N.C. Gen. Stat. § 15A-1443 (2021); *see also State v. Parker*, 354 N.C. 268, 290, 553 S.E.2d 885, 901 (2001).

B. Hearsay

¶ 13 Defendant claims for the first time on appeal that the State's exhibits which contain a date and time-stamp constitute inadmissible hearsay. According to Defendant, each date and time-stamp is a "non-verbal statement made by the unavailable informant who filmed the alleged transaction and was offered to prove the truth of the matter asserted."

¶ 14 Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, R. 801(c). "A 'statement' may be a written or oral assertion or non-verbal conduct intended by the declarant as an assertion." *State v. Satterfield*, 316 N.C. 55, 58, 340 S.E.2d 52, 54 (1986) (citation omitted). An act, such as a gesture, can be a statement for purposes of applying rules concerning hearsay. *Id.*; *State v. Fulcher*, 294 N.C. 503, 517, 243 S.E.2d 338, 348 (1978). Further, a declarant is a *person* who makes a statement." N.C. Gen. Stat. § 8C-1, R. 801(b) (emphasis added). "An assertion of one other than the presently testifying witness is hearsay and inadmissible if offered for the truth of the matter asserted." *Livermon v. Bridgett*, 77 N.C. App. 533, 540, 335 S.E.2d 753, 757 (1985). "If a statement is offered for any other purpose, it is not hearsay and is admissible." *State v. Frierson*, 153 N.C. App. 242, 245, 569 S.E.2d 687, 689 (2002) (quoting *State v. Dickens*, 346 N.C. 26, 46, 484 S.E.2d 553, 564 (1997)).

¶ 15 Defendant alleges that the date and time-stamps are out-of-court statements demonstrating that the video and images were taken on 23 February 2018 and were "made by the [confidential informant] who produced the video," but did not testify at trial. Defendant's argument is misplaced because the confidential informant was not the declarant of the video's date and time-stamp "statement."

¶ 16 Deputy Fann confirmed that the confidential informant merely "operat[ed]" the watch as an agent of the Sampson County Sheriff's Office but was not the declarant of the video. While the individual wearing the watch was able to point it at certain areas, according to Deputy Fann, the wearer is not "able to tap the watch to pull up certain information," such that the undercover informant could not manipulate or edit the recording. The wearer of the watch is unable to turn off the device, because law enforcement does not "show [the confidential informant] the sequence on how to do that." In fact, the confidential informant maintained no control of the recording device because Deputy Fann prepared and activated the device for the confidential informant to wear and Deputy Gore seized the watch and stopped the device's recording because the confidential informant did not have the ability to turn off the watch on his own. Thus, "whatever [the watch] captures . . . is turned over to [the Sheriff's Office], that's what it captured."

¶ 17 Deputy Fann explained that neither the watch nor the video recording is subject to being edited and described the watch as working "almost like an auxiliary . . . it's an auxiliary plug that you plug directly into the device. The USB plugs into the computer, and you can extract it off the watch to the computer."

¶ 18 In reference to the date and time-stamp appearing on the State's exhibits, Deputy Fann testified that the "date is accurate," but he did not "believe the time-stamp is . . . [the Sheriff's Office] don't [sic] have a way to correct it, so [it] . . . shows up by itself." The testimony at trial makes clear that neither the Sampson County Sheriff's Office nor the confidential informant had control over whether a date and time-stamp appears on the video recordings. "In other words, [this] information was generated instantaneously by the computer without the assistance or input of a person." *United States v. Hamilton*, 413 F.3d 1138, 1142 (10th Cir. 2005).

¶ 19 North Carolina has not specifically addressed whether computer records generally constitute hearsay. Other courts, however, have addressed the issue, and we find the analysis in those cases to be instructive. "When considering the potential hearsay implications of computer records, courts have drawn a distinction between "computer-generated" and "computer-stored" records." *Commonwealth v. Royal*, 46 N.E.3d 583, 587 (Mass. App. Ct. 2016); *see People v. Holowko*, 486 N.E.2d 877, 878-89 (Ill. 1985); *State v. Armstead*, 432 So. 2d 837, 839-840 (La. 1983); *State v. Kandutsch*, 799 N.W.2d 865, 879 (Wis. 2011). "The distinction between computer-stored and computer-generated records depends on the manner in which the content was created — by a person or by a machine." *Royal*, 46 N.E.3d at 587.

¶ 20 Computer-generated records "are those that represent the self-generated record of a computer's operations resulting from the computer's programming." *Kandutsch*, 799 N.W.2d at 878. Therefore, "[b]ecause computer-generated records, by definition, do not contain a statement from a person, they do not necessarily implicate hearsay concerns." *Commonwealth v. Thissell*, 928 N.E.2d 932, 937 n.13 (Mass. 2010); *see Baker v. State*, 117 A.3d 676, 683 (Md. Ct. Spec. App. 2015) ("When records are entirely self-generated by the internal operations of the computer, they do not implicate the hearsay rule because they do not constitute a statement of a 'person.' "). In contrast, computer-stored records "constitute hearsay because they merely store or maintain the statements and assertions of a human being." *Kandutsch*, 799 N.W.2d at 878 (citation omitted).

¶ 21 Applying this analysis to the facts of this case, we hold that the date and time-stamp on the State's exhibits do not constitute hearsay. Here, the date and time-stamps are purely computer-generated records, "created solely by the mechanical operation of a computer and [does] not require human participation." *Commonwealth v. Davis*, 168 N.E.3d 294, 310 (Mass. 2021) (citation omitted). As in this case, the date and

time-stamp is "automatically generated *in response* to a human action[,]" like the turning on of a device or recording of a video, "but requires no actual human input or discretion in their generation." *Commonwealth v. Hopper*, 2022 Mass. App. LEXIS 469 at *13-14 (Mass. App. Ct. 2022) (unpublished) (holding that the time and date stamps recording on Facebook Messenger messages admitted into evidence did not constitute hearsay).

¶ 22 Because the electronic hardware of the device automatically generated the video recording's date and time-stamp, the date and time-stamp on the watch's video does not constitute "a statement made by the person who produced the video." Pursuant to our Rules of Evidence, the hearsay rule applies only to out-of-court statements and is defined as a *person's* "oral [assertion], written assertion, or nonverbal conduct of a person, if it is intended by him as an assertion." N.C. Gen. Stat. § 8C-1, R. 801. Hence, the relevant assertion was not made by a person; it was made by a machine. Accordingly, the machine generated date and time-stamp on the State's exhibits—the video taken by the confidential informant on the Sheriff's Office's camera watch, and subsequent still-frame images from the video — do not constitute hearsay. *See Hamilton*, 413 F.3d at 1142-43 (concluding that the computer-generated header information accompanying pornographic images retrieved from the Internet was not a hearsay statement because there was no "person" acting as a declarant); *United States v. Khorozian*, 333 F.3d 498, 506 (3d Cir. 2003) (concluding that an automatically generated time-stamp on a fax was not a hearsay statement because it was not uttered by a person). Further, the Deputy who activated the device and prepared it for the informant to wear was present in court and, in fact, testified about the date and time-stamp. Therefore, there was no error, much less plain error, in the trial court admitting the date and time-stamped video and still-frame images into evidence.

IV. Conclusion

¶ 23 For the above stated reasons, we hold the trial court did not err in admitting the date and time-stamped video and still-frame images into evidence as State's exhibits. We hold that automatically computer-generated date and time-stamps are not hearsay statements and therefore, admissible. Accordingly, we conclude Defendant received a fair trial free from error.

NO ERROR.

Judge JACKSON concurs.

Judge GRIFFIN concurs in result only.

SULLIVAN v. WOODY

[287 N.C. App. 199, 2022-NCCOA-849]

KARA ANN SULLIVAN, PLAINTIFF
v.
SCOTT NELSON WOODY, DEFENDANT
and
E. LYNN WOODY AND JAMES NELSON WOODY, INTERVENORS

No. COA21-651

Filed 20 December 2022

1. Attorney Fees—custody action—visitation rights—award against intervenor grandparents

In a child custody action in which the paternal grandparents intervened and successfully secured visitation rights, the trial court's attorney fees award—holding intervenor grandparents responsible for all of respondent mother's attorney fees, including those associated with claims to which intervenors were not parties—was vacated for a second time. The trial court, which failed to follow the mandate of the appellate court on remand, was once again directed to make findings of fact delineating the amount of fees reasonably incurred by respondent as a result of intervenors' visitation action (as opposed to those incurred by respondent as a result of claims made by the child's father for custody and support).

2. Attorney Fees—custody action—visitation rights—successful appeal by intervenor grandparents—associated fees

In a child custody action in which intervenor paternal grandparents successfully appealed an attorney fees award after securing visitation rights, where the appellate court vacated the trial court's attorney fees award regarding the visitation litigation for the second time, the trial court's additional award of attorney fees associated with intervenors' appeal was also vacated. Intervenors lawfully asserted their statutory right to visitation with their grandchild as well as their right to appeal the erroneous attorney fees award, and the trial court's entry of an additional award constituted an improper sanction under N.C.G.S. § 50-13.6. Pursuant to Appellate Procedure Rule 34, attorney fees incurred in defending an appeal may be awarded only by an appellate court.

Judge INMAN concurring in part and dissenting in part.

Appeal by Intervenors from orders entered 13 April 2021 by Judge Rebecca Eggers-Gryder in Mitchell County District Court. Heard in the Court of Appeals 9 August 2022.

Jackson Family Law, by Jill Schnabel Jackson, for Plaintiff-Appellee.

Arnold & Smith, PLLC, by Matthew R. Arnold and Ashley A. Crowder, for Intervenors-Appellants.

TYSON, Judge.

¶ 1 E. Lynn Woody and James Nelson Woody ("Grandparents"), Intervenors-Appellants, appeal for the *second* time from orders awarding attorney's fees to Kara Ann Sullivan ("Mother"). Grandparents intervened to secure visitation rights with their granddaughter during a highly-contested domestic and custody dispute between their son, Scott Woody Nelson ("Father") and Mother, which has lasted for nearly seven years.

¶ 2 After careful review of the record and this Court's previous mandate in this case, we *once again* vacate the trial court's amended order and remand for further findings to delineate and separate between reasonable attorney's fees Mother purportedly incurred to defend against Grandparents' visitation claim, as opposed to reasonable attorney's fees she may have incurred to litigate all remaining claims for custody and child support against Father. We also vacate the trial court's entry of an additional award for attorney's fees resulting from Grandparents' first successful appeal and remand.

I. Background

¶ 3 This Court summarized the factual history of this case in Grandparents' first appeal:

> This appeal arises from a heavily litigated child custody dispute that has now stretched on for more than three and a half years. [Mother] and [Father] were married on May 12, 2006. [Mother] filed a complaint seeking temporary and permanent custody of a minor child, child support, and attorney[']s fees on June 17, 2016. [Mother] and [Father] were not separated when the complaint was originally filed. The parties subsequently divorced.
>
> On August 21, 2016, [Grandparents], who are the parents of [Father] and grandparents of the minor child, filed a motion to intervene. The trial court granted [Grandparents]' motion on October 31, 2016. On December 5, 2016, [Grandparents] filed a complaint

> seeking temporary and permanent visitation rights and attorney['s] fees. [Mother] filed an answer to [Grandparents]' complaint on February 8, 2017.
>
> Before the matter was called for trial, [Mother] and [Father] stipulated that [Mother] was a fit and proper parent and that it would be in the best interest of the minor child to reside with [Mother], who would have legal and physical custody of the minor child. A trial was held on the remaining issues in the case—including [Father]'s visitation rights, [Grandparents]' visitation rights, and [Mother]'s claim for attorney's fees—over six days between March 28, 2018[,] and August 31, 2018.
>
> On September 12, 2018, the trial court entered a final order in the case. Pursuant to the final order, the trial court granted [Grandparents] visitation rights with the minor child. The trial court also ordered that [Father] and [Grandparents] were to be jointly liable for [Mother]'s attorney['s] fees in the amounts of $12,720.00 and $74,491.50.
>
> [Grandparents] filed a Notice of Appeal on 4 October 2018.

Sullivan v. Woody, 271 N.C. App. 172, 173-74, 843 S.E.2d 306, 307-08 (2020).

¶ 4 In their first appeal, Grandparents argued "the trial court erred[:] (1) when it made an award of attorney['s] fees against [them]; and[,] (2) when it found [Grandparents] liable for attorney['s] fees unrelated to their involvement in the custody action." *Id.* at 174, 843 S.E.2d at 308. This Court's decision, issued on 21 April 2020, held the trial court properly concluded an award of attorney's fees against Grandparents may be authorized by our General Statutes, but reversed the fee award order and remanded for the trial court to make additional findings of fact and conclusions of law regarding the reasonableness of the fee award against Grandparents, and of the costs Mother incurred to challenge Grandparents' claim specifically. *Id.* at 176-77, 843 S.E.2d at 309-10.

¶ 5 This Court concluded the trial court "failed to make the findings of fact necessary for a determination regarding what amount of [Mother]'s attorney['s] fees were reasonably incurred as the result of litigation by [Grandparents], as opposed to litigation by [Father]." *Id.* at 177, 843 S.E.2d at 309. This Court reversed the order and remanded the case based on the following reasoning:

> [T]he trial court failed to make those findings required by our precedent concerning[:] (1) the scope of legal services rendered by [Mother]'s attorneys in defending against [Grandparents]' visitation claim, or[,] (2) the time required of [Mother]'s attorneys in defending against that claim. Rather, the trial court's findings broadly relate to [Mother]'s attorney['s] fees associated with the entire action—including those claims brought by [Father], to which [Grandparents] were not parties.
>
> [Mother] has cited no authority, and we are aware of none, holding that [Grandparents] may be held liable for attorney['s] fees incurred as the result of claims or defenses they did not assert simply because they paid the opposing party's attorney['s] fees.

Id. at 177, 843 S.E.2d at 309-10.

¶ 6 Upon remand, the trial court conducted hearings on 19 November and 3 December 2020. The trial court did not hear or conduct a further evidentiary hearing, but Mother's attorneys submitted supplemental affidavits related to fees for services provided since entry of the original order. On 13 April 2021, the trial court entered an amended order for the *same amount* of attorney's fees awarded in its original order, totaling $87,211.50 against Grandparents.

¶ 7 On the same day, the trial court entered an additional judgment of $21,138.50 for attorney's fees Mother purportedly incurred *after* the original erroneous order, as those fees consisted of the attorney's fees used to challenge Grandparents' initial appeal. Grandparents *again* appeal from entry of both judgments for attorney's fees to this Court.

II. Jurisdiction

¶ 8 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2021).

III. Issues

¶ 9 Grandparents present extensive challenges to the trial court's award of attorney's fees. We again vacate and remand the amended order, because the trial court failed to follow this Court's prior mandate, and to make sufficient findings as required to find and hold Grandparents responsible *only* for reasonable attorney's fees Mother incurred *solely* as a result of Grandparents' successful claim for visitation.

¶ 10 Grandparents also argue the trial court erred by awarding attorney's fees for Grandparents' appeal "as punishment for providing financial assistance to their son and participating in the litigation."

IV. Insufficient Additional Findings About Allocation of Attorney's Fees

A. Standard of Review

¶ 11 **[1]** Whether the statutory requirements for attorney's fees are met is a question of law, which is reviewed *de novo* on appeal. *Cox v. Cox*, 133 N.C. App. 221, 228, 515 S.E.2d 61, 66 (1999) (citations omitted). The trial court must make "additional findings of fact upon which a determination of the requisite reasonableness can be based, such as findings regarding the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers" to enter an award of attorney's fees. *Cobb v. Cobb*, 79 N.C. App. 592, 595-96, 339 S.E.2d 825, 828 (1986) (citations omitted). "[T]he trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings." *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011) (citation omitted).

¶ 12 If the statutory requirements for attorney's fees "have been satisfied, the amount of the [attorney's fee] award is within the discretion of the trial judge and will not be reversed in the absence of an abuse of discretion." *Smith v. Barbour*, 195 N.C. App. 244, 255, 671 S.E.2d 578, 586 (2009) (citation, internal quotation marks, and alterations omitted). A trial court has no discretion to misapply, ignore, or fail to follow or properly apply this Court's mandates, controlling statutes, or precedents. *Id.* "Whether a trial court has properly interpreted the statutory framework applicable to costs is a question of law reviewed *de novo* on appeal." *Peters*, 210 N.C. App. at 25, 707 S.E.2d at 741 (citation omitted).

B. Analysis

¶ 13 "A mandate of an appellate court is binding upon the trial court and must be strictly followed *without variation or departure*. No judgment *other than that* directed or permitted by the appellate court may be entered." *McKinney v. McKinney*, 228 N.C. App. 300, 302, 745 S.E.2d 356, 357 (2013) (emphasis supplied) (citation and internal quotation marks omitted).

¶ 14 In this case, the trial court's amended order fails to follow and apply this Court's prior mandate on remand in the first appeal, requiring the trial court to "make the findings of fact necessary for a determination

regarding what amount of [Mother]'s attorney['s] fees were reasonably incurred *as the result of litigation by [Grandparents]*, *as opposed to litigation by [Father]*." *Sullivan*, 271 N.C. App. at 177, 843 S.E.2d at 309 (emphasis supplied). The amended order merely limited the attorney's fees to be paid by Grandparents to include only legal services provided *after* they petitioned for lawful visitation with their granddaughter and intervened in the action:

> 31. Prior to the entry of the Original Order, the Court reviewed Mr. Daniel M. Hockaday's Affidavit of Attorney['s] fees, which [Mother] incurred in this action for custody and support, and in defending the claims of [Father] for custody of the minor child and for child support, and in defending [Grandparents]' claims for visitation and attorney['s] fees. Mr. Hockaday's presence was necessary to represent [Mother] against [Grandparents]' claim for visitation, as well as to assist Ms. Hemphill in [Mother]'s case in chief. His legal assistance was also necessary because of the complicated nature of this matter, and the additional legal work needed in the discovery, due to [Grandparents]' and [Father]'s failure to cooperate fully in providing information. The law firm of Hockaday & Hockaday, P.A. has been paid the sum of $8,000.00 in legal fees, and another $4,720.00 is due. The total attorney['s] fees incurred by [Mother] from that firm are $12,720.00, which the Court finds as reasonable. The $8,000.00 was paid to Hockaday & Hockaday, P.A. by [Mother]'s parents.
>
> 32. The attorney['s] fees and costs incurred by [Mother] for the services of Mr. Hockaday prior to the entry of the Original Order were reasonable. With regard to the statement offered to the Court by Mr. Hockaday, his statement begins with February 2, 2017[,] which is after the date [Grandparents] became parties to this action. The Court finds that all of Mr. Hockaday's legal services for the period from 15 February 2017 through 16 May 2018 are relevant to the action initiated by [Grandparents] and their participation in this case as herein stated. Mr. Hockaday's legal expertise has been necessary on behalf of [Mother]. Therefore, the Court finds that

> [Grandparents] are liable to Hockaday & Hockaday, P.A. for reasonable attorney['s] fees in the amount of $12,720.00.
>
> . . . .
>
> 37. With regard to the Affidavit and statement offered to the Court by Ms. Hemphill, on 31 August 2018, the liability of [Grandparents] should be limited to the period of time beginning December 5, 2016, when [Grandparents] became full parties to this action and when they plead for attorney['s] fees. At the Court's direction, Ms. Hemphill re-submitted to the Court a revised Affidavit with accompanying Exhibits "A" and "B" for the time December 5, 2016[,] through September 5, 2018. From December 5, 2016, when [Grandparents] became parties, through the conclusion of the 31 August 2018 hearing and the entry of the final order, the Court finds that all of Ms. Hemphill's legal services are relevant to the action initiated by [Grandparents] and their participation in this case. Ms. Hemphill's legal expertise has been necessary on behalf of [Mother]. For that period, the total attorney['s] fees which [Grandparents] are liable to Hemphill Law Finn [sic], PLLC are $68,851.00; total paralegal/legal assistant fees are $5,496.00, and the total expenses and costs are $144.50. These amounts total $74,491.50, and the Court finds that these attorney['s] fees and costs incurred by [Mother] for the services of Ms. Hemphill were reasonable. The Court finds that [Grandparents] are liable to the Hemphill Law Firm, PLLC for the attorney['s] fees and expenses in the amount of $74,491.50 for the time period from December 5, 2016[,] through September 5, 2018.

¶ 15 The trial court clarified Grandparents would only be responsible for attorney's fees Mother incurred to two separate law firms after they intervened and held Father liable for Mother's attorney's fees incurred from 16 June through 4 December 2016, before Grandparents intervened, in the amount of $26,539.60. The amended order, however, fails to distinguish between "the scope of legal services rendered by [Mother]'s attorneys in defending against [Grandparents]' *visitation claim*" or describe "the time required of [Mother]'s attorneys in defending against

that claim." *Id.* at 177, 843 S.E.2d at 310 (emphasis supplied); *see generally Robinson v. Robinson*, 210 N.C. App. 319, 337, 705 S.E.2d 785, 797 (2011) ("Because this is a combined action for equitable distribution, alimony, and child support, the trial court's findings should have reflected that the fees awarded are attributable only to fees which Ms. Robinson incurred with respect to the alimony and/or child support actions.") (citation omitted).

¶ 16 The amended order before us again holds Grandparents liable for fees associated with "defending the claims of [Father] for custody of the minor child and for child support" and for Mother's "case in chief" on the fees due to Hockaday & Hockaday, P.A. For example, only two entries in one of the amended affidavits for attorney's fees from one of Mother's attorneys, Mr. Hockaday, explicitly mention services related to Grandparents, totaling $495.00 of the $4,720.00 billed in services rendered.

¶ 17 In addition, the trial court limited Grandparents' liability for Mother's attorney's fees with the separate Hemphill Law Firm from 5 December 2016 to 5 September 2018, but the supplemental affidavit and accompanying billable hours log fail to distinguish between services provided to defend against all of Father's claims as opposed to those services solely related to Grandparents' claim for visitation.

¶ 18 By contrast, the supplemental affidavits introduced to support the trial court's second judgment for attorney's fees entered on 13 April 2021 were "intended solely for the purpose of representing [Mother] in the appeal by [Grandparents] in this action" and "incurred as a result of the appeal of [Grandparents] in this action and the remand." In the original order and in the amended order for attorney's fees, the trial court recited *five remaining issues* to be resolved at trial, but *only one*, "[t]he child's best interest determination as to [Grandparents]' schedule of visitation with the minor child," directly pertained to Grandparents' claim for visitation.

¶ 19 The trial court failed to strictly follow this Court's prior mandate, and we again vacate and remand the amended order of the trial court for further findings and conclusions. *McKinney*, 228 N.C. App. at 302, 745 S.E.2d at 357. We re-emphasize our holding and law of the case in Grandparents' first appeal that "[Mother] has cited no authority, and we are aware of none, holding that [Grandparents] may be held liable for [reasonable] attorney['s] fees incurred as the result of claims or defenses they did not assert simply because they paid the opposing party's attorney['s] fees." *Sullivan*, 271 N.C. App. at 177, 843 S.E.2d at 310.

¶ 20 The amended orders also fail to address whether Mother's or her attorneys' actions demonstrate recalcitrance, stubbornness, needless delays, or good faith to extend or incur unwarranted expenses on the settlement or resolution of Grandparents' statutory visitation claim. The amended orders also do not demonstrate Mother's reasons or need to employ three separate law firms simultaneously in this seven-year litigation that she initiated.

¶ 21 Under the statutory authority stated in North Carolina General Statute Chapter 84-23, the North Carolina State Bar has issued Rule 1.5 regarding attorney's fees and the reasonableness thereof:

> (a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.
>
> (b) When the lawyer has not regularly represented the client, the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

N.C. Rev. R. Prof. Conduct 1.5(a)-(b).

¶ 22 Rule 1.5, subsection (e) provides:

> "(e) A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
>
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
>
> (3) the total fee is reasonable."

N.C. Rev. R. Prof. Conduct 1.5(e).

¶ 23 Upon remand, the trial court may receive new evidence to clarify which services provided related solely to Mother's challenge of Grandparents' statutory claim for visitation and the reasonableness and division of those fees under Rule 1.5. *See Hicks v. Alford*, 156 N.C. App. 384, 389, 576 S.E.2d 410, 414 (2003) ("Whether on remand for additional findings a trial court receives new evidence or relies on previous evidence submitted is a matter within the discretion of the trial court." (citations omitted)).

¶ 24 Because we *again* vacate the trial court's amended order and remand on this ground, it is unnecessary at this time to address Grandparents' remaining challenges to the fees awarded in the amended order, which are preserved. *See Sullivan*, 271 N.C. App. at 173, 843 S.E.2d at 307 ("Because we conclude the trial court failed to make those findings necessary for the fees awarded, we need not address [Grandparents]' additional assignments of error, all of which relate to the award.").

V. Attorney's Fees Associated with Grandparents' First Appeal

A. Standard of Review

¶ 25 **[2]** "Whether a trial court has properly interpreted the statutory framework applicable to costs is a question of law reviewed *de novo* on appeal. The reasonableness and necessity of costs is reviewed for abuse of discretion." *Peters*, 210 N.C. App. at 25, 707 S.E.2d at 741 (citations omitted). As consistent with State Bar Rule 1.5: "Where the applicable statutes afford the trial court discretion in awarding costs, we review the trial court's determinations for an abuse of discretion." *Khomyak v. Meek*, 214 N.C. App. 54, 57, 715 S.E.2d 218, 220 (2011).

B. Analysis

1. "American Rule" Regarding Attorney's Fees

¶ 26 "Our legal system generally requires each party to bear his [or her] own litigation expenses, including attorney's fees, regardless [of] whether he [or she] wins or loses. Indeed, this principle is so firmly entrenched that it is known as the 'American Rule.' " *Fox v. Vice*, 563 U.S. 826, 832, 180 L. Ed. 2d 45, 53 (2011) (citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 44 L. Ed. 2d 141, 147 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.")); *see also Batson v. N.C. Coastal Res. Comm'n*, 282 N.C. App. 1, 12, 2022-NCCOA-122, ¶ 39, 871 S.E.2d 120, 129 (2022) (Tyson, J., dissenting) (first citing *Ehrenhaus v. Baker*, 243 N.C. App. 17, 27-28, 776 S.E.2d 699, 705-06 (2015); and then citing *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972)). The English Rule, on the other hand, provides attorney's fees fall within the court's direction, but are "regularly allowed to the *prevailing party*." *Alyeska Pipeline Service Co.*, 421 U.S. at 247, 44 L.Ed.2d at 147 (emphasis supplied).

¶ 27 Our Supreme Court has held a trial court *may only award* attorney's fees when authorized by statute. *City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972) ("Today in this State, all costs are given in a court of law by virtue of some statute. The simple but definitive statement of the rule is: Costs, in this state, are entirely creatures of legislation, and without this they do not exist.") (citations, quotation marks, and alterations omitted); *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 448, 167 L. Ed. 2d 178, 185 (2007) (explaining the American Rule is a "default rule [and] can, of course, be overcome by statute") (citation omitted); *Batson*, 282 N.C. App. at 12, ¶ 39, 871 S.E.2d at 129 (Tyson, J., dissenting) (citations omitted).

2. North Carolina Rules of Appellate Procedure 34(a)

¶ 28 Rule 34 of the North Carolina Rules of Appellate Procedure provides "[a] court of the *appellate division* may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both" *if it finds* "an appeal or any proceeding in an appeal was frivolous." N.C. R. App. P. 34(a) (emphasis supplied). An appellate court may impose various sanctions against a party for bringing frivolous appeals, including the award of "reasonable expenses, including reasonable *attorney[']s] fees*, incurred because of the *frivolous appeal or proceeding*." N.C. R. App. P. 34(b)(2) (emphasis supplied).

3. North Carolina General Statute § 50-13.6

¶ 29 Our General Assembly has also enacted legislation governing the assignment of attorney's fees in actions for child support or custody *in the district court*. N.C. Gen. Stat. § 50-13.6 (2021). "In an action or proceeding for the custody or support, or both, of a minor child . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit." *Id.*

> [T]he clear intent of N.C. Gen. Stat. § 50-13.6 is to allow the trial court the discretion to ensure *one parent* in a custody action will not have an inequitable advantage *over the other parent*—based upon *a parent's* inability to afford qualified counsel. North Carolina General Statute § 50-13.6 concerns leveling the field in a custody action by ensuring *each parent* has competent representation. The trial court's authority to award attorney's fees under N.C. Gen. Stat. § 50-13.6 does not depend upon who "wins" any particular ruling in a custody proceeding.

Blanchard v. Blanchard, 279 N.C. App. 269, 277, 2021-NCCOA-487, ¶ 15, 865 S.E.2d 686, 692 (2021) (emphasis supplied) (citation omitted) (confirming N.C. Gen. Stat. § 50-13.6 was intended to place *parents* on equal footing with their available funds and assets in *parental custody* disputes, not to punish *grandparents* or other third parties such as siblings for claiming visitation rights, according to *Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002)).

¶ 30 Trial courts, nevertheless, do not possess "unbridled discretion" when assessing attorney's fees. *Burr*, 153 N.C. App. at 506, 570 S.E.2d at 224 (citations omitted) (explaining trial courts "must find facts to support its award"). As explained in *Davignon v. Davignon* and consistent with State Bar Rule 1.5:

> The trial court must make findings of fact to support and show "the basis of the award, including: the nature and scope of the legal services, the skill and time required, and the relationship between the fees customary in such a case and those requested." The trial court is also required to make findings to allocate and show what portion of the attorney's fees was attributable to the custody and child support aspects of the case.

245 N.C. App. 358, 365-66, 782 S.E.2d 391, 396-97 (2016) (citing *Robinson v. Robinson*, 210 N.C. App. 319, 337, 707 S.E.2d 785, 798 (2011); *Smith v. Price*, 315 N.C. 523, 538, 340 S.E.2d 408, 417 (1986)); *see* N.C. Rev. R. Prof. Conduct 1.5. Also consistent with State Bar Rule 1.5: "Reasonableness, not arbitrary classification of attorney activity, is the key factor under all our attorney['s] fees statutes." *Coastal Production Credit Ass'n v. Goodson Farms*, 70 N.C. App. 221, 228, 319 S.E.2d 650, 656 (1984) (citations omitted).

¶ 31 In derogation to and contrary to the "American Rule," which specifies parties must bear their own attorney's fees and fee-shifting statutes must be narrowly construed, N.C. Gen. Stat. § 50-13.6 should not be used by trial courts as a third-party, fee-shifting, full employment act for the domestic relations bar, nor should trial courts use the statute to punish or deplete parties' marital or other assets through endless litigation. *Id.*; N.C. Gen. Stat. § 50-13.6; *see Fox v. Vice*, 563 U.S. 826, 832, 180 L. Ed. 2d 45, 53 (2011) (citation omitted).

¶ 32 Here, the trial court found, in the order for the attorney's fees associated with Grandparents' appeal, "[Grandparents] have acted in bad faith in this litigation." The trial court's decision to reference Grandparents' purported "bad faith" for intervening and asserting their statutory right to visit their grandchild tends to show the trial court intended to punish Grandparents for exercising their rights. N.C. Gen. Stat. § 50-13.1(a) (2021) (providing "[a]n order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate").

¶ 33 This Court has held "attorney's fees and costs incurred *in defending an appeal* may only be awarded under N.C. R. App. P. 34 by an appellate court" because holding otherwise would discourage litigants from pursuing "valid challenges" to trial court decisions. *Hill v. Hill*, 173 N.C. App. 309, 318, 622 S.E.2d 503, 509 (2005) (citation and internal quotation marks omitted); *cf. McKinney*, 228 N.C. App. at 305, 745 S.E.2d at 360 (distinguishing *Hill* in a case where "attorney's fees [we]re not being awarded as a sanction, but as a discretionary award pursuant to § 50-13.6").

¶ 34 Grandparents lawfully and properly asserted their statutory right to visit with their grandchild and their *right to appeal the trial court's erroneous distribution* of attorney's fees between Father and Grandparents. N.C. Gen. Stat. § 50-13.6 may not be used to sanction Grandparents for their purported "bad faith" in lawfully intervening for visitation or bringing forth the trial court's error in their first appeal.

¶ 35 This Court's prior mandate and remand did not anticipate nor direct the trial court to find facts nor sanction Grandparents under Rule 34 or any other basis by awarding Mother attorney's fees purportedly incurred by yet a *third* attorney she retained to diminish Grandparent's successful assertion of visitation and to defend their meritorious appeal, which was necessitated by the trial court's failure to follow and apply the law. N.C. R. App. P. 34(a); *Hill*, 173 N.C. App. at 318, 622 S.E.2d at 509.

¶ 36 *Again*, the trial court's erroneous and unlawful order is vacated and jurisdiction is remanded for compliance with this Court's rulings and mandate. Grandparents' present and meritorious *second* appeal is necessitated *solely* by the trial court's recalcitrant and inexplicable failure to follow and implement this Court's prior mandate upon remand. N.C. Gen. Stat. § 7A-32(c) (2021); *McKinney*, 228 N.C. App. at 302, 745 S.E.2d at 357; *see also Sullivan*, 271 N.C. App. at 177, 843 S.E.2d at 309.

VI. Conclusion

¶ 37 We vacate the trial court's amended order and *again* remand for further findings and conclusions not inconsistent with the prior mandate and this opinion. N.C. Gen. Stat. § 7A-32(c) confers "[t]he Court of Appeals [with] [ ] jurisdiction . . . to supervise and control the proceedings of . . . trial courts[.]" *Id.*

¶ 38 In the event the trial judge is unwilling or incapable of again precisely following this Court's mandate on remand, the Chief District Court Judge of the 24th Judicial District is authorized and directed to implement this Court's opinion and order upon remand. *Id.*; *McKinney*, 228 N.C. App. at 302, 745 S.E.2d at 357. *It is so ordered.*

VACATED AND REMANDED WITH INSTRUCTIONS.

Judge GORE concurs.

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

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

¶ 39 I agree with the majority's conclusion that the trial court's amended order and judgment awarding attorney's fees to Mother arising from the initial custody dispute—the same fees award addressed in our earlier decision—must be vacated and remanded a second time for the trial court to make findings of fact to delineate between the attorney's fees

Mother incurred to defend against Grandparents' visitation claim as opposed to fees she incurred to litigate claims for custody and child support against Father. I disagree, however, with the majority's reversal of the trial court's second order and judgment requiring Grandparents to pay Mother's additional attorney's fees incurred as a direct result of Grandparents' visitation claims and Grandparents' earlier appeal. The majority has replaced the trial court's unchallenged findings of fact with its own view of the evidence and has disregarded controlling precedent. As to this issue, I respectfully dissent.

¶ 40 I would conclude the trial court's second order and judgment awarding attorney's fees incurred in the first appeal complies with the governing statute, is consistent with binding precedent, is supported by unchallenged findings of fact, and falls within the trial court's discretion.

1. Standard of Review

¶ 41 Although the issue of whether the statutory requirements for attorney's fees are met is a question of law, which we review *de novo* on appeal, *Cox v. Cox*, 133 N.C. App. 221, 228, 515 S.E.2d 61, 66 (1999), "the trial court's findings of fact supporting the award of attorney's fees are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings," *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011). Further, "[u]nchallenged findings are deemed to be supported by the evidence and are binding on appeal." *In re S.C.L.R.*, 378 N.C. 484, 2021-NCSC-101, ¶ 9 (citation omitted). If the statutory requirements for attorney's fees have been satisfied, "the amount of the attorney fee award is within the discretion of the trial judge and will not be reversed in the absence of an abuse of discretion." *Smith v. Barbour*, 195 N.C. App. 244, 255, 671 S.E.2d 578, 586 (2009) (cleaned up).

2. Section 50-13.6 Authorizes Trial Court's Award of Appellate Fees against Grandparents

¶ 42 N.C. Gen. Stat. § 50-13.6 (2021) provides: "In an action or proceeding for the custody or support, or both, of a minor child . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit."

¶ 43 Grandparents concede in their brief that the statute does not require a party be the prevailing party or that the party awarded fees be entitled to custody. And our caselaw is clear that an award for attorney's fees in a child custody or support proceeding is not dependent on the

outcome of the case. *See, e.g.*, *Blanchard v. Blanchard*, 279 N.C. App. 269, 2021-NCCOA-487, ¶ 14 ("Nothing in the plain language of [Section 50-13.6] suggests a determination that an interested party has acted in good faith or has insufficient means to cover the costs associated with the action are *determinations contingent on the ultimate outcome of an appeal, by either party, from the underlying judgment.*" (citation omitted) (emphasis added)); *Wiggins v. Bright*, 198 N.C. App. 692, 695, 679 S.E.2d 874, 876 (2009) ("If the proceeding is one covered by [Section] 50-13.6, as is the case here, and the trial court makes the two required findings regarding good faith and insufficient means, then *it is immaterial whether the recipient of the fees was either the movant or the prevailing party.*" (emphasis added)).

¶ 44 Grandparents argue for the first time on appeal, and the majority agrees, that the trial court was not authorized to award attorney's fees incurred in the prior appeal because that appeal was taken solely from an award of attorney's fees. Grandparents cite no authority to support their argument and other than its own policy statement, the majority cites no authority to support this conclusion. "It is not the role of the appellate courts to create an appeal for an appellant. It is likewise not the duty of the appellate courts to supplement an appellant's brief with legal authority or arguments not contained therein." *Kabasan v. Kabasan*, 257 N.C. App. 436, 443, 810 S.E.2d 691, 697 (2018) (citations and quotation marks omitted) (cleaned up).

¶ 45 Bolder than creating a new rule of law, the majority's holding directly conflicts with binding precedent. A fundamental principle of the rule of law is that courts respect precedent. "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[.]" *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted).

¶ 46 In *McKinney v. McKinney*, 228 N.C. App. 300, 745 S.E.2d 356 (2013), this Court applied Section 50-13.6 to affirm the trial court's award of appellate attorney's fees from a prior appeal, holding that "the award of appellate attorney's fees in matters of child custody and support, as well as alimony, is within the discretion of the trial court." 228 N.C. App. at 304, 307, 745 S.E.2d at 359, 361 (applying, explicitly, this Court's holding in *Fungaroli v. Fungaroli*, 53 N.C. App. 270, 273, 280 S.E.2d 787, 790 (1981) to the context of child custody and support). *See also Whedon v. Whedon*, 313 N.C. 200, 208-09, 328 S.E.2d 437, 442 (1985) (holding the trial court erred in dismissing the defendant's request for appellate attorney's fees without prejudice).

¶ 47 This case is procedurally identical to *McKinney*. *McKinney* arose, like this case, from the *second* appeal of an attorney's fee award. 228 N.C. App. at 300-01, 307, 745 S.E.2d at 357. And, as in this case, the first appeal in *McKinney* concerned only the award of attorney's fees. *Id.* *McKinney* followed a trial court's amended fee award order, pursuant to this Court's mandate to vacate an earlier award and remand for more precise findings of fact to award only fees within the scope of the statute. *Id.* at 301, 745 S.E.2d at 357-58. As here, on remand, the trial court made an award for appellate attorney's fees associated with the first appeal. *Id.* This Court in *McKinney* affirmed the award of attorney's fees incurred in the first appeal. *Id.* at 307, 745 S.E.2d at 361. As in this case, in *McKinney*, the award of attorney's fees was the only issue raised in both the first and second appeals. The majority does not distinguish or otherwise address the holding in *McKinney*.

¶ 48 The majority further reasons that the trial court lacked statutory authority to order Grandparents, as opposed to Father, to pay Mother's attorney's fees incurred in the first appeal. This reasoning ignores that only Grandparents—not Father—took the first appeal, so that only Grandparents could be responsible for Mother's attorney's fees incurred defending that appeal. It also ignores that Grandparents, as a result of intervening in this matter, are parties adverse to a custody action and subject to liability for attorney's fees pursuant to Section 50-13.6. This Court has interpreted N.C. Gen. Stat. § 50-13.1(a) to provide that "grandparents have standing to seek visitation with their grandchildren when those children are *not* living in a[n] . . . 'intact family.' " *Fisher v. Gaydon*, 124 N.C. App. 442, 444, 477 S.E.2d 251, 253 (1996) (emphasis in original). Neither this Court nor our Supreme Court has previously held that attorney's fees may not be awarded against Grandparents pursuant to Section 50-13.6. Perhaps that is why Grandparents did not even advance this argument in their appeal.

¶ 49 Further advocating for appellants more than their own counsel, the majority categorizes the trial court's award of appellate attorney's fees as a sanction for Grandparents' "bad faith" and asserts that such an award is solely in the province of this Court pursuant to Rule 34 of our Rules of Appellate Procedure. This assertion again ignores this Court's binding precedent and the trial court's order, which expressly awarded appellate fees pursuant to its discretionary, statutory authority under Section 50-13.6. The trial court's finding that Grandparents "acted in bad faith in this litigation" does not constitute a Rule 11 sanction. Second, this Court's authority to award fees and costs associated with defending an appeal under Appellate Rule 34 does not divest the trial court's authority

to award discretionary attorney's fees pursuant to Section 50-13.6—the two are not mutually exclusive.

¶ 50 In *Hill v. Hill*, 173 N.C. App. 309, 622 S.E.2d 503 (2005), the decision quoted by the majority on this point, this Court reversed the trial court's order for *sanctions under Rule 11* "awarding attorney's fees and costs incurred by defendants due to plaintiff's appeal to this Court and petition to our Supreme Court." 173 N.C. App. at 322, 622 S.E.2d at 512. We held that "[t]he authority to *sanction frivolous appeals* by shifting 'expenses incurred on appeal onto appellants' is exclusively granted to the appellate courts under N.C. R. App. P. 34." *Id.* at 317, 622 S.E.2d at 509 (emphasis added) (citations omitted) (cleaned up). *Hill* does not hold that trial courts are not authorized to award appellate attorney's fees pursuant to Section 50-13.6.

3. Grandparents Have Not Demonstrated Abuse of Discretion

¶ 51 Finally, the majority asserts that the trial court abused its discretion in awarding attorney's fees paid to Mother's third attorney in the first appeal. Notably, Grandparents do not challenge the trial court's findings of fact regarding the third attorney, including the reasonableness of her fees. Indeed, Grandparents do not challenge a single finding of fact or conclusion of law in the appellate fees order. Regardless of the majority's opinion about whether it was necessary for Mother to retain an additional attorney to represent her on appeal, the trial court's finding that the representation was necessary and reasonable is binding on appeal where unchallenged. *See In re S.C.L.R.*, ¶ 9.

¶ 52 Grandparents have failed to demonstrate the trial court abused its discretion in the amount it awarded Mother for attorney's fees incurred after the original order and in defending against Grandparents' first appeal. *See Smith*, 195 N.C. App. at 256, 671 S.E.2d at 586. The majority's conclusion to the contrary is based solely on its own characterization of the award, which disregards the trial court's findings of fact and exceeds the arguments raised by Grandparents.

¶ 53 For the above reasons, I would affirm the trial court's order awarding appellate attorney's fees and respectfully dissent from the majority opinion regarding this fee award.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 DECEMBER 2022)

ADVENTURE TRAIL OF CHEROKEE, INC. v. OWENS 2022-NCCOA-850 No. 22-479	Jackson (18CVS775)	Vacated
BYRD v. HODGES 2022-NCCOA-851 No. 22-193	Robeson (19CVS1150)	Affirmed
EQUESTRIAN LAKES, LLC v. N.C. DEP'T OF TRANSP. 2022-NCCOA-852 No. 22-321	Moore (21CVS903)	Affirmed
JUAREZ v. ALVAREZ-GOMEZ 2022-NCCOA-853 No. 22-474	Sampson (21CVD1238)	Affirmed
GRAEFF v. GRAEFF 2022-NCCOA-854 No. 22-406	Cabarrus (20CVD302)	Affirmed
HIGH v. WAKE CHAPEL CHURCH, INC. 2022-NCCOA-855 No. 22-358	Wake (21CVS3776)	Affirmed in Part, Dismissed in Part
HORAN v. HORAN 2022-NCCOA-856 No. 22-203	Wake (19CVD9167)	Affirmed
HUDSON v. HUDSON 2022-NCCOA-857 No. 22-521	Mecklenburg (21CVS14150)	Affirmed
IN RE B.J.N. 2022-NCCOA-858 No. 22-529	Mecklenburg (21SP828)	Vacated and Remanded
IN RE C.L.W. & C.R.W. 2022-NCCOA-859 No. 21-509	Pender (18JA07) (18JA08)	Affirmed in Part, Vacated in Part, and Remanded
IN RE JONES 2022-NCCOA-860 No. 22-392	Forsyth (21CVD2389)	Affirmed

IN RE K.A.S. 2022-NCCOA-861 No. 21-757-2	Cleveland (18JT14)	Affirmed
IN RE T.B. 2022-NCCOA-862 No. 22-337	Cumberland (21SPC50166)	Affirmed
IN RE T.M. 2022-NCCOA-863 No. 21-676-2	Stokes (19JA92) (19JT92)	AFFIRMED IN PART, VACATED IN PART, AND REMANDED
IN RE V.J. 2022-NCCOA-864 No. 22-119	Cumberland (21JA166)	Vacated and Remanded
MARTINEZ v. CITY OF WILSON 2022-NCCOA-865 No. 22-344	Wilson (20CVS794)	Reversed
McLENDON HILLS EQUESTRIAN CTR., LLC v. N.C. DEP'T OF TRANSP. 2022-NCCOA-866 No. 22-322	Moore (21CVS902)	Affirmed
McLEOD v. McLEOD 2022-NCCOA-867 No. 22-292	Iredell (15CVD202)	Affirmed
PEDROTTI v. PEDROTTI 2022-NCCOA-868 No. 22-273	Wake (15CVD12470)	Affirmed in Part and Vacated in Part
ROCK v. CITY OF DURHAM 2022-NCCOA-869 No. 22-235	Durham (19CVS4409)	Affirmed
SCGVIII-LAKEPOINTE, LLC v. VIBHA MEN'S CLOTHING, LLC 2022-NCCOA-870 No. 21-740	Mecklenburg (19CVS16728)	Dismissed
SCGVIII-LAKEPOINTE, LLC v. VIBHA MEN'S CLOTHING, LLC 2022-NCCOA-871 No. 21-690	Mecklenburg (19CVS16728)	Affirmed
SKALAK v. SKALAK 2022-NCCOA-872 No. 22-287	Pitt (16CVD2869)	DISMISSED IN PART AND AFFIRMED IN PART

STATE v. ALSTON 2022-NCCOA-873 No. 22-562	Chatham (18CRS482-87)	Affirmed.
STATE v. AVERY 2022-NCCOA-874 No. 21-700	Catawba (20CRS3951) (20CRS50474) (20CRS50476)	JUDGMENT VACATED AND REMANDED FOR RESENTENCING
STATE v. BOLICK 2022-NCCOA-875 No. 22-349	Alexander (19CRS50647)	Affirmed
STATE v. BUSHYHEAD 2022-NCCOA-876 No. 22-201	Haywood (19CRS52240)	No Error
STATE v. CAMPBELL 2022-NCCOA-877 No. 22-343	McDowell (20CRS346)	NO PLAIN ERROR.
STATE v. COLEMAN 2022-NCCOA-878 No. 22-215	Pender (19CRS50655)	No Plain Error in Part; No Prejudicial Error in Part
STATE v. DAVIS 2022-NCCOA-879 No. 20-811	Nash (12CRS55226)	Affirmed
STATE v. DYER 2022-NCCOA-880 No. 22-362	Jackson (19CRS52292)	Vacated and Remanded
STATE v. FINCHER 2022-NCCOA-881 No. 22-509	Union (20CRS54413)	NO PREJUDICIAL ERROR
STATE v. GOMEZ 2022-NCCOA-882 No. 21-696	Lee (16CRS51662-63)	Affirmed
STATE v. GRIFFIN 2022-NCCOA-883 No. 22-502	Wayne (19CRS2408) (19CRS51961)	No Error in Part; No Plain Error in Part
STATE v. HAYES 2022-NCCOA-884 No. 22-567	Onslow (18CRS54225)	Vacated and Remanded
STATE v. HUDSON 2022-NCCOA-885 No. 22-579	Brunswick (20CRS52200)	Affirmed

STATE v. JOHNSON 2022-NCCOA-886 No. 22-128	Wilkes (19CRS52410)	NO PREJUDICIAL ERROR
STATE v. LEWIS 2022-NCCOA-887 No. 22-417	Watauga (18CRS50115)	NO PLAIN ERROR
STATE v. MERIS 2022-NCCOA-888 No. 22-300	Guilford (14CRS592676-79) (15CRS68137) (16CRS24079-80) (16CRS24208) (16CRS24485-87) (16CRS65968) (16CRS66102-03) (16CRS67176-78) (16CRS69052-57) (16CRS69401-04) (16CRS69965) (16CRS78413)	Affirmed
STATE v. SOLLER 2022-NCCOA-889 No. 22-141	New Hanover (19CRS54532)	Affirmed in Part and Remanded for Resentencing
STATE v. STEEN 2022-NCCOA-890 No. 21-725	Lincoln (10CRS50368-370)	Affirmed.
STATE v. STEEN 2022-NCCOA-891 No. 22-225	Richmond (15CRS52250)	No Error
STATE v. TAYLOR 2022-NCCOA-892 No. 22-393	Jackson (20CR050566)	Reversed and Remanded
STATE v. TRAPP 2022-NCCOA-893 No. 22-487	Rowan (21CR50517)	Remanded for correction of clerical error
STATE v. WALKER 2022-NCCOA-894 No. 22-149	Watauga (17CRS51579)	No Error
STATE v. WOODS 2022-NCCOA-895 No. 22-250	Guilford (20CRS65092-95)	Affirmed

WALL RECYCLING, LLC v. WAKE CNTY. 2022-NCCOA-896 No. 22-181	Wake (20CVS5190)	Reversed and Remanded
WATSON v. N.C. DEP'T OF PUB. SAFETY 2022-NCCOA-897 No. 22-538	N.C. Industrial Commission (TA-28347)	Affirmed
WFP, LLC v. REHAB BUILDERS, INC. 2022-NCCOA-898 No. 22-331	Durham (19CVS3033)	Affirmed
WILSON v. WILSON 2022-NCCOA-899 No. 22-253	Sampson (18CVD837)	Affirmed

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS