287 N.C. App.—No. 4 Pages 522-614

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AUGUST 18, 2023

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

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OF
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[11] Appointed 13 January 2023.

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FILED 7 FEBRUARY 2023

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a larger footpath network throughout the neighborhood, even assuming that the homeowners' association's refusal to purchase a floodplain connected to the easement evinced an intention to abandon the easement, defendants failed to present any evidence of an unequivocal external act by plaintiffs (lot owners within the neighborhood) in furtherance of an intention to abandon the easement and therefore failed to create a genuine issue of material fact that plaintiffs had abandoned the easement. **Abbott v. Abernathy, 522.**

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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.

ABBOTT v. ABERNATHY

[287 N.C. App. 522 (2023)]

JAMES CHANDLER ABBOTT, ET AL., PLAINTIFFS
v.
MICHAEL C. ABERNATHY, ET AL., DEFENDANTS

No. COA22-162

Filed 7 February 2023

1. Appeal and Error—preservation of issues—failure to argue element of claim—failure to support argument—failure to raise issue before trial court

In an easement dispute, defendants failed to preserve a number of issues for appellate review: the affirmative defense of laches, by failing to argue the prejudice element of the claim on appeal; adverse possession and the statute of limitations, by failing to cite any case law in support of their arguments; extinguishment of plaintiffs' claims by the Marketable Title Act, the affirmative defense of lack of a dominant estate, and the "material issue" of the easement's precise location, by failing to raise the issues before the trial court; and the grantor's intent, by expressly disclaiming any argument on the issue before the trial court.

2. Easements—appurtenant—access to neighborhood footpaths—standing

In a dispute concerning an appurtenant easement along the border of defendants' property for the use of neighborhood lot owners as part of a larger footpath network throughout the neighborhood, plaintiffs had standing to bring an action, as lot owners in the neighborhood, to enforce their rights to use the easement. The appellate court rejected defendants' argument that plaintiffs lacked standing because they did not reside on any parcels adjoining the easement.

3. Easements—abandonment—unequivocal external act—failure to purchase property connected to easement

In a dispute concerning an appurtenant easement along the border of defendants' property for the use of neighborhood lot owners as part of a larger footpath network throughout the neighborhood, even assuming that the homeowners' association's refusal to purchase a floodplain connected to the easement evinced an intention to abandon the easement, defendants failed to present any evidence of an unequivocal external act by plaintiffs (lot owners within the neighborhood) in furtherance of an intention to abandon the easement and therefore failed to create a genuine issue of material fact that plaintiffs had abandoned the easement.

4. Easements—overburdening and misuse—original scope—pedestrian walkway for neighborhood residents

In a dispute concerning an appurtenant easement along the border of defendants' property for the use of neighborhood lot owners as part of a larger footpath network throughout the neighborhood, the fact that the city purchased the undeveloped floodplain connected to the easement and converted it into a public greenway did not cause plaintiff lot owners' proposed use of the easement to constitute overburdening and misuse. Plaintiffs' proposed use of the easement as a footpath for neighborhood residents to access the greenway fell squarely within the easement's scope as a pedestrian walkway.

5. Easements—dedication of land for public use—connection to public greenway—use of easement by non-residents—trespass

In a dispute concerning an appurtenant easement along the border of defendants' property for the use of neighborhood lot owners as part of a larger footpath network throughout the neighborhood, the appellate court rejected defendants' argument that plaintiffs were attempting to force a public dedication of defendants' land. Although the easement became connected to a government-owned greenway after the city purchased the floodplain connected to the easement, plaintiffs disclaimed any intent to offer the easement to the public and instead stated that the use of the easement by persons who were not residents of the neighborhood would constitute trespassing.

Appeal by defendants Rodney and Lynne Worthington from order entered 9 November 2021 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 September 2022.

Rosenwood, Rose & Litwak, PLLC, by Erik M. Rosenwood, for plaintiffs-appellees.

Arnold & Smith, PLLC, by Paul A. Tharp, for defendants-appellants Rodney and Lynne Worthington.

ZACHARY, Judge.

Defendants Rodney and Lynne Worthington appeal from the trial court's order denying their motion for summary judgment and granting

Plaintiffs' motions for summary judgment and declaratory judgment. After careful review, we affirm.

I. Background

The parties are residents of Park Crossing, a neighborhood development in Charlotte that borders Little Sugar Creek. Park Crossing was developed in the early 1980s by First Carolina Investors of Mecklenburg, Inc., and it "contains approximately 605 homes, along with a swim club, tennis facility, and other amenities." The recorded plats associated with Park Crossing show four easements burdening certain properties; the easements were part of "pedestrian walkway systems" intended to "link the development without the necessity of pedestrian activity along the vehicular roadways" to a "floodway fringe area"—"swampy" land adjacent to the neighborhood. In 2000, the developer offered to sell the "floodway fringe area" to Park Crossing's owners' association, which the association declined. In 2001, the developer sold the land to Mecklenburg County. Thereafter, the City of Charlotte began to develop the Little Sugar Creek Greenway, which included the floodplain. The Greenway contains paved access points to various neighborhoods along its route.

The Worthingtons purchased their home in Park Crossing in 1998. The deed to the Worthingtons' property states that the title is subject to "[a]ll enforceable easements, restrictions and conditions of record." Of the four easements depicted in the Park Crossing development plats, one is a ten-foot-wide easement along the border of the Worthingtons' property, five feet of which crosses the Worthingtons' property (the "Easement"). The Easement is depicted on plats recorded at Map Book 20, Page 421 and Map Book 20, Page 499, Mecklenburg County Registry.

Plaintiffs allege that after the City completed the Greenway, Park Crossing residents increasingly used the four easements to access it. As foot traffic grew, some owners of the properties burdened by the easements "began intentionally obstructing access to the Greenway [pedestrian easements], including erecting and placing obstructions composed of ropes, fencing, and other material designed to interfere with use of the [pedestrian easements] across their property." Some also called the police to report that residents were trespassing on their property when the residents used the easements.

On 23 August 2019, a small group of Park Crossing homeowners filed a complaint in Mecklenburg County Superior Court against the Worthingtons and several other owners of Park Crossing development property burdened by the pedestrian easements. The complainants

sought, *inter alia*, a declaratory judgment "in their favor as to the enforceability" of the easements, as well as injunctive relief to prevent the Worthingtons and other defendants "from constructing any further obstacles, traps, obstructions, fences, and the like" restricting access to the easements.

On 18 December 2019, some of the original defendants filed a motion to dismiss pursuant to Rule 12(b)(7) of the North Carolina Rules of Civil Procedure, arguing that the original plaintiffs had failed to add all necessary parties to this action by neglecting to include all homeowners in Park Crossing as parties. The trial court entered an order on 4 February 2020 in which it concluded that "all record owners of lots within Park Crossing are 'necessary parties' to this litigation pursuant to Rule 19 of the North Carolina Rules of Civil Procedure." The court stayed the action and granted the original plaintiffs leave to amend their complaint to join the necessary parties.

The original plaintiffs then sent each Park Crossing homeowner a package that included a copy of the trial court's order, a letter from the original plaintiffs' counsel, and a "Lot Owner Preference Form." The Lot Owner Preference Form allowed each owner to choose to take part in the action either as a plaintiff, a defendant, or a non-participating defendant (a "default defendant"). Those who chose not to participate in the litigation were served with a copy of the lawsuit and named as default defendants. Approximately 350 Park Crossing owners chose to participate as plaintiffs, while roughly 470 others were joined as default defendants in the suit. None of the owners chose to join the action as defendants.

On 8 June 2020, the original and newly added plaintiffs (collectively, "Plaintiffs") filed an amended complaint. In the amended complaint, Plaintiffs sought a declaratory judgment establishing the rights of all Park Crossing residents to use the easements; Plaintiffs also requested injunctive relief preventing the defendants from "interfer[ing] with the use and enjoyment of the" easements. On 17 August 2020, the defendants filed an answer and raised several affirmative defenses.

On 17 November 2020, Plaintiffs filed a motion for summary judgment, and on 29 March 2021, filed an amended motion for summary judgment. A small group of defendants, including the Worthingtons, filed a cross-motion for summary judgment "as to all causes of action" alleged in Plaintiffs' amended complaint on 29 March 2021.

On 8 July 2021, Plaintiffs filed motions for entry of default and judgment by default against the default defendants. On 8 September 2021,

the trial court granted Plaintiffs' motions, concluding that the four pedestrian easements were valid and "for the benefit of each resident of Park Crossing[.]"

The parties' summary judgment motions came on for hearing on 31 August 2021 in Mecklenburg County Superior Court. By the time of the hearing, Plaintiffs had "reached settlements with everybody except the Defendants Worthington." The hearing proceeded, with the Worthingtons contending that the Easement terminated as a matter of law once Mecklenburg County purchased the land to which the Easement leads, as the Easement "has now become a public way" without the Worthingtons' consent. The Worthingtons also asserted that Plaintiffs lacked standing to bring this action, and maintained that the Easement was abandoned. Finally, the Worthingtons argued before the trial court that Plaintiffs' requested use of the Easement constituted overburdening. Plaintiffs contended that the Easement was valid, not abandoned, and for the benefit of all Park Crossing residents.

On 9 November 2021, the trial court entered an order granting declaratory judgment and summary judgment in favor of Plaintiffs, and denying the Worthingtons' motion for summary judgment. The court found that "[t]he express language and clear depictions in the Park Crossing maps and plats . . . recorded by the [d]eveloper dedicate the [pedestrian easements] as appurtenant easements to and for the benefit of each resident of Park Crossing." The court ordered that the Worthingtons remove any obstructions to the Easement and refrain from restricting residents' access to the Easement in the future.

The Worthingtons timely appealed the trial court's order.

II. Appellate Jurisdiction

As a preliminary matter, we address this Court's jurisdiction to review the Worthingtons' appeal of the trial court's order granting Plaintiffs' motions for summary judgment and declaratory judgment, and denying the Worthingtons' motion for summary judgment.

Generally, this Court only hears appeals from final judgments. *See* N.C. Gen. Stat. § 7A-27(b)(1)–(2) (2021). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). By contrast, "[a]n interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Id.* at 362, 57 S.E.2d at 381. 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). "A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Curl v. Am. Multimedia, Inc.*, 187 N.C. App. 649, 652, 654 S.E.2d 76, 78–79 (2007) (citation omitted), *petition for disc. review withdrawn*, 362 N.C. 470, 665 S.E.2d 741 (2008).

Although the trial court's order in the instant case involved only the Worthingtons as defendants, to the exclusion of the suit's numerous other defendants, the order on appeal nevertheless constitutes a final judgment in the matter. When the parties' motions came on for hearing, the Worthingtons were the only non-default defendants with whom Plaintiffs had not entered into a settlement agreement. Shortly after the motions hearing, the trial court entered default and granted default judgment against the default defendants. Hence, Plaintiffs and the Worthingtons were the sole remaining parties when the trial court entered the order from which the Worthingtons appeal. Furthermore, the court granted Plaintiffs' motion for declaratory judgment and granted summary judgment in favor of Plaintiffs on all of their claims. As such, the trial court's order "dispose[d] 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. Accordingly, we conclude that this Court has jurisdiction over this matter.

III. Preservation of Issues

[1] The Worthingtons advance several arguments on appeal challenging the trial court's order. They argue that the trial court erred by granting Plaintiffs' motion for summary judgment because (1) Plaintiffs lacked standing to enforce the Easement; (2) Plaintiffs abandoned the Easement; (3) Plaintiffs' proposed use of the Easement constitutes overburdening and misuse; (4) the Worthingtons have not dedicated their lands for public use; (5) the doctrine of laches barred Plaintiffs' action; (6) adverse possession and the statute of limitations barred Plaintiffs' claims; (7) the Marketable Title Act extinguished Plaintiffs' claims; (8) the grant of the Easement was void because it lacked a description of the dominant estate; (9) the material issue of the physical location of the Easement precluded summary judgment; and (10) Plaintiffs' proposals are inconsistent with the grantor's intent. However, the Worthingtons failed to preserve several of these arguments for appellate review.

"Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C. R. App.

P. 28(b)(6); *see, e.g.*, *K2HN Constr. NC, LLC v. Five D Contr'rs, Inc.*, 267 N.C. App. 207, 213, 832 S.E.2d 559, 564 (2019) (determining that the plaintiff abandoned issues on appeal from summary judgment where it failed to establish "(1) what the elements of [its] claims are; or (2) how the evidence demonstrates the existence of any genuine issue of material fact"); *Premier Plastic Surgery Ctr., PLLC v. Bd. of Adjust. for Town of Matthews*, 213 N.C. App. 364, 368, 713 S.E.2d 511, 514 (2011) (concluding that the appellants "abandoned [an] issue by failing to provide any reason or argument in support of their assertion"); *Dillingham v. Dillingham*, 202 N.C. App. 196, 203, 688 S.E.2d 499, 508 (2010) ("Though [the] respondent cites this Court to the legal definition of the equitable defense of laches in his brief, he fails to provide any argument as to why this defense should apply to the present case. Thus, his assignment of error . . . is deemed abandoned."); *Williams v. HomEq Servicing Corp.*, 184 N.C. App. 413, 420, 646 S.E.2d 381, 385 (2007) (concluding that six of the plaintiff's arguments pursuant to nine sections of the pertinent statutes were "deemed abandoned pursuant to N.C. R. App. P. 28(b)(6)" where he "only specifically argue[d] in his brief" three sections), *appeal withdrawn*, 362 N.C. 374, 662 S.E.2d 552 (2008).

In addition, "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *Piraino Bros., LLC v. Atl. Fin. Grp., Inc.*, 211 N.C. App. 343, 348, 712 S.E.2d 328, 332 (citation and internal quotation marks omitted) (concluding that the plaintiffs could not rely upon a theory on appeal that was not raised in the trial court where the plaintiffs sought reversal of summary judgment), *disc. review denied*, 365 N.C. 357, 718 S.E.2d 391 (2011). The principle articulated in *Piraino*—that a party may not rely upon a different theory on appeal than the one presented to the trial court—is well established. *See, e.g.*, *Cobb v. Pa. Life Ins. Co.*, 215 N.C. App. 268, 280, 715 S.E.2d 541, 551 (2011) ("[The plaintiff's] argument on section 58-63-15(11)(n) was not presented to the trial court, and [he] is barred from raising a new theory on appeal to defeat summary judgment."); *Frank v. Funkhouser*, 169 N.C. App. 108, 114, 609 S.E.2d 788, 793 (2005) (declining to review the plaintiff's argument that summary judgment should be reversed based on a theory not included in the complaint and not argued to the trial court in opposing summary judgment); *Holroyd v. Montgomery Cty.*, 167 N.C. App. 539, 546, 606 S.E.2d 353, 358 (2004) (concluding that "[f]ailure to plead or argue a theory of recovery before the trial court precludes the assertion of that theory on appeal" where the plaintiff sought reversal of summary judgment based on a theory not included in the complaint (citation omitted)), *disc. review and cert.*

denied, 359 N.C. 631, 613 S.E.2d 690 (2005); *Hoisington v. ZT-Winston-Salem Assocs.*, 133 N.C. App. 485, 490, 516 S.E.2d 176, 180 (1999) (concluding that a party "is not permitted on appeal to advance new theories or raise new issues in support of [its] opposition to the [summary judgment] motion"), *disc. review and cert. improvidently allowed*, 351 N.C. 342, 525 S.E.2d 173 (2000).

This principle is also incorporated in Rule 10 of the Appellate Rules, which provides that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). Importantly, the complaining party must also "obtain a ruling upon [its] request, objection, or motion" from the trial court. *Id.* Our Supreme Court explained the rationale behind this Rule:

> The requirement expressed in Rule 10[(a)(1)] that litigants raise an issue in the trial court before presenting it on appeal goes to the heart of the common law tradition and [our] adversary system. This Court has repeatedly emphasized that Rule 10[(a)(1)] prevent[s] unnecessary new trials caused by errors that the trial court could have corrected if brought to its attention at the proper time. Rule 10 thus plays an integral role in preserving the efficacy and integrity of the appellate process.
>
> We have stressed that Rule 10[(a)](1) is not simply a technical rule of procedure but shelters the trial judge from an undue if not impossible burden.

Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 195, 657 S.E.2d 361, 363 (2008) (citations and internal quotation marks omitted).

Here, the Worthingtons properly preserved their arguments regarding standing, abandonment, overburdening and misuse, and public use. However, for the reasons explained below, we conclude that they have not sufficiently preserved the remaining arguments for appellate review.

First, although the Worthingtons asserted the affirmative defense of laches in their answer, they have abandoned any argument on appeal concerning this issue by failing to argue the prejudice element of the claim. To successfully assert the affirmative defense of laches, a defendant must establish that (1) "a delay of time has resulted in some change

in the condition of the property or in the relations of the parties"; (2) the delay is "unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches"; and (3) "the claimant knew of the existence of the grounds for the claim." *Johnson v. N.C. Dep't of Cultural Res.*, 223 N.C. App. 47, 55, 735 S.E.2d 595, 600 (2012) (citation omitted), *disc. review denied*, 366 N.C. 566, 738 S.E.2d 377 (2013). "The 'prejudice element' of the laches doctrine refers to whether a defendant has been prejudiced in its ability to defend against the plaintiff's claims by the plaintiff's delay in filing suit." *Id.* at 56, 735 S.E.2d at 601 (citation omitted). On appeal, the Worthingtons assert that "[t]he prejudice Defendants will suffer is manifest. They stand to lose their privacy, the quiet and peaceful enjoyment of their land, and their property value." To the extent that the Worthingtons advance the doctrine of laches on appeal, they have stated no reason or argument in support of the prejudice element for that issue in their brief. Accordingly, this issue is abandoned. *See* N.C. R. App. P. 28(b)(6); *see also*, *e.g.*, *Wilson v. Pershing, LLC*, 253 N.C. App. 643, 650, 801 S.E.2d 150, 156 (2017) (concluding that where an appellant's brief "does not contain any substantive arguments on [an issue presented], this issue has been abandoned").

The Worthingtons have similarly abandoned their argument that Plaintiffs' claims are barred by adverse possession and the statute of limitations. In support of this issue, the Worthingtons contend in their appellate brief: "Plaintiffs' claims are subject to the twenty-year statute of limitations provided in N.C. Gen. Stat. § 1-40. Plaintiffs' failure to bring a claim regarding their purported rights respecting the easements within a twenty-year period following actual or constructive notice of their claims (35-40 years ago) precludes this action." However, the Worthingtons fail to cite any case law in support of this claim. "It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein. Th[is argument is] deemed abandoned by virtue of N.C. R. App. P. 28(b)(6)." *Lasecki v. Lasecki*, 257 N.C. App. 24, 47, 809 S.E.2d 296, 312 (2017) (citation omitted); *see* N.C. R. App. P. 28(b)(6).

Furthermore, the Worthingtons have failed to preserve their argument that the Marketable Title Act extinguished Plaintiffs' claims. The Worthingtons did not raise any argument concerning the Marketable Title Act below, and thus never obtained the requisite ruling from the trial court. *See* N.C. R. App. P. 10(a)(1). Nor did they argue the affirmative defense of lack of a dominant estate before the trial court. In that "the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts" when "a theory argued on

appeal was not raised before the trial court," *Piraino*, 211 N.C. App. at 348, 712 S.E.2d at 332 (citation and internal quotation marks omitted), the Worthingtons are prohibited from now asserting these arguments on appeal.

Likewise, the Worthingtons' argument regarding the "material issue" of the Easement's location is unpreserved: the Worthingtons did not dispute the location of the Easement before the trial court, and a party "cannot create an issue of material fact for summary judgment by raising it for the first time on appeal." *Bryant v. Wake Forest Univ. Baptist Med. Ctr.*, 281 N.C. App. 630, 635 n.1, 870 S.E.2d 269, 273 n.1, *disc. review denied*, 382 N.C. 326, 876 S.E.2d 279 (2022).

Finally, the Worthingtons waived appellate review of their argument regarding the grantor's intent. At the hearing on the summary judgment motions, the Worthingtons' counsel explicitly disclaimed any argument regarding grantor's intent: "First and foremost, the most important thing to get across is that we're not contending that this is an intent issue. . . . [W]e contend that based on the plain language of the plat and -- and the language contained in the record, that this is not an intent issue." By expressing to the trial court that they were *not* arguing grantor's intent as a basis for their motion for summary judgment, the Worthingtons waived their opportunity to obtain a ruling from the court on this ground. Therefore, they have not preserved this issue for review. *See* N.C. R. App. P. 10(a)(1).

We now examine the merits of the Worthingtons' remaining, preserved arguments.

IV. Discussion

The Worthingtons assert that the trial court's grant of summary judgment in favor of Plaintiffs was improper because (1) Plaintiffs lacked standing to bring this action, (2) Plaintiffs abandoned the Easement, (3) Plaintiffs' desired use of the Easement constitutes overburdening and misuse, and (4) the Worthingtons have not dedicated their lands for public use.

A. Standard of Review

A trial court properly grants summary judgment "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). "When considering a motion for summary judgment, the trial judge must view the presented evidence in

a light most favorable to the nonmoving party." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted).

"The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact." *Badin Shores Resort Owners Ass'n v. Handy Sanitary Dist.*, 257 N.C. App. 542, 549, 811 S.E.2d 198, 204 (2018) (citation omitted). The moving party may meet this burden "by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Id.* (citation omitted).

Once the moving party makes the requisite showing, "the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a prima facie case at trial[.]" *Cummings v. Carroll*, 379 N.C. 347, 358, 866 S.E.2d 675, 684–85 (2021) (citation and internal quotation marks omitted). "[T]he non-moving party must forecast sufficient evidence to show the existence of a genuine issue of material fact in order to preclude an award of summary judgment." *Badin Shores*, 257 N.C. App. at 550, 811 S.E.2d at 204 (citation omitted).

"If the trial court grants summary judgment, the decision should be affirmed on appeal if there is any ground to support the decision." *Proffitt v. Gosnell*, 257 N.C. App. 148, 151, 809 S.E.2d 200, 204 (2017) (citation omitted). Appellate courts review "decisions arising from trial court orders granting or denying motions for summary judgment using a de novo standard of review." *Cummings*, 379 N.C. at 358, 866 S.E.2d at 684. "When reviewing de novo, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Asher v. Huneycutt*, 284 N.C. App. 583, 588, 876 S.E.2d 660, 666 (2022) (citation and internal quotation marks omitted).

B. Plaintiffs' Standing

[2] The Worthingtons assert that Plaintiffs lacked standing to initiate this action because they did not "reside on any parcels adjoining the easements at issue," thereby divesting them of "any ownership interest in any parcel containing any of the easements at issue," as well as "any ownership interest in the floodplain lands" adjoining the Park Crossing development, to which the Easement leads. We disagree.

"An appurtenant easement is an easement created for the purpose of benefitting particular land. This easement attaches to, passes with and is an incident of ownership of the particular land." *Nelms v. Davis*,

179 N.C. App. 206, 209, 632 S.E.2d 823, 825–26 (2006) (citations and internal quotation marks omitted). Our Supreme Court has explained that lot owners have certain rights to streets, parks, and playgrounds as appurtenant easements in the subdivision where they reside:

> Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks and playgrounds, a purchaser of a lot or lots acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement. It is said that such streets, parks and playgrounds are *dedicated* to the use of lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. *It is a right in the nature of an easement appurtenant.* Whether it be called an easement or a dedication, *the right of the lot owners to the use of the streets, parks and playgrounds may not be extinguished, altered or diminished except by agreement or estoppel.* This is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots.

Cleveland Realty Co. v. Hobbs, 261 N.C. 414, 421, 135 S.E.2d 30, 35–36 (1964) (citations omitted) (second and third emphases added); *see also Connolly v. Robertson*, 151 N.C. App. 613, 616–17, 567 S.E.2d 193, 196–97 (2002).

Here, because the Easement at issue is an appurtenant easement, Plaintiffs had standing to bring this action to enforce their rights to use it. The developer of Park Crossing dedicated the Easement as part of a network of paths designed to "link the development without the necessity of pedestrian activity along the vehicular roadways." As such, the Easement was "dedicated to the use of lot owners in the development[,]" creating "a right in the nature of an easement appurtenant" for all who live there. *Hobbs*, 261 N.C. at 421, 135 S.E.2d at 36 (emphasis omitted). Moreover, as our Supreme Court established in *Hobbs*, the right of the lot owners to the use of appurtenant easements within a community "may not be extinguished, altered or diminished except by agreement or estoppel." *Id.* No such agreement exists here; in fact, the Declaration of Covenants, Conditions, and Restrictions for Park Crossing expressly provides that "[t]he Association, *or any Owner*, shall have the right to enforce . . . all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration." (Emphasis added).

In that the Park Crossing developer dedicated the Easement for the use of lot owners as part of a larger footpath network throughout the neighborhood, Plaintiffs had standing to enforce their rights to the use of the Easement as an appurtenant easement. *See id.* The Worthingtons' argument accordingly fails.

C. Abandonment of Easement

[3] The Worthingtons next argue that "[i]f Plaintiffs possessed any rights respecting Defendants' properties, they abandoned them long before this action." They assert that "Plaintiffs showed a clear intention to abandon and terminate the easements" by seeking to convert them "into vehicles of ingress and egress for users of the public greenway[,]" which the Worthingtons contend "pervert[ed] the original nature and purpose of the easements." This argument lacks merit.

"An easement may be abandoned by unequivocable acts showing a clear intention to abandon and terminate the right . . . ." *Combs v. Brickhouse*, 201 N.C. 366, 369, 160 S.E. 355, 356 (1931). "The essential acts of abandonment are the intent to abandon and the unequivocal external act by the owner of the dominant tenement by which the intention is carried to effect." *Skvarla v. Park*, 62 N.C. App. 482, 487, 303 S.E.2d 354, 357 (1983). "Mere lapse of time in asserting one's claim to an easement, unaccompanied by acts and conduct inconsistent with one's rights, does not constitute waiver or abandonment of the easement." *Id.* (concluding that the plaintiffs did not abandon an easement after 70 years of nonuse because there was "no evidence of any external unequivocal act by [the] plaintiffs, or their predecessors in title, indicating an intent to abandon the easement").

In the present case, the Worthingtons contend that because the Park Crossing owners' association declined to purchase the floodplain from the developer, "[t]he community abandoned the plan, the land, and the [four] easements." A review of the record, however, belies this contention. Assuming, *arguendo*, that the association's refusal evinced an intention to abandon the Easement, the Worthingtons nevertheless must present evidence of Plaintiffs' "unequivocal external act" in furtherance of this intention, *id.*, which they have failed to do. In that "[m]ere lapse of time in asserting one's claim to an easement, unaccompanied by acts and conduct inconsistent with one's rights, does not constitute waiver or abandonment of the easement[,]" *id.*, the Worthingtons failed to "forecast sufficient evidence to show the existence of a genuine issue of material fact in order to preclude an award of summary judgment[,]" *Badin Shores*, 257 N.C. App. at 550, 811 S.E.2d at 204 (citation omitted).

Therefore, the trial court properly granted summary judgment in favor of Plaintiffs regarding the issue of abandonment.

D. Overburdening and Misuse of Easement

[4] The Worthingtons also argue that Plaintiffs' proposed use of the Easement constitutes overburdening and misuse, as it "allows for access to other properties not included in the [E]asement and allows for usage of a kind not contemplated in the grants." This argument is unavailing.

"If an easement is granted, the user of the easement may neither change the easement's purpose nor expand the easement's dimensions." *Bunn Lake Prop. Owner's Ass'n v. Setzer*, 149 N.C. App. 289, 296, 560 S.E.2d 576, 581 (2002); *see also*, *e.g.*, *Moore v. Leveris*, 128 N.C. App. 276, 281, 495 S.E.2d 153, 156 (1998) (concluding that an easement to use a public neighborhood road did not allow the defendant to place a sewer line under the road); *Swaim v. Simpson*, 120 N.C. App. 863, 864–65, 463 S.E.2d 785, 787 (1995) (concluding that the installation of utility pipes on an easement went beyond the easement's intended use of ingress and egress), *aff'd per curiam*, 343 N.C. 298, 469 S.E.2d 553 (1996).

To determine whether a particular act constitutes overburdening or misuse of an easement, this Court applies the following rules:

> First, the scope of an express easement is controlled by the terms of the conveyance if the conveyance is precise as to this issue. Second, if the conveyance speaks to the scope of the easement in less than precise terms (i.e., it is ambiguous), the scope may be determined by reference to the attendant circumstances, the situation of the parties, and by the acts of the parties in the use of the easement immediately following the grant. Third, if the conveyance is silent as to the scope of the easement, extrinsic evidence is inadmissible as to the scope or extent of the easement. However, in this latter situation, a reasonable use is implied.

City of Charlotte v. BMJ of Charlotte, LLC, 196 N.C. App. 1, 17, 675 S.E.2d 59, 69 (2009) (citation omitted), *disc. review denied*, 363 N.C. 800, 690 S.E.2d 533 (2010).

In the case at bar, the plats detailing the Easement label it as a ten-foot-wide pedestrian easement that runs southwest along the property line of the Worthington's property, following the property line to the end of the lot. As the trial court determined, "[t]he express language and clear depictions in the Park Crossing maps and plats . . . recorded

by the [d]eveloper" demonstrate a dedication of the Easement to and for the benefit of each resident of Park Crossing as a pedestrian path. In their amended complaint, Plaintiffs requested a declaratory judgment to establish their right "to access, use, and enjoy the [Easement], including for the purpose of accessing the Little Sugar Creek Greenway[.]" Unlike the challenged use in *Swaim*, Plaintiffs' proposed use of the Easement stays within its original intended scope of pedestrian ingress and egress; the fact that the Easement now leads to a developed Greenway, rather than merely an undeveloped floodplain, is immaterial, as it does not change the purpose for which Plaintiffs seek to use the Easement. *See Swaim*, 120 N.C. App. at 864–65, 463 S.E.2d at 787.

Plaintiffs' proposed use of the Easement as a footpath for Park Crossing residents to access the Greenway falls squarely within the Easement's scope as a pedestrian walkway, and the Worthingtons failed to meet their burden "to produce a forecast of evidence demonstrating that [they] will be able to make out at least a prima facie case at trial" concerning overburdening and misuse of the Easement. *Cummings*, 379 N.C. at 358, 866 S.E.2d at 684–85 (citation and internal quotation marks omitted). We therefore conclude that the trial court did not err in granting summary judgment in favor of Plaintiffs on this claim.

E. Dedication of Land for Public Use

[5] Lastly, the Worthingtons contend that "Plaintiffs are forcing a public dedication of [the Worthingtons'] land, over [the Worthingtons'] objections and despite the lack of any dedication or developer-grantor intention that the [E]asement be open to the public." The Worthingtons further maintain that "[b]ecause an offer of public dedication must be shown by 'clear and unmistakable' intent, and no such unambiguous intention is present on the face of the plat," the trial court erred in entering summary judgment in favor of Plaintiffs. This argument is unpersuasive.

"A private right-of-way or street may become a public street by one of three methods: (1) in regular proceedings before a proper tribunal; (2) by prescription; or (3) through action by the owner, such as a dedication, gift, or sale." *Wright v. Town of Matthews*, 177 N.C. App. 1, 10, 627 S.E.2d 650, 658 (2006) (citation omitted). "[A] dedication must be made to the public, and not to part of the public nor to private owners of particular land." *Tower Dev. Partners v. Zell*, 120 N.C. App. 136, 143–44, 461 S.E.2d 17, 22 (1995), *appeal dismissed*, 342 N.C. 897, 471 S.E.2d 64 (1996). "Because North Carolina does not have statutory guidelines for dedicating streets to the public, the common law principles of offer and acceptance apply." *Id.* at 140, 461 S.E.2d at 20. Accordingly, a "dedication of property to the public consists of two steps: (1) an offer of dedication,

and (2) an acceptance of this offer by a proper public authority." *Dep't of Transp. v. Elm Land Co.*, 163 N.C. App. 257, 265, 593 S.E.2d 131, 137, *disc. review denied*, 358 N.C. 542, 599 S.E.2d 42 (2004) (citation omitted).

"The evidence in support of the intent of an owner to dedicate an easement should be clear and unmistakable." *Wright*, 177 N.C. App. at 11, 627 S.E.2d at 658 (citation and internal quotation marks omitted). "In easements, as in deeds generally, the intention of the parties is determined by a fair interpretation of the grant." *Borders v. Yarbrough*, 237 N.C. 540, 542, 75 S.E.2d 541, 543 (1953) (citation omitted). "An offer of dedication may also be implied through conduct of the owner manifesting an intent to set aside land for the public." *Wright*, 177 N.C. App. at 13, 627 S.E.2d at 660 (citation and internal quotation marks omitted). "When proving implied dedication, where no actual intent to dedicate is shown, the manifestation of implied intent to dedicate must clearly appear by acts which to a reasonable person would appear inconsistent and irreconcilable with any construction except dedication of the property to public use." *Dep't of Transp. v. Kivett*, 74 N.C. App. 509, 513, 328 S.E.2d 776, 779 (1985).

"Furthermore, a dedication is not valid until the offer to dedicate is accepted by the responsible public authority." *Tower*, 120 N.C. App. at 144, 461 S.E.2d at 22. "A dedication without acceptance is merely a revocable offer[,]" and acceptance "cannot be established by permissive use." *Oliver v. Ernul*, 277 N.C. 591, 598, 178 S.E.2d 393, 396 (1971).

In the instant case, the Worthingtons argue that Plaintiffs seek to open the Easement to the public because the Easement now connects to the Greenway, an area owned by the government and open to the public. Such action, the Worthingtons argue, is improper because the Worthingtons never consented to a public dedication. While it is true that the Worthingtons did not consent to dedicate the Easement to the public and that an easement cannot "be converted into a public way without the consent of the owner of the servient estate[,]" *Wood v. Woodley*, 160 N.C. 17, 20, 75 S.E. 719, 720 (1912), the Worthingtons' claim nevertheless misses the mark. Plaintiffs actively disclaimed any intention of offering the Easement to the public, accurately asserting below that although the Easement "leads from a public street in the neighborhood to some land that is owned by the county, it would be trespassing for anybody to use it who is not a member of Park Crossing[.]" Plaintiffs similarly state on appeal that the Easement "is not a public easement." Moreover, even assuming that Plaintiffs intended that the Easement be dedicated to the public, the Worthingtons' claim fails, as neither party presented any evidence of acceptance by a public authority. *See Oliver*, 277 N.C. at 598, 178 S.E.2d at 396.

In that a "dedication without acceptance is merely a revocable offer" and acceptance "cannot be established by permissive use[,]" *id.*, the Easement was not dedicated to the public without the Worthingtons' consent. Thus, the trial court did not err in granting summary judgment on this claim in favor of Plaintiffs.

V. Conclusion

For the foregoing reasons, we conclude that that the trial court properly granted Plaintiffs' motions for summary judgment and declaratory judgment, and denied the Worthingtons' motion for summary judgment. Accordingly, we affirm the court's order.

AFFIRMED.

Chief Judge STROUD and Judge MURPHY concur.

KIARASH BASSIRI, PLAINTIFF
v.
WADE PILLING, DEFENDANT

No. COA22-411

Filed 7 February 2023

1. Appeal and Error—final judgment—remaining claim voluntarily dismissed—appeal not interlocutory

Although the trial court's order granting defendant's motion to dismiss as to two of plaintiff's claims was not a final judgment at the time it was entered because one claim was left still pending, plaintiff's subsequent voluntary dismissal of the remaining claim rendered the trial court's order a final judgment. When plaintiff thereafter filed his notice of appeal from the order, the appeal was not interlocutory and it was properly before the Court of Appeals.

2. Alienation of Affections—subject matter jurisdiction—kind of action in question—act within a state that recognizes the cause of action

Because the trial courts of this state possess subject matter jurisdiction over actions for alienation of affections, the trial court erred by concluding that it lacked subject matter jurisdiction over plaintiff's claim for alienation of affections. The complaint alleged

that the alienating conduct may have occurred in North Carolina and Utah, both of which recognize the cause of action.

Appeal by plaintiff from order entered 29 November 2021 by Judge Dawn M. Layton in Wake County Superior Court. Heard in the Court of Appeals 2 November 2022.

Mills & Alcorn, L.L.P., by Cynthia A. Mills, for plaintiff-appellant.

Daphne Edwards and Ashley Fillippeli for defendant-appellee.

ZACHARY, Judge.

Plaintiff Kiarash Bassiri appeals from the trial court's order granting Defendant Wade Pilling's motion to dismiss for lack of subject-matter jurisdiction pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2021). After careful review, we reverse and remand for further proceedings.

I. Background

Plaintiff and his wife were married in 2010 and lived together in North Carolina in what Plaintiff describes as a "happy and loving marriage," in which "genuine love and affection existed." In 2019 and continuing until January 2020, Defendant and Plaintiff's wife began a friendship that evolved into a romantic, intimate relationship. Plaintiff and his wife eventually separated, although they remained legally married when Plaintiff commenced this suit against Defendant.

On 1 December 2020, Plaintiff filed a verified complaint against Defendant, asserting claims for alienation of affections, criminal conversation, and intentional infliction of emotional distress. On 12 March 2021, Defendant filed a responsive pleading in which he first moved to dismiss Plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) and (2), alleging that the trial court lacked both subject-matter and personal jurisdiction. Defendant's responsive pleading also included his answer and affirmative defenses.

On 26 May 2021, Plaintiff served Defendant with discovery, including a set of interrogatories. On 26 July 2021, Defendant served Plaintiff with his verified responses and objections to the interrogatories. In Defendant's responses, Defendant averred, *inter alia*, that he and Plaintiff's wife had "engaged in some intimate activity when [Defendant] first met her in October 2019 in California, in November 2019 in Nevada, and about a month later in Utah, but [they] did not engage in sexual

intercourse." Defendant further acknowledged that he has "only seen [Plaintiff's wife] in person on three occasions"—in California, Nevada, and Utah. Most other contact between them occurred via email, text messages, and social media such as Facebook and Snapchat.

On 26 August 2021, Defendant took a voluntary dismissal with prejudice of his Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, leaving pending his Rule 12(b)(1) motion to dismiss. That same day, Defendant's Rule 12(b)(1) motion to dismiss came on for hearing in Wake County Superior Court.

By order entered on 29 November 2021, the trial court determined that it lacked subject-matter jurisdiction over Plaintiff's claims for alienation of affections and criminal conversation and granted Defendant's motion to dismiss those claims. In its order, the trial court made the following pertinent findings of fact:

> 11. In Plaintiff's Interrogatories, Plaintiff asked Defendant to identify the location of any intimate activity he engaged in with Plaintiff's Wife.
>
> 12. In Defendant's verified Interrogatory Responses to questions 13, 14, 15 and 17, Defendant stated that he had only seen Plaintiff's Wife in person on three occasions:
>
> A. In October 2019 in California at a conference where he initially met her;
>
> B. In November 2019 in Nevada; and
>
> C. In January 2020 in Utah.
>
> 13. In Defendant's verified Interrogatory Responses, Defendant stated he has never met Plaintiff's Wife in the state of North Carolina.
>
> 14. There is no evidence to support Plaintiff's allegation that any intimate act in which Defendant engaged with Plaintiff's Wife occurred in the state of North Carolina.
>
> 15. There is no evidence that Defendant has ever been to North Carolina, traveled to North Carolina, or engaged in any act with Plaintiff's Wife in North Carolina.
>
> 16. There is no evidence that Defendant engaged in any act with Plaintiff's Wife other than meeting her in person outside the state of North Carolina, in California, Nevada, and Utah. There is evidence that Defendant and Plaintiff's

> [W]ife communicated via Facebook, Snapchat, emails and texts while Plaintiff[']s Wife] was in North Carolina.
>
> 17. There is no evidence, as alleged in Plaintiff's Complaint, that Defendant committed the acts alleged in the pleading in the state of North Carolina; on the contrary, there is credible evidence that Defendant has never been to North Carolina, has never traveled to North Carolina, has never met Plaintiff's Wife, for any purpose, in the state of North Carolina, and only met Plaintiff's Wife in person outside the state of North Carolina three times: once initially at a dental conference where he spoke in California in 2019, at another dental conference at which he spoke in November 2019 in Nevada, and in January 2020 in Utah. There is evidence that Defendant and Plaintiff's [W]ife communicated via Facebook, Snapchat, emails and texts while Plaintiff[']s Wife] was in North Carolina.

The trial court thus concluded:

> 1. This Court lacks subject matter jurisdiction, pursuant to N.C. Gen. Stat[.] § 1A-1, Rule 12(b)(1), over Plaintiff's claims for alienation of affection[s] and criminal conversation because there is no evidence that an act underlying a claim for alienation of affection[s] or criminal conversation occurred between Plaintiff's Wife and Defendant within the state of North Carolina.
>
> 2. Alienation of affection[s] and criminal conversation are transitory torts and for North Carolina substantive law to apply a Plaintiff must show that the alleged torts occurred in the state of North Carolina. *See Jones v. Skelley*, 195 N.C. App. 500, 506-513, 673 S.E.2d 385, 389-394 (2009). If the tortious injury occurred in a state that does not recognize alienation of affections and criminal conversation, the matter cannot be tried in North Carolina and North Carolina courts lack subject matter jurisdiction. *See id.*
>
> 3. "A motion to dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure represents a challenge to the trial court's subject matter jurisdiction over the plaintiff's claims. N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2018). 'Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question.' *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673,

> 675 (1987). 'Whenever it appears by the suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.[']
> N.C. Gen. Stat. § 1A-1, Rule 12(h)(3) (2018)." *Dipasupil v. Neely*, 268 N.C. App. 466, 834 S.E.2d 451 (2019) (unpublished). Subject matter jurisdiction is a prerequisite to personal jurisdiction. *Id.*
>
> 4. Because the evidence shows that no alleged intimate act between Plaintiff's Wife and Defendant underlying the actions for alienation of affection[s] and criminal conversation occurred in the state of North Carolina, pursuant to N.C. Gen. Stat[.] § 1A-1, Rule 12(b)(1), this Court lacks subject matter jurisdiction and must dismiss said actions.

On 9 December 2021, Plaintiff took a voluntary dismissal of his claim for intentional infliction of emotional distress. Plaintiff timely filed his notice of appeal from the trial court's order granting Defendant's motion to dismiss on 22 December 2021.

II. Appellate Jurisdiction

[1] Ordinarily, this Court only hears 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 v. City of Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). By contrast, "[a]n interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Id.* at 362, 57 S.E.2d at 381.

The trial court's order granted Defendant's motion to dismiss as to two of Plaintiff's claims, but left pending Plaintiff's claim for intentional infliction of emotional distress. Therefore, the trial court's order was not a final judgment at the time that it was entered. "At that point, [P]laintiff's appeal would have been interlocutory because the entire case was not disposed of." *Tarrant v. Freeway Foods of Greensboro, Inc.*, 163 N.C. App. 504, 507–08, 593 S.E.2d 808, 811, *disc. review denied*, 358 N.C. 739, 603 S.E.2d 126 (2004). However, Plaintiff took a voluntary dismissal of his claim for intentional infliction of emotional distress before filing his notice of appeal. This dismissal rendered the trial court's order a final judgment. *See id.* at 508, 593 S.E.2d at 811 (declining to dismiss the plaintiff's appeal after the plaintiff voluntarily dismissed the remaining claims, as "[a]ll claims and judgments [we]re final with respect to all the

parties, and there [wa]s nothing left for the trial court to determine"). Accordingly, Plaintiff's appeal is properly before this Court, and we proceed to review the merits of his appeal.

III. Discussion

[2] On appeal, Plaintiff argues that the trial court erred by concluding that it lacked subject-matter jurisdiction over his claim for alienation of affections and thus granting Defendant's Rule 12(b)(1) motion to dismiss.[1] Much of the appellate briefing in this case concerns the trial court's finding of fact that there exists "evidence that Defendant and Plaintiff's [W]ife communicated via Facebook, Snapchat, emails and texts while Plaintiff['s Wife] was in North Carolina." Plaintiff contends that this finding undermines the trial court's conclusion of law that it lacked subject-matter jurisdiction. We agree, albeit on a more fundamental basis; unlike the thornier issues of personal jurisdiction and conflict of laws posed by the facts of this case, the issue of subject-matter jurisdiction is resolved simply by recognition of the broad grant of general jurisdiction to our trial courts.

After careful review, we conclude that the trial court erred by concluding that it lacked subject-matter jurisdiction over Plaintiff's claim for alienation of affections. Accordingly, we reverse the trial court's grant of Defendant's motion to dismiss with regard to Plaintiff's alienation of affections claim and remand to the trial court for further proceedings.

A. Standard of Review

Whether a trial court possesses subject-matter jurisdiction over a case is a question of law, which this Court reviews de novo. *Clark v. Clark*, 280 N.C. App. 403, 418, 867 S.E.2d 704, 717 (2021). "Unlike a Rule 12(b)(6) dismissal, the court need not confine its evaluation of a Rule 12(b)(1) motion to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing." *Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (citation omitted), *appeal withdrawn*, 348 N.C. 284, 501 S.E.2d 913 (1998). Also, "[u]nlike a Rule 12(b)(6) motion, consideration of

1. Plaintiff makes no argument on appeal that the trial court erred in granting Defendant's motion to dismiss as regards the criminal conversation claim. This claim is therefore "deemed abandoned." *Wilkerson v. Duke Univ.*, 229 N.C. App. 670, 679, 748 S.E.2d 154, 161 (2013); *see also* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Further, because Plaintiff took a voluntary dismissal of his claim for intentional infliction of emotional distress, the present appeal solely concerns the trial court's dismissal of Plaintiff's claim for alienation of affections.

matters outside the pleadings does not convert the Rule 12(b)(1) motion to one for summary judgment." *Id.* (citation and internal quotation marks omitted).

When conducting de novo review, "this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Farquhar v. Farquhar*, 254 N.C. App. 243, 245, 802 S.E.2d 585, 587 (2017) (citation and internal quotation marks omitted). However, if "the trial court resolves issues of fact" in an order granting a Rule 12(b)(1) motion, then "those findings are binding on the appellate court if supported by competent evidence in the record." *Smith*, 128 N.C. App. at 493, 495 S.E.2d at 397.

B. Analysis

"It is a universal principle as old as the law that the proceedings of a court without subject-matter jurisdiction are a nullity. Put another way, subject-matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act." *Lakins v. W. N. Carolina Conf. of United Methodist Church*, 283 N.C. App. 385, 397–98, 873 S.E.2d 667, 677 (2022) (citations and internal quotation marks omitted). Subject-matter jurisdiction is "the power of the court to deal with the kind of action in question." *Clark*, 280 N.C. App. at 418, 867 S.E.2d at 717 (citation omitted). "A court has jurisdiction over the subject matter if it has the power to hear and determine cases of the general class to which the action in question belongs." *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 324, 244 S.E.2d 164, 165 (1978).

By contrast, personal jurisdiction is "the power to bring the person to be affected by the judgment before the court so as to give him an opportunity to be heard." *Id.* In that subject-matter jurisdiction concerns the kind of action in question rather than the person affected by the action, subject-matter jurisdiction often exists where personal jurisdiction does not. *See High v. Pearce*, 220 N.C. 266, 271, 17 S.E.2d 108, 112 (1941) ("Properly speaking, there can be no jurisdiction of the person where there is none of the subject matter, although the converse might indeed, and often does, occur.").

Because Defendant took a voluntary dismissal with prejudice of his Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the trial court never considered that issue; hence, the question of whether the trial court had personal jurisdiction over Defendant is not before us. Defendant's Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction was the only motion that the trial court considered and upon which it ruled in the order from which Plaintiff appeals, and therefore we confine our analysis solely to the issue of subject-matter jurisdiction.

"Subject[-]matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). Section 7A-240 of our General Statutes broadly confers subject-matter jurisdiction upon the superior and district courts of this state:

> Except for the original jurisdiction in respect of claims against the State which is vested in the Supreme Court, original general jurisdiction of *all justiciable matters of a civil nature* cognizable in the General Court of Justice is vested in the aggregate in the superior court division and the district court division as the trial divisions of the General Court of Justice. Except in respect of proceedings in probate and the administration of decedents' estates, the original civil jurisdiction so vested in the trial divisions is vested concurrently in each division.

N.C. Gen. Stat. § 7A-240 (emphasis added).

On the issue of subject-matter jurisdiction, both parties cite *Jones v. Skelley*. 195 N.C. App. 500, 673 S.E.2d 385 (2009), *superseded in part on other grounds*, N.C. Gen. Stat. § 52-13(a) (2015). In *Jones*, this Court stated that "if the tortious injury occurs in a state that does not recognize alienation of affections, the case cannot be tried in a North Carolina court." 195 N.C. App. at 506–07, 673 S.E.2d at 390 (citation and internal quotation marks omitted); *see also Wise v. Hollowell*, 205 N.C. 286, 289, 171 S.E. 82, 83 (1933) ("[I]f the act complained of is insufficient to constitute a cause of action there[,] it is likewise insufficient here."). "Establishing that the defendant's alienating conduct occurred within a state that still recognizes alienation of affections as a valid cause of action is essential to a successful claim since most jurisdictions have abolished the tort." *Hayes v. Waltz*, 246 N.C. App. 438, 443, 784 S.E.2d 607, 613 (2016).

However, it does not necessarily follow that the alleged alienating conduct must have occurred *in North Carolina* in order for a plaintiff to raise a valid alienation of affections claim over which the trial court would have subject-matter jurisdiction. Rather, the alienating conduct must have "occurred within a state that still recognizes alienation of affections as a valid cause of action[.]" *Id.* In the case at bar, there are two states in which allegedly alienating conduct may have occurred and which recognize a cause of action for alienation of affections: North Carolina and Utah. *See Heiner v. Simpson*, 23 P.3d 1041, 1043 (Utah 2001).

Although this Court has previously addressed the issue of subject-matter jurisdiction in the context of alienation-of-affections claims in which the allegedly alienating conduct occurred across multiple states, in each of those prior cases, North Carolina was the *only* jurisdiction involved that recognized the claim of alienation of affections. *See*, *e.g.*, *Dipasupil v. Neely*, 268 N.C. App. 466, 834 S.E.2d 451, 2019 WL 6133850, at *1 (2019) (unpublished) (in which a Florida resident sued a Virginia resident over conduct alleged to have occurred in Minnesota and Washington, D.C., while the plaintiff resided in North Carolina); *Jones*, 195 N.C. App. at 505, 673 S.E.2d at 389 ("Plaintiff contends a material issue of fact exists as to the state in which the alleged alienation of affections occurred, North Carolina, which recognizes the tort, or South Carolina, which has abolished the tort . . . ."); *Darnell v. Rupplin*, 91 N.C. App. 349, 351, 371 S.E.2d 743, 745 (1988) ("[The] defendant's involvement with [the] plaintiff's husband . . . spanned four states: North Carolina, Maryland, Virginia, and Washington, D.C. Of these four states, North Carolina is the only one that recognizes a legal cause of action for the tort of alienation of affections."). Thus, the sufficiency of the claim in each of these cases was dependent upon whether the alleged injury occurred in North Carolina.

The question of whether the trial court has subject-matter jurisdiction is frequently conflated with the question of where the alleged alienating conduct and injury occurred because North Carolina is often the only jurisdiction involved that recognizes the claim. Indeed, the factual determination of where the allegedly injurious conduct occurred is critical to the eventual *choice-of-law* analysis that determines whether a plaintiff has sufficiently alleged a valid cause of action under the applicable substantive law. *See Darnell*, 91 N.C. App. at 351, 371 S.E.2d at 745 ("The substantive law applicable to a transitory tort [such as alienation of affections] is the law of the state where the tortious injury occurred, and not the substantive law of the forum state."). Nonetheless, that factual determination is irrelevant to the foundational question of *whether the trial court has subject-matter jurisdiction* over "the kind of action in question." *Clark*, 280 N.C. App. 403, 418, 867 S.E.2d 704, 717 (citation omitted). Instead, the choice-of-law analysis is more properly assessed pursuant to a Rule 12(b)(6) motion to dismiss for failure to state a claim, rather than a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction. *See Church v. Carter*, 94 N.C. App. 286, 289, 380 S.E.2d 167, 169 (1989) ("The alleged failure of a complaint to state a cause of action for which relief can be granted . . . does not equate with a lack of jurisdiction over the subject matter of the complaint.").

Here, the dispositive question of law—whether the trial court possesses subject-matter jurisdiction over the *kind of action* in question—is a deceptively simple one. The kind of action presented is one for alienation of affections, a tort over which the trial courts of this state indisputably possess subject-matter jurisdiction. *See* N.C. Gen. Stat. § 7A-240; *see also*, *e.g.*, *Darnell*, 91 N.C. App. at 351, 371 S.E.2d at 745. Whether Plaintiff has successfully stated a claim for which relief may be granted under the substantive law applicable to his claim consistent with our conflict-of-laws rules is downstream of and irrelevant to the resolution of this straightforward question of law.

Accordingly, even though several of the trial court's findings of fact concerning Defendant's actions or presence in North Carolina are supported by competent evidence, these findings of fact do not support the trial court's conclusion that it lacked subject-matter jurisdiction over Plaintiff's alienation of affections claim. The trial court's order must be reversed and remanded for further proceedings.

On remand, should the evidence persuade the finder of fact that the tort of alienation of affections occurred in either North Carolina or Utah, then the substantive law of the applicable jurisdiction will apply. *See Cooper v. Shealy*, 140 N.C. App. 729, 736, 537 S.E.2d 854, 859 (2000). "Should it be determined that the tort[ ] occurred in [California or Nevada], then no substantive law could apply since none of these alleged acts are [a] tort[ ] in th[ose] state[s]. In that event, the case would, by necessity, be dismissed." *Id.*

IV. Conclusion

For the foregoing reasons, the trial court's order granting Defendant's Rule 12(b)(1) motion for lack of subject-matter jurisdiction is reversed and Plaintiff's claim for alienation of affections is remanded to the trial court for further proceedings.

REVERSED AND REMANDED.

Judges ARROWOOD and GRIFFIN concur.

IN RE A.H.D.

[287 N.C. App. 548 (2023)]

IN THE MATTER OF A.H.D., V.I.D.

No. COA22-382

Filed 7 February 2023

1. Termination of Parental Rights—sufficiency of petition—notice of grounds for termination—willful failure to pay child support

In a private action where a mother sought the termination of a father's parental rights in their children on the ground of willful failure to pay child support (N.C.G.S. § 7B-1111(a)(4)), the petition served as a sufficient basis for the termination proceeding where, although the petition did not explicitly mention section 7B-1111(a)(4), it alleged sufficient factual allegations to put the father on notice that his parental rights could be terminated on that ground. Importantly, the petition alleged that the father not only "failed" to pay child support for over a year, but also "refused" to do so, thereby indicating a willful decision not to pay.

2. Termination of Parental Rights—termination orders—failure to state standard of proof—sufficient evidence to support termination—reversal and remand

In a private termination of parental rights action brought by a mother, the trial court's orders terminating the father's rights in the parties' children on the ground of willful failure to pay child support (N.C.G.S. § 7B-1111(a)(4)) were reversed because the court failed to announce—either in open court or in the written orders—that it had used the required "clear, cogent, and convincing evidence" standard of proof when making factual findings to support termination. Nevertheless, because the mother had presented sufficient evidence on which the court could have terminated the father's rights under section 7B-1111(a)(4), the orders were reversed and remanded—rather than reversed outright—so that the trial court could reconsider the record and apply the correct standard of proof to make new findings of fact.

Appeal by respondent-father from orders entered 7 January 2022 by Judge Robert M. Wilkins in District Court, Randolph County. Heard in the Court of Appeals 10 January 2023.

Kimberly Connor Benton for respondent-father.

No brief filed for petitioner-mother.

STROUD, Chief Judge.

Father appeals from two orders terminating his parental rights as to each of his two children on the grounds he willfully failed to pay child support for a year or more preceding the filing of the termination petitions pursuant to N.C. Gen. Stat. § 7B-1111(a)(4) (2019). Because the Petitions gave Father adequate notice as to the acts, omissions, or conditions at issue in the case, they are a sufficient basis for the termination proceeding. Although the trial court failed to make Findings of Fact based upon the proper standard of proof of clear, cogent, and convincing evidence, the record includes sufficient evidence upon which the trial court could make the required findings to support termination of Father's parental rights under § 7B-1111(a)(4), so we must reverse and remand.

I. Background

On or about 14 January 2020, Mother filed two "Verified Petition[s] For Termination of Parental Rights" to terminate Father's parental rights as to their two children, Ariel and Vanessa.[1] (Capitalization altered.) After including information about Mother's and Father's residences and the names and birthdates of the children, the Petitions alleged, in relevant part, Mother had "physical custody" of both children and alleged the following identical "grounds for termination" of Father's parental rights:

> b. That for more than one (1) year [Father] has had no contact with the minor child. [Father] has not visited or contacted the minor child since May 6, 2018;
>
> c. That for more than one (1) year, [Father] has failed and refused to pay child support. He has not paid child support since May 6, 2018;
>
> d. That [Father] is therefore subject to termination of his parental rights pursuant to North Carolina General Statutes § 7B[.]

On or about 5 March 2020, Father filed responses admitting his and Mother's residences and the children's names and birthdates but denying all other allegations.

1. We use pseudonyms to protect the children's identity.

The trial court held a hearing in the termination proceeding on 1 November 2021. The trial court indicated at the start of the hearing that it first wanted "to hear testimony and evidence about whether there are any grounds for termination of parental rights" and then would receive testimony of the children's best interests after that "if appropriate[.]"

During the portion of the hearing focused on the grounds for terminating parental rights, Mother and Father testified. Mother first testified she took physical custody of the children after the parents separated on 6 May 2018 because Father went to jail for committing a crime against Mother's sister. Following the separation, Father had no contact with the children because "[h]e never asked." Mother also testified she got a custody order granting her permanent custody in June 2018; she had a child support order entered in July 2018. The child support order required Father to pay approximately $1,100 per month. Mother testified between 2018 and 2020 when she filed the Petitions, Father had "just refused to pay" leading to "over $20,000.00 in arrears[,]" although after the Petitions were filed he made "three or four payments" of "at most $500" as a result of "[c]hild support enforcement[.]"

At the grounds portion of the termination hearing, Father testified about his employment and child support payments. Father operated his own store before his arrest, but Mother sold all the contents of his store right after he went to jail. Upon his pre-trial release from jail at the end of May 2018, Father took about six months "to get started back up" running "another small business[,]" and he continued doing that work until he was convicted of the crime against Mother's sister in February 2021 and sentenced to over a decade in prison. Father testified he gave Mother cash payments around the "end of 2018" that were "for the benefit of the children[.]" Father also said he gave Mother "cash a few times" in 2019, but he was not able to pay the full $1,100 per month required by the child support order. Beyond his employment and child support, Father testified he tried to reach out to Mother and the children "[a]t least a couple times a week" but Mother told him to stop calling her. Father could not have visits with the children or contact them because of the conditions of his house arrest.

Following that testimony, both attorneys made arguments on the grounds for termination. The arguments by Mother's attorney focused on the ground Father had failed to pay child support. Father's attorney first argued the abandonment ground did not apply because: the trial court lacked clear, cogent, and convincing evidence given the conflicting testimony; his pre-trial release conditions prevented him from having contact with the children; and he did not have Mother's new

address where he could send letters to the children. As to the willful failure to pay child support ground, Father's attorney argued there was no evidence of the child support order beyond Mother's testimony and there was too much "confusing" and "conflicting" testimony about payments Father made for there to be clear, cogent, and convincing evidence of a willful failure to pay.

Following those arguments, the trial court ruled the abandonment ground was not supported because "there [was] a question as to how willful [sic] his failure to have contact with the children would have been" given the testimony about pre-trial release conditions and the lack of "legal documents" on such conditions. The trial court found the willful failure to pay child support ground "exist[ed]" based on Father's non-compliance "with the terms of the child support order that was reportedly entered approximately July 2018." The trial court then moved on to the best interest stage without making any additional oral findings or indicating the standard of proof it was employing for the Findings of Fact.

At the best interest stage, the guardian *ad litem* ("GAL") for both children, Mother, Mother's new husband, and Father testified. The GAL testified about his investigative steps and recommendation, and the court received his report into evidence. Mother testified about: Father's relationship with the children; Father yelling and making demeaning comments towards her in front of the children; her new husband, and his relationship with the children, including his plan to adopt them; the relationship her family had with the children; and her employment and child care arrangements. Mother's new husband testified about: his relationship with the children, his plan to adopt the children following the termination proceedings, and his family's relationship with the children. Finally, Father testified about: his relationship with the children, his family's relationship with the children, and his lack of child support payments.

After that testimony, Mother's attorney, Father's attorney, and the GAL made arguments on best interests. The trial court then reviewed the required factors under N.C. Gen. Stat. § 7B-1110 and ruled it was in the children's best interests to terminate Father's parental rights.

On 7 January 2022, the trial court entered two Orders, one for each child, terminating Father's parental rights. Each Order began with the trial court making Findings of Fact as to adjudicatory grounds and then as to dispositional best interests, but the trial court did not state the standard of proof for the Findings of Fact. In the adjudicatory grounds portion of each Order, the trial court made Findings on custody and the child's name and residence; the history of Mother and Father's

relationship; and Father's subsequent incarceration. The trial court then made two Findings on child support that were identical in each Order:

> 8. [Mother] testified that in July, 2018, a child support order was put in place for [Father] to pay child support. [Father] has failed and refused for more than one (1) year to pay child support pursuant to the child support order for the use and benefit of the minor child. [Father] has not paid child support since May 6, 2018, and he is more than $20,000.00 in arrears.
>
> 9. Pursuant to 7B-1111(a)(4), [Mother] has custody of the minor child by agreement of the parties, and [Father], whose parental rights are sought to be terminated for a period of one year or more next preceding the filing of the Petition, has willfully and without justification failed to pay for the care, support, education of the minor child as required and decreed by the child support order. Therefore, there are grounds to terminate parental rights against [Father].

The trial court then made best interests Findings as to both children addressing: their relationships with Mother, Father, and Mother's new husband; Mother's allegations about Father's abusive actions towards Mother; the GAL's recommendation; and the plan for Mother's new husband to adopt the children.

Based on these Findings, the trial court concluded all parties were "properly before" it; "[t]here exist grounds for the termination of parental rights" of Father; and "[i]t would be in the best interest of the minor" children if Father's parental rights were terminated. Based upon those Findings and Conclusions, the trial court terminated Father's parental rights. Father timely filed written notice of appeal.[2]

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2. The trial court entered the termination orders on 7 January 2022. Father did not file his written notice of appeal until 18 February 2022, which was more than 30 days after the trial court entered the orders on appeal. *See* N.C. Gen. Stat. § 7B-1001(b) (2021) ("Notice of appeal . . . shall be made within 30 days after entry and service of the order[.]"). But Father was not served with the termination orders until 21 January 2022, so he filed notice of appeal within 30 days "after entry *and service* of the order" as required. N.C. Gen. Stat. § 7B-1001(b) (emphasis added); *see also In re J.M.K.*, 261 N.C. App. 163, 165, 165 n.2, 820 S.E.2d 106, 107, 107 n.2 (2018) (explaining the father timely filed notice of appeal even though more than 30 days had passed since the order was entered because the father was not served until 7 days before he filed the notice of appeal).

II. Analysis

On appeal, Father challenges both the termination Petitions and the adjudicatory portion of the termination Orders. Father argues the Petitions "failed to allege grounds existed to terminate" his "parental rights" under N.C. Gen. Stat. § 7B-1111(a)(4). As to the Orders, Father first contends the trial court violated his "constitutional rights by failing to make findings of fact based upon clear, cogent, and convincing evidence[,]" as required at the adjudicatory stage of a termination proceeding. Father then asserts the trial court "erred in finding" he "had willfully failed to pay child support for more than twelve months prior to the filing of the termination of parental rights petition" such that it erred in terminating his rights under N.C. Gen. Stat. § 7B-1111(a)(4). We address each contention in turn.

A. Sufficiency of Termination Petitions

[1] Father first argues the Petitions in this case "failed to allege grounds existed to terminate" his parental rights under N.C. Gen. Stat. § 7B-1111(a)(4). Specifically, Father contends the Petitions were "insufficient to put him on notice his rights were subject to termination under this" statutory ground because, like in a case from this Court, *In re I.R.L.*, 263 N.C. App. 481, 823 S.E.2d 902 (2019), the Petitions: "failed to reference a specific statutory ground under" N.C. Gen. Stat. § 7B-1111; "failed to allege there was a judicial decree or support order requiring" Father "to financially support" the children; and "failed to allege" Father "willfully failed to pay any support."

Petitions in termination of parental rights cases must state "[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist." N.C. Gen. Stat. § 7B-1104(6) (2019). "[W]hile there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to what acts, omissions or conditions are at issue." *In re B.C.B.*, 374 N.C. 32, 34, 839 S.E.2d 748, 751 (2020) (citation and quotation marks omitted). The allegations in a petition do not need to include the "precise statutory provision ultimately found by the trial court" as long as the petition includes sufficient factual allegations. *In re A.H.*, 183 N.C. App. 609, 614-15, 644 S.E.2d 635, 638-39 (2007) (indicating a citation to the precise statutory provision is not required before finding adequate notice based on the facts alleged); *see In re B.L.H.*, 190 N.C. App. 142, 147, 660 S.E.2d 255, 257 (2008) ("Where the factual allegations in a petition to terminate parental rights do not refer to a specific statutory ground for termination, the trial court may find any ground for

termination under N.C.G.S. § 7B–1111 as long as the factual allegations in the petition give the respondent sufficient notice of the ground."). For example, in *In re A.H.*, this Court found the termination petition was sufficient even though it "did not specifically" include citation to the statutory grounds for termination because the petition's language "directly parallel[ed]" the statutory language in making factual allegations. *In re A.H.*, 183 N.C. App. at 615, 644 S.E.2d at 638-39.

Here, the trial court terminated Father's parental rights for both children based on N.C. Gen. Stat. § 7B-1111(a)(4). N.C. Gen. Stat. § 7B-1111(a)(4) permits termination of parental rights when:

> One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement.

N.C. Gen. Stat. § 7B-1111(a)(4). As a result, the Petitions here needed to put Father on notice that Mother sought to terminate his parental rights due to his willful failure to pay child support. *See In re B.C.B.*, 374 N.C. at 34, 839 S.E.2d at 751 (explaining a petition to terminate parental rights "must put a party on notice as to what acts, omissions or conditions are at issue").

Here, the Petitions included the following identical "grounds for termination":

> b. That for more than one (1) year [Father] has had no contact with the minor child. [Father] has not visited or contacted the minor child since May 6, 2018;
>
> c. That for more than one (1) year, [Father] has failed and refused to pay child support. He has not paid child support since May 6, 2018;
>
> d. That [Father] is therefore subject to termination of his parental rights pursuant to North Carolina General Statutes § 7B[.]

While the Petitions' language is not "exhaustive or extensive," *see generally id.* (indicating allegations do not need to be exhaustive or extensive), the Petitions indicated Father had "failed and *refused* to pay child support" for approximately a year-and-a-half, (emphasis added),

thereby fulfilling the requirement of notice of the specific ground on which Mother sought to terminate Father's parental rights, namely willful failure to pay child support for more than a year pursuant to N.C. Gen. Stat. § 7B-1111(a)(4). *See* N.C. Gen. Stat. § 7B-1111(a)(4). Notably, of all eleven statutory grounds to terminate parental rights, only § 7B-1111(a)(4) addresses the failure to pay the other parent in order to support the child pursuant to a court order or custody agreement, *i.e.* child support. N.C. Gen. Stat. § 7B-1111(a).

Father's argument to the contrary does not convince us. Father argues the Petitions here are "substantially like" the petitions in another case from this Court, *In re I.R.L.* Specifically he alleges the Petitions here, like the ones in *In re I.R.L.*, failed to allege: the specific statutory ground for termination; a judicial decree or support order requiring Father to financially support the children; and willful failure to pay.

In *In re I.R.L.*, the mother alleged the father had "failed to provide substantial financial support or consistent care for the minor child[,]" and the trial court terminated the father's parental rights for willful failure to pay child support under N.C. Gen. Stat. § 7B-1111(a)(4). *In re I.R.L.*, 263 N.C. App. at 486, 823 S.E.2d at 906. This Court found that petition insufficient to put the father on notice his parental rights could be terminated under § 7B-1111(a)(4) based on a combination of four factors. *See id.* First, the petition did not make a "reference to the specific statutory ground of N.C. Gen. Stat. § 7B-1111(a)(4)[.]" *Id.* Second, the petition was "entirely silent as to whether a judicial decree or support order required [the f]ather to pay for [the child's] care or support." *Id.* Third, the petition failed "to include any allegations asserting [the f]ather's failure to pay was willful." *Id.* Fourth, "[a]n allegation that a parent failed to provide financial support or consistent care may be an assertion under the ground of abandonment." *Id.* (citation and quotation marks omitted).

Here, only two of the factors are present. The Petitions here do not reference the specific statutory ground in that they do not cite to § 7B-1111(a)(4), but this factor alone does not have significant weight because of our caselaw indicating "a petition will not be held inadequate simply because it fails to allege the precise statutory provision[.]" *In re A.H.*, 183 N.C. App. at 614, 644 S.E.2d at 638. The only other factor from *In re I.R.L.* present in the Petitions here is the lack of allegation about a "judicial decree or support order" requiring Father to pay child support. *See In re I.R.L.*, 263 N.C. App. at 486, 823 S.E.2d at 906. While it would be better practice to include such an allegation specifically, Father does not include any caselaw saying the failure to plead the child support order

alone renders a petition insufficient. Thus, even the two factors that make this case similar to *In re I.R.L.* have less significance here. *See id.*

Additionally, the other two factors from *In re I.R.L.*, *see id.*, weigh in favor of the sufficiency of the Petitions here. The Petitions allege Father willfully failed to pay through their use of the word "refused[.]" The word "refused" indicates an active decision not to pay. *See Joyner v. Garrett*, 279 N.C. 226, 233, 182 S.E.2d 553, 558 (1971) ("In Black's Law Dictionary (4th Ed., 1951) *refusal* is defined as 'the declination of a request or demand, or the omission to comply with some requirement of law, *as the result of a positive intention to disobey*.' " (second emphasis added)). Put another way, an active decision not to pay *is* a willful decision not to pay.

Beyond the allegation of willfulness, the Petitions here also differ from *In re I.R.L.* because their language cannot be construed as an allegation of a separate ground. *See In re I.R.L.*, 263 N.C. App. at 486, 823 S.E.2d at 906 (finding petition insufficient in part because the language could be an assertion of the ground of abandonment in addition to the willful failure to pay child support). In *In re I.R.L.* the petition spoke only of a failure to provide financial support, *id.*, but here the Petitions specifically allege Father "refused to pay child support." While other grounds in § 7B-1111(a) can be based on the *failure* to pay support, *see*, *e.g.*, N.C. Gen. Stat. § 7B-1111(a)(5)(d) (permitting termination of a father's parental rights when the child was born out of wedlock and the father did not "[p]rovide[] substantial financial support"), and even the *failure* to pay child support, *see In re I.R.L.*, 263 N.C. App. at 486, 823 S.E.2d at 906 (indicating the failure to pay child support could support an allegation of abandonment by citing to this Court's case in *In re C.J.H.*, 240 N.C. App. 489, 504, 772 S.E.2d 82, 92 (2015)), no other ground involves the *willful failure* to pay child support.

Therefore, by alleging Father "refused to pay child support[,]"the Petitions are sufficient to give Father adequate notice "as to what acts, omissions or conditions are at issue." *In re B.C.B.*, 374 N.C. at 34, 839 S.E.2d at 751. As a result, the Petitions are sufficient and can be the basis for a termination of parental rights proceeding. *See id.*

B. Challenges to Adjudicatory Portion of Termination Orders

[2] In addition to challenging the sufficiency of the Petitions, Father argues the trial court committed multiple errors in the Orders terminating his parental rights. Father first asserts the trial court erred by "failing to make findings of fact based upon clear, cogent, and convincing evidence[,]" which it was constitutionally required to do at the adjudicatory

stage. Father then argues the trial court erred in terminating his rights under N.C. Gen. Stat. § 7B-1111(a)(4). After discussing the standard of review, we address Father's arguments.

1. Standard of Review

When reviewing the adjudicatory stage of a termination of parental rights proceeding, we must "determine whether the findings are supported by clear, cogent and convincing evidence and [whether] the findings support the conclusions of law." *In re D.W.P.*, 373 N.C. 327, 330, 838 S.E.2d 396, 400 (2020) (citation and quotation marks omitted).

2. Failure to Make Findings Based on Clear, Cogent, and Convincing Evidence

We first address Father's argument the trial court violated his "constitutional rights by failing to make findings of fact based upon clear, cogent, and convincing evidence[.]" Our statutes mandate that adjudicatory Findings "shall be based on clear, cogent, and convincing evidence." N.C. Gen. Stat. § 7B-1109(f) (2019). This "statutory burden of proof . . . protects a parent's constitutional due process rights as enunciated by the United States Supreme Court[.]" *In re J.C.*, 380 N.C. 738, 742, 869 S.E.2d 682, 685 (2022) (citing *Santosky v. Kramer*, 455 U.S. 745, 747-48, 71 L. Ed. 2d 599 (1982); *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499 (2001)). In order to satisfy the requirement of § 7B-1109(f), and therefore appropriately protect parents' constitutional rights, *see id.*, a trial court must "announce[] the 'clear, cogent, and convincing' standard of proof *either* in making findings of fact in the written termination order or in making such findings in open court." *In re B.L.H.*, 376 N.C. 118, 126, 852 S.E.2d 91, 97 (2020) (emphasis in original).

Here, the trial court failed to meet that standard. Both written Orders only state the trial court made "the following findings of fact[.]" The written Orders do not include any standard of proof, including the required clear, cogent, and convincing standard. *See* N.C. Gen. Stat. § 7B-1109(f). The trial court also did not announce the standard of proof in open court when making its ruling at the adjudicatory portion of the hearing. Therefore, the trial court erred by not announcing it was making Findings based on the clear, cogent, and convincing standard of proof. *See*, *e.g.*, *In re M.R.F.*, 378 N.C. 638, 642, 862 S.E.2d 758, 762 (2021) ("In the present case, however, the trial court failed to announce the standard of proof for its adjudicatory findings either in open court *or* in its written order. Therefore, the trial court failed to comply with the statutory mandate." (emphasis in original)).

When a trial court errs by not making findings using the clear, cogent, and convincing standard of proof, the reviewing court must at a minimum reverse for that error. *See In re J.C.*, 380 N.C. at 743, 747, 869 S.E.2d at 686, 688; *In re M.R.F.*, 378 N.C. at 642-43, 862 S.E.2d at 762-63. A case reversed on these grounds can be remanded to the trial court for it to "review and reconsider the record before it by applying the clear, cogent, and convincing standard to make findings of fact . . . unless 'the record of th[e] case is insufficient to support findings which are necessary to establish *any* of the statutory grounds for termination.' " *In re J.C.*, 380 N.C. at 746, 869 S.E.2d at 688 (quoting *In re M.R.F.*, 378 N.C. at 648, 862 S.E.2d at 766) (emphasis in original). Two examples are illustrative of the difference between a case that *can* be reversed and remanded to the trial court and a case that *must* be reversed without remand. In *In re J.C.*, our Supreme Court reversed and remanded because it could not "say that remand of this case for the trial court's consideration of the evidence in the record utilizing the proper clear, cogent, convincing standard of proof would be futile, so as to compel us to conclude that the record of this case is insufficient to support findings which are necessary to establish any of the statutory grounds for termination." *In re J.C.*, 380 N.C. at 747, 869 S.E.2d at 688 (citations, quotation marks, and emphasis omitted). By contrast, in *In re M.R.F.*, our Supreme Court was "compelled to simply, *without remand*, reverse the trial court's order" because of the "petitioner's failure to present sufficient evidence to support any of the alleged grounds for the termination of the parental rights of respondent father[.]" *In re M.R.F.*, 378 N.C. at 642-43, 862 S.E.2d at 762-63 (emphasis in original).

Thus, we must determine whether "the record of this case is insufficient to support findings which are necessary to establish any of the statutory grounds for termination." *In re J.C.*, 380 N.C. at 746, 869 S.E.2d at 688 (citations, quotation marks, and emphasis omitted). If Mother did not present sufficient evidence of the ground for termination—willful failure to pay child support under N.C. Gen. Stat. § 7B-1111(a)(4)—we must reverse without remand. *See In re M.R.F.*, 378 N.C. at 642-43, 862 S.E.2d at 762-63. If she presented sufficient evidence of that ground, we will reverse and remand for the trial court to "review and reconsider the record before it by applying the clear, cogent, and convincing standard to make findings of fact." *In re J.C.*, 380 N.C. at 746, 869 S.E.2d at 688. Father's remaining arguments on appeal address the sufficiency of the evidence and Findings on § 7B-1111(a)(4), so we turn to those arguments now.

3. Sufficiency of the Evidence and Findings as to § 7B-1111(a)(4)

Father makes multiple specific arguments as part of his general argument that the trial court erred by terminating his parental rights

under § 7B-1111(a)(4). All of his arguments relate to the sufficiency of the evidence presented by Mother or the sufficiency of the Findings made by the trial court to support its conclusion that Father's parental rights were subject to termination under § 7B-1111(a)(4). Under § 7B-1111(a)(4), the petitioner must present evidence and the trial court must make findings of fact on two elements:

> (1) that an order or parental agreement requiring the payment of child support was in effect . . . and (2) that the party whose parental rights were sought to be terminated had [willfully] not paid child support as required by the order or parental agreement within the year preceding the entry of the petition.

In re S.R., 283 N.C. App. 149, 158-59, 872 S.E.2d 406, 413 (2022) (citing *In re C.L.H.*, 376 N.C. 614, 620, 853 S.E.2d 434, 439 (writing quoted language in the context of what the petitioner must show before going on to discuss the first requirement in the context of whether the "trial court's findings of fact were []sufficient to support the termination" of parental rights); N.C. Gen. Stat. § 7B-1111(a)(4) (including the requirement that the failure to pay be willful).

Father's arguments relate to both elements. As to the existence of a child support order, Father first argues "[t]here was no evidence presented to prove the existence of a valid child support order." Father also argues the trial court's Findings were insufficient to establish the existence of a child support order, and thus the Findings did not support terminating Father's parental rights under § 7B-1111(a)(4), because the only Finding "to address the existence of a child support order[,]" is not "valid" and must be "disregarded" since it only recounts Mother's testimony. Turning to the second element, Father contends "there was insufficient evidence to support the court's conclusion [Father's] failure [to] pay child support was without justification" and the trial court "failed to make any findings of fact regarding the willfulness of his failure to pay child support." Thus, on the two elements Father contests—the existence of a child support order and the willfulness of his failure to pay—he argues both Mother presented insufficient evidence and the trial court's Findings are insufficient to support its Conclusion that his parental rights can be terminated.

Since we must already at least reverse because of the trial court's failure to make Findings by clear, cogent, and convincing evidence, we need only address whether Mother presented sufficient evidence as to each element. As explained above, we can remand based on the trial court's failure to state the proper standard of proof as long as Mother presented

sufficient evidence to support termination under § 7B-1111(a)(4). The same is true if the trial court's Findings are insufficient to support its Conclusion of Law that Father's rights could be terminated on that ground; as long as Mother presented sufficient evidence, we can remand for entry of a new order. *See In re C.L.H.*, 376 N.C. 614, 622-23, 853 S.E.2d 434, 441 (2021) ("Where, as in this matter, the 'trial court's adjudicatory findings were insufficient to support its conclusion that termination of the parent's rights was warranted, but the record contained additional evidence that could have potentially supported a conclusion that termination was appropriate,' we 'vacate[] the trial court's termination order and remand[ ] the case for further proceedings, including the entry of a new order containing findings of fact and conclusions of law addressing the issue of whether [the] ground for termination existed.' " (quoting *In re K.N.*, 373 N.C. 274, 284, 837 S.E.2d 861, 869 (2020) (brackets in original)). Thus, as to each of the two elements Father contests, if Mother presented sufficient evidence of the element, we can reverse and remand the case rather than reverse it outright. *See In re J.C.*, 380 N.C. at 746, 869 S.E.2d at 688 (allowing remand only if sufficient evidence has been presented); *In re C.L.H.*, 376 N.C. at 622-23, 853 S.E.2d at 441 (same).

Looking at the first element, Mother presented sufficient evidence of "an order or parental agreement requiring the payment of child support[.]" *In re S.R.*, 283 N.C. App. at 158, 872 S.E.2d at 413. Although our record does not include a child support order, Mother testified about the existence of the child support order, which dated back to July 2018:

> Q. Okay. From 5/6/2018 until today has [Father] paid any child support in this case?
>
> A. He did not pay any until he was forced to by child support. I did have a child support order, but like soon after (inaudible). But, nothing was ever paid on that. I did get taxes back, his taxes back once, and then there was –
>
> . . .
>
> THE COURT: Right. So, back to this child support; you got a child support order approximately June of 2018?
>
> A. I believe it was in July.
>
> THE COURT: Right. July - approximately July of 2018 you got a child support order. How much did they order him to pay?
>
> A. $1,098.00 a month.

> THE COURT: $1,098.00, okay. Is that here in Randolph County?
>
> A. Yes, sir.

Mother's testimony provides sufficient evidence on the issue of the existence of a child support order as the first element of the termination of Father's parental rights under § 7B-1111(a)(4). In *In re C.L.H.*, our Supreme Court had to determine whether there was "evidence in the record which might support a conclusion that grounds existed to terminate respondent's parental rights pursuant to" § 7B-1111(a)(4) that would allow for vacatur and remand given the trial court did not make a finding that the respondent failed to pay as required by a child support order. *In re C.L.H.*, 376 N.C. at 621-23, 853 S.E.2d at 440-41. The *In re C.L.H.* Court found such evidence in the record in part because "petitioner testified that there was a child support order in place at the time of the termination hearing." *Id.* at 621-22, 853 S.E.2d at 440. Similarly here, Mother's testimony about the existence of a child support order is sufficient evidence to meet her burden of presenting evidence for the first element under § 7B-1111(a)(4). *See id.*; *In re S.R.*, 283 N.C. App. at 158-59, 872 S.E.2d at 413 (delineating elements of § 7B-1111(a)(4)).

We also note Father testified, and he never disputed that he was required to pay child support under a court order. Father acknowledged the existence of a child support order but simply claimed he was unable to pay at certain times. For example, Father was asked on cross-examination if he had ever moved the court to reduce his child support when his income went down, and Father stated, "I tried to, yes." Father also stated he "went to court once and got it continued." Father did not dispute the existence of a child support order but admitted he had unsuccessfully tried to reduce his child support obligation. Despite Mother's testimony about the child support order and Father's own testimony acknowledging his child support obligation, Father asks us to place a higher burden on Mother than the law provides by requiring Mother to present a copy of the child support order as evidence. *See In re C.L.H.*, 376 N.C. at 621-22, 853 S.E.2d at 440 (finding testimony a child support order was in place at the time of the termination hearing sufficient to support termination for willful failure to pay child support).

The trial court noted Mother's testimony about the existence of a child support order in the Finding Father challenges, Finding 8. In each Order terminating Father's parental rights, Finding 8 states:

> [Mother] testified that in July, 2018, a child support order was put in place for [Father] to pay child support. [Father]

> has failed and refused for more than one (1) year to pay child support pursuant to the child support order for the use and benefit of the minor child. [Father] has not paid child support since May 6, 2018, and he is more than $20,000.00 in arrears.

Since we must reverse and remand for entry of a new order based upon the failure to identify the standard of proof, we also note that this Finding is defective as it is a recitation of testimony and not a true finding of fact. As Father argues, "[a]ccording to well-established North Carolina law, recitations of the testimony of each witness do not constitute findings of fact by the trial judge." *In re A.C.*, 378 N.C. 377, 383-84, 861 S.E.2d 858, 867 (2021) (citation, quotation marks, and brackets omitted). The first line of Finding 8 merely recites Mother's testimony and thus it is not a Finding of Fact this Court would have been able to rely upon if we had to evaluate the overall validity of the trial court's termination Orders. *See id.* (noting our Supreme Court "disregarded the language" that merely recited testimony by a witness when "determining the validity of the trial court's termination order"). Again this discussion does not impact our decision on whether to remand because Mother presented sufficient evidence to support a finding that a child support order was put in place in July 2018. *See In re J.C.*, 380 N.C. at 746, 869 S.E.2d at 688; *In re C.L.H.*, 376 N.C. at 622-23, 853 S.E.2d at 441. But we note this issue for the benefit of the trial court on remand. The trial court's Findings of Fact on remand should not simply recite the testimony on this crucial fact; the existence of a child support order is necessary for termination of parental rights under § 7B-1111(a)(4), *see In re S.R.*, 283 N.C. App. at 158, 872 S.E.2d at 413, and the trial court would need to make this finding by clear, cogent and convincing evidence to support the order of termination. *See* N.C. Gen. Stat. § 7B-1109(f) (requiring trial court to make all findings of fact based on this standard).

Turning to the second element of § 7B-1111(a)(4), we must determine whether Mother presented evidence sufficient to support a Finding that Father willfully failed to pay for a year preceding the filing of the Petitions. *See In re S.R.*, 283 N.C. App. at 158-59, 872 S.E.2d at 413 (delineating this second element); *see also* N.C. Gen. Stat. § 7B-1111(a)(4) (clarifying the failure to pay must be willful). In the context of termination of parental rights for willful failure to pay child support under § 7B-1111(a)(4), the word " 'willful' . . . has been defined as 'disobedience which imports knowledge and a stubborn resistance, doing the act . . . without authority—careless whether he has the right or not—in violation of law' " and "as 'doing an act purposely and deliberately.' " *Bost v. Van Nortwick*, 117 N.C. App. 1, 14, 449 S.E.2d 911, 919 (1994)

(second ellipses in original) (quoting *In re Roberson*, 97 N.C. App. 277, 280-81, 387 S.E.2d 668, 670 (1990)) (defining "willful" under the old version of the statute, N.C. Gen. Stat. § 7A-289.32(5)); *see In re J.D.S.*, 170 N.C. App. 244, 257, 612 S.E.2d 350, 358 (2005) (indicating N.C. Gen. Stat. § 7A-289.32(5) is "now codified as G.S. § 7B-1111(a)(4)"). Father here argues there was "insufficient evidence" to support a Finding "his failure to pay child support was willful" because he lacked the ability to pay.

Focusing on Father's argument about the lack of evidence on his ability to pay, our Supreme Court recently noted with approval this Court's longstanding precedent that "[b]ecause a proper decree for child support will be based on the supporting parent's ability to pay as well as the child's needs, . . . there is no requirement that [the] petitioner independently prove or that the termination order find as fact [the] respondent's ability to pay support during the relevant statutory time period." *In re C.L.H.*, 376 N.C. at 622, 853 S.E.2d at 440-41 (ellipses in original) (quoting *In re J.D.S.*, 170 N.C. App. at 257, 612 S.E.2d at 358, which in turn quoted *In re Roberson*, 97 N.C. App. at 281, 387 S.E.2d at 670) (so noting after explaining it was not necessary to reach the issue of whether a failure to pay was willful because the case was already being remanded on the grounds the trial court failed to make a finding on the existence of a child support order). Thus, because Mother here testified to the existence of a valid child support order, she did not need to "independently prove" Father had an ability to pay in order to present sufficient evidence to support a Finding that Father willfully failed to pay. *Id.*

Father's arguments about his lack of ability to pay do not change our decision that Mother presented sufficient evidence of willful failure to pay, although the trial court will need to make new Findings on remand, as discussed above. Father first indicates he "offered evidence to rebut" Mother's evidence of his ability to pay. Father testified he was unable to pay the full amount of child support during the relevant time period. But Father also testified he was self-employed from late 2018 until 2021, which corresponded with the time Father was on pre-trial release from jail, and that testimony indicates Father had the ability to pay at least some money during the time period. Mother testified, however, Father paid nothing between 2018 and when she filed the Petitions in January 2020. This testimony thus provides evidence Father had at least some ability to pay during the relevant time period.

But this testimony revealing Father had some ability to pay is ultimately not relevant for the current decision of whether we can remand the case or must reverse it outright. While Father could "present evidence to prove he was unable to pay child support in order to rebut a

finding of willful failure to pay[,]" *Bost*, 117 N.C. App. at 16, 449 S.E.2d at 919, to determine whether we can remand the case, we only need to determine whether Mother presented sufficient evidence on which the trial court *could* have found Father willfully failed to pay. *See In re J.C.*, 380 N.C. at 746, 869 S.E.2d at 688; *In re C.L.H.*, 376 N.C. at 622-23, 853 S.E.2d at 441. The trial court has the duty of determining the credibility and weight of all the evidence, and only the trial court can make the findings of fact resolving any conflicts in the evidence. *See, e.g.*, *In re D.W.P.*, 373 N.C. 327, 330, 838 S.E.2d 396, 400 (2020) ("[I]t is the duty of the trial judge to pass upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. The trial judge's decisions as to the weight and credibility of the evidence, and the inferences drawn from the evidence are not subject to appellate review." (citations, quotation marks, and brackets omitted)). As we have explained, Mother presented such sufficient evidence when she testified a valid child support order required Father to pay. *See In re C.L.H.*, 376 N.C. at 622, 853 S.E.2d at 440-41.

In his other argument, Father contends we should interpret § 7B-1111(a)(4) "in *pari materia*" with N.C. Gen. Stat. § 5A-21's provisions on civil contempt for failure to pay child support because "terminating parental rights is far more severe" than holding a parent in civil contempt and doing so is necessary "[t]o protect a parent's constitutional rights[.]" Specifically, Father asserts, based on this Court's decision in *Cty. of Durham ex rel. Durham DSS v. Burnette*, 262 N.C. App. 17, 821 S.E.2d 840 (2018), the trial court should have looked at his "current circumstances" with regard to ability to pay "regardless of when the original child support order was entered." Father contends the trial court "made no efforts" to undertake that inquiry in this case. We do not need to address this argument from Father because it focuses on the sufficiency of the trial court's Findings rather than on the sufficiency of the evidence Mother presented, the latter of which determines whether we can remand the case. *See In re J.C.*, 380 N.C. at 746, 869 S.E.2d at 688; *In re C.L.H.*, 376 N.C. at 622-23, 853 S.E.2d at 441.

Thus, Mother presented sufficient evidence of both elements of § 7B-1111(a)(4). Because Mother presented sufficient evidence upon which the trial court could have made Findings to support a conclusion that Father's parental rights could be terminated under N.C. Gen. Stat. § 7B-1111(a)(4), we can remand the case rather than reverse it outright. *See In re J.C.*, 380 N.C. at 746, 869 S.E.2d at 688; *In re C.L.H.*, 376 N.C. at 622-23, 853 S.E.2d at 441. The trial court is not required to make any particular finding on remand; the trial court instead must make the findings, based upon clear, cogent, and convincing evidence, it determines

are appropriate based on the evidence. *See*, *e.g.*, *In re N.W.*, 381 N.C. 851, 857, 874 S.E.2d 498, 504 (2022) ("Although the trial court does have responsibility for evaluating the credibility of the witnesses, weighing the evidence, and determining the relevant facts, its findings of fact must be based upon clear, cogent, and convincing evidence[.]" (citations omitted)); *In re J.C.*, 380 N.C. at 746, 869 S.E.2d at 688 ("[U]pon remand a trial court must review and reconsider the record before it by applying the clear, cogent, and convincing standard to make findings of fact.").

III. Conclusion

We reverse and remand this case to the trial court. While the Petitions provided Father sufficient notice of the grounds on which his parental rights could be terminated, we reverse because the trial court failed to announce, either in open court or in the written Orders terminating Father's parental rights, it was making Findings using the required clear, cogent, and convincing standard of proof. Because Mother presented sufficient evidence on which the trial court could have terminated Father's parental rights under N.C. Gen. Stat. § 7B-1111(a)(4), we remand the case rather than reverse it outright. On remand, the trial court shall consider "the record before it in order to determine whether [Mother] has demonstrated by clear, cogent, and convincing evidence" that Father's parental rights could be terminated. *In re J.C.*, 380 N.C. at 747, 869 S.E.2d at 688 (remanding case with such instructions where trial court did not announce the proper clear, cogent, and convincing standard of proof).

REVERSED AND REMANDED.

Judges ZACHARY and COLLINS concur.

IN RE CUSTODIAL L. ENF'T AGENCY RECORDINGS

[287 N.C. App. 566 (2023)]

IN THE MATTER OF CUSTODIAL LAW ENFORCEMENT AGENCY RECORDINGS SOUGHT BY:

APG-EAST LLC d/b/a "The Daily Advance"; Scripps Broadcast Holdings, LLC d/b/a WTKR-TV and WGNT-TV; Capital Broadcasting Company, Inc. d/b/a WRAL-TV; The McClatchy Company, LLC d/b/a "The News and Observer" and "The Charlotte Observer"; Carolina Public Press, Inc. d/b/a "Carolina Public Press"; Grey Media Group, Inc. d/b/a WBTV, WECT and WITN; WUNC, LLC d/b/a "WUNC-FM"; DTH Media Co d/b/a "The Daily Tarheel"; Nexstar Media, Inc. d/b/a "WAVY-TV" and "WVBT-TV"; Cable News Network, Inc. d/b/a "CNN"; WTVD Television, LLC d/b/a WTVD-ABC11; The Associated Press; WP Company, LLC d/b/a "The Washington Post"; Charter Communications d/b/a "Spectrum News"; Chatham Media Group, LLC d/b/a "Chatham News + Record"; and Gannett Co., Inc. d/b/a "Wilmington Star News" and "USA Today", The New York Times Co. d/b/a The New York Times, Media Convergence Group, d/b/a Newsy Court TV Media, LLC d/b/a Court TV,

Petitioners

No. COA22-446

Filed 7 February 2023

1. Public Records—law enforcement agency recordings—media request—standing—statutory requirement to "file an action"

The trial court properly dismissed a petition that was filed by twenty media entities—on a form issued by the Administrative Office of the Courts (AOC)—seeking the release of custodial law enforcement agency recordings (CLEARs) pertaining to a fatal shooting and subsequent protests for lack of standing where petitioners failed to comply with the requirement in N.C.G.S. § 132-1.4A(g) to "file an action." The plain meaning and use of the word "action" in subsection (g), which established a general procedure for release of CLEARs, as opposed to the use of the word "petition" in subsection (f), which established an expedited process for release of CLEARs to a certain category of individuals and provided that the petition shall be filed using an AOC-approved form, evidenced legislative intent that those seeking release under subsection (g) must file a civil action and comply with all attendant procedural requirements.

2. Jurisdiction—one judge overruling another—jurisdictional issue—no prejudicial error

In a matter involving a media request seeking the release of custodial law enforcement agency recordings, which was initiated by petition using a form issued by the Administrative Office of the Courts, where one superior court judge previously determined that the filing of a petition was sufficient to invoke the trial court's jurisdiction but a subsequent judge concluded that the media entities

lacked standing because the relevant statute required them to file a civil action rather than a petition, even if there was any error by the second judge in overruling the first judge, such error was not prejudicial in this instance because issues of subject matter jurisdiction may be raised and addressed at any time.

Appeal by Petitioners from order entered 9 November 2021 by Judge Jerry R. Tillett in Pasquotank County Superior Court. Heard in the Court of Appeals 29 November 2022.

Stevens Martin Vaughn & Tadych, PLLC, by Michael J. Tadych, Karen M. Rabenau, Hugh Stevens, C. Amanda Martin, and Elizabeth J. Soja, for Petitioners-Appellants.

No brief filed for Respondent-Appellee.

GRIFFIN, Judge.

Petitioners, twenty media entities, appeal from Judge Tillett's order dismissing their joint motion for release of custodial law enforcement agency recordings pursuant to N.C. Gen. Stat. § 132-1.4A(g). Petitioners contend that the trial court misconstrued the law applicable to N.C. Gen. Stat. § 132-1.4A(g), and therefore erred in refusing to grant and dismissing their petition for release. Petitioners also allege Judge Tillett improperly overruled prior determinations made by another superior court judge, Judge Foster.

Our review of the relevant statutory scheme shows that our legislature intended two different procedures for individuals seeking release of custodial law enforcement recordings: an expedited petition process for certain enumerated individuals, and an ordinary civil action for all others. We hold that Judge Tillett properly dismissed Petitioners' petition for lack of standing because they failed to "file an action" as required by N.C. Gen. Stat. § 132-1.4A(g). We affirm.

I. Factual and Procedural Background

On 21 April 2021, Andrew Brown, Jr., suffered fatal gunshots during the attempted service of arrest and search warrants on Brown at a property in Elizabeth City. On 26 April 2021, Petitioners filed the first in a series of petitions seeking release of any and all custodial law enforcement agency recordings made from the events of April 21 and protests that followed, pursuant to N.C. Gen. Stat. § 132-1.4A(g). Petitioners filed their petitions for release using the AOC-CV-270 form issued by

the North Carolina Administrative Office of the Courts ("AOC"), entitled "Petition for Release of Custodial Law Enforcement Agency Recording."

On 27 April 2021, Petitioners filed their Second Amended Petition for Release of Custodial Law Enforcement Agency Recording. The Second Amended Petition included a total of twenty media entities as petitioners, which sought recordings from the law enforcement offices in Dare, Perquimans, and Pasquotank Counties, Elizabeth City, and the North Carolina State Bureau of Investigation. The Second Amended Petition used the same form, noted that it was a general request for release pursuant to N.C. Gen. Stat. § 132-1.4A(g), and requested:

> The release of all body cam, dashboard camera, cell phone, fixed camera recordings, or any other recordings as defined by [N.C. Gen. Stat. §] 132-1.4A(a)(6)* regarding this incident, from the time deputies first arrived at the residence through the protests at the scene, and later that evening, which are in the possession or control of the [law enforcement] offices or the [SBI].
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> . . .
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> *including, without limitation recordings from Ring and other similar doorbell/security cameras to which law enforcement has access and/or over which the Elizabeth City Police Department or Elizabeth City had control.

On 28 April 2021, Judge Jeffery B. Foster held a hearing on the Second Amended Petition in Pasquotank County Superior Court. At the time of the hearing, there was an active investigation into the events of 21 April 2021. The Pasquotank County district attorney advocated for the State's interest in the "orderly administration of justice," and asked the court to postpone release of any recordings until after the district attorney's office had decided whether to bring any charges. No other interested party objected to the release of any recordings at that time.

On 17 May 2021, Judge Foster entered a written order denying Petitioners' Second Amended Petition constituting a final disposition. In the written order, Judge Foster concluded that Petitioners were "members of a general class of 'any person requesting release of a recording' " as contemplated by N.C. Gen. Stat. § 132-1.4A(g) and had "filed 'an action' " as required by the statute. Nonetheless, Judge Foster held "the release of the videos to the [Petitioners was] not appropriate at [that] time." In balancing the interest of release to the public and the media against the State's interest, Judge Foster found the State's interest weighed more heavily because "[r]elease would create a serious threat to

the fair[] and orderly administration of justice" and there was a need to protect the State's "active internal or criminal investigation." There is no record of an appeal having been taken from Judge Foster's written order denying Petitioners' Second Amended Petition.

On 18 May 2021, the Pasquotank County district attorney announced that he would not bring any charges in relation to the 21 April 2021 incident. On 21 May 2021, as a result of the district attorney's decision, Petitioners filed a Third Amended and Renewed Petition (the "Third Petition") restating their request for release of the 21 April 2021 recordings by law enforcement offices in Dare, Perquimans, and Pasquotank Counties, Elizabeth City, and the North Carolina State Bureau of Investigation. The Third Petition once again was submitted on the AOC-CV-270 petition form, noted that it was a general request for release pursuant to N.C. Gen. Stat. § 132-1.4A(g), and requested:

> On 5/18/21, the District Attorney announced he would not bring charges against the deputies. Petitioners request the release of all recordings as defined by [N.C. Gen. Stat. §]132-1.4A(a)(6)* regarding [the 21 April 2021] incident, from 8:00 a.m. on 21 April 2021 through protests at the scene, and later that evening, which are in the possession or control of the custodial law enforcement agencies identified herein.
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> . . .
>
> *including, without limitation, recordings from Ring and other similar doorbell/security cameras to which law enforcement has access and/or over which the Elizabeth City Police Department had control or were operated on their behalf).

On 13 September 2021, Judge Tillett held a hearing on the Third Petition in Currituck County Superior Court. Judge Tillett stated during the hearing that he was unsure Petitioners had followed the "appropriate procedure" for N.C. Gen. Stat. § 132-1.4(g), even though they "had plenty of time to go file it" properly. The district attorney then moved for the first time to dismiss the Third Petition pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure. Judge Tillet heard the motion and further stated his belief that, wherever N.C. Gen. Stat. § 132-1.4A(g) is referenced, "it says may file an action," even though the section "appears to allow a broader category of person than otherwise provided for disclosure."

On 9 November 2021, Judge Tillet entered a written order dismissing Petitioners' Third Petition pursuant to Rules 12(b)(1), (b)(2), (b)(4), (b)(5), and (b)(6) of the North Carolina Rules of Civil Procedure. The written order concluded that Petitioners failed to file "an action" in compliance with N.C. Gen. Stat. § 132-1.4A(g), and thereafter had failed to serve notice upon all required parties.

Petitioners timely appeal.

II. Analysis

Petitioners contend that Judge Tillett erred by dismissing their petition because (1) he acted based upon a misinterpretation of the controlling statutes and (2) he inappropriately overruled the prior decisions of Judge Foster.

A. Standing to Request Release

[1] Petitioners contend the trial court erred by dismissing their petition for release of law enforcement recordings under Rules 12(b)(1), (b)(2), (b)(4), (b)(5), and (b)(6), prior to any review of its merits. In so ruling, the court held that Petitioners had failed to file a proper action placing themselves and their claims before the court, and had further failed to comply with the service requirements of an appropriate action.

Though the trial court listed many rules in its order, the core of its decision turned on Petitioners' failure to file and serve a proper action, resulting in a lack of standing. This Court reviews the trial court's decisions regarding standing and jurisdiction *de novo*, substituting our own judgment and considering each question of law anew. *See Catawba Cnty. ex rel. Rackley v. Loggins*, 370 N.C. 83, 87, 804 S.E.2d 474, 478 (2017); *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008). Likewise, "[q]uestions of statutory interpretation are questions of law and are reviewed de novo." *In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010).

Law enforcement agencies are custodians for the recordings "captured by a body-worn camera, a dashboard camera, or any other video or audio recording device operated by or on behalf of a law enforcement agency or law enforcement agency personnel when carrying out law enforcement responsibilities." N.C. Gen. Stat. § 132-1.4A (2021). By definition, these custodial law enforcement agency recordings ("CLEARs") are neither public nor personnel recordings. N.C. Gen. Stat. § 132-1.4A(b). Law enforcement agencies are not permitted to allow viewing of CLEARs absent compliance with court orders resulting from proceedings under Section 132-1.4A. *See* N.C. Gen. Stat. § 132-1.4A(f), (g).

Section 132-1.4A defines two methods for viewing CLEARs: disclosure and release. Disclosure means "[t]o make a recording available for viewing or listening to by the person requesting disclosure, at a time and location chosen by the custodial law enforcement agency." N.C. Gen. Stat. Ann. § 132-1.4A(a)(4). Subsections 132-1.4A(b1) through (e) provide a mechanism through which certain categories of individuals who appear in or are otherwise involved in a CLEAR are presumptively authorized to receive disclosure. *See* N.C. Gen. Stat. § 132-1.4A(b1)–(e). Under "disclosure," only viewing, and not copying or dissemination, is allowed.

Release means "to provide a copy of a recording." N.C. Gen. Stat. Ann. § 132-1.4A(a)(7). Subsections 132-1.4A(f) and (g) provide instructions for those seeking "release," and for the law enforcement agencies being asked to allow release of CLEARs:

> (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. There shall be no fee for filing *the petition which shall be filed on a form approved by the Administrative Office of the Courts* and shall 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. 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.
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> . . .
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> 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. . . .
>
> (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. 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 [eight enumerated] standards[.]
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> . . .
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> In any proceeding pursuant to this subsection, the following persons *shall be notified* and those persons, or their designated representative, shall be given an opportunity to be heard at any proceeding: (i) the head of the custodial law enforcement agency, (ii) any law enforcement agency personnel whose image or voice is in the recording and the head of that person's employing law enforcement agency, and (iii) the District Attorney. *Actions* brought pursuant to this subsection shall be set down for hearing as soon as practicable, and subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts.

N.C. Gen. Stat. Ann. § 132-1.4A(f), (g) (emphasis added).

These two statutory subsections are similar in form and function. The differences between them lie in the language our legislature used to describe the individuals who have standing to seek release, how release was to be requested, and who must receive notice of the release request. Subsection (f) creates an "expedited process" for release of CLEARs to specifically identified individuals presumptively authorized to receive disclosure under subsections (b1) through (e). Those specifically identified individuals seeking release under subsection (f) are directed to file a petition using a form made for this process by AOC. Notice is then

to be given to the head of the law enforcement agency in custody of the CLEAR.

Subsection (g) establishes a "general" procedure for release of CLEARs to all individuals and entities other than those contemplated by subsection (f). Subsection (g) instructs anyone else seeking release to "file an action." Both subsection (f) and (g) require the release seeker to provide the date and time of the CLEAR, or other reasonably particular information identifying the requested CLEAR. However, subsection (g) does not direct nor permit the release seeker to use a form created by AOC. The general procedure outlined in subsection (g) also states that notice must be given to not only the head of the law enforcement agency in custody of the CLEAR, but also to the district attorney and to all law enforcement personnel whose images or voices appear in the CLEAR.

Judge Tillett's decision to dismiss Petitioners' petition relied on these distinctions. Judge Tillett held that Petitioners lacked standing because section 132-1.4A(g) requires the party seeking the release to file an "action," but Petitioners had filed only a petition using the AOC-CV-270 form. We must determine whether the legislature's use of the word "action" in section 132-1.4A(g) requires an individual seeking general release of CLEARs to initiate their request by filing a civil action. We hold that it does.

" 'Statutory interpretation properly begins with an examination of the plain words of the statute.' " *Belmont Ass'n, Inc. v. Farwig*, 381 N.C. 306, 310, 873 S.E.2d 486, 489 (2022) (citation omitted). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005). "Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used." *N.C. Dep't of Correction v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) (citation omitted).

Where the meaning of words in a statute is unclear, this Court interprets the statute with a focus on giving effect to the intent of the legislature in enacting the statutory scheme:

> Legislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish. The statute's words should be given their natural and ordinary meaning unless the context requires them to be construed differently.

Shelton v. Morehead Mem'l Hosp., 318 N.C. 76, 81–82, 347 S.E.2d 824, 828 (1986) (citations omitted). "This Court must consider any differences in otherwise identically worded statutes, because these differences in wording strongly suggest that the General Assembly did not intend the words included in one statute, or subsection of a statute, to apply to other statutes or subsections that do not include those words." *State v. McCants*, 275 N.C. App. 801, 824–25, 854 S.E.2d 415, 432 (2020) (citation, quotation marks, and internal editing marks omitted).

Section 132-1.4A(g) states that anyone seeking general release of a CLEAR may "file an action." "Action" is a term of art, defined as "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense." N.C. Gen. Stat. § 1-2 (2021). The plain meaning and use of the term "action" means that our legislature intended for those seeking release under section 132-1.4A(g) to file an ordinary civil action, not a petition using an AOC form.

This Court has held in a similar circumstance that our legislature's use of the term "action" means that the intended result was an ordinary civil action, not any sort of special proceeding. *Charns v. Brown*, 129 N.C. App. 635, 637, 502 S.E.2d 7, 8 (1998). This Court in *Charns* interpreted our legislature's intent regarding the term "action" in the public records statute, N.C. Gen. Stat. § 132-9, but its logic is nonetheless useful here. Public records are the "property of the people" and, by default, viewable by the public without contest at minimal cost. N.C. Gen. Stat. § 132-1 (2021). The facts in *Charns* concerned actions to compel disclosure of public records after a request for disclosure of those records had been denied. *Charns*, 129 N.C. App. at 637, 502 S.E.2d at 8. The plaintiff successfully compelled access to public records. *Id.* The defendant custodian of those records appealed, arguing the plaintiff failed to comply with the procedural requirements of filing an action. *Id.* The plaintiff argued that, even though the legislature referred to actions to compel disclosure as "actions," the resulting proceedings were "special proceedings," instead. This Court held that the legislature intended an "action," and the party seeking access to the records must comply with all the statutory and procedural requirements of an "action." *Id.* at 638, 502 S.E.2d at 9.

The same conclusion is appropriate in this case. Access to public records is not ordinarily contested, but section 132-9 authorizes public record seekers to initiate an action when their request is denied. CLEARs by statute are not public records, are by default not to be

released, and therefore proceedings for their release are by their very nature contested. It follows that section 132-1.4A(g) would require an action be filed to resolve a contested matter.

Interpreting section 132-1.4A as a whole leads us to the same conclusion. The legislature chose to allow specifically identified release seekers under the "expedited process" in subsection (f) to "petition," while "general" release seekers under subsection (g) are directed to "file an action." Petitioners are not the first to initiate their request for release under subsection (g) using form AOC-CV-270. The form includes a checkbox through which its user may indicate that they seek release under "G.S. 132-1.4A(g) – General."

Nonetheless, section 132-1.4A(g) makes no reference to the creation or use of a form created by AOC for actions filed pursuant to that subsection, while subsections 132-1.4A(b2) and (f) explicitly state that those seeking disclosure or release should use a form developed and/or approved by AOC. We must construe the differences between these subsections materially; if the legislature had intended an AOC form be used in conjunction with subsection (g), it would have instructed as such. *See McCants*, 275 N.C. App. at 824–25, 854 S.E.2d at 432.

We reach our conclusion in this case in full awareness of our judiciary's flexibility in resolving cases in a timely and efficient manner when those cases are initiated improperly:

> Within the guidelines of our Constitution, the legislature is charged with the responsibility of providing the necessary procedures for the proper commencement of a matter before the courts. Occasionally, however, the proscribed procedures of a statutory scheme fail to embrace the unanticipated and extraordinary proceeding such as that disclosed by the record before us. In similar situations, it has been long held that courts have the inherent power to assume jurisdiction and issue necessary process in order to fulfill their assigned mission of administering justice efficiently and promptly.

In re Albemarle Mental Health Ctr., 42 N.C. App. 292, 296, 256 S.E.2d 818, 821 (1979). The Court in *Albemarle* employed this reasoning, though, in an instance where the legislature had failed "to provide precise statutory directions" for the type of proceeding required under the statute. *Id.* Here, section 132-1.4A(g) provides precise directions that those seeking release must "file an action." We are not left to interpret whether filing a petition is sufficient for our courts to assume jurisdiction.

Petitioners failed to properly initiate judicial process under section 132-1.4A(g) by filing an AOC form. Section 132-1.4A(g) requires the party seeking release of CLEARs to "file an action" and to comply with all procedural requirements inherent therein. Judge Tillett did not err by dismissing Petitioners' petition under Rules 12(b)(1), (b)(2), (b)(4), (b)(5), and (b)(6).

B. Overruling a Superior Court Judge

[2] Petitioners also contend Judge Tillett's decision to dismiss their Third Amended Petition was error because he improperly overruled Judge Foster's earlier determination that Petitioners had properly, "pursuant to [subsection 132-1.4A(g),] filed 'an action' " when they used the AOC-CV-270 form to file their Second Amended Petition. Petitioners further contend that Judge Tillett erred by considering the district attorney's Rule 12(b) motion to dismiss because it was made orally at trial without prior notice to Petitioners.

Petitioners correctly state that "no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). However, even if we were to find that Judge Tillett erred, the error would not be prejudicial in this case because this Court is free to review questions of subject matter jurisdiction no matter when they arise and no appeal was taken from Judge Foster's prior dismissal. "Standing is jurisdictional in nature and consequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of the case are judicially resolved." *In re S.E.P.*, 184 N.C. App. 481, 487, 646 S.E.2d 617, 621 (2007) (citation omitted and internal marks omitted). "Therefore, issues pertaining to standing may be raised for the first time on appeal, including *sua sponte* by the Court." *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878–79 (2002).

III. Conclusion

The plain language of N.C. Gen. Stat. § 132-1.4A(g) instructs those seeking general release of CLEARs to "file an action." The Third Amended Petition filed by Petitioners failed to comply with the statutory requirements. Therefore, Judge Tillett did not err by dismissing Petitioners' petition.

AFFIRMED.

Judges TYSON and CARPENTER concur.

IN RE Z.J.W.

[287 N.C. App. 577 (2023)]

IN THE MATTER OF Z.J.W., A MINOR CHILD

No. COA22-456

Filed 7 February 2023

Termination of Parental Rights—ex parte proceedings after remand—lack of notice and opportunity to be heard for parent—due process violation

In a termination of parental rights matter in which a prior termination order was reversed and the matter remanded to the trial court with instructions to enter a new order containing proper findings of fact and conclusions of law, respondent father did not receive a fundamentally fair proceeding where the trial court held an ex parte in-chambers meeting with only the guardian ad litem and counsel for the department of social services before entering a new order terminating respondent's parental rights to his daughter. Respondent's constitutional due process rights were violated since neither respondent nor his counsel were given notice of the meeting and an opportunity to be heard.

Appeal by Respondent-Father from Order entered 9 September 2021 by Judge Elizabeth Freshwater-Smith in Nash County District Court. Heard in the Court of Appeals 11 January 2023.

Jayne B. Norwood, for petitioner-appellee Nash County Department of Social Services.

Garron T. Michael for respondent-appellant father.

Poyner Spruill LLP, by Caroline P. Mackie and Andrea Liberatore, for guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

Respondent-Father appeals from the trial court's Termination of Parental Rights Order entered 9 September 2021, which adjudicated grounds to terminate Respondent-Father's parental rights in his minor child Jill[1] pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). The Record before us tends to reflect the following:

1. The juvenile is referred to by the parties' stipulated pseudonym.

On 10 January 2018, the Nash County Department of Social Services (DSS) filed a Juvenile Petition (Petition) alleging Jill was an abused and neglected juvenile as defined by N.C. Gen. Stat. § 7B-101. The Petition alleged that on or about 25 June 2017, DSS received a referral alleging Jill to be an abused and neglected juvenile. Both Respondent-Father and Respondent-Mother stipulated a factual and legal basis exists to adjudicate Jill as being abused and neglected as defined in N.C. Gen. Stat. § 7B-101, as alleged in the Petition. Jill was adjudicated abused and neglected on 11 July 2018. DSS obtained custody of Jill, and the trial court adopted a permanent plan of reunification with a concurrent plan of adoption.

On 20 February 2019, DSS filed a Motion to terminate Respondent-Father's parental rights in Jill. In the Motion, DSS alleged Jill was an abused and neglected juvenile and there was a probability the abuse and neglect would continue if Jill was returned to the custody of Respondent-Father. Following hearings on 27 June 2019 and 25 July 2019, the parental rights of both Respondent-Father and Respondent-Mother were terminated. The trial court entered a Termination of Parental Rights Order on 23 September 2019 (2019 Termination Order). Respondent-Father timely filed written Notice of Appeal.[2]

On appeal to the Supreme Court of North Carolina, Respondent-Father challenged numerous findings of fact and the trial court's conclusion grounds existed for the termination of Respondent-Father's parental rights in Jill. *In re Z.J.W.*, 376 N.C. 760, 855 S.E.2d 142 (2021). Our Supreme Court concluded:

> [T]he trial court's determination that respondent-father's parental rights in Jill were subject to termination on the basis of abandonment and neglect by abandonment lacked sufficient support in the trial court's findings of fact and that the trial court's determination that respondent-father's parental rights in Jill were subject to termination on the basis of prior neglect and the likelihood of a repetition of neglect rested upon a misapplication of the applicable law.

Id. at 782, 855 S.E.2d at 158 . The trial court's 2019 Termination Order was reversed, in part; vacated, in part; and remanded, in part, for:

> the entry of a new termination order containing proper findings of fact and conclusions of law concerning the

2. Respondent-Mother did not appeal this Order and is not a party to the proceedings on appeal.

> extent to which respondent-father's parental rights in Jill were subject to termination on the basis of prior neglect coupled with the likelihood of a repetition of neglect and whether the termination of respondent-father's parental rights would be in Jill's best interests.

Id.

Following the issuance of the Supreme Court's opinion and disposition, the trial court held an in-chambers meeting with counsel for DSS and the guardian *ad litem* (GAL) on 14 July 2021. Neither Respondent-Father, counsel for Respondent-Father, nor any other opposing party was notified or participated in this meeting. Outside of this in-chambers meeting, there were no other meetings or hearings held, and Respondent-Father was not provided with any notice of the termination proceedings or the trial court's process and decision in filing a new termination order consistent with the Supreme Court's opinion.

On 9 September 2021, the trial court entered a new Termination of Parental Rights Order (2021 Termination Order). In the 2021 Termination Order, the trial court concluded grounds exist to terminate Respondent-Father's parental rights to Jill based on prior neglect and the likelihood of future neglect. Further, the 2021 Termination Order also concluded the termination of Respondent-Father's parental rights was in Jill's best interest. On 11 October 2021, Respondent-Father timely filed written Notice of Appeal of the 2021 Termination Order.

Issue

The dispositive issue on appeal is whether Respondent-Father was denied a fundamentally fair termination proceeding when the trial court engaged in *ex parte* communications with DSS and the GAL without notice to Respondent-Father prior to the entry of the 2021 Termination Order.

Analysis

Respondent-Father contends the trial court acted under a "misapprehension of the law" in the entry of the 2021 Termination Order, resulting in Respondent-Father being denied a fundamentally fair proceeding.

"[A] parent enjoys a fundamental right 'to make decisions concerning the care, custody, and control' of his or her children under the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *Adams v. Tessener*, 354 N.C. 57, 60, 550 S.E.2d 499, 501 (2001) (quoting *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49,

57 (2000)). Thus, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures[.]" *In re Murphy*, 105 N.C. App. 651, 653, 414 S.E.2d 396, 397 (1992) (quoting *Santosky v. Kramer*, 455 U.S. 745, 753-54, 71 L. Ed. 2d 599, 606 (1986)).

"A parent whose rights are considered in a termination of parental rights proceeding must be provided with fundamentally fair procedures consistent with the Due Process Clause of the Fourteenth Amendment." *In re J.E.B.*, 376 N.C. 629, 633, 853 S.E.2d 424, 428 (2021) (citations and quotation marks omitted). Further, Canon 3(A)(4) of the North Carolina Code of Judicial Conduct provides: "[a] judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding." N.C. Code of Judicial Conduct, Canon 3(A)(4).

On remand, the trial court engaged in *ex parte* communications with counsel for DSS and the GAL prior to the entry of the 2021 Termination Order in an unrecorded in-chambers meeting. Respondent-Father contends "the trial court acted under a misapprehension of the law that on remand [Respondent-Father] was no longer a party to the proceedings [and] was not entitled to due process and fundamentally fair procedures, or both."

We agree that the Record reflects the trial court appears to have acted under a "misapprehension of the law" by conducting the in-chambers meeting on remand and that such a misapprehension warrants remand. *See In re M.K.*, 241 N.C. App. 467, 475, 773 S.E.2d 535, 541 (2015) ("Our Supreme Court has held that 'where it appears that the judge below has ruled upon matter before him upon a misapprehension of the law, the cause will be remanded . . . for further hearing in the true legal light.' " (quoting *Capps v. Lynch*, 253 N.C. 18, 22, 116 S.E.2d 137, 141 (1960)).

Nothing in the Record indicates Respondent-Father or counsel for Respondent-Father were provided notice of the trial court's proceedings on remand. As such, Respondent-Father was not afforded an opportunity to participate or be heard on the 2021 Termination Order prior to its entry. In briefing to this Court and in response to Respondent-Father's due process argument, both DSS and the GAL appear to suggest any error in this regard was harmless because the trial court was not required to conduct a new hearing or consider new evidence in entering the 2021 Termination Order on remand.

The Supreme Court remanded the case for "further proceedings not inconsistent with this opinion, including the entry of a new termination order containing proper findings of fact and conclusions of law." *Z.G.W.*, 376 N.C. at 782, 855 S.E.2d at 158. As such, the trial court was permitted, but not required, to hear from the parties on remand. Nevertheless, the trial court did hear from two of the parties: DSS and the GAL. Respondent-Father, as a party to the termination proceedings, was still entitled to procedural due process, including proper service of process, notice of proceedings, and fair procedures. *See Santosky*, 455 U.S. at 753-54, 71 L. Ed. 2d at 606 (1982) (holding a state must provide respondents with fundamentally fair procedures when it moves to destroy weakened familial bonds). Once the trial court determined to hear from the GAL and DSS on the matter on remand, Respondent-Father was entitled to basic notice and an opportunity to be heard. The error in this regard is further compounded by the fact there is no record of what was discussed or presented to the trial court in-chambers for us to review.[3]

Thus, on remand, Respondent-Father was entitled to the same due process protections and fundamentally fair procedures afforded to him at the outset of the termination proceedings. Therefore, by engaging with counsel for DSS and the GAL outside the presence and without prior notice to Respondent-Father, the trial court violated Respondent-Father's due process right to notice and an opportunity to be heard. Consequently, we vacate the 2021 Termination Order and remand this matter for the trial court to enter a new Termination of Parental Rights Order with fundamentally fair procedures consistent with the Due Process Clause of the Fourteenth Amendment.

Conclusion

Accordingly, for the foregoing reasons, we vacate the 2021 Termination Order and remand this matter to the trial court for further proceedings as set forth herein and consistent with our Supreme Court's prior decision in this case.

VACATED AND REMANDED.

Judges DILLON and TYSON concur.

3. The Record on Appeal contains a narrative in which the parties simply acknowledge this in-chambers meeting took place.

JANU INC D/B/A STONECRAFTERS, AUM HOSPITALITY SERVICES, PLAINTIFFS
v.
MEGA HOSPITALITY, LLC, MEGA-C HOSPITALITY, LLC, MEGA-B HOSPITALITY, LLC, MEGA-K HOSPITALITY, LLC, G.R. BHAT, AND SUJATA BHAT, DEFENDANTS

No. COA22-194

Filed 7 February 2023

1. Civil Procedure—notice of hearing—uncalendared motion—personal jurisdiction—irregular judgment

In a contract dispute, the portion of the judgment granting defendant's motion to dismiss for lack of personal jurisdiction was irregular and therefore was vacated where defendant failed to give plaintiff prior notice that defendant intended to present the issue of personal jurisdiction at the hearing that had been scheduled on defendant's motion to dismiss for failure to state a claim. Plaintiff did not waive the lack of notice by participating in the hearing because plaintiff immediately notified the trial court that the motion for lack of personal jurisdiction was not calendared before the court.

2. Jurisdiction—personal—waiver of objection—by seeking affirmative relief on other basis

In a contract dispute, the trial court erred in finding that it lacked personal jurisdiction over defendant where defendant waived any jurisdictional objections by calendaring a hearing and seeking affirmative relief from the trial court on its motions to dismiss for failure to state a claim and for attorney's fees.

3. Attorney Fees—prevailing party—statutory requirement—not met

In a contract dispute, the appellate court declined to address defendant's argument that the trial court's denial of attorney fees should be vacated. Defendant was not the prevailing party and therefore was not entitled to attorney fees pursuant to N.C.G.S. § 6-21.5.

Appeal by defendant from judgment entered 13 September 2021 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 21 September 2022.

Stam Law Firm, PLLC, by R. Daniel Gibson, for the plaintiff-appellants.

Currin & Currin, by George B. Currin, for the defendant-appellee.

Robert A. Brady, for the defendant-appellee.

TYSON, Judge.

Janu Inc. ("Plaintiff"), a North Carolina corporation, and Defendant, Mega K, LLC ("Mega K"), dispute the breach of a contract over the remodeling of a hotel Defendant owns. Defendant moved to dismiss for failure to state a claim in the complaint and for lack of personal jurisdiction. Defendant noticed a hearing regarding the motion to dismiss for failure to state a claim. Plaintiff vehemently objected to calendaring a hearing on jurisdiction prior to having received requested jurisdictional discovery. The trial court ruled on both motions and concluded it lacked personal jurisdiction over Defendant. We affirm in part, vacate in part, and remand.

I. Background

Plaintiff is a North Carolina corporation doing business as both Stonecrafters and AUM Hospitality Services. Plaintiff remodels hotels and supplies hotel furniture, fixtures, carpet, and craft stonework.

G.R. Bhat is the member-manager of Defendant, Mega K, which owns and operates a Days Inn hotel located in Hayes, Kansas. G.R. Bhat was a charter member of and initially held a 1% interest in Mega K on 3 March 2015. On 9 April 2015, a former member transferred his 69% membership interest in Mega K to G.R. Bhat. G.R. Bhat denies being listed as the registered agent for Mega K for any period of time.

G.R. Bhat resided in North Carolina from 2011 to 2017. He owned personal property and maintained his personal residence in Cary. G.R. Bhat used his personal address in Cary as Mega K's official mailing address during 2016 and 2017.

Plaintiff and G.R. Bhat allegedly reached an agreement to remodel Defendant's hotel and to also supply hotel furnishings and fixtures. Although the record does not contain a copy of a fully-integrated written contract between Plaintiff and Defendant, Defendant presumably believed an agreement existed based on the following information included in the record on appeal:

1. G.R. Bhat agreed via email to pay Plaintiff $116,062 for providing lounge chairs for 104 hotel rooms. That email, sent on 10 March 2016, also acknowledged other costs Defendant would incur for Plaintiff's additional work and supplying products.

2. G.R. Bhat forwarded the contact information for the hotel's "Design Team" to stonecraftersnc@gmail.com on 13 March 2016.

3. G.R. Bhat agreed to pay a $13,520 deposit for draperies before Plaintiff ordered the window treatments in an email dated 19 March 2016.

4. Other emails mention substantial costs Plaintiff had incurred and Defendant agreed to pay for hotel furnishings, specifically including headboards, nightstands, writing desks, ergonomic chairs, artwork, carpet, and lighting, and other installation, painting, and shipping fees.

5. Defendant denied being indebted to Plaintiff in the interrogatories and asserted Plaintiff had "failed to deliver the products and/or services pursuant to the *agreement* between Mega K, LLC and [Plaintiff] and they are therefore in breach of the *agreement*." (emphasis supplied)

6. G.R. Bhat agreed to meet with Plaintiff in North Carolina to discuss several unpaid invoices. He mentioned meeting somewhere in the Raleigh area and promised to "be there with [his] checkbook."

7. Defendant admits on appeal that the "parties disagreed as to whether Plaintiff[']s renovation work at the Days Inn hotel was satisfactory and consistent with the *terms of their agreement*." (emphasis supplied)

8. Mega K mailed several checks to Plaintiff's address in North Carolina, and the invoices Plaintiff addressed to "G.R. Bhat" and "Mega K Hospitality" reference that North Carolina address in the header.

Defendant was displeased with Plaintiff's work, and Plaintiff alleged Defendant had failed to pay Plaintiff according to the terms of their agreement. Plaintiff filed a complaint on 18 December 2018, alleging breach of contract, an action on unverified account and for account stated, and asserting unjust enrichment.

Plaintiff believed G.R. Bhat had acted on behalf of an LLC named "Mega-K Hospitality, LLC," not "Mega K, LLC." When Plaintiff struggled to locate the intended Defendant, it brought forth a lawsuit against: (1) G.R. Bhat, the person they negotiated the contract with; (2) G.R. Bhat's wife, Sujata Bhat; and, (3) all of the "Mega" businesses they could find associated with G.R. Bhat, including Mega Hospitality, LLC; Mega-C

Hospitality, LLC; Mega-B Hospitality, LLC; and Mega-K Hospitality, LLC ("Defendants").

Plaintiff initially alleged the entities listed in their initial complaint operated as "shell corporations solely for the purposes of shielding themselves and their corporate alter egos from liability." Defendants moved to dismiss for failure to state a claim and lack of personal jurisdiction and sought attorney's fees on 9 July 2019.

After Plaintiff identified Mega K, LLC as the company it purportedly contracted with, Plaintiff amended its complaint to correct the misnomer on 8 October 2019. Defendants again moved to dismiss Plaintiff's amended complaint for failure to state a claim and lack of personal jurisdiction on 16 December 2019. They also filed another motion for attorney's fees pursuant to N.C. Gen. Stat. § 6-21.5 (2021).

Defendants attempted to calendar a hearing on their motion to dismiss Plaintiff's claims for failure to state a claim *and* for lack of personal jurisdiction. Plaintiff responded to Defendant's request on 19 December 2019, stating: "I'm happy to hear your 12(b)(6) motion before receiving discovery. Much of my discovery request relates to the 12(b)(4) motion. Without that discovery, I have to object to hearing that part of your motion to dismiss."

Defendants brought forth a motion on 10 January 2020 for an extension to respond to Plaintiff's discovery requests, which the court granted.

Twenty-one days later, Defendants attempted, for the second time, to schedule a hearing on *both* motions. Plaintiff explained to Defendant:

> We must have different recollections of the phone call.
>
> My position on this has been consistent: I cannot agree to a hearing on your motion to dismiss for lack of personal jurisdiction until I have received discovery on that issue. I'm willing to waive the request for production of documents and the non-jurisdictional interrogatories. I cannot, in good faith to my client, agree to a hearing on a motion to dismiss for lack of personal jurisdiction when there is jurisdictional discovery outstanding.

Defendants' counsel appeared to comply. The "Calendar Request," submitted by Defendants on the same day they received Plaintiff's email, requested to calendar a hearing *only* on the motion to dismiss for failure to state a claim. Defendants understood the "Calendar Request" was to only cover their motion to dismiss for failure to state a claim, because

Defendants had confirmed via email that "the motion for attorney['s] fees [wa]s not calendared or scheduled for hearing."

On 7 February 2020, Plaintiff voluntarily dismissed Mega Hospitality, LLC, Mega-C Hospitality, LLC, Mega-B Hospitality, LLC, and Sujata Bhat, after Defendants' counsel represented all LLCs were adequately capitalized and not operating as shell entities.

The hearing on the remaining Defendants' motion to dismiss for failure to state a claim was held on 17 February 2020. At the hearing, Defendants nevertheless discussed personal jurisdiction before discussing their motion to dismiss for failure to state a claim: "[T]hen it dawned on me that they may not have personal jurisdiction and the court may not have personal jurisdiction over the actual party in controversy here, which is Mega K, LLC, in Kansas." Defendants' discussion prompted the trial court to ask Plaintiff about personal jurisdiction:

> THE COURT: Thank you. How do you say that you have personal jurisdiction over Mega K, LLC?
>
> [PLAINTIFF'S COUNSEL]: We're not here on that motion, but there's a few facts that we would present at that motion. We're also awaiting some jurisdictional discovery.
>
> . . .
>
> [S]aying, "Well, you can't prove personal jurisdiction; therefore, we should dismiss this complaint for failure to state a claim." Those are two different motions to dismiss. Those are two different standards. Those are two very different considerations for the Court.

Two days after the hearing, Defendants submitted partial responses to Plaintiff's jurisdictional discovery requests. Defendants failed to answer seven interrogatories; partially answered some of the remaining interrogatories; and, included no official response to Plaintiff's requests for production or explanation about which requests for production each of the documents produced answered. Plaintiff filed a motion to compel Defendants to respond to Plaintiff's discovery requests on 26 August 2020.

Plaintiff voluntarily dismissed its claims against G.R. Bhat in August 2020, leaving Mega K, LLC as the only remaining Defendant. The trial court entered an order on 13 September 2021, *574 days after the hearing*, (1) granting Defendant's motion to dismiss for failure to state a claim, (2) denying Defendant's motion for attorney's fees, and (3) granting Defendant's motion to dismiss for lack of personal jurisdiction.

Plaintiffs moved that day to alter or amend the trial court's order, under North Carolina Rules of Civil Procedure Rule 59. The trial court never ruled on Plaintiff's motion. On 13 October 2021, Plaintiffs filed a timely notice of appeal. Plaintiff also withdrew its motion to alter or amend the trial court's order, because the trial court lacked jurisdiction to amend a final order pending appeal.

II. Jurisdiction

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

III. Issues

Plaintiff argues: (1) the trial court lacked authority to decide the personal jurisdiction issue *sua sponte*; (2) the trial court deprived Plaintiff of due process by ruling on Defendant's motion to dismiss for lack of personal jurisdiction at a hearing held without prior notice and while jurisdictional discovery was pending; and (3) the trial court erred by finding it lacked personal jurisdiction over Defendant.

Defendant filed a cross-appeal, asserting: (1) the trial court erred by denying Defendant's motion for attorney's fees under N.C. Gen. Stat. § 6-21.5; and (2) if this Court holds the trial court erred by ruling on the uncalendared motion to dismiss for lack of personal jurisdiction at the hearing, then this Court should also hold the trial court erred by denying Defendant's uncalendared motion for attorney's fees.

IV. Notice and Hearings on Uncalendared Motions

A. Standard of Review

"Whether a party has adequate notice is a question of law, which we review *de novo*." *Swanson v. Herschel*, 174 N.C. App. 803, 805, 622 S.E.2d 159, 160 (2005) (citation omitted); *see also Brown v. Ellis*, 206 N.C. App. 93, 105, 696 S.E.2d 813, 822 (2010) (citing *Swanson*, 174 N.C. App. at 805, 622 S.E.2d at 160) (stating Rule 59 motions to amend an order are reviewed *de novo* if the judgment involves a question of law or legal inference).

B. Analysis

[1] "Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, section 17, of the North Carolina Constitution." *Swanson*, 174 N.C. App. at 805, 622 S.E.2d at 160-61 (citations and quotation marks omitted).

Forty-three years ago this Court held:

> Although, once a court has obtained jurisdiction in a cause through the service of original process, a party has no constitutional right to demand notice of further proceedings in the cause, *the law does not require parties to dance continuous or perpetual attendance* on a court simply because they are served with original process.
>
> The law recognizes that it must make provision for notice additional to that required by the law of the land and due process of law if it is to be a practical instrument for the administration of justice. *For this reason*, *the law establishes rules of procedure* admirably adapted to secure to a party, who is served with original process in a civil action or special proceeding, an opportunity to be heard in opposition to steps proposed to be taken in the civil action or special proceeding where he has a legal right to resist such steps[,] and principles of natural justice demand that his rights be not affected without an opportunity to be heard.

Laroque v. Laroque, 46 N.C. App. 578, 581, 265 S.E.2d 444, 446 (citation and quotation marks omitted) (emphasis supplied); *see also Swanson*, 174 N.C. App. at 805, 622 S.E.2d at 160-61 ("Notice is adequate if it is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.") (citations and quotation marks omitted).

The North Carolina Rules of Civil Procedure and the local rules of practice specific to each county or judicial district establish procedural rules requiring prior notice to litigants to protect their due process rights. *Brown*, 206 N.C. App. at 107, 696 S.E.2d at 823 (citing *Laroque*, 46 N.C. App. at 581, 265 S.E.2d at 446) ("Therefore, even though service of the summons and complaint on the defendant gave the court jurisdiction over defendant, due process still requires compliance with procedural rules governing notice."); *see also* N.C. Gen. R. Prac. Super. & Dist. Ct. 22(a) ("Local rules of practice and procedure for a judicial district must be supplementary to, and not inconsistent with, the General Rules of Practice. Local rules should be succinct and not unnecessarily duplicative of statutes or Supreme Court rules.").

Rule 6(d) of the North Carolina Rules of Civil Procedure provides:

> **For motions, affidavits**. – A written motion, other than one which may be heard ex parte, *and notice of the hearing* thereof shall be served *not later than five days*

> *before the time specified for the hearing*, unless a different period is fixed by these rules or by order of the court.

N.C. Gen. Stat. § 1A-1, Rule 6(d) (2021) (emphasis supplied).

The Tenth Judicial District Local Rules for Civil District Court also provides:

> Any party requesting that a motion or non-jury trial be calendared must submit a completed calendar request (WAKE-CVD-01) to the Trial Court Administrator. . . . Under appropriate circumstances, the Trial Court Administrator may set a motion for hearing at any time so long as the notice requirements of Rule (6) (d) of the Rules of Civil Procedure are satisfied or all parties consent. . . . Calendar requests must be served on counsel for all opposing parties and any self-represented person contemporaneously with submission of the calendar request to the Trial Court Administrator."

Tenth Jud. Dist. Loc. R. 3.2.

If a party has no prior required notice of a hearing on a motion, judgment on the motion is irregular, and action thereon is not binding. *See Everett v. Johnson*, 219 N.C. 540, 542, 14 S.E.2d 520, 521 (1941) ("It is readily conceded that the judgment should be set aside for irregularity, if in fact counsel . . . had no notice of the time and place of the hearing."). "An irregular judgment is one entered contrary to the usual course and practice of the court, and [it] will be vacated on proper showing of irregularity and merit." *Id.* (citations omitted).

In *Howell v. Howell*, this Court vacated a trial court's order because the defendant did not receive proper notice of the hearing pursuant to Rule 6 of the North Carolina Rules of Civil procedure. 22 N.C. App. 634, 636-37, 207 S.E.2d 312, 314 (1974) (explaining "Rule 6(d) of the Rules of Civil Procedure requires that motions . . . be served on the opposing party not later than five days before the time specified for the hearing," and thus it was "erroneous for the trial court to continue the hearing because of the lack of adequate notice, and the orders entered must be vacated"). Although the defendant in *Howell* "could have waived the lack of notice and proceeded with the hearing," his actions did not constitute a waiver. *Id.* at 637, 207 S.E.2d at 314. "Rather, he appeared at the hearing, notified the court that he had not received adequate notice, that he was not prepared, and objected to the hearing on the grounds of lack of notice." *Id.*

Here, Defendant failed to provide the required prior notice regarding its intention for the court to hear personal jurisdiction at the hearing, as is required under Rule 6(d) of the North Carolina Rules of Civil Procedure and under the Tenth Judicial District Local Rules for Civil District Court Rule 3.2. Defendant knew Plaintiff was not prepared to discuss personal jurisdiction prior to receiving jurisdictional discovery. Defendant had moved for an extension to provide requested jurisdictional discovery *after* the hearing. Plaintiff and Defendant also exchanged numerous emails regarding Plaintiff's refusal to consent to calendaring a hearing concerning the motion to dismiss for personal jurisdiction.

Plaintiff did not waive the lack of notice defect by participating in the hearing. Plaintiff immediately notified the trial court that the motion for lack of personal jurisdiction was not calendared before the court, as similar to the defendant in *Howell*. *Id.*; *see also Ayscue v. Griffin*, 263 N.C. App. 1, 11, 823 S.E.2d 134, 141 (2018) (holding plaintiff's motion for reconsideration should have been allowed because the trial court only indicated it would rule on the issue "at the end of the hearing" and the "hearing on Plaintiffs' motion was only calendared to consider Plaintiffs' motion *in limine*").

The judgment entered on Defendant's motion to dismiss for lack of personal jurisdiction was irregular. *Everett*, 219 N.C. at 542, 14 S.E.2d at 521. That portion of the trial court's order is vacated.

V. Personal Jurisdiction

[2] Plaintiff also argues the trial court erred as a matter of law by finding it lacked personal jurisdiction over Defendant. N.C. Gen. Stat. § 1-75.7 (2021) provides: "A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person: (1) Who makes a general appearance in an action[.]"

In addition to making a general appearance, "it is well established that seeking affirmative relief from a court on any basis other than lack of jurisdiction constitutes a waiver of jurisdictional objections." *Farm Credit Bank v. Edwards*, 121 N.C. App. 72, 77, 464 S.E.2d 305, 308 (1995) (citation omitted); *see also In re J.T.*, 363 N.C. 1, 4, 672 S.E.2d 17, 18 (2009) (explaining "any form of general appearance waives all defects and irregularities in the process and gives the court jurisdiction") (citation and internal quotation marks omitted).

Here, Defendant waived any jurisdictional objections by calendaring a hearing and seeking affirmative relief from the trial court on its motions to dismiss for failure to state a claim and for attorney's fees. *Id.* The trial court erred by failing to exercise personal jurisdiction over Defendant and dismissing Plaintiff's claims.

VI. Attorney's Fees

[3] Defendant similarly argues the trial court's denial of attorney's fees should be vacated because the attorney's fees motion was not calendared for the hearing.

Our General Statutes provide:

> In any civil action, special proceeding, or estate or trust proceeding, the court, upon motion of the *prevailing party*, may award a reasonable attorney's fee to the *prevailing party* if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading.

N.C. Gen. Stat. § 6-21.5 (2021) (emphasis supplied).

We need not address whether the trial court's order denying Defendant's attorney's fees motion should be vacated as an irregular judgment, because Defendant is not a prevailing party and fails to meet the express requirements of N.C. Gen. Stat. § 6-21.5. *Id.* Defendant's argument is overruled.

VII. Conclusion

Defendant failed to comply with the prior notice requirements when calendaring the hearing. *Everett*, 219 N.C. at 542, 14 S.E.2d at 521; N.C. Gen. Stat. § 1A-1 Rule 6(d); Tenth Jud. Dist. Loc. R. 3.2. The judgment entered upon Defendant's motion to dismiss for lack of personal jurisdiction was not properly noticed and is vacated.

Defendant moved for and calendared a hearing for its motions to dismiss for failure to state a claim under Rule 12(b)(6) and for attorney's fees, waiving any jurisdictional objections. Any objections to jurisdictional defects are waived when a party makes a general appearance or invokes and seeks a court's ruling on non-jurisdictional issues. *Farm Credit Bank*, 121 N.C. App. at 77, 464 S.E.2d at 308; *In re J.T.*, 363 N.C. at 4, 672 S.E.2d at 18. The trial court's conclusion it lacked personal jurisdiction over Defendant is also vacated.

Defendant is not a prevailing party under N.C. Gen. Stat. § 6-21.5. The trial court's denial of Defendant's attorney's fees is affirmed. *It is so ordered.*

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges CARPENTER and WOOD concur.

JRM, INC., PLAINTIFF
v.
THE HJH COMPANIES, INC. D/B/A THE SALT GROUP, THE HJH CONSULTING GROUP, INC. AND TODD G. SIZER, DEFENDANTS

No. COA22-537

Filed 7 February 2023

Appeal and Error—interlocutory order—substantial right—denial of motion to compel arbitration—no valid arbitration agreement

In a business contract dispute, where the trial court correctly concluded that defendant (a company that acted as an intermediary negotiator of cost savings) failed to demonstrate the existence of a valid arbitration agreement with plaintiff (an irrigation equipment company), defendant's appeal from the trial court's order denying its motion to compel arbitration was dismissed as interlocutory because there was no substantial right shown to warrant immediate review.

Judge DILLON concurring with separate opinion.

Appeal by defendant from judgment entered 21 January 2022 by Judge Susan E. Bray in Davidson County Superior Court. Heard in the Court of Appeals 11 January 2023.

Nelson Mullins Riley & Scarborough LLP, G. Gray Wilson and Lorin J. Lapidus, for the plaintiff-appellee.

Johnston Allison & Hord, PA, by Michael J. Hoefling and Kathleen D.B. Burchette, for the defendant-appellant.

TYSON, Judge.

JRM Inc. ("Plaintiff") sued HJH Co. and Todd G. Sizer after Plaintiff realized Sizer had acted without authority and signed a contract binding Plaintiff to HJH. HJH ("Defendant") moved for an order to compel arbitration. The trial court concluded HJH had failed to meet its burden to prove a valid arbitration agreement existed by mutual agreement of all parties. HJH appeals. We dismiss.

I. Background

Plaintiff manufactures, sells, and distributes irrigation equipment for golf courses and other turf covered surfaces. Plaintiff's office is located in Clemmons. HJH Companies is a Texas corporation doing business as the "The Salt Group." HJH's principal place of business is located in San Antonio, Texas.

HJH's business model centers on generating cost-savings for companies by negotiating lower rates and costs with third-party vendors. HJH then bills those companies for any purported savings. News reports revealed HJH had "overstat[ed] the amount of money clients owed the company so it could tap a line of credit with the bank." A consultant for HJH pled guilty in federal court to knowingly inflating and fabricating figures for unearned estimates of fees to be earned under contingent fee contracts.

During the sentencing hearing, the prosecutor argued the convicted consultant was "only following the orders of his boss," the owner of HJH. The trial court expressed its frustration with the situation, stating: 'This court is going to [ ] hav[e] to fashion an appropriate sentence . . . on the man who really is not the person who should be before the court. But, unfortunately, that's the person we have."

Before 2020, HJH had reached out to Plaintiff's officers on numerous occasions, attempting to convince Plaintiff to enter into an agreement for its purported cost-savings services. Plaintiff's officers repeatedly expressed no desire to contract with HJH, as Plaintiff has historically been able to secure efficient and reasonable agreements with vendors, and HJH's services were not needed.

Plaintiff hired Sizer in mid-October of 2020 as its Chief Financial Officer. Within a couple of weeks of hiring Sizer, he entered an agreement for cost-saving services with HJH on 3 November 2020. The purported agreement included a reference to arbitration agreement provisions included on HJH's website.

Plaintiff's President and Chief Executive Officer, James R. Merritt, submitted a sworn affidavit to the trial court. In the affidavit, Merritt stated only he and his wife, Jennifer B. Merritt, the secretary of JRM, were authorized to enter into or execute contracts on behalf of the company.

Sizer concealed the HJH agreement, and other unauthorized agreements, from Plaintiff's management. In the spring of 2021, Merritt learned of an unauthorized contract Plaintiff had entered into with a third party, who is not a litigant in this case. As a result, Plaintiff amended

the company's policy handbook on 22 March 2021, clarifying and listing only Merritt and his wife as having the authority to enter into binding contracts with third parties. Merritt also asked Sizer if he had signed any other contracts. Sizer responded he had not.

Sizer continued to contract with and pay HJH for alleged cost-saving services without authority and without Plaintiff's knowledge or consent. Sizer appeared to know he was unauthorized to contract with HJH, because he waited until HJH's accounts payable manager was out of the office to log into the company's accounting system, add HJH as a vendor, and to secretly pay HJH for alleged cost-savings services on 26 July 2021. Two days after this conduct, Sizer resigned from the company on 28 July 2021.

Sizer, however, continued to contract with HJH after he submitted his resignation. He signed an addendum to the HJH agreement on 11 August 2021, which purported to obligate Plaintiff to pay $92,298.55 to HJH for "merchant card services that had never been obtained." Plaintiff did not learn about this addendum until after Sizer had left the company. Additionally, Plaintiff received a $15,000 invoice from HJH on Sizer's last official day of employment, which Sizer promised to explain in an email, but never addressed.

Plaintiff subsequently sent Sizer a letter informing him they would withhold his final paycheck to partially mitigate their damages, and they informed him they planned to "continue to investigate [his] role in this matter, and reserve[d] the right to pursue all available civil and criminal remedies to the fullest extent of the law."

Plaintiff received numerous invoices, demand letters, and collection calls from HJH. These communications claimed Plaintiff owed HJH a principal amount of $108,798.55. The amount Plaintiff purportedly owed, however, significantly increased after Plaintiff's lawyers asserted claims against HJH. HJH's final demand letter expressed Plaintiff owed them $241,861.47 for both the principal and interest and threatened to force arbitration to be held in Texas.

According to Merritt, it "would impose an extreme hardship on [Plaintiff] to have to defend a meritless claim in [Texas]." Plaintiff brought several claims against HJH, including: declaratory relief regarding the validity and scope of the purported contracts, fraud, unfair and deceptive trade practices, illegal conspiracy, recission of the contract, and punitive damages on 22 October 2021. Plaintiff also alleged Sizer breached his fiduciary duty and committed constructive fraud.

HJH moved to dismiss Plaintiff's claims, or alternatively to compel arbitration and stay litigation, on 29 December 2021. Plaintiff served two affidavits in opposition to the motion. HJH filed an untimely affidavit in support of the motion.

A hearing on the motions was held on 10 January 2022. The trial court entered an order striking the affidavit of Tisha Petty ("Petty Affidavit"), who is the Senior Manager Account Services and Legal Liaison for HJH, and denied both of HJH's motions on 20 January 2022. HJH filed a notice of appeal on 7 February 2022.

II. Jurisdiction

HJH argues the amended order improperly denied its right to compel arbitration, and the trial court's order affects a substantial right and is immediately appealable. HJH also asserts the trial court erred in striking the Petty Affidavit, which supported its motion to compel arbitration.

III. Standard of Review

Precedents governing the review of the enforceability of arbitration clauses in contracts is well-established:

> Because the law of contracts governs the issue of whether there exists an agreement to arbitrate, *the party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes*. The trial court's determination of whether a dispute is subject to arbitration is a conclusion of law reviewable de novo.

T.M.C.S., Inc. v. Marco Contr'rs, Inc., 244 N.C. App. 330, 339, 780 S.E.2d 588, 595 (2015) (emphasis supplied) (citations, alterations, and internal quotation marks omitted).

IV. Analysis

Appellate jurisdiction is conferred by statute. This Court only possesses jurisdiction over the appeal of "any interlocutory order or judgment of a superior court or district court in a civil action or proceeding" if it "[a]ffects a substantial right." N.C. Gen. Stat. § 7A-27(b) (2021).

"This Court has repeatedly held 'an order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed.' " *Earl v. CGR Dev. Corp.*, 242 N.C. App. 20, 22, 773 S.E.2d 551, 553 (2015) (citations omitted).

While courts should not refuse to implement the terms of an arbitration agreement, if a valid agreement to arbitrate *exists*, a motion to compel arbitration is properly denied if a valid agreement to arbitrate *does not exist*. "If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate *unless it finds that there is no enforceable agreement to arbitrate*." N.C. Gen. Stat. § 1-569.7(a)(2) (2021) (emphasis supplied).

> The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. . . . The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary.

Slaughter v. Swicegood, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004) (quoting *Routh v. Snap–On Tools Corp.*, 108 N.C. App. 268, 271–72, 423 S.E.2d 791, 794 (1992), and *Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (2002)) (citations and internal quotation marks omitted).

For example, in *Evangelistic Outreach Ctr. v. General Steel Corp.*, this Court affirmed the trial court's denial of a motion to compel arbitration where the trial court resolved conflicts in the evidence regarding whether a valid arbitration agreement *existed*. 181 N.C. App. 723, 726-27, 640 S.E.2d 840, 843 (2007). There, the proponent of the alleged arbitration agreement submitted an unverified motion alleging a one-page purchase order, which noted the agreement was subject to the terms and conditions on its face and on the reverse side. *Id.* at 726, 640 S.E.2d at 843. The proponent submitted a copy of the reverse side, which contained an arbitration clause. *Id.* The proponent also submitted an affidavit from a Customer Service Manager alleging the manager faxed both sides of the agreement to the plaintiff. *Id.* To counter this evidence, the plaintiff submitted both a verified response to requests for admissions, in which plaintiff denied ever receiving the reverse side of the agreement, and an affidavit denying receipt of the second page or any document referencing arbitration. *Id.* at 727, 640 S.E.2d at 843. Plaintiff also denied entering into any contract including an arbitration clause. *Id.*

As our Court explained:

> The trial court denied defendant's motion in an order stating in relevant part that "[t]he Defendant has failed in its burden of proof to prove that there was an agreement between the parties to arbitrate." Thus, the trial court denied defendant's motion on the grounds that proof of the

> very *existence* of an arbitration agreement was lacking. We conclude that the evidence supports this conclusion.

Id.

Here, the trial court found and concluded HJH had "failed to meet its burden of proving that [a] valid arbitration agreement exist[ed] by mutual agreement of both parties" pursuant to N.C. Gen. Stat. § 1-569.7(a)(2) (2021). The trial court also concluded HJH "failed to meet its burden of showing clear and unmistakable proof that HJH and JRM agreed to delegate the threshold issue of arbitrability to an arbitrator." A trial court may properly deny a motion to compel arbitration if it determines evidence of the "very *existence* of an arbitration agreement [i]s lacking." *Evangelistic Outreach Ctr.*, 181 N.C. App. at 727, 640 S.E.2d at 843.

The trial court did not err as a matter of law by concluding HJH had failed to prove a valid arbitration agreement existed. *Id.* Plaintiff submitted two affidavits to support the assertion it never entered into a valid arbitration agreement with HJH. Defendant did not offer any evidence to support an agreement to arbitrate existed aside from the disputed agreement and the stricken Petty Affidavit. The trial court struck the Petty Affidavit from the record because HJH did not serve the Petty Affidavit with the motion to compel arbitration, nor was it served at least two days prior to the hearing. N.C. Gen. Stat. § 1A-1, Rule 6(d) (2021) ("When a motion is supported by affidavit, the affidavit shall be served with the motion; and except as otherwise provided in Rule 59(c), opposing affidavits shall be served at least two days before the hearing.").

This Court otherwise lacks jurisdiction to review the portion of the trial court's interlocutory order striking the Petty Affidavit. *See State v. Carver*, 2021-NCCOA-141, ¶23, 277 N.C. App. 89, 94, 857 S.E.2d 539, 543, *writ denied*, *review denied*, 379 N.C. 156, 863 S.E.2d 597 (2021). In *Carver*, this Court held it may not exercise pendant appellate jurisdiction over interlocutory orders that are not immediately appealable, and "if a trial court denies the State's motion to dismiss based on sovereign immunity—a ruling that is immediately appealable—the State ordinarily cannot appeal the denial of its motion to dismiss on other grounds, even if those other rulings are contained in the same order." *Id.*

Without the untimely Petty Affidavit, the trial court did not err as a matter of law by declining to conclude an agreement to arbitrate existed. *Evangelistic Outreach Ctr.*, 181 N.C. App. at 727, 640 S.E.2d at 843; *Gay*, 271 N.C. App. at 13-14, 842 S.E.2d at 643-44. The trial court's ruling denying the motion to compel arbitration in the absence of the existence of an arbitration agreement is affirmed.

If a valid agreement to arbitrate does not exist, Defendant has failed to show a substantial right is affected. This Court lacks jurisdiction to review the trial court's interlocutory order denying HJH's motion to compel arbitration. N.C. Gen. Stat. §§ 7A-27(b)(3)(a) and 1-569.7(a)(2); *Slaughter*, 162 N.C. App. at 461, 591 S.E.2d at 580. Defendant has not filed a petition for writ of certiorari. N.C. R. App. P. 21.

V. Conclusion

The trial court properly concluded HJH had failed to show Plaintiff and HJH entered into a valid agreement to arbitrate their disputes. *Evangelistic Outreach Ctr.*, 181 N.C. App. at 727, 640 S.E.2d at 843; *Gay*, 271 N.C. App. at 13-14, 842 S.E.2d at 643-44.

Without the existence of a valid arbitration agreement, no substantial right is shown to warrant immediate review. HJH's appeal is interlocutory. N.C. Gen. Stat. §§ 7A-27(b)(3)(a) and 1-569.7(a)(2); *Slaughter*, 162 N.C. App. at 461, 591 S.E.2d at 580.

This Court lacks appellate jurisdiction to assess the trial court's other findings contained in the order entered on 20 January 2022, and its purported appeal is dismissed. *See Carver*, ¶23, 277 N.C. App. at 94, 857 S.E.2d at 543. *It is so ordered.*

DISMISSED.

Judge HAMPSON concurs.

Judge DILLON concurs with separate opinion.

DILLON, Judge, writing separately.

I essentially agree with the analysis contained in the majority opinion except for the disposition to *dismiss* Defendants' appeal of the trial court's denial of their motion to compel arbitration. I believe the disposition should be to *affirm* the trial court order. That is, I conclude we do have jurisdiction to consider whether Defendants, in fact, have a substantial right which would be forever lost by the trial court's order.

By dismissing the appeal, the majority, in essence, concludes we do not have appellate jurisdiction to consider whether Defendants have a substantial right which would be forever lost by the trial court's interlocutory order. We should not reach the *merits* of Defendants' claim to that substantial right in answering the threshold jurisdictional

question. To do so would, in the words of the United States Supreme Court, "conflat[e] the jurisdictional question with the *merits* of the appeal." *Arthur Andersen v. Carlisle*, 556 U.S. 624, 628 (2009). As that Court instructs, "[j]urisdiction over the appeal[,] 'must be determined by focusing on the category of order appealed from, rather than upon the strength of the grounds for reversing the order.' " *Id.* (quoting *Behrens v. Pelletier*, 516 U.S. 299, 311 (1996)).

Here, the interlocutory order being appealed by Defendants falls within the category of interlocutory orders over which we have jurisdiction to review immediately: an order which denies litigants their motion to compel arbitration.

The fact that we all ultimately conclude there is no strength in Defendants' grounds for reversing the trial court's interlocutory order should not affect whether we have appellate jurisdiction to evaluate those grounds. *See Arthur Andersen*, 556 U.S. at 629 ("It is more appropriate to grapple with [the] merits question after the court has accepted jurisdiction over the case."). *See also Neusoft Med. v. Neuisys*, 242 N.C. App. 102, 774 S.E.2d 851 (2015) (arbitration matter); *Meherrin v. Lewis*, 197 N.C. App. 380, 385, 86, 677 S.E.2d 203, 207-08 (2009) (*affirming* trial court's order denying dismissal based on sovereign immunity, concluding appellate jurisdiction existed to consider defendant's claim to sovereign immunity as a member of an Indian tribe, but determining on the merits that the defendant, in fact, did not belong to a recognized tribe and therefore did not have sovereign immunity).

I am aware that parties may assert frivolous claims to some substantial right to put an ongoing case on hold. But an appellant who makes a frivolous assertion of a substantial right for an improper purpose (*e.g.*, delay) does so at the risk of being sanctioned by this Court. *See* N.C. R. App. P. 34. *See also Arthur Andersen*, 556 U.S. at 629 (addressing concern that recognizing appellate jurisdiction might result in frivolous appeals by stating that those bringing such appeals subject themselves to sanctions).

In any event, my disagreement with the majority is essentially over a distinction without a difference, as the majority in its opinion also resolves the key issue on appeal; namely, whether the trial court correctly determined that Defendants have no right to arbitrate.

STATE OF NORTH CAROLINA
v.
DARYL SPENCER SCOTT

No. COA22-326

Filed 7 February 2023

1. Search and Seizure—traffic stop—frisk—reasonable suspicion —possession of a firearm by a felon

In a prosecution for possession of a firearm by a felon, the trial court properly denied defendant's motion to suppress evidence of a pistol that a police officer had seized from defendant's vehicle after frisking both defendant and the vehicle (during a lawful traffic stop). The totality of the circumstances showed that the officer had a reasonable suspicion to perform the frisk where the officer: observed defendant visiting a high-crime area and interacting with a known drug dealer; received caution data showing that defendant was a validated gang member who had previously been charged with murder; was aware of an active gang war in the area; and, based on his training and experience, knew that suspects involved in drug and gang activity were likely to be armed and dangerous.

2. Appeal and Error—preservation of issues—motion to suppress —argument not raised at suppression hearing or trial—waiver

In a prosecution for possession of a firearm by a felon, where defendant moved to suppress evidence of a pistol that law enforcement had seized while searching his vehicle, defendant did not argue at the suppression hearing or at trial that the duration of the initial traffic stop leading up to the seizure had been unlawfully extended; therefore, he failed to preserve this argument for appellate review.

3. Sentencing—prior record level—point for committing crime while on parole—notice—waiver—colloquy under the Blakely Act

In a prosecution for possession of a firearm by a felon, the trial court did not err in calculating defendant's prior record level for sentencing purposes where it added a point under N.C.G.S. § 15A-1340.14(b)(7) for committing a crime while defendant was on "probation, parole, or post-release supervision." Although the State failed to provide written notice of its intent to prove the prior record level point as required under subsection (b)(7), defendant waived the written notice requirement where his defense counsel affirmed in open court that he had received notice and then signed

the sentencing worksheet indicating that defendant had committed a crime while on parole. Further, the trial court was not required to conduct a colloquy under the Blakely Act (to confirm that defendant waived notice) because defendant did not object when defense counsel stipulated to the addition of the sentencing point (by signing the sentencing worksheet).

Appeal by Defendant from a judgment entered 21 September 2021 by Judge William W. Bland in New Hanover County Superior Court. Heard in the Court of Appeals 21 September 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General T. Hill Davis, III, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for Defendant.

WOOD, Judge.

Defendant appeals from a conviction of possessing a firearm as a felon alleging the trial court erred when it denied his motion to suppress evidence of a firearm found during a search he contends was unconstitutional and increased his prior record level at sentencing. We disagree.

I. Background

Wilmington Police Officer Pagan was surveilling the parking lot of Sam's Minimart in Wilmington on 14 February 2020. The parking lot was located in an area of the city where drug sales and shootings were not uncommon. He observed Defendant's Honda Accord park on the lot next to a silver sedan whose owner Officer Pagan knew had a history of drug dealing. Defendant and a passenger exited the Honda and approached the silver sedan. Shortly thereafter, Defendant and his passenger returned to the Honda and drove away. Officer Pagan followed them a short distance in his patrol car and noticed the Honda's license plate appeared expired. He then activated the blue lights on his patrol car to conduct a traffic stop of Defendant's vehicle. Defendant promptly pulled over.

Officer Pagan approached Defendant and informed him that he was stopped because of the expired license plate. Defendant did not appear nervous and responded that the registration should not be expired. Upon request, Defendant produced his driver's license but was unable to locate the car's registration. Officer Pagan returned to his patrol vehicle

with Defendant's license where he learned from his car's computer system that Defendant was designated as a "validated gang member" and had previously been charged with murder. Relevant to this case, Officer Pagan was aware of a local gang war between two prominent gangs at the time. Officer Pagan retrieved a clip board from his trunk and briefed an arriving officer of the situation before re-approaching Defendant.

Upon returning to Defendant's vehicle, Officer Pagan asked Defendant to step out of the vehicle so that he could perform a weapons frisk. Defendant complied, and Officer Pagan frisked him at the rear of the Honda. Officer Pagan did not find a weapon on Defendant's person. He then asked the three passengers to exit the vehicle as backup officers arrived. After Officer Pagan performed a non-intrusive pat down of Defendant, Defendant informed him that a pocketknife was present in the front, driver-side door compartment. With this information, Officer Pagan returned to the vehicle to retrieve the pocketknife, and Defendant asked Officer Pagan if he would retrieve Defendant's phone near the center console. Officer Pagan obliged Defendant and found an open beer can in the center console. He then rummaged through the front, driver-side door compartment but did not initially find a pocketknife, so he next peered under the driver's seat where he discovered a pistol.

After securing the pistol, Officer Pagan ordered Defendant and all passengers be detained and placed in handcuffs. A further search of the passenger compartment revealed a scale and bags consistent with heroin paraphernalia. On 24 August 2020, Defendant was indicted for possessing a firearm as a felon in violation of N.C. Gen. Stat. § 14-415.1 (2021) and possessing drug paraphernalia in violation of N.C. Gen. Stat. § 90-113.22(A) (2021).

On 21 September 2021, in a pretrial motion, Defendant moved to suppress evidence of the firearm. Defendant argued that Officer Pagan's frisk of Defendant's vehicle was constitutionally impermissible and therefore produced unlawfully acquired evidence. Defendant did not argue that the traffic stop was impermissibly extended beyond the scope of Officer Pagan's original mission. The trial court denied Defendant's motion.

During his trial, which took place on 23 September 2021, Defendant generally objected to the evidence obtained during the frisk of his vehicle, specifically the firearm. The trial court overruled Defendant's objection. On the same day, the jury found Defendant guilty of possession of a firearm by a felon and not guilty of possession of drug paraphernalia.

During the sentencing hearing, the trial court calculated Defendant's sentence by using a prior record level worksheet for structured sentencing.

The worksheet listed a subtotal of nine points from the prior crimes of second-degree murder and three misdemeanor convictions. The court then added one point for committing a crime "while the offender was on probation, parole, or post-release supervision." Thus, Defendant's prior record points totaled ten points, and he was sentenced as a prior record level IV offender. Absent the additional point, Defendant would have been sentenced as a prior record level III offender.

The trial court sentenced Defendant to an active term of a minimum of nineteen and a maximum of thirty-two months imprisonment.

Defendant appeals as of right pursuant to N.C. Gen. Stat. § 15A-1444(a) (2021). He contests the trial court's denial of his motion to suppress evidence and contends he did not receive notice of the additional point for committing a crime while on probation, parole, or post-release supervision and was, therefore, sentenced improperly.

II. Standard of Review

We review the denial of a motion to suppress to determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)). We review conclusions of law *de novo*. *State v. Johnson*, 225 N.C. App. 440, 443-44 (2013). "Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009) (citations omitted).

We review "[t]he determination of an offender's prior record level [as] a conclusion of law that is subject to *de novo* review on appeal." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citing *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007)).

III. Discussion

A. Evidence Suppression

Defendant first alleges error with the trial court's denial of his motion to suppress evidence of the firearm. Defendant argues that the evidence should have been suppressed because it was obtained in violation of Defendant's right to be free from an unreasonable search and seizure and challenges the trial court's conclusion of law holding otherwise. Specifically, Defendant argues that Officer Pagan improperly frisked Defendant and his vehicle and impermissibly extended the duration of the traffic stop. We are not persuaded.

During the motion to suppress, the trial court concluded:

> But up to that point of seeing the firearm under the driver's seat in which the defendant had been driving, the court does not find any constitutional violation of the defendant's rights. The officer has conducted a legitimate stop and taken appropriate actions for his safety and for the safety of the defendant as well as the passengers in the defendant's vehicle; and therefore the motion to suppress is respectfully denied.

We review this conclusion of law *de novo* to determine if Officer Pagan overstepped his constitutional limits.

The State may not unreasonably seize or search people. N.C. Const. art. I, § 20; U.S. Const. amend. IV. If it does, evidence obtained from that illegal conduct must be suppressed at trial. *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992). "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *State v. Fizovic*, 240 N.C. App. 448, 452, 770 S.E.2d 717, 720 (2015) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L. Ed. 2d 576, 585 (1967)).

Defendant concedes, and we agree, that Officer Pagan's initial traffic stop was proper. "[A] traffic stop is considered a 'seizure' " for our purposes. *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012). Officer Pagan observed Defendant's vehicle bearing an expired license plate, and we have held that this observation alone supports a seizure. *State v. Edwards*, 164 N.C. App. 130, 136, 595 S.E.2d 213, 218 (2004). We therefore next evaluate Defendant's claims that the frisk and time extension were unjustified and, therefore, unconstitutional.

1. Weapons Frisk

[1] If, during a lawful stop, an officer "reasonably believes that the person is armed and dangerous, the officer may frisk the person to discover a weapon or weapons." *State v. Pearson*, 348 N.C. 272, 275, 498 S.E.2d 599, 600 (1998) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). An officer may also frisk a vehicle to include even the passenger compartment and other such places where a "suspect may gain immediate control of weapons" but "limited to those areas in which a weapon may be placed or hidden." *State v. Johnson*, 378 N.C. 236, 2021-NCSC-85, ¶ 16 (quoting *Michigan v. Long*, 463 U.S. 1032, 1049, 103

S. Ct. 3469, 3481, 77 L. Ed. 2d 1201, 1220 (1983)). This is a limited search and may only be justified if "the officer develops a reasonable suspicion that the suspect of the traffic stop is armed and dangerous." *Id.* The "legitimate and weighty interest in officer safety" supports this intrusion. *State v. Johnson*, 246 N.C. App. 677, 692, 783 S.E.2d 753, 764 (2016) (quotation marks omitted) (quoting *Arizona v. Johnson*, 555 U.S. 323, 331, 129 S. Ct. 781, 786, 172 L. Ed. 2d 694, 702 (2009)). The necessary standard of "[r]easonable suspicion demands more than a mere 'hunch' on the part of the officer but requires 'less than probable cause and considerably less than preponderance of the evidence.' " *State v. Johnson*, 378 N.C. 236, 2021-NCSC-85, ¶ 16 (quoting *State v. Williams*, 366 N.C. 110, 117, 726 S.E.2d 161, 167 (2012)). It "requires only 'some minimal level of objective justification,' and arises from 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion." *Id.* (first quoting *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008); and then quoting *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906). "The crucial inquiry is 'whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.' " *State v. Johnson*, 246 N.C. App. 677, 693, 783 S.E.2d 753, 764-65 (2016) (quoting *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883, 20 L. Ed. 2d at 909). Officers are therefore "entitled to formulate 'common-sense conclusions' about 'the modes or patterns of operation of certain kinds of lawbreakers.' " *State v. Butler*, 331 N.C. 227, 234, 415 S.E.2d 719, 723 (1992) (quoting *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621, 629 (1981)). "A court ' "must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion" exists.' " *State v. Otto*, 366 N.C. 134, 138, 726 S.E.2d 824, 828 (2012) (quoting *Styles*, 362 N.C. at 414, 665 S.E.2d at 440).

Here, Officer Pagan observed Defendant visit a parking lot noted for its drug sales and shootings, and while there, Defendant exited his vehicle and briefly approached the vehicle of a known drug dealer. After Defendant was stopped, Officer Pagan received caution data notifying him Defendant was a validated gang member and had previously been charged with murder. Officer Pagan was aware that two local gangs were involved in a gang war, and in his experience, suspects involved with drug and gang activity may be armed and dangerous.

Each of these factors, standing alone, might not be sufficient to justify a weapons frisk. *See State v. Jackson*, 368 N.C. 75, 80, 772 S.E.2d 847, 850 (2015) (stating that defendant's presence in a high-crime area alone is not sufficient), *State v. Johnson*, 378 N.C. 236, 2021-NCSC-85, ¶ 18 n.2

(expressing hesitancy to use a suspect's prior criminal record as a factor except in specific circumstances), *State v. Butler*, 331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992) (stating that officer's experience and defendant's presence around suspected drug dealers are not, on their own, sufficient). However, "[w]e examine the totality of the circumstances surrounding Officer [Pagan]'s interaction with [D]efendant in order to achieve a comprehensive analysis as to whether the officer's conclusion that [D]efendant may have been armed and dangerous was reasonable." *State v. Johnson*, 378 N.C. 236, 2021-NCSC-85, ¶ 18.

For example, our Supreme Court held in *State v. Butler* that the following factors, when taken together, were sufficient to justify a weapons frisk:

> 1) defendant was seen in the midst of a group of people congregated on a corner known as a "drug hole"; 2) [Officer] Hedges had had the corner under daily surveillance for several months; 3) Hedges knew this corner to be a center of drug activity because he had made four to six drug-related arrests there in the past six months; 4) Hedges was aware of other arrests there as well; 5) defendant was a stranger to the officers; 6) upon making eye contact with the uniformed officers, defendant immediately moved away, behavior that is evidence of flight; and 7) it was Hedges' experience that people involved in drug traffic[king] are often armed.

331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992).

In the present case, similar factors are present: 1) Defendant's presence in a high-crime area; 2) Defendant's interaction with a known drug dealer; 3) caution data revealing Defendant's prior charge of murder and gang involvement; 4) Officer Pagan's awareness of an active gang war; and 5) Officer Pagan's own training and experiences. Though Defendant did not exhibit "evidence of flight" as in *Butler*, we hold that the additional factors of Defendant's status as a validated gang member and Officer Pagan's awareness of an active, local gang war are more than sufficient to cause an officer to reasonably suspect the individual is armed and dangerous. This suspicion permitted Officer Pagan to search both Defendant and his vehicle for weapons before continuing with the purpose of the stop. We, therefore, agree with the trial court's ruling and hold that Officer Pagan did not overstep his constitutional bounds when he frisked Defendant and Defendant's vehicle.

2. Extension of Stop

[2] Defendant next argues that evidence of the firearm should have been suppressed because the stop was unlawfully extended beyond the scope of its purpose. *See Rodriguez v. United States*, 575 U.S. 348, 354, 135 S. Ct. 1609, 1614, 191 L. Ed. 2d 492, 498 (2015). We note, however, that Defendant did not present this argument at the suppression hearing or during trial. Instead, Defendant relied upon the above weapons frisk theory to support his suppression motion.

"[A] criminal defendant is not entitled to advance a particular theory in the course of challenging the denial of a suppression motion on appeal when the same theory was not advanced in the court below." *State v. Hernandez*, 227 N.C. App. 601, 608, 742 S.E.2d 825, 829 (2013). Such "argument is deemed waived on appeal." *State ex rel. Boggs v. Davis*, 207 N.C. App. 359, 363, 700 S.E.2d 85, 88 (2010) (citing *State v. Augustine*, 359 N.C. 709, 721, 616 S.E.2d 515, 525 (2005)).

Because Defendant did not raise this argument in the trial court below, it has been waived.

B. Sentencing

[3] Defendant next argues that he did not receive proper notice of the State's intent to prove the tenth prior record point and that the trial court did not properly inquire into whether notice was given or otherwise waived. As with the preceding argument, Defendant did not object to this alleged error with the trial court. However, "[i]t is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citing *State v. Morgan*, 164 N.C. App. 298, 304, 595 S.E.2d 804, 809 (2004)). We therefore review this alleged error *de novo*. *Id.*

Under North Carolina's structured sentencing guidelines, a trial court may assign prior record points to a defendant if the defendant was previously convicted of certain crimes and if the defendant committed the relevant crime while on probation, parole, or post-release supervision. N.C. Gen. Stat. § 15A-1340.14(b) (2021). The sum of these points total the prior record level to be used in calculating the severity of a sentence. § 15A-1340.14(c). Among the list of possible point assignments stands subsection (b)(7):

> If the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-

> release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment, 1 point.

§ 15A-1340.14(b)(7). Subsection (b)(7) is unique in that, unlike with other point assignments, "[t]he State must provide a defendant with written notice of its intent to prove the existence of . . . a prior record level point under . . . (b)(7) at least 30 days before trial." § 15A-1340.16(a6). However, "[a] defendant may waive the right to receive such notice." *Id.* In either case, "[t]he court shall . . . determine whether the State has provided the notice to the defendant . . . or whether the defendant has waived his or her right to such notice." § 15A-1022.1(a). The court is required to follow this and other procedures outlined in Section 15A-1022.1 "unless the context clearly indicates that they are inappropriate." § 15A-1022.1(e).

In the present case, before signing the worksheet, the trial court asked whether the State gave Defendant proper notice of its intent to seek the additional point of committing a crime while on probation, parole, or post-release supervision.

> [PROSECUTOR]: Your Honor, these convictions began back in 2002 running all the way up to his second-degree murder conviction in 2009 for which he was on parole at the time of this offense, and we have indicated that by adding the proper point in the prior sentencing worksheet.
>
> THE COURT: Had notice been given of that?
>
> [PROSECUTOR]: Yes, sir. We had discussed that.
>
> [DEFENSE COUNSEL]: Yes, Judge.
>
> THE COURT: Okay.

And again, the trial court asked,

> THE COURT: Please. Have you -- you had a chance, [defense counsel], to look at this?
>
> [DEFENSE COUNSEL]: I have, your Honor.
>
> THE COURT: Do you agree that the worksheet is an accurate representation of his prior record?
>
> [DEFENSE COUNSEL]: I do, Judge.

Finally, the Court addressed the point specifically to confirm with both the Defendant and Defendant's counsel as to whether they were

informed of the extra point and that it increased the Defendant from 9 to 10 points (resulting in a Level IV rather than Level III).

> THE COURT: I do see this point is the point that takes it from 9 to 10, that this offense was committed while on probation, parole, or post-release supervision. Any—you have anything to say regarding that point?
>
> [DEFENSE COUNSEL]: Not regarding that particular point, Judge.

After these inquiries, the court found that "the State and the defendant have stipulated in open court to the prior convictions, points, and record level." Both the prosecutor's and defense counsel's signatures appear on the worksheet under the "Stipulation" heading.

1. Notice Requirement

We first look to whether the State provided Defendant with written notice of its intent to prove the prior record point of committing an offense while "on probation, parole, or post-release supervision" as required by Section 15A-1340.16(a6).[1] We note the presence of a prior record level worksheet in the record that defense counsel might have received as part of discovery, and a review of the transcript during sentencing shows defense counsel was familiar with the worksheet; however, there is no certificate of service within the file to allow us to conclude written notice was given to Defendant. The worksheet lists point assignments for Defendant's prior convictions, an additional point assignment for committing a crime while "on probation, parole, or post-release supervision," and a prior record level IV calculation. Moreover, defense counsel's signature appears alongside the prosecutor's signature under the heading "Stipulation" which states, "The prosecutor and defense counsel . . . stipulate to the information set out in Sections I [scoring] and V [prior convictions] of this form and agree with the defendant's prior record level . . . ." However, this court has held that merely providing a defendant with a proposed prior record level worksheet during discovery is not sufficient to effectuate the written notice requirement of Section 15A-1340.16(a6). *State v. Crook*, 247 N.C. App. 784, 797, 785 S.E.2d 771, 780 (2016). In the absence of any other writing, then, we must conclude the State failed to deliver proper written notice to Defendant.

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1. This is a separate inquiry from determining if the State actually *proved* Defendant's prior record level by stipulation or other means. *See* N.C. Gen. Stat. § 15A-1340.14(f) (2021); *State v. Briggs*, 249 N.C. App. 95, 99, 790 S.E.2d 671, 674 (2016).

Therefore, we next look to whether Defendant waived his right to notice. To determine this, we look at the inquiry and responses made at the sentencing hearing. The circumstances in this case are similar to those in *State v. Wright*, 265 N.C. App. 354, 357-58, 826 S.E.2d 833, 836 (2019). In *Wright*, "the trial court inquired about the notice of the State's intent to prove the aggravating factor, and [defense] counsel responded that he was 'provided the proper notice' and had 'seen the appropriate documents.' " *Wright*, 265 N.C. App. at 360, 826 S.E.2d at 837. The trial court also asked the defendant directly if he wished to "waive the right to have the jury determine the aggravating factor and . . . stipulate to the aggravating factor?" to which the defendant replied, "Yes, sir." *Id.* The defendant's and his counsel's affirmations constituted a sufficient waiver of notice. This Court reasoned that the "defendant's knowing and intelligent waiver of a jury trial on the aggravating factor under the circumstances necessarily included waiver of the thirty day advance notice of the State's intent to use the aggravating factor." *Id.* at 361, 826 S.E.2d at 838. "Even though the State had not technically given 'proper notice' because the additional file numbers were added to the notice only twenty days before trial instead of thirty days, defendant and his counsel had sufficient information to give an 'intentional relinquishment of a known right.' " *Id.* (quoting *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 336, 777 S.E.2d 272, 279 (2015)).

In the present case, Defendant's counsel stated affirmatively that he had received notice of the State's intent to assess the sentencing point, which was confirmed by the attorney for the State. When asked by the trial court if the State provided notice of its intent to prove Defendant was on parole at the time of the offense, the prosecutor stated, "Yes, sir. We had discussed that," and defense counsel responded, "Yes, Judge." Though the trial court did not question Defendant directly about his intent to waive notice, as in *Wright*, we hold that defense counsel's stipulation and affirmation on behalf of his client was sufficient to constitute waiver of the notice requirement.

Moreover, Defendant's counsel affirmed that Defendant was on parole at the time of the commission of the present crime and signed the sentencing worksheet which indicated that the Defendant was on parole. Furthermore, the second-degree murder conviction that was the basis for Defendant's conviction for a felon in possession of a firearm was the basis of this sentencing point. This conviction was stipulated to by Defendant at trial, and the judgment in that case was introduced as State's Exhibit 7 at trial. This conviction was also referenced in Defendant's indictment in this case.

2. Court Inquiry

Finally, we consider whether the trial court performed its procedural duties under Section 15A-1022.1, the Blakely Act. This statute requires the court to "determine whether the State . . . provided the notice to the defendant required by G.S. 15A-1340.16(a6) or whether the defendant . . . waived his or her right to such notice." § 15A-1022.1(a). When a defendant admits to a prior record finding for the offense of committing a crime while on probation, parole, or post-release supervision, the trial court must also perform a mandatory colloquy with

> the defendant personally and advise the defendant that:
>
> (1) He or she is entitled to have a jury determine the existence of any aggravating factors or points under G.S. 15A-1340.14(b)(7); and
>
> (2) He or she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.

§ 15A-1022.1(b). Further, it must "determine that there is a factual basis for the admission, and that the admission is the result of an informed choice by the defendant." § 15A-1022.1(c). These procedures may be ignored, however, if "the context clearly indicates that they are inappropriate." § 15A-1022.1(e).

Exploring the context necessary to cast aside the requirements of Section 15A-1022.1, this Court held in *State v. Marlow* that certain "circumstances under which defendant's prior record was stipulated" were sufficient to fall within this exception. 229 N.C. App. 593, 602, 747 S.E.2d 741, 748, (2013).

> After asking defense counsel if they had a chance to review the prior record level and have a discussion with defendant, defense counsel responded "[h]e did [stipulate], yes, sir." Defense counsel had the opportunity to inform defendant of the repercussions of conceding certain prior offenses and defendant had the opportunity to interject had he not known such repercussions. Yet, even after being informed, defendant neither objected to nor hesitated when asked about such convictions. With such a routine determination as to whether defendant was convicted of possession of drug paraphernalia while on

> probation for another offense, we see no reason to have engaged in an extensive colloquy with defendant.

Id.

Here, we likewise hold that the court's interaction with defense counsel amounted to the same "routine determination." Defense counsel affirmed he had seen the prior record level worksheet and that it was "an accurate representation of his prior record." Defendant, through his counsel, stipulated to the addition of the prior record point as evidenced by defense counsel's signature. As in *Marlow*, defense counsel "had the opportunity to inform defendant of the repercussions of conceding certain prior offenses and defendant had the opportunity to interject had he not known such repercussions" and did not object to the point at sentencing. *Id.* Therefore, the trial court was not required to follow the precise procedures prescribed in N.C. Gen. Stat. § 15A-1022.1 (2021), as defendant acknowledged his status and violation by arrest in open court.

IV. Conclusion

Evidence of the firearm was properly obtained such that the trial court did not err by denying Defendant's motion to suppress. Though the State did not provide written notice of its intent to prove a unique prior record point, Defendant waived such notice, and the trial court was not required to perform a colloquy under the Blakely Act. N.C. Gen. Stat. § 15A-1022.1 (2021). We find no error in the jury's verdict or the judgment entered by the trial court.

NO ERROR.

Judges TYSON and CARPENTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 FEBRUARY 2023)

AZEVEDO v. ONSLOW CNTY. DEP'T OF SOC. SERVS. No. 22-376	Onslow (19JRI2)	Affirmed.
CARPENTER v. N.C. DEP'T OF HEALTH & HUM. SERVS. No. 22-170	N.C. Industrial Commission (TA-28759)	Affirmed
DENTON v. BAUMOHL No. 22-500	Buncombe (19CVD2859)	Affirmed
GROOMS v. GROOMS No. 22-536	Wake (21CVD3464)	Dismissed
IN RE E.D.S. No. 22-507	Henderson (11JT109) (11JT110) (11JT140)	Dismissed
IN RE L.L.J. No. 22-386	Mecklenburg (16JT333)	Affirmed
IN RE S.N.B. No. 22-405	Craven (17JT135)	Vacated and Remanded
IN RE T.H. No. 22-452	Durham (17JT207) (17JT208) (17JT209)	Affirmed
IN RE T.M.R. No. 22-367	Yancey (13JT36) (19JT19) (19JT20)	Affirmed
JORDAN CONSULTANTS, ASLA, P.A. v. TRINITY CONSULTING & DEV., LLC No. 22-458	Guilford (20CVD6667)	Dismissed
KNECHTGES v. N.C. DEP'T OF PUB. SAFETY No. 22-213	Office of Admin. Hearings (20OSP02124)	Affirmed
LIRA v. FELTON No. 22-666	Harnett (21CVS1883)	Affirmed.

STATE v. ADAMS No. 22-315	Mecklenburg (17CRS15693) (17CRS15695)	Denied in part and affirmed in part.
STATE v. BASKINS No. 22-264	Guilford (14CRS88609)	No Prejudicial Error.
STATE v. DOUGLAS No. 22-528	Mecklenburg (19CRS225438-40) (19CRS225442-43) (19CRS225449)	No Error
STATE v. FLOWERS No. 22-534	Forsyth (20CRS2003) (20CRS60137)	No Error
STATE v. GARY No. 22-232	Lee (21CRS206)	Affirmed.
STATE v. LIVELY No. 22-575	Henderson (17CRS731)	No Error
STATE v. MARTIN No. 22-428	Caswell (15CRS465-468) (15CRS50340)	No Error
STATE v. MINTON No. 22-306	Catawba (17CRS55200) (17CRS55201)	No Error
STATE v. REAVIS No. 22-556	Davie (20CRS50412-13) (20CRS50574) (19CVD2859)	Vacated and Remanded
STATE v. RUFF No. 22-485	Polk (19CRS62)	No Error
STATE v. SMITH No. 20-692	Durham (18CRS1769) (18CRS52421)	Vacated and Remanded.
WATER DAMAGE EXPERTS OF HILLSBOROUGH, LLC v. MILLER No. 22-270	New Hanover (19CVS2724)	Affirmed
WILLIS v. N.C. DEP'T OF STATE TREASURER No. 22-373	Chowan (21CVS1)	Affirmed