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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

OCTOBER 12, 2023

MAILING ADDRESS: The Judicial Department
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OF
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[1] Resigned 31 December 2022. [2] Term ended 31 December 2022. [3] Term ended 31 December 2022.
[4] Sworn in 1 January 2023. [5] Sworn in 1 January 2023. [6] Sworn in 1 January 2023. [7] Died 23 May 2023.

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[11] Appointed 13 January 2023.

COURT OF APPEALS

CASES REPORTED

FILED 4 APRIL 2023

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

Interlocutory order—divorce case—post-separation support—certiorari allowed—In an action for absolute divorce, the Court of Appeals granted an ex-husband's petition for a writ of certiorari to review an order granting post-separation support to his ex-wife. Although the order was interlocutory and not otherwise appealable (the trial court did not certify the order under Civil Procedure Rule 54(b), and post-separation support orders do not affect a substantial right), appellate courts have discretion to issue writs of certiorari where no right of appeal from an interlocutory order exists and where doing so would serve the administration of justice. **Brosnan v. Cramer, 202.**

Interlocutory order—substantial right—res judicata defense—lack of specific assertions—In a negligence action brought against the owners of an assisted living center (defendants) by the estate of a patient who fell multiple times during her two-week stay, the appellate court determined that it had no jurisdiction to hear defendants' appeal from the trial court's order denying defendants' motion to dismiss (which defendants based on collateral estoppel and res judicata principles after a federal court granted defendants' motion for summary judgment in a prior suit involving the same facts). Since the trial court's order was interlocutory, defendants had the burden of showing that the order was immediately appealable as affecting a substantial right, but they failed to do so by not including in their opening brief—as part of the statement of grounds for appellate review—an explanation of how the challenged order would either create a risk of inconsistent verdicts or otherwise affect a substantial right on the particular facts of the case. **Bartels v. Franklin Operations, LLC, 193.**

modified without manufacturer approval—without the support necessary to prevent a crushing-type accident, decedent's estate (plaintiff) alleged facts sufficient to establish an exception to the Industrial Commission's exclusive jurisdiction over plaintiff's claims against decedent's employer (defendant). Plaintiff alleged that the employer intentionally engaged in conduct knowing it was substantially certain to cause serious injury or death to decedent, who did not have the proper experience, training, or safety equipment to perform the work that caused his death. **Est. of Stephens v. ADP TotalSource DE IV, Inc., 208.**

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.

BARTELS v. FRANKLIN OPERATIONS, LLC

[288 N.C. App. 193 (2023)]

EDWARD BARTELS, ADMINISTRATOR OF THE ESTATE OF JEANNE ELLEN BARTELS, PLAINTIFF
v.
FRANKLIN OPERATIONS, LLC D/B/A FRANKLIN MANOR ASSISTED LIVING CENTER, SABER HEALTHCARE GROUP, LLC, AND KIMBERLY RICHARDSON, DEFENDANTS

No. COA22-746

Filed 4 April 2023

Appeal and Error—interlocutory order—substantial right—res judicata defense—lack of specific assertions

In a negligence action brought against the owners of an assisted living center (defendants) by the estate of a patient who fell multiple times during her two-week stay, the appellate court determined that it had no jurisdiction to hear defendants' appeal from the trial court's order denying defendants' motion to dismiss (which defendants based on collateral estoppel and res judicata principles after a federal court granted defendants' motion for summary judgment in a prior suit involving the same facts). Since the trial court's order was interlocutory, defendants had the burden of showing that the order was immediately appealable as affecting a substantial right, but they failed to do so by not including in their opening brief—as part of the statement of grounds for appellate review—an explanation of how the challenged order would either create a risk of inconsistent verdicts or otherwise affect a substantial right on the particular facts of the case.

Interlocutory appeal by defendants from order entered 25 April 2022 by Judge Vince M. Rozier, Jr. in Wake County Superior Court. Heard in the Court of Appeals 21 February 2023.

Gugenheim Law Offices, P.C., by Stephen J. Gugenheim, for plaintiff-appellee.

Parker Poe Adams & Bernstein LLP, by Scott E. Bayzle and Daniel E. Peterson, for defendant-appellant.

FLOOD, Judge.

Defendants argue the trial court erred in denying their motion for summary judgment on *res judicata* and collateral estoppel grounds. As we explain in further detail below, we lack appellate jurisdiction to hear Defendants' interlocutory appeal.

I. Facts and Procedural Background

Defendant Franklin Operations, LLC ("Franklin Operations") is a Virginia corporation with a principal place of business in Franklin County, North Carolina, and that does business in North Carolina as the licensed owner and operator of an adult care home known as Franklin Manor Assisted Living Center (Defendant "Franklin Manor"). Defendant Saber Healthcare Group, LLC ("Saber") is an Ohio corporation that does business in North Carolina as the manager of Franklin Manor. Defendant Kimberly Richardson ("Richardson") was Executive Director of Franklin Manor and, allegedly, a joint employee of Saber.[1]

From 28 October 2015 to 13 November 2015, Jeanne Ellen Bartels ("Ms. Bartels") was a resident of the Alzheimer's Dementia special care unit at Franklin Manor. During her approximately two weeks at Franklin Manor, Ms. Bartels suffered three falls: one on 4 November, one on 6 November, and one on 13 November. Ms. Bartels died within two years after her discharge from Franklin Manor. Plaintiff is the administrator of Ms. Bartels' estate.

A. The Federal Action

On 24 May 2016, Ms. Bartels and two others[2] filed a Class Action Complaint against Franklin Manor, Saber, and others,[3] in Franklin County Superior Court, alleging they had entered into an "Assisted Living Residency Agreement" (the "Agreement") with the defendants. The plaintiffs sought relief for, *inter alia*, breach-of-contract, and alleged the defendants violated the Agreement by failing "to comply with their contractual obligations to provide services to meet the safety, good grooming and well-being needs of the [p]laintiffs and Class Members." The plaintiffs contended the defendants' contractual obligations included "assistance with walking, toileting, housekeeping, grooming, eating, delivering medications, and overall supervision to ensure that the residents remain safe[,]" and Franklin Manor was staffed "in such a manner that they were unable to provide the [required] services."

The case was removed to the United States District Court for the Eastern District of North Carolina. On 21 October 2020, the federal court

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1. This group is collectively referred to as "Defendants."

2. Plaintiff and Class Members in the trial level contract suit will be referred to as "the plaintiffs."

3. Defendants in the trial level contract suit and federal contract suit will be referred to as "the defendants."

denied the plaintiffs' motion for class certification, and the case proceeded on the individual claims of Plaintiff and his co-plaintiffs. That case was litigated in federal court for more than five years. As part of discovery, the defendants provided the expert report of Dr. James S. Parson, who reviewed records concerning Ms. Bartels' medical records and the care she received at Franklin Manor. The defendants also provided the expert report of Stacy Macey.

On 30 April 2021, the defendants moved for summary judgment. On 27 January 2022, the federal court granted the defendants' motion.

B. The Current Action

On 3 October 2018, while the federal action was pending, Plaintiff filed the original complaint of the current action in Wake County Superior Court. In addition to Franklin Operations and Saber, Richardson was named as Defendant. Plaintiff sought relief for alleged ordinary and corporate negligence or, in the alternative, for medical malpractice. As part of the negligence claim, Plaintiff alleged "Saber['s] . . . employees and agents had a duty to exercise reasonable care to ensure the safety of the residents of Franklin Manor, including [Ms. Bartels]." Plaintiff contended, "[a]s a direct and proximate result of the above-described negligence of Defendant Saber . . . and its employees and agents, [Ms. Bartels] suffered injuries to her person, and such injuries caused her great physical and mental pain and suffering, and caused her to incur medical expenses[.]" Further, "[t]he acts and failures of Defendant Saber . . . and its managing employees and managing agents were committed in reckless disregard of the rights of [Ms. Bartels], were grossly negligent and resulted in [her] serious and permanent injury[.]"

On 4 March 2022, after the deadline for Plaintiff to appeal the federal court's judgment expired, Defendants filed both a notice of the federal court's final order and judgment and a Motion for Summary Judgment. Defendants moved on the grounds that Plaintiff's recovery is barred under the doctrines of *res judicata* and under the doctrine of collateral estoppel. On 25 April 2022, the trial court entered an order denying the motion. Defendants timely appealed.

II. Jurisdiction

In most instances, a party has "no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, "immediate review is available where the order affects a substantial right." *Smith v. Polsky*, 251 N.C. App. 589, 594, 796 S.E.2d 354, 358 (2017). An interlocutory appeal of the "denial of a motion to dismiss premised on *res judicata*

and collateral estoppel does not *automatically* affect a substantial right; the burden is on the party seeking review of the interlocutory order to show how it will affect a substantial right absent immediate review." *Whitehurst Inv. Properties, LLC v. NewBridge Bank*, 237 N.C. App. 92, 95, 764 S.E.2d 487, 489 (2014) (emphasis in original); *see also Dewey Wright Well and Pump Co., Inc. v. Worlock*, 243 N.C. App. 666, 669, 778 S.E.2d 98, 100–01 (2015) ("The appellant bears the burden of demonstrating that the order is appealable despite the interlocutory nature.").

"[T]o meet its burden of showing how a substantial right would be lost without immediate review, the appealing party must show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *Whitehurst*, 237 N.C. App. at 96, 764 S.E.2d at 490; *see also Smith*, 251 N.C. App. at 596, 796 S.E.2d at 360 ("Interlocutory appeals are limited to the situation when the rejection of defenses based upon res judicata or collateral estoppel give rise to a risk of two actual trials resulting in two different verdicts.") (citation and internal quotation marks omitted). "In making this determination, [we] take a restricted view of the substantial right exception to the general rule prohibiting immediate appeals from interlocutory orders." *Id.* at 595, 796 S.E.2d at 359.

In *Bockweg v. Anderson*, our Supreme Court held "the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable." 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993). Following our Supreme Court's decision, this Court issued several opinions where we cited *Bockweg*, and held a denial of a motion for summary judgment on the basis of *res judicata* affects a substantial right and entitles a party to immediate interlocutory appeal (the "*Moody* line of cases"). *See Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 83, 609 S.E.2d 259, 261 (2005) ("The denial of a motion for summary judgment on the basis of res judicata affects a substantial right and, thus, entitles a party to immediate appeal."); *see also Clancy v. Onslow Cty.*, 151 N.C. App. 269, 271, 564 S.E.2d 920, 922 (2002); *see also Wilson v. Watson*, 136 N.C. App. 500, 501, 524 S.E.2d 812, 813 (2000); *see also Little v. Hamel*, 134 N.C. App. 485, 487, 517 S.E.2d 901, 902 (1999).

This Court, however, has issued a separate, more specific line of cases where we "noted the permissive language in *Bockweg*, emphasizing that *Bockweg* holds the denial of summary judgment based on a defense of *res judicata may* affect a substantial right." *Brown v. Thomson*, 264 N.C. App. 137, 140, 825 S.E.2d 271, 273 (2019) (emphasis added) (internal quotation marks omitted) (citing *Country Club of*

Johnston Cnty., Inc. v. U.S. Fidelity and Guar Co., 135 N.C. App. 159, 166, 519 S.E.2d 540, 545 (1999)). Likewise, in regard to collateral estoppel, this Court has provided "the denial of summary judgment based on collateral estoppel . . . *may* expose a successful defendant to repetitious and unnecessary lawsuits. . . . [and] *may* affect a substantial right[.]" *See McCallum v. N.C. Co-op Ext. Serv. of N.C. State Univ.*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231 (2001) (emphasis added); *see also Dewey*, 243 N.C. App. at 670, 778 S.E.2d at 101 ("When a trial court enters an order rejecting the affirmative defenses of res judicata and collateral estoppel, the order *can* affect a substantial right and *may* be immediately appealed. Incantation of the two doctrines does not, however, automatically entitle a party to an interlocutory appeal of an order rejecting those defenses.") (emphasis added) (citation omitted).

Although an order rejecting the defenses of *res judicata* and collateral estoppel "*can* affect a substantial right and *may* be immediately appealed[,]" an interlocutory appeal from such an order is "limited to the situation when the rejection of defenses based upon res judicata or collateral estoppel give[s] rise to a risk of two actual trials resulting in two different verdicts[.]" *Smith*, 251 N.C. App. at 596, 796 S.E.2d at 359–60 (emphasis in original) (internal quotation marks omitted) (citing *Foster v. Crandell*, 181 N.C. App. 152, 162, 638 S.E.2d 526, 534, *disc. rev. denied*, 361 N.C. 567, 650 S.E.2d 602 (2007)). In the more recent case of *Denney v. Wardson Construction, Inc.*, 264 N.C. App. 15, 824 S.E.2d 436, (2019), we distinguished the *Moody* line of cases from the more specific line of cases and explained how an appellant must meet its burden of showing there is a risk of two different, inconsistent verdicts.

In *Denney*, the defendant filed an interlocutory appeal to this Court for the trial court's denial of its motion to dismiss and contended, "rejection of a res judicata defense is like rejection of a sovereign immunity defense—meaning there is no need to explain why the facts of this particular case warrant immediate appeal." 264 N.C. App. at 18, 824 S.E.2d at 438–39. The defendant "point[ed] to a series of [decade-old] decisions made by this [C]ourt that, in its view, expressly adopted a bright-line rule that any order rejecting a res judicata defense is immediately appealable." *Id.* at 18, 824 S.E.2d at 439; *see Moody*, 169 N.C. App. at 83, 609 S.E.2d at 261 (2005); *see also Wilson*, 136 N.C. App. at 501, 524 S.E.2d at 813 (2000); *see also Little*, 134 N.C. App. at 487, 517 S.E.2d at 902 (1999). We were unpersuaded by the defendant's argument, and provided,

> To confer appellate jurisdiction in this circumstance, the appellant *must* include in *its opening brief*, in *the statement of grounds for appellate review*, sufficient facts and

argument to support appellate review on the ground that the unchallenged order affects a substantial right.

Importantly, this Court will not construct arguments for or find support for appellant's right to appeal from an interlocutory order on our own initiative. That burden falls solely on the appellant. As a result, if the appellant's opening brief fails to explain why the challenged order affects a substantial right, we must dismiss the appeal for lack of the appellate jurisdiction.

. . . .

We are not persuaded the [*Moody* line of cases] mean what [the defendant] claims. To be sure, these cases all permitted an immediate appeal of a res judicata issue. But none of these cases examined and rejected the notion that the appellants *must* show the appeal is permissible based on the *particular facts of their case*. Instead, the Court in these cases simply held that the appeal was permissible, without a detailed distinction between the types of issues that categorically affect a substantial right and those that must be considered on a case-by-case basis.

More importantly, there is a separate, more specific line of cases holding that an individualized factual showing is required in res judicata cases. As this Court recently reaffirmed, when a trial court enters an order rejecting the affirmative defense of res judicata, the order *can* affect a substantial right and *may* be immediately appealed.

. . . .

The [more specific] line of cases applied this reasoning and held that rejections of a res judicata defense, while not categorically appealable in every case, *may* be immediately appealable if it creates a risk of inconsistent verdicts. Thus, even assuming there is a conflict between the [more specific] line of cases and the [*Moody* line of] cases . . . we must follow the [more specific line of cases] because that line of precedent both came first and, over time, expressly addressed and distinguished the reasoning of the cases cited by [the defendant].

Applying this controlling line of precedent, we again reaffirm that an appellant seeking to appeal an interlocutory

> order involving res judicata *must* include in the statement of the grounds for appellate review an explanation of how the challenged order would create a risk of inconsistent verdicts or otherwise affect a substantial right on the particular facts of that case.

Denney, 264 N.C. App. at 17–19, 824 S.E.2d at 438–39 (emphasis added) (internal citations and internal quotation marks omitted). As the defendant in *Denney* failed to include in its statement of the grounds for appellate review an explanation of how the challenged order would create a risk of inconsistent verdicts *on the particular facts of the case*, we dismissed the defendant's interlocutory appeal for lack of appellate jurisdiction. *Id.* at 19–20, 824 S.E.2d at 439–40.

Here, in the statement of grounds for appellate review in their opening brief, Defendants assert,

> The [trial court's] order affects a substantial right and is therefore immediately appealable. Franklin Manor and [Saber] are deprived of the benefit of a previous final ruling and judgment in their favor by a court of competent jurisdiction, and would therefore be subjected to a subsequent trial on matters previously and finally adjudicated.

To support this assertion, Defendants cite language from *McCallum v. N.C. Co-op Ext. Serv. of N.C. State Univ.*; specifically, that "the denial of a motion for summary judgment based on the defense of *res judicata* . . . is immediately appealable[,]" and "we hold that the denial of a motion for summary judgment based on the defense of collateral estoppel may affect a substantial right, and . . . [the] defendants' appeal, although interlocutory, is properly before us." 142 N.C. App. at 51, 542 S.E.2d at 231.

Defendants do not allege in their opening brief they are categorically entitled to immediate appeal for the trial court's rejection of their *res judicata* defense, but their argument, together with the language they cite from *McCallum*, supports only that contention. As we have clarified, there is no categorical right to immediate appeal from denial of a *res judicata* defense in every case; denial of a motion for summary judgment based on *res judicata can* affect a substantial right and *may* be immediately appealed.[4] *See Denney*, 264 N.C. App. at 19, 824 S.E.2d

4. We note that, in *McCallum*, immediately after the language cited by Defendants, we provided, "the denial of summary judgment based on the defense of *res judicata can* affect a substantial right and *may* be immediately appealed." 142 N.C. App. at 51, 542 S.E.2d at 230 (emphasis added).

at 439; *see Brown*, 264 N.C. App. at 140, 825 S.E.2d at 273. Likewise, as provided in *McCallum*—the relevant language of which is *cited by Defendants*—denial of a motion for summary judgment based on collateral estoppel *can* affect a substantial right and *may* be immediately appealed. *See McCallum*, 142 N.C. App. at 51, 542 S.E.2d at 230. Immediate appeal from the denial of *res judicata* and collateral estoppel defenses is proper where the rejection of these two defenses gives rise to the risk of inconsistent verdicts (and therefore affects a substantial right), but the appellant *must* meet its burden of showing this risk.[5] *See Denney*, 264 N.C. App. at 19–20, 824 S.E.2d at 439–40; *see Smith*, 251 N.C. App. at 596, 796 S.E.2d at 359–60; *see Whitehurst*, 237 N.C. App. at 95, 764 S.E.2d at 489; *see also Dewey*, 243 N.C. App. at 669, 778 S.E.2d at 100–01.

Applying the "controlling line of precedent," Defendants are not categorically entitled to immediate appeal from the trial court's denial of their Motion for Summary Judgment premised on *res judicata* and collateral estoppel. *See Denney*, 264 N.C. App. at 19, 824 S.E.2d at 439. Per *Denney*, it was incumbent upon Defendants to include, in their opening brief, an explanation of how the trial court's order would create a risk of inconsistent verdicts or otherwise affect a substantial right based on the *particular facts of this case*. *See Denney*, 264 N.C. App. at 19–20, 824 S.E.2d at 439–40; *see Whitehurst*, 237 N.C. App. at 95, 764 S.E.2d at 489. Although *Denney* pertained singularly to an interlocutory appeal premised on *res judicata*, interlocutory appeals premised on collateral estoppel are, like with *res judicata*, limited to situations where the rejection of a collateral estoppel defense gives rise to the risk of two inconsistent verdicts. *See Smith*, 251 N.C. App. 596, 796 S.E.2d 359–60. The burden is on the appellant to show this risk, and we delineated in *Denney* the requirements for an appellant to meet this burden. *See Denney*, 264 N.C. App. at 17–19, 824 S.E.2d at 438–39. Accordingly, the rules set forth in *Denney* apply not only to our analysis of Defendants'

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5. In *Skinner v. Quintiles Transnational Corp.*, we noted an "apparent conflict" in our caselaw—that we have held "the denial of a motion for judgment on the pleadings based on *res judicata* affects a substantial right and is immediately appealable[,]" while "another panel of this Court has limited such interlocutory appeals to situations where the prior decision involved a jury verdict." 167 N.C. App. 478, 482, 606 S.E.2d 191, 193 (2004). We did not attempt to resolve this conflict, and instead invoked Rule 2 of the North Carolina Rules of Appellate Procedure to hear the appellant's interlocutory appeal premised on *res judicata*. *Id.* at 482, 606 S.E.2d at 193. Since *Skinner*, however, we have clarified in the more specific line of cases that, for interlocutory appeals, an individualized factual showing is required in *res judicata* cases. *See Denney*, 264 N.C. App. at 18–19, 824 S.E.2d at 439.

appeal premised on *res judicata*, but also their appeal premised on collateral estoppel.

Defendants do not explain in their opening brief, based on the *particular facts of this case*, how the trial court's order creates a risk of inconsistent verdicts or otherwise affects a substantial right under either the defenses of *res judicata* or collateral estoppel. Rather, Defendants argue, without further support, "[t]he [trial court's] order affects a substantial right and is therefore immediately appealable[,]" and Defendants "are deprived of the benefit of a previous final ruling and judgment in their favor by a court of competent jurisdiction and would therefore be subjected to a subsequent trial on matters previously and finally adjudicated." Defendants do, in their reply brief, assert "the federal court held that the adequacy of Ms. Bartels' supervision and care at Franklin manor *was* the factual issue 'at the heart' of Plaintiff's Federal Action[,]" and "[t]he factual issues are the same, and there is the possibility of inconsistent verdicts if this case proceeds to trial." Defendants' assertion in their reply brief does not meet the requirements as set forth in *Denney*; Defendants do not show in their opening brief, in the statement of the grounds for appellate review, that appeal is permissible based on the particular facts of this case. *See Denney*, 264 N.C. App. at 18, 824 S.E.2d at 438. Defendants have failed to meet their burden of demonstrating the trial court's order affected a substantial right, and we will not on our own initiative construct arguments for or find support for Defendants' right to appeal from an interlocutory order. *See Smith*, 251 N.C. App. at 595, 796 S.E.2d at 358-59; *see Denney*, 264 N.C. App. at 19–20, 824 S.E.2d at 439–40.

III. Conclusion

Defendants failed to show in their opening brief, in the statement of grounds for appellate review, why their appeal is permissible on the facts of this case. We therefore dismiss Defendants' interlocutory appeal for lack of appellate jurisdiction.

DISMISSED.

Judges ZACHARY and RIGGS concur.

KATHERINE AIMEE BROSNAN, PLAINTIFF
v.
GEORGE GEOFFREY CRAMER, DEFENDANT

No. COA22-654

Filed 4 April 2023

1. Appeal and Error—interlocutory order—divorce case—post-separation support—certiorari allowed

In an action for absolute divorce, the Court of Appeals granted an ex-husband's petition for a writ of certiorari to review an order granting post-separation support to his ex-wife. Although the order was interlocutory and not otherwise appealable (the trial court did not certify the order under Civil Procedure Rule 54(b), and post-separation support orders do not affect a substantial right), appellate courts have discretion to issue writs of certiorari where no right of appeal from an interlocutory order exists and where doing so would serve the administration of justice.

2. Divorce—jurisdiction—post-separation support—voluntarily dismissed—raised again after divorce judgment entered—not "pending"

In an action for absolute divorce, where the ex-wife voluntarily dismissed her claim for post-separation support and did not raise it again before the divorce judgment was entered, the trial court lacked subject matter jurisdiction to grant the ex-wife's request for post-separation support after the divorce judgment had been entered because, at that point, the claim was not "pending" within the meaning of N.C.G.S. §§ 50-11(c) and 50-19.

Appeal by Defendant from Order entered 8 February 2022 by Judge Anna E. Worley in District Court, Wake County. Heard in the Court of Appeals 24 January 2023.

Parker Bryan Britt Tanner & Jenkins, PLLC, by Amy L. Britt, Stephanie T. Jenkins, and Alicia J. Journey, for Plaintiff-Appellee.

Connell & Gelb, PLLC, by Michelle D. Connell, Raleigh, for Defendant-Appellant.

STADING, Judge.

George Geoffrey Cramer ("Defendant") appeals from an order entered 8 February 2022 granting Katherine Aimee Brosnan ("Plaintiff") postseparation support. Defendant filed a Petition for Writ of Certiorari on 7 October 2022. Plaintiff filed a Motion to Dismiss Defendant's Appeal on 17 August 2022. Based on the foregoing reasons, we grant Defendant's Petition for Writ of Certiorari and deny Plaintiff's Motion to Dismiss Appeal. We vacate and remand the Order of the trial court with instructions consistent with this Opinion.

I. Factual and Procedural History

Defendant and Plaintiff married on 1 November 2008. Plaintiff filed for alimony, attorney's fees, child custody, child support, equitable distribution, and postseparation support on 15 October 2020. Defendant filed his answer, counterclaims, and affirmative defenses on 20 January 2021. Plaintiff filed her reply on 15 March 2021. Thereafter, on 8 April 2021, Plaintiff filed a notice of voluntary dismissal specifically stating "[t]he Plaintiff gives notice of voluntary dismissal without prejudice in this case of her claim for postseparation support as to the Defendant."

Under a separate case number, Defendant filed a complaint seeking absolute divorce on 19 April 2021 pursuant to N.C. Gen. Stat. § 50-6. Plaintiff accepted service of the complaint on 27 April 2021. Plaintiff did not attempt to revive the postseparation support claim by answering the complaint with a counterclaim or by any other means prior to the entry of judgment of absolute divorce. In the absence of a responsive pleading, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, Defendant filed a Motion for Summary Judgment on the claim for absolute divorce on 9 June 2021. Defendant's Motion for Summary Judgment was granted on 2 July 2021. Twenty days later, on 22 July 2021, Plaintiff filed a motion in the cause for postseparation support in an effort to reinstate the previously dismissed postseparation support claim.

In response to Plaintiff's Motion in the Cause filed to reestablish a claim for postseparation support, Defendant filed a Motion to Dismiss. On 8 February 2022 the trial court denied Defendant's Motion to Dismiss Plaintiff's claim for postseparation support. Additionally, the trial court ordered Defendant to pay monthly postseparation support from 1 December 2021 until "the death of either party, Plaintiff's remarriage, Plaintiff's cohabitation, the dismissal of Plaintiff's alimony claim, or the entry of an order resolving Plaintiff's alimony claim, whichever occurs first." The trial court ordered a stay of the postseparation support portion of the judgment pending disposition of this appeal.

Defendant filed and served a notice of appeal on 17 February 2022. Plaintiff filed a motion to dismiss Defendant's interlocutory appeal on 17 August 2022, claiming that the appealed order neither affected a substantial right nor fell within a category permitting immediate appeal. Defendant filed a notice of Rule 60(b) motion on 7 October 2022, requesting this Court to delay consideration of his appeal from the trial court's order until the trial court entered an order indicating how it would be inclined to rule on the Rule 60 motion were this appeal not pending. This Court denied Defendant's request for delayed consideration by order on 20 October 2022. Additionally, Defendant filed a Petition for Writ of Certiorari on 7 October 2022.

II. Jurisdiction

[1] "An 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." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citations omitted). Defendant acknowledges the appeal of postseparation support based on subject-matter jurisdiction is interlocutory. When an appeal is interlocutory, Defendant's avenues for appellate review are limited. *See* N.C. Gen. Stat. § 50-19.1.

> "An interlocutory order may be immediately appealed in only two circumstances: (1) when the trial court, pursuant to N.C.R. Civ. P. 54(b), enters a final judgment as to one or more but fewer than all of the claims or parties and certifies that there is no just reason to delay the appeal; or (2) when the order deprives the appellant of a substantial right that would be lost absent appellate review prior to a final determination on the merits."

Akers v. City of Mount Airy, 175 N.C. App. 777, 779, 625 S.E.2d 145, 146 (2006). In the present matter, there is not a Rule 54(b) certification on the order for postseparation support. Additionally, existing case law has established that a "postseparation support order is a temporary measure, it is interlocutory, it does not affect a substantial right, and it is not appealable." *Rowe v. Rowe*, 131 N.C. App. 409, 411, 507 S.E.2d 317, 319 (1998).

However, this Court has the discretion to issue extraordinary writs "to supervise and control the proceedings of any of the trial courts of the General Court of Justice" pursuant to N.C. Gen. Stat. § 7A-32(c) (2022). "The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of

trial tribunals when . . . no right of appeal from an interlocutory order exists . . . ." N.C. R. App. P. 21. Moreover, "the appellate courts of this State in their discretion may review an order of the trial court, not otherwise appealable, when such review will serve the expeditious administration of justice or some other exigent purpose." *Stanback v. Stanback*, 287 N.C. 448, 453, 215 S.E.2d 30, 34 (1975). After careful review of the question presented, we grant Defendant's Petition for Writ of Certiorari.

III. Analysis

[2] Defendant argues that a recent ruling by this Court in *Smith v. Smith*, 282 N.C. App. 735, 870 S.E.2d 154 (2022), resolves the issue before us and eliminates the need to consider the current appeal. However, the facts of *Smith* are distinguishable from this case in that "[n]o formal claims for postseparation support, alimony, or equitable distribution were filed until after the judgment of absolute divorce was entered . . . ." *Id.* The present dispute diverges factually in that the claim for postseparation support was filed and voluntarily dismissed by Plaintiff before the judgement of absolute divorce was entered. Thus, we consider the merits of the appeal.

Here, despite Plaintiff's dismissal of the postseparation support claim prior to the entry of absolute divorce, the trial court denied Defendant's Motion to Dismiss and ordered postseparation support on 8 February 2022. The Order specifically decreed "[b]eginning December 1, 2021 and continuing on the first day of each month thereafter, Defendant shall pay [a specific amount of] postseparation support to Plaintiff[.]" Furthermore, the trial court held that "[t]he postseparation support payments are stayed pending appeal of this order." With respect to the trial court's order on postseparation support, we consider the trial court's findings of fact to be supported by competent evidence and no further factual development to be required. *See Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962). However, issues of statutory interpretation are questions of law, fully reviewable under a *de novo* standard of review. *See In re Summons Issued to Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009).

As Defendant correctly points out, "[b]ecause postseparation orders are interlocutory, there is little case law addressing this very common, independent claim." Although no specific case law was cited or referenced, the trial court ordered postseparation support on 8 February 2022 by finding:

> [C]onsidering the purposes of postseparation support (i.e., to provide temporary support pending the award or

> denial of alimony), the case law surrounding alimony and the language of N.C. Gen. Stat. § 50-16.1A(4), postseparation support in this action is not foreclosed. N.C. Gen. Stat. § 50-16.2A clearly states that you can raise postseparation support by motion. At the time of the divorce, Plaintiff's alimony claim remained pending, and Defendant was on notice that there was a claim for spousal support pending in this matter.

And in accordance with the North Carolina Rule of Civil Procedure addressing dismissal of actions, absent a more specific statute, a claim dismissed without prejudice would normally survive:

> [A]n action or any claim therein may be dismissed by the plaintiff without order of court . . . . Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice . . . . If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal[.]

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2022).

However, the text of the statute entitled "The effects of absolute divorce" speaks more directly to the issue presented to this Court:

> A divorce obtained pursuant to G.S. 50-5.1 or G.S. 50-6 shall not affect the rights of either spouse with respect to any action for alimony or postseparation support pending at the time the judgment for divorce is granted. Furthermore, a judgment of absolute divorce shall not impair or destroy the right of a spouse to receive alimony or postseparation support or affect any other rights provided for such spouse under any judgment or decree of a court rendered before or at the time of the judgment of absolute divorce.

N.C. Gen. Stat. § 50-11(c) (2022) (emphasis added).

Similarly, the language contained in N.C. Gen. Stat. § 50-19 (2022) addresses the "[m]aintenance of certain actions[,]" including claims of postseparation support. It states that "[n]otwithstanding the provisions of G.S. 1A-1, Rule 13(a), any action described in subdivision (a)(1) through (a)(5) of this section that is filed as an independent, separate action may be prosecuted during the *pendency* of an action for divorce under G.S. 50-5.1 or G.S. 50-6." *Id.* (emphasis added).

This case presents a conflict between a generally applicable provision of the North Carolina Rules of Civil Procedure and the more specific sections of Chapter 50 of the North Carolina General Statutes. To resolve such contradictions, our appellate courts have consistently applied a canon of statutory construction known as *generalia specialibus non derogant*. "North Carolina's appellate courts have repeatedly recognized that '[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability.' " *Perry v. GRP Fin. Servs. Corp.*, 196 N.C. App. 41, 49, 674 S.E.2d 780, 785 (2009) (citation omitted). Accordingly, since N.C. Gen. Stat. § 50-11(c) and N.C. Gen. Stat. § 50-19 specifically address the voluntarily dismissed claim at issue in this case, the language in those statutes are controlling.

Having settled the appropriate controlling statutory authority, we must now consider the text of those statutes and determine its application in this particular setting. This Court must review the words chosen by the General Assembly to ensure that both the purpose and the intent of the legislation are effectuated. *See Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). When the language used is clear and unambiguous, this Court must refrain from judicial construction and accord words undefined in the statute their plain and definite meaning. *Utilities Comm. v. Edmisten*, *Atty. General*, 291 N.C. 451, 466, 232 S.E.2d 184, 193 (1977). An application of the aforementioned principle requires consideration of the plain meaning of the words used in the more controlling statutes. Specifically, we are charged with acknowledging the plain meaning of the statutory language "postseparation support *pending* at the time the judgment for divorce is granted" in N.C. Gen. Stat. § 50-11(c) (2022) (emphasis added) and "action may be prosecuted during the *pendency* of an action for divorce" in N.C. Gen. Stat. § 50-19 (2022) (emphasis added).

Merriam-Webster defines "pending" as "not yet decided; being in continuance." *Pending*, Merriam-Webster Dictionary (11th ed. 2003). The use of "pending" and "pendency" indicates that the General Assembly was referring to claims that remain active at the time a judgment for divorce is granted. "It is presumed that the legislature intended each portion of [a statute] to be given full effect and did not intend any provision to be mere surplusage." *Porsh Builders, Inc. v. Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981). The General Assembly's use of the words "pending" and "pendency" in both statutes is not coincidental, nor is it mere surplusage. Here, Plaintiff's claim for postseparation support was voluntarily dismissed and not reinstated before the judgment for divorce was granted, so it could not have been *pending*.

Consequently, the trial court was divested of subject-matter jurisdiction to enter an order awarding postseparation support. For these reasons, we conclude the trial court erred in denying Defendant's Motion to Dismiss Plaintiff's claim for postseparation support.

III. Conclusion

Since the trial court lacked subject-matter jurisdiction to award Plaintiff postseparation support, the trial court erred in denying Defendant's Motion to Dismiss. As such, we vacate the trial court's Order and remand with instructions to grant Defendant's Motion to Dismiss.

VACATED AND REMANDED.

Judges GORE and RIGGS concur.

THE ESTATE OF DESMOND JAPRAEL STEPHENS, LARRY F. STEPHENS, ADMINISTRATOR, PLAINTIFF
v.
ADP TOTALSOURCE DE IV, INC., MICRON PRECISION, LLC D/B/A KING MACHINE OF NORTH CAROLINA AND KORY J. KACHUR, DEFENDANTS

No. COA22-372

Filed 4 April 2023

1. Workers' Compensation—Industrial Commission's exclusive jurisdiction—exceptions—willful negligence of employer

Where decedent was crushed to death at his workplace when his employer's on-site vice president directed him to stand beneath and disassemble a 2,000-pound metal tire mold that was suspended by a forklift—which had been modified without manufacturer approval—without the support necessary to prevent a crushing-type accident, decedent's estate (plaintiff) alleged facts sufficient to establish an exception to the Industrial Commission's exclusive jurisdiction over plaintiff's claims against decedent's employer (defendant). Plaintiff alleged that the employer intentionally engaged in conduct knowing it was substantially certain to cause serious injury or death to decedent, who did not have the proper experience, training, or safety equipment to perform the work that caused his death.

2. Workers' Compensation—Industrial Commission's exclusive jurisdiction—exceptions—willful negligence of co-employee

Where decedent was crushed to death at his workplace when his employer's on-site vice president (defendant) directed him to stand beneath and disassemble a 2,000-pound metal tire mold that was suspended by a forklift—which had been modified without manufacturer approval—without the support necessary to prevent a crushing-type accident, decedent's estate (plaintiff) alleged facts sufficient to establish an exception to the Industrial Commission's exclusive jurisdiction over plaintiff's claims against defendant. Plaintiff alleged that defendant acted with willful, wanton, and reckless negligence and that his negligence resulted in the death of decedent, who did not have the proper experience, training, or safety equipment to perform the work that caused his death.

Judge DILLON concurring in part and dissenting in part.

Appeal by Defendants from order entered 20 December 2021 by Judge Stanley L. Allen in Caswell County Superior Court. Heard in the Court of Appeals 19 October 2022.

Hendrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, G. Anderson Stein, and Tyler A. Stull, for Defendants-Appellants.

Law Offices of James Scott Farrin, by Coleman Cowan and Preston W. Lesley, and Law Offices of R. Lee Farmer, PLLC, by R. Lee Farmer, for Plaintiff-Appellee.

COLLINS, Judge.

Desmond Japrael Stephens was crushed to death at his workplace when part of a 2,000-pound metal tire mold that was elevated by a forklift that had been modified without manufacturer approval fell onto his chest. Plaintiff filed willful negligence claims against Stephens' employer and his on-site supervisor (collectively "Defendants"). Defendants moved to dismiss the claims under North Carolina Rules of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction, and 12(b)(6), for failure to state a claim upon which relief can be granted, arguing that the North Carolina Industrial Commission has exclusive jurisdiction over workplace injuries and Plaintiff failed to allege facts sufficient to establish an exception to the Commission's exclusive jurisdiction. The trial court denied Defendants' motions and Defendants appealed. Because Plaintiff alleged facts sufficient to establish exceptions to the Commission's exclusive jurisdiction, we affirm.

I. Factual Background

The facts of this case, as Plaintiff alleged, are as follows: King Machine operates a facility in Casswell County "where it manufactures tire molds and repurposes tire molds for tire manufacturers[,]" which weigh "approximately two thousand (2,000) pounds and [are] used in the tire manufacturing process to give tires their final shape, taking on tread pattern and sidewall engraving." Defendant Kory J. Kachur "was the on-site Vice President of King Machine and was responsible and familiar with the work that was being performed by the employees of Defendant King Machine who were present at the facility . . . ." "At the time of the incident, [Stephens] was employed by King Machine as a general laborer and had been an employee for approximately three (3) weeks[,]" prior to which Stephens had "never worked in a factory or manufacturing facility and never repaired and/or repurposed tire molds," nor had he "receive[d] training as to the proper method of repairing and repurposing tire molds."

On 30 April 2019, although "Defendants knew [Stephens] was not trained, qualified or experienced" to work with tire molds, Defendants "pulled [Stephens] from another part of the Plant" and "instructed [Stephens] to detach bolts from below a two-piece tire mold weighing approximately two thousand (2,000) pounds elevated by a forklift." Stephens was "not supervised" or "provided with adequate personal protective/supportive equipment while undertaking the tasks assigned to him." "Shortly after [Stephens] was instructed to perform work under the tire mold a bolt snapped causing one part of the two piece mold to collapse from the elevated position" onto Stephens' chest, killing him.

After Stephens' death, the North Carolina Occupational Safety and Health Division of the North Carolina Department of Labor ("NCOSH") investigated the Caswell County Plant and concluded that King Machine had violated several sections of the Occupational Safety and Health Act ("OSHA"). Specifically, NCOSH concluded that King Machine "committed a 'Willful Serious' violation of 29 CFR 1910.178(m)(2), whereby employees stood under or passed under the elevated portion of a [forklift][,] . . . while unbolting metal plates weight approximately 1,705 pounds." NCOSH also concluded that King Machine "committed a violation of 29 CFR 1910.178(a)(4) and 29 CFR 1910.178(a)(5), whereby Defendant King Machine modified their [forklifts] without manufacturer approval with a single hook beam front-end forklift attachment to transport and lift approximately 1,705 pound metal plates."

II. Procedural History

Plaintiff filed its initial complaint in superior court in October 2020, alleging willful negligence against King Machine and Kachur and seeking compensatory and punitive damages. Defendants answered in January 2021, denying Plaintiff's allegations, and asserting that the court lacked subject matter jurisdiction because Plaintiff had failed to allege conduct that warranted an exception to the Industrial Commission's exclusive jurisdiction over workplace injuries. In July 2021, Plaintiff filed a motion for leave to amend its complaint to add allegations clarifying its claims, which was granted. Plaintiff filed its amended complaint in September 2021, which included a negligence claim against King Machine in addition to the previous allegations of willful negligence against each defendant. Defendants answered in October 2021, denying Plaintiff's allegations and reasserting that the court lacked subject matter jurisdiction to hear the case. Defendants filed motions to dismiss Plaintiff's complaint under North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6) in December 2021. After hearing the parties' arguments, the trial court denied Defendants' motions. Defendants appealed.

The record on appeal was settled on 22 April 2022. Defendants filed their principal brief on 8 July 2022. Plaintiff filed a supplement to the record on appeal on 4 August 2022 pursuant to North Carolina Rules of Appellate Procedure 9(b)(5), asserting that the settled record on appeal was insufficient to respond to the issues presented in Defendants' brief. On 8 August 2022, Plaintiff filed its brief. Defendants subsequently moved to strike Plaintiff's 9(b)(5) supplement, arguing that the documents in the supplement were not appropriate additions to the record on appeal because they "were neither filed with the trial court, submitted to the trial court for consideration at the hearing, admitted by the trial court, or made the subject of an offer of proof[.]" Plaintiff also moved on 11 October 2022, pursuant to North Carolina Rules of Appellate Procedure 9(b)(5)(b) and 37, to add the transcript from the December 2021 hearing on Defendants' motions to dismiss to the record on appeal; Defendants opposed the motion.

III. Discussion

A. Motions on Appeal

1. Defendants' Motion to Strike Plaintiff's Rule 9(b)(5) Supplement to the Record on Appeal

Plaintiff's brief, filed four days after it filed the 9(b)(5) supplement, extensively referenced documents in the supplement. Defendants moved

to strike the supplement, arguing that its contents were not appropriate additions to the record on appeal. Defendants further requested that this Court strike all references to the supplement in Plaintiff's brief.

Rule 9(b)(5)(a) of the North Carolina Rules of Appellate Procedure states, "If the record on appeal as settled is insufficient to respond to the issues presented in an appellant's brief . . . , the responding party may supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9." N.C. R. App. P. 9(b)(5)(a). Rule 9(d) states, "Exhibits and other items that have been filed, served, submitted for consideration, admitted, or made the subject of an offer of proof may be included in the record on appeal . . . ." N.C. R. App. P. 9(d).

It is well-settled that this Court may "only consider the pleadings and filings before the trial court . . . ." *Twaddell v. Anderson*, 136 N.C. App. 56, 68, 523 S.E.2d 710, 719 (1999). As Defendants argue, Plaintiff has failed to demonstrate that the documents in the 9(b)(5) supplement had been filed, served, submitted for consideration, admitted, or made the subject of an offer of proof. Accordingly, Defendants' motion to strike the 9(b)(5) supplement and all references to its contents is allowed.

2. Plaintiff's Motion to Add the Hearing Transcript

After all briefs in this matter had been filed, Plaintiff moved pursuant to Rule 9(b)(5)(b) to add the transcript of the hearing on Defendants' motions to dismiss to the record on appeal. Rule 9(b)(5)(b) states, "On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal." N.C. R. App. P. 9(b)(5)(b).

In support of its motion, Plaintiff argues that inclusion of the transcript will assist this Court's understanding of the issues and that no prejudice would result from the addition as both parties reference the hearing in their briefs. Defendants oppose the motion, arguing that, because all briefs had already been filed, Defendants would have no opportunity to respond to any issue raised by the introduction of the transcript. Defendants also argue that their proposed issues on appeal are the same issues presented in their brief, and thus good cause does not exist to add the transcript to the record after the record on appeal was settled.

After considering the parties' arguments, in our discretion, we deny Plaintiff's motion to add the hearing transcript to the record on appeal.

B. Appellate Jurisdiction

The trial court's order denying Defendants' motions to dismiss is not a final order and is therefore interlocutory. *Veazey v. City of Durham*,

231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An 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.") A party generally has "no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, an interlocutory order may be immediately appealable if the judgment affects a substantial right. N.C. Gen. Stat. § 7A-27(b)(3)(a) (2021). Our Supreme Court has determined that the denial of a motion to dismiss under Rule 12(b)(1) and the exclusivity provision of the North Carolina Workers' Compensation Act ("the Act") affects a substantial right and is immediately appealable. *See Burton v. Phoenix Fabricators & Erectors, Inc.*, 362 N.C. 352, 661 S.E.2d 242 (2008). Similarly, this Court has recognized that denial of a motion to dismiss under Rule 12(b)(6) is immediately appealable as affecting a substantial right to the extent that the motion relates to the exclusivity provision of the Act. *Est. of Vaughn v. Pike Elec., LLC*, 230 N.C. App. 485, 491-92, 751 S.E.2d 227, 231-32 (2013).

Defendants' motions to dismiss under Rules 12(b)(1) and 12(b)(6) are based on the exclusivity provision of the Act and its effect on the trial court's jurisdiction over the matter. Thus, the trial court's order denying Defendants' motions affects a substantial right and is immediately appealable. *See* N.C. Gen. Stat. § 7A-27(b)(3)(a). Accordingly, this Court has jurisdiction to review the trial court's order.

C. Standard of Review

Defendants make interrelated arguments that the trial court erred by failing to dismiss Plaintiff's claims under North Carolina Rules of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction, and 12(b)(6), for failure to state a claim upon which relief can be granted.

We review an order denying a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure de novo. *Hatcher v. Harrah's N.C. Casino Co.*, 169 N.C. App. 151, 155, 610 S.E.2d 210, 212 (2005) (citation omitted). Under de novo review, "the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted).

We likewise review a trial court's order denying a Rule 12(b)(6) motion to dismiss de novo. *Est. of Long v. Fowler*, 378 N.C. 138, 148, 861 S.E.2d 686, 694 (2021). In ruling on a Rule 12(b)(6) motion to dismiss,

"the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citation omitted). "[T]he well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (quotation marks and citation omitted). Dismissal under Rule 12(b)(6) is proper only in the following circumstances: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

Because a trial court's jurisdiction over workers' compensation matters depends on whether an exception to the Act's exclusivity provision applies, the threshold question is whether Plaintiff has stated a claim which fits within those exceptions. *See Blow v. DSM Pharm., Inc.*, 197 N.C. App. 586, 589, 678 S.E.2d 245, 249 (2009). Thus, we review whether Plaintiff's complaint stated a claim for which relief can be granted under Rule 12(b)(6).

D. Analysis

Defendants argue that the North Carolina Industrial Commission has exclusive jurisdiction over Plaintiff's claims under the Act because Plaintiff failed to state a claim that falls within exceptions to the Act's exclusivity provision.

The Act states:

> Every employer subject to the compensation provisions of this Article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee for personal injury or death by accident to the extent and in the manner herein specified.

N.C. Gen. Stat. § 97-9 (2021). The Act also provides:

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall

> exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

Id. § 97-10.1 (2021).

In effect, the Act provides an avenue for injured employees to receive "sure and certain recovery for their work-related injuries without having to prove negligence on the part of the employer or defend against charges of contributory negligence." *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003). "In return, the Act limits the amount of recovery available for work-related injuries and removes the employee's right to pursue potentially larger damages awards in civil actions." *Woodson v. Rowland*, 329 N.C. 330, 338, 407 S.E.2d 222, 227 (1991) (citation omitted).

The exclusivity provision generally precludes common law negligence actions against employers and co-employees whose negligence caused the injury. *Pleasant v. Johnson*, 312 N.C. 710, 713, 325 S.E.2d 244, 247 (1985). However, our Supreme Court recognizes two exceptions to the exclusivity provision. First, an employee may pursue a civil action against an employer when the employer "intentionally engages in misconduct knowing it is substantially certain to cause injury or death to employees and an employee is injured or killed by that conduct[.]" *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228. Second, an employee may pursue a civil action against a co-employee for their willful, wanton, and reckless negligence. *Pleasant*, 312 N.C. at 717, 325 S.E.2d at 250.

1. Willful Negligence of King Machine (Woodson Claim)

[1] Defendants argue that Plaintiff failed to allege facts sufficient to establish an exception to the Commission's exclusive jurisdiction under *Woodson*. To state a *Woodson* claim, a plaintiff "must allege that the employer intentionally engaged in misconduct knowing that such conduct was substantially certain to cause injury or death . . . ." *Vaughn*, 230 N.C. App. at 494, 751 S.E.2d at 233-34 (citing *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228). " 'Substantial certainty' under *Woodson* is more than the 'mere possibility' or 'substantial probability' of a serious injury or death. No one factor is determinative in evaluating whether a plaintiff has stated a valid *Woodson* claim; rather, all of the facts taken together must be considered." *Arroyo v. Scottie's Prof. Window Cleaning, Inc.*, 120 N.C. App. 154, 159, 461 S.E.2d 13, 16 (1995) (citations omitted).

In *Woodson*, decedent worked for defendant-employer, a subcontractor who was hired to help dig two trenches to lay sewer lines.

Woodson, 329 N.C. at 334-35, 407 S.E.2d at 225. In the interest of time, the general contractor provided a second crew to dig the second trench. *Id.* at 335, 407 S.E.2d at 225. The foreman for the second crew refused to work on the second trench without a trench box, as safety regulations required. *Id.* Defendant-employer procured a trench box for the second crew but did not do so for his own crew. *Id.* While decedent was working in the first trench without the protection of a trench box, the trench collapsed, and decedent was killed. *Id.* at 336, 407 S.E.2d at 225-26.

The administrator of decedent's estate filed a wrongful death action in superior court against defendant-employer and forecast evidence that the soil conditions were such that the trench was substantially certain to fail, that defendant-employer knew of the dangers associated with trenching and had disregarded safety regulations, and that defendant-employer had been at the site and had observed the trench firsthand. *Id.* at 345-46, 407 S.E.2d at 231-32. The trial court granted summary judgment in favor of defendant-employer. *Id.* at 333, 407 S.E.2d at 224. Our Supreme Court reversed, stating that plaintiff's forecast of evidence was sufficient to show that there was a genuine issue of material fact as to whether defendant-employer's conduct satisfied the substantial certainty standard. *Id.* at 345, 407 S.E.2d at 231.

Our Supreme Court revisited the *Woodson* exception, again in a summary judgment posture, in *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 597 S.E.2d 665 (2003). There, decedent worked for the town of Scotland Neck as a general maintenance worker who assisted in the operation of a garbage truck. *Id.* at 553, 597 S.E.2d at 666. Part of decedent's job involved attaching a dumpster to a latching mechanism on the garbage truck, which allowed the truck to lift the dumpster and empty the dumpster's contents into the truck. *Id.* One day, while the dumpster was being lifted, the latching mechanism failed, causing the dumpster to swing towards decedent and pin him against the truck. *Id.* at 553-54, 597 S.E.2d at 666. Although decedent's co-workers freed him, he later died from his injuries. *Id.* at 554, 597 S.E.2d at 666.

An investigation revealed that the truck's latching mechanism was broken and the dumpster was bent, and that these defects were the direct cause of the accident. *Id.* Although several of decedent's co-workers indicated that the latching mechanism had been broken for at least two months prior to the accident, decedent's supervisor denied any knowledge of such defects. *Id.* Additionally, an NCOSH investigation found five state labor law violations, including "failure to train employees in the safe operation of garbage truck equipment, failure to properly supervise employees in the operation of garbage truck equipment, failure to

implement a program for inspection of garbage truck equipment, operation of defective garbage truck equipment, and unsafe operation of garbage truck equipment." *Id.*

Plaintiffs, the co-administrators of decedent's estate, filed a complaint in superior court against the town and its officials alleging "willful, wanton, reckless, careless and gross negligence." *Id.* at 554, 597 S.E.2d at 666-67. Defendants moved to dismiss plaintiffs' claim under Rule 12(b)(6) and were denied. *Whitaker v. Town of Scotland Neck*, 154 N.C. App. 660, 662, 572 S.E.2d 812, 813 (2002). However, the trial court later granted defendants summary judgment. *Id.* This Court reversed, relying on a six-factor test established in *Wiggins v. Pelikan, Inc.*, 132 N.C. App. 752, 513 S.E.2d 829 (1999). *Id.* at 663-65, 572 S.E.2d at 814-15. Our Supreme Court reversed this Court and reinstated the trial court's order granting summary judgment. *Whitaker*, 357 N.C. at 558, 597 S.E.2d at 669. In doing so, the Supreme Court "explicitly reject[ed] the *Wiggins* test and rel[ied] solely on the standard originally set out . . . in *Woodson v. Rowland*." *Id.* at 556, 597 S.E.2d at 667. The Supreme Court emphasized that "[t]he *Woodson* exception represents a narrow holding in a fact-specific case, and its guidelines stand by themselves." *Id* at 557, 597 S.E.2d at 668.

The Supreme Court distinguished the facts before it from those in *Woodson*, specifically noting that:

> On the day of the accident, none of the Town's supervisors were on-site to monitor or oversee the workers' activities. Decedent was not expressly instructed to proceed into an obviously hazardous situation as in *Woodson*. There is no evidence that defendants knew that the latching mechanism on the truck was substantially certain to fail or that if such failure did occur, serious injury or death would be substantially certain to follow.

Id. at 558, 597 S.E.2d at 668. The Supreme Court pointed out that "in *Woodson*, the employee worked in a deep, narrow trench in which it was impossible for him to escape . . . [,]" and that "decedent was not so helpless." *Id.* at 558, 597 S.E.2d at 669. The Supreme Court concluded that "[t]he facts of this case involve defective equipment and human error that amount to an accident rather than intentional misconduct." *Id.*

This Court examined the *Woodson* exception in the context of a motion to dismiss under Rule 12(b)(6) in *Arroyo* and *Vaughn*. In *Arroyo*, plaintiff had been working as a window washer for less than a year when he was instructed to wash windows on a tall building by climbing

down a ladder from the roof without safety equipment. 120 N.C. App. at 157, 461 S.E.2d at 15. To reach some of the windows, plaintiff was required to stand on a narrow ledge and lean outward. *Id.* Plaintiff and a coworker attempted to balance each other by locking arms, but plaintiff's supervisor instructed them to stop because they were working too slowly. *Id.* Shortly after plaintiff ceased locking arms with his coworker for balance, he fell and suffered permanent injury. *Id.* at 158, 461 S.E.2d at 15-16.

Plaintiff filed a complaint in superior court alleging that he had never been given any safety training in the cleaning of high-rise exterior windows; that his employer did not publish safety rules or enforce State and Federal safety measures; that his employer was aware that permitting or requiring him to work from a great height without safety equipment was dangerous and substantially certain to cause serious injury or death; and that his employer intentionally forewent safety precautions because they were considered too cumbersome. *Id.* at 155-157, 461 S.E.2d at 14-15. The trial court dismissed plaintiff's complaint for failure to state a claim. *Id.* at 155, 461 S.E.2d at 14. This Court reversed, holding that plaintiff's allegations were "sufficient to state a legally cognizable claim under *Woodson* that defendant intentionally engaged in conduct that it knew was substantially certain to cause serious injury or death." *Id.* at 159-60, 461 S.E.2d at 17.

In *Vaughn*, decedent worked as a groundman who assisted other employees working on overhead power distribution lines. 230 N.C. App. at 486, 751 S.E.2d at 229. Decedent's supervisor directed decedent to climb a utility pole and retrofit a live transformer, in part by "removing the hotline clamp from the primary line which [left] the primary line exposed." *Id.* at 487-88, 751 S.E.2d at 230. This task was ordinarily "reserved for [a] trained and experienced lineman[,]" as opposed to decedent, who was a groundman. *Id.* at 488, 751 S.E.2d at 230. While decedent was attempting this procedure, he was electrocuted. *Id.*

Plaintiff filed a complaint in superior court alleging that decedent had not received any training to perform the work required of a lineman, that decedent had not been provided with proper safety equipment, that decedent's employer was aware that requiring an untrained groundman to perform the work of a trained lineman was certain to result in death or serious injury, and that decedent's employer knew that groundmen were instructed to perform the inherently dangerous activities reserved for trained linemen. *Id.* at 487-89, 751 S.E.2d at 229-30. The trial court denied the employer's motion to dismiss. *Id.* at 490, 751 S.E.2d at 231. This Court reversed, noting that plaintiff made no factual allegations

to support his contention that the employer knew groundmen were instructed to perform the inherently dangerous activities reserved for trained linemen. *Id.* at 498-99, 751 S.E.2d at 236. Furthermore, plaintiff's allegations established that the practice was in clear violation of the employer's published work methods and safety manuals, suggesting that the employer "did not intend for any of its groundmen, including [d]ecedent, to climb utility poles and de-energize transformers." *Id.* at 499, 751 S.E.2d at 236.

In *Arroyo*, plaintiff alleged facts that, taken as true, were sufficient to establish that the employer intentionally placed plaintiff in the dangerous situation knowing the danger involved. *See Arroyo*, 120 N.C. App. at 159-60, 461 S.E.2d at 16-17. On the other hand, in *Vaughn*, plaintiff was unable to articulate specific facts indicating that the employer knew of and disregarded safety procedures, and his conclusory allegations were discordant with the employer's published safety policies. *See Vaughn*, 230 N.C. App. at 498-99, 751 S.E.2d at 236-37.

Here Plaintiff alleged the following:

> 17. Upon information and belief, [Stephens] had no experience and received no training in the repair and/or replacement of tire molds and the proper method of disconnecting the two-piece tire molds in use at Defendant King Machine.
>
> 18. At the time of the incident, Defendants knew working under heavy loads without proper support or using proper equipment was certain to result in death or serious injury.
>
> . . . .
>
> 20. Upon information and belief, Defendant King Machine . . . instructed [Stephens] to detach bolts from below a two-piece tire mold weighing approximately two thousand (2,000) pounds elevated by a forklift.
>
> 21. Defendants knew [Stephens] was not trained, qualified or experienced to undertake such a dangerous activity.
>
> . . . .
>
> 25. Upon information and belief, [Stephens] was not provided with adequate personal protective/supportive equipment while undertaking the tasks assigned to him.
>
> . . . .

35. Following [Stephens'] death, an investigation was performed by [NCOSH].

36. [NCOSH] reached the following conclusions as a result of their investigation:

a. Defendant King Machine committed a "Willful Serious" violation of 29 CFR 1910.178(m)(2), whereby employees stood under or passed under the elevated portion of a [forklift] . . . while unbolting metal plates weight approximately 1,705 pounds.

. . . .

c. Defendant King Machine committed a violation of 29 CFR 1910.178(a)(4) and 29 CFR 1910.178(a)(5), whereby Defendant King Machine modified their [forklifts] without manufacturer approval with a single hook beam front-end forklift attachment to transport and lift approximately 1,705 pound metal plates.

37. Under information and belief, Defendants knew or should have known the proper safety measures in the industry and Defendant knew or should have known of the proper method of elevating heavy equipment, like tire molds, so that the two piece molds can be disassembled.

. . . .

52. As alleged herein, Defendant King Machine . . . intentionally engaged in conduct knowing it was substantially certain to cause serious injury or death to [Stephens]. Among other things, this conduct included the following:

a. Instructing [Stephens], a new general laborer, to perform work below an approximately 2,000 pound tire mold, work that he had not been trained to perform and was inherently dangerous to perform;

b. Instructing [Stephens] to work below the tire mold without proper experience, training, or safety equipment;

c. Fostering a work environment in which speed is prioritized such as [Stephens] was forced to

perform dangerous and deadly work for which he had not been trained and for which he was unqualified to perform.

d. Instructing [Stephens] to perform work from below a forklift without the proper supports necessary to prevent a crushing type incident;

e. The violation of applicable statutes, rules and regulations, including with limitation 29 CFR 1910.178(a)(4), 29 CFR 1910.178(a)(5), 29 CFR 1910.178(l)(3)(i)(M), and 29 CFR 1910.178(m)(2); and

f. Such other intentional and/or aggravated conduct as may be revealed during discovery.

Plaintiff's allegations are more like those in *Arroyo* than those in *Vaughn*. Specifically, Plaintiff alleged that King Machine "knew working under heavy loads without proper support or using proper equipment was certain to result in death or serious injury[,]" that NCOSH concluded King Machine had committed a " 'Willful Serious' violation of [OSHA], whereby employees stood under or passed under the elevated portion of a [forklift] . . . while unbolting metal plates weight approximately 1,705 pounds[,]" and that NCOSH concluded King Machine had "modified their [forklifts] without manufacturer approval" to facilitate this process. As in *Arroyo*, Plaintiff alleged facts that, taken as true, establish that King Machine was both aware of and encouraged the misconduct that resulted in Stephens' death.

Additionally, Plaintiff alleged facts that, taken as true, establish that King Machine's conduct "was substantially certain to cause injury or death . . . ." *Vaughn*, 230 N.C. App. at 494, 751 S.E.2d at 233-34 (citing *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228). In *Woodson*, our Supreme Court held that directing employees to dig a trench without a trench box was substantially certain to result in the trench caving in. In *Arroyo*, this Court held that directing employees to clean high-rise windows with no fall protection was substantially certain to result in an employee falling from the building. Here, directing employees to stand beneath and disassemble 2,000-pound metal tire molds—suspended by forklifts that had been modified without manufacturer approval—without the proper supports necessary to prevent a crushing-type incident is substantially certain to result in the tire mold falling on and crushing the employee.

Defendants argue that Plaintiff's allegations are insufficient to state a *Woodson* claim because "Plaintiff does not allege a history of safety violations or the removal of safety equipment[,]" and because "Plaintiff does not allege [King Machine] knew the bolt would snap." (Capitalization altered).[1] Although the *Woodson* exception is narrow and fact-bound, these exact allegations are not required to state a *Woodson* claim. *Woodson* itself did not state the cause of the trench cave-in, only that the cave-in was substantially certain. Nor did *Arroyo* state how plaintiff fell, only that a fall was substantially certain. Here, Plaintiff made no argument that the mold was secure but for a bolt that snapped. Instead, Plaintiff explicitly alleged that the mold was improperly suspended, and that if a safe method for working beneath the mold exists, Stephens was not so informed.

The dissent asserts that *Whitaker* is a more appropriate case by which to measure the present facts. The dissent's reliance on *Whitaker* is misplaced as *Whitaker* is procedurally and factually distinguishable. Unlike the present case, *Whitaker* and *Woodson* were decided on motions for summary judgment rather than on motions to dismiss like *Arroyo* and *Vaughn*. In fact, in *Whitaker*, as here, the trial court denied defendant's motion to dismiss plaintiffs' claim under Rule 12(b)(6). *Whitaker*, 154 N.C. App. at 662, 572 S.E.2d at 813.

"The distinction between a Rule 12(b)(6) motion to dismiss and a motion for summary judgment is more than a mere technicality." *Locus v. Fayetteville St. Univ.*, 102 N.C. App. 522, 527, 402 S.E.2d 862, 866 (1991). At summary judgment, the parties, and the court, have the benefit of discovery. *See* N.C. Gen. Stat. §1A-1, Rule 56 ("The judgment sought shall be rendered forthwith 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 . . . ."). On a motion to dismiss, the question is solely whether the allegations are legally sufficient. *Wood v. Guilford Cnty.*, 355 N.C. at 166, 558 S.E.2d at 494 (citation omitted).

In *Woodson*, our Supreme Court had the benefit of expert testimony indicating that the soil conditions were ripe for a cave-in. In *Whitaker*, the trial court denied defendant's motion to dismiss but granted summary judgment after plaintiff had the opportunity to present evidence that the town knew its garbage truck was defective and failed to do

1. The dissent, too, improperly focuses on the precipitating event. Plaintiff's allegation, and our decision, is that requiring employees to work beneath 2,000-pound metal plates without proper supports is substantially certain to result in serious injury or death to anyone standing below, no matter what they are doing.

so. Here, Plaintiff has had no such opportunity, and it would be inappropriate to compare his allegations to a case that emerged from a significantly more developed evidentiary record.[2] Accordingly, this case is more appropriately compared to *Arroyo* and *Vaughn*, which arose from the same procedural posture.

In addition to the distinct procedural posture, the facts alleged in Plaintiff's amended complaint are not, as the dissent asserts, "much closer to those in *Whitaker* than those in *Woodson*." In *Whitaker*, the Court emphasized that "[o]n the day of the accident, none of the Town's supervisors were on-site to monitor or oversee the workers activities[,]" and that "[d]ecedent was not expressly instructed to proceed into an obviously hazardous situation . . . ." *Whitaker*, 357 N.C. at 558, 597 S.E.2d at 668. Here, Plaintiff alleged that Kachur "was the on-site Vice President of King Machine and was responsible and familiar with the work that was being performed[,]" and that Kachur "did, in fact, instruct [Stephens] to work below the approximately 2,000 pound tire mold . . . ." Furthermore, in *Whitaker*, the Court could not conclude that the town engaged in intentional misconduct because plaintiff failed to present evidence that the town knew its garbage truck was faulty. *Id.* Here, Plaintiff alleged that King Machine "modified their [forklifts] without manufacturer approval . . . to transport and lift approximately 1,705 pound metal plates" and "actively create[ed], through its use of [a forklift] vs crane, a dangerous condition such that workers, like [Stephens], were unable to perform their duties safely and subject themselves to bodily harm and death[.]"

The dissent further mischaracterizes our decision by invoking an explicitly-rejected six-factor test and using it as a lens through which to view our analysis. As our Supreme Court stated when it disavowed that test, "[*Woodson*'s] guidelines stand by themselves." *Id.* at 557, 597 S.E.2d at 668. Our decision was reached, as *Whitaker* instructs, by applying the substantial certainty standard as it existed in *Woodson* and without reference to the *Wiggins* factors.

Because Plaintiff alleged facts that, taken as true, establish that King Machine intentionally engaged in misconduct knowing that such conduct was substantially certain to, and in fact did, cause Stephens' death, Plaintiff's allegations are sufficient to state a legally cognizable claim under *Woodson*. *See Arroyo*, 120 N.C. App. at 159-60, 461 S.E.2d at 17.

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2. Plaintiff acknowledged this limitation in both his complaint and his brief.

2. Willful Negligence of Kory J. Kachur (Pleasant Claim)

[2] Defendants argue that Plaintiff failed to allege facts sufficient to establish an exception to the Commission's exclusive jurisdiction under *Pleasant*. To state a *Pleasant* claim, a plaintiff must allege that a co-employee acted with willful, wanton, and reckless negligence; and that the co-employee's negligence resulted in plaintiff's injury. *Pleasant*, 312 N.C. at 717-18, 325 S.E.2d at 250. Willful negligence is "the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed." *Id.* at 714, 325 S.E.2d at 248 (citations omitted). Wanton conduct is "an act manifesting a reckless disregard for the rights and safety of others." *Id.* (citations omitted). "This does not require an actual intent to injure, but can be shown constructively when the co employee's conduct threatens the safety of others and is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified." *Vaughn*, 230 N.C. App. at 500, 751 S.E.2d at 237 (quotation marks and citation omitted).

In *Pleasant*, plaintiff's co-employee on a construction site attempted to drive a truck as close to plaintiff as possible without striking him, but miscalculated and struck plaintiff, seriously injuring him. *Pleasant*, 312 N.C. at 711, 325 S.E.2d at 246. Our Supreme Court held that this behavior constituted willful, wanton, and reckless negligence and allowed the case to proceed in superior court. *Id.* at 718, 325 S.E.2d at 250.

Our Supreme Court revisited the *Pleasant* exception in *Pendergrass v. Card Care Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993), where it held that two co-employees' alleged negligence did not rise to the level of the negligence in *Pleasant*. There, plaintiff was seriously injured when his arm was caught in a final inspection machine that he was operating. *Id.* at 236, 424 S.E.2d at 393. Plaintiff filed a complaint in superior court alleging that two co-employees were grossly and wantonly negligent "in directing [plaintiff] to work at the final inspection machine when they knew that certain dangerous parts of the machine were unguarded, in violation of OSHA regulations and industry standards." *Id.* at 238, 424 S.E.2d at 394. Our Supreme Court held that the co-employees' conduct, as plaintiff alleged, did not fall within the *Pleasant* exception, reasoning that:

> Although they may have known certain dangerous parts of the machine were unguarded when they instructed [plaintiff] to work at the machine, we do not believe this supports an inference that they intended that [plaintiff] be

> injured or that they were manifestly indifferent to the consequences of his doing so.

Id.

More recently, in *Vaughn*, this Court held that plaintiff had alleged facts sufficient to state a *Pleasant* claim against his supervisor.[3] In *Vaughn*, decedent worked as a groundman who assisted other employees working on overhead power distribution lines. 230 N.C. App. at 486, 751 S.E.2d at 229. Decedent's supervisor directed decedent to climb a utility pole and retrofit a live transformer, in part by "removing the hotline clamp from the primary line which [left] the primary line exposed." *Id.* at 487-88, 751 S.E.2d at 230. This task was ordinarily "reserved for [a] trained and experienced lineman[,]" as opposed to decedent, who was a groundman. *Id.* at 488, 751 S.E.2d at 230. While decedent was attempting this procedure, he was electrocuted. *Id.*

This Court held the supervisor's behavior was "not less egregious than that of the co-employee in *Pleasant* . . . ." *Id.* at 502, 751 S.E.2d at 238. Noting that decedent was "an untrained groundman who had previously worked as a truck driver," this Court held that the supervisor's alleged direction to decedent to climb the power pole and work on live power lines without the necessary training, equipment, or experience was "sufficient to create an inference that [the supervisor] was manifestly indifferent to the consequences of his actions . . . ." *Id.* at 503, 751 S.E.2d at 239.

Here, Plaintiff alleged the following:

> 17. Upon information and belief, [Stephens] had no experience and received no training in the repair and/or replacement of tire molds and the proper method of disconnecting the two-piece tire molds in use at Defendant King Machine.
>
> 18. At the time of the incident, Defendants knew working under heavy loads without proper support or using proper equipment was certain to result in death or serious injury.
>
> . . . .

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3. Although this Court held that plaintiff's allegations were insufficient to state a claim against the employer under *Woodson*, this Court held that plaintiff had alleged facts sufficient to state a claim against the supervisor under *Pleasant*. *Vaughn*, 230 N.C. App. at 503, 751 S.E.2d at 239.

20. Upon information and belief, Defendant King Machine, under guidance or lack thereof from Defendant Kachur, instructed [Stephens] to detach bolts from below a two-piece tire mold weighing approximately two thousand (2,000) pounds elevated by a forklift.

21. Defendants knew [Stephens] was not trained, qualified or experienced to undertake such a dangerous activity.

22. Despite [Stephens'] training or lack thereof, the task that [Stephens] was instructed to perform was inherently dangerous for a skilled laborer, let alone a newly hired employee with no training.

23. Upon information and belief, [Stephens] was not supervised while undertaking the dangerous activity of disassembling tire molds.

24. Upon information and belief, [Stephens] was pulled from another part of the Plant in the moments leading up to the incident described herein due to staffing shortages.

25. Upon information and belief, [Stephens] was not provided with adequate personal protective/supportive equipment while undertaking the tasks assigned to him.

. . . .

45. At the time of the incident alleged in this Complaint, Defendant Kachur knew, or was substantially certain, that instructing [Stephens], who had no training or experience to work under an approximately 2,000 pound tire mold without any supports or safety measures posed a serious risk of injury or death.

46. Despite knowledge that instructing [Stephens] to perform this work posed a serious risk of injury or death to [Stephens], Defendant Kachur did, in fact, instruct [Stephens] to work below the approximately 2,000 pound tire mold by failing to provide the appropriate equipment that is standard in the industry.

47. In directing, instructing and requiring that [Stephens] work below heavy tire molds, a task that Defendant Kachur knew [Stephens] was not trained for or experienced in, the conduct of Defendant Kachur demonstrated willful negligence, wanton negligence, reckless negligence, a

> reckless disregard for the rights and safety of others, and a manifest indifference to others, including [Stephens].

Plaintiff's allegations are similar to the allegations in *Vaughn*. Here, like in *Vaughn*, Plaintiff alleged that Kachur knowingly directed Stephens—an untrained employee who had been working elsewhere in the plant—to detach bolts from beneath a 2,000-pound metal tire mold—which was suspended by a forklift that had been modified without manufacturer approval—without any training, supervision, or safety equipment. Like in *Vaughn*, this conduct is sufficient to create an inference that Kachur was manifestly indifferent to the consequences of his actions. *See Vaughn*, 230 N.C. App. at 503, 751 S.E.2d at 239. Thus, like the supervisor's conduct alleged in *Vaughn*, Kachur's conduct as Plaintiff alleged is sufficient to state a legally cognizable claim under *Pleasant*.

The dissent asserts without further support, "I do not believe that the factual allegations in the complaint are sufficient to establish a *Pleasant* claim against Mr. Stephens' supervisor." Again, focusing on a contrived theory that a bolt on the tire mold was defective,[4] the dissent claims Kachur's actions "fall short to show that he had actual or constructive intent to injure Mr. Stephens . . . ." However, Plaintiff expressly alleged that Kachur knew the danger of working beneath a 2,000-pound metal tire mold, knew that Stephens had no training or experience in working beneath a 2,000-pound metal tire mold, and directed Stephens to perform the work anyway, without protective equipment, instruction, or supervision. Such an action cannot be characterized as anything less than a manifest indifference to the consequences of his actions.

3. Ordinary Negligence of King Machine (Stranger to Employment Claim)

Plaintiff argues, in the alternative, that King Machine was not Stephens' employer when the incident occurred, and therefore Plaintiff's negligence action against King Machine does not fall within the Commission's jurisdiction. Specifically, Plaintiff argues that "[Stephens] was an employee of TotalSource at all times and never an employee of [King Machine]."

Our Supreme Court has interpreted the Act's exclusivity provision as "allowing an injured worker to bring a common law negligence action against a third party . . . when the third party is a 'stranger to the employment.' " *Wood v. Guilford Cnty.*, 355 N.C. 161, 164, 558 S.E.2d 490, 493-94

4. Plaintiff made no allegation that any part of the mold was defective.

(2002) (citations omitted). However, Plaintiff's argument depends entirely on an alleged employment agreement that is not in the record on appeal. Furthermore, the record on appeal shows that Plaintiff alleged,[5] and Defendants admitted,[6] that King Machine was Stephens' employer at the time of the incident. Accordingly, we decline to address Plaintiff's argument that the Act does not apply.

IV. Conclusion

Because Plaintiff alleged facts sufficient to establish exceptions to the Commission's exclusive jurisdiction over this case under *Woodson* and *Pleasant*, the trial court did not err by denying Defendants' motions to dismiss pursuant to Rule 12(b)(6). Because Plaintiff sufficiently pled *Woodson* and *Pleasant* claims, the trial court did not err by denying Defendants' motions to dismiss pursuant to Rule 12(b)(1). The trial court's order denying Defendants' motions to dismiss is affirmed.

AFFIRMED.

Judge WOOD concurs.

Judge DILLON concurs in part and dissents in part by separate opinion.

DILLON, Judge, concurring in part and dissenting in part.

Desmond Stephens was tragically crushed to death in a workplace accident by half of a heavy two-piece tire mold which fell on him when a bolt providing support for the mold failed. His estate filed this action against his employers and supervisor for his death. Because I conclude the complaint fails to allege a claim establishing any exception to the Industrial Commission's exclusive jurisdiction, my vote is to reverse the trial court's order denying Defendants' motion to dismiss. Therefore, I respectfully dissent.[1]

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5. Paragraph 13 of Plaintiff's complaint states, "At the time of the incident, [Stephens] was employed by King Machine as a general laborer and had been an employee for approximately three (3) weeks."

6. Paragraph 13 of Defendants' answer states, "The allegations of Paragraph 13 are admitted, upon information and belief."

1. I concur in Section III.A. of the majority opinion disposing of the parties' motions on appeal.

Woodson Claim Against Employers

Generally, our Workers' Compensation Act provides the sole remedies against an employer for a workplace accident. However, in its 1991 landmark *Woodson* decision, our Supreme Court carved out a narrow exception to the Act's exclusivity, that a tort action apart from the Act may be maintained where an employee's injury or death is caused by intentional conduct of the employer and the employer knew it was substantially certain that such conduct would cause the injury or death:

> We hold that when an employer *intentionally* engages in misconduct *knowing* it is *substantially certain* to cause serious injury or death to employees and an employee is injured or killed by the misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act.

Woodson v. Rowland, 329 N.C. 330, 341-42, 407 S.E.2d 222, 228 (1991).

The majority relies primarily on our Court's 1995 *Arroyo* opinion handed down four years after *Woodson*, to conclude that Mr. Stephens' estate has properly alleged a *Woodson* claim. *Arroyo v. Scottie's*, 120 N.C. App. 154, 461 S.E.2d 13 (1995). I conclude that this reliance on *Arroyo* is misplaced and that our Supreme Court's more recent guidance in *Whitaker v. Scotland Neck*, 357 N.C. 552, 597 S.E.2d 665 (2003) compels reversal of the trial court's order, as explained below.

In *Arroyo*, our Court relied on several factors to conclude that an employee had proved a *Woodson* claim. In 1999, four years after *Arroyo*, our Court identified and weighed six factors to conclude that an employee had proved a *Woodson* claim. *Wiggins v. Pelikan*, 132 N.C. App. 752, 513 S.E.2d 829 (1999). In *Wiggins*, we expressly relied on *Arroyo* for two of the factors; namely, whether the employer knew of, but failed to take, additional safety precautions which would have reduced the risk *and* whether the employer's conduct which created the risk violated state or federal work safety regulations. *Id.* at 757, 513 S.E.2d at 833.

The majority in the present case relies, in part, on allegations supporting the existence of the two "*Arroyo*" factors restated in *Wiggins*: Mr. Stephens' employers failed to take additional safety precautions by failing to provide Mr. Stephens "adequate personal protective/supportive equipment," and Mr. Stephens' employers willfully violated government

safety regulations. The majority also cites allegations in the complaint supporting the existence of another *Wiggins* factor, namely that Mr. Stephens "was not trained, qualified or experienced" to perform the task assigned to him by his employers. *Id.* at 758, 513 S.E.2d at 833 (factor which considers "[w]hether the defendant-employer offered training").

However, in 2003, four years after *Wiggins* and eight years after *Arroyo*, our Supreme Court reversed a decision of our Court in which we allowed a plaintiff's *Woodson* claim to proceed, holding that "the six-factor test created by the Court of Appeals in *Wiggins* misapprehends the narrowness of the substantial certainty standard set forth in *Woodard*." *Whitaker*, 357 N.C. at 555-56, 597 S.E.2d at 667.

Our Supreme Court reiterated that *Woodson* provided a "*narrow* exception to the general exclusivity of the [Act]" by allowing an employee or his estate to sue the employer in tort "*only in the most egregious cases* of employer misconduct" where said conduct is intentional and "where such misconduct is *substantially certain* to lead to the employee's serious injury or death." *Id.* at 557, 597 S.E.2d at 668 (emphasis added). The Court reminded that a *Woodson* claim is not stated where the evidence shows a "mere possibility" or even a "substantial probability" that the employer's intentional misconduct would result in injury or death. *Id.*

In *Whitaker*, the evidence showed that a sanitation worker was crushed to death by a dumpster as the dumpster was suspended as its contents were being emptied into a garbage truck and the mechanism which latched the dumpster to the truck during the process failed, causing the dumpster to swing around and strike the employee. *Id.* at 558, 597 S.E.2d at 669. The Court in *Whitaker* distinguished these facts with those shown in *Woodson*. Specifically, the Court noted that a valid tort claim existed in *Woodson* because the evidence there showed the employer "disregarded all safety measures and intentionally placed his employee into a hazardous situation in which experts concluded *that only one outcome was substantially certain to follow*: an injurious, if not fatal, cave-in of the trench." *Id.* at 557-58, 597 S.E.2d at 668.

The evidence in *Whitaker* showed the latching mechanism holding the suspended dumpster in place was defective and the employer had committed five "serious" violations of state labor law, including among others a "failure to train employees" and a "failure to properly supervise employees[.]" *Id.* at 554, 597 S.E.2d at 666. The Court, though, no *Woodson* claim existed, in part, because "[t]here was no evidence that [the employer] knew that the latching mechanism on the truck was substantially certain to fail[.]" *Id.* at 668, 597 S.E.2d at 668.

The facts as alleged in the complaint in the case before us is much closer to those in *Whitaker* than those in *Woodson*. It is true that it was substantially certain Mr. Stephens would be seriously injured or die *if* a bolt keeping the tire mold suspended failed. But there is no allegation that it was substantially certain that the bolt would fail as Mr. Stephens was working under the mold, much less that Mr. Stephens' employers knew that the bolt was going to fail. There is no allegation that Mr. Stephens' inexperience contributed to the bolt failing. This is not to say that there was not a strong possibility or probability that the bolt would fail; however, there is no allegations to suggest that it was *substantially certain* that the bolt would fail. The allegations only show willful negligence by the employers and a tragic accident.

Pleasant Claim Against Supervisor

I do not believe that the factual allegations in the complaint are sufficient to establish a *Pleasant* claim against Mr. Stephens' supervisor. While the factual allegations show that Mr. Stephens' supervisor willfully breached duties he may have owed to Mr. Stephens, they fall short to show that he had actual or constructive intent to injure Mr. Stephens much less that he knew or had reason to know that the bolt which failed causing Mr. Stephens' death was defective. *See Pleasant v. Johnson*, 312 N.C. 710, 714-15, 325 S.E.2d 244, 248 (1985) (noting the "distinction between the willfulness which refers to the breach of duty and the willfulness which refers to the injury" stating that "[i]n the former only the negligence is willful, while in the latter the injury is intentional").

ALVIN MITCHELL, PETITIONER
v.
THE UNIVERSITY OF NORTH CAROLINA BOARD OF GOVERNORS, RESPONDENT

No. COA21-639

Filed 4 April 2023

1. Public Officers and Employees—termination—tenured university professor—neglect of duty and misconduct—due process

The termination of a tenured university professor (petitioner) for neglect of duty (for failing both to resolve a student grading issue and to timely open an online class that had been assigned to him) and misconduct (for sending a written letter to his direct supervisor with racially inflammatory language) did not violate petitioner's right to due process and was in accordance with the procedures set forth in the Code of the Board of Governors of the University of North Carolina. The Chancellor, as final decision-maker, was not required to adopt the recommendation of the Faculty Hearing Committee (FHC) to reverse sanctions upon its determination that the university failed to make out a prima facie case; petitioner was given the opportunity to present further evidence after the Chancellor sent the matter back to the FHC but chose not to; and petitioner did not present any evidence to overcome the presumption that the Chancellor acted in good faith and in compliance with governing law when the Chancellor reached a different conclusion than the FHC.

2. Public Officers and Employees—termination—tenured university professor—use of racially inflammatory language—freedom of speech—matter of public concern

The termination of a tenured university professor for misconduct—based on his use of racially inflammatory language in a letter he wrote to his direct supervisor—did not violate the professor's constitutional right to free speech because the letter did not involve a matter of public concern but, rather, consisted of the professor's personal criticisms of his supervisor's work and disagreement with some of her decisions.

Judge MURPHY concurring in part and dissenting in part.

Appeal by Petitioner from Order entered 26 July 2021 by Judge Martin B. McGee in Forsyth County Superior Court. Heard in the Court of Appeals 11 May 2022.

Allison Tomberlin for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Zach Padget, for respondent-appellee.

HAMPSON, Judge.[1]

Factual and Procedural Background

Alvin Mitchell (Petitioner) appeals from the trial court's Order affirming a decision of The University of North Carolina Board of Governors (BOG) which, in turn, upheld Petitioner's discharge from employment as a tenured professor at Winston-Salem State University (WSSU). The Record before us tends to reflect the following:

Petitioner was hired by WSSU in July 2006 as an Associate Professor of Justice Studies in the Department of Social Sciences and was granted tenure in December 2008. In July 2015, Dr. Cynthia Villagomez and Dr. Denise Nation became co-chairs of the Department of Social Sciences and, thus, Petitioner's direct supervisors. This appeal arises out of Petitioner's discharge from employment based on three alleged acts of misconduct by Petitioner taking place between the Fall of 2015 and the Fall of 2017 while he was under the supervision of Dr. Villagomez and Dr. Nation.

First, during Petitioner's Introduction to Corrections course in the Fall 2015 semester, a student submitted a paper that Petitioner did not feel met the necessary requirements. Petitioner provided the student an opportunity to resubmit the paper, which led to the student receiving a grade of "incomplete" in the class. Throughout 2016, the student and his academic success counselor attempted to reach out to Petitioner without success. Pursuant to WSSU policy, in December 2016, the student's grade of "incomplete" converted to an F. Dr. Nation and Petitioner's supervising Dean, Dr. Doria K. Stitts, both attempted to resolve the grade issue with him over email, but he did not respond. Dr. Nation and Dr.

1. Judge Murphy contributed substantial authorship of those portions of the Opinion of the Court on which we are unanimous. This specifically includes the Factual and Procedural Background and our discussion of the alleged procedural errors asserted by Petitioner.

Villagomez approached Petitioner to discuss the issue as Petitioner was teaching a class, leading to a verbal altercation in which Dr. Villagomez called the police.

Second, sometime during the 2016-2017 academic year, two students in Petitioner's Research Methods class conducted research to draft a paper. The students learned about a conference in New Orleans—the Race, Gender & Class Conference—where they could present their findings. They approached Dr. Nation to obtain funding to attend the conference, but she did not approve the funding, instead recommending a different conference by the American Society of Criminology (ASC). One of the students believed that Dr. Nation may have encouraged the students to look into the ASC conference because it was primarily Caucasian. When Petitioner learned of the conversation, he wrote a letter to Dr. Nation in response:

> Hi Denise, it was brought to my attention that you told a student that the conference I and two of my students are presenting at has no substance or standards, meaning that it is useless and unaccredited, and anyone can present. In addition, you told the student she should try to present at the ASC held in November because it is a better conference and has a lot of substance. You are entitled to your opinion. However, you should not be telling the student things like that, especially with no proof. The Race, Gender & Class conference is locally, regionally, and internationally known and ha[s] scholars from around the world presenting. In addition, the conference has been in existence for over 20 years. Thirdly, this conference does not take anyone. You have to be accepted through their process. It is amazing how you always try to debunk what I do. Yet you complain that I tell students negative things about you. It would have been better to tell the student that you did not want to help fund her instead of telling her falsehoods about the RGC conference and asking her to present on scholarship day. That is not appropriate behavior as a chair.
>
> After all these years, it is amazing that you still think that anything white is better. I looked up the ASC and nothing but a bunch of white men (some white women) are running it. Keep promoting and praising those white folks who are associated with the ASC. As I told you before, you can graduate from and praise their schools, come up with a

> great theory, hangout with them, praise Latessa and other European professors (you need to ask them about their civil rights record), wear their European style weaves, walk with their bounce, hire them, present at their conferences, and even publish in their journals. In their eyes you will never be equal to them. They still look at you as a wanna be white, an international nigger, an international coon, and an international sambo (lol) because you display that kind of behavior. You will never get it. Wake up.

Dr. Nation believed the letter created a hostile workplace, and, while she ultimately decided to not file a formal complaint with the Equal Employment Opportunity Commission, she did report the incident to the Dean and Provost and sent them a copy of the letter.

Third, Petitioner's Summer 2017 semester Constitutional Law class was involuntarily reassigned by Dr. Nation to another professor because of concerns regarding the rigor of the course and his failure to provide a syllabus in a previous semester. Less than one week before the Fall 2017 semester, Petitioner informed Dr. Nation and Dr. Villagomez via email that he did not feel comfortable teaching Research Methods II—a course given to him in lieu of Constitutional Law—despite having already approved the course on his schedule and having taught it for at least six years. Dr. Nation did not allow him to change courses. On 22 August 2017, one day after the semester began, Dr. Nation informed Petitioner that he had failed to open an online course he was teaching. Petitioner responded by stating "I do not know my schedule anymore . . . ." However, Dr. Villagomez reiterated that his schedule had not changed.

On 31 August 2017, WSSU Interim Provost Carolynn Berry provided Petitioner with notice of WSSU's intent to discharge him pursuant to Section 603 of *The Code of the Board of Governors of the University of North Carolina* (UNC Code) for neglect of duty and misconduct. According to the UNC Code, "neglect of duty[] includ[es] sustained failure to meet assigned classes or to perform other significant faculty professional obligations[,]" and "misconduct . . . includ[es] violations of professional ethics, mistreatment of students or other employees, research misconduct, financial fraud, criminal, or other illegal, inappropriate or unethical conduct." However, "[t]o justify serious disciplinary action, such misconduct should be either (i) sufficiently related to a faculty member's academic responsibilities as to disqualify the individual from effective performance of university duties, or (ii) sufficiently serious as to adversely reflect on the individual's honesty, trustworthiness or fitness to be a faculty member."

On 10 January 2018, a hearing was held before the Faculty Hearing Committee (FHC). Following the presentation of WSSU's case, the FHC determined that WSSU had not made a prima facie case and recommended the Chancellor overturn the sanctions. Despite this recommendation, in accordance with the UNC Code's procedure, the Chancellor issued a letter on 30 January 2018 disagreeing with the FHC's determination and sent the matter back to the FHC to conclude the hearing. After the Chancellor's determination, Petitioner informed the FHC he did not wish to present any further evidence. The FHC once again found WSSU had not proven its case. However, after reviewing the transcript, the FHC's recommendation, and all of the evidence received by the FHC, the Chancellor issued his decision on 7 March 2018 and upheld the Provost's decision to discharge Petitioner. The Chancellor determined Petitioner violated the UNC Code via neglect of duty because he failed to provide his student with a final grade and failed to open the online course. The Chancellor also further determined Petitioner violated the UNC Code via misconduct when he sent the letter to Dr. Nation.

Following the Chancellor's determination, Petitioner appealed to the WSSU Board of Trustees (BOT). The Appeals Committee of the BOT concluded WSSU had produced sufficient evidence to uphold Petitioner's dismissal for neglect of duty and misconduct. Petitioner then sought review of the BOT's decision to the BOG, which upheld the BOT's decision on 23 May 2019. The BOG concluded as follows:

> Substantively, based upon a careful consideration of the record as a whole, statements submitted by the parties, and consideration of all controlling laws and policies, there is sufficient evidence in the record to support a determination that [Petitioner] failed to adequately resolve a grading issue, resulting in the student receiving a failing grade for the class and endangering the student's eligibility to receive financial aid, which failure constitutes neglect of duty under Section 603(1) of [the UNC Code]. In addition, there is sufficient evidence in the record to support the determination that [Petitioner] failed to timely open [a]n online class that he knew he was scheduled to teach, and that he continued to fail to open the class at least six days after being directed to do so by his department chairs and his [D]ean, which failure constitutes neglect of duty under Section 603(1) of [the UNC Code]. Finally, there is sufficient evidence in the record to support the determination that [Petitioner] wrote and delivered to his direct supervisor [a] personally and professionally insulting,

> racially inflammatory note in which he referred to her as a "nigger," a "coon," and a "sambo," which constitutes misconduct under Section 603(1) of [the UNC Code].

The BOG also found that "[Petitioner] erroneously characterize[d] his letter to Dr. Nation as [a] letter written by him in his capacity as a private citizen, on a matter of public concern."

Petitioner sought judicial review in Superior Court. After a whole record review, the trial court affirmed the decision of the BOG. The trial court concluded:

> the decision to terminate the Petitioner for (1) his neglect of duty for failing to open the online course, (2) his neglect of duty for failing to issue a final grade, and (3) misconduct for the derogatory and racially charged letter to [Dr. Nation] . . . is supported by substantial evidence in the record and is not arbitrary, capricious, or an abuse of discretion[.]
>
> . . . .
>
> the decision to discharge the Petitioner . . . was not in violation of any constitutional provisions, in excess of statutory authority or jurisdiction of the agency, made upon unlawful procedure or affected by other error of law. The Petitioner's discharge related to his letter of March 2017 was not in violation of his First Amendment rights and proper procedures were followed.

The trial court also ruled the process afforded Petitioner at the agency level was adequate. Petitioner timely appealed to this Court.

Issues

On appeal to this Court, Petitioner raises two primary issues: (I) whether the BOG's decision upholding Petitioner's discharge from employment was affected by unlawful procedures during the proceedings before WSSU's FHR and Chancellor; and (II) whether Petitioner's discharge from employment was in violation of his First Amendment right of free speech where the discharge was based, in part, on the letter he sent to Dr. Nation.

Analysis

"Appellate review of a superior court order concerning an agency decision requires an examination of the trial court's order for any errors

of law." *Emp. Sec. Comm'n of N.C. v. Peace*, 128 N.C. App. 1, 6, 493 S.E.2d 466, 470 (1997), *aff'd in part*, *rev. dismissed in part*, 349 N.C. 315, 507 S.E.2d 272 (1998). Our standard of review is defined by statute:

> A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in G.S. 7A-27. The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases. In cases reviewed under G.S. 150B-51(c), the court's findings of fact shall be upheld if supported by substantial evidence.

N.C. Gen. Stat. § 150B-52 (2021). Here, Petitioner "challenges the trial court's law-based inquiries, including whether the [BOT's] decision violated constitutional provisions, was made upon unlawful procedure, was in excess of statutory authority, or was affected by other error of law[.]" The trial court reviewed these asserted errors under N.C. Gen. Stat. § 150B-51(c) and "the [trial] court's findings of fact shall be upheld if supported by substantial evidence." *Id.*

When conducting our review, the agency is entitled to a presumption of good faith.

> The agency's decision is presumed to be made in good faith and in accordance with governing law. Therefore, the burden is on the party asserting otherwise to overcome such presumptions by competent evidence to the contrary when making a claim that the decision was affected by error of law or procedure.

Richardson v. N.C. Dep't of Pub. Instruction Licensure Section, 199 N.C. App. 219, 223-24, 681 S.E.2d 479, 483, *disc. rev. denied*, 363 N.C. 745, 688 S.E.2d 694 (2009) (citation omitted). "It is well established that an agency's construction of its own regulations is entitled to substantial deference." *Morrell v. Flaherty*, 338 N.C. 230, 237, 449 S.E.2d 175, 179-80 (1994) (citation and quotation marks omitted). We must also generally defer to the agency's interpretation of its regulations "unless it is plainly erroneous." *Id.* at 238, 449 S.E.2d at 180.

I. WSSU Hearing Procedures

[1] "To assert a due process claim, [Petitioner] must show that [he was] deprived of a protected property interest in employment. If tenured, an employee has a protected property right because tenure constitutes a promise of continued employment." *Pressman v. Univ. of N.C. at Charlotte*, 78 N.C. App. 296, 302, 337 S.E.2d 644, 648 (1985) (citations

omitted). Here, Petitioner was a tenured professor who held a protected property interest in his employment. "Section 603 specifies the due process protections to which a tenured faculty member is entitled and contains a detailed schedule of steps involving notice and hearings which the university must take prior to discharging a tenured faculty member." *Bernold v. Bd. of Governors of Univ. of N.C.*, 200 N.C. App. 295, 299, 683 S.E.2d 428, 431 (2009). Even if the UNC Code satisfies the requirements of due process, WSSU must then comply with its own procedures. *McAdoo v. Univ. of N.C. at Chapel Hill*, 225 N.C. App. 50, 68-69, 736 S.E.2d 811, 824 (2013) ("A state actor violates due process when it fails to follow its own rules and procedures." (citations omitted)). Petitioner puts forward three instances in which he believes his due process rights were violated by WSSU's failure to comply with its own procedures: the Chancellor ignoring the prima facie determinations made by the FHC; Petitioner's own waiver of a full hearing; and the trial court's reliance on what were purportedly the Chancellor's findings of fact instead of the FHC's.

A. Chancellor Declining to Accept the FHC's Recommendation

First, Petitioner asserts that the Chancellor could not move forward with his dismissal when the FHC determined twice that WSSU had failed to make out a prima facie case. We disagree. While the Chancellor is required to consider the recommendations of the FHC, the decision to discharge ultimately remains with the Chancellor under the UNC Code. The FHC's decision at the end of the hearing is transmitted to the Chancellor as a written recommendation. The Chancellor is expressly allowed to "decline[] to accept a [FHC] recommendation that is favorable to the faculty member[.]" According to Petitioner, this renders the due process protections outlined in the Faculty Handbook meaningless.[2] However, the Faculty Handbook contemplates that a record will be made at the FHC hearing which can be used on the multiple levels of appeal available to WSSU and faculty members: "[T]he purpose of the hearing is to create a record of testimony and documentary evidence for review by the parties, the [BOT] and/or [BOG], should the Faculty Member seek further review of the discharge or imposition of other serious sanctions." For a better record, "[i]f the Chancellor disagrees with the [FHC's] determination [of whether a prima facie case has been presented], he/she will send it back for a full hearing."

2. Mitchell does not argue that the Chancellor did not provide a meaningful review of the FHC's recommendations.

Indeed, in this case, the Chancellor expressly sent the matter back to the FHC for the FHC to conclude the hearing and provide Petitioner an opportunity to present evidence. Petitioner declined. Furthermore, WSSU submits a different interpretation of the UNC Code. WSSU, as a government agency, interprets its procedure to mean that the Chancellor has the final say if the Chancellor and the FHC disagree. "It is well established that an agency's construction of its own regulations is entitled to substantial deference." *Morrell*, 338 N.C. at 237, 449 S.E.2d at 179-80 (citation and quotation marks omitted). We must also generally defer to the agency's interpretation of its regulations "unless it is plainly erroneous." *Id.* at 238, 449 S.E.2d at 180. The agency's interpretation of the ultimate decision maker is not plainly erroneous. The text of the UNC Code aligns with the interpretation followed by WSSU: "The [C]hancellor shall issue a *final* written opinion within 30 [d]ays after receiving the hearing documents including the transcript of the hearing. The [C]hancellor's decision shall be based on the recommendations and evidence received from the FHC including the Transcript of the hearing." (emphasis added.)

We find it analytically relevant that the FHC is tasked with providing "recommendations," while the Chancellor issues a "final written opinion" based on those recommendations. The Chancellor and the FHC clearly have separate roles to play in the discipline process; therefore, it was not plainly erroneous for WSSU to interpret the role of the Chancellor as the final decision maker in instances of disagreement with the FHC.

B. Petitioner's Decision Not to Present Further Evidence

Second, Petitioner argues that he could not have knowingly, intelligently, and voluntarily waived his right to a full hearing because he erroneously believed the Chancellor was bound by the FHC's recommendations. Petitioner was represented by counsel at the FHC's hearing and aware of the purposes of the hearing as described in the notice provided to him. Petitioner made his own decision not to present further evidence after the prima facie determination was rejected by the Chancellor. He was also aware of his ability to present evidence at that point in the hearing; the WSSU Faculty Handbook states that "[t]he Faculty Member shall have the right to counsel, to present the testimony of witnesses and other evidence, to confront and cross-examine adverse witnesses and to examine all documents and other adverse demonstrative evidence, and to make argument." Petitioner's decision not to present argument after the prima facie determination was rejected by the Chancellor does not make the procedure afforded to him defective or violate his due process rights.

C. Chancellor Acting as a Fact Finder

Third, Petitioner argues that only the FHC was authorized to function as a fact finder and not the Chancellor. Even presuming, without deciding, Petitioner's argument is correct, Petitioner has presented no evidence that the Chancellor ignored the findings of fact reached by the FHC.

> The agency's decision is presumed to be made in good faith and in accordance with governing law. Therefore, the burden is on the party asserting otherwise to overcome such presumptions by competent evidence to the contrary when making a claim that the decision was affected by error of law or procedure.

Richardson, 199 N.C. App. at 223-24, 681 S.E.2d at 483 (citation omitted). Without anything in the Record to support Petitioner's assertion, he has not overcome the presumption that the Chancellor acted in good faith and in accordance with governing law when reviewing the recommendations of the FHC, as the Chancellor could have reached a different conclusion than the FHC using the same set of facts. Thus, regardless of whether it would constitute a violation of due process for the Chancellor to have acted in a fact-finding capacity, Petitioner presented no evidence to support that the Chancellor so acted; accordingly, this argument fails.

For all the reasons stated above, Petitioner's due process rights were not violated when the Chancellor rejected the prima facie determination made by the FHC; when he chose not to present argument after the prima facie determination; or when the Chancellor reached a different conclusion than the FHC after reviewing the record and recommendation. Accordingly, the procedure used to terminate Petitioner's employment was not unlawful, defective, or in violation of his due process rights.

II. Discharge based on Petitioner's Letter to Dr. Nation

[2] Petitioner further argues the trial court's decision upholding the BOG's final decision upholding Petitioner's discharge—based in part on Petitioner's letter to Dr. Nation—was in error because, Petitioner contends, his letter "touched upon a matter of public concern." As such, he argues that, as a public employee, his discharge implicated his First Amendment right to free speech and violated his protected interest in freedom of expression. We disagree.

"Public employment may not be conditioned on criteria that infringes the employees' protected interest in freedom of expression."

Pressman, 78 N.C. App. at 300, 337 S.E.2d at 647 (citation omitted). "An employee may not be discharged for expression of ideas on a matter of public concern." *Id.* (citation omitted). "The expression need not be public but may be made in a private conversation." *Id.* (citation omitted).

"To make out a claim under the First Amendment, the [public] employee must show that his speech is concerning a matter of public concern." *Id.* (citing *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)). "A matter is of public concern if when fairly considered it relates 'to any matter of political, social, or other concern to the community.' " *Id.* at 300-01, 337 S.E.2d at 647 (quoting *Connick*, 461 U.S. at 146, 103 S.Ct. at 1690, 75 L.Ed.2d at 719). "The context, form, and content of the employee's speech as revealed by the whole record are used to determine the nature of the speech." *Id.* at 301, 337 S.E.2d at 647. "Whether speech is a matter of public concern is a question of law for the courts to decide." *Id.* at 301, 337 S.E.2d at 647-48.

"If the speech is upon a matter of public concern, there must be a 'balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Id.* (quoting *Connick*, 461 U.S. at 142, 103 S.Ct. at 1687, 75 L.Ed.2d at 717 (citation and quotation marks omitted)). "The balancing of interests is a question of law for the courts." *Id.* (citation omitted).

Here, the BOG determined Petitioner failed to present any evidence that his letter to Dr. Nation addressed a matter of public concern. The BOG further noted Petitioner "erroneously characterized" his letter as addressing a matter of public concern. The trial court affirmed this ruling.

Indeed, on appeal, Petitioner again cites no record support for his contention. Instead, Petitioner contends, without citation, his letter was "an impassioned plea" and a "strongly worded condemnation of racism within academia and Nation's perceived participation in that racist culture." There is no evidence in this Record, however, that Dr. Nation's decision to deny funding to Petitioner's students for Petitioner's chosen conference was racially motivated or a product of racial bias in academia. There is, further, also no evidence that Petitioner intended his letter to be an effort to combat racism in academia or to advocate on the part of his students for funding to attend his preferred conference on that basis.

To the contrary, the context, form, and content of Petitioner's speech—as revealed by the whole Record—reflects Petitioner's speech

was nothing more than an expression of his personal grievance towards Dr. Nation and his displeasure with her administrative decision not to provide funding for Petitioner's preferred conference. That Petitioner did so by invoking his own racist epithets does not convert his letter into one addressing a matter of public concern. In fact, in *Pressman*, this Court addressed a professor's statements during a meeting concerning a Dean's lack of administrative competence, including a lack of opportunity for personal growth because of a heavy workload, lack of guidance for grading, and the failure to develop a master's program and a recruiting program. *Pressman*, 78 N.C. App. at 301, 337 S.E.2d at 648. This Court found the "criticism not based on public-spirited concern but more narrowly focused on [the professor's] own personal work and his personal displeasure with internal policies." *Id.* at 301-02, 337 S.E.2d at 648. Thus, the Court concluded the professor failed to show his speech was addressing a matter of public concern and, thus, did not implicate the professor's First Amendment protections as a public employee. Here, even ignoring Petitioner's racial invectives directed towards Dr. Nation, the letter, taken in context, is nothing more than criticism focused on Petitioner's own work, broader disagreements with Dr. Nation and her criticism of him, and his displeasure with her decision not to provide funding.

Thus, Petitioner's letter to Dr. Nation, in this case, did not implicate a matter of public concern. Therefore, the BOG did not commit any error of law by upholding Petitioner's discharge from employment based, in part, on his letter to Dr. Nation. Consequently, the trial court did not err in affirming the BOG.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's 26 July 2021 Order.

AFFIRMED.

Judge ZACHARY concurs.

Judge MURPHY concurs in part and dissents in part in separate opinion.

MURPHY, Judge, concurring in part and dissenting in part.

While I agree with the Majority's analysis as to whether Petitioner was afforded adequate process during termination proceedings, I dissent in part from the Majority on the basis that Petitioner's remarks

implicated a matter of public concern, therefore requiring the trial court to conduct a First Amendment balancing test.

"It is clearly established that a State may not discharge an employee on a basis that infringes the employee's constitutionally protected interest in freedom of speech." *Rankin v. McPherson*, 483 U.S. 378, 383 (1987). This is true "despite the fact that the statements are directed at their [] superiors." *Pickering v. Board of Education*, 391 U.S. 563, 574 (1968). "The threshold question . . . is whether [Petitioner's] speech may be fairly characterized as constituting speech on a matter of public concern." *Id.* "The determination of whether speech is protected under the First Amendment is a question of law." *Holland v. Harrison*, 254 N.C. App. 636, 643 (2017).

Controversial speech by a public employee is not a novel issue. In *Pressman v. University of North Carolina at Charlotte*, a nontenured professor was denied reappointment after he "attended a faculty meeting where the faculty discussed [the university dean's] lack of administrative competence." *Pressman v. University of North Carolina at Charlotte*, 78 N.C. App. 296, 298 (1985). The professor expressed his concern over a variety of workplace topics at the meeting. *Id.* Establishing North Carolina's two-pronged test regarding free speech by government employees, we said the following:

> To make out a claim under the First Amendment, the employee must show that his speech is concerning a matter of public concern. A matter is of public concern if when fairly considered it relates "to any matter of political, social, or other concern to the community." The context, form, and content of the employee's speech as revealed by the whole record are used to determine the nature of the speech. Whether speech is a matter of public concern is a question of law for the courts. If the speech is upon a matter of public concern, there must be a "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." The balancing of interests is a question of law for the courts.

Id. at 300-01 (quoting *Connick v. Myers*, 461 U.S. 138 (1983)). We held that the professor's "speech was not upon a matter of public concern." *Id.* at 301. Instead, "[h]is speech can be more accurately described as an employee grievance concerning internal policy." *Id.* His "criticism [was] not based on public-spirited concern but more narrowly focused on his

own personal work and his personal displeasure with internal policies." *Id*. at 301-02.

Here, Petitioner's letter to Dr. Nation reads, in whole, as follows:

> Hi Denise, it was brought to my attention that you told a student that the conference I and two of my students are presenting at has no substance or standards, meaning that it is useless and unaccredited, and anyone can present. In addition, you told the student she should try to present at the ASC held in November because it is a better conference and has a lot of substance. You are entitled to your opinion. However, you should not be telling the student things like that, especially with no proof. The Race, Gender & Class conference is locally, regionally, and internationally known and ha[s] scholars from around the world presenting. In addition, the conference has been in existence for over 20 years. Thirdly, this conference does not take anyone. You have to be accepted through their process. It is amazing how you always try to debunk what I do. Yet you complain that I tell students negative things about you. It would have been better to tell the student that you did not want to help fund her instead of telling her falsehoods about the RGC conference and asking her to present on scholarship day. That is not appropriate behavior as a chair.
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> After all these years, it is amazing that you still think that anything white is better. I looked up the ASC and nothing but a bunch of white men (some white women) are running it. Keep promoting and praising these white folks who are associated with the ASC. As I told you before, you can graduate from and praise their schools, come up with a great theory, hangout with them, praise Latessa and other European professors (you need to ask them about their civil rights record), wear their European style weaves, walk with their bounce, hire them, present at their conferences, and even publish in their journals. In their eyes you will never be equal to them. They still look at you as a wanna be white, an international nigger, an international coon, and an [i]nternational sambo (lol) because you display that kind of behavior. You will never get it. Wake up.

Under *Pressman*, the question this letter raises is twofold and subject to resolution as a matter of law: (1) whether the speech at issue,

holistically and in context, addresses a matter of public concern and (2) whether the interests of the employee in expressing the concern outweigh the employer's interest in the efficient administration of its services. As the extent of the discussion of this constitutional issue at trial was a singular statement that Petitioner's termination "was not in violation of any constitutional provisions," I understand the trial court to have ruled, without discussion, that the letter did not address a matter of public concern.

At the threshold, I make two notes. First, the broader subject of academia's relationship with race has long been acknowledged as a subject of public concern and remains so, now more than ever. Universities in this state and across the country market themselves to, and communicate with, the public based on demographic diversity with respect to—among other things—race. *See*, *e.g.*, Duke University Office of the Provost, *Duke's Commitment to Diversity and Inclusion*, https://provost.duke.edu/initiatives/commitment-to-diversity-and-inclusion (last accessed 5 January 2023); Wake Forest University, *Diversity & Inclusion*, https://admissions.wfu.edu/experience-wake-forest/diversity/ (last accessed 5 January 2023); Harvard University, *Diversity and Inclusion*, https://www.harvard.edu/about/diversity-and-inclusion/ (last accessed 5 January 2023); Stanford Graduate School of Business, *Diversity, Equity & Inclusion*, https://www.gsb.stanford.edu/experience/diversity-equity-inclusion (last accessed 5 January 2023); *see also Campus Ethnic Diversity: National Universities*, U.S. News & World Report, https://www.usnews.com/best-colleges/rankings/national-universities/campus-ethnic-diversity (last accessed 5 January 2023). Copious amounts of ink have been spilled over what the significance of race in academia should be, what constitutes racism, and how to solve the myriad of problems it poses. *See*, *e.g.*, Kevin Laland, *Racism in academia, and why the 'little things' matter*, Nature (Aug. 25, 2020), https://www.nature.com/articles/d41586-020-02471-6; John McWhorter, *Words Have Lost Their Common Meaning*, The Atlantic (Mar. 31, 2021), https://www.theatlantic.com/ideas/archive/2021/03/nation-divided-language/618461/; Yuvraj Joshi, *Racial Transition*, 98 Wash. U. L. Rev. 1181, 1203-1208 (2021). The U.S. Department of Education has reported on racial diversity in higher education. United States Department of Education, *Advancing Diversity and Inclusion in Higher Education: Key Data Highlights Focusing on Race and Ethnicity and Promising Practices* (Nov. 2016), https://www2.ed.gov/rschstat/research/pubs/advancing-diversity-inclusion.pdf (last accessed 5 January 2023). The way race is taught in schools has become one of the defining political issues of this decade. *See* Lauren Camera, *Congressional Democrats*

Target Bans on Teaching About Racism in Schools, U.S. News & World Report (Feb. 2, 2022, 3:06 p.m.), https://www.usnews.com/news/education-news/articles/2022-02-02/congressional-democrats-take-aim-at-efforts-to-ban-critical-race-theory (last accessed 5 January 2023); Stephen Kearse, *GOP Lawmakers Intensify Effort to Ban Critical Race Theory in Schools*, Pew (June 14, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/14/gop-lawmakers-intensify-effort-to-ban-critical-race-theory-in-schools. Few topics could be more legitimately said to constitute issues of public concern.

Second, the bulk of authoritative caselaw addressing adverse employment action in response to employee speech has attempted to cleanly differentiate speech concerning sociopolitical issues from speech concerning strictly personal or administrative issues. In *Connick v. Myers*, the U.S. Supreme Court laid out the then-recent history of developments in First Amendment jurisprudence concerning adverse employment action:

> For most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights. The classic formulation of this position was Justice Holmes, who, when sitting on the Supreme Judicial Court of Massachusetts, observed: "A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." For many years, Holmes' epigram expressed this Court's law.
>
> The Court cast new light on the matter in a series of cases arising from the widespread efforts in the 1950s and early 1960s to require public employees, particularly teachers, to swear oaths of loyalty to the state and reveal the groups with which they associated. In *Wieman v. Updegraff*, 344 U.S. 183[] . . . (1952), the Court held that a State could not require its employees to establish their loyalty by extracting an oath denying past affiliation with Communists. In *Cafeteria Workers v. McElroy*, 367 U.S. 886[] . . . (1961), the Court recognized that the government could not deny employment because of previous membership in a particular party. By the time *Sherbert v. Verner*, 374 U.S. 398[] . . . (1963), was decided, it was already "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon

a benefit or privilege." It was therefore no surprise when in *Keyishian v. Board of Regents*, 385 U.S. 589[] . . . (1967), the Court invalidated New York statutes barring employment on the basis of membership in "subversive" organizations, observing that the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, had been uniformly rejected.

In all of these cases, the precedents in which *Pickering* [*v. Board of Education*, 391 U.S. 563 (1968),] is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs. The issue was whether government employees could be prevented or "chilled" by the fear of discharge from joining political parties and other associations that certain public officials might find "subversive." The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. Speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.

Pickering . . . followed from this understanding of the First Amendment. In *Pickering*, the Court held impermissible under the First Amendment the dismissal of a high school teacher for openly criticizing the Board of Education on its allocation of school funds between athletics and education and its methods of informing taxpayers about the need for additional revenue. Pickering's subject was a matter of legitimate public concern upon which free and open debate is vital to informed decision-making by the electorate.

Our cases following *Pickering* also involved safeguarding speech on matters of public concern. The controversy in *Perry v. Sindermann*, 408 U.S. 593[] . . . (1972), arose from the failure to rehire a teacher in the state college system who had testified before committees of the Texas

> legislature and had become involved in public disagreement over whether the college should be elevated to four-year status—a change opposed by the Regents. In *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274[] . . . (1977), a public school teacher was not rehired because, allegedly, he had relayed to a radio station the substance of a memorandum relating to teacher dress and appearance that the school principal had circulated to various teachers. The memorandum was apparently prompted by the view of some in the administration that there was a relationship between teacher appearance and public support for bond issues, and indeed, the radio station promptly announced the adoption of the dress code as a news item. Most recently, in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410[] . . . (1979), we held that First Amendment protection applies when a public employee arranges to communicate privately with his employer rather than to express his views publicly. Although the subject-matter of Mrs. Givhan's statements were not the issue before the Court, it is clear that her statements concerning the school district's allegedly racially discriminatory policies involved a matter of public concern.

Connick, 461 U.S. at 143-46 (marks and extratextual citations omitted). *Pressman*, which cited *Connick* in its articulation of the two-pronged test cited above, reached a different result than the most recent cases *Connick* cited, holding that a state employee's speech was simply "an employee grievance concerning internal policy" rather than one "based on public-spirited concern" when it concerned a college administration's "lack of opportunity for personal development . . . , lack of guidance for grading, failure to develop a masters program, failure to recruit quality students and faculty, and inadequate or inappropriate educational direction . . . ." *Pressman*, 78 N.C. App. at 298, 301-302.

While the Majority treats the fact pattern in *Pressman* and the ensuing holding as directly controlling in this case, Petitioner's letter fits only with great difficulty into the framework set out in *Connick* and *Pressman*; it reads, simultaneously and inseparably, as a defense of the academic legitimacy of a conference, an expression of dissatisfaction on the state of racial diversity in academia, and a statement of frustration with Dr. Nation, both personally and with any potential unconscious biases. Admittedly, examining the speech at issue holistically and in context—as we must, *see Pressman*, 78 N.C. App. at 300-01—the letter's status is not immediately clear on its face. Its first paragraph, while

critical of Dr. Nation's conduct toward a student, reads not simply as a rebuke, but an attempt to defend the broader academic legitimacy of the RGC conference by appealing to its level of recognition, longevity, and internal vetting process. And the second paragraph—the only part of the letter discussed by the trial court—was not an isolated set of remarks; rather, it was an elaboration on the first paragraph and an expression of Petitioner's belief that racial bias informed the perception that the RGC was less academically legitimate than other conferences. Petitioner's personal criticisms of Dr. Nation, while undeniably present, were predicated on concern for her impact on the perceived social and academic value of the conference and informed by the social and academic influence she exerted by virtue of her position.

Given the blended nature of the letter, we have been tasked with answering whether the personally offensive character of the letter precludes our holding that it addresses a matter of public concern under *Pressman* and *Connick*. And the answer, as informed by the analysis of the U.S. Supreme Court in *Givhan v. W. Consol. Sch. Dist.*, 439 U.S. at 411-413, is no. There, as discussed in the above-quoted portion of *Connick*, the Court held that an employee's views on a matter of public concern are protected even when expressed privately. *Givhan*, 439 U.S. at 414 ("This Court's decisions . . . do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly."). The remarks by the plaintiff in that case were more than just private; they were, according to the defendant school district, " 'insulting,' 'hostile,' 'loud,' and 'arrogant[,]' " yet they were held to address a matter of public concern nonetheless. *Id.* at 412. So too here.[1]

To be clear, in concluding that Petitioner's letter—especially its second paragraph—addressed a matter of public concern rather than merely being a statement of racial abuse, I am cognizant of its *precise* framing and context. Petitioner's use of racially-charged rhetoric in the letter was not a statement that Mitchell regarded Dr. Nation as lesser because of her race; rather, it was a statement of Petitioner's perception that *other* academics saw Dr. Nation as lesser because of her race—a perception presumably informed by his own experience as a Black academic and scholar. Indeed, the Record indicates that the letter may

1. I further note that the remarks at issue in *Givhan*, much like the remarks here, were most immediately trained on the policies of the school at which the petitioner in that case was employed while also implicating broader social issues. *Id.* at 412-13 (marks omitted) (noting that the "petitioner had made demands on [] two occasions" but that "all the complaints in question involved employment policies and practices at the school which petitioner conceived to be racially discriminatory in purpose or effect").

have been prompted in the first instance by a *student's* concerns that Dr. Nation had recommended the ASC over the RGC on a racially preferential basis. Our courts are duly attuned to the fact that, in the ordinary case, use of racial slurs and epithets, especially when employed to insult a member of a different racial group, are inflammatory, deeply wounding, and sufficient to constitute constitutionally unprotected "fighting words." *See In re Spivey*, 345 N.C. 404, 414-15 (1997).[2] However, this is not the ordinary case; and, while I express no opinion on the

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2. Our Supreme Court's full reasoning in *Spivey* was as follows:

> By another assignment of error, [the] respondent Spivey contends that his removal from office for his behavior, including the use of the word "nigger" and other tasteless language, violates the First Amendment to the Constitution of the United States and Article I, Section 14 of the Constitution of North Carolina. Spivey argues that he has been wrongly removed from office because of the content of his speech. He claims that this violated his constitutionally protected right to express his viewpoint. We disagree.
>
> Taken in context, the use of the word "nigger" by Spivey squarely falls within the category of unprotected speech defined by the Supreme Court in *Chaplinsky v. New Hampshire,* 315 U.S. 568[] . . . (1942). In *Chaplinsky*, the United States Supreme Court wrote
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> > [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.
>
> *Id.* at 571-72[] . . . . At the hearing on this matter, there was testimony concerning the hurt and anger caused African-Americans when they are subjected to racial slurs by white people. We question, however, whether such testimony was necessary to the findings of the superior court in this case. Rule 201(b) of the North Carolina Rules of Evidence provides that a trial court may take judicial notice of a fact if it is not subject to reasonable dispute in that it is generally known within the territorial jurisdiction of the trial court. N.C.G.S. § 8C-1, Rule 201(b) (1992). No fact is more generally known than that a white man who calls a black man a "nigger" within his hearing will hurt and anger the black man and often provoke him to confront the white man and retaliate. The trial court was free to judicially note this fact. Additionally, evidence concerning the circumstances surrounding Spivey's verbal outbursts in the bar tends to show that his use of this racial epithet in the present case was intended by him to hurt and anger Mr. Jacobs and to provoke a confrontation with him. " 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution.' " *Chaplinsky*, 315 U.S. at 572[] . . . (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10[] . . . (1940)).

underlying veracity of Petitioner's remarks, their *function* was more than simple derogation.

I would reverse the trial court's determination that Petitioner's speech did not address a matter of public concern. However, as the trial court's tacit determination that Petitioner's speech did not implicate the First Amendment discontinued its analysis before it conducted a balancing test under the second prong of *Pressman*, I would also remand the case for further proceedings, as that issue has not yet been "raised and passed upon in the trial court." *State v. Morrow*, 200 N.C. App. 123, 127 (2009) (emphasis added) ("Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised *and passed upon* in the trial court."); *see also Pressman*, 78 N.C. App. at 300-01 (marks and citations omitted) (emphasis added) ("If the speech is upon a matter of public concern, there must be a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. The balancing of interests is a question of law *for the courts*."). Should the trial court have then determined that Petitioner's interests in making the statements in the letter outweighed any countervailing interests of WSSU in terminating him, the trial court may have further determined whether any of the remaining bases offered by WSSU, independently or in combination, supported Petitioner's termination.

I respectfully dissent in part.

> [The] [r]espondent Spivey cites *Bond v. Floyd*, 385 U.S. 116[] . . . (1996), for the proposition that governmental restriction on the ability of elected officials to express their views, however objectionable, stifles public debate and violates the First Amendment. We conclude that nothing in that opinion protects the use of racial invective by a public official against a member of the public in a bar. Spivey's use of the word "nigger" and his abusive conduct on the night in question did not in any way involve an expression of his viewpoint on any local or national policy. In fact, Spivey himself has repeatedly asserted since the incident in question that the use of the racial epithet "nigger" does not in any way reflect his views about race.
>
> Mr. Spivey's abusive verbal attack on Mr. Jacobs which gave rise to the inquiry removing him from office is not protected speech under the First Amendment. Instead, when taken in context, his repeated references to Mr. Jacobs as a "nigger" presents a classic case of the use of "fighting words" tending to incite an immediate breach of the peace which are not protected by either the Constitution of the United States or the Constitution of North Carolina. We overrule this assignment of error.

In re Spivey, 345 N.C. 404, 414-15 (1997).

STATE OF NORTH CAROLINA
v.
RICHARD FRANKLIN COLLINS, DEFENDANT

No. COA22-488

Filed 4 April 2023

1. Evidence—expert testimony—child sexual abuse case—statement that the child was "not coached"

The trial court in a child sexual abuse case properly admitted expert testimony by a forensic interviewer indicating that the victim had not been "coached." Although an expert may not testify that a prosecuting child-witness in a sexual abuse trial is credible or is not lying about the alleged abuse, a statement that the child was "not coached" is not a statement on the child's truthfulness.

2. Evidence—cross-examination—child sexual abuse case—child's school records—Rule 403 analysis—remoteness

In a child sexual abuse case, where defendant was charged with statutory rape and other crimes against his eleven-year-old step-granddaughter, the trial court did not abuse its discretion under Evidence Rule 403 by preventing defendant from cross-examining the child about conduct referenced in her elementary school records, including instances where she cheated on a test and stole a pen. The conduct described in those records—having occurred between four and six years before the alleged abuse—was too temporally remote from the charged crimes and was only marginally probative of the child's propensity for truthfulness at the time of defendant's trial.

3. Evidence—interrogation video—child sexual abuse case—footage showing polygraph testing equipment—Rule 403 analysis

In a child sexual abuse case, where defendant was charged with statutory rape and other crimes against his eleven-year-old step-granddaughter, the trial court did not abuse its discretion under Evidence Rule 403 by admitting into evidence a video of defendant's interrogation where, even though defendant contended that the footage showed equipment relating to a polygraph test that he took, and polygraph evidence is inadmissible under North Carolina law, the court thoroughly reviewed the video and concluded that it only depicted miscellaneous items on the interrogation table and not the actual polygraph evidence.

Appeal by defendant from judgment entered 9 December 2021 by Judge Edwin G. Wilson, Jr., in Rockingham County Superior Court. Heard in the Court of Appeals 11 January 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamika L. Henderson for the State.

Mark Montgomery for the Defendant.

DILLON, Judge.

Defendant was convicted by a jury of statutory rape of a child by an adult, taking indecent liberties with a child, and a sex act by a substitute parent or guardian after having sexual intercourse with his eleven-year-old step-granddaughter, Carol.[1] Our review shows Defendant received a fair trial, free from reversible error.

I. Background

Carol and her sister were placed in the custody and care of their grandmother, Marie Collins. In 2017, Ms. Collins married Defendant Richard Frank Collins, at which time Defendant moved into Ms. Collin's home where both granddaughters resided.

Evidence offered at trial tended to show that when Carol was eleven years old in May 2017, Defendant forcibly raped Carol while they were home alone. Defendant was found guilty by a jury of statutory rape of a child by an adult, taking indecent liberties with a child, and a sex act by a substitute parent or guardian. The trial court entered a consolidated judgment and imposed an active sentence of 300 to 420 months. Additionally, the trial court ordered Defendant to register as a sex offender for life and to have no contact with Carol. Defendant timely appeals.

II. Analysis

Defendant makes three arguments on appeal, which we address in turn.

A. Admissibility of Expert Testimony

[1] Defendant first contends that the trial court erred when it allowed expert testimony, over objection, by a forensic interviewer. The

1. Pseudonym used for the protection of the juvenile and for the ease of reading.

forensic interviewer testified that she saw no indication Carol had been "coached." Our Supreme Court has held that "an expert may not testify that a prosecuting child-witness in a sexual abuse trial is believable [or] is not lying about the alleged sexual assault." *State v. Baymon*, 336 N.C. 748, 752, 446 S.E.2d 1, 3 (1994). However, in *Baymon*, the Court appears to agree with the State's argument in that case that "a statement that a child was not coached is not a statement on the child's truthfulness." *Id.* And our Court has interpreted *Bayman* as an endorsement of that argument. *State v. Ryan*, 223 N.C. App. 325, 333-34, 734 S.E.2d 598, 604 (2012) (stating that "our Supreme Court has agreed that 'a statement that a child was not coached is not a statement on the child's truthfulness' "). Our Supreme Court, though, ultimately based its decision in *Bayman* on a different issue. *Id.* at 760, 446 S.E.2d at 7.

Neither party cites a published opinion which *holds*, one way or another, whether an opinion regarding coaching is admissible. We note a recent unpublished opinion wherein our court held it was not error for the trial court to allow an opinion that a child victim was not coached. *State v. Clark*, 270 N.C. App. 639, 838 S.E.2d 694 (2020) (unpublished), *aff'd in part, rev'd in part on other grounds*, 380 N.C. 204, 858 S.E.2d 56 (2022) (not resolving whether expert opinion about coaching was erroneous, but simply holding it was not plain error to allow the "allegedly erroneous testimony").

Where there is no controlling precedent, it would not seem improper for us to predict how our Supreme Court would rule based on their precedent as federal courts do. *See, e.g.*, *Moore v. Circosta*, 494 F.Supp.3d 289, 330 (M.D.N.C. 2020) ("[T]his court's job is to predict how the Supreme Court of North Carolina would rule on the disputed state law question."). Based upon our Supreme Court's statement in *Baymon* and our Court's interpretation of that statement, we conclude it was not error for the trial court to allow expert testimony that Carol was not coached.

B. Motion for a New Trial

[2] Defendant next contends that he is entitled to a new trial because the trial court granted the State's *motion in limine* which prevented his cross-examination of Carol about conduct referenced in her elementary school records. He contends that these school records reflect Carol's propensity for untruthfulness.

Rule 608(b) permits questioning of a witness with respect to specific instances of conduct in the narrow situation where: (1) the purpose of the evidence is to impeach or enhance credibility by proving the conduct indicates his/her character for truthfulness or untruthfulness and is

not too remote in time; (2) the conduct in question is, in fact, probative of truthfulness or untruthfulness and is not too remote in time; (3) the conduct did not result in conviction; and (4) the inquiry into the conduct is not during cross-examination. *State v. Morgan*, 315 N.C. 626, 634, 340 S.E.2d 84, 89-90 (1986).

However, the trial court has discretion to apply the safeguards of Rule 403 and may exclude the proffered evidence if it determines that the risk of unfair prejudice substantially outweighs the probative value of the evidence. *Id.* at 634. The trial court may only be reversed when there is an abuse of discretion or when the trial court's ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Barts*, 316 N.C. 666, 682, 343 S.E.2d 828, 839 (1986).

In this case, the State filed its *motion in limine* to prevent Defendant from cross-examining Carol about her confidential school records. The behavior in the records occurred between 2011 and 2013 when Carol would have been in kindergarten, first grade, and second grade. It was not an abuse for the trial court to consider Carol's behavior during that time as too remote in time from Defendant's alleged sexual assault of Carol. Further, the conduct contained in the records, which includes childhood conduct, such as cheating on a test and stealing a pen, was marginally probative regarding Carol's truthfulness years later. Therefore, we conclude that the trial court did not abuse its discretion by not allowing Defendant to cross-examine Carol concerning these records.

III. Admissibility of Video Evidence

[3] Lastly, Defendant argues that the trial court committed reversible error by admitting, over his objection, the video tape of his interrogation. Defendant contends the video tape showed equipment relating to a polygraph examination.

Rule 403 prohibits the admission of otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. R. Evid., Rule 403(2) (2022). This Court reviews a trial court's decision to admit evidence under Rule 403's balancing test for abuse of discretion. *State v. Bedford*, 208 N.C. App. 414, 419, 702 S.E.2d 522, 528 (2010).

We conclude that the trial court did not err in allowing the video into evidence. To be sure, our Supreme Court has held that "polygraph

evidence is no longer admissible in any trial." *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983). And the State did stipulate that a polygraph test was given, and the results of the test would not be admitted. However, the trial court thoroughly reviewed the video and concluded that it merely depicted miscellaneous items on the table and not the actual polygraph evidence. Further, all references in the video to the polygraph examination were redacted and kept from the jury.

III. Conclusion

We conclude Defendant received a fair trial, free of reversible error.

NO ERROR.

Judges TYSON and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
ANTONIO DUPREE JEFFERSON

No. COA22-450

Filed 4 April 2023

Constitutional Law—right to be present at criminal trial—refusal to attend—disruption and delay

Even assuming he preserved the issue for review, defendant waived his right to be present during a portion of his criminal trial by refusing to attend and by rejecting the trial court's repeated offers for him to attend. The record showed that defendant was aware of his right to be present and that his decision not to attend was an attempt to disrupt and delay the proceedings; even so, the trial court gave defendant every opportunity to attend and complied with N.C.G.S. § 15A-1032, which permits a trial judge to remove a disruptive defendant from the courtroom.

Appeal by Defendant from Judgment entered 17 November 2021 by Judge Joseph N. Crosswhite in Rutherford County Superior Court. Heard in the Court of Appeals 16 November 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Katherine A. Murphy and Special Deputy Attorney General Olga E. Vysotskaya de Brito, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Antonio Dupree Jefferson (Defendant) appeals from Judgment entered 17 November 2021 upon jury verdicts finding Defendant guilty of Assault by Strangulation, Habitual Misdemeanor Assault, and being a Habitual Felon.[1] The Record before us tends to reflect the following:

On 19 August 2019, Defendant was indicted for Assault by Strangulation, Assault on a Female, and Second-Degree Kidnapping. On 9 December 2019, Defendant was indicted for Habitual Misdemeanor Assault, and on 24 August 2020, Defendant was charged in a superseding indictment as having attained Habitual Felon status.

This matter came on for trial on 15 November 2021. Defendant was present in the courtroom on the first day of proceedings and expressed he was not ready for his case to go to trial. The trial court adjourned and informed all parties, including Defendant, proceedings would resume the following morning.

However, the next day, Defendant refused to leave his jail cell to attend the trial court proceedings. The trial court asked Defendant's counsel to take his cellphone to Defendant so the trial court could address Defendant. The trial court engaged in a colloquy with Defendant offering to give Defendant "every opportunity . . . to let [Defendant] participate in this trial and let [Defendant] participate in [his] own defense."

After conferring with Defendant's counsel and the State, the trial court engaged in a second colloquy with Defendant by phone to determine whether Defendant was still unwilling to attend trial. When the trial court repeatedly asked Defendant if he would attend trial, Defendant did not respond. The trial court then informed Defendant it is his "right not to participate, but if [he] continue[s] to say that [he] won't participate, then [the trial court] fully want[s] [Defendant] to know that we are going to proceed." The trial court further informed Defendant his absence would preclude him from participating in his trial or providing

1. The Judgment contained in the Record does not reflect a file-stamp. However, the Statement of Organization of Trial Tribunal in the settled Record reflects this Judgment was, in fact, entered.

assistance to his counsel. Defendant continued to ignore the trial court's inquiries, stating he would instead be taking a shower.

The trial court stated on the record:

> The Court has attempted to give [Defendant] the right to proceed with this trial and to participate in this trial; that [Defendant] has continually interrupted this Court, the prosecutor, and his attorney over and over again. [Defendant] has indicated that he will not participate in this trial. The Court will find that his behavior is willfully disruptive.

The trial court also made findings detailing the prior history of the case, the time Defendant and his counsel had to prepare his defense, and Defendant's refusal to cooperate with his defense counsel over the prior year. The trial court further noted: "The Court has, through numerous telephone conversations today offered the defendant to be here, offered to have the defendant brought clothes or to make a phone call, or to do anything the Court can to make his appearance here more comfortable and more beneficial to the defendant." The trial court stated on the record: Defendant refused to attend trial or assist his counsel in preparing his defense and Defendant was obstructing justice. Based on these findings, the trial court announced its intention to proceed with trial, beginning later that morning.

The trial court again beseeched Defendant: "I will tell you everything that I just said, I will completely take it back. We will welcome you to be here. We will give you every opportunity to change clothes and participate in trial. I certainly hope that you reconsider that between now and the next little bit that we bring the jury over here." The trial court offered Defendant another opportunity to address the court, and Defendant again asserted his desire to instead take a shower. Yet again, the trial court informed Defendant: "Well, I will tell you this. I will again offer you the ability to get your clothes changed and get on over here. You're just a walk across the street. So we will sit here, and we will wait, but I will tell you it's every intention I have to proceed with this trial in about 15 minutes when the jury gets back. So hopefully you will have a change of heart, but I certainly am not going to force them to restrain you and carry you over here, okay?"

The trial court again delayed the start of trial, after Defendant later appeared to indicate he wished to be present; however, Defendant ultimately declined to attend the proceedings. Before opening statements, the trial court addressed the jury: "Before we get started, I just want to

inform you that . . . the defendant in this matter, was given an opportunity to be here this morning, and he declined. In the Court's discretion, this trial will proceed in his absence. I instruct you that the guilt or innocence of [Defendant] is to be based on the evidence presented in court and the law that I will give to you. The fact that [Defendant] is not present in court should not influence your decision in any way."

After hearing testimony from the State's first witness, the trial court announced a recess and outside the presence of the jury, asked Defendant's counsel to speak with Defendant once again about attending the proceedings. Defendant's counsel spoke with Defendant via the jail's intercom system; however, Defendant refused to attend and hung up on his trial counsel. Even after this, the trial court again asked Defendant's counsel to visit his client at the jail and to try one more time to invite Defendant to take part in his trial. Defendant refused to speak with his counsel or the trial court.

The trial court reconvened, and the State called additional witnesses to testify. After the last of the State's witnesses testified, the trial court took a brief recess. When the trial court resumed, Defendant chose to attend the hearing. Defendant did not explain his prior absence. The trial court informed Defendant he still had the right to testify in his defense; however, Defendant chose not to testify. The trial court engaged Defendant in a brief colloquy for the purpose of recording Defendant's stipulation to his prior convictions. Defendant stipulated to prior convictions of Assault by Strangulation and Assault on a Detention Employee.

On 17 November 2021, the trial court reconvened for the final day of proceedings—with Defendant in attendance. The State presented the trial court with a recorded phone call from the prior morning in which Defendant stated he was attempting to delay the trial court from moving forward. The trial court admitted the recording into evidence and noted it would not be published to the jury unless it became relevant at a later point in time.

The same day, the jury returned a verdict finding Defendant guilty of Assault by Strangulation and guilty of Assault on a Female. The jury also returned a verdict finding Defendant guilty of having the status of being a Habitual Felon.

The trial court subsequently entered its Judgment. The trial court applied Defendant's conviction for Assault on a Female as the basis for Defendant's charge of Habitual Misdemeanor Assault, and therefore arrested judgment on the Assault on a Female conviction. The trial court consolidated the remaining charges—one count of Habitual

Misdemeanor Assault and one count of Assault by Strangulation, each enhanced by Defendant's Habitual Felon status—for purposes of sentencing. The trial court sentenced Defendant as a Habitual Felon to a consolidated, active sentence of 97 to 129 months of imprisonment. Defendant provided oral Notice of Appeal in open court.

Issue

The dispositive issue on appeal is whether Defendant, through his actions, waived his right to be present during a portion of trial by actively refusing the trial court's repeated offers for Defendant to attend trial made during multiple colloquies between Defendant and the trial court.

Analysis

Defendant contends the trial court erred by proceeding in Defendant's absence as he did not validly waive his right to be present at trial. Specifically, Defendant claims his waiver was uninformed and thus, invalid, as the trial court failed to ensure Defendant was aware of his "obligation" to be present. The State, however, argues Defendant failed to preserve the issue of his absence from trial as he did not object to the trial court proceeding in his absence. The State further asserts the trial court did not err in proceeding with trial in Defendant's absence where Defendant refused to leave his cell despite the trial court's entreaties to him to voluntarily take part in the trial.

"When a party fails to timely object at trial, he has the burden of establishing his right to appellate review by showing that the exception was preserved by rule or law or that the error alleged constitutes plain error." *State v. Miller*, 146 N.C. App. 494, 501, 553 S.E.2d 410, 415 (2001) (citations omitted). Defendant concedes plain error review is not available in this case. Instead, Defendant contends his right to appellate review is governed by N.C. Gen. Stat. § 15A-1446, which provides no objection is required to preserve an argument "[t]he defendant was not present at any proceeding at which his presence was required." N.C. Gen. Stat. § 15A-1446(d)(15) (2021). However, our Court has also held "[t]he failure to object at trial to the alleged denial of [a defendant's constitutional right to be present at all stages of the trial] constitutes waiver of the right to argue the denial on appeal." *Miller*, 146 N.C. App. at 501, 553 S.E.2d at 415 (citations omitted).

However, even presuming the issue of Defendant's right to be present for the entirety of his trial was preserved, a defendant, through his actions, may waive that right. The right of the defendant to be present at criminal proceedings is protected by both the federal and state

constitutions. *See* U.S. Const. amends. VI, XIV; N.C. Const. art. I, § 23. "In particular, our state Constitution provides in pertinent part: 'In all criminal prosecutions, every person charged with crime has the right . . . to confront the accusers and witnesses with other testimony. . . .' " *State v. Richardson*, 330 N.C. 174, 178, 410 S.E.2d 61, 63 (1991) (quoting N.C. Const. art. I, § 23). Nevertheless, "[i]n noncapital felony trials, this right to confrontation is purely personal in nature and may be waived by a defendant." *Id.* (citing *State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985)); *see also Taylor v. United States*, 414 U.S. 17, 19, 94 S.Ct. 194, 195, 38 L.Ed.2d 174, 177 (1973) ("[w]here the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present." (citations and quotation marks omitted)). In other words, "[i]n every criminal prosecution it is the right of the accused to be present throughout the trial, unless he waives the right." *State v. Pope*, 257 N.C. 326, 330, 126 S.E.2d 126, 129 (1962). For example, "[a] defendant may waive the general right to be present at his trial through his voluntary and unexplained absence from court." *State v. Davis*, 186 N.C. App. 242, 243, 650 S.E.2d 612, 614 (2007). "[I]n order to waive the right to be present, however, the defendant must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away." *State v. Sides*, 376 N.C. 449, 458, 852 S.E.2d 170, 177 (2020) (citation and quotation marks omitted).

Here, it is evident Defendant, by his own choice, elected to absent himself from trial—notwithstanding the efforts of his trial counsel and the trial court to convince him otherwise. On multiple occasions, the trial court interacted with Defendant and provided him the opportunity to be present, advised him that the trial would proceed in Defendant's absence, attempted to impress upon Defendant that his absence would impair Defendant's ability to assist in his defense and make it harder to defend the case, and offered to delay the trial briefly to allow Defendant to change clothes and appear in court. Indeed, it is clear Defendant was aware of the processes taking place and his right to be present. Further, Defendant offered no sound reason for his absence.

Nevertheless, on appeal, Defendant contends his absence did not constitute a voluntary waiver of his right to be present at trial because he was not sufficiently made aware of his "obligation to be present." Specifically, Defendant claims two particular instances in the trial

court's repeated colloquies with Defendant in which the trial court stated: "I suppose that is really your right not to participate" and "if you don't want to participate, again, that is your right" somehow nullified the voluntariness of Defendant's absence from trial. Defendant argues the trial court's suggestion Defendant had a "right" not to participate at trial was error because "there is, in general, no right for a defendant to be absent from his own trial[.]"

Defendant cites no case law to suggest a trial court is required to engage in a colloquy with a defendant prior to the defendant absenting themselves from trial. Defendant also makes no argument or showing that he was not, in fact, aware of his obligation to attend his own trial. To the contrary, the Record reflects Defendant's obstinance and refusal to attend trial was an attempt to disrupt and delay the trial in the forlorn hope the trial court would not proceed in his absence.

Defendant broadly cites *State v. Shaw*, 218 N.C. App. 607, 721 S.E.2d 363 (2012), in support of his position. It is true, in *Shaw*, this Court observed: "there are no cases recognizing a defendant's absolute right to not be present at trial." *Id.* at 609, 721 S.E.2d at 364. However, *Shaw* addressed a defendant's argument that it was error for the trial court to compel his presence and force him to appear at trial—an argument this Court rejected. *Id.* Indeed, this Court expressly noted:

> [t]he court will always require the presence of the prisoner in court during the trial . . . if he be in close custody of the law, unless in case the prisoner expressly himself, and not by counsel, waives his right to be present; but the court may require it, if it shall deem it advisable to do so.

Id. at 609, 721 S.E.2d at 365 (quoting *State v. Kelly*, 97 N.C. 404, 407-08, 2 S.E. 185, 187 (1887)). Thus, *Shaw* recognized the long-standing rule that a defendant may waive his right to be present and the trial court *may* compel the defendant's presence if the trial court deems it advisable to do so. Notably, in this case, Defendant does not contend the trial court was required to compel Defendant's presence and force him to appear at trial. In fact, it is clear the trial court, in its colloquies with Defendant, did not deem it advisable to compel Defendant to appear in order to avoid further disruption by Defendant. By advising Defendant it was Defendant's "right" not to be present, the trial court was plainly conveying to Defendant that the choice to appear or waive his presence at trial was Defendant's. This is not inconsistent with our opinion in *Shaw*.

Moreover, although not addressed by the parties on appeal, the trial court astutely and prudently also complied with N.C. Gen. Stat.

§ 15A-1032, which permits a trial judge to remove a disruptive defendant from the trial. Section 15A-1032 provides:

> (a) A trial judge, after warning a defendant whose conduct is disrupting his trial, may order the defendant removed from the trial if he continues conduct which is so disruptive that the trial cannot proceed in an orderly manner. When practicable, the judge's warning and order for removal must be issued out of the presence of the jury.
>
> (b) If the judge orders a defendant removed from the courtroom, he must:
>
> (1) Enter in the record the reasons for his action; and
>
> (2) Instruct the jurors that the removal is not to be considered in weighing evidence or determining the issue of guilt.
>
> A defendant removed from the courtroom must be given the opportunity of learning of the trial proceedings through his counsel at reasonable intervals as directed by the court and must be given opportunity to return to the courtroom during the trial upon assurance of his good behavior.

N.C. Gen. Stat. § 15A-1032 (2021). Here, the trial court warned Defendant—outside the presence of the jury—that his continued conduct, including his refusal to appear, would not be permitted to delay the trial further. The trial court also stated on the record, outside the presence of the jury, the reasons for determining Defendant's conduct was disruptive of the proceedings. The trial court also appropriately instructed the jury not to consider Defendant's absence in determining Defendant's guilt. Finally, the trial court instructed Defendant's trial counsel to try and meet or talk with Defendant during breaks in the proceedings and repeatedly offered Defendant the opportunity to return to the courtroom—and Defendant ultimately did return to the courtroom prior to the conclusion of the evidence. Defendant makes no argument the trial court failed to comply with the statute or in finding Defendant's behavior disruptive so as to justify proceeding in Defendant's absence. As such, this provides a separate ground to affirm the trial court.

Thus, Defendant, though his actions, waived his right to be present during a portion of trial by actively refusing the trial court's repeated offers for Defendant to attend trial made during multiple colloquies between Defendant and the trial court. Therefore, the trial court did not

err in permitting the trial to proceed, in part, in Defendant's absence. Consequently, the trial court, in turn, did not err in entering judgment upon the jury's verdict resulting from that trial.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error at trial and affirm the trial court's 17 November 2021 Judgment.

NO ERROR.

Judges ZACHARY and GRIFFIN concur.

TONYA IRENE SARTOR WATSON, PLAINTIFF
v.
THOMAS STEUART WATSON, DEFENDANT

No. COA22-473

Filed 4 April 2023

Divorce—alimony—adultery—summary judgment—before party complied with relevant discovery requests

In an action for alimony and other relief, where the wife admitted to committing adultery, the trial court erred by granting partial summary judgment in favor of the husband on the wife's claim for alimony because the husband had not yet responded to certain discovery requests that could establish that he also had committed adultery during the marriage.

Appeal by plaintiff from judgment entered 15 July 2021 by Judge Robert A. Mullinax, Jr., in Catawba County District Court. Heard in the Court of Appeals 24 January 2023.

Robinson and Lawing, LLP, by L. Bruce Scott and Melissa G. Jackson, for Plaintiff-Appellant.

Adkins Law, PLLC, by C. Christopher Akins and Jacqueline M. Keenan, for Defendant-Appellee.

DILLON, Judge.

Plaintiff Tonya Irene Sartor Watson ("Wife") commenced this domestic action against her husband Defendant Thomas Steuart Watson ("Husband"). Wife is appealing from an order granting Husband partial summary judgment on her claim for alimony based on Wife's admission to committing adultery and from an order denying her subsequent motion seeking an amendment to, or relief from, the partial summary judgment order. As explained below, we conclude Wife failed to notice her appeal in time, but in our discretion, we issue a writ of *certiorari* to address her appeal. On the merits, we conclude that the trial court was premature on granting summary judgment, as Husband had not responded to certain discovery requests from Wife where his responses could provide evidence sufficient to establish that he, too, engaged in sexual acts with another woman during the marriage. Accordingly, we vacate the trial court's grant of partial summary judgment and remand the matter for further proceedings. On remand, the trial court may reconsider Husband's motion for summary judgment after the discovery issue is resolved.

I. Background

Husband and Wife were married in 2004 and had one child during the marriage. In 2020, Wife commenced this action against Husband, requesting alimony and other relief.

In July 2021, after a hearing on the matter, the trial court granted Husband partial summary judgment on Wife's claim for alimony. Later that month, Wife moved for the judgment to be amended or, in the alternative, for relief from the judgment. On 2 December 2021, the trial court denied Wife's motion.

On 7 December 2021, Wife filed her written notice of appeal from both the July 2021 partial summary judgment order and the December 2021 order denying her subsequent motion.

II. Analysis

A. Appellate Jurisdiction

The record on appeal suggests that the orders being appealed from are interlocutory because there is nothing in the record showing that certain claims alleged by Wife have been resolved. For instance, the record does not show that Wife's claim for equitable distribution has been resolved.

Generally, "there is no right of immediate appeal from interlocutory orders." *Wing v. Goldman Sachs*, 382 N.C. 288, 293, 876 S.E.2d 390, 395 (2022). Our appellate rules require that an appellant's brief contain

"[a] statement of the grounds for appellate review." N.C. R. App. P. 28(b)(4) (2021). An appellant's failure to state a proper ground for our Court's jurisdiction subjects the appeal to dismissal. *See Larsen v. Black Diamond*, 241 N.C. App. 74, 78, 772 S.E.2d 93, 96 (2015) (appeal subject to dismissal because appellants "failed to state *any* grounds for appellate review in their principal brief.").

In her brief, Wife cites, as grounds for our appellate jurisdiction, that the July 2021 summary judgment order dismissing her alimony claim "is a final judgment, and appeal therefore lies as a matter of right directly to the Court of Appeals pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 50-19.1." Husband makes no argument challenging our jurisdiction over Wife's appeal.

The record does not show that the trial court's July 2021 summary judgment on Wife's alimony claim was a final judgment. However, Wife is correct that N.C. Gen. Stat. § 50-19.1 provides that a litigant in a domestic case may appeal immediately from "an order or judgment adjudicating a claim for" one of a number of domestic claims, including a claim for alimony "[n]otwithstanding any other pending claims filed in the same action." N.C. Gen. Stat. § 50-19.1 (2021). That is, our General Assembly provides a litigant the option to appeal an interlocutory judgment resolving a domestic claim *either* before all domestic claims have been resolved *or* when all claims have been resolved. *Id.*

However, when a litigant elects to appeal an interlocutory judgment resolving a domestic claim while other claims are pending, the litigant still must comply with Rule 3 of our Rules of Appellate Procedure, requiring that the notice of appeal be filed within thirty days after entry of the judgment[.]" N.C. R. App. P. 3(c)(1) (2021).

In this matter, the trial court entered summary judgment on Wife's alimony claim in July 2021, but Wife did not notice her appeal from that order until December, well outside the 30-day limit allowed by our Rule. We conclude Wife's subsequent motion for amendment of/relief from the summary judgment pursuant to Rules 52, 59, and 60 did not toll the running of her time to notice her appeal. Specifically, Rule 52 deals with amendments to "findings", and summary judgment orders do not contain findings. *Hodges v. Moore*, 205 N.C. App. 722, 723, 697 S.E.2d 406, 407 (2010) (holding that "the provisions of Rule 52 . . . do not apply to orders granting summary judgment.") Rule 59 deals with "trials", not summary judgment orders. *See TD Bank v. Eagle Crest*, 249 N.C. App. 235, 791 S.E.2d 651 (2016) (holding that "Rule 59 [is] not a valid route to challenge the order for summary judgment"). And Rule 60 motions do

not toll the running of the time to notice an appeal. *Lovallo v. Sabato*, 216 N.C. App. 281, 283, 715 S.E.2d 909, 911 (2011) (reiterating that "[m]otions entered pursuant to Rule 60 do not toll the time for filing a notice of appeal.").

However, our General Assembly, though, has empowered our court to issue writs of *certiorari* "in aid of [our] own jurisdiction[] or to supervise and control the proceedings of any of the trial courts of the General Court of Justice[.]" N.C. Gen. Stat. § 7A-32(c) (2021). And our appellate courts may grant certiorari *ex mero motu*. *Brown v. Renaissance*, 350 N.C. 587, 516 S.E.2d 382 (1999) (issuing the writ *ex mero motu* to review a decision from our court); *State v. Mangum*, 270 N.C. App. 327, 336, 840 S.E.2d 862, 869 (2020) (recognizing our court's "discretion to issue a writ of certiorari *ex mero motu*").

We exercise our discretion to issue a writ of *certiorari* to review Wife's appeal. We conclude that this matter represents a rare situation where issuing the writ is warranted based on a number of factors. Wife's argument has merit, as discussed in the section below. Husband does not appear to have suffered any prejudice by Wife's failure to timely appeal. In fact, if we were not to issue the writ, Wife could still appeal this interlocutory order when all her claims are resolved. *See* N.C. Gen. Stat. §50-19.1 ("A party does not forfeit his right to appeal under this section if the party fails to immediately appeal from [an interlocutory judgment on an alimony claim].") In the interest of judicial economy, it would be better to resolve Wife's challenge to the trial court's grant of summary judgment on her alimony claim at this time.

B. Merits of Wife's Challenge

Husband moved for summary judgment on Wife's alimony claim on the basis that Wife had engaged in illicit sexual behavior during the marriage, prior to the date of separation. Indeed, a dependent spouse is generally barred from receiving alimony if she is found to have committed "an act of illicit sexual behavior" during the marriage and prior to separation. N.C. Gen. Stat. § 50-16.3A(a) (2021).

At the hearing on his motion, Husband produced sworn statements from alleged paramours of his Wife that each had engaged in adultery with Wife during their marriage with Husband. Typically, such proof alone may not be sufficient to warrant summary judgment to defeat a claim for alimony, as it is the supporting spouse who bears the burden of proof to show that their spouse had engaged in such behavior. *See*, *e.g.*, *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976) (explaining the narrow circumstances where the party with the burden

of persuasion may be entitled to summary judgment on the strength of the affidavits of his witnesses). Here, though, Wife has conceded to engaging in at least one affair.

Accordingly, summary judgment for Husband would be appropriate *unless* Wife met her burden of showing *either* Husband consented to the affair *or* Husband also engaged in at least one act of illicit sexual behavior. *See* N.C. Gen. Stat. § 50-16.3A(a).

Evidence showing illicit sexual behavior need not be direct evidence but rather may be also based on "circumstantial evidence" of an "adulterous disposition, or inclination" of Husband and an alleged paramour and "the opportunity created to satisfy their mutual [] inclinations." *In re Estate of Trogdon*, 330 N.C. 143, 148, 409 S.E.2d 897, 900 (1991).

In her complaint, Wife does allege that Husband engaged in adultery and other illicit sexual behavior during the marriage. We note that her complaint is verified, but that she makes her allegation regarding Husband's adultery and illicit sexual behavior "upon information and belief[,]" so that the verified allegation is not sufficient evidence for a summary judgment hearing.

In any event, Wife argues the trial court should not have ruled on Husband's motion while Husband had not yet turned over discovery which the trial court had ordered him to produce and which could show Husband had inclination and opportunity to commit illicit sexual acts during the marriage.

Our Supreme Court has instructed that "[o]rdinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Conover v. Newton*, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979); *see also Howse v. Bank of America*, 255 N.C. App. 22, 30, 804 S.E.2d 552, 558 (2017). This rule is not absolute, and our review of a trial court's decision to grant summary judgment with discovery pending is within the discretion of the trial court. *Id.*

Based on the record before us, we conclude it was an abuse of discretion to rule on Husband's summary judgment motion. Specifically, we note that Wife has knowledge of several suspicious texts between Husband and a co-worker and that she had sought from Husband, among other documents, his Facebook messages and travel records during the time she suspects Husband to have engaged in an illicit affair. The record shows that Wife filed a motion to compel discovery

of these documents when Husband failed to timely respond; that the trial court granted Wife's motion to compel as to these and other documents; and that Husband still had not complied at the time of the hearing on Husband's summary judgment motion. We cannot say whether Husband's responses will result in the discovery of evidence to support Wife's contention that Husband engaged in illicit sexual acts. But his responses "might lead to production of [such] evidence[.]" *Conover*, 297 N.C. at 512, 256 S.E.2d at 220.

III. Conclusion

We grant *certiorari* to consider Wife's appeal. Considering the merits, we agree with Wife that the trial court abused its discretion in granting Husband summary judgment on Wife's alimony claim where the record shows that Husband had yet to comply with discovery requests ordered by the trial court. We, therefore, vacate that order and remand for further proceedings. On remand, the trial court may consider Husband's motion after resolution of the discovery issue.

VACATED AND REMANDED.

Judges GORE and RIGGS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 4 April 2023)

CRAIG v. TOWN OF HUNTERSVILLE No. 22-142	Mecklenburg (19CVS16070)	AFFIRMED IN PART AND DISMISSED IN PART
IN RE A.K.R. No. 22-627	Stokes (20JT66) (20JT67)	Affirmed
IN RE A.R.C. No. 22-480	Rutherford (21JT52)	Vacated and Remanded.
IN RE J.D.C. No. 22-610	Lincoln (20JT43)	Affirmed.
IN RE M.J.K. No. 22-592	Wake (20JT160)	Affirmed
IN RE P.J.W.W. No. 22-511	Nash (21JT31)	Affirmed
MANN v. VAICKUS No. 22-20	Wake (14CVD16153)	Affirmed in Part; Remanded in Part
N.C. FARM BUREAU MUT. INS. CO., INC. v. MEBANE No. 22-708	Wake (21CVS7683)	Affirmed
O'BRIEN v. O'BRIEN No. 21-155	Mecklenburg (18CVD10038)	Affirmed in part; vacated and remanded in part; reversed in part.
SELPH v. SELPH No. 22-881	Johnston (22CVD2249)	Dismissed
STATE v. CARRASCO No. 22-704	Ashe (21CRS50540-44)	No Error
STATE v. EDWARDS No. 22-60	McDowell (19CRS52070)	No Error
STATE v. FAGGART No. 22-798	Forsyth (18CRS57956)	No Error
STATE v. HUCKS No. 22-766	New Hanover (19CRS59539)	No Error.

STATE v. JONES No. 22-700	Mecklenburg (20CRS14182) (20CRS219947) (20CRS219950)	No Error
STATE v. PATTERSON No. 22-606	Carteret (20CRS50579-80) (20CRS50584-85) (20CRS50589-90) (20CRS527)	Vacated and Remanded
STATE v. POWERS No. 22-717	Robeson (19CRS53971)	Appeal Dismissed; No Error.
STATE v. RIDINGS No. 22-594	Davie (18CRS51680) (19CRS51194) (19CRS51194) (19CRS51194) (21CRS146)	Vacated and Remanded
STATE v. TOMLIN No. 22-780	Cabarrus (20CRS53855) (20CRS53856)	Affirmed in Part and Remanded.
STEIN v. CASH-JANKE No. 22-726	Wake (20CVD1846)	Vacated and Remanded

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