289 N.C. App.—No. 3 Pages 271-464

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

DECEMBER 18, 2023

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

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OF

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FILED 20 JUNE 2023

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ADMINISTRATIVE LAW

Judicial review—service—through party's attorney—In a case involving a teacher challenging his suspension from his job, where petitioner (N.C. Board of Education) sought judicial review of the administrative law judge's final decision reversing the teacher's suspension, petitioner's attempted service upon the teacher—through the teacher's attorney, at the attorney's address—was insufficient to establish personal jurisdiction pursuant to N.C.G.S. § 150B-46, which requires service upon all parties of record to the proceedings. The teacher's apparent directives that he be served through his attorney did not negate the fact that strict compliance with N.C.G.S. § 150B-46 is required for proper service. **N.C. State Bd. of Educ. v. Minick, 369.**

APPEAL AND ERROR

Invited error—affirmative actions—redacted video—The appellate court rejected the State's argument that defense counsel invited error, thus waiving appellate review of the admission of portions of a videotaped interview between law enforcement and defendant, by cooperating with the State to determine the appropriate redactions to the interview and agreeing to the admission of the redacted video and its publication to the jury. Because defense counsel did not take any affirmative action to introduce the redacted interview, the invited error doctrine did not apply. **State v. Miller, 429**.

Petition for writ of certiorari—denial of motion to suppress—intent to appeal—Where defendant clearly intended to appeal from the trial court's order

APPEAL AND ERROR—Continued

denying his motion to suppress, as evidenced by his counsel's announcement in open court about defendant's intent, but lost his right to appeal because he failed to appeal the trial court's judgment entered upon his guilty plea, the appellate court granted defendant's petition for writ of certiorari to review the suppression order. **State v. Furtch, 413.**

CHILD CUSTODY AND SUPPORT

Motion to modify custody—best interests of the child—consideration of child's wishes—discretionary decision—The trial court did not abuse its discretion in its order denying a mother's motion to modify custody where, in determining the best interests of the child, the court considered all of the evidence and made findings about the child's testimony and personal preferences, but declined to assign more weight to the child's wishes. **Johnson v. Lawing, 334.**

Motion to modify custody—reference to child's counseling records—not improper—The trial court did not err in its order denying a mother's motion to modify custody by referring in its findings to the child's counseling records—which had not been admitted into evidence—because the reference did not indicate an improper consideration of the records themselves but merely served to address the mother's contention that the child's father did not keep her informed of various appointments. **Johnson v. Lawing, 334.**

Permanent custody order—application of best interest standard—parent's fitness and constitutionally protected status—required finding—In a child custody dispute between a mother and her children's paternal grandmother, where the trial court's "temporary custody order" was in substance actually a permanent custody order, the trial court erred by applying the "best interest of the child" standard without first finding that the mother was unfit or had acted inconsistently with her constitutionally protected status as the children's parent. **Tillman v. Jenkins, 452.**

Standing—grandparent initiation of custody proceeding—allegations of unfitness—In a child custody dispute between a mother and her children's paternal grandmother, the grandmother had standing to initiate the custody proceeding because she adequately alleged that the mother had acted inconsistently with her parental status—with allegations including that the mother lacked stable housing, was unable to physically and financially care for the children, and had acted in a manner inconsistent with her constitutionally protected rights to parent the children. **Tillman v. Jenkins, 452.**

Temporary custody order—interlocutory appeal—"temporary" order not temporary—Although a temporary child custody order is normally interlocutory and not immediately appealable, the trial court's "temporary custody order" was not temporary where, at the time of the appeal, the paternal grandmother had had "temporary" custody of the mother's children for nearly three years and where the most recent "temporary" order failed to state a clear and specific reconvening time for a permanent custody hearing. Therefore, the Court of Appeals had jurisdiction to hear the mother's appeal from the order. **Tillman v. Jenkins, 452.**

CIVIL PROCEDURE

Judgment on the pleadings—as to counterclaims—no motion before the court—pleadings not yet "closed"—improper—In a legal dispute between adjacent

property owners over access to a right-of-way on defendant's driveway, the trial court erred in dismissing defendant's counterclaims under Civil Procedure Rule 12(c), which allows a party to move for judgment on the pleadings "after the pleadings are closed." To begin with, there was no Rule 12(c) motion as to defendant's counterclaims for the court to rule on, since plaintiffs had only moved for judgment on the pleadings as to their own claims. At any rate, a Rule 12(c) motion as to defendant's counterclaims would have been improper because plaintiffs had not replied to those counterclaims, and therefore the pleadings had not yet "closed." **Maynard v. Crook, 357.**

Order dismissing counterclaims—under Rule 12(b)(6)—motions under Rules 52, 59, and 60—After the trial court entered an order in a property-related action dismissing defendant's counterclaims under Civil Procedure Rule 12(b)(6), the court did not abuse its discretion in denying defendant's Rule 59 motion for a new trial where the order dismissing defendant's counterclaims was issued in response to a pre-trial motion and where no trial on the merits had yet occurred. Further, because defendant filed her amended counterclaims after the court had already properly dismissed her original counterclaims, the court did not abuse its discretion in denying defendant's Rule 60 motion for relief from the dismissal order without addressing defendant's request to amend her counterclaims. However, because the order dismissing defendant's counterclaims included extensive factual findings that went beyond a mere recitation of undisputed facts forming the basis of the court's decision, the court did abuse its discretion in denying defendant's Rule 52(b) motion requesting that the court amend the order to remove those improper findings. **Maynard v. Crook, 357.**

CLERKS OF COURT

Removal proceeding—constitutional interpretation—disqualification versus removal—In a proceeding to remove respondent from serving as county clerk of superior court pursuant to N.C.G.S. § 7A-105 (which provides for suspension or removal based on willful misconduct), a panel of the Court of Appeals noted its disagreement with a prior appellate opinion in the same case which interpreted Article VI, section 8 of the North Carolina Constitution as authorizing removal of a superior court clerk and thereby erroneously (in the current panel's view) effectuated section 7A-105 as a procedural mechanism for disqualification under Article VI. By contrast, the current panel would interpret the same constitutional provision (which is titled "Disqualifications for office") as only authorizing disqualification, as differentiated from Article IV, section 17 (titled "Removal of Judges, Magistrates, and Clerks") which by its plain language specifically authorizes removal and, thus, is the only constitutional provision for which 7A-105 was intended to be a procedural mechanism for removal of clerks. **In re Chastain, 271.**

Removal proceeding—corruption or malpractice—multiple incidents—considered in the aggregate—In a proceeding to remove respondent from serving as county clerk of superior court, there was no prohibition on the trial court's application of the corruption or malpractice standard for disqualification—under Article VI, section 8 of the North Carolina Constitution—by considering multiple incidents of alleged misconduct in totality rather than individually in isolation. **In re Chastain, 271.**

Removal proceeding—corruption or malpractice—sufficiency of findings—evidentiary support—In a proceeding to remove respondent from serving as

county clerk of superior court based on multiple incidents of misconduct where respondent exceeded the scope of her authority and undermined the administration of justice and the authority of other judicial officials, the trial court did not err in entering an order permanently disqualifying respondent from office pursuant to Article VI, section 8 of the North Carolina Constitution where its challenged findings of fact were supported by competent evidence, and where those findings in turn were sufficient to support the court's conclusions of law (aside from a portion of one ultimate finding that did not affect the outcome). **In re Chastain, 271.**

Removal proceeding—corruption or malpractice—willful misconduct—egregious in nature—In a proceeding to remove respondent from serving as county clerk of superior court, the trial court properly entered an order permanently disqualifying respondent from office where its conclusion that respondent acted in a manner which met the corruption or malpractice standard pursuant to Article VI, section 8 of the North Carolina Constitution was supported by evidence that respondent willfully persisted in misconduct by exceeding the scope of her authority as clerk, including by visiting a criminal defendant in a detention center even though the defendant had already appeared before a judge, demanding a magistrate's time despite having no authority over magistrates, using vulgarities in relation to a judge in the presence of citizens, and interfering in a civil dispute in which a judge had already issued no-contact orders. **In re Chastain, 271.**

Removal proceeding—inadmissible evidence—presumed ignored except for credibility purposes—In a proceeding to remove respondent from serving as county clerk of superior court, the trial court on remand from a prior appeal was presumed to have disregarded inadmissible evidence and to have considered only acts alleged in the charging affidavit when determining whether the standard for disqualification had been met pursuant to Article VI, section 8 of the North Carolina Constitution. Although the court's order permanently disqualifying respondent from office referred to acts that were not in the charging affidavit, the court noted that it had not considered those acts as grounds for disqualification but only with regard to respondent's credibility as specifically allowed by the appellate opinion previously issued in the case. **In re Chastain, 271.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Corpus delicti rule—concealment of death of child—no body found—extrajudicial confession—In defendant's prosecution for concealment of the death of a child who did not die of natural causes, the trial court did not err by denying defendant's motion to dismiss because the State presented sufficient evidence and satisfied the corpus delicti rule. Although the child's body could not be found, the State presented substantial independent evidence tending to establish the trustworthiness of defendant's extrajudicial confession—including the suspicious circumstances under which the child was missing, the discovery of discarded children's items in a hidden campsite where defendant told investigators the body might have been concealed, defendant's text messages to a person who lived in the home with the child that "[the mother] killed or abused her child" and "[y]ou didn't report the crime to the cops just like I didn't," and the fact that defendant was not under arrest when he made the incriminating statements to law enforcement. **State v. Colt, 395.**

CONSTITUTIONAL LAW

Effective assistance of counsel—termination of parental rights—no objection to personal jurisdiction—In a termination of parental rights proceeding, respondent failed to show that, but for her counsel's alleged deficient representation for failing to object to the trial court's lack of personal jurisdiction based on defective service of process, there was a reasonable probability that there would have been a different outcome. Although there was no evidence that a summons had been issued or served on respondent, any defect was waived given the record evidence that respondent had actual notice of the hearing (after having been personally served with the termination petition and two notices of hearing) and that her counsel made a general appearance on her behalf when she failed to appear at the hearing. **In re M.L.C., 313.**

Right to be present at trial—waiver—need for sua sponte competency hearing—harmless error—At a trial for multiple sexual offenses where, during jury deliberations, defendant passed out and was removed from the courtroom after intentionally overdosing on drugs and alcohol, the trial court was not required to sua sponte conduct a competency hearing to determine whether defendant had the capacity to voluntarily waive his constitutional right to be present during the remainder of his trial, as there was no substantial evidence of anything (such as a history of mental illness) tending to cast doubt on defendant's competency before his intentional overdose. Even if the court had erred, such error was harmless where the trial court was able to observe defendant throughout the trial and conducted two colloquies with defendant both before and after the overdose incident; defendant was represented by able counsel (who did not move for further inquiry into defendant's competency), was able to actively participate in the proceedings, and did not exhibit any bizarre or concerning behaviors before overdosing; and the jury was specifically instructed not to hold defendant's absence from the courtroom against him. **State v. Minyard, 436.**

CONTRACTS

Memorandum of understanding—restructuring of insolvent insurers—severability of illegal provision—In an action brought by a group of insolvent insurers (plaintiffs) against a business owner and his company (defendants), where defendants bought out plaintiffs, caused $1.2 billion held for plaintiffs' policyholders to be invested into defendants' non-insurance affiliate companies, entered into a "Memorandum of Understanding" (MOU) with plaintiffs memorializing a restructuring plan to facilitate repayment of plaintiffs' debts, and then failed to complete the restructuring plan by the deadline under the MOU, the trial court—ruling in favor of plaintiffs on their breach of contract claim—did not err in enforcing the remainder of the MOU after severing one of its unenforceable provisions (regarding the amendment of loan agreements between plaintiffs and defendants' affiliated companies). The validity of the MOU's remaining provisions did not depend upon the unenforceable provision, nor did the unenforceable provision constitute a "main purpose" or an "essential feature" as defined in the MOU. Further, the inclusion of a severability clause in the MOU suggested that the parties intended the MOU to be divisible. **Southland Nat'l Ins. Corp. v. Lindberg, 378.**

Vacation rental agreement—forum-selection clause—equitable estoppel—In a negligence, wrongful death, and negligent infliction of emotional distress action arising from the drowning death of a child in a pool at a vacation home that had been rented by the child's grandmother from defendants, the trial court did not err

in declining to apply the doctrine of equitable estoppel to bind plaintiffs (the child's parents) to the vacation rental agreement's forum selection clause where plaintiffs' complaint alleged no breach of duty owed to them under the vacation rental agreement and did not allege that the agreement conferred any direct benefit on them. Rather, plaintiffs' claims were grounded in legal duties arising from statutory or common law—not any asserted rights under the contract. **Jarman v. Twiddy & Co. of Duck, Inc., 319.**

Vacation rental agreement—forum-selection clause—third-party beneficiaries—In a negligence, wrongful death, and negligent infliction of emotional distress action arising from the drowning death of a child in a pool at a vacation home that had been rented by the child's grandmother from defendants, the trial court did not err in declining to apply the third-party beneficiary doctrine to bind plaintiffs (the child's parents) to the vacation rental agreement's forum selection clause where there was no evidence that defendants and the grandmother intended to confer any legally enforceable rights on plaintiffs through the vacation rental agreement. Any benefit plaintiffs received through the vacation rental agreement—including the ability to use the vacation home as members of the grandmother's family, as provided by a provision restricting use of the premises to "You and Your family"—was incidental rather than direct. **Jarman v. Twiddy & Co. of Duck, Inc., 319.**

DAMAGES AND REMEDIES

Fraud—compensatory and punitive damages—in relation to specific performance on breach of contract claim—election of remedies—judgment not self-executing—In an action brought by a group of insolvent insurers (plaintiffs) against a business owner and his company (defendants), who bought out plaintiffs and then failed to carry out a debt restructuring plan for plaintiffs under an agreement between the parties, the trial court—which awarded the remedy of specific performance on plaintiffs' breach of contract claim—erred in declining to award compensatory and punitive damages on plaintiffs' claim for fraud. Although plaintiffs had elected the remedy of specific performance under the agreement, the doctrine of election of remedies did not bar plaintiffs from recovering both specific performance and monetary damages because each remedy related to a separate wrongdoing by defendants (breach of contract and fraud, respectively). Furthermore, because the trial court's judgment conditioned the assessment of compensatory damages on whether the appellate court determined that specific performance was an available remedy, the judgment was not self-executing and therefore was vacated (as to remedies available to plaintiffs on their fraud claim). **Southland Nat'l Ins. Corp. v. Lindberg, 378.**

EVIDENCE

Relevance—unfair prejudice—Confrontation Clause—deceased child's mother in prison for murder—In defendant's prosecution for concealment of the death of a child who did not die of natural causes, the trial court did not err by allowing a witness to testify that the child's mother was in prison for second-degree murder. The testimony was relevant to whether the child was deceased; it was not unfairly prejudicial because other substantial evidence established that the child had died of unnatural causes; and, even assuming the testimony raised a Confrontation Clause issue regarding the mother's guilty plea, any potential error would be harmless in light of other evidence establishing that the child had died of unnatural causes. **State v. Colt, 395.**

EVIDENCE—Continued

Video interview—plain error analysis—substantial evidence of guilt—In defendant's murder trial, even assuming that the trial court erred by admitting portions of a redacted interview between defendant and law enforcement, there was no plain error because defendant could not show prejudice in light of the substantial other evidence of defendant's guilt—including testimony from two eye witnesses who picked defendant out of a photo lineup and identified him as the shooter in court and surveillance footage showing someone near the bus stop when the victim was shot wearing clothes that the defendant had been wearing. **State v. Miller, 429.**

FIDUCIARY RELATIONSHIP

Real estate agent and buyer—purchase of home—duty to advise buyer to seek legal advice—In plaintiff buyer's action against defendant realtor, who served as plaintiff's real estate agent when she signed a contract to buy a house that ended up having multiple latent defects, the trial court properly granted summary judgment for defendant on plaintiff's breach of fiduciary duty claim. Specifically, there was no genuine issue of material fact as to whether defendant breached his duty to advise plaintiff to seek legal counsel before signing the sales contract, where defendant had satisfied this duty in writing through an exclusive buyer-agent agreement that plaintiff signed when she hired defendant. Because plaintiff never asked about the contract's legal terms and instead made only a general inquiry about whether the contract was "standard," defendant was not required to verbally advise plaintiff to seek legal advice about the contract. **Mann v. Huber Real Est., Inc., 340.**

Real estate agent and buyer—purchase of home—reference to sales contract as "standard"—no duty breached—buyer's duty to read contract—In plaintiff buyer's action against defendant realtor, who served as plaintiff's real estate agent when she signed a contract to buy a house that ended up having multiple latent defects, the trial court properly granted summary judgment for defendant on plaintiff's breach of fiduciary duty claim. Specifically, defendant did not breach his duty of care to plaintiff when he referred to the sales contract as a "standard contract" where, although plaintiff assumed that the contract—which, among other things, disclaimed the warranty of merchantability, fitness for a particular purpose, and habitability—was "standard" among all builders and similar transactions (rather than being "standard" for the particular builder who sold the house), there was no evidence that defendant represented as much to plaintiff. Furthermore, plaintiff had a positive duty to read the sales contract before signing it, and she presented no evidence of special circumstances that would have absolved her of that duty. **Mann v. Huber Real Est., Inc., 340.**

FRAUD

Fraudulent inducement—memorandum of understanding—restructuring of insolvent insurers—no due diligence—reasonable reliance—In an action brought by a group of insolvent insurers (plaintiffs) against a business owner and his company (defendants), where defendants bought out plaintiffs, caused $1.2 billion held for plaintiffs' policyholders to be invested into defendants' non-insurance affiliate companies, entered into a "Memorandum of Understanding" (MOU) with plaintiffs memorializing a restructuring plan to facilitate repayment of plaintiffs' debts, and then failed to complete the restructuring plan by the deadline under the MOU, the trial court properly held defendants liable for fraudulently inducing plaintiffs to enter into the MOU and two other related agreements. The record showed

that defendants made representations about their ability to perform under the MOU while knowing that performance under the MOU was impossible, and plaintiffs relied on those representations when entering into the MOU and other agreements. Further, although plaintiffs failed to conduct due diligence before entering these agreements, their reliance on defendants' representations was reasonable where: (1) the duty of due diligence applicable to sophisticated business entities in real property sales transactions did not apply to plaintiffs, (2) discovery of defendants' fraud could not have been easily verified, and (3) defendants were in the best position to know whether they could perform under the MOU's terms. **Southland Nat'l Ins. Corp. v. Lindberg, 378.**

MOTOR VEHICLES

Fleeing to elude arrest—intent—sufficiency of evidence—The trial court properly denied defendant's motion to dismiss a charge of felony fleeing to elude arrest where the State presented sufficient evidence of defendant's intent to elude two officers, who were trying to conduct a traffic stop after defendant's car ran a stop sign. The evidence showed that, after one of the officers pulled up behind defendant's vehicle and activated his patrol car's emergency signals, defendant made several abrupt turns, drove ten to fifteen miles per hour over the speed limit, ran multiple stop signs, repeatedly drove in the oncoming lane of traffic, and passed several well-lit areas in a residential neighborhood; additionally, the officer saw marijuana being thrown out of defendant's car during the chase; then, during her arrest, defendant was noncooperative and combative with the officers, and even tried to provoke a crowd that had formed around them by rolling down the patrol car window and shouting. **State v. Jackson, 424.**

SEARCH AND SEIZURE

Motion to suppress—supporting affidavit—facts not included—court's discretion to consider merits—In a drugs prosecution, although the supporting affidavit accompanying defendant's motion to suppress did not contain facts supporting the motion, the trial court properly exercised its discretion when it elected to address the merits of the motion rather than summarily denying it. **State v. Furtch, 413.**

Traffic stop—extension—inquiries incident to stop—in support of mission—In a drugs prosecution, the trial court properly denied defendant's motion to suppress drugs found in his vehicle during a traffic stop where the court's challenged findings about the distance traveled by an officer to catch up to defendant's vehicle and the amount of time the officer took to conduct a pat-down of defendant's person were supported by competent evidence. Further, the court's conclusions of law that the searches of defendant's person and vehicle after defendant was stopped for following another vehicle too closely and driving erratically did not impermissibly extend the stop since they were conducted in the ordinary course of inquiries incident to the stop and were permitted as precautionary measures to ensure the officer's safety. Likewise, a K-9 sniff for drugs that was unrelated to the reasons for the traffic stop did not unreasonably prolong the duration of the stop. **State v. Furtch, 413.**

SENTENCING

Prior record level—proof of prior convictions—copy of records maintained by Department of Public Safety—In sentencing defendant for first-degree felony

murder and possession of a firearm by a felon, the trial court did not err in its calculation of defendant's prior record level where the State satisfied its burden to prove defendant's prior convictions by submitting a printout of the computerized criminal record maintained by the Department of Public Safety, as permitted pursuant to N.C.G.S. § 15A-1340.14(f). **State v. Miller, 429.**

TERMINATION OF PARENTAL RIGHTS

Personal jurisdiction—summons-related defect—waiver—general appearance by counsel—The trial court had personal jurisdiction over respondent mother in a termination of parental rights proceeding where, although there was no evidence that a summons had been issued or served on respondent and respondent did not appear at the termination hearing, any defect in service of process was waived because respondent had actual notice of the hearing (after having been personally served with the termination petition and two hearing notices) and her counsel made a general appearance on her behalf at the hearing. **In re M.L.C., 313.**

TORTS, OTHER

Failure to state a claim—slander of title—special damages—invasion of privacy—physical intrusion by non-party upon property—In a legal dispute between adjacent property owners over access to a right-of-way on defendant's driveway, the trial court properly dismissed defendant's counterclaim for slander of title under Civil Procedure Rule 12(b)(6) (failure to state a claim) where the damages that defendant alleged—namely, expenses she incurred to defend against a temporary restraining order that plaintiffs obtained to prevent her from impeding their access to the right-of-way—did not constitute special damages. The trial court also properly dismissed under Rule 12(b)(6) defendant's counterclaim for invasion of privacy where, rather than alleging that plaintiffs physically intruded upon her home or private affairs, defendant alleged that "many strangers" and "potential purchasers" of plaintiffs' property—in other words, non-parties to the case—had trespassed on her property. **Maynard v. Crook, 357.**

UNFAIR TRADE PRACTICES

Purchase of home—realtor's statement—reference to sales contract as "standard"—In plaintiff buyer's action against defendant realtor, who served as plaintiff's real estate agent when she signed a contract to buy a house that ended up having multiple latent defects, the trial court properly granted summary judgment for defendant on plaintiff's unfair and deceptive trade practices claim. There was no factual dispute about whether defendant referred to the sales contract—which, among other things, disclaimed the warranty of merchantability, fitness for a particular purpose, and habitability—as a "standard contract." Although plaintiff assumed that defendant meant the contract was "standard" among all builders and similar transactions (rather than being "standard" for the particular builder who sold the house), she never alleged that defendant actually told her that the contract was "standard" in that general sense. Furthermore, plaintiff did not argue that defendant's reference to the contract as "standard" was unfair or deceptive. **Mann v. Huber Real Est., Inc., 340.**

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.

IN RE CHASTAIN

[289 N.C. App. 271 (2023)]

IN THE MATTER OF PATRICIA BURNETTE CHASTAIN

No. COA22-649

Filed 20 June 2023

1. Clerks of Court—removal proceeding—inadmissible evidence—presumed ignored except for credibility purposes

In a proceeding to remove respondent from serving as county clerk of superior court, the trial court on remand from a prior appeal was presumed to have disregarded inadmissible evidence and to have considered only acts alleged in the charging affidavit when determining whether the standard for disqualification had been met pursuant to Article VI, section 8 of the North Carolina Constitution. Although the court's order permanently disqualifying respondent from office referred to acts that were not in the charging affidavit, the court noted that it had not considered those acts as grounds for disqualification but only with regard to respondent's credibility as specifically allowed by the appellate opinion previously issued in the case.

2. Clerks of Court—removal proceeding—corruption or malpractice—multiple incidents—considered in the aggregate

In a proceeding to remove respondent from serving as county clerk of superior court, there was no prohibition on the trial court's application of the corruption or malpractice standard for disqualification—under Article VI, section 8 of the North Carolina Constitution—by considering multiple incidents of alleged misconduct in totality rather than individually in isolation.

3. Clerks of Court—removal proceeding—corruption or malpractice—sufficiency of findings—evidentiary support

In a proceeding to remove respondent from serving as county clerk of superior court based on multiple incidents of misconduct where respondent exceeded the scope of her authority and undermined the administration of justice and the authority of other judicial officials, the trial court did not err in entering an order permanently disqualifying respondent from office pursuant to Article VI, section 8 of the North Carolina Constitution where its challenged findings of fact were supported by competent evidence, and where those findings in turn were sufficient to support the court's conclusions of law (aside from a portion of one ultimate finding that did not affect the outcome).

4. Clerks of Court—removal proceeding—corruption or malpractice—willful misconduct—egregious in nature

In a proceeding to remove respondent from serving as county clerk of superior court, the trial court properly entered an order permanently disqualifying respondent from office where its conclusion that respondent acted in a manner which met the corruption or malpractice standard pursuant to Article VI, section 8 of the North Carolina Constitution was supported by evidence that respondent willfully persisted in misconduct by exceeding the scope of her authority as clerk, including by visiting a criminal defendant in a detention center even though the defendant had already appeared before a judge, demanding a magistrate's time despite having no authority over magistrates, using vulgarities in relation to a judge in the presence of citizens, and interfering in a civil dispute in which a judge had already issued no-contact orders.

5. Clerks of Court—removal proceeding—constitutional interpretation—disqualification versus removal

In a proceeding to remove respondent from serving as county clerk of superior court pursuant to N.C.G.S. § 7A-105 (which provides for suspension or removal based on willful misconduct), a panel of the Court of Appeals noted its disagreement with a prior appellate opinion in the same case which interpreted Article VI, section 8 of the North Carolina Constitution as authorizing removal of a superior court clerk and thereby erroneously (in the current panel's view) effectuated section 7A-105 as a procedural mechanism for disqualification under Article VI. By contrast, the current panel would interpret the same constitutional provision (which is titled "Disqualifications for office") as only authorizing disqualification, as differentiated from Article IV, section 17 (titled "Removal of Judges, Magistrates, and Clerks") which by its plain language specifically authorizes removal and, thus, is the only constitutional provision for which 7A-105 was intended to be a procedural mechanism for removal of clerks.

Judge WOOD dissenting.

Appeal by Respondent from order entered 5 April 2022 by Judge Thomas H. Lock in Franklin County Superior Court. Heard in the Court of Appeals 8 February 2023.

Zaytoun Ballew & Taylor, PLLC, by Matthew D. Ballew, Robert E. Zaytoun, and Claire F. Kurdys, for Respondent-Appellant.

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GRIFFIN, Judge.

Respondent Patricia Burnette Chastain appeals from an order permanently disqualifying her from serving in the Office of Clerk of Superior Court of Franklin County. This is Respondent's second appeal in this matter. Our Court addressed Respondent's first appeal in *In re Chastain*, 281 N.C. App. 520, 869 S.E.2d 738 (2022) ("*Chastain I*"), and remanded the matter for proceedings consistent with the Court's opinion.

In this appeal, we address Respondent's contention the trial court erred in its application of the appropriate standard for disqualification for office under Article VI of the North Carolina Constitution. Upon review of the trial court's application of the standard, together with Respondent's conduct, we hold the trial court properly disqualified Respondent from office as her conduct in office amounted to nothing less than corruption or malpractice.

I. Factual and Procedural Background

In 2014, Respondent was elected to serve as Franklin County Clerk of Superior Court. She was reelected to a second term in 2018. In July 2020, Affiant Jeffrey Thompson commenced this proceeding, pursuant to N.C. Gen. Stat. § 7A-105, seeking removal of Respondent from office. Upon motion by Respondent and a subsequent hearing on the matter on 10 September 2020, the Senior Resident Superior Court Judge of Franklin County, Judge Dunlow, was recused by Judge J. Stanley Carmical. Accordingly, on 28 September 2020, Judge Thomas H. Lock, the Senior Resident Superior Court Judge of Johnston County, presided over the removal hearing, which concluded on 30 September 2020. Following the hearing, on 16 October 2020, Judge Lock issued an order ("2020 Order") permanently removing Respondent from serving in the office of Clerk of Superior Court of Franklin County. On 4 May 2020, Respondent appealed the 2020 Order to this Court. On 1 February 2022, for reasons further explained in *Chastain I*, our Court vacated the 2020 Order and remanded the matter for further proceedings consistent with that panel's opinion.

Upon remand, Judge Lock again presided over the matter which came on for hearing on 16 March 2022. On 5 April 2022, Judge Lock entered an order ("2022 Order") permanently disqualifying Respondent

from serving in the Office of Clerk of Superior Court of Franklin County in accordance with Article VI of the North Carolina Constitution. On 4 May 2022, Respondent filed notice of appeal from the 2022 Order.

II. Standard of Review

Upon removal proceedings against a clerk of superior court, the affiant bringing the charges must prove grounds for removal exist by clear, cogent, and convincing evidence. *In re Cline*, 230 N.C. App. 11, 20–21, 749 S.E.2d 91, 98 (2013). As such, we review the trial court's findings of fact, of which Respondent challenges, to determine whether they are supported by clear, cogent, and convincing evidence, and in turn, whether those findings support its conclusions of law. *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (internal marks and citations omitted). Challenged findings of fact are binding on appeal if supported by competent evidence. *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981). Likewise, findings of fact which remain unchallenged are also binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). We review the trial court's conclusions of law de novo. *State v. Biber*, 365 N.C. 162, 171, 712 S.E.2d 874, 880 (2011).

III. Analysis

Respondent contends the trial court erred in permanently disqualifying and removing her from serving in the Office of Clerk of Superior Court of Franklin County, as it failed to properly apply the standard for disqualification under Article VI of the North Carolina Constitution.

At the outset, we recognize this Court is bound by our Court's previous decision in *Chastain I*. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same [C]ourt is bound by that precedent, unless it has been overturned by a higher [C]ourt."); *see also State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 133 (2004) ("While we recognize that a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel and may duly note its disagreement or point out that error in its opinion, the panel is bound by that prior decision until it is overturned by a higher [C]ourt."). Thus, we analyze Respondent's contentions in accordance with our Court's opinion in *Chastain I*.

A. The Standard

Our Court's decision in *Chastain I* analyzed two constitutional avenues under which a superior court clerk of a county in North Carolina

may be removed—Article IV and Article VI of our State Constitution. *See Chastain*, 281 N.C. App. at 524, 869 S.E.2d at 742. Article IV, section 17, authorizes the removal of a superior court clerk who engages in misconduct. *Id.* at 523, 869 S.E.2d at 741 (citing N.C. Const. art. IV, § 17(4)). Alternatively, Article VI, section 8, authorizes the removal of a superior court clerk "as a consequence of being disqualified from holding any office under Article VI where she is 'adjudged guilty of corruption or malpractice in any office.' " *Id.* at 524–25, 869 S.E.2d at 742 (quoting N.C. Const. art. VI § 8) (emphasis omitted).

After addressing both avenues for removal, the Court held "the Article IV avenue could not serve as the basis for Judge Lock's decision to remove [Respondent] from office," as our Constitution conferred jurisdiction to consider Respondent's removal, under Article IV, only upon the Senior Regular Resident Superior Court Judge, Judge Dunlow. *Id.* at 524, 869 S.E.2d at 742. Additionally, our Court held Respondent could be properly removed by Judge Lock, under Article VI, if Judge Lock were to find her conduct in office met the corruption or malpractice standard supplied by Article VI, section 8, of our State Constitution because, "unlike Article IV, Article VI does not specify any procedure or confer authority on any particular judge or body to make disqualification determinations[.]" *Id.* at 525, 869 S.E.2d at 742.

Our Court had not considered the removal of a clerk of superior court before *Chastain I*. Thus, the Court relied on precedent concerning the removal of other elected officials, primarily judges, and defined this corruption or malpractice standard to include, at a minimum, "acts of willful misconduct which are egregious in nature[.]" *Id.* at 528, 869 S.E.2d at 745.

The prior panel of this Court held willful misconduct requires more than just intent to commit an offense, but rather purpose and design in doing so. *Id.* (*citing State v. Stephenson*, 218 N.C. 258, 264, 10 S.E.2d 819, 823 (1940)). Similarly, this Court found willful misconduct in office to be more than an error in judgment or a mere lack of diligence. *Id.* at 528, 869 S.E.2d at 744 (citing *In re Martin*, 302 N.C. 299, 316, 275 S.E.2d 412, 421 (1981) (internal marks and citations omitted)). Instead, willful misconduct may, but is not required to, encompass conduct involving moral turpitude, dishonesty, or corruption. *Id.* The Court reiterated that where a judge knowingly and willfully persists in misconduct of which the judge knows, or should know, to be acts of willful misconduct in office "and conduct prejudicial to the administration of justice which brings the judicial office into disrepute, he should be removed from office." *Id.* (quoting *In re Martin*, 302 N.C. at 316, 275 S.E.2d at 421);

see also In re Hunt, 308 N.C. 328, 338, 302 S.E.2d 235, 240 (1983) ("[C]onduct prejudicial to the administration of justice, if knowingly and persistently repeated, would itself rise to the level of willful misconduct in office, which is a constitutional ground for impeachment and disqualification for public office." (citing *In re Peoples*, 296 N.C. 109, 157–58, 250 S.E. 2d 890, 918 (1978))).

This Court set a framework for what constitutes willful misconduct, defining the standard to include only acts of willful misconduct which are egregious in nature. *Chastain*, 281 N.C. App. at 528, 869 S.E.2d at 745. We understand egregious acts to be those that are extremely or remarkably bad. *Egregious*, Black's Law Dictionary 652 (11th ed. 2019). In tailoring its definition, the Court relied heavily upon our Supreme Court's decision in *In re Peoples*—even so far as to say a respondent's actions would meet the standard if said acts of willful misconduct were, at a minimum, as egregious as those in *Peoples*. *Chastain*, 281 N.C. App. at 528, 869 S.E.2d at 744; *see also In re Peoples*, 296 N.C. at 156–57, 250 S.E.2d at 917–18.[1]

The Court in *Chastain I* established this general definition of the corruption or malpractice standard. However, the application of the standard, as to the disqualification and consequential removal of clerks, has yet to be addressed. This is the task before this Court. We look to precedent addressing the application of the standard as to other elected officials, while recognizing the conduct which amounts to corruption or malpractice will necessarily differ based on the elected office held by the respondent.

B. Application of the Standard

Respondent contends the trial court erred in applying the corruption or malpractice standard defined by our Court in *Chastain I*. Specifically, Respondent argues her conduct did not rise to meet the standard and the trial court only concluded otherwise because it considered acts alleged outside the charging affidavit and considered the evidence in totality rather than isolation. Further, Respondent explicitly challenges the trial court's Findings of Fact 17, 19, 30, 37, 45, and 46; and Conclusions of Law 3, 5, 7, 9, and 10.

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1. Our Supreme Court disqualified the judge from holding further judicial office under Article VI, section 8, where evidence of his misconduct included, among other things, he: dismissed several cases without trial or the defendants present and without the knowledge of the district attorney; maintained a personal file where he indefinitely held cases he caused to be removed from the active trial docket; paid the clerk money he obtained from several defendants in cases he disposed of in absence of those defendants.

1. Consideration of Acts Outside the Charging Affidavit

[1] Respondent argues the trial court erred in applying the corruption or malpractice standard by relying on acts outside the charging affidavit to make the necessary findings and conclusions for disqualification under said standard. Specifically, Respondent argues the trial court considered incidents with Judge Davis and District Attorney Waters to support its findings that Respondent acted with notice, knowledge, and intent such that her conduct met the corruption or malpractice standard.

Our General Assembly codified the procedural mechanism for removal of clerks in N.C. Gen. Stat. § 7A-105 which states, inter alia, "the procedure [for removal of a clerk of superior court] shall be initiated by the filing of a sworn affidavit with the chief district judge of the district in which the clerk resides[.]" N.C. Gen. Stat. § 7A-105 (2021). In interpreting this statute, our Court, in *Chastain I*, recognized, pursuant to our Supreme Court's holding in *In re Spivey*, "any procedure to remove an elected official must afford that official due process." *Chastain*, 281 N.C. App. at 528–29, 869 S.E.2d at 744–45 (citing *In re Spivey*, 345 N.C. 404, 413–14, 480 S.E.2d 693, 698 (1997) (holding our Constitution does not prohibit our General Assembly from enacting methods for removal "so long as [the officers] whose removal from office is sought are accorded due process of law")).

Our Court held in *Chastain I*, that Judge Lock, in rehearing any case pertaining to Respondent's removal, was limited to considering only those acts alleged in the charging affidavit, as Respondent had both the due process and statutory right to notice of the acts for which her removal was being sought. *Chastain*, 281 N.C. App. at 529, 869 S.E.2d at 745. Our Court noted, however, the trial court was permitted to consider facts not alleged in the charging affidavit as a means to assess Respondent's credibility. *Id.* at 529, 869 S.E.2d at 745; *see State v. Johnson*, 378 N.C. 236, 242, 861 S.E.2d 474, 482 (2021) (" 'The weight, credibility, and convincing force of such evidence is for the trial court, who is in the best position to observe the witnesses and make such determinations.' " (quoting *Macher v. Macher*, 188 N.C. App. 537, 540, 656 S.E.2d 282, 284 (2008))).

Though the trial court is limited in what it can consider during proceedings for removal of a clerk, we are cognizant that, "[w]here, as here, the trial judge acted as the finder of fact, it is presumed that he disregarded any inadmissible evidence that was admitted and based his judgment solely on the admissible evidence that was before him." *In re Cline*, 230 N.C. App. 11, 27, 749 S.E.2d 91, 102 (2013) (citing *Bizzell v. Bizzell*, 247 N.C. 590, 604–06, 101 S.E.2d 668, 678–79 (1958)) (internal

quotation marks and citations omitted). Consequently, this Court will only find reversible error where it affirmatively appears the action of the court was influenced by the consideration of inadmissible evidence. *See Bizzell*, 247 N.C. at 604–05, 101 S.E.2d at 678.

Here, evidence not contained in the charging affidavit, which had been previously introduced in the first removal proceeding against Respondent, was excised from the record. Notably, counsel for Respondent stated:

> Certain things came into evidence. [Affiant's counsel] put certain things into the evidence that was not in the affidavit. None of that—that's been excised. That's out of this record now. Particularly the matters relating to fixing the tickets, allegedly, that the DA testified to, as well as going to the district court judge repeatedly to strike orders of arrest. That's—that's not—that's not here before you.

Not only were these allegations excised from the record upon which the trial court relied in making its findings and conclusions here, but the trial court further confirmed its declination in considering this evidence by unequivocally stating within its findings and conclusions, it had not relied upon this evidence except to consider Respondent's credibility as authorized by this Court in *Chastain I*. In Finding of Fact 14, the trial court stated:

> Respondent's interactions with Mr. Waters and Judge Davis described in the preceding two paragraphs were not specifically alleged in the charging affidavit. Hence, the court has not considered the evidence concerning them as a potential basis for removal. However, this evidence has been considered to assess Respondent's credibility[.]

Similarly, in Finding of Fact 48, the trial court stated:

> As to evidence related to Respondent's conduct discussed at the evidentiary hearing but not alleged in the charging affidavit, the court has not considered such evidence as grounds for Respondent's disqualification from office.

Thereafter, the trial court concluded in Conclusion of Law 4:

> Respondent's repeated requests to District Attorney Michael Waters on behalf of persons seeking the reduction or dismissal of criminal charges and her repeated ex parte requests to Judge John Davis to strike orders

> of arrest for persons charged with criminal offenses were not specifically alleged in the charging affidavit and were not considered by this court as a potential basis for removal. However, this evidence was considered to assess Respondent's credibility[.]

These Findings and Conclusion demonstrate the trial court's abstention from relying on evidence outside the charging affidavit for purposes other than considering Respondent's credibility. Moreover, Judge Lock acted as the fact finder. Thus, we presume he only used this evidence to assess credibility pursuant to our decision in *Chastain I*.

We hold the trial court did not err as it properly excluded acts outside the charging affidavit from consideration when making the necessary findings and conclusions for the disqualification of Respondent under the corruption or malpractice standard.

2. Conduct Considered in Totality rather than Isolation

[2] Respondent argues the trial court erred in applying the standard by considering Respondent's conduct in totality rather than in isolation. Accordingly, Respondent challenges Conclusions of Law 9 and 10.

Removal proceedings against Respondent were initiated pursuant to N.C. Gen. Stat. § 7A-105 which states, in part, "[a] clerk of superior court may be suspended or removed from office for willful misconduct[.]" N.C. Gen. Stat. § 7A-105. Our Court in *Chastain I* stated: "we construe the language 'willful misconduct' in Section 7A-105 in the context of an Article VI hearing to include only those acts of willful misconduct which rise to the level of 'corruption or malpractice' in office." *Chastain*, 281 N.C. App. at 528, 869 S.E.2d at 744. The Court further noted, "Judge Lock lacked authority to rely on any acts of [Respondent] that did not rise to this level to support his sanction under Article VI." *Id.*

This Court did not limit the scope of Judge Lock's review to only those acts which independently rose to meet the corruption or malpractice standard under Article VI. Instead, the Court simply instructed that, upon remand, Judge Lock could not base his sanction—Respondent's disqualification—upon any act which did not rise to the corruption or malpractice standard. Further, the Court's holding instructed the trial court to limit its review to "whether the acts alleged in the charging affidavit before [Judge Lock] rose to the level of 'corruption or malpractice' in office under Article VI of our Constitution." *Chastain*, 281 N.C. App. at 530, 869 S.E.2d at 745–46. Neither instruction by this Court forbids or limits the trial court from considering Respondent's actions in totality

in order to conclude those actions met the standard for disqualification under Article VI.

Further, in defining the corruption or malpractice standard, this Court relied on precedent which allowed for such aggregation. Specifically, this Court in *Chastain I* quoted *In re Martin* stating, "[w]e do note that our Supreme Court has stated that 'persistent' acts of 'misconduct' may rise to the level of '[willful] misconduct.' " *Chastain*, 281 N.C. App. at 528, 869 S.E.2d at 744 (quoting *Martin*, 302 N.C. at 316, 275 S.E.2d at 421). This shows our Court did not intend the "any acts" language to limit the scope of the trial court's review to only those acts by Respondent which independently rose to meet the standard. Accordingly, we hold the trial court did not err in applying the standard where it considered Respondent's actions in totality rather than in isolation.

Nonetheless, we address Respondent's contention as to the trial court's Conclusions of Law 9 and 10, which state:

> 9. Even if Respondent's acts of misconduct viewed in isolation do not constitute willful misconduct, her knowing and persistently repeated conduct prejudicial to the administration of justice itself rises to the level of willful misconduct, is equivalent to corruption or malpractice under Article VI of the Constitution of North Carolina, and warrants permanent disqualification from office.
>
> 10. . . . Even if each act of misconduct was insufficient to warrant disqualification from office independently, the cumulative effect of the willful misconduct is that it was egregious in nature, was equivalent to corruption or malpractice under Article VI, § 8 of the Constitution of North Carolina, and warrants permanent disqualification from office.

Respondent argues these Conclusions of Law improperly lump all of Respondent's isolated conduct together to find it collectively rose to meet the standard. Our Court in *Chastain I* never limited the trial court's review to only acts which independently rose to the standard. Thus, the trial court did not err in Conclusions of Law 9 or 10.

3. Findings of Fact 17, 19, 30, 37, 45, and 46; and Conclusions of Law 3, 5, and 7

[3] Respondent specifically challenges the trial court's Findings of Fact 17, 19, 30, 37, 45, and 46; and Conclusions of Law 3, 5, and 7.

a. Finding of Fact 17

Respondent argues Finding of Fact 17 "erroneously states that [Respondent] 'went to the Franklin County Detention Center and demanded that she be allowed access to Machada for the purpose of having him complete an affidavit of indigency.' " However, the relevant portion of Finding of Fact 17 states:

> Respondent went to the Franklin County Detention Center and sought access to Machada for the purpose of having him complete an affidavit of indigency.

Respondent contends this Finding is erroneous as there is no testimony or evidence in the record suggesting she "demanded" anyone in the jail allow her access to Machada. However, not only is Finding of Fact 17 void of the word "demand," of which Respondent takes issue, but Respondent's testimony at the hearing indicates that on 7 March 2017, she went to the Franklin County Detention Center to see Machada and spoke with him for ten minutes. Finding of Fact 17 is supported by competent evidence and is therefore binding on appeal.

b. Finding of Fact 19

Respondent argues the trial court erred in Finding of Fact 19 which states:

> When Sheriff Winstead learned of this incident, he banned Respondent from further visits in the detention center.

Respondent contends "this incident" refers to the erroneous facts described in Finding of Fact 17 and the record is void of evidence that Sheriff Winstead ever learned of Respondent's "demand," or that Sheriff Winstead ever offered any testimony as to the specific reason he decided not to let Respondent return to the jail. Finding of Fact 19 is not erroneous as to its reference of "this incident," for, as mentioned above, the word "demand" does not appear in Finding of Fact 17. Further, the trial court did not err where it relied on Finding of Fact 17 in making Finding of Fact 19, as Finding of Fact 17 is supported by competent evidence.

Moreover, Sheriff Winstead testified at the September 2020 hearing as to Respondent being banned from the jail:

> Q: All right. Have you been present for any of [Respondent's] trips to the jail?
>
> A: No, I have not.

> Q: Okay. Are you aware of incidents that have occurred while she has been at the jail?
>
> . . .
>
> A: Yes.
>
> . . .
>
> Q: All right. As a result of incidents, have you taken any action?
>
> A: I have.
>
> Q: And what is that action?
>
> A: I do not allow [Respondent] to come in our facilities or the sheriff's office, jail, or magistrate's office.
>
> . . .
>
> Q: As a result of any of the Machada incidents, have you had to take any action with regard to the clerk?
>
> A: As a result to the Machada incidents. I mean that was one of the incidents that was brought as far as not letting her back into the jail.

This testimony provides evidentiary support for Finding of Fact 19. Because Finding of Fact 19 is supported by competent evidence, it is binding on appeal.

c. Conclusion of Law 3

Respondent argues the trial court erred in Conclusion of Law 3, which states:

> When Respondent, without the knowledge or authorization of the presiding district court judge, demanded access to the county jail for the purpose of obtaining an affidavit of indigency from a murder defendant knowing that the defendant already had been appointed counsel and afforded a first appearance before the district court judge, her conduct was an inappropriate intervention into the case and was an act beyond the legitimate exercise of Respondent's authority notwithstanding the Rules of the North Carolina Commission on Indigent Defense Services. Her actions were an effort to undermine Judge Davis' authority. Such willful misconduct was egregious

> in nature and is equivalent to corruption or malpractice under Article VI of the Constitution of North Carolina.

Respondent contends this Conclusion of Law is clearly erroneous as it relies upon a fact with no support from the record by stating Respondent decided to see Machada in jail "knowing that [Machada] already had been appointed counsel." Respondent further asserts there is not a separate finding within the trial court's order to support this fact.

The above portion of Conclusion of Law 3 challenged by Respondent serves as an ultimate finding. An "ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact and should be distinguished from the findings of primary, evidentiary, or circumstantial facts." *In re Z.A.M.*, 374 N.C. 88, 97, 839 S.E.2d 792, 798 (2020) (quotations and citations omitted). However, regardless of whether the trial court's statement is considered a finding of ultimate fact or a conclusion of law, there must be adequate evidentiary findings of fact to support the ultimate finding or conclusion of law. *Id.* (quotations and citations omitted). Nevertheless, "[w]here there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings which do not affect the conclusions." *Black Horse Run Property Owners Association-Raleigh, Inc. v. Kaleel*, 88 N.C. App. 83, 86, 362 S.E.2d 619, 621 (1987) (citations omitted); *see also In re Estate of Skinner*, 370 N.C. 126, 139–40, 804 S.E.2d 449, 458 (2017).

We agree with Respondent that the portion of Conclusion of Law 3, which indicates Respondent went to the detention facility knowing Machada had been appointed counsel, is not supported by record evidence. In fact, although Respondent testified she understood Judge Davis had conducted Machada's first appearance, she stated she was not aware a lawyer had already been appointed. As such, this portion of Conclusion of Law 3, which we deem an ultimate finding, is not supported by adequate evidentiary findings of fact and is therefore erroneous.

Regardless, there are sufficient findings of fact to support Conclusion of Law 3. The trial court's additional findings in this Conclusion are supported by Respondent's own testimony, stating, upon arriving at her office the morning of the incident, "[t]he staff stated that Judge Davis had come early that morning and gotten one of the staff to go with him to the magistrate's office and to do the preliminary hearing." Despite Respondent testifying she was unable to find an affidavit of indigency within Machada's file, she was informed of Judge Davis's involvement in the Machada case and did not inquire as to the affidavit of indigency before going to the detention center to meet with Machada.

This evidence, in combination with the trial court's unchallenged findings of fact, are sufficient to support Conclusion of Law 3. Therefore, regardless of whether a portion of this conclusion is erroneous, the ultimate conclusion is not.

The trial court did not err in Conclusion of Law 3.

d. Finding of Fact 30

Respondent contends the trial court erred in a portion of Finding of Fact 30, which states:

> Respondent told the Diazes that she was telling them the law in this matter, and that Judge Davis "legally" did not have the right to enter the orders he had entered.

Respondent argues Finding of Fact 30 erroneously states Respondent told the Diazes "that Judge Davis did not have the right to enter the orders he had entered" as both the body camera footage and transcript of the same show otherwise. However, the body camera footage captured during Respondent's conversation with Adam Diaz proves the opposite. Respondent references the order entered by Judge Davis and its contents, stating: "[Judge Davis] legally can't say that." This statement, within the footage, provides sufficient evidence to support the above Finding. Because Finding of Fact 30 is supported by competent evidence, it is binding on appeal.

e. Finding of Fact 37

Respondent contends Finding of Fact 37 erroneously states:

> Respondent's statements to the Diazes again evidenced a sympathy for Ms. Gayden and a calculated decision to act on Ms. Gayden's behalf in her legal dispute with the Diazes. Respondent knew or should have known that her conduct in the dispute was well beyond the legitimate exercise of her authority and severely undermined the administration of justice. It moreover evidenced contempt for the legitimacy of Judge Davis' lawful orders.

Respondent argues this Finding is not supported by competent evidence because Respondent had a genuine interest in hearing the concerns of both parties. Further, Respondent argues she engaged in a voluntary discussion with the Diazes, listened intently as they explained their concerns, and wished the Diazes happiness and peace from the long-running ordeal. Respondent contends there exists no evidence that her conduct was a calculated decision to intervene in the dispute solely to support Gayden's position.

To the contrary, the body camera footage, obtained during Respondent's conversations with both Gayden and the Diazes, provides sufficient evidence to support this Finding. On 27 December 2019, Respondent met with Gayden outside her home, and sympathized with Gayden as to the conflict with the Diazes stating, "anything more I am going to look at as pure harassment, pure harassment, and it's not right. It's not right, and we're not going to put up with it." Further, Respondent repeatedly told Gayden that Adam Diaz was abusing the legal system by continually calling 911 and even expressed pity toward Gayden's position in the conflict noting, "it sounds like, to me, that at this point, you're getting picked on." Respondent then left Gayden and went to the Diaz home to address the issue. The footage depicts Respondent arriving at the Diaz home, and stating she was there to mediate. The video further shows Respondent positioning herself as an advocate for Gayden as she argued with Adam Diaz about every issue over which he expressed concern. Additionally, Respondent consistently referred to Adam Diaz's behavior, in calling 911, as an abuse of the judicial process. At one point, the officer on scene had to pull Respondent aside to correct her, stating he believed the Diazes were doing the right thing by calling 911 and had not been abusing the system. While, by the end of her encounter with the Diazes, Respondent was somewhat friendly, she entered the conversation with animosity toward the Diazes.

This body camera footage is, in itself, sufficient evidence to support Finding of Fact 37.

f. Conclusion of Law 5

Respondent contends the trial court improperly relied upon Finding of Fact 30 in making Conclusion of Law 5, which states:

> By intervening into the legal dispute between Ann Elizabeth Gayden and Adam and Sarah Diaz, and by engaging in that conduct on 27 December 2019 described in paragraphs 25 through 37 of the above Findings of Fact and that subsequent conduct on 31 December 2019 described in paragraph 38 of those Findings, Respondent engaged in conduct which tended to undermine the authority of John Davis, breed disrespect for his office and the legal processes already in place, and diminish the high standards of the office of Clerk of Superior Court.

Of the findings of fact mentioned here—Findings of Fact 25-38—Respondent only challenges Findings of Fact 30 and 37, which, as stated above, are supported by competent evidence. These Findings, with

the other twelve unchallenged findings, support Conclusion of Law 5. Therefore, the trial court did not err in Conclusion of Law 5.

g. Finding of Fact 45

Respondent challenges a portion of the trial court's Finding of Fact 45, which states:

> . . . Mr. Arnold heard Respondent say, "I just talked with the chief magistrate and he's not going to do a thing." He then heard Respondent say, "F[---] John Davis" or "F[---], I'm not calling John Davis" or "I don't give a f[---] about John Davis."

Respondent argues this Finding is erroneous as it is not supported by competent evidence because Magistrate Arnold admitted he did not know exactly what phrase Respondent used but that it could have been any of the three. Magistrate Arnold testified at the hearing: "The second thing [Respondent] said was, . . . either, f[---] John Davis; f[---], I'm not calling John Davis, or I don't give a f[---] about John Davis." Finding of Fact 45 includes this exact language without asserting that Magistrate Arnold knew exactly what Respondent said. Finding of Fact 45 is supported by competent evidence and is therefore binding on appeal.

h. Finding of Fact 46

Respondent argues the trial court erred in Finding of Fact 46 as it "erroneously concludes from the evidence [Respondent] did, in fact, say, 'F[---] John Davis.' " Respondent's argument lacks merit as the quoted language appears nowhere in Finding of Fact 46, which states:

> Under N.C. Gen. Stat. § 7A-146, the chief district court judge of each judicial district is charged with the supervision of the magistrates in the judge's district. The clerk of Superior Court has no supervisory authority over magistrates.

Because Respondent's argument here does not correspond with the challenged Finding, Respondent's argument lacks merit and is overruled. Thus, Finding of Fact 46 is binding on appeal.

i. Conclusion of Law 7

Respondent challenges a portion of Conclusion of Law 7 which states:

> By publicly attempting to exercise authority over Chief Magistrate James Arnold on 25 June 2020—conduct outside the scope of her official responsibilities—and thereafter using vulgarity in the presence of members of the

> public to describe her feelings toward Chief District Court Judge Davis, Respondent, at a minimum, engaged in conduct prejudicial to the administration of justice which brings her office into disrepute[.]

Respondent argues this Conclusion erroneously states Respondent engaged in improper conduct by using vulgarity to describe her feelings toward Judge Davis. However, Finding of Fact 45, which was supported by competent evidence, indicates Respondent used vulgarity to describe her feelings toward Judge Davis. Because the trial court's findings of fact support this Conclusion, the trial court did not err.

4. Respondent's Conduct and Resulting Disqualification

[4] We now review Respondent's conduct to determine whether the trial court properly disqualified Respondent from office, having concluded she acted in a manner which rose to the corruption or malpractice standard.

Respondent addresses four instances of misconduct—The Affidavit of Indigency, The Gayden/Diaz Home Visit, The Magistrate Arnold Phone Call, and The Audit—arguing her actions do not rise to the corruption or malpractice standard.

a. Respondent's Conduct

The trial court's Findings of Fact reflect the following:

The Affidavit of Indigency

On or about 6 March 2017, the defendant, Machada, was arrested for first-degree murder. On 7 March 2017, Sheriff Winstead informed the District Attorney, Mr. Waters, he did not want to transport Machada to the courtroom for a first appearance as he considered Machada dangerous and a security risk. District Attorney Waters then asked Judge Davis to conduct Machada's first appearance in the county jail and Judge Davis agreed. Machada was uncommunicative during his first appearance. Thus, Judge Davis did not ask Machada to complete an affidavit of indigency regarding the appointment of counsel.

Later that day, Respondent looked at Machada's file and did not find a completed affidavit of indigency. A member of Respondent's staff told her Judge Davis had conducted Machada's first appearance earlier that morning. Notwithstanding this information and without speaking to Judge Davis, Respondent went to the Franklin County Detention Center, met with Machada, and had him complete an affidavit of indigency.

After discovering Respondent's actions in visiting with Machada, Sheriff Winstead banned Respondent from further visits in the detention center, as well as the Sheriff's Office and Magistrate's Office. Sherriff Winstead stated the Machada incident was only one of the incidents involving the Respondent he considered in making the decision.

The Gayden/Diaz Home Visit

On 27 December 2019, Respondent went to the neighboring properties of Ann Gayden and Adam and Sarah Diaz to mediate an ongoing dispute between the two. Respondent was aware of the dispute and knew Judge Davis had entered no-contact orders against Gayden and in favor of the Diazes. These orders were still in effect. Respondent called the Sheriff's Office and asked a deputy to meet her at the properties. Deputy Dailey met Respondent on scene and witnessed interactions between Respondent and both Gayden and the Diazes. He captured the interactions on his body camera. Respondent went to Gayden and told her she believed Gayden was being picked on and harassed. Respondent also told Gayden that Adam Diaz was abusing the system by calling 911 and would be criminally charged if he continued to do so.

Next, Respondent went to the Diaz home and confronted Adam Diaz, stating, "I have a right and an obligation lawfully to come out here and mediate this." Respondent also stated she had jurisdiction over the entire county and was obligated by law to mediate the case. Respondent continued to refer to Adam Diaz's behavior, in calling 911, as an abuse of the judicial process until Deputy Dailey pulled her aside and told her it was not. Additionally, in speaking about the restraining order, Respondent told Adam Diaz, "as far as I'm concerned its for both of you" and even stated, in reference to the order, "[Judge Davis] legally can't say that." When Adam Diaz told Respondent she was speaking contrary to what Judge Davis had told them, she responded: "I'm telling you the law." When the Diazes complained Gayden had a drinking problem, Respondent told them to request Gayden have an assessment. The Diazes said they had asked for one previously but the judge said "they didn't have the power to do that[.]" Respondent then stated, "yes you do. Based on the evidence that I've heard, this would help her[,]" even noting she had the authority to, and would, order Gayden's assessment herself.

On 31 December 2019, Respondent directed one of her employees to file a copy of Gayden's deed containing the easement across the Diazes' property in two of the lawsuits Gayden had filed against the Diazes. In both case files, Respondent handwrote "Ms. Ann Gayden has legal right of way to travel per easement to her property" in the margin of the deed.

Respondent did not consult with and was not authorized by Judge Davis or any other district court judge before she did so, nor did she inform any district court judge or the Diazes' attorney she had placed this document in the case files thereafter.

The Magistrate Arnold Phone Call

On 25 June 2020, Franklin County Chief Magistrate James Arnold received a phone call from Respondent. She was yelling and often incoherent during the conversation. Respondent said she was at Magistrate Arnold's office and had several people with her who wanted to talk with a magistrate. She then demanded Magistrate Arnold send a magistrate to talk with the people. Magistrate Arnold stated he would not send a magistrate without knowing more information and asked Respondent to let him speak with the people, but she refused. Respondent threatened to give out Magistrate Arnold's personal phone number or post her own number on the door of the Magistrate's Office. Magistrate Arnold requested she not do either and said he would talk with her the next day. He suggested she contact Judge Davis if she wanted to complain about the Magistrate's Office. Respondent stated she was not going to call Judge Davis and Magistrate Arnold ended the phone call. Nearly 30 to 45 seconds later, Magistrate Arnold's cell phone rang. He knew Respondent was calling and could tell, after answering, she had inadvertently called. Magistrate Arnold heard Respondent say, "I just talked with the chief magistrate and he's not going to do a thing." He then heard Respondent say, "F[---] John Davis" or "F[---], I'm not calling John Davis" or "I don't give a f[---] about John Davis."

The Audit

Pursuant to the North Caroline State Auditor's duty to periodically examine and report on the financial practices of state agencies and institutions, the State Auditor's office conducted a performance audit of the Franklin County Clerk of Court's office for the period from 1 July 2019 through 31 January 2020. The Auditor thereafter published a written report of the Auditor's findings. Although the Auditor found no evidence of embezzlement or misappropriation of funds, several deficiencies in internal control and instances of noncompliance that were considered reportable were identified, including: untimely completion of bank reconciliations; failure to identify and transfer unclaimed funds to the State Treasurer or rightful owner; failure to compel estate inventory filings or fee collection; failure to compel inventory filings or assess and collect sufficient bonds for estates of minors and incapacitated adults; and failure to accurately disburse trust funds held for minors and incapacitated adults.

Further, in Respondent's response to the audit, she admitted: new employees were not properly trained in preparing bank reconciliations or on the escheat process; her office failed to document evidence of its requests to compel estate inventory filings; her staff made unintentional mistakes in calculating inventory fees and not collecting the required amounts; and monitoring procedures were not in place to ensure the reconciling adjustments were entered into the financial management system, to ensure funds were transferred and apparent owners notified, to ensure inventories were compelled timely and bonds were sufficient for the guardianship estates, or to ensure trust funds were accurately disbursed.

b. Resulting Disqualification

Our Court in *Chastain I* defined the corruption or malpractice standard to include acts of willful misconduct which are egregious in nature. *See supra* III.A. Upon remand, the trial court relied on this definition to disqualify Respondent. Thus, we do the same, noting as our Supreme Court did in *In re Peoples*, that in order to properly appraise Respondent's conduct we need only ask one question: "What would be the quality of justice and the reputation of the courts, if every clerk, exercised the duties of her office in the manner Respondent did here?" *See Peoples*, 296 N.C. at 156, 250 S.E.2d at 917.

Respondent was the Clerk of Superior Court of Franklin County for six years. This time in office is significant. Respondent knew, or should have known, the duties and ethical responsibilities of her office. *See* N.C. Gen. Stat. § 7A-103 ("Authority of clerk of superior court."). Conversely, Respondent continually acted outside the scope of her position as Clerk and engaged in misconduct. This misconduct not only undermined the authority of Judge Davis and other judges in the county but brought the judicial system into disrepute.

Respondent knew Judge Davis had already conducted Machada's first appearance. Nonetheless, she went to the detention center, without advisement from Judge Davis, and held a meeting with Machada. In doing so, Respondent acted in a manner prejudicial to the administration of justice and undermined the authority of Judge Davis. Additionally, Respondent was willfully persisting in misconduct such that Sherriff Winstead testified he had prior issues with Respondent—to the extent that, upon learning of this incident, he was forced to ban Respondent from entering the Sheriff's Office, jail, and Magistrate's Office.

In another instance, Respondent, despite knowing the Clerk of Superior Court has no supervisory authority over magistrates, called Magistrate Arnold and demanded he send a magistrate to speak with

people waiting outside the Magistrate's Office. Further, Respondent unequivocally acted with conduct prejudicial to the administration of justice which inevitably brought the judicial office into disrepute by speaking with absolute vulgarity about Judge Davis stating: "F[---] John Davis" or "F[---], I'm not calling John Davis" or "I don't give a f[---] about John Davis." This was done in the presence of citizens of Franklin County.

Even without considering the above instances, Respondent's conduct in the Gayden/Diaz dispute, alone, was sufficient to warrant her disqualification. There is no procedure which calls for the mediation of actions like the one in which Gayden and the Diazes were involved. Respondent also engaged a represented party as the Diazes had an attorney in this matter. The Clerk of Superior Court certainly understands their role is not to try and practice law, much less with a represented party. Regardless, Respondent went to the properties of each and professed it was her legal duty to mediate their dispute. Despite being aware of the order issued by Judge Davis concerning the matter, Respondent continued to try and mediate the situation. These acts with Respondent's additional statements severely undermined the administration of justice and the authority of Judge Davis as Respondent made claims about the order stating, "[Judge Davis] legally can't say that." Moreover, Respondent did not have the authority to modify official court files in connection with the Gayden-Diaz dispute. Yet, she instructed a member of her staff to file several deeds on which she made handwritten notes without authorization and without notifying anyone thereafter.

Here, Respondent knowingly persisted in misconduct as she consistently acted beyond the scope of her authority as Clerk. Further, she acted in a manner prejudicial to the administration of justice in continuing to undermine the authority of both Judge Davis and other judges within the district by questioning their judgment, condemning court orders, and in altering and filing deeds without authorization. The Clerk of Superior Court knows that these actions are beyond the duties of that office. Respondent's conduct rose to meet the corruption or malpractice standard as Respondent's actions constituted willful misconduct which was egregious in nature.

Having reviewed the above instances of Respondent's conduct, we hold Respondent was properly disqualified as her conduct amounted to corruption or malpractice.

C. Chastain I

[5] Notwithstanding our holding here, we emphasize our discrepancies with the Court's opinion in *Chastain I*.

Undoubtedly, in congruence with our Court's opinion in *Chastain I*, we recognize Article IV, section 17, authorizes the removal of a superior court clerk who engages in misconduct. N.C. Const. art. IV, § 17. Further, we agree that, pursuant to Article IV, section 17(4), none other than Judge Dunlow could preside over Respondent's removal proceeding. *Chastain*, 281 N.C. App. at 522, 869 S.E.2d at 741 ("Article IV confers on a single individual, the authority to remove the elected Clerk in a county; namely, the senior regular resident Superior Court Judge in that same county. Accordingly, no other judge may be conferred with jurisdiction over the subject matter of removing a Clerk for misconduct under Article IV.").

However, our Court in *Chastain I* held, as an alternative, Article VI, section 8, authorizes the removal of a superior court clerk "as a consequence of being disqualified from holding any office under Article VI where she is 'adjudged guilty of corruption or malpractice in any office.' " *Chastain*, 281 N.C. App. at 524–25, 869 S.E.2d at 742 (quoting N.C. Const. art. VI § 8) (emphasis omitted). With this, we disagree.

Article VI, section 8 of our Constitution states:

> The following persons shall be disqualified for office:
>
> . . . any person who has been adjudged guilty of corruption or malpractice in any office, or any person who has been removed by impeachment from any office, and who has not been restored to the rights of citizenship in the manner prescribed by law.

N.C. Const. art. VI, § 8. This article concerns disqualification for office, not removal from office. Based on the plain language contained in the constitutional provisions—Article IV, section 17(4), specifically references removal while Article VI, section 8, concerns only disqualification—coupled with the fact that Article IV, section 17, is specifically titled "Removal of Judges, Magistrates, and Clerks" while Article VI, section 8, is titled "Disqualifications for office" we can be certain that Article VI is a disqualification provision only and not one of removal. For, if it was intended Article VI serve, alongside Article IV, as an additional means for removal from office, Article VI would have been drafted in the same manner as Article IV.

Further, our Court in *Chastain I* erroneously effectuates N.C. Gen. Stat. § 7A-105 as a procedural mechanism for disqualification under Article VI of our State Constitution when it was only intended as a procedural mechanism for removal of clerks under Article IV.

Chapter 7A, section 105, of the North Carolina General Statutes, titled "§ 7A-105. Suspension, removal, and reinstatement of clerk[,]" states:

> A clerk of superior court may be suspended or removed from office for willful misconduct or mental or physical incapacity, and reinstated, under the same procedures as are applicable to a superior court district attorney, except that the procedure shall be initiated by the filing of a sworn affidavit with the chief district judge of the district in which the clerk resides, and the hearing shall be conducted by the senior regular resident superior court judge serving the county of the clerk's residence. If suspension is ordered, the judge shall appoint some qualified person to act as clerk during the period of the suspension.

N.C. Gen. Stat. § 7A-105. This statute is a procedural mechanism for removal of clerks under Article IV of our State Constitution alone, as, by its plain language, the statute offers no guidance as to how someone may be disqualified for office.

However, our Court, in *Chastain I*, relied on *Peoples* to hold otherwise. In *Peoples*, our Supreme Court noted the long, complicated history of Article VI, section 8, specifically citing a major revision in our State Constitution in 1971. *Peoples*, 396 N.C. at 165, 250 S.E.2d at 922. Our Supreme Court further explained the revision "extended the bar against office holding persons found guilty of committing a felony against the United States or another state and substituted the phrase 'adjudged guilty' for the term 'convicted.' " *Id.* at 166, 250 S.E.2d at 923. Moreover, the Court concluded:

> [T]he substitution of the term "adjudged guilty" for the term "convicted" permits the General Assembly to prescribe proceedings in addition to criminal trials in which an adjudication of guilt will result in disqualification from office.

Id. Relying on this conclusion, the Court in *Peoples* analyzed N.C. Gen. Stat. § 7A-376, a statute which bars a judge from future judicial office when he has been removed for willful misconduct stating, in relevant part:

> (b) Upon recommendation of the Commission, the Supreme Court may . . . remove any judge for willful misconduct in office, . . . or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. . . . *A judge who is removed for any of the foregoing reasons . . . is disqualified from holding further judicial office.*

N.C. Gen. Stat. § 7A-376 (2021) (emphasis added). The Court held this statute was enacted pursuant to the General Assembly's power to "prescribe proceedings in addition to criminal trials in which an adjudication of guilt will result in disqualification from office" under Article VI. *Peoples*, 296 N.C. at 166, 250 S.E.2d at 923. Further, the Court held, through this statute, the General Assembly was acting within its power when it made disqualification from judicial office a consequence of removal. *Id.*

Like the Court in *Peoples*, we too recognize the General Assembly's right to prescribe procedure for disqualification, but unlike the Court in *Peoples*, we must apply N.C. Gen. Stat. § 7A-105, a statute which can be distinguished from section 7A-376 as it applies only to clerks, not judges, and lacks any reference to disqualification at all. Further, we must presume our General Assembly intentionally refrained from, or has yet to consider, including disqualification as a consequence of removal under section 7A-105 as the General Assembly included specific language referencing disqualification as a consequence of removal under section 7A-376. *See Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (citations omitted) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *see also State v. McCants*, 275 N.C. App. 801, 822, 854 S.E.2d 415, 430 (2020).

Aside from noting the General Assembly can provide a procedural mechanism for disqualification of clerks but has yet to do so, we must point out that our Court in *Chastain I* sought to hold removal proper as a consequence of disqualification. *See Chastain*, 281 N.C. App. at 524, 869 S.E.2d at 741. Our Supreme Court in *Peoples* only held the General Assembly acted within their authorization to create a statute, concerning judges, under which disqualification was a consequence of removal and not vice versa. As *Peoples* and *Chastain I* differ in this way, we find no authority under which removal has been considered as a consequence of disqualification.

While we recognize a person currently in office, who is disqualified for any future office pursuant to Article VI, section 8, after being adjudged guilty of corruption or malpractice in office, should likely be removed from the office they currently hold, neither our Constitution nor our General Statutes provide for removal upon disqualification.

We do not take issue with the Court's interpretation of the corruption or malpractice standard under Article VI. We only note the Court's application of the standard as to removal, together with its application

and recognition of N.C. Gen. Stat. § 7A-105 as a procedural mechanism for disqualification, was in error as the standard applies only to disqualification and the statute only serves as a procedural mechanism for removal. As such, our Court, in *Chastain I*, should have remanded the matter for further proceedings by Judge Dunlow under Article IV without instructing on an alternative method for removal.

IV. Conclusion

In congruence with our Court's opinion in *Chastain I*, we hold the trial court did not commit error in ordering Respondent permanently disqualified from serving in the Office of Clerk of Superior Court of Franklin County, pursuant to Article VI of the North Carolina Constitution, as Respondent's conduct amounted to nothing less than corruption or malpractice.

AFFIRMED.

Judge FLOOD concurs.

Judge WOOD dissents by separate opinion.

WOOD, Judge, dissenting.

The outcome of this matter is of significant importance to North Carolina jurisprudence and future interpretation of the North Carolina Constitution. Review of an order removing an elected judicial official is one of the "most serious undertaking[s]" in which an appellate court may engage. *In re Hayes*, 356 N.C. 389, 406, 584, S.E.2d 260, 270 (2002). Our Supreme Court has instructed that Article VI "expressly limit[s] disqualifications to office for those who are *elected by the people* to those disqualifications set out in the Constitution." *Baker v. Martin*, 330 N.C. 331, 339, 410 S.E.2d 887, 892 (1991) (emphasis added). Article VI, Section 8 requires that "any person who has been adjudged guilty of corruption or malpractice in any office" shall be disqualified from holding office. Because this is an ultimate consequence, conduct must rise to the high constitutional standard of *egregious* and willful misconduct so as to constitute "corruption or malpractice" before an elected official may be permanently disqualified from office. Because I believe the trial court's findings of fact do not support its conclusion that Ms. Chastain's actions were so *egregious* as to warrant permanent disqualification from office, I respectfully dissent from the majority opinion.

I. Background

Ms. Chastain began service as the Franklin County Clerk of Superior Court on 1 May 2013, having been appointed by the Honorable Judge Robert J. Hobgood, who was the senior Resident Superior Court Judge of Franklin County. The people of Franklin County, thereafter, elected Ms. Chastain to be their Clerk of Superior Court in 2014 and re-elected her to that position in 2018. It is clear from the record that, over the course of her service as Clerk of Superior Court, animosity grew between Ms. Chastain and certain officers of the court and other civil servants in Franklin County.

This animosity climaxed in 2020 after a local attorney commenced an action seeking the removal of Ms. Chastain from office, pursuant to N.C. Gen. Stat. § 7A-105, by filing an affidavit alleging that she had committed acts of willful misconduct. The charging affidavit alleged several acts of misconduct that the affiant had not personally witnessed. Superior Court Judge Thomas H. Lock presided over the matter during a hearing which took place from 28 September 2020 to 30 September 2020. On 16 October 2020, the trial court ordered that Ms. Chastain be removed from office and permanently disqualified from holding office as Clerk of Superior Court. Ms. Chastain appealed. For reasons further explained in *Chastain I*, this Court vacated the order and remanded the matter to the trial court on 1 February 2022. This Court reasoned, if Senior Resident Superior Court Judge John Dunlow were to hear the matter on remand, the court could utilize the lesser standard specified in Article IV to remove Ms. Chastain from office. If, however, Judge Lock were to rehear the matter, the court could only utilize the higher standard specified in Article VI.

On remand, Judge Lock again presided over the matter and ordered that Ms. Chastain be permanently disqualified and removed from office, this time in professed accordance with Article VI of the North Carolina Constitution. Ms. Chastain once more appeals to this Court pursuant to Article IV, Section 17(4) of our Constitution, alleging, among other things, that the trial court committed error when it concluded that the alleged misconduct merited her disqualification and removal from office.

II. Standard of Review

In Clerk of Superior Court removal proceedings before the trial court, the Affiant bringing charges bears the burden of proof, by "clear, cogent and convincing evidence," that grounds exist for removal. *In re Cline*, 230 N.C. App. 11, 21, 749 S.E.2d 91, 98 (2013). Accordingly, we must determine whether the trial court's "findings of fact are adequately

supported by clear and convincing evidence, and in turn, whether those findings support its conclusions of law." *In re Hill*, 368 N.C. 410, 416, 778 S.E.2d 64, 68 (2015).

When reviewing the conduct of an elected Clerk of Superior Court, it must be noted that our Supreme Court held:

> Absent evidence to the contrary, it will always be presumed "that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. . . . Every reasonable intendment will be made in support of the presumption."

Styers v. Phillips, 277 N.C. 460, 473, 178 S.E.2d 583, 591 (1971) (quoting *Huntley v. Potter*, 255 N.C. 619, 628, 122 S.E.2d 681, 687 (1961)).

We review the trial court's conclusions of law *de novo* on appeal. *In re K.J.D.*, 203 N.C. App. 653, 657, 692 S.E.2d 437, 441 (2010). "Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009) (citations omitted).

III. Discussion

Our elected judicial officials, including our Clerks of Superior Court, are entrusted by the people with the administration of justice on their behalf. N.C. Const. art. I, § 2. Thus, where our elected officials are "drawn from the same fountain of authority, the people," and where our Constitution allows for the removal of an elected official by a like official, such removal must be effectuated with the utmost care and respect for the people's will—and not purely as a result of internal, oligarchical enmity. The Federalist No. 51 (James Madison).

The Clerk of Superior Court is a constitutional officer, whose office is established by Article IV, Section 9(3) of our Constitution. Our Constitution provides the avenues by which an elected Clerk may be removed. As *Chastain I* reasoned, Article VI is the only constitutional provision applicable to the disqualification and, consequentially, removal of an elected clerk when a judge other than the senior resident superior court judge adjudicates the matter. *Chastain I*, 281 N.C. App. 520, 529, 869 S.E.2d 738, 745 (2022). Though the senior resident superior court judge could have presided over the matter under the Rule of Necessity as explained in *Chastian I*, Judge Lock presided, and therefore, Article VI is the controlling constitutional provision.

Under Article VI, Section 8, "any person who has been adjudged guilty of corruption or malpractice in any office" shall be disqualified from holding public office. N.C. Const. art. VI, § 8. If a person elected to public office becomes disqualified from office, it necessarily follows that the person may no longer serve in that office and must be removed. *See Chastain I*, 281 N.C. App. at 527, 869 S.E.2d at 744 (discussing removal under Article VI). For purposes of disqualification after being "adjudged guilty of corruption or malpractice," removal from office is effectuated upon adjudication. By the plain language of this provision, it is clear the drafters intended only for the most egregious conduct to apply, including disqualification by impeachment, being found guilty of treason, being found guilty of a felony, or being adjudged guilty of corruption or malpractice in office. This Court construed this "corruption or malpractice" standard "to include at a minimum acts of willful misconduct *which are egregious in nature*." *Id.* at 528, 869 S.E.2d at 744 (emphasis added) (citing *In re Peoples*, 296 N.C. 109, 166, 250 S.E.2d 890, 923 (1978)). Implicit in this expression and as supported by our caselaw, the "corruption or malpractice" standard of Article VI requires more than mere "misconduct" or even "willful misconduct"; it requires *egregious* and willful misconduct.

The North Carolina Supreme Court has defined corruption as "[t]he act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others." *State v. Agnew*, 294 N.C. 382, 392–93, 241 S.E.2d 684, 691 (1978) (quoting *State v. Shipman*, 202 N.C. 518, 540, 163 S.E. 657, 669 (1932)). It requires proof of an unlawful or fraudulent intent. *Id.* Multiple other crimes resulting from misconduct in public office are set forth in our General Statutes. *See* N.C. Gen. Stat. §§ 14-228 to -248 (2022). Offenses of public office which require a corrupt or fraudulent intent or involve leveraging public office to unlawfully obtain a material benefit are charged as felonies; whereas charges of failure to properly discharge duties or misuse of confidential information are misdemeanors. *Id.*

Being "adjudged guilty of malpractice" is not defined under our statutes. I agree with the proposition advanced by Respondent that, arguably, the nearest analogy is a civil claim for professional malpractice damages. To establish a civil claim for professional malpractice, the plaintiff must show: the nature of the defendant's profession; the defendant's duty to conform to a certain standard of conduct; a breach of duty; and proximate cause of harm to the claimant. *Reich v. Price*, 110 N.C. App. 255, 258, 429 S.E.2d 372, 374 (1993), *cert. denied*, 334 N.C. 435, 433 S.E.2d 178 (1993). In contrast, for the criminal offense of willful

failure to discharge duties in office under N.C. Gen. Stat. § 14-230, which is subject to only a misdemeanor sentence and subsequent removal from office, it must be evidenced that the defendant is an official of a state institution; the official willfully failed to discharge the duties of his office; and the act or omission resulted in injury to the public. *State v. Birdsong*, 325 N.C. 418, 422, 384 S.E.2d 5, 7 (1989). It can be inferred then that "malpractice in office" under Article VI requires at a minimum not only the specific intent to willfully violate one's official duties under the law but also proof that such conduct was *egregious* and proximately caused injury to the claimant or the public.

In re Peoples provides helpful context under this high standard. 296 N.C. 109, 250 S.E.2d 890 (1978). There, our Supreme Court disqualified a former district court judge from holding any elected office pursuant to Article VI after the Judicial Standards Commission instituted an action against him and recommended he be removed from office. For several years, the judge had, among other things, repeatedly removed certain cases from the active trial docket and into the judge's indefinitely pending "personal file" and had accepted money from defendants for "court costs" that were never received by the clerk's office. *Id.* at 155–56, 250 S.E.2d at 917. Prior to a hearing on the action brought by the Judicial Standards Commission, the judge in that case resigned, and the removal power of Article IV no longer had effect. However, our Supreme Court permanently disqualified him from public office under Article VI due to the egregious nature of the judge's conduct. Discussing what "guilty" means in Article VI, our Supreme Court held that "[t]he word *guilty* connotes evil, intentional wrongdoing and refers to conscious and culpable acts." *Id.* at 165, 250 S.E.2d at 922. *In re Peoples* is one of the only cases that directly contemplates Article VI, and its holding reinforces the notion that disqualification under Article VI is an extreme consequence.

For lack of caselaw regarding Article VI disqualifications, Ms. Chastain provides this Court with an exhaustive list of cases involving the removal of elected officials under Article IV. Article IV allows for the removal of a clerk of superior court "for misconduct or mental or physical incapacity." N.C. Const. art. IV, § 17. Article IV's "misconduct" standard presents a lesser standard than Article VI's "corruption or malpractice" standard, *Chastain I*, 281 N.C. App. at 525, 869 S.E.2d at 742, yet all of our Article IV cases evidence acts substantially more egregious in nature than Ms. Chastain's alleged misconduct, even when viewed in the light most damning to Ms. Chastain.

In one example, our Supreme Court upheld the removal of a district attorney who, while in the early morning hours at a bar, repeatedly

yelled "ni–er" to another patron and engaged in "other improper conduct" before being forcefully removed. *In re Spivey*, 345 N.C. 404, 408, 480 S.E.2d 693, 695 (1997). In another case, a district court judge was removed for accepting multiple cash bribes. *In re Hunt*, 308 N.C. 328, 330, 302 S.E.2d 235, 236 (1983). Still more, a superior court judge was properly removed after eliminating conditions of a probationer without notice to the district attorney, sexual misconduct, and coercing an assistant district attorney to "help" the judge's former mistress in a DWI case. *In re Kivett*, 309 N.C. 635, 309 S.E.2d 442 (1983); *see also In re Sherill*, 328 N.C. 719, 403 S.E.2d 255 (1991) (judge possessed marijuana, cocaine, and drug paraphernalia); *In re Cline*, 230 N.C. App. 11, 749 S.E.2d 91 (2013) (district attorney repeatedly and publicly accusing a judge of "intentional and malicious conduct" such that his "hands are covered with the blood of justice" and other invectives made with actual malice).

In the present matter, Ms. Chastain's conduct, even if willful and considered in isolation or combination, was not *egregious* as to merit her disqualification and removal from the elected office of Clerk of Superior Court. The trial court relied upon four instances of misconduct in its findings of fact before concluding that Ms. Chastain's conduct "warrant[ed] permanent disqualification from office."

A. Affidavit of Indigency

In the first instance, the trial court found that Ms. Chastain "demanded access to the county jail for the purpose of obtaining an affidavit of indigency from a murder defendant knowing that the defendant already had been appointed counsel." The findings as to this event are as follows:

> 15. On or about 6 March 2017, the Franklin County Sheriff's Office arrested an individual named Oliver Funes Machada for the first degree murder of his mother by decapitating her. Sheriff Kent Winstead telephoned District Attorney Waters and asked him to come to the crime scene. Later that day, either a district court judge or Indigent Defense Services appointed provisional counsel for Machada.
>
> 16. The next morning, 7 March 2017, the Sheriff informed Mr. Waters that he did not want to transport Machada to the courtroom for a first appearance because he considered Machada dangerous and a security risk. Mr. Waters then asked Chief District Court Judge John Davis if he would conduct Machada's first appearance

in the county jail, and Judge Davis agreed. Machada was uncommunicative during his first appearance. Judge Davis did not ask Machada to complete an affidavit of indigency regarding the appointment of counsel.

17. Later that day, Respondent looked at Machada's court file and observed that there was not a completed affidavit of indigency in it. A member of Respondent's staff told her that Judge Davis already had conducted Machada's first appearance earlier that morning. Notwithstanding this information and without speaking to Judge Davis, Respondent went to the Franklin County Detention Center and sought access to Machada for the purpose of having him complete an affidavit of indigency. In so doing, Respondent interfered with a matter that Judge Davis already had addressed.

18. Rules 1.4 and 2A.2 promulgated by North Carolina Commission on Indigent Defense Services require a defendant to complete and sign a sworn affidavit of indigency in every case in which counsel is appointed. Rule 1.1(4) further provides: "When these rules describe the functions a court performs, the term 'court' includes clerks of superior courts." Nonetheless, Respondent's intervention in these proceedings, after Machada already had been afforded a first appearance, was improper.

19. When Sheriff Winstead learned of this incident, he banned Respondent from further visits in the detention center.

From this, the trial court concluded as a matter of law that, by having the defendant fill out this indigency form after he had been appointed counsel, Ms. Chastain's actions were "an inappropriate intervention into the case and was an act beyond the legitimate exercise of Respondent's authority notwithstanding the Rules of the North Carolina Commission on Indigent Defense Services" and "were an effort to undermine Judge Davis'[s] authority" and that "[s]uch willful misconduct was egregious in nature and is equivalent to corruption or malpractice under Article VI." I disagree.

The trial court recognized that Ms. Chastain had the authority and responsibility under "Rules 1.4 and 2A.2 promulgated by North Carolina Commission on Indigent Defense Services" to "require a defendant to complete and sign a sworn affidavit of indigency in every case in which

counsel is appointed." The trial court further found that "Rule 1.1(4) further provides: 'When these rules describe the functions a court performs, the term "court" includes clerks of superior courts.' " Yet despite recognizing this responsibility, the trial court found Ms. Chastain's conduct to be improper. Truly, respect for a judge's authority, especially by one employed in the administration of justice, is necessary for the proper reverence of our institution. Perhaps it was true that Ms. Chastain, on this occasion, succumbed in some small way to that familiar tinge of frustration and took matters upon herself to complete that which the judge neglected to do. The record does more than hint at the animosity surrounding the officials here. However, this single occurrence of alleged misconduct, if it could be called misconduct at all, was not so egregious as to support the disqualification and removal of a democratically elected clerk from office under Article VI.

I also note that Ms. Chastain testified that she was unaware that an attorney had actually been appointed to Machada prior to his signing an affidavit of indigency, and no evidence was introduced to challenge this understanding. Nevertheless, even taken as true, the findings do not support the conclusion that Ms. Chastain's actions breached the high standard of egregious and willful misconduct necessary to warrant disqualification from office.

B. Dispute Between Neighbors

In the second instance, the trial court found that Ms. Chastain improperly intervened in an easement dispute between two neighbors, against one of whom Judge Davis had previously entered a no-contact order. The dispute had been ongoing between the parties for several years. The trial court found the following:

> 25. On the morning of 27 December 2019, a Franklin County resident named Ann Elizabeth Gayden came to the Office of the Clerk of Superior Court and complained to Respondent about an ongoing dispute with her neighbors, Adam and Sarah Diaz, concerning an easement. Respondent was familiar with Ms. Gayden and was aware of the dispute. Respondent specifically was aware that Chief District Court Judge John Davis, pursuant to Chapter 50-C of the General Statutes of North Carolina, had entered no-contact orders *against* Ms. Gayden and *in favor* of the Diazes on 20 February 2019, and Respondent knew those orders were still in effect.
>
> 26. Respondent decided to go [to] the properties of Ms. Gayden and the Diazes. She called the Franklin

County Sheriff's Office and asked that a deputy meet her there. Although Respondent testified that she believed Ms. Gayden was experiencing some sort of crises, she also testified that she went to the Diazes' residence for a social visit. Respondent's testimony in this regard was inconsistent. The court further finds it to be disingenuous and an attempt to minimize the seriousness of her interference in the Gayden-Diaz dispute.

27. Sheriff's Deputy Justin Dailey was dispatched to the scene, and he arrived at approximately 11:18 a.m. on 27 December 2019. He thereafter witnessed the interactions between Respondent and Ms. Gayden and Respondent and the Diazes. Deputy Dailey moreover recorded these interactions on the body camera he was wearing. Deputy Dailey's recording was received in evidence as Affiant's Exhibit 1.

28. Respondent met first with Ms. Gayden, who was visibly upset. Respondent told Ms. Gayden, among other things, that Ms. Gayden legally owned the easement and had a right to enter the driveway, that she (Respondent) was going to enter an order that day, that she thought Ms. Gayden was afraid and scared, and that Ms. Gayden was "getting picked on." Respondent further stated that if he (Adam Diaz) continued "to do this", Respondent was going to call 911 and he would be charged. Respondent moreover told Ms. Gayden that Respondent, by law, could mediate any case and said that was what she was doing.

29. Respondent knew that she did not have the authority to enter orders or to interfere with Judge Davis's prior orders in this matter. Respondent falsely led Ms. Gayden to believe otherwise, thereby undermining the normal judicial process, including Judge Davis' judicial authority. Respondent's statements to Ms. Gayden furthermore evidenced a sympathy for her and a deliberate decision to intervene on her behalf in Ms. Gayden's legal dispute with the Diazes.

30. Thereafter, Respondent went to the residence of the Diazes and met them outside their home. The Diazes also were visibly upset. Respondent introduced herself, told the Diazes that she had jurisdiction over the entire county, and falsely stated that she was obligated to

mediate their case. Mr. Diaz told Respondent that there was already a restraining order against Ms. Gayden in place, and Respondent replied that, as far as Respondent was concerned, the restraining order was for both of them. Mr. Diaz stated that Ms. Gayden continued to operate a tractor on the easement and to loiter on it in violation of the court order, to which Respondent replied that she thought Ms. Gayden was videotaping the Diaz property to prove that she (Gayden) was not doing anything. Respondent told the Diazes that she was telling them the law in this matter, and that Judge Davis "legally" did not have the right to enter the orders he had entered.

31. Respondent's false and misleading statements to the Diazes were made with the intent to undermine Judge Davis' prior order and judicial authority, and were made to benefit Ms. Gayden.

32. Respondent's false and misleading statements also were made to intimidate the Diazes into believing that she would influence or change the Diazes legal rights relating to the easement dispute, particularly if the Diazes did not permit Ms. Gayden to use the easement as Respondent deemed fit. In so doing, Respondent misstated the scope of her authority in an effort to affect the proceedings.

33. Respondent was aware the Diazes were represented by counsel, namely, Jeffrey Scott Thompson (the Affiant), in their cases against Ms. Gayden, but Respondent told the Diazes they should hire another attorney in connection with the dispute. Respondent knew or should have known that it was improper for the Clerk of Court to recommend a particular attorney or to disparage an attorney to that attorney's clients.

34. Respondent finally told the Diazes to give it (the dispute) one more court date and that the orders could be extended if needed. Respondent shook hands with the Diazes, gave them her business card and personal cell phone number, and departed the scene.

35. The no-contact orders that Judge Davis had entered on 20 February 2019 did not restrain any conduct or activity by the Diazes. Respondent knew or should have known this fact.

36. There are no procedures in place in the Ninth Judicial District for the mediation of Chapter 50-C actions. Respondent was aware that she had no legal authority to conduct mediation or to compel the parties to a lawsuit to mediate it. Her statements to the parties that she was obligated by law to mediate the matter were false.

37. Respondent's statements to the Diazes again evidenced a sympathy for Ms. Gayden and a calculated decision to act on Ms. Gayden's behalf in her legal dispute with the Diazes. Respondent knew or should have known that her conduct in the dispute was well beyond the legitimate exercise of her authority and severely undermined the administration of justice. It moreover evidenced contempt for the legitimacy of Judge Davis' lawful orders.

38. On 31 December 2019, Respondent, at the request of Ms. Gayden, directed one of her employees to file a copy of Ms. Gayden's deed containing the easement across the Diazes' property in two of the lawsuits Ms. Gayden had filed against the Diazes. In both case files (Franklin County File Numbers 19 CVD 444 and 19 CVD 445), Respondent handwrote the following words in the margin of the deed: "Ms. Ann Gayden has legal right of way to travel per easement to her property." Respondent wrote these words without the authorization of Chief District Court Judge John Davis, and without consulting any other district court judge about her action. Respondent did not thereafter inform any district court judge or the Diazes' attorney that she had placed this document in these case files. Respondent knew she did not have the authority to modify official court files in connection with the Gayden-Diaz dispute.

39. The incident of 27 December 2019 involving Respondent's interactions with Ms. Gayden and the Diazes was widely reported in the Franklin County news media and on Raleigh television station WRAL. Clips from Affiant's Exhibit 1 were included in the WRAL news broadcasts.

The trial court concluded that, because Ms. Chastain intervened in that matter and made false and misleading statements, Ms. Chastain "engaged in conduct which tended to undermine the authority of Judge

Davis, breed disrespect for his office and the legal processes already in place, and diminish the high standards of the office of Clerk of Superior Court." He found this occurred after Judge Davis and the District Attorney rebuked Ms. Chastain for "acting outside the scope of her official responsibilities." Thus, the trial court concluded that "[s]uch willful misconduct was egregious in nature . . . and independently warrants permanent disqualification from office."

I join with the trial court's reprimand of Ms. Chastain in this instance; it is not the place of a Clerk of Superior Court to interject herself into the legal dispute of two neighbors and make false statements, even for the purposes of ameliorating the situation. However, this, too, is not an instance of *egregious* misconduct warranting her disqualification from office and, thus, does not support the trial court's conclusion of law. Ms. Chastain's initiative, though misplaced, produced no injury to any individual, was exercised with parties who did not have an action pending before her, was not an "evil, intentional wrongdoing," and stands as comparatively innocent with the cases cited above wherein elected officials were removed under a lesser standard than required here. Having worked with the disputes between these warring neighbors for many years, Ms. Chastain was more than familiar with the parties involved. Ms. Chastain did not personally gain any benefit from mediating a truce here, which might otherwise imply some level of corruption. Though she may have harbored sympathies for one party over the other, this does not weigh into a consideration of corruption or malpractice.

To be clear, I am reiterating the high standard necessary to disqualify a citizen, particularly an elected official, from office. Though she may have acted beyond the scope of her position, as the majority holds, this overstep cannot be held to have been egregious or to proximately cause injury to the public so as to invoke her disqualification under Article VI, Section 8.

C. Magistrate Call

In the third instance, the trial court found that Ms. Chastain "attempt[ed] to exercise authority over Chief Magistrate James Arnold . . . and thereafter us[ed] vulgarity in the presence of members of the public to describe her feelings toward Chief District Court Judge Davis." The trial court's findings are as follows:

> 41. Respondent said she was at Mr. Arnold's office located in the Sheriff's Office. The magistrate's office was unattended at the time because the office was short-staffed.

There was a sign posted on the door of the magistrates' office instructing members of the public to call 911 if they needed a magistrate after normal business hours.

42. Respondent told Mr. Arnold that she had some people with her, and he could hear people talking in the background. Respondent stated that she had received several complaints about the hours the magistrates' office was open. Mr. Arnold told Respondent that a magistrate was on call 24 hours a day, to which Respondent replied that she was open 24 hours a day.

43. Respondent told Mr. Arnold that the people with her wanted to talk with a magistrate and demanded that he send a magistrate to the office to talk with them. The Respondent did not say what the people with her wanted and she did not claim that they were experiencing any sort of emergency. Mr. Arnold stated that he would not send a magistrate without knowing more and he asked Respondent to let him speak with the people. Respondent refused.

44. Respondent threatened to give Mr. Arnold's private telephone number to the people with her, and he stated that she should not do that. Respondent then told him that she was going to post her own telephone number on the magistrates' door, to which Mr. Arnold replied that Respondent was not a magistrate. Mr. Arnold told Respondent he would talk with her the next day and suggested that she call Chief District Court Judge John Davis if she wanted to complain about the magistrates' office. Respondent stated she was not going to call Judge Davis, and Mr. Arnold ended the telephone call.

45. About 30 to 45 seconds later, Mr. Arnold's cell phone rang again. He could tell from his phone's caller ID feature that Respondent was the person calling. He answered his telephone and could hear Respondent talking to other people whom he also could hear in the background. Respondent did not say anything to Mr. Arnold, and he quickly concluded that she had inadvertently called him without realizing she had done so. Mr. Arnold heard Respondent say, "I just talked with the chief magistrate and he's not going to do a thing." He then heard Respondent say, "F[---] John Davis" or "F[---], I'm not calling John Davis" or "I don't give a f[---] about John Davis." Regardless of

> Respondent's exact words, she made highly inappropriate and vulgar statements in the presence of others with the intent to undermine the public's respect for Judge Davis and Mr. Arnold and for their judicial authority.
>
> 46. Under N.C. Gen. Stat. § 7A-146, the chief district court judge of each judicial district is charged with the supervision of the magistrates in the judge's district. The clerk of Superior Court has no supervisory authority over magistrates.

As with the previous instances, the trial court concluded Ms. Chastain attempted to exercise authority over the magistrate and that conduct was "outside the scope of her official responsibilities—and thereafter us[ed] vulgarity in the presence of members of the public to describe her feelings toward Chief District Court Judge Davis." The court concluded that she "at a minimum, engaged in conduct prejudicial to the administration of justice which brings her office into disrepute." The court further concluded that, while acting in her official capacity, her conduct was "intentional and knowing, and she acted with a specific intent to accomplish a purpose which she knew or should have known was beyond the legitimate exercise of her authority" and that this instance "independently warrants permanent disqualification from office."

Although the trial court could not determine the exact words Respondent used, it found that "she made highly inappropriate and vulgar statements in the presence of others with the intent to undermine the public's respect for Judge Davis and Mr. Arnold and for their judicial authority." However, words, and the meaning behind them, are important and necessary in determining someone's intent. From the trial court's findings of the four potential statements that may have been made by Respondent, there are four different interpretations and intentions that could be found. Furthermore, Magistrate Arnold testified, while he believed he heard Respondent say the curse word at issue, he did not know what phrase she actually said. Instead, he testified that that the most he could say is that he heard her say a single phrase which, for all he knew, could very well have been, "F__, I am not calling John Davis." Accordingly, such evidence cannot support the trial court's conclusion that Respondent used "vulgarity in the presence of members of the public to describe her feelings toward Chief District Court Judge Davis."

The trial court's finding that the Clerk of Superior Court does not have supervisory authority over magistrates is correct; however, under North Carolina law, the Clerk of Superior Court has the statutory obligation to nominate all magistrates for selection by the senior resident

superior court judge of the district. N.C. Gen. Stat. § 7A-171 (2022). As such, it does not strain credibility that Respondent may have felt authorized or obligated to call the chief magistrate when she found the magistrate's office unmanned. Implicit with the official duty of nominating magistrates is the obligation of the Clerk to keep herself informed about the job performance of the magistrates in her district so she can make an intelligent decision as to whether to renominate any such individuals in the future.

The trial court's findings do not support the conclusion that Ms. Chastain's actions rise to the level of egregious and willful misconduct demanded of Article VI's "corruption or malpractice" standard to warrant disqualification from office.

D. Periodic Audit

In the fourth instance, the trial court found that Ms. Chastain's "deficiencies in the oversight of the financial and accounting responsibilities of the Clerk of Superior Court . . . evidenced a gross unconcern for her fiduciary duties . . . and demonstrated a reckless disregard for the high standards of her office." This instance stemmed from a periodic audit of the clerk's office. The trial court found the following:

> 20. Pursuant to the North Carolina State Auditor's duty to periodically examine and report on the financial practices of state agencies and institutions, State Auditor Beth A. Wood's office conducted a performance audit of the Franklin County Clerk of Court's office for the period from 1 July 2019 through 31 January 2020. The Auditor thereafter published a written report of the Auditor's findings. (Affiant's Exhibit 10)
>
> 21. The Auditor identified the following deficiencies in internal control and instances of noncompliance that were considered reportable under the Government Auditing Standards issued by the Comptroller General of the United States:
>
> - Untimely completion of bank reconciliations;
> - Failure to identify and transfer unclaimed funds to the State Treasurer or rightful owner and failure to notify apparent owners;
> - Failure to compel estate inventory filings or fee collection;

- Untimely or failure to compel inventory filings or assess and collect sufficient bonds for estates of minors and incapacitated adults; and
- Failure to accurately disburse trust funds held for minors and incapacitated adults.

22. The Auditor found no evidence of embezzlement or misappropriation of funds by the Respondent or any employee of the Clerk of Court's office.

23. In respondent's written response to the audit, included in the Auditor's Report, Respondent admitted, among other things, that: new employees were not properly trained in preparing bank reconciliations; monitoring procedures were not in place to ensure the reconciling adjustments were entered into the financial management system; new employees were not properly trained on the escheat process; monitoring procedures were not in place to ensure funds were transferred and apparent owners were notified; her office failed to document evidence of its requests to compel estate inventory filings; her staff made unintentional mistakes in calculating inventory fees and not collecting the required amounts; monitoring procedures were not in place to ensure inventories were compelled timely and bonds were sufficient for the guardianship estates; and new employees were not properly trained and monitoring procedures were not in place to ensure trust funds were accurately disbursed.

24. By the time of the audit, Respondent had been in office more than 6 years and knew or reasonably should have known the accounting and fiduciary responsibilities of the Office of Clerk of Superior Court. Nonetheless, she willfully and persistently failed to perform some of the core duties of her responsibilities as Clerk of Court.

The trial court concluded that these deficiencies "evidenced a gross unconcern for her fiduciary duties . . . and demonstrated a reckless disregard for the high standards of her office." The court concluded that "Respondent's lack of oversight of her office constituted willful misconduct in office that was egregious in nature, is equivalent to corruption or malpractice . . . and independently warrants permanent disqualification from office" under Article VI of our Constitution.

Yet, as with the other instances, the deficiencies revealed by the Auditor's report could hardly be said to constitute the *egregious* and willful misconduct necessary to disqualify and, consequently, remove an elected official from office pursuant to Article VI. The audit did not reveal any criminal or material misconduct by Respondent or anyone in her office. It did identify areas where improvements could be made regarding the training and monitoring of staff members. It is not appropriate to equate temporary deficiencies in the training and monitoring of employees with intentional and knowing misuse of office. The audit found no evidence of "knowing misuse" of office or bad faith intent to violate the law. Willful misconduct requires "more than an error of judgment or a mere lack of diligence," and acts of "negligence or ignorance," in the absence of bad faith intent to violate the law, do not rise to the level of willful misconduct. *In re Nowell*, 293 N.C. 235, 248–49, 237 S.E.2d 246, 255 (1977).

E. Cumulative Consideration of Actions

The trial court, in the alternative to finding independent grounds to support the requirements of Article VI, concluded that the instances listed above, when considered together, constituted *egregious* and willful misconduct sufficient to disqualify Ms. Chastain from office. I disagree. While our Supreme Court in *In re Martin* asserts that "if a judge knowingly and wil[l]fully persists in indiscretions and misconduct which . . . constitute wil[l]ful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute, he should be removed from office," 295 N.C. 291, 305–06, 245 S.E.2d 766, 775 (1978), the holding is inapplicable here. Ms. Chastain did not "persist in indiscretions and misconduct." As noted above, the instances the trial court noted were singular, isolated occurrences, separated by substantial time, place, and parties involved. Further, in *Chastain I*, this Court held that "Judge Lock lacked authority to rely on any acts of Ms. Chastain that did not rise to [corruption or malpractice] to support his sanction under Article VI." 281 N.C. App. at 528, 869 S.E.2d at 744. The trial court cannot commingle and combine conduct that is not egregious and willful to reach the highest bar of corruption and malpractice under Article VI.

Because the caselaw relied upon by the parties and the trial court involve the removal or disqualification of elected judges or district attorneys, I take this opportunity to clarify a matter concerning the standard of conduct of a Clerk of Superior Court. Though the procedure for removing a Clerk of Superior Court may be the same as that necessary for the removal of district attorneys and judges, the standards

are not the same. For example, district attorneys are held to the Rules of Professional Conduct governing lawyers. Thus, a trial court may consider removing a district attorney for violation of these standards which might be relevant if the lawyer were to "engage in conduct that is prejudicial to the administration of justice," "state or imply an ability to influence improperly a government agency or official," and "knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law." N.C. Rules of Pro. Conduct r. 8.4. Similarly, judges are held to the standards outlined in the Code of Judicial Conduct. A judge may be removed if that judge engages in conduct prejudicial to the administration of justice such as failing to "perform the duties of the judge's office impartially and diligently" or exhibiting "impropriety." N.C. Code of Judicial Conduct r. 2-3.

Clerks of Superior Court, by contrast, are not required to be licensed attorneys as a condition of holding office and, consequently, are not held to the same high standards as lawyers and judges. As the trial court noted in one of its findings, "there is no formal code of ethics applicable to Clerks of Court." Instead, this Court looks to the standard of "corruption or malpractice" as stated in our Constitution when determining if a Clerk of Superior Court was properly disqualified from office under Article VI. In an apparent nod to the Rules of Professional Conduct applicable to lawyers and judges under *In re Peoples*, the trial court concluded that Ms. Chastain's conduct was "prejudicial to the administration of justice." However, this is not the standard for disqualification of a Clerk of Superior Court under Article VI, Section 8.

I stress this is no mere firing of an employee. By being adjudged guilty of corruption or malpractice, Ms. Chastain is not only removed from elected office, but is forever prohibited from holding *any* elected office. As our Supreme Court long ago said of disqualification,

> It fixes upon the convicted party a stigma of disgrace and reproach in the eyes of honest and honorable men that continues for life. It is difficult to conceive of a punishment more galling and degrading in this country than disqualification to hold office, whether one be an office seeker or not.

Harris v. Terry, 98 N.C. 131, 133, 3 S.E. 745, 746 (1887). Perhaps the greater injury rests upon the people of Franklin County who elected Ms. Chastain as their Clerk of Superior Court multiple times. Our system is not wholly democratic (and this, perhaps, for good reason), but, when adjudicating the disqualification of an elected official, care for the

people's will is requisite to the proper respect for their sovereignty. The trial court here did not respect that sovereignty.

IV. Conclusion

The will of the people must not be cast aside by the stroke of a judge's pen without due consideration and just cause under the high standard set forth by our Constitution. Therefore, I respectfully dissent.

IN THE MATTER OF M.L.C.

No. COA22-784

Filed 20 June 2023

1. Termination of Parental Rights—personal jurisdiction—summons-related defect—waiver—general appearance by counsel

The trial court had personal jurisdiction over respondent mother in a termination of parental rights proceeding where, although there was no evidence that a summons had been issued or served on respondent and respondent did not appear at the termination hearing, any defect in service of process was waived because respondent had actual notice of the hearing (after having been personally served with the termination petition and two hearing notices) and her counsel made a general appearance on her behalf at the hearing.

2. Constitutional Law—effective assistance of counsel—termination of parental rights—no objection to personal jurisdiction

In a termination of parental rights proceeding, respondent failed to show that, but for her counsel's alleged deficient representation for failing to object to the trial court's lack of personal jurisdiction based on defective service of process, there was a reasonable probability that there would have been a different outcome. Although there was no evidence that a summons had been issued or served on respondent, any defect was waived given the record evidence that respondent had actual notice of the hearing (after having been personally served with the termination petition and two notices of hearing) and that her counsel made a general appearance on her behalf when she failed to appear at the hearing.

Appeal by Respondent-Mother from Order entered 27 June 2022 by Judge Hal G. Harrison in Watauga County District Court. Heard in the Court of Appeals 23 May 2023.

di Santi Capua & Garrett, PLLC, by Chelsea Bell Garrett, for Petitioner-Appellee Watauga County Department of Social Services.

David A. Perez for Respondent-Appellant Mother.

Parker Poe Adams & Bernstein LLP, by Stephen V. Carey, for Guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

Respondent-Mother appeals from an Order terminating her parental rights as to minor child, Mark.[1] Relevant to this appeal, the Record before us tends to reflect the following:

On 22 March 2021, the Watauga County Department of Social Services (DSS) filed a Juvenile Petition alleging Mark to be a neglected and dependent juvenile. The Petition alleged the following:

On or about 19 March 2021, DSS received a report regarding Mark, which prompted DSS to visit Mark and Respondent-Mother that same day. DSS found Respondent-Mother in an apartment, passed out on a couch, with another individual. A third individual was in a bedroom with Mark. Drug paraphernalia was found throughout the dwelling. Respondent-Mother appeared to be under the influence of an unidentified substance. On that same day, the trial court granted DSS an Order for Nonsecure Custody. Mark was initially placed with his maternal grandmother but was soon thereafter placed in the custody of a foster family, where he remained. Respondent-Mother was personally served by the Watauga County Sheriff's Department with a copy of the Juvenile Petition, Summons, and Order for Nonsecure Custody on 22 March 2021. On 23 November 2021, the trial court entered an Order adjudicating Mark to be a dependent juvenile.

On 13 April 2022, DSS filed a Petition for Termination of Parental Rights (Termination Petition). No summons was issued. However, DSS issued a Notice of Motion Seeking Termination of Parental Rights and

1. A pseudonym is used for the minor child designated in the caption as M.L.C.

a Notice of Termination of Parental Rights Hearing (Notice of Hearing). The Notice of Hearing specified the hearing would be held on "March 26-27, 2022." Respondent-Mother was served with the Termination Petition and the two notices, both personally by the Watauga County Sheriff's Department on 20 April 2022 and via certified mail.

On 27 March 2022—one of the noticed dates—the trial court held a hearing on the Termination Petition. Trial counsel for Respondent-Mother was present at the hearing and informed the trial court Respondent-Mother was present at the courthouse the day before the hearing—26 March 2022—and was advised to return the next day; however, Respondent-Mother failed to appear. As such, trial counsel made a Motion to Continue. The trial court denied the Motion. Respondent-Mother's trial counsel raised no issue regarding service, and the trial court expressly stated in its pre-trial findings that proper service was made. At the conclusion of the hearing, the trial court concluded grounds exist to terminate Respondent-Mother's parental rights, and it is in Mark's best interest that Respondent-Mother's parental rights be terminated. On 27 June 2022, the trial court entered an Order terminating Respondent-Mother's parental rights in Mark.[2] Respondent-Mother timely filed written Notice of Appeal on 8 July 2022.

Issues

The dispositive issues on appeal are: (I) whether the trial court properly obtained personal jurisdiction over Respondent-Mother; and (II) whether Respondent-Mother's trial counsel's performance was deficient or fell below an objective standard of reasonableness, affecting Respondent-Mother's fundamental right to a fair hearing.

Analysis

I. Personal Jurisdiction

[1] Respondent-Mother contends the trial court did not obtain personal jurisdiction over Respondent-Mother. Respondent-Mother contends this is so because: (1) there is no indication in the Record that a summons for the Termination Petition was ever issued and no such summons was ever served upon Respondent-Mother; and (2) "although Respondent-Mother appeared the day *before* the termination trial, she did not appear on the actual day of the termination trial."

2. Respondent-Mother does not challenge any of the trial court's Findings of Fact or Conclusions of Law.

"Jurisdiction over the person of a defendant is obtained by service of process upon him, by his voluntary appearance, or consent." *Hale v. Hale*, 73 N.C. App. 639, 641, 327 S.E.2d 252, 253 (1985). Under Rule 12(h)(1) of the North Carolina Rules of Civil Procedure, the "defense of lack of jurisdiction over the person . . . is waived . . . if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course." N.C. Gen. Stat. § 1A-1, Rule 12(h)(1) (2021). "[S]ummons-related defects implicate personal jurisdiction . . . ." *In re K.J.L.*, 363 N.C. 343, 348, 677 S.E.2d 835, 838 (2009). "[A]ny form of general appearance 'waives all defects and irregularities in the process and gives the court jurisdiction of the answering party even though there may have been no service of summons.' " *In re J.T.(I), J.T.(II), A.J.*, 363 N.C. 1, 4, 672 S.E.2d 17, 18 (2009) (quoting *Harmon v. Harmon*, 245 N.C. 83, 86, 95 S.E.2d 355, 359 (1956) (citations omitted)). "Even without a summons, a court may properly obtain personal jurisdiction over a party who consents or makes a general appearance, for example, by filing an answer or appearing at a hearing without objecting to personal jurisdiction." *K.J.L.*, 363 N.C. at 346, 677 S.E.2d at 837 (citation omitted). Further, we note this Court has previously recognized "litigants often choose to waive the defense of defective service when they had actual notice of the action and when the inevitable and immediate response of the opposing party will be to re-serve the process." *In re Dj.L., D.L., & S.L.*, 184 N.C. App. 76, 85, 646 S.E.2d 134, 141 (2007).

Here, Respondent-Mother failed to appear at the termination hearing on 27 March 2022. However, Respondent-Mother appeared at the courthouse the day before, on 26 March 2022, and was instructed by her counsel to appear the following day. She failed to do so. Even assuming without deciding Respondent-Mother did not *herself* make a general appearance before the trial court in this proceeding—despite having actual notice of the Termination Petition and hearing and appearing on the first noticed date, 26 March 2022—trial counsel for Respondent-Mother appeared before the trial court on 27 March 2022 without objecting to personal jurisdiction.[3] And, to trial counsel's credit, he attempted to continue the proceeding to make further efforts to secure Respondent-Mother's presence. His general appearance was not one made in a manner that simply waived any possible defect—he ably cross-examined the sole witness in the matter, a DSS worker, and elicited testimony that was beneficial to Respondent-Mother's case. His

3. Respondent-Mother did not raise any objection to service or personal jurisdiction when she was present on 26 March 2022.

general appearance was more than just cursory, and as such, the trial court properly obtained personal jurisdiction over Respondent-Mother. *Williams v. Williams*, 46 N.C. App. 787, 789, 266 S.E.2d 25, 27 (1980) ("[I]t has long been the rule in this jurisdiction that a general appearance by a party's attorney will dispense with process and service.").

II. Ineffective Assistance of Counsel

[2] Respondent-Mother next contends she received ineffective assistance of counsel because her trial counsel failed to object to the lack of personal jurisdiction on 27 March 2022. To the extent Respondent-Mother did in fact have an objection to the lack of personal jurisdiction—even after appearing before the trial court the day before—Respondent-Mother failed to demonstrate such an objection would affect the outcome of the termination hearing.

"When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *In re K.N.*, 181 N.C. App. 736, 741, 640 S.E.2d 813, 817 (2007) (citation and quotation marks omitted). The Juvenile Code provides: "[i]n cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent," N.C. Gen. Stat. § 7B-602(a) (2021), and "[w]hen a petition [for termination of parental rights] is filed," the parent "has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right," N.C. Gen. Stat. § 7B-1101.1(a) (2021).

> When addressing a contention by a respondent that he or she received ineffective assistance of counsel, this Court has explained that: "Parents have a right to counsel in all proceedings dedicated to the termination of parental rights. Counsel necessarily must provide effective assistance, as the alternative would render any statutory right to counsel potentially meaningless. To prevail on a claim of ineffective assistance of counsel, respondent must show that counsel's performance was deficient and the deficiency was so serious as to deprive him of a fair hearing. To make the latter showing, the respondent must prove that there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings."

In re B.S., 378 N.C. 1, 5, 859 S.E.2d 159, 161-62 (2021) (quoting *In re G.G.M.*, 377 N.C. 29, 41-42, 833 S.E.2d 478, 487 (2021) (citations and quotation marks omitted)).

Thus, Respondent-Mother "must prove that there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *G.G.M.*, 377 N.C. at 42, 833 S.E.2d 487. Respondent-Mother has failed to do so. In fact, Respondent-Mother contends trial counsel "is able counsel but in regard to *this* particular instance of not having objected to the court not having obtained personal jurisdiction over his client . . . 'was deficient or fell below an objective standard of reasonableness.' " The Record before us reflects Respondent-Mother had actual notice of both the termination action and hearing. Indeed, Respondent-Mother acknowledges she was personally served by Watauga County Sheriff's Department with the Termination Petition, Notice of the Motion Seeking Termination of Respondent-Mother's Parental Rights, and Notice of the Termination Hearing.[4] A review of the Record also reveals trial counsel moved to continue the proceeding when Respondent-Mother, who was present at the courthouse the day before, failed to appear on the day the termination hearing began.

Thus, Respondent-Mother has failed to demonstrate that but for trial counsel's failure to object to the lack of personal jurisdiction, there would have been a different result in the termination hearing. Therefore, trial counsel's waiver of the defense of lack of personal jurisdiction based on defective service of process did not constitute deficient performance. Consequently, Respondent-Mother was not deprived of a fair hearing, and we affirm the trial court's Order terminating Respondent-Mother's parental rights in Mark.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Order terminating Respondent-Mother's parental rights to Mark.

AFFIRMED.

Judges FLOOD and RIGGS concur.

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4. Upon the filing of a motion for termination of parental rights pursuant to N.C. Gen. Stat. § 7B-1102, a notice in the underlying abuse, neglect, or dependency matter must be prepared pursuant to N.C. Gen. Stat. § 7B-1106.1. Upon the filing of a petition for termination of parental rights, a summons must be issued pursuant to N.C. Gen. Stat. § 7B-1106.

JARMAN v. TWIDDY & CO. OF DUCK, INC.

[289 N.C. App. 319 (2023)]

THOMAS JARMAN AND JESSICA VAUGHN, INDIVIDUALLY AND AS ADMINISTRATORS OF THE ESTATE OF GRESSY THOMAS JARMAN, PLAINTIFFS
v.
TWIDDY AND COMPANY OF DUCK, INC., ROGER STRICKER AND PATRICIA STRICKER, DEFENDANTS AND THIRD-PARTY PLAINTIFFS
v.
GEORGIA MAY, THIRD-PARTY DEFENDANT

No. COA22-422

Filed 20 June 2023

1. Contracts—vacation rental agreement—forum-selection clause—third-party beneficiaries

In a negligence, wrongful death, and negligent infliction of emotional distress action arising from the drowning death of a child in a pool at a vacation home that had been rented by the child's grandmother from defendants, the trial court did not err in declining to apply the third-party beneficiary doctrine to bind plaintiffs (the child's parents) to the vacation rental agreement's forum selection clause where there was no evidence that defendants and the grandmother intended to confer any legally enforceable rights on plaintiffs through the vacation rental agreement. Any benefit plaintiffs received through the vacation rental agreement—including the ability to use the vacation home as members of the grandmother's family, as provided by a provision restricting use of the premises to "You and Your family"—was incidental rather than direct.

2. Contracts—vacation rental agreement—forum-selection clause—equitable estoppel

In a negligence, wrongful death, and negligent infliction of emotional distress action arising from the drowning death of a child in a pool at a vacation home that had been rented by the child's grandmother from defendants, the trial court did not err in declining to apply the doctrine of equitable estoppel to bind plaintiffs (the child's parents) to the vacation rental agreement's forum selection clause where plaintiffs' complaint alleged no breach of duty owed to them under the vacation rental agreement and did not allege that the agreement conferred any direct benefit on them. Rather, plaintiffs' claims were grounded in legal duties arising from statutory or common law—not any asserted rights under the contract.

Appeal by Defendant/Third-Party Plaintiff Twiddy and Company of Duck, Inc. from Order entered 15 December 2021 by Judge John W.

Smith in Johnston County Superior Court. Heard in the Court of Appeals 16 November 2022.

Fox Rothschild LLP, by Matthew Nis Leerberg, Henson Fuerst, PA, by Carma L. Henson, and Silverman Thompson Slutkin & White, by Andrew George Slutkin and Ethan Shale Nochumowitz admitted pro hac vice, for Plaintiffs-Appellees Thomas Jarman and Jessica Vaughn.

Poyner Spruill LLP, by Dylan J. Castellino and Timothy W. Wilson, for Defendant/Third-Party Plaintiff-Appellant Twiddy and Company of Duck, Inc.

HAMPSON, Judge.

Factual and Procedural Background

Twiddy and Company of Duck, Inc. (Twiddy) appeals from an Order entered 15 December 2021 denying its Motion to Change Venue of an action brought by Thomas Jarman and Jessica Vaughn, individually and as administrators of the Estate of Gressy Thomas Jarman (Plaintiffs). The Record before us tends to reflect the following:

On 3 June 2019, Plaintiffs' minor child died after drowning in a pool at a vacation home in Corolla, North Carolina owned by Roger and Patricia Stricker (the Strickers).[1] At the time, the vacation home was rented by Georgia May (May)[2] under a Vacation Rental Agreement with Twiddy, a realty company located in Duck, North Carolina that served as the agent for the Strickers. Plaintiffs were not parties to the Vacation Rental Agreement but were staying at the vacation home with May and other family members.

Relevant to this case, the Vacation Rental Agreement between Twiddy and May provided:

> Twiddy . . . is the Agent for a VACATION HOME . . . . The owner . . . has given Agent the authority to enter into this Agreement . . . . This Agreement sets forth the terms under which You will lease the Premises through the Agent.
>
> . . . .

1. The Strickers are residents of Pennsylvania.

2. May is the grandmother of the minor child and a resident of Maryland.

1. THIS IS A VACATION RENTAL AGREEMENT UNDER THE NORTH CAROLINA VACATION RENTAL ACT . . . .

2. Agent, as agent of the Owner, hereby rents to You and You hereby rent from the Agent, the Premises in accordance with the terms and conditions contained in this Agreement . . . .

. . . .

4. Use and Tenant Duties. The use of the Premises is restricted to use by You and Your family . . . . The term "family" as used herein means parents, grandparents, children and extended family members vacationing at the Premises.

. . . .

17. Indemnification and Hold Harmless. You agree to indemnify and save harmless the Owner and Agent from any liabilities . . . arising from or related to any claim or litigation which may arise out of or in connection with Your use and occupancy of the Premises including but not limited to any claim or liability. . . which is caused, made, incurred or sustained by You as a result of any cause, unless caused by the grossly negligent or willful act of Agent or the Owner, or the failure of Agent or the Owner to comply with the Vacation Rental Act. . . . The terms "Tenant," "You," and "Your" as used in this Agreement shall include Tenant's heirs, successors, assigns, guests, invitees, representatives and other persons on the Premises during Your occupancy (without regard to whether such persons have authority under this Agreement to be upon the Premises), where the context requires or permits.

. . . .

21. Disputes: This Agreement shall be governed by and interpreted in accordance with the laws of the State of North Carolina, and shall be treated as though it were executed in the County of Dare, State of North Carolina. Any action relating to this Agreement shall be instituted and prosecuted only in the Dare County Superior Court, North Carolina. You specifically consent to such jurisdiction and to extraterritorial service of process. You shall be responsible for all legal fees and court costs incurred

> by Agent and Owner in the enforcement of their rights or Your obligations under this Agreement.
>
> **22. Miscellaneous:** You agree and have verified that for purposes of this vacation rental agreement that Your confirmation number shall serve as Your electronic signature and to be bound by same and in the same manner as if You had otherwise ordinarily executed the document. . . . Each section, subsection or paragraph of this Agreement shall be deemed severable . . . .

May electronically signed each individual paragraph of the Vacation Rental Agreement.

On 18 February 2021, Plaintiffs filed a Complaint against Twiddy and the Strickers (collectively, Defendants) in Superior Court in Johnston County, North Carolina, where Plaintiffs reside. The Complaint alleged claims of negligence, wrongful death, negligent infliction of emotional distress, and punitive damages. Defendants both filed responsive pleadings generally denying liability in the form of Motions, Answers, and Third-Party Complaints. The Third-Party Complaints joined May as Third-Party Defendant alleging the Plaintiffs' Complaint falls within the Indemnification and Hold Harmless provision of the Vacation Rental Agreement.

In their responsive pleadings, Defendants both included Motions to Change Venue. The Motions alleged the terms of the Vacation Rental Agreement included a mandatory forum-selection clause requiring this action be brought by Plaintiffs in Dare County, North Carolina. Defendants' Motions were heard on 28 October 2021 in Johnston County Superior Court. Defendants contended Plaintiffs should be bound by the Vacation Rental Agreement—specifically, the provision requiring "Any action relating to this Agreement shall be instituted and prosecuted only in the Dare County Superior Court, North Carolina"—as third-party beneficiaries to the Vacation Rental Agreement or by the doctrine of equitable estoppel. Defendants further contended the language of the Vacation Rental Agreement is broad enough to cover Plaintiffs' claims for negligence, wrongful death, negligent infliction of emotional distress, and punitive damages.

On 15 December 2021, the trial court entered its Order Denying Defendants' Motions to Change Venue. In its Order, the trial court included Findings of Fact:

> 14. Thomas Jarman did not sign the Vacation Rental Agreement.

15. Jessica Vaughn did not sign the Vacation Rental Agreement.

16. No evidence has been presented that Thomas Jarman ever read, or was aware, of the terms of the Vacation Rental Agreement.

17. No evidence was presented that Jessica Vaughn ever read, or was aware, of the terms of the Vacation Rental Agreement.

18. Plaintiffs were not parties to the Vacation Rental Agreement.

19. The signatories to the Vacation Rental Agreement did not intend to confer a direct benefit on Plaintiffs, and there was never a meeting of the minds that the plaintiffs would become parties or third[-]party beneficiaries to the contract.

20. Plaintiffs were not actively nor directly involved in the formation of the Vacation Rental Agreement.

21. Plaintiff[s'] causes of action are only based upon duties imposed on Defendants by North Carolina common law and North Carolina statutory law.

22. Plaintiffs' causes of action do not arise out of or relate to the Vacation Rental Agreement.

23. The Plaintiffs are not seeking the benefit of the Vacation Rental Agreement. Plaintiffs' causes of action exist separate and apart from the Vacation Rental Agreement entered into between Defendant Twiddy and Third-Party Defendant . . . May, and do not arise out of or relate to the Vacation Rental Agreement.

24. The Court distinctly makes no findings of fact regarding whether the forum-selection clause of the Vacation Rental Agreement should, or should not, be enforced against . . . May. That issue is not presently before this Court.

The trial court then concluded: Plaintiffs were not third-party beneficiaries of the Vacation Rental Agreement; Plaintiffs were not equitably estopped from denying the applicability of the forum-selection clause; and Plaintiffs' causes of action did not arise out of or relate to the Vacation Rental Agreement. Finally, the trial court concluded Johnston

County was a proper venue for this action pursuant to N.C. Gen. Stat. § 1-82. Twiddy timely filed written Notice of Appeal from the Order Denying Defendants' Motions to Change Venue on 10 January 2022.[3]

Appellate Jurisdiction

The trial court's Order Denying Defendants' Motions to Change Venue is an interlocutory order. "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." *McClennahan v. N.C. School of the Arts*, 177 N.C. App. 806, 807-08, 630 S.E.2d 197, 199 (2006) (citation and quotation marks omitted). "Generally, a party has no right to appeal an interlocutory order." *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 775, 501 S.E.2d 353, 354 (1998) (citing *N.C. Dep't of Transportation v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995)). "However, 'an appeal is permitted . . . if the trial court's decision deprives the appellant of a substantial right [that] would be lost absent immediate review.' " *Id.* (citing *Page*, 119 N.C. App at 734, 460 S.E.2d at 334). " '[A]n immediate appeal is permitted where an erroneous order denying a party the right to have the case heard in the proper court would work an injury to the aggrieved party [that] would not be corrected if no appeal was allowed before the final judgment.' " *Id.* at 775-76, 501 S.E.2d 354-55 (quoting *Perkins v. CCH Computax, Inc.*, 106 N.C. App. 210, 212, 415 S.E.2d 755, 757, *reviewed on other grounds*, 332 N.C. 149, 419 S.E.2d 574, *decision reversed*, 333 N.C. 140, 423 S.E.2d 780 (1992)).

This Court has recognized an order denying a motion based on improper venue, which asserts venue is proper elsewhere, affects a substantial right because it " 'would work an injury to the aggrieved party which could not be corrected if no appeal was allowed before the final judgment.' " *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 121-22, 535 S.E.2d 397, 401 (2000) (quoting *DesMarais v. Dimmette*, 70 N.C. App. 134, 136, 318 S.E.2d 887, 889 (1984)). Likewise, orders addressing the validity of a forum-selection clause also affect a substantial right. *US Chem. Storage, LLC v. Berto Constr., Inc.*, 253 N.C. App. 378, 381, 800 S.E.2d 716, 719 (2017). Thus, Twiddy's appeal from the trial court's denial of Defendants' Motions to Change Venue is properly before us as the trial court's Order denying Defendants' Motions affects a substantial right.

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3. The Strickers did not separately appeal. Neither the Strickers nor May have made any appearance in this Court.

Issues

The key issues on appeal are whether, on the facts of this case, Plaintiffs—as non-signatories to the Vacation Rental Agreement—may be bound by the forum-selection clause contained in the Vacation Rental Agreement as (I) third-party beneficiaries or (II) by equitable estoppel.

Analysis

As a preliminary matter, the parties disagree on the standard of review we should apply to the trial court's Order in this case. Twiddy contends we should employ a de novo review. Plaintiffs assert our review is limited to whether the trial court abused its discretion in denying the change of venue.

"Generally, a trial court's denial of a motion to change venue 'will not be disturbed absent a showing of a manifest abuse of discretion.' " *LendingTree, LLC v. Anderson*, 228 N.C. App. 403, 407, 747 S.E.2d 292, 296 (2013) (quoting *Carolina Forest Ass'n, Inc. v. White*, 198 N.C. App. 1, 10, 678 S.E.2d 725, 732 (2009) (citation and quotation marks omitted)). Likewise, as a general proposition, "[w]e employ the abuse-of-discretion standard to review a trial court's decision concerning clauses on venue selection." *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 566, 566 S.E.2d 160, 161 (2002) (citation omitted). In particular, we apply an abuse of discretion standard when the trial court issues an order regarding the enforceability of a venue-selection clause under a Rule 12(b)(3) motion. *See Wall v. Automoney, Inc.*, 284 N.C. App. 514, 529, 877 S.E.2d 37, 51 (2022), *rev. denied*, 384 N.C. 190, 884 S.E.2d 739 (2023); *see also SED Holdings, LLC v. 3 Star Props., LLC*, 246 N.C. App. 632, 636, 784 S.E.2d 627, 630 (2016); *Davis v. Hall*, 223 N.C. App. 109, 110, 733 S.E.2d 878, 880 (2012); *Cable Tel. Servs., Inc. v. Overland Contr'g., Inc.*, 154 N.C. App. 639, 645, 574 S.E.2d 31, 35 (2002); *Mark Grp. Int'l, Inc.*, 151 N.C. App. at 568, 566 S.E.2d at 162; *Appliance Sales & Serv., Inc. v. Command Elecs. Corp.*, 115 N.C. App. 14, 21, 443 S.E.2d 784, 789 (1994). We apply the abuse of discretion standard in these cases because the disposition of these cases is "highly fact-specific." *Cox*, 129 N.C. App. at 776, 501 S.E.2d at 355 (citation omitted). On the other hand, when a trial court is called upon to *interpret* a forum- or venue-selection clause as a matter of law, we review the trial court's decision de novo. *US Chem. Storage, LLC*, 253 N.C. App. at 382, 800 S.E.2d at 720.

In this case, we broadly apply an abuse of discretion standard to the trial court's Order because the central determination made by the trial court was whether to enforce the forum-selection clause in the Vacation

Rental Agreement between Twiddy and May as against Plaintiffs.[4] However, the trial court's decision not to enforce the forum-selection clause stemmed from its legal conclusions Plaintiffs were not third-party beneficiaries or estopped from denying the applicability of the forum-selection clause.[5] "[T]he trial court's articulation and application of the relevant legal standard is a legal question that is reviewed de novo." *Miller v. Carolina Coast Emergency Physicians, LLC*, 382 N.C. 91, 104, 876 S.E.2d 436, 447 (2022) (citation omitted). "And, whatever the standard of review, 'an error of law is an abuse of discretion.' " *Id.* (quoting *Da Silva v. WakeMed*, 375 N.C. 1, 5 n.2, 846 S.E.2d 634, 638 (2020)); *cf. LendingTree, LLC* , 228 N.C. App. at 407, 747 S.E.2d at 296 ("Therefore, although we apply abuse of discretion review to general venue decisions, we apply *de novo* review to waiver arguments." (citation omitted)).

I. Third-Party Beneficiaries

[1] On appeal, Twiddy first contends the trial court erred by failing to apply the third-party beneficiary doctrine to bind Plaintiffs to the forum-selection clause. The third-party beneficiary doctrine usually applies to allow a third-party to enforce a contract executed for their direct benefit. *See Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 650, 407 S.E.2d 178, 181 (1991). A party "is a third-party beneficiary if she can show (1) that a contract exists between two persons or entities; (2) that the contract is valid and enforceable; and (3) that the contract was executed for the direct, and not incidental, benefit of the plaintiff." *Holshouser v. Shaner Hotel Grp. Properties One Ltd. P'ship*, 134 N.C. App. 391, 399-400, 518 S.E.2d 17, 25 (1999), *aff'd*, 351 N.C. 330, 524 S.E.2d 568 (2000). Here, however, Twiddy contends that the Vacation Rental Agreement—existing between Twiddy and May and as otherwise generally enforceable—was executed for the direct benefit of Plaintiffs, and, thus, Plaintiffs—as third-party beneficiaries—should be bound by its provisions.

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4. Indeed, the parties agree the forum-selection clause itself is properly interpreted as mandatory and not permissive. The parties do, however, disagree as to whether—if the forum-selection clause was deemed enforceable as to Plaintiffs—Plaintiffs' claims in this case would otherwise fall within the scope of the forum-selection clause's language.

5. The trial court included these determinations as both findings of fact and conclusions of law. We view the trial court's application of the third-party beneficiary and equitable estoppel doctrines to be in the nature of conclusions of law. *See Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 412, 720 S.E.2d 785, 792 (2011) ("Generally, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." (citation and quotation marks omitted)).

In support of its position, Twiddy relies in large part on our decision in *LSB Fin. Servs., Inc. v. Harrison*, 144 N.C. App. 542, 548 S.E.2d 574 (2001). There, this Court affirmed a trial court's decision enforcing an arbitration clause in an agreement against a third-party to the agreement. *Id.* at 543, 548 S.E.2d 575. In that case, the plaintiff was a banking institution and the defendant was a former employee of the plaintiff. Under then-existing law, the plaintiff was not permitted to become a member of the National Association of Securities Dealers, Inc. (NASD) and, consequently, could not engage in the business of securities transactions unless it partnered with a NASD member. *Id.* The plaintiff partnered with a registered brokerage and the defendant served as a "dual employee" of the plaintiff and the securities brokerage. *Id.* at 543, 584 S.E.2d at 576. This allowed the defendant to serve as a broker under the supervision and control of the plaintiff. *Id.* The plaintiff was then permitted to share in the profits derived from the defendant's securities brokerage work. *Id.* In order to perform the securities brokerage work, the defendant was required to apply and register with NASD using a U-4 form. *Id.* at 543-44, 584 S.E.2d at 576. The U-4 registration form with NASD included an arbitration clause. *Id.* at 544, 584 S.E.2d at 576. The defendant voluntarily terminated her employment with the plaintiff and joined another brokerage. *Id.* The plaintiff sued the defendant alleging, among other things, a breach of a separate non-compete. *Id.* The defendant moved to compel arbitration against the plaintiff even though the plaintiff was not (and could not) be a party to the U-4 registration with NASD. *Id.*

Our Court explained the direct benefit the plaintiff received from the U-4: "plaintiff required defendant to sign the U-4 Form so that plaintiff would be in a lawful position to benefit from the business of securities transactions." *Id.* at 549, 548 S.E.2d at 579. As such, the plaintiff was an intended beneficiary of the U-4 registration and, therefore, deemed to be in privity of contract as a third-party beneficiary. *Id.* at 548, 548 S.E.2d 578-79. As a result, we held the plaintiff could be compelled to arbitrate its claims against the defendant.[6]

Indeed, the benefit the plaintiff received in *LSB Fin. Servs.* is illustrative of the type of benefit our Courts have required to show a direct—rather than incidental—benefit for purposes of invoking the third-party beneficiary doctrine. " 'A person is a direct beneficiary of the contract if the contracting parties intended to confer a legally enforceable benefit

6. Our decision in that case also found grounding in equitable estoppel and principles of agency.

on that person.' " *Revels v. Miss Am. Org.*, 182 N.C. App. 334, 336, 641 S.E.2d 721, 723 (2007) (quoting *Holshouser*, 134 N.C. App. at 400, 518 S.E.2d at 25). " 'It is not enough that the contract, in fact, benefits the [third-party], if, when the contract was made, the contracting parties did not intend it to benefit the [third-party] directly.' " *Id.* " 'As a general proposition, the determining factor as to the rights of a third[-]party beneficiary is the intention of the parties who actually made the contract.' " *Vogel v. Reed Supply Co.*, 277 N.C. 119, 128, 177 S.E.2d 273, 279 (1970) (quoting 17 Am.Jur.2d, Contracts § 304). " 'The real test is said to be whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts.' " *Id.* "The Court, in determining the parties' intentions, should consider circumstances surrounding the transaction as well as the actual language of the contract." *Raritan River Steel Co.*, 329 N.C. at 652, 407 S.E.2d at 182.

In *LSB Fin. Servs.*, the whole purpose of the U-4 registration form was to allow the plaintiff to legally engage in securities brokering. The plaintiff was not only aware of the U-4 form but required the defendant (plaintiff's employee) to register with NASD. Not only did the defendant's registration confer upon the plaintiff the legal right to engage in securities brokering, but it also had the direct benefit of granting the plaintiff the right to be compensated for securities brokerage work, through the efforts of its employee.

In the case *sub judice*, unlike in *LSB Fin. Servs.*, the Vacation Rental Agreement between Twiddy and May was not intended to directly benefit Plaintiffs by vesting them with any legally enforceable right. Certainly, Plaintiffs, themselves, are not expressly designated as beneficiaries under the Vacation Rental Agreement. Moreover, as the trial court found, there was no evidence Plaintiffs ever read or were aware of the terms of the Vacation Rental Agreement. Further, there is no evidence Plaintiffs were active or involved in entering into the Vacation Rental Agreement. On the Record before us, there is no evidence of "the type of active and direct dealings which courts have required to confer third[-]party beneficiary status on a party not contemplated by the contract itself." *Hospira Inc. v. Alphagary Corp.*, 194 N.C. App. 695, 703, 671 S.E.2d 7, 13 (2009) (citation and quotation marks omitted).

Twiddy, nevertheless, contends the provisions of the Vacation Rental Agreement placed Plaintiffs in a class of persons intended to benefit from the contractual relationship between Twiddy and May. First, Twiddy points to the provisions restricting use of the vacation home to May and May's "family". Second, Twiddy relies on provisions of the indemnification clause. These provisions, however, do not provide any

direct benefit to Plaintiffs or evidence any intent to provide a direct benefit to Plaintiffs.

As an initial matter, by its very terms, the provision restricting use of the property does not purport to confer any benefit on May or any user of the property. The provision restricting use of the property provides:

> **4. Use and Tenant Duties.** The use of the Premises is restricted to use by You and Your family . . . . The term "family" as used herein means parents, grandparents, children and extended family members vacationing at the Premises.

It serves to expressly *restrict* May in whom she may invite to use the property during her tenancy. Further, the provision provides no legally enforceable right of access to the property by Plaintiffs (or other family members). *See Raritan River Steel Co.*, 329 N.C. at 652, 407 S.E.2d at 182. It merely grants May the ability to invite family members to use the property. As such, any benefit to Plaintiffs was purely incidental. Twiddy, nevertheless, contends—by virtue of this provision—Plaintiffs became lawful users of the property. To the contrary, however, this provision plainly supposes that in its absence, Plaintiffs (along with any number of others) could have been lawful users of the property. In any event, there is no evidence or showing this provision was intended to directly benefit Plaintiffs. Rather, the intent of this provision appears to be to provide uniformity in the types of users to whom Twiddy would rent the property on behalf of the Strickers. *See Revels*, 182 N.C. App. at 336-37, 641 S.E.2d at 724.

Likewise, the indemnity provision certainly itself provides no benefit to May or Plaintiffs. Rather, it is intended to attempt to cast a wide net over those from which Defendants might seek indemnification for damages. The provision provides:

> **17. Indemnification and Hold Harmless.** You agree to indemnify and save harmless the Owner and Agent for any liabilities . . . arising from or related to any claim or litigation which may arise out of or in connection with Your use and occupancy of the Premises including but not limited to any claim or liability. . . which is caused, made, incurred or sustained by You as a result of any cause, unless caused by the grossly negligent or willful act of Agent or the Owner, or the failure of Agent or the Owner to comply with the Vacation Rental Act. . . . The terms "Tenant," *"You," and "Your" as used in this Agreement shall include Tenant's*

> *heirs*, *successors*, *assigns*, *guests*, *invitees*, *representatives and other persons on the Premises during Your occupancy (without regard to whether such persons have authority under this Agreement to be upon the Premises)*, where the context requires or permits.

(emphasis added).

To be fair, Twiddy does not contend the indemnity provision itself provides any benefit to Plaintiffs. Instead, Twiddy asserts because the provision provides its definition of "You" and "Your" is "as used in this Agreement", then this definition should apply to the forum-selection clause which states: "You specifically consent to such jurisdiction and to extraterritorial service of process." As such, Twiddy argues Plaintiffs—as guests or invitees—should be bound as third-parties to the forum-selection clause. However, this argument ignores the fact the Vacation Rental Agreement expressly provides its provisions are severable and, indeed, May was required to execute each provision individually. *See Wooten v. Walters*, 110 N.C. 251, 254-55, 14 S.E. 734, 735 (1892) ("A contract is entire, and not severable, when by its terms, nature and purpose, it contemplates and intends that each and all of its parts, material provisions, and the consideration, are common each to the other, and interdependent. . . . On the other hand, a severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be.").

Moreover, Twiddy's argument that "You" and "Your" as defined by the indemnity provision should be read uniformly into and throughout the Vacation Rental Agreement is defeated by the fact it is plainly apparent in the terms of the agreement itself that Defendants themselves intended no such thing. By way of illustration, employing the expansive definitions of "You" and "Your" to the provision restricting use of the property "by You and Your family" yields ludicrous results permitting practically anyone to use the property during May's tenancy resulting in essentially no restriction whatsoever. It would mean the property would be restricted to use by May and her heirs, successors, assigns, guests, invitees, representatives, and other persons on the Premises during May's occupancy (without regard to whether such persons have authority under this Agreement to be upon the Premises) . . . and their families (including extended families). In other words, use would not be restricted to just May and her family members—it could include everyone from non-family social guests and their families, delivery drivers

and their families, and even complete strangers who would otherwise be trespassers and their families. This would functionally obliterate the provision restricting use of the property. We decline to interpret the Vacation Rental Agreement to reach such an absurd result. *See Atl. Disc. Corp. v. Mangel's of N.C., Inc.*, 2 N.C. App. 472, 478, 163 S.E.2d 295, 299 (1968) ("A construction of a contract leading to an absurd, harsh or unreasonable result should be avoided if possible." (citing 51C C.J.S. Landlord and Tenant § 232(4), p. 594)). As such, it could not have been the parties' intent that these definitions of "You" and "Your" be applied throughout the Vacation Rental Agreement as Twiddy contends.[7] In turn, then, this provision evinces no intent on the part of the parties to directly benefit Plaintiffs or bind them to the Vacation Rental Agreement, including specifically to the forum-selection clause as third-party beneficiaries.

In summary, there is no showing on this Record that Defendants and May intended to confer any legally enforceable right on Plaintiffs via the Vacation Rental Agreement. Instead, the Record here reflects any benefit incurred by Plaintiffs through the Vacation Rental Agreement was incidental and not direct. As such, Twiddy has failed to show Plaintiffs were third-party beneficiaries to the Vacation Rental Agreement. In turn, we conclude the trial court did not err by declining to apply the third-party beneficiary doctrine to bind Plaintiffs to the forum-selection clause.

II. Equitable Estoppel

[2] Next, Twiddy contends the trial court also erred by failing to apply the doctrine of equitable estoppel to bind Plaintiffs to the forum-selection clause in the Vacation Rental Agreement. " 'Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.' " *Ellen v. A.C. Schultes of Md., Inc.*, 172 N.C. App. 317, 321, 615 S.E.2d 729, 732 (2005) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and quotation marks omitted)).

While Twiddy identifies no prior case where Courts have applied equitable estoppel to bind a party to a forum- or venue-selection clause, both parties again analogize this situation to cases involving arbitration clauses. In that context, we have recognized: " '[A] nonsignatory

7. We acknowledge the additional clause appended to the definition of "You" and "Your" in the indemnification provision which states: "where the context requires or permits." The parties make no argument as to how this clause operates in the context of the definition. It could modify "as used in this Agreement" or it could modify "other persons". It could have some other function entirely.

to an arbitration clause may, in certain situations, compel a signatory to the clause to arbitrate the signatory's claims against the nonsignatory despite the fact that the signatory and nonsignatory lack an agreement to arbitrate.' " *Smith Jamison Constr. v. APAC-Atl., Inc.*, 257 N.C. App. 714, 717, 811 S.E.2d 635, 638 (2018) (quoting *Am. Bankers Ins. Grp., Inc. v. Long*, 453 F.3d 623, 627 (4th Cir. 2006)). " 'One such situation exists when the signatory is equitably estopped from arguing that a nonsignatory is not a party to the arbitration clause.' " *Id.* " 'In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.' " *Ellen*, 172 N.C. App. at 321, 615 S.E.2d at 732 (quoting *Schwabedissen*, 206 F.3d at 418). " 'To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.' " *Id.* For example, "In *Schwabedissen*, the Fourth Circuit Court of Appeals noted that '[a] nonsignatory is estopped from refusing to comply with an arbitration clause "when it [is seeking or] receives a 'direct benefit' from a contract containing an arbitration clause." ' " *Id.*; *see also LSB Fin. Servs.*, 144 N.C. App. at 548, 548 S.E.2d at 579.

"[W]here the issue is whether the underlying claims are such that the party asserting them should be estopped from denying the application of the arbitration clause, a court should examine whether the plaintiff has asserted claims in the underlying suit that, either literally or obliquely, assert a breach of a duty created by the contract containing the arbitration clause." *Carter v. TD Ameritrade Holding Corp.*, 218 N.C. App. 222, 231, 721 S.E.2d 256, 263 (2012) (citation and quotation marks omitted). Even where a plaintiff's claims sound in tort and not contract, a plaintiff may not avoid arbitration where the claims at their root are an attempt to hold the opposing party to the terms of the contract. *See id.* at 232, 721 S.E.2d at 263. Nevertheless, where a party's claims "are dependent upon legal duties imposed by North Carolina statutory or common law rather than contract law," equitable estoppel does not operate to require enforcement of an arbitration clause against a non-signatory even where the contract "provides part of the factual foundation" for plaintiffs' complaint. *Ellen*, 172 N.C. App. at 322, 615 S.E.2d at 732-33; *see also Smith Jamison Constr.*, 257 N.C. App. at 720-21, 811 S.E.2d at 640 (applying *Ellen* to conclude "Although the existence of the Subcontract '[p]rovide[s] part of the factual foundation for [the] complaint,' [the] claims . . . are 'dependent upon legal duties imposed by North Carolina statutory or common law rather than contract law.' ").

Applying these analogous principles to this case, Plaintiffs' Complaint alleges no breach of duty owed to them by the Vacation Rental Agreement. The Complaint further makes no allegation the Vacation Rental Agreement conferred any direct benefit on them. Indeed, the Complaint includes no claim or allegation whatsoever arising out of the Vacation Rental Agreement itself.

To the contrary, the Complaint is grounded in claims for negligence and wrongful death dependent upon legal duties allegedly imposed on Defendants by North Carolina statutory or common law rather than contract law. *Ellen*, 172 N.C. App. at 322, 615 S.E.2d at 732. Twiddy contends, however, the provisions of the Vacation Rental Agreement operating to allow Plaintiffs to be permissive users of the property during May's tenancy and providing the Strickers "agree to provide the premises to You in a fit and habitable condition" forms the basis for Plaintiffs' claims.[8] Plaintiffs' Complaint makes no such allegations. For example, there is no claim Plaintiffs are entitled to any refund of rent paid as a result of any breach of the duty under the Agreement. Moreover, even if the Vacation Rental Agreement—including listing May's family as permissive users of the property—"provides part of the factual foundation" for Plaintiffs' Complaint,[9] "[P]laintiffs' 'entire case' does not 'hinge[ ] on [any] asserted rights under the . . . contract.' " *Ellen*, 172 N.C. App. at 322, 615 S.E.2d at 732-33 (citation omitted). As such, we conclude the doctrine of equitable estoppel did not require the trial court, under these facts and allegations, to bind Plaintiffs to the forum-selection clause in the Vacation Rental Agreement. *See Smith Jamison Constr.*, 257 N.C. App. at 721, 811 S.E.2d at 640.

* * * *

Thus, as a matter of law, on the facts and allegations of this case, Plaintiffs—as non-signatories to the Vacation Rental Agreement—may not be bound by the forum-selection clause contained in the Vacation Rental Agreement as third-party beneficiaries or by equitable estoppel. Therefore, the trial court did not err by declining to enforce the forum-selection clause against Plaintiffs in this action. Consequently,

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8. This agreement to provide the premises in fit and habitable condition really appears to be intended to provide Defendants with the opportunity to cure any defect or offer substitute performance prior to having to refund May's rental.

9. It bears mentioning both sets of Defendants, in their Answers, admit upon information and belief the allegation Plaintiffs and their minor child were lawful visitors and/or tenants at the time of the incident. Thus, how and whether Plaintiffs were permissive users of the property at the time is not even really at issue in the case.

the trial court did not abuse its discretion in denying the Motions to Transfer Venue.[10]

Conclusion

Accordingly, for the foregoing reasons, the trial court's 15 December 2021 Order denying the Defendants' Motions to Change Venue is affirmed.

AFFIRMED.

Judges ZACHARY and GRIFFIN concur.

ROBERT ALEXANDER JOHNSON, PLAINTIFF
v.
NICOLE RENEE LAWING, DEFENDANT

No. COA22-754

Filed 20 June 2023

1. Child Custody and Support—motion to modify custody—reference to child's counseling records—not improper

The trial court did not err in its order denying a mother's motion to modify custody by referring in its findings to the child's counseling records—which had not been admitted into evidence—because the reference did not indicate an improper consideration of the records themselves but merely served to address the mother's contention that the child's father did not keep her informed of various appointments.

2. Child Custody and Support—motion to modify custody—best interests of the child—consideration of child's wishes—discretionary decision

The trial court did not abuse its discretion in its order denying a mother's motion to modify custody where, in determining the best interests of the child, the court considered all of the evidence and

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10. We express no opinion as to whether—if Plaintiffs were bound by the Vacation Rental Agreement—Plaintiffs' claims would fall within the scope of the forum-selection clause. Like the trial court, we also express no opinion as to whether the forum-selection clause applies to Defendants' third-party claims against May. We also express no opinion as to whether Defendants may have waived application of the forum-selection clause by bringing their third-party indemnification action in Johnston County.

made findings about the child's testimony and personal preferences, but declined to assign more weight to the child's wishes.

Appeal by Defendant from order entered 27 January 2022 by Judge Frederick B. Wilkins, Jr., in Surry County District Court. Heard in the Court of Appeals 10 May 2023.

Schiller & Schiller, PLLC, by David G. Schiller, for Plaintiff-Appellee.

J. Clark Fischer for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from the trial court's order dismissing her motion to show cause with prejudice and denying her motion to modify custody. Defendant argues that "the trial court abused its discretion by basing its ruling on matters not admitted into evidence and failing to make any findings about the wishes of the minor child and the expressed unhappiness of the child in his father's custody[.]" (capitalization altered). For the reasons stated herein, we affirm.

I. Procedural Background

On 15 June 2015, a final custody order was entered granting Plaintiff Robert Johnson primary custody, and Defendant Nicole Lawing visitation, of their minor son, Ian.[1] The custody order was modified on 7 February 2018 to suspend Defendant's overnight visitation "as long as she is residing with [her] parents at their current home, and until she moves."

Defendant filed a motion to modify custody on 1 October 2021, alleging that there had been a substantial change in circumstances and that it was in the child's best interest to modify the custody order. Defendant also filed a motion to show cause based on Plaintiff's alleged failure to keep Defendant informed of Ian's medical and school appointments. Defendant alleged, inter alia, that:

> A. The defendant has moved . . . . The defendant has lived at the residence for several years and the residence is suitable and conducive to raising the minor child.
>
> . . . .

1. We use a pseudonym to protect the identity of the minor child.

> E. The minor child has expressed a strong desire to live with the defendant. The minor child has begged the defendant to come live with her.
>
> F. The minor child has expressed that he does not see his dad, the plaintiff, very much and the plaintiff does not spend time with him. The plaintiff would not even allow the minor child to participate in sports unless the defendant paid for it. The plaintiff treats the child noticeably different than he does his other children.
>
> . . . .
>
> H. The minor child has had behavioral issues at school which the [defendant] believes is due to his living arrangements with the plaintiff's wife. . . .
>
> I. The plaintiff does not keep the defendant informed of important appointments including doctor and school appointments which is a violation of the order.
>
> J. On a couple of occasions the plaintiff has taken the minor child to see therapists and doctors because the minor child has expressed his desire to live with the defendant. The plaintiff did not disclose such appointments to the defendant in violation of the [c]ourt order. The plaintiff's actions are willful and without lawful excuse. . . .

After a hearing on 24 January 2022, the trial court entered a written order on 27 January 2022 dismissing Defendant's motion to show cause with prejudice and denying Defendant's motion to modify custody. Defendant timely appealed.

II. Discussion

Defendant argues that "the trial court abused its discretion by basing its ruling on matters not admitted into evidence and failing to make any findings about the wishes of the minor child and the expressed unhappiness of the child in his father's custody[.]" (capitalization altered).[2]

A custody order may be modified upon a showing that there has been a "substantial change of circumstances affecting the welfare of the

2. Defendant does not argue that the trial court erred by dismissing her motion to show cause, and this argument is thus deemed abandoned. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."); N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

child[.]" *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998); *see also* N.C. Gen. Stat. § 50-13.7(a) (2022) (establishing that a custody order "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party"). "The change in circumstances may have either an adverse or beneficial effect on the child." *Walsh v. Jones*, 263 N.C. App. 582, 587, 824 S.E.2d 129, 133 (2019) (citation omitted).

"The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). If the trial court determines that there has been a substantial change in circumstances that affects the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. *Id.*

"We review an order for modification of custody to determine if the findings of fact are supported by substantial evidence and if the conclusions of law are supported by the findings; the trial court determines the credibility and weight of the evidence." *Walsh*, 263 N.C. App. at 588, 824 S.E.2d at 134 (citation omitted). "Unchallenged findings of fact are binding on appeal." *Scoggin v. Scoggin*, 250 N.C. App. 115, 118, 791 S.E.2d 524, 526 (2016) (quotation marks and citations omitted). "If the findings of fact and conclusions of law are supported, then we review the trial court's decision regarding custody for abuse of discretion." *Walsh*, 263 N.C. App. at 588, 824 S.E.2d at 134 (citation omitted).

1. Counseling Records

[1] Defendant contends that "the trial court erred by considering records of the minor child that were never introduced into evidence." (capitalization altered).

Here, the trial court made the following finding of fact:

> It is undisputed that on August 25, 2020, September 8, 2020, and October 6, 2020 the plaintiff transported the parties' son . . . to Jodi Province Counseling Services for therapy sessions . . . and did not notify defendant prior to such sessions occurring. It is likewise undisputed that the defendant on October 12, 2020 and November 6, 2020 consulted with the therapist and did not notify the plaintiff that she was having consultations regarding the parties' child prior to doing so. Defendant was invited to sessions by the therapist on October 12, 2020, and did thereafter

> attend the same. (See the Treatment Plan, Comprehensive Clinical Assessment, and Service Notes of Jodi Province Counseling Services, PLLC filed herein.) These sessions continued to May 26, 2021, at which time the sessions were terminated due to the child having met all treatment goals, and each of the parties hereto reporting no further concerns. The parties were advised that further sessions if needed were available, however no further counseling nor therapy has occurred. The Treatment Plan, Comprehensive Clinical Assessment, and Service Notes of Jodi Province Counseling Services, PLLC filed herein shall be and remain sealed, not to be opened without express permission of the Court.

There is no indication that the trial court considered the counseling records in denying Defendant's motion to modify the custody order. Rather, the reference to the counseling records directly addresses Defendant's contention in her motion to show cause that "[P]laintiff does not keep the defendant informed of important appointments including doctor and school appointments which is a violation of the order." The trial court's reference to the counseling records in its single order that both dismissed Defendant's motion to show cause and denied Defendant's motion to modify custody did not amount to error.

2. Best Interests Determination

[2] Defendant next contends that "the trial court's order is fatally flawed because it failed to consider the minor child's expressed wishes to live with his mother and unhappiness with the current custodial agreement." (capitalization altered).

"[A] custody order is fatally defective where it fails to make detailed findings of fact from which an appellate court can determine that the order is in the best interest of the child[.]" *Carpenter v. Carpenter*, 225 N.C. App. 269, 273, 737 S.E.2d 783, 787 (2013) (citation omitted). "The paramount consideration in matters of custody and visitation is the best interests of the child, and in determining such matters the trial judge may consider the wishes of a child of suitable age and discretion." *Reynolds v. Reynolds*, 109 N.C. App. 110, 112-13, 426 S.E.2d 102, 104 (1993) (quotation marks and citations omitted). "The expressed wish of a child of discretion is, however, never controlling upon the court, since the court must yield in all cases to what it considers to be for the child's best interests, regardless of the child's personal preference." *Clark v. Clark*, 294 N.C. 554, 577, 243 S.E.2d 129, 142 (1978). "The preference of the child should be based upon a considered and rational judgment,

and not made because of some temporary dissatisfaction or passing whim or some present lure." *Id.*

Here, although the trial court concluded that "[t]here has been a change in the substantial circumstances of [Defendant,]" it also concluded that there was "no[] showing of how those changes will affect the bests interests of the minor child." In so concluding, the trial court made the following findings of fact:

> 10. The plaintiff does return from work each day, and the family sits and eats dinner together as a family, as has been their practice prior to and subsequent to the entry of the 2018 Order herein. The plaintiff describes his relationship with both the parties' child and his other children as loving, respectful, and good. He does keep all of his children in age appropriate activities and has attended to the emotional and educational needs of his son, [Ian], in an appropriate and timely manner.
>
> 11. [Ian] is a healthy 10 year-old boy who is very proud that he has had no cavities, is seldom sick, and who enjoys school. He is an A-B student, and has maintained that level this school year having brought all of his grades to A except for one B. He has only had four absences from school since kindergarten. He had one in first grade and three due to flu during the third grade, and he has never been tardy. The behavioral issues he experience[d] during first grade have been resolved, and each year he has had fewer minor behavior issues at school. He has always met or exceeded standards and progressed in all of his subjects, and is at or above grade level on his third grade End of Grade tests. Both his father and stepmother, and his mother review and assist him by going over his homework with him. He has expressed a desire to spend more time with his mother.

These findings show that the trial court considered [Ian's] testimony and his "desire to spend more time with his mother." However, the trial court also considered other evidence, including testimony from both parents, in concluding that "[a] modification of the existing Orders regarding custody . . . is not necessary to promote or foster [Ian's] best interests." Accordingly, that the trial court did not assign more weight to the child's "expressed . . . desire to spend more time with his mother" did not amount to an abuse of discretion.

III. Conclusion

The trial court did not err by referencing the counseling records in its order. Furthermore, the trial court did not abuse its discretion in its best interests determination by failing to assign more weight to the child's wishes. Accordingly, the trial court's order is affirmed.

AFFIRMED.

Judges DILLON and STADING concur.

GALYA MANN, PLAINTIFF
v.
HUBER REAL ESTATE, INC., PAUL HUBER, LEVEL CAROLINA HOMES, LLC, D.B.A. LEVEL HOMES, 2-10 HOME BUYERS WARRANTY, DEFENDANTS

No. COA22-956

Filed 20 June 2023

1. Fiduciary Relationship—real estate agent and buyer—purchase of home—reference to sales contract as "standard"—no duty breached—buyer's duty to read contract

In plaintiff buyer's action against defendant realtor, who served as plaintiff's real estate agent when she signed a contract to buy a house that ended up having multiple latent defects, the trial court properly granted summary judgment for defendant on plaintiff's breach of fiduciary duty claim. Specifically, defendant did not breach his duty of care to plaintiff when he referred to the sales contract as a "standard contract" where, although plaintiff assumed that the contract—which, among other things, disclaimed the warranty of merchantability, fitness for a particular purpose, and habitability—was "standard" among all builders and similar transactions (rather than being "standard" for the particular builder who sold the house), there was no evidence that defendant represented as much to plaintiff. Furthermore, plaintiff had a positive duty to read the sales contract before signing it, and she presented no evidence of special circumstances that would have absolved her of that duty.

2. Fiduciary Relationship—real estate agent and buyer—purchase of home—duty to advise buyer to seek legal advice

In plaintiff buyer's action against defendant realtor, who served as plaintiff's real estate agent when she signed a contract to buy a

house that ended up having multiple latent defects, the trial court properly granted summary judgment for defendant on plaintiff's breach of fiduciary duty claim. Specifically, there was no genuine issue of material fact as to whether defendant breached his duty to advise plaintiff to seek legal counsel before signing the sales contract, where defendant had satisfied this duty in writing through an exclusive buyer-agent agreement that plaintiff signed when she hired defendant. Because plaintiff never asked about the contract's legal terms and instead made only a general inquiry about whether the contract was "standard," defendant was not required to verbally advise plaintiff to seek legal advice about the contract.

3. Unfair Trade Practices—purchase of home—realtor's statement—reference to sales contract as "standard"

In plaintiff buyer's action against defendant realtor, who served as plaintiff's real estate agent when she signed a contract to buy a house that ended up having multiple latent defects, the trial court properly granted summary judgment for defendant on plaintiff's unfair and deceptive trade practices claim. There was no factual dispute about whether defendant referred to the sales contract—which, among other things, disclaimed the warranty of merchantability, fitness for a particular purpose, and habitability—as a "standard contract." Although plaintiff assumed that defendant meant the contract was "standard" among all builders and similar transactions (rather than being "standard" for the particular builder who sold the house), she never alleged that defendant actually told her that the contract was "standard" in that general sense. Furthermore, plaintiff did not argue that defendant's reference to the contract as "standard" was unfair or deceptive.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by Plaintiff from order entered 4 August 2022 by Judge John M. Dunlow in Durham County Superior Court. Heard in the Court of Appeals 22 March 2023.

Klein & Sheridan, LC PC, by Benjamin Sheridan and Jed Nolan, for Plaintiff-Appellant.

Manning, Fulton & Skinner, P.A., by Lawrence D. Graham, Jr., and William C. Smith, Jr., for Defendants-Appellees.

COLLINS, Judge.

Galya Mann ("Plaintiff") appeals the trial court's order granting summary judgment in favor of Huber Real Estate, Inc., and Paul Huber (collectively, "Realtor"). Plaintiff argues that the trial court erred by granting Realtor's motion for summary judgment on her claims for breach of fiduciary duty and unfair and deceptive trade practices. We affirm the trial court's order.

I. Background

Plaintiff moved from Bulgaria to the United States and attended East Carolina University, where she obtained an undergraduate degree in supply chain management and a Masters of Business Administration degree. Since her graduation, she has owned her own business.

Plaintiff and her husband first owned a home together in Wilmington, North Carolina.[1] They sold that home and purchased a townhome in Clayton, North Carolina. Plaintiff was not involved in these transactions because she "didn't know much about the United States or anything related to real estate." When asked whether she read, reviewed, or signed any of the documentation for the purchase of the Clayton townhome, Plaintiff responded, "No. I am a spouse. I must have signed all the documents but that's all I did."

Plaintiff and her husband began looking for a new home in Durham, North Carolina, in 2018. Plaintiff and her daughter met Realtor in April of that year at an open house for a property that Realtor was showing. Plaintiff hired Realtor as her real estate agent for the sale of her Clayton townhome and in her search for a new home in the Raleigh-Durham area. On or about 14 August 2018, Plaintiff received an Exclusive Buyer Agency Agreement ("Agreement") from Realtor. Plaintiff testified at her deposition that she "most probably" read the document; could not remember if she discussed the document with Realtor; "[m]ost probably" asked Realtor to explain parts of the document to her, but could not remember; and did not ask a lawyer to help her decipher anything in the document that she did not understand. When asked whether she had enough time to review the document thoroughly before signing, Plaintiff responded, "My answer is I do not remember at this time."

Paragraph 10 of the Agreement states as follows:

> 10. **OTHER PROFESSIONAL ADVICE.** In addition to the services rendered to Buyer by the Firm under the

1. Plaintiff and her husband are separated, and he is not a party to this appeal.

> terms of this Agreement, Buyer is advised to seek other professional advice in matters of law, taxation, financing, insurance, surveying, wood-destroying insect infestation, structural soundness, engineering, and other matters pertaining to any proposed transaction. Although Firm may provide Buyer the names of providers who claim to perform such services, Buyer understands that Firm cannot guarantee the quality of service or level of expertise of any such provider. Buyer agrees to pay the full amount due for all services directly to the service provider whether or not the transaction closes. Buyer also agrees to indemnify and hold Firm harmless from and against any and all liability, claim, loss, damage, suit, or expense that Firm may incur either as a result of Buyer's selection and use of any such provider or Buyer's election not to have one or more of such services performed.

When asked whether she read and understood Paragraph 10 at the time of signing the agreement, Plaintiff responded, "I cannot comment what happened three years ago."

After looking at a home in the Sterling community that did not meet Plaintiff's family's needs, Plaintiff asked Realtor whether there were other options on the market. Realtor suggested the Brightleaf community in Durham, which was being developed by Level Carolina Homes, LLC ("Level Homes"). That day or the day after, Plaintiff drove around the Brightleaf community. Plaintiff, her husband, and Realtor met with Level Homes' sales representative a few days later. At that meeting, they "[m]ost probably" viewed the house they ultimately bought, "viewed some documents[,]" and "discuss[ed] interior selection." Plaintiff and her husband were "[m]ost probably" given a copy of the sales contract, but Plaintiff could not recall whether they took the contract home with them.

The following exchange took place between Realtor's attorney and Plaintiff at her deposition regarding her review of the contract:

> [Realtor's Attorney]. Did you have sufficient time to review the document before you signed it?
>
> [Plaintiff]. I don't believe so.
>
> [Realtor's Attorney]. You did not have sufficient time --
>
> [Plaintiff]. This is a large document.

[Realtor's Attorney]. Did you read the document before you signed it?

[Plaintiff]. We were concerned about the changes in the interior selection, that part we did go through.

[Realtor's Attorney]. The question is: Did you read this contract before you signed it?

[Plaintiff]. Not the full contract. We relied on our realtor who said that this was a standard contract.

[Realtor's Attorney]. So you did not read the full contract but relied on your realtor who said it was a standard contract?

[Plaintiff]. Yes.

[Realtor's Attorney]. Did the realtor, Mr. Huber, tell you not to read the contract?

[Plaintiff]. The realtor, Mr. Huber, gets 6 percent of the sale of this house to tell us this is the standard contract or not.

[Realtor's Attorney]. My question is: Did Mr. Huber tell you not to read this contract?

[Plaintiff]. I do not remember.

. . . .

[Realtor's Attorney]. Did you discuss the content of the contract with Mr. Huber?

[Plaintiff]. I asked Mr. Huber if this was a standard contract and he said it was a standard contract.

[Realtor's Attorney]. Did you understand that to mean it was the standard contract for all transactions or the standard contract for Level Homes transactions?

[Plaintiff]. I am not in the real estate so when I ask my real estate agent if this is standard contract, I'm assuming that he means this is standard contract period. For all transactions.

[Realtor's Attorney]. Even transactions that Level Homes was not involved in?

[Plaintiff]. Yes. All transactions. I'm guessing there are standard contracts and custom contracts.

Prior to signing the sales contract, Plaintiff asked Realtor to negotiate changes to the contract pertaining to the interior design of the home, which he did. Plaintiff only remembered discussing interior changes with Realtor and did not remember discussing any warranty, arbitration, or limitation of damages provisions with Realtor. Plaintiff and her husband e-signed the purchase contract on 19 August 2018 when they were "[m]ost probably at home." Plaintiff's initials appear at the bottom of each page and her signature appears on page 9.

The contract included provisions that disclaimed all warranties, including the warranty of merchantability, fitness for a particular purpose, and habitability; limited damages to the cost of repair or replacement; provided that the total damages may not exceed the total purchase price; and required that any disputes be resolved by arbitration. The contract also provided a limited warranty through 2-10 Home Buyers Warranty, which included a one-year warranty on workmanship and materials, a two-year warranty on systems, and a ten-year warranty on structural defects.

After Plaintiff moved into the home, she discovered numerous latent defects, including improper lot grading and drainage, improper shingle and gutter installation, foundation cracks, no moisture barrier in the crawlspace, improper mounting of the HVAC, electrical issues, water in the crawl space, plumbing problems, and biological growth. The repairs to Plaintiff's home were estimated to cost between $83,894.72 and $90,594.73.

Plaintiff filed an unverified complaint against Realtor, Level Homes, and 2-10 Home Buyers Warranty. Against all defendants, Plaintiff brought claims for unfair and deceptive trade practices and civil conspiracy. Against Realtor, Plaintiff also brought claims for breach of fiduciary duty, negligence, and unjust enrichment. Against Level Homes, Plaintiff also brought claims for negligence, fraudulent inducement, unjust enrichment, and unconscionable contract. Against 2-10 Home Buyers Warranty, Plaintiff also brought claims for fraudulent inducement, unjust enrichment, and unconscionable contract.

Level Homes moved to dismiss or, in the alternative, to stay the proceedings and compel arbitration.[2] Realtor answered and moved to dismiss for failure to state a claim under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. By orders entered 16 November 2021, the trial court denied Level Homes' motion to dismiss and deferred its decision

2. This motion is not in the record but is referenced in the trial court's order deciding the motion.

on the motion to stay and compel arbitration, and denied Realtor's Rule 12(b)(6) motion to dismiss.

Realtor moved for summary judgment in April 2022. Realtor's motion came on for hearing on 11 July 2022 and by order entered 4 August 2022, the trial court allowed Realtor's motion for summary judgment on all claims. Plaintiff timely appealed.

II. Discussion

Plaintiff contends that the trial court erred by granting Realtor's motion for summary judgment on her breach of fiduciary duty and unfair and deceptive trade practices claims.[3]

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2022). "The party moving for summary judgment bears the burden of bringing forth a forecast of evidence which tends to establish that there is no triable issue of material fact." *Inland Constr. Co. v. Cameron Park II, Ltd., LLC*, 181 N.C. App. 573, 576, 640 S.E.2d 415, 418 (2007) (quotation marks and citation omitted).

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (2022). In other words, "[o]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Draughon v. Harnett Cnty. Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (quotation marks and citations omitted).

"In the course of a trial court's ruling on a motion for summary judgment, [a] verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible

3. Plaintiff does not appeal the trial court's order granting summary judgment on her claims for negligence, unjust enrichment, and conspiracy.

in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Hampton v. Scales*, 248 N.C. App. 144, 149, 789 S.E.2d 478, 483 (2016) (quotation marks and citations omitted). However, the trial court may not consider unverified pleadings when ruling on a motion for summary judgment because they do not comply with the requirements of Rule 56(e). *Tew v. Brown*, 135 N.C. App. 763, 767, 522 S.E.2d 127, 130 (1999), *disc. review improvidently allowed*, 352 N.C. 145, 531 S.E.2d 213 (2000); *Weatherford v. Glassman*, 129 N.C. App. 618, 623, 500 S.E.2d 466, 470 (1998). Here, Plaintiff's complaint was not verified; thus, it could not be considered in deciding Realtor's summary judgment motion. *See Hampton*, 248 N.C. App. at 149, 789 S.E.2d at 483; *see also Rankin v. Food Lion*, 210 N.C. App. 213, 220, 706 S.E.2d 310, 315-16 (2011).

"We review a trial court's order granting summary judgment de novo." *Archie v. Durham Pub. Sch. Bd. of Educ.*, 283 N.C. App. 472, 474, 874 S.E.2d 616, 619 (2022) (citation omitted). This de novo review requires a two-part analysis: (1) whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) whether the moving party is entitled to judgment as a matter of law. *Fayetteville Publ'g Co. v. Advanced Internet Techs., Inc.*, 192 N.C. App. 419, 428, 665 S.E.2d 518, 524 (2008).

A. Breach of Fiduciary Duty

Plaintiff first contends that the trial court erred by granting Realtor summary judgment on her breach of fiduciary duty claim because there were genuine issues of material fact precluding summary judgment.

"[T]he relationship between a real estate agent and his or her client is by, definition, one of agency, with the agent owing a fiduciary duty to the buyer in all matters relating to the relevant transaction."[4] *Cummings v. Carroll*, 379 N.C. 347, 374-75, 866 S.E.2d 675, 695 (2021) (citation omitted).

> A real estate agent has the fiduciary duty to exercise reasonable care, skill, and diligence in the transaction of business entrusted to him, and he will be responsible to his principal for any loss resulting from his negligence in failing to do so. The care and skill required is that generally

4. Realtor is a real estate broker. The fiduciary duties owed to a client by a real estate broker are the same as those owed by a real estate agent. *See, e.g.*, *Sutton v. Driver*, 211 N.C. App. 92, 100, 712 S.E.2d 318, 323 (2011).

> possessed and exercised by persons engaged in the same business. This duty requires the agent to make a full and truthful disclosure to the principal of all facts known to him, or discoverable with reasonable diligence and likely to affect the principal. The principal has the right to rely on his agent's statements, and is not required to make his own investigation.

Id. at 375, 866 S.E.2d at 695 (quoting *Brown v. Roth*, 133 N.C. App. 52, 54-55, 514 S.E.2d 294, 296 (1999)). A real estate agent also has a duty to "disclose any material facts known to the agent and to discover and disclose to the principal all material facts about which the agent should reasonably have known." *Id.* (quotation marks, italics, and citation omitted).

1. Standard Contract

[1] Plaintiff first asserts that "[t]here is a factual dispute that should be sent to a jury over whether [Realtor] breached the fiduciary duty by calling the sales contract a 'standard contract.' " However, as the parties agree that Realtor referred to the contract as "standard," the issue is not a question of fact, but is rather whether Realtor was entitled to judgment as a matter of law on Plaintiff's breach of fiduciary claim.

At Plaintiff's deposition, the following exchange took place between Plaintiff and Realtor's attorney:

> [Realtor's Attorney]. Did you discuss the content of the contract with Mr. Huber?
>
> [Plaintiff]. I asked Mr. Huber if this was a standard contract and he said it was a standard contract.
>
> [Realtor's Attorney]. Did you understand that to mean it was the standard contract for all transactions or the standard contract for Level Homes transactions?
>
> [Plaintiff]. I am not in the real estate so when I ask my real estate agent if this is standard contract, I'm assuming that he means this is standard contract period. For all transactions.
>
> [Realtor's Attorney]. Even transactions that Level Homes was not involved in?
>
> [Plaintiff]. Yes. All transactions. I'm guessing there are standard contracts and custom contracts.

In Realtor's affidavit, he averred as follows:

> I have sold a number of "spec" homes for large volume builders in different neighborhoods, and I cannot recall a situation in which I was involved that the particular builder's standard form contract was not used. If I told Plaintiff her contract was "standard" it was to communicate that it was Level Home's standard contract, which I believed because it was on Level Homes' pre-printed form, and presented to Plaintiff on our first visit to the Level Homes . . . sales office. I did not tell her this particular contract was "standard" among all builders and all similar transactions.

(Emphasis omitted).

Furthermore, at Realtor's deposition, the following exchange took place between Realtor and Plaintiff's attorney:

> [Plaintiff's Attorney]. Do you know whether or not you told Ms. Mann this was a standard contract?
>
> [Realtor]. To best of my recollection, I told her that all builders use their own standard contracts.
>
> [Plaintiff's Attorney]. Why would you use the word standard in that sentence?
>
> [Realtor]. It's just a generality.
>
> [Plaintiff's Attorney]. What does it mean to you in that context?
>
> [Realtor]. It means that they have their own standard. It means that they use their own -- their own forms.

Plaintiff admits that when she and Realtor first met with a Level Homes' sales representative, she and her husband were "[m]ost probably" given a copy of the sales contract. Realtor averred that the contract "was on Level Homes' pre-printed form, and presented to Plaintiff on our first visit to the Level Homes . . . sales office[.]" Plaintiff testified that when she asked Realtor if "this was a standard contract[,]" Realtor "said it was a standard contract." Plaintiff further testified that she "guess[ed] there are standard contracts and custom contracts." However, Plaintiff testified that she "assum[ed]" that Realtor meant "this is standard contract period . . . for all transactions." But there is no evidence that Realtor told Plaintiff it was the standard contract for all transactions or that Realtor's remark could reasonably be construed to mean as much.

Plaintiff asserts that she could rely solely on Realtor's representation that the sales contract was a "standard contract" and forego her own review of the contract. Plaintiff is misguided.

According to well-established North Carolina law,

> one who signs a paper writing is under a duty to ascertain its contents, and in the absence of a showing that he was wilfully misled or misinformed by the defendant as to these contents, or that they were kept from him in fraudulent opposition to his request, he is held to have signed with full knowledge and assent as to what is therein contained. If unable to read or write, he must ask that the paper be read to him or its meaning explained.

Williams v. Williams, 220 N.C. 806, 809-10, 18 S.E.2d 364, 366 (1942) (citations omitted). "It is well established in North Carolina that '[o]ne who signs a written contract without reading it, when he can do so understandably[,] is bound thereby unless the failure to read is justified by some special circumstances.' " *Marion Partners, LLC v. Weatherspoon & Voltz, LLP*, 215 N.C. App. 357, 359, 716 S.E.2d 29, 31 (2011) (first alteration in original) (quoting *Davis v. Davis*, 256 N.C. 468, 472, 124 S.E.2d 130, 133 (1962)). As a result, a litigant's " 'duty to read an instrument or to have it read before signing it, is a positive one, and the failure to do so, in the absence of any mistake, fraud or oppression, is a circumstance against which no relief may be had, either at law or in equity.' " *Mills v. Lynch*, 259 N.C. 359, 362, 130 S.E.2d 541, 543-44 (1963) (quoting *Furst v. Merritt*, 190 N.C. 397, 402, 130 S.E. 40, 43 (1925)).

Here, Plaintiff has failed to present evidence that special circumstances absolved her of the duty to read the contract. Plaintiff thus had a positive duty to read the sales contract and her failure to do so "is a circumstance against which no relief may be had, either at law or in equity." *Mills*, 259 N.C. at 362, 130 S.E.2d at 543 (quoting *Furst*, 190 N.C. at 402, 130 S.E. at 43).

In summary, Realtor's reference to the sales contract as a "standard contract" did not amount to a breach of fiduciary duty and Realtor was entitled to judgment as a matter of law.

2. Legal Advice

[2] Plaintiff also argues that a factual question arises over whether Realtor advised Plaintiff to seek legal advice prior to signing the contract.

Realtor attached to his motion for summary judgment the Agreement, signed by both Plaintiff and Realtor, which states in relevant part:

"*Buyer is advised to seek other professional advice in matters of law*, taxation, financing, insurance, surveying, wood-destroying insect infestation, structural soundness, engineering, and other matters pertaining to any proposed transaction" and that "*Buyer also agrees to indemnify and hold Firm harmless from and against any and all liability, claim, loss, damage, suit, or expense that Firm may incur* either *as a result of* Buyer's selection and use of any such provider or *Buyer's election not to have one or more of such services performed*." (Emphasis added).

Janet Thoren, Director of Regulatory Affairs and Legal Counsel for the North Carolina Real Estate Commission, submitted an affidavit and testified consistent with her affidavit by deposition. Thoren averred that her "division conducts administrative prosecutions of licensed real estate brokers when probable cause is found to believe they have violated Chapter 93A or the Commission's codified rules" and that she is "knowledgeable of and familiar with the various laws, regulations, rules, and guidance that govern any person or entity in the state of North Carolina licensed as a real estate broker and involved in the real estate brokerage business." She further averred that, because the Commission "has not investigated the facts alleged in this particular case[,]" she "cannot give an opinion about what should or should not have been done in this particular case by any licensed broker involved." Thoren's affidavit further states as follows:

> 5. Notwithstanding the above, the standard of care required of real estate licensees in the state of North Carolina includes, but is not limited to, advising a client to seek legal counsel for matters of law, including interpretation of purchase contracts. That duty is incorporated into and facilitated by paragraph 10 of the Exclusive Buyer Agency Agreement, Standard Form 201 ("Form 201"). Because the advice does not have to be verbal, in my opinion, if a buyer does not question the form or content of legal documents such as the purchase contract, the buyer agent's duty to advise a client to seek legal counsel regarding transactional documents may be satisfied in writing. Form 201 may satisfy that requirement.
>
> 6. In North Carolina, it is common and accepted for builders selling new home construction to utilize their own contracts drafted by their own attorneys and to require the use of such forms by any potential buyers of their product. These types of contracts are sometimes referred to as the builder's "standard" contract. Real estate brokers are not

> educated on such contracts and have no authority to provide opinions or offer legal advice on their terms, including but not limited to effects of different warranties, and arbitration clauses or other dispute resolution provisions. Real estate brokers are prohibited by law from offering legal advice or interpreting contract language.

Here, the following exchange took place between Plaintiff and Realtor's attorney at Plaintiff's deposition:

> [Realtor's Attorney]. Did you and Mr. Huber discuss the warranty provisions in the contract?
>
> [Plaintiff]. I don't think we went into detail but the interior changes.
>
> [Realtor's Attorney]. Did Mr. Huber make any representations or warranties to you about what the warranty provisions stated in the contract?
>
> [Plaintiff]. As I told you, that is as much as I remember.
>
> [Realtor's Attorney]. So you don't remember discussing the warranty provision in the contract?
>
> [Plaintiff]. I don't believe we discussed the warranty provisions.
>
> [Realtor's Attorney]. Did you and Mr. Huber discuss the arbitration provision in the contract before you signed it?
>
> [Plaintiff]. No.
>
> [Realtor's Attorney]. Did you and Mr. Huber discuss the limitation of damages provision in the contract before you signed it?
>
> [Plaintiff]. I don't believe so.

Plaintiff's inquiry about whether the contract was "standard" was not an inquiry about the legal terms of the contract; it was, at most, a general inquiry about whether the contract was "custom" in some way. Plaintiff admits that there was no discussion about the various legal terms of the contract that she now complains of and that her focus was on the interior changes to the home, which Realtor negotiated for her. Because Plaintiff made no inquiry into the legal terms of the contract which, according to Thoren, may have required Realtor to verbally advise Plaintiff to seek legal advice, Realtor's duty to advise Plaintiff

to seek legal counsel regarding the contract was satisfied in writing through the Agreement signed by Plaintiff.

Plaintiff relies on *Cummings* to support her assertion that the Agreement did not insulate Realtor from liability; such assertion is inapposite here. In *Cummings*, the exclusive buyer agency agreement attempted to limit the defendants-real estate agents' fiduciary duties by providing, inter alia, that they had only a duty to disclose "material facts related to the property or concerning the transaction of which they had actual knowledge[.]" 379 N.C. at 375, 866 S.E.2d at 695-96 (quotation marks and brackets omitted). In holding that "[t]he fiduciary duty that a real estate agent owes to his or her principal arises from the agency relationship itself . . . rather than upon the nature of the contractual provisions governing any specific agent-principal relationship[,]" the Court noted that "a real estate agent is obligated to '*discover and disclose*' those material facts that may affect [plaintiffs'] rights and interests or influence [plaintiffs'] decision in the transaction rather than to simply disclose those of which the agent has 'actual knowledge.' " *Id.* at 376, 866 S.E.2d at 696 (quotation marks and citation omitted). Here, however, the Agreement did not limit Realtor's fiduciary duties, but rather, consistent with Realtor's fiduciary duties, advised Plaintiff to seek other professional advice in addition to the services rendered by Realtor.

Accordingly, there is no genuine issue of material fact regarding whether Realtor advised Plaintiff to seek legal advice prior to signing the sales contract.

B. Unfair and Deceptive Trade Practices

[3] Plaintiff next contends that the trial court erred by granting Realtor summary judgment on the unfair and deceptive trade practices claim because Realtor unfairly and deceptively informed Plaintiff that Level Homes' contract was "standard."

Section 75-1.1 of our General Statutes provides that "unfair or deceptive acts or practices in or affecting commerce" are unlawful. N.C. Gen. Stat. § 75-1.1(a) (2022). To establish a prima facie claim for unfair and deceptive trade practices, "the plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, . . . and (3) the act proximately caused injury to the plaintiff." *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 664, 464 S.E.2d 47, 58 (1995) (citation omitted). "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539,

548, 276 S.E.2d 397, 403 (1981) (citation omitted). "A practice is deceptive if it has the tendency to deceive . . . ." *D C Custom Freight, LLC v. Tammy A. Ross & Assocs.*, 273 N.C. App. 220, 228, 848 S.E.2d 552, 559 (2020) (citation omitted). Whether an act or practice is unfair or deceptive is a question of law. *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 172, 684 S.E.2d 41, 50 (2009).

As discussed in more detail above, there is no factual dispute about whether Realtor called the sales contract a "standard contract." Plaintiff does not argue that Realtor told her that the contract was a standard contract for all transactions, only that she "assum[ed] that he mean[t] this is standard contract period. For all transactions." Furthermore, Plaintiff does not argue that Realtor's reference to the contract as "standard" to communicate that it was Level Homes' standard contract, rather than a standard contract for all transactions, was unfair or deceptive.

Accordingly, the trial court did not err by granting Realtor summary judgment on Plaintiff's unfair and deceptive trade practices claim.

III. Conclusion

The trial court did not err by granting Realtor summary judgment on Plaintiff's breach of fiduciary duty and unfair and deceptive trade practices claims because there is no genuine issue of material fact and Realtor was entitled to judgment as a matter of law. Accordingly, the trial court's order is affirmed.

AFFIRMED.

Judge DILLON concurs.

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

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

I concur in that portion of the majority's opinion affirming the trial court's grant of summary judgment with respect to Plaintiff's claim for unfair and deceptive trade practices. However, I respectfully dissent from the majority's holding affirming summary judgment in favor of Realtor for Plaintiff's claim for breach of fiduciary duty. Accordingly, I would hold that the trial court erred by granting summary judgment on Plaintiff's claim for breach of fiduciary duty because Realtor had a

duty to refer Plaintiff to an attorney when she questioned whether the contract was standard.

There is no question that a realtor owes a fiduciary duty to their clients. *Brown v. Roth*, 133 N.C. App. 52, 54, 514 S.E.2d 294, 296 (1999). Such duty "is not prescribed by contract, but is instead imposed by operation of law." *Cummings v. Carroll*, 379 N.C. 347, 376, 866 S.E.2d 675, 696 (2021) (citation and internal quotation marks omitted). Based on this fiduciary duty, a realtor must "exercise reasonable care, skill, and diligence in the transaction of business [e]ntrusted to him, and he will be responsible to his principal for any loss resulting from his negligence in failing to do so." *Brown*, 133 N.C. App. at 54, 514 S.E.2d at 296 (citation and internal quotation marks omitted). Generally, what is "reasonable" in the context of negligent behavior depends on the circumstances and is therefore a question for the jury. *Forbes v. Par Ten Grp., Inc.*, 99 N.C. App. 587, 595-96, 394 S.E.2d 643, 648 (1990) (citation and internal quotation marks omitted), *disc. review denied*, 328 N.C. 89, 402 S.E.2d 824 (mem.) (1991).

"This duty requires the agent to 'make a full and truthful disclosure [to the principal] of all facts known to him, or discoverable with reasonable diligence' and likely to affect the principal." *Brown*, 133 N.C. App. at 54-55, 514 S.E.2d at 296 (citations omitted). "In sum, . . . a real estate broker has a duty to make full and truthful disclosure of all known or discoverable facts likely to affect the client. And, the client may rely upon the broker to comply with this duty and forego his or her own investigation." *Sutton v. Driver*, 211 N.C. App. 92, 100, 712 S.E.2d 318, 323 (2011). In cases concerning whether a realtor fulfilled their fiduciary duty to their client, "the relevant issue . . . is whether the record discloses the existence of a genuine issue concerning the extent to which [the realtor] exercised a level of diligence consistent with applicable professional standards." *Cummings*, 379 N.C. at 376-77, 866 S.E.2d at 696 (citation omitted).

Here, I would hold the trial court erred by granting summary judgment to Realtor on Plaintiff's breach of fiduciary duty claim, because there is a genuine issue of fact as to whether Realtor breached their fiduciary duty to Plaintiff regarding the contract between the builder and Plaintiff. The Director of Regulatory Affairs and Legal Counsel for the North Carolina Real Estate Commission, Janet Thoren ("Ms. Thoren") testified as an expert. Ms. Thoren wrote in her affidavit that when a buyer questions a contract, the "standard of care" requires agents to advise the client to seek legal advice regarding the documents. However, "if a buyer *does not question the form or content of legal documents*

. . . the buyer agent's duty to advise a client to seek legal counsel regarding transactional documents may be satisfied in writing[,]" by the agreement. Ms. Thoren, reiterated this sentiment in her deposition, stating that "if the buyer has questions about [a] contract" the broker "should refer the buyer to an attorney[.]" Still, Ms. Thoren confirmed that despite this general advice, she could not opine on whether Realtor violated any rules, since she had not investigated this incident.

During the summary judgment hearing, Plaintiff's attorney argued that Plaintiff asked Realtor whether the contract from the builder was "standard . . ., to which he replied yes, this is a standard contract[,]" thus she "relied on [Realtor]" and "forewent her own investigation." Plaintiff's attorney specifically argued that Plaintiff's inquiry about whether the builder's contract was standard "warranted a referral to an attorney[,]" which Realtor failed to provide. Realtor's attorney countered that although his "client [didn't] recall that specific exchange, . . . he sa[id] that if he was asked [whether the contract was standard], he would have said yeah, this is [the builder's] standard contract."

Based on these arguments, the record, and there being no specific guidance from the commission, I would hold there is a genuine issue of material fact as to whether Realtor breached his fiduciary duty to Plaintiff by failing to advise her, verbally, at the time she signed the agreement with the builder, to seek legal counsel to answer her question about whether the contract was standard, since she was questioning the form of the contract. I do not believe that boiler plate language in the agreement relied upon by the majority is sufficient to satisfy the obligations under the facts set forth in this case. Therefore, I would vacate the trial court's order granting summary judgment on Plaintiff's claim for breach of fiduciary duty and remand for a trial on this issue. Thus, I dissent.

MAYNARD v. CROOK

[289 N.C. App. 357 (2023)]

ARNOLD MAYNARD, JENNIFER MAYNARD, AND HAROLD ELLIS, PLAINTIFFS
v.
JUNE CROOK, DEFENDANT

No. COA22-794

Filed 20 June 2023

1. Torts, Other—failure to state a claim—slander of title—special damages—invasion of privacy—physical intrusion by non-party upon property

In a legal dispute between adjacent property owners over access to a right-of-way on defendant's driveway, the trial court properly dismissed defendant's counterclaim for slander of title under Civil Procedure Rule 12(b)(6) (failure to state a claim) where the damages that defendant alleged—namely, expenses she incurred to defend against a temporary restraining order that plaintiffs obtained to prevent her from impeding their access to the right-of-way—did not constitute special damages. The trial court also properly dismissed under Rule 12(b)(6) defendant's counterclaim for invasion of privacy where, rather than alleging that plaintiffs physically intruded upon her home or private affairs, defendant alleged that "many strangers" and "potential purchasers" of plaintiffs' property—in other words, non-parties to the case—had trespassed on her property.

2. Civil Procedure—judgment on the pleadings—as to counterclaims—no motion before the court—pleadings not yet "closed"—improper

In a legal dispute between adjacent property owners over access to a right-of-way on defendant's driveway, the trial court erred in dismissing defendant's counterclaims under Civil Procedure Rule 12(c), which allows a party to move for judgment on the pleadings "after the pleadings are closed." To begin with, there was no Rule 12(c) motion as to defendant's counterclaims for the court to rule on, since plaintiffs had only moved for judgment on the pleadings as to their own claims. At any rate, a Rule 12(c) motion as to defendant's counterclaims would have been improper because plaintiffs had not replied to those counterclaims, and therefore the pleadings had not yet "closed."

3. Civil Procedure—order dismissing counterclaims—under Rule 12(b)(6)—motions under Rules 52, 59, and 60

After the trial court entered an order in a property-related action dismissing defendant's counterclaims under Civil Procedure

Rule 12(b)(6), the court did not abuse its discretion in denying defendant's Rule 59 motion for a new trial where the order dismissing defendant's counterclaims was issued in response to a pre-trial motion and where no trial on the merits had yet occurred. Further, because defendant filed her amended counterclaims after the court had already properly dismissed her original counterclaims, the court did not abuse its discretion in denying defendant's Rule 60 motion for relief from the dismissal order without addressing defendant's request to amend her counterclaims. However, because the order dismissing defendant's counterclaims included extensive factual findings that went beyond a mere recitation of undisputed facts forming the basis of the court's decision, the court did abuse its discretion in denying defendant's Rule 52(b) motion requesting that the court amend the order to remove those improper findings.

Appeal by Defendant from orders entered 3 February, 4 February, 9 February, and 13 June 2022 by Judge Josephine Kerr Davis in Durham County Superior Court. Heard in the Court of Appeals 11 April 2023.

Oak City Law, LLP, by Robert E. Fields III and Samuel Pinero, for Plaintiffs-Appellees Arnold Maynard and Jennifer Maynard; Anderson Jones, PLLC, by Todd A. Jones and Lindsey E. Powell, for Plaintiff-Appellee Harold Ellis.

Bugg & Wolf, P.A., by William J. Wolf, for Defendant-Appellant.

COLLINS, Judge.

Defendant June Crook appeals from the trial court's orders denying certain motions as moot, dismissing her counterclaims, denying her motion for sanctions, denying her Rule 52 and 59 motions to alter or amend the order dismissing her counterclaims, and denying her Rule 60 motion for relief from the order dismissing her counterclaims. Defendant contends that the trial court erred by dismissing her counterclaims and abused its discretion by denying her Rule 52, 59, and 60 motions.

Because Defendant's complaint failed to sufficiently allege claims for slander of title and invasion of privacy, the trial court did not err by dismissing her counterclaims under Rule 12(b)(6). However, the trial court erred by dismissing her counterclaims under Rule 12(c). Furthermore, although the trial court did not abuse its discretion by denying Defendant's Rule 59 and 60 motions, the trial court abused its

discretion by denying her Rule 52 motion. We therefore affirm in part and reverse in part and remand with instructions.

I. Procedural Background

Plaintiffs Arnold Maynard and Jennifer Maynard entered into a contract with Plaintiff Harold Ellis (collectively, "Plaintiffs") to purchase a 10.001-acre tract of land ("the Property") in Bahama, North Carolina. Ellis represented to the Maynards that the Property was accessible from a 60-foot public right-of-way. However, Defendant, who owns the tract of land adjacent to the Property, claimed that the right-of-way, upon which her driveway is situated, is her property and prevented Plaintiffs from accessing the Property from the right-of-way.

Plaintiffs filed suit on 26 April 2021, seeking a temporary restraining order, preliminary injunction, and permanent injunction to prevent Defendant from impeding their access to the right-of-way. The trial court granted a temporary restraining order on 30 April 2021.

Defendant moved to dissolve the temporary restraining order and to dismiss Plaintiffs' claims pursuant to Rule 12(b)(6). Thereafter, Defendant filed an answer and counterclaims for invasion of privacy, slander of title, and unfair and deceptive trade practices. Plaintiffs moved for judgment on the pleadings pursuant to Rule 12(c) as to the relief sought in their complaint and for dismissal of Defendant's counterclaims pursuant to Rule 12(b)(6) on 30 July 2021.

Defendant filed a motion for sanctions against Ellis pursuant to Rules 33, 34, and 37 on 6 January 2022. Defendant moved for summary judgment on Plaintiffs' claims on 10 January 2022.

On 27 January 2022, Defendant voluntarily dismissed her counterclaim for unfair and deceptive trade practices. Plaintiffs voluntarily dismissed their claims without prejudice on 2 February 2022.

After hearings on 14 September 2021 and 3 February 2022,[1] the trial court entered an order on 3 February 2022 denying as moot the following: Plaintiffs' motion for judgment on the pleadings as to their own claims and as to Defendant's unfair and deceptive trade practices counterclaim,[2] Plaintiffs' motion for a preliminary injunction, Defendant's

1. No transcript of these hearings appears in the Record, but they are referenced in the trial court's orders.

2. There is no motion for judgment on the pleadings as to Defendant's unfair and deceptive practices counterclaim in the Record.

motion to dismiss, and Defendant's motion for summary judgment. The trial court entered an order on 4 February 2022 dismissing with prejudice pursuant to Rules 12(b)(6) and 12(c) Defendant's counterclaims for invasion of privacy and slander of title. On 7 February, Defendant filed "Amended Counterclaims" for invasion of privacy, slander of title, malicious prosecution, and to quiet title. By written order entered 9 February 2022, the trial court denied Defendant's motion for sanctions against Ellis.

Defendant filed a "Motion to Amend and Motion for Relief pursuant to Rules 52, 59, and 60" on 14 February 2022, moving for "Amendment pursuant to Rule 52, to Alter or Amend pursuant to Rule 59(e), and for Relief pursuant to Rule 60(b) from this [c]ourt's Order Dismissing Defendant's Counterclaims entered on February 4, 2022." Defendant's motion requested, in relevant part, that the trial court:

> 1. Enter an Order pursuant to Rule 60 of the North Carolina Rules of Civil Procedure vacating ab initio this [c]ourt's Order entered on February 4, 2022 Dismissing Defendant's Counterclaims;
>
> 2. In the alternative, vacating ab initio this [c]ourt's Order entered on February 4, 2022 and entering a new Order dismissing Defendant's Counterclaims for failing to state a claim, without findings of fact[.]

After a hearing on 23 February 2022,[3] the trial court denied the motion by written order entered 13 June 2022.

On 22 June 2022, Defendant filed a notice of appeal from the 3 February order denying motions as moot, the 4 February order dismissing Defendant's counterclaims, the 9 February order denying Defendant's motion for sanctions, and the 13 June order denying Defendant's Rule 52, 59, and 60 motions.[4]

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3. No transcript of this hearing appears in the Record.

4. Although Defendant's notice of appeal includes the 3 February order denying motions as moot and the 9 February order denying Defendant's motion for sanctions, Defendant's brief does not address these issues and they are thus deemed abandoned. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."); N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

II. Discussion

A. Motion to Dismiss

[1] Defendant first contends that the trial court erred by granting Plaintiffs' Rule 12(b)(6) motion to dismiss her counterclaims for slander of title and invasion of privacy.

A counterclaim survives the dismissal of the plaintiff's original claim. *See Jennette Fruit v. Seafare Corp.*, 75 N.C. App. 478, 482, 331 S.E.2d 305, 307 (1985). The standard of review for dismissal of a counterclaim is the same as the standard of review that governs dismissal of a complaint. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b) (2022). "In considering a motion to dismiss under Rule 12(b)(6), the Court must decide whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Izzy Air, LLC v. Triad Aviation, Inc.*, 284 N.C. App. 655, 657, 877 S.E.2d 65, 68 (2022) (quotation marks and citation omitted). "We review de novo a trial court's order on a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6)." *Bill Clark Homes of Raleigh, LLC v. Town of Fuquay-Varina*, 281 N.C. App. 1, 5, 869 S.E.2d 1, 3 (2021) (citation omitted).

1. Slander of Title

"The elements of slander of title are: (1) the uttering of slanderous words in regard to the title of someone's property; (2) the falsity of the words; (3) malice; and (4) special damages." *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 30, 588 S.E.2d 20, 28 (2003) (citations omitted).

"Facts giving rise to special damages must be alleged so as to fairly inform defendant of the scope of plaintiff's demand." *Stanford v. Owens*, 46 N.C. App. 388, 398, 265 S.E.2d 617, 624 (1980) (citation omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 9(g) (2022) ("When items of special damage are claimed each shall be averred."). "[G]eneral damages are such as might accrue to any person similarly injured, while special damages are such as did in fact accrue to the particular individual by reason of the particular circumstances of the case." *Penner v. Elliott*, 225 N.C. 33, 35, 33 S.E.2d 124, 126 (1945) (quotation marks and citations omitted). "[S]pecial damages are usually synonymous with pecuniary loss[,]" *Iadanza v. Harper*, 169 N.C. App. 776, 779, 611 S.E.2d 217, 221 (2005), and are "[t]hose which are the actual . . . result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case[.]" *Canady v. Mann*, 107 N.C. App. 252, 257, 419 S.E.2d 597, 600 (1992) (quotation marks and citation omitted).

Here, Defendant's complaint alleges the following regarding special damages:

> 47. Ms. Crook has incurred substantial expenses defending against the Temporary Restraining Order. Ms. Crook has incurred extensive attorneys' fees, surveying fees, and expert fees to date.
>
> 48. Ms. Crook is entitled to damages in excess of $25,000 arising from the wrongfully obtained Temporary Restraining Order.
>
> . . . .
>
> 75. As a result of Mr. Harold Ellis' slanderous statements regarding Ms. June Crook's title to the Crook Homestead, Ms. June Crook has suffered damages in the form of repeated intrusions unto her property by strangers who had been mislead (sic) by Mr. Ellis' false advertising and the invasion of her privacy.

The relatively few slander of title cases decided in our state establish that the slander of title must interfere with the sale of property or otherwise cause specific monetary harm. *See Cardon v. McConnell*, 120 N.C. 461, 462, 27 S.E. 109 (1897) ("[U]nless the plaintiff shows . . . a pecuniary loss or injury to himself, he cannot maintain [a slander of title] action."); *see also Selby v. Taylor*, 57 N.C. App. 119, 121-22, 290 S.E.2d 767, 769 (1982) (holding that plaintiff sufficiently alleged special damages where "because of the . . . writing published by defendants, . . . others did not bid on the property and plaintiff, as a result of that suffered a $20,000 loss").

Expenses incurred in defending against an action are not the natural and proximate consequence of the slander of title and do not constitute special damages. *See Allen v. Duvall*, 63 N.C. App. 342, 348-49, 304 S.E.2d 789, 793 (1983), *rev'd on other grounds*, 311 N.C. 245, 316 S.E.2d 267 (1984), *on reh'g*, 311 N.C. 745, 321 S.E.2d 125 (1984). In *Allen*, this Court explained:

> The plaintiffs have cross-assigned error to the court's failure to include their attorney fees as part of the damages. We believe the court was correct in refusing to do so. The plaintiffs argue that as a direct result of the slander of their title, they had to retain attorneys. If this were a proper element of damages, it should be included in every case in which a person retains an attorney as a result of

> some damage done to him. We believe the court was correct in not including legal fees as a part of the damages.

Id.

Defendant does not allege an interference with the sale of her property or specific monetary harm, but instead alleges that she "has incurred substantial expenses defending against the Temporary Restraining Order" and has "incurred extensive attorneys' fees, surveying fees, and expert fees to date." As these expenses do not constitute special damages, Defendant has failed to sufficiently allege special damages. Accordingly, the trial court did not err by granting Plaintiffs' motion to dismiss Defendant's slander of title counterclaim under Rule 12(b)(6).

2. Invasion of Privacy

The tort of invasion of privacy by intrusion into seclusion is defined as "the intentional intrusion physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . [where] the intrusion would be highly offensive to a reasonable person." *Toomer v. Garrett*, 155 N.C. App. 462, 479, 574 S.E.2d 76, 90 (2002) (quotation marks and citation omitted). "The kinds of intrusions that have been recognized under this tort include physically invading a person's home or other private place, eavesdropping by wiretapping or microphones, peering through windows, persistent telephoning, unauthorized prying into a bank account, and opening personal mail of another." *Keyzer v. Amerlink, Ltd.*, 173 N.C. App. 284, 288, 618 S.E.2d 768, 771 (2005) (quotation marks and citations omitted).

Here, Defendant's complaint alleges, in part:

> 54. As a result of Mr. Harold Ellis' false advertising, potential purchasers have entered Ms. Crook's property and approached her on her property.
>
> 55. Upon information and belief, as a result of Mr. Ellis' false assertion that Crook Driveway is actually a public right of way, many strangers have been disregarding Ms. Crook's "No Trespassing" sign near the entrance of her home and have driven down Crook Driveway and almost to her house before turning around. Upon information and belief, these were potential purchasers of the Ellis Property who were investigating the alleged public access.
>
> 56. On other occasions, strangers would approach June Crook's home and demand access to the Ellis property through Crook Driveway.

> 57. While falsely advertising the Ellis Property, Mr. Harold Ellis and his real estate agent attempted to place a "For Sale" sign at the entrance to Ms. June Crook's property, in an intentional attempt to cause strangers to travel down Crook Driveway.
>
> . . . .
>
> 64. Despite having knowledge that there was no public right of way existing alongside June Crook's Property, Harold Ellis and Arnold and Jennifer Maynard filed a Complaint . . . seeking an *ex parte* temporary restraining order and preliminary injunction restraining June Crook from the use of her Property.
>
> 65. The actions of Harold Ellis and Arnold and Jennifer Maynard constitute an invasion upon the privacy of June Crook. The actions of Harold Ellis and Arnold and Jennifer Maynard intruded upon the solitude, seclusion, private affairs and personal concerns of June Crook.
>
> 66. The actions of Harold Ellis and Arnold and Jennifer Maynard willfully, intentionally, maliciously and recklessly intruded upon the privacy of June Crook.
>
> 67. Any reasonable person would be highly offended by the constant harassment by potential purchasers and subsequent attempt to *ex parte* restrain Ms. Crook's use of her Property.
>
> 68. June Crook has been damaged by the intrusion of her privacy committed by Harold Ellis and Arnold and Jennifer Maynard.

The complaint does not allege that Plaintiffs intruded, physically or otherwise, upon Defendant's home or private affairs. While Defendant's complaint alleges that "potential purchasers" and "many strangers" have physically entered her property, Defendant cites no authority, and we find none, supporting the proposition that a claim for invasion of privacy lies where an individual, other than the individual against whom the cause of action is asserted, physically intrudes upon a defendant's home. Furthermore, we have found no authority to support Defendant's proposition that filing a lawsuit is the kind of intrusion that has been recognized under this tort.

As the allegations in Defendant's complaint failed to sufficiently state a claim for invasion of privacy, the trial court did not err by granting Plaintiffs' Rule 12(b)(6) motion to dismiss.

B. Motion for Judgment on the Pleadings

[2] Defendant contends that the trial court erred by dismissing her counterclaims pursuant to Rule 12(c) because "[t]here was no motion for judgment on the pleadings before the [c]ourt."

We review a trial court's order granting a motion for judgment on the pleadings de novo. *Benigno v. Sumner Constr., Inc.*, 278 N.C. App. 1, 3-4, 862 S.E.2d 46, 49 (2021). Rule 12(c) permits a party to move for judgment on the pleadings "[a]fter the pleadings are closed . . . ." N.C. Gen. Stat. § 1A-1, Rule 12(c) (2022). Rule 7(a) sets forth a limited list of permissible pleadings and states:

> There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a crossclaim; a third-party complaint if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. If the answer alleges contributory negligence, a party may serve a reply alleging last clear chance. No other pleading shall be allowed except that the court may order a reply to an answer or a third-party answer.

N.C. Gen. Stat. § 1A-1, Rule 7(a) (2022). The rule's express provision that "[t]here shall be . . . a reply to a counterclaim" contemplates that the pleadings do not "close" until a reply to a counterclaim is filed. *See, e.g.*, *Flora v. Home Fed. Sav. & Loan Ass'n*, 685 F.2d 209, 211 n.4 (7th Cir. 1982) ("Fed. R. Civ. P. 7(a) prescribes when the pleadings are closed. In a case such as this when, in addition to an answer, a counterclaim is pleaded, the pleadings are closed when the plaintiff serves his reply." (citation omitted)); *Doe v. United States*, 419 F.3d 1058, 1061 (9th Cir. 2005) ("[T]he pleadings are closed [under Rule 7(a)] for the purposes of Rule 12(c) once a complaint and answer have been filed, assuming . . . that no counterclaim or cross-claim is made." (citations omitted)).

Here, the trial court's order dismissed Defendant's counterclaims under Rules 12(b)(6) and 12(c). As discussed above, the trial court did not err by dismissing Defendant's counterclaims under Rule 12(b)(6). However, the trial court erred by dismissing Defendant's counterclaims under Rule 12(c) because there was no motion for judgment on the

pleadings as to Defendant's counterclaims before the court; moreover, such a motion would have been improper because the pleadings had not yet closed. Plaintiffs moved for judgment on the pleadings pursuant to Rule 12(c) as to their own claims but did not move for judgment on the pleadings as to Defendant's counterclaims. Even assuming arguendo that Plaintiffs' Rule 12(c) motion purported to move for judgment on the pleadings as to Defendant's counterclaims, dismissing Defendant's counterclaims under Rule 12(c) was improper because Plaintiffs had not replied to Defendant's counterclaims, and thus the pleadings had not yet closed. Accordingly, the trial court erroneously dismissed Defendant's counterclaims pursuant to Rule 12(c).

C. Rule 52, 59, and 60 Motions

[3] Defendant next contends that the trial court abused its discretion by denying her "Motion to Amend and Motion for Relief pursuant to Rules 52, 59, and 60[.]" (capitalization altered). Specifically, Defendant argues that "[t]he form of the trial court's order of dismissal is clearly erroneous, inappropriate, and highly prejudicial" in that it "contains clearly erroneous factual statements inconsistent with [Defendant's] allegations and erroneous statements of law that are inappropriate to include in such an order."

A challenge to a trial court's decision to grant or deny relief pursuant to N.C. Gen. Stat. § 1A-1, Rules 52, 59, or 60 is reviewed under an abuse of discretion standard. *Burnham v. S&L Sawmill, Inc.*, 229 N.C. App. 334, 346, 749 S.E.2d 75, 84 (2013). "An abuse of discretion is shown only when the court's decision is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Paynich v. Vestal*, 269 N.C. App. 275, 278, 837 S.E.2d 433, 436 (2020) (quotation marks and citation omitted).

1. Rule 52 Motion

Rule 52(b) governs amendments to findings of fact made by a trial court and states, "Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly." N.C. Gen. Stat. § 1A-1, Rule 52(b) (2022). "The primary purpose of a Rule 52(b) motion is to enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court." *Branch Banking & Tr. Co. v. Home Fed. Sav. & Loan Ass'n*, 85 N.C. App. 187, 198-99, 354 S.E.2d 541, 548 (1987). "If a trial court has omitted certain essential findings of fact, a motion under Rule 52(b) can correct this oversight and avoid remand by the appellate court for further findings." *Id.* (citation

omitted). By its plain language, Rule 52(b) also allows the trial court to amend, and thus omit, erroneous findings.

The purpose of the entry of findings of fact by a trial court is to resolve contested issues of fact, to make clear what was decided for purposes of res judicata and estoppel, and to allow for meaningful appellate review. *See War Eagle, Inc. v. Belair*, 204 N.C. App. 548, 551, 694 S.E.2d 497, 500 (2010); *Greensboro Masonic Temple v. McMillan*, 142 N.C. App. 379, 382, 542 S.E.2d 676, 678 (2001). As resolution of evidentiary conflicts is not within the scope of Rule 12 and findings of fact in a Rule 12 order are not binding on appeal, an order granting a Rule 12(b)(6) motion to dismiss generally should not include findings of fact. *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979); *M Series Rebuild, LLC v. Town of Mount Pleasant*, 222 N.C. App. 59, 63, 730 S.E.2d 254, 258 (2012); *Tuwamo v. Tuwamo*, 248 N.C. App. 441, 446, 790 S.E.2d 331, 336 (2016).

The trial court may, however, recite the undisputed facts that form the basis of its decision. *See, e.g.*, *Capps v. Raleigh*, 35 N.C. App. 290, 292, 241 S.E.2d 527, 529 (1978) (opining that, when deciding a motion for summary judgment, "in rare situations it can be helpful for the trial court to set out the *undisputed* facts which form the basis for his judgment"); *see also Wiley v. United Parcel Serv., Inc.*, 164 N.C. App. 183, 189, 594 S.E.2d 809, 813 (2004) ("[F]indings and conclusions do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judgment." (quotation marks and citation omitted)). When this is done, any findings should clearly be denominated as "uncontested facts" and not as the resolution of contested facts. *War Eagle*, 204 N.C. App. at 551-52, 694 S.E.2d at 500 (commenting on the presence of detailed findings of fact in a trial court's order granting summary judgment).

Because an order granting a Rule 12(b)(6) motion to dismiss generally should not include findings of fact, a Rule 52(b) motion requesting that the trial court add such findings is improper. However, a Rule 52(b) motion to remove erroneous findings of fact is not improper and is reviewed for an abuse of discretion. *See Burnham*, 229 N.C. App. at 346, 749 S.E.2d at 84.

Here, the trial court made extensive findings of fact that go beyond a mere recitation of undisputed facts forming the basis of its decision. Instead, the findings mischaracterize the allegations set forth in Defendant's complaint and resolve evidentiary conflicts in a manner that decides ownership of the Property, which is the central issue in the

action Plaintiffs voluntarily dismissed, thereby creating the danger of a future claim of collateral estoppel.

Based on this unique set of procedural and factual circumstances, the trial court abused its discretion by denying Defendant's Rule 52(b) motion requesting that the court "enter[] a new [o]rder dismissing Defendant's Counterclaims for failing to state a claim, without findings of fact[.]"

2. Rule 59 Motion

Rule 59 addresses new trials and amendments to judgments and states, "[a] new trial may be granted to all or any of the parties and on all or part of the issues" for any of the nine grounds enumerated in the statute. N.C. Gen. Stat. § 1A-1, Rule 59(a) (2022). Additionally, a party may move to "amend the judgment under section (a) of this rule . . . ." N.C. Gen. Stat. § 1A-1, Rule 59(e) (2022). However, "Rule 59(e) is available only on the grounds enumerated in Rule 59(a) and they apply only after a trial on the merits." *Doe v. City of Charlotte*, 273 N.C. App. 10, 19, 848 S.E.2d 1, 8 (2020). Thus, "litigants cannot bring a motion under Rule 59(e) to seek reconsideration of a pre-trial ruling by the trial court." *Id.*

Here, as there was no trial on the merits and the order dismissing Defendant's counterclaims was issued in response to a pre-trial motion, the trial court did not abuse its discretion by denying Defendant's Rule 59 motion.

3. Rule 60(b) Motion

Rule 60(b) provides for relief from a judgment or order for various reasons, including mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, and "[a]ny other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2022).

Defendant asserts that "[t]he order denying the motion to amend or alter the order of dismissal also failed to address [Defendant's] request to be allowed to amend her counterclaims." Defendant's amended counterclaims were filed on 7 February, after the order dismissing her counterclaims was entered on 4 February. Because Defendant's counterclaims were properly dismissed under Rule 12(b)(6) before she filed her amended counterclaims, the trial court did not abuse its discretion by not addressing Defendant's request to amend her counterclaims.

III. Conclusion

The trial court did not err by granting Plaintiffs' motion to dismiss Defendant's counterclaims under Rule 12(b)(6) because Defendant's

complaint failed to sufficiently state claims for slander of title and invasion of privacy. Furthermore, the trial court did not abuse its discretion by denying Defendant's Rule 59 and 60 motions. Accordingly, we affirm in part. However, the trial court erred by dismissing Defendant's counterclaims under Rule 12(c) and abused its discretion by denying Defendant's Rule 52 motion. Accordingly, we reverse in part and remand to the trial court with instructions to enter a new order summarily dismissing Defendant's counterclaims under Rule 12(b)(6).

AFFIRMED IN PART; REVERSED IN PART AND REMANDED WITH INSTRUCTIONS.

Chief Judge STROUD and Judge FLOOD concur.

NORTH CAROLINA STATE BOARD OF EDUCATION, PETITIONER
v.
MATTHEW J. MINICK, RESPONDENT

No. COA22-303

Filed 20 June 2023

Administrative Law—judicial review—service—through party's attorney

In a case involving a teacher challenging his suspension from his job, where petitioner (N.C. Board of Education) sought judicial review of the administrative law judge's final decision reversing the teacher's suspension, petitioner's attempted service upon the teacher—through the teacher's attorney, at the attorney's address—was insufficient to establish personal jurisdiction pursuant to N.C.G.S. § 150B-46, which requires service upon all parties of record to the proceedings. The teacher's apparent directives that he be served through his attorney did not negate the fact that strict compliance with N.C.G.S. § 150B-46 is required for proper service.

Appeal by petitioner from order entered 21 September 2021 by Judge Mark E. Klass in Superior Court, Orange County. Heard in the Court of Appeals 4 October 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Zach Padget, for petitioner-appellant.

Mary-Ann Leon for respondent-appellee.

The McGuinness Law Firm, by J. Michael McGuinness and Verlyn Chesson Porte, for amicus curiae N.C. Association of Educators.

STROUD, Chief Judge.

Petitioner appeals an order granting respondent's motion to dismiss. Because petitioner failed to properly serve respondent, we affirm.

I. Background

A detailed factual background is not needed for this case as the only issue on appeal is service. In relevant part, petitioner is the North Carolina Board of Education ("Board"), and respondent ("Mr. Minick") is a North Carolina teacher. Respondent was suspended from his job as a teacher and filed a "Petition for a Contested Case Hearing" ("CCH Petition") with the Office of Administrative Hearings ("OAH") in August 2020. On the CCH Petition form, Mr. Minick printed the address of his attorney in the space labeled "Print your full address," and in the space labeled "Print your name" Mr. Minick printed "Matthew J. Minick, by and through his attorney, Narendra K. Ghosh[.]" In September 2020, on the same day, Attorney Ghosh withdrew and Mr. Minick's second counsel, Attorney Mary-Ann Leon, filed a Notice of Appearance.

In January of 2021, an Administrative Law Judge ("ALJ") heard the CCH Petition. On 23 March 2021, the ALJ filed a final decision reversing the Board's suspension of Mr. Minick. On 21 April 2021, the Board then filed a Petition for Judicial Review of the ALJ's final decision ("Petition"). The Certificate of Service for the Petition was filed 23 April 2021, and indicates the Petition was served on OAH and Mr. Minick in care of his attorney Mary-Ann Leon:

> Matthew Minick
> c/o Mary-Ann Leon[1]
> The Leon Law Firm, P.C.
> 704 Cromwell Drive, Suite E
> Greenville, NC 27858

1. "C/o" in a mailing address means the enclosed document is addressed to the first party listed and has been placed "in the care of" the second party listed, to be forwarded to the first party. *See, e.g.*, *Huggins v. Hallmark Enterprises, Inc.*, 84 N.C. App. 15, 17-18, 351 S.E.2d 779, 780-81 (1987) (using "c/o" to send mail to the second listed party, to be directed to the first listed party).

Nothing in the record indicates the Board attempted to serve the Petition on Mr. Minick in any manner other than through his attorney.

On 9 June 2021, Mr. Minick filed a motion to dismiss the Petition because he was not served but rather only his attorney had been served. Mr. Minick requested that the Petition be "dismissed for lack of personal jurisdiction" under North Carolina General Statute § 150B-46.[2]

The Board filed a response to Mr. Minick's motion on 25 June 2021. The response asserted service was adequate because the CCH Petition listed Mr. Minick's own name, "by and through his attorney" on the line for his name. Further, Mr. Minick's second attorney's Notice of Appearance filed with OAH directed that any documents filed should be served on her, not on Mr. Minick:

> MARY-ANN LEON, of The Leon Law Firm, P.C., gives notice to the Court of her appearance on behalf of the Petitioner in this matter, MATTHEW J. MINNICK, [sic] and requests all future documents, calendars, or other information relating to this matter, either transmitted by the court or by counsel, be served upon her.

The Board asserted its service upon Ms. Leon was sufficient for personal jurisdiction.

On 21 September 2021, without findings of fact or conclusions of law, the trial court granted Mr. Minick's motion to dismiss:

> The Court, having considered the relevant pleadings in this matter, the arguments of the parties' counsel, and the proffered and other relevant authorities, and, in particular, having reviewed N.C. Gen. Stat. § 150B-46, GRANTS [Mr. Minick's] Motion to Dismiss.

The Board appealed.

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2. Mr. Minick's motion to dismiss also cited North Carolina Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction but did not cite North Carolina Rule of Civil Procedure 12(b)(5) for insufficiency of service of process. This appears to be a procedural distinction without a difference. In this case, North Carolina General Statute § 150B-46 governs service, but according to our precedent this statute is a jurisdictional rule; failure to effect service pursuant to North Carolina General Statute § 150B-46 deprives the trial court of personal jurisdiction. *See, e.g.*, *Tobe-Williams v. New Hanover County Bd. of Educ.*, 234 N.C. App. 453, 460-61, 759 S.E.2d 680, 687 (2014) (concluding that, although the petitioner failed to serve the petition pursuant to North Carolina General Statute § 150B-46, the respondent board waived the issue of lack of personal jurisdiction by submitting to the jurisdiction of the trial court by arguing the merits of the case at the hearing).

II. Service

The Board contends that by serving Mr. Minick through his attorney, the service was "consistent with [Mr. Minick's] own directives in this matter[.]" Mr. Minick counters that service on his attorney does not satisfy the conditions of North Carolina General Statute § 150B-46.

A. Standard of Review

We review the Board's appeal *de novo* for whether Mr. Minick was properly served:

> Plaintiff asserts the trial court erred by granting Defendant's motion to dismiss for lack of personal jurisdiction. This Court has previously held "[w]here there is no valid service of process, the court lacks jurisdiction over a defendant, and a motion to dismiss pursuant to Rule 12(b) should be granted." *Davis v. Urquiza*, 233 N.C. App. 462, 463-64, 757 S.E.2d 327, 329 (2014) (citation omitted). "On a motion to dismiss for insufficiency of process where the trial court enters an order without making findings of fact, our review is limited to determining whether, as a matter of law, the manner of service of process was correct." *Thomas & Howard Co. v. Trimark Catastrophe Servs.*, 151 N.C. App. 88, 90, 564 S.E.2d 569, 571 (2002) (alteration and citations omitted).

Patton v. Vogel, 267 N.C. App. 254, 256-57, 833 S.E.2d 198, 201 (2019). Further, questions of statutory interpretation are questions of law also reviewed *de novo*. *Applewood Properties, LLC v. New South Properties, LLC*, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013).

B. Service under North Carolina General Statute § 150B-46

Both parties agree that Mr. Minick was to be served pursuant to North Carolina General Statute § 150B-46 which states in relevant part:

> Within 10 days after the petition is filed with the court, the party seeking the review shall serve copies of the petition by personal service or by certified mail upon all who were *parties of record* to the administrative proceedings. Names and addresses of such parties shall be furnished to the petitioner by the agency upon request.

N.C. Gen. Stat. § 150B-46 (2021) (emphasis added).

Strict compliance with the service requirement of North Carolina General Statute § 150B-46 is necessary for the trial court to acquire personal jurisdiction over an appeal from an administrative agency:

> For seventy years, our Supreme Court has held: there can be no appeal from the decision of an administrative agency except pursuant to specific statutory provisions therefore. Obviously then, the *appeal must conform to the statute granting the right* and regulating the procedure.

Aetna Better Health of North Carolina, Inc. v. North Carolina Department of Health and Human Services, 279 N.C. App. 261, 268, 866 S.E.2d 265, 270 (2021) (emphasis in original) (citation, quotation marks, and brackets omitted). Service requirements under North Carolina General Statute § 150B-46 are jurisdictional; a case is properly dismissed where a party is not properly served. *Id.* at 269, 866 S.E.2d at 270 (citation omitted). For the trial court to exercise personal jurisdiction over Mr. Minick, as a "part[y] of record to the administrative proceedings," the Board was required to serve the Petition upon Mr. Minick within 10 days of the Petition being filed with the trial court, by personal service or certified mail. N.C. Gen. Stat. § 150B-46.

There is no dispute Mr. Minick was a party to the administrative proceeding and service upon him was required. The dispositive question here is whether service *upon Mr. Minick's attorney*, by certified mail, constitutes service *upon Mr. Minick* for purposes of satisfying the jurisdictional prerequisites set forth in North Carolina General Statute § 150B-46: if so, Mr. Minick was properly served; if not, Mr. Minick was not properly served.

We first address the parties' arguments regarding *Follum v. North Carolina State University*, 198 N.C. App. 389, 679 S.E.2d 420 (2009), and *Butler v. Scotland County Board of Education*, 257 N.C. App. 570, 811 S.E.2d 185 (2018); the cases relied upon by Mr. Minick in his motion to dismiss the Petition. The Board seeks to distinguish these cases and asserts "[t]his Court's holdings in the cases of *Follum* and *Butler* do not support dismissal of the Board's Petition" because "[t]he facts in *Follum* and *Butler* are inapplicable to this case." The Board argues that, although the petitioner in *Follum* served his petition for judicial review on the respondent's attorney of record in that case, *see Follum*, 198 N.C. App. at 391, 679 S.E.2d at 421, and although the petitioner in *Butler* also served his petition for judicial review upon the attorney for the respondent, *see Butler*, 257 N.C. App. at 571, 811 S.E.2d at 187, these cases are distinguishable from the present case because the Board "did serve [Mr.

Minick] with a copy of its Petition" when the Board "specifically directed its certified mailing to [Mr. Minick] *at his attorney's address*," (emphasis added), consistent with Mr. Minick's "directive" to serve him at his second attorney's address as established by his use of his first attorney's address on the CCH Petition. The Board also notes Mr. Minick's motion to dismiss shows Mr. Minick had actual knowledge of the Petition. Mr. Minick argues both cases are controlling and not distinguishable. Mr. Minick asserts "[i]n both cases, as here, the dispositive issue was that the attorney [served] was not the party." (Brackets added.)

Although both *Follum* and *Butler* are cases where the petitioner was the individual party, and not the respective licensing board or employer, the procedural posture for both cases is similar. In *Follum*, the petitioner filed a contested case petition alleging North Carolina State University ("NCSU"), the respondent, demoted him without cause and failed to post employment positions he qualified for. *Follum*, 198 N.C. App. at 390-91, 679 S.E.2d at 421. OAH dismissed the petition after NCSU filed a motion pursuant to North Carolina Rule of Civil Procedure 12(b) to dismiss for lack of personal jurisdiction, subject matter jurisdiction, and failure to state a claim. *Id.* at 391, 679 S.E.2d at 421. OAH mailed a copy of the decision to Mr. Follum and to NCSU's attorney of record, Ms. Potter. *Id.*

Mr. Follum then filed a petition for judicial review seeking review of the decision. *Id.* Mr. Follum served the petition on NCSU's attorney but "did not serve respondent's process agent nor any other individual employed by respondent." *Id.* NCSU filed a motion to dismiss for insufficiency of process "asserting that petitioner had failed to properly serve the [p]etition for [j]udicial [r]eview." *Id.* Mr. Follum then served the petition on NCSU's process agent. *Id.* at 391, 679 S.E.2d at 421-22. The trial court held a hearing and concluded, among other issues not applicable to this appeal, that NCSU's attorney of record "was not an individual who could properly receive service." *Id.* at 391-92, 679 S.E.2d at 422. Mr. Follum appealed to this Court. *Id.* at 392, 679 S.E.2d at 422.

On appeal, Mr. Follum asserted he properly served NCSU the petition by serving NCSU's attorney of record, although by the time he later did serve NCSU's process agent the petition was untimely. *Id.* This Court disagreed. *Id.* After a review of *Davis v. North Carolina Dept. of Human Resources*, 126 N.C. App. 383, 485 S.E.2d 342 (1997), *aff'd in part*, *rev'd in part on other grounds*, 349 N.C. 208, 505 S.E.2d 77 (1998) (affirmed in part as to issue of service), this Court determined:

> that in order to comply with section 150B-46, at the very least, petitioner did have to serve said petition upon a

> "person at the agency[,]" i.e., a person at the agency that was a party to the administrative proceedings. [*Davis*, 126 N.C. App.] at 388, 485 S.E.2d at 345. Here, *as respondent's counsel of record*, Ms. Potter was charged with representing respondent's interests; however, Ms. Potter is an employee of the Department of Justice and a member of the Attorney General's staff, not of NCSU. As such, as set out in *Davis*, Ms. Potter does not qualify as a "person at the agency[,]" and service of the Petition for Judicial Review upon her does not comply with section 150B-46. *Id.*

Follum, 198 N.C. App. at 394, 679 S.E.2d at 423 (emphasis added). This Court determined serving a party's attorney is not sufficient under North Carolina General Statute § 150B-46. *See id.*

Mr. Follum also argued, similar to the Board's argument here, that service in *Follum* satisfied North Carolina General Statute § 150B-46 because he was unable to acquire a physical street address to which he could mail the petition; he was only able to find a post office box address. *Id.* Mr. Follum claimed a private letter carrier would not deliver to a post office box, and a provision of Rule of Civil Procedure 4 therefore allowed service upon NCSU's attorney. *Id.* This Court rejected the argument that service on a party's attorney was sufficient when a petitioner could not secure a mailing address for a respondent. *Id.* First, the issue was controlled by North Carolina General Statute § 150B-46, not Rule of Civil Procedure 4(j)(4)(c), and second, the record indicated "petitioner was aware of [NCSU's process agent's] physical street address[.]" *Id.* at 395, 679 S.E.2d at 424. The Court ultimately concluded "petitioner's service of his [p]etition for [j]udicial [r]eview upon Ms. Potter . . . did not comply with the mandates of section 150B-46 *because Ms. Potter is not a party of record to the administrative proceedings*," *id.* (emphasis added), even though she had been "charged with representing [NCSU's] interests," *id.* at 394, 679 S.E.2d at 423, and the petitioner failed to serve the petition on any proper party within the 10-day window provided in North Carolina General Statute § 150B-46. *Id.* at 395, 679 S.E.2d at 424. Service under North Carolina General Statute § 150B-46 requires service upon a party of record, and not upon an attorney representing the party's interests. *See id.*

This Court's analysis in *Butler* is equally instructive. *See generally Butler*, 257 N.C. App. 570, 811 S.E.2d 185. The petitioner, Mr. Butler, was a career teacher; he was placed on suspension and the school board later terminated his employment during a review hearing. *Id.* at 571, 811 S.E.2d at 187. Mr. Butler filed a "Notice of Appeal and Petition for Judicial

Review" from the hearing before the school board. *Id.* The school board filed a motion to dismiss asserting Mr. Butler failed to properly serve the petition upon the school board. *Id.* The trial court held a hearing, then entered an order granting the motion to dismiss, and Mr. Butler appealed to this Court. *Id.*

After a brief discussion determining that North Carolina General Statute § 150B-46 controlled the issue of service, this Court concluded that: "It is undisputed that Butler's petition failed to comply with N.C. Gen. Stat. § 150B-46 in several respects. . . . Second, Butler failed to personally serve the Board within ten days of the filing of the petition by means of either personal service or certified mail." *Id.* at 573, 811 S.E.2d at 188. After further review of the applicability of provisions of the Administrative Procedures Act in school board appeals, this Court, citing *Follum*, 198 N.C. App. at 395, 679 S.E.2d at 424, held the petitioner's "appeal was deficient in" the same manner because the petitioner:

> failed to comply with N.C. Gen. Stat. § 150B-46's service requirements in that instead of personally serving the Board with his petition within the ten-day time limit he *simply served a copy of his petition upon the attorney for the Board*. Thus, his petition for judicial review was properly dismissed by the trial court.

Butler, 257 N.C. App. at 578, 811 S.E.2d at 191 (emphasis altered).

While facts of these cases vary, as noted by the Board, the dispositive issue does not. In each case, the petitioners failed to comply with North Carolina General Statute § 150B-46 because they failed to personally serve respondents as parties to the administrative proceedings below but instead served an attorney representing the respondents. Although service on an attorney of record would be appropriate in many other types of cases under Rule 4 of the North Carolina Rules of Civil Procedure, North Carolina General Statute § 150B-46 controls service in this context. *See Davis*, 126 N.C. App. at 388, 485 S.E.2d at 345 (" '[W]here one statute deals with a particular subject or situation in specific detail, while another statute deals with the subject in broad, general terms, the particular, specific statute will be construed as controlling, absent a clear legislative intent to the contrary.' *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 154-55, 423 S.E.2d 747, 751 (1992). In the present case, G.S. 150B-46 deals with the service of a petition for judicial review of an agency decision, while Rule 4 applies generally to service in all civil matters. Therefore, since G.S. 150B-46 is more specific and there is no legislative intent to the contrary, its terms control.").

Here, the Board only "served" Mr. Minick by mailing a copy of the Petition to his attorney's address. The Board argues that service upon Mr. Minick's second attorney was appropriate because Mr. Minick "directed" the Board to do so by listing his first attorney's address on the original CCH Petition. The Board argues Mr. Minick's decision to print his first attorney's address on the line labeled "Print your full address here" on the CCH Petition was a "directive" to serve Mr. Minick at that address, or apparently any future counsel's address. In the cases discussed above, the attorneys who were served all had appeared in the proceedings and were already representing the respondents, but this Court in each case held service upon the attorney was not sufficient. *See Butler*, 257 N.C. App. at 578, 811 S.E.2d at 191; *Follum*, 198 N.C. App. at 395, 679 S.E.2d at 424. Thus, the mere appearance of the attorney as counsel in the case does not constitute a "directive" to serve the attorney for purposes of North Carolina General Statute § 150B-46. The CCH Petition does not include any language to indicate that, by printing an address other than his own on the CCH Petition, Mr. Minick waived the statutory service requirements in North Carolina General Statute § 150B-46. *See Aetna*, 279 N.C. App. at 268, 866 S.E.2d at 270 (noting that after the petitioner asserted an agreement existed for counsel to serve all pleadings via email, "[t]he superior court explicitly rejected these assertions and found, 'there was no such agreement' and 'with respect to this judicial review proceeding in particular, there was no evidence or argument that the Department or any other party agreed to waive the statutory service requirements necessary to vest jurisdiction in the superior court for a petition for judicial review' "). The fact that the Board "directed" the Petition to Mr. Minick after mailing it to his attorney's office does not change the fact that the Board only sent a copy of the Petition to Mr. Minick's attorney, but not Mr. Minick.[3]

The Board also noted, "Moreover, [Mr. Minick's] Motion to Dismiss acknowledged timely receipt of the Board's Petition." But in each case discussed above, it appears the respondent had actual notice of the petitions for review. *See Butler*, 257 N.C. App. at 571, 811 S.E.2d at 187; *Follum*, 198 N.C. App. at 391, 679 S.E.2d at 421-22. Even if Mr. Minick had actual notice of the Petition, this notice does not render service upon his attorney compliant with North Carolina General Statute § 150B-46. *See Butler*, 257 N.C. App. at 571, 811 S.E.2d at 187; *Follum*, 198 N.C. App. at 391, 679 S.E.2d at 421-22.

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3. There was no dispute regarding Mr. Minick's address or the Board's knowledge of his address. The record shows the Board previously served Mr. Minick correspondence related to his license suspension at Mr. Minick's home address.

Strict compliance with North Carolina General Statute § 150B-46 is required for proper service of a party, and without such compliance there is no personal jurisdiction. *Aetna*, 279 N.C. App. at 268-69, 866 S.E.2d at 270 (determining service upon counsel was inadequate to serve a party under North Carolina General Statute § 150B-46). Accordingly, the trial court correctly concluded Mr. Minick was not properly served and thus granted his motion to dismiss.

III. Conclusion

Service upon Mr. Minick's attorney did not satisfy the North Carolina General Statute § 150B-46 service requirement. We affirm the trial court's order granting Mr. Minick's motion to dismiss.

AFFIRMED.

Judges MURPHY and GORE concur.

SOUTHLAND NATIONAL INSURANCE CORPORATION IN REHABILITATION, BANKERS LIFE INSURANCE COMPANY IN REHABILITATION, COLORADO BANKERS LIFE INSURANCE COMPANY, IN REHABILITATION, AND SOUTHLAND NATIONAL REINSURANCE CORPORATION, IN REHABILITATION, PLAINTIFFS

v.

GREG E. LINDBERG, GLOBAL GROWTH HOLDINGS, INC. F/K/A ACADEMY ASSOCIATION, INC., AND NEW ENGLAND CAPITAL, LLC, DEFENDANTS

No. COA22-1049

Filed 20 June 2023

1. Contracts—memorandum of understanding—restructuring of insolvent insurers—severability of illegal provision

In an action brought by a group of insolvent insurers (plaintiffs) against a business owner and his company (defendants), where defendants bought out plaintiffs, caused $1.2 billion held for plaintiffs' policyholders to be invested into defendants' non-insurance affiliate companies, entered into a "Memorandum of Understanding" (MOU) with plaintiffs memorializing a restructuring plan to facilitate repayment of plaintiffs' debts, and then failed to complete the restructuring plan by the deadline under the MOU, the trial court—ruling in favor of plaintiffs on their breach of contract claim—did not err in enforcing the remainder of the MOU after severing one of its unenforceable provisions (regarding the amendment of loan

agreements between plaintiffs and defendants' affiliated companies). The validity of the MOU's remaining provisions did not depend upon the unenforceable provision, nor did the unenforceable provision constitute a "main purpose" or an "essential feature" as defined in the MOU. Further, the inclusion of a severability clause in the MOU suggested that the parties intended the MOU to be divisible.

2. Fraud—fraudulent inducement—memorandum of understanding—restructuring of insolvent insurers—no due diligence—reasonable reliance

In an action brought by a group of insolvent insurers (plaintiffs) against a business owner and his company (defendants), where defendants bought out plaintiffs, caused $1.2 billion held for plaintiffs' policyholders to be invested into defendants' non-insurance affiliate companies, entered into a "Memorandum of Understanding" (MOU) with plaintiffs memorializing a restructuring plan to facilitate repayment of plaintiffs' debts, and then failed to complete the restructuring plan by the deadline under the MOU, the trial court properly held defendants liable for fraudulently inducing plaintiffs to enter into the MOU and two other related agreements. The record showed that defendants made representations about their ability to perform under the MOU while knowing that performance under the MOU was impossible, and plaintiffs relied on those representations when entering into the MOU and other agreements. Further, although plaintiffs failed to conduct due diligence before entering these agreements, their reliance on defendants' representations was reasonable where: (1) the duty of due diligence applicable to sophisticated business entities in real property sales transactions did not apply to plaintiffs, (2) discovery of defendants' fraud could not have been easily verified, and (3) defendants were in the best position to know whether they could perform under the MOU's terms.

3. Damages and Remedies—fraud—compensatory and punitive damages—in relation to specific performance on breach of contract claim—election of remedies—judgment not self-executing

In an action brought by a group of insolvent insurers (plaintiffs) against a business owner and his company (defendants), who bought out plaintiffs and then failed to carry out a debt restructuring plan for plaintiffs under an agreement between the parties, the trial court—which awarded the remedy of specific performance on plaintiffs' breach of contract claim—erred in declining to award compensatory and punitive damages on plaintiffs' claim for fraud.

Although plaintiffs had elected the remedy of specific performance under the agreement, the doctrine of election of remedies did not bar plaintiffs from recovering both specific performance and monetary damages because each remedy related to a separate wrongdoing by defendants (breach of contract and fraud, respectively). Furthermore, because the trial court's judgment conditioned the assessment of compensatory damages on whether the appellate court determined that specific performance was an available remedy, the judgment was not self-executing and therefore was vacated (as to remedies available to plaintiffs on their fraud claim).

Appeal by defendants and cross-appeal by plaintiffs from order and judgment entered 18 May 2022 by Judge A. Graham Shirley II in Wake County Superior Court. Heard in the Court of Appeals 26 April 2023.

Fox Rothschild by Matthew Nis Leerberg, Troy D. Shelton, Nathan W. Wilson for petitioner-appellants, cross-appellees.

Condon Tobin Sladek Thorton PLLC by Aaron Z. Tobin for petitioner-appellants, cross-appellees.

Williams Mullen by Wes J. Camden, Caitlin M. Poe, Lauren E. Fussell for respondent-appellees, cross-appellants.

FLOOD, Judge.

I. Facts and Procedural Background

Southland National Insurance Corporation, Bankers Life Insurance Company, Colorado Bankers Life Insurance Company, and Southland National Reinsurance Corporation (collectively "Plaintiffs") are insolvent insurers who were purchased by Greg. E. Lindberg ("Lindberg") in 2014. Lindberg, along with Global Growth Holdings, Inc., formerly known as Academy Association, Inc. and New England Capital, LLC (collectively, "Defendants"), appeal from the trial court's order that held Defendants liable for breach of contract and fraud. Plaintiffs cross-appeal on the narrow issue of whether the trial court erred in failing to award them compensatory and punitive damages in addition to specific performance. The facts that underlie the case are as follows.

The Plan

In 2014, Lindberg re-domesticated Plaintiffs to North Carolina in order to take advantage of this State's favorable regulations. Prior to this

re-domestication, acting as owner of Plaintiffs, Lindberg made a special agreement with former Commissioner of Insurance, Wayne Goodwin, allowing Lindberg to invest up to forty percent of Plaintiffs' assets into affiliated business entities. Lindberg then invested up to forty percent of Plaintiffs' money into the purchase of other, non-insurance companies, also owned by Lindberg. Simply put, Lindberg created a scheme in which he caused $1.2 billon held for Plaintiffs' policyholders to be invested into other non-insurance companies that he also owned or controlled.

In November 2016, Wayne Goodwin lost his seat as Commissioner of Insurance to Mike Causey (the "Commissioner"), who reduced the cap on affiliated investments from forty percent to ten percent. Lindberg struggled to untangle his affiliated investments and, as the deadline for diversification drew near, the North Carolina Department of Insurance (the "NCDOI") grew concerned that there would be a "mismatch between investments and policyholder liabilities." In other words, because Lindberg had invested so much of Plaintiffs' money into affiliated companies, the NCDOI worried that Plaintiffs might experience a shortfall on their obligation to pay individual policyholders.

Upon realizing an impending shortfall, on 18 October 2018, the Commissioner, Plaintiffs, and Lindberg entered into a Consent Order placing Plaintiffs under administrative supervision. The NCDOI placed an out-of-state company, Noble Consulting Services ("Noble"), in charge of the administrative supervision with Noble's CEO and owner, Mike Dinius ("Dinius") as the main point of contact. During the period of Administrative Supervision, Defendants agreed to deadlines by which they were required to reduce their affiliated investments. Dinius conducted an analysis and concluded it would be virtually impossible for those deadlines to be met. In an effort to avoid the shortfall, in May 2019 Plaintiffs agreed to negotiate a restructuring of the affiliated business entities' obligations. The negotiations around restructuring resulted in a Memorandum of Understanding (the "MOU"), the enforceability of which is central to this case.

While negotiating the terms of the MOU, Defendants maintained total access and control over the portfolios of their affiliated companies—which, by the terms of the MOU were called Specified Affiliated Companies ("SACs"). During this time, Plaintiffs had no equity interest, control, or visibility into the SACs or several tiers of holding companies above them, though they could have asked for that information at any time. Plaintiffs opted to rely on the representations and warranties provided by Defendants. Dinius and members of Plaintiffs' management team were aware that some of the SACs had obligations to third

parties, but trusted Defendants' representations and warranties regarding their ability to uphold the terms of the MOU, regardless of those obligations. When asked at trial if during the course of negotiating the MOU, Defendants ever said "[h]ey, Mr. Dinius, look, you know, we're not sure everything in here is right so don't hold us to it," Dinius replied "[n]o, they did not." Dinius further stated that the representations and warranties made in the MOU were "very important[,]" and "[s]ince Lindberg controlled all of these entities, we were relying on him to tell us if he could effectuate this or not."

On 27 June 2019, the parties entered into several agreements—the MOU, an Interim Amendment to Loan Agreement ("IALA"), and a Revolving Credit Agreement (the "Revolver"). The IALA provided debt relief to Defendants of more than $100 million by deferring interest payments for a period of six months and modifying the underlying loans' interest rates and maturity dates, effectively allowing Defendants more time to repay the loans. Meanwhile, under the terms of the Revolver, Plaintiff Colorado Bankers Life Insurance Company provided a $40 million revolving line of credit to a company owned by Defendants.

The MOU

The MOU, in essence, was an agreement to adjust and restructure debts to facilitate repayment, requiring Lindberg to relinquish control of the SACs by making them subsidiaries of a New Holding Company (the "NHC"). The NHC would be managed by an independent board of qualified individuals whose primary goal would be protecting the best interests of Plaintiffs' policyholders.

Of multiple opening recitals in the MOU, one states the parties . . .

> intend that this MOU and the transactions contemplated herein will serve to protect the best interests of the policyholders of each of the North Carolina Insurance Companies . . . [.] In so doing, the Parties also intend to increase the long-term equity value of the [SACs], so long as it is consistent with the protection of the best interest of the Policyholders and in accordance with North Carolina law.

After the recitals, the MOU enumerated four Articles. Article I bound the parties to execute and deliver the Interim Loan Amendments attached to the MOU, a document that granted debt relief to Defendants. Article II titled "Global Restructuring" sought to restructure most of the revenue-generating businesses within Lindberg's portfolio of companies

that owed money to Plaintiffs. Under Article II, the NHC would use the revenue from these companies in Lindberg's portfolio to pay down the debts owed to Plaintiffs. Importantly, Article II also required the parties to restructure the SACs "to become subsidiaries, either directly or indirectly," of the NHC "on or before [30 September 2019]." Article III titled "Global Loan Amendments" allowed the NHC to make additional, future amendments to the loans on which the SACs were the ultimate borrowers, ensuring that any new loans entered into had protections and benefits for Lindberg. The MOU did not require that Article II and Article III be implemented contemporaneously.

Finally, Article IV titled "Additional Terms and Conditions" contained representations and warranties that:

> a. Each of the Recitals, Schedules, and Exhibits to this MOU are true and accurate in all respects;
>
> . . .
>
> e. The execution of the MOU and the consummation of the transaction set forth in the MOU do not violate any law;
>
> . . .
>
> g. The execution of the MOU and the consummation of the transactions set forth in the MOU do not result in a breach of, constitute a default under, or result in the acceleration of any contract to which any of them is a party or is bound or to which any of their assets are subject[.]
>
> h. The execution of the MOU and the consummation of the transactions set forth in the MOU do not create in any party the right to accelerate, terminate, modify, cancel, or require any notice or consent under any contract to which any of them is a party or is bound or to which any of their assets are subject[.]

Additionally, Article IV contained two important clauses: a severability clause and a specific performance clause. The severability clause stated that "[a]ny term or provision of this MOU that is invalid or unenforceable in any situation in any jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions hereof . . . [.]" Under the specific performance clause, the parties agreed that a nonbreaching party "shall be entitled to specific performance . . . in addition to any other remedy to which they are entitled at law or in equity."

On the same day the parties entered into the MOU, IALA, and Revolver, Plaintiffs consented to being placed into Rehabilitation pursuant to N.C. Gen. Stat. § 58-30-75. During Rehabilitation, a moratorium was placed on policyholder surrenders, and Plaintiffs' obligation to pay policyholders was suspended. During the period of Rehabilitation and upon execution of the MOU, Defendants had either direct or indirect control over most of the SACs and the authority to contribute those entities to the NHC.

The Breach

Two weeks before the deadline to perform under Article II of the MOU, George Vandeman ("Vandeman") acting as a chairman for Defendant Academy Association, Inc., sent a communication to Plaintiffs stating that the restructuring plan set forth under Article II could not be accomplished because:

> i. Seller notes . . . are subject to breach and acceleration upon reorganization;
>
> ii. The debt reduction from the IALA and the reorganization may result in adverse tax consequences to Lindberg; [and]
>
> iii. The reorganization will trigger certain changes in control provisions in contracts with third-parties[.]

On 30 September 2019, Defendants failed to contribute the SACs to the NHC, thus breaching Article II of the MOU. On 1 October 2019, Plaintiffs filed suit in Wake County Superior Court alleging breach of the MOU and fraud. Plaintiffs requested specific performance of the MOU, compensatory damages, and punitive damages.

The Trial Court's Order and Judgment

After a bench trial, the trial court entered a judgment in favor of Plaintiffs, ordering specific performance but not compensatory or punitive damages. First, the trial court held that Article III of the MOU was unenforceable because it was an agreement to agree, making it severable from the rest of the MOU. Upholding the remainder of the MOU, the trial court found Defendants breached Article II by failing to perform by the 30 September 2022 deadline, and awarded specific performance.

Next, the trial court concluded that Defendants fraudulently induced Plaintiffs to sign the MOU by making false representations and warranties under Article IV regarding the execution and performance of

obligations. Specifically, the trial court found that Defendants fraudulently represented that performance under the MOU was duly authorized and

> (2) [did] not violate any law; (3) would not result in a breach of, constitute a default under, or result in the acceleration of any contract to which any of them is a party or is bound or to which any of their assets are subject; and (4) [did] not create in any party the right to accelerate, terminate, modify, cancel or require any notice or consent under any contract to which any of them is a party or is bound or to which any of their assets are subject.

The trial court further found that the fraudulent representations and warranties made to Plaintiffs in the MOU caused Plaintiffs to enter into two other agreements—the IALA and the Revolver—to their detriment. The trial court declined to award any remedy for Plaintiffs' fraud claim because they had elected the remedy of specific performance. Instead, the trial court stated that "if an appellate Court should determine that specific performance is not an available remedy this Court would enter an award of punitive damages in the amount of three times compensatory damages."

On 26 May 2022, the trial court entered an Amended Judgment and Order to correct clerical errors. Defendants filed a Notice of Appeal of the Amended Judgment and Order on 13 June 2022. Plaintiffs then filed a Conditional Notice of Cross-Appeal, seeking review of the trial court's failure to award fraud damages. As part of their Cross-Appeal, Plaintiffs also filed a request for Judicial Notice on 19 January 2023, which this Court denied by order.

II. Jurisdiction

An appeal lies of right directly to this Court from any final judgment of a superior court. N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Argument

On appeal, Defendants argue that Article III was an essential part of the MOU and without it, the entire agreement was rendered unenforceable. Further, if the MOU was entirely unenforceable, then the trial court erred when it found fraudulent inducement. For the reasons set forth below, we disagree.

A. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the

trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001)), *disc. rev. denied*, 356 N.C. 434, 572 S.E.2d 428 (2002).

B. Severance of Article III

[1] Plaintiffs and Defendants agree the trial court correctly concluded Article III was an unenforceable agreement to agree. Defendants, however, contend Article III was essential to the MOU's main purpose, and severing it rendered the entire MOU unenforceable. After a thorough review, we conclude the trial court did not err when it enforced the remainder of the MOU after severing Article III.

1. Main Purpose

Defendants argue Article III was a main purpose and an essential feature of the MOU upon which other provisions depended. We disagree.

To determine whether an unenforceable provision is a "main purpose" or "essential feature," the Court must look at whether other provisions of the contract are dependent on the unenforceable one. *See Robinson, Bradshaw, & Hinson, P.A. v. Smith*, 129 N.C. App. 305, 314, 498 S.E.2d 841, 848 (1998) (holding that despite one section of a contingency-fee contract being invalid, the remainder of the contract is still enforceable because it is severable and not the main purpose or essential feature of the agreement). Put another way, severance of an unenforceable provision is appropriate when the other provisions "are in no way dependent upon the enforcement of the illegal provisions for their validity." *Am. Nat'l Elec. Corp. v. Poythress Commer. Contractors, Inc.*, 167 N.C. App. 97, 101, 604 S.E.2d 315, 317 (2004) (citations omitted).

To argue that a contract's main purpose may not be severed, Defendants cite to *Green v. Black*, a case in which the parties entered into a written agreement where the defendant was to repay the plaintiff for a personal loan. *Green v. Black*, 270 N.C. App. 258, 840 S.E.2d 900 (2020). The agreement included a provision stating that, should the defendant default, a new agreement would be drafted that would include a "mutually agreed upon payment schedule for the remaining amount due." *Green*, 270 N.C. App. at 260, 840 S.E.2d at 902. This Court held that the provision was void for uncertainty and was therefore unenforceable, but upheld the remainder of the agreement. *Id.* at 265, 840 S.E.2d at 905–06. This Court further concluded that the parties' intended main purpose was to "memorialize an agreement to exchange money for

a promise to pay the money back with interest on a certain date[,]" and because of that, a sentence regarding what would happen in the event of default was severable. *Id.* at 264, 840 S.E.2d at 905.

Unlike the parties in *Green*, the parties in this case expressly memorialized the MOU's main purpose, leaving nothing for this Court to demystify. At the time of signing, the parties agreed that the MOU's main purpose was "to protect the best interests of the policyholders[,]" and "in so doing, the parties also intend to increase the long-term equity value of the [SACs], *so long as it is consistent with the protection of the best interests of the Policyholders*[.]" (emphasis added).

Defendants attempt to convince this Court that the MOU's main purpose was not only to rehabilitate Plaintiffs' companies, but to ensure Lindberg would continue to benefit from the overall transaction. This argument ignores another of Defendants' motivations: to make money using capital provided by hardworking, North Carolina policyholders.

2. Severability

Defendants further argue that because Article III was the main purpose of the MOU, severing it rendered the remainder of the MOU unenforceable. We disagree.

"It is the general law of contracts that the purport of a written instrument is to be gathered from its four corners . . . ." *Ussery v. Branch Banking and Trust Co.*, 368 N.C. 325, 336, 777 S.E.2d 272, 280 (2015) (quoting *Carolina Power & Light Co. v. Bowman*, 229 N.C. 682, 693–94, 51 S.E.2d 191, 199 (1949) (Stacy, C.J. , Dissenting)). " 'A contract is entire, and not severable, when, by its terms, nature and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other, and interdependent.' " *Mebane Lumber Co. v. Avery & Bullock Builders, Inc.*, 270 N.C. 337, 341, 154 S.E.2d 665, 668 (1967) (quoting *Wooten v. Walters*, 110 N.C. 251, 254, 14 S.E. 734, 735 (1892)). On the other hand, this Court has held that a contract may be severable when it has two or more parts that are "not necessarily dependent on each other, nor is it intended by the parties that they shall be." *Kornegay v. Aspen Asset Group, LLC*, 204 N.C. App. 213, 226, 693 S.E.2d 723, 734 (2010) (quoting *Mebane Lumber Co.*, 270 N.C. at 342, 154 S.E.2d at 668). A court may sever an unenforceable provision and enforce the balance of the contract only when the other provisions "are in no way dependent upon the enforcement of the illegal provisions for their validity." *Am. Nat'l Elec. Corp.*, 167 N.C. App. at 101, 604 S.E.2d at 317. While not determinative, the decision to include a severability clause in an agreement may provide

general guidance when determining the parties' intent. *See Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 421-22, 276 S.E.2d 422, 434-35 (1981) ("[A] severability is relevant to a decision only when the validity of a particular provision of the Act is at issue."); *see also* 15 Williston on Contracts § 45:6 (4th ed) ("The parties' intent to enter into a divisible contract may be expressed in the contract directly, through a so-called 'severability clause[.]' ").

Defendants argue "[t]he rest of the MOU depended on [Article III,]" and "Article III was the key to maximizing the value of the SACs to pay back Plaintiffs investments." To support this argument, Defendants make several points. First, as evidence of the entangled purpose of Articles II and III, Defendants point to the fact that performance under the two articles was due on the same day, stating that the articles were dependent on each other "because of the nature of insurance rehabilitation." Next, Defendants claim that, standing alone, Article II left Lindberg vulnerable because it allowed the NHC and Plaintiffs to bind themselves (and ultimately Lindberg) to potentially risky financing agreements. Further, without Article III, the SACs would no longer enjoy the protection of a right to cure within thirty days after notice of default. Finally, Article III provided Lindberg a "success fee" of 1.5% of all the debt that was paid down—a significant benefit which, without Article III, Lindberg would no longer be entitled to.

Defendants' evidence of Article III's intrinsic entanglement with the remainder of the MOU is attenuated at best. As the trial court noted in its Amended Judgment and Order, "the other Articles of the MOU can and have been implemented and enforced notwithstanding the failure of the Parties to complete [Article III]." A review of the Record leads us to the same conclusion: Article II and Article III were not necessarily dependent on each other, nor did the parties intend they be. *See Kornegay*, 204 N.C. App. at 213, 693 S.E.2d at 723 (holding a contract was divisible because there were two distinct promises, each of which could be performed without the other). Importantly, as of the publishing of this opinion, Defendants and Lindberg have enjoyed the benefit of millions of dollars of debt relief provided by Plaintiffs, yet continue to claim the MOU is unenforceable.

Further, despite each Article under the MOU having the common purpose of rehabilitating Plaintiffs, performance of the parties under each Article was separate and distinct. Under Article I, Plaintiffs promised to grant debt relief to Defendants; under Article II Defendants promised to reorganize the SACs under the NHC; finally, under Article III, both parties would amend loan agreements from Plaintiffs to some of the SACs

in the future. We further note that the amendments and restructuring outlined in Article III were to take place *after* the SACs were transferred to the NHC. These facts tend to show that each article required independent performance during different times and could involve independent breach. Further, while it may be true that without Article III Lindberg would be left in a financially vulnerable situation, protecting Lindberg was not the primary purpose of the MOU. Rather, the primary purpose was to protect Plaintiffs' policyholders, as concluded above. Finally, taking into consideration all "four corners" of the MOU and the promises contained therein, this Court gleans the parties intended the MOU to be divisible given the inclusion of a severability clause. *See Ussery*, 368 N.C. at 336, 777 S.E.2d at 280. For those reasons, we conclude the trial court did not err when it enforced the remainder of the MOU after severing Article III. *See Kornegay*, 204 N.C. App. at 213, 693 S.E.2d at 723.

C. Fraudulent Inducement

[2] Next, Defendants appeal from the trial court's finding of fraudulent inducement, arguing that Plaintiffs' reliance on the representations and warranties under Article IV was per se unreasonable because they are sophisticated entities and failed to conduct any due diligence prior to entering into the MOU. We disagree.

To prevail on their claim that the trial court erred when it found Defendants liable for fraudulent inducement, Defendants must show that none of the evidence relied on by the trial court in reaching its conclusion was competent. *Sisk v. Transylvania Cmty. Hosp. Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010). To determine the competency of the trial court's evidence supporting its conclusion that Defendants fraudulently induced Plaintiffs, we begin by analyzing whether all the elements of fraud are met. We then examine whether Plaintiffs' reliance on Defendants' representations was reasonable.

1. Fraud

Defendants assert the trial court erred in finding they fraudulently induced Plaintiffs to enter into the MOU, IALA and Revolver. The elements of fraud are: "(1) false representation or concealment of a past or existing material fact; (2) reasonably calculated to deceive; (3) made with intent to deceive; (4) which does in fact deceive; (5) resulting in damage to the injured party." *Whisnant v. Carolina Farm Credit*, 204 N.C. App. 84, 94, 693 S.E.2d 149, 156–57 (2010) (citation omitted) (cleaned up).

Here, there is no disputing that Plaintiffs were deceived by Defendants, and they suffered economic injury as a result. Therefore,

this Court turns its attention to the remaining three elements to determine whether Defendants' conduct amounted to fraud.

With respect to the first three elements, the Record tends to show that Defendants made representations and warranties that were calculated to deceive Plaintiffs regarding their obligations to third parties and ability to perform under the terms of the MOU. Specifically, under Article IV, Defendants represented that

> [t]he execution of the MOU and the consummation of the transactions set forth in the MOU do not create in any party the right to accelerate, terminate, modify, cancel, or require any notice or consent under any contract to which any of them is a party or is bound or to which any of their assets are subject[.]

Two weeks before performance was due, however, Vandeman, acting as a chairman for Defendant Academy Association, Inc., sent an email to Plaintiffs stating that the restructuring plan set forth under Article II could not be accomplished because:

> i. Seller notes . . . are subject to breach and acceleration upon reorganization;
>
> ii. The debt reduction from the IALA and the reorganization may result in adverse tax consequences to Lindberg; [and]
>
> iii. The reorganization will trigger certain changes in control provisions in contracts with third-parties[.]

Put plainly, Defendants made representations about their ability to perform under the MOU, then just two weeks before performance was due, cited those exact representations as the reason why they *could not* perform. Relying on these representations, Plaintiffs entered into the MOU, IALA, and Revolver, which provided Defendants debt relief of more than $100 million and a $40 million revolving line of credit. The facts in the Record show Defendants were in the best position to understand whether they could perform under the MOU's terms because Lindberg controlled the SACs. Further, because Lindberg understood the intricacies of the SACs' business structures, he knew performance under the MOU was impossible, yet made representations that induced Plaintiffs to enter into the contract. For those reasons, we hold the trial court did not err in finding Defendants' actions satisfied the elements of fraud. *See Whisnant*, 204 N.C. App. at 94, 693 S.E.2d at 156–57.

2. Reasonable Reliance

Next, we consider whether Plaintiffs' reliance on Defendant's fraudulent representations was reasonable. To prevail on a fraud claim, a plaintiff must prove they actually relied on misrepresentations and that their reliance was reasonable. *Cobb v. Pa. Life Ins. Co.*, 215 N.C. App. 268, 277, 715 S.E.2d 541, 549 (2011). "Reliance is not reasonable if a plaintiff fails to make any independent investigation . . . [.]" *State Props., LLC v. Ray*, 155 N.C. App. 65, 73, 574 S.E.2d 180, 186 (2002). Reliance will not be considered unreasonable, however, "if the plaintiff can show that 'it was induced to forego additional investigation by defendant's misrepresentations.' " *Hudgins v. Wagoner*, 204 N.C. App. 480, 491, S.E.2d 436, 445 (2010) (citations omitted). Additionally, if a defendant's representations "could not be readily or easily verified," a plaintiff's reliance is more likely to be regarded as reasonable. *Phelps-Dickson Builders L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 439, 617 S.E.2d 664, 671 (2005). The reasonableness of a party's reliance is an issue of fact for the fact finder. *Marcus Bros. Textiles v. Price Waterhouse, LLP*, 350 N.C. 214, 224, 513 S.E.2d 320, 327 (1999). "Findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary." *Sisk*, 364 N.C. at 179, 695 S.E.2d at 434 (quoting *Tillman v. Com. Credit Loans, Inc.*, 362 N.C. 93, 100–01, 655 S.E.2d 362, 369 (2008)). Competent evidence is evidence that a "reasonable mind might accept as adequate to support the finding." *City of Asheville v. Aly*, 233 N.C. App. 620, 625, 757 S.E.2d 494, 499 (2014) (citing *In re Adams*, 240 N.C. App. 318, 320-21, 693 S.E.2d 705, 708 (2010)).

Defendants claim that Plaintiffs' reliance was per se unreasonable because Plaintiffs are sophisticated business entities entering into a multi-billion-dollar deal, yet chose to forego conducting any due diligence prior to signing the MOU. Plaintiffs concede they failed to conduct due diligence; however, for the reasons discussed below, we hold their reliance was reasonable under the circumstances.

Defendants cite to several cases involving the sale of real property in which a plaintiff failed to conduct due diligence prior to entering into a contract. There is, however, one important difference between the cases cited and the facts of our current case: this was not a purchase. The MOU was a temporary agreement to help Plaintiffs out of Rehabilitation and, eventually, back into the ownership and control of Lindberg. The MOU functioned as a stop gap to avoid impending financial ruin, and as such, functioned very differently than would an MOU for a real property transaction. Here, the only thing being bought under the MOU was time.

Further, while it is true Plaintiffs had unfettered access to Defendants' accountings, the facts show that Lindberg was in the best position to understand the complex scaffolding of each SAC's business structure. Collectively, these complex structures involved: multiple tiers of operating and holding companies; loans that had been syndicated and repackaged, then transferred several times; underlying loan agreements and sellers' notes; equity equivalence agreements; and third-party financing agreements. Plaintiffs lacked the time and expertise to determine whether the representations and warranties were accurate, and ascertaining that information would have involved a complex legal analysis. The veracity of Defendants' representations could not have been "readily or easily verified," and moreover, Plaintiffs had no reason to believe Lindberg would make false statements, considering he stood to benefit from the MOU's success as well. *See Phelps-Dickson Builders L.L.C.*, 172 N.C. App. at 439, 617 S.E.2d at 671.

Here, because the MOU did not govern a sale, we do not hold Plaintiffs to the same heightened standard as the sophisticated business entities in the case law to which Defendant cites. Further, Plaintiffs' reliance on Defendants' representations was reasonable because discovery of Defendants' fraud would not have been readily or easily verified, and Defendant was in the best position to know whether the MOU, as written, could be effectuated. *See id.* at 439, 617 S.E.2d at 671. For those reasons, we hold the trial court relied on competent evidence to reach its conclusion and affirm the fraud judgment against Defendants.

D. Damages

[3] On cross-appeal, Plaintiffs argue that the trial court erred when it failed to award damages for Defendants' fraud. Conversely, Defendants argue the trial court correctly concluded Plaintiffs were not entitled to compensatory or punitive damages for fraud, reasoning that it would amount to "double recovery," running afoul of the election of remedies doctrine.

After a review of the Record, we agree with Plaintiffs.

1. Standard of Review

"Since this case was tried before a judge sitting without a jury, this Court is bound by the trial court's findings which are supported by competent evidence, even if evidence exists to sustain contrary findings. [R]eview of the trial court's conclusions of law is de novo." *Hickory Orthopaedic Ctr., P.A. v. Nicks*, 179 N.C. App. 281, 286, 633 S.E.2d 831, 834 (2006) (quotation omitted).

2. Election of Remedies Doctrine

"The fact finder . . . has broad discretion in awarding damages to ensure that the plaintiff is made whole and the wrongdoer does not profit from its conduct." *TradeWinds Airlines, Inc. v. C-S Aviation Servs.*, 222 N.C. App. 834, 850, 733 S.E.2d 162, 174 (2012). The "doctrine of election of remedies is not to prevent recourse to any remedy, but to prevent double redress for a single wrong." *Smith v. Oil Corp.*, 239 N.C. 360, 368, 79 S.E.2d 880, 885 (1954).

Our Supreme Court's precedent demonstrates that remedies for both breach of contract and fraud may coexist. In *Parker v. White*, our Supreme Court held that a party who has been fraudulently induced to enter into a contract may either repudiate the contract or "affirm the contract, keeping whatever property or advantage he has derived under it, and may recover in an action for deceit the damages caused by the fraud." 235 N.C. 680, 688, 71 S.E.2d 122, 128 (1952). Affirming the contract ends the defrauded party's right to rescind the contract, but does not excuse breach of that agreement. *See Hutchins v. Davis*, 230 N.C. 67, 73, 52 S.E.2d 210, 214 (1949) (holding that affirming a contract does not prevent the defrauded party from recovering by filing a new action or counterclaim for damages sustained as a result of fraud).

Here, the doctrine of election of remedies does not bar Plaintiffs from recovering for both specific performance and for monetary damages because each remedy relates to a separate and distinct wrongdoing by Defendants. Defendants breached the MOU on 1 October 2019 when they failed to reorganize the SACs. Defendants' fraudulent conduct, however, occurred on 27 June 2019 when the MOU, IALA, and Revolver were executed.

It is true that Plaintiffs made one election of remedy relating to their breach of contract claim—specific performance. Plaintiffs' election of specific performance, however, does not preclude them from recovering monetary damages for fraud. These harms are not mutually exclusive and neither are their remedies.

3. Conditional Judgment

A conditional judgment is "one whose force depends upon the performance or nonperformance of certain acts[.]" *Hagedorn v. Hagedorn*, 210 N.C. 164, 165, 185 S.E. 768, 769 (1936). Put another way, if an order is not self-executing, it is "therefore, conditional and void." *Cassidy v. Cheek*, 308 N.C. 670, 674, 303 S.E.2d 792, 795 (1983).

Here, in its judgment, the trial court found Defendants liable for fraud and stated that "if an appellate Court should determine that specific performance is not an available remedy this Court would enter an award of punitive damages in the amount of three times compensatory damages." The conditional assessment of compensatory damages in the event this Court determined specific performance is not available makes the trial court's judgment "not self-executing." *See id.* at 674, 303 S.E.2d at 795. For that reason, we vacate the trial court's judgment only as it pertains to remedies available to Plaintiffs for Defendants' fraud, and we remand for further proceedings consistent with this opinion.

IV. Conclusion

We hold the trial court's conclusions of law were supported by findings of fact based on competent evidence. *See Cartin*, 151 N.C. App. at 699, 567 S.E.2d at 176. For those reasons, this Court affirms the trial court's conclusions that the MOU was enforceable after severing Article III, and that Defendants are liable for fraud. This Court further vacates and remands the trial court's order and judgment only as it relates to remedies available to Plaintiffs for Defendants' fraud.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges ZACHARY and WOOD concur.

STATE v. COLT

[289 N.C. App. 395 (2023)]

STATE OF NORTH CAROLINA
v.
KARL DAVID COLT, DEFENDANT

No. COA22-514

Filed 20 June 2023

1. Confessions and Incriminating Statements—corpus delicti rule—concealment of death of child—no body found—extrajudicial confession

In defendant's prosecution for concealment of the death of a child who did not die of natural causes, the trial court did not err by denying defendant's motion to dismiss because the State presented sufficient evidence and satisfied the corpus delicti rule. Although the child's body could not be found, the State presented substantial independent evidence tending to establish the trustworthiness of defendant's extrajudicial confession—including the suspicious circumstances under which the child was missing, the discovery of discarded children's items in a hidden campsite where defendant told investigators the body might have been concealed, defendant's text messages to a person who lived in the home with the child that "[the mother] killed or abused her child" and "[y]ou didn't report the crime to the cops just like I didn't," and the fact that defendant was not under arrest when he made the incriminating statements to law enforcement.

2. Evidence—relevance—unfair prejudice—Confrontation Clause—deceased child's mother in prison for murder

In defendant's prosecution for concealment of the death of a child who did not die of natural causes, the trial court did not err by allowing a witness to testify that the child's mother was in prison for second-degree murder. The testimony was relevant to whether the child was deceased; it was not unfairly prejudicial because other substantial evidence established that the child had died of unnatural causes; and, even assuming the testimony raised a Confrontation Clause issue regarding the mother's guilty plea, any potential error would be harmless in light of other evidence establishing that the child had died of unnatural causes.

Chief Judge STROUD concurring in a separate opinion.

Appeal by defendant from judgment entered 26 April 2021 by Judge William W. Bland in Wayne County Superior Court. Heard in the Court of Appeals 11 April 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marissa K. Jensen, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

FLOOD, Judge.

Karl David Colt ("Defendant") appeals from the trial court's Judgment sentencing him to 80 to 108 months' imprisonment. Defendant argues the State failed to satisfy the *corpus delicti* rule primarily because the minor victim's body was never found, and the State did not present sufficient evidence establishing the minor victim died. Defendant further argues the trial court erred in admitting testimony regarding the minor's mother's conviction for second-degree murder because, among other reasons, the testimony was an inadmissible testimonial statement.

After careful review, we conclude that the *corpus delicti* rule was satisfied because substantial independent evidence established the trustworthiness of Defendant's confession. We further conclude the trial court did not err in overruling Defendant's objections to testimony that the mother was in prison for second-degree murder.

I. Factual and Procedural History

Defendant was indicted on 8 September 2020 for concealment of the death of a child who did not die of natural causes. On 26 April 2021, a jury found Defendant guilty. Defendant was sentenced to an aggravated range of 80 to 108 months' imprisonment.

The evidence presented at trial tended to show Kayla Clements ("Clements") gave birth to a baby boy, Kaceyn, on 11 March 2016. In the spring of 2016, shortly after Kaceyn was born, Clements and Kaceyn moved into the apartment of Clements's younger sister, Sandi. Clements and Kaceyn lived with Sandi until October 2016. Sandi testified that, while Clements and Kaceyn lived in her apartment, Kaceyn spent most of his time in a Graco Pack 'n Play (the "Pack 'n Play"). Sandi further testified that the Pack 'n Play had a blue frame with a green cover, and the green cover had animals around the trim.

Kaceyn's father, Jose Jimenez ("Jimenez"), had periodic visits with Kaceyn after his birth, but Clements stopped allowing Jimenez to see

Kaceyn in late 2016. At trial, testimony confirmed that the last time Jimenez saw Kaceyn was 12 September 2016. While no exact date was given, trial testimony also revealed Jimenez allegedly made arrangements with Clements to see Kaceyn in "late 2016," but Clements always came up with last minute excuses for why she could not meet Jimenez.

In late 2017, Jimenez hired a private investigator and an attorney to help locate Kaceyn, but they could not find him. Jimenez testified that Clements visited Florida in 2017 for "about four or five months" and did not bring Kaceyn with her.

On 8 February 2018, Captain Shawn Harris ("Captain Harris") of the Wayne County Sheriff's Office (the "WCSO") received a call from an officer of the Goldsboro Police Department who had spoken with Jimenez about a missing child. Because the officer believed the case originated outside the jurisdiction of Goldsboro, he introduced Jimenez to Captain Harris. Jimenez explained to Captain Harris that Clements had stopped allowing him to see Kaceyn, and Jimenez's attempts to find Kaceyn with the help of a private investigator failed. As of 8 February 2018, Jimenez had not found Kaceyn, but he did know Clements was in the Carteret County Jail, as confirmed by Captain Harris, who testified she was there on a civil contempt order.

Based on this meeting with Jimenez, the WCSO opened a case on Kaceyn, and on 12 February 2018, it requested the help of the State Bureau of Investigation (the "SBI") in what was officially considered a missing person investigation. Agent Aaron Barnes ("Agent Barnes") of the SBI was assigned to the case.

Through the joint investigation of the WCSO and SBI (collectively, "investigators"), investigators determined the following. On or around 1 October 2016, Clements and Kaceyn moved out of Sandi's apartment and into a home in Goldsboro, North Carolina, (the "Home"). Clements and Kaceyn lived in the Home from approximately October 2016 through November 2016. Jared Greene ("Greene") and Phillip Goff ("Goff") also resided at the Home. Clements had a romantic relationship with Goff, and Greene had a romantic relationship with Defendant, who regularly visited the Home on weekends.

On 15 February 2018, Agent Barnes and two other detectives involved with the investigation interviewed Defendant. Investigators requested to interview Defendant based on his contacts with Clements, Greene, and Goff. This interview was audio recorded, and the recording was played at trial in the presence of the jury.

In the 15 February 2018 interview, Defendant confirmed that he visited Greene, Clements, and Goff at the Home on weekends from August 2016 until approximately May 2017.

During the interview, Defendant stated "at one time there was a child [in the Home], but I do not know what ever happened to the child after that." Defendant confirmed the child in the home was Clements's. Defendant described the Home as "a small cinder block house." Defendant described Kaceyn as an "infant," but guessed he was likely younger than a year old. In October 2016,[1] when Defendant saw Kaceyn for the first time, he observed Kaceyn in a playpen and noticed Kaceyn had bruises on his face that Defendant thought could have been the result of "shaken baby" syndrome. Defendant further told investigators the next time he saw Kaceyn, Kaceyn seemed to have trouble breathing, had a severely swollen head, and appeared braindead. Defendant stated he did not think Kaceyn could have survived without medical treatment.

When investigators asked Defendant if he knew where Kaceyn was, Defendant told investigators he thought it was possible Clements and Goff hid Kaceyn's body in a wooded area across the street from the Home where Goff frequently set up a campsite. Defendant described the campsite as being "a good distance" and not fully visible from the road, with a beaten down path with cut down branches leading to the campsite. Defendant drew investigators a map detailing where the campsite was in comparison to the Home.

Following the interview, investigators confirmed Defendant's statements that the home was a small cinder block residence with a wooded area across the street. On 16 February 2018, investigators searched the wooded area and found "a dark blue or purple . . . Graco playpen frame," a stuffed teddy bear, an inflatable pool toy, and a piece of fabric with a Hello Kitty design on it. Agent Barnes also confirmed that the wooded area contained a campsite due to the presence of a stone fire pit and logs for sitting, and the campsite was not visible from the road.

At trial, the State presented the jury with the Graco playpen frame found in the wooded area. After the playpen frame was set up, the State asked Sandi if the playpen frame found in the woods matched the dimensions of the Pack 'n Play Clements used for Kaceyn while

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1. Defendant told investigators he did not know the exact date, but it was right after Hurricane Matthew because road closures made it difficult for him to drive to the Home. During the trial, Judge Bland took judicial notice that Hurricane Matthew passed through North Carolina on 9 October 2016.

living with Sandi. Sandi confirmed the frame found in the woods had the same dimensions as Kaceyn's Pack 'n Play. Sandi testified that Kaceyn's Pack 'n Play had a loose end-rail that prevented the Pack 'n Play from standing up properly.

Agent Barnes confirmed Greene had moved to Florida when Agent Barnes traveled to Florida to interview Greene regarding Kaceyn's disappearance. During the interview, Greene showed Barnes texts in which Defendant stated, "[I'm] getting screwed in this case by [Clements] killing her baby," "[Clements] killed or abused her child," and "[y]ou didn't report the crime to the cops just like I didn't[.]" At trial, Agent Barnes read these text messages to the jury.

On 27 March 2018, investigators interviewed Defendant a second time. This interview was also recorded and played at trial in the presence of the jury. Defendant claimed he overheard Clements tell Goff that Kaceyn had died, and they needed to "get rid" of Kaceyn. Even though, in his first interview, Defendant stated he thought Kaceyn may have been buried in the woods across from the home, in this interview, Defendant told investigators Clements and Goff made plans to hide the body somewhere around "Grasshopper's home." Grasshopper was a woman who frequently sold methamphetamine to Defendant, Clements, and Goff. Defendant claimed Clements told Goff that Grasshopper's house would be an excellent place to get rid of the body.

According to Defendant, when Clements, Goff, Greene, and Defendant were preparing to leave the Home, Clements went into her room to, presumably, get herself and the baby ready. When Clements came out of the room, she had the baby carrier completely covered with a tan blanket. Defendant drove Clements, Greene, and Goff to Grasshopper's house "around midnight." While at Grasshopper's house, Goff waited in the car while everyone else went inside. About "twenty to thirty minutes later," Clements, Greene, and Defendant returned to the car after purchasing methamphetamine from Grasshopper, and the carrier was empty and the blanket was wadded up in a ball.

Defendant hypothesized Goff could have disposed of Kaceyn's body in a "line of trees" located on the right side of Grasshopper's house. Defendant told investigators that, when Goff, Clements, Defendant and Greene all returned home that night, Goff and Clements told the other two not to say anything about what took place that night. Defendant stated in the second interview that he felt bad that he did not call for help, and one of his biggest mistakes was failing to tell people about Kaceyn's death or report it to law enforcement.

Agent Barnes testified that through his investigation, he determined "Grasshopper" was an individual named Sonya Mendez who sold methamphetamine. Throughout the course of his investigation, Agent Barnes never found anyone who saw Kaceyn after October 2016. At the time he was last seen, Kaceyn would have been only eight months old, and by the time the investigation began, he would have been almost two years old.

On 13 July 2018 an arrest warrant was issued for Defendant for concealment of the death of a child. On 8 September 2020, a grand jury indicted Defendant for concealment of death of a child who did not die of natural causes.

At trial, Defendant's counsel motioned for mistrial numerous times. The first motion for mistrial was based upon Agent Barnes's testimony that Clements was in prison for second-degree murder. During Agent Barnes's testimony, the State asked him where Clements presently was, and Agent Barnes testified that she was "currently in the North Carolina Department of Corrections." The State then asked, "[d]o you know why?" Defendant's counsel then objected on various grounds, including the Confrontation Clause, relevancy, unfair prejudice, and a run-around of the *corpus delicti* rule.

The trial court overruled Defendant's counsel's objection, allowing the State to ask why Clements was in the North Carolina Department of Corrections. Upon questioning by the State, Agent Barnes answered, "[f]or second-degree murder." Defendant's counsel motioned for mistrial due to this testimony, and the trial court denied the motion.

In a renewed motion for mistrial, Defendant's counsel added as another ground for mistrial the trial court's ruling that there was sufficient evidence to satisfy the *corpus delicti* rule. The trial court denied the motion.

At trial, Defendant's counsel also motioned to dismiss on the basis of insufficiency of the evidence and failure to satisfy the *corpus delicti* rule. The trial court denied the motion, finding Defendant's confession was supported by substantial independent evidence tending to establish its trustworthiness, and finding the State presented substantial evidence of each essential element of the crime charged.

Defendant did not testify or present evidence at trial. A jury convicted Defendant of concealment of the death of a child who did not die of natural causes, and the trial court sentenced Defendant in the aggravated range of 80 to 108 months' imprisonment.

II. Jurisdiction

Appeal lies of right directly to this Court from any final judgment of a superior court. N.C. Gen. Stat. § 7A-27(b)(1) (2021). "A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered." N.C. Gen. Stat. § 15A-1444(a) (2021).

III. Issues

The issues before this Court are whether the trial court erred by: (1) denying Defendant's *corpus delicti* challenge and motion to dismiss, and (2) overruling Defendant's objections to Agent Barnes's testimony that Clements was in prison for second-degree murder. We will address these issues in turn.

IV. Analysis

A. *Corpus Delicti* Challenge

[1] On appeal, Defendant argues the State failed to satisfy the *corpus delicti* rule because it did not present evidence to strongly corroborate Defendant's extrajudicial statements to law enforcement. We disagree.

1. Standard of Review

"We review *de novo* the trial court's denial of a motion to dismiss." *State v. DeJesus*, 265 N.C. App. 279, 284, 827 S.E.2d 744, 748 (2019). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

State v. Fritsch, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (citation and internal quotation marks omitted) (alteration omitted).

"Upon a defendant's motion to dismiss for insufficient evidence, the question for the court is whether there is substantial evidence (1) of each essential element of the offense charged and (2) of defendant's being the perpetrator of such offense." *DeJesus*, 265 N.C. App. at 284, 827 S.E.2d at 748. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). "Whether a defendant's extrajudicial confession may survive a motion to dismiss depends upon the satisfaction of the *corpus delicti* rule." *DeJesus*, 265 N.C. App. at 284, 827 S.E.2d at 749.

2. Relevant Law

"[A]n extrajudicial confession, standing alone, is not sufficient to sustain a conviction of a crime." *State v. Parker*, 315 N.C. 222, 229, 337 S.E.2d 487, 491 (1985). When the State substantially relies upon an extrajudicial confession, the reviewing court applies the *corpus delicti* rule "which requires some level of independent corroborative evidence in order to ensure that a person is not convicted of a crime that was never committed." *DeJesus*, 265 N.C. App. at 284, 827 S.E.2d at 749 (internal quotation marks omitted). *Corpus delicti*, meaning the body of the crime, consists of "the injury or harm constituting the crime," and a showing that "th[e] injury or harm was caused by someone's criminal activity." *Parker*, 315 N.C. at 231, 337 S.E.2d at 492. A defendant's confession ordinarily furnishes the proof necessary to show "the defendant was the perpetrator of the crime." *State v. Trexler*, 316 N.C. 528, 533, 342 S.E.2d 878, 881 (1986).

The *corpus delicti* rule itself is rooted in three policy factors:

> first, the shock which resulted from those rare but widely reported cases in which the "victim" returned alive after his supposed murderer had been convicted; and secondly, the general distrust of extrajudicial confessions stemming from the possibilities that a confession may have been erroneously reported or construed, involuntarily made, mistaken as to law or fact, or falsely volunteered by an insane or mentally disturbed individual[;] and, thirdly, the realization that sound law enforcement requires police investigations which extend beyond the words of the accused.

DeJesus, 265 N.C. App. at 285, 827 S.E.2d at 749.

"[T]o be relied on to prove the *corpus delicti* . . . the trustworthiness of the confession" must be "established by corroborative evidence." *Id.*

at 235, 337 S.E.2d at 494. Our Supreme Court expanded the strict rule that always required independent proof of the *corpus delicti* and adopted in its place the "trustworthiness version" of the rule. *Id.* at 230, 337 S.E.2d at 492. Under this version, "the adequacy of corroborating proof is measured not by its tendency to establish the *corpus delicti* but by the extent to which it supports the trustworthiness of the admissions." *Id.* at 230, 337 S.E.2d at 492 (quotation marks omitted). This applies especially to the instant case where the victim's body cannot be found. *See State v. Cox*, 367 N.C. 147, 153, 749 S.E.2d 271, 276 (2013) (carefully applying the trustworthiness version of the *corpus delicti* rule is especially important in those cases where there is no body to be found).

Under the trustworthiness version of the *corpus delicti* rule, "the State need not provide independent proof of the *corpus delicti* so long as there is substantial independent evidence tending to establish the trustworthiness of the defendant's extrajudicial confession." *DeJesus*, 265 N.C. App. at 285, 827 S.E.2d at 749 (quotation marks omitted). "Such substantial independent evidence may includ[e] facts that tend to show the defendant had the opportunity to commit the crime, as well as other *strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession." *DeJesus*, 265 N.C. App. at 285, 827 S.E.2d at 749 (emphasis in original) (quotation marks omitted). We may look to the totality of the circumstances to determine whether the evidence strongly corroborates a defendant's confession. *State v. Sweat*, 366 N.C. 79, 85, 727 S.E.2d 691, 696 (2012) ("Under the totality of the circumstances, the State strongly corroborated essential facts and circumstances embraced in defendant's confession."); *see also DeJesus*, 265 N.C. App. at 286, 827 S.E.2d at 750 ("[T]ogether with the [d]efendant's opportunity to commit the[] crimes and the circumstances surrounding his statement to detectives provide *sufficient corroboration to engender a belief in the overall truth of [d]efendant's confession*.") (emphasis added). Where there is no contention that a defendant's "extrajudicial confession was the product of deception or coercion," the trustworthiness of a defendant's confession is "bolstered." *DeJesus*, 265 N.C. App. at 286, 827 S.E.2d at 750 (quotation marks omitted); *see also Cox*, 367 N.C. at 154, 749 S.E.2d at 277 ("The trustworthiness of [the] defendant's confession is thus further bolstered by the evidence that defendant made a voluntary decision to confess.").

It is unnecessary for the State to present "independent evidence of *each element* of the crime to show [that the d]efendant's confession . . . [is] trustworthy. . . . The State need only show corroborative evidence tending to establish the reliability of the confession—not the reliability of each part of the confession which incriminates the defendant."

State v. Messer, 255 N.C. App. 812, 822, 806 S.E.2d 315, 323 (2017) (emphasis added) (quotations omitted).

3. Elements of the Crime

The elements of the concealment of death charge are: (1) failure to notify law enforcement of the death of a child; (2) intent to conceal the death of a child; (3) the victim was a child who is less than sixteen years of age; and (4) knowing or having reason to know the child did not die of natural causes. *See* N.C. Gen. Stat. §§ 14-401.22(a1), (e) (2021).

Here, substantial evidence of the first element exists because Defendant never discussed Kaceyn's death with law enforcement until investigators interviewed him, corroborating Defendant's confession that one of his biggest mistakes was failing to tell people about Kaceyn's death or report it to law enforcement. *See* N.C. Gen. Stat. §§ 14-401.22(a1), (e). Additionally, there is substantial evidence of the third element because Sandi's trial testimony that Kaceyn was born on 11 March 2016 corroborates Defendant's confession that Kaceyn was an infant likely younger than a year old. *See* N.C. Gen. Stat. §§ 14-401.22(a1), (e). Accordingly, we must determine whether at trial, the State presented substantial independent evidence tending to establish the trustworthiness of Defendant's confession as it relates to the second element, the intent to conceal the death of a child, and the fourth element, knowing or having reason to know the child did not die of natural causes. *See DeJesus*, 265 N.C. App. at 285, 827 S.E.2d at 749; *see also* N.C. Gen. Stat. §§ 14-401.22(a1), (e).

Defendant argues that numerous pieces of evidence the State presented at trial were either not significant or corroborative, or both. Defendant grounds this argument primarily on his assumption that the State did not satisfy what he views was its threshold burden to prove, independently of Defendant's statements to investigators, that Kaceyn was dead. We conclude, however, in view of the totality of the evidence presented at trial, the State strongly corroborated Defendant's statements to investigators. *See Sweat*, 366 N.C. at 85, 727 S.E.2d at 696.

a. Intent to Conceal the Death of a Child

First, we must determine whether substantial independent evidence tends to establish that Kaceyn was, in fact, dead. *See DeJesus*, 265 N.C. App. at 285, 827 S.E.2d at 749; *see also Messer*, 255 N.C. App. at 822, 806 S.E.2d at 323. We determine that substantial evidence tends to support Kaceyn's death, satisfying the first policy factor justifying the *corpus delicti* rule: that no one should be convicted of a crime for a death that did not occur. *See DeJesus*, 265 N.C. App. at 285, 827 S.E.2d at 749.

Evidence presented at trial tended to show the following. Jimenez had periodic visits with Kaceyn after Kaceyn's birth, but he was unable to see Kaceyn anymore after Clements made excuses as to why she could not meet with Jimenez, likely because Clements no longer had Kaceyn. Jimenez's testimony as to when he last saw Kaceyn, in late September 2016, matches Defendant's statements to investigators that Defendant last saw Kaceyn right after Hurricane Matthew, which passed through North Carolina on 9 October 2016. Jimenez's attempts to find Kaceyn with the help of a private investigator and an attorney failed in late 2017. Clements traveled to Florida for four or five months in 2017, but she did not have Kaceyn with her. Jimenez could not find Kaceyn in late 2017, and Clements did not travel to Florida with Kaceyn, likely because Kaceyn was deceased. Law enforcement failed to find Kaceyn even after Jimenez's report of his missing child. These facts clearly establish that Kaceyn was missing under inherently suspicious circumstances.

Moreover, the evidence discovered across the road from the Home establishes the trustworthiness of Defendant's confession that Kaceyn was dead. *See DeJesus*, 265 N.C. App. at 285, 827 S.E.2d at 749. Investigators confirmed there was a stone fire pit and logs, which were invisible from the road, corroborating Defendant's statements to investigators that there was a hidden campsite across the road from the Home. In the campsite area, law enforcement found a stuffed teddy bear, an inflatable pool toy, fabric with a Hello Kitty design on it, and a "blue or purple" Graco playpen frame. The discovery of the children's items in the woods at a minimum supports an inference of an attempt to discard a deceased baby's items at the hidden campsite.

Defendant argues that the dark blue or purple playpen discovered at the campsite does not match the one in which Clements kept Kaceyn at Sandi's apartment, but Sandi's testimony that Kaceyn spent most of his time in a blue playpen closely aligns with Defendant's statements to investigators.

Therefore, in view of the totality of the circumstances and in the light most favorable to the State, we conclude the discarded children's items, taken together with the fact that no one had seen Kaceyn since October 2016 at the latest, constitutes strong corroboration of Defendant's confession that Kaceyn was dead. *See DeJesus*, 265 N.C. App. at 285, 827 S.E.2d at 749; *see also Sweat*, 366 N.C. at 85, 727 S.E.2d at 696; *see also Rose*, 339 N.C. at 192, 451 S.E.2d at 223.

Second, substantial evidence tends to establish Defendant's intent to conceal the death of a child. *See DeJesus*, 265 N.C. App. at 285, 827 S.E.2d at 749. Defendant's texts to Greene in which Defendant stated,

"[Clements] killed or abused her child" and "[y]ou didn't report the crime to the cops just like I didn't" demonstrate that Defendant knew a crime occurred yet purposely failed to report it to law enforcement. Defendant argues his texts are not independent evidence, as required by *Parker*, 315 N.C. at 236, 337 S.E.2d at 495, because they are Defendant's own words. Defendant's text messages to Greene, however, are evidence independent of Defendant's statements to investigators.

Accordingly, substantial independent evidence tends to establish Defendant's intent to conceal Kaceyn's death. *See DeJesus*, 265 N.C. App. at 284–85, 827 S.E.2d at 748–49.

b. Death by Unnatural Causes

Finally, substantial evidence tends to establish that Defendant knew or had reason to know Kaceyn did not die of natural causes. *See DeJesus*, 265 N.C. App. at 284–85, 827 S.E.2d at 748–49. Defendant's text to Greene strongly corroborates Defendant's confession because these statements show Kaceyn's death was not natural. *See* N.C. Gen. Stat. §§ 14-401.22(a1), (e).

Substantial evidence also tends to establish that Defendant frequented the Home at the same time Clements and Kaceyn lived there and likely would have been aware of the suspicious circumstances surrounding Kaceyn's disappearance. Defendant himself related these circumstances to law enforcement, corroborating his statements to investigators that he did not think Kaceyn could survive without medical treatment as Kaceyn had bruises, trouble breathing, a severely swollen head, and appeared braindead.

Accordingly, substantial independent evidence regarding Defendant's knowledge of Kaceyn's unnatural death tends to establish the trustworthiness of Defendant's confession. *See DeJesus*, 265 N.C. App. at 284–85, 827 S.E.2d at 748–49.

4. Voluntariness of the Confession

We note that there is no challenge to the voluntariness of Defendant's statements to law enforcement. Defendant was not under arrest during either of his recorded interviews with law enforcement. Because Defendant's confession was voluntary, its trustworthiness is bolstered, and the second factor justifying the *corpus delicti* rule—guarding against the untrustworthiness of an involuntary confession—is satisfied. *See DeJesus*, 265 N.C. App. at 286, 827 S.E.2d at 750; *Parker*, 265 N.C. App. at 285, 827 S.E.2d at 750.

We, therefore, find the *corpus delicti* rule is satisfied because there is substantial independent evidence tending to establish the trustworthiness of Defendant's confession. *See DeJesus*, 265 N.C. App. at 285, 827 S.E.2d at 749; *see also Sweat*, 366 N.C. at 85, 727 S.E.2d at 696. Moreover, Defendant's confession itself constitutes substantial evidence that he was the perpetrator of the crime. *See Parker*, 315 N.C. at 231, 337 S.E.2d at 492; *see also DeJesus*, 265 N.C. App. at 284, 827 S.E.2d at 748. Because there was substantial evidence of each element of the crime charged and that Defendant was the perpetrator, the trial court properly denied the motion to dismiss. *See DeJesus*, 265 N.C. App. at 284, 827 S.E.2d at 748.

B. Testimony that Clements Was in Prison for Second-Degree Murder

[2] Next, Defendant argues the trial court erred by allowing Agent Barnes's testimony regarding Clements's conviction for second-degree murder because it: (1) was irrelevant because there was no questioning by the prosecutor or testimony by Agent Barnes connecting Clements's whereabouts to Kaceyn's death; (2) was unfairly prejudicial because it likely would lead jurors to believe that Clements killed Kaceyn and therefore, Defendant must have concealed Kaceyn's death; and (3) constituted a violation of the Confrontation Clause.

1. Rule 401

Defendant argues the State did not sufficiently connect its questioning about Clements's conviction for second-degree murder, and the testimony was therefore irrelevant pursuant to N.C. R. Evid. 401. We disagree.

"Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard[,] . . . such rulings are given great deference on appeal." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (quotation marks omitted).

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. R. Evid. 401. Agent Barnes's testimony that Clements was in prison for second-degree murder was directly relevant to the fact that Kaceyn died because at trial, the jury heard testimony regarding the texts Defendant sent to Greene which stated, "[Clements] killed or abused her child." Such evidence was relevant because it made it more probable that Kaceyn was deceased. *See* N.C. R. Evid. 401.

Accordingly, the trial court did not err by allowing such testimony because it was relevant to whether Kaceyn was dead. *See* N.C. R. Evid. 401; *see also Dunn*, 162 N.C. App. at 266, 591 S.E.2d at 17.

2. Rule 403

Defendant argues evidence of Clements being in prison for second-degree murder was unfairly prejudicial.

"We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion. An abuse of discretion results when the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (internal quotation marks and citations omitted).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. R. Evid. 403.

Defendant specifically argues Agent Barnes's testimony regarding Clements's second-degree murder conviction unfairly prejudiced Defendant because it could have led the jurors to conclude Clements murdered Kaceyn, and Defendant must be guilty of concealing Kaceyn's death. This evidence was not unfairly prejudicial because, as addressed above in Section IV, substantial evidence established that Kaceyn died of unnatural causes. *See* N.C. R. Evid. 403.

Therefore, Agent Barnes's testimony did not unfairly prejudice Defendant, and the trial court did not err by overruling Defendant's objections. *See* N.C. R. Evid. 403; *see also Whaley*, 362 N.C. at 160, 655 S.E.2d at 390.

3. U.S. Const. amend. VI; N.C. Const. art. I, § 23

Defendant argues Agent Barnes's testimony that Clements was in prison for second-degree murder violated Defendant's constitutional right to confront witnesses against him.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Harris*, 242 N.C. App. 162, 164, 775 S.E.2d 31, 33 (2015).

Under both our Federal and State Constitutions, defendants have the right to confront witnesses against them. U.S. Const. amend. VI;

N.C. Const. art. I, § 23. The hallmark of a defendant's right to confront witnesses against him or her is cross-examination. *See Crawford v. Washington*, 541 U.S. 36, 54, 124 S. Ct. 1354, 1365, 158 L. Ed. 2d 177, 194 (2004). A witness's testimonial statements are inadmissible against a defendant unless at trial the witness "was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id*. at 54, 124 S. Ct. at 1365, 158 L. Ed. 2d. at 183.

Defendant reasons that Clements's conviction occurred because of her guilty plea, so testimony regarding her conviction equates to evidence of her guilty plea and therefore constitutes testimonial evidence against Defendant. While no North Carolina case directly addresses whether a witness's testimony regarding the murder conviction of a defendant in a different case constitutes a testimonial statement, we did find a Fourth Circuit case that is instructive. The guilty plea of a defendant from a different case does not constitute testimonial evidence. *United States v. Kuai Li*, 280 F. App'x 267, 269 (4th Cir. 2008) (federal district court did not err when it took judicial notice of guilty plea entered by a corrupt government official who assisted the defendant in the crime "because the taking of such notice did not result in the admission of a testimonial statement"). On appeal, a Confrontation Clause violation may be found to be a harmless error in light of other evidence inculpating a defendant. *United States v. Banks*, 482 F.3d 733, 741 (4th Cir. 2007).

Here, as an initial matter, Agent Barnes did not testify regarding how Clements's conviction for second-degree murder came about. As far as the jury members knew, it could have resulted from a jury conviction or from a guilty plea. Even if Agent Barnes's testimony somehow notified the jury of Clements's guilty plea, however, we need not decide whether that constituted a testimonial statement. Any potential error would be harmless in light of the other evidence establishing that Kaceyn died of unnatural causes. *See Banks*, 482 F.3d at 741.

Accordingly, the trial court did not commit prejudicial error by allowing Agent Barnes's testimony regarding Clements's whereabouts. *See Banks*, 482 F.3d at 741.

V. Conclusion

We hold the trial court did not err in denying Defendant's motion to dismiss because there was sufficient evidence presented at trial, and the State satisfied the *corpus delicti* rule. We further hold that even if testimony that Clements was in prison for second-degree murder constituted testimonial evidence, any potential Confrontation Clause error

was a harmless error in light of other evidence implicating Defendant in concealing Kaceyn's death.

AFFIRMED.

Judge CARPENTER concurs.

Chief Judge STROUD concurs in a separate opinion.

STROUD, Chief Judge, concurring.

While I agree with the majority that the trial court properly denied Defendant's motion to dismiss and would ultimately conclude there was no prejudicial error, I write separately as I do not agree with the analysis in section IV. B. 1 and 2 regarding Rules of Evidence 401 and 403.

As noted by the majority, Agent Barnes testified before the jury regarding his investigation of Kaceyn's disappearance. The State asked him "Now, through your investigation, do you know where Kayla Clements is now?" and he answered, "She is currently in the North Carolina Department of Corrections." The State then asked, "Do you know why?" At this point, Defendant objected and asked "to be heard outside the presence of the jury." Outside the presence of the jury, Defendant stated grounds for the objection in detail, including the Confrontation Clause and the *Bruton* rule,[1] as well as the lack of the relevance of the evidence, unfair prejudice under Rule 403, and due process.

1. The *Bruton* rule stems from *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968). "In *Bruton*[,] the United States Supreme Court held that at a joint trial, admission of a statement by a nontestifying codefendant that incriminated the other defendant violated that defendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *State v. Evans*, 346 N.C. 221, 231, 485 S.E.2d 271, 277 (1997) (citing *Bruton*, 391 U.S. at 126, 20 L. Ed. 2d at 479), *cert. denied*, 522 U.S. 1057, 139 L. Ed. 2d 653 (1998). Furthermore, "[t]he principles set out in *Bruton* apply only to the extrajudicial statements of a declarant who is unavailable at trial for full and effective cross-examination. *Nelson v. O'Neil*, 402 U.S. 622, 91 S. Ct. 1723, 29 L. Ed. 2d 222 (1971). Where the declarant takes the stand and is subject to full and effective cross-examination, a codefendant implicated by extrajudicial statements has not been deprived of his right to confrontation." *Evans*, 346 N.C. at 232, 485 S.E.2d at 277; *see State v. Hardy*, 293 N.C. 105, 118, 235 S.E.2d 828, 836 (1977) (summarizing the North Carolina Supreme Court's interpretation of the *Bruton* rule).

Defendant argued,

> They're trying to take an admission from a codefendant and use it to prove something here. Now that admission by Ms. Clements is admissible against her, but it is not admissible against my client. Now the State had every ability to issue a writ and have Ms. Clements come and testify here at this trial. They chose not to do so and they chose not to put her on the list, so this absolutely would violate the rules in Bruton and the confrontation clause, and therefore it is inadmissible testimony.

The discussion and voir dire regarding these objections continued at length, for 18 pages of transcript. Ultimately, based on the State's representation it would limit the question to Clements's imprisonment for second-degree murder; the trial court then overruled Defendant's objection. The State then asked Agent Barnes again in the presence of the jury why Clements was incarcerated, and Agent Barnes testified she was incarcerated for second-degree murder. Defendant then renewed his prior objections and moved to strike Agent Barnes's testimony, which the trial court overruled.

It is entirely reasonable to expect the jury would *assume* the victim was Kaceyn, but the identity of the victim was the primary reason for Defendant's objection to the question and the trial court's ruling on the objection. At oral argument of this case before this Court, the State could not articulate *any* reason the evidence that Clements was incarcerated for second-degree murder could be relevant *except* that it would tend to show Kaceyn was deceased. Clements was not there to testify as a witness. Nor did the State present a certified record of Clements's conviction. Instead, the State sought to rely upon the jury's logical assumption of a fact – that Clements was imprisoned for *Kaceyn's* murder – when the trial court had already ruled Agent Barnes could not testify to this fact. Defendant objected to the evidence of the identity of the victim of Clements's second-degree murder conviction for several reasons and the trial court did not allow this evidence to be presented, and yet the majority opinion still finds the evidence of the second-degree murder conviction relevant and admissible *because* the jury would likely infer Kaceyn must have been the victim of the murder.

The majority opinion is correct that the only way the second-degree murder conviction could possibly be relevant in this case was if Kaceyn was the victim. The fact that Clements was imprisoned for murdering *someone* would not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2021). In other words, the fact that Clements murdered *someone* does not aid the jury in determining if Kaceyn was actually deceased or if Defendant concealed the death of Kaceyn. This unrelated crime would not "make the existence of any fact that is of consequence to the determination . . . more probable or less probable." N.C. Gen. Stat. § 8C-1, Rule 401. "While our law no longer strictly forbids stacking inferences upon each other, in this case the link between the circumstances proved by direct evidence and the inferences drawn from these circumstances stretches too far" because there was no evidence presented that Clements was imprisoned for Kaceyn's murder, and the State did not question Agent Barnes on the identity of the victim of the second-degree murder, as it represented to the trial court. *State v. Lamp*, 383 N.C. 562, 571, 884 S.E.2d 623, 629 (2022) (citation omitted).

The testimony regarding Clements's imprisonment for second-degree murder was not relevant, but even worse, the only way it could be relevant is that the jury's logical assumption would be that Kaceyn was the victim. And this was the very reason for Defendant's objections and the State's tacit acknowledgement at trial of the merit of Defendant's objections based upon the Confrontation Clause and the *Bruton* case by the State's agreement not to elicit testimony as to the identity of the victim. The trial court should have sustained Defendant's objection to this testimony under Rule 401. *See* N.C. Gen. Stat. § 8C-1, Rule 401. Therefore, there would be no need to engage in a Rule 403 analysis regarding prejudicial versus probative value. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2021) ("*Although relevant*, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." (emphasis added)).

But although this evidence should have been excluded, I agree the error was not prejudicial in this case. This one sentence of testimony did not prejudice Defendant considering the substantial amount of evidence tending to show Kaceyn was deceased and regarding the circumstances of his death, and therefore the trial court properly denied Defendant's motion to dismiss. *See generally State v. Milby*, 302 N.C. 137, 142, 273 S.E.2d 716, 720 (1981) ("It is well-established that the burden is on the appellant not only to show error but also to show that he suffered prejudice as a result of the error. The test for prejudicial error is whether there is a reasonable possibility that the evidence complained of contributed to the conviction[.]" (citation omitted)). Therefore, there was no prejudicial error.

Thus, I write separately to concur in result only.

STATE v. FURTCH

[289 N.C. App. 413 (2023)]

STATE OF NORTH CAROLINA
v.
DAMIAN LEWIS FURTCH

No. COA22-643

Filed 20 June 2023

1. Appeal and Error—petition for writ of certiorari—denial of motion to suppress—intent to appeal

Where defendant clearly intended to appeal from the trial court's order denying his motion to suppress, as evidenced by his counsel's announcement in open court about defendant's intent, but lost his right to appeal because he failed to appeal the trial court's judgment entered upon his guilty plea, the appellate court granted defendant's petition for writ of certiorari to review the suppression order.

2. Search and Seizure—motion to suppress—supporting affidavit—facts not included—court's discretion to consider merits

In a drugs prosecution, although the supporting affidavit accompanying defendant's motion to suppress did not contain facts supporting the motion, the trial court properly exercised its discretion when it elected to address the merits of the motion rather than summarily denying it.

3. Search and Seizure—traffic stop—extension—inquiries incident to stop—in support of mission

In a drugs prosecution, the trial court properly denied defendant's motion to suppress drugs found in his vehicle during a traffic stop where the court's challenged findings about the distance traveled by an officer to catch up to defendant's vehicle and the amount of time the officer took to conduct a pat-down of defendant's person were supported by competent evidence. Further, the court's conclusions of law that the searches of defendant's person and vehicle after defendant was stopped for following another vehicle too closely and driving erratically did not impermissibly extend the stop since they were conducted in the ordinary course of inquiries incident to the stop and were permitted as precautionary measures to ensure the officer's safety. Likewise, a K-9 sniff for drugs that was unrelated to the reasons for the traffic stop did not unreasonably prolong the duration of the stop.

Appeal by Defendant from judgment entered 16 November 2021 by Judge Peter B. Knight in Henderson County Superior Court. Heard in the Court of Appeals 11 April 2023.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for Defendant-Appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alexander G. Walton, for the State-Appellee.

COLLINS, Judge.

Defendant Damian Lewis Furtch appeals from judgment entered upon his guilty plea to two counts of trafficking in methamphetamine; possession with intent to manufacture, sell and/or deliver a Schedule II controlled substance; and maintaining a vehicle used for keeping and selling a controlled substance. Defendant argues that the trial court erred by denying his motion to suppress because the traffic stop was unconstitutionally extended and the narcotics investigation exceeded the scope of the traffic stop. We grant Defendant's petition for writ of certiorari and affirm the trial court's denial of the motion to suppress.

I. Background

Detective Jacob Staggs and Detective Josh Hopper with the Henderson County Sheriff's Office were performing drug interdiction on 18 February 2019 as part of the Crimes Suppression Unit. The Crimes Suppression Unit is generally responsible for patrolling high crime areas. Staggs and Hopper's vehicle was positioned facing northbound on U.S. 25 South, "the road that goes from Henderson County into Greenville County toward Travelers Rest."

That night, Staggs had received a "whisper tip" from the Narcotics Unit to be on the lookout for a silver minivan. Shortly before midnight, Staggs spotted a silver minivan following a white pickup truck too closely and got behind the minivan to run its tag through dispatch. While observing the minivan and trying to find a safe place to conduct a traffic stop, the minivan "failed to maintain lane control, kept weaving in its lane, [and] hitting the line[.]"

Staggs initiated the traffic stop and approached the vehicle from the passenger side. Staggs explained to Defendant that he was "kind of weaving" and "kind of . . . following too closely[,]" and asked him for his driver's license. Defendant told Staggs that he was heading to

Hendersonville to visit family. When Staggs asked Defendant where his family lived, Defendant told him Black Mountain, "which [was] kind of odd" to Staggs because Black Mountain is not in Hendersonville. While Staggs was speaking with Defendant, K-9 Deputy Cory Smith with the Henderson County Sheriff's Office arrived on the scene.

After retrieving Defendant's license, Staggs went back to his patrol vehicle, ran Defendant's license through dispatch, and made sure he had no outstanding warrants. Hopper remained standing at the rear of Defendant's vehicle. Staggs confirmed that Defendant had a valid license and no outstanding warrants before writing him a warning citation for following too closely and failing to maintain lane control.

After printing the citation and "highlight[ing] certain things that are important," Staggs exited his patrol vehicle and spoke briefly with Smith. Smith asked Staggs to have Defendant step out of the car for safety while the K-9 conducted the free air sniff.

Staggs then approached Defendant and asked him to exit the vehicle so he could "explain the warning citation[.]" Staggs frisked Defendant for weapons before explaining the warning citation. As Staggs was explaining the citation to Defendant, Smith notified Staggs that the K-9 had alerted on Defendant's vehicle. Staggs finished explaining the citation to Defendant and then explained that they had probable cause to search his vehicle because the K-9 had alerted to narcotics. During the search, the officers discovered an envelope containing 474 grams of methamphetamine.

Defendant was charged with two counts of trafficking in methamphetamine; possession with intent to manufacture, sell and/or deliver a Schedule II controlled substance; and maintaining a vehicle used for keeping and selling a controlled substance. Defendant filed a motion to suppress, which was denied after a hearing on 15 November 2021 by written order entered 24 November 2021. Defendant subsequently pled guilty to the charges and reserved the right to appeal from the denial of his motion to suppress. The trial court sentenced Defendant to 177 to 225 months' imprisonment.

II. Discussion

A. Petition for Writ of Certiorari

[1] We first address this Court's jurisdiction to hear Defendant's appeal. "An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b)

(2021). To properly appeal the denial of a motion to suppress after a guilty plea, a defendant must: (1) prior to finalization of the guilty plea, provide the trial court and the prosecutor with notice of his intent to appeal the suppression order, and (2) timely and properly appeal from the final judgment. *State v. Jackson*, 249 N.C. App. 642, 645, 791 S.E.2d 505, 508 (2016).

Here, Defendant timely gave notice that he intended to appeal the denial of his motion to suppress, and the reservation of this right was noted in the transcript. Furthermore, Defendant, through trial counsel, announced in open court that he "would be giving notice of appeal . . . as to the motion to suppress and the [c]ourt's ruling on that motion." However, Defendant failed to appeal, either in open court or in writing, from the trial court's judgment entered upon his guilty plea, as is required by N.C. Gen. Stat. § 15A-979(b). Accordingly, Defendant lost his right to appeal the trial court's order denying his motion to suppress.

Recognizing this failure, Defendant has filed a petition for writ of certiorari. North Carolina Rule of Appellate Procedure 21(a) provides, inter alia, that "[a] writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a). "Whether to allow a petition and issue the writ of certiorari is not a matter of right and rests within the discretion of this Court." *State v. Biddix*, 244 N.C. App. 482, 486, 780 S.E.2d 863, 866 (2015) (citation omitted). Here, it is apparent that the trial court and the prosecutor were aware of Defendant's intent to appeal the denial of the motion to suppress prior to the entry of Defendant's guilty plea, and Defendant lost his appeal through no fault of his own. *See State v. Cottrell*, 234 N.C. App. 736, 740, 760 S.E.2d 274, 277 (2014) (granting petition for writ of certiorari where "it is apparent that the State was aware of defendant's intent to appeal the denial of the motion to suppress prior to the entry of defendant's guilty pleas and . . . defendant has lost his appeal through no fault of his own"). Accordingly, we grant Defendant's petition for writ of certiorari and address Defendant's appeal on the merits.

B. Motion to Suppress

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citation omitted). "When supported by competent evidence, the trial court's

factual findings are conclusive on appeal, even where the evidence might sustain findings to the contrary." *State v. Hall*, 268 N.C. App. 425, 428, 836 S.E.2d 670, 673 (2019) (citation omitted). "Unchallenged findings of fact are binding on appeal." *State v. Fizovic*, 240 N.C. App. 448, 451, 770 S.E.2d 717, 720 (2015) (citation omitted). "We review the trial court's conclusions of law on a motion to suppress de novo." *State v. Ladd*, 246 N.C. App. 295, 298, 782 S.E.2d 397, 400 (2016) (italics and citation omitted). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks, italics, and citations omitted).

1. Supporting Affidavit

[2] As an initial matter, Defendant argues that "[i]f, in this case, defense counsel made a minor procedural error, with respect to the format of his suppression motion–one that was not objected to by the State or noted by the trial court–[Defendant] should still have his claims considered by this Court." (quotation marks and citation omitted).

A motion to suppress "must be accompanied by an affidavit containing facts supporting the motion" and "may be based upon personal knowledge, or upon information and belief, if the source of the information and the basis for the belief are stated." N.C. Gen. Stat. § 15A-977(a) (2021). The trial court may summarily deny a motion to suppress if the motion does not allege a legal basis for the motion, or the affidavit does not support the ground alleged as a matter of law. N.C. Gen. Stat. § 15A-977(c) (2021). While the trial court has the authority to summarily deny a motion to suppress that fails to comply with the required procedural formalities, the trial court also has the discretion to refrain from summarily denying such a motion that lacks an adequate supporting affidavit if it chooses to do so. *State v. O'Connor*, 222 N.C. App. 235, 239-40, 730 S.E.2d 248, 251 (2012).

Here, the affidavit accompanying Defendant's motion to suppress states:

> That upon information and belief and after discussion with the above captioned defendant, review of discovery provided by the State including officer reports and documents produced in connection with this case, review of video evidence provided in discovery, the undersigned attorney has reason to believe that all alleged in the attached Motion to Suppress is accurate and alleged in good faith.

Although the accompanying affidavit did not include facts supporting the motion, the trial court, in its discretion, refrained from summarily denying Defendant's motion to suppress and conducted an evidentiary hearing addressing the merits of the issues raised by Defendant's motion. *Id.* at 241, 730 S.E.2d at 252. The merits of Defendant's appeal from the trial court's order denying his motion to suppress are therefore properly before this Court.

2. Traffic Stop

[3] Defendant argues that "Staggs deviated from the mission of the stop and unconstitutionally extended it[.]"

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures. U.S. Const. amend. IV. "Article I, Section 20 of the North Carolina Constitution similarly prohibits unreasonable searches and seizures." *State v. Thorpe*, 232 N.C. App. 468, 477, 754 S.E.2d 213, 220 (2014) (citation omitted).

"A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief." *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quotation marks and citation omitted). "A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 166 (2012) (quotation marks and citation omitted). "[T]o detain a driver beyond the scope of the traffic stop, the officer must have the driver's consent or reasonable articulable suspicion that illegal activity is afoot." *Id.* (citation omitted). "An officer has reasonable suspicion if a reasonable, cautious officer, guided by his experience and training, would believe that criminal activity is afoot based on specific and articulable facts, as well as the rational inferences from those facts." *O'Connor*, 222 N.C. App. at 238, 730 S.E.2d at 250-51 (quotation marks and citations omitted).

"The reasonable duration of a traffic stop, however, includes more than just the time needed to write a ticket. Beyond determining whether to issue a traffic ticket, an officer's mission includes ordinary inquiries incident to the traffic stop." *State v. Bullock*, 370 N.C. 256, 257, 805 S.E.2d 671, 673 (2017) (quotation marks, brackets, and citations omitted). "Such inquiries may involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *State v. France*, 279 N.C. App. 436, 441, 865 S.E.2d 707, 712 (2021) (quotation marks and citation omitted).

"In addition, an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely." *Bullock*, 370 N.C. at 258, 805 S.E.2d at 673 (quotation marks and citation omitted). "As a precautionary measure to protect the officer's safety, a police officer may as a matter of course order the driver and passengers of a lawfully stopped car to exit his vehicle during a stop for a traffic violation." *State v. Jones*, 264 N.C. App. 225, 231, 825 S.E.2d 260, 265 (2019) (quotation marks and citation omitted). Furthermore, because " 'traffic stops remain lawful only so long as unrelated inquires do not *measurably* extend the duration of the stop,' a 'frisk that lasts just a few seconds . . . d[oes] not extend the traffic stop's duration in a way that would require reasonable suspicion.' " *Id.* (quoting *Bullock*, 370 N.C. at 262-63, 805 S.E.2d at 676-77). "[B]ecause officer safety stems from the mission of the traffic stop itself, time devoted to officer safety is time that is reasonably required to complete that mission." *Bullock*, 370 N.C. at 262, 805 S.E.2d at 676.

"[T]he Fourth Amendment permits an officer to conduct an investigation *unrelated* to the reasons for the traffic stop as long as it [does] not lengthen the roadside detention." *France*, 279 N.C. App. at 442, 865 S.E.2d at 712 (quotation marks and citations omitted). Thus, "an officer who lawfully stops a vehicle for a traffic violation but who otherwise does not have reasonable suspicion that any crime is afoot beyond a traffic violation may execute a dog sniff only if the check does not prolong the traffic stop." *State v. Warren*, 242 N.C. App. 496, 499, 775 S.E.2d 362, 365 (2015).

a. Findings of Fact

Defendant challenges portions of findings of fact 14 and 22.

Finding of fact 14 states:

> The undersigned cannot find as a fact what distance was traveled by Deputy Staggs while he was catching up to the minivan. The traffic at that time was neither "light" nor "heavy." Generally, the vehicle traffic at that time was traveling 65 m.p.h., more or less. Deputy Staggs did not operate his blue lights or his siren, until such time as he had been behind the minivan for sufficient time to observe the minivan weave within its lane again.

Defendant contends that "[b]ecause Staggs testified he was parked at mile marker 3 and the stop occurred at mile marker 8, the trial court's finding that it could not determine what distance Staggs followed the

minivan is unsupported." However, the trial court also made the following unchallenged findings of fact:

> 11. . . . Deputy Staggs observed that, in his opinion, the silver minivan was following too closely behind an older model white pickup truck. At the time, Deputy Staggs['] vehicle was parked at about Mile Marker 3. . . .
>
> . . . .
>
> 13. . . . Deputy Staggs departed from his stationary position, and operated his vehicle away from the shoulder of the highway for the purpose of following the silver minivan.
>
> 15. At such time as Deputy Staggs turned on his blue lights (no siren), the minivan promptly moved to the right-hand lane and safely came to a stop along the shoulder. The point of the stop, at about mile marker 8, was about five miles from the location where Deputy Staggs first observed the minivan.

The challenged portion of finding of fact 14, when viewed in conjunction with these findings, indicates that the trial court could not find as a fact the distance Staggs traveled after departing from his stationary position before catching up to the minivan. The trial court's findings of fact that "Deputy Staggs['] vehicle was parked at about Mile Marker 3" and that "[t]he point of the stop, at about mile marker 8, was about five miles from the location where Deputy Staggs first observed the minivan" are supported by competent evidence. When asked at the suppression hearing at what mile marker he was positioned, Staggs testified, "At that point in time I want to say 3." Furthermore, Staggs testified that "I stopped him around mile marker 8, getting close to Interstate 26 there." However, there is no competent evidence in the record to support any finding as to what distance Staggs traveled after departing from his stationary position before catching up to the minivan. Thus, the trial court did not err by declining to "find as a fact what distance was traveled by Deputy Staggs while he was catching up to the minivan."

Finding of fact 22 states:

> Upon printing of the warning citation, Deputy Staggs got out of his vehicle, approached the Defendant's car from the rear, and asked the Defendant to get out and come around to where the Deputy was. The Defendant complied immediately. The Deputy asked the Defendant whether he

> had any weapons, to which the Defendant replied that he did not. The Deputy told the Defendant that he was going to perform a quick patdown for weapons; the Defendant promptly complied with the Deputy's requests. The Deputy did so in a matter of not more than about 10 seconds.

Defendant contends that "[t]he trial court's finding that the pat-down 'did not last longer than about 10 seconds' is unsupported to the extent it implies the pat-down did not last longer than 10 seconds in total." The challenged portion of this finding indicates that the trial court found that the pat-down itself, rather than the entire encounter, lasted for about ten seconds. In making this finding, the trial court considered Staggs' dash cam video. Staggs begins his pat down of Defendant at 8:16 of the dash cam video and concludes the pat down at 8:27. Thus, the trial court's finding of fact that Staggs frisked Defendant for "not more than about 10 seconds" is supported by competent evidence.

Accordingly, the trial court's findings of fact are supported by competent evidence.

b. Conclusions of Law

Defendant contends that conclusions of law 8, 13, 15, and 19 are not supported by the trial court's findings of fact.

Conclusion of law 8 states:

> Deputy Staggs['] conversation immediately following the stop of the Defendant's vehicle, was relatively short, and was directly related to the purpose of the stop. The conversation did nothing to change Deputy Staggs' reasonable suspicion that the Defendant's vehicle was following the white pickup truck too closely, and in fact the conversation appeared to confirm that belief.

This conclusion of law is supported by finding of fact 19, which states, in part:

> [Staggs] told the Defendant why he had stopped him – to the effect of you were "kind of following too close." The Defendant agreed, although the undersigned does not take this agreement by the Defendant as an admission, but instead, merely that instead of denying knowledge of such allegation, the Defendant agreed.

Although the trial court did "not take this agreement by Defendant as an admission," the trial court noted that "instead of denying knowledge

of such allegation, the Defendant agreed." This finding supports the trial court's conclusion of law that Staggs' conversation with Defendant "appeared to confirm" that Defendant was following too closely.

Conclusions of law 13, 15, and 19 state:

> 13. Deputy Staggs' explanation of the warning citation after the Defendant was directed to get out of his vehicle took no longer than it would have had the Defendant remained in his vehicle, save for the time required for the brief "pat-down" and the time it took to walk the few steps to the guardrail beside the Deputy Staggs' vehicle. Had Deputy Staggs explained the warning citation to the Defendant while the Defendant remained in the vehicle, he could not have explained the citation and then handed it to the Defendant without being on the highway side of the Defendant's vehicle, in the lane of travel of the highway, thus presenting a safety issue. Deputy Staggs' direction of the Defendant to exit his vehicle for this purpose was lawful.
>
> 15. Deputy Staggs had the authority to direct the Defendant to step out of his vehicle during the stop, to "pat-down" or frisk the Defendant, and to explain the warning citation to the Defendant provided that he did not extend the stop of the Defendant unnecessarily to do so; in fact, the stop was not extended unnecessarily to complete these acts.
>
> 19. The cursory search of the Defendant's vehicle did not extend the stop of the Defendant's vehicle, and was completed prior to the completion of the lawful purposes of the stop.

Staggs initiated the traffic stop after observing a silver minivan following a white pickup truck too closely, "fail[ing] to maintain lane control, . . . weaving in its lane, [and] hitting the line[.]" At that point, Staggs was legally authorized to detain Defendant for "the length of time reasonably necessary to accomplish the mission of the stop[.]" *Bullock*, 370 N.C. at 257, 805 S.E.2d at 673 (citations omitted). Upon approaching the vehicle, Staggs informed Defendant of the reason for the stop and requested his identification. Staggs then returned to his patrol vehicle to run Defendant's license through dispatch and make sure he had no outstanding warrants. Such inquiries are "ordinary inquiries incident to the traffic stop." *Id.* (quotation marks, brackets, and citation omitted).

Upon writing a warning citation for left of center and following too closely, Staggs asked Defendant to step out of the vehicle to explain the warning citation. Staggs was permitted to order Defendant out of the car as a precautionary measure to protect his safety. *Jones*, 264 N.C. App. at 231, 825 S.E.2d at 265. Likewise, Staggs' pat down of Defendant did not measurably extend the duration of the traffic stop in a way that would require reasonable suspicion. *Bullock*, 370 N.C. at 263, 805 S.E.2d at 677 ("So this very brief frisk did not extend the traffic stop's duration in a way that would require reasonable suspicion."). Although unrelated to the mission of the traffic stop, the K-9 free air sniff did not prolong the stop because it took place while Staggs was explaining the ticket to Defendant. *Warren*, 242 N.C. App. at 498-99, 775 S.E.2d at 365.

At no point during the traffic stop did any of the officers' actions "convert the encounter into something other than a lawful seizure[.]" *Arizona v. Johnson*, 555 U.S. 323, 333 (2009). For the entirety of the traffic stop, Staggs was either " 'diligently pursu[ing] the investigation[,]' conducting 'ordinary inquiries incident to [the traffic] stop[,]' or taking necessary 'precautions in order to complete [his] mission safely.' " *France*, 279 N.C. App. at 444, 865 S.E.2d at 714 (quoting *Rodriguez v. United States*, 575 U.S. 348, 354-56 (2015)). Although the K-9 free air sniff was unrelated to the reasons for the traffic stop, it did not prolong the traffic stop and was therefore permissible. *Id.*

Accordingly, the trial court did not err by denying Defendant's motion to suppress.

III. Conclusion

As the trial court's findings of fact are supported by competent evidence and the trial court's findings of fact support its conclusions of law, the trial court did not err by denying Defendant's motion to suppress. Accordingly, we grant Defendant's petition for writ of certiorari and affirm the trial court's denial of Defendant's motion to suppress.

AFFIRMED.

Chief Judge STROUD and Judge FLOOD concur.

STATE OF NORTH CAROLINA
v.
BRITTANY MICHELLE JACKSON

No. COA22-922

Filed 20 June 2023

Motor Vehicles—fleeing to elude arrest—intent—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of felony fleeing to elude arrest where the State presented sufficient evidence of defendant's intent to elude two officers, who were trying to conduct a traffic stop after defendant's car ran a stop sign. The evidence showed that, after one of the officers pulled up behind defendant's vehicle and activated his patrol car's emergency signals, defendant made several abrupt turns, drove ten to fifteen miles per hour over the speed limit, ran multiple stop signs, repeatedly drove in the oncoming lane of traffic, and passed several well-lit areas in a residential neighborhood; additionally, the officer saw marijuana being thrown out of defendant's car during the chase; then, during her arrest, defendant was noncooperative and combative with the officers, and even tried to provoke a crowd that had formed around them by rolling down the patrol car window and shouting.

Appeal by Defendant from judgment entered 7 March 2022 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 25 April 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Rana M. Badwan, for the State-Appellee.

Stephen G. Driggers for Defendant-Appellant.

COLLINS, Judge.

Defendant Brittany Michelle Jackson appeals from judgment entered upon jury verdicts of guilty of misdemeanor possession of marijuana and misdemeanor fleeing to elude arrest with a motor vehicle. Defendant argues that the trial court erred by denying her motion to dismiss the charge of fleeing to elude arrest because the State presented insufficient evidence that she had the specific intent to elude arrest. We find no error.

I. Background

On 28 October 2020, Defendant attended a barbeque with her son at an apartment complex in Selma, North Carolina. Around 7 pm, Defendant left the complex to drive another individual to the store. Selma Police Detective Justin Vause and Officer Joseph Atkinson were parked in a marked police vehicle where they could "watch the duly regulated stop sign" leading out of the apartment complex. Vause watched Defendant drive through the stop sign at 10 miles per hour without braking and began to follow her. Vause pulled in behind her and activated his lights and sirens to conduct a traffic stop. Defendant "made an abrupt turn" onto another street and "went into the oncoming lane and continued to travel in the oncoming lane of travel." "At that time[,] the vehicle turned on its hazard lights and increased its speed" from a very slow speed to about 35 to 40 miles per hour in a residential area marked as a 25 mile-per-hour zone.

Defendant called 911 as she put her hazard lights on. She did not initially stop because she did not know the area and did not know if the marked car behind her was an "actual police officer." During the 911 call, the operator told Defendant that it was a police officer in the car behind her.

Defendant kept driving and then made an abrupt right turn onto a different street, turning into the oncoming lane of light traffic. She continued to travel in the oncoming lane. Defendant then made another right turn onto a different street and continued to maintain a speed over the legal limit; she only "slow[ed] down enough to make [the vehicle's] turn" and "then [she] increase[d] its speed back up." Defendant did not stop for the posted stop signs at either turn. During the pursuit, Defendant and Vause passed several well-lit areas including a church, fire station, EMS station, and civic center.

Defendant made a final right turn and traveled back towards the apartment complex for approximately one mile with "numerous patrol vehicles behind" her. Defendant's speed remained above the speed limit, fluctuating between 30 to 45 miles per hour in the 25 mile-per-hour residential zone. When Defendant made the final right turn, Vause saw that "the passenger window was down, and at that time, there [were] objects being thrown out of the vehicle." Vause then smelled an overwhelming odor of marijuana in his patrol vehicle.

Upon arrival at the apartment complex, Defendant parked in the "very back" area of the complex. Vause parked, exited his vehicle, approached the driver's side, and commanded Defendant to get out of

the car. Defendant did not comply. Vause "beat on the window to tell [Defendant] to open the window" and tried "to open the door and the door was locked." After a few moments, Defendant opened the door and Vause was able to remove Defendant from the vehicle. Defendant was "belligerent," "argumentative," and "jumping in [Vause's] face," and Vause placed Defendant in handcuffs. As Defendant was being placed under arrest, around 50 to 60 people gathered at the scene. Defendant continued to be argumentative and "act out" as Vause placed Defendant inside his patrol car; Defendant then unrolled the patrol car's window with her foot and shouted at the group of people to provoke the crowd. Vause and a female officer put Defendant in leg shackles to keep her from rolling any windows down and from further provoking the crowd.

On 7 December 2020, Defendant was indicted for possession with intent to manufacture, sell, or distribute marijuana; possession of marijuana paraphernalia; and felony fleeing to elude arrest with a motor vehicle.[1] The case came on for trial on 28 February 2022. After the State's evidence and again after all the evidence, Defendant moved to dismiss the charge of felony fleeing to elude arrest for insufficient evidence. The trial court denied the motion.

The jury found Defendant not guilty of possession of marijuana paraphernalia but guilty of misdemeanor possession of marijuana and misdemeanor fleeing to elude arrest with a motor vehicle. Defendant was sentenced to 30 days' imprisonment; the trial court then suspended the sentence and placed Defendant on 12 months' supervised probation. Defendant gave notice of appeal in open court.

II. Discussion

Defendant argues that the trial court erred by failing to dismiss the charge of fleeing to elude arrest with a motor vehicle because the State failed to present sufficient evidence of Defendant's intent to elude arrest.

A. Standard of Review

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of

1. N.C. Gen. Stat. § 20-141.5(a) provides that a violation of the section constitutes a Class 1 misdemeanor. However, N.C. Gen. Stat. § 20-141.5(b) provides that, if two or more aggravating factors are present at the time the violation occurs, a violation of the section shall be a Class H felony. These aggravating factors include, inter alia, reckless driving as proscribed by N.C. Gen. Stat. § 20-140 and driving when the person's driver's license is revoked. N.C. Gen. Stat. § 20-141.5(b)(3), (5) (2022). These two aggravating factors were listed on Defendant's indictment.

the crime and that the defendant is the perpetrator." *State v. Golder*, 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020) (citations omitted). "Substantial evidence is [the] amount . . . necessary to persuade a rational juror to accept a conclusion." *Id.* (citations omitted). "In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* at 249-50, 839 S.E.2d at 790 (quotation marks and citations omitted). We disregard a defendant's evidence except to the extent it favors or clarifies the State's case. *State v. Graves*, 203 N.C. App. 123, 125, 690 S.E.2d 545, 547 (2010) (citation omitted). "Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 199 (1995). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *Golder* 374 N.C. at 250, 839 S.E.2d at 790 (citations omitted).

B. Discussion

N.C. Gen. Stat. § 20-141.5(a) provides, "It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties." N.C. Gen. Stat. § 20-141.5(a) (2022). "[A] defendant accused of violating N.C. Gen. Stat. § 20-141.5 must actually intend to operate a motor vehicle in order to elude law enforcement officers . . . ." *State v. Woodard*, 146 N.C. App. 75, 80, 552 S.E.2d 650, 654 (2001). "Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. McDaris*, 274 N.C. App. 339, 344, 852 S.E.2d 403, 407-08 (2020) (citation omitted).

Considered in the light most favorable to the State, the evidence tends to show the following: Defendant ran a stop sign after leaving the apartment complex. Vause pulled in behind Defendant and Defendant saw Vause turn on his vehicle's emergency equipment. She abruptly turned right onto a different street, traveling into the oncoming lane of travel. Defendant then increased her speed, drove 10 to 15 miles per hour above the posted 25 mile-per-hour speed limit, made a series of abrupt right turns, drove through several stop signs, again swerved into the oncoming lane, and passed several well-lit areas in a residential neighborhood, including a fire station and an EMS station. During Vause's pursuit, marijuana was thrown out of the car that Defendant was driving. When Defendant pulled over, she initially refused to comply

with Vause's commands to roll her window down and open her door, and then was combative with the officers and tried to provoke the crowd that had formed at her arrest. After arrest, she continued to provoke the crowd by rolling down the patrol car's window and shouting.

"This is not a case of a nervous motorist taking a moment longer than necessary to stop for an officer in order to pull into a well-lit or populated parking lot to stop instead of stopping on a dark or empty highway[.]" *State v. Cameron*, 223 N.C. App. 72, 76, 732 S.E.2d 386, 389 (2012). The State's evidence is substantial evidence tending to show Defendant intended to evade officers. *See id.* (evidence that defendant intentionally drove away from a law enforcement officer "at a high rate of speed while committing traffic violations and seriously endangering herself, many law enforcement officers, and anyone else on the road along the way" was sufficient to survive a motion to dismiss). Accordingly, the trial court properly denied Defendant's motion to dismiss.

III. Conclusion

As the evidence, viewed in the light most favorable to the State, is substantial evidence of each element of the crime of fleeing to elude arrest, the trial court did not err by denying Defendant's motion to dismiss.

NO ERROR.

Judges TYSON and RIGGS concur.

STATE v. MILLER

[289 N.C. App. 429 (2023)]

STATE OF NORTH CAROLINA
v.
SANTARIO KENDELL MILLER

No. COA22-453

Filed 20 June 2023

1. Appeal and Error—invited error—affirmative actions—redacted video

The appellate court rejected the State's argument that defense counsel invited error, thus waiving appellate review of the admission of portions of a videotaped interview between law enforcement and defendant, by cooperating with the State to determine the appropriate redactions to the interview and agreeing to the admission of the redacted video and its publication to the jury. Because defense counsel did not take any affirmative action to introduce the redacted interview, the invited error doctrine did not apply.

2. Evidence—video interview—plain error analysis—substantial evidence of guilt

In defendant's murder trial, even assuming that the trial court erred by admitting portions of a redacted interview between defendant and law enforcement, there was no plain error because defendant could not show prejudice in light of the substantial other evidence of defendant's guilt—including testimony from two eye witnesses who picked defendant out of a photo lineup and identified him as the shooter in court and surveillance footage showing someone near the bus stop when the victim was shot wearing clothes that the defendant had been wearing.

3. Sentencing—prior record level—proof of prior convictions—copy of records maintained by Department of Public Safety

In sentencing defendant for first-degree felony murder and possession of a firearm by a felon, the trial court did not err in its calculation of defendant's prior record level where the State satisfied its burden to prove defendant's prior convictions by submitting a printout of the computerized criminal record maintained by the Department of Public Safety, as permitted pursuant to N.C.G.S. § 15A-1340.14(f).

Appeal by Defendant from judgments entered 9 November 2021 by Judge Gregory R. Hayes in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 January 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Brian D. Rabinovitz, for the State.

Mecklenburg County Public Defender Kevin P. Tully, by Assistant Public Defender Julie Ramseur Lewis, for Defendant.

COLLINS, Judge.

Defendant appeals from judgments entered upon jury verdicts of guilty of first degree murder on the basis of felony murder and possession of a firearm by a felon. Defendant argues that the trial court plainly erred by admitting certain portions of a redacted recording of an interview between law enforcement and Defendant and erred in calculating Defendant's prior record level. Even assuming for the sake of argument that the challenged portions of the interview were erroneously admitted, their admission did not rise to the level of plain error. Furthermore, the trial court did not err in its prior record level calculation.

I. Factual Background and Procedural History

Defendant was indicted on 9 July 2018 for first degree murder and possession of a firearm by a felon. He was tried beginning 1 November 2021. At trial, the State presented eight witnesses and 39 exhibits, including video surveillance footage of the area and a redacted recording of the interview between law enforcement and Defendant. Defendant did not present any evidence. The State's evidence tended to show the following:

During the late night and early morning of 20-21 May 2018, Defendant, Shalamar Venable, Marquis Hines, Dean Hough, and several other individuals were gathered at a bus stop in Charlotte. Hines and Hough testified that Defendant left the bus stop for one to two hours before returning with another man, whom Hough identified as "Damien." Upon returning, Defendant confronted Venable regarding drugs and money that Defendant believed Venable owed him. When Venable denied that she owed Defendant money, Defendant pulled out a revolver.

Hines testified that, after Defendant pulled out the revolver, Defendant punched Venable and fired a shot past her. Venable then stepped toward Defendant, and Defendant shot her two to three times. Hines and another man tried to approach, but Defendant pointed the revolver at them, and they retreated. As Hines was retreating, he turned back and saw Defendant going through Venable's pockets. Upon reaching the nearby woods, Hines called 911.

Hough testified that, after Defendant pulled out the revolver, Hough began walking away from the scene. When Hough was a short distance from the scene, he heard four or five gunshots and looked back to see Defendant and Damien leaving the scene. Hough returned to the scene to find Venable on the ground and called 911.

Venable was taken to the hospital where she was pronounced dead. The medical examiner determined that she had suffered four gunshot wounds, and that two of them were responsible for her death.

Police interviewed Hines and Hough separately after the shooting and showed them photographic lineups of six individuals, one of whom was Defendant. When Hines was shown the photo lineup, he identified two individuals as possibly the shooter, one of whom was Defendant. Hines said that his confidence that Defendant was the shooter was 7 out of 10, and that his confidence that the other individual was the shooter was 7 or 8 out of 10. At trial, Hines identified Defendant as the shooter.

When Hough initially viewed the photo lineup, he did not pick anyone out. Upon reviewing the lineup a second time, he identified Defendant as possibly the shooter, noting that the picture of Defendant "looks the same. From his eyes, on down, his whole face." At trial, Hough identified Defendant as the shooter.

Defendant was arrested on 29 June 2018 and interviewed by two detectives. The recording of the interview was redacted upon agreement between the State and Defendant, and the redacted version of the interview was published to the jury during Defendant's trial. During the interview, Defendant initially denied any knowledge of, or involvement in, the events surrounding Venable's death. Detectives confronted Defendant with purported statements from eyewitnesses identifying Defendant as the shooter and showed Defendant surveillance video depicting someone near the bus stop when Venable was shot wearing clothes like those Defendant had been wearing. Upon viewing the surveillance footage, Defendant remarked that the figure in the video "looks just like me, but I don't know."

Defendant then admitted to being in the area on the night of the shooting with another man whom Defendant identified as a "dope fiend." Defendant stated that he had confronted Venable regarding drugs, and that the dope fiend began to argue with Venable. Defendant said he did not want to get involved so he left the area. Defendant heard gunshots but continued about his business because it did not involve him. Defendant continued to deny that he had shot Venable for the duration of the interview.

On 9 November 2021, the jury returned guilty verdicts for first degree felony murder[1] and possession of a firearm by a felon. Defendant was sentenced to life imprisonment without the possibility of parole for his first degree murder conviction and 17 to 30 months' imprisonment to begin at the expiration of his life sentence for his possession of a firearm by a felon conviction. Defendant gave oral notice of appeal in open court.

II. Discussion

A. Defendant's Recorded Interview

Defendant first argues that the trial court plainly erred by admitting certain portions of the recorded interview between law enforcement and Defendant because the challenged portions of the recording contained hearsay and inadmissible character evidence, were unfairly prejudicial, regarded Defendant's pre-arrest silence, and/or shifted the burden of proving his innocence.

1. Preservation and Standard of Review

[1] "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]" N.C. R. App. P. 10(a)(1). "[A]n issue that was not preserved by objection . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4).

Defendant acknowledges that he did not object to the admission of the statements that he now argues were admitted in error. However, Defendant specifically and distinctly argues that the admission of these statements amounts to plain error. Thus, the evidentiary issues are reviewable for plain error. *See id.*

The State argues that Defendant invited any error and waived appellate review because, "(1) Defendant, through counsel, actively cooperated with the State to determine the appropriate redactions to his videotaped interview; (2) the redactions to the video were for the benefit of Defendant; and (3) Defendant agreed to the admission of the redacted video and its publication to the jury."

"[U]nder the doctrine of invited error, a party cannot complain of a charge given at his request, or which is in substance the same as one

1. The jury did not find Defendant guilty of first degree murder on the basis of malice, premeditation, and deliberation.

asked by him[.]" *Sumner v. Sumner*, 227 N.C. 610, 613, 44 S.E.2d 40, 41 (1947) (citations omitted); *see also State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971) ("Ordinarily one who causes . . . the court to commit error is not in a position to repudiate his action or assign it as ground for a new trial."). The invited error doctrine is codified by N.C. Gen. Stat. § 15A-1443(c), which states, "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2021). "Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Crane*, 269 N.C. App. 341, 343, 837 S.E.2d 607, 608 (2020) (citation omitted).

Our courts have consistently applied the invited error doctrine when a defendant's affirmative actions directly precipitate error. *See*, *e.g.*, *id.* at 345, 837 S.E.2d at 609-10 (applying invited error doctrine where defense counsel elicited the testimony at issue on cross-examination); *State v. Roseboro*, 344 N.C. 364, 373, 474 S.E.2d 314, 318 (1996) (applying invited error doctrine where "defendant unequivocally agreed" to limit the purpose of certain testimony); *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416, (2001) (applying invited error doctrine where defendant requested evidence be admitted "despite explicit warnings by the trial court that defendant's statement had not been properly redacted").

On the other hand, our courts have declined to apply the invited error doctrine where such specific and affirmative actions are absent. *See*, *e.g.*, *State v. Chavez*, 270 N.C. App. 748, 757, 842 S.E.2d 128, 135 (2020) (holding invited error doctrine did not apply where defendant "did not request the [erroneous] instruction, but merely consented to it"), *rev'd on other grounds*, 378 N.C. 265, 861 S.E.2d 469 (2021); *State v. Harding*, 258 N.C. App. 306, 311, 813 S.E.2d 254, 259 (2018) (holding invited error doctrine did not apply where defendant "failed to object, actively participated in crafting [a portion of] the challenged instruction, and affirmed it was 'fine' ").

Here, the record reflects that Defendant agreed with the State on certain portions that were redacted from the interview, and that Defendant did not object to the redacted interview being published to the jury. The record does not reflect that Defendant took any affirmative action to introduce the redacted interview. Accordingly, the invited error doctrine does not apply.

2. Analysis

[2] Even assuming for the sake of argument that the challenged statements were erroneously admitted, Defendant has failed to establish that the error constituted plain error.

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (quotation marks and citations omitted).

Here, absent the complained of portions of the redacted interview, the jury heard from two eyewitnesses who picked Defendant out of a photo lineup as the likely shooter and identified Defendant as the shooter in court. Both eyewitnesses gave testimony that Defendant had previously been at the bus stop with Venable; that Defendant left for one to two hours and returned with another man; and that, upon returning, Defendant argued with and subsequently shot Venable. The jury also heard Defendant's eventual version of events that corroborated both eyewitnesses' testimonies in every respect except as to who shot Venable. Additionally, the jury saw video surveillance footage depicting someone near the bus stop when Venable was shot wearing clothes like those Defendant had been wearing. The jury also saw Defendant being shown that footage and stating, "it looks just like me," shortly before changing his story to the version of events that corroborated both eyewitnesses' testimonies.

In light of this substantial evidence of Defendant's guilt, Defendant cannot show that, "absent the error, the jury probably would have returned a different verdict." *Id.* at 519, 723 S.E.2d at 335. Accordingly, the admission of the challenged statements, if error, did not amount to plain error.

B. Prior Record Level Calculation

[3] Defendant next argues that the trial court erred in calculating his prior record level because the State failed to prove Defendant's prior felonies.

The determination of a defendant's prior record level is a conclusion of law, which is reviewed de novo. *State v. Black*, 276 N.C. App. 15, 17, 854 S.E.2d 448, 451 (2021) (citation omitted).

The State must prove each of a felony offender's prior convictions by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1340.14(f) (2021). To satisfy its burden, the State must prove both "that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." *Id.*

The State may prove a defendant's prior convictions by submitting "[a] copy of records maintained by the Department of Public Safety[.]" *Id.* § 15A-1340.14(f)(3). Additionally, a record from the Department of Public Safety "bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court, and that the facts set out in the record are true." *Id.* § 15A-1340.14(f).

Here, the trial court checked the box on Defendant's Prior Record Level Worksheet indicating that, in making its determination about Defendant's prior record level, "the Court has relied upon the State's evidence of the defendant's prior convictions from a computer printout of DCI-CCH." The DCI-CCH is a computerized criminal record maintained by the North Carolina State Bureau of Investigation ("NCSBI"). *See* 14B N.C. Admin. Code 18A.0102(6) (2021) (defining CCH as "computerized criminal history record information"); *id.* 18A.0102(19) (2021) (defining DCI as the "Division of Criminal Information" within the NCSBI). The NCSBI is administratively located within the Department of Public Safety. N.C. Gen. Stat. § 143B-915 (2021). Thus, a DCI-CCH is a record maintained by the Department of Public Safety and may be used to prove Defendant's prior convictions pursuant to N.C. Gen. Stat. § 15A-1340.14(f).

By submitting Defendant's DCI-CCH to the trial court, as indicated by the court on Defendant's Prior Record Level Worksheet, the State satisfied its burden to prove Defendant's prior convictions by a preponderance of the evidence. Accordingly, the trial court did not erroneously calculate Defendant's prior record level.

III. Conclusion

Because Defendant has failed to demonstrate plain error, and because the State met its burden to prove Defendant's prior convictions, we conclude that Defendant received a fair trial free from prejudicial error.

NO PLAIN ERROR AND NO ERROR.

Chief Judge STROUD and Judge ZACHARY concur.

STATE OF NORTH CAROLINA
v.
JAMES ALLEN MINYARD

No. COA22-962

Filed 20 June 2023

Constitutional Law—right to be present at trial—waiver—need for sua sponte competency hearing—harmless error

At a trial for multiple sexual offenses where, during jury deliberations, defendant passed out and was removed from the courtroom after intentionally overdosing on drugs and alcohol, the trial court was not required to sua sponte conduct a competency hearing to determine whether defendant had the capacity to voluntarily waive his constitutional right to be present during the remainder of his trial, as there was no substantial evidence of anything (such as a history of mental illness) tending to cast doubt on defendant's competency before his intentional overdose. Even if the court had erred, such error was harmless where the trial court was able to observe defendant throughout the trial and conducted two colloquies with defendant both before and after the overdose incident; defendant was represented by able counsel (who did not move for further inquiry into defendant's competency), was able to actively participate in the proceedings, and did not exhibit any bizarre or concerning behaviors before overdosing; and the jury was specifically instructed not to hold defendant's absence from the courtroom against him.

Appeal by defendant from order entered 22 December 2021 by Judge Robert C. Ervin in Burke County Superior Court. Heard in the Court of Appeals 24 May 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sherri Horner Lawrence, for the State.

Wake Forest University School of Law Appellate Advocacy Clinic, by John J. Korzen, for defendant-appellant.

TYSON, Judge.

This Court allowed James Allen Minyard's ("Defendant") Petition for Writ of *Certiorari* ("PWC") on 12 August 2022 to review the 22 December

order of the Burke County Superior Court, allowing in part and denying in part Defendant's motion for appropriate relief ("MAR"). We affirm and remand.

I. Background

This Court's prior opinion sets forth the facts underlying this case in greater detail. *See State v. Minyard*, 231 N.C. App. 605, 606, 753 S.E.2d 176, 179, *disc. rev. denied*, 367 N.C. 495, 797 S.E.2d 914 (2014) (R. N. Hunter, J.). This Court unanimously held "the trial court did not err in denying Defendant's motions to dismiss, nor in choosing not to conduct a *sua sponte* competency hearing after Defendant voluntarily intoxicated himself and waived his right to be present during a portion of the proceedings." *Id*. at 627, 753 S.E.2d at 191-92.

Facts pertinent to Defendant's MAR are: Defendant was indicted for first-degree sexual offense and six counts of taking indecent liberties with a minor on 14 September 2009. Defendant was also indicted as attaining habitual felon status on 13 June 2011. The cases proceeded to trial on 13 August 2012. The trial court dismissed one count of taking indecent liberties with a minor and the first-degree sexual offense charge after the close of the State's evidence. The trial court allowed the charge of attempted first-degree sexual offense and the five remaining charges of taking indecent liberties with a minor to proceed to trial. Defendant testified for over thirty-five minutes immediately before the defense rested its case-in-chief on 15 August 2012. After closing arguments, after instructing and submitting the case to the jury, the trial court instructed Defendant to remain inside the courtroom, unless he needed to speak with his attorney, while the jury was deliberating.

The trial court recessed from 2:10 p.m. until 2:38 p.m., when the jury asked for a transcript of the victim's recorded interview. As the trial court was reconvening to bring the jury back into the courtroom, Defendant's counsel informed the trial court that Defendant was "having a little problem." With Defendant present in the courtroom the trial court informed all parties he would respond to the jury's question by stating no written transcript existed of the victim's interview on the DVD they were shown. The jury returned to their deliberations.

Around this time Defendant was having problems staying "vertical" and the trial court advised as follows:

> [Defendant] you've been able to join us all the way through this. And let me suggest to you that you continue to do that. If you go out on us, I very likely will revoke your conditions of release. I'll order you arrested. We'll

> call emergency medical services; we'll let them examine you. If you're healthy, you'll be here laid out on a stretcher if need be. If you're not healthy, we will continue on without you, whether you're here or not. So do you very best to stay vertical, stay conscious, stay with us.

The trial court recessed until the jury requested to re-watch the last ten minutes of the DVD. The trial court informed the parties it would allow this request. The trial court resumed proceedings and noted:

> All right, all counsel, all parties are present. Defendant is present, and the Defendant is not - - is in the courtroom but is not joining us at the defense table, and has not come up at the request of the Court. I have a report that he has overdosed. That is, he has taken medication, so much medication that he's at a point where he might not be functioning very well.

A defense witness, Evelyn Gantt, informed the trial court Defendant had consumed eight Alprazolam pills because: "He was just worried about the outcome and I don't know why he took the pills." Defendant was taken into custody and the trial court ordered for him to be examined by emergency medical services. Defendant was led from the courtroom to receive medical attention. Subsequently, the jury had another question. Before the jury was brought back into open court, the trial court allowed both sides an opportunity to be heard. The trial court found Defendant had disrupted the proceedings by leaving the courtroom against the instructions of trial court and had voluntarily overdosed on drugs, based upon the following findings of facts:

> The Court finds Defendant left the courtroom without his lawyer.
>
> The Court finds that while the jury was in deliberation — the jury had a question concerning an issue in the case — and prior to the jurors being returned to the courtroom for a determination of the question, the Court directed the Defendant to — who was in the courtroom at that point — to return to the Defendant's table with his counsel. Defendant refused, but remained in the courtroom. The Court permitted that.
>
> The Court noticed that after the question was resolved with the juror, that while the jury was out in deliberations working on Defendant's case, the Defendant took an

> overdose of Xanax. While he was here in the courtroom and while the jury was still out in deliberations, Defendant became lethargic and slumped over in the courtroom.
>
> . . . .
>
> The Court finds that outside of the jury's presence the Court noted that Defendant was stuporous and refused to cooperate with the Court and refused reasonable requests by bailiffs.
>
> . . . .
>
> The Court finds that Defendant's conduct on the occasion disrupted the proceedings of the Court and took a substantial amount of time to resolve how the Court should proceed. The Court finally ordered that Defendant's conditions of pretrial release be revoked and ordered the Defendant into the custody of the sheriff, requesting the sheriff to get a medical evaluation of the Defendant.
>
> The Court finds that Defendant, by his own conduct, voluntarily disrupted the proceedings in this matter by stopping the proceedings for a period of time so the Court might resolve the issue of his overdose.
>
> The Court notes that the — with the consent of the State and Defendant's counsel that the jurors continued in deliberation and continued to review matters that were requested by them by way of question.
>
> The Court infers from Defendant's conduct on the occasion that it was an attempt by him to garner sympathy from the jurors. However, the Court notes that all of Defendant's conduct that was observable was outside of the jury's presence.
>
> The Court notes that both State and Defendant prefer that the Court not instruct jurors about Defendant's absence. And the Court made no reference to Defendant being absent when jurors came in with response to — or in response to question or questions that had been asked.

When the jury returned to the courtroom, the trial court instructed the jurors Defendant's absence should not be considered in weighing evidence or determining guilt. The trial court allowed the jury's requests to review portions of the victim's interview preserved on the DVD.

A jury found Defendant guilty of five counts of taking indecent liberties with a child, one count of attempted first-degree sexual offense, and of attaining habitual felon status. After the jury entered its verdict, the trial court amended its prior findings after emergency medical services indicated Defendant had purportedly consumed "fifteen Klonopin" and two forty-ounce alcoholic beverages. Defendant returned to the courtroom the next morning and was present and declined to testify at the habitual felon proceeding and the sentencing phases of the other charges.

Defendant was sentenced to concurrent sentences of 225 to 279 months imprisonment as a habitual felon for the attempted first-degree sexual offense and 121 to 155 months for the five counts of taking indecent liberties with a child on 15 August 2012.

On prior appeal, Defendant's appellate counsel argued, *inter alia*, the trial court erred by not pausing the trial and conducting a *sua sponte* competency hearing when Defendant passed out after ingesting eight Alprazolam or possibly fifteen Clonazepam pills and two forty-ounce alcoholic beverages during a break in the proceedings. On 7 January 2014 this Court filed a unanimous opinion holding no error had occurred at trial. The North Carolina Supreme Court denied Defendant's petition for discretionary review.

Defendant wrote a letter to Superior Court Judge Jerry Cash Martin, which the trial court received on 2 October 2015. Defendant asserted he was a diabetic and he had been temporarily affected by low blood sugar at his trial. Defendant argued "under the 5th, 8th, and 14th amendment[s] the trial should have been stopped and a mental health hearing should have been scheduled at a later date to see if [he] was fit to continue or not." Judge Robert C. Ervin treated Defendant's 2 October 2015 letter as a MAR and denied the MAR by order entered 5 October 2015.

Defendant filed a *pro se* "kitchen sink" second MAR on 24 February 2018 arguing: (1) he was denied a speedy trial; (2) he received ineffective assistance of counsel; (3) the trial court engaged in misconduct by stating Defendant was "drunk and over-dos[ed]" and by failing to conduct a competency hearing; (4) his sentence violated double-jeopardy; (5) a witness for the State committed perjury; (6) prosecutorial misconduct; (7) he was entitled to an instruction on a lesser-included offense; and, (8) he was convicted of an offense that no longer exists. *Jennings v. Sheppard*, 2:21-cv-00449-JFA-MGB (D.S.C. Feb. 22, 2022) (referring to the defendant's MAR as a "kitchen sink").

Judge Ervin denied Defendant's MAR by order entered 21 March 2018 holding, *inter alia*, Defendant had failed to establish he was

prejudiced by being voluntarily absent from a portion of his trial. This Court denied Defendant's PWC by order entered 24 January 2019. The Supreme Court of North Carolina denied Defendant's PWC by order entered 1 April 2020.

Defendant filed yet another MAR in Burke County Superior Court on 21 May 2021. Defendant asserted he was entitled to a new trial based on the Supreme Court of North Carolina's opinion in *State v. Sides*, 376 N.C. 449, 852 S.E.2d 170 (2020). Defendant argued the trial court erred by failing *sua sponte* to inquire, without motion or inquiry from counsel, into his competency after he purportedly fell into a stupor during jury deliberations due to overdosing on benzodiazepines. Judge Ervin requested briefing on four issues: (1) whether *Sides* applies to this case; (2) if so, whether *Sides* is legally distinguishable; (3) if not, whether the trial court's actions constituted a competency hearing; and, (4) if not, whether Defendant has to show the trial court's failure to hold a competency hearing prejudiced him. The trial court appointed counsel for Defendant and held a hearing on the MAR on 20 December 2021.

Judge Ervin entered an order allowing in part and denying in part the MAR on 22 December 2021. Judge Ervin concluded the trial court's failure to conduct a competency proceeding prior to the habitual felon and sentencing phases was prejudicial error and vacated Defendant's habitual felon verdict. Judge Ervin held, although *Sides* applied to Defendant's case and substantial evidence could raise a *bona fide* doubt of Defendant's competency, "[t]he failure to conduct a *sua sponte* capacity evaluation was harmless error in th[at] portion of the proceeding [after jury deliberations had begun]" and denied Defendant's claim for a new trial.

Defendant filed another PWC on 26 May 2022. This Court allowed Defendant's PWC to review Judge Ervin's 22 December 2021 order denying in part Defendant's MAR. The State did not cross-appeal nor seek further review of the order.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 15A-1422(c)(3), 7A-32(c) (2021) and N.C. R. App. P. 21(a).

III. Issues

Defendant argues the trial court erred in denying him a new trial based upon *Sides*, and also holding the trial court's error did not occur during a "critical phase" of trial, and is subject to harmless error review.

IV. Award of a New Trial

A. Standard of Review

This Court reviews a trial court's ruling on a MAR "to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982). "When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal." *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (citation omitted).

B. Analysis

Criminal defendants possess a Constitutional right to be present at all stages of their trial. *See Kentucky v. Stincer*, 482 U.S. 730, 745, 96 L. Ed. 2d 631, 647 (1987). The Supreme Court of the United States has also held a defendant may waive his right, in non-capital cases, to be present where he "voluntarily absents" himself. *See Taylor v. United States*, 414 U.S. 17, 19, 38 L. Ed. 2d 174, 177 (1973).

The Supreme Court of North Carolina has recognized a "[t]rial court has a constitutional duty to institute, sua sponte [sic], a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent." *State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 581 (1977); *see also* N.C. Gen. Stat. § 15A-1002 (2021). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Denny*, 361 N.C. 662, 664-65, 652 S.E.2d 212, 213 (2007) (citation and quotation marks omitted).

When a defendant's capacity to proceed is questioned during the trial, the court must determine whether a hearing is necessary, and must decide "whether there was substantial evidence before the trial court as to [the defendant's] lack of capacity to truly make such a voluntary decision" to absent himself from the trial. *Sides*, 376 N.C. at 459, 852 S.E.2d at 177. A trial judge must conduct a fact-intensive inquiry when evaluating whether a *sua sponte* competency hearing is necessary. *See id.* "The method of inquiry [rests] within the discretion of the trial judge, the only requirement being that [the] defendant be accorded due process of law." *State v. Gates*, 65 N.C. App. 277, 281, 309 S.E.2d 498, 501 (1983).

A 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" in order to voluntarily waive his right to be present at trial. *Taylor*, 414 U.S. at 17 n.3, 38 L. Ed. 2d at 177 n.3 (citation omitted).

This Court has previously held: "[e]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant" to an inquiry into a defendant's competency. *State v. McRae*, 139 N.C. App. 387, 390, 533 S.E.2d 557, 559 (2000).

Defendant's MAR allegations and the trial court's granting in part and denying in part of relief was based upon its application of *State v. Sides*. In *Sides*, the Supreme Court reviewed a defendant's appeal, who was charged with four counts of felony embezzlement. After the first three days of trial, the defendant intentionally ingested sixty Xanax tablets. *Id.* at 450, 852 S.E.2d at 172. A doctor evaluated the defendant and recommended she be involuntarily committed, checking the box on the petition form describing her as " 'mentally ill and dangerous to self or others or mentally ill and in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness.' " *Id.*

A magistrate found reasonable grounds to conclude the defendant required involuntary commitment, and she began a period of commitment. *Id.* at 451, 852 S.E.2d at 172. A psychiatrist evaluated her the next day, and noted the defendant remained suicidal and required inpatient stabilization. *Id.*

Our Supreme Court held the trial court erred by presuming the defendant's suicide attempt was a voluntary waiver of her right to be present at the trial. After her attempt, the trial court sought information on whether the absence was voluntary or involuntary. *Id.* at 451, 852 S.E.2d at 173. The trial court recessed the proceedings after reviewing draft orders from the State. *Id.* at 452, 852 S.E.2d at 173.

The trial court in *Sides* intended to wait until the following Monday, when the defendant would be released or the trial court would have access to her medical records. *Id.* at 452-53, 852 S.E.2d at 173-74. Proceedings resumed on the following Monday, while the defendant remained hospitalized. *Id.* at 453, 852 S.E.2d at 174. The trial court read the defendant's medical records, which included the recommendation from doctors for her to remain hospitalized, as well as information about her mood disorder history and her pharmacy of prescriptions: Haldol for agitation, Vistaril for anxiety, Trazodone to aid sleep, and 100 milligrams of Zoloft daily. The trial court reviewed the medical records and

confirmed with defense counsel that they had not observed anything, which would indicate the defendant lacked competency to proceed at trial. *Id.* The trial court ruled defendant "voluntarily by her own actions made herself absent from the trial" over defense counsel's objection. *Id.* at 454-455, 852 S.E.2d at 174.

The Court in *Sides* held that while a defendant may voluntarily waive the constitutional right to be present at trial, the defendant may only waive the right when she is competent. *Id.* at 456, 852 S.E.2d at 175. The trial court erred "by essentially skipping over the issue of competency and simply assuming that [the] defendant's suicide attempt was a voluntary act that constituted a waiver of her right to be present during her trial, [and] both the majority at the Court of Appeals and the trial court had 'put the cart before the horse.' " *Id.* at 457, 852 S.E.2d at 176. "Once the trial court had *substantial evidence* that [the] defendant may have been incompetent, it should have sua sponte [sic] conducted a competency hearing to determine whether she had the capacity to voluntarily waive her right to be present during the remainder of her trial." *Id.* (emphasis supplied).

Our Supreme Court held:

> In such cases, the issue is whether the trial court is required to conduct a competency hearing before proceeding to determine whether the defendant made a voluntary waiver of her right to be present, or, alternatively, whether it is permissible for the trial court to forego a competency hearing and instead assume a voluntary waiver of the right to be present on the theory that the defendant's absence was the result of an intentional act.

Id. at 457, 852 S.E.2d at 175–76.

Our Supreme Court further held:

> [T]he issue of whether substantial evidence of a defendant's lack of capacity exists so as to require a sua sponte competency hearing requires a fact-intensive inquiry that will hinge on the unique circumstances presented in each case. *Our holding should not be interpreted as a bright-line rule that a defendant's suicide attempt automatically triggers the need for a competency hearing in every instance.* Rather, *our decision is based on our consideration of all the evidence in the record when viewed in its totality.*

Id. at 466, 852 S.E.2d at 182 (emphasis supplied).

Before oral arguments were presented but after briefing was completed in this case, the Supreme Court of North Carolina reviewed this Court's unanimous analysis of a similar issue in *State v. Flow*, 384 N.C. 528, 549, 886 S.E.2d 71, 87 (2023).

> The morning of the sixth day of the trial before the jury was to be charged, Defendant was being escorted from the Gaston County Jail. At some point, Defendant indicated he had forgotten his glasses in his cell and asked if he could go and get them. Defendant was standing over the ledge of the second-floor mezzanine. Detention officers reported to the second-floor mezzanine after being told Defendant was "hanging" on the second-floor mezzanine approximately sixteen feet off of the ground. Detention officers told Defendant not to jump, but Defendant jumped feet first. Defendant fell onto a metal table and landed on the ground. Defendant suffered injuries to his left leg and ribs. Defendant was transported to the hospital and underwent surgery to reduce a fracture in his femur.
>
> The trial court conducted a hearing to determine whether Defendant's absence was voluntary. The trial court considered and denied Defendant's counsel's motion for the court to make further inquiry into his capacity to proceed.
>
> The trial court ruled Defendant had voluntarily absented himself from the proceedings, and the trial would continue without Defendant present. The jury charge, jury deliberations, and sentencing commenced without Defendant present. Defendant's counsel objected to each phase proceeding outside of Defendant's presence.

State v. Flow, 277 N.C. App. 289, 295, 859 S.E.2d 224, 228 (2021).

Unlike in *Sides*, nothing in the defendant's prior record, conduct, or actions in Flow's had provided the trial court or anyone else with notice or evidence he may have been incompetent. Our Supreme Court noted:

> Although the trial court declined to specifically consider whether defendant had manifested a "suicidal gesture" at the time of his jump [from a second floor courthouse balcony], we do not deem the trial court's approach to connote inadequate contemplation by the tribunal of the evidence presented on defendant's capacity. Suicidality does not automatically render one incompetent; conversely, a defendant may be found incompetent by way

> of mental illness without being determined to be suicidal. However, a defendant cannot be found to have acted voluntarily if he lacked capacity at the time of his conduct in question. Logically, competency is a necessary predicate to voluntariness. By receiving evidence concerning defendant's state of mind leading up to, and at the time of, his apparent suicide attempt, the trial court was able to determine whether defendant had acted voluntarily and had thereby waived his right to be present at all stages of his trial. Clearly, the trial court considered all information relative to defendant's capacity which was presented to it and found, implicitly at least, that defendant was competent to proceed to trial. Therefore, *the trial court was not required to make a specific determination regarding whether defendant's acts amounted to a suicidal gesture.*

Flow, 384 N.C. at 548-49, 886 S.E.2d at 86 (emphasis supplied) (internal citations, quotation marks, and brackets omitted).

Defendant argues a "bona fide doubt of his capacity and competency arose during trial when he became 'stuporous' and non-responsive." Aside from the act and side effects brought about by Defendant's alleged voluntary ingestion of mind and mood altering sedatives and alcohol, Defendant does not offer any prior history or evidence, much less substantial evidence, to support his assertions. Defendant did not exhibit bizarre behavior at any point during his trial or during his 35 minutes of testimony charging and submitting the case to the jury prior to assertedly ingesting Alprazolam and consuming two forty-ounce alcoholic beverages.

No substantial evidence tended to alert the court or counsel nor cast doubt on Defendant's competency prior to his voluntary actions after all the evidence was presented, the case was submitted, and the jury had commenced deliberations. The trial court was able to observe Defendant over and throughout the course of the trial and was able to conduct two colloquies directly with Defendant prior to and after the incident. Unlike in *Sides*, the trial court was not presented with *any evidence of a history* of Defendant's mental illness. The trial court did not err in denying Defendant's MAR.

Judge Ervin's order from the MAR heading granted Defendant relief for his attaining habitual status and ordered: "The judgment entered against the defendant in these cases is vacated and the jury's verdict determining that the defendant was an [sic] habitual felon is also vacated. The remainder of the defendant's Motion for Appropriate

Relief is denied. The defendant's cases will be rescheduled for further proceedings concerning his alleged status as an habitual felon and for re-sentencing."

The State failed to cross appeal or seek further review of the MAR order vacating Defendant attaining habitual felon status and ordering another habitual felon status hearing and resentencing on the issue. These unappealed portions of the order are not before this Court and remain undisturbed.

Neither party cited, briefed, nor filed a Memorandum of Additional Authority for either this Court's unanimous opinion in *Flow* nor the Supreme Court's affirmance opinion thereof until three days prior to arguments. *See* N.C. R. Pro. Conduct 3.3(a)(2) ("A lawyer shall not knowingly: fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel[.]").

V. Structural and Harmless Error

Presuming, without deciding, the trial court erred by *sua sponte* not holding a further competency inquiry or hearing, any purported error is not structural and is harmless beyond a reasonable doubt.

In *Flow*, the Supreme Court of North Carolina examined the defendant's statutory and due process challenges to his competency to proceed during trial following his volitional and intentional acts. Defendant here only asserts due process challenges under the Constitution of the United States and not under the North Carolina Constitution.

A. Standard of Review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted). "When violations of a defendant's rights under the United States Constitution are alleged, harmless error review functions the same way in both federal and state courts." *State v. Ortiz-Zape*, 367 N.C. 1, 13, 743 S.E.2d 156, 164 (2013) (quoting *State v. Lawrence*, 365 N.C. 506, 513, 723 S.E.2d 326, 331 (2012)).

By enacting N.C. Gen. Stat. § 15A-1443(b), our General Assembly "reflects the standard of prejudice with regard to violation[s] of the defendant's rights under the Constitution of the United States, as set out in the case of *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705 (1967)." N.C. Gen. Stat. § 15A-1443 official cmt. (2021). The burden falls "upon the State to demonstrate, beyond a reasonable doubt, that

the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2021); *see also Brecht v. Abrahamson*, 507 U.S. 619, 630, 123 L. Ed. 2d 353, 367 (1993); *Chapman*, 386 U.S. at 24; 17 L. Ed. 2d at 710-11; *Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331.

"[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24, 17 L. Ed. 2d at 708; *see also Davis v. Ayala*, 576 U.S. 257, 267, 192 L. Ed. 2d 323, 332-33 (2015); N.C. Gen. Stat. § 15A-1443(b).

B. Analysis

Defendant asserts the trial court's failure to *sua sponte* hold additional inquiry into his competency is "structural error and is reversible *per se*." *State v. Garcia*, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004).

The Supreme Court of the United States has made "a distinction between structural errors, which require automatic reversal, and all other errors, which are subject to harmless-error analysis. *Arnold v. Evatt*, 113 F.3d 1352, 1360 (4th Cir. 1997). "The United States Supreme Court emphasizes a strong presumption against structural error." *State v. Polke*, 361 N.C. 65, 74, 638 S.E.2d 189, 195 (citing *Neder v. United States*, 527 U.S. 1, 9, 144 L. Ed. 2d 35, 47 (1999)), *cert denied*, 552 U.S. 836, 169 L. Ed. 2d 55 (2006).

Structural errors are rare Constitutional errors, which prevent a criminal trial from "reliably serv[ing] its function as a vehicle for determination of guilty or innocence." *Garcia*, 358 N.C. at 409, 597 S.E.2d at 744 (citation omitted).

The Supreme Court of North Carolina has held:

> The United States Supreme Court has identified only six instances of structural error to date: (1) complete deprivation of right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); (2) a biased trial judge, *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927); (3) the unlawful exclusion of grand jurors of the defendant's race, *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986); (4) denial of the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984); (5) denial of the right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); and[,] (6)

> constitutionally deficient jury instructions on reasonable doubt, *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). *See Johnson v. United States*, 520 U.S. 461, 468-69, 117 S. Ct. 1544, 137 L. Ed. 2d 718, 728 (identifying the six cases in which the United States Supreme Court has found structural error).

Polke, 361 N.C. at 73, 638 S.E.2d at 194.

The United States Court of Appeals for the Fourth Circuit has warned "judges should be wary of prescribing new structural errors unless they are certain that the error's presence would render every trial in which it occurred unfair." *Arnold*, 113 F.3d at 1360. Defendant's alleged "structural error" does not fall under any of the six cases in which the Supreme Court of the United States has identified as structural error. This alleged Constitutional error, like all other Constitutional errors not so identified by the Supreme Court of the United States, is subject to harmless error review. Defendant's *per se* argument is overruled.

The State argues any purported error was harmless beyond a reasonable doubt because Defendant was competent throughout his trial and testimony and any alleged doubt to his competency did not arise until after all evidence was presented, closing arguments had been completed, the jury was charged, the case was submitted, and jury deliberations had begun. Defendant argues a criminal defendant possesses a Constitutional right to be present at all stages of their trial. *See Stincer*, 482 U.S. at 745, 96 L. Ed. 2d at 647.

Defendant had actively participated in his trial and testified extensively on his own behalf. The trial court noted:

> Defendant's counsel has not suggested anything that the defendant could have done during the course of responding to the jury's requests that would have altered the outcome of [the] jury's deliberations and this Court does not believe that the defendant's inability to participate in this stage of this trial would have affected the outcome.

The State correctly notes Defendant was represented by able and competent counsel, who was present and did not question or move for further inquiry. Defendant did not exhibit any bizarre or concerning behaviors during his trial prior to leaving the courtroom contrary to instruction, and voluntarily ingesting a controlled substance and alcohol while the jury was deliberating his guilt. No substantial evidence tended to alert or cast doubt upon Defendant's competency prior to his actions

at trial in intentional disregard of the trial court's express instructions for him to remain in the courtroom unless conferring with counsel.

The trial court was able to observe Defendant throughout the course of the trial and was able to conduct two colloquies directly with Defendant in open court with his counsel present prior to and after the incident. Reviewing the trial transcript, it is reasonable to infer from the trial court's observations and statements, and Defendant's actions after hearing all the evidence against him and having just testified at length, Defendant was able to "read the room" and observe the probable impact of the evidence and his credibility on the jury. Defendant, possibly for the first time, realized the gravity of his multiple assaults and predatory crimes on a young boy and the probable consequences and accountability he was facing. This view is also supported by Gantt, Defendant's witness, who told the trial court Defendant had consumed eight Alprazolam pills because, "[h]e was just worried about the outcome" of an extended prison sentence.

Defendant's counsel and the State did not wish to be heard on the issue. Defendant's pretrial release was revoked, he was taken into custody, examined by emergency medical personnel at the scene, and taken to the hospital for further observation and treatment. The laboratory results in the record from the hospital does not demonstrate elevated or abnormal levels of glucose to support asserted diabetes nor any debilitating health issue Defendant asserted to explain his voluntary behaviors.

Defendant was returned to court after his voluntary behaviors and in hospital medical review. Defendant had been free on bond and release and no evidence showed the jury viewed his behaviors. The jury was specifically instructed, with consent of the State and Defendant's counsel, not to hold his absence from the courtroom against him. *See State v. Daniels*, 337 N.C. 243, 275, 446 S.E.2d 298, 318 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995) (This Court presumes that jurors follow the trial court's instructions.).

VI. Conclusion

It is not the proper role of the trial court judge to sit as a second-chair defense counsel with his able counsel present. "[I]t's [the judge's] job to call balls and strikes and not to pitch or bat." Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Committee on the Judiciary United States Senate, 109 Cong. 56 (Statement of John G. Roberts, Jr.).

The trial court was not presented with any evidence of a prior history of Defendant's mental illness to provoke *sua sponte* further

inquiry. *Sides* is inapplicable to the facts and Defendant's actions before us. *Sides*, 376 N.C. at 459, 852 S.E.2d at 177. On the issues before this Court, the trial court properly denied Defendant's MAR.

Without prior indications, the trial court was not required in the absence of motion or inquiry to *sua sponte* further inquire into Defendant's capacity to proceed following his intentional acts to intoxicate himself or to voluntarily absent himself from trial. Presuming, without deciding, any error occurred under the analysis in *Sides* or *Flow*, the State has shown it was harmless error beyond a reasonable doubt. The order denying Defendant's MAR is affirmed.

In accordance with Judge Ervin's order on the MAR hearing, including those portions where no appeal was filed or further review sought by the State: "The judgment entered against the defendant in these cases is vacated and the jury's verdict determining that the [D]efendant was an habitual felon is also vacated. The remainder of the [D]efendant's Motion for Appropriate Relief is denied. The [D]efendant's cases will be rescheduled for further proceedings concerning his alleged status as an habitual felon and for re-sentencing." The jury's guilty verdicts on the remaining substantive crimes remain undisturbed. *It is so ordered.*

AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS AND FOR RESENTENCING.

Judges ZACHARY and STADING concur.

TILLMAN v. JENKINS

[289 N.C. App. 452 (2023)]

LASHUNDA TILLMAN, PLAINTIFF
v.
SASHA JENKINS, DEFENDANT

No. COA22-531

Filed 20 June 2023

1. Child Custody and Support—temporary custody order—interlocutory appeal—"temporary" order not temporary

Although a temporary child custody order is normally interlocutory and not immediately appealable, the trial court's "temporary custody order" was not temporary where, at the time of the appeal, the paternal grandmother had had "temporary" custody of the mother's children for nearly three years and where the most recent "temporary" order failed to state a clear and specific reconvening time for a permanent custody hearing. Therefore, the Court of Appeals had jurisdiction to hear the mother's appeal from the order.

2. Child Custody and Support—standing—grandparent initiation of custody proceeding—allegations of unfitness

In a child custody dispute between a mother and her children's paternal grandmother, the grandmother had standing to initiate the custody proceeding because she adequately alleged that the mother had acted inconsistently with her parental status—with allegations including that the mother lacked stable housing, was unable to physically and financially care for the children, and had acted in a manner inconsistent with her constitutionally protected rights to parent the children.

3. Child Custody and Support—permanent custody order—application of best interest standard—parent's fitness and constitutionally protected status—required finding

In a child custody dispute between a mother and her children's paternal grandmother, where the trial court's "temporary custody order" was in substance actually a permanent custody order, the trial court erred by applying the "best interest of the child" standard without first finding that the mother was unfit or had acted inconsistently with her constitutionally protected status as the children's parent.

Appeal by Defendant from order entered 12 November 2021 by Judge Karen D. McCallum in Mecklenburg County District Court. Heard in the Court of Appeals 25 January 2023.

Wray Law Firm, PLLC, by Tiasha L. Wray and Gregory Hunt, for Defendant-Appellant.

Offit Kurman, P.A., by Kyle A. Frost and K. Mitchell Kelling, for Plaintiff-Appellee.

COLLINS, Judge.

Defendant-Mother appeals from an order granting "temporary care, custody and control" of her two minor children to Plaintiff-Grandmother, the children's paternal grandmother. Mother argues that the trial court erred by using the "best interest of the child" standard to award Grandmother custody without first finding that Mother was unfit or had acted inconsistently with her constitutionally protected status as the children's natural parent. Because the trial court's order was a permanent custody order and the trial court did not find that Mother was unfit or had acted inconsistently with her constitutionally protected status, the trial court erred by using the "best interest of the child" standard to determine custody of the children. The order is vacated and the matter is remanded with instructions.

I. Factual Background and Procedural History

Mother is the biological mother of two children who were born in 2012. Mother's former husband ("Father") was the biological father of the children. Mother and Father divorced in 2015 and entered into a parenting agreement in June 2016, whereby Father was awarded primary physical custody of the children and Mother was awarded visitation. In May 2020, Father was killed by a member of Mother's family. Grandmother filed a "Motion to Modify Child Custody, *Ex Parte* Motion for Emergency Custody[,] and Motion for Attorney's Fees" in July 2020.[1] The trial court entered an "Ex Parte Temporary Emergency Custody Order" on 28 July 2020, awarding temporary custody of the children to Grandmother, granting supervised visitation to Mother, and scheduling the matter for hearing on 5 August 2020.

After hearings on 5 August and 3 November 2020, the trial court entered an "Order for Supervised Visitation" in January 2021, finding, in relevant part:

1. This pleading is not in the record on appeal but is referenced in various pleadings and orders.

> 8. Father was murdered by a member of [Mother's] family on May 23, 2020, while the minor children were present and witnessed the murder.
>
> . . . .
>
> 11. That after the murder Mother refused visitation to Grandmother who practically raised the minor children since they were months old, and that this was not in the best interest of the minor children.
>
> . . . .
>
> 14. That on August 5, 2020 [Grandmother's] *Ex Parte* Motion for Emergency Custody was heard by the court and this court finds that said emergency still exists.
>
> 15. The minor children have been through the trauma of witnessing their father's murder and Mother continues to put them in an environment where they are around family members who are constantly threatening the [G]randmother and other family members, and this is not in the best interest of the minor children.

Based on its findings, the trial court concluded that the parties were properly before the court and that the court had jurisdiction over the matter. Based on its findings and conclusions, the trial court ordered, in relevant part:

> 1. []Grandmother's *Ex Parte* Motion for Emergency Custody is GRANTED.
>
> 2. []Grandmother is awarded temporary physical and legal custody of the minor children.
>
> 3. []Mother is granted supervised visitation with Carolina Solutions every other week for a period of four (4) hours.
>
> . . . .
>
> 15. That pending further orders of the court, the court retains jurisdiction over the parties for enforcement and/or modification of said Order hereto and of the subject matter herein.

At a hearing on 17 September 2021, the trial court dismissed Grandmother's "Motion to Modify the Parenting Agreement that was

entered on 23 June 2016."[2] Mother's attorney sent an email to individuals at the children's school, stating in part:

> We appeared in court this morning and the pending custody action [Grandmother] had against [Mother] were dismissed by the court. As such, there aren't any pending custody actions or any custody orders in effect. Given the recent change of events, we ask that you disregard any custody orders previously provided to you as they no longer have any legal effect. And, it is our expectation that the children be released to [Mother] upon request.

In response, Grandmother's attorney emailed the following message to individuals at the school: "All, No order dismissing [Grandmother's] action has been entered by the Court at this time. Please also be advised we are filing a Motion for Emergency custody shortly." After the hearing, Mother apparently went to pick up the children from school. That same day, Grandmother filed a new "Complaint for Child Custody and Child Support and Attorney's Fees[;] Motion for Ex Parte Emergency Custody and Attorney's Fees, or in the Alternative a Motion for Temporary Parenting Arrangements," seeking an emergency custody order granting her temporary exclusive care, custody, and control of the children or, should the court not grant emergency custody, temporary primary custody of the children.

On 22 September 2021, the trial court entered a new "Ex Parte Temporary Emergency Custody Order," finding that "[Grandmother] alleges that Mother is mentally unstable and incapable of providing care for the minor child"; "Mother tried to remove the minor children from school"; and "[Grandmother] is concerned that Mother may flee the jurisdiction with the minor children." The trial court awarded Grandmother temporary care, custody, and control of the children and scheduled the matter for hearing on 30 September 2021. Mother answered Grandmother's complaint on 27 September 2021, denying Grandmother's material allegations, and moved to dismiss the complaint pursuant to North Carolina Rule of Civil Procedure 12(b)(6).

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2. The record does not contain a "Motion to Modify the Parenting Agreement that was entered on 23 June 2016," an order dismissing the motion, or a transcript of the 17 September 2021 hearing. The motion is referenced in various pleadings and orders. It is assumed that the "Motion to Modify the Parenting Agreement" and the "Motion to Modify Child Custody" filed in July 2020, also not in the record, are the same motion. The 17 September 2021 hearing is referenced in Mother's counsel's email to the children's school and Grandmother's complaint filed on that date.

The matter came on for a review of emergency custody on 30 September 2021. At the hearing, the trial court heard only Grandmother's case-in-chief, which included testimony from Grandmother, one of the children's teachers, and the children's therapist. The trial court did not allow Mother to present evidence. At the close of Grandmother's case, Mother moved to dismiss Grandmother's claim for emergency custody, pursuant to North Carolina Rule of Civil Procedure 41(b). The trial court granted Mother's motion to dismiss "based on the fact that there is no emergency." However, the trial court announced that it was inclined to enter a temporary custody order. Mother objected on the ground that Grandmother presented no evidence challenging Mother's fitness as the children's natural parent. The trial court advised the parties to return for a hearing on 4 October 2021 "to address the issue of whether or not the court had authority to enter a temporary custody order without considering or having any evidence regarding Mother's unfitness, or conduct in a manner inconsistent with Mother's parental right."

At the 4 October 2021 hearing, the trial court acknowledged that a permanent custody order would require the court to find that Mother had waived her constitutionally protected status but determined it had the authority to enter a temporary custody order pursuant to N.C. Gen. Stat. § 50-13.5(d)(2) without a showing that Mother had waived her constitutionally protected status. The trial court stated that it would deny Grandmother's motion for emergency custody, refrain from ruling on Grandmother's motion for a temporary parenting arrangement until a later hearing, and enter a temporary order continuing primary custody with Grandmother.[3]

Mother then inquired about scheduling a permanent custody hearing:

> [MOTHER]: [] When can we come back to be heard on permanent custody? How short are these temporary orders going to be in place if my client's constitutional rights are not going to be considered?
>
> THE COURT: Okay. So let's give a 90-day review.
>
> [MOTHER]: 90-day review for temporary? Or -- because, I mean, Your Honor, you know how Mecklenburg County

3. The trial court noted that, because it determined no emergency existed, it would have to hear Grandmother's motion for a temporary parenting arrangement for Mother to put on evidence. Instead, the trial court entered its temporary order based solely on Grandmother's evidence during the emergency custody hearing.

> temporary orders work.· And this last one was just in place -- an emergency order was in place for over a year. So I guess my next question would be can we get on a trial calendar to be heard on permanent custody sooner than later?
>
> . . . .
>
> THE COURT: --- [W]e're going to have a 90-day review date, and then after that we'll set a custody date.
>
> [MOTHER]: So we're looking at at least six months?
>
> THE COURT: It's a school year. I'm not going to move them out of school ---

The trial court announced, "I will give them the traditional shared schedule for the holidays based on the CMS school schedule, or even year for one parent, odd for the other."

On 12 November 2021, the trial court entered a "Temporary Custody Order" finding:

> 12. At the September 30, 2021 emergency return hearing, the court heard evidence from [Grandmother], the minor children's teachers and their therapist.
>
> 13. At the close of [Grandmother's] evidence, counsel for Mother moved to dismiss [Grandmother's] claim for emergency custody pursuant to Rule 41(b).
>
> 14. The Court granted counsel's Rule 41 motion, but the Court was inclined to enter a temporary custody order, to which counsel for Mother objected on the grounds that [Grandmother] provided no evidence challenging Mother's fitness as required in actions brought by non-parents.
>
> . . . .
>
> 16. On October 4, 2021, after arguments from counsel, the Court found it had authority to enter a temporary custody order pursuant to N.C.G.S 50-13.5(d)(2) and that Plaintiff was not required to make a showing challenging Mother's protected status, but rather, the standard for the court's consideration was best interest.
>
> 17. Mother was not provided an opportunity to present any evidence or her case and chief.

The order denied Grandmother's claim for emergency custody, concluded that "[i]t is in the best interests of the minor children and would promote their general welfare, for their custody to be primarily with the [Grandmother], as hereinafter set out with more specificity[,]" and awarded Grandmother "temporary care, custody and control" of Mother's children. Mother was given visitation of the children weekly from Friday to Monday, Thanksgiving break in even years starting in 2022, Christmas break in 2021 and then half of Christmas break in subsequent years, Mother's Day, and spring break in even years. The order scheduled a "review hearing 90 days from the entry of this order on a date to be determined by the court." Mother appealed.

II. Discussion

A. Appellate Jurisdiction

[1] We first address this Court's jurisdiction to hear this appeal. "As a general rule, interlocutory orders are not immediately appealable." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citation omitted). "An interlocutory order is one that does not determine the issues, but directs some further proceeding preliminary to a final decree." *Brewer v. Brewer*, 139 N.C. App. 222, 227, 533 S.E.2d 541, 546 (2000) (citation omitted). "A temporary child custody order is normally interlocutory and does not affect any substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition on the merits." *Sood v. Sood*, 222 N.C. App. 807, 809, 732 S.E.2d 603, 606 (2012) (citation omitted). However, the trial court's designation of a custody order as temporary is not sufficient to render the order interlocutory and not subject to appeal. *Brewer*, 139 N.C. App. at 228, 533 S.E.2d at 546. Rather, "whether an order is temporary or permanent in nature is a question of law, reviewed on appeal de novo." *Smith v. Barbour*, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582 (2009) (citation omitted).

"A temporary order is not designed to remain in effect for extensive periods of time or indefinitely[.]" *LaValley v. LaValley*, 151 N.C. App. 290, 292 n.5, 564 S.E.2d 913, 915 n.5 (2002) (citation omitted). A "[t]emporary custody order[] resolve[s] the issue of a party's right to custody pending the resolution of a claim for permanent custody." *Brewer*, 139 N.C. App. at 228, 533 S.E.2d at 546 (citation omitted). Where "the trial court fails to state a 'clear and specific reconvening time' in its otherwise temporary order, it will be treated as a permanent one." *Maxwell v. Maxwell*, 212 N.C. App. 614, 618, 713 S.E.2d 489, 492 (2011). Furthermore, where an order states a reconvening time, but the time interval between the two hearings is not reasonably brief, the order will be treated as a permanent

one. *See Brewer*, 139 N.C. App. at 228, 533 S.E.2d at 546 (holding that "a year is too long a period to be considered as 'reasonably brief,' in a case where there are no unresolved issues"). Whether the time interval between hearings is reasonably brief "must be addressed on a case-by-case basis." *LaValley*, 151 N.C. App. at 293 n.6, 564 S.E.2d at 915 n.6.

Here, Grandmother was awarded temporary physical and legal custody of the children on 28 July 2020. Grandmother retained temporary physical and legal custody by order entered in January 2021. Grandmother's motion to modify Mother's parenting agreement with Father was dismissed 17 September 2021, but Grandmother was again awarded temporary care, custody, and control of the children on 22 September 2021. The trial court entered yet another "Temporary Custody Order" on 12 November 2021, again awarding primary custody to Grandmother and establishing a shared holiday schedule designed to last indefinitely.

Although the order scheduled the matter "for a review hearing 90 days from the entry of this order on a date to be determined by the court[,]" the trial court informed the parties that the 90-day hearing was only to review the temporary custody arrangement, that "after that we'll set a custody date[,]" and that it was "not going to move [the children] out of school[.]"

Grandmother has now had "temporary" custody of Mother's children since 28 July 2020–almost three years. Two years passed between the entry of the initial temporary order and the potential date of a permanent custody hearing after the school year ended in the summer of 2022. The chronic temporary, and thus interlocutory, orders have evaded appellate review and avoided addressing whether Mother is unfit or has acted inconsistently with her parental rights. Furthermore, the "Temporary Custody Order" failed to state a clear and specific reconvening time for a permanent custody hearing.

For the foregoing reasons, the "Temporary Custody Order" was not temporary, but was instead a permanent custody order. Accordingly, this Court has jurisdiction to hear Mother's appeal pursuant to N.C. Gen. Stat. § 7A-27(b)(2) as she appeals from a final order.

B. Standing

[2] Mother first argues that Grandmother lacked standing to initiate a custody proceeding.

Whether a party has standing to initiate a custody proceeding is a question of law reviewed de novo. *Thomas v. Oxendine*, 280 N.C. App.

526, 531, 867 S.E.2d 728, 733 (2021). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Wellons v. White*, 229 N.C. App. 164, 173, 748 S.E.2d 709, 717 (2013) (quotation marks and citation omitted).

N.C. Gen. Stat. § 50-13.1(a) provides, "Any parent, relative, or other person . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child[.]" N.C. Gen. Stat. § 50-13.1(a) (2021). The statute "grants grandparents the broad privilege to institute an action for custody . . . ." *Eakett v. Eakett*, 157 N.C. App. 550, 552, 579 S.E.2d 486, 488 (2003). "Although grandparents have the right to bring an initial suit for custody, they must still overcome the parents' constitutionally protected rights." *Thomas*, 280 N.C. App. at 531, 867 S.E.2d at 733 (quotation marks and citation omitted). Thus, to have standing to initiate a custody action against a parent, the grandparent must allege the parent is "unfit or has engaged in conduct inconsistent with their parental status." *Id.* (citations omitted).

Here, Grandmother alleged the following:

> 24. Upon information and belief, Mother has not had stable housing, moving repeatedly, or staying with various family members, largely due to her inability to retain stable employment.
>
> 25. The minor children have been seeking therapy due to the sudden death of their father. The children's therapist . . . has indicated that they are flourishing in their current environment and they should maintain their current school life balance and routine. . . .
>
> 26. [Mother] did not support therapy for the minor children and upon information and belief would not abide by any recommendations regarding therapy for the minor children.
>
> 27. Upon information and belief, Mother is unable to physically and financially care for the minor children. Mother, by her own actions, has not provided a suitable environment that is conducive of the best interests and welfare of the minor children.
>
> 28. There is a substantial risk of serious physical and emotional injury to the minor children while in Mother's custody.
>
> . . . .

> 33. [Mother], by her own actions, has acted in a manner inconsistent with the constitutionally protected rights to parent the minor children with regard to the upbringing and care of the minor children.

Grandmother adequately alleged that Mother had acted inconsistently with her parental status. Accordingly, Grandmother had standing to initiate this action.

C. Custody Determination

[3] Mother next argues that the trial court erred when it applied the "best interest of the child" standard to determine custody of her children without first finding that Mother was unfit or had acted inconsistently with her constitutionally protected status as the children's natural parent.

Whether a trial court applied the correct legal standard to determine custody is a question of law reviewed de novo. *Blanchard v. Blanchard*, 279 N.C. App. 280, 284, 865 S.E.2d 693, 697 (2021).

In custody actions between a parent and nonparent, the parent's constitutionally protected right to make decisions concerning the care, custody, and control of their children must prevail unless the court finds that the parent is unfit or has acted inconsistently with their constitutionally protected status. *Price v. Howard*, 346 N.C. 68, 73, 484 S.E.2d 528, 531 (1997) (citation omitted). If a natural parent is not unfit or has not acted in a manner inconsistent with their constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent would offend the Due Process Clause. *Id.* at 79, 484 S.E.2d at 534 (citations omitted). Only if "such conduct is properly found by the trier of fact, based on evidence in the record, [should] custody [] be determined by the 'best interest of the child' test . . . ." *Id.* at 79, 484 S.E.2d at 535.

Here, the parties do not dispute that the trial court made no finding that Mother was unfit or had acted inconsistently with her constitutionally protected status as the children's natural parent prior to applying the best interest of the child standard in its determination to grant Grandmother custody. The trial court acknowledged it would be required to find that Mother had waived her constitutionally protected status to enter a permanent order, but determined that it had the authority "to enter a temporary custody order pursuant to N.C.G.S. 50-13.5(d)(2)[,] and that [Grandmother] was not required to make a showing challenging Mother's protected status, but rather, the standard

for the court's consideration was best interest." However, as discussed above, the trial court's "Temporary Custody Order" was a permanent order. Accordingly, the trial court was required to find Mother unfit or that her conduct was inconsistent with her constitutionally protected status before applying the "best interest of the child" standard to determine custody of the children. The trial court's failure to do so was error.

III. Conclusion

Because the trial court erred by applying the "best interest of the child" standard without first finding that Mother was unfit or had acted inconsistently with her constitutionally protected status as the children's natural parent, the trial court's order is vacated and the matter is remanded with instructions to the trial court to hold a permanent custody hearing and enter a permanent custody order within 60 days of the issuance of this opinion. Nothing herein shall be interpreted as preventing the trial court from entering a temporary custody order to govern the custody of the children pending the entry of the permanent custody order within the next 60 days.

VACATED AND REMANDED WITH INSTRUCTIONS.

Judges ARROWOOD and WOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 JUNE 2023)

AZIZ v. HEATHERSTONE HOMEOWNERS ASS'N, INC. No. 22-819	Cabarrus (18CVS2531)	No error in part and vacated in part.
IN RE A.C. No. 22-709	Buncombe (20JA306) (20JA307)	Affirmed in Part, Vacated in Part, and Remanded for Correction of Clerical Error
IN RE A.G. No. 22-656	Cumberland (21JA157) (21JA158)	Affirmed
IN RE FORECLOSURE OF ALMANZAR No. 22-911	Wake (21SP1014)	Affirmed
IN RE J.A.H. No. 22-945	Guilford (17JT333) (18JT421) (20JT94)	Affirmed
IN RE L.M. No. 22-655	Cumberland (20JA375) (20JA376) (20JA377) (20JA378)	Affirmed
IN RE N.G. No. 22-722	Mecklenburg (18JT325)	Affirmed
STATE v. EUBANKS No. 22-451	Gaston (19CRS59605)	No Error.
STATE v. GALLOWAY No. 22-960	Forsyth (20CRS318) (20CRS51941-43)	No Error
STATE v. KENNEDY No. 22-676	Caswell (17CRS50575) (18CRS208) (18CRS209)	No Plain Error in Part, No Error in Part
STATE v. LOCKLEAR No. 22-308	Carteret (20CRS51579) (20CRS525)	No plain error

STEELE v. N.C. DEP'T OF PUB. SAFETY No. 23-77	N.C. Industrial Commission (TA-28162)	Affirmed

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