289 N.C. App.—No. 4 Pages 465-631

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JANUARY 5, 2024

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

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OF

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COURT OF APPEALS

CASES REPORTED

FILED 5 JULY 2023

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Child support order—amount challenged—lack of evidence to review findings—In a child support matter in which the appellate court vacated the trial court's order and remanded on the basis that several findings regarding the parties' respective incomes and various expenses were not supported by evidence, the appellate court was unable to evaluate, based on a similar lack of evidence, whether the trial court abused its discretion in ordering the father to pay monthly child support in the amount of $461.00. **Gavia v. Gavia, 491.**

Mootness—motion to strike—amended motion for summary judgment—no substantive amendment—In a class action filed against a county regarding the county's assessment of school impact fees, where plaintiffs moved to strike the county's amended motion for summary judgment and where the trial court—after denying plaintiffs' motion—granted summary judgment for the county, plaintiffs' argument on appeal that the court erred in denying their motion to strike was dismissed as moot. The county's amendments to its original summary judgment motion

Child support—prospective—deviation from guidelines—lack of findings— In a child support matter in which the appellate court vacated the trial court's order on the basis that several findings of fact regarding the parties' respective incomes and various expenses were not supported by the evidence, there was also a lack of evidence to support the trial court's deviation from the North Carolina Child Support Guidelines, which it did when, instead of ordering the father to pay support starting from the date the mother requested it in her responsive pleading, the court ordered the father to begin paying support after the hearing was held. The matter was remanded for additional findings, based on new or existing evidence according to the trial court's discretion. **Gavia v. Gavia, 491.**

Child support—purported consent order between the parties—validity—lack of evidence in appellate record—In a child support matter in which the appellate court vacated the trial court's order on the basis that several findings of fact were not supported by the evidence, the appellate court concluded there was insufficient evidence from which it could determine whether the parties entered into a consent agreement or whether the trial court's order was intended to constitute a consent judgment. Although there was some indication that the parties had discussed certain issues during a break in the proceedings and that the trial court spoke with the parties' counsel in chambers, nothing in the transcript of the proceedings or in the order demonstrated that the parties gave their unqualified consent to a permanent child support order. **Gavia v. Gavia, 491.**

CONTRACTS

Breach of contract claim—easement obligation—cost of road maintenance—calculation of damages—In an action to determine whether the grantees (defendants) of a road easement—under which defendants agreed to share the cost of the road's "maintenance and repair"—were obligated to pay for their portion of paving the gravel road, although defendants were not liable for the paving pursuant to the terms of the easement, the trial court correctly determined that defendants were liable on plaintiffs' breach of contract claim for the portion of the work that was done to prepare and rebuild the gravel base of the road, which constituted repair and maintenance. Where the trial court based its calculation of the cost owed by defendants on its erroneous decision to reform the deed, the matter was remanded for recalculation of the damages based on the original deed. **Foxx v. Davis, 473.**

COUNTIES

Class action—assessment of school impact fees—summary judgment—entitlement to refund—statutory requirements—In a class action filed against a county on behalf of two classes, one of which consisted of persons (Refund Class) seeking a refund of certain school impact fees assessed pursuant to a local statute (the Enabling Act), the trial court properly granted summary judgment in favor of the county. The Enabling Act provided that no refunds would be paid if the impact fees were reduced due to an "updated school impact fee study that results in changes to impact fee levels charged," but that refunds would be owed if the impact fees were reduced for "reasons other than an updated school impact fee study." Here, the county received a new set of impact fee studies (which contained new data not seen in previous studies, and therefore were "updated" for purposes of the Enabling Act) and explicitly cited to those studies when enacting an impact fee reduction. Even if the studies were not strictly current and the county may have considered other

he and the victim even had sex at all; thus, the evidence did not support an inference that defendant engaged in unprotected intercourse with the victim and, upon discovering that the victim was HIV-positive, was provoked to kill the victim out of sudden distress over being exposed to HIV. **State v. Gardner, 552.**

Second-degree murder—malice—jury instruction—lesser included offense—voluntary manslaughter—insufficiency of evidence—The trial court in a second-degree murder prosecution did not err in declining to instruct the jury on the lesser included offense of voluntary manslaughter, where the evidence was positive as to each element of the charged offense, including malice. Specifically, malice could be inferred from the nature of the crime and the circumstances of the victim's death where: the victim's car (with its license plate removed) was taken far off the road and set on fire with the victim locked inside the trunk, his body burning down to its skeletal remains; the victim's blood was found in a residence where defendant would stay; inside the residence, a large section of carpet had been removed and replaced with new carpeting, which had traces of bleach and blood stains around it; and a carpet cleaning machine inside the residence contained the victim's DNA. Further, regardless of whether it was improper for the court to opine that a voluntary manslaughter charge required stacking too many inferences upon each other, the court properly declined to instruct the jury on voluntary manslaughter where there was no evidence supporting such an instruction. **State v. Gardner, 552.**

INDICTMENT AND INFORMATION

Facial invalidity—error conceded by State—conviction vacated and remanded—In a criminal case arising from a hit-and-run car crash, defendant's conviction for failure to comply with driver's license restrictions was vacated where the State conceded on appeal that the indictment charging him with that crime was facially invalid. The judgment, which consolidated the license restriction offense with other convictions that were valid, was vacated and the matter was remanded for resentencing (upon which, the trial court was directed to correct two other errors conceded on appeal by the State regarding defendant's prior record level and sentencing level for his driving while impaired conviction). Additionally, defendant's arguments on appeal relating to the license restriction charge were dismissed as moot. **State v. Taylor, 581.**

MOTOR VEHICLES

Driving while impaired—reckless driving—motion to dismiss—sufficiency of evidence—identity of driver—In a prosecution for driving while impaired and reckless driving based on a single-vehicle accident involving a pickup truck that had run off the road and crashed into a steel fence, the State presented sufficient evidence from which the jury could conclude that defendant was the driver of the truck, including that defendant was found alone at the scene—trapped under the steel fence outside of the vehicle, unresponsive, and bleeding—and was the owner of the truck. **State v. Burris, 535.**

PUBLIC OFFICERS AND EMPLOYEES

Termination—football coach—violation of employment contract—failure to report gun on campus—The trial court's order affirming the final decision of the Winston-Salem State University (WSSU) Board of Trustees terminating petitioner football coach's employment was affirmed by the Court of Appeals where

petitioner's clear violation of his employment contract in failing to report to police the potential presence of a gun in a dorm room created grounds for termination. The appellate court rejected petitioner's arguments on appeal as lacking merit—contrary to petitioner's argument, WSSU consistently advocated multiple grounds for petitioner's termination (including the violation of his employment contract), and petitioner failed to identify any conflicts in the evidence or to challenge the sufficiency of the evidence to support any specific finding of fact. **Boulware v. Univ. of N.C. Bd. of Governors, 465.**

REFORMATION OF INSTRUMENTS

Deed—mutual mistake—three-year statute of limitations—time of discovery—claim barred—In a dispute over the terms of a road easement that had been granted to defendants—under which defendants agreed to pay a certain percentage of the cost of the road's "maintenance and repair" subject to subsequent property owners' obligations—defendants' reformation claim, on the basis of mutual mistake, was barred by the three-year statute of limitations. Defendants waited to file their claim over five years after they should have discovered any alleged mistake when they entered into an agreement with plaintiffs to exempt another adjacent property owner from any road maintenance obligations. **Foxx v. Davis, 473.**

ROBBERY

Attempted armed robbery—intent—implied demand—sufficiency of evidence—In a prosecution for attempted armed robbery and attempted first-degree murder, the State presented substantial evidence from which a jury could reasonably infer that defendant intended to rob the victim at gunpoint where defendant's actions in tapping his revolver against the car window and demanding that the victim open his door constituted an implied demand coupled with the threatened use of a gun. **State v. Legrand, 572.**

SEARCH AND SEIZURE

Warrantless blood draw—impaired driving—unconscious driver—exigent circumstances—In a prosecution for driving while impaired and reckless driving based on a single-vehicle accident involving a pickup truck that had run off the road, there were sufficient exigent circumstances to justify a warrantless blood draw where defendant was found unconscious near the vehicle with severe injuries and extensive bleeding, defendant smelled of alcohol and there were open beer cans inside and outside the vehicle, the responding trooper spent an hour investigating and securing the scene while defendant was transported to a hospital for medical treatment, and defendant was still unconscious when the trooper arrived at the hospital. Therefore, there was no reversible error in the admission of the results of the blood draw into evidence. **State v. Burris, 535.**

SENTENCING

Prior record level—out-of-state convictions—classification—substantial similarity—The trial court did not err when sentencing defendant (for possession of a firearm by a felon) as a prior record level V after the court made a finding that defendant's out-of-state felony convictions were substantially similar to North Carolina offenses and could be classified accordingly. The trial court reviewed the

N.C. COURT OF APPEALS
2024 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	8 and 22
February	5 and 19
March	4 and 18
April	1, 15, and 29
May	13 and 27
June	10
August	12 and 26
September	9 and 23
October	7 and 21
November	4 and 18
December	2

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

BOULWARE v. UNIV. OF N.C. BD. OF GOVERNORS

[289 N.C. App. 465 (2023)]

KIENUS PEREZ BOULWARE, PETITIONER
v.
THE UNIVERSITY OF NORTH CAROLINA BOARD OF GOVERNORS,
EX REL. WINSTON-SALEM STATE UNIVERSITY BOARD OF TRUSTEES, RESPONDENT

No. COA22-840

Filed 5 July 2023

Public Officers and Employees—termination—football coach—violation of employment contract—failure to report gun on campus

The trial court's order affirming the final decision of the Winston-Salem State University (WSSU) Board of Trustees terminating petitioner football coach's employment was affirmed by the Court of Appeals where petitioner's clear violation of his employment contract in failing to report to police the potential presence of a gun in a dorm room created grounds for termination. The appellate court rejected petitioner's arguments on appeal as lacking merit—contrary to petitioner's argument, WSSU consistently advocated multiple grounds for petitioner's termination (including the violation of his employment contract), and petitioner failed to identify any conflicts in the evidence or to challenge the sufficiency of the evidence to support any specific finding of fact.

Appeal by defendant from judgment entered 31 January 2022 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 7 June 2023.

Freedman Thompson Witt Ceberio & Byrd PLLC, by Christopher M. Watford, for the petitioner-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kari R. Johnson, for the respondent-appellee.

TYSON, Judge.

Kienus Perez Boulware ("Boulware") appeals from orders entered on 31 January 2022, which denied his request for relief and affirmed the decision of the Winston-Salem State University ("WSSU") Board of Trustees. We affirm.

I. Background

Boulware began his employment with WSSU on 4 January 2010. He was employed as head coach for five years and agreed to a fixed-term contract for 48 months set to terminate on 31 December 2020.

Boulware's contract set forth his duties, which included management and supervision of the football team as well as "other duties . . . as may be assigned." The contract stated he could be terminated for just cause for a significant or repetitive violation of the duties set forth in the contract, as well as a "significant or repetitive violation of any law, regulation, rule, constitutional provision or bylaw of the institution."

Boulware was assigned the duty of serving as a Campus Security Authority ("CSA"), a person who assists the University in complying with The Clery Act, which tasks universities with reporting crimes and keeping a public crime log. As part of his training as a CSA, Boulware signed a letter that explained the types of crimes he was obligated to report.

> Our university has a responsibility to notify the campus community about any crimes which pose an ongoing threat to the community, and, as such, campus security authorities are obligated by law to report crimes to the university police department. Even if you are not sure whether an ongoing threat exists, immediately contact the university police department.

On 4 April 2019, two WSSU football players were involved in an altercation during practice and fought again in the weightroom after practice. Boulware intervened and sent the players home. Later that morning, he was informed the altercation had reignited in the players' dorm room.

On his way to the dorms, Boulware contacted the father of one of the students and he was informed of a possibility a gun was involved. Boulware arrived at the dorm room with an assistant coach, engaged with the players, but did not contact WSSU Police. The players were asked if there was a gun in the room. All answered no and no formal search occurred. A bag with a substance, possibly marijuana, was found in the room, but no gun was seen. Boulware gave the bag to the student's father, who had arrived, and he disposed of it. Boulware attempted to inform the Athletic Director, but he could not reach him. He never informed the WSSU Police Department or the Director of Athletics, instead contacting only the Office of Student Conduct.

On 23 April 2019, Chancellor Elwood L. Robinson signed a Notice of Intent to Discharge Boulware for cause. The Chancellor listed Clause 5 of the Boulware's employment contract, WSSU EHRA Personnel Policies, Section 300.2.1 of the UNC Policy Manual and Section 611 of the Code of the University of North Carolina Board of Governors. Those policies list causes for discharge including, but not limited to, incompetence, unsatisfactory performance, neglect of duty, or misconduct that interferes with the capacity of the employee to perform effectively the requirements of his or her employment.

Boulware requested a hearing before the WSSU's EHRA Grievance Committee on 29 April 2019. The hearing was originally scheduled for 30 May 2019 but was continued until 23 July 2019 per Boulware's request. Boulware and WSSU were represented by counsel at the hearing.

After hearing evidence and testimony, the Grievance Committee recommended Boulware's termination be affirmed. The Grievance Committee drafted a decision letter, which outlined the termination procedures for Boulware. The procedures initially described and outlined in the letter applied to at-will employees, which did not include Boulware, who held a non-faculty ERHA position exempt from the State Human Resources Act. Consequently, the letter incorrectly stated it was being sent to WSSU's Board of Trustees, but the letter was instead re-routed to Chancellor Robinson when WSSU attorneys realized the procedures described in previous letters to Boulware were inconsistent with the UNC System's Code. The decision letter Boulware received outlined the wrong procedures, but the process was handled correctly and properly sent to Chancellor Robinson. Boulware's attorneys consented to the change in procedure via email. Chancellor Robinson adopted the Grievance Committee's recommendation on 22 November 2019.

On 3 December 2019, Boulware gave notice of appeal to WSSU's Board of Trustees. The Board of Trustees issued its Final Decision upholding his termination on 5 March 2020.

Boulware filed a Petition for Judicial Review requesting his termination of employment contract be reversed on 1 June 2020. He asserted the WSSU Board's Final Decision violated his constitutional protections, was made upon unlawful procedures, was affected by errors of law, was unsupported by substantial evidence, and constituted an abuse of discretion.

Boulware's First Petition for Judicial Review was heard on 3 September 2020. On 28 September 2020, Judge Gottlieb entered an order stating: "Boulware's grievance was properly referred to the

Grievance Committee for an impartial, fact-finding hearing and the Grievance Committee's Recommendation was properly issued." However, the Court nevertheless concluded that, because of the procedural errors, the review and decision were:

> made upon unlawful procedure within the meaning of N.C. Gen. Stat § 150B-51(b)(3); and (ii) was affected by other error of law within the meaning of N.C. Gen. Stat § 150B-51(b)(4).

The court vacated the final decision of the Board of Trustees and remanded the matter for impartial review of the Grievance Committee's Recommendation with subsequent review, if necessary and requested, as provided by the UNC system's code.

The record, including the transcript from the Committee's hearing, was reviewed by Dr. Kimberly van Noort, Senior Vice President for Academic Affairs and Academic Officer for The University of North Carolina System. Dr. van Noort issued a decision on 15 December 2020 agreeing with the Grievance Committee's recommendation to terminate Boulware's contract and employment. Boulware responded by submitting a notice of appeal to the WSSU Board of Trustees.

WSSU's Board of Trustees unanimously affirmed Dr. van Noort's decision on 7 May 2021. Board Chair Harris and the original board attorney did not participate in the appeal, due to concerns raised by Boulware.

Boulware filed a Second Petition for Judicial review on 7 June 2021 based upon the same contentions from the First Petition: asserting violations of constitutional provisions; unlawful procedures; errors of law; lack of substantial evidence; and, abuse of discretion. On 21 July 2021, Boulware requested Judge Gottlieb to rule upon unresolved issues from the First Petition. After this hearing, Judge Gottlieb declined to rule on the First Petition, ruling any unresolved issues from the First Petition were intrinsically intertwined with the issues raised in the Second Petition. Anything not specifically addressed in the prior order should be addressed in the Second Petition.

The case was heard on 11 January 2022. Judge Morgan issued his ruling, consolidating both the First and Second Petitions, affirming the final decision of the WSSU Board of Trustees, and denying all relief for Boulware on 31 January 2022.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

Boulware argues the Final Decision to terminate his employment was not supported by substantial evidence because all decisions were based on a misapprehension of law.

Boulware also argues that the trial court erred as a matter of law because the WSSU changed its justification for dismissing Boulware's appeal *post hoc* after the case was remanded for impartial review. Boulware lastly contends the conclusions of law are not supported by proper findings of fact because the substantive findings are mere recitations of evidence.

IV. Standard of Review

This Court examines the trial court's order for errors of law by completing two steps: "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994).

The trial court's review of the issues was governed by N.C. Gen. Stat. § 150B-51 which reads in part:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> . . .
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted [ ]
>
> . . .
>
> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to . . . subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(b)-(c) (2021).

Under the whole record test, "if the agency's findings are supported by substantial evidence, they must be upheld." *Sack v. N.C. State Univ.*, 155 N.C. App. 484, 491, 54 S.E.2d 120, 127 (2002). Substantial evidence is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." *In re Denial of NC Idea's Refund*, 196 N.C. App. 426, 433, 675 S.E.2d 88, 94 (2009) (internal citations and quotations omitted).

V. Misapprehension of Law

Boulware argues the Final Decision to terminate his employment was not supported by substantial evidence because all decisions were based upon a misapprehension of The Clery Act. 20 U.S.C. § 1092(f) (2018) (tasking universities with reporting crimes and keeping a public crime log). He argues WSSU relied upon a misapprehension of The Clery Act as a basis for their argument against him, and substantial evidence does not exist to support the Board's decision. *Id.*

Substantial evidence tends to show Boulware engaged in a significant violation of his assigned contractual duties. Boulware signed his CSA training letter on 7 November 2019 and acknowledged his awareness and understanding of his duty to *immediately* report any on-going threats to the university's police department even if unsure whether an on-going threat existed.

Boulware testified he was aware of the possibility of a gun being involved in the altercation between his players, yet instead of contacting law enforcement, he engaged with numerous people, including the agitated players and the father of one of the players inside the dorm for over two hours. Despite being made aware of the potential presence of a gun, Boulware never searched for one nor informed university police of this allegation. This testimony alone is a substantial violation, and his failure to comply risked serious harm or even death of students, staff, or the public.

Clear and substantial evidence of a violation of Boulware's contractual obligations was presented and substantiated his termination.

VI. *Post Hoc* Change in Justification

Boulware argues that the trial court erred as a matter of law because WSSU changed its justification for dismissing Boulware *post hoc* after the case was remanded for impartial review. He asserts the initial focus to justify the termination of his contract was a violation of The Clery Act, but when Judge Gottlieb remanded for an impartial review, WSSU utilized a different theory.

The initial letter of termination to Boulware from 25 April 2019 was introduced at trial. In the opening sentences, the letter notifies the intent to dismiss based on "WSSU EHRA Personnel Policies, Section 300.2.1 of the UNC Policy Manual and Section 611 of The Code of the University of North Carolina Board of Governors." The letter describes Boulware's failure to contact law enforcement and its potential impact on campus safety. All of these assertions allegedly occurred before any reference to The Clery Act. In the initial briefs to the Superior Court, WSSU asserted Boulware was terminated for failure to fulfill both his contractual and legal obligations to notify university police officers of a serious safety concern. This assertion is consistent with Dr. Van Noort's impartial review after remand, as well as the Board of Trustee's decision, to unanimously uphold the review.

These documents from the hearings provide clear and substantial evidence WSSU had stated numerous grounds for Boulware's termination, beginning in the initial letter. WSSU consistently maintained these arguments throughout the multiple review levels, including the current appeal before this Court.

VII. Findings of Fact

Boulware contends the conclusions of law are not supported by proper findings of fact because the substantive findings are mere recitations of evidence.

Judge Morgan's Findings of Fact utilizes direct quotes from testimony. Boulware does not identify any conflicts in the evidence or testimony, and he does not challenge the sufficiency of the evidence to support any specific Finding of Fact. A significant portion of the Findings of Fact Boulware cites as relying upon direct testimony are taken directly from Boulware's testimony, which neither side disputes. "Where there is directly conflicting evidence on key issues, it is especially crucial that the trial court make its own determination as to what pertinent facts are actually established by the evidence, rather than merely reciting what the evidence may tend to show." *Moore v. Moore*, 160 N.C. App. 569, 572, 587 S.E.2d 74, 75 (2003) (internal quotations and citation omitted).

No conflicting evidence is shown, and Boulware does not contend the Findings of Fact are not supported by the evidence. This Court has previously stated where "[p]laintiff does not challenge any of the trial court's findings of fact as unsupported by the evidence[,]" the findings of fact "are binding on appeal." *Garrett v. Burris*, 224 N.C. App. 32, 34, 735 S.E.2d 414, 416 (2012). Without conflicts in the Findings of Fact,

and no contention the Findings of Fact are not supported by competent evidence, Boulware's argument is overruled.

VIII. Conclusion

Boulware's argument asserting the Final Decision to terminate his employment contract was not supported by substantial evidence, due to a misapprehension of The Clery Act, fails. Boulware's clear violation of his employment contract created grounds for termination whether or not The Clery Act was asserted as a ground.

Boulware's argument WSSU changed its justification for termination midway through the legal process and reviews also fails. Documents entered at trial provide clear and substantial evidence to support WSSU had stated multiple grounds for Boulware's termination, not solely his violation of The Clery Act. These factors are found in the initial termination letter, and WSSU consistently maintained these arguments throughout the multiple levels of review.

Boulware's challenges to the substantive findings as mere recitations of evidence and the purportedly unsupported conclusions of law are without merit. Boulware fails to identify any conflicts in the evidence or testimony and does not challenge the sufficiency of the evidence as not supporting any specific findings of fact. The Findings of Fact are binding upon appeal. *Moore*, 160 N.C. App. at 572, 587 S.E.2d at 75; *Burris*, 224 N.C. App. at 34, 735 S.E.2d at 416. These findings of fact support the conclusions of law. The order appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judge MURPHY and Judge STADING concur.

FOXX v. DAVIS

[289 N.C. App. 473 (2023)]

THOMAS A. FOXX AND WIFE, VIRGINIA A. FOXX, PLAINTIFFS
v.
WALTER GLEN DAVIS, JR., TRUSTEE OF THE WALTER GLEN DAVIS, JR. REVOCABLE LIVING TRUST DATED THE 9TH DAY OF JUNE, 2005 AND FLORENCE S. DAVIS, DEFENDANTS

No. COA22-1014

Filed 5 July 2023

1. Declaratory Judgments—scope of easement obligation—"maintenance and repair" of road—plain language—paving excluded

In an action to determine whether the grantees (defendants) of a road easement—under which defendants agreed to share the cost of the road's "maintenance and repair"—were obligated to pay for their portion of paving the road, the trial court did not err by granting defendants partial summary judgment on their declaratory judgment claim where it correctly concluded that paving over the existing gravel road constituted an improvement and thus was excluded from the terms "maintenance" and "repair" as used in the easement.

2. Reformation of Instruments—deed—mutual mistake—three-year statute of limitations—time of discovery—claim barred

In a dispute over the terms of a road easement that had been granted to defendants—under which defendants agreed to pay a certain percentage of the cost of the road's "maintenance and repair" subject to subsequent property owners' obligations—defendants' reformation claim, on the basis of mutual mistake, was barred by the three-year statute of limitations. Defendants waited to file their claim over five years after they should have discovered any alleged mistake when they entered into an agreement with plaintiffs to exempt another adjacent property owner from any road maintenance obligations.

3. Unjust Enrichment—scope of easement—road improvement excluded—no voluntary acceptance of benefit

In an action to determine whether the grantees (defendants) of a road easement—under which defendants agreed to share the cost of the road's "maintenance and repair"—were obligated to pay for a portion of paving the road, the trial court did not err by determining that plaintiffs could not recover from defendants the cost of paving the road under a theory of unjust enrichment, where defendants affirmatively rejected plaintiffs' proposal to have the road paved

and where their continued use of the road after it was paved did not amount to voluntary acceptance of the paving.

4. Contracts—breach of contract claim—easement obligation—cost of road maintenance—calculation of damages

In an action to determine whether the grantees (defendants) of a road easement—under which defendants agreed to share the cost of the road's "maintenance and repair"—were obligated to pay for their portion of paving the gravel road, although defendants were not liable for the paving pursuant to the terms of the easement, the trial court correctly determined that defendants were liable on plaintiffs' breach of contract claim for the portion of the work that was done to prepare and rebuild the gravel base of the road, which constituted repair and maintenance. Where the trial court based its calculation of the cost owed by defendants on its erroneous decision to reform the deed, the matter was remanded for recalculation of the damages based on the original deed.

Appeal by Plaintiffs and cross-appeal by Defendants from orders entered 19 January 2021 by Judge R. Gregory Horne, 5 January 2022 by Judge Nathaniel J. Poovey, and 11 May 2022 and 18 May 2022 by Judge Kimberly Y. Best, and judgment entered 8 June 2022 by Judge Kimberly Y. Best in Watauga County Superior Court. Heard in the Court of Appeals 25 April 2023.

Miller & Johnson, PLLC, by Nathan A. Miller, for Plaintiffs-Appellants/Cross-Appellees.

Moffatt & Moffatt, PLLC, by Tyler R. Moffatt and Joseph T. Petrack, for Defendants-Appellees/Cross-Appellants.

COLLINS, Judge.

This appeal arises from a dispute between the parties involving paving a road running through an easement. Plaintiffs appeal from orders granting Defendants' motion for partial summary judgment on their declaratory judgment action; Defendants' motion for summary judgment on their reformation claim ("Reformation Order"); and Defendants' motion to amend the Reformation Order.

Plaintiffs also appeal, and Defendants cross-appeal, the trial court's judgment entered after a bench trial. Plaintiffs argue that the trial court erred by concluding that Defendants were not liable for a portion of

the cost of paving the road under a theory of unjust enrichment and by concluding that Defendants were liable only in the amount of $9,900 for breach of contract. Defendants argue that the trial court erred by concluding that they were liable for breach of contract.[1]

We hold as follows: The trial court did not err by granting Defendants' motion for partial summary judgment on their declaratory judgment action. However, the trial court erred by granting Defendants' motion for summary judgment on their reformation claim and their subsequent motion to amend the Reformation Order.

The trial court did not err in its judgment by concluding that Defendants were not liable for a portion of the cost of paving the road under a theory of unjust enrichment. Furthermore, the trial court did not err by concluding that Defendants were liable for breach of contract. However, the trial court erred by concluding that Defendants were liable for the breach in the amount of $9,900.

Accordingly, we affirm in part, reverse in part, and remand.

I. Background

Plaintiffs Thomas Foxx and Virginia Foxx owned multiple tracts of real property in Watauga County. Plaintiffs entered into a contract with Defendants Walter Glen Davis, Jr., and Florence Davis in February 1997 for the purchase of a 10-acre tract of Plaintiffs' property (the "Davis Property").[2] In May 1997, Plaintiffs conveyed to Defendants by general warranty deed the Davis Property and an easement across an adjoining tract of Plaintiffs' property to access the Davis Property. Concerning the easement, the deed stated, in relevant part:

> There is also conveyed herewith a perpetual, non-exclusive right-of-way and easement for purposes of ingress, egress and regress 50 feet in width leading from N.C. Highway 105 to the [Davis Property] . . . .
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> By acceptance of this deed, Grantees . . . hereby agree to share in the maintenance and repair of the road to be

1. Plaintiffs' notice of appeal includes the trial court's order setting aside an entry of default against Defendants. However, Plaintiffs make no argument pertaining to this order on appeal and any issue pertaining to this order is abandoned. *See* N.C. R. App. P. 28(a); N.C. R. App. P. 28(b)(6).

2. Walter Glen Davis, Jr., conveyed by quitclaim deed his one-half undivided interest in the Davis Property to himself as trustee of the Walter Glen Davis, Jr., Revocable Living Trust in August 2005, and he is therefore a party to this action in his capacity as trustee.

> constructed by Grantors from N.C. Highway 105 to the [Davis Property] . . . . Until such time as Grantors convey property to third parties together with an easement to use said road, Grantors shall pay 20% of the cost of maintenance and repair of said road and Grantees shall pay 80% of the cost of maintenance and repair of said road. Grantors hereby covenant and agree to obligate each additional property owner who is conveyed an easement to use said road to share equally in Grantees' 80% obligation for maintenance and repair.

A 12-foot-wide gravel road leading from NC Highway 105 to the Davis Property was constructed by Plaintiffs in 1997 and is known as Rime Frost.

In April 2016, Plaintiffs conveyed a 55.225-acre tract of their property to the Blue Ridge Conservancy by warranty deed ("Conservancy Deed"). Thereafter, Plaintiffs and Defendants entered into a contract which essentially relieved Blue Ridge Conservancy of any obligation to contribute to maintenance or repair of Rime Frost. The contract between Plaintiffs and Defendants stated, in relevant part:

> WHEREAS, the deed from FOXX to DAVIS . . . contained provisions whereby FOXX agreed to pay a portion of the cost of maintenance and repair of a road leading from U.S. Highway 105 to the property conveyed to DAVIS and to obligate additional property owners who may be conveyed an easement to use said road to share in DAVIS' obligation for maintenance and repair of the road. . . .
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> . . . .
>
> WHEREAS, FOXX, DAVIS and the DAVIS TRUST, each desire to (i) terminate the provisions contained in the deeds requiring road maintenance contribution . . . as those provisions may apply because of the conveyance of the . . . 55.225 acres, and (ii) to release Blue Ridge Conservancy, its successors and assigns, as owners of the 55.225 acre tract from the aforesaid responsibilities as contained in the deed . . . . Except for the specific release of Blue Ridge Conservancy, its successors and assigns, as owners of the 55.225 acre tract, from the responsibilities contained in the above referenced deeds, the obligations of FOXX, DAVIS AND the DAVIS TRUST in all other respects remain unchanged.

Plaintiffs obtained a proposal from Moretz Paving on 4 September 2019 to pave Rime Frost from the point where it crosses the Watauga River to the point where it splits near the parties' driveways. Moretz Paving's total estimate was $64,900 and was broken down as follows: the preparation of the stone base for paving totaled $19,800, and the application of the asphalt totaled $45,120. Mr. Foxx met with Mr. Davis to discuss the proposal, and Mr. Davis stated that he would discuss the proposal with Mrs. Davis. Plaintiffs did not receive any further response from Defendants regarding the proposal.

Plaintiffs sent Defendants a letter on 8 November 2019, which stated:

> After talking with Glen and sending you both a copy of the paving proposal over 6 weeks ago, we have not heard from you. I also left [Mrs. Davis] a recorded message on her phone on Monday, November 4. However, we could not wait longer to hear from you if we were to get on the spring/summer schedule for 2020 and, therefore, we have submitted the signed contract for the work to be done.
>
> Based upon your General Warranty Deed of May 7, 1997, but adjusted in your favor since we now live here on the property, we would share equally in the cost of this section of road work.

Defendants sent an email to Plaintiffs on 13 November 2019, which stated, "[we] have both reviewed the proposal and discussed it, and we do not wish to participate in the paving of the farm road." Plaintiffs had Rime Frost paved by Moretz Paving in July 2020 for a total cost of $64,900.

Plaintiffs filed suit against Defendants in August 2020, asserting claims for breach of contract, termination of easement, and unjust enrichment/quantum meruit. Defendants moved to dismiss Plaintiffs' termination of easement claim, which was granted by written order entered 19 January 2021. On 8 February 2021, Defendants filed an answer and counterclaims for declaratory judgment, accounting, and recoupment. Defendants' declaratory judgment action asked the trial court to decide the following:

> a. Does the Easement prohibit Plaintiffs from placing any impediments within the 50-foot easement area shown on the plat recorded in Plat Book 13, Page 179, Watauga County, North Carolina Public Registry?

b. What activities are included within the scope of the terms "maintenance" and "repair" as those terms are used in the Easement?

c. Does paving Rime Frost from the point where Rime Frost crossed the Watauga River to the point where Rime Frost splits near the driveways between the Plaintiffs' and Defendants' respective properties constitute an "improvement," rather than "maintenance" or "repair" of the road, and, thus, fall outside the scope of the Easement?

d. What portion of purported funds that were paid for the work Plaintiffs allege in their Complaint was for "improvements" to Rime Frost?

e. What portion of purported funds that were paid for the work Plaintiffs allege in their Complaint was for "maintenance" and "repair" of Rime Frost as those terms are used in the Easement?

f. Was the obligation to pay for maintenance and repairs to Rime Frost contained in the Easement (i.e., 'Grantors shall pay 20% of the cost of maintenance and repair of said road and Grantees shall pay 80% of the cost of maintenance and repair of said road') modified by the Conservancy Deed?

g. Did the Conservancy Deed violate Plaintiffs' covenant to obligate each additional property owner who is conveyed an easement to use Rime Frost to share equally in Defendants' 80% obligation for maintenance and repair?

h. Was the obligation to pay for maintenance and repairs to Rime Frost contained in the Easement (i.e., 'Grantors shall pay 20% of the cost of maintenance and repair of said road and Grantees shall pay 80% of the cost of maintenance and repair of said road') modified by the November 8, 2019 letter from Plaintiffs to Defendants?

Defendants filed amended counterclaims, asserting an additional claim for reformation of the easement based on mutual mistake. Defendants alleged, in part, that "[t]he shared mutual understanding of Plaintiffs and Defendants at the time of entering into the [purchase contract] was that Plaintiffs would sell additional tracts of land from the Plaintiffs' Property and with each sale, Defendants' obligation to pay for road maintenance would be reduced proportionately[.]"

Defendants moved for partial summary judgment on their declaratory judgment action. The trial court granted the motion by order entered 5 January 2022, declaring that:

> a. Resurfacing of the gravel roadway within the Easement with asphalt, concrete, or other hot-mix or non-gravel compacted material constitutes an improvement and therefore does not fall within the scope of the terms "maintenance" and "repair," as used in the Easement;
>
> b. In the present action, Plaintiffs' asphalt paving over the existing gravel roadway in the Easement from the point where the Easement crosses the Watauga River to the point of intersection of the Easement and Plaintiffs' driveway constituted an improvement and therefore fell outside of the scope of the terms "maintenance" and "repair," as used in the Easement; and
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> c. The terms "maintenance" and "repair," as used in the Easement, do not include the maintenance or repair (as herein interpreted) of the asphalt paving over the existing gravel roadway in the Easement from the point where the Easement crosses the Watauga River to the point of intersection of the Easement and Plaintiffs' driveway.

The parties filed competing motions for summary judgment on Defendants' reformation claim. The trial court denied Plaintiffs' motion and granted Defendants' motion for summary judgment.[3] In its Reformation Order, the trial court reformed the easement to read, in pertinent part: "Until such time as Grantors convey[] property to third parties together with an easement to use said road, Grantors shall pay 50% of the cost of maintenance and repair of said road and Grantees shall pay 50% of the cost of maintenance and repair of said road."

Defendants voluntarily dismissed the portion of their declaratory judgment action, which petitioned the trial court to decide whether the easement was modified by the Conservancy Deed, and whether the Conservancy Deed violated Plaintiffs' covenant to obligate each additional property owner to share equally in Defendants' 80% obligation for maintenance and repair. Additionally, Defendants moved to amend the Reformation Order to further state: "Grantors hereby covenant and agree to obligate each additional property owner who is conveyed an

3. The parties also filed competing motions for partial summary judgment on Defendants' declaratory judgment action, but the trial court did not rule on the motions.

easement to use said road to share equally in Grantees' 50% obligation for maintenance and repair." The trial court granted Defendants' motion by written order entered 18 May 2022. That same day, Defendants voluntarily dismissed the remainder of their declaratory judgment action, as well as their claims for accounting and recoupment.

A bench trial was held on 18 May 2022 on Plaintiffs' remaining claims for unjust enrichment and breach of contract. The trial court entered a written judgment on 8 June 2022, concluding, in relevant part, that Defendants were not liable to Plaintiffs under the theory of unjust enrichment, but that Defendants were liable to Plaintiffs in the amount of $9,900 for breach of contract.

Plaintiffs filed a timely notice of appeal from the trial court's orders and judgment. Defendants filed a timely notice of appeal from the trial court's judgment.

II. Discussion

A. Summary Judgment

Plaintiffs argue that the trial court erred by granting Defendants partial summary judgment on their declaratory judgment action and summary judgment on their reformation claim.

1. Standard of Review

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). "In ruling on a motion for summary judgment, the trial court must view the evidence in the light most favorable to the non-moving party." *Keller v. Deerfield Episcopal Ret. Cmty., Inc.*, 271 N.C. App. 618, 622, 845 S.E.2d 156, 160 (2020) (quotation marks and citation omitted).

"The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact." *Badin Shores Resort Owners Ass'n v. Handy Sanitary Dist.*, 257 N.C. App. 542, 549, 811 S.E.2d 198, 204 (2018) (citation omitted). "This burden can be met by proving: (1) that an essential element of the non-moving party's claim is nonexistent; (2) that discovery indicates the non-moving party cannot produce evidence to support an essential element of his claim; or (3) that an affirmative defense would bar the claim." *CIM Ins. Corp. v. Cascade Auto Glass, Inc.*, 190 N.C. App. 808, 811, 660 S.E.2d 907, 909 (2008) (citation omitted).

When the movant properly supports its motion for summary judgment pursuant to 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). Furthermore, affidavits, both supporting and opposing, must be made "on personal knowledge, . . . set forth such facts as would be admissible in evidence, and . . . show affirmatively that the affiant is competent to testify to the matters stated therein." *Merritt, Flebotte, Wilson, Webb & Caruso, PLLC v. Hemmings*, 196 N.C. App. 600, 604-05, 676 S.E.2d 79, 83 (2009) (quotation marks and citation omitted).

We review a trial court's order granting summary judgment de novo. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). "Under de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower [court]." *Archie v. Durham Pub. Sch. Bd. of Educ.*, 283 N.C. App. 472, 474, 874 S.E.2d 616, 619 (2022) (quotation marks and citation omitted).

2. Declaratory Judgment

[1] Plaintiffs contend that the trial court erred by declaring that paving Rime Frost "constituted an improvement and therefore fell outside of the scope of the terms 'maintenance' and 'repair,' as used in the Easement" and that "[t]he terms 'maintenance' and 'repair,' as used in the Easement, do not include the maintenance or repair . . . of the asphalt paving over the existing gravel roadway[.]"

An easement created by a deed is a contract and is therefore interpreted in accordance with general principles of contract law. *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962). "The controlling purpose of the court in construing a contract is to ascertain the intention of the parties as of the time the contract was made[.]" *Id.* "If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) (citation omitted). "In construing contracts[,] ordinary words are given their ordinary meaning unless it is apparent that the words were used in a special sense. The terms of an unambiguous contract are to be taken and understood in their plain, ordinary and popular sense." *Badin Shores Resort Owners Ass'n*, 257 N.C. App. at 557, 811 S.E.2d at 208 (quotation marks and citation omitted). "When the language of a contract is plain and unambiguous then construction of the agreement is a matter of law for the court." *RME Mgmt., LLC v. Chapel H.O.M. Assocs.*,

LLC, 251 N.C. App. 562, 567, 795 S.E.2d 641, 645 (2017) (quotation marks and citation omitted).

Here, the deed creating the easement states, in pertinent part:

> By acceptance of this deed, Grantees . . . hereby agree to share in the maintenance and repair of the road to be constructed by Grantors from N.C. Highway 105 to the [Davis Property] . . . . Until such time as Grantors convey property to third parties together with an easement to use said road, Grantors shall pay 20% of the cost of maintenance and repair of said road and Grantees shall pay 80% of the cost of maintenance and repair of said road. Grantors hereby covenant and agree to obligate each additional property owner who is conveyed an easement to use said road to share equally in Grantees' 80% obligation for maintenance and repair.

The deed does not define the terms "maintenance" or "repair," and we therefore interpret these terms in their plain, ordinary, and popular sense in construing the contract. *Badin Shores Resort Owners Ass'n*, 257 N.C. App. at 557, 811 S.E.2d at 208. "Maintenance" is defined as "to keep in an existing state (as of repair)[.]" *The Merriam-Webster Dictionary* 431 (2016). "Repair" is defined as "to restore to good condition[.]" *Id.* at 613. Paving Rime Frost did not constitute maintenance or repair because it did not keep the gravel road in an existing state or restore the gravel road to good condition. Rather, paving Rime Frost constituted an improvement because it enhanced the quality of the road. *See id.* at 361 (defining "improve" as "to enhance or increase in value or quality"). Thus, under the plain language of the easement, paving Rime Frost was not maintenance or repair, but rather was an improvement.

Furthermore, the road Plaintiffs constructed from N.C. Highway 105 to the Davis Property in 1997 was "a gravel road . . . 12 feet wide with probably six inches of gravel on it." The easement thus indicates that the parties' intent was for Defendants to share in the maintenance and repair of Rime Frost as a gravel road.

Accordingly, the trial court did not err by granting Defendants partial summary judgment on their declaratory judgment claim.

3. Reformation

[2] Plaintiffs contend that the trial court erred by reforming the deed to reduce Defendants' road maintenance and repair obligation from 80% to 50% based on mutual mistake. Plaintiffs specifically argue that Defendants' reformation claim is barred by the statute of limitations.

"Reformation is a well-established equitable remedy used to reframe written instruments where, through mutual mistake or the unilateral mistake of one party induced by the fraud of the other, the written instrument fails to embody the parties' actual, original agreement." *Branch Banking & Trust Co. v. Chi. Title Ins. Co.*, 214 N.C. App. 459, 463, 714 S.E.2d 514, 517-18 (2011) (quotation marks and citation omitted). "A mutual mistake is one common to both parties to a contract . . . wherein each labors under the same misconception respecting a material fact, the terms of the agreement, or the provisions of the written instrument designed to embody such agreement." *Id.* (quotation marks and citation omitted). When a party seeks to reform a contract based on mutual mistake, the burden of proof lies with the moving party to prove the mutual mistake by clear, cogent, and convincing evidence. *Smith v. First Choice Servs.*, 158 N.C. App. 244, 250, 580 S.E.2d 743, 748 (2003).

Under N.C. Gen. Stat. § 1-52, an action for relief on the ground of mistake must be brought within three years of "the discovery by the aggrieved party of the facts constituting the . . . mistake." N.C. Gen. Stat. § 1-52(9) (2022). "A plaintiff 'discovers' the mistake–and therefore triggers the running of the three-year limitations period–when he actually learns of its existence or should have discovered the mistake in the exercise of due diligence." *Wells Fargo Bank, N.A. v. Coleman*, 239 N.C. App. 239, 244, 768 S.E.2d 604, 608 (2015) (citation omitted).

Here, the purchase contract, dated 5 February 1997, states, in relevant part:[4]

> Davis will agree to share in a percentage of the road maintenance until further development occurs, at which time a POA will be formed. This percentage will be 80% Davis, and 20% Foxx. Each new homeowner will share equally in the 80% share. Foxx will not share in the maintenance after five (5) homeowners are present or no longer uses the road for farming or residential use.

Likewise, the deed creating the easement, dated 7 May 1997, states:[5]

> By acceptance of this deed, Grantees . . . agree to share in the maintenance and repair of the road to be constructed by Grantors from N.C. Highway 105 to the property conveyed herein as shown on the above-referenced plat. Until

4. The Davises are Defendants in this case and the Foxxes are Plaintiffs.

5. Grantees are Defendants in this case and Grantors are Plaintiffs.

> such time as Grantors convey property to third parties together with an easement to use said road, Grantors shall pay 20% of the cost of maintenance and repair of said road and Grantees shall pay 80% of the cost of maintenance and repair of said road.

Furthermore, on 17 August 2005, Walter Glen Davis, Jr., conveyed by quitclaim deed his one-half undivided interest in the Davis Property to himself as trustee of the Walter Glen Davis, Jr., Revocable Living Trust. The quitclaim deed included the verbiage from the 7 May 1997 deed regarding maintenance and repair of the road. Defendants also entered into an agreement with Plaintiffs on 15 April 2016 to "terminate the provisions contained in the deeds requiring road maintenance contribution" as to Blue Ridge Conservancy, and to "release Blue Ridge Conservancy, . . . as owners of the 55.225 acre tract from the aforesaid responsibilities as contained in the deed[.]"

Defendants should have discovered any mutual mistake by 15 April 2016 at the latest, after entering into the agreement with Plaintiffs to exempt Blue Ridge Conservancy from any road maintenance obligations. Because Defendants did not file their reformation claim until 3 August 2021, more than five years later, it is barred by the statute of limitations, and the trial court erred by granting Defendants' motion for summary judgment. Furthermore, the trial court erred by granting Defendants' motion to amend the Reformation Order to add that Plaintiffs "agree to obligate each additional property owner who is conveyed an easement to use said road to share equally in Grantees' 50% obligation for maintenance and repair" because Defendants' reformation claim is barred by the statute of limitations.

B. Judgment

Plaintiffs and Defendants argue that the trial court made erroneous conclusions of law in its judgment entered after a bench trial on Plaintiffs' remaining claims for unjust enrichment and breach of contract.

1. 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 those findings support the conclusions of law and ensuing judgment." *Ward v. Ward*, 252 N.C. App. 253, 256, 797 S.E.2d 525, 528 (2017) (citation omitted). "Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those

findings." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (citation omitted). The trial court's conclusions of law are reviewable de novo on appeal. *Donnell-Smith v. McLean*, 264 N.C. App. 164, 168, 825 S.E.2d 672, 675 (2019).

2. Unjust Enrichment

[3] Plaintiffs argue that the trial court erred by concluding that Defendants were not liable for a portion of the cost of paving the road under a theory of unjust enrichment.

A prima facie claim for unjust enrichment has five elements: (1) "one party must confer a benefit upon the other party"; (2) "the benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances"; (3) "the benefit must not be gratuitous"; (4) "the benefit must be measurable"; and (5) "the defendant must have consciously accepted the benefit." *JPMorgan Chase Bank, Nat'l Ass'n v. Browning*, 230 N.C. App. 537, 541-42, 750 S.E.2d 555, 559 (2013) (quotation marks, emphasis, and citations omitted).

"Not every enrichment of one by the voluntary act of another is unjust." *Wright v. Wright*, 305 N.C. 345, 350, 289 S.E.2d 347, 351 (1982). "Where a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched. The recipient of a benefit voluntarily bestowed without solicitation or inducement is not liable for [its] value." *Rhyne v. Sheppard*, 224 N.C. 734, 737, 32 S.E.2d 316, 318 (1944).

Here, the trial court made the following pertinent findings of fact:

> 21. In 2019, the Plaintiffs asked Moretz Paving, Inc. to give them a proposal for paving Rime Frost from where the pavement ends just after the bridge crossing the Watauga River to where the Plaintiffs' driveway intersects with Rime Frost.
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> 22. Moretz Paving, Inc. dispatched Robert Stroup, an estimator with Moretz Paving, Inc. to estimate the cost and prepare the proposal for the paving of Rime Frost for the Plaintiffs.
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> . . . .
>
> 24. Mr. Stroup prepared an estimate on September 4, 2019 for the total amount of $64,900.00. . . .

. . . .

> 34. Plaintiffs notified Defendants of their desire to pave Rime Frost and of the costs and asked Defendants to participate by sharing equally in the cost of the paving of Rime Frost.
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> 35. On November 13, 2019, Defendants informed the Plaintiffs via email that they were not going to participate in the paving. . . .
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> 36. In July of 2020, Plaintiffs had Moretz Paving, Inc., repair[] and prepare[] the gravel base and pave[] Rime Frost from where the pavement ended after the Watauga River bridge to Plaintiffs' driveway.
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> . . . .
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> 39. There was never an agreement between the parties to share in the asphalt costs.
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> . . . .
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> 42. Defendants did not voluntarily accept the paving of Rime Frost, and in fact refuse[d] the paving before the work commenced.

These findings of fact are supported by competent evidence, including, inter alia, Defendants' lack of response after Mr. Foxx met with Mr. Davis to discuss the proposal, and Defendants' email to Plaintiffs specifically declining to participate in the paving of Rime Frost.

Plaintiffs contend that Defendants voluntarily accepted the paving of Rime Frost because Defendants "never stated they weren't going to voluntarily accept the paving and find another way to reach their home[,]" and Defendants "continue to utilize the pavement more than once a day." However, Defendants affirmatively rejected Plaintiffs' proposal to pave Rime Frost and Defendants' continued use of Rime Frost to access their property does not constitute a voluntary acceptance of the paving. *See Rhyne*, 224 N.C. at 737, 32 S.E.2d at 318. The findings of fact support the trial court's conclusion of law that Plaintiffs failed to prove that Defendants "are liable to Plaintiffs for the asphalt under the legal theory of quantum meruit[6]/unjust enrichment because Defendants did

6. "*Quantum meruit* is a measure of recovery for the reasonable value of services rendered in order to prevent unjust enrichment." *Whitfield v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414 (1998) (citations omitted).

not voluntarily accept the paving of Rime Frost, and in fact refused the paving before the work commenced."

Accordingly, the trial court did not err by concluding that Plaintiffs could not recover under a theory of unjust enrichment.

3. Breach of Contract

[4] Defendants argue that the trial court erred by concluding that they were liable for breach of contract and awarding Plaintiffs $9,900, one-half of the cost of preparing Rime Frost for paving. Plaintiffs assert that the trial court correctly concluded that Defendants were liable for breach of contract, but erred by only awarding them one-half of the cost of preparing Rime Frost for paving based upon the reformed deed.

The trial court made the following pertinent findings of fact:

> 26. The preparation of the stone base for the paving of Rime Frost was $19,800.00.
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> 27. The application of the asphalt, including all materials and labor cost $45,120.00.
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> 28. Mr. Stroup determined that 660 tons of gravel would be needed to repair and prepare Rime Frost for paving as the road had 2 to 3 inches of gravel in most places and 6 inches in some places.
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> 29. Mr. Stroup testified that the industry standard for a gravel road is 6 inches of gravel and if you are going to do the work right then you would need to compact it.
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> . . . .
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> 31. Heather Isaacs with Moretz Paving, Inc. as a Senior Administrative Assistant noted in her testimony that you might not wet a gravel road as a repair.
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> . . . .
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> 33. The [c]ourt finds that the testimony of Robert Stroup and Heather Isaacs aren't inconsistent and that to repair and maintain a gravel road it requires adding the base gravel to depth of 6 inches, to compact it and to wet it.

Robert Stroup with Moretz Paving testified, in relevant part, as follows:

> Q. How much gravel base was there on the road?
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> A. Gravel base applied was 600, I mean, yeah, 660 tons.

Q. I understand that. How much on the road already existed, if you know?

A. Well I can't answer that. You know, two to three inches in places, and then there might be five, six in another.

. . . .

Q. What exactly goes into the prepped to pave? What exactly consists of that work?

A. Stone is added and bladed with a mower grader, and then to prep it, to pave, you add water to it and take a laboratory roller and compact it and it's ready to pave. The prep to pave is the compaction process of getting it ready to pave it.

. . . .

Q. Have you ever outside of Moretz Paving, have you ever worked on repairing a gravel road without paving it?

A. Yes, sir, but not to the extent of compacting it like you are. It's a whole different process, prepping to paving, just getting it down on your driveway where you can drive over it.

Q. If someone had a gravel road, driveway, and simply wanted it to be repaired on an annual basis, do you know what type of work would go into that?

A. Yes, sir. As a general rule you would, in most cases in this country people just take their farm tractor and put a blade on it and drag it and that's the end of it. To do it properly it needs to be bladed and get the proper elevations on it to where the water would run to where it's supposed to go and then compact it. But very seldom does that happen. It's an expense that as a general rule folks don't want to go to.

Q. So there's a difference between preparing a road to pave it compared to repairing a gravel road?

A. Yes, sir, very definitely.

Heather Isaacs with Moretz Paving testified, in relevant part, as follows:

> Q. Mr. Stroup testified earlier, I asked him about whether there was any difference in preparing a road to pave it versus maintaining and repairing an existing gravel road. And I'll represent to you, I believe as you were in the courtroom, that he said that there was a difference. Would you agree that there's a difference between those two things?
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> A. Yes, absolutely.
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> Q. What do you believe the difference would be between those two things?
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> A. Besides cost –
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> . . . .
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> Q. When you said besides cost, what would be the difference in cost?
>
> A. Well if you're just repairing a gravel road, you're not going to have as much man hours. You're not going to have – if you're doing a repair, sometimes you can get away with a little bit less material as well. But to repair something correctly as far as just repairing just a gravel road, if I'm just going to repair a gravel road, I would go in with a motor grader, I would lay the stone down, and then I would roll it. But you know, whenever you're prepping it to pave it you have to actually wet that. And you're probably not going to take the time to wet just a repair gravel [sic]. . . .

Stroup's testimony indicates that maintaining a gravel road involves adding stone and "[t]o do it properly it needs to be bladed . . . and then compact[ed]." Isaacs' testimony indicates that maintaining a gravel road involves laying stone, using a motor grader, and rolling the gravel. Although Isaacs testified that "you're probably not going to take the time to wet just a repair gravel[,]" the trial court determined the credibility of the witnesses and the weight to be given their testimony in making its findings of fact. *See Kirkhart v. Saieed*, 98 N.C. App. 49, 54, 389 S.E.2d 837, 840 (1990) ("The trial court is in the best position to weigh the evidence, determine the credibility of witnesses and the weight to be given their testimony, and draws the reasonable inferences therefrom." (quotation marks and citation omitted)). Therefore, the trial court's findings of fact are supported by competent evidence and are conclusive on appeal. *Shear*, 107 N.C. App. at 160, 418 S.E.2d at 845.

The trial court's findings of fact support the trial court's following conclusions of law:

> 11. The [c]ourt concludes that [Defendants], breached its obligation under the Easement to pay their share of maintenance and repair of Rime Frost.
>
> 12. That Rime Frost is a private road for which the Plaintiffs and Defendants are to share in the repair and maintenance of Rime Frost in the same manner as it was initially constructed . . . .
>
> 13. That the preparation work and materials to rebuild the gravel base as performed by Moretz Paving, Inc. constitutes repair and maintenance as set forth in the Easement.
>
> 14. The total cost of the repair and maintenance of the gravel base of Rime Frost, as performed by Moretz Paving, Inc., was $19,800.00.

However, because the trial court erred by reforming the deed to reduce Defendants' maintenance and repair obligation from 80% to 50%, the trial court erroneously concluded that "Defendants are responsible for 50% of the cost of the repair and maintenance of the gravel base of Rime Frost, as performed by Moretz Paving, Inc. which totals $9,900.00." Thus, although the trial court did not err by awarding Plaintiffs a portion of the costs associated with preparing Rime Frost for paving, the trial court erroneously calculated the costs based upon the reformed deed. Accordingly, we reverse and remand to the trial court for recalculation of damages based upon the original deed.

III. Conclusion

We affirm the trial court's order granting Defendants' motion for partial summary judgment on their declaratory judgment action because paving Rime Frost did not constitute maintenance or repair. However, we reverse the trial court's orders granting Defendants' motion for summary judgment on their reformation claim and their subsequent motion to amend the Reformation Order because Defendants' reformation claim is barred by the statute of limitations. Furthermore, we affirm the part of the trial court's judgment concluding that Defendants were not liable for a portion of the cost of paving the road under a theory of unjust enrichment because Defendants did not voluntarily accept the benefit. Finally, we reverse the part of the trial court's judgment concluding that Defendants were liable for breach of contract in the amount of $9,900

and remand to the trial court to recalculate damages based upon the original deed.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges TYSON and RIGGS concur.

JACOB GAVIA, PLAINTIFF
v.
MIKEN GAVIA, DEFENDANT

No. COA22-651

Filed 5 July 2023

1. Child Custody and Support—child support—gross income—daycare expenses—lack of evidentiary support

In a child support action between the mother and father of two children, the trial court's order was vacated and the matter remanded to the trial court because several findings of fact—about the parties' respective monthly gross incomes, the amount paid by the father for the children's health insurance, and the amount spent by the father on daycare expenses—either did not match the parties' testimony or were not supported by any evidence.

2. Child Custody and Support—child support—improper decree—non-party ordered to pay children's insurance—lack of in loco parentis status

In a child support action between the mother and father of two children, the trial court's decree that the mother's husband was required to obtain supplemental health insurance to cover the children was improper where the mother's husband was not a party to the proceedings and, even if he had been, there was no evidence that he had assumed in loco parentis status of the parties' children.

3. Appeal and Error—child support order—amount challenged—lack of evidence to review findings

In a child support matter in which the appellate court vacated the trial court's order and remanded on the basis that several findings regarding the parties' respective incomes and various expenses were not supported by evidence, the appellate court was unable to evaluate, based on a similar lack of evidence, whether the trial

court abused its discretion in ordering the father to pay monthly child support in the amount of $461.00.

4. Child Custody and Support—child support—purported consent order between the parties—validity—lack of evidence in appellate record

In a child support matter in which the appellate court vacated the trial court's order on the basis that several findings of fact were not supported by the evidence, the appellate court concluded there was insufficient evidence from which it could determine whether the parties entered into a consent agreement or whether the trial court's order was intended to constitute a consent judgment. Although there was some indication that the parties had discussed certain issues during a break in the proceedings and that the trial court spoke with the parties' counsel in chambers, nothing in the transcript of the proceedings or in the order demonstrated that the parties gave their unqualified consent to a permanent child support order.

5. Child Custody and Support—child support—prospective—deviation from guidelines—lack of findings

In a child support matter in which the appellate court vacated the trial court's order on the basis that several findings of fact regarding the parties' respective incomes and various expenses were not supported by the evidence, there was also a lack of evidence to support the trial court's deviation from the North Carolina Child Support Guidelines, which it did when, instead of ordering the father to pay support starting from the date the mother requested it in her responsive pleading, the court ordered the father to begin paying support after the hearing was held. The matter was remanded for additional findings, based on new or existing evidence according to the trial court's discretion.

Appeal by defendant from order entered 19 April 2022 by Judge Stephen A. Bibey in Hoke County District Court. Heard in the Court of Appeals 8 February 2023.

No brief filed for plaintiff-appellee father.

Jody Stuart Foyles for defendant-appellant mother.

STADING, Judge.

Miken Gavia ("mother") appeals from an order entered in Hoke County District Court awarding her joint child custody and monthly child support.

I. Background

Mother and Jacob Gavia ("father") married on 16 July 2011 and have two minor children together. On 8 October 2018, father filed for divorce, child custody, child support, equitable distribution, and attorney's fees. Mother answered and counterclaimed for the same. The trial court subsequently entered an order granting father's claim for absolute divorce. Mother has since remarried. A hearing was held on 13 April 2022 to determine child custody and child support. After the hearing, the trial court entered an "order on permanent child custody and child support" on 19 April 2022. Thereafter, mother filed her notice of appeal.

II. Jurisdiction

The 19 April 2022 order fully resolves the issues of child custody and child support, and no other claims remain pending. Therefore, our Court has jurisdiction to hear this appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Analysis

On appeal, we address: (1) whether findings of fact nos. 12, 13, 15, 16, 17, 18, and 19 are supported by competent evidence, (2) whether the trial court erred in ordering child support in the amount of $461.00 per month, (3) whether a valid consent order existed between the parties, and (4) whether the trial court erred by failing to order arrears.

A. Findings of Fact Nos. 12, 13, 15, 16, 17, 18, and 19

"The trial court is given broad discretion in child custody and support matters" and the court's "order will be upheld if substantial competent evidence supports the findings of fact." *Meehan v. Lawrence*, 166 N.C. App. 369, 375, 602 S.E.2d 21, 25 (2004) (citation omitted). Thus, on appeal, this Court must determine "whether a trial court's findings of fact are supported by substantial evidence [and also] must determine if the trial court's factual findings support its conclusions of law." *State v. Smart*, 198 N.C. App. 161, 165, 678 S.E.2d 720, 723 (2009) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citation omitted).

1. Findings of Fact Nos. 12, 13, 15, 16, and 17

[1] We first consider mother's argument that findings of fact nos. 12, 13, 15, 16, and 17 are not supported by competent evidence. Mother maintains that the record lacks evidence to support the dollar amounts in each cited finding. In relevant part, the trial court's order contained the following findings of fact:

> 12. That Plaintiff father is employed with Lee Electric with a monthly gross income of $7,494.00.
>
> 13. That Defendant mother is employed with a law firm with a monthly gross income of $2,665.00.
>
> . . .
>
> 15. That Plaintiff father provides monthly healthcare premium expenses for the minor children in the amount of $270.90.
>
> 16. That Plaintiff father provides monthly daycare expenses for the minor children in the amount of $967.50.
>
> 17. That based upon Worksheet B of the North Carolina Child Support Guidelines, the recommended child support amount of $461.00 payable from Plaintiff father to Defendant mother.

At trial, both parties testified to approximations of their monthly incomes. Father testified that he made between $4,000 and $5,000 monthly before taxes. Mother testified that she made $2,800 monthly before taxes, and her annual salary was $37,000. Mother gave the only testimony about insurance, stating that "[father] carries the insurance through his employer." Any testimony about daycare only referenced times, explaining that it was before and after school. No other evidence contradicted this testimony from either party.

The only evidence of the parties' respective incomes is the unrebutted testimony of each witness providing general dollar amounts of the earnings before taxes that do not match the gross incomes found by the trial court. Other than the fact that "[father] carries the insurance through his employer," there is no evidence of the amount paid as found in the trial court's order. Likewise, there was no evidence of the amount paid for daycare expenses. Consequently, there is no evidence to support the trial court's inputs resulting in "the recommended child support amount of $461.00 payable from . . . father to . . . mother." If documents substantiating income and expenses were produced to the trial court,

they were not admitted into evidence. Thus, there is not substantial evidence adequate to support these contested findings of fact. Accordingly, we vacate the order and remand to the trial court. "On remand, the trial court, in its discretion, may enter a new order based on the existing record, or may conduct further proceedings including a new evidentiary hearing if necessary." *Jain v. Jain*, 284 N.C. App. 69, 77, 874 S.E.2d 663, 669 (2022) (citation omitted).

2. The Trial Court's Finding of Fact No. 19

[2] Next, we consider mother's argument that competent evidence does not support finding of fact no. 19, that requires her current husband—a nonparty to the suit—to provide medical insurance to the parties' children. At the 13 April 2022 hearing, mother testified that her current husband was a member of the military. Subsequently, the trial court announced in its ruling:

> In regards to mom being married now to a military member . . . because . . . I have ordered that there is continued legal as well as shared custody would mean that these two children would be available to be registered [in DEERS] through your spouse's insurance and a program in . . . TRICARE . . . and . . . would be eligible for supplemental insurance to the insurance coverage meaning that you will still have the primary responsibility, but should for some reason or another . . . his company doesn't provide the opportunity, you're still under the obligation.

The trial court memorialized this portion of its ruling as finding of fact no. 19 in its order:

> 19. That Defendant mother shall, through her military husband, enroll the minor children into the DEERs system so that they may be enrolled into Tricare for supplemental insurance coverage. Defendant mother shall provide Plaintiff father with any identification cards or health insurance information necessary to allow Plaintiff father to utilize such coverage.

"Generally, a judgment is in a form that contains findings, conclusions, and a decree. The decretal portion of a judgment is that portion which adjudicates the rights of the parties." *Spencer v. Spencer*, 156 N.C. App. 1, 13–14, 575 S.E.2d 780, 788 (2003) (citation omitted). Comparatively, "[f]indings of fact are statements of what happened in space and time." *Dunevant v. Dunevant*, 142 N.C. App. 169, 173, 542

S.E.2d 242, 245 (2001) (citation omitted). Finding of fact no. 19 contains an "*unequivocal directive*" that mother's new husband "enroll [the parties' child] into Tricare." *Spencer*, 156 N.C. App. at 14, 575 S.E.2d at 788. Thus, although this directive was listed as a finding of fact, it is properly classified as a decree of the trial court.

Regardless of the classification of finding of fact no. 19, for judicial efficiency on remand, we first address whether the trial court erred by decreeing an unequivocal directive to a nonparty. At the hearing, mother's testimony indicated that she was a dependent on her current husband's health insurance. Therefore, this decree listed as finding of fact no. 19 commanded mother's current husband—an individual not named as a party in the pending litigation—to act pursuant to the trial court's order. In *Geoghagan v. Geoghagan*, this Court stated that a "necessary party is a party that is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without [its] presence as a party." 254 N.C. App. 247, 249–50, 803 S.E.2d 172, 175 (2017) (internal quotation marks and citation omitted). This Court has also described a necessary party as "one whose interest will be directly affected by the outcome of the litigation." *Id.* (internal quotation marks and citation omitted). While couched in terms suggesting the order was directed at mother, the trial court's decree required her current husband to obtain supplemental health insurance through his employer and assume any resulting financial implications. Therefore, her current husband is a necessary party since his interests are directly affected by the outcome of the litigation.

Assuming *arguendo*, that mother's current husband was a party to the current suit, N.C. Gen. Stat. § 50-13.4(b) (2023) provides that "the judge may not order support to be paid by a person who is not the child's parent or an agency, organization or institution standing in loco parentis absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing." Moreover, if found to be liable, "any other person, agency, organization or institution standing in loco parentis shall be secondarily liable for such support." *Id.* Accordingly, in North Carolina, a stepparent can voluntarily assume secondary child support obligations if the evidence supports finding they are *in loco parentis* to a child. "The term 'in loco parentis' has been defined by this Court as a person in the place of a parent or someone who has assumed the status and obligations of a parent without a formal adoption." *Duffey v. Duffey*, 113 N.C. App. 382, 384–85, 438 S.E.2d 445, 447 (1994) (citations omitted) (finding that defendant—a

party to the suit—stood *in loco parentis* by voluntarily assuming obligations to support his stepchildren). However, absent such evidence and findings, there is no duty for a person to support stepchildren. *Id.*

In the present matter, the record does not contain any evidence that would permit a finding that mother's current husband assumed *in loco parentis* status of the parties' children. Nonetheless, at this juncture, an inquiry of this nature is premature in the absence of the necessary party. In its current form, the trial court's order directs a nonparty to act, and the trial court lacked the power to require his action or affect his rights without him first being joined as a party. *See Geoghagan*, 254 N.C. App. at 250, 803 S.E.2d at 175. Accordingly, we vacate and remand the trial court's order for further proceedings that: (1) do not require the actions of or affect the rights of a nonparty, or (2) for joinder of the necessary party. *See id.*

3. Finding of Fact No. 18

While mother's headings in her brief and her proposed issues on appeal indicate that she assigns error to finding of fact no. 18, her brief contains no argument against it. Thus, this Court will consider any issue she asserts for finding of fact no. 18 as abandoned, and the finding will be deemed conclusive on appeal. N.C. R. App. P. 28(b)(6) (2023); *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998).

B. Decree of Child Support Amount

[3] In mother's next assignment of error, she maintains that the trial court erred by ordering child support in the amount of $461.00 per month. "Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Leary v. Leary*, 152 N.C. App. 438, 441–42, 567 S.E.2d 834, 837 (2002) (citations omitted). When determining whether the trial court erred in the award of child support, "the trial court's ruling will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

Here, the trial court's order decrees "[t]hat . . . father shall pay as permanent child support to . . . mother the sum of $461.00 per month for child support[.]" Mother argues that this amount ordered by the trial court is unsupported by competent evidence. As stated above in subsection A, there is not substantial evidence to support the trial's court's findings of fact. As explained by our Supreme Court:

> Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980). Since this Court can only consider evidence on the record, and the findings of fact were not supported by evidence, we are precluded from ruling on this issue at this time. N.C. R. App. 3(c)(1) (2023).

C. Valid Consent Orders

[4] Next, we consider mother's argument that the parties did not enter into a valid consent order. The record shows that after testimony but just before announcing its ruling, the trial court took a short break to speak with counsel in chambers. There is no recitation in the record of the contents of the conversation. While we can speculate that the parties crafted an oral agreement, our "review is solely upon the record on appeal." N.C. R. App. P. 3(c)(1). Upon announcing its ruling, the trial court recalled that mother made a salary of $37,000 but "is to provide proof of her actual income to her . . . attorney," and father is "to provide the actual gross income to his attorney." Also, upon referencing health insurance, the trial court appeared to address father by saying "you will still have the primary responsibility," to which father responded in the affirmative. Following another recess, the trial court inquired if "counsel had an opportunity to discuss . . . the proposed order [with their clients]." In response, father's attorney stated, "Yes . . . we worked on child support during the break. We have provided proof of income to both parties and we will report . . . that the child support amount is $461 payable by . . . father to . . . mother beginning May 1st." Then, the trial court asked the attorneys if "by consent they're agreeing to a permanent child support order being entered?" Attorneys for both parties responded in the affirmative.

The validity of a consent judgment rests upon the "unqualified consent" of the parties, and the judgment is void if such consent does not exist at the time the court approves the agreement and promulgates it as a judgment. *Rockingham Cnty. DSS ex rel. Walker v. Tate*, 202 N.C. App. 747, 750, 689 S.E.2d 913, 916 (2010) (citation omitted). "The parties' failure . . . to acknowledge their continuing consent to the proposed

judgment, before the judge who is to sign the consent judgment, subjects the judgment to being set aside on the ground the consent of the parties was not subsisting at the time of its entry." *Id.* In *Tevepaugh v. Tevepaugh*, this Court found that an agreement was not to become a judgment "*until* it was signed by the presiding judge and the judge was not to sign it *until* he had reviewed it with the parties and each of them had acknowledged they understood the legal effect of the [a]greement." 135 N.C. App. 489, 493, 521 S.E.2d 117, 120–21 (1999) (emphasis original).

On 13 April 2022, the trial court announced portions of its ruling in open court with both parties present. Subsequently, father's attorney prepared and signed the proposed order with the words "approved via fax + text 4/18/22" in the signature block for mother's attorney. The signatures of either party do not appear on the order. This proposed order contained income and expenditure amounts which were not reviewed with or acknowledged by the parties in the trial court. It is unclear from the appellate record whether the trial court intended the order to be a valid consent judgment. However, in any event, neither the transcript of the 13 April 2022 proceeding, nor the four corners of the order, permit us to find unqualified consent by the parties. Thus, as to the decree of support from father to mother in the amount of $461.00, absent findings of fact founded by substantial evidence and factual findings supporting a resulting conclusion of law, or a valid consent order between the parties, the trial court erred by ordering that amount of child support. On remand, if the parties wish to enter a consent order, they may do so consistent with existing precedent.

D. Prospective Child Support

[5] Lastly, mother argues that the trial court erred in not ordering prospective child support. After the hearing, there was a discussion between the trial court and attorneys agreeing that "there are no arrears." In the decretal portion of the order, the trial court declined to order "arrears" to mother. Arrears is defined as "[a]n unpaid or overdue debt." *Arrears*, *Black's Law Dictionary* (7th ed. 1999). In North Carolina, there are two types of child support arrears. Retroactive support, or prior maintenance, is child support ordered for a period of time before a complaint is filed. *Briggs v. Greer*, 136 N.C. App. 294, 300, 254 S.E.2d 577, 586 (2000) (citation omitted). This is available when a custodial parent seeks reimbursement from the noncustodial parent for expenditures made on behalf of a child before the action was commenced, in which case "the trial court must set out specific findings of fact in a reimbursement award for retroactive support." *Id.* (citation omitted). Mother did

not seek such reimbursement in this matter. Since prior maintenance was not requested, the trial court's use of the term arrears necessarily referred to prospective child support. Prospective child support includes the portion of the child support award representing "that period from the time a complaint seeking child support is filed to the date of trial." *State v. Hinton*, 147 N.C. App. 700, 706, 556 S.E.2d 634, 639 (2001) (citation omitted).

"If the trial court decides not to order prospective child support, it must show that it properly deviated from the Guidelines and include appropriate findings of fact to justify the deviation." *State ex rel. Gillikin v. McGuire*, 174 N.C. App. 347, 351, 620 S.E.2d 899, 902–03, 2005 (citation omitted). Since finding of fact no. 12 held that "there are no arrears," and child support began "before the 1st day of May 2022, and a like sum shall be paid on or before the 1st day of each consecutive month thereafter," the trial court did not order prospective child support. Mother requested child support in her answer filed 17 December 2018. Father provided child support in the amount of $313.68 starting on 1 September 2019. Even so, there are no findings in the trial court's order to support a deviation from the North Carolina Child Support Guidelines. Accordingly, we remand to the trial court for further findings of fact and conclusions of law consistent with this opinion.

IV. Conclusion

For the foregoing reasons, we vacate the trial court's order. "On remand, the trial court, in its discretion, may enter a new order based on the existing record, or may conduct further proceedings including a new evidentiary hearing if necessary." *Jain*, 284 N.C. App. at 77, 874 S.E.2d at 669.

VACATED AND REMANDED.

Judges MURPHY and HAMPSON concur.

IN RE A.H.

No. COA22-683

Filed 5 July 2023

1. Child Abuse, Dependency, and Neglect—neglect—single incident—child crossed busy road—unsupported findings and conclusion

The trial court erred by adjudicating respondent-father's nine-year-old daughter as neglected—based on an incident where she got out of her father's vehicle and was nearly hit by traffic as she ran across a busy street—where several findings of fact challenged by respondent either were not supported by the evidence, contradicted the evidence, or were mere recitations of testimony and where the remaining findings of fact were insufficient to support the court's conclusion of neglect. The single incident, and respondent's response or lack of response to it—neither following his daughter to ensure her safety nor contacting the department of social services after learning it had taken custody of his daughter—were insufficient to rise to the level of neglect.

2. Child Abuse, Dependency, and Neglect—dependency—availability of alternative childcare arrangements—DSS's evidentiary burden not met

The trial court erred by adjudicating respondent-father's nine-year-old daughter as dependent—based on an incident where she got out of her father's vehicle and was nearly hit by traffic as she ran across a busy street and where respondent neither followed her to ensure her safety nor contacted the department of social services (DSS) after learning it had taken custody of his daughter—where DSS failed to meet its burden of introducing evidence that no alternative childcare arrangements were available to respondent.

Judge FLOOD dissenting.

Appeal by Respondent-Father from orders entered 20 and 24 May 2022 by Judge Thomas B. Langan in Stokes County District Court. Heard in the Court of Appeals 23 May 2023.

Leslie Rawls for Petitioner-Appellee Stokes County Department of Social Services.

Mercedes O. Chut for Respondent-Appellant Father.

James N. Freeman, Jr., for Appellee Guardian ad Litem.

RIGGS, Judge.

Respondent-Appellant Father M.H. appeals from adjudication and disposition orders placing his daughter, A.H. ("Aerin"),[1] in the custody of the Stokes County Department of Social Services ("DSS") on the bases of neglect and dependency. He contends, in part, that the trial court's findings are inadequate to support those adjudications because the findings concern a single incident that is insufficient to establish neglect or dependency under our child protection statutes and caselaw. After careful review, we agree with Father and reverse both the adjudication and disposition orders on these bases without reaching any remaining arguments.

I. FACTUAL AND PROCEDURAL HISTORY

On the afternoon of 4 October 2021, Father picked up nine-year-old Aerin and her two stepsiblings from a bus stop after elementary school in King, North Carolina. Father, who was previously separated from Aerin due to incarceration, had only recently been granted temporary legal and physical custody of Aerin on 27 May 2021 through a case with Aerin's biological mother. Following the filing of the petition in this matter, Aerin's biological mother relinquished all parental rights on 15 December 2021.

Aerin and Father began arguing on their drive from the bus stop, eventually leading Aerin to leave Father's truck before they reached their destination for fear of potential corporal punishment. After Aerin exited the vehicle, Father attempted to follow Aerin in his truck but was unable to do so due to difficulty maneuvering the vehicle and its attached trailer around the area's numerous cul-de-sacs. To keep up with his daughter, Father exited his truck and pursued her on foot down Sheraton Road; Aerin saw her father following and took off towards Newsome Road, which runs near Sheraton Road. Father aborted the chase before Aerin reached Newsome Road because he had been forced to leave the other two children in the vehicle, with no adult present with them.

Bystander Jimmy Shearin was also driving home on 4 October 2021 after picking up his grandson from elementary school. Mr. Shearin was

1. We use a pseudonym to protect the privacy and identity of the minor child and for ease of reading. *See* N.C. R. App. P. 42(b).

driving a van behind a dump truck down Newsome Road when he saw Father chasing after Aerin on foot down Sheraton Road. He watched Aerin run across Newsome Road and into the path of the oncoming dump truck; he also observed that Father did not follow Aerin across the road, as he had turned away and started walking back up the side street just as she started crossing the road and before she ran in front of the truck.

Mr. Shearin slowed his vehicle and began to watch Aerin to make sure she was safe, following her as she walked towards a nearby business. He then pulled into the business's parking lot and asked Aerin if she was okay. Aerin was crying and screaming and thus too upset to respond immediately. Mr. Shearin eventually calmed Aerin down and coaxed her into his vehicle, telling her that he had his grandson with him, that she would be safe in his car, and that nobody would see her due to the vehicle's tinted windows. Aerin explained to Mr. Shearin that she was fleeing from her father and was afraid that he would come get her. Mr. Shearin called law enforcement after listening to Aerin and turned her over to them once they arrived on the scene.

DSS immediately received a child protective services report in connection with the incident, and social worker Valerie Neal responded within an hour. Ms. Neal interviewed Aerin, who reported that she ran from her father after being scolded for sharing the family's personal housing information with her teacher and being threatened with a "whoop[ing]." Ms. Neal also spoke with Aerin's stepmother, who met Ms. Neal at the parking lot. The stepmother misrepresented her husband's involvement in the day's events, telling Ms. Neal that her brother had been the man who picked up Aerin and subsequently chased her down Sheraton Road. Ms. Neal conducted a home inspection a short time later and, after an investigation totaling roughly two hours, executed a verified petition alleging abuse and neglect. DSS filed the petition the following day. Father did not contact DSS during the two-hour window between the start of the investigation and the execution of the petition, nor did he contact DSS the following morning before the petition was filed.

The trial court held an adjudication hearing on 23 February 2022. Mr. Shearin testified first, consistent with the above recitation of the facts. Ms. Neal testified next, but the trial court limited her recounting of Aerin's interview to corroborative purposes only.

Father also testified, explaining that at the time of the incident he was on parole and had a pending absconsion violation; that violation

was later dismissed and he completed his parole with zero violations. He explained that he was unable to reach Aerin on foot during the chase because he was not physically fit enough, and that he had to abandon pursuit because he had two young children back in his truck. He was unequivocal in testifying that he never saw a dump truck on Newsome Road. He further testified that he eventually caught up to Aerin in his truck, stating that a crowd had gathered and that Aerin was in the custody of a woman who was hurling racial epithets and threats at him while refusing to turn over the child. He denied seeing or encountering Mr. Shearin. He also told the trial court that he had been on the phone with his wife the entire time, and elected to leave Aerin with the woman because he did not want to get into a physical altercation, he had to meet his pregnant wife at a nearby gas station to direct her to the scene, and he believed that Aerin was at least safe with the woman and crowd for the time being. Father testified that he did not meet up with his wife in the confusion, who instead headed directly to the scene and met with Ms. Neal. Father then testified that he dropped off the two children in his truck with their aunt; within an hour, he was able to make contact with his wife who informed him Aerin was in DSS custody. Per that same testimony, Father arrived at his home in Greensboro later that evening.

Aerin's stepmother testified after her husband. She confirmed that she was not honest in her statements to Ms. Neal regarding Father's involvement in the incident and admitted to being uncooperative because she did not trust Ms. Neal. Aerin also took the stand, with her testimony mirroring the description of events testified to by Mr. Shearin.

The trial court ultimately adjudicated Aerin neglected and dependent, and adjudication and disposition orders were entered placing Aerin in DSS custody. Father timely appeals.

II. ANALYSIS

Father presents several principal arguments on appeal, including that the findings of fact are unsupported by the evidence and/or insufficient to support the adjudications of both neglect and dependency. We agree with Father that several of the trial court's findings are unsupported or otherwise improper, and that the remaining findings do not establish neglect or dependency. We therefore reverse the trial court's adjudication order and its subsequent disposition order.

A. Standard of Review

A trial court's adjudication order is reviewed "to determine (1) whether the findings of fact are supported by clear and convincing

evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (citation and quotation marks omitted). "If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary." *Id.*

B. Neglect

[1] Father challenges several findings as unsupported by the evidence or inadequate to support a determination of neglect. First, he contends that the findings fail to show that he knew Aerin was in danger when she ran across Newsome Road. Next, he asserts the findings that Father and his wife failed to look after Aerin after she fled from her father are likewise unsupported. He further challenges several findings concerning Father's treatment of Aerin and his post-release supervisory status. Finally, he contends that even if all findings are supported by the evidence, they fail to establish neglect or dependence. We address each contention in turn.

1. Unsupported or Erroneous Findings

Father properly identifies Findings of Fact 33, 39 through 42, 44, and 45 as unsupported by the evidence. Finding of Fact 33 states, in relevant part, that "[Aerin] stated, Daddy thought I'd gotten run over, so he just walked back to his truck." Aerin's conjecture as to her father's state of mind is insufficient to support a proper finding of fact, and we strike this portion of Finding of Fact 33. *See In re K.L.T.*, 374 N.C. 826, 843, 845 S.E.2d 28, 41 (2020) (noting inferences in findings of fact "cannot rest on conjecture or surmise" (citation and quotation marks omitted)). Findings of Fact 39 through 42, which merely restate Ms. Neal's testimony without any apparent evaluation of its credibility, are likewise improper. *See In re A.E.*, *J.V.*, *E.V.*, *A.V.*, 379 N.C. 177, 185, 864 S.E.2d 487, 495 (2021) (disregarding findings that recited testimony "without any indication that the trial court evaluated the credibility of the relevant witness or resolved any contradictions in his or her testimony"). Finally, Findings of Fact 44 and 45 misstate Father's post-release supervision status based on the uncontroverted testimony of record and are stricken to the extent that they conflict with that evidence.

2. Remaining Findings Regarding Newsome Road Incident

Assuming their competency and propriety, and acknowledging that the trial court repeatedly noted that it did not consider Father to be credible, the remaining findings establish the trial court's determination as to Father's involvement in what transpired on Newsome Road as follows:

12. Mr. Shearin, returning home from the school pickup, turned onto Newsome Road . . . . Driving on Newsome Road, his van was directly behind a dump truck.

. . . .

14. As Mr. Shearin drove down Newsome Road and approached Sheraton Road on his left, he noticed a young black child in a pink shirt. She was running out of Sheraton Road, from the left, and into Newsome Road. A black man was chasing the child. She darted directly in front of the dump truck without stopping, and Mr. Shearin believed [Aerin] had been hit by the dump truck.

15. As the child began her dash in front of the dump truck, Mr. Shearin observed the black man, who had been chasing the child, stop at the side of the road, turn around, and walk back up Sheraton Road. The black man did not follow the child across the road nor remain to see if she was okay. The black man turned and walked away before the child was directly in front of the dump truck.

. . . .

28. On 10/4/21, [Aerin] . . . rode the bus home, along with [her step-siblings], and was met by her father . . . . [Father] was driving a truck with a work trailer attached.

. . . .

30. . . . [Father] told [Aerin] he was tired of her telling other people their business. He stated . . . he was going to whoop her.

31. Afraid of her father, [Aerin] got out of the truck and began walking away. [Father] told her to get back into the truck, but [Aerin] refused. He followed her in his truck but was unable to keep up with her, because he had to maneuver his truck in the cul de sacs of the neighborhood.

32. . . . [Father] started chasing after her, so she began running. She ran out into Newsome Road in front of a big truck . . . .

33. . . . [Aerin] saw her father get into the truck and drive away. She never saw her father again that day.

. . . .

> 52. After he left the scene on Newsome Road, [Father] drove from Newsome Road . . . and went inside a 711 convenience store to get drinks for [the other two children]. He did not return to the scene of the incident.

In sum, the above findings establish that Father: (1) chased Aerin on foot because he could not keep up in his truck and trailer; (2) pursued Aerin until she reached Newsome Road, at which time he turned around to return to his truck with two other minor children; (3) could not have seen Aerin cross in front of the dump truck, as he had already turned away; and (4) proceeded to take care of the other two minor children by stopping at a convenience store without returning to Newsome Road.

As for Father's involvement in the DSS investigation, the trial court's pertinent findings, assuming their competency and propriety, are as follows:

> 59. No respondent was able to make a proper plan for [Aerin] on 10/5/2021. Her father . . . left and did not return to the scene.
>
> 61. . . . [Father] left the scene of the incident and did not return nor inquire about his child.

These findings thus establish only that Father did not contact DSS between the events of Newsome Road and the filing of the petition less than 24 hours later.[2]

3. Conclusion of Neglect

The above findings are insufficient to support a legal conclusion of neglect. The findings as to what Mr. Shearin and Aerin observed at the scene in no way establish whether *Father* perceived a dangerous situation and was thus neglectful in failing to attend to it. In fact, consistent with all the testimony, the trial court found that Father had turned his back *as* she crossed Newsome Road and *before* she ran in front of the dump truck, and thus did not witness what transpired. Aerin's actions in darting into the road, standing alone, do not constitute neglect. *See In re Stumbo*, 357 N.C. 279, 288-89, 582 S.E.2d 255, 261 (2003) ("[A] circumstance that probably happens repeatedly across our state, where a toddler slips out of a house without the awareness of the parent or care

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2. To the extent the trial court relied on findings regarding Father's failure to contact DSS *after* the filing of the petition in reaching its neglect determination, that reliance is improper. *See*, *e.g.*, *In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 15 (2006) ("[P]ost-petition evidence is admissible for consideration of the child's best interest in the dispositional hearing, but not an adjudication of neglect[.]").

giver . . . does not in and of itself constitute 'neglect[.]' "). No evidence or findings establish additional facts that Father saw or could have seen an oncoming dump truck or dangerous traffic on the road—or that he could have done anything at all to stop Aerin from crossing in front of it when she did so—such that his decision to turn around and tend to the other children in his care was so negligent as to be legal neglect, and no such evidence appears of record. *See In re V.M.*, 273 N.C. App. 294, 300, 848 S.E.2d 530, 535 (2020) (holding a trial court's findings regarding neglect were inadequate when they only "support a determination that a tragic and unfortunate accident occurred here—an accident which might have been preventable with the benefit of hindsight, but which respondent-mother had no way of knowing would occur, nor any means to prevent it"). It is axiomatic that "[t]he absence of evidence is not evidence," *Cnty. of Durham by and through Durham DSS v. Burnette*, 262 N.C. App. 17, 23, 821 S.E.2d 840, 846 (2018), and DSS—not Father—bore the burden of positively proving additional facts showing actions amounting to neglect as alleged in the petition. The trial court similarly had the duty to find those additional facts from the evidence were it to adjudicate Aerin neglected.

It is true that, consistent with the trial court findings, there is no dispute in the record that Father did not return to Newsome Road to try and locate his daughter. However, the trial court found that he had two other small children to care for and watch after at the time. And Father's testimony explains that he: (1) left the scene for a gas station a half-mile away to look after two other children in his care; (2) tried to locate his pregnant and stressed wife so that he could direct her to Aerin; (3) believed that Aerin was safe in the nearby parking lot with the crowd of people; and (4) in less than two hours, learned from his wife that his daughter was safely in the custody of DSS. While the trial court was free to reject Father's testimony as incredible,[3] the remaining

3. That Father left to try and meet his wife and later learned Aerin was safe within two hours of the event does not appear in the trial court's findings of fact. What findings were made appear to credit Father's testimony at points and discredit them at others, all without consistently identifying which specific portions of Father's testimonial statements were considered credible. Indeed, Finding of Fact 54's blanket finding, stating only that "[t]he Court does not find [Father] to be credible," suggests that *all* of his testimony was not deemed credible despite the trial court's plain reliance on portions thereof for several of its findings. While a trial court can deem some aspects of a witness's testimony credible and some not, the trial court's findings referencing and recounting a witness's testimony must nonetheless "include[] an indication concerning whether the trial court deemed the relevant *portion* of the testimony credible." *In re H.B.*, 384 N.C. 484, 490, 886 S.E.2d 106, 111 (2023) (citation and quotation marks omitted) (emphasis added).

findings—Findings of Fact 59 and 61—simply state that he did not return to Newsome Road; that fact, standing alone, does not establish that his decision to tend to the other two minors in his care amounted to neglect under the law. *See Stumbo*, 357 N.C. at 283, 582 S.E.2d at 258; *V.M.*, 273 N.C. App. at 300, 848 S.E.2d at 535. Indeed, the uncontroverted evidence and findings show that Aerin was safely in the care of Mr. Shearin, law enforcement, and later DSS within minutes of the event.[4] The findings do not set forth facts demonstrating that his failure to return to the scene, standing alone, was so negligent as to amount to neglect.[5]

Father's lack of contact with DSS in the less-than-24-hour period between the incident at Newsome Road and DSS's filing of its petition does not bridge this gap. There was no evidence introduced showing that he ever had an opportunity to contact DSS or was informed of Ms. Neal's contact information. What evidence was introduced shows that Ms. Neal received a report at 3:15 p.m., arrived at Newsome Road around 4:00 p.m., began her home inspection between 5:30 and 5:45 p.m., executed her verified petition before a magistrate later that evening, and filed the petition the following day. Again, "the absence of evidence is not evidence," *Cnty. of Durham*, 262 N.C. App. at 23, 821 S.E.2d at 846, and DSS failed to meet its burden of introducing evidence proving Father's failure to contact DSS after business hours on the 4th and on the morning of the 5th before the filing of the petition amounted to neglect, particularly when the only evidence that was introduced—credible or not—shows Father knew that his wife had already met with DSS and that Aerin was safe in DSS custody.

C. Dependency

[2] To adjudicate a minor dependent, a trial court must "address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). Findings as to both prongs are required. *Id.*

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4. The trial court's order states that its determination of neglect rested, in no small part, on "[Father's] willful conduct of turning away and leaving [Aerin] on the busy roadway." But, "when determining whether a child is neglected, the circumstances and conditions surrounding the child are what matters, *not the fault or culpability of the parent*." *In re Z.K.*, 375 N.C. 370, 373, 847 S.E.2d 746, 748-49 (2020) (emphasis added).

5. For example, the trial court might have found from the evidence that Father decided to leave Aerin at Newsome Road not out of concern for the other children in his care, but because he was afraid of being arrested on the outstanding absconsion violation. Pointedly, the trial court made no such finding.

At a minimum, DSS failed to introduce evidence of—and the trial court thus failed to make adequate findings concerning—the second prong. While it is true that Father did not contact or provide DSS with any alternative arrangements, this cannot meet *DSS's burden* of showing no such arrangements exist. *In re K.C.T.*, 375 N.C. 592, 596-97, 850 S.E.2d 330, 334 (2020). That Father's wife did not immediately offer to take custody of Aerin or share Father's contact information with DSS, or that he was not immediately available within 24 hours to DSS, is not evidence that no alternative childcare arrangements were available to Father, and those facts cannot relieve DSS of its evidentiary burden. *See P.M.*, 169 N.C. App. at 428, 610 S.E.2d at 406 (reversing a conclusion of dependency because a finding that "the juvenile is dependent based on the fact that he does not have a parent who is capable of properly caring for him in that his father is incarcerated and his mother does not comply with court ordered protection plans set out for the protection of the juvenile" failed to adequately address the second dependency prong).

III. CONCLUSION

For the foregoing reasons, we hold that numerous findings of fact in the trial court's adjudication order are unsupported or improper, and the remaining findings fail to establish neglect or dependency. We therefore reverse the trial court's adjudication order and the disposition order based thereon.

REVERSED.

Judge HAMPSON concurs.

Judge FLOOD dissents by separate opinion.

FLOOD, Judge, dissenting.

Despite the majority's and Respondent-Father's narrow framing of the issue, our task is not to address whether the "single isolated incident" of Aerin running across the road alone can support neglect; rather, the issue is whether, under the totality of the evidence—including Respondent-Father's inaction *after* Aerin ran across the road—the trial court made sufficient findings of fact to support the ultimate conclusion of neglect. I conclude it did, and therefore would hold the trial court did not err. I respectfully dissent.

I. Adjudicating Neglect

Respondent-Father presents several arguments on appeal, including that the findings of fact are not supported by clear and convincing competent evidence. The majority does not address the challenged findings, concluding that even if the findings are supported, they do not establish neglect or dependency.

Our standard of review instructs that "[t]he role of this Court in reviewing a trial court's adjudication of neglect . . . is to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact[.]" *In re V.M.*, 273 N.C. App. 294, 296, 848 S.E.2d 530, 533 (2020) (citation and internal quotation marks omitted). "[T]he trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re R.B.*, 280 N.C. App. 424, 430, 868 S.E.2d 119, 124 (2021) (citation omitted). "Clear and convincing evidence is an intermediate standard of proof, greater than the preponderance of the evidence standard applied in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in most criminal cases." *In re J.L.*, 264 N.C. App. 408, 419, 826 S.E.2d 258, 266 (2019) (internal citations and quotation marks omitted). "Findings supported by competent evidence are 'binding on appeal.' " *In re J.R.*, 243 N.C. App. 309, 312, 778 S.E.2d 441, 443 (2015) (citation omitted).

A. Findings of Fact Supported by Competent Evidence

First, I agree with the majority that Findings of Fact 33, 39 through 42, 44, and 45 are unsupported by the evidence, and therefore, I do not consider them in this analysis. As for the remaining findings, a robust review shows the challenged findings are supported by competent evidence that is clear and convincing.

1. Findings that Respondent-Father Left Aerin in a Dangerous Situation

Respondent-Father contends the findings that he left Aerin in a dangerous situation stem from subjective opinion and speculation and have no evidentiary support. I disagree.

a. Findings of Fact 14, 15, and 16

Respondent-Father argues Findings of Fact 14, 15, and 16 may support Mr. Shearin's belief, but they do not support findings regarding what Respondent-Father saw, thought, or intended.

Findings of Fact 14, 15, and 16 state:

> 14. As Mr. Shearin drove down Newsome [R]oad and approached Sheraton Road on his left, he noticed a young [] child in a pink shirt. She was running out of Sheraton Road, from the left, and into Newsome Road. [Respondent-Father] was chasing the child. She darted directly in front of the dump truck without stopping, and Mr. Shearin believed she had been hit by the dump truck.
>
> 15. As the child began her dash in front of the dump truck, Mr. Shearin observed [Respondent-Father], who had been chasing the child, stop at the side of the road, turn around, and walk back up Sheraton Road. [Respondent-Father] did not follow the child across the road nor remain to see if she was okay. [Respondent-Father] turned and walked away before the child was directly in front of the dump truck.
>
> 16. As soon as the dump truck moved forward and turned left, out of the way, Mr. Shearin slowly drove down Newsome Road, looking for the little girl, believing she had been hit. When he didn't see her, he believed she was under the dump truck.

Although trial court is required to make findings of fact that are supported by clear and convincing evidence and in turn support the legal conclusions, *see In re V.M.*, 273 N.C. App. at 296, 848 S.E.2d at 533, the trial court here is not required to make findings that support what Respondent-Father perceived. Contrary to the majority's conclusion that the findings establish Respondent-Father "could not have seen Aerin cross in front of the dump truck, as he had already turned away," the uncontroverted evidence shows he was watching Aerin as she ran into the road. Moreover—whether Respondent-Father actually saw Aerin cross in front of the dump truck or not—I cannot reconcile the fact that Respondent-Father watched his nine-year-old child run into a busy road and walked away from her with the conclusion that it was not a dangerous situation.

Mr. Shearin testified that he was driving behind a dump truck on Newsome Road when he saw "a young girl in a pink shirt" run into the road, in front of the dump truck. He further testified that the girl was being chased by a man. When asked about Respondent-Father's reaction to Aerin running onto the road, Mr. Shearin stated, "he just turned around and walked back the other way."

Similarly, Aerin testified that she did not see the dump truck on the road because she "was too busy looking at [her] dad." When asked if she was looking back at Respondent-Father as she ran across Newsome Road, she answered in the affirmative. The trial court found the testimonies of both Mr. Shearin and Aerin to be credible. Thus, Mr. Shearin's testimony is correctly summarized in Findings of Fact 14, 15, and 16.

Findings of Fact 14, 15, and 16, therefore, are supported by competent evidence. *See In re J.R.*, 243 N.C. App. at 312, 778 S.E.2d at 443.

b. Finding of Fact 32

Respondent-Father contends Finding of Fact 32 is an insufficient finding of fact because it merely describes Aerin's testimony.

Finding of Fact 32 states:

> 32. According to [Aerin], [Respondent-Father] followed her to the corner of Sheraton Road, got out of his truck, and ordered [Aerin] into the vehicle. Then, he started chasing after her, so she began running. She ran into Newsome Road in front of a big truck, which she said honked at her. She recalled she was looking behind her at her daddy, as she ran from him, and when she got out into the road, she heard the dump truck honk at her.

Our Supreme Court has held " '[r]ecitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge' absent an indication concerning 'whether [the trial court] deemed the relevant portion of [the] testimony credible.' " *In re A.E.*, 379 N.C. 177, 185, 864 S.E.2d 487, 495 (2021) (alterations in original) (emphasis in original) (citation omitted).

Here, in Finding of Fact 38, which is discussed in greater detail below, the trial court found Aerin's testimony to be credible. This finding of credibility is sufficient to transform Aerin's testimony reflected in Finding of Fact 32 into a finding of fact. *See In re A.E.*, 379 N.C. at 185, 864 S.E.2d at 495. As Finding of Fact 32 is supported by Aerin's testimony, it is therefore, supported by competent evidence. *See In re J.R.*, 243 N.C. App. at 312, 778 S.E.2d at 443.

2. Findings as to Failure to Check on Aerin

Respondent-Father challenges the findings that neither he nor Ms. Harris attempted to check on Aerin after she ran across the road as "erroneous and speculative."

a. Findings of Fact 51 and 61

Respondent-Father argues Finding of Fact 51 and portions of Finding of Fact 61 that state he did not attempt to inquire about his child are unsupported because the trial court heard no evidence Respondent-Father had an opportunity to speak with DSS before it filed the petition.

Finding of Fact 51 states: "[Respondent-Father] noted he never called [Ms.] Neal about the events of [4 October 2021]." Similarly, the challenged portion of Finding of Fact 61 provides: "[Respondent-Father] left the scene of the incident and did not return nor inquire about his child. . . . " First, Finding of Fact 51 does not state Respondent-Father failed to contact Ms. Neal prior to her filing the petition; rather, it states Respondent-Father *never* called Ms. Neal about the events of 4 October 2021. Respondent-Father's own testimony supports this finding. Respondent-Father testified that he never spoke with Ms. Neal, and Ms. Neal likewise testified that she never spoke with Respondent-Father.

Finding of Fact 51 is, therefore, supported by competent evidence. *See In re J.R.*, 243 N.C. App. at 312, 778 S.E.2d at 443.

As for the challenged portion of Finding of Fact 61, Respondent-Father never returned to the scene or inquired about Aerin. Respondent-Father testified that after he left Aerin on Newsome Road, he drove to a 7-Eleven convenience store. From the 7-Eleven, Respondent-Father dropped his two step-children off with Ms. Harris's sister and then drove to Greensboro, North Carolina.

The challenged portion of Finding of Fact 61 is, therefore, supported by competent evidence. *See In re J.R.*, 243 N.C. App. at 312, 778 S.E.2d at 443.

b. Findings of Fact 50, 55 and 61

Respondent-Father argues portions of Findings of Fact 50, 55, and 61 are unsupported by the evidence because the trial court did not hear evidence that Ms. Harris had the opportunity to pack clothes for Aerin or turn over her book bag before DSS filed the petition.

Findings of Fact 50, 55, and 61 state, in pertinent part:

> 50. . . . . [Aerin] had no clothes beyond those she was wearing and needed clothing to wear to school the next day.
>
> . . . .

> 55. . . . . Ms. Neal asked [Ms.] Harris to provide [Aerin] with clothes for one night and her bookbag for school the next day. [Ms.] Harris said she had nothing that belonged to [Aerin]. [Ms.] Harris said a friend had [Aerin's] book bag but would not give [Ms. Neal] the name of the friend nor any contact information.
>
> . . . .
>
> 61. . . . . [Ms.] Harris made no effort to provide the child's clothes or her book bag, which was last observed to be in [Respondent-Father's] truck.

Aerin testified that after she was taken into DSS custody, they had to take her to get clothes before she could go to her first foster parent. Aerin had to go to the clothing pantry because the only clothes she had were the clothes she was wearing on 4 October 2021. Ms. Neal also testified that she took Aerin to get clothes at the DSS clothing closet because Ms. Harris would not provide clothes for Aerin.

The challenged portion of Finding of Fact 50 is, therefore, supported by competent evidence. *See In re J.R.*, 243 N.C. App. at 312, 778 S.E.2d at 443.

Findings of Fact 55 and 61 are likewise supported by competent evidence. Ms. Neal testified that she asked Ms. Harris if she could have clothes for Aerin and her book bag for school the following day. Ms. Harris told Ms. Neal none of Aerin's belongings were in the home, and there was nothing Ms. Harris could provide for Aerin. When Ms. Neal asked whether Aerin had a book bag for school, Ms. Harris would not tell Ms. Neal where it was. No evidence in the Record indicates that Ms. Harris offered to bring Aerin her clothes or her book bag once she could retrieve them from wherever they were or attempted to assist in any way.

Findings of Fact 55 and 61 are, therefore, supported by competent evidence. *See In re J.R.*, 243 N.C. App. at 312, 778 S.E.2d at 443.

c. Findings of Fact 52, 59, and 61

Respondent-Father argues Finding of Fact 52 and portions of Findings of Fact 59 and 61 that state he never returned to the scene of the incident are "misleading" because the trial court did not hear evidence that Respondent-Father could have returned to the scene and taken Aerin home after she crossed Newsome Road.

As Respondent-Father's arguments take issue with what the trial court did *not* find, and the inferences that stem from the findings the trial court did make, I reiterate our standard of review here: the findings of fact must be supported by "clear and convincing competent evidence." *In re R.B.*, 280 N.C. App. at 430, 868 S.E.2d at 124 (citation omitted). Findings of fact that are supported by such evidence are deemed conclusive, even where some evidence supports contrary findings. *See id.* at 430, 868 S.E.2d at 124.

Findings of Fact 52, 59, and 61 state:

> 52. After he left the scene on Newsome Road, [Respondent-Father] drove from Newsome Road to Main Street, King, and went inside a 7/11 convenience store to get drinks for [the other minor children.] He did not return to the scene of the incident.
>
> . . . .
>
> 59. . . . . [Respondent-Father] left and did not return to the scene. . . . .
>
> . . . .
>
> 61. . . . . [Respondent-Father] left the scene of the incident and did not return nor inquire about his child. . . .

As previously determined, Respondent-Father did not return to the Belmont Place Drive residence; he instead left King and drove to Greensboro.

Findings of Fact 52, 59, and 61 are, therefore, supported by competent evidence. *See In re J.R.*, 243 N.C. App. at 312, 778 S.E.2d at 443.

d. Findings of Fact 59, 60, and 61

Respondent-Father argues Findings of Fact 59 through 61 are actually conclusions of law.

"The labels 'findings of fact' and 'conclusions of law' employed by the lower tribunal in a written order do not determine the nature of our standard of review." *In re Estate of Sharpe*, 258 N.C. App. 601, 605, 814 S.E.2d 595, 598 (2018). When a trial court "labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' as a conclusion *de novo*." *Id.* at 605, 814 S.E.2d at 598. "[A]ny determination requiring the exercise of judgment, or the application of legal principles, is more properly classified as a conclusion of law. Any determination reached through 'logical reasoning from the evidentiary facts' is more

properly classified a finding of fact." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (cleaned up).

Findings of Fact 59, 60, and 61 state:

> 59. No respondent [sic] was able to make a proper plan for [Aerin] on [4 October 2021]. Her father, [Respondent-Father] left and did not return to the scene. [Ms.] Harris did not offer to make a plan for the child, [sic] during her interview with [Ms.] Neal. Finally, [] the child's mother[] was unable to be located on [4 October 2021].
>
> 60. [Respondent-Father] threatened to physically punish [Aerin], who was afraid of her father. [Aerin's] emotional response to the events of [4 October 2021], including crying, screaming, and initially being [in]consolable, support the grave impact the events had on [Aerin].
>
> 61. Neither [Ms.] Harris nor [Respondent-Father] was suitable to provide care and supervision of [Aerin] on [4 October 2021]. [Respondent-Father] left the scene of the incident and did not return nor inquire about his child. [Ms.] Harris called [Aerin] a "pathological liar" and did not inquire about her safety and wellbeing after the incident. [Ms.] Harris made no effort to provide the child's clothes or her book bag, which was last observed to be in [Respondent-Father's] truck.

Findings of Fact 59, 60, and 61 do not include an exercise of judgment or application of legal principles, but instead were reached through logical reasoning from the evidence presented to the trial court and are appropriately categorized as findings of fact. *See In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675. As such, this Court must determine whether the challenged findings are supported by competent evidence. *See In re J.R.*, 243 N.C. App. at 312, 778 S.E.2d at 443. Having already concluded Findings of Fact 59 and 61 are supported by competent evidence, I turn to Finding of Fact 60.

Respondent-Father argues Aerin did not suffer actual injury nor was she at risk of injury from corporal punishment, and "grave impact" does not convey potential injury as required to support an adjudication of neglect. This argument invites an incorrect inquiry. Finding of Fact 60 does not need to show Aerin suffered actual injury; rather, it needs to be supported by competent evidence, which it is. Aerin testified that she was afraid of her father. Mr. Shearin and Ms. Neal also testified that Aerin expressed extreme fear of her father. Ms. Neal included in her initial

report that Aerin was afraid of Respondent-Father. Moreover, Mr. Shearin testified that Aerin was "screaming, crying, you know, just hysterical . . . she couldn't even talk." Based on this testimony, the trial court made a reasonable inference that the events of the day had a serious impact on Aerin. *See In re K.L.T.*, 374 N.C. 826, 843, 845 S.E.2d 28, 41 (2020) (holding the trial court is permitted to make reasonable inferences based on the weight it assigns particular evidence).

Finding of Fact 60 is, therefore, supported by competent evidence. *See In re J.R.*, 243 N.C. App. at 312, 778 S.E.2d at 443.

The above referenced challenged findings of fact are supported by competent evidence that is clear and convincing. *See In re V.M.*, 273 N.C. App. at 296, 848 S.E.2d at 533. Based on a comprehensive review of these findings, I conclude the findings establish Respondent-Father (1) knew Aerin ran into a busy roadway, (2) left Aerin on the side of the road, and (3) never made any attempts to check on Aerin's well-being by either returning to Newsome Road or contacting DSS.

3. Trial Court's Fact-Finding Obligation

Respondent-Father argues the trial court did not fulfill its fact-finding obligation by determining Respondent-Father's testimony was not credible. This argument is unsupported by our case law.

"It is the province of the trial court when sitting as the fact-finder to assign weight to particular evidence and to draw reasonable inferences therefrom." *In re K.L.T.*, 374 N.C. at 843, 845 S.E.2d at 41. It is not this Court's role to review "[e]videntiary issues concerning credibility, contradictions, and discrepancies," as these are for the trial court to resolve. *Sergeef v. Sergeef*, 250 N.C. App. 404, 406, 792 S.E.2d 192, 193 (2016). Moreover, the trial court is not required to explain its reasoning so long as it makes a finding of credibility. *See Matter of H.B.*, 384 N.C. 484, 490, 886 S.E.2d 106, 111 (2023) (concluding the trial court fulfilled its duty to evaluate the evidence by finding " . . . the said report to [be] both credible and reliable."); *see also In re A.E.*, 379 N.C. at 185, 864 S.E.2d at 495.

In Findings of Fact 49 and 52, the trial court determined Respondent-Father's testimony was not credible. The trial court fulfilled its obligation to make a finding of credibility, and it is not our role to review these findings. *See Sergeef*, 250 N.C. App. at 406, 792 S.E.2d at 193.

Having concluded the findings of fact are supported by clear and convincing competent evidence and that the trial court fulfilled its fact

finding obligation, I now turn to whether the findings of fact support the conclusions of neglect. *See In re V.M.*, 273 N.C. App. at 296, 848 S.E.2d at 533.

B. Conclusions of Neglect

Bound by our well-established standard of review, I conclude the above findings are sufficient to support a legal conclusion of neglect.

A neglected juvenile is one whose parent "does not provide proper care, supervision or discipline" or "creates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15) (2021). "In general, treatment of a child which falls below the normative standards imposed upon parents by our society is considered neglectful. However, not every act of negligence on part of the parent results in a neglected juvenile." *In re V.M.*, 273 N.C. App. at 297, 848 S.E.2d at 533 (citations omitted). "In order to constitute actionable neglect, the conditions at issue must result in '*some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment.*' " *In re K.L.T.*, 374 N.C. at 831, 845 S.E.2d at 34 (emphasis added) (citation omitted). Neglect has most often been found when the "conduct at issue constituted either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile." *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003). "This Court is required to consider the totality of the evidence to determine whether the trial court's findings sufficiently support its ultimate conclusion that [Aerin] is a neglected juvenile." *In re F.S.*, 268 N.C. App. 34, 43, 835 S.E.2d 465, 471 (2019).

To further the position that one single act of negligent parenting is insufficient to support a showing of neglect, Respondent-Father and the majority cite to *In re Stumbo*, 357 N.C. 279, 582 S.E.2d 255 and *In re H.P.*, 278 N.C. App. 195, 862 S.E.2d 858 (2021). Relying on these cases to support the contention that one single act of neglect is insufficient to support an adjudication of neglect is misplaced.

In *In re Stumbo*, DSS began an investigation after receiving an anonymous call about an unsupervised two-year-old playing naked in the driveway of a house. 357 N.C. at 280, 582 S.E.2d at 256. The issue in that case was whether the single incident of the unsupervised two-year-old was sufficient to constitute neglect. *Id.* at 287, 582 S.E.2d at 260. Our Supreme Court concluded the evidence in the record did not constitute a report of "neglect" because it was factually incomplete. *Id.* at 285, 582 S.E.2d at 259. The record lacked any information regarding the contents of the anonymous phone call, the length of time the child was outside

unsupervised, the character of the surrounding area, or whether this incident had happened before. *Id.* at 282, 585 S.E.2d at 258. Contrary to what the majority and Respondent-Father appear to argue—that a single incident is insufficient for a finding of neglect—*In re Stumbo* did not hold as an absolute that an isolated incident of neglect could *never* support an adjudication of neglect. Moreover, unlike the situation in *In re Stumbo*, the case before us does not involve an incident of a "toddler slip[ing] out of a house without the *awareness* of the parent or care giver—no matter how conscientious or diligent the parent or care giver might be." *See id.* at 288, 582 S.E.2d at 261. Here, Respondent-Father was fully aware he left his nine-year-old child on the side of the road with strangers.

In *In re H.P.*, a social worker observed a naked three-year-old running barefoot in the snow. 78 N.C. App. at 199, 862 S.E.2d at 863. Just days later, DSS received another report that the three-year-old was walking down the street alone in the rain. *Id.* at 199, 862 S.E.2d at 864. Subsequently, DSS filed petitions alleging the three-year-old, as well as respondent-mother's other children, were neglected and dependent. *Id.* at 200, 862 S.E.2d at 864. At the adjudication hearing, DSS relied on "Exhibit A," which was a summary of DSS's history with the family, including all the reports DSS received over a span of four years. *Id.* at 200, S.E.2d at 864. The trial court then relied solely on Exhibit A in making its forty-seven findings of fact. *Id.* at 202, 862 S.E.2d at 866. No other evidence was presented at the hearing, none of the individuals who made the reports testified at the hearing, respondent-parents did not testify, DSS's testimony largely consisted of reading from Exhibit A, and this Court concluded Exhibit A was "contradictory on its face." *Id.* at 203–04, 862 S.E.2d at 866–67. This Court noted the only two uncontested substantive findings made by the trial court—the toddler running naked in the snow and walking alone in the street—were insufficient to constitute neglect. *Id.* at 208, 862 S.E.2d at 869. Specifically, these instances could not constitute neglect because the trial court did not make any findings that the children "experienced, or were at risk of experiencing, physical, mental, or emotional harm," and the conclusions of neglect were therefore unsupported by the findings of fact. *Id.* at 208, 862 S.E.2d at 869.

In re V.M. is likewise instructive for the case at bar. In *In re V.M.*, the trial court adjudicated an infant neglected based on a single incident where he was fed a bottle that had been unknowingly mixed with alcohol instead of water. 273 N.C. App. at 295, 848 S.E.2d at 532. This Court reversed the trial court's order, holding "[t]he trial court did not find that respondent-mother knew, or even reasonably could have

discovered, the danger of alcohol in the bottles. The trial court did not find the respondent-mother's behavior fell 'below the normative standards imposed upon parents by our society.' " *Id.* at 299, 848 S.E.2d at 535. This Court found the trial court's "most glar[ing]" omission to be that the infant suffered "some physical, mental, or emotional impairment," or was at a substantial risk of such impairment. *Id.* at 300, 848 S.E.2d at 535. This Court did *not* hold, however, that the trial court could *not* have concluded the infant was neglected, explicitly stating:

> Had the court engaged in more detailed analysis, offered additional factual findings, explained what steps respondent-mother would or should have taken, determined that the danger was in some way foreseeable, or even just offered more than a token conclusion, we might be able to uphold such a determination. But the analysis in this case was cursory and conclusory, at best.

Id. at 300, 848 S.E.2d at 535.

These cases consistently demonstrate this Court's conclusion that insufficient findings cannot support conclusions of neglect. These cases do not indicate, however, that one act of parental negligence—such as the issue before us has been framed—can *never* support a conclusion of neglect. Rather, the inquiry into whether the trial court erred in adjudicating a juvenile as neglected is extremely fact-intensive.

I reiterate my view that the issue before us is not whether a single, isolated incident alone can support neglect. This Court must consider whether, under the totality of the evidence of this particular case, the trial court made sufficient findings of fact to support the ultimate conclusion of neglect. *See In re F.S.*, 268 N.C. App. at 43, 835 S.E.2d at 471.

At the outset, I agree with Respondent-Father that Findings of Fact 57 and 58 are more properly categorized as conclusions of law because they contain applications of legal principles. *See In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675–76 ("The determination of neglect requires the application of the legal principles put forth in N.C. Gen. Stat. [§ 7B-101(15)] and is therefore a conclusion of law."). As such, they will be reviewed *de novo*. *See In re Estate of Sharpe*, 258 N.C. App. at 605, 814 S.E.2d at 598.

The challenged findings state:

> 57. There was a substantial risk to [Aerin] of serious physical injury, when the father turned around, walked away, and left [Aerin] on a busy roadway on [4 October 2021].

> [Respondent-Father] did not provide proper care of his child, when he left her running into a busy roadway of [sic] Newsome Road.
>
> 58. Based on a [sic] totality of the circumstances, including [Respondent-Father]'s willful conduct of turning away and leaving [Aerin] on the busy roadway, [Aerin] was in an environment injurious and did not receive proper care and supervision.

Respondent-Father argues Findings of Fact 57 and 58 do not support the conclusion that he "willfully or negligently" abandoned Aerin on Newsome Road. Further, he argues "all witnesses agreed" Respondent-Father was following Aerin to get her back in the truck and "off the road," and there is no evidence he could have prevented Aerin from crossing the road. This argument is factually inaccurate and misplaced.

Respondent-Father's argument is factually inaccurate because the witnesses do *not* agree Respondent-Father was following Aerin to get her back in his truck and off the road. All witnesses agreed Respondent-Father was following Aerin *until* she ran across Newsome Road. As Aerin was crossing the road, Respondent-Father turned around, got back in his truck, drove away, and did not return that day.

Respondent-Father's argument is misplaced because it focuses on the sole fact of Aerin crossing the road. Respondent-Father is likely correct that he could not have prevented Aerin from crossing the road: it was an unfortunate series of events that led to Aerin running from her father and into potentially grave danger. What Respondent-Father and the majority do not appear to consider—and what I find most troubling—are his actions *after* Aerin crossed the road. Respondent-Father did not stay to see if Aerin made it safely to the other aside, he did not stay on the roadside with her, and there is no evidence he inquired about her during the rest of the day. Even assuming Respondent-Father did not see the dump truck, his nine-year-old, hysterical daughter had just run into a busy roadway during school pickup traffic. The majority also seems to give credence to Respondent-Father's claim that he believed Aerin was safe with a crowd of people. Not only was this "crowd of people" never corroborated by any other witnesses, but the trial court also determined Respondent-Father's testimony was not credible. It is also difficult to see how leaving a child with strangers on the side of the road is akin to "safety."

Respondent-Father's actions on 4 October 2021 constituted neglect because leaving Aerin on the side of the road, with no regard for her well-being, constituted "severe or dangerous conduct" which could have potentially resulted in injury to Aerin. *See In re Stumbo*, 357 N.C. at 283, 582 S.E.2d at 258. Moreover, there is no evidence in the record Respondent-Father attempted to call anyone in DSS on 4 October 2021 to inquire about his daughter, even though he testified that he knew she was in DSS custody.

Respondent-Father compares this incident to those in *In re Stumbo* and *In re H.P.*, where the juveniles also faced traffic risks, but he argues his nine-year-old daughter knew not to "play in traffic." Respondent-Father further argues Aerin was unharmed, and the fact that she arrived safely on the other side of the road weighs against any conclusion that she could not safely navigate busy roads. Based on the testimony of Mr. Shearin, however, it appears Aerin "safely" crossed the road by a stroke of sheer luck. Aerin testified she was not even looking at the road as she ran into it, which is clear evidence she did not safely navigate the road.

Further distinguishing this case from *In re Stumbo* and *In re H.P.*, the trial court here made sixty-four detailed findings of fact based on corroborated testimony of Aerin, Mr. Shearin, and Ms. Neal, which can hardly be considered "factually incomplete." *See In re Stumbo*, 357 N.C. at 285, 582 S.E.2d at 259. The trial court in this case conducted a detailed analysis of the events that transpired on 4 October 2021 and the impact the events had on Aerin. *See id.* at 300, 848 S.E.2d at 535. Moreover, the trial court's conclusions included the most important element of a neglect case—that Aerin was "at a substantial risk of serious harm." *See id.* at 299, 848 S.E.2d at 534; *see also In re H.P.*, 278 N.C. App. at 208, 862 S.E.2d at 869; *In re K.L.T.*, 374 N.C. at 831, 845 S.E.2d at 34. This conclusion is supported by very detailed factual findings supporting more than a "token conclusion." *See In re V.M.*, 273 N.C. App. at 300, 848 S.E.2d at 535.

While I am cognizant of Respondent-Father's difficult situation —having two other young children with him in the truck—this incident occurred just blocks from the Belmont residence. Even if Respondent-Father could not have responsibly taken the other two children home and returned to check on Aerin, he could have returned to Newsome Road after he dropped his step-children off at their aunt's home. Instead, he left town. Respondent-Father's willful acts of walking away from Aerin as she reached Newsome Road, leaving Aerin with strangers, and never inquiring about her well-being was treatment of Aerin that fell "below the normative standards imposed upon parents by our society." *See In re V.M.*, 273 N.C. App. at 297, 848 S.E.2d at 533.

Based on the totality of the evidence and the findings of fact, I would hold the trial court did not err by concluding Aerin was neglected when Respondent-Father left her in an "environment injurious to her welfare" and that she was "at risk of physical, mental, and emotional impairment." *See In re K.L.T.*, 374 N.C. at 831, 845 S.E.2d at 34; *see also In re F.S.*, 268 N.C. App. at 43, 835 S.E.2d at 471.

II. Adjudicating Dependency

I further disagree with the majority that the trial court erred in adjudicating dependency. As the majority noted, the trial court is required to address the parent's ability to provide care and alternative childcare arrangements. *See In re P.M.*, 169 N.C. App. at 427, 610 S.E.2d at 406. Because I conclude the trial court fulfilled this duty, I would affirm the conclusion of dependency.

The trial court's Findings of Fact 59 and 62 addressed Respondent-Father's ability to provide care, supervision, and the availability of alternative childcare arrangements. Respondent-Father, however, challenges Findings of Fact 59 and 62 arguing there is no evidence to support the findings that he or Ms. Harris were unwilling to create a care plan for Aerin, DSS did not attempt to work with Respondent-Father "in the two hours before it decided to file a petition[,]" and DSS did not ask them to suggest appropriate childcare arrangements. This argument is unpersuasive.

Findings of Fact 59 and 62 state:

> 59. No respondent [sic] was able to make a proper plan for [Aerin] on [4 October 2021]. Her father, [Respondent-Father] left and did not return to the scene. [Ms.] Harris did not offer to make a plan for the child, [sic] during her interview with [Ms.] Neal. Finally, [] the child's mother[] was unable to be located on [4 October 2021].
>
> . . . .
>
> 62. At the time of the filing of the petition, [Aerin] needed placement and assistance because no parent or custodian was able and willing to provide for [her] care.

DSS could not have attempted to work with Respondent-Father because he left the scene, did not return to check on Aerin, and did not go to the Belmont residence. Respondent-Father made no attempts to contact DSS or inquire about Aerin even after he knew she was in DSS custody. Moreover, Ms. Harris testified that she did not cooperate with Ms. Neal.

It was clear from Ms. Harris's lack of cooperation with Ms. Neal that she was not willing to assist in finding an alternative childcare arrangement for Aerin. It is also clear DSS could not have asked Respondent-Father to assist in finding placement for Aerin because Respondent-Father left town; Ms. Harris represented to DSS that she did not have contact information for him and did not know his whereabouts.

Findings of Fact 59 and 62 are supported by clear and convincing evidence, and thus I would hold the trial court did not err in adjudicating Aerin dependent. *See In re R.B.*, 280 N.C. App. at 437, 868 S.E.2d at 128; *see also In re V.M.*, 273 N.C. App. at 296, 848 S.E.2d at 533.

III. Conclusion

Based on the above, I would hold the trial court did not err in adjudicating Aerin as neglected and dependent. For the foregoing reasons, I respectfully dissent.

IN THE MATTER OF N.B., N.W.

No. COA22-796

Filed 5 July 2023

Child Abuse, Dependency, and Neglect—temporary emergency jurisdiction—subsequent presence for more than six months—home-state jurisdiction

In a child abuse, dependency, and neglect case, the trial court had subject matter jurisdiction to enter an adjudication and initial disposition order where, at the outset of the proceedings, the court properly exercised temporary emergency jurisdiction and then, after the children and their mother had lived in North Carolina without interruption for more than six months and there was no custody order from any other state, transitioned to home-state jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act.

Appeal by respondent-mother from order entered 1 July 2022 by Judge Angela C. Foster in Guilford County District Court. Heard in the Court of Appeals 6 June 2023.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Health and Human Services.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

Mary McCullers Reece for respondent-appellant mother.

ZACHARY, Judge.

Respondent-Mother appeals from the trial court's order adjudicating her child "Nancy"[1] to be a neglected and dependent juvenile, and her child "Nell" to be an abused and neglected juvenile, and maintaining the children's placement in the custody of the Guilford County Department of Health and Human Services ("DHHS"). She argues that the trial court lacked subject-matter jurisdiction over these proceedings. After careful review, we affirm.

I. Background

In 2020, Respondent-Mother lived in Tacoma, Washington, with her four children and her husband, who is the legal father of Nancy, her youngest daughter.[2] In or around October 2020, Respondent-Mother separated from her husband, and shortly afterward began the process of relocating with her children to North Carolina. At the end of October, Nell's aunt traveled to Tacoma to pick up Nell and one of Respondent-Mother's older children, and returned to High Point with them.

On 10 December 2020, DHHS received a report that Nell had disclosed to her aunt that she had been sexually abused by her stepfather, Respondent-Mother's husband. In January 2021, Respondent-Mother brought Nancy and another of her older children to live with relatives in Winston-Salem. DHHS contacted Respondent-Mother on 7 January and informed her of Nell's disclosure, but Respondent-Mother told the social worker that Nell had lied before and that she did not trust Nell's aunt. Respondent-Mother refused to complete a safety assessment with DHHS, and DHHS was unable to complete a child and family team meeting with Respondent-Mother.

After the family moved to North Carolina, Respondent-Mother's two older children relocated to Pennsylvania to live with their father. Respondent-Mother also traveled to Pennsylvania with Nancy.

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1. Consistent with the parties' stipulation, we use pseudonyms to protect the identities of the juveniles in accordance with N.C. R. App. P. 42(b).

2. As the trial court found as fact, the paternity of Nancy "ha[d] not been established through DNA paternity testing" as of the adjudication and disposition hearing; however, Respondent-Mother's husband is listed as Nancy's father on her birth certificate.

On 19 January 2021, DHHS filed juvenile petitions regarding all four of Respondent-Mother's children. DHHS alleged that Nell was an abused, neglected, and dependent juvenile; the other children were alleged to be neglected and dependent juveniles. By order entered that day, the trial court granted DHHS nonsecure custody of Nancy and Nell, but not the older children.[3] Nell was placed with her aunt, but DHHS was unable to take custody of Nancy, as she was in Pennsylvania with Respondent-Mother when DHHS filed the juvenile petitions.

Respondent-Mother and Nancy returned to North Carolina and appeared before the trial court on 4 February 2021, at which point DHHS took custody of Nancy and placed her with Nell's aunt as well. In its initial orders regarding the need for continued nonsecure custody of Nancy and Nell, the trial court indicated that it possessed temporary emergency jurisdiction pursuant to N.C. Gen. Stat. § 50A-204 (2021).

On 31 March 2022, the matter came on for adjudication and disposition hearings in Guilford County District Court. By then, Respondent-Mother had relocated to Charlotte and obtained housing through an organization assisting victims of domestic violence. She also completed the public housing application process and was placed on the waiting list for public housing in High Point. Nell's father was incarcerated in Pennsylvania and participated in the hearings by teleconference. However, Nancy's father did not participate in the hearings; he had not yet been served with the juvenile petitions, as his whereabouts were unknown.

On 6 July 2022, the trial court filed its adjudication and disposition order. As regards its jurisdiction over the matter, the trial court concluded:

> At the time of the filing of the juvenile petition[s], [DHHS] was acting under Temporary Emergency Jurisdiction pursuant to [N.C. Gen. Stat.] § 7B-500 and [N.C. Gen. Stat.] § 50A-204. However, at the time of the Adjudication Hearing, North Carolina had obtained Home State Jurisdiction pursuant to [N.C. Gen. Stat.] § 50A-102(7) in that both juveniles and [Respondent-M]other had lived in the State of North Carolina without interruption for a period exceeding six months and there was no existing Custody Order from any other State.

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3. DHHS ultimately filed a voluntary dismissal of the juvenile petitions regarding the older children, after it determined "that there were no safety concerns with the [Pennsylvania] home or with the[ir] father[.]"

The trial court adjudicated Nancy as a neglected and dependent juvenile, and Nell as a neglected and abused juvenile. The trial court continued DHHS's custody of Nancy and Nell, suspended Respondent-Mother's visitation with them, and relieved DHHS of its obligation to make reasonable efforts to reunify them with Respondent-Mother. Respondent-Mother timely filed notice of appeal.

II. Discussion

Respondent-Mother argues that the trial court erred by entering the adjudication and initial disposition order because "North Carolina did not have jurisdiction to enter non-temporary, non-emergency orders under" the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). For the reasons that follow, we disagree.

A. Standard of Review

Subject-matter jurisdiction is "the power of the court to deal with the kind of action in question[,]" *In re N.T.U.*, 234 N.C. App. 722, 724, 760 S.E.2d 49, 52 (citation omitted), *disc. review denied*, 367 N.C. 826, 763 S.E.2d 517 (2014), and, as a result, is "a threshold requirement for a court to hear and adjudicate a controversy brought before it," *In re M.B.*, 179 N.C. App. 572, 574, 635 S.E.2d 8, 10 (2006). Whether a court possesses subject-matter jurisdiction is a question of law, which this Court reviews de novo on appeal. *N.T.U.*, 234 N.C. App. at 724, 760 S.E.2d at 52.

When conducting de novo review, "this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *In re T.N.G.*, 244 N.C. App. 398, 402, 781 S.E.2d 93, 97 (2015) (citation and internal quotation marks omitted). However, unchallenged findings of fact are binding on appeal. *N.T.U.*, 234 N.C. App. at 733, 760 S.E.2d at 57.

B. Analysis

On appeal, Respondent-Mother does not challenge any of the trial court's findings of fact, nor does she challenge the trial court's adjudications of Nancy as a neglected and dependent juvenile and Nell as an abused and neglected juvenile. Rather, her arguments are entirely concerned with the trial court's subject-matter jurisdiction over these proceedings.

Respondent-Mother contends that (1) the trial court erred by concluding that it had obtained home-state jurisdiction because North Carolina was not the home state at the inception of these proceedings, and (2) the trial court could not "create 'home[-]state' jurisdiction

for the adjudication simply by passage of time." She also asserts that the trial court erred by failing "to consult with the Washington courts, obtain an order [from Washington] declining jurisdiction, and make appropriate findings to support its order" in which the court exercises jurisdiction "beyond temporary emergency jurisdiction[.]" This appeal thus raises the question of whether (and under what conditions) temporary emergency jurisdiction under the UCCJEA may eventually ripen into home-state jurisdiction.

1. Subject-Matter Jurisdiction and the UCCJEA

Subject-matter jurisdiction "is conferred upon the courts by either the North Carolina Constitution or by statute." *M.B.*, 179 N.C. App. at 574, 635 S.E.2d at 10 (citation omitted). Our Juvenile Code provides that the trial court "has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C. Gen. Stat. § 7B-200(a).

Additionally, "the jurisdictional requirements of the [UCCJEA] must be satisfied for a court to have authority to adjudicate petitions filed pursuant to our Juvenile Code, even though the Juvenile Code provides that the district courts of North Carolina have exclusive, original jurisdiction over any case involving a juvenile." *M.B.*, 179 N.C. App. at 574, 635 S.E.2d at 10 (citation omitted). "The UCCJEA, which is designed to provide a uniform set of jurisdictional rules and guidelines for the national enforcement of child custody orders, is codified in Chapter 50A of the North Carolina General Statutes." *Id.* at 574–75, 635 S.E.2d at 10 (citation and internal quotation marks omitted).

Under the UCCJEA,

> a court of this State has jurisdiction to make an initial child-custody determination only if:
>
> (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the

more appropriate forum under [N.C. Gen. Stat. §] 50A-207 or [§] 50A-208, and:

a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and

b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

(3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under [N.C. Gen. Stat. §] 50A-207 or [§] 50A-208; or

(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

N.C. Gen. Stat. § 50A-201(a).

For the purposes of the UCCJEA, a "child-custody determination" is "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child" and "includes a permanent, temporary, initial, and modification order." *Id.* § 50A-102(3). " 'Initial determination' means the first child-custody determination concerning a particular child." *Id.* § 50A-102(8).

A child's "home state" under the UCCJEA is "the state in which [the] child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding[,]" including a proceeding on abuse, neglect, or dependency allegations. *Id.* § 50A-102(4), (7). A proceeding commences with "the filing of the first pleading[.]" *Id.* § 50A-102(5); *see, e.g.*, *T.N.G.*, 244 N.C. App. at 403, 781 S.E.2d at 97.

In this case, it is uncontested that the trial court did not have "home-state" jurisdiction pursuant to N.C. Gen. Stat. § 50A-201(a) at the commencement of the present proceedings, as neither juvenile had lived in North Carolina for six months prior to the filing of the petitions in this matter.

However, the UCCJEA also provides that the courts of this State may exercise "temporary emergency jurisdiction if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." N.C. Gen. Stat. § 50A-204(a). It is similarly uncontested that the trial court in this case properly exercised temporary emergency jurisdiction at the initiation of these proceedings. Accordingly, we must address the transition from temporary emergency jurisdiction to home-state jurisdiction under the UCCJEA.

2. Temporary Emergency Jurisdiction and Home-State Jurisdiction

Respondent-Mother first argues that "at the time of the petition, North Carolina did not have jurisdiction to make an initial custody decision" because it was not the children's home state pursuant to N.C. Gen. Stat. § 50A-201. Implicit in this argument is the proposition that a trial court cannot enter an initial child-custody determination while exercising temporary emergency jurisdiction pursuant to § 50A-204. This proposition is not supported by the text of the UCCJEA.

Section 50A-204(b) provides, in pertinent part:

> If a child-custody proceeding has not been or is not commenced in a court of a state having jurisdiction under [N.C. Gen. Stat. §] 50A-201 through [§] 50A-203, a child-custody determination made under this section becomes a final determination if it so provides, and this State becomes the home state of the child.

Id. § 50A-204(b). The plain language of this section thus contemplates that a court exercising temporary emergency jurisdiction may enter an initial child-custody determination, which "includes a . . . temporary . . . order." *Id.* § 50A-102(3). The trial court thus had jurisdiction to enter the initial, temporary nonsecure custody orders.

However, Respondent-Mother proceeds to argue that "North Carolina courts do not have jurisdiction to enter an adjudication order while exercising temporary emergency jurisdiction." The key issue, then, is under what conditions North Carolina "becomes the home state of the child" in order for a temporary child-custody determination to "become[ ] a final determination if it so provides[.]" *Id.* § 50A-204(b). Respondent-Mother asserts that the trial court could not "create 'home[-]state' jurisdiction for the adjudication simply by passage of time." However, this Court has previously concluded otherwise.

Respondent-Mother acknowledges two cases in which this Court determined that a trial court possessed home-state jurisdiction over termination-of-parental-rights proceedings after initially exercising temporary emergency jurisdiction over child-custody proceedings. *See N.T.U.*, 234 N.C. App. at 728, 760 S.E.2d at 54; *In re E.X.J.*, 191 N.C. App. 34, 43–44, 662 S.E.2d 24, 29–30 (2008), *aff'd per curiam*, 363 N.C. 9, 672 S.E.2d 19 (2009).

In *N.T.U.*, this Court "determined that the trial court properly exercised temporary emergency jurisdiction over the custody of [the juvenile] initially," before noting that the juvenile had "lived in North Carolina with his foster parents" for over a year and a half without "any custody proceedings instituted, or custody orders entered, in any state other than North Carolina." 234 N.C. App. at 728, 760 S.E.2d at 54. Accordingly, this Court "conclude[d] that North Carolina became [the juvenile]'s home state such that the trial court possessed jurisdiction to terminate [the r]espondent's parental rights pursuant to N.C. Gen. Stat. § 50A-201(a)." *Id.*

Similarly, in *E.X.J.*, this Court held that "the trial court had emergency jurisdiction to enter the initial nonsecure custody orders[,]" then recognized that, "[b]y the time of the filing of the petition and motion for termination of parental rights, [the children] and [the] respondent mother had been physically present in North Carolina for two years." 191 N.C. App. at 43, 662 S.E.2d at 29. Accordingly, "[g]iven the children's residency and the lack of any other custody proceedings or orders in other states, 'North Carolina became the home state wherein the trial court had jurisdiction under the UCCJEA to enter orders' terminating [the] respondents' parental rights." *Id.* at 44, 662 S.E.2d at 29–30 (quoting *M.B.*, 179 N.C. App. at 576, 635 S.E.2d at 11).

Respondent-Mother maintains that *N.T.U.* and *E.X.J.* do not control the case before us because "those cases involved [termination] petitions for which the respective departments of social services established standing by way of properly entered nonsecure custody orders." Yet both *N.T.U.* and *E.X.J.* relied upon our precedent in *M.B.*, which Respondent-Mother cannot successfully distinguish from the present case.

Unlike *N.T.U.* and *E.X.J.*, but like the present case, *M.B.* did not concern a termination-of-parental-rights proceeding commenced after a prior child-custody determination. Instead, *M.B.* concerned the trial court's authority to enter an initial child-custody determination while exercising temporary emergency jurisdiction, then to recognize that North Carolina had become the child's home state and order that the

child-custody determination become a final order pursuant to N.C. Gen. Stat. § 50A-204(b). 179 N.C. App. at 576, 635 S.E.2d at 11.

In *M.B.*, the child and both parents moved from New York to North Carolina between February and March of 2005, and in April of that year, DSS filed a juvenile petition alleging that the child was neglected. *Id.* at 572–73, 635 S.E.2d at 9. In June 2005, the trial court entered an order finding temporary emergency jurisdiction, adjudicating the child as neglected, and placing the child in the temporary custody of DSS. *Id.* at 573, 635 S.E.2d at 9. The trial court also ordered the parents and DSS to "provide any and all information and paperwork in relation to an alleged New York court proceeding concerning M.B., as such a proceeding may impact the trial court's subject[-]matter jurisdiction." *Id.*

During the process of appealing the trial court's temporary custody order, "DSS received a letter from Westchester County, New York, stating that there [we]re no pending matters or any orders regarding M.B." *Id.* at 574, 635 S.E.2d at 10. Accordingly, in October 2005, while the appeal was pending before this Court, the trial court entered an order "providing that (1) North Carolina [wa]s now the home state of M.B. because M.B. ha[d] been in North Carolina for over six months; and (2) the temporary child custody determination entered on 17 June 2005 [wa]s now the final order of custody." *Id.*

On appeal, this Court affirmed the trial court's initial invocation of temporary emergency jurisdiction. *Id.* at 576, 635 S.E.2d at 11. Furthermore, this Court determined that "any issue of temporary jurisdiction [wa]s now moot" and specifically cited the October 2005 order—as well as the fact that "M.B., M.B.'s mother, and [M.B.'s] father ha[d] been physically present in North Carolina for more than six months"—to support its conclusion that "North Carolina [wa]s now the home state under the UCCJEA[.]" *Id.* Although this Court in *M.B.* did not specifically refer to N.C. Gen. Stat. § 50A-204(b), it is apparent that the trial court's October 2005 order conformed with the provisions of that statute for the purposes of assuming home-state jurisdiction. *Id.*; *see also* N.C. Gen. Stat. § 50A-204(b).

DHHS contends on appeal that "[t]he relevant facts of *In re M.B.* are nearly identical to those in this case." We agree. As the trial court concluded—and as is supported by unchallenged (and therefore, binding) findings of fact, *N.T.U.*, 234 N.C. App. at 733, 760 S.E.2d at 57—"both juveniles and [Respondent-M]other had lived in the State of North Carolina without interruption for a period exceeding six months and there was no existing Custody Order from any other State" at the time the trial court entered the adjudication and disposition order. As such,

and as the trial court declared in its order, "North Carolina . . . obtained Home State Jurisdiction" under the UCCJEA.

Lastly, DHHS advances a pair of unpublished opinions[4] as persuasive authority for the application of the holding in *M.B.* to this case. Indeed, in *In re K.M.*, this Court "conclude[d] that North Carolina became the home state wherein the trial court had jurisdiction under the UCCJEA to enter orders adjudicating the juveniles abused, neglected, and dependent" where the trial court made unchallenged findings of fact concerning "the court's exercise of emergency jurisdiction, the juveniles' residency in North Carolina for over six months, and the lack of any other custody proceedings or orders in any other state[.]" 228 N.C. App. 281, 748 S.E.2d 773, 2013 WL 3356835, at *3 (2013) (unpublished). And in *In re L.C.D.*, this Court concluded that "North Carolina became [the child]'s home state after six months" of her continuous residence in nonsecure custody in the state and "[i]n the interim, no custody proceedings were instituted or custody orders entered in another state." 253 N.C. App. 840, 800 S.E.2d 137, 2017 WL 2437033, at *3 (2017) (unpublished).

In the case at bar, the trial court properly concluded that it had home-state jurisdiction at the time of the adjudication and disposition order. In that Respondent-Mother does not otherwise challenge the trial court's findings of fact or conclusions of law, the trial court's order is properly affirmed.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judges ARROWOOD and GRIFFIN concur.

4. Although unpublished opinions do not have precedential value, "an unpublished opinion may be used as persuasive authority at the appellate level if the case is properly submitted and discussed and there is no published case on point." *Zurosky v. Shaffer*, 236 N.C. App. 219, 234, 763 S.E.2d 755, 764 (2014).

STATE v. BURRIS

[289 N.C. App. 535 (2023)]

STATE OF NORTH CAROLINA
v.
KYLE ALLEN BURRIS, DEFENDANT

No. COA22-408

Filed 5 July 2023

1. Evidence—lay testimony—reckless driving—identity of driver—no personal observation—curative instruction

In a prosecution for driving while impaired and reckless driving based on a single-vehicle accident involving a pickup truck that had run off the road and near which defendant was discovered trapped under a fence, although a trooper's testimony that he believed defendant was the driver of the truck was inadmissible because the trooper did not personally observe defendant driving, there was no reversible error where the trial court gave the jury a curative instruction to disregard the opinion testimony. Even assuming that the instruction was insufficient, defendant could not demonstrate that the trooper's testimony prejudiced him because he failed to object to other evidence of the trooper's belief that defendant was the driver.

2. Motor Vehicles—driving while impaired—reckless driving—motion to dismiss—sufficiency of evidence—identity of driver

In a prosecution for driving while impaired and reckless driving based on a single-vehicle accident involving a pickup truck that had run off the road and crashed into a steel fence, the State presented sufficient evidence from which the jury could conclude that defendant was the driver of the truck, including that defendant was found alone at the scene—trapped under the steel fence outside of the vehicle, unresponsive, and bleeding—and was the owner of the truck.

3. Search and Seizure—warrantless blood draw—impaired driving—unconscious driver—exigent circumstances

In a prosecution for driving while impaired and reckless driving based on a single-vehicle accident involving a pickup truck that had run off the road, there were sufficient exigent circumstances to justify a warrantless blood draw where defendant was found unconscious near the vehicle with severe injuries and extensive bleeding, defendant smelled of alcohol and there were open beer cans inside and outside the vehicle, the responding trooper spent an hour investigating and securing the scene while defendant was transported

to a hospital for medical treatment, and defendant was still unconscious when the trooper arrived at the hospital. Therefore, there was no reversible error in the admission of the results of the blood draw into evidence.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from judgment entered 11 August 2021 by Judge Jacqueline D. Grant in Buncombe County Superior Court. Heard in the Court of Appeals 8 March 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Phillip T. Reynolds, for the State.

Kimberly P. Hoppin for the Defendant.

DILLON, Judge.

Defendant Kyle Allen Burris appeals from a judgment entered upon a jury verdict convicting him of driving while impaired and reckless driving to endanger. We conclude that Defendant received a fair trial, free of reversible error.

I. Background

On the evening of 22 November 2014, a law enforcement officer responded to a single-vehicle accident in Buncombe County. Upon arriving at the scene, the trooper saw a pickup truck off the right side of the road. The vehicle was up against a steel fence and had sustained extensive damage. The trooper found Defendant lying trapped under the steel fence outside the vehicle. Defendant was unresponsive and appeared to suffer from severe injuries. He was bleeding excessively. He smelled of alcohol. The trooper found open beer cans, both inside and outside the vehicle. Defendant was eventually taken to the hospital, still unconscious, while the trooper remained at the scene. The trooper was able to determine that Defendant was the owner of the vehicle, and there was no evidence at the scene that anyone else was riding in the vehicle when the wreck occurred.

Defendant was convicted by a jury in superior court for driving while impaired and reckless driving to endanger. Defendant timely appealed.

II. Analysis

Defendant raises two issues on appeal, which we address in turn.

A. Evidence That Defendant Was Driving the Vehicle

Defendant makes two arguments concerning the evidence that he was, in fact, driving the wrecked vehicle.

[1] First, Defendant contends the trial court erred when it allowed certain evidence showing the trooper believed Defendant driving the vehicle when it wrecked. This argument pertains to both Defendant's driving while impaired conviction and his reckless driving to endanger convictions, both of which required the State to prove that Defendant was driving the vehicle when the wreck occurred.

We agree that the trooper's opinion testimony that Defendant was the driver was inadmissible because the trooper did not personally observe Defendant driving the vehicle. *See* N.C. Gen. Stat. § 8C-1, Rule 701 (2021) (Lay testimony is generally confined to a witness's personal observations); *State v. Fulton*, 299 N.C. 491, 494, 263 S.E.2d 608, 610 (1980) (stating that "[o]rdinarily opinion evidence of a non-expert witness is inadmissible because it tends to invade the province of the jury.").

However, we conclude the admission of the trooper's opinion testimony does not constitute reversible error in this case. In so holding, we note the trial court gave a curative instruction regarding the trooper's opinion testimony. Specifically, the trial court expressly stated that the officer would be permitted to talk about what he observed during his post-crash investigation of the scene, but that he would not be permitted to "conclusively say [Defendant] was the driver". The trial court instructed the jury to disregard the trooper's opinion testimony, stating:

> The Court is going to sustain the defendant's objection to the extent [the officer] has referred to the defendant as "the driver." The jury is to disregard any testimony referring to the defendant as "the driver", because that's actually an issue that you will decide as the jury.

See State v. Black, 328 N.C. 191, 200, 400 S.E.2d 398, 404 (1991) ("When the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured.").

Further, assuming the trial court's curative instruction was insufficient, Defendant has failed to establish that he was prejudiced by the officer's statement, as Defendant failed to object to *other* evidence tending to show the trooper believed Defendant to be the driver. *See State v. Delau*, 381 N.C. 226, 237, 872 S.E.2d 41, 48 (2022) (holding that any error in allowing an officer to testify about the driver's identity was not prejudicial when the warrant application admitted without objection

contained the same information, the officer's conclusion that the defendant was driving). For example, Defendant did not object when the State offered the trooper's "Affidavit and Revocation Report" as evidence, which contained multiple references to Defendant as the driver.

[2] Second, Defendant argues the trial court erred when it denied Defendant's motion to dismiss the charges for insufficient evidence showing Defendant was the driver. To survive a motion to dismiss, there must be substantial evidence of each essential element of the crime and that the defendant is the offender. *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015). When considering the motion, evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference. *Id.* at 574, 780 S.E.2d at 826.

We conclude there was sufficient evidence from which the jury could find that Defendant was driving the vehicle when the crash occurred. In addition to the State's exhibits which were not objected to which described Defendant as the driver, there was evidence that Defendant was found alone at the accident scene and that Defendant was the owner of the vehicle. *See, e.g.*, *State v. Ray*, 54 N.C. App. 473, 475, 283 S.E.2d 823, 825 (1981) ("It is possible that other circumstantial evidence – such as … evidence as to the [defendant's] ownership of the automobile – in addition to the testimony of the officer [finding the defendant alone in a vehicle that was running]" would be sufficient to meet the State's burden of showing the defendant was driving the vehicle). When viewed in the light most favorable to the State, we conclude that the evidence was sufficient to survive Defendant's motion to dismiss.

B. Warrantless Blood Draw

[3] At trial, the jury was instructed it could convict Defendant of drunk driving *solely* on the grounds that Defendant's blood alcohol level was above the legal limit. N.C. Gen. Stat. § 20-138.1(a)(2) (2021). It was on this ground that Defendant was convicted of this charge. Defendant argues the trial court erred by denying his motion to suppress the warrantless blood draw, the results of which were the only evidence that his blood alcohol level exceeded the legal limit.

The evidence concerning the blood draw showed that Defendant was transported to the hospital, that the trooper went directly to the hospital after completing his work at the crash scene, and that the trooper obtained a blood sample from Defendant while Defendant remained unconscious.

Blood tests are considered a search under both the federal and North Carolina constitutions. *Schmerber v. California*, 384 U.S. 757, 767

(1966). Accordingly, "blood draws may only be performed after either obtaining a warrant, obtaining valid consent from the defendant, or under exigent circumstances with probable cause." *State v. Romano*, 369 N.C. 678, 692, 800 S.E.2d 644, 653 (2017).

Here, the trooper did not obtain a warrant prior to obtaining a blood sample from Defendant at the hospital.

Also, Defendant did not give *express* consent for the blood draw as he was unconscious throughout. Our General Assembly, however, has provided that a driver has given *implied* consent to a blood draw when he is found unconscious and there is reasonable grounds to suspect that he has been driving while impaired. N.C. Gen. Stat. § 20-16.2(b) (2021). Our Supreme Court has limited the scope of this statute by holding that the Fourth Amendment is violated when an unconscious driver is deemed as consenting to a blood draw based on this implied consent statute for purposes of an impaired driving prosecution. *See Romano*, 369 N.C. at 691, 800 S.E.2d at 652 (stating that Section 20-16(b) is not "a per se categorical exception to the warrant requirement.").

We, therefore, consider whether there were sufficient exigent circumstances to justify the trooper's action in not first obtaining a warrant before obtaining a draw of Defendant's blood. Our resolution of this issue is controlled by the recent United States Supreme Court decision in *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019).

Mitchell, decided two years after our Supreme Court decided *Romano*, concerned the constitutionality of a warrantless blood draw from an unconscious motorist suspected of impaired driving in a state with an implied consent statute similar to our implied consent statute.

A four-judge plurality of the Court in *Mitchell* - sidestepping the issue as to whether prosecutors can rely on an implied consent statute to show consent by an unconscious driver to a blood draw – held that exigent circumstances "almost always" exist to conduct a warrantless blood draw where an unconscious driver is taken to the hospital[1]:

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1. The plurality opinion, authored by Justice Alito, garnered the votes of three other justices. Justice Thomas concurred in the judgment. Justice Thomas argued that the natural metabolism of alcohol in the blood means that exigent circumstances are present whenever someone is suspected of driving under the influence of alcohol. *Mitchell*, 139 S. Ct. at 2539-41 (Thomas, Justice concurring). Because Justice Alito's opinion is based on a narrower ground, it represents the Court's holding. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds....' " (quoting *Gregg v. Georgia*, 428 U.S.153, 169 n. 15 (1976) (plurality opinion))).

> Thus, exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when a drunk-driving suspect is unconscious []: With such suspects, too, a warrantless blood draw is lawful.
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> … [U]nconsciousness does not just create pressing needs; it is *itself* a medical emergency. . . . Police can reasonable anticipate that . . . [the defendant's] blood may be drawn anyway, . . . and that immediate medical treatment could delay (or otherwise distort the results of) a blood draw conducted later, upon receipt of a warrant, thus reducing evidentiary value.
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> * * *
>
> When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC [blood alcohol content] without offending the Fourth Amendment.

Id. at 2537-39. The Court, though, remanded that case to allow *the defendant* a chance to show his was the "unusual case" that would require a warrant, seemingly placing on the defendant the burden to make this showing where the State proves that the defendant was unconscious and needed treatment at a hospital:

> We do not rule out the possibility that in an unusual case *a defendant would be able to show* that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. *Because [the defendant] did not have a chance to attempt to make that showing*, a remand for that purpose is necessary.

Id. (emphasis added). In remanding the case, the Court was not saying that a defendant has the *initial* burden to prove a lack of exigent circumstances. The Court recognized the State has this burden of showing exigency but was stating that the State meets this burden by showing the defendant was unconscious and in need of medical

attention at a hospital. The Court then simply recognized that, where the State makes this showing, the defendant should have the opportunity to offer evidence of other facts to show a lack of exigency. *See State v. Mitchell*, 404 Wis.2d 103, 110-15 (2022) (after remand from the United States Supreme Court, Wisconsin intermediate appellate court concludes the defendant failed to meet his burden of showing his was an unusual case); *McGraw v. State*, 289 So.3d 836, 839 (Fla. 2019) (Florida Supreme Court remands so "[the defendant] can be given the opportunity to demonstrate" his was an unusual case which required a warrant); *Peoples v. Eubanks*, 160 N.E.3d 843, 864 (2019) (Illinois Supreme Court interprets *Mitchell* as stating "in cases where the "general rule" applies, the burden shifts to defendant to establish a lack of exigent circumstances."). *But see State v. Key*, 848 S.E.2d 315, 316 (South Carolina Supreme Court refusing to shift the burden to the defendant to show his to be an unusual case).

In the case before us, the trial court's findings show the State met its burden of showing exigency under *Mitchell*. It found in its written order that Defendant was unconscious and badly injured at the crash scene when the trooper arrived; the trooper spent an hour investigating and securing the scene during which Defendant was transported by ambulance to a hospital; the trooper then went directly to the hospital; and Defendant had been sedated and was still unconscious when the trooper arrived. Further, the trial court stated from the bench:

> As [the officer] testified, [Defendant] had become unresponsive. That his injuries were such [the officer] was concerned that he would probably have to undergo surgery, and it could even possibly lead to a fatality. And in those circumstances, the blood alcohol evidence would dissipate as more time passed. You don't know how long the defendant would have been in surgery, what additional medical treatment would have been rendered. And as a result of that, that would have created exigent circumstances that the Court finds not taking the time to go get a warrant from the magistrate's office, not knowing how long that will take, depending on when the magistrate was available, what's going on with the jail.
>
> So the Court finds that exigent circumstances existed, which justified getting the blood draw from the defendant. So again, the motion to suppress is denied.

However, we conclude that the matter need not be remanded. The *Mitchell* Court remanded the case before it to allow the defendant a

chance to offer evidence "[b]ecause [the defendant] did not have a chance to attempt to make that showing [that his was an unusual case]." *See Mitchell*, 139 S. Ct. at 2539. Here, though, the record shows Defendant did have that opportunity, as the *Mitchell* case was discussed at length at the hearing. And, on appeal, Defendant does not cite *Mitchell* or otherwise make any argument that he was not afforded the opportunity to make the showing at the hearing. We, therefore, conclude that the trial court did not commit reversible error by allowing the results of the warrantless blood draw into evidence.

NO ERROR.

Judge GORE concurs.

Judge TYSON concurs in part and dissents in part with separate opinion.

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

I concur with the majority's holding the trial court erred by allowing the state trooper, as a lay witness, to testify Defendant was the driver of the vehicle for either charge, because the trooper never observed Defendant drive, being seated behind the wheel, or even present inside of the vehicle. This error was cured by the trial judge's instruction to disregard this testimony.

The trial court erred in denying Defendant's motion to suppress the Defendant's blood alcohol concentration ("BAC") level, derived solely from the warrantless blood draw without the State proving probable cause and exigent circumstances, and where the jury was instructed solely on Defendant's BAC level as evidence to support Defendant's guilt. I respectfully dissent.

I. Fourth Amendment

The Fourth Amendment of the Constitution of the United States *guarantees*: "The right of the people to be *secure in their persons*, houses, papers, and effects, *against unreasonable searches and seizures*, shall not be violated, and *no Warrants shall issue*, but upon probable cause, supported by Oath or affirmation, and *particularly describing* the place to be searched, and *the persons or things to be seized*." U.S. Const. amend. IV (emphasis supplied).

The Supreme Court of the United States ruled:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Schmerber v. California, 384 U.S. 757, 770, 16 L. Ed. 2d 908, 919 (1966).

"The [Fourth] Amendment thus prohibits 'unreasonable searches,' . . . [and] the taking of a blood sample . . . is a search." *Birchfield v. North Dakota*, 579 U.S. 438, 455, 195 L. Ed. 2d 560, 575 (2016) (citations omitted). *Accord State v. Carter*, 322 N.C. 709, 714, 370 S.E.2d 553, 556 (1988).

The Supreme Court of North Carolina has held: "drawing blood . . . constitutes a search under both the Federal and North Carolina Constitutions." *State v. Romano*, 369 N.C. 678, 685, 800 S.E.2d 644, 649 (2017) (citations omitted). "[B]lood draws may only be performed after either obtaining a warrant, obtaining valid consent from the defendant, or under exigent circumstances with probable cause." *Id.* at 692, 800 S.E.2d at 653.

The Supreme Court of the United States further held: Blood tests: (1) "require piercing the skin and extract[ion of] a part of the subject's body"; (2) are "significantly more intrusive than blowing into a tube"; and (3) place in the hands of law enforcement "a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading." *Birchfield*, 579 U.S. at 463-64, 195 L. Ed. 2d at 580 (citations and internal quotation marks omitted).

Our Supreme Court adopted and interpreted the test in *Schmerber*, as "forbidding law enforcement authorities acting without a search warrant from requiring a defendant to submit to the drawing of a blood sample unless probable cause and exigent circumstances exist to justify a warrantless seizure of the blood sample." *State v. Welch*, 316 N.C. 578, 587, 342 S.E.2d 789, 794 (1986) (citing *Winston v. Lee*, 470 U.S. 753, 84 L. Ed. 2d 662 (1985) (clarifying how North Carolina courts construe the *Schmerber* factors). Without probable cause and exigent circumstances, or another exception to the warrant requirement, a warrantless search violates the Fourth Amendment to the Constitution of the United States and Article One, Section Nineteen of the North Carolina Constitution,

and any evidence illegally obtained must be excluded. *Id.*; U.S. Const. amend. IV; N.C. Const. art. 1, § 19.

The Supreme Court of the United States in *Schmerber* also explained the Fourth Amendment's warrant requirement is not a mere formality, but requires necessary judgment calls that are made "by a neutral and detached magistrate," and not "by the officer engaged in the often competitive enterprise of ferreting out crime." *Schmerber*, 384 U.S. at 770, 16 L. Ed. 2d at 919 (citation and quotation marks omitted). This default Constitutional requirement for and specificity of a warrant, and the further prohibition against General Warrants, serves as bulwark protections of individual liberties against warrantless searches and seizures, which violate the Fourth Amendment. A warrant issued "by a neutral and detached magistrate" also ensures a police officer is not the sole interpreter of the Constitution's protections and an individual's "interests in human dignity and privacy" are protected. *Id.*

A search conducted without a warrant is "per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585 (1967) (citations and footnotes omitted). "In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley v. California*, 573 U.S. 373, 382, 189 L. Ed. 2d 430, 439 (2014) (citation omitted). The narrow exception of probable cause and exigent circumstances to the warrant requirement is necessarily limited. The burden to prove necessity and exigency to proceed without a warrant remains on the State and does not shift to Defendant. *See Welsh v. Wisconsin*, 466 U.S. 740, 749-50, 80 L. Ed. 2d 732, 743 (1984) ("Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are 'few in number and carefully delineated,' and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." (internal citations omitted)).

The record and testimony show the trooper took an hour or two to complete his work at the scene before going directly to the hospital to confront Defendant. The trooper stated he went to the hospital, rather than a magistrate for a warrant, because Defendant might be headed into surgery. Upon arrival at the hospital, he located and "advised" the injured and unconscious Defendant of his chemical analysis rights for a Breathalyzer and asserted he could not perform a breath test on Defendant.

The trial court found exigent circumstances existed to deny Defendant's motion to suppress by holding:

> [T]he blood alcohol evidence would dissipate as more time passed. You don't know how long the defendant would have been in surgery, what additional medical treatment would have been rendered. And as a result of that, that would have created exigent circumstances that the Court finds justifies not taking the time to go get a warrant from the magistrate['s] office, not knowing how long that will take, depending on when the magistrate was available, what's going on with the jail.
>
> So the Court finds that exigent circumstances existed, which justified getting the blood draw from the defendant. So, again, the motion to suppress is denied.

None of these factors, individually or collectively, excuse the requirement of a warrant. "[T]he natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *Romano*, 369 N.C. at 687, 800 S.E.2d at 656 (citation and internal quotation marks omitted).

The majority's opinion cites *Mitchell v. Wisconsin*, 588 U.S. __, 204 L. Ed. 2d 1040 (2019), which neither party argues nor relies upon in their briefs, to support its conclusion. None of those facts or conditions in *Mitchell* support their result to allow the needle-extracted, unrestricted search under these facts to allow "a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading." *Birchfield*, 579 U.S. at 463-64, 195 L. Ed. 2d 560, 566-67. *"[N]o Warrants shall issue*, but upon probable cause, supported by Oath or affirmation, *and particularly describing the place to be searched*, and the persons *or things to be seized*." U.S. Const. amend. IV (emphasis supplied).

The majority's opinion unconstitutionally shifts the burden onto the Defendant *to prove the default necessity of a warrant!* The Fourth Amendment *guarantees and mandates the requirement of a warrant*, and their analysis of the narrow warrantless search exception becomes: why do you need a detached neutral magistrate upon "probable cause, supported by Oath or affirmation" to issue a specified search warrant before your bodily fluids are extracted and removed from your body, while injured, unconscious, and without restrictions? That result simply cannot be what the Founders and Framers intended. *Schmerber*, 384 U.S. at 770, 16 L. Ed. 2d at 919 (explaining necessary judgment calls are to be made "by a neutral and detached magistrate," and not "by the officer engaged in the often competitive enterprise of ferreting out crime").

The Bill of Rights was demanded to amend the Constitution to protect individuals from the interference and overreach of government officials, and, most specifically, to protect the privacy and rights of individuals, particularly those unconscious or utterly incapable, like infants and incompetents, of asserting their rights or providing informed consent. *See* Patrick M. Garry, *Liberty Through Limits: The Bill of Rights as Limited Government Provisions*, 62 SMU L. Rev. 1745, 1757 (2009) ("In the view of the Anti-Federalists, the Bill of Rights would set 'limits' and build 'barriers' against government abuse or enlargement of its powers. The purpose of the Bill of Rights would be to limit the exercise of delegated powers, thus providing a second limitation on the power of government. . . . But the Bill of Rights placed limits on even those enumerated powers, forbidding the federal government from using its enumerated powers to encroach on areas protected by the Bill of Rights."); *Olmstead v. United States*, 277 U.S. 438, 478, 72 L. Ed. 944, 956 (1928) (Brandis, J., dissenting) (stating the Founders "conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men").

II. Fifth Amendment

A law enforcement officer giving warnings and reading "rights" to an injured and unconscious person at a hospital, who is utterly incapable of understanding and giving informed consent, prior to demanding and compelling medical personnel to draw his blood without his knowledge is the height of hypocrisy. This warrantless blood extraction makes a mockery of both the Fourth Amendment's protections of "the right of the people to be secure in their persons" and the prohibitions "against unreasonable searches and seizures." U.S. Const. amend. IV.

The Fifth Amendment's right against self-incrimination, and *Miranda* warnings of the individual's "right to remain silent" were instituted to avoid compelled interrogations and testimony or evidence derived from "General Warrants" or warrantless searches. "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. While the Supreme Court of the United States has held "that forcing drunk-driving suspects to undergo a blood test does not violate their constitutional right against self-incrimination," the Supreme Court also demanded a "blood test" must be based upon probable cause and ordered by a detached and neutral magistrate's warrant. *Mitchell*, 588 U.S. at __, 204 L. Ed. 2d at 1046 (citing *Schmerber*, 384 U.S. at 765, 16 L. Ed. 2d at 917).

"[T]hese fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search." *Schmerber*, 384 U.S. at 769-70, 16 L. Ed. 2d at 919. The Supreme Court of North Carolina agreed and has also held: "[T]he natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *State v. Romano*, 369 N.C. 678, 687, 800 S.E.2d 644, 656 (2017) (quotation marks omitted) (quoting *Missouri v. McNeely*, 569 U.S. 141, 165, 185 L. Ed. 2d 696, 715 (2013)).

The fact that a suspect fell unconscious at some point or was going into surgery does not equate to insufficient time for the trooper to seek and demonstrate probable cause to obtain a warrant. If an officer has the time to secure a warrant prior to the blood draw, "the Fourth Amendment mandates that they do so[,]"and the burden of the officer's failure to do so rests upon the State. *McNeely*, 569 U.S. at 152, 185 L. Ed. 2d at 707 (citation omitted).

The trooper testified, and the trial court found, the trooper did not obtain a warrant because there might be a line and he might have to wait on a magistrate to review his sworn affidavit for probable cause and application to issue the warrant. That is the point of requiring a warrant. The trooper's assertion is sheer conjecture. Even if true, no evidence was presented by the State to support this "reason" or "exigency" for failing to secure a warrant.

Presuming probable cause existed, exigent circumstances did not require an immediate warrantless blood draw, since the hospital would have already drawn Defendant's blood for typing and tests upon arrival. *See State v. Scott*, 278 N.C. App. 354, 861 S.E.2d 892 (2021) (involving blood samples taken upon defendant's arrival at the hospital and picked up a week after being drawn).

Additionally, the possibility of Defendant's death during surgery did not provide an exigency. If deceased, Defendant would not have been charged in any event.

The trial court's finding to support denial of Defendant's motion to suppress was:

> As [the trooper] testified, [Defendant] had become unresponsive. That his injuries were such [the trooper] was concerned that he would probably have to undergo surgery, and it could even possibly lead to a fatality. And in those circumstances, the blood alcohol evidence would

> dissipate as more time passed. You don't know how long the defendant would have been in surgery, what additional medical treatment would have been rendered. And as a result of that, that would have created exigent circumstances that the Court finds justifies not taking the time to go get a warrant from the magistrate[']s] office, not knowing how long that will take, depending on when the magistrate was available, what's going on with the jail.

All these stated reasons, considered individually or together, are pretextual to avoid the Fourth Amendment's requirement for a warrant. *McNeely*, 569 U.S. at 152, 185 L. Ed. 2d at 715 (explaining that if the police have time to secure a warrant before the blood draw, "the Fourth Amendment mandates that they do so").

The purported possibility the magistrate might be delayed, Defendant's unconsciousness, or possibility of BAC dissipation does not excuse the trooper's inaction and does not create an exigent circumstance to justify the trooper's failure to seek a warrant or to order or compel a medical professional to act contrary to Defendant's rights. The burden to show probable cause and the reasons for the absence of a warrant rests upon the State, not the Defendant. That burden does not shift. The State's evidence and this finding does not support the trial court's denial of Defendant's motion to suppress. Defendant's arguments have merit.

III. The State's Burden on Remand

The majority's opinion cites *Mitchell's* purported exception to warrantless exigent circumstances exception by quoting: "We do not rule out the possibility that in an unusual case *a defendant would be able to show* that his blood would not have been drawn if police had not been seeking BAC information, *and* that police could *not have reasonably judged that a warrant application would interfere* with other pressing needs or duties." *Mitchell*, 588 U.S. at __, 204 L. Ed. 2d at 1052 (emphasis supplied). The burden to explain and show the absence of a warrant rests solely upon the State, not the Defendant, and judging the affidavit and application for a warrant and probable cause rests solely with the neutral detached magistrate, not the officer. *Schmerber*, 384 U.S. at 770, 16 L. Ed. 2d at 919 (explaining judgment calls are to be made "by a neutral and detached magistrate," and not "by the officer engaged in the often competitive enterprise of ferreting out crime").

I agree with the Supreme Court of South Carolina's refusal, upon very similar facts, to apply *Mitchell* in a manner to purportedly shift the

burden onto a defendant to show his to be an unusual case to challenge the warrantless extraction of his blood. *State v. Key*, 848 S.E.2d 315, 316 (S.C. 2020) ("We have carefully considered the *Mitchell* holding and conclude we will not impose upon a defendant the burden of establishing the absence of exigent circumstances. We hold the burden of establishing the existence of exigent circumstances remains upon the State."). *Accord McDonald v. United States*, 335 U.S. 451, 456, 93 L. Ed. 153, 158 (1948) ("We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."); *United States v. McGee*, 736 F.3d 263, 269 (4th Cir. 2013) ("The government bears the burden of proof in justifying a warrantless search or seizure.").

The State's brief and the trial court's findings concede the trooper had completed his work on the scene and avoided seeking the warrant from the magistrate because he did not want to wait in line or he pre-supposed the magistrate may be busy with other cases, the alcohol evidence may dissipate, and Defendant might die. None of these assertions or findings are exigent to supplant nor excuse the mandate of a warrant "supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

IV. Constitutional Error Standard of Review

"[B]efore a federal constitutional error can be held [to be] harmless, the court must be able to declare a belief [the error] was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 710-11 (1967). *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) (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). *See also Brecht v. Abrahamson*, 507 U.S. 619, 630, 123 L. Ed. 2d 353, 368 (1993); *Chapman*, 386 U.S. at 24, 17 L. Ed. 2d at 711; *State v. Lawrence*, 365 N.C. 506, 513, 723 S.E.2d 326, 331 (2012).

The General Assembly adopted the standard in *Chapman* and stated the General Statutes of North Carolina "reflects the standard of prejudice with regard to violation of the defendant's rights under the Constitution of the United States, as is set out in the case of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)." N.C. Gen. Stat. § 15A-1443 cmt. (2021).

"When violations of a defendant's rights under the United States Constitution [sic] 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 *Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331). *See also State v. Autry*, 321 N.C. 392, 399, 364 S.E.2d 341, 346 (1988) ("[Pre]suming *arguendo* that the search violated defendant's constitutional rights and that the evidence therefrom was improperly admitted at trial, we find any such error in its admission harmless beyond a reasonable doubt.").

Our Supreme Court also deemed the assertion an unconscious driver has consented to a blood draw based on this implied consent statute for purposes of an impaired driving prosecution to violate the Fourth Amendment. *See State v. Romano*, 369 N.C. at 691, 800 S.E.2d at 652-53 (stating that N.C. Gen. Stat. § 20-16(b) is not "a *per se* categorical exception to the warrant requirement").

The sole basis upon which the jury was instructed to find Defendant guilty of driving while impaired was his BAC level, the result of which was only obtained because of a warrantless blood sample taken without his knowledge or consent and while he was injured and unconscious.

The jury was not instructed on any other statutory grounds of appreciable impairment. While the State's other evidence of odor and beer cans on the scene may have been sufficient to survive a motion to dismiss, the State failed to establish that the erroneous admission of Defendant's BAC evidence, the only basis submitted to the jury, was harmless beyond a reasonable doubt. Defendant's conviction for driving while impaired is properly reversed.

V. Reckless driving to endanger

The majority and I agree the trooper's testimony asserting Defendant was the driver was inadmissible. Lay witness testimony is generally confined to a witness' personal observations. N.C. Gen. Stat. § 8C-1, Rule 701 (2021); *State v. Lindley*, 286 N.C. 255, 257, 210 S.E.2d 207, 209 (1974) (stating that "[o]pinion evidence is generally inadmissible 'whenever the witness can relate the facts so that the jury will have an adequate understanding of them and the jury is as well qualified as the witness to draw inferences and conclusions from the facts[ ]' " (citations omitted)). "[O]pinion evidence of a non-expert witness is [generally] inadmissible because it tends to invade the province of the jury." *State v. Malone-Bullock*, 278 N.C. App. 736, 740, 863 S.E.2d 659, 664 (2021) (citation and internal quotation marks omitted).

The majority and I also agree the trial court cured any improper testimony when it gave the jury the following curative instruction:

> The Court is going to sustain the defendant's objection to the extent [the trooper] has referred to the defendant as "the driver." The jury is to disregard any testimony referring to the defendant as "the driver", because that's actually an issue that you will decide as the jury.

Our Supreme Court has held that where a trial court sustains an objection and instructs the jury to disregard improper testimony, any prejudice is normally cured. *State v. Black*, 328 N.C. 191, 200, 400 S.E.2d 398, 404 (1991) ("The defendant objected[,] and his objection was sustained. The trial court then instructed the jury to disregard the statement. When the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." (citation omitted)).

Defendant's charges of reckless driving to endanger does not *ipso facto* arise solely from Defendant's purported driving while impaired. Reckless driving to endanger is not a lesser-included offense of DWI. N.C. Gen. Stat. § 20-141.6(d) (2021) ("The offense of reckless driving under G.S. 20-140 is a lesser-included offense of the offense set forth in this section."). Some additional evidence, such as excessive speed or a passenger endangered by being located in the vehicle, is required. N.C. Gen. Stat. § 20-140(b) (2021) (providing that "[a]ny person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving."); *see State v. Dupree*, 264 N.C. 463, 466, 142 S.E.2d 5, 7 (1965) ("The mere fact that defendant's automobile was on the left of the center line in the direction it was traveling when the collision occurred, without any evidence that it was being operated at a dangerous speed or in a perilous manner, except being on the wrong side of the road some 40 feet before the collision, does not show on defendant's part an intentional or wilful [sic] violation of G.S. [§] 20-140(b)[.]"). Without lawful evidence of Defendant's BAC, nor additional evidence of Defendant's "reckless driving to endanger," both of Defendant's convictions are properly vacated.

The failure to suppress the BAC, derived solely from extracted blood from a warrantless search, was erroneous and was not harmless beyond a reasonable doubt. On remand, the BAC evidence from the warrantless search should be suppressed and excluded from the jury. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
EDWARD JORGE GARDNER

No. COA22-781

Filed 5 July 2023

1. Homicide—second-degree murder—jury instruction—lesser included offense—voluntary manslaughter—heat of passion

The trial court in a second-degree murder prosecution did not err in declining to instruct the jury on the lesser included offense of voluntary manslaughter, where the evidence did not show that defendant acted "in the heat of passion" when he killed another man who had contacted him about meeting to have unprotected sexual intercourse. Although the victim was HIV-positive, nothing in the record indicated that defendant was made aware of this fact or that he and the victim even had sex at all; thus, the evidence did not support an inference that defendant engaged in unprotected intercourse with the victim and, upon discovering that the victim was HIV-positive, was provoked to kill the victim out of sudden distress over being exposed to HIV.

2. Homicide—second-degree murder—malice—jury instruction—lesser included offense—voluntary manslaughter—insufficiency of evidence

The trial court in a second-degree murder prosecution did not err in declining to instruct the jury on the lesser included offense of voluntary manslaughter, where the evidence was positive as to each element of the charged offense, including malice. Specifically, malice could be inferred from the nature of the crime and the circumstances of the victim's death where: the victim's car (with its license plate removed) was taken far off the road and set on fire with the victim locked inside the trunk, his body burning down to its skeletal remains; the victim's blood was found in a residence where defendant would stay; inside the residence, a large section of carpet had been removed and replaced with new carpeting, which had traces of bleach and blood stains around it; and a carpet cleaning machine inside the residence contained the victim's DNA. Further, regardless of whether it was improper for the court to opine that a voluntary manslaughter charge required stacking too many inferences upon each other, the court properly declined to instruct the jury on voluntary manslaughter where there was no evidence supporting such an instruction.

Appeal by Defendant from judgments entered 13 September 2021 and 13 October 2021 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 25 April 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamara S. Zmuda, for the State-Appellee.

Cooley Law Office, by Craig M. Cooley, for Defendant-Appellant.

COLLINS, Judge.

Edward Jorge Gardner ("Defendant") appeals from judgments entered upon jury verdicts of guilty of second-degree murder and burning personal property and Defendant's guilty pleas to attaining habitual felon status and possession of a telephone by an inmate. Defendant argues that the trial court erred by refusing his request for a jury instruction on the lesser-included offense of voluntary manslaughter. Defendant also includes two "non-meritorious arguments." We find no error.

I. Background

The evidence at trial tended to show the following: Ralph Dunbar was a 53 year-old gay man who was HIV-positive and used dating sites to meet men. On 9 June 2017, Dunbar told a co-worker, Eric Chavis, that he had met a man via Craigslist, was meeting him in person after work, and was nervous about the meeting. Dunbar then met up with and spoke with that man, William Alexander. After having a drink together, Alexander explained that he was not physically attracted to Dunbar and "not interested in doing anything with him," and the two men did not engage in any sexual activities. Dunbar asked Alexander whether he knew anyone who would be interested in having anal sex, and Alexander named Defendant.

Alexander explained that he met Defendant through an ad for a sexual encounter posted on Craigslist and knew Defendant by the name of "Jay." Over the course of two to three months, Alexander and Defendant had met approximately three times for sex. During one of these meetings, Defendant wanted to have anal sex but Alexander did not. Alexander helped Defendant post a social media ad for sex. After Dunbar expressed excitement about meeting up with Defendant, Alexander texted Defendant to see if he was interested; Defendant responded that he was. Dunbar and Defendant exchanged numbers and started a text conversation.

Dunbar and Defendant's text conversation lasted from 5:19 p.m. until 7:19 p.m. and contained the following messages:

[Defendant]: Hey . . . Jay here

[Dunbar]: How ya doin

[Defendant]: Good . . . just woke up from a nap

[Dunbar]: Want company?

[Defendant]: Yes

[Dunbar]: When?

[Defendant]: Well I need to get up and shower first

[Dunbar]: and I need to

[Defendant]: He will let u take a shower there wont he?

[Dunbar]: Probably. What time you want me there?

[Defendant]: Is an hour too long?

[Dunbar]: No.

[Defendant]: That's perfect.

[Defendant]: Are u gonna come tho?

[Dunbar]: K. I'll CALL you when I'm OTW

[Dunbar]: He'll yeah, I'm gonna come

[Defendant]: lol . . . ok

[Dunbar]: Nice!!! What's your question?

[Defendant]: Did you [f***] today?

[Dunbar]: No sir . . . .

[Dunbar]: I worked all day. Why?

[Defendant]: Thought yall might have

[Dunbar]: Nope. I was answering your ad. He was gracious and hooked me up

[Defendant]: Oh . . . cool

[Dunbar]: You have lube?

[Defendant]: Yes

[Dunbar]: Cool. Let me get done here. See ya soon.

[Defendant]: Ok . . . is that [pu***] safe?

[Dunbar]: Yessir. You prefer raw?

[Defendant]: Yes

[Dunbar]: Nice!!! Is that monster safe?

[Defendant]: Yes my [c***] is safe and clean

[Dunbar]: Cool. Same here.

[Dunbar]: No $$ exchange, right?

[Dunbar]: No $$ exchange, right?

[Defendant]: No

[Dunbar]: Cool. Call ya soon.

[Defendant]: Ok

[Dunbar]: I'm almost ready to leave. What's your address?

Dunbar and Defendant then had a series of incoming and outgoing telephone calls to each other until 8:20 p.m. Approximately six hours after setting up Dunbar and Defendant, Alexander texted Defendant to ask if he met up with Dunbar. Defendant responded affirmatively, saying that they had met and had a good time.

The following morning at approximately 5:30 a.m., Eric Simmons of the Greensboro Fire Department received a call about a fire off Falcon Ridge Road. Upon arrival, Simmons saw a car on fire, set back about 150 feet off the road, that had been burned down to its metal frame. While putting out the fire, Simmons pried open the locked trunk and discovered "white skeletal remains." Simmons notified police officers on the scene of the skeletal remains and protected the scene for evidence collection. Greensboro Police Detective Mike Matthews arrived on the scene to inspect the burned car and skeletal remains. While conducting his inspection, Matthews noticed that the car did not have a license plate and that there was a fresh cigarette lighter near the car. Matthews later determined that the car was a 2001 Ford Taurus and Dunbar was the owner. Matthews was also able to determine through a search of Dunbar's phone records that Defendant was the last person to call Dunbar. Detective Christa Leonard was called to the scene of the burned car and processed the following evidence: a green-in-color drink bottle; burned fabric; red melted wax; the fresh cigarette lighter first

spotted by Detective Matthews; and aluminum foil. Leonard also found the remnants of a wallet found under the skeletal remains in the trunk. A portion of the wallet appeared to have Dunbar's signature on it.

On 12 June 2017, Associate Chief Medical Examiner Lauren Scott performed an autopsy on the body found in the trunk of the burned Ford Taurus. Scott determined that the body was that of Dunbar and that the cause of death was "homicidal violence of undetermined means," meaning that death was due to homicide but the body was "too disrupted, too fragmented . . . to pinpoint a specific cause of death[.]" Scott explained that Dunbar's body was too badly burned to determine any injuries caused prior to the fire but that, based upon carbon monoxide testing, Dunbar was most likely dead prior to the fire being set. Scott prepared a "blood card" of Dunbar, whereby a sample of Dunbar's blood was placed on an absorbent card for use by a lab for further sampling, and Scott gave it to Detective Leonard.

On 19 June 2017, Leonard assisted with a search of an apartment where Defendant sometimes lived with his girlfriend of 10 years, Ashea Francis. In the apartment, Leonard found Defendant's driver's license and discovered that a four-by-four section of the carpet had been irregularly cut out. Around the cut-out section, there were spots where it looked like bleach had been poured onto the carpet. Under the new pieces of carpet and padding, the concrete floor had "reddish brown stains" on it. Leonard took an evidence swabbing of the reddish brown stains, but there was insufficient DNA on which to conduct an analysis. Leonard then discovered another stain on the linoleum floor at the base of the stairs, which appeared to be a blood stain, and took an evidence swabbing of the stain. The swabbing matched Dunbar's DNA. Leonard found a new roll of carpet in the master bedroom of the apartment and also found a carpet cleaning machine in the closet. Leonard took evidence swabbings from a reddish-brown substance found in the intake nozzle and inside basin of the carpet cleaning machine; both swabbings matched Dunbar's DNA. Later that same day, Sergeant John Ludemann went to another apartment where Defendant was located and executed a search warrant. While executing the warrant, Ludemann placed Defendant into handcuffs and noticed "significant burn marks" on Defendant's left arm and wrist.

Defendant's girlfriend, Francis, testified that Defendant sometimes lived with her and sometimes lived with his mother. Francis was not aware that Defendant engaged in sexual relations with men. Francis was out of town during the dates of 8-10 June 2017, but she testified that Defendant had been in Greensboro and had access to her apartment

during that time. Francis noticed the burns on Defendant's arm and asked Defendant about the burns; he told her that he got them from work. Francis did not cause the burns on Defendant's arm. Francis testified that she did not remove the four-by-four section of carpet in her apartment and did not give Defendant permission to remove the carpet. Francis also explained that she owned the carpet cleaner but had never cleaned up blood with it.

Special Agent Harrison Putnam, with the Federal Bureau of Investigation, was tendered and accepted by the trial court as an expert witness in cell phone site record analysis. Putnam analyzed Dunbar's and Defendant's cell phone records and reported his findings in Exhibit 128. His report indicated that, on the night of 9 June 2017, Defendant's and Dunbar's cell phones connected at least four calls between 7:00 p.m. and 9:00 p.m. Defendant's first call, made at 7:20:42 p.m., was placed to Dunbar's cell phone and connected with a cell site close to the Francis residence. Dunbar's cell phone records indicate a corresponding call with Defendant, connecting at approximately 7:20:44 p.m., and that Dunbar's cell phone connected with a cell site close to Dunbar's residence. Defendant made another call to Dunbar's cell phone at 8:06 p.m., and Defendant's cell phone connected with a cell site close to the Francis residence. Dunbar's cell phone records indicate a corresponding call with Defendant's at 8:06 p.m. and that Dunbar's cell phone connected with a cell site "south-southwest of the [Francis] residence." Dunbar then made two calls to Defendant's cell phone, one at 8:16 p.m. and another at 8:20 p.m., and those calls "used the same cell site" "that is nearest to the [Francis] address." Defendant's cell phone records indicate two corresponding calls with Dunbar at 8:16 p.m. and 8:20 p.m. and that Defendant's cell phone connected with a cell site close to the Francis residence. Putnam explained that the 8:16 p.m. and 8:20 p.m. calls between Dunbar and Defendant "used a cell site that is closer to the vicinity of the [Francis] residence[.]" After the 8:20 p.m. call, Dunbar's cell phone activity ceased. Defendant placed another call at 3:38 a.m., and his cell phone connected with a cell site that was southeast of the Francis residence and located in the general area of where the car fire was located.

Defendant was indicted in July 2017 and April 2020 on the charges of: (1) first-degree murder; (2) burning personal property; (3) having attained habitual felon status; and (4) possession of a telephone by an inmate. The charges of first-degree murder and burning personal property came on for jury trial on 30 August 2021. At the charge conference, the trial court indicated it would charge the jury on first-degree

and second-degree murder. Defendant requested the trial court instruct the jury on voluntary manslaughter; the trial court denied Defendant's request. The trial court noted Defendant's objection to this ruling and stated that it was "preserved for appellate review[.]" Three days later, the jury found Defendant guilty of second-degree murder and of burning personal property. Following the jury's verdict, Defendant pled guilty to attaining habitual felon status and possession of a telephone by an inmate.

Defendant was sentenced as a record level IV offender. The trial court imposed an active sentence of a minimum of 360 months' imprisonment on the second-degree murder conviction and ordered Defendant to pay $4500 in restitution. The trial court consolidated the burning personal property, habitual felon, and possession of a telephone by an inmate convictions, sentencing Defendant to 60-84 months' imprisonment, to begin at the expiration of the second-degree murder sentence. Defendant gave notice of appeal from his second-degree murder and burning personal property convictions.

II. Discussion

A. Jury Instruction

[1] Defendant first argues that the trial court erred by denying his request to charge the jury on voluntary manslaughter.

We review a trial court's decision regarding jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). A trial court must give a requested jury instruction only if it is "correct in itself and supported by [the] evidence." *State v. Locklear*, 363 N.C. 438, 464, 681 S.E.2d 293, 312 (2009) (quotation marks and citation omitted). "A jury must be instructed on a lesser included offense only when evidence has been introduced from which the jury could properly find that the defendant had committed the lesser included offense." *State v. Woodard*, 324 N.C. 227, 232, 376 S.E.2d 753, 756 (1989) (citation omitted). When determining whether the evidence supports a jury instruction on a lesser-included charge, the trial court must consider the evidence in the light most favorable to the defendant. *State v. Clegg*, 142 N.C. App. 35, 46, 542 S.E.2d 269, 277 (2001).

"First-degree murder is the unlawful killing—with malice, premeditation and deliberation—of another human being." *State v. Arrington*, 336 N.C. 592, 594, 444 S.E.2d 418, 419 (1994) (citations omitted). Second-degree murder is the unlawful killing of another human being with malice but without premeditation and deliberation. *State v. Arrington*, 371 N.C. 518, 523, 819 S.E.2d 329, 332 (2018) (citation omitted). Voluntary manslaughter

is a lesser included offense of first degree and second-degree murder. *See State v. Wrenn*, 279 N.C. 676, 681-82, 185 S.E.2d 129, 132 (1971). "In order to receive an instruction on voluntary manslaughter, there must be evidence tending to show a killing was committed in the heat of passion suddenly aroused by adequate provocation, or in the imperfect right of self-defense." *State v. Simonovich*, 202 N.C. App. 49, 53, 688 S.E.2d 67, 71 (2010) (quotation marks, brackets, and citations omitted).

Here, Defendant argues that the evidence tended to show that he acted in the heat of passion but does not assert that the evidence tended to show that he acted in imperfect self-defense.

To receive an instruction based on a theory of heat of passion, there must be evidence that: (1) defendant committed the act "in the heat of passion; (2) defendant's passion was sufficiently provoked; and (3) defendant did not have sufficient time for his passion to cool off." *State v. Bare*, 77 N.C. App. 516, 522-23, 335 S.E.2d 748, 752 (1985) (citation omitted). These elements may be shown by the State's evidence or by the defendant's evidence. *Id.* Mere speculation as to the elements is not sufficient. *State v. Gary*, 348 N.C. 510, 524, 501 S.E.2d 57, 67 (1998).

Here, no evidence in the record supports a finding that Defendant acted "in the heat of passion." The evidence presented tended to show that Dunbar and Defendant texted about meeting to potentially have sex, but no evidence tended to show the two actually had sex. The evidence further showed that Dunbar did not disclose his HIV-status to Defendant via text, and instead responded yes when asked if he was "safe." While the record shows that Dunbar was HIV-positive, no evidence tended to show that Dunbar told Defendant he was HIV-positive, or that Defendant learned of this HIV-status and became angry.

Defendant theorizes that a juror "could've concluded that [Defendant] had penetrative anal sex with Dunbar" and "could've reasonably concluded [Defendant] was significantly concerned about having unprotected sex with another man who had an STD or HIV," and that this could have caused Defendant's "actions to spawn suddenly and passionately." These claims are pure speculation and are not sufficient. *See id.* Further, the record is devoid of evidence that Defendant's passion was sufficiently provoked. Additionally, Defendant does not address in his brief whether evidence tended to show sufficient time for his passions to cool.

As there was no "evidence tending to show a killing was committed in the heat of passion suddenly aroused by adequate provocation," the trial court did not err by refusing to give the instruction on the

lesser-included offense of voluntary manslaughter. *Simonovich*, 202 N.C. App. at 53, 688 S.E.2d at 71 (quotation marks, brackets, and citation omitted).

B. Non-meritorious arguments

[2] Defendant makes two other "non-meritorious arguments" on appeal, asserting that (1) the record evidence was not "clear and positive regarding second-degree murder" and (2) the trial court's "inference stacking holding is wrong."

1. Second-Degree Murder

Defendant argues that the State's evidence was not clear and positive as to the element of malice.

"Where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on the lesser included offense is required." *State v. Thomas*, 325 N.C. 583, 594, 386 S.E.2d 555, 561 (1989) (citation omitted). "Second-degree murder is the unlawful killing of another person with malice, but without premeditation and deliberation." *State v. Cozart*, 131 N.C. App. 199, 203, 505 S.E.2d 906, 909 (1998) (citations omitted). Our Courts recognize three theories of proof of malice: (1) "express hatred, ill-will, or spite"; (2) an act inherently dangerous to human life that is done "in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief"; or (3) "a condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *State v. Coble*, 351 N.C. 448, 450-51, 527 S.E.2d 45, 47 (2000) (quotation marks and citation omitted). Malice is a state of mind and thus rarely proven with direct evidence; it is ordinarily proven by circumstantial evidence from which malice may be inferred. *State v. Sexton*, 357 N.C. 235, 238, 581 S.E.2d 57, 58 (2003). Malice may be inferred by the nature of the crime and the circumstances of the victim's death. *See State v. Rick*, 126 N.C. App. 612, 618, 486 S.E.2d 449, 452 (1997) (inferring implicit malice from the nature of the crime where the defendant was seen driving alone in the victim's car; the victim's house was in disarray; marks on the ground in the victim's backyard matched the same dimensions as the cement block that was used to weigh down the victim's body in water; and defendant left a note for a friend saying that he intended to kill himself because he had done something bad).

Here, as in *Rick*, implicit malice can be inferred by the nature of the crime and the circumstances of Dunbar's death: Dunbar's car was

taken about 150 feet off of the road and set on fire; Dunbar's body was locked in the trunk of the car and burned down to its skeletal remains; the license plate was removed from the car; Dunbar's blood was found in Francis' residence where Defendant would stay and where his driver's license was found; a four-by-four section of the carpet had been removed and replaced with new carpet and padding; there were bleach and blood stains found under and around the replaced carpet; and a carpet cleaning machine, located in Francis' residence, contained Dunbar's DNA in the intake nozzle and inside basin. This evidence supports the element of malice.

2. Inference Stacking

Defendant asserts that the trial court erred in refusing to charge voluntary manslaughter "because – from its perspective – it required too many inferences." While it is true that the trial court stated, "I stand by my legal reasoning that I may not base – a charge may not be based upon one inference layer[ed] upon another[,]" the trial court did not base its refusal to give a voluntary manslaughter instruction solely on inference stacking. The trial court explained that there was not "a scintilla of any such" evidence to support such an instruction and that any offense other than first-degree and second-degree murder would be "built upon the absence of evidence[.]" We agree that no evidence presented at trial tended to show and support an instruction on voluntary manslaughter, as there was no evidence presented of the element of heat of passion, and thus the trial court did not err by refusing to charge the jury on the lesser-included offense of voluntary manslaughter.

III. Conclusion

As no evidence tended to show that "a killing was committed in the heat of passion suddenly aroused by adequate provocation," the trial court did not err by refusing to instruct the jury on the lesser-included offense of voluntary manslaughter. *Simonovich*, 202 N.C. App. at 53, 688 S.E.2d at 71 (quotation marks, brackets, and citations omitted).

NO ERROR.

Judges TYSON and RIGGS concur.

STATE OF NORTH CAROLINA
v.
CALVIN RAY HOCUTT, DEFENDANT

No. COA22-851

Filed 5 July 2023

Evidence—hearsay—recorded recollection—foundation—examined and adopted—eyewitness drunk, legally blind, and suffering from short-term memory issues

In a prosecution for felony cruelty to an animal arising from the fatal shooting of a dog, the trial court committed plain error by admitting written hearsay as substantive evidence where the eyewitness who gave the statement (dictated to his son because the eyewitness could not read or write) was drunk (at the time of the shooting and at the time he made the statement), legally blind, and suffered from short-term memory issues. The eyewitness's signature on the statement was insufficient to establish the necessary foundation to admit the hearsay statement under Evidence Rule 803(5) because the statement was not read back to the eyewitness at the time it was transcribed so that he could adopt it when the matter was fresh in his memory, the eyewitness's in-court testimony contradicted his written statement, and the eyewitness could recall the events described in the written statement. Because the improperly admitted hearsay statement was the only evidence definitively identifying defendant as the person who shot the dog, the error had a probable impact on the jury's verdict and therefore required a new trial.

Appeal by Defendant from judgment entered 17 February 2022 by Judge William W. Bland in Wayne County Superior Court. Heard in the Court of Appeals 25 April 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Brenda Menard, for the State.

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

RIGGS, Judge.

Defendant Calvin Ray Hocutt appeals from a judgment entered after a jury found him guilty of felony cruelty to an animal. Mr. Hocutt contends, among other arguments, that the trial court committed plain error in admitting written hearsay as substantive evidence when: (1) the eyewitness who gave the written statement testified at trial that he was unable to remember the most incriminating portions of that statement; (2) that same witness testified he was drunk, legally blind, and suffered from short-term memory issues at the time the statement was made; and (3) the admission of the statement as substantive evidence and subsequent publication to the jury was contrary to the North Carolina Rules of Evidence and so prejudicial as to warrant a new trial. The State disagrees, countering that the written statement was admissible under the hearsay exception found in Rule 803(5), which allows for the admission of recorded hearsay "concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately . . . ." N.C. R. Evid. 803(5) (2021). Because we hold that the State failed to establish the necessary foundation to admit the disputed hearsay evidence under Rule 803(5), and because said hearsay was the only evidence introduced tending to show Mr. Hocutt as the perpetrator of the crime, we agree with Defendant that the trial court plainly erred and order a new trial.

I. FACTUAL AND PROCEDURAL HISTORY

On 21 March 2022, Michael Lozier and his father, Thomas "Tommy" Lozier, each lived in adjacent single-wide motorhomes that they rented from their neighbor, Jean "Rambo" Gelin, in Dudley, North Carolina. Michael was in his room that afternoon when he received a phone call from his stepmother asking him to come outside because she had heard a gunshot in the neighborhood. He met his father, who was drunk, in their shared driveway; the two did not think much of the event, as gunshots were common in the neighborhood.

Rambo returned home that evening after dark. One of his dogs, Campbell, was not in his usual place by Rambo's backdoor and, on the following morning, Rambo received a text message from Tommy's wife that Campbell had been shot the day before. Rambo met with Tommy and Michael in Rambo's front yard, and Tommy told Rambo that Mr. Hocutt had shot Campbell. Rambo called the Wayne County Sheriff's Department at Tommy's urging, and Deputy Brandon Elrod responded to the shooting.

When Deputy Elrod arrived, he met Michael, Tommy, and Rambo inside Rambo's fenced front yard. Campbell's body was also in the front

yard, and Deputy Elrod observed a small entry wound in the dog's chest. A search of the area for other evidence, such as shell casings, proved unsuccessful. Tommy did offer to give a statement; however, that statement was dictated to his son because Tommy could not read or write. Michael transcribed the following statement, as signed by Tommy:

> Yesterday about 5:00 pm I was in the nabors [sic] yard an [sic] I herd [sic] a gun shot at Rambo's house (121/ Brookterrace) an [sic] seen [Mr. Hocutt] runing [sic] away from Rambo's front gate with a rifle (22) back to his house[.] [Mr. Hocutt] then told me he shot the dog in the chest an [sic] killed him[.] I herd [sic] a real loud wine [sic] an [sic] then it stoped [sic] all together [sic].

At the time Tommy signed the document, no one read it back to him to confirm its accuracy. The document also did not disclose that Tommy was both legally blind and drunk at the time he saw Mr. Hocutt running from Rambo's house.

Detective Milburn Powers interviewed Rambo, Tommy, and Michael later that week. Detective Powers also obtained and executed a search warrant for Mr. Hocutt's home in an attempt to locate a small-caliber rifle, but no evidence was obtained as a result. Detective Powers subsequently learned that Mr. Hocutt did own such a rifle, but that it had been reported stolen on 4 April 2020.

Mr. Hocutt was indicted for felony cruelty to animals on 1 March 2021. Trial began on 15 February 2022 and, after jury selection, the trial court held a *voir dire* hearing regarding Tommy's recorded out-of-court statement. Michael testified first, telling the trial court that he transcribed his father's statement because his father could not read or write. He further testified that, while the trial court was on break after jury selection, he had spoken with Tommy, Mr. Hocutt, and Mr. Hocutt's father, Joshua Smith,[1] about Tommy's anticipated testimony. In that conversation:

> [Tommy] was saying to [Mr. Smith], . . . it weren't fair, you know . . . .
>
> . . . .
>
> [T]hat Rambo was kind of like, ah—you know, pushing him towards, you know . . . making it that, you know, the event . . . , whatever, you know, the statement that he

1. Mr. Smith was also Tommy's co-worker.

> wrote right there, he said he felt that he, you know, he was kind of pushed into making that statement by the deputy and Rambo and whoever, you know[.]

Michael then confirmed for the trial court that he was going to testify truthfully and without pressure from anyone else.

Tommy's *voir dire* testimony followed, during which he stated that his written statement was "pretty much [accurate] or close to it." He acknowledged that he signed it; when asked if his son wrote down what he had said, Tommy testified "I guess. I guess he did because he's sitting in the front seat and I'm in the back seat." He also testified that he was drunk when he saw Mr. Hocutt the day before, drunk at the time he gave the statement, and that he and Mr. Smith wanted to bring that to the prosecutor's attention. On cross-examination, Tommy testified that the written statement was never read back to him because "I had trust in my son that he was . . . filling it out as he was listening to it, I guess." Like Michael, he assured the trial court that he would testify truthfully, to the best of his recollection, and without influence.

Once the jury returned to the courtroom, the State called Michael as its first witness. Michael testified consistent with the above recitation of the facts, and Tommy's written statement was admitted into evidence without objection during this testimony. He further testified that Tommy was drunk on a daily basis, including on the dates in question, due to several tragic deaths in the family.

Tommy testified next. When asked if he saw Mr. Hocutt carrying anything on the day of the shooting, Tommy testified:

> And I'm, I'm not really sure that I remember, because I were drinking that day, I was drinking that day, but I, I was saying that—and I have short-term memory, and it's hard for me to remember my, my own birthday, and, um . . . as long as it's been since this happened . . . .

On follow-up questioning, he further testified:

> I heard a gunshot and I'd seen Calvin coming back from where his dog . . . [,] [m]e and [Mr. Smith[2]] was out there talking and when [Mr. Hocutt] come back, I mean . . . I can't—it's hard for me to remember, I know, I know he come across, back across the road, he told [Mr. Smith] too

2. Tommy would later contradict this detail, stating he was by himself in his yard when he heard the gunshot.

> the dog was dead or something, I don't know, I, I heard a gunshot, the dog is dead, and so I put two and two together.
>
> [THE STATE]: Did you see [Mr. Hocutt] with a gun?
>
> [TOMMY]: I seen him with something in his hand, I'm not going to say it was a gun, because I was impaired and, and, and—I still can't remember.

When presented with his written statement by the State, Tommy testified that he could not read or write and was legally blind, though he did confirm that he and his son had signed the statement. The prosecutor read the statement aloud for the jury and asked if that was "the statement as you recall on March 22?" Tommy replied as follows:

> I'm, I'm—I may have, yeah, I may have.
>
> . . . .
>
> I may have, I, I ain't going to be as for sure about it because I'm not going to jeopardize myself when I can't remember, you know, I don't know.
>
> [THE STATE]: Today you do not remember what you saw on March 22.
>
> [TOMMY]: Like I said, I seen him coming back, I don't—I couldn't have told you if it could have been a stick or it could have been a—now I couldn't tell you, but then that's what it looked like.
>
> [THE STATE]: And that's the statement [Mr. Hocutt] made to you then?
>
> . . . .
>
> [TOMMY]: I can't say about that now; I can't remember that.

The State then published the written statement to the jury without objection.

On cross-examination, Tommy confirmed to the jury that he was unable to read the statement and that he did not remember whether it had ever been read back to him. He also testified that he had memory issues, was legally blind, and was drunk at the time of the shooting. As for whether Mr. Hocutt had fired weapons in the neighborhood in the past, Tommy testified on redirect that law enforcement "had been over there two or three times about them—they practice—target practice

behind the house." Finally, on re-cross, Tommy gave the following testimony concerning what he witnessed Mr. Hocutt carrying:

> I didn't know what it was, I know—I know that they run the dog away from there, they run the dog away and the dog come back, this is what—that I saw, and then he kept over there and [Mr. Hocutt] went running and I don't know, I'm not going to say if he had a gun, if he had a stick, because [Mr. Smith] was the one that had a stick, he went over there and killed—killed his dog—because then I'd be mad too, and I don't, I don't . . . I don't know what to say.
>
> . . . .
>
> I can't say it weren't a gun, I can't—I don't know what it was. I don't want to say that it was a stick and it was a gun or if it was a gun it was a stick. Do you understand?

After the Loziers testified, Deputy Elrod, Detective Powers, and Rambo all took the stand. Deputy Elrod detailed his receipt of Tommy's statement and immediate search of Rambo's yard; Detective Powers recounted his interview with Tommy and search of Mr. Hocutt's home; and Rambo testified to his lack of prior interactions with Mr. Hocutt, his discovery of Campbell's body, and Tommy's statements to him that Mr. Hocutt killed Campbell.

Mr. Hocutt's counsel moved to dismiss the charge against him at the close of the State's evidence and renewed that motion at the close of all evidence. The trial court denied both motions and proceeded to the charge conference. During the conference, Mr. Hocutt's counsel offered no changes to the pattern jury instructions proposed by the trial court. At the conclusion of the charge conference, the trial court stated, without objection, that "I don't think there's any instruction that would relate to [Tommy's written statement], that statement. There's not an admission or a confession, just a statement by a witness. And we talked about witnesses already."

Following instruction and deliberation, the jury returned a guilty verdict. Mr. Hocutt was sentenced to six to 17 months' imprisonment, which was suspended for 18 months' special probation, including a four-month active term. Mr. Hocutt gave oral notice of appeal in open court.

II. ANALYSIS

Mr. Hocutt first argues that the admission of Tommy's written statement—and the repetition of that hearsay in testimony from Detective

Powers and Rambo—as substantive evidence without a limiting instruction amounted to plain error, asserting the statements do not fall within any applicable hearsay exception in the North Carolina Rules of Evidence. The State presents the counterargument that Rule 803(5) supplies just such an exception, at least as far as the written hearsay statement is concerned. After consideration of the Rule, our precedents, and the record in this case, we ultimately agree with Mr. Hocutt: Tommy's written statement was never "shown to have been made *or adopted by the witness when the matter was fresh in his memory*" as required by the Rule's plain language, N.C. R. Evid. 803(5) (emphasis added), and that statement—as well as the testimony from Detective Powers and Rambo repeating that hearsay—should not have been admitted as substantive evidence and without a limiting instruction. And, because Tommy's hearsay statements were the only evidence definitively identifying Mr. Hocutt as the person who shot Campbell, the trial court's error had a probable impact on the jury's guilty verdict. Finally, as our resolution of this issue requires a new trial, we decline to address the remaining arguments presented in Mr. Hocutt's brief.

A. Standard of Review

When evidence is admitted without objection, plain error review of that evidence's admissibility applies on appeal when expressly argued in the defendant's brief. N.C. R. App. P. 10(a)(4) (2022); *State v. Betts*, 377 N.C. 519, 523, 858 S.E.2d 601, 604 (2021). Under that standard:

> [A] defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326 (2012) (citations and quotation marks omitted).

B. Rule 803(5) and Tommy's Statement

As discussed above, Rule 803(5) allows as substantive evidence:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and

> accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly.

N.C. R. Evid. 803(5). Our Court has summarized this Rule as consisting of three necessary parts:

> (1) The document must pertain to matters about which the declarant once had knowledge; (2) The declarant must now have an insufficient recollection as to such matters; (3) The document must be shown to have been made by the declarant or, *if made by one other than the declarant, to have been examined and adopted when the matters were fresh in her memory.*

State v. Love, 156 N.C. App. 309, 314, 576 S.E.2d 709, 712 (2003) (cleaned up) (citation omitted) (emphasis added). Under the third prong, "the record need not have been made by the witness herself; it is enough that she able to testify that (1) *she saw it at a time when the facts were fresh in her memory*, and that (2) it actually represented her recollection at the time." *State v. Spinks*, 136 N.C. App. 153, 159, 523 S.E.2d 129, 133 (1999) (cleaned up) (citation and quotation marks omitted) (emphasis added).

In *Spinks*, this Court examined a written out-of-court statement and held that it was inadmissible because it was not adopted by the declarant consistent with the Rule. There, the State's witness could not recall the events at issue and was presented with "a summary of [her] oral statement, as written by a police investigator in the course of his investigation of this case." *Id.* at 158, 523 S.E.2d at 133. However, "[w]hen asked whether she had read the document prior to signing it, [the witness] stated, 'I didn't even read it. I just signed this piece of paper.' " *Id.* She further testified that she could not remember some parts of the statement, leading the State to offer—and the trial court to accept—the written statement as substantive evidence under Rule 803(5) and over the defendant's objection. We ultimately held that this ruling was in error for failure to satisfy the Rule's third requirement:

> Here, the trial court erred in allowing the statement to be read into evidence without a showing that the statement 'was made or adopted by [the witness] when the matter was fresh in [her] memory and to reflect that knowledge correctly." Subsequent to the admission of the statement, [the witness's] testimony makes it clear that not only does she not recall the matters in the statement, she disagrees with some of the statements found therein. It appears

> from [the witness's] testimony that she did not write the statement herself, and that she did not read it before signing it. . . . Further, by the plain language of Rule 803(5), it was error to admit the written statement as an exhibit.

Id. (citation omitted).

The Rule's third prong is likewise unsatisfied here. It is undisputed Tommy did not write the statement attributed to him, as he is illiterate, legally blind, and was drunk on the day it was transcribed. There is likewise no dispute that he did not read the statement before signing it for the same obvious reasons. Finally, there was no testimony that anyone ever read the statement back to him at the time it was transcribed; to the contrary, he alternatingly testified that no one read it back to him or that he could not remember whether anyone did so. And while he did testify at trial that the statement appeared to be accurate, it cannot be said that he was adopting it "when the matter was fresh in his memory," N.C. R. Evid. 803(5), as he repeatedly testified that he could not recall key facts recounted in the written statement and, on one occasion, contradicted them.

Though the State argues that the statement was adequately adopted because Tommy signed the statement, *Spinks* makes clear that his signature on the statement is inadequate to satisfy the third prong of Rule 803(5) when: (1) it was never read back to him for adoption; (2) his in-court testimony contradicted the statements contained therein; and (3) he could not recall the events described. *Spinks*, 136 N.C. App. at 159, 523 S.E.2d at 133. Finally, the trial court likewise erred in admitting the statement as an exhibit, in contravention of the express provisions of the Rule. *Id.*

Though we hold that Tommy's statement was admitted without adequate foundation under Rule 803(5), nothing herein should be construed to hold that an illiterate witness's recorded recollection may never be admissible. An audio recording of a witness's statement presents a distinctly different set of circumstances than those found here. Alternatively, had the trial court heard testimony that the statement was read aloud to Tommy at the time it was recorded, and had Tommy testified that the statement read to him during *voir dire* matched his recollection of the statement as previously read to him, the trial court could have admitted the statement as substantive evidence under the Rule. And the residual hearsay exception allows the trial court to admit, in its discretion, a hearsay statement "not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of

trustworthiness[.]" N.C. R. Evid. 803(24) (2021). *See also State v. Reid*, 380 N.C. 646, 662, 869 S.E.2d 274, 287 (2022) (noting that admission of hearsay under the residual exception is in the trial court's discretion upon consideration of several trustworthiness factors). Finally, hearsay may sometimes be admissible as non-substantive evidence with an appropriate limiting instruction. N.C. R. Evid. 105 (2021). None of the above alternatives appears in this record, however, and we hold the trial court erred by admitting Tommy's hearsay statement as substantive evidence and without providing a limiting instruction.

C. Prejudice

Having shown error in the statement's admission as substantive evidence and without a limiting instruction, Mr. Hocutt argues that the mistake was so prejudicial as to amount to plain error because: (1) all the other evidence concerning the shooting was circumstantial; and (2) Tommy's remaining testimony was "only . . . that he could not remember if [Mr. Hocutt] had a gun and that [Mr. Hocutt] said the dog was dead." The State does not argue lack of prejudice, and instead rests on its predicate—and now rejected—argument that any admission of the statement was proper under Rule 803(5). We agree with Mr. Hocutt that the trial court's error was so prejudicial as to amount to plain error necessitating a new trial.

When Tommy's hearsay statements are excised from consideration, we can identify no remaining direct evidence that tends to show or identifies Mr. Hocutt as Campbell's killer. This case is thus distinct from cases in which the admission of hearsay, while erroneous, did not amount to plain error. *Cf. State v. Waddell*, 351 N.C. 413, 423, 527 S.E.2d 644, 651 (2000) (holding error in admitting hearsay testimony was inadequately prejudicial on plain error review of first-degree sex offense conviction because "there was abundant evidence of fellatio through defendant's own admissions to support his conviction").

Absent the admission of Tommy's hearsay statements as substantive evidence and without a limiting instruction,[3] the jury would be left only with Tommy's circumstantial testimony that Mr. Hocutt: (1) was

3. As noted above, Tommy's written hearsay statement that Mr. Hocutt killed Campbell was repeated in later testimony by Detective Powers and Rambo. Unlike Mr. Hocutt, the State makes no argument addressing the impact of this testimony on the prejudicial effect of the erroneous admission and publication of Tommy's hearsay statement. Given that this testimony should have been subject to the same limiting instruction and was given *after* the erroneous admission and publication of Tommy's written statement, said testimony increased the probative value of that inadmissible hearsay and appears to reinforce—rather than undercut—the prejudicial nature of the error committed below.

seen near Rambo's property carrying something; and (2) told Tommy and Mr. Smith that Campbell was dead. No other evidence placed Mr. Hocutt at the scene, and no other evidence suggested he was armed or shot Campbell. And Tommy's in-court testimony was itself of questionable veracity, given his other testimony that he was blind, drunk, and suffered from short-term memory loss at the time of the shooting. In light of this thin evidence and the lack of any contrary argument from the State, the admission of Tommy's out-of-court statement had a probable impact on the jury's verdict that Mr. Hocutt shot and killed Campbell intentionally and with malice.

III. CONCLUSION

For the foregoing reasons, we hold that the trial court plainly erred in admitting Tommy's hearsay statement as substantive evidence without adequate foundation, and Mr. Hocutt is entitled to a new trial.

NEW TRIAL.

Judges TYSON and COLLINS concur.

STATE OF NORTH CAROLINA
v.
WILLIE LEGRAND, JR. A/K/A WILLIE LEGRANDE, DEFENDANT

No. COA22-586

Filed 5 July 2023

1. Robbery—attempted armed robbery—intent—implied demand—sufficiency of evidence

In a prosecution for attempted armed robbery and attempted first-degree murder, the State presented substantial evidence from which a jury could reasonably infer that defendant intended to rob the victim at gunpoint where defendant's actions in tapping his revolver against the car window and demanding that the victim open his door constituted an implied demand coupled with the threatened use of a gun.

2. Homicide—attempted first-degree murder—intent—multiple gunshots fired at victim—sufficiency of evidence

In a prosecution for attempted first-degree murder and attempted armed robbery, the State presented substantial evidence from

which a jury could infer that defendant intended to kill the victim, including that defendant fired multiple gunshots toward the victim as the victim ran away. Even though defendant argued that the first gunshot resulted from an accidental discharge during a struggle over the gun and that the other two shots did not come close to hitting the victim and were only meant to scare or warn the victim, the evidence was sufficient to survive defendant's motion to dismiss.

3. Sentencing—prior record level—out-of-state convictions—classification—substantial similarity

The trial court did not err when sentencing defendant (for possession of a firearm by a felon) as a prior record level V after the court made a finding that defendant's out-of-state felony convictions were substantially similar to North Carolina offenses and could be classified accordingly. The trial court reviewed the prior convictions in open court and fully executed the sentencing worksheet with its finding of substantial similarity, and defendant presented no evidence to overcome the presumption of regularity.

Appeal by Defendant from Judgment entered 02 September 2021 by Judge James P. Hill, Jr. in Randolph County Superior Court. Heard in the Court of Appeals 21 March 2023.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for Defendant-Appellant (allowed as substitute counsel by order filed 20 December 2022 and filed Defendant-Appellant's Reply Brief on 7 February 2023; Record on Appeal and Defendant Brief filed by Paul F. Herzog, allowed to withdraw as attorney of record by order filed 21 December 2022).

RIGGS, Judge.

Defendant Willie Legrand, Jr., appeals from judgment following a jury verdict convicting him of possession of firearm by a felon, attempted robbery with a dangerous weapon, and attempted first-degree murder. Mr. Legrand raises three issues on appeal. In his first two issues, Mr. Legrand argues the trial court erred in denying his motion to dismiss the attempted armed robbery and attempted murder charges. Additionally,

he argues the trial court erred in calculating his prior record level. After careful review, we hold the trial court did not err.

I. FACTUAL AND PROCEDURAL HISTORY

On 19 October 2018, Defendant Willie Legrand, Jr. approached Richard Jurgensen, who was leaving a convenience store and returning to his parked car in Asheboro, North Carolina. After Mr. Jurgensen got into his car, Mr. Legrand yanked on Mr. Jurgensen's locked driver's side door handle. When the door did not open, Mr. Legrand told Mr. Jurgensen to, "Open the door, open the door," and he tapped on Mr. Jurgensen's window with a revolver while motioning for Mr. Jurgensen to exit. Mr. Jurgensen believed his only option was to open the door when Mr. Legrand stated, "What's the matter with you? Do you want to get shot. [sic]."

Upon exiting the car, Mr. Jurgensen tried to grab the gun from Mr. Legrand because he noticed the revolver was not cocked, and they began to struggle over the revolver. Mr. Jurgenson shoved Mr. Legrand, causing him to fall to the ground. When Mr. Legrand fell, his right arm hit the ground and the gun fired. Mr. Jurgensen ran for the store while shouting, "Help, robbery, call 911." Mr. Legrand got back on his feet and raised the gun in Mr. Jurgensen's direction. He fired a second gunshot that struck the wall of the convenience store approximately six feet away from Mr. Jurgensen. Mr. Legrand then fired a third shot which Mr. Jurgensen said was aimed above his head. Police arrived at the store to investigate, but Mr. Legrand left the site before the police arrived.

The State issued two sets of indictments. On 5 November 2018, the State charged Mr. Legrand with possession of firearm by a felon, attempted robbery with a dangerous weapon, second-degree kidnapping, and attempted first-degree murder. On 3 June 2019, the State alleged in its second set of indictments that Mr. Legrand was a habitual felon and violent habitual felon.

A jury trial began 30 August 2021 in the Randolph County Superior Court. The court denied Mr. Legrand's motion to dismiss all charges but later granted his renewed motion to dismiss the second-degree kidnapping charge. On 2 September 2021, the jury returned a guilty verdict on the remaining charges. Mr. Legrand pleaded guilty to the habitual felon and violent habitual felon charges.

The court proceeded with Mr. Legrand's sentencing on 2 September 2021. The State introduced Mr. Legrand's "criminal history record" in Exhibits 20 through 24. Mr. Legrand's criminal history included several

federal felony convictions. After reviewing the exhibits, the trial court found Mr. Legrand's out-of-state convictions were substantially similar to state offenses, noting:

> THE COURT: The [c]ourt, based upon the information presented, finds by preponderance of the evidence that any non-North Carolina offenses included in the stipulation as to prior conviction is substantially similar to North Carolina offenses, and North Carolina classification assigned to said respective offenses is accurate. [The c]ourt, therefore, concludes that defendant would be prior record level V for purposes of felony sentencing.

The trial court checked a box on Mr. Legrand's prior record level worksheet stating similar language:

> For each out-of-state conviction listed in Section V on the reverse, the [c]ourt finds by a preponderance of the evidence that the offense is substantially similar to a North Carolina offense and that the North Carolina classification assigned to this offense in Section V is correct.

At the conclusion of the sentencing portion of the trial, the court imposed two sentences of life without the possibility of parole for the convictions of attempted murder and attempted armed robbery. Additionally, the court sentenced Mr. Legrand to 127 to 165 months imprisonment for the conviction of possession of firearm by a felon. The court entered a written judgment consistent with the sentence delivered from the bench at the conclusion of the trial. Mr. Legrand gave an oral notice of appeal on the record.

II. ANALYSIS

On appeal, Mr. Legrand argues the trial court improperly denied his motion to dismiss the attempted armed robbery and attempted murder charges for insufficient evidence. Additionally, Mr. Legrand argues the court improperly calculated his prior record level. After careful review, we hold the trial court did not err.

A. Motion to Dismiss the Attempted Armed Robbery

[1] Mr. Legrand argues the State's evidence did not support the intent element of attempted armed robbery. He reasons the State's evidence did not show he made an express demand for money or property; therefore, evidence of intent was insufficient. We disagree.

1. Standard of Review

This Court reviews *de novo* whether a trial court erred in denying a motion to dismiss for insufficient evidence on each element of a criminal offense. *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016). "In ruling upon a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences which may be drawn from the evidence." *State v. Poole*, 154 N.C. App. 419, 424, 572 S.E.2d 433, 437 (2002) (quoting *State v. Hairston*, 137 N.C. App. 352, 354, 528 S.E.2d 29, 30 (2000)).

2. Denial of motion to dismiss attempted armed robbery was proper

Attempted robbery with a dangerous weapon requires "(1) the unlawful attempted taking of personal property from another, (2) the possession, use or threatened use of 'firearms or other dangerous weapon, implement or means,' and (3) danger or threat to the life of the victim." *State v. Wilson*, 203 N.C. App. 110, 114, 689 S.E.2d 917, 921 (2010) (quoting *State v. Torbit*, 77 N.C. App. 816, 817, 336 S.E.2d 122, 123 (1985)) (citation omitted). "The gravamen of the offense is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery." *State v. Ballard*, 280 N.C. 479, 485, 186 S.E.2d 372, 375 (1972). When reviewing a trial court's denial of a motion to dismiss for insufficient evidence, this Court considers "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Lee*, 218 N.C. App. 42, 56, 720 S.E.2d 884, 894 (2012).

Mr. Legrand argues that because there was no spoken demand for money or property, the evidence was insufficient to support a charge of attempted robbery. However, Mr. Legrand's conduct along with Mr. Jurgensen's testimony supports a reasonable inference of attempted armed robbery. In *State v. Poole*, this Court affirmed the lower court's denial of a motion to dismiss when the State presented evidence showing the defendant pointed a gun at the victim and said "give it up" when the two were in a parking lot. 154 N.C. App. at 423-255, 572 S.E.2d at 436-38. The Court held that this evidence was sufficient to support a reasonable inference of intent for attempted robbery. *Id.* at 425, 572 S.E.2d at 437-38.

Similarly, here, the jury heard testimony that Mr. Legrand tapped on Mr. Jurgensen's window with a revolver and demanded Mr. Jurgensen

open his car door. Although Mr. Legrand argues his conduct could indicate his intent to commit crimes other than robbery, that argument fails because on these facts, a jury could reasonably infer an intent to commit attempted armed robbery. Specifically, based on this record, a jury could make a reasonable inference that Mr. Legrand made an overt act in furtherance of an attempted armed robbery and that he did so by way of an implied demand coupled with his use of a gun.

Relying erroneously on *Powell*, *Smith*, and *Davis*, Mr. Legrand argues that because the encounter did not happen in a retail setting, a jury cannot reasonably infer intent for robbery from his words. *State v. Smith*, 300 N.C. 71, 265 S.E.2d 164 (1980); *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980); *State v. Davis*, 340 N.C. 1, 455 S.E.2d 627 (1995). However, Mr. Legrand misconstrues the central element of these decisions: "the gravamen of the offense is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery"—not the location of that overt act. *Ballard*, 280 N.C. 479, 485, 186 S.E.2d 372, 375. *Cf. State v. Jacobs*, 31 N.C. App. 582, 584, 230 S.E.2d 550, 551-52 (1976) (holding evidence of an overt act was insufficient where the defendant made no gesture indicating an intent to touch, no threatened use of a gun, and no express or implied demand). Here, Mr. Legrand displayed a gun, threatened its use, and made an obvious implied demand. As in *Poole*, we find that, on these facts, a jury could make a reasonable inference of attempted robbery.

Accordingly, we affirm the ruling of the trial court denying the motion to dismiss.

B. Motion to Dismiss the Attempted Murder Charge

[2] In his second issue on appeal, Mr. Legrand argues the trial court erred in denying the motion to dismiss the attempted murder charge for insufficient evidence of intent. We disagree.

1. Standard of Review

This Court considers whether a trial court erred in denying a motion to dismiss *de novo*. *State v. Crockett*, 368 N.C. at 720, 782 S.E.2d at 881.

2. Denial of motion to dismiss attempted murder charge was proper

To survive a motion to dismiss, the State must show sufficient evidence for each element of the attempted murder offense. *Lee*, 218 N.C. App. at 56, 720 S.E.2d at 894. "The essential elements of attempted

first-degree murder are: (1) a specific intent to kill another person unlawfully; (2) an overt act calculated to carry out that intent, going beyond mere preparation; (3) the existence of malice, premeditation and deliberation accompanying the act; and (4) a failure to complete the intended killing." *State v. Foreman*, 270 N.C. App. 784, 789, 842 S.E.2d 184, 188 (2020) (quoting *State v. Cozart*, 131 N.C. App 199, 202-03, 505 S.E.2d 906, 909 (1998)).

Mr. Legrand argues that there was insufficient evidence for the jury to make a reasonable inference of the requisite intent. This Court has held intent to commit a felony may be inferred from the defendant's conduct during the incident in question. *State v. Lucas*, 234 N.C. App. 247, 254, 758 S.E.2d 672, 677 (2014) (citing *State v. Allah*, 231 N.C. App. 88, 92, 750 S.E.2d 903, 907 (2013)) (citation omitted). Where the State's evidence showed the accused fired multiple gunshots, then premeditation, deliberation, and specific intent to kill may be inferred. *State v. Chapman*, 359 N.C. 328, 377, 611 S.E.2d 794, 829 (2005).

Mr. Legrand contends the intent for attempted murder could not be inferred because the first gunshot resulted from an accidental discharge, the second gunshot landed six feet away from Mr. Jurgensen, and the third gunshot went well over Mr. Jurgensen's head. Additionally, Mr. Legrand maintains his gunshots could be construed as his attempt to scare or warn Mr. Jurgensen after they struggled over Mr. Legrand's gun, and Mr. Jurgensen shoved Mr. Legrand to the ground.

These arguments are unavailing. The State met the intent element when it presented evidence showing Mr. Legrand fired multiple gunshots. *State v. Allen*, 233 N.C. App. 507, 512-13, 756 S.E.2d 852, 858 (2014); *see also Chapman*, 359 N.C. at 377, 611 S.E.2d at 829 (holding premeditation, deliberation, and intent for attempted murder may be inferred where the defendant fired six to eight shots); *State v. Cain*, 79 N.C. App. 35, 47, 338 S.E.2d 898, 905 (1986) ("The requisite 'intent to kill' can be reasonably inferred by the defendant's use of a .357 magnum revolver, fired numerous times."); *State v. Maddox*, 159 N.C. App. 127, 132, 583 S.E.2d 601, 604 (2003) (holding evidence of intent sufficient where the defendant fired at the victim when fleeing). Here, where the State's evidence showed that Mr. Legrand fired three gunshots, at least one of which was aimed at Mr. Jurgenson, the State presented sufficient evidence from which a jury could infer the requisite intent.

Mr. Legrand's next argument, centering on his contention that none of the bullets came close to hitting Mr. Jurgensen, is equally unavailing in light of this Court's ruling in *State v. Lyons*. 268 N.C. App. 603, 836

S.E.2d 917 (2019). In *Lyons*, this Court concluded that the jury could draw a reasonable inference of intent from the victim's testimony that the gun was pointed at her as she ducked just seconds before the gun was fired, regardless of whether the gun was actually pointed at her when the defendant pulled the trigger. *Id.* at 613, 836 S.E.2d at 924. The Court reasoned that "the standard of review on a motion to dismiss compels us to adopt the reasonable inference most favorable to the State from the evidence," which in that case was an inference that defendant aimed and fired a gun at the deputy, even though defendant argued he only fired a bullet to scare the deputy. *Id.* at 612-613, 836 S.E.2d at 924. Therefore, the Court affirmed the lower court's denial of the motion to dismiss.

This case tracks those facts from *Lyons*. Mr. Jurgensen saw Mr. Legrand aim his gun in Mr. Jurgensen's direction before firing the second gunshot. That alone establishes that the motion to dismiss was properly denied, but the jury heard further evidence from which it could have inferred that Mr. Legrand's ineffectual aim did not negate his intent, including the low lighting at the gas station and the fact that Mr. Legrand wore a hat that hung low over his face. The State presented sufficient evidence for a jury to reasonably infer the requisite intent. Therefore, we find no error in the lower court's ruling.

C. Determination of Prior Record Level

[3] On appeal, Mr. Legrand does not challenge the validity of his conviction for possession of a firearm by a felon but takes issue with his sentencing on that conviction. Therefore, we review only the sentencing as it pertains to his conviction for possession of firearm by a felon.

The trial court sentenced Mr. Legrand to a term of 127 to 165 months of active confinement for possession of a firearm by a felon based upon its findings that Mr. Legrand was a prior record level V and a habitual felon. Mr. Legrand argues the lower court erred in finding he was a prior record level V and argues he should be sentenced at a prior record level III status. Mr. Legrand argues that he is properly sentenced under prior record level III because the lower court could classify his out-of-state felony convictions as Class I felonies only, which, in turn, results in fewer points for the prior record level analysis. Mr. Legrand reasons the State failed to follow N.C. Gen. Stat. § 15A–1340.14(e), requiring the State to prove an out-of-state felony is substantially similar to a North Carolina offense before it attaches a more serious felony classification to an out-of-state offense. N.C. Gen. Stat. § 15A–1340.14(e) (2021).

1. Standard of Review

"The trial court's determination of a defendant's prior record level is a conclusion of law, which this Court reviews *de novo* on appeal." *State v. Threadgill*, 227 N.C. App. 175, 178, 741 S.E.2d 677, 679-80 (2013).

2. Trial court properly considered prior offenses

The transcript of Mr. Legrand's trial indicates the court found substantial similarity between the crimes after reviewing State's exhibits 20, 21, 22, 23, and 24.

> THE COURT: The [c]ourt, based upon the information presented, finds by preponderance of the evidence that any non-North Carolina offenses included in the stipulation as to prior conviction is substantially similar to North Carolina offenses, and North Carolina classification assigned to said respective offenses is accurate.

The court confirmed this statement when it checked a box confirming it made this finding on Mr. Legrand's prior record-level worksheet.

Mr. Legrand argues the lower court did not make a proper finding because there is nothing in the transcript of the sentencing hearing where the trial court recounted or detailed the evidence from the State proving substantial similarity between Mr. Legrand's out-of-state offenses and North Carolina offenses. Given the Court's indication of review in open court and its full execution of the sentencing worksheet finding substantial similarity, this Court presumes the trial court reached this finding properly. *State v. Harris*, 27 N.C. App. 385, 386-87, 219 S.E.2d 306, 307 (1975) (quoting *State v. Stafford*, 274 N.C. 519, 528, 164 S.E.2d 371, 377 (1968)) ("Unless the contrary is made to appear, it will be presumed that judicial acts and duties have been duly and regularly performed."). Mr. Legrand has submitted no evidence to the contrary, and thus has not carried his burden of overcoming the presumption of regularity. *See State v. Johnson*, 265 N.C. App. 85, 87, 827 S.E.2d 139, 141 (2019) ("If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights."). Therefore, we find no error.

III. CONCLUSION

After careful review of the issues, we hold that the State presented sufficient evidence of each element of the crimes such that a jury could make a reasonable inference of intent. Therefore, the trial court did not

err by denying the motions to dismiss. Additionally, we hold that Mr. Legrand did not show that the trial court erred in finding his prior federal crimes were substantially similar to North Carolina crimes for purposes of sentencing.

NO ERROR.

Judges MURPHY and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
RYAN LEE MATTHEW TAYLOR

No. COA22-788

Filed 5 July 2023

1. Evidence—expert testimony—methodology—estimated vehicle speed during car crash

In a prosecution for second-degree murder and other crimes related to a hit-and-run car crash, the trial court did not abuse its discretion in allowing a state trooper, testifying as an expert in accident reconstruction, to estimate the speed of defendant's car at the moment defendant crashed the car into another vehicle, killing two people. The circumstances of the accident made it impossible to calculate the car's exact speed using either of two established scientific tests, and therefore the trooper relied on a crash reconstruction exercise with circumstances resembling those of the crash involving defendant; it was permissible for the trooper—without giving a specific speed—to compare the two crashes and opine that defendant's car was driving above the applicable speed limit based on the trooper's observations and knowledge about the speed and force needed to cause the kind of damage done to the crash victims' vehicle.

2. Evidence—other crimes, wrongs, or acts—prior pending DWI charge—car crash involving drunk driver—second-degree murder—malice

In a prosecution for second-degree murder and other crimes related to a hit-and-run car crash, including driving while impaired (DWI), the trial court did not err in admitting evidence of a prior, pending DWI charge against defendant to show intent, knowledge,

or absence of mistake under Rule of Evidence 404(b). Specifically, the evidence was properly introduced to show that defendant acted with malice—an essential element of second-degree murder—when he drove his car while intoxicated and subsequently crashed the car into another vehicle, killing two people.

3. Indictment and Information—facial invalidity—error conceded by State—conviction vacated and remanded

In a criminal case arising from a hit-and-run car crash, defendant's conviction for failure to comply with driver's license restrictions was vacated where the State conceded on appeal that the indictment charging him with that crime was facially invalid. The judgment, which consolidated the license restriction offense with other convictions that were valid, was vacated and the matter was remanded for resentencing (upon which, the trial court was directed to correct two other errors conceded on appeal by the State regarding defendant's prior record level and sentencing level for his driving while impaired conviction). Additionally, defendant's arguments on appeal relating to the license restriction charge were dismissed as moot.

Appeal by defendant from judgment entered 10 September 2021 by Judge Cynthia King Sturges in Vance County Superior Court. Heard in the Court of Appeals 24 May 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Jonathan J. Evans, for the plaintiff-appellee.

Patterson Harkavy LLP, by Narendra K. Ghosh, for the defendant-appellant.

TYSON, Judge.

Ryan Lee Matthew Taylor ("Defendant") appeals from judgments entered upon a jury's verdicts. We find no error in part, vacate in part, and remand.

I. Background

Ashira Jefferson, Kasi Thompson, Elijah Brown, and Kaija Richardson were driving to drop Richardson off at 1:00 a.m. on 5 May 2018 after eating dinner and attending a movie with friends in Henderson. Jefferson was driving a Honda sedan with Brown seated

in the passenger seat. Richardson was seated in the driver's side rear seat, and Thompson was seated in the passenger's side rear seat.

Drake Branson was also separately leaving the movie theater with his wife. As Branson was waiting to turn onto Raleigh Road, he noticed a Chevrolet Tahoe with aftermarket blue tint headlights approaching on Raleigh Road. As the Tahoe passed his location, Branson noticed the Tahoe make an erratic movement into the left lane, emit a loud revving sound, and pass the car, which had just pulled out in front of Branson's car. Branson pulled onto Raleigh Road and a few minutes later encountered Jefferson's Honda sedan off of the roadway and stopped in Richardson's yard. Branson pulled over and called 911. The Honda sedan displayed severe damage to the back of the vehicle and the roof had lifted open. Thompson was laying outside of the car in a ditch near the roadway. The roadway was littered with debris ejected from inside the car.

Emergency Medical Services ("EMS") responded to the scene at 1:23 a.m. Jefferson suffered a broken jaw. Thompson was unconscious and unresponsive with an open injury to the back of her head. Brown was removed from inside of the Honda sedan, suffering with seizures, which indicated a "traumatic brain injury."

Thompson and Brown were transported to Maria Parham Hospital and later transferred by helicopter to Duke University Hospital in Durham. Thompson died approximately two hours after the wreck occurred. Brown died four days later.

North Carolina State Highway Patrol Troopers, Michael Wilder and Christopher Lanham, responded to the scene at approximately 1:25 a.m. The troopers noticed a Chevrolet Tahoe with blue tint headlights located approximately fifty yards farther down Raleigh Road. The Chevrolet Tahoe had been driven through a fence and into the lot of a self-storage facility. The headlights on the Chevrolet Tahoe were illuminated, but the driver was not inside the vehicle nor at the scene. The troopers examined the Chevrolet Tahoe and determined no key was in the ignition and observed a cold six pack of beer in the front passenger side floorboard. Some of the containers had been opened. The vehicle had incurred severe front-end damage.

A canine unit was dispatched and a search was initiated for the vehicle's driver. The canine tracked a scent approximately one to two hundred yards through a barbed wire fence until encountering two railroad cars located on the other size of the U.S. Highway 1 Bypass bridge. Defendant was found lying under one of the railroad cars.

Trooper Lanham ordered him to come out. Defendant was wearing a dark blue T-shirt and khaki shorts. Trooper Lanham searched Defendant and located his ID in his pocket, as well as a key that fit into the ignition switch of the Chevrolet Tahoe, which was registered to Defendant. Defendant's DNA profile was later matched to DNA found on the driver and passenger side airbags inside the wrecked vehicle. Defendant told officers he had been a passenger in the vehicle and had "paid [a security guard named] Rick $20 to give me a ride from [the] 85 Bar."

The troopers noted Defendant was uncooperative, combative, and refused to answer questions. Trooper Lanhan also noted a strong odor of alcohol on Defendant's breath, his eyes were red and glassy, and his speech was slurred. Defendant admitted to consuming alcohol that evening. EMS accessed, treated, and transported Defendant to Maria Parham Hospital at 2:40 a.m. because of knee pain.

Defendant exhibited dangerous behavior at the hospital and was told to leave the emergency department. Defendant left and walked across the street to a Sheetz gas station at 3:05 a.m.

At 3:20 a.m., Trooper Wilder arrived at the hospital and discovered Defendant was no longer there, but located him across the street at the Sheetz gas station. Trooper Wilder placed Defendant under arrest and transported him to the magistrate's office. Defendant refused to provide a breath sample for chemical analysis. Trooper Wilder obtained a search warrant for Defendant's blood, which was drawn at Maria Parham Hospital at 4:56 a.m. The State Crime Laboratory ascertained Defendant's blood alcohol concentration to be .15 grams of alcohol per 100 milliliters of blood.

Trooper Wilder obtained a further search warrant for Defendant's cell phone on the afternoon of 6 May 2018. While executing that search warrant, Defendant told Trooper Wilder he would like to speak with him about the collision that had occurred. Defendant also admitted alcohol was involved in the crash. Defendant asserted the collision had occurred because "they pulled out in front of me." Defendant was unsure if the Chevrolet Tahoe had overturned during the wreck.

Trooper Wilder obtained still photographs from the camera located behind the self-storage facility. The photographs showed the Chevrolet Tahoe stopping on the property and Defendant being the only individual depicted on the cameras. The photographs also showed Defendant attempting to climb a barbed wire fence.

Christopher Wilson, a security guard at Bar 85, testified for the State. Wilson was working at the bar on the night of the incident. Wilson

observed Defendant enter the bar and saw him leave at approximately 12:04 a.m. Wilson stated Defendant was agitated about something, which had happened inside of the bar, and was "talking crazy." Defendant told Wilson "they won't let [him] back in, they [had kicked him] out." Defendant had a drink in his hand and left through the outdoor smoking section of the bar.

Defendant entered his Chevrolet Tahoe, backed into another vehicle parked behind him, and then drove forward. Defendant drove through the grass and a ditch instead of using the driveway exit onto the roadway from the parking lot.

Wilson also testified he had no knowledge of anyone named "Rick" being employed at Bar 85. While incarcerated after the accident, Defendant spoke with family members and discussed the accident, stating "if I wouldn't have had nothing to drink it would've been chalked up as just a[n] accident."

Defendant was indicted for two counts of felony death by motor vehicle, felony hit and run resulting in serious injury or death, reckless driving to endanger, failure to reduce speed, failure to comply with drivers license restriction, driving while impaired ("DWI"), and two counts of second-degree murder. A jury convicted Defendant of all charges.

The trial court arrested judgment on the two convictions of felony death by motor vehicle due to the convictions for second-degree murder. Defendant was sentenced in the presumptive range to 180-228 months for each of the second-degree murders. Defendant's convictions for felony hit and run, failure to reduce speed, failure to comply with license restrictions, and reckless driving were consolidated for judgment and Defendant was sentenced to 19-32 months. Defendant was also sentenced to six months for the DWI, with all sentences running consecutively. Defendant appealed.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2021).

III. Issues

Defendant argues the trial court: (1) erred by admitting expert testimony on speed; (2) erred by admitting evidence of an alleged prior DWI; (3) lacked jurisdiction over the license restriction charge because of a defective indictment; (4) erred by failing to dismiss the license restriction charge; (5) erred by sentencing him as a prior record level II

offender; and, (6) erred by imposing a Level Three DWI. Defendant also raised an ineffective assistance of counsel claim.

IV. Expert Testimony

A. Standard of Review

"Trial courts enjoy wide latitude and discretion when making a determination about the admissibility of [expert] testimony." *State v. King*, 366 N.C. 68, 75, 733 S.E.2d 535, 539-40 (2012) (citation omitted). A trial court's ruling on Rule 702(a) is reviewed for abuse of discretion. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). "A trial court may be reversed for abuse of discretion only upon showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (citations omitted).

When error is asserted that "the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*." *State v. Parks*, 265 N.C. App. 555, 563, 828 S.E.2d 719, 725 (2019) (citations omitted).

B. Analysis

[1] Defendant argues the trial court erred in allowing an expert witness to testify about the speed of the Chevrolet Tahoe based upon unreliable methodology. North Carolina Rule of Evidence 702 governs testimony by an expert witness at trial:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2021).

The Supreme Court of North Carolina has interpreted Rule 702(a) and examined Supreme Court of the United States' precedents interpreting Rule 702(a): *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136, 139 L. Ed. 2d 508 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238 (1999). Our Supreme Court held:

> the witness must be qualified as an expert by knowledge, skill, experience, training, or education. This portion of the rule focuses on the witness's competence to testify as an expert in the field of his or her proposed testimony. Expertise can come from practical experience as much as from academic training. Whatever the source of the witness's knowledge, the question remains the same: Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject? The rule does not mandate that the witness always have a particular degree or certification, or practice a particular profession. But this does not mean that the trial court cannot screen the evidence based on the expert's qualifications. In some cases, degrees or certifications may play a role in determining the witness's qualifications, depending on the content of the witness's testimony and the field of the witness's purported expertise. As is true with respect to other aspects of Rule 702(a), the trial court has the discretion to determine whether the witness is sufficiently qualified to testify in that field.

State v. McGrady, 368 N.C. 880, 889-90, 787 S.E.2d 1, 9 (2016) (citations and quotation marks omitted).

State Patrol Trooper Roderick Murphy, who was not one of the two investigating troopers on the night of the wreck, was tendered and admitted as an expert in crash reconstruction at Defendant's trial. Trooper Murphy was allowed to testify over Defendant's objection that the Chevrolet Tahoe's speed exceeded the forty-five-mile-per-hour speed limit on the highway at the time of the crash.

Trooper Murphy also testified he "was unable to use either of the two scientific tests he had to determine the rate of speed and therefore would not be able to give an accurate answer." Trooper Murphy based his opinion on his nineteen years of experience in law enforcement, specialized training in the fundamentals, tools, and methods of crash reconstruction, prior experience of over thirty crash reconstruction conferences he had attended with exercises and demonstrations.

Trooper Murphy analogized the wreck with a comparable exercise wherein a Dodge Charger had struck a Chevrolet Tahoe. This rear-end collision occurred at a known speed, which resulted in less damage than the wreck at bar. Defendant argues this comparable is not substantially similar to meet the reliability requirements of *Daubert* and Rule 702(a).

Given the specifics of this accident, which made the two established methods unreliable to calculate speed, no objective equation was available to calculate the speed Defendant's Chevrolet Tahoe was traveling at the time of the crash. Trooper Murphy did not give a specific speed, but gave an opinion based upon what he had observed and the speed and force necessary to inflict the extent of the rear end and roof damage observed to Jefferson's Honda sedan. Trooper Murphy's testimony established the principles and methods he had employed were "applied . . . reliably to the facts of the case[,]" per Rule 702(a)(3). N.C. Gen. Stat. § 8C-1, Rule 702(a)(3) (2021). Defendant was fully able to cross-examine and challenge this testimony and has failed to show the trial court abused its discretion by admitting this opinion testimony.

V. Rule 404(b)

Defendant argues the trial court erred in admitting evidence of a prior 2017 DWI incident, as not admissible under Rule 404(b). *See* N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021).

A. Standard of Review

Our Supreme Court has held:

> When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusions that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

B. Analysis

[2] Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be

> admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021).

The trial court admitted, over Defendant's objection, information about a pending 2017 DWI charge. The State argues the evidence of Defendant's prior traffic offenses is properly admitted under Rule 404(b) to show his intent, knowledge, or absence of mistake to support malice, an essential element of second-degree murder. Defendant argues the pending 2017 DWI charge is not "sufficiently similar to the circumstances at issue." *State v. Locklear*, 159 N.C. App. 588, 594, 583 S.E.2d 726, 731 (2003), *aff'd per curiam*, 359 N.C. 63, 602 S.E.2d 359 (2004).

This Court has allowed pending charges to be admitted to show malice, as long as the evidence is admissible under Rule 404(b). *See State v. Grooms*, 230 N.C. App. 56, 64, 748 S.E.2d 162, 168 (2013) ("our appellate courts have also upheld the admission of evidence of a defendant's pending charge for DWI to show malice when the circumstances surrounding the pending charge were sufficiently similar to those surrounding the charged offense.") (citation omitted).

In *State v. Jones*, evidence of the defendant's pending charge of driving while intoxicated was introduced to establish that the defendant had acted with malice. Our Supreme Court held the introduction of such evidence demonstrated: "that defendant was aware that his conduct leading up to the collision at issue here was reckless and inherently dangerous to human life. Thus, such evidence tended to show malice on the part of defendant and was properly admitted under Rule 404(b)." 353 N.C. 159, 172-73, 538 S.E.2d 917, 928 (2000). Defendant's argument is overruled.

VI. Indictment of License Restriction Charge

[3] Defendant argues, and the State concedes, the indictment for the license restriction charge and conviction was facially invalid. Defendant's conviction and judgment for failure to comply with license restrictions is vacated. Defendant's judgment, which consolidated this offense with other valid convictions and sentences imposed, is also vacated and this cause is remanded for resentencing. Defendant's additional arguments, including his assertion of an ineffective assistance of counsel ("IAC") claim, relate to the indictment of the license restriction charge, which we are vacating due to the State's concession, are dismissed as moot.

VII. Sentencing as Prior Record Level II

Defendant argues, and the State also concedes, the trial court erred by sentencing him as a prior record level II. The State concedes the trial court should have sentenced Defendant as a prior record level I. Defendant's judgments are vacated and upon remand is to be resentenced at the proper prior record level.

VIII. Level Three DWI Sentence

Defendant argues, and the State further concedes, the trial court erred by imposing a level three DWI sentence and the court should have imposed a level four DWI sentence. Defendant's DWI sentence is vacated and remanded to be resentenced at the proper level.

IX. Conclusion

The trial court did not err or abuse its discretion in admitting Trooper Murphy's testimony concerning Defendant's estimated vehicle speed. The trial court also did not err in admitting evidence of an alleged and pending prior DWI charge to show malice, knowledge, or absence of mistake under Rules of Evidence 404(b) and 403.

Defendant received a fair trial free from prejudicial error for his convictions of two counts of second-degree murder in 18-CRS-05126 and 18-CRS-051279; felony hit and run resulting in serious injury or death in 18-CRS-051234, DWI in 18-CRS-051233; reckless driving to endanger in 18-CRS-703002; and, failure to reduce speed in 18-CRS-703003. The State concedes the license restriction violation indictment was facially invalid and the trial court did not possess jurisdiction to enter judgment thereon.

The trial court erred in sentencing Defendant as a prior record level II offender. The trial court also erred when it sentenced Defendant as a level three DWI offender. Defendant's judgments, consolidated with his failure to comply with his license restrictions violation conviction, are vacated and remanded.

All of Defendant's judgments are remanded for resentencing. Defendant's remaining challenges of error are dismissed as moot or not argued. *It is so ordered.*

NO ERROR IN PART, VACATED IN PART, AND REMANDED FOR RESENTENCING.

Judges ZACHARY and STADING concur.

ZANDER v. ORANGE CNTY.

[289 N.C. App. 591 (2023)]

ELIZABETH ZANDER AND EVAN GALLOWAY,
FOR THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFFS
v.
ORANGE COUNTY, NC, AND THE TOWN OF CHAPEL HILL, DEFENDANTS

No. COA22-691

Filed 5 July 2023

1. Counties—class action—assessment of school impact fees—summary judgment—potential inclusion of illegal fees—remand

In a class action filed against a county on behalf of two classes, one of which consisted of persons (the Feepayer Class) against whom the county had allegedly assessed ultra vires school impact fees under a statute (the Enabling Act) that was enacted to defray the costs of constructing "capital improvements" for schools, the trial court erred in granting summary judgment for the county and against the Feepayer Class. Although the county complied with the Enabling Act's procedural requirements for estimating total capital improvement costs, and it also properly included certain costs that were challenged on appeal, the record showed that the county may have assessed costs that did not constitute "capital improvements . . . to schools" under the Enabling Act. Therefore, a genuine issue of material fact existed concerning damages owed to the Feepayer Class, and the matter was remanded. Contrary to its argument, the Feepayer Class was not automatically entitled to a full refund of the impact fees, since the Enabling Act's clear intent was to make feepayers whole for illegal fees only.

2. Counties—class action—assessment of school impact fees—summary judgment—entitlement to refund—statutory requirements

In a class action filed against a county on behalf of two classes, one of which consisted of persons (Refund Class) seeking a refund of certain school impact fees assessed pursuant to a local statute (the Enabling Act), the trial court properly granted summary judgment in favor of the county. The Enabling Act provided that no refunds would be paid if the impact fees were reduced due to an "updated school impact fee study that results in changes to impact fee levels charged," but that refunds would be owed if the impact fees were reduced for "reasons other than an updated school impact fee study." Here, the county received a new set of

impact fee studies (which contained new data not seen in previous studies, and therefore were "updated" for purposes of the Enabling Act) and explicitly cited to those studies when enacting an impact fee reduction. Even if the studies were not strictly current and the county may have considered other factors in addition to the studies when reducing the fees, the Refund Class was still not entitled to a refund under the Enabling Act's refund provisions.

3. Appeal and Error—mootness—motion to strike—amended motion for summary judgment—no substantive amendment

In a class action filed against a county regarding the county's assessment of school impact fees, where plaintiffs moved to strike the county's amended motion for summary judgment and where the trial court—after denying plaintiffs' motion—granted summary judgment for the county, plaintiffs' argument on appeal that the court erred in denying their motion to strike was dismissed as moot. The county's amendments to its original summary judgment motion were not substantive and, therefore, had no bearing on the resolution of plaintiffs' appeal.

Judge STADING dissenting.

Appeal by Plaintiffs from an Order entered 17 June 2022 by Judge Allen Baddour in Orange County Superior Court. Heard in the Court of Appeals 24 January 2023.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by William A. Robertson, Robert J. King, III, Daniel F. E. Smith, and Matthew B. Tynan, for Plaintiffs-Appellants.

Womble Bond Dickinson (US) LLP, by Sonny S. Haynes and James R. Morgan, Jr., for Defendants-Appellees.

RIGGS, Judge.

Plaintiffs Elizabeth Zander and Evan Galloway appeal from a summary judgment order dismissing their class action complaint brought against Defendants Orange County (the "County") and the Town of Chapel Hill[1] on behalf of persons: (1) who were assessed allegedly *ultra*

1. The parties agreed at trial and in their briefs to this Court that any claims against the Town of Chapel Hill are subsumed into the claims against the County; as such, we omit further discussion of the Town of Chapel Hill from this opinion.

vires school impact fees by the County (the "Feepayer Class"); or (2) who are allegedly entitled to a refund of some school impact fees due to a 2016 change in the fee schedule (the "Refund Class"). On appeal, Plaintiffs contend that the evidence conclusively establishes that both classes are entitled to relief and that there are no genuine issues of material fact for resolution at trial. After careful review, we agree that the County unlawfully included some costs not authorized by statute in calculating the impact fees and hold that the Feepayer Class is entitled to recoup the portion of the school impact fees that were assessed to cover those improper costs. However, because the evidence does not establish the amount of impact fees attributable to these impermissible costs, we remand the matter for further proceedings to determine the damages owed to the Feepayer Class. As to the Refund Class, we hold that the trial court properly granted summary judgment for the County because the forecast of evidence demonstrates that no refunds are owed under the applicable ordinance.

I. FACTUAL AND PROCEDURAL HISTORY

A. The Enabling Act

In 1987, the General Assembly enacted a statute authorizing the County to assess impact fees "to help defray the costs to the County of constructing certain capital improvements" necessitated by new residential development. 1987 N.C. Sess. Laws 617, ch. 460, § 17(b)(1) (hereinafter the "Enabling Act"). The Enabling Act defined "capital improvements" as follows:

> For purposes of this subsection, the term capital improvements includes the acquisition of land for open space and greenways, capital improvements to public streets, schools, bridges, sidewalks, bikeways, on and off street surface water drainage ditches, pipes, culverts, other drainage facilities, water and sewer facilities and public recreation facilities.

Id. § (b)(2).

The Enabling Act also established minimum procedures that the County must follow as it "endeavor[s] to approach the objective of having every development contribute" to a fund for capital improvements in a reasonable and fair manner. *Id.* § (c). Specifically, the County is required, "among other steps and actions," to:

> (1) Estimate the total cost of improvements by category (e.g., streets, sidewalks, drainage ways, etc.) that will be

> needed to provide in a reasonable manner for the public health, safety and welfare of persons residing within the County during a reasonable planning period not to exceed 20 years. The Board of County Commissioners may divide the County into two or more districts and estimate the costs of needed improvements within each district. These estimates shall be periodically reviewed and updated and the planning period used may be changed from time to time.
>
> (2) Establish a percentage of the total costs of each category of improvement that, in keeping with the objective set forth above, should fairly be borne by those paying the impact fee.
>
> (3) Establish a formula that fairly and objectively apportions the total costs that are to be borne by those paying impact fees among various types of developments. . . .

Id. The Enabling Act was later amended in 1993 to define the word "costs" as including loan obligations, lease payments, and installment sale contracts connected with capital improvements. 1993 N.C. Sess. Laws 313, ch. 642, § 4(a).

B. Impact Fee Studies and Ordinances

In 2003, the County enacted an ordinance designed to ensure adequate school capacity at specified service levels in the face of new development. ORANGE COUNTY, N.C., CODE OF ORDINANCES §§ 15-88, 88.2 (2003). The County began creating Schools Adequate Facilities Ordinance Technical Advisory Committee reports ("SAPFOTAC reports") to aid the process. The SAPFOTAC reports were limited, however, insofar as they only estimated the need for entirely new schools by type without considering expansion of existing school facilities or the capacity needs of schools individually.

The County also sought assistance in calculating future capital improvement costs and impact fees from consultants TischlerBise. In 2007, TischlerBise completed school impact fee reports (the "2007 Studies") for each school district operated by the County: (1) the Orange County School District ("OCSD"); and (2) the Chapel Hill-Carrboro School District ("CHCSD"). The 2007 Studies employed the "incremental expansion method" of estimating future capital improvement needs and attributable impact fee assessments by: (1) establishing the capital

cost per student at the County's desired level of service;[2] and (2) assessing that cost against different types of residential development based on their anticipated student generation, *i.e.*, the anticipated number of students added to the school system by each new residence type built.

First, TischlerBise identified the level of service by reference to the County's ordinances, which mandated the following levels of service by school type: 105% for elementary schools; 107% for middle schools; and 110% for high schools. From there, and based on current student enrollment data, TischlerBise calculated the capital improvements—such as acreage, building square footage, and number of portable classrooms—attributable to each individual student at the levels of service mandated by the County's ordinances. TischlerBise then estimated the current cost of each of these capital improvements per unit, *i.e.*, by acre, square foot, *etc.* Taking these numbers together, and after accounting for revenue credits attributable to non-impact fee funding sources, TischlerBise arrived at a net total capital improvement cost per individual student, separated by elementary, middle, or high school. Finally, TischlerBise calculated the maximum allowable impact fee for each residence type by multiplying the net capital improvement cost per student by the number of elementary, middle, and high school students generated from each new type of house built. TischlerBise relied on the estimated student generation data for the 2006-2007 school year in arriving at the maximum allowable impact fees.

Stated differently, TischlerBise estimated future capital improvement needs by calculating how much it would cost in capital improvements to maintain adequate school capacity levels on a per-new-student basis: as each new residence was built, an impact fee would be assessed to cover the capital improvement cost of adding the students generated by the residence to the school system without negatively impacting capacity. TischlerBise then provided maximum allowable impact fees by development type based on these calculations.

TischlerBise included the following costs as "capital improvements" in drafting the 2007 Studies: (1) construction; (2) land acquisition; (3) portable/temporary classrooms; (4) support facilities; (5) buses; and

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2. The term "level of service," as used by both the County and TischlerBise, refers to enrollment as expressed by percentage, so a school operating at a service level above 100% is overcapacity and, if that overage exceeds the County's accepted level of service, capital expenditures are needed to meet this overage in demand and growth. Obviously, growth needs cannot be accurately assessed without an understanding of where the school system's current capacity and level of service are.

(6) TischlerBise's consulting fee. For the five-year period beginning in 2008, TischlerBise estimated that the OCSD's "school local capital costs average approximately $6 million per year, or $30.4 million over five years," and the CHCSD's "school local capital costs average approximately $11.3 million per year, or $56.7 million over five years." The Reports advised the County that, based on these five-year estimates, assessing the maximum impact fees calculated by TischlerBise "would cover approximately 85 percent of [OCSD's] projected related capital improvement costs," and "approximately 84 percent of [CHCSD's] projected related capital improvement costs." TischlerBise also calculated anticipated student enrollment and housing development increases for the ten-year period beginning in 2007, relying on historical development data from the past 10 years.[3]

Following receipt of the 2007 Studies, the County enacted impact fees at 32% of the maximum calculated by TischlerBise beginning in 2009; that percentage then increased to 40% in 2010, 50% in 2011, and 60% in 2012. The County never assessed impact fees at 100% of the maximum calculated by TischlerBise under the incremental expansion method.

In 2014, TischlerBise provided the County with a new student generation rate study. Then, in 2016, TischlerBise completed an updated set of impact fee studies (the "2016 Studies") that accounted for new dwelling types and student generation data. The 2016 Studies anticipated $19MM in future capital costs over the next five years for the OCSD and $23.28MM for the CHCSD, while again estimating the anticipated student enrollment and housing development increases for the next 10 years.

The County adopted new impact fee schedules following the release of the 2016 Studies to account for the new housing types captured therein. It also amended the impact fee ordinance to provide as follows:

> If the Schedule of Public School Impact Fees . . . is reduced due to an updated school impact fee study that results in changes to impact fee levels charged, no refund of previously paid fees shall be made. If the Schedule of Public School Impact Fees . . . is reduced due to reasons

3. To the extent the dissent takes issue with the methodologies employed by TischlerBise in arriving at the total estimated improvements over the five-year period from 2007 to 2012 and the anticipated student generation and development rates for the 10-year period from 2007 to 2017, the plain language of the Enabling Act does not establish a specific means by which the County must calculate anticipated needed capital improvement costs within a reasonable period of 20 years or less.

> other than an updated school impact fee study, the difference between the old and new fees shall be returned to the feepayer . . . .

ORANGE COUNTY, N.C., CODE OF ORDINANCES § 30-35(e)(2) (2016) (hereinafter the "2016 Ordinance"). The new fee schedule resulted in the reduction of impact fees for some dwelling types and an increase for others. *Id.* The County did not offer refunds, reasoning that the impact fee reductions were "due to an updated impact fee study that result[ed] in changes to [the] impact fee levels charged[.]" *Id.*

C. Plaintiffs' Suit

Plaintiffs filed suit against the County on 6 February 2017, challenging the impact fee assessments and lack of refunds. On 3 March 2017, Plaintiffs filed an amended class action complaint alleging, *inter alia*, that: (1) the County failed to comply with the Enabling Act's fee-setting provisions and the fees were thus *ultra vires*; and (2) they were entitled to a refund due to the 2016 Ordinance's reduction in fees.

The trial court entered a case management order following class action certification. Under its terms, all motions for summary judgment were to be filed on or before 22 December 2021. Plaintiffs filed their motion for summary judgment on 30 November 2021, and the County did the same on 1 December 2021. Plaintiffs later filed an amended motion with exhibits on 22 December 2021, and the County followed suit on 1 February 2022. The County's amended motion for summary judgment did not include any substantive changes, and instead simply identified the pleadings and evidence on which the motion was based, including several affidavits with exhibits that were attached to the amended motion. Plaintiffs subsequently moved to strike the County's amended motion as untimely.

The above motions were heard on 14 March 2022. After taking the matter under consideration at the close of the hearing, the trial court entered a written order denying Plaintiffs' motion to strike and granting summary judgment for the County on 17 June 2022. Plaintiffs filed written notice of appeal on 28 June 2022.

II. ANALYSIS

Plaintiffs raise several arguments on appeal, divided amongst the Feepayer and Refund Classes. As to the Feepayer Class, Plaintiffs contend that the County: (1) failed to estimate the total cost of improvements in accordance with the Enabling Act's rate-setting procedures; (2) included improper costs in calculating its impact fees; and (3) owe

the Feepayer Class a full refund of all illegally assessed impact fees at 6% annual interest—totaling well in excess of $12MM—pursuant to N.C. Gen. Stat. § 160D-106 (2021). For the Refund Class, Plaintiffs assert that the impact fee reductions in the 2016 Ordinance were not solely caused by the updated 2016 Studies and refunds are therefore owed under the 2016 Ordinance's refund provision. Both classes, Plaintiffs posit, are owed attorney's fees. Lastly, Plaintiffs challenge the trial court's denial of their motion to strike the County's amended summary judgment motion.

A. Standards of Review

Orders granting summary judgment are reviewed de novo on appeal. *Bryan v. Kittinger*, 282 N.C. App. 435, 437, 871 S.E.2d 560, 562 (2022). Issues of statutory construction—including the construction of ordinances—raise questions of law subject to the same standard. *Thompson v. Union Cnty.*, 283 N.C. App. 547, 555, 874 S.E.2d 623, 630 (2022). We apply the *de novo* standard on review of a summary judgment order to determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c) (2021). A movant "bears the burden of bringing forth a forecast of evidence which tends to establish that there are no triable issues of material fact." *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998) (citation omitted). If the movant meets this burden, "the nonmoving party must then produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a *prima facie* case at trial." *Id.* (cleaned up). We consider the evidence in the light most favorable to the nonmovant, and "any doubt as to the existence of an issue of triable fact must be resolved in favor of the party against whom summary judgment is contemplated." *Id.*

Rulings on motions to strike, including motions to strike affidavits, are reviewed more deferentially for abuse of discretion. *Blair Concrete Servs., Inc. v. Van-Allen Steel Co.*, 152 N.C. App. 215, 219, 566 S.E.2d 766, 768 (2002).

B. Feepayer Class Claims

[1] Plaintiffs present a tripartite argument on behalf of the Feepayer Class. First, Plaintiffs assert that the County, together with TischlerBise, failed to "[e]stimate the total cost of improvements by category (e.g., streets, sidewalks, drainage ways, etc.) that will be needed . . . during a reasonable planning period" and "estimate the costs of needed improvements within each [school] district" as required by the Enabling Act.

Enabling Act § (c)(1). Second, Plaintiffs allege that the County's calculation of impact fees included costs beyond the "costs to the County of constructing certain capital improvements" authorized and defined by the Enabling Act. *Id.* § (b)(1); *see also id.* § (b)(2) (defining "capital improvements"). Finally, and assuming merit under their first two contentions, Plaintiffs claim that the impact fees must be refunded *in toto* with interest as "illegally imposed . . . fee[s] . . . for development or a development approval not specifically authorized by law" under N.C. Gen. Stat. § 160D-106. We address each contention in turn.

1. Procedural Compliance with the Enabling Act

In challenging the procedures used by the County to set its impact fees, Plaintiffs identify two purported infirmities that allegedly contravene the Enabling Act, namely that the County and TischlerBise: (1) failed to estimate anticipated total capital improvement costs of schools over a "reasonable planning period[,]" Enabling Act § (c)(1); and (2) failed to tie the impact fees to specific needs for identified new schools, *id.* Neither assertion withstands scrutiny.

In rejecting Plaintiffs' first challenge, we note that the impact fee ordinance itself plainly states a 10-year planning period was used in setting the impact fee rates: "[f]ollowing their collection, funds shall be expended within ten (10) years, *the time frame coinciding with the public school facilities capital improvements program (CIP) school impact fee period.*" ORANGE COUNTY, N.C., CODE OF ORDINANCES § 30-35(c)(5) (2008) (emphasis added). Though Plaintiffs assert this could not have been the case because the County's 30(b)(6) designee and Director of Planning and Inspections testified that TischlerBise did not use a 10-year planning period, this overlooks the fact that *the County Board of Commissioners is not TischlerBise.*[4] The County was still free to use

4. To be clear, Plaintiffs explicitly claim that the County "confirm[ed] through its 30(b)(6) witness that a 10-year planning period was *not* used," and thus the 10-year planning period established by ordinance could not have been employed by the County. But Plaintiffs—and the dissent—overstate the witness's testimony; while he indeed testified that TischlerBise (rather than the County) did not use a 10-year planning period, when subsequently asked whether planning periods of less than ten years were used by the consultants, the witness testified that he would have to "look through the [TischlerBise] report[s] again" to identify the Reports' planning period because he "d[id] not know the answer" from memory. And, though he could not recall the exact planning period used, nothing suggests it was in excess of 20 years, and the witness ultimately testified that "[w]hat I do know is that [the planning period used by TischlerBise] was a reasonable period of time to assess the impacts for the public health, safety, and welfare of persons in the county." On the whole, the witness's testimony establishes that TischlerBise *did* use a planning period, but that the witness could not remember exactly what timespan it covered;

the 10 years of student generation and development estimates included in the Reports to arrive at the total anticipated needed capital improvement costs for the 10-year planning period established by ordinance. The County acknowledged as much in its responses to Plaintiffs' interrogatories: when asked to identify the planning period found in TischlerBise's 2007 Reports, the County identified the Reports' "projection of school improvement costs to 2012 *and* 2017." (Emphasis added). Contrary to Plaintiffs' and the dissent's arguments, the cited testimony from the County's 30(b)(6) designee does not speak to *the County's* use of the 2007 Reports' 10-year student generation and housing development estimates, alongside the Reports' estimated capital improvement costs per student, to anticipate total capital improvement costs to schools over the 10-year planning period stated in the ordinances. Thus, the County's reliance on TischlerBise's 2007 Studies does not disprove or contradict the County's use of a 10-year planning period.

Further, even if the County did not employ the ordinance's 10-year planning period and otherwise relied exclusively on TischlerBise's 2007 Reports to comply with the Enabling Act—as Plaintiffs assert and the dissent entertains—the Reports themselves estimated the total anticipated capital improvement costs to schools for a five-year period, stating OCSD's "school local capital costs average approximately $6 million per year, or *$30.4 million over five years*," and the CHCSD's "school local capital costs average approximately $11.3 million per year, or *$56.7 million over five years*." Again, the County's discovery responses explicitly identified this five-year estimate as a planning period used by TischlerBise in the 2007 Report. That the County's 30(b)(6) designee did not know and could not recall exactly which planning period TischlerBise used in its 2007 Reports does not contradict, impeach, or otherwise have evidentiary relevance to TischlerBise's clear estimate of the total anticipated capital improvement costs of schools over a five-year period in the Reports themselves.

The dissent notes that there is conflicting evidence as to whether a 10-year planning period or some other planning period was used. But genuine issues of fact are not always *material* to the litigation such as to

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conversely, the excerpted testimony did not address at all what planning period *the County* used. We are not, contrary to the assertion by the dissent, relying on the distinction between the County's witness and TischlerBise to "discount" any failure by the County to use a planning period. We instead simply recognize that the evidence, contrary to Plaintiffs' and the dissent's contentions, shows that the witness was testifying to his lack of definite knowledge concerning TischlerBise's utilized planning period rather than completely disclaiming any use of: (1) a planning period by TischlerBise; or (2) a 10-year planning period, consistent with the ordinance, *by the County*.

preclude summary judgment. *See Lowe v. Bradford*, 305 N.C. 366, 329, 289 S.E.2d 363, 366 (1982) ("An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." (citation omitted)). As explained above, the Feepayers and the dissent have not identified any evidence showing that the County did not utilize a 10-year planning period, let alone that *no* planning period of less than 20 years was used (or that a planning period exceeding 20 years was applied) such that the Enabling Act was violated. Thus, assuming there is a genuine issue as to whether the County used a five-year or a 10-year planning period based on its 30(b)(6) designee's testimony, that fact is not *material* to the Feepayer's claims because, whichever way that issue is resolved, it cannot establish non-compliance with the Enabling Act. We respectfully disagree with the dissent that a genuine issue of *material* fact exists as to this portion of the Plaintiffs' claims.

Plaintiffs' second procedural violation argument fares no better than their first. Under their reading of the Enabling Act, the County was required to predict and itemize each new school, facility expansion, or other capital improvement project needed over the planning period. But the plain language of the Enabling Act imposes no such specificity requirement. Instead, the Enabling Act broadly tasked the County with "*endeavor[ing] to approach* the objective of having every development contribute . . . that development's fair share of the costs of the capital improvements that are needed in part because of that development." Enabling Act § (c) (emphasis added). Consistent with that open-ended mandate, all that the Enabling Act necessitates is the County "[e]stimate the total cost of improvements *by category* (e.g., streets, sidewalks, drainage ways, etc.) that will be needed" over the planning period as between the two school districts. *Id.* § (c)(1) (emphasis added). The parenthetical following the word "category" makes clear that "schools" is a category to itself. *See id.* § (b)(2) (defining "capital improvements" to include "capital improvements to *public streets*, *schools*, bridges, *sidewalks*, bikeways, *on and off street surface water drainage ditches*, pipes, culverts, other drainage facilities, water and sewer facilities and public recreation facilities" (emphasis added)); *see also State v. Tew*, 326 N.C. 732, 739, 392 S.E.2d 603, 607 (1990) ("All parts of the same statute dealing with the same subject are to be construed together as a whole, and every part thereof must be given effect if this can be done by any fair and reasonable interpretation." (citation omitted)). As such, the County was merely required to estimate the total cost of school capital improvements between the two districts—no greater specificity or itemization is compelled by the Enabling Act. And even if more granularity

was necessary, the 2007 Studies included such detail by breaking down school capital improvement expenses by type into land acquisition costs, construction costs, and more.

Contrary to Plaintiffs assertion that the 2007 Studies relied on by the County did not estimate the total cost of capital improvements to schools as between the two school districts, those Studies expressly estimated that OCSD would incur a total of $30.4MM in school capital improvement costs over five years and CHCSD a total of $56.7MM over the same span, while including additional predictive data for the following 10 years. Thus, Plaintiffs have not put forth any evidence demonstrating that the County failed to comply with the procedural requirements of the Enabling Act.

2. The Impact Fee Calculations Included Impermissible Costs Beyond "Capital Improvements to . . . Schools"

Plaintiffs next assert that to the extent the County did engage in any capital improvement calculations, those calculations included impermissible costs, namely: (1) land acquisition; (2) support and transportation facilities; (3) portable classrooms; (4) buses; and (5) TischlerBise's consultant fee. Determining whether the County could appropriately include these items in its estimations and calculations of school impact fees requires us to construe and apply the following definition of "capital improvements" provided by the Enabling Act:

> For purposes of this subsection, the term capital improvements includes the acquisition of land for open space and greenways, capital improvements to public streets, schools, bridges, sidewalks, bikeways, on and off street surface water drainage ditches, pipes, culverts, other drainage facilities, water and sewer facilities and public recreation facilities.

Enabling Act § (b)(2). We are obliged to apply statutorily provided definitions when interpreting legislative acts. *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202 (1974).

a. Land Acquisition and Portable Classrooms

The parties first dispute whether purchasing real property constitutes a "capital improvement to . . . schools." Enabling Act § (b)(2). Plaintiffs note that land acquisition is expressly included as it relates to "open space and greenways" but is otherwise absent from the definition, *id.*, contending that land acquisition is therefore excluded from the other listed categories. *See, e.g.*, *Evans v. Diaz*, 333 N.C. 774, 779-80,

430 S.E.2d 244, 247 (1993) ("Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list." (citations omitted)). However, this overlooks the definitional list's recursive quality; in the context of schools, the General Assembly used the term "capital improvements" to define itself, providing that "the term capital improvements includes . . . capital improvements to . . . schools[.]" Enabling Act § (b)(2). Thus, we interpret the statutory definition to: (1) identify the several categories of capital improvements for which impact fees may be assessed, *e.g.*, schools; and (2) *enlarge* the common definition of "capital improvements" to include land acquisition for projects that otherwise would not involve any improvement-related expenditures—like undeveloped "open space"—while maintaining the ordinary definition as it applies to schools and the other identified categories.

The ordinary definition of "capital improvement" includes land acquisition in addition to construction. *See Capital Improvement*, *Black's Law Dictionary* (11th ed. 2019) ("An outlay of funds to *acquire* or improve a fixed asset. – Also termed capital improvement; capital outlay." (emphasis added)). This also comports with how the term is used elsewhere in our General Statutes, particularly when referring to the State's powers to pay for and pursue "capital improvements." *See*, *e.g.*, N.C. Gen. Stat. § 143C-1-1(d)(5) (2021) (defining "capital improvement" under the State Budget Act as "[a] term that *includes real property acquisition*, new construction or rehabilitation of existing facilities, and repairs and renovations over one hundred thousand dollars ($100,000) in value" (emphasis added)); N.C. Gen. Stat. § 162A-211(a)(1) (2021) (defining "costs of constructing capital improvements" for purposes of sewer and water systems development fees as including both "[c]onstruction contract prices" and "[l]and acquisition cost"). Further, this Court has described the purchase of land as a proper expenditure from a county's "capital improvement fund." *See generally Davis v. Iredell Cnty.*, 9 N.C. App. 381, 176 S.E.2d 361 (1970) (upholding a county's use of "capital improvement fund" monies to buy land for a new judicial complex on constitutional and statutory grounds). Because the purchase of land falls within the ordinary meaning of the term "capital improvements," and such meaning accords with both statutory and case law, we hold that the Enabling Act allowed the County to assess school impact fees to buy new land for schools. *Cf. Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 20, 803 S.E.2d 142, 150 (2017) (defining the word "interest" in a statute based on a common dictionary definition that was "consistent with the manner in which 'interest' is used in other statutory provisions and judicial decisions").

Portable classrooms, too, appear to be "capital improvements to . . . schools," as they are "improvements" to real property under the commonly understood definition of the term. *See Improvement*, *Black's Law Dictionary* (11th ed. 2019) ("An addition to property, usu. real estate, whether *permanent or not*" (emphasis added)).[5] Indeed, Plaintiffs' counsel acknowledged at oral argument that these portable classrooms could be considered "capital improvements" for impact fee expenditure purposes. We therefore hold the County properly included this expense in calculating its impact fees.

b. Support and Transportation Facilities

Support and transportation facilities are certainly capital improvements; the question becomes whether they are "capital improvements to . . . schools," specifically. In their brief, Plaintiffs asserted that the word "school," for purposes of the Enabling Act, strictly and unambiguously means "a place where instruction is given: a building or group of buildings in which a school is conducted." *School*, *Webster's Third New International Dictionary* (3rd ed. 2002). Though a reasonable definition, Plaintiffs' counsel candidly conceded at oral argument that the question of what constitutes "capital improvements to . . . schools" is "a bit unclear." Rightly so; the limited definition offered by Plaintiffs is far from the only common one, with other ordinary definitions using more expansive terms to include all buildings used by an educational institution. *See*, *e.g.*, *School*, *The American Heritage Dictionary of the English Language* (4th ed. 2001) ("The building or group of buildings housing an educational institution"); *School*, *Webster's New World Dictionary and Thesaurus* (4th ed. 2010) ("a place or institution, with its buildings, etc., for teaching and learning"); *School*, *Oxford Dictionary of English* (1st ed. 2010) ("the buildings used by a school"). Though legislative bodies have sometimes sought to clarify what buildings and improvements constitute part of a "school" by using alternative, expressly defined language, no such effort was made regarding the Enabling Act. *See generally Appalachian Materials*, *LLC v. Watauga Cnty.*, 262 N.C. App. 156, 822 S.E.2d 57 (2018) (holding there was no ambiguity in the term "educational facility," which was defined by ordinance to include only "elementary schools, secondary schools, community colleges, colleges, and universities" as well as "any property owned by schools for instructional purposes").

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5. Though termed "portable classrooms," the law requires them to "be anchored in a manner required to assure their structural safety in severe weather[,]" N.C. Gen. Stat. § 115C-521(b) (2021), revealing them to be less "portable" than their name suggests.

Whether something is part of a "school" is itself a fact-specific inquiry, and the common understanding of the word will often conflict with Plaintiffs' preferred definition. For example, a cafeteria, administrative building, parking lot, or playground are not in-and-of themselves "place[s] where instruction is given" or "buildings in which a school is conducted," *School*, *Webster's Third New International Dictionary* (3rd ed. 2002), but construct them on an elementary school campus and they are invariably considered part of the "school."[6] We therefore reason that the word "school," as used in the Enabling Act, is broad and ambiguous, and could plausibly be read as either a limited reference to the buildings in which instruction occurs or a more expansive mention of all buildings and improvements used by a scholastic institution. *See*, *e.g.*, *Visible Props., LLC v. Vill. of Clemmons*, 284 N.C. App. 743, 754, 876 S.E.2d 804, 812 (2022) ("When there are two or more reasonable interpretations of the law, the law is ambiguous." (citation omitted)).[7] Because we are required to construe any ambiguity in the Enabling Act broadly, N.C. Gen. Stat. § 153A-4 (2021), we hold that "capital improvements to . . . schools" includes the support and transportation facilities considered in the County's establishment of its impact fees.

c. Buses and Consultant Fees

Unlike the aforementioned expenses, buses and TischlerBise's consultant fees are not "capital improvements to . . . schools" because they are not themselves "capital improvements" as the word is ordinarily understood. A bus and a consultant's report simply are not "acqui[sitions] [of] or improve[ments] [to] a fixed asset." *Capital Expenditure*, *Black's Law Dictionary* (11th ed. 2019). Nor are they "addition[s] to property[.]" *Improvement*, *Black's Law Dictionary* (11th ed. 2019).

The County's arguments to the contrary are unpersuasive. Though the County asserted in its brief and oral argument that TischlerBise's

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6. This is by no means an exhaustive list of examples, and the same may be said of countless other improvements like gymnasiums, athletic fields, sprinkler buildings, *etc.* *See*, *e.g.*, N.C. Gen. Stat. § 159D-37 (6a)a. (2021) (identifying, *inter alia*, libraries, laboratories, dormitories, dining halls, athletic facilities, laundry facilities, "and other structures or facilities related to these facilities or required or useful for the instruction of students, the conducting of research, or the operation of the institution" as "educational facilities").

7. In addition to arguing the merits of their claims, Plaintiffs assert they are owed attorney's fees on the basis that the County violated an unambiguous statute. *See* N.C. Gen. Stat. § 6-21.7 (2021) (providing that attorney's fees must be awarded if a county is found to have "violated a statute or case law setting forth unambiguous limits on its authority"). Our holding that the Enabling Act is ambiguous precludes such an automatic award of attorney's fees, though they may still be awarded in the sound discretion of the trial court. *Id.*

consultant fees relate to the "design" of future capital improvements, the reports in no way purport to "design" any capital improvements. The 2007 Studies do not, for example, include any architectural designs, traffic or environmental impact studies, or other necessary reports developed as part of a capital improvement project. As for buses, the County maintains that any expenses incurred from the operation or functioning of a school are "costs to the County of constructing certain capital improvements" recoupable under the Enabling Act. Enabling Act § (b)(1). But such a position is untenable; the County could not identify any school-related costs that fell outside this definition at oral argument, and this reading could logically reach everything from pencils to teacher salaries to cleaning supplies. In short, the County's reading would render the specific phrase "capital improvements" meaningless, and "a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant." *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981). Because the evidence shows the County may have included improper costs in calculating its impact fees, the trial court erred in granting summary judgment for the County on this claim.

d. Remand Is Required

Though we hold that the County could not include buses and TischlerBise's consultant fees in calculating school impact fees, this does not fully resolve Plaintiffs' claims on behalf of the Feepayer Class. As noted in its brief, the County never set its impact fees at 100% of the maximum amounts calculated by TischlerBise, electing instead to impose fees ranging between 32% and 60% of that maximum amount at various times. The County thus may have calculated and assessed impact fees that did not incorporate or cover anticipated bus and consultant costs, as a review of the 2007 Studies shows that buses and consultant fees accounted for 4-6% of the maximum total impact fees calculated for the OCSD and 1-2% for the CHCSD. Further, the legislative findings in the County's ordinances reference the assessment of impact fees only to cover "new school *facilities*," ORANGE COUNTY, N.C., CODE OF ORDINANCES §§ 30-31.(2)-(4) (2008) (emphasis added), an undefined term whose ordinary meaning unambiguously does not include buses or consultant fees. That ordinance also explicitly states what the school impact fees may be spent on without express mention of buses or consultant studies:

> Funds shall be used for capital costs associated with the construction of new public school space, including new buildings or additions to existing buildings or otherwise converting existing buildings into new public school space

> where the expansion is related to new residential growth. Such capital costs include actual building construction; design, engineering, and/or legal fees; land acquisition and site development; equipment and furnishings; infrastructure improvements; and/or debt service payments and payments under leases through which to finance such costs.

Id. § 30-35(c)(1). Because the issue of what damages are owed to Plaintiffs is unsettled on the record, we remand the Feepayer claim for further proceedings to resolve this factual question.

Plaintiffs maintain that remand is not required because N.C. Gen. Stat. § 160D-106 requires the return of an illegally assessed fee *in toto* and does not provide for partial refunds. Even setting aside the unresolved factual question of whether improper costs were actually included in the County's final setting and expenditure of its school impact fees, we decline to adopt Plaintiffs' position because doing so would countenance an absurd result.

The statute at issue is designed to make plaintiffs whole for *illegal* fees only; nothing in the statute suggests it is intended to punish local governments while granting a windfall to plaintiffs. Section 160D-106 does not, for example, allow for punitive or treble damages. *Compare* N.C. Gen. Stat. § 160D-106, *with* N.C. Gen. Stat. § 75-16 (2021) (establishing treble damages for unfair and deceptive trade practice claims), *and* N.C. Gen. Stat. § 1D-15 (2021) (allowing for punitive damages in civil actions when certain aggravating factors are shown); *see also Houpe v. City of Statesville*, 128 N.C. App. 334, 351, 497 S.E.2d 82, 93 (1998) (holding a defendant could not pursue damages against a municipal government under punitive statute prohibiting blacklisting of employees because "punitive damages may not be recovered against a municipality absent statutory authorization, which [the blacklisting statute] fails to provide" (citations omitted)). Though it does allow for the recovery of interest, it does so at *less* than the legal rate imposed on ordinary compensatory civil judgments. *Compare* N.C. Gen. Stat. § 160D-106 (authorizing refunds at 6% interest), *with* N.C. Gen. Stat. §§ 24-1 & -5 (2021) (collectively establishing the legal interest rate for civil judgments at 8% unless varied by contract). The intent of the statute to make feepayers whole without enriching them is further reinforced by its title, "*Refund* of *Illegal* Fees." N.C. Gen. Stat. § 160D-106 (emphasis added); *see also Brown v. Brown*, 353 N.C. 220, 224, 539 S.E.2d 621, 623 (2000) ("Although the title of an act cannot control when the text is clear, the title is an indication of legislative intent." (citation omitted)); *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 8,

727 S.E.2d 675, 681 (2012) ("[E]ven when the language of a statute is plain, the title of an act should be considered in ascertaining the intent of the legislature." (citation and quotation marks omitted)). That the statute contemplates "refunds" specifically undercuts any intent to award profits above and beyond the "illegal" amount paid. *See Refund*, *Oxford Dictionary of English* (1st ed. 2010) ("a *repayment* of a sum of money" (emphasis added)). And it does not otherwise appear that the statute was intended to encourage greater caution on the part of the County in assessing impact fees, particularly when: (1) the General Assembly elsewhere provided "local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of power," N.C. Gen. Stat. § 153A-4; and (2) the Enabling Act instructs the County to "*endeavor to approach* the objective of having every development contribute to a capital improvements fund," Enabling Act § (c) (emphasis added).

Said differently, allowing the Feepayers to profit (and not simply be made whole) by recovering the lawfully assessed portions alongside the much smaller unlawful portions would run contrary to N.C. Gen. Stat. § 160D-106's plain intent, as it would enrich the Feepayers and punish the County. We are required in such circumstances to deviate from the statute's plain language to avoid an absurd result that contravenes the legislature's manifest intent, particularly when the County was: (1) entitled to broad construction of any ambiguities, N.C. Gen. Stat. § 153A-4; and (2) given a broad mandate "to endeavor to approach" a fair assessment of fees, Enabling Act § (c). *See State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) ("[W]here a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, . . . the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." (citations and quotation marks omitted)).

In sum, we hold that the trial court erred in granting summary judgment for the County against the Feepayer Class claims to the extent that the County acted outside its authority under the Enabling Act by including buses and TischlerBise's consultant fees in the calculation and assessment of school impact fees. Because there remains a genuine issue of material fact as to the damages, if any, owed to the Feepayer Class under this theory, we remand the matter to the trial court for further proceedings not inconsistent with this opinion.

C. Refund Class Claims

[2] The 2016 Ordinance provides that no refunds are to be paid if impact fees are "reduced due to an updated school impact fee study that results

in changes to impact fee levels charged." 2016 Ordinance, § 30-35(e)(2). Conversely, refunds are owed if the impact fees are "reduced due to reasons other than an updated school impact fee study." *Id.* Plaintiffs rely on these provisions to press two distinct arguments on behalf of the Refund Class: (1) the 2016 Studies were not "updated school impact fee stu[dies]" because they were not strictly up-to-date; and (2) even if the 2016 Studies were a cause of the reduction, they were not the sole cause of the rate changes, and refunds are therefore owed because the fees were reduced for additional "reasons other than an updated school impact fee study." *Id.* We disagree with both contentions.

1. The 2016 Studies Were Updated

Plaintiffs first argument is premised on the assertion that "updated" means "to bring up to date" and "including the latest facts." *Update & Up-to-date*, *Webster's Third New International Dictionary* (3rd ed. 2002). As a semantic matter, the common meaning of the word "updated" does not invariably refer to something that is absolutely current. *See*, *e.g.*, *Updated*, *Oxford Dictionary of English* (1st ed. 2010) (defining the adjective "updated" as something "made *more* modern or up to date" (emphasis added)). The 2016 Studies, which included new data over the 2007 Studies, were thus "updated" under the common meaning of the word.

As a factual matter, the 2016 Studies meet even Plaintiffs' preferred definition. They were published in August and September 2016 and were based on the "current average student generation rates," the "actual current" level of service data, and the school inventory data available at the time the reports were drafted. The County then set its new impact fee rates on 15 November 2016. Yet Plaintiffs fault the Studies only for failing to include data released and certified *on or after 18 November 2016*, weeks after the Studies were published and days after the new impact fees were adopted. While the modified impact fee rates did not go into effect until January 2017, this does not negate the fact that the 2016 Studies were "updated" and "up-to-date" at the time the County actually enacted the reduction in fees.

2. The Impact Fees Were Reduced Due to the Updated 2016 Studies

Plaintiffs' second argument on behalf of the Refund Class is likewise misplaced. The 2016 Studies were the only precipitants identified in the prefatory text of the 2016 Ordinance changing the impact fee schedule:

> WHEREAS, *to ensure impact fees remain proportional to actual impacts caused, the County initiated a technical study in 2015 to study the school impact fees* and

> determine the "maximum supportable impact fee" that could be charged for various new housing types, and
>
> WHEREAS, said *technical study was completed in August 2016*, and
>
> WHEREAS, the County has held the required public hearing on the proposed amendments to Chapter 30, Article II of the Code of Ordinances *and the impact fee studies*.
>
> BE IT ORDAINED by the Board of Commissioners of Orange County that Chapter 30, Article II—Education Facilities Impact Fee is hereby amended as depicted in the attached pages.

Orange County, N.C., Ordinance ORD-2016-034 (Nov. 28, 2016) (emphasis added).

Though Plaintiffs seek to impeach this legislative record based on the County's discovery responses and statements by the County's planning director, the county attorney, and individual commissioners suggesting that additional policy considerations were at play, our caselaw provides that generally, for purposes of statutory interpretation, the intentions of the legislating body are to be derived from the text of the enactment itself rather than statements of individuals. *N.C. Milk Comm'n v. Nat'l Food Stores, Inc.*, 270 N.C. 323, 332-33, 154 S.E.2d 548, 555-56 (1967). *See also State v. Evans*, 145 N.C. App. 324, 329, 550 S.E.2d 853, 857 (2001) (holding that Governor James B. Hunt, Jr.'s press release stating an intention to "crack down on drunk drivers and let them know they'll pay the price" by tripling the civil driver's license revocation period was not competent evidence to show that the increased revocation period was intended to be punitive, and thus criminal, in nature). Indeed, the record reveals that these policy concerns, to the extent that they were considered by the County and its Board of Commissioners, were all resolved *in light of and in reliance on* the new data and analysis provided by the updated 2016 Studies. The record reflects that the updated 2016 Studies were both the precipitating and indispensable cause of the County's reduction in school impact fees, and the changes were not made "*due to reasons other than* an updated school impact fee study." 2016 Ordinance § 30-35(e)(2) (emphasis added).[8]

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8. The dissent asserts that reference to the 2016 Ordinance's prefatory language for the Commission's legislative intent renders application of the provision allowing for refunds "futile." But this is not inexorably true; if an ordinance reducing impact fees included a prefatory "whereas" clause explicitly *disclaiming* reliance on any updated impact

Even if Plaintiffs are correct that the County considered other policy implications in adjusting the impact fees, we decline to adopt Plaintiffs' reading of the 2016 Ordinance's refund provision; namely, that refunds are owed if impact fees are reduced for reasons in addition to an updated study. Such a reading would render ineffective the first clause of the refund provision that no refunds are owed "[i]f the Schedule of Public School Impact Fees . . . is reduced due to an updated school impact fee study that results in changes to impact fee levels charged." *Id*. When asked at oral argument for an example of when refunds would be owed under the 2016 Ordinance, counsel for Plaintiffs asserted that a TischlerBise study showing that impact fees were being assessed over the maximum amount allowed by law would "forc[e] the County to reduce its fees." But this is not quite right; TischlerBise, a private consulting firm, cannot "force" the Board of County Commissioners, as an independent legislative body, to take any action whatsoever. Only the limits placed on the County by law can do that. *See, e.g.*, *Rowe v. Franklin Cnty.*, 318 N.C. 344, 348-49, 349 S.E.2d 65, 68-69 (1986) (holding that a county's act "is *ultra vires* if it is beyond the purposes or powers expressly or impliedly conferred . . . by its . . . charter and relevant statutes and ordinances"). Rather, the County would only reduce the fees in this scenario for additional or other reasons: for example, the County Commissioners may have reduced the fees for the additional reason that they agreed with TischlerBise's analysis and methodology showing that *the law* compelled a reduction, or they may have disagreed with the study but nonetheless determined that a reduction was proper on other policy grounds.[9] Either way, refunds would be owed even under Plaintiffs' own hypothetical attempt at triggering the non-refund provisions of the 2016 Ordinance, and we will avoid a reading that renders any portion thereof "useless or redundant." *Porsh Builders, Inc.*, 302 N.C. at 556, 276 S.E.2d at 447.

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fee studies, then the 2016 Ordinance's provisions would plainly require refunds. So, too, would refunds be required if the impact fees were reduced and no updated studies had been done at all. In actuality, and as explained *infra*, it is the reading of the refund provision advocated by the Plaintiffs and adopted by the dissent that impermissibly renders a portion of the 2016 Ordinance a nullity.

9. Plaintiffs' counsel impliedly recognized these points at oral argument, stating on the one hand that, "if the study results indicated that the County had to [reduce fees] *to stay in compliance with the statute and the constitutional requirements for impact fees*, then that would be the study causing them to go down," while recognizing on the other that "the County . . . could have completely disregarded the TischlerBise studies." (Emphasis added).

Based on the above, we hold that the trial court properly granted summary judgment for the County on the Refund Class's claims. The 2016 Studies were "updated," and the impact fee reduction was "due to [those] updated school impact fee stud[ies]" within the meaning of the 2016 Ordinance. 2016 Ordinance § 30-35(e)(2). We therefore affirm the trial court's summary judgment order on this ground.

D. Plaintiffs' Motion to Strike

[3] Finally, Plaintiffs assert that the trial court erred in denying their motion to strike the County's amended motion for summary judgment. The amended motion did not substantively alter the original motion, while the affidavits attached to the amended motion were timely filed in opposition to Plaintiffs' motion for summary judgment. *See* N.C. R. Civ. P. 56(c) (2021) ("The adverse party may serve opposing affidavits at least two days before the hearing."). Because the portions properly subject to the motion to strike are not substantive and have no bearing on the resolution of this appeal, whether the trial court abused its discretion is moot. *See Roberts v. Madison Cnty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) ("A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." (citation omitted)). We therefore decline to address this portion of Plaintiffs' appeal.

III. CONCLUSION

Plaintiffs, on behalf of the Feepayer Class, have demonstrated that there are genuine issues of material fact concerning the damages owed due to the assessment of impact fees to cover costs that do not fit within the Enabling Act's definition of "capital improvements to . . . schools,"—specifically the assessments for buses and the TischlerBise study—and the County has not shown that this claim is precluded as a matter of law. We therefore reverse the summary judgment order in part and remand for further proceedings on this claim. However, we hold that the Plaintiffs have failed to show any such genuine issue of material fact as to the Refund Class, and the trial court properly granted summary judgment for the County on these claims.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judge GORE concurs.

Judge STADING dissents by separate opinion.

STADING, Judge, dissenting.

I respectfully dissent from the majority's decision to affirm the trial court's order granting summary judgment for Orange County. In this matter, we consider whether Orange County exceeded the bounds of its delegated authority under 1987 N.C. Sess. Laws 616, ch. 460 § 17 ("the Session Law"), and subsequent amendments, through its calculation and exaction of impact fees before issuing a certificate of occupancy for any new residential housing unit. To collect the impact fees authorized under the Session Law, the Orange County Board of Commissioners adopted the "Educational Facilities Impact Fee Ordinance." ORANGE COUNTY, N.C., ORANGE COUNTY CODE OF ORDINANCES ch. 30, art. VI, §§ 30-31 – 30-80 (1993) ("the Ordinance"). The Ordinance mandated that no "occupancy permit shall be issued for any new residential dwelling unit until the public school impact fees hereby required have been paid in full." *Id.* The Ordinance was later amended with updated impact fee schedules and a provision for reimbursement of fees if they were "reduced due to reasons other than an updated school impact fee study." ORANGE COUNTY, N.C., ORANGE COUNTY CODE OF ORDINANCES ch. 30, art. VI, §§ 30-31 – 30-80 (2016).

The Session Law was intended to "help defray the costs to the County of constructing certain capital improvements, the need for which is created in part by the new development that takes place within the County." 1987 N.C. Sess. Laws 616, ch. 460, § 17(b). To lawfully fulfill this objective, the legislature provided mandatory steps for the County to determine the cost of capital improvements and a formula for calculating impact fees. 1987 N.C. Sess. Laws 616, ch. 460, § 17(c). The North Carolina Constitution requires the General Assembly to "provide for the organization . . . of counties, cities and towns, and other governmental subdivisions" and authorizes it to "give such powers . . . as it may deem advisable." N.C. CONST. art. VII, § 1. "From the very formation of our State government, municipalities, in their various forms, have been considered creatures of the legislative will, and are subject to its control." *Quality Built Homes, Inc. v. Town of Carthage*, 369 N.C. 15, 18, 789 S.E.2d 454, 457 (2016) (citations omitted). Logically, "[a]ll acts beyond the scope of the powers granted to a municipality are void." *City of Asheville v. Herbert*, 190 N.C. 732, 735, 130 S.E. 861, 863 (1925) (citations omitted).

Substantial evidence shows that when Orange County calculated the taxes at issue, it neglected to follow the protocol outlined and mandated by the General Assembly in the Session Law. While I agree with the majority that impact fees should not have been expended on buses and consultant studies, I am nevertheless precluded from reaching

consideration of impermissible costs because a jury should resolve the lawfulness of the impact fees as a preliminary matter. Similarly, there is a genuine issue of material fact to be resolved with respect to the contradictory evidence of underlying reasons for a reduction in impact fees.

I. The Session Law and the County Ordinance

A. The Session Law

To accommodate the demands of rapidly growing Orange County, the General Assembly passed the Session Law to authorize additional taxation within Orange County's planning jurisdiction. Section 17 read as follows: "Orange County may provide by ordinance for a system of impact fees to be paid by developers to help defray the costs to the County of constructing certain capital improvements, the need for which is created in substantial part by the new development that takes place within the County." 1987 N.C. Sess. Laws 616, ch. 460, § 17(b). The Session Law defined capital improvements to include: "the acquisition of land for open space and greenways, capital improvements to public streets, schools, bridges, sidewalks, bikeways, on and off street surface water drainage ditches, pipes, culverts, other drainage facilities, water and sewer facilities and public recreation facilities." *Id.*

The law provided for a mandatory, deliberate scheme that the County was required to follow to ensure that each development contributed to a capital improvement fund, a sum bearing a reasonable relationship to that development's fair share of necessary costs. 1987 N.C. Sess. Laws 616, ch. 460, § 17(c). The Session Law's language outlined a three-step process:

> (1) Estimate the total cost of improvements by category (e.g., streets, sidewalks drainage ways, etc.) that will be needed to provide in a reasonable manner for the public health, safety and welfare of persons residing within the County during a reasonable planning period not to exceed 20 years. The Board of County Commissioners may divide the County into two or more districts and estimate the costs of needed improvements within each district. These estimates shall be periodically reviewed and updated and the planning period used may be changed from time to time.
>
> (2) Establish a percentage of the total costs of each category of improvement that, in keeping with the objective set forth above, should fairly be borne by those paying the impact fee.

> (3) Establish a formula that fairly and objectively apportions the total costs that are to be borne by those paying impact fees among various types of developments. . . .

Id. In sum, the legislation charged the County with (1) estimating the total cost of reasonable improvements by category over a planning period of 20 years or less, (2) establishing a percentage of those costs fairly assumed by the fee payer, and (3) establishing a formula apportioning the costs among different types of developments. In 1991, the legislature expanded the applicability of the Session Law from the "planning jurisdiction of Orange County" to "everywhere in Orange County." 1991 N.C. Sess. Laws 607, ch. 324, § 1. The law was amended again in 1993 to specifically permit Orange County to use impact fees for financing and leasing obligations. 1993 N.C. Sess. Laws 313, ch. 642, § 4(a).

B. The County Ordinance

In 1993, Orange County adopted an "Educational Facilities Impact Fee Ordinance" to provide for the system of impact fees. Orange County, N.C., Orange County Code of Ordinances ch. 30, art. VI, §§ 30-31 – 30-80 (1993). Until its repeal in 2017, the Ordinance was amended several times. Orange County, N.C., Orange County Code of Ordinances ch. 30, art. VI, §§ 30-31 – 30-80 (2017) (previously amended 1993, 1995, 1996, 2001, 2008, 2009, 2011, 2013, 2016). In 1993, the Ordinance set impact fees at $750 per residential dwelling unit for both Orange County and Chapel Hill-Carrboro School Districts. Orange County, N.C., Orange County Code of Ordinances ch. 30, art. VI, § 30-33 (1993). The impact fees changed over time as the Ordinance was amended. In 1995, the amended Ordinance set impact fees at $750 per residential dwelling unit in the Orange County School District and $1,500 per residential dwelling unit in the Chapel Hill-Carrboro School District. Orange County, N.C., Orange County Code of Ordinances ch. 30, art. VI, § 30-33 (1995). Additional amendments instituted more complex annual increases with additional categories of dwelling unit type. In 2008, the Ordinance was amended to incorporate figures derived from a report produced by the County's hired consultant. This amendment implemented maximum supportable impact fees, as calculated in the report, at 32% in 2009, 40% in 2010, 50% in 2011, and 60% in 2012. In doing so, the County adopted its hired consultant's calculations and underlying assumptions.

Each version of the Ordinance contained a clause under the subheading "Limitation on Expenditure of Funds" that stated, "[f]ollowing their collection, funds shall be expended within ten (10) years, the time frame coinciding with the public school facilities capital improvements

program (CIP) school impact fee period." ORANGE COUNTY, N.C., ORANGE COUNTY CODE OF ORDINANCES ch. 30, art. VI, §§ 30-35(c)(5) (2017) (previously amended 1993, 1995, 1996, 2001, 2008, 2009, 2011, 2013, 2016). The Ordinance, as amended in 2016, contained a provision contemplating when reimbursement of fees shall be made:

> If the Schedule of Public School Impact Fees . . . is reduced due to an updated school impact fee study that results in changes to impact fee levels charged, no refund of previously paid fees shall be made. If the Schedule of Public School Impact Fees . . . is reduced due to reasons other than an updated school impact fee study, the difference between the old and new fees shall be returned to the feepayer . . . with interest. . . . If the Schedule of Public School Impact Fees . . . is increased, no additional fees shall be collected from new construction for which certificates of occupancy have been issued.

ORANGE COUNTY, N.C., ORANGE COUNTY CODE OF ORDINANCES ch. 30, art. VI, § 30-35(e)(2) (2016).

II. Chronology of Actions by the County

A. Initial Calculation Method

A review of the record displays the County's course of action throughout the lifespan of the legislation. In the 1990s, the County used a process contained within a "Technical Report" to calculate the proportionate share of impact fees for financing public school capital needs. This report used a formula for "needed improvements" by multiplying "demand units" and "service standards." "Demand units" were derived by employing census data (later updated with additional data collection) to arrive at the average number of school-age children per residential housing unit. "Service standards" were determined by relevant square-footage standards and land area needed per student by type of school. The report then specified a reasonable cost calculation for the above-determined "needed improvements" multiplied by "cost per unit." The overall method also accounted for proportionality by employing several "factors." These factors included credit for projected sales-tax contributions, grants from the State, and revenue from property tax collections over a ten-year period using a present-value estimation for future payments.

Consistent with the Session Law, the "Technical Report" appeared to implement a ten-year planning period. This report quoted the portion of

the Session Law, directing Orange County to "estimate the total cost of improvements . . . that will be needed . . . during a reasonable planning period not to exceed 20 years." More importantly, the analysis specified that the ten-year timeframe is "the period of time within which the new school facilities listed [within the report] . . . will be needed." Moreover, the report listed that "both school districts have prepared ten-year school improvement planning programs which identify new public schools needed within the next 10 years to meet projected student enrollments."

Lastly, the "Technical Report" weighed the sufficiency of the benefits that are received by fee payers. The report noted the relevancy of temporal restriction on projected needs and established rational geographical districts that existed "in the form of the Chapel Hill-Carrboro School District and the Orange County School District." To address disparities in each district's population and cost of living, the report tabulated separate impact fees for each school district. This geographical distinction sought to ensure that residents of one district would not pay impact fees higher than necessary, nor pay for facilities they would never use. In practice, this limitation was exemplified by the need for a single new elementary school in the Orange County School District; meanwhile, the Chapel Hill-Carrboro School District required two new elementary schools, a new middle school, and expansion of an existing high school. Accounting for such differences in the calculation pursued the objective of fairly and objectively apportioning the costs.

B. Subsequent Calculation Method

In 2001, the County engaged Tischler & Associates, Inc., a consulting firm, to produce a report on "School Impact Fees" for both school districts. In that report, "[t]he basic formula used to derive the impact fee for both school districts is to multiply student generation rates by the net capital costs of public schools per student." A chart included in the report indicated that "student generation rates" were "public school students per housing unit" in the 2000–01 school year.

"Capital costs," reflected in a chart contained in the report, were comprised of average land costs based on past purchases, building costs derived from averages of "anticipated total project costs for five new schools," portable classroom costs determined by then-current prices, an enigmatic formula that estimated replacement costs of administrative facilities, and finally, cumulative transportation costs reliant upon 2001 figures. A credit was factored in for "future principal payments on existing General Obligation bonds." The consulting firm recommended implementation of this methodology based on its experience

that, "jurisdictions usually conclude that it is better to adopt impact fees based on current standards rather than desired levels of service" since the "latter approach creates existing deficiencies that must be corrected in a reasonable time from non-impact fee funding."

In 2007, the consultant, now TischlerBise, Inc. ("TischlerBise"), created a separate "School Impact Fees" report for each school district. These reports employed the "incremental expansion fee calculation" method to calculate the maximum supportable school impact fees for each district. According to TishclerBise, this method was "best suited for public facilities that will be expanded in regular increments, with [level of service] standards based on current conditions in the community." Also, this method used revenue "to expand or provide additional facilities, as needed, to accommodate new development."

TischlerBise's reports depicted the impact fee formula as the student per housing unit by type of unit (student generation rate), multiplied by the net local capital cost per student. The equation is visually represented as: Impact Fees = Student Generation Rate x Net Capital Cost per Student. The student generation rate stemmed from the system's average number of public school students per housing unit. The costs were "based on current levels of service . . . and project costs for each type of school facility (i.e., elementary, middle, and high), land for school sites, support facilities, portable classrooms, and buses." Finally, a credit was assessed for future revenue credits such as property taxes, and site-specific credits such as system improvements.

An in-depth look at the student generation rates by type of housing unit reveals that TishlerBise used an adjusted rate based on current enrollment from the 2006–07 school year. A detailed review of the formula to determine net capital cost per student shows that it consisted of several factors. First, construction costs were calculated using planned project costs in present dollars and previous project costs converted to "present-day costs" by using the "Marshall Valuation Service Comparative Cost Multipliers." These costs were expressed per square foot and multiplied by the square feet per student. The number of square feet per student was approximated by taking the existing facility square footage and dividing it by the current enrollment at each level. Second, a similar level of service calculation for land was employed by determining acre per student. An approximation of land value per acre of suitable sites was provided for each district "[p]er the Orange County Tax Assessor's office." As for portable classrooms, the consultant again applied its level of service formula to estimate costs. Next, to determine the costs of support facilities, the existing

building costs were divided by the current enrollment in each district. The costs of a shared transportation facility were assessed to both school districts. Vehicle costs were decided based on existing levels of service per district enrollment for the 2006–07 school year. Also included in TischlerBise's tabulation was a "consultant study cost per student," that required the feepayer to pay for the study (which assessed the fees to the feepayer). Finally, the calculation considered credits for present value on future principal payments of property taxes, paying down school bond debt per projected student enrollment.

After the total net local capital costs per student were determined by adding the above-listed categories, each district's maximum supportable impact fees were calculated by multiplying those costs by the student generation rate per level of school and housing unit type. These figures were expressed in a chart as fees at each level of school (elementary, middle, or high school) per housing unit type (single-family detached, single-family attached, multifamily, or manufactured home). Next, these numbers were summed to determine the maximum supportable impact fee per housing unit type. The report then recommended a "full update . . . every 3 to 5 years to reflect changes in development trends, infrastructure capacities, costs, funding formulas, etc." In contrast to the references contained in the 1990s report, the 2007 report did not mention the use of a planning period within the parameters set by the Session Law.

In 2016, Orange County again retained TischlerBise to complete another report to assess impact fees in each district. Like the earlier report, this report cited the "three basic methods for calculating impact fees" and favored the incremental expansion method. Unlike the prior report, student generation rates were further divided into more specific categories. There was no ascertainable use or articulation of a specific planning period to arrive at the rates. Costs were adjusted upwards in some cases (construction, portable classrooms in one district, support facilities, transportation in one district, consultant study), remained constant in others (portable classrooms in one district), or removed altogether (land, transportation in one district). Overall, in the Orange County School District, maximum impact fees were calculated much higher in each category of housing unit, with exceptions for the new categories of single-family detached of less than 800 square feet and age-restricted units. The Chapel Hill-Carrboro City School District assessments for maximum impact fees were higher for single-family attached and multifamily, and slightly lower for single-family detached and manufactured units.

III. Analysis

A. Standard of Review

This case presents cross-motions for summary judgment. Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2023). "[A]ll inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (citations omitted). In other words, "[t]he court must view the evidence presented by both parties in the light most favorable to the nonmoving party." *Wilmington Star-News v. New Hanover Reg'l Medical Ctr.*, 125 N.C. App. 174, 178, 480 S.E.2d 53, 55 (1997) (citation omitted). The standard of review for summary judgment is *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted).

B. Fee Payer Class

"Counties are instrumentalities and agencies of the State government and are subject to its legislative control; they possess only such powers and delegated authority as the General Assembly may deem fit to confer upon them." *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 654, 142 S.E.2d 697, 701 (1965) (citations omitted). "They are authorized to exercise only those powers expressly conferred upon them by statute and those which are necessarily implied by law from those expressly given." *Davidson Cnty. v. High Point*, 321 N.C. 252, 257, 362 S.E.2d 553, 557 (1987) (citations omitted). "Powers which are necessarily implied from those expressly granted are only those which are indispensable in attaining the objective sought by the grant of express power." *Id.* (citation omitted). Additionally, any such "statutorily granted powers" conferred upon a political subdivision "are to be strictly construed." *Id.* (citation omitted).

Here, in exercising its authority to tax, delegated by the Session Law, the County was required to "[e]stimate the total cost of improvements by category . . . that will be needed to provide in a reasonable manner . . . during *a reasonable planning period* not to exceed 20 years." 1987 N.C. Sess. Laws 616, ch. 460, § 17(c) (emphasis added). Since "the statutory language is clear and unambiguous, we must give effect to the plain and definite meaning of the language." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (citation omitted). In order to determine whether the County complied with

the unambiguous language of the Session Law, an analysis of the formula used by its hired consultant is necessary.

The formula used by TischlerBise to calculate the fees imposed on residential developments begins by determining the "student generation rate" (number of public school students per housing unit). This portion of the calculation considers estimated demand levels that would be relevant for determining, what if any, planning period was employed. As a starting point, the County provided "2005 student generation rates" to TischlerBise. The consultant multiplied the provided rates by "estimated housing units" (from a base year of 2006—07) to surmise the number of "estimated students." Then, the "adjusted student generation rates" used in TischlerBise's impact fee calculation were derived by dividing actual student population (from 2006—07 school year enrollment data) by "estimated students," and then multiplying this result by the County's 2005 student generation rate. After carefully reviewing TischlerBise's calculation, there is evidence that a planning period was not incorporated into the formula that ultimately determined impact fees. The language of the Session Law requires "a reasonable planning period not to exceed 20 years." 1987 N.C. Sess. Laws 616, ch. 460, § 17(c). Therefore, an application of the plain meaning rule to the Session Law's language and employment of the principle of strict construction would preclude this Court from concluding that the trial court properly granted summary judgment for the County.

The majority's holding that the County complied with the Session Law's planning period requirement is overly reliant on language in the Ordinance that "funds . . . shall be expended within (10) ten years, the timeframe coinciding with the public school facilities capital improvements program (CIP) school impact fee period." Orange County, N.C., Orange County Code of Ordinances ch. 30, art. VI, § 30-35(c)(5) (2008). However, these words mean nothing if the County's course of action pursuant thereto failed to follow its own requirements. Here, the paramount consideration is a thorough review of the calculations used in TischlerBise's reports that determined maximum supportable impact fees which were adopted by the County. Therefore, merely placing a window dressing of statutorily-compliant language in the Ordinance—the requisite planning period in this case—has no bearing if such planning period was not genuinely employed in the calculations implemented by the County upon taxing the citizenry.

Alternatively, the majority maintains that "even if the County did not employ the ordinance's 10-year planning period and otherwise relied exclusively on . . . TischlerBise's 2007 Reports . . . the Reports themselves

estimated the total anticipated capital improvement costs to schools for a five-year period, stating OCSD's 'school local capital costs average approximately $6 million per year, or *$30.4 million over five years*,' and the CHCSD's 'school local capital costs average approximately $11.3 million per year, or *$56.7 million over five years*.' " To the contrary, this "Cash Flow Projections" section of TischlerBise's 2007 reports is not a planning period, but a projection provided to the County showing that the "maximum supportable level" of impact fees (determined by their method of calculation) would cover 85% of capital costs over a period of five years. A summary of projected cash flow is not an ascertainable planning period used in the math of TischlerBise's 2007 reports.

The majority also discounts the impact of any flaws in the consultant's work by relying on "the fact that the County Board of Commissioners is not TischlerBise." This logic would withstand scrutiny if the County had independently used a system to tax its citizens that articulated needs by category ("estimate the total cost of improvements by category. . . that will be needed"), appropriately tailored within the confines of the Session Law ("in a reasonable manner for the public health, safety and welfare"), and within a specific period of time to accurately calculate demand ("during a reasonable planning period not to exceed 20 years"). 1987 N.C. Sess. Laws 616, ch. 460, § 17(c). Nonetheless, the record is clear that the County applied percentages to the exact same numbers contained in their consultant's reports. In sum, the County's taxation scheme directly implemented the calculations (and any underlying assumptions) used by TischlerBise. Accordingly, if TischlerBise failed to use "a planning period" as mandated by the Session Law, the County also failed to do so.

Further, the majority maintains that "even if the County did not employ the ordinance's 10-year planning period and otherwise relied on TischlerBise's 2007 Reports," this action was compliant with the Session Law because "the County's discovery responses explicitly identified this five-year estimate [from the 'Cash Flow Projections' section of TischlerBise's 2007 reports] as a planning period." Even if strict construction of the Session Law somehow permits us to accept alternate or multiple planning periods, we face contradictory evidence in the record from a County 30(b)(6) witness—the Director of Planning and Inspections Department for Orange County. This witness stated that the planning period was not ten years, and "it depends" as to whether it was less than ten years. When asked if the planning period was less than nine years, his response was, "you look back seven years." After the inability to provide a planning period, the County witness offered, "[w]hat I do know is that it was a reasonable period of time to assess the

impacts for public health, safety, and welfare of persons in the county." The majority maintains that this evidence "shows that the witness was testifying to his lack of definite knowledge concerning TischlerBise's utilized planning period rather than completely disclaiming any use of: (1) a planning period by TischlerBise; or (2) a 10-year planning period. . . ." While the majority provides an explanation to the witness's answer, the other explanation—that he does not know because a planning period was not used—is equally plausible and ripe for the deliberation of a jury. On its face, the evidence of compliance with the Session Law is contradictory and leaves fact-finding to be done by the factfinder.

The majority opinion also rests on the assertion that "whether the County used a five-year or a 10-year planning period[,] . . . that fact is not *material* to the Feepayer's claims because, whichever way that issue is resolved, it cannot establish non-compliance with the Enabling Act." However, the Session Law plainly required the County to "estimate the total cost of improvements by category . . . during *a reasonable planning period* not to exceed 20 years . . . and *the planning period* used may be changed from time to time." 1987 N.C. Sess. Laws 616, ch. 460, § 17(c) (emphasis added). To limit the planning period at or under twenty years, it must be identifiable. And to change the planning period from time to time, it must be ascertainable. Therefore, suggesting that the planning period can be X (an unknown number), and that we can just assume that X is equal to or less than twenty years, does not permit the County to carry out the intent of the words of the Session Law. Also, a plain and definite meaning of "a planning period" and "the planning period" can only mean a singular planning period. Assuming *arguendo*, if the Session Law somehow permitted the County to use planning periods of both X and Y (both equal to or less than twenty years), there is evidence that TischlerBise's reports did not even employ such calculation. The use of "a reasonable planning period not to exceed twenty years," is material to the litigation. Here, the statute must be strictly construed and, unlike horseshoes and hand grenades, strict compliance with its provisions is required.

Moreover, logic requires that a planning period must be identified for use in the mathematical formula estimating the anticipated needs sought to be addressed by the Session Law and the taxes authorized thereunder. In other words, if the County does not properly calculate the demand side of the equation as required by the Session Law, it cannot determine the permitted levels of taxation. Accordingly, the failure to use "a planning period" is noncompliance with the Session Law and results in *ultra vires* fee collection. 1987 N.C. Sess. Laws 616, ch. 460, § 17(c). The inability of the County and the majority to articulate

the planning period illustrates the point that the calculations used by TischlerBise, and adopted by the County, may not have employed a planning period. Likewise, the majority also claims that "the Feepayers and the dissent have not identified any evidence showing that the County did not utilize a . . . planning period of less than 20 years. . . ." However, this is to be expected since the evidence indicates there is an absence of a planning period in the math of the consultant. Evidence of noncompliance with the Session Law is a material fact, as "it would constitute or would irrevocably establish any material element of a claim. . . ." *Bone International, Inc. v. Brooks*, 304 N.C. 371, 375, 283 S.E.2d 518, 520 (1981) (citation omitted).

Here, summary judgment would be 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). Furthermore, "[w]hen considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Strickland v. Hedrick*, 194 N.C. App. 1, 9, 669 S.E.2d 61, 67 (2008) (citation omitted). "All inferences of fact must be drawn against the movant and in favor of the nonmovant." *Id.* (citation omitted). Contrary to the ruling of the trial court, the record before us shows there is genuine issue of material fact as to the claims against the Defendant. The record contains evidence that the incremental expansion method of calculation, employed by TischlerBise and adopted by the County, did not estimate the costs of improvements to be made "during a reasonable planning period not to exceed 20 years." 1987 N.C. Sess. Laws 616, ch. 460, § 17(c). Accordingly, regarding the County's compliance with the Session Law, there is an issue of fact to be resolved by a jury of the citizens who stand to assume the benefits and detriments of those fees.

C. Refund Class

Unlike the rule of strict construction guiding our review of a county's legislatively granted powers, "[a] remedial statute must be construed broadly in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained." *O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006) (citation omitted). A "statute, being remedial, should be construed liberally, in a manner which assures fulfillment of the beneficial goals for which it is enacted and which brings within it all cases fairly falling within its intended scope." *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 524, 259 S.E.2d 248, 251 (1979) (citations omitted). "The rules applicable

to statutes apply equally to the construction and interpretation of an ordinance adopted by the 'legislative body' of a municipality." *In re O'Neal*, 243 N.C. 714, 720, 92 S.E.2d 189, 193 (1956) (citation omitted).

At issue, the Ordinance as amended in 2016, provides that when a reduction in impact fees is made "due to an updated school impact fee study . . . no refund of previously paid fees shall be made." ORANGE COUNTY, N.C., ORANGE COUNTY CODE OF ORDINANCES ch. 30, art. VI, § 30-35(e) (2016) (repealed 2017). However, refunds shall be made if there is a reduction in fees "due to reasons other than an updated school impact fee study." *Id.* § 30-35(e)(2). Based on these provisions, plaintiffs posit two arguments: (1) that the 2016 TischlerBise impact fee studies were not "updated school impact fee stu[dies]" because they did not contain up-to-date data, and (2) the reduction in fees was "due to reasons other than an updated school impact fee study." Whereas the majority finds that both contentions lack merit, I would hold that the second issue creates a genuine issue of material fact, rendering the trial court's order of summary judgment inappropriate.

A review of the record shows that, on 11 December 2008, the Board of Commissioners of Orange County voted to implement annually increasing impact fees. Thereafter, in 2016, TischlerBise completed school impact fee reports for each school district. The maximum supportable impact fees calculated by TischlerBise were increased in each category of housing unit (excepting the new subcategory of single-family detached less than 800 square feet) from the last effective rates assessed under the 2008 Ordinance. *Id.* § 30-35(e). Nonetheless, on 15 November 2016, the County adopted the calculations from the report and assessed a percentage to these maximum figures that "feels fair." As a result of the numbers provided and the percentage selected (43% percent of the maximum supportable impact fee), effective 1 January 2017, fees for some categories from each district were reduced from their previous levels. At the same meeting, the Board updated the subsection on "Reimbursement of fees" to read: "[i]f . . . reduced due to an updated school impact fee study . . . no refund of previously paid fees shall be made." However, "[i]f . . . reduced due to reasons other than an updated school impact fee study, the difference between the old and new fees shall be returned to the feepayer. . . ." *Id.*

The record provides several possibilities as the impetus for the reduction in school impact fees. On 19 October 2016, the County attorney sent an email cautioning the Board of Commissioners about the North Carolina Supreme Court's recent posture towards impact fees. The email further warned the Board of Commissioners of "another keep

your head down aspect," perceiving that the status of the legislature with respect to the real estate lobby, made the timing of the proposed ordinance amendment "less than desirable." According to the County's planning director, this correspondence "would have been something that if they were to update their impact fees . . . they needed to keep these things in mind when they proceeded with making adjustments." The County's response to interrogatories provided another possible reason for the change in fee levels: "[a] breakeven point of 43% of the MSIF [maximum supportable impact fees] was used to achieve the same revenues in the first year as compared to the 2008 Fee Schedule." Compared to the reports produced by TischlerBise in 2007, the 2016 reports supported nearly across-the-board increases in school impact fees for both school systems. Nonetheless, on 15 November 2016, the County adopted the calculations from the 2016 reports and assessed a percentage to these increased maximum numbers that "feels fair" and thereby lowered impact fees for most housing categories.

Despite the preceding possibilities, the majority points to the following prefatory text of the Ordinance as amended in 2016, in which the County identifies the 2016 study as the precipitant for changes inthe fee rate:

> WHEREAS, *to ensure impact fees remain proportional to actual impacts caused, the County initiated a technical study in 2015 to study the school impact fees* and determine the "maximum supportable impact fee" that could be charged for various new housing types, and
>
> WHEREAS, said *technical study was completed in August 2016*, and
>
> WHEREAS, the County has held the required public hearing on the proposed amendments to Chapter 30, Article II of the Code of Ordinances *and the impact fee studies*.
>
> BE IT ORDAINED by the Board of Commissioners of Orange County that Chapter 30, Article II—Education Facilities Impact Fee is hereby amended as depicted in the attached pages.

ORANGE COUNTY, N.C., ORANGE COUNTY CODE OF ORDINANCES ch. 30, art. VI, § 30-35(e) (2016) (repealed 2017) (emphasis added). We should not accept the mention of the 2016 study in the prefatory language of the amended Ordinance as superior to and unchallenged by other contrary evidence that should be viewed "in a light most favorable to the

nonmoving party." *Strickland*, 194 N.C. App. at 9, 669 S.E.2d at 67. While the prefatory language of the amended Ordinance suggests one possible precipitant, overreliance on this text turns a blind eye to other evidence in the record.

Consider an ordinance, such as the remedial ordinance at issue, which requires a determination of causation. If the prefatory language always unquestionably governs in the face of evidence to the contrary, then the inclusion of the language of the amended Ordinance mandating that refunds shall be made if there is a reduction in fees "due to reasons other than an updated school impact fee study" was unnecessary and futile. Orange County, N.C., Orange County Code of Ordinances ch. 30, art. VI, § 30-35(e)(2) (2016) (repealed 2017). Deference to the prefatory language to this end does not broadly construe the amended Ordinance "in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained." *O & M Indus.*, 360 N.C. at 268, 624 S.E.2d at 348 (citation omitted).

Next, the majority opinion seeks to square this circle by negating the discovery responses from the County and citing principles of statutory interpretation, in stating that "the intentions of the legislating body are to be derived from the text of the enactment rather than the statement of individuals." Such consideration might rule the day if our inquiry was one of pure statutory construction—seeking to derive the legislature's intent from an ambiguous enactment. However, here, we seek to determine whether there is a genuine issue of material fact as to whether the County complied with the unambiguous language of the amended Ordinance. "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *Savage v. Zelent*, 243 N.C. App. 535, 538, 777 S.E.2d 801, 804 (2015). An application of this standard does not permit this Court to discount the discovery responses and statements by the County's planning director, the County's attorney, and individual commissioners. Dismissing the "reasons other than an updated school impact fee study" in the record as "policy concerns" does not negate their role in causation. Orange County, N.C., Orange County Code of Ordinances ch. 30, art. VI, § 30-35(e)(2) (2016) (repealed 2017). Being remedial, the rules of construction governing interpretation of the amended Ordinance do not provide us the latitude to ignore evidence of some reasons—including policy reasons—for the reduced fees.

The record reflects several potential "reasons other than an updated school impact fee study" for which the County reduced impact fees. Considering these other possible reasons contained in the record, broad construction of the County's self-imposed requirement for refunds "due

to reasons other than an updated school impact fee study" shows that a genuine issue of material fact exists. *Id.* § 30-35(e). As such, I would reverse the trial court's grant of summary judgment and allow a jury to fulfill its proper role as the finder of fact.

IV. Conclusion

Under a *de novo* standard of review of summary judgment, when viewing the evidence presented by both parties—the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits—in the light most favorable to the nonmoving party, there are genuine issues of material fact. As to the fee payer class, there is evidence that TischlerBise's method of calculating impact fees, adopted by the County, did not use a planning period. Employment of a planning period is not evident in the consultant's method of calculation, nor is it known to the County's own 30(b)(6) witness. Since there is a genuine dispute of material fact as to whether the County used a planning period, the impact fees may have been *ultra vires*. For the refund class, the record contains evidence that impact fees were reduced for reasons other than an updated school impact fee study. The County's own 30(b)(6) witness cited concerns of "timing" and "the nature of the General Assembly." Thus, there is a genuine issue of material fact as to whether the County complied with the refund provision required by its Ordinance as amended in 2016. Accordingly, I respectfully dissent from the majority and would hold that the trial court's order granting summary judgment for Orange County must be reversed.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 JULY 2023)

BETTS v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 22-324	N.C. Industrial Commission (X59367)	REMANDED IN PART AND AFFIRMED IN PART
FOXX v. STREET No. 23-73	Mitchell (22CVS77)	Affirmed.
FOXX v. STREET No. 23-	Mitchell (22CVS75)	Affirmed.
IN RE A.H. No. 22-833	Guilford (21JA84) (21JA85) (21JA86) (21JA87)	Affirmed
IN RE A.L. No. 22-916	Guilford (20JT75) (20JT76)	Affirmed
IN RE A.L.J.W. No. 22-986	Randolph (21JT41) (21JT42)	Affirmed
IN RE A.M.H.B. No. 22-711	Pender (20JT33)	Affirmed
IN RE C.L. No. 22-946	Franklin (20JT28) (20JT29)	Reversed
IN RE C.T. No. 22-843	Lincoln (20JA22) (20JA23) (20JA24) (20JA25)	Vacated and Remanded
IN RE EST. OF CORBETT No. 22-526	New Hanover (16E1551)	No Error
IN RE EST. OF CORBETT No. 22-618	New Hanover (16E1551)	AFFIRMED IN PART AND DISMISSED IN PART
IN RE J.S. No. 22-878	Union (20JT143)	Vacated and Remanded

IN RE K.S. No. 22-942	Person (17JT74) (17JT75)	Affirmed
IN RE M.N.-R.S. No. 22-759	Wilkes (20JA95)	Vacated and Remanded
IN RE N.W. No. 22-355	Johnston (21JA39) (21JA40) (21JA41) (21JA42) (21JA43)	REVERSED IN PART; VACATED IN PART AND REMANDED.
IN RE S.G.S. No. 22-868	Buncombe (19JT140)	Affirmed
IN RE T.A.C. No. 22-857	Ashe (21JT21) (21JT22)	Reversed and Remanded
IN RE WILL OF LANCE No. 22-1048	Transylvania (20E31)	Affirmed
IN RE Z.A.G. No. 22-815	Buncombe (19JT173)	Affirmed
MONDA v. MATTHEWS No. 22-1041	Davie (21CVS335)	Affirmed
RODRIGUEZ v. MABE STEEL, INC. No. 22-999	N.C. Industrial Commission (21-001716)	Affirmed
SMITH v. PIEDMONT TRIAD ANESTHESIA, P.A. No. 22-464	Forsyth (16CVS5181-82)	Affirmed
STATE v. DANCY No. 22-1055	Person (20CRS51060) (20CRS701806)	NO ERROR; NO PREJUDICIAL ERROR
STATE v. FORD No. 23-23	Pitt (21CRS56504)	NO ERROR IN PART, VACATED IN PART AND REMANDED FOR RESENTENCING
STATE v. GANNON No. 22-827	Johnston (20CRS51476)	Affirmed

STATE v. GARCIA No. 22-791	Wake (19CRS209718)	No Error
STATE v. McCARTY No. 22-388	Onslow (16CRS57559) (17CRS58110-11)	NO ERROR; NO PLAIN ERROR; NO INEFFECTIVE ASSISTANCE OF COUNSEL.
STATE v. McCORMICK No. 22-690	Cumberland (19CRS3012) (19CRS51622) (19CRS54261-62)	No Error
STATE v. PAINTER No. 22-864	Wayne (16CRS54517-18)	No Error
STATE v. PURVIS No. 22-897	Pitt (20CRS56642-43) (20CRS56646-47) (20CRS56673)	Vacated in part and Remanded
STATE v. STOKES No. 22-898	Onslow (16CRS56184) (17CRS50499) (19CRS50295) (20CRS310-11)	No Error
STATE v. THOMPSON No. 22-682	Mecklenburg (12CRS253233-35) (12CRS253237) (12CRS55383-85) (12CRS55387-89) (12CRS55391) (12CRS55394)	Affirmed.
TUEL v. TUEL No. 23-20	Johnston (17CVD1533)	Vacated and Remanded
UNDERWOOD v. INGLES MKTS., INC. No. 23-42	N.C. Industrial Commission (18-001543)	Affirmed
WALSH v. STREET No. 23-72	Mitchell (22CVS76)	Affirmed.

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