290 N.C. App.—No. 2 Pages 128-243

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

FEBRUARY 12, 2024

MAILING ADDRESS: The Judicial Department
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OF

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COURT OF APPEALS

CASES REPORTED

FILED 15 AUGUST 2023

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Denial of motion for appropriate relief—guilty plea—recanted testimony—pure question of law—certiorari denied—In a case in which defendant had entered an *Alford* plea to second-degree murder and robbery with a dangerous weapon, defendant's appeal from the denial of his motion for appropriate relief (MAR) was dismissed, and his petition for a writ of certiorari denied, where the trial court properly determined that there was no recanted testimony for purposes of N.C.G.S. § 15A-1415(c) because a witness's statement to police identifying defendant as the person who shot and killed the victim, which she later recanted, was not made under oath or affirmation at a trial or in an affidavit or deposition and therefore did not constitute testimony. The trial court was not required to hold an evidentiary hearing where the basis for the MAR involved a pure question of law and not one of fact. **State v. Brown, 196.**

Mootness—public meeting notice requirements—emergency decision ratified at regular meeting—regular meeting not challenged—In an action for declaratory relief arising from a town's decision to remove from public property a monument commemorating Confederate soldiers, although plaintiffs alleged that the

town's initial emergency meeting did not comply with notice requirements under the open meetings law, plaintiffs' notice argument was moot where plaintiffs did not independently challenge the town's subsequent regular meeting, at which the town unanimously ratified its prior decision from the emergency meeting to remove the monument. **Edwards v. Town of Louisburg, 136.**

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CHILD ABUSE, DEPENDENCY, AND NEGLECT

Permanency planning—guardianship—legal significance—lack of evidence—In a case involving a child who had been adjudicated neglected, the trial court's order awarding guardianship of the child to her foster parents was vacated where the court's findings and conclusions that the foster parents understood the legal significance of guardianship and their responsibilities were not supported by any evidence; an unsigned financial "affidavit" regarding the parties' finances was insufficient evidence for this purpose. **In re P.L.E., 176.**

Permanency planning—guardianship—parental visitation denied—lack of mandatory findings—In a case involving a child who had been adjudicated neglected, the trial court erred in its order awarding guardianship to the child's foster parents by denying visitation to the child's mother without making mandatory

findings in accordance with N.C.G.S. § 7B-906.1(d) and (e) regarding whether reports on visitation had been made and whether there was a need to create, modify, or enforce an appropriate visitation plan. **In re P.L.E., 176.**

CONSTITUTIONAL LAW

Contracts Clause—anti-pension-spiking legislation—impairment of employment contract—impairment of contract between employer and retirement system—In an action brought by a county board of education (petitioner) challenging an anti-pension-spiking statute, which established a contribution-based benefit cap on certain state employees' pensions while requiring employers to make additional contributions to employees who were exempt from the benefit cap (to restore those employees' retirement allowances to the pre-cap amount), where the Retirement Systems Division of the Department of the State Treasurer (respondent) issued a final agency decision requiring petitioner to pay an additional contribution to one of its cap-exempt employees, the trial court erred in concluding that the statute violated the Contract Clause of the federal constitution. Petitioner failed to establish that the statute substantially impaired its employment contract with the employee where there was no record evidence showing that the additional contribution was significant in relation to all of the contributions petitioner made to the employee's pension throughout that employee's career, and where there was no evidence showing that the employee's salary increase toward the end of her career affected how the statute's benefit cap analysis applied to her. Further, petitioner failed to establish that it had an implied contract with respondent that gave petitioner a vested right in keeping constant the amounts it contributed to the state pension fund. **Wilson Cnty. Bd. of Educ. v. Ret. Sys. Div., 226.**

North Carolina—county school fund provision—challenge to anti-pension-spiking statute—In an action brought by a county board of education (petitioner) challenging an anti-pension-spiking statute, which established a contribution-based benefit cap on certain state employees' pensions while requiring employers to make additional contributions to employees who were exempt from the benefit cap (to restore those employees' retirement allowances to the pre-cap amount), the trial court erred in concluding that the statute violated Article IX, Section 7(a) of the state constitution, which requires county school funds to be used exclusively for maintaining free public schools. In its as-applied challenge to the statute, petitioner failed to present any facts showing that the additional contributions required under the statute would undermine its ability to provide a sound basic education to children in the county or that such payments did not constitute a use that maintained free public schools. **Wilson Cnty. Bd. of Educ. v. Ret. Sys. Div., 226.**

DECLARATORY JUDGMENTS

Standing—removal of Confederate monument—ownership stake not alleged —The trial court properly granted summary judgment to a town on plaintiffs' claims seeking a temporary restraining order, preliminary injunction, and declaratory judgment—which plaintiffs filed to challenge the town's decision to remove from public property a monument commemorating Confederate soldiers—where plaintiffs not only failed to allege they had any proprietary or contractual interest in the monument but also either denied having or admitted to not having an ownership interest in various discovery responses and therefore lacked standing to pursue a claim for declaratory relief. **Edwards v. Town of Louisburg, 136.**

TERMINATION OF PARENTAL RIGHTS

Grounds for termination—willful abandonment—sufficiency of findings—no attempts to contact child—The trial court did not err in concluding that grounds existed to terminate respondent-father's parental rights in his daughter based on willful abandonment where the court's findings of fact were sufficient to support its conclusions of law. The father's specific challenges to the findings regarding his lack of gifts for his daughter and lack of effort to contact her lacked merit, especially in light of other, unchallenged findings establishing that he never sent gifts or attempted to contact her. Furthermore, the trial court was not required to make findings on every piece of evidence presented, and on the issue of whether the mother intentionally obstructed access to the daughter, the trial court made detailed findings and ultimately found that the mother's testimony was more credible than the father's. **In re A.N.B., 151.**

ZONING

Unified development ordinance—land use buffer—zoning districts versus land use designations—The trial court utilized the correct standard of review and did not err when it upheld the decision of a county board of adjustment (BOA) regarding whether land use buffer regulations in the county's Unified Development Ordinance (UDO) applied to a gravel road between petitioner's property and an adjacent residential subdivision. The BOA properly interpreted the UDO provisions as requiring buffers based on zoning districts and not on land use designations; therefore, although petitioner claimed to operate an "active farm" on her property, no buffer was required because both properties were zoned rural residential. **Arter v. Orange Cnty., 128.**

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.

ALISON ARTER, PETITIONER
v.
ORANGE COUNTY, STEPHEN M. BURT, SHARON C. BURT, JODI BAKST, AND REAL ESTATE EXPERTS, RESPONDENTS

No. COA23-86

Filed 15 August 2023

Zoning—unified development ordinance—land use buffer—zoning districts versus land use designations

The trial court utilized the correct standard of review and did not err when it upheld the decision of a county board of adjustment (BOA) regarding whether land use buffer regulations in the county's Unified Development Ordinance (UDO) applied to a gravel road between petitioner's property and an adjacent residential subdivision. The BOA properly interpreted the UDO provisions as requiring buffers based on zoning districts and not on land use designations; therefore, although petitioner claimed to operate an "active farm" on her property, no buffer was required because both properties were zoned rural residential.

Judge CARPENTER dissenting.

Appeal by petitioner from order entered 23 June 2022 by Judge R. Allen Baddour, Jr., in Orange County Superior Court. Heard in the Court of Appeals 6 June 2023.

Petesch Law, by Andrew J. Petesch, for petitioner-appellant.

James C. Bryan and Joseph Herrin for respondent-appellee Orange County.

The Brough Law Firm, PLLC, by Robert E. Hornik, Jr., for respondents-appellees Stephen M. Burt, Sharon C. Burt, Jodi Bakst, and Real Estate Experts.

GORE, Judge.

Petitioner, Alison Arter, appeals from the superior court's Order affirming the decision of the Orange County Board of Adjustment ("BOA"). The trial court's order upheld a written determination that land use buffer regulations found in Section 6.8.6 of the Orange County

Unified Development Ordinance ("UDO") did not apply to a gravel road which divides petitioner's property from the adjacent subdivision at issue. Petitioner asserts, among other things, that the superior court: (i) misinterpreted various provisions of the Orange County UDO and (ii) erred in determining that the BOA's decision was supported by competent, material, and substantial evidence in the record.

Petitioner appeals as a matter of right from a final judgment of superior court pursuant to N.C. Gen. Stat. section 7A-27. Upon review, we affirm.

I.

Petitioner owns and resides on her property (the "Arter Property") located in Orange County, North Carolina. Petitioner purchased the property from respondents Stephen Burt and Sharon Burt in 2007. As of February 2021, the Burts still owned the adjoining property—an approximately 55-acre tract of land—which respondent Jodi Bakst eventually developed into a 12-lot residential subdivision (the "Array Subdivision").

Orange County implements zoning, subdivision, and other land use regulations in their UDO. Both the Arter Property and the Array Subdivision are zoned R-1 (Rural Residential) pursuant to the UDO. Petitioner has continuously used the Arter Property for the operation and management of equine facilities. The Array Subdivision is a low intensity "flexible" residential subdivision.

The primary concern petitioner expressed regarding the Array Subdivision is that the gravel road entrance into the subdivision—Array Drive—runs generally parallel in some areas to the common boundary line between the Arter Property and Array Subdivision. Petitioner claimed that the proximity of Array Drive to her horse stable would be injurious to her horses, and that a buffer should have been required between her property and the road. Petitioner claims to operate an "active farm" on her property, that the UDO requires a 30-foot wide, Type B vegetated buffer along the common boundary line, and that the Table of Land Use Buffers found at UDO section 6.8.6(D) requires such a buffer. Petitioner's concerns led her to review proposed subdivision plans, attend the developer's neighborhood meeting, and consult with County Planning Staff.

After learning that Planning Staff were not going to implement a land buffer under the provisions of the UDO, petitioner submitted letters through counsel to Planning Supervisor Michael Harvey requesting an administrative determination on whether a land use buffer was required between the Arter Property and Array Subdivision. Harvey

determined that the UDO does not require the establishment of a land use buffer when parcels have the same or similar general use designations. In Harvey's view, the question of whether a property was used for "Active Farm/Agriculture" was irrelevant and of no effect.

Petitioner appealed Harvey's 2021 determination to the Orange County BOA. The BOA upheld Harvey's determination by written decision dated 20 July 2021. Petitioner timely filed a Petition for Writ of Certiorari and, after a hearing on the merits, the Orange County Superior Court affirmed the BOA's decision by written order filed 23 June 2022. Petitioner timely filed notice of appeal to this Court on 22 July 2022.

II.

> When an appellate court reviews a superior court order regarding an agency decision, the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.

Mann Media, Inc. v. Randolph Cnty. Planning Bd., 356 N.C. 1, 14, 565 S.E.2d 9, 18 (2002) (cleaned up).

III.

It is evident from the record that the superior court applied the appropriate standard of review. The dispositive issue on appeal is whether the superior court erred in concluding that the Orange County BOA properly interpreted the provisions of the Orange County UDO. "Because issues concerning the interpretation of zoning ordinances are questions of law, we likewise review the issues *de novo*." *Myers Park Homeowners Ass'n v. City of Charlotte*, 229 N.C. App. 204, 208, 747 S.E.2d 338, 342 (2013).

> In general, municipal ordinances are to be construed according to the same rules as statutes enacted by the legislature. The basic rule is to ascertain and effectuate the intention of the municipal legislative body. We must therefore consider this section of the ordinance as a whole, and the provisions *in pari materia* must be construed together.

George v. Edenton, 294 N.C. 679, 684, 242 S.E.2d 877, 880 (1978) (cleaned up). "Where the language of a[n] [ordinance] is clear, the courts must give the [ordinance] its plain meaning; however, where the [ordinance]

is ambiguous or unclear as to its meaning, the courts must interpret the [ordinance] to give effect to the [municipal] legislative intent." *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citation omitted).

In this case, it is undisputed that ambiguity exists between Orange County UDO sections 6.8.6(B) and 6.8.6(D). Section 6.8.6(B) is entitled "Applicability" and states, "Land use buffers will be required based on the *zoning district* of the proposed use and the *zoning district* of the adjacent uses." In contrast, the heading of the "Land Use Buffer Table" found at section 6.8.6(D) refers to "Zoning *or Use* of Adjacent Properties." When determining buffer requirements based on zoning districts, both the Arter Property and the Array Subdivision are zoned R-1. Adjacent R-1 properties do not require a buffer under section 6.8.6.(D). However, if the Arter Property qualifies as an "active farm," then a 30-foot-wide buffer would be required under section 6.8.6(D) based on land use designation.

As noted by the trial court, the BOA, and the Orange County Planning Department, Article 1 of the Orange County UDO also includes various provisions intended to assist in the interpretation of the UDO and resolve ambiguity. Section 1.1.12 provides:

> 1.1.12 Headings and Illustrations
>
> Headings and illustrations contained herein are provided for convenience and reference only and do not define or limit the scope of any provision of this Ordinance. *In case of any difference between meaning or implication between the text of this Ordinance and any heading, drawing, table, figure, or illustration, the text controls.*

Thus, when sections 6.8.6(B) and 6.8.6(D) are construed *in pari materia* with section 1.1.12, it is evident that the plain text of section 6.8.6(B) controls over the table in section 6.8.6(D). Accordingly, we conclude that the BOA properly interpreted the UDO as requiring buffers based on zoning districts. Any issue of fact regarding land use is inconsequential where the text of the ordinance controls. The superior court properly upheld the BOA's determination on this basis.

IV.

For the foregoing reasons, we determine that the superior court applied the appropriate standard of review and did so properly. Considering our resolution of this matter above, it is unnecessary to reach the remainder of petitioner's arguments.

AFFIRMED.

Judge RIGGS concurs.

Judge CARPENTER dissents by separate opinion.

CARPENTER, Judge, dissenting.

I respectfully dissent from the majority opinion, in which the majority concludes the Orange County Board of Adjustment (the "Board") and the Orange County Superior Court "properly interpreted the [Orange County Unified Development Ordinance ("UDO")] as requiring buffers based on zoning districts." I disagree with the majority's interpretation of UDO § 6.8.6 and write separately to explain my reading of the ordinance. After careful consideration of the provisions of the UDO, I conclude UDO § 6.8.6 requires land use buffers according to zoning districts *or* land uses, as depicted in Table 6.8.6.D (the "Land Use Buffer Table"). Accordingly, I would reverse and remand the matter to the superior court with instructions to determine whether Alison Arter's ("Petitioner") property (the "Arter Property") constitutes an "active farm/agriculture" within the meaning of UDO § 6.8.6, and thus, necessitates a buffer to separate it from an adjacent subdivision.

On appeal, Petitioner argues the Board and the superior court erred by incorrectly interpreting UDO § 6.8.6 and by failing to consider whether the Arter Property constitutes "active farm/agriculture" for the purposes of applying the Land Use Buffer Table.

As the majority properly acknowledges, our review of this matter is limited to determining: (1) whether the superior court applied the correct standard of review; and (2) whether the superior court correctly applied that standard. *MCC Outdoor, LLC v. Town of Franklinton Bd. of Comm'rs*, 169 N.C. App 809, 810, 610 S.E.2d 795–96, *disc. rev. denied*, 359 N.C. 634, 616 S.E.2d 540 (2005).

In considering an appeal from a decision of a zoning board, the reviewing court's standard of review depends on the nature of the issue or issues presented on appeal. *Myers Park Homeowners Ass'n v. City of Charlotte*, 229 N.C. App 204, 207, 747 S.E.2d 338, 341 (2013). When the issue is whether the board erred in interpreting an ordinance, a question of law, the reviewing court reviews the issue de novo. *Id.* at 207, 747 S.E.2d at 342. Under de novo review, the reviewing court may consider the interpretation of the board, but is not bound by that interpretation,

and may freely substitute its judgment as appropriate. *Id.* at 208, 747 S.E.2d at 342.

Here, in its 22 June 2022 Order ("the Order"), the superior court affirmed the Board's decision. As the majority notes, it appears from the Order that the superior court properly reviewed the Board's interpretation of the UDO de novo. *See MCC Outdoor, LLC*, 169 N.C. App at 810, 610 S.E.2d at 795–96. Thus, the next step is considering whether the superior court *correctly applied* the de novo standard. *See id.* at 810, 610 S.E.2d at 796.

Generally, "municipal ordinances are to be construed according to the same rules as statutes enacted by the legislature." *George v. Town of Edenton*, 294 N.C. 679, 684, 242 S.E.2d 877, 880 (1978). Statutory interpretation begins with an examination of the plain words of a statute, or in this case, an ordinance. *Lanvale Props., LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 155, 731 S.E.2d 800, 810 (2012); *see George*, 294 N.C. at 684, 242 S.E.2d at 880. Similar to statutes, "[i]f the language of the [ordinance] is clear and is not ambiguous, [this Court] must conclude that the legislat[ive body] intended the [ordinance] to be implemented according to the plain meaning of its terms." *Lanvale Props., LLC*, 366 N.C. at 155, 731 S.E.2d at 810 (citation omitted). If, however, the language is ambiguous, "courts [may] resort to canons of judicial construction to interpret meaning." *Jeffries v. Cnty. of Harnett*, 259 N.C. App. 473, 488, 817 S.E.2d 36, 47 (2018). "In interpreting a municipal ordinance, the basic rule is to ascertain and effectuate the intent of the legislative body." *Four Seasons Mgmt. Servs. v. Town of Wrightsville Beach*, 205 N.C. App. 65, 77, 695 S.E.2d 456, 463 (2010) (citations and quotation marks omitted).

"Zoning ordinances should be given a fair and reasonable construction, in the light of their terminology, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the [o]rdinance as a whole." *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966) (citation omitted). An ambiguous zoning ordinance "should be resolved in favor of the free use of property." *Id.* at 266, 150 S.E.2d at 443 (citation omitted).

In determining the meaning of UDO § 6.8.6, we should first examine the plain language of the ordinance. *See Lanvale Props., LLC*, 366 N.C. at 155, 731 S.E.2d at 810. Here, the relevant ordinance, UDO § 6.8.6(B), states: "[l]and use buffers [are] required based on the zoning district of the proposed use and the zoning district of the adjacent uses." In light of the plain language, it is unclear whether, and in what manner, "the zoning district of the proposed use" or "the zoning district of the adjacent

uses" dictates the applicability of land use buffers; thus, it requires referencing the related Land Use Buffer Table. Unlike UDO § 6.8.6(B), the Land Use Buffer Table indicates the application of land use buffers is determined using the zoning district *or* use of the subject and adjacent properties. Furthermore, the Land Use Buffer Table specifies the buffer type that is required, based upon the particular zoning districts or uses of the subject and adjacent properties. The language in UDO § 6.8.6(B), coupled with the conflicting Land Use Buffer Table, creates ambiguity as to whether the buffers apply to the zoning districts of subject and adjacent properties and/or land uses of subject and adjacent properties. Since there is ambiguity, rules of construction should be utilized to interpret the meaning of UDO § 6.8.6. *See Jeffries*, 259 N.C. App. at 488, 817 S.E.2d at 47.

"[W]hen interpreting provisions of a law that are all part of the same regulatory scheme, [this Court] should strive to find a reasonable interpretation so as to harmonize them rather than interpreting them to create irreconcilable conflict." *Visible Props., LLC v. Vill. of Clemmons*, 284 N.C. App. 743, 750, 876 S.E.2d 804, 810 (2022) (citation and quotation marks omitted). "Unless a term is defined specifically within the ordinance in which it is referenced, it should be assigned its plain and ordinary meaning. In addition, [this Court] avoid[s] interpretations that create absurd or illogical results." *Ayers v. Bd. of Adjustment for Town of Robersonville*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201 (1994) (citations omitted).

In this case, the UDO contains a pertinent rule of construction in section 1.1.12, which provides:

> [h]eadings and illustrations contained [in the UDO] are provided for convenience and reference only and do not define or limit the scope of any provision of this Ordinance. In case of any difference of meaning or implication between the text of this Ordinance and any heading, drawing, table, figure, or illustration, the text controls.

In other words, in the event of a conflict between the plain language of the UDO and a table, the text controls.

In this case, a conflict exists between the text of UDO § 6.8.6(B) and the Land Use Buffer Table because the text suggests the requirement of land use buffers is based on "zoning districts of proposed/adjacent uses;" however, the Land Use Buffer Table indicates it is based on "zoning *or* uses." (Emphasis added). If the difference in language is resolved pursuant to UDO § 1.1.12, the applicability of land use buffers should be

based *solely* on the zoning districts of the proposed and adjacent uses. Yet, the Land Use Buffer Table does not indicate which columns or rows pertain to zoning districts and which pertain to land uses. Furthermore, this interpretation would disregard the columns in the Land Use Buffer Table that are not apparent zoning districts—including "active farm/agriculture," "interstate highway," "arterial street," and "collector street"—rendering an illogical result. *See Ayers*, 113 N.C. App. at 531, 439 S.E.2d at 201. For example, under this construction, Orange County's 100-foot-wide buffer requirement between any zoning district and an interstate highway would be extinguished. For these reasons, UDO § 1.1.12 does not resolve the apparent conflict in UDO § 6.8.6 because the text of UDO § 6.8.6(B) does not, on its own, state when or how land use buffers are required.

The final step of this analysis is to consider the intent of the local legislative body and interpret UDO § 6.8.6 as to harmonize its various sections and eliminate internal conflict, which in this case, means recognizing and giving meaning to each column and row in the Land Use Buffer Table. *See Jeffries*, 259 N.C. App. at 488, 817 S.E.2d at 47. Here, the Land Use Buffer Table specifically includes an "active farm/agriculture" column, which is not labeled as either a zoning-district type or a land-use type. Moreover, the plain language of the Land Use Buffer Table, "zoning districts or uses," and the use of the term "land use" throughout UDO § 6.8.6 supports the interpretation that UDO § 6.8.6 applies to zoning districts or land uses. *See Lanvale Props., LLC*, 366 N.C. at 155, 731 S.E.2d at 810. This interpretation is further supported by the express purpose of the buffer requirement under the UDO. *See Yancey*, 268 N.C. at 266, 150 S.E.2d at 443. According to UDO § 6.8.6(A), a land use buffer is used to "buffer lower intensity *uses* from incompatible higher intensity/density land *uses*." (Emphasis added). Finally, the goals of the Comprehensive Plan emphasize the desire to preserve agricultural areas from incompatible uses as well as to recognize and support the right to farm. By specifically including zoning districts and land uses in the Land Use Buffer Table, when viewed in the context of the entire UDO and Comprehensive Plan, the intent of including UDO § 6.8.6 was, in part, to establish land buffers based on zoning districts *or* land uses in an effort to protect agriculture. *See id.* at 266, 150 S.E.2d at 443. As a result, I would conclude the superior court erred by affirming the Board's incorrect interpretation that UDO § 6.8.6 solely applies to zoning districts. Hence, in my view, the superior court's interpretation of UDO § 6.8.6 was incorrect. *See MCC Outdoor, LLC*, 169 N.C. App. at 810, 610 S.E.2d at 796.

The majority correctly notes that "if the Arter Property qualifies as an 'active farm,' then a 30-foot-wide buffer would be required under section 6.8.6(D) based on land use designation." Nevertheless, UDO § 6.8.6(D) does not define an "active farm" as a land use or a zoning district. Because there exists a question of fact as to whether the Arter Property constitutes "active farm/agriculture" under the UDO, I would remand to the superior court to make a finding as to that issue.

Although I agree with the majority's conclusion that the superior court used the proper standard of review when evaluating Petitioner's issues on appeal, I disagree with the majority's holding that the superior court correctly applied de novo review in interpretating UDO § 6.8.6. After reviewing the UDO in accordance with the principles of statutory construction, in my view, UDO § 6.8.6 requires land use buffers based on the zoning districts *or* land uses of the subject and adjacent properties. Accordingly, I would reverse and remand to determine whether the Arter Property constitutes "active farm/agriculture" for the purpose of applying UDO § 6.8.6 and requiring a 30-foot-wide buffer.

DEBORAH NASH EDWARDS, ROBERT W. COOPER, TIFFANY PATTERSON, WILLIAM H. RIGGAN, III, ZACHERY MYERS, MARTHA MILLER, EARL OLDHAM, DONALD K. DRIVER, DEBRA B. POLEO, PAULA WALTERS, NATALIE PETERSON AND ANITA M. DRIVER, PLAINTIFFS

v.

TOWN OF LOUISBURG, NORTH CAROLINA, A BODY POLITIC, DEFENDANT

No. COA22-688

Filed 15 August 2023

1. Declaratory Judgments—standing—removal of Confederate monument—ownership stake not alleged

The trial court properly granted summary judgment to a town on plaintiffs' claims seeking a temporary restraining order, preliminary injunction, and declaratory judgment—which plaintiffs filed to challenge the town's decision to remove from public property a monument commemorating Confederate soldiers—where plaintiffs not only failed to allege they had any proprietary or contractual interest in the monument but also either denied having or admitted to not having an ownership interest in various discovery responses and therefore lacked standing to pursue a claim for declaratory relief.

2. Appeal and Error—mootness—public meeting notice requirements—emergency decision ratified at regular meeting—regular meeting not challenged

In an action for declaratory relief arising from a town's decision to remove from public property a monument commemorating Confederate soldiers, although plaintiffs alleged that the town's initial emergency meeting did not comply with notice requirements under the open meetings law, plaintiffs' notice argument was moot where plaintiffs did not independently challenge the town's subsequent regular meeting, at which the town unanimously ratified its prior decision from the emergency meeting to remove the monument.

Judge TYSON dissenting.

Appeal by plaintiffs from order entered 28 March 2022 by Judge Michael O'Foghludha in Franklin County Superior Court. Heard in the Court of Appeals 7 February 2023.

Larry E. Norman Attorney, PLLC, by Larry E. Norman, for plaintiffs-appellants.

Cauley Pridgen, P.A., by James P. Cauley, III, and Emily C. Cauley-Schulken, for defendant-appellee.

GORE, Judge.

Plaintiffs appeal the trial court's order granting summary judgment in favor of defendant Town of Louisburg. Plaintiffs lack standing to bring a claim for declaratory relief under N.C. Gen. Stat. § 100-2.1, and their claim under North Carolina's Open Meetings Law (§§ 143-318.9 – 143-318.18) is moot. We affirm.

I.

A.

On 13 May 1914, the Joseph J. Davis Chapter of the United Daughters of the Confederacy dedicated the monument of a Confederate soldier (the "Monument") in memory of Franklin's Confederate dead. The Monument was located on North Main Street in Louisburg, North Carolina, on a right-of-way owned by the State. The State does not claim

ownership of the Monument itself. In an order denying plaintiffs' motion for preliminary injunction filed 20 July 2020, the trial court found that:

> 4. Rising tensions and demonstrations have recently surrounded similar monuments across North Carolina and the United States, resulting in citizens removing similar monuments on their own and resulting in injuries to citizens, law enforcement officers and property.
>
> 5. Based on similar protests and demonstrations and rising tensions in the Town of Louisburg during the month of June, 2020, the Louisburg Police Chief considered the situation around the Monument to constitute a police and public safety emergency and the Police Chief advised Town officials of his concerns.
>
> 6. On June 22, 2020, an emergency meeting of the Louisburg Town Council was held using the Zoom video conferencing platform, wherein the Town Council voted to remove and relocate the Monument.
>
> 7. The Town Council meeting was well attended and citizens were permitted to participate by submitting comments via Zoom and via email on the issue of the Monument.

Following the Council's decision at the 22 June 2020 emergency meeting, protests diminished. The soldier on top of the Monument was removed and put into storage while the Town investigated a suitable location to relocate the Monument base. At a subsequent regular meeting held on 20 July 2020, the Town Council voted to ratify its prior decision to remove and relocate the Monument. The Monument was later moved to a section of the Town's cemetery where Confederate veterans are buried.

B.

Plaintiffs commenced this action on 23 June 2020 in Franklin County Superior Court seeking a temporary restraining order, preliminary injunction, and declaratory judgment regarding the respective rights and obligations of the parties concerning the Monument. Plaintiffs alleged the Town failed to comply with the terms and provisions of N.C. Gen. Stat. § 100-2.1 (Protection of monuments, memorials, and works of art) and Article 33C of the North Carolina General Statutes concerning "Meetings of Public Bodies." Plaintiffs also argued defendant

violated the notice requirements for special meetings under the Town of Louisburg Code of Ordinances. As written in their complaint, plaintiffs sought a "[d]eclaratory judgment declaring that the actions of the Town of Louisburg ordering the removal or relocation of the Confederate Monument be declared void and of no effect."

The trial court did not issue a temporary restraining order. Defendant Town of Louisburg filed a motion to dismiss under Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure, which the trial court denied by written order entered 28 July 2020. The trial court entered a separate order denying plaintiffs' motion for preliminary injunction the same day.

On 9 April 2021, defendant filed a motion for summary judgment under Rule 56 of the North Carolina Rules of Civil Procedure. On 28 March 2022, the trial court entered an order granting summary judgment in favor of defendant on all claims.

C.

Plaintiffs timely filed written notice of appeal on 12 April 2022. The trial court's order granting defendant's motion for summary judgment is immediately appealable on grounds that such ruling is a final adjudication on the merits of all issues in controversy.

II.

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). "An issue is genuine if it may be maintained by substantial evidence." *Bernick v. Jurden*, 306 N.C. 435, 440, 293 S.E.2d 405, 409 (1982) (quotation marks and citation omitted). "[A] fact is material if it would constitute or would irrevocably establish any material element of a claim or defense." *Id.* (alteration in original) (citation omitted). "In ruling on a summary judgment motion, we consider the evidence in the light most favorable to the non-movant, drawing all inferences in the non-movant's favor." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 563, 853 S.E.2d 698, 714 (2021) (quotation marks and citation omitted). "We review a trial court's order granting or denying summary judgment de novo." *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012) (citation omitted).

III.

A.

[1] Defendant raised several arguments in support of summary judgment on plaintiffs' claim for declaratory relief under N.C. Gen. Stat. § 100-2.1. The trial court granted defendant's motion but did not state the basis for its rationale. While there are several possible reasons for its ruling, "[i]f the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) (citations omitted). We first consider whether the trial court's order should be affirmed because plaintiffs lack standing to pursue a claim for declaratory judgment under § 100-2.1.

"Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Beachcomber Props., L.L.C. v. Station One, Inc.*, 169 N.C. App. 820, 823, 611 S.E.2d 191, 193 (2005) (citations omitted). "The North Carolina Constitution confers standing to sue in our courts on those who suffer *the infringement of a legal right* . . . ." *Comm. to Elect Dan Forest*, 376 N.C. at 608, 853 S.E.2d at 733 (emphasis added). "A plaintiff must establish standing in order to assert a claim for relief." *United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 625, 881 S.E.2d 32, 44 (2022) (citation omitted). "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction, and standing is required to seek a declaratory judgment . . . ." *Id.* at 652, 881 S.E.2d at 61 (Newby, C.J., concurring) (internal citation omitted).

Under North Carolina's Uniform Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253 – 1-267, "an action is maintainable . . . only in so far as it affects the civil rights, status and other relations in the present actual controversy between parties." *Chadwick v. Salter*, 254 N.C. 389, 395, 119 S.E.2d 158, 162 (1961) (internal quotation marks omitted) (quoting *Calcutt v. McGeachy*, 213 N.C. 1, 4, 195 S.E. 49, 51 (1938)). However, "[t]he mere filing of a declaratory judgment is not sufficient, on its own, to grant a plaintiff standing . . . ." *United Daughters of the Confederacy*, 383 N.C. at 629, 881 S.E.2d at 46 (alteration in original) (internal citation and quotation marks omitted). "In other words, plaintiff is still required to demonstrate that it has sustained a legal or factual injury arising from defendants' actions as a prerequisite for maintaining the present declaratory judgment action." *Id.* at 629, 881 S.E.2d at 46-47.

Plaintiffs assert "ownership of the Monument itself" is a disputed issue of material fact precluding summary judgment. They offer various and conflicting positions about who owns the Monument—whether it be Franklin County, a specific County commissioner, the town of Louisburg, or the Daughters of the Confederacy. In any event, disputed ownership is not a genuine issue of material fact precluding summary judgment in this case. Plaintiffs fail to show some "proprietary or contractual interest in the monument . . .", *id.* at 629, 881 S.E.2d at 57, i.e., "a legally protected interest invaded by defendants' conduct." *Soc'y for the Hist. Pres. of the Twentysixth N.C. Troops, Inc. v. City of Asheville*, 282 N.C. App. 701, 704, 872 S.E.2d 134, 138-39, *rev. or reh'g granted and stay granted by* 383 N.C. 680, 880 S.E.2d 679 (2022). Through their responses to requests for admissions and in their depositions, each plaintiff party to this action either denies they have an ownership interest in the Monument or admits they do not own the Monument. Plaintiffs offer no alternative argument that they maintain the requisite standing to pursue a claim for declaratory relief on this basis.

Moreover, in addressing a substantially similar issue in *United Daughters of the Confederacy*, our Supreme Court observed that nothing "in N.C.G.S. § 100-2.1 . . . explicitly authorizes the assertion of a private cause of action for the purpose of enforcing that statutory provision." 383 N.C. at 638, 881 S.E.2d at 52. Here, like in *United Daughters of the Confederacy*, "even if N.C.G.S. § 100-2.1 could be interpreted to implicitly authorize the assertion of a private right of action, nothing in the relevant statutory language or the allegations contained in the . . . complaint suggests that plaintiff[s] would be 'in the class of persons on which the statute confers the right[.]' " *Id.* (second alteration in original) (quoting *Comm. to Elect Dan Forest*, 376 N.C. at 597, 853 S.E.2d at 726).

Unlike *United Daughters of the Confederacy*, the instant appeal arises from an order granting defendant's motion for summary judgment, not a dismissal for lack of subject matter jurisdiction. "Matters determined by a summary judgment, just as by any other judgment, are res judicata in a subsequent action." *T.A. Loving Co. v. Latham*, 15 N.C. App. 441, 444, 190 S.E.2d 248, 250-51 (1972) (quotation marks and citation omitted). By contrast, a dismissal under N.C. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction "is not on the merits and thus is not given res judicata effect." *Cline v. Teich*, 92 N.C. App. 257, 264, 374 S.E.2d 462, 466 (1988) (emphasis omitted) (citation omitted). Under our precedent, "[s]ummary judgment is proper if the plaintiff lacks standing to bring suit." *Morris v. Thomas*, 161 N.C. App. 680, 683, 589 S.E.2d 419, 421 (2003) (citation omitted). Having determined that defendant is "entitled to summary judgment on the ground [p]laintiff[s] lacked

standing, we need not address [p]laintiff[s'] additional assignments of error." *Northeast Concerned Citizens, Inc. v. City of Hickory*, 143 N.C. App. 272, 278, 545 S.E.2d 768, 772, *disc. rev. denied*, 353 N.C. 526, 549 S.E.2d 220 (2001).

B.

[2] Plaintiffs also alleged "that the Defendant failed to provide proper notice of the meeting of the Town Council conducted on June 22, 2020[,] . . ." and "that such actions of the Defendant violated the terms and provisions of Article 33C of the North Carolina General Statutes concerning the 'Meetings of Public Bodies' " and local ordinances. Under North Carolina's Open Meetings Law (§§ 143-318.9 – 143-318.18):

> Any person may institute a suit in the superior court requesting the entry of a judgment declaring that any action of a public body was taken, considered, discussed, or deliberated in violation of this Article. Upon such a finding, the court may declare any such action null and void. Any person may seek such a declaratory judgment, and the plaintiff need not allege or prove special damage different from that suffered by the public at large.

N.C. Gen. Stat. § 143-318.16A(a) (2022).

Defendant raised several arguments in support of summary judgment on this issue, and the trial court did not specify the basis for its ruling. We first address defendant's argument that "[a]ny deficiency in the procedures around the Council's actions at the meeting on June 22, 2020[,] were cured and made moot by the Council's unanimous decision at its regular meeting held on July 20, 2020."

> [A]ctions filed under the Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253 through -267 (2005), are subject to traditional mootness analysis. A case is considered moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Typically, courts will not entertain such cases because it is not the responsibility of courts to decide abstract propositions of law.

Citizens Addressing Reassignment & Educ., Inc. v. Wake Cnty. Bd. of Educ., 182 N.C. App. 241, 246, 641 S.E.2d 824, 827 (2007) (cleaned up).

At a regular meeting held on 20 July 2020, the Town Council voted unanimously to ratify the prior action taken regarding relocation of the

Monument. Plaintiffs never brought an independent challenge to the 20 July 2020 meeting, and they never amended their complaint to challenge the Town Council's actions at the 20 July 2020 meeting. Even if plaintiffs had obtained their requested relief, a declaration that the actions of the Town Council taken on 22 June 2020 were null and void, this ruling could not "have any practical effect on the existing controversy." *Id.* (quotation marks and citation omitted). Thus, "[t]his issue presents only an abstract proposition of law for determination and is, therefore, also moot." *Id.* at 246, 641 S.E.2d at 828.

IV.

For the foregoing reasons, we affirm the trial court's 28 March 2022 order granting summary judgment in favor of defendant on all claims.

AFFIRMED.

Judge ZACHARY concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The proper mandate is to reverse and remand with instructions for the trial court to enter dismissal of Plaintiffs' complaint or summary judgment for lack of standing without prejudice. *United Daughters of the Confederacy, N.C. Div. v. City of Winston-Salem*, 383 N.C. 612, 650, 881 S.E.2d 32, 60 (2022). I respectfully dissent.

I. Background

Defendant filed a stand-alone motion to dismiss under Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure, prior to filing an answer. The trial court denied the motion by written order entered 28 July 2020. Defendant later filed a Rule 56 motion for summary judgment on 9 April 2021. The trial court entered an order granting summary judgment in favor of Defendant on both claims of declaratory judgment and under N.C. Gen. Stat. § 100 on 28 March 2022. The trial court failed to neither make or enter findings nor state its reasoning for granting Defendant's motion, other than "no genuine issues as to any material facts" under either N.C. Gen. Stat. § 100-2.1 or under the "open meeting laws." *See* N.C. Gen. Stat. §§ 100-2.1; 143-318.9–143-318.18 (2021).

II. Standard of Review

This Court has held: "As with other issues of subject matter jurisdiction, standing is a question of law. Where, as here, the trial court decided the standing question without making jurisdictional findings of fact, we review the legal question of standing *de novo* based on the record before the trial court." *Shearon Farms Townhome Owners Ass'n II v. Shearon Farms Dev., LLC*, 272 N.C. App. 643, 649, 847 S.E.2d 229, 234 (2020) (internal citations omitted).

III. Standing

A. *Committee to Elect Dan Forest*

Our Supreme Court extensively discussed the development of our State's standing doctrine as it applies to statutorily-granted rights in the case of *Committee to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 853 S.E.2d 698 (2021) ("*Dan Forest*"):

> In summary, our courts have recognized the broad authority of the legislature to create causes of action, such as "citizen-suits" and "private attorney general actions," even where personal, factual injury did not previously exist, in order to vindicate the public interest. *In such cases, the relevant questions are only whether the plaintiff has shown a relevant statute confers a cause of action and whether the plaintiff satisfies the requirements to bring a claim under the statute.* There is no further constitutional requirement because the issue does not implicate the concerns that motivate our standing doctrine. *See, e.g.*, *Stanley* [*v. Department of Conservation and Development*, 284 N.C. 15, 28, 199 S.E.2d 641 (1973)]. *The existence of the legal right is enough.*
>
> Having surveyed the relevant English, American, and North Carolina law of standing, we are finally in a position to determine whether ... the North Carolina Constitution imposes an "injury-in-fact" requirement, as under the federal constitution. While our Court of Appeals has previously come to that conclusion, which was followed by numerous panels of that court, *see, e.g.*, *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113-15, 574 S.E.2d 48 (2002) (holding North Carolina law requires "injury in fact" for standing and applying *Lujan* [*v. Defenders of Wildlife*, 504 U.S. 555, 119

> L. Ed. 2d 351 (1992)]), we are not bound by those decisions and conclude our Constitution *does not include* such a requirement.

Id. at 599, 853 S.E.2d at 727-28 (emphasis supplied).

The Supreme Court also held the language unrelated to standing in *Stanley v. Department of Conservation and Development* cited above was "an aberration and must be considered dictum" in *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 645-48, 386 S.E.2d 200, 207-08 (1989). In *Dan Forest*, the Supreme Court also expressly abrogated any portion of this Court's opinion in *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.* that was inconsistent with their analysis in *Dan Forest*. *Dan Forest*, 376 N.C. at 601 n.44, 853 S.E.2d at 729 n.44.

The Court held North Carolina's Constitution does not impose a requirement for a plaintiff or petitioner to allege an "injury in fact" when challenging the validity of or asserting the applicability of a statute, and particularly against disturbing a war grave marker or monument. N.C. Gen. Stat. § 100-2.1. Instead, the limits on standing imposed is "a rule of prudential self-restraint" in cases challenging the constitutionality of governmental action, to ensure our courts only address actual controversies. *Id.* at 608, 853 S.E.2d at 733.

Our Supreme Court clarified the requirements for a party to establish a specific claim under a statute:

> When a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, however, *the legal injury itself gives rise to standing*. The North Carolina Constitution confers standing to sue in our courts on those who suffer the infringement of a legal right, *because* "*every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law*." N.C. Const. art. I, § 18, cl. 2. Thus, when the legislature exercises its power to create a cause of action under a statute, even where a plaintiff has no factual injury and the action is solely in the public interest, *the plaintiff has standing to vindicate the legal right so long as he is in the class of persons on whom the statute confers a cause of action*.

Id. at 608, 853 S.E.2d at 733 (emphasis supplied).

B. *United Daughters of the Confederacy*

More recently, in *United Daughters of the Confederacy*, our Supreme Court reviewed and stated the specific requirements needed to establish standing to challenge under similar facts, and the Court held the proper remedy for lack of jurisdictional standing issues is to dismiss without prejudice:

> A careful analysis of the amended complaint satisfies us that plaintiff has failed to identify any legal right conferred by the common law, state or federal statute, or the state or federal constitutions of which they have been deprived by defendants' conduct. . . .
>
> Although the amended complaint claims that the local chapter was involved in raising funds to erect the monument and that it received permission from the County to place the monument outside the old county courthouse building in 1905, plaintiff does not allege that the local chapter or any of its members retained an ownership interest in the monument or had executed a contract with the County providing that the monument would remain upon the old courthouse property in perpetuity. As a result, even construing plaintiff's allegations concerning the funding for and erection of the monument as true, the mere fact that the local chapter "funded and erected the [monument]" does not suffice to establish standing in the absence of an affirmative claim to have some sort of proprietary or contractual interest in the monument. This is particularly true given that the plaintiff's allegations that the City's actions violated various state and federal laws, which we address in further detail below, assume that the *County*, rather than plaintiff, owns the monument.
>
> In addition, our taxpayer standing jurisprudence makes it clear that, "where a plaintiff undertakes to bring a taxpayer's suit on behalf of a public agency or political subdivision, his complaint must disclose that he is a taxpayer of the agency [or] subdivision," *Branch v. Bd. of Ed. of Robeson Cnty.*, 233 N.C. 623, 626 (1951) (citing *Hughes v. Teaster*, 203 N.C. 651 (1932)); *see also Fuller*, 145 N.C. App. at 395–96, and "allege facts sufficient to establish" either that "there has been a demand on and a refusal by the proper authorities to institute proceedings for the protection of the interests of the public agency or political

subdivision" or that "a demand on such authorities would be useless." *Id.* Although plaintiff has included such assertions in its brief before this Court, no such allegations appear in the amended complaint. *See Davis v. Rigsby*, 261 N.C. 684, 686 (1964) (noting that "[a] party is bound by his pleadings and, unless withdrawn, amended, or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive against the pleader"). . . .

In the same vein, we hold that the amended complaint fails to allege sufficient facts necessary to establish associational standing. Although plaintiff argues that it is a "legacy organization whose purposes include 'historical, benevolent, memorial, [In addition, given that plaintiff did not advance this argument before the Court of Appeals, it is not permitted do so for the first time before this Court. *See Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309 (2001) (noting the long-standing rule that "issues and theories of a case not raised below will not be considered on appeal;" see also N.C. R. App. P. 10(a) (providing that issues not raised in a party's brief are deemed abandoned).] educational and patriotic programs;' " that its charter "clearly and [un]equivocally gives it an articulated interest in the status and preservation of objects of remembrance such as the [m]onument;" that it "has succeeded to the interests of those deceased members of an affiliated chapter who were responsible for designing, funding, and erecting the [monument];" and that it has "a specific requirement for membership . . . that one is a lineal descendant of an individual who served in the government or the armed forces of the Confederacy," none of these factual allegations are raised in the amended complaint. In addition, the amended complaint does not identify any of plaintiff's individual members or describe how the legal rights of any of plaintiff's individual members have been violated. As a result, the amended complaint fails to allege facts sufficient to show that "the interests [plaintiff] seeks to protect are germane to the organization's purpose" or that its members "would otherwise have standing to sue in their own right." *River Birch Assocs.*, 326 N.C. at 130.

United Daughters of the Confederacy, 383 N.C. at 629-33, 881 S.E.2d at 47-49.

Taking all the above under consideration and after the Supreme Court's decision *Dan Forest*, a two-step test is used to determine whether a plaintiff has standing to challenge a legislative action. First, as set forth by *Dan Forest*, we must first determine if the relevant statute, here the Declaratory Judgment Act ("DJA"), confers on Plaintiff a cause of action. Plaintiff must show the DJA confers a cause of action generally and Plaintiff is among the class of persons upon whom the cause of action was conferred. *See id.* at 607-09, 853 S.E.2d at 733-34.

The second question becomes whether Plaintiff has satisfied the statutory requirements under the DJA or other statute to bring a claim. *See id.* at 599, 608 n.51, 853 S.E.2d at 727-28, 733 n.51. Any alleged infringement of a legal right is sufficient to establish standing. Under *Dan Forest*, Plaintiff need not allege any "injury in fact." *Id.* at 599, 853 S.E.2d at 728. "[T]o the extent it implicates the doctrine of standing, our [Constitutional] remedy clause should be understood as *guaranteeing* standing to sue in our courts where a legal right at common law, by statute, or arising under the North Carolina Constitution has been infringed." *Id.* at 607, 853 S.E.2d at 733 (emphasis original), *see* N.C. Const. art. I, § 18.

C. *Cmty. Success Initiative v. Moore*

Our Supreme Court more recently applied both *Dan Forest* and *United Daughters of the Confederacy* in *Cmty. Success Initiative v. Moore*, holding:

> The standing requirements articulated by this Court are not themselves mandated by the text of the North Carolina Constitution. *See Comm. To Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 599, 853 S.E.2d 698, 728 (2021) ("[T]he 'judicial power' provision [in Article IV] of our Constitution imposes no particular requirement regarding 'standing' at all."). This Court has developed standing requirements out of a "prudential self-restraint" that respects the separation of powers by narrowing the circumstances in which the judiciary will second guess the actions of the legislative and executive branches. *Id.*
>
> . . .
>
> To ensure the requisite concrete adverseness, "a party must show they suffered a 'direct injury.' The personal or 'direct injury' required in this context could be, but is not necessarily limited to, 'deprivation of a constitutionally guaranteed personal right or an invasion of his property

> rights.' " *Forest*, 376 N.C. at 607-08, 853 S.E.2d at 733 (citations omitted).
>
> . . .
>
> The direct injury criterion applies even where, as here, a plaintiff assails the constitutionality of a statute through a declaratory judgment action. *See United Daughters*, 383 N.C. at 629, 881 S.E.2d at 46-47 ([P]laintiff is still required to demonstrate that it has sustained a legal or factual injury arising from defendants' actions as a prerequisite for maintaining the present declaratory judgment action.").

Cmty. Success Initiative v. Moore, 384 N.C. 194, 206-07, 886 S.E.2d 16, 28-29, (2023).

IV. Summary Judgment

"Jurisdiction is [t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 789-90 (2006) (citation and internal quotation marks omitted). "The court must have personal jurisdiction and . . . subject matter jurisdiction [, which is] [j]urisdiction over the nature of the case *and* the type of relief sought, in order to decide a case." *Catawba Cty. v. Loggins*, 370 N.C. 83, 88, 804 S.E.2d 474, 478 (2017) (citation omitted) (emphasis supplied).

In *United Daughters of the Confederacy*, the trial court had granted the defendants' motions to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(b)(6) (2021) with prejudice. 383 N.C. at 650, 2022-NCSC-143, 881 S.E.2d at 60.

The superior court here entered conflicting orders in initially denying Defendant's Rule 12(b)(1) motion where Plaintiffs had maintained the burden to establish standing, while later allowing Defendant's Rule 56 motion for summary judgment presumably for lack of jurisdictional standing. *See* N.C. Gen. Stat. § 1A-1, Rule 56 (2021). Our Supreme Court previously held subject matter jurisdiction challenges are properly asserted under Rule 12(b)(1), instead of Rule 12(b)(6). *United Daughters of the Confederacy*, 383 N.C. at 650, 881 S.E.2d at 60 (citations omitted).

While there may be purported conflicting caselaw from this Court regarding issues of jurisdictional or subject matter standing being disposed of by summary judgment, the Supreme Court of North Carolina reviews challenges to subject matter jurisdiction through a

Rule 12(b)(1) motion to dismiss, instead of under either a motion to dismiss under Rule 12(b)(6) or a motion for summary judgment under Rule 56. *Id.*

V. Without Prejudice

Our Supreme Court has held under similar facts: "when a complaint is dismissed for lack of subject matter jurisdiction, that decision does *not* result in a final judgment on the merits and does not bar further action by the plaintiff on the same claim." *Id.* (citations omitted).

In *United Daughters of the Confederacy*, the Supreme Court addressed a defendant's motion to dismiss for lack of subject matter jurisdiction. *Id.* The majority's opinion asserts the posture in the instant case on a motion for summary judgment pursuant to Rule 56 is factually distinguishable from *United Daughters of the Confederacy*, citing *Landfall Grp. Against Paid Transferability v. Landfall Club*, 117 N.C. App. 270, 273, 450 S.E.2d 513, 515-16 (1994), where the "defendant met its summary judgment burden by showing that there is no genuine issue of material fact due to the lack of standing, [and] the burden shifted to [the] plaintiff to show that [a litigant] is a member of [the] defendant" group.

This presumption and conclusion mis-states binding precedent from our Supreme Court. *See Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985) (the Court of Appeals "acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina and its responsibility to follow those decisions, until otherwise ordered by the Supreme Court" when it abolished two tort causes of action).

"[S]tanding is a 'necessary prerequisite to a court's proper exercise of subject matter jurisdiction[,]' " and is not a merits adjudication. *Willowmere Cmty. Ass'n v. City of Charlotte*, 370 N.C. 553, 561, 809 S.E.2d 558, 563 (2018) (citation omitted). The trial court's dismissal and entry of summary judgment for lack of subject matter jurisdiction is not a "final judgment on the merits." *United Daughters of the Confederacy*, 383 N.C. at 650, 881 S.E.2d at 60 (citations omitted).

VI. Conclusion

The trial court's order on summary judgment on standing jurisdiction is properly reversed and remanded to the trial court with instructions to enter the order without prejudice. *Willowmere Cmty. Ass'n*, 370 N.C. at 561, 809 S.E.2d at 563; *Dan Forest*, 376 N.C. at 607-08, 853 S.E.2d at 733; *United Daughters of the Confederacy*, 383 N.C. at 650, 2022-NCSC-143, 881 S.E.2d at 60; *Cmty. Success Initiative*, 384 N.C. at 240, 886 S.E.2d at 49-50. I respectfully dissent.

IN RE A.N.B.

[290 N.C. App. 151 (2023)]

IN THE MATTER OF A.N.B.

No. COA22-934

Filed 15 August 2023

1. Appeal and Error—notice of appeal—service—failure to serve guardian ad litem—non-jurisdictional defect

In a termination of parental rights case, respondent-father's failure to serve his notice of appeal on his daughter's appointed guardian ad litem (GAL) was a non-jurisdictional defect and not a substantial or gross violation of the appellate rules, especially in light of the GAL's actual notice of the appeal and lack of any objection in any of the filings before the appellate court. Therefore, respondent-father's petition for writ of certiorari as an alternative ground for review was denied as superfluous.

2. Appeal and Error—preservation of issues—failure to object—child's guardian ad litem and lack of attorney—termination of parental rights

In a termination of parental rights case, the appellate court declined to review respondent-father's arguments regarding his daughter's guardian ad litem (GAL) and his daughter's lack of attorney because the father failed to object at trial and the alleged errors were not automatically preserved for appellate review. The appellate court also declined to invoke Appellate Rule 2 because the case did not present exceptional circumstances meriting Rule 2 review.

3. Termination of Parental Rights—grounds for termination—willful abandonment—sufficiency of findings—no attempts to contact child

The trial court did not err in concluding that grounds existed to terminate respondent-father's parental rights in his daughter based on willful abandonment where the court's findings of fact were sufficient to support its conclusions of law. The father's specific challenges to the findings regarding his lack of gifts for his daughter and lack of effort to contact her lacked merit, especially in light of other, unchallenged findings establishing that he never sent gifts or attempted to contact her. Furthermore, the trial court was not required to make findings on every piece of evidence presented, and on the issue of whether the mother intentionally obstructed access to the daughter, the trial court made detailed findings and ultimately found that the mother's testimony was more credible than the father's.

IN RE A.N.B.

[290 N.C. App. 151 (2023)]

Appeal by respondent-father from order entered 5 August 2022 by Judge Paul J. Delamar in District Court, Craven County. Heard in the Court of Appeals 17 July 2023.

W. Michael Spivey for appellant-respondent-father.

Peacock Family Law, by Carolyn T. Peacock, for appellee-petitioner-mother.

No brief for appellee guardian ad litem.

STROUD, Chief Judge.

Respondent-father appeals from an order terminating his parental rights to his minor child, asserting the trial court erred by failing to appoint an attorney for the minor child and failing to make sufficient findings of fact to support its conclusions. We decline to review Respondent-father's first argument because he failed to preserve it by raising it before the trial court. Further, because the trial court's findings of fact were sufficient to support its conclusions of law, we affirm.

I. Background

Alice[1] was born to Respondent-father and Petitioner-mother in January 2015 while Father and Mother were both residents of New Hanover County. Father and Mother were never married. Shortly after Alice's birth, Mother started a Chapter 50 custody proceeding in New Hanover County.[2] In or about October 2015, the District Court, New Hanover County, entered a consent order ("2015 Custody Order") granting Mother primary physical custody of Alice. Mother and Father were granted joint legal custody of Alice and Father was granted visitation.[3]

About two years later, in December 2017, Father "was arrested for Driving While Impaired and Misdemeanor Child Abuse." Father and his brother were found passed out from a heroin overdose in a car, stopped at a red light, with Alice and her half-sibling in the back seat without any child seats or restraints. Bystanders called emergency services to assist and emergency responders had to break the window of Father's

1. We use the pseudonym for the juvenile stipulated to by the parties.

2. The record indicates Mother initiated the custody proceeding, but the record is unclear on when Mother filed a complaint in the custody action.

3. The date on the file stamp of the 2015 Custody Order is illegible but it was signed 7 October 2015.

vehicle to help Father, his brother, and the two children. Father and his brother were revived with Narcan and survived the incident. The New Hanover County Department of Social Services ("DSS") contacted Mother and Mother was reunited with Alice at the scene of the incident. Because of Father's overdose, DSS later substantiated neglect against Father in February 2018 and sent Mother a letter stating "[t]here was sufficient information found during the Investigative Assessment [into the December 2017 incident] to Substantiate . . . [n]eglect in the form of Injurious Environment against [Father]." DSS recommended all contact between Father and Alice be supervised until Father could make "significant progress" on his sobriety and left supervision arrangements to Mother's discretion.

Mother then filed a motion in District Court, New Hanover County, to modify the 2015 Custody Order. Father did not appear at the May 2018 hearing on the motion to modify because he was incarcerated, and although he "was provided with information on how to writ himself to court" for the modification hearing, he had "chosen not to do so." The district court entered an order on 14 May 2018 ("2018 Custody Order") granting Mother's motion and awarding Mother sole legal and physical custody of Alice. Mother also got married in May 2018.

In June 2018, Father filed a Rule 60 motion for relief from the 2018 Custody Order. Father's motion was heard in December 2018. In January 2019,[4] the district court entered an order granting Father's motion, determining it was in Alice's "best interest . . . for each parent to participate in custody hearings," and ordering a new trial.

On 29 August 2019, the district court entered a consent order allowing Alice's paternal Grandparents to intervene in the custody proceeding. A subsequent consent order regarding custody was filed 11 March 2020 ("2020 Custody Order"). The 2020 Custody Order found:

> 22. [Mother] is fit and proper to exercise temporary sole custody.
>
> 23. [Father] is not fit and proper to exercise secondary custody by visitation as [Father] has issues regarding his sobriety, recent relapse, and pending criminal charges.
>
> 24. The [paternal grandparents] are fit and proper persons to have visitation with [Alice] and it is in the best interests and welfare of [Alice] that [her paternal grandparents] be granted liberal visitation with [Alice].

4. The file stamp on this order is illegible, but the order was signed 4 January 2019.

Mother was granted sole custody of Alice and Grandparents were granted visitation. Father was "restricted from all visitations set forth [in the 2020 Custody Order], unless the parties mutually agree[d] otherwise." Mother, Father, and Grandparents all consented to entry of the 2020 Custody Order. Later, in November 2020, venue for the Chapter 50 custody proceeding was transferred to Craven County. Due to restrictions imposed because of the COVID-19 pandemic, Grandparents did not start their visitation with Alice until December 2020.

On 6 July 2021, Mother filed a petition in Craven County to terminate Father's parental rights ("Petition"). Mother alleged two grounds for termination of Father's parental rights: (1) Father willfully abandoned Alice for the six months preceding the Petition, and (2) Father had "willfully failed and refused to pay child support" as ordered by the District Court, New Hanover County, in a prior child support action.[5] Father filed a response on 14 September 2021, generally denying the allegations of the Petition.

On 19 November 2021, the trial court entered a pre-trial order concluding an appointment of a guardian *ad litem* ("GAL") was appropriate and appointing the public defender's office as Alice's GAL. Pursuant to local rules the public defender's office delegated the GAL duties to Mr. Barnhill, a licensed attorney. The trial court calendared Mother's Petition for hearing on 13 July 2022.

Mr. Barnhill completed an investigation and prepared a GAL court report in May 2022.[6] The GAL court report found Father had never sought review of the 2020 Custody Order, although the 2020 Custody Order was intended to be temporary. The GAL court report also found "Respondent Father admitted last seeing [Alice] on . . . December 21, 2017, when [Respondent Father] as driver, along with his brother, passed out in traffic while transporting his two children." The GAL court report found Alice had lived with Mother and her husband since Alice was three months old, Alice had "a loving and bonded relationship" with her younger half-sibling born of Mother and her husband, and it was Mother's husband's intention to adopt Alice and raise her as his own.

The GAL court report initially noted "that the . . . issue of grounds for termination [of Father's parental rights] [was] beyond the scope of [Mr. Barnhill's] task. If not, Respondent Father's self-inflicted absence

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5. Documents from the child support proceeding were not included in the record on appeal.

6. The GAL court report is not file stamped but was signed 12 May 2022.

from [Alice] for five years serves as a substantial ground." The GAL court report also found, consistent with other evidence in the record, that Father had in fact paid child support but due to a computer error by Child Support Enforcement, Mother had not received these payments. Ultimately, the GAL court report recommended termination of Father's parental rights due to his absence and because Mother's husband was about to be deployed overseas for an extended period for military service, and "[h]e should be able to take the family he has committed to without the interference of someone whose right to do so is based entirely on biology."

Mother's Petition was heard 13 July 2022 and 15 July 2022. The hearing was bifurcated into adjudication and disposition phases; the parties first addressed the grounds for termination of Father's parental rights then addressed Alice's best interests. During the adjudicatory phase, Mother testified that she had never been served with any notices or documents requesting a review of the 2020 Custody Order granting her sole custody and denying Father visitation. Mother also testified that Father had never tried to call her, text her, or email her regarding Alice, and Father had never sent Alice any gifts. Mother presented as evidence a timeline from May 2020 to July 2022, including her records of all communications with Father. The timeline contains three communications preceding the filing of the Petition:

- **25 June 2021:** Mother asked for Father's phone number from Alice's Grandparents. Mother texted Father and they met face-to-face over Zoom. Mother asked Father whether he would consent to Mother's husband adopting Alice and Father refused.
- **28 June 2021:** Mother texted Father after Father asked for contact with Mother through Alice's paternal grandmother. Father asked Mother whether he needed to "go through the courts to see [Alice] or if he would work with" Mother. Mother told Father they would discuss visitation more on a scheduled Zoom call on 1 July 2021.
- **1 July 2021:** Mother, her husband, and Father met on Zoom. The parties agreed that Mother and Father would stay in contact so that Father could show he had improved his life since the 2017 incident. The parties created a group text chat with Mother, her husband, and Father to keep in contact. Mother then sent

> a photo to Father through the group chat of Alice's "responsibility chart" and Father responded with a single message. The record does not show the content of this message.

Mother then filed the Petition after these communications transpired. Mother testified that these messages were the only communications between her and Father in the six months preceding her filing of the Petition. Mother then testified regarding post-Petition communications between her and Father. There were few communications between the parties, and Father missed the only two Zoom calls the parties scheduled.

Father's attorney cross-examined Mother and called Alice's Grandparents to testify. The testimony elicited at the termination hearing by Father's attorney largely addressed Grandparents' visitation with Alice, which is not relevant to this appeal.[7] Relevant to the grounds for termination, Father's attorney attempted to show that Father tried to visit with Alice but Mother had obstructed Father's attempts to communicate with Alice. Grandfather testified about a meeting at Mother's attorney's office where Mother set rules for visitation, which Grandfather recalled as:

> Rule number one, we could not speak [Father's] name when we came to her house. His name was not to be spoken. Rule number two, no one could have [Mother's] phone number, not even myself. The only one that could have the phone number was [Grandmother]. And the only one that could call [Mother] was [Grandmother].

Grandfather also testified about attempts Father made to set up visitation with Alice. Grandfather testified Father "told [Grandfather] that he had called [Mother] on several occasions and asked to speak with [Alice] or set up some kind of time" for visitation, but Mother did not allow visitation. Grandfather testified these requests for visitation would have occurred "around 2021" because the calls occurred after the Grandparents had started visitation with Alice in December 2020, but Grandfather was not aware of any specific dates that Father tried to call Mother to coordinate a visit.

Grandfather also testified Father had "given [Grandparents] a lot of money" to buy Christmas gifts, clothes, and toys for Alice. Grandfather

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7. During the hearing, the trial court had to repeatedly redirect the examination and witnesses' testimony back toward the grounds for termination of Father's parental rights, and away from visitation issues between the Grandparents and Alice after entry of the 2020 Custody Order.

estimated that about a third of Alice's gifts were generally paid for by Father and that Father had bought specific gifts for Grandfather to take and give to Alice. However, Grandfather testified he never told Mother that Father was paying for the gifts, and the only time Grandfather told Mother that Father had given Grandparents money for gifts was in June 2022, after the Petition was filed. There was no documentation admitted into evidence to prove any gifts had come from Father. Grandfather testified he did not want to identify any gifts as coming from Father because he thought Mother would stop visitation. Grandfather also testified no party attempted to file any motion to modify the 2020 Custody Order on the advice of Father's attorney because Father was waiting to resolve a pending criminal charge before seeking visitation. At the termination hearing, the trial court also stated it had reviewed the court file and confirmed no motions had been filed by any party to modify the 2020 Custody Order.

Father also testified he had been trying to visit with Alice since 2017, but Mother would not let Father directly speak with herself or Alice; Mother directed Father to contact Mother's attorney. However, Father did not identify any specific attempts he made to begin visiting with Alice. Father testified that until July 2021 he simply paid his child support and that his attempts to begin visiting Alice were made between 2018 and entry of the 2020 Custody Order.

On cross-examination, Father again confirmed that he had no documentation to show he requested visitation between entry of the 2020 Consent Order and the first Zoom call on 25 June 2021. Between March 2020 and June 2021, Father provided no information to Mother, did not call Mother to ask for visitation, did not send emails, did not send mail, and generally made no efforts to contact Mother to see Alice.

Alice's Grandmother also testified Mother tried to prevent Father from visiting Alice. Grandmother first testified Mother established rules to limit references to Father during the Grandparents' visitation; Grandmother testified that she was not allowed to say Father's name, share Mother's new phone number, or share Mother's address. Although Father asked Grandmother for Mother's phone number and address, Grandmother did not share that information with Father. Grandmother testified Father did not have contact information for Mother until 25 June 2021, when Mother reached out for Father's contact information through the Grandparents to contact Father and ask for his consent to Alice's adoption.

Grandmother also testified Father bought gifts and gave the Grandparents money to buy gifts for Alice from 2020 through July 2021.

However, Grandmother testified she had no record of any attempts by Father to contact Mother to visit Alice. Grandmother additionally testified that, to her knowledge, Father did not seek legal counsel in Craven County until after the Petition was filed.

In rebuttal, Mother testified that she did not limit Father's access to Alice. As to Mother's phone number, Mother testified "the phone number was directed to [Grandfather]. I told [Grandmother] that I would like to have communication solely through her because of previous harassment from [Grandfather], but I did not say that she could not give my phone number to [Father]." Mother also testified that she and Grandparents did not speak about sharing her physical address. As to not referring to Father during the Grandparents' visitation with Alice, Mother testified "the boundary was to please not discuss or bring up [Father] during their visits because [Alice] had been so traumatized. And [Alice] – the visits [were] for [Grandparents] to be with [Alice]. To be grandparents with her and just spend time with her as her grandparents."

At the close of the adjudicatory phase of the termination hearing, the trial court found "by clear, cogent, and convincing evidence that [Mother] met her burden and proved grounds" to terminate Father's parental rights for willfully abandoning Alice because "there was a period of six months . . . preceding the filing of the petition during which [Father] made no efforts to have visitation with" Alice.

The trial court then moved on to the dispositional phase. Mr. Barnhill testified during the dispositional phase of the hearing. However, because Father does not challenge the dispositional stage of the hearing on appeal, we do not discuss the specifics of Mr. Barnhill's testimony. For purposes of this appeal we simply note that Father did not object to Mr. Barnhill's role as GAL for Alice or raise any question regarding any need for separate legal representation for Alice.

On 5 August 2022, the trial court entered a written order ("Termination Order") finding grounds existed to terminate Father's parental rights:

> 43. The Court makes the following additional Findings of Fact to support the grounds of abandonment by clear cogent and convincing evidence in this matter:
>
> a. The Respondent Father has had the ability to call and text [Mother] regarding [Alice] since March 11, 2020.
>
> b. The Respondent Father made no efforts to call [Mother] to set up visitation with [Alice] from March 11, 2020 until the Petition was filed in this matter.

c. The Respondent Father made no efforts to text [Mother] to set up visitation with [Alice] from March 11, 2020 until the filing of the Petition in this matter.

d. The Respondent Father did not send any text messages to [Mother] from March 11, 2020 until the filing of the Petition in this matter to make inquiries about [Alice]'s health, education or welfare.

e. The Respondent Father did not email [Mother] and request visitation at any time from March 11, 2020 until the filing of the Petition in this matter.

f. The Respondent Father did not email [Mother] and make inquiries as to the health, education and welfare of [Alice] from March 11, 2020 until the filing of the Petition in this matter.

g. The Respondent Father did not send any mail to [Mother] from March 11, 2020 until the filing of the Petition in this matter requesting visitation.

h. The Respondent Father did not send any mail to [Mother] inquiring about the health, education or welfare of [Alice] from March 11, 2020 until the filing of the Petition in this matter.

i. The Respondent Father was represented by counsel from March 11, 2020 through November 17, 2020. The Respondent Father did not file any pleadings with the Court requesting a review of the Temporary Order entered on March 11, 2020, by consent which suspended all of the Respondent Father's visitation with [Alice].

j. After the case was transferred from New Hanover County to Craven County, the Respondent Father did not file any requests for review, either *pro se* or with the assistance of an attorney, requesting a review and/or visitation with [Alice] from November 17, 2020 through the filing of the Petition in this matter.

k. [Mother] has had absolutely no contact with the Respondent Father since March 11, 2020, until she initiated a phone call with the [Father] on June 24, 2021, requesting the [Father] sign a step-parent Consent to Adopt.

> l. The Respondent Father's parents have regularly visited with [Alice] since December 2020. They have been allowed by [Mother] to bring the Respondent Father's other child to the visitations in [Mother]'s home. At no time did the Respondent Father's parents request [Mother] to allow the Respondent Father to have contact or visitation with [Alice] from December 2020 until the filing of the Petition in this matter.
>
> m. The Respondent Father's parents brought gifts to [Mother] for [Alice] for holidays and birthdays. At no time did any of the gifts have any cards or tags signifying that the gifts were, in fact, from the Respondent Father. Instead, the gifts were offered to [Alice] as gifts from the paternal grandparents. However, at trial the [Father] testified that he contributed to the payment of some of these gifts, although no other evidence was offered to support this testimony, such as a card or tag on any of the gifts signifying that the gift was from anyone other than the [Grandparents].
>
> n. The Respondent Father has provided no gifts, cards or letters of endearment for [Alice] to [Mother] from March 11, 2020, until the filing of the Petition in this matter.
>
> o. The Respondent Father has made no efforts of any type, either direct or indirect, to have any contact with [Alice] from March 11, 2020 until the filing of the Petition in this matter.
>
> p. The Respondent Father has sent no cards, gifts or any other tokens of affection for [Alice] from March 11, 2020 to the filing of the Petition in this matter.
>
> q. The Respondent Father's last in-person contact with [Alice] was December 2017.
>
> r. The Respondent Father was aware of [Mother]'s cell phone number, email and physical address and failed [to] act as a normal parent would in requesting contact or visitation with [Alice] at any time from March 11, 2020 until the filing of the Petition in this matter.

(Formatting altered.) The trial court then concluded it was in Alice's best interests to terminate Father's parental rights for "willfully abandon[ing]

the minor child for at least six months preceding the filing of the Petition," and ordered Father's parental rights terminated as to Alice. Father appealed 26 August 2022.

On 8 November 2022, after filing his notice of appeal, Father filed a post-trial "Motion for Relief from Judgment Pursuant to Rule 60(b)" ("Rule 60 motion"). (Capitalization altered.) Father's Rule 60 motion was heard 8 December 2022. The Rule 60 motion and hearing are discussed in greater detail below when discussing Father's arguments based on this motion.

II. Jurisdiction

[1] Father filed a petition for writ of certiorari ("PWC") in this Court acknowledging Father's notice of appeal was not served on Mr. Barnhill, Alice's appointed GAL. Father's PWC is verified, and Father asserts his appellate counsel discussed the appeal with Mr. Barnhill, and Mr. Barnhill was present at the hearing on Father's Rule 60 motion. Also attached to the PWC is an affidavit by Father's trial counsel attesting: (1) Father's trial counsel notified Mr. Barnhill that Father had appealed the Termination Order; (2) trial counsel was informed by Father's appellate counsel that Father's appellate counsel discussed Father's appeal with Mr. Barnhill; and (3) Mr. Barnhill was aware of and present for the hearing on Father's Rule 60 motion related to the appeal while the appeal was pending before this Court.

Father asserts failing to serve the notice of appeal on Mr. Barnhill is a non-jurisdictional defect, and Mr. Barnhill also waived any error in service by attending the Rule 60 hearing. Thus, Father filed his PWC as an alternative ground for review in case this Court deems the potential lack of service to the GAL as a jurisdictional issue. Neither Mr. Barnhill nor Mother filed a response to Father's PWC. Nor did Mr. Barnhill file an appellee brief.

Rule of Appellate Procedure 3.1 governs service of Father's notice of appeal and states in relevant part:

> Any party entitled to an appeal under N.C.G.S. § 7B-1001(a) may take appeal by filing notice of appeal with the clerk of superior court in the time and manner set out in N.C.G.S. § 7B-1001(b) and (c) and *by serving copies of the notice of appeal on all other parties*.

N.C. R. App. P. 3.1(b) (emphasis added).

We cannot locate a published case from this Court interpreting the service provision of Rule 3.1(b). However, there is a line of cases

from our appellate courts holding a party's failure to serve their notice of appeal on all parties in technical compliance with Rule of Appellate Procedure 3 is a non-jurisdictional defect, and the party's noncompliance with the Rules of Appellate Procedure must instead be assessed for whether the party's noncompliance is a "substantial or gross violation of the appellate rules." *MNC Holdings, LLC v. Town of Matthews*, 223 N.C. App. 442, 445-47, 735 S.E.2d 364, 366-67 (2012) (summarizing the line of cases leading to the conclusion failure to serve notice of appeal under Rule 3 is a non-jurisdictional defect). We also note that the same rule has been applied in the criminal context, under Rule of Appellate Procedure 4. In *State v. Golder*, this Court saw no need to grant a defendant's petition for writ of *certiorari* because "[i]t is the *filing* of the notice of appeal that confers jurisdiction upon this Court, not the *service* of the notice of appeal." *State v. Golder*, 257 N.C. App. 803, 804, 809 S.E.2d 502, 504 (2018), *aff'd as modified*, 374 N.C. 238, 839 S.E.2d 782 (2020) (emphasis in original). In coming to this conclusion, this Court cited the same line of cases discussed in *MNC Holdings*. *See id.* (citing *Lee v. Winget Road, LLC*, 204 N.C. App. 96, 100, 693 S.E.2d 684, 688 (2010); *Hale v. Afro-American Arts Intern., Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993)).

Mr. Barnhill appears to have actual notice of Father's appeal; Mr. Barnhill has not raised any issue before this Court regarding service of Father's notice of appeal in an appellee brief, response to Father's PWC, or motion to dismiss the appeal; and thus there is no indication in the record before us that any party would be prejudiced should we hear Father's appeal. Consistent with this Court's discussion in *MNC Holdings* regarding service under Rule of Appellate Procedure 3, and this Court's adoption of the same rule in *Golder* as to Rule of Appellate Procedure 4, we see no reason why the same standard should not apply under Rule of Appellate Procedure 3.1. We therefore conclude "that any error in service made by [Father] is non-jurisdictional and is not a substantial or gross violation of the appellate rules." *MNC Holdings*, 223 N.C. App. at 447, 735 S.E.2d at 367. We deny Father's PWC because it is superfluous.

III. Rule 60 Motion

[2] Father first directs us to his Rule 60 motion. Even if we generously assume Father properly made a Rule 60 motion regarding violations of North Carolina General Statute § 7B-1108, he did not preserve this argument due to his failure to object at trial regarding Mr. Barnhill's role as a GAL or the fact that Alice did not have an attorney. Indeed, Mr. Barnhill was present at the hearing on Father's motion but he did not ask to be

heard and neither party asked him to testify or make a statement. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely . . . objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). This Court has specifically held violations of North Carolina General Statute § 7B-1108 are not automatically preserved for appellate review. *See In re A.D.N.*, 231 N.C. App. 54, 65-66, 752 S.E.2d 201, 208-09 (2013).

Father alternatively requests we invoke North Carolina Rule of Appellate Procedure 2 to hear his arguments regarding his Rule 60 motion and the trial court's noncompliance with North Carolina General Statute § 7B-1108. Rule of Appellate Procedure 2 states that "[t]o prevent manifest injustice to a party . . . either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of" the Rules of Appellate Procedure. N.C. R. App. P. 2. "Rule 2, however, must be invoked cautiously" and only in "exceptional circumstances." *Dogwood Development and Management Co., LLC v. White Oak Transport Co.*, Inc., 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (citation and quotation marks omitted). We conclude no "exceptional circumstances" exist in this case and decline to invoke Rule 2. Thus, we do not consider Father's arguments as to Mr. Barnhill's role as GAL.

IV. Termination Order

[3] Father next challenges the trial court's findings of fact in the Termination Order and also asserts "the trial court erred by failing to make findings resolving conflicting evidence about facts relevant and material to whether Father willfully abandoned" Alice. (Capitalization altered.) Father does not challenge the dispositional portion of the trial court's Termination Order.

A. Standard of Review

At the adjudicatory stage, "[t]he standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re C.M.P.*, 254 N.C. App. 647, 654, 803 S.E.2d 853, 858 (2017) (citation and quotation marks omitted). "If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *Id.* (citation and quotation marks omitted). "Unchallenged findings of fact are conclusive on appeal and binding on

this Court." *Id.* (citation and quotation marks omitted). The trial court's conclusions of law are reviewed *de novo*. *Id.*

B. Abandonment of a Juvenile

The trial court terminated Father's parental rights under North Carolina General Statute § 7B-1111(a)(7) for willfully abandoning Alice during the requisite six-month period preceding the filing of the Petition. North Carolina General Statute § 7B-1111(a)(7) provides that:

> (a) The court may terminate the parental rights upon a finding of one or more of the following:
>
> . . . .
>
> (7) The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]

N.C. Gen. Stat. § 7B-1111(a)(7) (2021).

Our Supreme Court has further defined willful abandonment:

> In the context of a termination of parental rights proceeding, the ground of "[a]bandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612 (1997) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511 (1986)). Where "a parent withholds [his] presence, [his] love, [his] care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, (1962). Although a parent's acts and omissions, which are at times outside of the statutorily provided period, may be relevant in assessing a parent's intent and willfulness in determining the potential existence of the ground of abandonment, the dispositive time period is the six months preceding the filing of the petition for termination of parental rights.

In re A.A., 381 N.C. 325, 335, 873 S.E.2d 496, 505 (2022). "In this context, the word [']willful' encompasses more than an intention to do a thing; there must also be purpose and deliberation. Whether a biological parent has a willful intent to abandon his child is a question of fact to be

determined from the evidence." *In re A.K.D.*, 227 N.C. App. 58, 61, 745 S.E.2d 7, 9 (2013) (citation and quotation marks omitted). Here, because the Petition was filed 6 July 2021, the relevant six-month period for purposes of North Carolina General Statute § 7B-1111(a)(7) was 6 January 2021 to 6 July 2021. *See* N.C. Gen. Stat. § 7B-1111(a)(7).

1. Finding of Fact 43(m)

Father specifically challenges finding 43(m), asserting the trial court only recited Father's testimony, failed to find the credibility of the parties as to this finding, and the record evidence was insufficient to support the finding. Finding 43(m) states:

> m. The Respondent Father's parents brought gifts to [Mother] for [Alice] for holidays and birthdays. At no time did any of the gifts have any cards or tags signifying that the gifts were, in fact, from the Respondent Father. Instead, the gifts were offered to [Alice] as gifts from the paternal grandparents. *However*, *at trial the Respondent [Father] testified that he contributed to the payment of some of these gifts*, although no other evidence was offered to support this testimony, such as a card or tag on any of the gifts signifying that the gift was from anyone other than the [Grandparents].

(Emphasis added.) This finding is supported by competent evidence.

Mother, Father, Grandfather, and Grandmother all testified that the Grandparents brought gifts to Alice. Mother testified Father never sent gifts, but that the Grandparents "came to our house with gifts, but that's from -- that's it." Grandfather testified Father provided funds for gifts or would provide a gift for the Grandparents to take to Alice, but before the Petition he never made Mother aware any gift was from Father. Grandmother testified the Grandparents brought gifts to Alice and that Father bought some, but there was no evidence Father had actually bought the gifts or contributed to the Grandparents' gifts. Father testified that he purchased some gifts and gave money to Grandparents for gifts, but did not testify that he told Mother or Alice the gifts were from him.

Mother, Father, Grandfather, and Grandmother all also testified that the gifts were never marked as if Father was sending the gift. Mother testified there was no indication that gifts were from Father. Grandfather testified that there was no documentary evidence, such as a tag, card, or bank record that the gift came from Father. Grandmother testified the gifts were never marked as coming from Father. Father testified that he never told Mother he had purchased the gifts.

We also note Father does not challenge finding 43(n), which states "Respondent Father has provided no gifts, cards or letters of endearment for [Alice] to [Mother] from March 11, 2020 until the filing of the Petition in this matter." This unchallenged finding is binding on appeal and establishes that Father never sent Alice gifts. *See In re C.M.P.*, 254 N.C. App. at 654, 803 S.E.2d at 858.

Finding 43(m) is supported by competent evidence. As a whole, the parties agreed the Grandparents brought gifts to Alice and these gifts were never identified as having come from Father. The gifts were always treated as if they were given by the Grandparents. Although a portion of finding 43(m) notes Father's testimony, the reference to Father's testimony is immediately followed by an actual finding of fact that "no other evidence was offered to support this testimony, such as a card or tag on any of the gifts signifying that the gift was from anyone other than the [Grandparents]." *See In re A.C.*, 378 N.C. 377, 384-85, 861 S.E.2d 858, 867-68 (2021) (discussing findings that make references to testimony and also resolve conflicts in the evidence). The trial court specifically noted the conflict in the evidence and resolved the conflict in its finding of fact. Father's challenge to finding 43(m) is overruled.

2. Finding of Fact 43(o)

Father also challenges finding 43(o) as unsupported by competent evidence. Finding 43(o) states:

> o. The Respondent Father has made no efforts of any type, either direct or indirect, to have any contact with the minor child from March 11, 2020 until the filing of the Petition in this matter.

But Father fails to challenge other findings of fact that would result in the same conclusion of abandonment.

The trial court's unchallenged findings show that between 11 March 2020 and 6 July 2021, including the determinative period under § 7B-1111(a)(7): (1) Father had "the ability to call and text" Mother regarding visitation with Alice but chose not to; (2) Father had the ability to email Mother regarding visitation with Alice but chose not to; (3) Father had the ability to email Mother about Alice's "health, education and welfare" but chose not to; (4) Father did not send physical mail to Mother "inquiring about the health, education or welfare" of Alice; (5) Father did not attempt to seek review or modify the 2020 Custody Order or otherwise attempt to begin visitation with Alice through judicial process; (6) Father had no contact with Mother until Mother

initiated an attempt to seek his consent to a step-parent adoption; (7) the Grandparents never requested on Father's behalf that Mother allow Father to visit or have contact with Alice; (8) Father never sent gifts to Alice, although he testified that he gave financial support for the purchase of gifts; (9) "[t]he Respondent Father's last in-person contact with [Alice] was December 2017[;]" and (10):

> [t]he Respondent Father was aware of [Mother's] cell phone number, email and physical address and failed [to] act as a normal parent would in requesting contact or visitation with the minor child at any time from March 11, 2020 until the filing of the Petition [on 6 July 2021] in this matter.

Thus, the trial court made findings that Father "was aware of the actions he could take, [and] the evidence and the findings of fact indicate that he was unwilling to take any action whatsoever to indicate that he had any interest in preserving his parental connection with" Alice. *In re J.A.J.*, 381 N.C. at 776, 874 S.E.2d at 574 (citation and quotation marks omitted). We need not consider finding 43(o) due to the numerous unchallenged and binding findings of fact that establish his abandonment of Alice.

3. Lack of Findings

Aside from the two specific challenges to the trial court's findings of fact, Father generally challenged the trial court's findings as insufficient because the trial court did not resolve every conflict in the evidence or make a finding on every piece of evidence presented, particularly as to Mother blocking his access to Alice. Father specifically asserts the trial court did not resolve the conflict in the evidence regarding Mother's "years-long effort . . . to terminate Father's parental rights during ongoing custody litigation." But, "[t]he trial court is not required to make findings of fact on all the evidence presented, nor state every option it considered." *See In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005).

Here, the trial court made extensive findings of fact resolving many conflicts in the evidence. Father's main contention at the termination hearing was that Mother intentionally obstructed his access to Alice, and Mother presented evidence that Father could have taken action to contact her or establish contact with Alice but he simply failed to do so between March 2020 and July 2021. The trial court reviewed both parties' evidence and made detailed findings resolving the factual issues presented at the termination hearing, and these findings reveal the trial court ultimately concluded that Mother's version of events was more

credible. "While the record contains conflicting evidence concerning the nature and extent of [Father's] attempts to contact [Alice] and the extent to which [Mother] successfully interposed obstacles to any efforts that [Father] might have made to contact his [daughter], it is not the role of this Court, rather than the trial court, to resolve such disputed factual issues" and make findings of fact on the conflicted evidence. *In re D.T.H.*, 378 N.C. 576, 585, 862 S.E.2d 651, 658 (2021). Even where there is evidence in the record to the contrary, "[i]f the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal[.]" *In re C.M.P.*, 254 N.C. App. at 654, 803 S.E.2d at 858. And here, the trial court resolved the conflicting evidence and made extensive findings on the evidence it found most credible when it found Father had made no efforts to contact Mother or Alice between 11 March 2020 and 6 July 2021.

We also note this Court and the North Carolina Supreme Court have both rejected arguments like Father's. In *In re A.L.S.*, the respondent-mother argued she was subject to a 2016 custody order which granted the petitioners, the mother's cousin and her husband, sole custody and did not allow the mother visitation, like the 2020 Custody Order here. *See In re A.L.S.*, 374 N.C. 515, 521-22, 843 S.E.2d 89, 93-94 (2020). The mother's cousin also testified that she would actively avoid the mother and try to prevent contact between the mother and minor child. *See id.* The mother asserted "this evidence provides an alternative explanation for her own conduct that is 'inconsistent with a willful intent to abandon [the minor child].' " *Id.* at 521, 843 S.E.2d at 93.

The Supreme Court found "respondent-mother's argument unpersuasive. While there was evidence of ill will between petitioners and respondent-mother, this Court has held that a parent *will not be excused from showing interest in [the] child's welfare by whatever means available*." *Id.* at 522, 843 S.E.2d at 93-94 (emphasis in original) (citation and quotation marks omitted). Even though her cousin testified she would obstruct the mother's access to the minor child, the "[r]espondent-mother's failure to even attempt any form of contact or communication with [the minor child] gives rise to an inference that she acted willfully in abdicating her parental role, notwithstanding any personal animus between her and petitioners." *Id.* at 522, 843 S.E.2d at 94. And "[a]lthough the 2016 custody order did not give respondent-mother a right to visitation, the order in no way prohibited respondent-mother from contacting [the minor child]," again, like the 2020 Custody Order. *Id.* "Moreover, as the trial court found, respondent-mother 'never sought to modify that custody order' in order to gain visitation rights." *Id.*; *see also In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785-86 (2009) (rejecting

the father's argument before this Court that "the 'biggest factor' leading to his status as an absentee parent was the successful efforts of [the] [p]etitioner-[m]other, motivated by a number of factors, 'to shut him out of the children's lives[,]' " because the father had the means and ability to inquire after his children but failed to do so). As noted in *In re A.L.S.*, even if there is evidence that a petitioner has attempted to prevent the respondent from having access to the minor child, if the respondent still has some means available to contact the child or establish access, the trial court may find evidence of the respondent's willful intent to abandon the child by remaining absentee and not trying to contact the child by any means necessary. *See In re A.L.S.*, 374 N.C. at 521-22, 843 S.E.2d at 93-94; *see also In re M.D.*, 200 N.C. App. at 43, 682 S.E.2d at 785-86.

While the 2020 Custody Order prohibited Father from engaging in visitation it did not prohibit contact entirely between Father, Alice, and Mother. Father also had the option to seek modification of the 2020 Custody Order to reinstate specific visitation, but he failed to take any action to do so. The findings overall demonstrate the trial court simply found Father's argument that Mother prevented him from having any contact or access not to be credible, and Father's argument was merely an excuse for why he did not attempt to contact Mother or Alice or seek visitation with Alice within the determinative period under North Carolina General Statute § 7B-1111(a)(7). Father's argument is overruled.

4. Conclusion of Law

The trial court's findings support its conclusion that Mother "has shown by clear cogent and convincing evidence that the Respondent Father has willfully abandoned the minor child for at least six months preceding the filing of the Petition" as required by North Carolina General Statute § 7B-1111(a)(7), and that Father's rights may be terminated. *See In re C.M.P.*, 254 N.C. App. at 654, 803 S.E.2d at 858; *see also* N.C. Gen. Stat. § 7B-1111(a)(7).

V. Conclusion

The Termination Order is affirmed.

AFFIRMED.

Judges ARROWOOD and FLOOD concur.

IN RE INHABER

[290 N.C. App. 170 (2023)]

IN THE MATTER OF ERIC R. INHABER

No. COA22-927

Filed 15 August 2023

Attorneys—disciplinary hearing—sanctions—sufficiency of notice—limited record of proceeding

An order suspending an attorney from practicing law for one year was vacated on appeal where the limited record pertaining to the attorney's disciplinary hearing—which consisted solely of the suspension order itself and the attorney's written narrative describing his recollections of the proceeding—did not show that the attorney had received sufficient prior notice of the hearing. The attorney's narrative, which went unchallenged on appeal, stated that he was not provided notice of the hearing. In contrast, the suspension order did state that the attorney had received prior notice; however, the order did not indicate whether the notice identified the charges against the attorney and the possible sanctions that may be imposed—both of which needed to be provided to the attorney to meet the constitutional due process requirements for notice.

Appeal by Respondent from Order entered 25 July 2022 by Judge Thomas R. Young in Iredell County District Court. Heard in the Court of Appeals 9 May 2023.

Freedman Thompson Witt Ceberio & Byrd PLLC, by Christopher M. Watford for Appellant.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III, court-appointed amicus curiae.

RIGGS, Judge.

Respondent Eric R. Inhaber appeals an order entered in Iredell County District Court suspending Mr. Inhaber from practicing law in Judicial District 22A for a period of one year. The court entered the order under its inherent authority to conduct disciplinary hearings. On appeal, Mr. Inhaber argues he did not have proper notice of the hearing and the lack of a *verbatim* transcript deprived him of the ability to appeal the findings of fact in the suspension order. After careful review, we hold Mr. Inhaber did not receive proper notice of the hearing and vacate the

order. Because we vacate the order on the first issue he raises, we do not reach any additional issues on appeal.

I. FACTS & PROCEDURAL HISTORY

Mr. Inhaber is an attorney licensed in the State of North Carolina since 1995. His law practice primarily focuses on representing people charged with traffic violations in Mecklenburg County and the surrounding counties.

On or about 8 July 2022, Mr. Inhaber was in Iredell County District Court representing several clients on traffic infractions. He asked Assistant District Attorney Autumn Rushton ("ADA Rushton") to re-calendar several matters and withdraw the motions for arrest based upon defendant's failure to appear in these cases. ADA Rushton opposed re-calendaring and withdrawing the orders for arrest because she alleged that Mr. Inhaber had failed to appear at the relevant administrative court session in a timely manner. Mr. Inhaber indicated he was unfamiliar with the procedure in this district court, and it was difficult for him to arrive at the administrative sessions in a timely fashion because he represented clients in multiple counties. ADA Rushton advised Mr. Inhaber of the appropriate procedure and protocol for Iredell County District Court.

Two weeks later, on 18 July 2022, Mr. Inhaber approached ADA Rushton about a continuance on one case and withdrawing a failure to show arrest order and re-calendaring for another case; ADA Rushton granted both requests.

During the morning session on 20 July 2022, either in open court or outside the courtroom,[1] a dispute arose between ADA Rushton and Mr. Inhaber. ADA Rushton believed Mr. Inhaber had secured agreement to re-calendar the two cases by falsely representing they were both on the present day's calendar. ADA Rushton rescinded her agreement to re-calendar when she learned that both matters were not on the calendar.

During the dispute, Mr. Inhaber purportedly raised his voice and acted unprofessionally. The dispute supposedly created a delay of approximately ten minutes to the court's proceedings. Although Mr. Inhaber apologized for his actions, he maintained that he had not misrepresented that the cases were on the current docket. Assistant District Attorney Megan Powell ("ADA Powell") indicated she overheard a

1. The order is unclear whether the "heated" portion of the dispute occurred in the courtroom or outside of the courtroom.

portion of the interaction between ADA Rushton and Mr. Inhaber and that Mr. Inhaber led ADA Rushton to believe both cases were calendared for 20 July 2022.

Mr. Inhaber was instructed by an assistant district attorney to return to court for the afternoon session—he believed he was being summoned to address a client's traffic citation. However, at the conclusion of the afternoon session, the trial court held a disciplinary hearing regarding the events which occurred in the morning session and earlier that month. This disciplinary hearing was not transcribed; the record of this proceeding is based upon Mr. Inhaber's transcriptive narrative ("Narrative") made pursuant to N.C. R. App. P. 9(c) (2023) and the suspension order. In the prefatory clause of the order, the trial court indicated Mr. Inhaber was provided notice of a disciplinary hearing, without indicating whether the notice identified the conduct subject to sanctions and the proposed sanctions. The Narrative does not indicate that Mr. Inhaber objected to lack of notice at the hearing.

During the hearing, ADA Rushton and ADA Powell testified and a third Assistant District Attorney Reagan Hill ("ADA Hill") was in attendance. The Narrative indicates the trial court may not have taken sworn testimony from witnesses. According to the Narrative, Mr. Inhaber was not allowed to cross-examine witnesses during the hearing.

Three days after the hearing, on 25 July 2022, the trial court entered an order suspending Mr. Inhaber's license to practice law in Judicial District 22A for one year and required him to "petition for reinstatement of his ability to practice law in Judicial District 22A by filing appropriate pleading with the Clerk of the Superior Court of Iredell County, and by giving notice to the district attorney presiding in said judicial district." (Capitalization altered) Mr. Inhaber filed a timely notice of appeal on 22 August 2022.

Because the disciplinary hearing on 20 July 2022 was not transcribed or recorded, Mr. Inhaber attempted to reconstruct a record of the hearing for this appeal as allowed under Rule 9(c)(1) of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 9(c)(1) (2023). To assist him in creating a record of the disciplinary hearing, Mr. Inhaber attempted to consult with the three assistant district attorneys who had participated in the hearing. Mr. Inhaber contacted District Attorney Sarah Kirkman ("DA Kirkman") for District 32 and requested affidavits and notes from the hearing from ADA Powell, ADA Rushton, and ADA Hill. The district attorney indicated requesting affidavits from her staff was outside the scope of her duties and declined any involvement in this matter.

Mr. Inhaber also reached out to the trial court and requested responses to a series of questions about the hearing. The trial court responded with a copy of the order indicating the order tracked the court's recollection of the events.

Mr. Inhaber wrote a two-and-a-half-page undated Narrative of his recollections of the hearing. The Narrative did not identify any objections made during the hearing, provide a summary of each witness and their testimony, identify if any evidence was introduced, outline the judgment reached by the trial court, or identify instructions given to the parties.

Although the district attorney's office is not a party to this appeal, Mr. Inhaber provided them with the proposed record on appeal. The District attorney's office did not object to the Narrative and indicated it did not desire to be part of the proceeding. Neither Mr. Inhaber's Narrative nor the order itself indicates whether any objections were made during the hearing. Neither document definitively indicated whether the court took sworn testimony. Finally, neither document indicates if the trial court rendered a judgment or gave instructions at the close of the hearing.

II. Standard of Review

Exercise of a trial court's inherent authority is discretionary in nature—when reviewing the trial court's conclusions of law, "we need determine only whether they are the result of a reasoned decision[.]" *In re Botros*, 265 N.C. App. 422, 427, 828 S.E.2d 696, 701 (2019). *See also In re Cranor*, 247 N.C. App. 565, 573, 786 S.E.2d 379, 385 (2016) (stating the proper standard of review for acts by the trial court in the exercise of its inherent authority is abuse of discretion). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).

III. ANALYSIS

A. Notice for the Hearing Was Insufficient

On appeal, Mr. Inhaber argues the trial court failed to provide appropriate notice for the hearing. We agree.

Trial courts possess inherent authority to ensure courts are run efficiently and properly and that litigants are treated fairly. *Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987). "Generally, in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the

proper administration of justice in the court, are within [the court's] discretion." *State v. Smith*, 320 N.C. 404, 415, 358 S.E. 2d 329, 335 (1987) (quoting *State v. Rhodes*, 290 N.C. 16, 23, 224 S.E. 2d 631, 635 (1976)). The North Carolina Supreme Court has affirmed that our trial courts have the inherent power and duty to discipline attorneys, as officers of the court, for unprofessional conduct. *In re Hunoval*, 294 N.C. 740, 744, 247 S.E.2d 230, 233 (1977) (citing Canon 3B(3), N.C. Code of Judicial Conduct ("A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.")).

Generally, when a trial court uses its inherent power to discipline an attorney, it either does so immediately or the trial court issues a show cause order to provide notice of the hearing. *Compare State v. Land*, 273 N.C. App. 384, 399-93, 848 S.E.2d 564, 570 (2020) (holding no error where the trial court acted in summary fashion to maintain control of the courtroom by holding *pro se* defendant in contempt for repeated interruptions of courtroom proceedings) *with In re: Botros*, 265 N.C. App at 439, 828 S.E.2d at 708 (holding an attorney received due process when he was personally served with a show cause order which detailed the allegations against him seventeen days before the hearing).

"Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, section 17, of the North Carolina Constitution." *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 448, 450 S.E.2d 888, 891 (1994). A party is entitled to notice when sanctions are imposed pursuant to the court's inherent power to discipline attorneys. *Williams v. Hinton*, 127 N.C. App. 421, 426, 490 S.E.2d 239, 242 (1997). Specifically, prior to the imposition of sanctions, "a party has a due process right to notice both (1) of the fact that sanctions may be imposed, and (2) the alleged grounds for the imposition of sanctions." *In re Appeal of Small*, 201 N.C. App. 390, 395, 689 S.E.2d 482, 486 (2009).

Generally, a party entitled to notice of a hearing waives notice when they appear at the hearing and participate in the hearing unless they object or otherwise request a continuance at the hearing. *McNair Construction Co. v. Fogle Bros. Co.*, 64 N.C. App. 282, 289, 307 S.E.2d 200, 204 (1983). However, our Supreme Court has held where sanctions may be imposed, the parties must be notified in advance of the charges against them. *Griffin v. Griffin*, 348 N.C. 278, 280, 500 S.E.2d 437, 439 (1998). Participation in the hearing, without prior notice of the charges and proposed sanctions, does not waive the notice requirements. *Id.*

In this case, whether Mr. Inhaber had notice of the specific charges against him or the sanctions which may be imposed is disputed and the meager record does not provide any clarity. The suspension order simply indicates it was entered "[a]fter giving notice to the Respondent and after affording the Respondent an opportunity to be heard." Mr. Inhaber's narrative, however, states he "was not provided notice of the hearing that would eventually lead to his discipline by the Court."

Although the District Attorney's office is not a party to this appeal, Mr. Inhaber provided that office with a copy of the Narrative. The District Attorney's office did not object to the Narrative nor provide documentation or a counternarrative showing that Mr. Inhaber had received notice identifying the charges against him and the possible sanctions in this case. To comply with the constitutional requirement for notice, the trial court must have given Mr. Inhaber notice of the charges against him and the sanction(s) that may be imposed. *Griffin*, 348 N.C. at 289, 500 S.E.2d at 439. Because the order does not demonstrate Mr. Inhaber has proper prior notice of the charges and possible sanctions, we hold notice was not proper and vacate the order.

B. Mr. Inhaber's Burden in Reconstructing the Transcript

On appeal, Mr. Inhaber argues he was prejudiced by the lack of a transcript of the hearing, in that the lack of a transcript kept him from being able to present issues on appeal. Because we held Mr. Inhaber did not receive proper notice of the hearing and vacate the order, we do not reach the issue of whether Mr. Inhaber met the burden to reconstruct the transcript or whether he was prejudiced by the lack of a transcript.

IV. Conclusion

After review of the record, we hold the notice of the disciplinary hearing against Mr. Inhaber was insufficient because it did not identify the charges against him or the possible sanctions. Accordingly, we vacate the order.

VACATED.

Judges TYSON and ARROWOOD concur.

IN RE P.L.E.

[290 N.C. App. 176 (2023)]

IN THE MATTER OF P.L.E.

No. COA22-793

Filed 15 August 2023

1. Child Abuse, Dependency, and Neglect—permanency planning—guardianship—legal significance—lack of evidence

In a case involving a child who had been adjudicated neglected, the trial court's order awarding guardianship of the child to her foster parents was vacated where the court's findings and conclusions that the foster parents understood the legal significance of guardianship and their responsibilities were not supported by any evidence; an unsigned financial "affidavit" regarding the parties' finances was insufficient evidence for this purpose.

2. Child Abuse, Dependency, and Neglect—permanency planning—guardianship—parental visitation denied—lack of mandatory findings

In a case involving a child who had been adjudicated neglected, the trial court erred in its order awarding guardianship to the child's foster parents by denying visitation to the child's mother without making mandatory findings in accordance with N.C.G.S. § 7B-906.1(d) and (e) regarding whether reports on visitation had been made and whether there was a need to create, modify, or enforce an appropriate visitation plan.

Appeal by respondent-mother from order entered 7 June 2022 by Judge William F. Brooks in Wilkes County District Court. Heard in the Court of Appeals 31 July 2023.

Sherryl Roten West for petitioner-appellee Wilkes County Department of Social Services.

Schell Bray PLLC, by Christina Freeman Pearsall, for guardian ad litem.

Garron T. Michael, Esq., for respondent-appellant mother.

TYSON, Judge.

Respondent-mother ("Respondent") appeals from a permanency planning order, which awarded guardianship of her minor child, P.L.E.

("Phoebe") to Phoebe's foster parents ("Mr. and Mrs. M.") and denied Respondent any visitation with Phoebe. *See* N.C. R. App. P. 42(b) (pseudonym used to protect the identity of minor). We vacate the order and award of guardianship and remand for further proceedings.

I. Background

Wilkes County Department of Social Services ("DSS") filed a petition on 23 September 2020 alleging Phoebe was a neglected juvenile. DSS stated it had received two reports regarding Phoebe's younger brother, "Blake," almost two years old, who was taken and admitted into the hospital by Respondent with significant bruising on 19 August 2020. Blake had sustained several injuries, including a broken clavicle, torn frenulum, and extensive bruising to his throat and other protected areas. The injuries were non-accidental. A subsequent skeletal survey conducted on 14 September 2020 showed Blake had suffered other bone breaks on the ulna and radius of his right arm and a distal portion of his left arm.

Due to Blake's extensive and unexplained injuries, which purportedly occurred while Phoebe, age three, was living inside the family home, and the parents' inability to identify the perpetrator, DSS alleged Phoebe was neglected. DSS asserted she did not receive proper care, supervision, or discipline and lived in an environment injurious to her welfare, where she was also at risk for abuse. No physical injuries to Phoebe were ever documented by DSS. Phoebe and Blake were placed with kinship, their maternal great-aunt, as a safety placement.

The district court held the adjudication and disposition hearing on 26 October 2020, yet failed to enter orders until over six months later on 8 June 2021. The trial court's order adjudicated Phoebe as neglected, based upon facts stipulated to by the parties. The same day, the district court entered a disposition order, which kept Phoebe in DSS' custody and approved her placement with Mr. and Mrs. M. after the maternal great-aunt stated she was unwilling or unable to continue caring for her. Blake was also placed with Mr. and Mrs. M. at this time. Respondent was denied any visitation with Phoebe "during the pendency of the investigation pertaining to the abuse allegations related to [Blake]."

The initial review hearing was held on 25 January 2021. Three and one-half months later, on 10 May 2021, the trial court entered an order, which found Respondent had signed a case plan on 12 November 2020. The court found her substantial progress on that plan, including she: (1) was in consistent contact with DSS; (2) was employed; (3) was residing in a stable home; (4) had started parenting classes; but, (5)

had not scheduled her mental health or substance abuse assessments. Respondent had also been charged with misdemeanor child abuse based on the injuries allegedly sustained by Blake. While that charge remained pending, visitation with Blake was not permitted, unless visitation was "therapeutically recommended." As required by statute, DSS was ordered to continue reasonable efforts towards reunification. N.C. Gen. Stat. § 7B- 901(c) (2021).

The trial court next conducted a permanency planning hearing on 26 July 2021. In its 10 August 2021 order, the court found Phoebe was attending therapy to address her "diagnosis" of "Unspecified Trauma and Stressor Related Disorder due to her reported and observed behaviors." The trial court found Respondent's continued progress, including she: (1) was attending parenting classes inconsistently; (2) had weekly contact with a DSS social worker; (3) had completed her mental health assessment; (4) had completed a substance abuse assessment; (5) had tested positive for cannabinoids; (6) had inappropriate housing; (7) was not currently employed; and, (8) was attending all scheduled court dates and meetings with DSS.

The court also found Respondent had allowed another woman and her one-year-old twins, who had an active DSS case, to reside with Respondent in her mobile home, which purportedly "smelled of marijuana." During a visit to Respondent's home, children who were present purportedly reported "the adults in the home smoked 'weed' via a bong or rolling it up in weird paper" and "snorted white stuff into their noses through a metal tube."

The court changed the plan and established a primary permanent plan of adoption with a secondary plan of guardianship. DSS was relieved from its obligation to assist the parents to make reasonable efforts towards reunification. Respondent's misdemeanor child abuse case remained pending, and she continued to be denied any visitation with Blake and Phoebe.

The next permanency planning hearing was held on 22 November 2021. The trial court again made findings regarding Respondent's progress, which had worsened. Respondent had completed four of sixteen parenting classes, was in arrears in child support, had not complied with the recommendation that she attend virtual group therapy, had not been employed since March 2021, and had a new criminal charge pending for misdemeanor larceny.

The court found Respondent had remained in contact with the social worker, had obtained housing, and was regularly attending court

hearings and meetings with DSS. The court also found Phoebe's therapy had been suspended "due to her progress in meeting all of her treatment goals." No changes were made to the primary and secondary permanent plans, and reunification efforts remained ceased. Respondent was restored with "limited telephone and video visits" with Phoebe, but DSS retained "the discretion to cease these visits if they appear detrimental to the wellbeing of the child."

The permanency planning hearing at issue in this appeal was held on 18 April 2022. The trial court entered an order seven weeks later on 7 June 2022, which found: Phoebe had resumed therapy based on "regressive behaviors" following the initial video visits with Respondent; Respondent was not in full compliance with her case plan; DSS recommended the primary permanent plan be changed from adoption to guardianship. Mr. M. was present in court and provided the court with a financial affidavit, which demonstrated Mr. and Mrs. M. had adequate resources to take care of Phoebe and understood the legal significance of being appointed as Phoebe's guardians. The court found by clear and convincing evidence Respondent and Phoebe's father had "acted inconsistently with their constitutional rights to parent the minor child."

The trial court changed the primary plan to guardianship with a secondary plan of adoption and awarded guardianship of Phoebe to Mr. and Mrs. M. Due to the therapist's report of Phoebe's negative reaction to her initial video visit with Respondent, no visitation was ordered. The court determined DSS had achieved the permanent plan for Phoebe and ordered no further review hearings were necessary. Respondent appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27 and 7B-1001(4) (2021).

III. Verification of Guardianship

A. Standard of Review

Appellate "review of a permanency planning review order 'is limited to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law.' " *In re H.A.J.*, 377 N.C. 43, 49, 855 S.E.2d 464, 469 (2021) (quotation omitted). At a permanency planning hearing, any evidence may be considered, "including hearsay evidence as defined in [N.C. Gen. Stat. §] 8C-1, Rule 801, or testimony or evidence from any person that is not a party, that the court finds to be relevant, reliable, and necessary to

determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. Stat. § 7B-906.1(c) (2021).

"The trial court's findings of fact are conclusive on appeal if supported by any competent evidence." *In re H.A.J.*, 377 N.C. at 49, 855 S.E.2d at 469. Unchallenged findings of fact are "deemed to be supported by the evidence and are binding on appeal." *In re J.C.M.J.C.*, 268 N.C. App. 47, 51, 834 S.E.2d 670, 673-74 (2019) (citation omitted). This Court reviews conclusions of law *de novo*. *Id.*

B. Analysis

[1] Respondent challenges the trial court's award of joint guardianship to Mr. and Mrs. M. She contends insufficient evidence shows they understood the legal significance of being appointed as guardians for her children. Under the Juvenile Code, before placing a juvenile in a guardianship, the trial court is mandated to determine whether the proposed guardian "understands the legal significance of the appointment" and "will have adequate resources to care appropriately for the juvenile." N.C. Gen. Stat. §§ 7B-600(c), 7B-906.1(j) (2021).

To satisfy the requirement that the guardians understand the legal significance and responsibilities of the appointment, "the record must contain competent evidence demonstrating the guardian's awareness of [his and] her legal obligations[.]" *In re K.B.*, 249 N.C. App. 263, 266, 803 S.E.2d 628, 630 (2016) (citation omitted). This Court has explained that various types of evidence can satisfy this standard:

> Evidence sufficient to support a factual finding that a potential guardian understands the legal significance of guardianship can include, *inter alia*, testimony from the potential guardian of a desire to take guardianship of the child, the signing of a guardianship agreement acknowledging an understanding of the legal relationship, and testimony from a social worker that the potential guardian was willing to assume legal guardianship.

In re E.M., 249 N.C. App. 44, 54, 790 S.E.2d 863, 872 (2016).

When two people are awarded joint guardianship, there must be sufficient evidence before the trial court that both persons understand the legal significance of the appointment. *See In re L.M.*, 238 N.C. App. 345, 348-49, 767 S.E.2d 430, 433 (2014) (vacating an order for guardianship where "there was no evidence that the foster mother accepted responsibility" for the juvenile and affirming the order in part because the record tended to show the foster father's desire to take guardianship of the minor child).

In awarding guardianship jointly to Mr. and Mrs. M., the trial court found:

> 23. [Mr. M.] was present in court. He provided a financial affidavit to the Court. Per the affidavit, and evidenced by the fact that [Mr. and Mrs. M.] have provided for the minor child for more than six consecutive months, they have adequate resources to care appropriately for the minor child, and are able and willing to provide proper care and supervision of the minor child in a safe home. [Mr. and Mrs. M.] understand the legal significance of being appointed the minor child's legal custodians.
>
> 24. The minor child has been placed with [Mr. and Mrs. M.] since October 28, 2020, and it is in the minor child's best interest that she be placed in guardianship with [Mr. and Mrs. M.]. [Mr. and Mrs. M.] are committed to caring for the minor child and providing guardianship.

Respondent first contends the trial court's findings and conclusions are erroneous because they state Mr. and Mrs. M. "understand the legal significance of being appointed the minor child's legal *custodians*," rather than being appointed Phoebe's guardians. This error may be a misnomer and clerical in nature. *See In re R.S.M*, 257 N.C. App. 21, 23, 809 S.E.2d 134, 136 (2017) ("A clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." (citations, alterations, and quotation marks omitted)). The remainder of the order uses the term "guardianship" repeatedly, including in the trial court's final decree that "guardianship of the minor child, [Phoebe], is hereby granted to [Mr. and Mrs. M.]" This error may be addressed and corrected upon remand.

Respondent next argues the trial court's finding of fact that Mr. and Mrs. M. understood the legal significance and accepted the responsibilities of guardianship was not supported by any competent evidence, noting that "at no point in any of the testimony [at the permanency planning hearing], or contained within either admitted court report is there any direct evidence regarding the foster parent's understanding of the guardianship appointment."

DSS and the guardian *ad litem* dispute Respondent's characterization of the evidence before the trial court. They point to a "Financial Affidavit of [Mr. and Mrs. M.] for Custody/Guardianship" purportedly filled out prior to the permanency planning hearing, which allegedly included the following section:

> **Part 5: RIGHTS AND RESPONSIBILITIES OF A CUSTODIAN/GUARDIAN**
>
> I understand the legal rights and responsibilities that will be bestowed upon me as the legal custodian/guardian for the above-named child(ren). I understand that this includes, but is not limited to, the responsibility to provide the child(ren) with food, shelter, care, and education until the child(ren) reach the age of majority. I understand that this includes, but is not limited to, the right to make all major decisions about the child's health, education, and religious upbringing.

The affidavit provided in the record to this Court is not signed by either Mr. or Mrs. M., and the portion of the affidavit containing a notary's affirmation is also blank. The unsigned "affidavit" itself is not competent or self-proving evidence of Mr. and Mrs. M.'s understanding of the legal significance and responsibilities of guardianship.

At the permanency planning hearing, Mr. M. offered the following testimony regarding the purported affidavit on direct examination from the GAL attorney advocate:

> Q. Sir, you filled out a financial affidavit earlier – earlier this week *indicating your finances*; is that correct?
>
> A. Yes, sir.
>
> Q. And everything on that affidavit is true to the best of your knowledge?
>
> A. Yes, sir.
>
> Q. And you and your significant other *have the financial means and ability* to care financially and emotionally for both [Phoebe] and [Blake]?
>
> A. That's correct.

The affidavit was purportedly entered into evidence during Mr. M.'s subsequent questioning by DSS:

> Q. Sir, you said you filled out *a financial affidavit*?
>
> A. Yes, ma'am.
>
> . . .
>
> [DSS Attorney]: May I approach again, your Honor?

> THE COURT: Sure.
>
> Q. And this is *the financial affidavit* that you filled out?
>
> A. Yes, ma'am.
>
> Q. And you and [Mrs. M.], you have been caring for both children for quite a while now?
>
> A. Yes, since October of 2020.
>
> Q. And – since October of 2020?
>
> A. Yes, ma'am.
>
> Q. Okay. So over a year-and-a-half?
>
> A. Yes, ma'am.
>
> Q. Okay.
>
> [DSS Attorney]: Your Honor, and we'll admit [sic] this as Department's 2.
>
> THE COURT: Okay. All right. Very well. Allow this being introduced into evidence without objection as Petitioner's Exhibit No. 2.

Mr. M.'s testimony does not cure the issues with the unsigned financial affidavit before us nor satisfy the joint requirements and acceptance for Mrs. M. *In re L.M.*, 238 N.C. App. at 348-89, 767 S.E.2d at 433. Mr. M. only acknowledges "filling out" the financial affidavit, and the only information that was "filled out" had to do with the couple's finances. Part 5 of the affidavit, which sets out the legal rights and responsibilities of a custodian/guardian, did not include any space to acknowledge it was read and understood, and there are no markings near it.

Mr. M.'s testimony did not discuss Part 5 nor otherwise address the legal obligations and responsibilities associated with guardianship. Mr. M.'s testimony did not provide any evidence that Mrs. M. was involved with filling out the affidavit or that he had discussed its contents with her, or that she understood and was in agreement with her joint responsibilities. *Id.*

Neither the unsigned financial affidavit nor Mr. M.'s testimony provides the evidence necessary to support the trial court's findings and conclusions that Mr. and Mrs. M. understood the legal significance and responsibilities of being appointed as Phoebe's guardians. No other witnesses offered testimony on the issue, and no other information

is included in either the DSS or GAL court report to support the trial court's findings.

The trial court erred by finding and concluding the foster parents jointly understood the legal significance and responsibilities of guardianship. *See In re E.M.*, 249 N.C. App. 44, 55, 790 S.E.2d 863, 872 (2016) (vacating and remanding an award of legal custody when one member of the custodial couple did not testify and there was no evidence he understood the legal significance of taking custody, the testimony from the other member of the couple did not address her understanding of the legal relationship, and the DSS court report did not reflect that "either of the custodians understood the legal significance of guardianship"); *In re J.D.M.-J.*, 260 N.C. App. 56, 59-61, 817 S.E.2d 755, 758-59 (2018) (vacating and remanding an award of legal custody when neither of the prospective custodians testified, no testimony was offered by DSS that the custodians were aware of the legal significance of assuming custody of the juveniles, and the custodians did not "sign a guardianship agreement acknowledging their understanding of the legal relationship"). We vacate the trial court's award of guardianship to Mr. and Mrs. M. and remand for further proceedings.

IV. Visitation

A. Standard of Review

"This Court reviews an order disallowing visitation for abuse of discretion." *In re J.L.*, 264 N.C. App. 408, 421, 826 S.E.2d 258, 268 (2019) (citation omitted). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re N.G.*, 186 N.C. App. 1, 10-11, 650 S.E.2d 45, 51 (2007) (citation and internal quotation marks omitted). A trial court has no discretion to fail to recognize, follow, or to correctly apply the law, or to commit an error of law. *See In re R.P.*, 276 N.C. App. 195, 198, 856 S.E.2d 868, 870 (2021) ("An abuse of discretion occurs when the trial court acts under a misapprehension of the law or its ruling is 'so arbitrary that it could not have been the result of a reasoned decision.' " (citation omitted)).

B. Analysis

[2] Respondent argues the trial court abused its discretion and erred when it denied her all visitation with Phoebe without adequately considering the totality of the circumstances of her parental rights and Phoebe's best interests.

N.C. Gen. Stat. § 7B-906.1(d) governs review and permanency planning hearings, provides a list of criteria the trial court "shall consider," and states the trial court must "make written findings" regarding

visitation. One of the items highlighted in the list is: "(2) Reports on visitation that has occurred and whether there is a need to create, modify, or enforce an appropriate visitation plan in accordance with [N.C. Gen. Stat. §] 7B-905.1." N.C. Gen. Stat. § 7B- 906.1(d)(2).

Under N.C. Gen. Stat. § 7B-905.1 (2021),

> [a]n order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home *shall provide for visitation* that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation. The court may specify in the order conditions under which visitation may be suspended.

N.C. Gen. Stat. § 7B-905.1(a) (emphasis supplied).

Another subsection of N.C. Gen. Stat. § 7B- 906.1 mandates the criteria the trial court "shall additionally consider" and "make written findings regarding" after "any permanency planning hearing where the juvenile is not placed with a parent." N.C. Gen. Stat. § 7B-906.1(e). The list includes the following criteria:

> (1) Whether it is possible for *the juvenile to be placed with a parent within the next six months and*, *if not*, *why* such placement is not in the juvenile's best interests.
>
> (2) Where the juvenile's placement with a parent is unlikely within six months, *whether legal guardianship or custody with a relative* or some other suitable person should be established *and*, *if so*, *the rights and responsibilities that should remain with the parents*.
>
> (3) Where the juvenile's placement with a parent is unlikely within six months, whether adoption should be pursued and, if so, any barriers to the juvenile's adoption, including when and if termination of parental rights should be considered.
>
> (4) Where the juvenile's placement with a parent is unlikely within six months, *whether the juvenile should remain in the current placement*, *or be placed in another permanent living arrangement and why*.
>
> (5) Whether the county department of social services has since the initial permanency plan hearing made

> reasonable efforts to implement the permanent plan for the juvenile.
>
> (6) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-906.1(e)(1)-(6) (emphasis supplied).

This Court has vacated and remanded permanency planning orders for failure to make written findings and conclusions of law pursuant to the criteria listed in N.C. Gen. Stat. § 7B-906.1. *See In re L.G.*, 274 N.C. App. 292, 851 S.E.2d 681 (2020). In *In re L.G.*, the trial court "ma[de] no mention of the possibility of [the child's] placement with either parent within the next six months" in the permanency planning order. *Id.* at 299, 851 S.E.2d at 687. Although the trial court "included *findings of fact* in the permanency planning order that *could support* a potential conclusion it was not possible for [the child] to be placed with [either parent] within six months, it *failed* to make that conclusion of law in the permanency planning *order*." *Id.* at 302, 851 S.E.2d at 689 (emphasis supplied). This Court remanded the matter to the trial court for "consideration of this issue and if the trial court so concludes, to include specific language regarding the possibility of [the child] being placed with a parent within six months in the permanency planning order." *Id.*

The record only reflects Phoebe's DSS-paid therapist's opinion of her behavior following a video call visitation with Respondent after a long state-enforced absence of visitation with Respondent. The sole finding of fact reflecting visitation is:

> Therapist Bailey wrote a letter following the beginning of video call visitation between [Phoebe] and her mother, [Respondent]. When visits were started, [Phoebe] would become nervous and hesitant to be in the same room as the video call. She was upset by the calls and continued to show inappropriate behavior following each of the calls that were made. Due to this, the therapist's letter documented concerns of regressive behaviors following the visit that the therapist felt were harmful for [Phoebe] and that the video visitation should cease. Due to these behaviors, the therapist felt that it was necessary for [Phoebe] to resume regular sessions.

Here, the facts are similar to those in *In re L.G.*, because the trial court failed to include language consistent with the mandated statutory criteria in N.C. Gen. Stat. § 7B-906.1(d)-(e). *Id.* "[W]hile the trial court included findings of fact in the permanency planning order [which may] *support* a potential conclusion it was not possible for [Phoebe] to be placed with

[Respondent] within six months, it *failed* to make that conclusion of law in the permanency planning *order*." *Id.* (emphasis supplied).

This matter is remanded to the trial court for further consideration and to make written and supported findings of fact as mandated and consistent with Respondent's parental rights and the criteria outlined in N.C. Gen. Stat. § 7B-906.1(d)-(e), including "[r]eports on visitation that has occurred and whether there is a need to create, modify, or enforce an appropriate visitation plan in accordance with [N.C. Gen. Stat. §] 7B-905.1." N.C. Gen. Stat. § 7B-906.1(d)(2); *In re L.G.*, 274 N.C. App. at 302, 851 S.E.2d at 689.

V. Conclusion

The trial court's conclusion that Mr. and Mrs. M. understood the legal significance of guardianship is not supported by findings based upon competent evidence in the record. The trial court's award of guardianship to Mr. and Mrs. M. is vacated and remanded for further proceedings.

The trial court's denial of Respondent's visitation with her children is vacated and remanded to the trial court for further consideration of the mandates of the statutes and this opinion. *See* N.C. Gen. Stat. §§ 7B-905.1 and 7B-906.1(d)-(e). *It is so ordered.*

VACATED AND REMANDED.

Judge FLOOD and RIGGS concur.

SHEPENYUK v. ABDELILAH

[290 N.C. App. 188 (2023)]

GANNA SHEPENYUK, PLAINTIFF
v.
YOUSSEF ABDELILAH, DEFENDANT

No. COA22-702

Filed 15 August 2023

Husband and Wife—marriage—without license—invalid

Plaintiff's action against her former romantic partner for post-separation support, alimony, equitable distribution, interim distribution, and attorney fees was properly dismissed where, although plaintiff and her partner participated in a religious wedding ceremony in Virginia years earlier, their marriage was invalid because they never obtained a marriage license as required by Virginia law and where there was no basis for treating the partnership as a marriage by presumption or by estoppel.

Appeal by Plaintiff from an order entered 27 May 2022 by Judge J. Brian Ratledge in Wake County District Court. Heard in the Court of Appeals 25 January 2023.

The Law Offices of Anton M. Lebedev, by Anton M. Lebedev, for the Plaintiff-Appellant.

Hatch, Little & Bunn, L.L.P., by Justin R. Apple, for the Defendant-Appellee.

WOOD, Judge.

Ganna Shepenyuk ("Plaintiff") appeals an order granting Youssef Abdelilah's ("Defendant") Rule 12(b)(6) motion to dismiss and dismissing her complaint for postseparation support, alimony, equitable distribution, interim distribution, and attorney fees. After careful review of the record and applicable law, we affirm the order of the trial court.

I. Factual and Procedural Background

Plaintiff and Defendant are former romantic partners who lived together. On 22 August 2015, the parties participated in a religious wedding ceremony in Virginia officiated by Defendant's brother, Mr. Kamal Abdelilah ("K. Abdelilah"). There is no evidence K. Abdelilah was ordained or legally authorized by law to officiate the ceremony. The parties never obtained a marriage license prior to or after the ceremony.

On 30 September 2021, Plaintiff filed a "Complaint and Motion for Domestic Violence Protective Order" ("DVPO Complaint") seeking an *ex parte* Domestic Violence Protective Order, as well as possession of the parties' residence. Plaintiff alleged she and Defendant are "persons of the opposite sex who are not married but live together or have lived together." In a statement attached to her DVPO Complaint, Plaintiff stated that she and Defendant "are not legally married, but [Defendant] does file taxes as jointly married . . . and uses the child support payments of [her] daughter to pay the bills." On 30 September 2021, Plaintiff obtained an *ex parte* DVPO against Defendant.

At the hearing on the DVPO on 14 October 2021, Plaintiff testified she and her "husband met back in 2013," and were "married on 22 August 2015." She further testified she and Defendant "were living for six plus years as husband and wife," called each other husband and wife, were known by "all [their] relatives, family, coworkers, [and] everybody . . . as a married couple," and "were raising four children together." Defendant testified he recently had found out they were not legally married.

That same day, district court Judge Eagles entered a DVPO order finding the "parties had a religious marriage ceremony in Virginia several years ago. Both parties found out years later that their marriage was not considered a legal marriage by the State of Virginia. This has caused conflict regarding distribution of property and possession of the house." The court further found that "[m]any of Plaintiff's allegations appear to be false, based on testimony and evidence introduced, including allegations regarding finances, name calling, and controlling behavior" and that "Plaintiff's testimony lacks credibility." The court concluded Plaintiff "has failed to prove grounds for issuance of a domestic violence protective order" and dismissed the DVPO Complaint.

On 19 November 2021, Plaintiff filed a Petition for Partition of Real Property ("Petition for Partition") seeking a partition by sale of the residence where the parties lived pursuant to N.C. Gen. Stat. § 46A-1. In this petition, Plaintiff stated she "is not currently legally married"; her marriage to Defendant "was void because the marriage license was never properly obtained"; and "the marriage ceremony took place in a State, where the minister may have lacked authority to hold the marriage ceremony." On 3 December 2021, Defendant filed an answer in which he admitted the parties "are not married and were never validly married."

On 11 January 2022, Plaintiff filed a verified complaint asserting equitable distribution and alimony claims, alleging the parties had an "implied partnership" and "constructive marriage." Plaintiff further alleged she

"has never seen a marriage license" and is "unsure whether [K.] Abdelilah was authorized to conduct the marriage ceremony in question."

On 9 February 2022, Plaintiff filed an amended complaint requesting that the parties be "presumptively treated as husband and wife" because a "marriage ceremony took place on 22 August 2015 at the Defendant's brother [K.] Abdelilah's, house in Virginia" and "after the marriage ceremony was performed, both parties believed that they were married to one another." Plaintiff again stated she "has never seen a marriage license" and remains "unsure whether [K.] Abdelilah was authorized to conduct the marriage ceremony in question." Plaintiff requested that the court deem "Plaintiff and Defendant married for the purpose of this action."

On 29 March 2022, Defendant filed a motion to dismiss Plaintiff's amended complaint pursuant to Rule 12(b)(6). Defendant alleged Plaintiff has actual knowledge that she and Defendant are not legally married. Furthermore, the motion alleged Plaintiff's own filings assert that the parties are not legally married, and thus, has failed to state a claim on which relief can be granted.

On 11 April 2022, Defendant filed an answer in response to Plaintiff's amended complaint and argued the doctrine of equitable estoppel bars Plaintiff from claiming the parties entered into a legal marriage because she previously alleged in court documents that she is not legally married to Defendant. Furthermore, Defendant claimed *res judicata* bars Plaintiff from relitigating her complaint because a North Carolina court previously ruled on the issue of whether she and Defendant are legally married.

On 14 April 2022, the trial court heard Defendant's motion to dismiss. Plaintiff's counsel argued the principle of marriage by estoppel applied, asserting "as far as the complaint on its four corners, it alleges that there was a marriage ceremony, and alternatively it alleges that even if a marriage is void, the [c]ourt should still consider the marriage under – a marriage in estoppel, which is recognized in North Carolina." Plaintiff's counsel conceded a "marriage license was never filed in Virginia, and because [they believed] there might have been some improprieties of the way the marriage ceremony was conducted, they were not married." Plaintiff's counsel further acknowledged that in the DVPO order, "Judge Eagles made a finding that she doesn't believe they were married but she believes there was a marriage -- a religious marriage ceremony that occurred." Additionally, Plaintiff's counsel argued Defendant needed to file an annulment action in Virginia instead of a court in North Carolina because it's "not this [c]ourt's job to interpret Virginia law and the validity of something that occurred in Virginia." Plaintiff's counsel conceded

his client did not dispute the trial court's previous finding that the parties did not have a legal marriage in Virginia.

On 27 May 2022, the trial court entered an "Order Dismissing Plaintiff's Complaint for Postseparation Support, Alimony, Equitable Distribution, Interim Distribution and Attorney's Fees." The trial court took judicial notice of previous court documents and found Plaintiff pleaded in the DVPO action, "the parties are, in fact, not married," and the trial court dismissed the DVPO action and noted the parties' marriage was not considered legal by the state of Virginia in its October 2021 order. The May 2022 order determined Plaintiff's complaint only alleged the date of the marriage ceremony, not the date of a legal marriage, so that the trial court was unable to grant relief based upon an equitable marriage theory.

On 1 June 2022, Plaintiff gave written notice of appeal, and filed an amended notice of appeal on 8 June 2022. Thus, the matter is properly before us on appeal.

II. Analysis

A. Standard of Review

A trial court's order granting a Rule 12(b)(6) motion to dismiss is reviewed *de novo*. *Locklear v. Lanuti*, 176 N.C. App. 380, 384, 626 S.E.2d 711, 714 (2006). In our review of an order allowing a motion to dismiss we consider whether, as a matter of law, "the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *New Bar P'ship v. Martin*, 221 N.C. App. 302, 306, 729 S.E.2d 675, 680 (2012) (citation omitted). A motion to dismiss under Rule 12(b)(6) tests the complaint's legal sufficiency. *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). Plaintiff's complaint is to be liberally construed, and "the court should not dismiss the complaint unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *New Bar P'ship*, 221 N.C. at 306, 729 S.E.2d at 680 (citation omitted).

A complaint may be dismissed if it is clearly without merit. *Lee v. Paragon Group Contractors*, 78 N.C. App. 334, 337, 337 S.E.2d 132, 134 (1985) (citation omitted). A complaint is without merit if 1) there is an absence of law to support a claim of the sort made; 2) there is an absence of fact sufficient to make a good claim; or 3) there is the disclosure of some fact which will defeat a claim. *Home Elec. Co. v. Hall & Underdown Heating & Air Conditioning Co.*, 86 N.C. App. 540, 542, 358

S.E.2d 539, 540 (1987) (citation omitted). In ruling on a motion to dismiss, the trial court may take judicial notice of its own records in a prior or contemporaneous case without converting the motion to dismiss into a motion for summary judgment. *Funderburk v. JPMorgan Chase Bank, N.A.*, 241 N.C. App. 415, 420, 775 S.E.2d 1, 4 (2015) (citation omitted).

B. The sufficiency of Plaintiff's complaint

Plaintiff first argues she sufficiently alleged claims of equitable distribution, alimony, and attorney's fees in her verified amended complaint to the trial court. Plaintiff contends she and Defendant should be presumptively treated as husband and wife due to a "marriage ceremony" which took place on 22 August 2015 in Virginia. Plaintiff cites to the trial court's previous finding that a religious marriage ceremony occurred between the parties and infers the principle of marriage by estoppel is applicable. Looking to Plaintiff's complaint, she alleges "after the marriage ceremony was performed, both parties believed that they were married to one another." Plaintiff's complaint also claims the trial court previously determined the parties "had a religious marriage ceremony in Virginia several years ago. Both parties found out later that their marriage was not considered a legal marriage by [the] State of Virginia." Plaintiff's complaint further alleges, "the Plaintiff has never seen a marriage license" and that she is "still unsure whether [K.] Abdelilah was authorized to conduct the marriage ceremony in question."

The issue of the validity of a marriage under state law is generally governed by the law of the place of the celebration of the marriage. *See Adams v. Howerton*, 673 F.2d 1036, 1038-39 (9th Cir. 1982) (citations omitted); *Fungaroli v. Fungaroli*, 53 N.C. App. 270, 279, 280 S.E.2d 787, 793 (1981) ("[A] marriage valid where contracted is valid everywhere.") (citation omitted). We give full faith and credit to an out of state marriage if the union was valid in the state where the marriage ceremony took place. Therefore, we look to Virginia law in our determination of whether a valid marital relationship exists between the parties.

Marriage is a creation of state law. As such, it is in the power of the state to give the requirements of marriage. The United States Supreme Court has expressed:

> Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and

> obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

Maynard v. Hill, 125 U.S. 190, 205, 8 S. Ct. 723, 726, 31 L. Ed. 654, 657 (1888). Under Virginia law, marriage is a status involving public welfare; it is not merely a contract between two people. The Virginia Supreme Court has described the marriage institution as a relationship among three parties: the husband, the wife, and the Commonwealth. *Cramer v. Commonwealth*, 214 Va. 561, 202 S.E.2d 911, 914 (Va. 1974).

In determining the requirements for marriage, Virginia's General Assembly codified that "every marriage in this Commonwealth shall be under a license and solemnized in the manner herein provided." Va. Code Ann. § 20-13. Consistent with the plain language of the statute, the Supreme Court of Virginia previously has held "no marriage or attempted marriage, if it took place in this State, can be held valid here, unless it has been shown to have been under a license, and solemnized according to our statutes." *Offield v. Davis*, 100 Va. 250, 40 S.E. 910, 912 (Va. 1902). In *Offield*, when deciding the validity of common law marriages, Virginia's Supreme Court considered the legislative intent and reasons of public policy behind the statutory requirements of solemnization and a license. *Id.* at 40 S.E. at 913. The Court held it significant that the revisers of the legislative code included a note that these statutory requirements were intended to dissuade from common law marriages. *Id.* at 40 S.E. at 911.

The intent and purpose of the legislature regarding the requirements for a valid marriage plainly state that a marriage license is required. In the present case, Plaintiff's complaint alleges no valid marriage license exists, thereby making the marriage between Plaintiff and Defendant, on its face, invalid. Notwithstanding the parties' failure to obtain a marriage license, Plaintiff contends she and Defendant should be treated presumptively as husband and wife because a "marriage ceremony" took place in Virginia, on 22 August 2015. We decline to extend this presumption to the parties or apply the doctrine of equitable estoppel.

Virginia public policy "has been to uphold the validity of the marriage status for the best interest of society." *Needam v. Needam*, 183 Va. 681, 33 S.E.2d 288, 290 (Va. 1945). Thus, the presumption of the validity of a marriage ranks as "one of the strongest presumptions known to the law." *Eldred v. Eldred*, 97 Va. 606, 34 S.E. 477, 484 (Va. 1899). However, the presumption of marriage cannot be extended to these present circumstances. Plaintiff's conflicting statements in her court filings regarding her relationship with Defendant, and any presumption to be drawn

therefrom, is refuted by the undisputed evidence of the nonexistence of a valid Virginia marriage license.

While the parties cohabitated, comingled their assets, held themselves out as married to the community, and filed joint tax returns, this evidence is insufficient to overcome Virginia's statutory requirements. The veracity of the evidence is in question where both parties have asserted repeatedly in their verified complaints and answers, conflicting statements as to whether they are married. Additionally, Plaintiff concedes the officiant may not have had legal authority to officiate the wedding and neither party attempted to meet the legal requirements for their marriage under Va. Code Ann. § 20-13 or cure their mistake once notified of the requirements. We cannot presume to be true what Plaintiff herself does not profess true. There simply is not enough evidence to "create a foundation for the presumption of marriage." *Id.*

Next, Plaintiff requests we apply estoppel and estop Defendant from refuting the marriage. On appeal, Plaintiff contends she is lawfully married and acted in good faith on this belief. She changed her position in life to become a "homemaker," so as to take care of the home they lived in together and to care for Defendant's biological children, his mother, as well as his brother for nearly five years. While we recognize and are sympathetic to Plaintiff's circumstance, we do not find sufficient basis in Virginia's legal precedent to apply the theory of estoppel to marriage. Consequently, we decline to expand its application here.

In *Levick v. MacDougal*, a couple were married without a license, but were aware of the licensure requirement and, in fact, acquired a license several days after their marriage ceremony. 294 Va. 283, 805 S.E.2d 775, 777-78 (Va. 2017). The Virginia Supreme Court upheld the marriage after determining that the parties' intent to get a license was satisfactory since it is true that "every marriage in Virginia . . . be licensed and solemnized" according to Va. Code Ann. § 20-13. *Id.* at. 805 S.E.2d at 779. Further, the Court's holding declined to address several contentions related to the validity of marriages and left such scenarios unanswered. The Court stated:

> Our holding also renders moot a myriad of debates in this case on various other subjects, including:
>
> • whether Code § 20–13, if violated under this sequence of events, provides a mandatory, as opposed to a mere directory, statutory requirement;
>
> • whether a violation of Code § 20–13, if proven, could be cured by Code § 20–31;

> • whether an allegedly completed marriage, if found to be invalid and incurable, would be declared void ab initio, as the circuit court held, or merely voidable, as the Court of Appeals held;
>
> • whether a party in Levick's position would be precluded by the doctrines of equitable estoppel or laches from challenging the validity of his marriage; and
>
> •whether the marital agreement should be enforced despite a mistaken assumption by the parties at the time of executing it that their marriage was lawful.

Id. at 805 S.E.2d at 785-86. The Court further clarified that its "silence on these underlying questions of law leaves them open for future debate and, thus, allows them to be addressed in later cases in which they are ripe for decision." *Id.* at 805 S.E.2d at 786.

Although the Virginia Supreme Court has left situations like the present case open for "future debate," we decline to apply legal principles that neither the Virginia courts have interpreted, nor the Virginia legislature has addressed. Accordingly, based upon the plain language of Va. Code Ann. § 20-13, the parties never entered into a valid marriage under Virginia law. The parties did not meet the basic statutory requirements for obtaining a valid marriage, nor did the parties at any point attempt to comply with the statute by curing their failure to obtain a license. They simply never got one. Further, as Plaintiff notes, we are unaware whether the individual who officiated the religious ceremony was even authorized to do so. Because the parties did not adhere to Virginia's statute, their marriage is not valid in Virginia and consequently, not valid here. Therefore, we hold the trial court properly dismissed Plaintiff's complaint for postseparation support, alimony, equitable distribution, interim distribution, and attorney fees. We need not consider Plaintiff's other issues on appeal.

III. Conclusion

For the above stated reasons, we affirm the trial court's order granting Defendant's motion to dismiss. The parties' marriage ceremony in Virginia did not result in a valid marriage because the parties failed to meet Virginia's statutory requirements. We decline to apply presumption of marriage or estoppel theories to the facts as presented in the record before us.

AFFIRMED.

Judges ARROWOOD and COLLINS concur.

STATE OF NORTH CAROLINA
v.
RYAN PIERRE BROWN, DEFENDANT

No. COA22-525

Filed 15 August 2023

Appeal and Error—denial of motion for appropriate relief—guilty plea—recanted testimony—pure question of law—certiorari denied

In a case in which defendant had entered an *Alford* plea to second-degree murder and robbery with a dangerous weapon, defendant's appeal from the denial of his motion for appropriate relief (MAR) was dismissed, and his petition for a writ of certiorari denied, where the trial court properly determined that there was no recanted testimony for purposes of N.C.G.S. § 15A-1415(c) because a witness's statement to police identifying defendant as the person who shot and killed the victim, which she later recanted, was not made under oath or affirmation at a trial or in an affidavit or deposition and therefore did not constitute testimony. The trial court was not required to hold an evidentiary hearing where the basis for the MAR involved a pure question of law and not one of fact.

Judge RIGGS dissenting.

Appeal by defendant from order entered 22 April 2022 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 24 January 2023.

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

Dobson Law Firm, PLLC, by Miranda Dues, for the Defendant-Appellant.

STADING, Judge.

Ryan Pierre Brown ("defendant") petitions for a writ of *certiorari*, claiming the trial court erred in summarily denying his motion for appropriate relief ("MAR"). Defendant asserts the trial court improperly denied his MAR because an evidentiary hearing was not held to make the ultimate legal determination at issue in this matter. For the reasons

set forth below, we deny defendant's petition for a writ of *certiorari* and dismiss his appeal.

I. Factual and Procedural History

On 11 August 2015, officers from the Greensboro Police Department responded to a report of "shots being fired" at an apartment complex. Upon arrival, they observed the victim, Jermaine Hayes, suffering from a gunshot wound. Mr. Hayes later died at the hospital. Kelsey Bell, the tenant of the apartment and girlfriend of the victim, sold Xanax to another woman named Brenda Goins. On her outing to buy the drug, Ms. Goins was accompanied by defendant and Demario Danzy. While Ms. Bell and Ms. Goins conducted the drug transaction inside the apartment, Mr. Hayes walked outside of his girlfriend's residence to where defendant and Mr. Danzy were located. Subsequently, Ms. Goins exited the apartment while Ms. Bell remained inside of her residence. Shortly thereafter, Ms. Bell heard gunshots and witnessed Mr. Hayes hastily re-enter the apartment and subsequently collapse on the floor.

Ms. Bell was acquainted with Ms. Goins and identified her as well as the vehicle at the crime scene. Police officers obtained a surveillance video showing defendant, Mr. Danzy, and Ms. Goins together. Later, Mr. Danzy was arrested and told investigators that he was the driver of the vehicle that transported defendant and Ms. Goins to Ms. Bell's apartment. Additionally, Mr. Danzy admitted that he and defendant had a common gang association and Mr. Hayes was involved in a rival gang. Mr. Danzy reported that after some discussion between the three males outside of the apartment, Ms. Goins exited the apartment and Mr. Hayes turned to walk away. Mr. Danzy recounted that defendant then pulled out a handgun and fired a number of shots at Mr. Hayes. Mr. Danzy claims this action by defendant startled him and he drove away with Ms. Goins and defendant in the vehicle.

Ms. Goins provided a statement to law enforcement that was "pretty similar to Mr. Danzy's [statement]." The information provided by Ms. Goins was different from Mr. Danzy's statement in that "[s]he did indicate that Mr. Danzy apparently was a little bit more involved with . . . egging on [defendant]." When Ms. Goins returned to the vehicle, she heard defendant say he would shoot Mr. Hayes, and Mr. Danzy encouraged him to go ahead and do it. She then reported that defendant pulled out a handgun and started firing, that it shocked everybody in the car, including Mr. Danzy, and they drove off.

On 28 September 2015, defendant was indicted for one count of first-degree murder and one count of robbery with a dangerous

weapon.[1] On 4 October 2017, defendant pled guilty to second-degree murder and robbery with a dangerous weapon pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970). The trial court judge entered a consolidated sentence of 192 to 243 months imprisonment.

On 11 April 2022, defendant filed a MAR pursuant to N.C.G.S. § 15A-1415(c), purporting that Ms. Goins had "recant[ed] her previous testimony and identification of Defendant as the shooter." The basis for defendant's motion was an affidavit signed by Ms. Goins on 6 January 2022, claiming that her statement made in 2015 to law enforcement identifying defendant as the shooter was incorrect. She now maintains that the co-defendant, Mr. Danzy, shot and killed Mr. Hayes.

On 22 April 2022, "[u]pon a review of the motion, the court file, the applicable statutory and case law," the trial court denied defendant's MAR without holding an evidentiary hearing since "the claim alleged involves only legal issues." The order contained findings noting, among other things, that "[t]here was no testimony[,] the case never went to trial[,] [and] defendant chose to plead guilty." Moreover, the trial court found there was "no recanted testimony[,]" as "Brenda Goins never gave any testimony or any statement under oath." Accordingly, the trial court concluded that defendant "entered a voluntary plea," and Ms. Goins's proffer was not testimony as anticipated by N.C.G.S. § 15A-1415(c). Defendant entered a notice of appeal with the trial court on 4 May 2022 and petitioned this Court to issue a writ of *certiorari* on 21 July 2022.

II. Analysis

In this matter, defendant claims that there are meritorious issues for our consideration such that we should grant his petition for writ of *certiorari*. Under N.C. Gen. Stat. § 15A-1422, "the court's ruling on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review . . . [i]f the time for appeal has expired and no appeal is pending, by writ of certiorari." N.C. Gen. Stat. § 15A-1422(c)(3) (2021). "The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit . . . review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief." N.C. R. App. P. 21. "A petition for the writ must show merit or that error was probably committed below. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (internal citations omitted). For

1. This robbery charge is unrelated to the present case.

the reasons discussed below, defendant's petition for the writ does not "show merit or that error was probably committed below." *Id.*

First, defendant contests the trial court's determination that "[t]here is no recanted testimony." N.C. Gen. Stat. § 15A-1415(c) provides in relevant part that "a defendant at any time after verdict may by a motion for appropriate relief, raise the ground that evidence is available which was unknown or unavailable . . . at the time of trial, which could not with due diligence have been discovered or made available at that time, including recanted *testimony*. . . ." N.C. Gen. Stat. § 15A-1415(c) (2021) (emphasis added). Since we are presented with a question of statutory interpretation, this inquiry is a question of law, subject to *de novo* review. *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009). Our "primary endeavor . . . in construing a statute is to give effect to legislative intent. . . . If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 276–77 (2005) (citations omitted).

As a preliminary matter, we note that our Supreme Court has analyzed the word *verdict* in the context of a separate statute involving postconviction DNA testing. *See State v. Alexander*, 380 N.C. 572, 587-89, 606, 869 S.E.2d 215, 227-28, 239 (2022) (Newby, C.J., concurring in the result). In any event, considering the matter before us, the operative word at issue is *testimony*—which is defined as "[e]vidence that a competent witness under oath or affirmation gives at a trial or in an affidavit or deposition." *Testimony*, *Black's Law Dictionary* (7th ed. 1999). Evident from the plain meaning of the text of the statute, as a precondition to prevail pursuant to defendant's claims made in his petition, this matter would have required that a witness previously provided *testimony* in some form, which was subsequently recanted. Comparatively, the unsworn statement given to law enforcement—upon which defendant purports reliance for his guilty plea—does not properly align with the definition of *testimony*. Consequently, defendant's claims contained in his petition fall outside of the parameters of N.C. Gen. Stat. § 15A-1415(c).

Defendant's reliance upon *State v. Nickerson*, 320 N.C. 603, 359 S.E.2d 760 (1987), and *State v. Britt*, 320 N.C. 705, 260 S.E.2d 660 (1987), is misplaced as the logic of each case involves the subsequent recanting of sworn testimony provided by a witness during a jury trial. Additionally, defendant and the dissent cite *State v. Howard*, 247 N.C. App. 193, 783 S.E.2d 786 (2016), and *State v. Brigman*, 178 N.C. App. 78, 632 S.E.2d 498 (2006), as a basis to grant defendant's petition for writ

of *certiorari* and vacate the ruling of the trial court. Unlike the present matter, in *State v. Howard*, a witness provided an affidavit repudiating a statement that defendant alleged "rendered his trial testimony false"—after providing sworn testimony at trial. 247 N.C. App. at 210, 783 S.E.2d at 797. Furthermore, the effort to analogize *State v. Brigman* fails for similar reasons—the witness testified at the defendant's trial. 178 N.C. App. at 83–84, 623 S.E.2d at 502.

The dissent would have us employ the jurisprudence of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), to resolve the issue before us. In *Crawford*, the United States Supreme Court recounted an extensive historical basis, including the trial of Sir Walter Raleigh, underpinning its analysis specific to the Sixth Amendment's Confrontation Clause. 541 U.S. at 43–50, 124 S. Ct. at 1359–63; U.S. Const. amend. VI. The Court's detailed account aimed to highlight that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50, 124 S. Ct. at 1363.

In stark contrast, here, defendant was confronted with no such evil and could have availed himself of rights afforded under the Constitution. The record shows that defendant pled guilty pursuant to *North Carolina v. Alford* and swore to his transcript of plea that contained an understanding that his decision forfeited his right to trial in which he could "confront and cross examine witnesses against" him. Had defendant's case proceeded to trial and the same statement was admitted in furtherance of a conviction, without an opportunity to confront the witness, *Crawford*'s analysis and definitional application would be relevant. 541 U.S. at 68–69, 124 S. Ct. at 1374. Moreover, had defendant's case proceeded to trial and the witnesses testified in conformity with this statement, but later recanted the testimony that led to a conviction, an evidentiary hearing would be appropriate under N.C. Gen. Stat. § 15A-1415(c). However, neither of these scenarios occurred here and defendant was not deprived of his constitutional or statutory rights. Defendant was provided those rights but elected to forego them in favor of a plea bargain to a lesser-included offense consolidated with another unrelated felony offense for sentencing. It would be a leap of logic for this Court to hold that the jurisprudence carefully crafted to prevent deprivation of the constitutional right to confront witnesses—fundamental to our system of justice—should be extended to the specific legal issue presented in this matter. Thus, we decline to conflate the Supreme Court's logic applied to Confrontation Clause jurisprudence to the concerns sought to be addressed by N.C. Gen. Stat. § 15A-1415(c) in determining the meaning of *testimony*.

Defendant's final argument, that the trial court erred in failing to hold an evidentiary hearing, points to the language in N.C. Gen. Stat. § 15A-1420, which states that "[a]ny party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit." N.C. Gen. Stat. § 15A-1420(c)(1) (2021). However, this subsection of the statute also requires that "[t]he court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact." *Id.* Furthermore, N.C. Gen. Stat. § 15A-1420 requires that "[t]he court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law." N.C. Gen. Stat. § 15A-1420(c)(3). As noted in defendant's cited case, *State v. Howard*:

> An evidentiary hearing is not automatically required before a trial court grants a defendant's MAR, but such a hearing is the general procedure rather than the exception. Indeed . . . an evidentiary hearing is mandatory *unless* summary denial of an MAR is proper, or *the motion presents a pure question of law*.

247 N.C. App. at 207, 783 S.E.2d at 796 (emphasis added). Indeed, here, the trial court was faced with a determination of law rather than an issue of fact. Therefore, in this matter, the trial court's summary denial of the MAR was proper.

III. Conclusion

For these reasons, defendant's petition for a writ of *certiorari* is denied and his appeal is dismissed.

DISMISSED.

Judge GORE concurs.

Judge RIGGS dissents by separate opinion.

RIGGS, Judge, dissenting.

Mr. Brown entered an *Alford* plea to the murder of Mr. Hayes, meaning he denied guilt but acknowledged "there [was] sufficient *evidence* to convince the judge or jury of [his] guilt." *State v. Guinn*, 281 N.C. App.

446, 447 n.1, 868 S.E.2d 672, 674 n.1 (2022) (emphasis added) (citations omitted). Among the evidence undergirding Mr. Brown's guilty plea were two statements that were the only indicia of his identity as the murderer: (1) a written statement from Mr. Danzy that Mr. Brown was the shooter; and (2) a proffer from Ms. Goins corroborating Mr. Danzy's statement and confirming, based on her eyewitness account, that Mr. Brown killed Mr. Hayes. Mr. Brown was not alone in relying on this evidence in making his *Alford* plea; the State agreed to the plea and premised its statement of the facts on this evidence at the plea hearing, and the trial court likewise depended on that evidence[1] in "first determining that there is a factual basis for the plea" before accepting it. N.C. Gen. Stat. § 15A-1022(c) (2021).

Almost five years later, Ms. Goins—by sworn affidavit—recanted her evidentiary statements relied upon by Mr. Brown, the State, and the trial court in the entry of his *Alford* plea. Ms. Goins' affidavit calls into substantial doubt the only two pieces of evidence establishing Mr. Brown as the shooter to the exclusion of all others; it both impeaches Mr. Danzy's testimony *and* serves as positive evidence that he, and not Mr. Brown, committed the murder.[2] Mr. Brown, justifiably relying on the statutory scheme designed to afford defendants—even those who plead guilty—with post-conviction relief, filed an MAR and requested an evidentiary hearing in light of Ms. Goins' recanting affidavit. The trial court denied the MAR without an evidentiary hearing on the basis that Ms. Goins' "affidavit is not recanted testimony or newly discovered evidence."

The majority dismisses Mr. Brown's appeal at the *certiorari* stage for lack of merit, reasoning that relief on the basis of newly discovered evidence is wholly unavailable to defendants who plead guilty or enter *Alford* pleas when they are convicted without receipt of sworn "testimony."[3] Because I believe the majority's holding is premised on an

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1. That Ms. Goins' proffer was considered evidentiary by the parties and the trial court is disclosed by his transcript of plea "consent[ing] to the Court hearing a summary of the evidence" and the proffer's subsequent inclusion in the State's recitation thereof.

2. The State's recitation of the facts at the plea hearing expressly recognized that Ms. Goins' statement was critical to its murder case and in shoring up Mr. Danzy's credibility: "[T]hat is the factual basis for the murder charge. . . . [I]f it had gone to trial, it would have been basically two against one on that. And so, of course, none of the State's witnesses would have been, you know, saints, but then again we've got two folks whose proffers are very, very consistent[.]"

3. Notably, "[s]worn testimony" may provide the necessary factual basis for a trial court's acceptance of an *Alford* or guilty plea. N.C. Gen. Stat. § 15A-1022(c)(4) (2021). The majority's analysis does not appear to bar an MAR challenging an *Alford* plea entered on sworn testimony should the testifying witness later recant those statements. Nor is it

inappropriately narrow reading of the relevant statute and leads to outcomes contrary to the legislature's intent both as to MARs and the basis required for entry of *Alford* and guilty pleas, I would vacate and remand the trial court's order for an evidentiary hearing. I respectfully dissent.

I. ANALYSIS

Section 15A-1415(c) of our General Statutes provides that:

> Notwithstanding the time limitations herein, a defendant at any time after verdict may by a motion for appropriate relief, raise the ground that evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, including recanted testimony, and which has a direct and material bearing upon . . . the defendant's guilt or innocence.

N.C. Gen. Stat. § 15A-1415(c) (2021). The majority seizes on the term "testimony" to hold that where no *sworn* witness statements appear of record, newly discovered evidence may not serve as a basis for post-conviction relief by MAR.[4] But the majority's narrow reading of "testimony" is not in keeping with the term's use in the law, nor is it consistent with the remedial nature of the statute. *See Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 440, 238 S.E.2d 597, 603 (1977) ("The Court will not adopt an interpretation which results in injustice when

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legally or logically apparent why a defendant who entered an *Alford* plea on sworn testimony may pursue an MAR based on recanted testimony while Mr. Brown may not; in both instances, the factual basis for the trial court's acceptance of the plea would be cast into doubt.

4. To the extent that the word "verdict" bears upon the applicability of the statute, I would construe it consistent with our Supreme Court's holding in *State v. Alexander*, 380 N.C. 572, 587-89, 869 S.E.2d 215, 227-28 (2022), which addressed the availability of post-conviction DNA testing to defendants who were convicted following *Alford* or guilty pleas. As discussed in greater detail *infra*, doing so is consistent with the remedial purposes of the MAR statutes, cf. id. at 587, 869 S.E.2d at 226-27, and avoids absurd results, *cf. State v. Alexander*, 271 N.C. App. 77, 80, 843 S.E.2d 294, 296 (2020) (noting that "to read 'verdict' in a strict, legal sense [in the post-conviction DNA testing statute] would lead to an absurd result, clearly not intended by the General Assembly," in that defendants who were convicted after a bench trial would not benefit), *aff'd*, 380 N.C. 572, 869 S.E.2d 215 (2022). Relatedly, construing the statute to require a trial would run afoul of these same concerns; a defendant who loses at a pretrial motion to suppress hearing based on perjured testimony and subsequently enters a guilty plea could not have the conviction set aside under that reading, as the perjured testimony and plea both occurred prior to any trial. This Court has implicitly rejected such a reading in at least one decision addressing this precise scenario. *State v. Hulse*, 214 N.C. App. 194, 714 S.E.2d 531, 2011 WL 3276757, at *2 (2011) (unpublished).

the statute may reasonably be otherwise consistently construed with the intent of the act." (citation omitted)); *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 524, 259 S.E.2d 248, 251 (1979) ("[T]his 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." (citations omitted)).

The word "testimony" has a broader definition in the law than the majority ascribes. For example, in the context of the Confrontation Clause of the Sixth Amendment and related jurisprudence:

> [T]estimonial evidence refers to statements that "were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use *at a later trial*." Testimonial evidence includes affidavits, depositions, *or statements given to police officers during an interrogation*. " 'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' "

State v. Ferebee, 177 N.C. App. 785, 788, 630 S.E.2d 460, 462-63 (2006) (emphasis added) (cleaned up) (quoting *Crawford v. Washington*, 541 U.S. 36, 51-52, 158 L. Ed. 2d 177, 192-93 (2004)). As such, "testimony" is not strictly understood as an in-court statement given under oath; instead, "*[a]n accuser who makes a formal statement to government officers bears testimony* . . . . The constitutional text [of the Sixth Amendment] . . . thus reflects an especially acute concern with a specific type of *out-of-court statement*." *Crawford*, 541 U.S. at 51, 158 L. Ed. 2d at 192-93 (emphasis added).[5] This broader understanding of the word "testimony," particularly in the context of unsworn statements given to law enforcement, is deeply rooted in history:

> Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive.

Id. at 52, 158 L. Ed. 2d at 193. The criminal law of this State makes numerous references to the clear concept of "unsworn testimony" outside the

5. In *Davis v. Washington*, the Supreme Court quoted this language from *Crawford* as "testimony . . . thus defined." 547 U.S. 813, 824, 165 L. Ed. 2d 224, 238 (2006).

context of the Sixth Amendment. *See*, *e.g.*, *State v. Gee*, 92 N.C. 756, 762 (1885) (observing that when a witness testifies at trial without taking an oath, "it is as much the duty of counsel to see that no unsworn testimony is received against the client . . . ."); *State v. Hendricks*, 138 N.C. App. 668, 671, 531 S.E.2d 896, 899 (2000) (holding that a defendant waived his argument that the trial court impermissibly allowed a victim to address the trial court during sentencing because "[d]efendant never objected at the hearing to [the victim's] unsworn testimony").[6]

Reading N.C. Gen. Stat. § 15A-1415(c) together with the statutory requirements of N.C. Gen. Stat. § 15A-1022(c) further leads me to conclude that Mr. Brown may seek relief by MAR following his tender—and the State and trial court's acceptance—of an *Alford* plea. Under that latter statute, "[t]he judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea." N.C. Gen. Stat. § 15A-1022(c).

While it is true that "[t]he statute does not require the trial judge to elicit evidence from each, any or all of the [statutorily] enumerated sources . . . [and] may consider any information properly brought to his attention," *State v. Sinclair*, 301 N.C. 193, 198, 270 S.E.2d 418, 421 (1980) (cleaned up), our Supreme Court has also observed that, "in enumerating these five sources, the statute contemplates that some substantive material independent of the plea itself appear of record which tends to show that defendant *is*, *in fact*, *guilty*." *State v. Agnew*, 361 N.C. 333, 336, 643 S.E.2d 581, 583 (2007) (emphasis added) (cleaned up). Thus, while a guilty plea absolves the State of establishing the defendant's guilt beyond a reasonable doubt, *State v. Hart*, 287 N.C. 76, 83, 213 S.E.2d 291, 296 (1975), the statute requires the trial court to accept the plea on an independent factual basis to try and ensure that the pleading defendant *is actually guilty*. *Agnew*, 361 N.C. at 336, 643 S.E.2d at 583. And while the factual summary by the prosecutor may sometimes support this independent factual basis for the plea, that summary must nonetheless contain information *of evidentiary value*. *See State v. Robinson*, 381 N.C. 207, 219, 872 S.E.2d 28, 37 (2022) ("Without *evidence* of a distinct interruption in the assault, the trial court did not have a sufficient factual basis

6. This concept of "unsworn testimony" also exists in Sixth Amendment jurisprudence. *See Davis*, 547 U.S. at 826, 165 L. Ed. 2d at 239 (noting that the Sixth Amendment would prohibit "having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition."). But as the above North Carolina caselaw demonstrates, the idea of "unsworn testimony" is not unique to that context.

upon which to sentence defendant to separate and consecutive assault sentences [pursuant to the guilty plea]." (emphasis added)).

In short, the independent factual basis required by N.C. Gen. Stat. § 15A-1022(c) serves to satisfy the trial court's, the State's, and the wider public's interest in convicting the person that actually committed the crime as disclosed by some evidentiary information indicating the defendant's guilt. The MAR statute, in turn, likewise seeks to ensure that only guilty parties are punished by allowing defendants to challenge their convictions based on newly discovered evidence, "including recanted testimony, and which has a direct and material bearing upon . . . the defendant's guilt or innocence." N.C. Gen. Stat. § 15A-1415(c). These aligned purposes, considered *in pari materia*, lead me to disagree with the majority (and by extension the trial court) that Mr. Brown is not entitled to an evidentiary hearing by MAR based upon a sworn affidavit from an eyewitness recanting a testimonial statement that established the independent factual basis for the plea. *Cf. State v. Brigman*, 178 N.C. App. 78, 94-95, 632 S.E.2d 498, 508-09 (2006) (holding an MAR premised on a witness's recanted testimony required resolution by evidentiary hearing); *State v. Howard*, 247 N.C. App. 193, 211, 783 S.E.2d 786, 798 (2016) (vacating and remanding an MAR order under that same rationale).

Of course, none of this is to say that Mr. Brown is truly guilty or innocent, that Ms. Goins' recanting affidavit is true or false, or that Mr. Danzy was or was not the shooter. We are not a fact-finding court, and those are factual questions for resolution by a finder of fact through the weighing of evidence and determinations of credibility. But the MAR statute, through N.C. Gen. Stat. § 15A-1415(c), affords Mr. Brown just such a procedure in the trial court, and I respectfully dissent from my colleagues' determination to the contrary.

II. CONCLUSION

Consistent with the above, I do not believe that N.C. Gen. Stat. § 15A-1415(c)'s reference to "testimony," as a remedial statute with intentions that fairly encompass Mr. Brown's circumstance, necessarily precludes him from raising an MAR in this context. The word is not exclusively subject to the narrow definition provided by the majority, and in keeping with the clear intent of the General Assembly in enacting the MAR statute and N.C. Gen. Stat. § 15A-1022(c), I would allow Mr. Brown's petition for writ of *certioriari*, deny the State's motion to dismiss, and vacate and remand the trial court's order with instructions to conduct an evidentiary hearing concerning Ms. Goins' recanted testimonial statements.

STATE OF NORTH CAROLINA
v.
JOHN LOUIS SPERA, DEFENDANT

No. COA22-814

Filed 15 August 2023

1. Identification of Defendants—in-court—improper testimony —motion for mistrial—negation of prejudicial impact

In a trial for misdemeanor larceny of a vehicle and robbery with a dangerous weapon, where the victim of an armed robbery emphatically identified defendant as the perpetrator throughout his testimony, the trial court did not commit a gross abuse of discretion when it denied defendant's motion for a mistrial after ruling that the victim's identification testimony was inadmissible. The court's curative instruction—that the jury "disregard totally" and "give no weight" to the victim's identification of defendant—was, on its own, insufficient to negate the prejudicial impact of the victim's testimony. However, where another witness at trial—who knew defendant personally and was present during the armed robbery—also identified defendant as the perpetrator during her testimony, and where defendant's counsel successfully impeached the victim's improper identification when cross-examining him, the combination of the court's jury instruction, the cumulative testimony, and defense counsel's cross-examination negated the sort of "substantial and irreparable prejudice" required for granting a mistrial.

2. Larceny—misdemeanor larceny of a vehicle—sufficiency of evidence—felonious intent—permanent deprivation of property

The trial court erred in denying defendant's motion to dismiss a charge of misdemeanor larceny of a vehicle where the State failed to present sufficient evidence supporting the element of felonious intent. According to the evidence, the victim and his friend, a drug dealer, went to a mobile home for a social visit when defendant, accompanied by another man, burst into the home, approached the victim while holding a hammer and demanding "powder" (implying an intent to steal drugs, which he ultimately did not find), seized the keys to the victim's truck from the victim's person, and took the truck for a joyride, after which defendant voluntarily returned the truck, handed the keys back to the victim, and released the victim unharmed. Apart from the taking itself, there were no additional facts present to support an inference that defendant intended to

permanently deprive the victim of his truck. Further, evidence of defendant's threatened force against the victim and use of force to seize the victim's keys did not overcome the uncontradicted evidence that defendant intended only a temporary deprivation of the truck.

Appeal by Defendant from judgment entered 10 March 2022 by Judge Nathan H. Gwyn, III in Union County Superior Court. Heard in the Court of Appeals 23 May 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Andrew L. Hayes, for the State.

Thomas, Ferguson & Beskind, LLP, by Kellie Mannette, for Defendant-Appellant.

RIGGS, Judge.

Defendant John Louis Spera appeals from a judgment following a jury trial, which found him guilty of misdemeanor larceny of a vehicle and robbery with a dangerous weapon. On appeal, Mr. Spera argues that the trial court: (1) abused its discretion by denying his motion for a mistrial after the testifying victim's identification of him as the perpetrator was ruled inadmissible; (2) erred in denying his motion to dismiss the misdemeanor larceny charge for insufficient evidence of intent to permanently deprive the victim of the property taken; and (3) committed plain error by failing to instruct the jury on the concept of temporary deprivation. After careful review, we hold that the trial court did not err in denying his motion for mistrial but did err in denying his motion to dismiss the misdemeanor larceny charge. As a result, we vacate the misdemeanor larceny conviction in File No. 17CRS052233 and remand for entry of judgment on the lesser-included offense of unauthorized use of a motor vehicle. We leave the remaining conviction undisturbed.

I. FACTUAL AND PROCEDURAL HISTORY

On 4 April 2017, recent high school graduate Dustin Perry was invited by his friend and drug dealer, Zackary Phifer, to hang out with two women, Hannah Tarleton and Charity Sharon, at a mobile home in Union County. Mr. Perry picked up Mr. Phifer at his mother's house around 10:00 PM and the two drove in Mr. Perry's pickup truck to the home where Ms. Tarleton and Ms. Sharon were spending the evening. On arrival, Mr. Phifer exited the truck, met with someone at the door, and waved for Mr. Perry to join him. The men headed inside together.

Mr. Perry and Mr. Phifer entered through the living room before heading into a room at the rear of the home. Ms. Tarleton and Ms. Sharon met Mr. Perry and Mr. Phifer in that room; a few minutes later, three or four other men burst into the room. Two of the men were armed, one with a knife and the other with a hammer. Mr. Perry knew the man with the knife as Luther Weathers, but he did not recognize the man with the hammer.

The unknown man with the hammer began shouting "where's the powder, where's the powder," at Mr. Perry and Mr. Phifer. The men then searched Mr. Perry and Mr. Phifer, rifling through the former's wallet and taking his phone and the keys to his truck. The armed robbers then left the room, and Mr. Perry heard them start up his truck and drive away for what Mr. Perry presumed was a joyride. The remaining men, along with Ms. Tarleton and Ms. Sharon, stayed behind with Mr. Perry and Mr. Phifer to ensure that they did not leave the back room.

Roughly thirty minutes after the robbery, the two armed robbers returned to the mobile home, escorted Mr. Perry and Mr. Phifer outside, returned the keys to Mr. Perry, and allowed them to leave unharmed. The man with the hammer did, however, threaten Mr. Perry with harm if he told the police about what had occurred. Mr. Perry found that unspecified "documentation" relating to the truck had been destroyed and a roadside safety kit was missing from the vehicle. Mr. Perry later reported the incident to law enforcement.

Detective James Maye with the Union County Sheriff's Office met and interviewed Mr. Perry about the night in question in May of 2017. Mr. Perry told Detective Maye that the man with the hammer was Black, about 5 feet tall, and bald. Roughly four years later, in 2021, the district attorney showed Mr. Perry a picture of Mr. Spera—who is white, 5'9", and has long hair—and Mr. Perry affirmatively identified him as the robber with the hammer.

Mr. Spera was subsequently indicted on one count of felony larceny of a motor vehicle and two counts each of second-degree kidnapping, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Trial commenced on 7 March 2022, and Mr. Perry testified to his recollection of the robbery. During his testimony, Mr. Perry repeatedly identified Mr. Spera as the robber with the hammer; however, after it was revealed that Mr. Perry had initially identified Mr. Spera through a photograph that had not been previously disclosed to the defense, Mr. Spera objected to any identification by Mr. Perry and moved for a mistrial. Following *voir dire* and argument—which included assertions by the State that Ms. Tarleton would also be testifying and providing an identification of Mr. Spera—the trial court

sustained Mr. Spera's objection, struck Mr. Perry's identification of Mr. Spera, and denied the motion for mistrial. Consistent with the State's argument, Ms. Tarleton did testify and identify Mr. Spera as one of the robbers while also acknowledging that she knew him socially and had previously engaged in sexual relations with him.

At the close of the State's evidence, Mr. Spera moved to dismiss the charges against him. The trial court dismissed the robbery and kidnapping charges that related to Mr. Phifer, as well as both conspiracy charges. It also reduced the felony larceny of a motor vehicle charge to a misdemeanor, as the State had not put in any evidence as to the truck's value. The trial court denied Mr. Spera's motion to dismiss the remaining charges involving Mr. Perry.

After the charge conference, the trial court instructed the jury on the remaining counts. For misdemeanor larceny of a motor vehicle, the trial court instructed the jury that a conviction required the jury to find "that at the time the Defendant intended to deprive the victim of its use permanently." After deliberation, the jury found Mr. Spera guilty of robbery with a dangerous weapon and misdemeanor larceny of a motor vehicle, acquitting Mr. Spera of second-degree kidnapping. The trial court sentenced Mr. Spera to 84 to 113 months' imprisonment for robbery with a dangerous weapon, followed by a consecutive sentence of 120 days for misdemeanor larceny. Mr. Spera gave oral notice of appeal at sentencing.

II. ANALYSIS

Mr. Spera's three principal arguments identify error in: (1) the denial of his motion for mistrial; (2) the denial of his motion to dismiss the misdemeanor larceny charge for insufficient evidence of the requisite intent; and (3) the trial court's failure to *sua sponte* instruct the jury regarding temporary deprivation. We disagree with Mr. Spera as to his first argument; however, because we hold the evidence was insufficient to show the requisite intent for misdemeanor larceny, we vacate that conviction and remand for entry of judgment on the lesser-included offense of unauthorized use of a motor vehicle. Finally, because our second holding is dispositive as to the larceny conviction, we decline to address Mr. Spera's third argument.

A. Mistrial

1. Standard of Review

A trial court's denial of a motion for mistrial is reviewed for abuse of discretion. *State v. Bradley*, 279 N.C. App. 389, 406, 864 S.E.2d 850, 864

(2021). This is a highly deferential standard, as the trial court's "ruling thereon (without findings of fact) is not reviewable without a showing of gross abuse of discretion." *State v. Daye*, 281 N.C. 592, 596, 189 S.E.2d 481, 483 (1972).

2. Analysis

[1] A mistrial is proper "when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict." *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991) (citation and quotation marks omitted). A motion for mistrial necessitates demonstration of harm "beyond a reasonable doubt." *State v. Nolen*, 144 N.C. App. 172, 178, 550 S.E.2d 783, 787 (2001) (citation omitted). In many instances, a curative instruction issued promptly by the trial court can effectively neutralize such prejudice. *State v. McDougald*, 279 N.C. App. 25, 30, 862 S.E.2d 877, 881 (2021). Additionally, any prejudicial impact can be negated by the admission of cumulative evidence establishing the same fact. *Nolen*, 144 N.C. App. at 179, 550 S.E.2d at 787-88.

Here, Mr. Perry emphatically identified Mr. Spera as one of the armed men that robbed him, and repeatedly referred to Mr. Spera throughout his testimony. Partway through that incriminating testimony, Mr. Spera's counsel learned that Mr. Perry had given an out-of-court identification to the prosecution, leading counsel to lodge an immediate objection "based on a highly improper photo" identification and lack of disclosure to the defense. The trial court—after hearing *voir dire* testimony, arguments from the parties, and the forecast from the State of Ms. Tarleton's anticipated identification testimony—sustained the objection and provided the following curative instruction:

> For the record the motion to suppress the identification of the Defendant is granted. I am instructing, ladies and gentlemen of the jury, that you are to disregard totally and to give no weight to the last witness's identification of the Defendant, that being Mr. Perry. Is that understood? You are to strike that entirely. Next witness.

Immediately following this instruction, Mr. Spera's counsel cross-examined Mr. Perry on the substantial discrepancies between Mr. Spera as he appeared in court and Mr. Perry's testimonial description of the perpetrator.

Mr. Spera acknowledges that curative instructions are usually sufficient to preclude a mistrial, but asserts this case is different based on the specific instruction given and the evidence presented, noting that

the sufficiency of a curative instruction is a fact-intensive inquiry dependent on the circumstances of each individual trial. *State v. Aldridge*, 254 N.C. 297, 300, 118 S.E.2d 766, 768 (1961). He argues—and we agree—that the trial court's curative instruction here was likely too vague, standing alone, to adequately dispel the prejudice of Mr. Perry's repeated and emphatic identifications of Mr. Spera. Where we part from Mr. Spera's logic, however, is in the import of Ms. Tarleton's testimony, and we ultimately hold that her cumulative testimony, coupled with the curative instruction, albeit inadequate standing alone, and his counsel's able cross-examination of Mr. Perry, defeats Mr. Spera's claim of a gross abuse of discretion by the trial judge in denying his mistrial motion.

In opposing Mr. Spera's mistrial motion, the State explicitly directed the trial court to Ms. Tarleton's anticipated testimony identifying Mr. Spera as one of the perpetrators of the alleged larceny. After she took the stand, Ms. Tarleton affirmatively identified Mr. Spera as such, and testified that "Spera stepped in and started demanding [the victims'] stuff. . . . He just started demanding their stuff, all they had. The weed, they had phones, everything. Whatever goods they may have had on them." She subsequently confirmed that Mr. Spera left the mobile home with the other robber, Mr. Weathers, and only recalled seeing Mr. Spera again after Mr. Perry's truck returned to the mobile home. As for her familiarity with the alleged perpetrators, she testified that she knew both Mr. Spera and Mr. Weathers intimately, which lent credence to her identification. And, though Mr. Spera's counsel elicited testimony from Ms. Tarleton that she was testifying pursuant to a plea arrangement, any evaluation as to her credibility—consistent with the standard credibility and interested witness instructions given by the trial court—was within the exclusive province of the jury. *State v. Hoff*, 224 N.C. App. 155, 160, 736 S.E.2d 204, 208 (2012). We cannot say that the trial court's decision to leave that credibility determination to the jury, made in light of those proper instructions, amounts to a manifest abuse of discretion.

Beyond Ms. Tarleton's cumulative testimony, any prejudice resulting from Mr. Perry's improper identification was further ameliorated by defense counsel's cross-examination. Immediately following the curative instruction, Mr. Spera's counsel elicited in testimony Mr. Perry's initial identification of the second robber, first described as a five-foot-tall bald Black man with a goatee—a description that clearly did not match Mr. Spera's appearance in the courtroom. Such evident discrepancies were probative to impeach any improper identification by Mr. Perry. *See, e.g.*, *State v. Joyner*, 33 N.C. App. 361, 365, 235 S.E.2d 107, 110 (1977) (holding trial counsel's cross-examination and impeachment of a witness concerning allegedly improper testimony negated any prejudice

from said testimony). In sum, trial counsel's cross-examination, Ms. Tarleton's cumulative testimony identifying Mr. Spera as the perpetrator of the alleged crime, and the trial court's curative instruction—however insufficient on its own—preclude us from holding that there was "substantial and irreparable prejudice to the defendant's case," N.C. Gen. Stat. § 15A-1061 (2021), such that the trial court's denial was "a gross abuse of . . . discretion," *State v. Bidgood*, 144 N.C. App. 267, 273, 550 S.E.2d 198, 202 (2001) (citation omitted).

Mr. Spera urges us to reach a different result based on *Aldridge*, where the Supreme Court reversed a trial court's denial of a mistrial for improperly admitted evidence notwithstanding a curative instruction and cumulative testimony from additional witnesses. 254 N.C. at 301, 118 S.E.2d at 768. The facts of *Aldridge*, a half-century old criminal child support case, render it inapposite to the case at bench. There, a married woman was seeking child support from a man who was not her husband, alleging he fathered her child. In an attempt to prove that the defendant was the child's father, the woman impermissibly (under the common law in effect at the time) testified before the jury that her husband could not have sired the child because she had not seen him for two years. *Id.* at 298, 118 S.E.2d at 767. Though a curative instruction was given and other witnesses gave "much less probative" testimony suggesting the woman's nonaccess to her husband, the Supreme Court ultimately held that the improper testimony was so prejudicial that a mistrial should have been declared. *Id.* at 299, 118 S.E.2d at 767.

But the prejudice identified in *Aldridge* stemmed from antiquated evidentiary concepts found in the common law of child support cases involving "illegitimate" children. Under the common law of that era, "[t]he wife [wa]s not a competent witness to prove the nonaccess of the husband . . . . Her testimony and declarations [were] excluded not only as violative of the confidential relations existing between husband and wife but pursuant to a sound public policy which prohibits the parent from bastardizing her own issue." *Ray v. Ray*, 219 N.C. 217, 219, 13 S.E.2d 224, 226 (1941). Thus, whether a wife had "access" to her husband was presumed to be private information within the marital relationship. *Id.* And, lacking DNA evidence, the testimony of the wife was presumed to be the most probative evidence of her sexual activities. *Cf. id.* ("[S]he is permitted to testify as to the illicit relations in actions directly involving the parentage of the child, for in such cases, proof thereof frequently would be an impossibility except through the testimony of the woman." (citations omitted)).

We decline to analogize the prejudice stemming from caselaw: (1) grounded in the patent sexism of the past; and (2) predating the modern

rules of evidence on paternity and DNA testing. *See* N.C. Gen. Stat. § 8-57.2 (2021) (abrogating the common law rule discussed in *Aldridge* and explicitly authorizing the mother in any action involving paternity of a child born during a marriage to testify to nonaccess); N.C. Gen. Stat. § 8-50.1(a) (2021) (requiring the trial court to order blood testing to determine parentage, "regardless of any presumptions with respect to parentage," upon motion of the State or defendant). Moreover, Mr. Spera's identity is not so intimate a fact as whether a spouse had "nonaccess" to their partner such that Mr. Perry's identification was inherently more probative than one from another witness; Ms. Tarleton was in the room at the time of the robbery, knew both Mr. Spera and Mr. Weathers well, and could thus provide an identification of equal—if not altogether greater—probative value.[1]

The case before us is also different for several additional reasons, namely: (1) Mr. Spera's counsel ably cross-examined Mr. Perry on the differences between his initial identification and Mr. Spera's in-court appearance, substantially undercutting the improper identification's probative value;[2] (2) Ms. Tarleton's identification of Mr. Spera was highly probative given her intimate familiarity with both Mr. Spera and Mr. Weathers; and (3) Mr. Spera's identity—unlike the details of the wife's sexual activities in *Aldridge*—was not intimate and private knowledge such that Mr. Perry was the best and most credible source for that information. Thus, *Aldridge*'s context and ruling do not align sufficiently with our case, and we find it inapposite to the appeal before us.

B. Motion to Dismiss

[2] Mr. Spera next challenges the trial court's denial of his motion to dismiss the larceny charge, arguing that the evidence presented does not sufficiently demonstrate his intention to permanently deprive Mr. Perry of his vehicle. He highlights that the evidence, at best, implies only an intended temporary deprivation. We agree with Mr. Spera, vacate his misdemeanor larceny conviction on this basis, and remand for entry of a judgment convicting him of the lesser-included offense of unauthorized use of a motor vehicle.

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1. Indeed, given that Ms. Tarleton's description of Mr. Spera's appearance at the time of the robbery lacked the glaring inconsistencies between Mr. Spera's actual appearance and Mr. Perry's initial description of the man with the hammer, Ms. Tarleton's identification could reasonably be afforded greater weight than Mr. Perry's.

2. Of note, the Supreme Court stated in *Aldridge* that the defendant's counsel "undertook, *with indifferent success*, to impeach [the woman's] testimony as to nonaccess." 254 N.C. at 299, 118 S.E.2d at 767-68 (emphasis added).

1. Standard of Review

A trial court's ruling on a motion to dismiss is subject to *de novo* review. *State v. Summey*, 228 N.C. App. 730, 733, 746 S.E.2d 403, 406 (2013). When considering the denial of a motion to dismiss, we assess "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. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted).

Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991) (citation and quotation marks omitted). In other words, the State must present "more than a mere scintilla" of evidence to establish each and every element of the charge. *State v. Smith*, 40 N.C. App. 72, 77-78, 252 S.E.2d 535, 539 (1979) (citations and quotation marks omitted). We grant "the State the benefit of every reasonable inference and resolv[e] any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). The presented evidence and inferences must go beyond "rais[ing] suspicion or conjecture." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018) (citation omitted).

2. Analysis

Larceny is a common law crime with the essential elements "that the defendant: (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently." *State v. Sisk*, 285 N.C. App. 637, 641, 878 S.E.2d 183, 186 (2022) (citations and quotation marks omitted). "The statutory provision upgrading misdemeanor larceny to felony larceny does not change the nature of the crime; the elements of proof remain the same." *State v. Smith*, 66 N.C. App. 570, 576, 312 S.E.2d 222, 226 (1984).

The final element—intent—is often inferred from circumstantial evidence rather than direct proof. *State v. Harlow*, 16 N.C. App. 312, 315, 191 S.E.2d 900, 902 (1972). However, our Supreme Court recognized long ago that "[s]omething more than the mere act of taking is necessary to be shown before the jury can proceed to inquire into the [defendant's] intent." *State v. Foy*, 131 N.C. 804, 805, 42 S.E. 934, 935 (1902). This "felonious intent" is multifaceted and includes more than just an intent of permanent deprivation:

> Felonious intent as applied to the crime of larceny is the intent which exists where a person knowingly takes and

> carries away the personal property of another without any claim or pretense of right with the intent wholly and permanently to deprive the owner of his property.

State v. Perry, 21 N.C. App. 478, 481-82, 204 S.E.2d 889, 891 (1974) (citation and quotation marks omitted). Thus, a defendant who takes another's property on an honestly mistaken belief that it belongs to them has not committed larceny. *See*, *e.g.*, *State v. Gaither*, 72 N.C. 458, 460 (1875) (holding, on appeal from a larceny conviction for taking and eating the alleged victim's chickens, that "it cannot be maintained, that if one takes the property of another and eats it, that he is guilty of larceny. It may be trespass, or mistake, or larceny, according to circumstances; it is not *necessarily* larceny." (emphasis in original)). Similarly, a defendant who knowingly and dishonestly takes another's property for only a temporary purpose lacks "felonious intent" necessary for larceny and has instead merely committed a trespass. *State v. Rogers*, 255 N.C. App. 413, 415, 805 S.E.2d 172, 174 (2017). Thus, proving felonious intent for larceny requires showing two distinct aspects of intent: (1) an intentionally wrongful taking of another's property, *State v. Bowers*, 273 N.C. 652, 655, 161 S.E.2d 11, 14 (1968); and (2) an intent to permanently deprive the victim of possession, *Rogers*, 255 N.C. App. at 415, 805 S.E.2d at 174.

Different facts may circumstantially demonstrate an intent to accomplish a wrongful taking, "inconsistent with an honest purpose, such as when done clandestinely, or, when charged with, denies, the fact; or secretly, or forcibly; or by artifice." *Foy*, 131 N.C. at 805-06, 42 S.E. at 935 (citations omitted). By contrast, intent to permanently deprive the owner of possession "may, generally speaking, be deemed proved if it appears he kept the goods as his own 'til his apprehension, or that he gave them away, or sold or exchanged or destroyed them." *State v. Smith*, 268 N.C. 167, 173, 150 S.E.2d 194, 200 (1966) (citation and quotation marks omitted). In summary, apart from the act of taking itself, additional facts must be present to support an inference of the requisite criminal intent, including both the intent to wrongfully take and the intent to permanently deprive the owner of possession. And while force goes to an intent to wrongfully take, *Foy*, 131 N.C. at 805-06, 42 S.E. at 935, no case cited by the State has held that it also demonstrates an intent to permanently deprive; to the contrary, courts have looked to other factors besides force to show intent to permanently deprive, even in cases where force was used, *Smith*, 268 N.C. at 172-73, 150 S.E.2d at 200 (holding intent to permanently deprive the owner of a rifle taken in an armed robbery was shown by the abandonment of the rifle after the taking rather than the death threats, use of a firearm, and firing of a warning shot at the victim's feet in the robbery itself).

Consistent with *Smith*, intent to permanently deprive the victim of possession has been shown in a number of factual circumstances, though the use of force does not appear to be among them. In *State v. Osborne*, a larceny case involving the theft of numerous personal articles from the victim's apartment, we held that the discovery of the items "in the defendant's bags and among his own possessions [was] sufficient evidence from which a reasonable jury could conclude defendant had the necessary intent to permanently deprive [the victim] of [his] property." 149 N.C. App. 235, 243, 562 S.E.2d 528, 534 (2002). That is, the stolen materials were kept until discovered, not voluntarily returned after a short period. Similarly, apprehension of missing money, in the defendants' possession and alongside other unrelated stolen items, was sufficient to show the requisite criminal intent to permanently deprive the rightful owner of possession in *State v. Jones*, 57 N.C. App. 460, 464, 291 S.E.2d 869, 872 (1982). In *State v. Hager*, we held that a jewelry thief's intent to permanently deprive the owner of possession was shown from the "defendant's exchanging the [stolen] items for cash" at several pawnshops. 203 N.C. App. 704, 708, 692 S.E.2d 404, 407 (2010). We likewise held that intent to permanently deprive was shown in an automobile theft in *State v. Jackson*; because the stolen car in that case was never recovered, "[t]he fact that the car ha[d] not yet been returned or even located by the police [was] sufficient to raise an inference in favor of the State that the defendant did in fact intend to keep the car permanently when he took it." 75 N.C. App. 294, 297-98, 330 S.E.2d 668, 670 (1985). Finally, abandonment of a car was similarly deemed sufficient evidence of intent of permanent deprivation in *State v. Allen*, where the "[d]efendant's abandonment of the vehicle . . . placed the vehicle beyond his power to return it to [the victim] and showed his indifference as to whether [the victim] ever recovered it." 193 N.C. App. 375, 381, 667 S.E.2d 295, 299 (2008).

These illustrative cases demonstrate that some additional facts beyond the taking itself must exist to prove an intent to permanently deprive the owner of possession. *Foy*, 131 N.C. at 805, 42 S.E. at 935; *Smith*, 268 N.C. at 173, 150 S.E.2d at 200. And, importantly, those decisions did not rely on force to show that particular form of intent; indeed, courts looked to other factors even in cases where force was present. *See Smith*, 268 N.C. at 172-73, 150 S.E.2d at 200; *see also Jones*, 57 N.C. App. at 464, 291 S.E.2d at 872 (discovery of missing money stolen in an armed bank robbery alongside other unrelated stolen goods served to establish intent to permanently deprive, rather than use of weapons in robbery); *State v. Mann*, 355 N.C. 294, 304, 560 S.E.2d 776, 783 (2002) (abandonment of vehicle, rather than use of a weapon in the armed robbery, showed intent to permanently deprive owner of possession).

In contrast to the above cases, other precedents demonstrate that where the uncontroverted evidence contradicts the intent of permanent deprivation, dismissal of the larceny charge is proper. We applied this principle in *Matter of Raynor* to reverse the denial of a motion to dismiss a larceny charge, as all the evidence showed the juvenile defendant picked up a watch with the intention to play with it before voluntarily returning it when asked by its owner. 64 N.C. App. 376, 378-79, 307 S.E.2d 219, 221 (1983). *State v. Watts*, 25 N.C. App. 194, 212 S.E.2d 557 (1975), is even more compelling. There, after being threatened with a hammer and scissors, the victim gave the defendant his wallet and some credit cards. *Id.* at 195, 212 S.E.2d at 557. When the defendant demanded more money, the victim replied that he would be receiving his $150 paycheck later that morning. *Id.* The defendant responded by "agree[ing] that he would take the money but forced [the victim] to get his television set and place it and other items in a paper bag, which defendant would hold as security until [the victim] could get the money." *Id.* at 195, 212 S.E.2d at 557-58. We held that these facts were insufficient to show larceny of the television set, as "[a]ll of the evidence tends to show that [the defendant] took the set for the purpose of coercing the owner to pay him $150," rather than with an intent to permanently deprive the victim of the TV. *Id.* at 198, 212 S.E.2d at 559. Thus, in Watts, the use of force and the taking of other items were insufficient to show intent to permanently deprive the owner of possession of the TV when all the other uncontradicted evidence established the taking was for a temporary purpose only. *Id.*

We have not identified—and the State has not provided—any precedent upholding a denial of a motion to dismiss a larceny charge where: (1) the only alleged evidence of intent of permanent deprivation was the taking itself; and (2) all additional evidence disclosed an intent to accomplish only a temporary deprivation.[3] Indeed, such precedent

3. The State relies primarily on *State v. Walker*, where a jewelry thief was caught putting rings into his pocket on the salesroom floor. 6 N.C. App. 740, 742, 171 S.E.2d 91, 92 (1969). When the thief was confronted by an owner of the store, the thief dropped the rings, offered to be searched and, when told the police would be searching him, fled the premises before he was apprehended a few blocks away. *Id.* The central issue in *Walker* was not intent, but "the question of asportation," *id.* at 743, 171 S.E.2d at 93, which is an entirely different element than intent. *See State v. Carswell*, 296 N.C. 101, 103, 249 S.E.2d 427, 428 (1978) (discussing "asportation, or carrying away" as an element of larceny (citation and quotation marks omitted)). Regardless, the defendant in *Walker* was initially apprehended and confronted by the store owner with the stolen goods in his possession, 6 N.C. App. at 742, 171 S.E.2d at 92, which is a well-recognized means of circumstantially demonstrating an intended permanent deprivation. *Smith*, 268 N.C. at 173, 150 S.E.2d at 200. Finally, unlike a truck—which is useful for innumerable purposes, both temporary and permanent—it is difficult to conceive of a reason for temporarily and illicitly taking a handful of rings and shoving them in one's pocket.

would be at odds with both our longstanding common law, *Foy*, 131 N.C. at 805-06, 42 S.E. at 935, and the logical notion that the lone act of taking does not indicate, one way or the other, whether the deprivation is intended to be permanent or temporary. The State's claim that Mr. Spera "took Mr. Perry's keys, without his consent, and permanently deprived Mr. Perry of his truck for some period of time," is internally inconsistent because "some period of time" essentially and logically concedes non-permanence. To hold that inferences drawn from the taking alone, with no other evidence related to the permanence of the taking, would permit the State to send larceny cases to the jury where only a lesser crime had been proven, eliminating the State's burden of proving the elements of the greater larceny offense. *See, e.g.*, *State v. Ross*, 46 N.C. App. 338, 339, 264 S.E.2d 742, 743 (1980) (recognizing unauthorized use of a motor vehicle as a lesser-included offense of larceny that does not require showing intent of permanent deprivation).

Nor do threats of violence and the taking of some other objects of lesser value—not alleged in the larceny indictment—amount to sufficient evidence to support such an inference when the remaining uncontroverted facts show an intent to only accomplish a temporary deprivation. *See Watts*, 25 N.C. App. at 198, 212 S.E.2d at 559; *Smith*, 268 N.C. at 172-73, 150 S.E.2d at 200. Again, consistent with logic and the absence of any caselaw to the contrary from the State, the use of force to accomplish a theft reveals an intent to wrongfully take an item, but it says nothing about the intended duration of the taking. *Compare Foy*, 131 N.C. at 805-06, 42 S.E. at 935 (noting use of force as circumstantial evidence showing an intent to wrongfully take possession of another's property), *with Smith*, 268 N.C. at 173, 150 S.E.2d at 200 (enumerating, without mention of force, facts that are generally considered sufficient to circumstantially show intent of permanent deprivation).

Turning to the specific evidence introduced in this case, there was insufficient evidence of an intent of permanent deprivation to send the misdemeanor larceny charge to the jury. Mr. Perry testified that Mr. Spera took the car on a "joy rid[e]," and Ms. Tarleton testified, without objection, that she "underst[ood] . . . [Mr. Perry and Mr. Taylor] were waiting until Luther [Weathers] came back with the truck so they could leave." And both witnesses testified that Mr. Spera returned the vehicle voluntarily, handed back the keys to Mr. Perry, and released him without harm. Mr. Perry also testified that Mr. Spera began the robbery by demanding "powder" and "must have assumed we were selling cocaine or something," suggesting Mr. Spera initially intended to steal drugs rather than permanently steal a truck. All of this uncontroverted evidence supports

only an inference of a temporary deprivation. *See Raynor*, 64 N.C. App. at 379, 307 S.E.2d at 221 (holding there was "*no* evidence whatsoever" of intent of permanent deprivation notwithstanding evidence that the item was initially recovered in the defendant's possession, as the defendant's testimony disclaimed such intent and uncontradicted evidence showed the item was voluntarily returned at the request of the purported victim (emphasis in original)).

No other facts support a contrary inference under the caselaw cited to this Court and reviewed above. While it is true that Mr. Spera threatened force and took the phone and keys from Mr. Perry, those facts do not overcome other uncontradicted evidence establishing a temporary deprivation only. *Watts*, 25 N.C. App. at 195, 212 S.E.2d 557-58; *Smith*, 268 N.C. at 172-73, 150 S.E.2d at 200; *cf. Raynor*, 64 N.C. App. at 379, 307 S.E.2d at 221. Any inference of a permanent deprivation from these facts amounts to mere conjecture and speculation insufficient to survive a motion to dismiss.

Having held that the trial court erred in denying Mr. Spera's motion to dismiss the larceny charge, we turn to the appropriate remedy. Mr. Spera argues that pure vacatur without remand is required, asserting that he was charged by indictment with larceny of property in excess of $1,000 and that unauthorized use of a motor vehicle is only a lesser-included offense of "larceny of a motor vehicle."[4] But our precedents establish that "[a]ll of the essential elements of the crime of unauthorized use of a conveyance, N.C.G.S. 14-72.2(a), *are included in larceny*, N.C.G.S. 14-72, and we hold that it may be a *lesser included offense of larceny* where there is evidence to support the charge." *Ross*, 46 N.C. App. at 339, 264 S.E.2d at 743 (emphasis added) (citation omitted); *see also State v. Hole*, 240 N.C. App. 537, 540, 770 S.E.2d 760, 763 (2015) (recognizing unauthorized use of a motor vehicle as a lesser-included offense of larceny but not possession of stolen goods). "Larceny of a motor vehicle" is not a separate or distinct offense from "larceny" under either our common law or statutes. *See, e.g.*, *State v. Allen*, 193 N.C. App. 375, 380, 667 S.E.2d 295, 299 (2008) (applying the common law elements of larceny and the related offense classification statute for larceny generally, N.C. Gen. Stat § 14-72, to a conviction for "felonious larceny of a motor vehicle").

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4. We note that the indictment in this case did specifically assert "larceny of a motor vehicle," alleging Mr. Spera "did steal, take and carry away a motor vehicle, to wit, a 1984 Chevrolet truck . . . having a value of more than $1,000.00."

Nothing in *Ross* or related precedents limits unauthorized use of a motor vehicle as a lesser-included offense to indictments for "larceny of a motor vehicle" alone. Consistent with this caselaw, we vacate Mr. Spera's conviction for misdemeanor larceny and remand for entry of a judgment on the lesser-included offense of unauthorized use of a motor vehicle. *See State v. Jolly*, 297 N.C. 121, 130, 254 S.E.2d 1, 7 (1979) (holding that the proper remedy for an improperly denied motion to dismiss where the only unproved element was the element elevating the offense to the greater crime is vacatur of the judgment and remand for entry of judgment on the lesser-included offense, as "in finding defendant guilty of [the greater crime], the jury necessarily had to find facts establishing the [lesser] offense").

III. CONCLUSION

For the foregoing reasons, we vacate Mr. Spera's conviction for misdemeanor larceny in 17CRS052233 and remand for entry of a judgment on the lesser-included offense of unauthorized use of a motor vehicle. Beyond that, we find no error in his remaining convictions.

VACATED IN PART AND REMANDED.

Judges HAMPSON and FLOOD concur.

STATE OF NORTH CAROLINA
v.
TERRELL WILEY

No. COA22-899

Filed 15 August 2023

Jury—juror qualifications—residency—split between two counties—relocation prior to reporting for jury service

The trial court in a murder prosecution did not abuse its discretion in excusing a juror from service after discovering that the juror was no longer a resident of the county where the proceedings were taking place (and therefore was unqualified per N.C.G.S. § 9-3 to serve as a juror). The juror informed the trial court that, at the time of trial, he was splitting his residence between the county where the court sat and a different county; however, because the juror admitted to moving to the different county one week before reporting

for jury service, it was within the court's discretion under N.C.G.S. § 15A-1211(d) to excuse the juror and replace him with an alternate.

Appeal by Defendant from Judgment entered 31 March 2022 by Judge William D. Wolfe in Person County Superior Court. Heard in the Court of Appeals 26 April 2023.

Attorney General Joshua H. Stein, by Senior Deputy Attorney General Amar Majmundar, for the State.

Glover & Petersen, P.A., by James R. Glover, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Terrell Wiley (Defendant) appeals from Judgment entered 31 March 2022 upon a jury verdict finding him guilty of First-Degree Murder. The Record before us tends to reflect the following:

On 10 September 2018, Defendant was indicted for First-Degree Murder. The matter came on for trial on 28 March 2022 in Person County Superior Court. On the third day of trial, 30 March 2022, the trial court noted a residency discrepancy with one of the jurors:

> THE COURT: All right. Let the record reflect the jury is not in the courtroom. This morning the Court was informed that one of our jurors -- and which juror is it, Mr. Clerk? Joshua Buchanan, number 4?
>
> THE CLERK: Yes. That's correct.
>
> THE COURT: All right. I was informed by the clerk that juror number 4 was having car trouble and was going to be significantly late. After consultation with counsel for both sides, I directed the sheriff to deploy to his location to bring him here. The sheriff has informed the Court that he did so, and that the juror was not present, that the people who were reported that he did not actually reside at that address, but instead lived in Durham County. I'm told that the juror actually pulled up to that location sometime while the sheriff was still there on -- on scene and confirmed that he did, in fact, live in Durham County and not in Person County. So what I'm going to do is I'm going to make inquiry of the individual juror as to whether or

not that is true. And if it is true, then I'm going to replace him with an alternate. Would you bring me juror number 4 only, please, Mr. Sheriff?

THE BAILIFF: Yes, sir.

THE COURT: All right. For the record, juror number 4, Mr. Joshua Buchanan, and only Mr. Buchanan, is now in the courtroom from the jury. Mr. Buchanan, I understand you had an issue getting here today?

JUROR BUCHANAN (4): Yes, sir. I had car trouble this morning.

THE COURT: Okay. There's nothing wrong with that, of course. That's outside of your control. But the sheriff told me that -- I sent him to go pick you up.

JUROR BUCHANAN (4): Yes, sir.

THE COURT: And he told me that when he got there that the people who were -- you weren't there, and the people who were said that you lived in Durham County.

JUROR BUCHANAN (4): Yes, sir. Just last week I moved to Durham County. But I don't currently have any mail going there or any way to prove I live in Durham County, so I didn't bring that up to the Court. I've been a resident of Roxboro for all my life. I just literally moved to Durham.

THE COURT: When was that?

JUROR BUCHANAN (4): I still don't -- last week. I still don't even have all my stuff moved in. Like half of my stuff is still at my mom's house versus where the sheriff showed up at. I'm still currently living in between both places because I currently work in Roxboro. So some nights I stay here and some nights I stay in Durham. I don't stay all the way -- I don't stay in Durham completely yet. I still haven't moved all my stuff there.

THE COURT: All right. Can I see counsel at the bench.

After a bench conference, the trial court dismissed Juror Buchanan to the jury room. The trial court then heard from both the State and defense counsel. The State asked the trial court to remove Juror Buchanan based on his statements—indicating he had moved and resided in Durham County—and replace him with one of the alternate

jurors. Defense counsel asked that Juror Buchanan remain on the jury, arguing Juror Buchanan had not established a residence in Durham County and had not terminated his residency in Person County.

The trial court then excused Juror Buchanan from the jury and replaced him with one of the alternate jurors. In excusing Juror Buchanan, the trial court and Juror Buchanan engaged in the following colloquy:

> THE COURT: All right. Mr. Buchanan, what I'm going to do is I'm going to excuse you from the jury and replace you with one of the alternates. Residency is one of the requirements to be a juror. All right. And that is something that if it has changed that you need to let the Court know as soon as possible if your -- yes, sir.
>
> JUROR BUCHANAN (4): I still live half in Roxboro.
>
> THE COURT: I understand.
>
> JUROR BUCHANAN (4): I'm not a full Durham County resident as of right now.
>
> THE COURT: I understand.
>
> JUROR BUCHANAN (4): I'm still staying here.
>
> THE COURT: I understand there was some -- some gray matter about it. It was a gray area for you. I get that. But it is of vital importance that you let the Court know that kind of thing. I'm not going to impose any sanction on you for that, you understand.
>
> JUROR BUCHANAN (4): Yes, sir.
>
> THE COURT: But that is one of the foundational things that you have to have to be a juror. So that's something, for example, when you were being asked about it -- because all the jurors were during jury selection -- what part of the county do you live in, that's the kind of answer you should have given. So what I'm going to do is I'm going to replace you with one of the alternates. Mr. Clerk, I'm going to direct that Mr. B[uchanan] not be paid for his jury service here this week. That's not based on any kind of contempt finding. It's based on the fact that he was never a proper juror for Person County because he's moved to Durham. Even though I realize you do split your residence right now, Mr. B[uchanan]. Okay. So you're excused.

On 31 March 2022, Defendant was found guilty of First-Degree Murder. Defendant was sentenced to life imprisonment without parole. On 5 April 2022, Defendant timely filed written Notice of Appeal.

Issue

The sole issue on appeal is whether the trial court abused its discretion in excusing a juror from service upon discovery the juror was no longer a resident of Person County.

Analysis

Defendant contends the trial court erred in removing Juror Buchanan from jury service upon discovery Juror Buchanan moved to Durham County. We disagree.

With respect to the qualification of jurors, N.C. Gen. Stat. § 9-3 provides: "All persons are qualified to serve as jurors and to be included on the master jury list who are citizens of the State and residents of the county . . . Persons not qualified under this section are subject to challenge for cause." N.C. Gen. Stat. § 9-3 (2021). Further, N.C. Gen. Stat. § 15A-1211(d) provides the trial court: "may excuse a juror without challenge by any party if he determines that grounds for challenge for cause are present." N.C. Gen. Stat. § 15A-1211(d) (2021). Such a determination is reviewed for an abuse of discretion. *State v. Nobles*, 350 N.C. 483, 513, 515 S.E.2d 885, 903 (1999).

In *State v. Tirado*, our Supreme Court noted that the trial court properly executed its authority under N.C. Gen. Stat. § 15A-1211 when determining an individual failed to meet the statutory requirements to serve as a juror when the individual admitted she was not a resident of the county where the trial took place. 358 N.C. 551, 574, 599 S.E.2d 515, 531 (2004). There, the prospective juror informed the trial court that she moved to Wake County, but her "permanent address" remained in Cumberland County "with [her] mom", where the trial was taking place. *Id.* at 573, 599 S.E.2d at 531. The trial court excused the prospective juror from service, concluding she was no longer a resident of Cumberland County. *Id.* at 574, 599 S.E.2d at 531.

Similarly, here, Juror Buchanan admitted he moved to Durham County prior to reporting for jury service. However, Juror Buchanan also informed the trial court he was living between both Durham County and Person County, noting "half of [his] stuff is still at [his] mom's house". In excusing Juror Buchanan, the trial court acknowledged Juror Buchanan "split" his residence, but ultimately concluded he was "never a proper juror for Person County because he's moved to Durham." This

conclusion is consistent with the Supreme Court's decision in *Tirado*. Because Juror Buchanan, like the prospective juror in *Tirado*, admitted to moving to a different county prior to reporting for jury service, it was within the trial court's discretion to excuse Juror Buchanan from further jury service. *Id.* Thus, the Record before us adequately establishes the trial court properly executed its discretionary authority under N.C. Gen. Stat. § 15A-1211(d) in determining Juror Buchanan failed to meet the statutory requirements to sit as a Person County juror. Therefore, the trial court did not abuse its discretion in excusing Juror Buchanan from jury service. Consequently, the trial court did not err in entering Judgment against Defendant.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error at trial and affirm the trial court's Judgment entered 31 March 2022.

NO ERROR.

Judges CARPENTER and STADING concur.

WILSON COUNTY BOARD OF EDUCATION, PETITIONER
v.
RETIREMENT SYSTEMS DIVISION, DEPARTMENT OF STATE TREASURER, TSERS BOARD OF TRUSTEES; TIM MOORE, NORTH CAROLINA SPEAKER OF THE HOUSE; AND PHILIP E. BERGER, PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, RESPONDENTS

No. COA22-1027

Filed 15 August 2023

1. Jurisdiction—superior court—petition for judicial review—contested case—constitutional challenges to anti-pension-spiking statute

After an administrative law judge granted summary judgment for a county board of education (petitioner) in a contested case challenging anti-pension-spiking legislation, the superior court had jurisdiction to hear petitioner's as-applied constitutional challenges against the legislation on a petition for judicial review. The jurisdictional requirements under N.C.G.S. § 150B-43 were met where: petitioner was "aggrieved" by a final agency decision from the Retirement Systems Division of the Department of the State Treasurer (respondent),

which required petitioner to pay an additional pension contribution to a state employee pursuant to the legislation; the litigation stemmed from a contested case; and the administrative law judge's decision constituted a final agency decision that left petitioner without an administrative remedy and without any other adequate statutory procedure for judicial review.

2. Constitutional Law—Contracts Clause—anti-pension-spiking legislation—impairment of employment contract—impairment of contract between employer and retirement system

In an action brought by a county board of education (petitioner) challenging an anti-pension-spiking statute, which established a contribution-based benefit cap on certain state employees' pensions while requiring employers to make additional contributions to employees who were exempt from the benefit cap (to restore those employees' retirement allowances to the pre-cap amount), where the Retirement Systems Division of the Department of the State Treasurer (respondent) issued a final agency decision requiring petitioner to pay an additional contribution to one of its cap-exempt employees, the trial court erred in concluding that the statute violated the Contract Clause of the federal constitution. Petitioner failed to establish that the statute substantially impaired its employment contract with the employee where there was no record evidence showing that the additional contribution was significant in relation to all of the contributions petitioner made to the employee's pension throughout that employee's career, and where there was no evidence showing that the employee's salary increase toward the end of her career affected how the statute's benefit cap analysis applied to her. Further, petitioner failed to establish that it had an implied contract with respondent that gave petitioner a vested right in keeping constant the amounts it contributed to the state pension fund.

3. Constitutional Law—North Carolina—county school fund provision—challenge to anti-pension-spiking statute

In an action brought by a county board of education (petitioner) challenging an anti-pension-spiking statute, which established a contribution-based benefit cap on certain state employees' pensions while requiring employers to make additional contributions to employees who were exempt from the benefit cap (to restore those employees' retirement allowances to the pre-cap amount), the trial court erred in concluding that the statute violated Article IX, Section 7(a) of the state constitution, which requires county school

funds to be used exclusively for maintaining free public schools. In its as-applied challenge to the statute, petitioner failed to present any facts showing that the additional contributions required under the statute would undermine its ability to provide a sound basic education to children in the county or that such payments did not constitute a use that maintained free public schools.

4. Pensions and Retirement—anti-pension-spiking legislation—benefit cap on pensions—for state employees retiring after specific date—presumption against retroactive application

In an action brought by a county board of education (petitioner) challenging an anti-pension-spiking statute, which established a contribution-based benefit cap on certain state employees' pensions while requiring employers to make additional contributions to employees who were exempt from the benefit cap (to restore those employees' retirement allowances to the pre-cap amount), where the Retirement Systems Division of the Department of the State Treasurer (respondent) issued a final agency decision requiring petitioner to pay an additional contribution to one of its cap-exempt employees, the trial court erred in concluding that the statute violated the common law prohibition against applying statutes retroactively. Because the employee in this case retired in January 2018, and the statute's plain language indicated that it applied only to employees retiring on or after January 2015, the statute was not retroactively applied to the employee.

5. Parties—joinder—legislative officials—action challenging state statute—as-applied challenge

In an action brought by a county board of education (petitioner) challenging an anti-pension-spiking statute, where petitioner named the North Carolina Speaker of the House and the President Pro Tempore of the North Carolina Senate (respondents) as parties, the trial court erred in denying respondents' motion to dismiss the action against them because they were not proper parties to the action. Although Civil Procedure Rule 19 would have required joining respondents as defendants to a civil action challenging the facial validity of a North Carolina statute, petitioner's lawsuit only challenged the statute as it applied to petitioner.

Appeal by Respondents from orders entered 18 March 2022 and 13 June 2022 by Judge William D. Wolfe in Wilson County Superior Court. Heard in the Court of Appeals 7 June 2023.

Poyner Spruill LLP, by Laura E. Crumpler and Katie G. Cornetto, for Petitioner-Appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga E. Vysotskaya de Brito, for Respondents-Appellants.

COLLINS, Judge.

This case involves legislation passed by the General Assembly which established a contribution-based benefit cap on retirement benefits for certain State employees who retire on or after 1 January 2015. *See* N.C. Gen. Stat. § 135-5 (2022). The legislation is designed to control the practice of "pension spiking," where an employee's compensation substantially increases to create a retirement benefit that is significantly greater than the employee's contributions would fund. The Retirement Systems Division of the Department of the State Treasurer; the Teachers' and State Employees' Retirement System Board of Trustees; Tim Moore, North Carolina Speaker of the House; and Philip Berger, President Pro Tempore of the North Carolina Senate (collectively, "Respondents") appeal from the superior court's orders entered 18 March 2022 denying their Rule 12(b)(1), (2), and (6) motion to dismiss the Wilson County Board of Education's ("Petitioner") petition for judicial review and 13 June 2022 reversing the administrative law judge's grant of summary judgment in Respondents' favor and granting summary judgment in Petitioner's favor.

We hold that the superior court erred by concluding that N.C. Gen. Stat. § 135-5(a3) violates Article I, Section 10, of the United States Constitution; violates Article IX, Section 7(a), of the North Carolina Constitution; and was impermissibly retroactively applied to Petitioner. Furthermore, the superior court erred by denying Respondents' Rule 12(b)(6) motion to dismiss the action against Speaker Moore and President Pro Tempore Berger. Accordingly, we reverse.

I. Background

A. Statutory Background

The Teachers' and State Employees' Retirement System ("TSERS") provides retirement allowances, or pensions, for teachers and other types of employees of the State of North Carolina. N.C. Gen. Stat. § 135-2 (2022). Any member of TSERS who has vested in the system is entitled to receive a lifetime pension once eligible to retire, and the amount an employee is entitled to receive is determined by a statutory formula. *See id.* § 135-5.

The TSERS pension fund is funded by a combination of employee and employer contributions. *Id.* §§ 135 8(b), (d). The employee contribution rate is statutorily set at 6% of the employee's compensation and is automatically deducted from the employee's paycheck. *Id.* § 135-8(b)(1). An employer is required to contribute "a certain percentage of the actual compensation of each member[,]" known as the "normal contribution," and "an additional amount equal to a percentage of the member's actual compensation[,]" known as the "accrued liability contribution." *Id.* § 135-8(d)(1). The employer contribution rate fluctuates and is "calculated annually by the actuary using assumptions and a cost method . . . selected by the Board of Trustees." *Id.* § 135-8(d)(2a).

In 2014, the General Assembly enacted An Act to Enact Anti-Pension-Spiking Legislation by Establishing a Contribution-Based Benefit Cap (the "Act"), 2014 N.C. Sess. Laws 88, which is codified in relevant part by N.C. Gen. Stat. § 135-5(a3). The Act establishes a retirement benefit cap applicable to employees with an average final compensation greater than $100,000 whose pension would otherwise be significantly greater than the accumulated contributions[1] made by that employee during their employment with the State. N.C. Gen. Stat. § 135-5(a3). "Average final compensation" is defined as "the average annual compensation of a member during the four consecutive calendar years of membership service producing the highest such average[.]" *Id.* § 135-1(5).

The Act directs the TSERS Board of Trustees to establish a "contribution-based benefit cap factor recommended by the actuary, based upon actual experience, such that no more than three-quarters of one percent (0.75%) of retirement allowances are expected to be capped." *Id.* § 135-5(a3). For every member retiring on or after 1 January 2015, the TSERS Board of Trustees is required to perform the following analysis: (1) determine the amount of the employee's accumulated contributions to TSERS; (2) determine the amount of a single life annuity[2] that is the actuarial equivalent of the employee's accumulated contributions; (3) multiply the annuity by the contribution-based cap factor; and (4) calculate the employee's expected pension based upon the employee's membership service. *Id.*

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1. "Accumulated contributions" is defined as "the sum of all the amounts deducted from the compensation of a member and accredited to his individual account in the annuity savings fund[.]" N.C. Gen. Stat. § 135-1(1) (2022).

2. "Annuity" is defined as "payments for life derived from that 'accumulated contribution' of a member." N.C. Gen. Stat. § 135-1(3) (2022). "Actuarial equivalent" is defined as "a benefit of equal value when computed upon the basis of actuarial assumptions as shall be adopted by the Board of Trustees." *Id.* § 135-1(2).

If the employee's expected pension exceeds the calculated contribution-based benefit cap, the employee's pension will be capped. *Id.* If, however, an employee became a member of TSERS before 1 January 2015, the employee's pension will not be capped; instead, the employee's last employer must contribute the amount "that would have been necessary in order for the retirement system to restore the member's retirement allowance to the pre cap amount." *Id.* §§ 135-5(a3), 135-8(f)(2)(f).

B. Adoption of the Cap Factor

During a 23 October 2014 meeting, the TSERS Board of Trustees adopted a cap factor of 4.8 for retirements that became effective on or after 1 January 2015. During a 22 October 2015 meeting, the TSERS Board of Trustees adopted a cap factor of 4.5 for retirements that became effective on or after 1 January 2016. In late 2016, the Cabarrus County Board of Education requested a declaratory ruling from the Retirement Systems Division that the cap factor was invalid because the TSERS Board of Trustees did not adopt the cap factor through rulemaking pursuant to the Administrative Procedure Act ("APA"), and that an invoice sent by the Retirement Systems Division for an additional contribution was consequently void.[3] *Cabarrus Cnty. Bd. of Educ. v. Dep't of State Treasurer*, 261 N.C. App. 325, 328, 821 S.E.2d 196, 200 (2018). The Retirement Systems Division denied the requested ruling. *Id.* On judicial review, the superior court granted summary judgment in the school board's favor and this Court affirmed, holding that "[t]he Division erred in invoicing . . . [the Cabarrus County Board of Education] for any additional contributions pursuant to N.C.G.S. § 135-5(a3) because the cap factor adopted by the Board . . . was not properly adopted" through APA rulemaking. *Id.* at 328, 345, 821 S.E.2d at 200, 210. While the Retirement Systems Division's appeal to the appellate division was pending, the TSERS Board of Trustees engaged in rulemaking and established a cap factor of 4.5, the same value it had adopted during its 22 October 2015 meeting. *See* 20 N.C.A.C. 2B.0405. The rule adopting the cap factor became effective on 21 March 2019. *Id.*

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3. The Johnston County Board of Education, Wilkes County Board of Education, and Union County Board of Education also filed requests for declaratory rulings. *See Johnston Cnty. Bd. of Educ. v. Dep't of State Treasurer*, 261 N.C. App. 537, 817 S.E.2d 918 (2018) (unpublished); *Wilkes Cnty. Bd. of Educ. v. Dep't of State Treasurer*, 261 N.C. App. 540, 818 S.E.2d 199 (2018) (unpublished); *Union Cnty. Bd. of Educ. v. Dep't of State Treasurer*, 261 N.C. App. 539, 817 S.E.2d 919 (2018) (unpublished).

Our Supreme Court subsequently affirmed this Court's decision, holding that the TSERS Board of Trustees "was required to adopt the statutorily mandated cap factor utilizing the rulemaking procedures required by the Administrative Procedure Act[.]" *Cabarrus Cnty. Bd. of Educ. v. Dep't of State Treasurer*, 374 N.C. 3, 25, 839 S.E.2d 814, 828 (2020). Shortly after the Supreme Court issued its decision, the General Assembly amended the APA to exempt the adoption of a contribution-based benefit cap factor from rulemaking. 2020 N.C. Sess. Law 48, sect. 4.1(c); N.C. Gen. Stat. § 150B-1(d)(30)(i) (2022).

C. The Instant Litigation

Petitioner first hired Susan Bullock (the "employee") in 1985. The employee had an average final compensation greater than $100,000 when she applied to retire effective 1 January 2018. After performing the calculations required by N.C. Gen. Stat. § 135-5(a3) and determining that Petitioner owed an additional contribution of $407,292.39 on behalf of the employee, the Retirement Systems Division sent Petitioner a notice of liability on 1 November 2017. Petitioner did not pay the additional contribution.

The Retirement Systems Division notified Petitioner on 21 May 2018 that it had recalculated the employee's pension based upon additional information and that Petitioner instead owed $401,763.96 on behalf of the employee. The Retirement Systems Division again notified Petitioner of the outstanding contribution on 8 March 2019. Petitioner sent a letter of appeal to the Retirement Systems Division on 6 May 2019, requesting that the notice of liability be withdrawn on the grounds that "the cap factor is unconstitutional" and the recently adopted cap factor rule was impermissibly retroactively applied to Petitioner. The Retirement Systems Division issued a final agency decision by letter dated 16 May 2019, concluding that "the assessment described in the March 8, 2019, letter is required by the laws governing TSERS, and will not be withdrawn."

Petitioner filed a petition for a contested case hearing in the Office of Administrative Hearings against the Retirement Systems Division and the TSERS Board of Trustees, alleging:

> [W]hen the invoice was sent to Petitioner here, the cap factor was not yet valid and any attempt to collect monies under a nonexistent rule cannot be enforced. Even if the rule had been in effect, it would not legally apply to a contract entered into prior to the statute's being enacted, and a retirement that occurred prior to the rule's adoption.

Petitioner alleged the following in its Prehearing Statement:

> Petitioner maintains that the rule cannot be applied to validate an invoice sent prior to the rule's effective date. Petitioner also maintains that the rule, effective March 21, 2019, cannot be applied to any retirement that occurred prior to the effective date of the rule. . . .
>
> Finally, Petitioner Wilson County Schools contends that the rule, and the statute upon which it is based, are both in violation of State and federal constitutional provisions.

The parties filed competing motions for summary judgment on 30 August 2021. On 29 September 2021, the administrative law judge ("ALJ") issued a final decision, denying Petitioner's motion for summary judgment and granting Respondents' motion for summary judgment.

Petitioner filed a petition for judicial review in Wilson County Superior Court and added Tim Moore, North Carolina Speaker of the House, and Philip Berger, President Pro Tempore of the North Carolina Senate, as respondents. Petitioner alleged that the ALJ's final decision was erroneous because the Act is unconstitutional and impermissibly retroactive. Respondents moved to dismiss the petition for judicial review under Rules 12(b)(1), (2), and (6), asserting that the superior court lacked jurisdiction to hear constitutional challenges to the Act and seeking to dismiss the action against Speaker Moore and President Pro Tempore Berger for failure to state a claim against them. The superior court denied the motion to dismiss by written order entered 18 March 2022.

After a hearing on 19 May 2022, the superior court entered an order on 13 June 2022 reversing the ALJ's grant of summary judgment in Respondents' favor and granting summary judgment in Petitioner's favor. The superior court concluded, in relevant part:

> 9. Where the Petition raised issues as to the constitutionality of NCGS 135-(5)(a)(3), this [c]ourt considered those arguments only 'as applied' to Petitioner, and not as facial constitutional challenges to the statute.
>
> . . . .
>
> 11. NCGS 135-(5)(a)(3), as applied to Petitioner on these facts, is an unconstitutional impairment of an existing contract in violation of Article I, Section 10 of the US Constitution, within the reasoning and ambit of the holding in Bailey v. State, 348 NC 130 (1998).

> 12. NCGS 135-(5)(a)(3), as applied to Petitioner on these facts, operates in violation of the common law prohibition against retroactive statutes and rules, within the reasoning and ambit of the holdings in Hicks v. Kearney, 189 NC 316 (1925) and Pinehurst v. Derby, 218 NC 653 (1940).
>
> 13. NCGS 135-(5)(a)(3), as applied to Petitioner on these facts, violates Article IX, Section 7(a) of the North Carolina Constitution, providing in part "all moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, *shall belong to and remain in the several counties*, and shall be faithfully appropriated and used exclusively for maintaining free public schools." (Emphasis added).
>
> 14. The Final Decision of the ALJ in this matter is in violation of constitutional provisions and affected by errors of law.

Respondents timely appealed.

II. Discussion

A. Jurisdiction

[1] Respondents first argue that the superior court lacked jurisdiction to hear Petitioner's constitutional challenges to the Act on a petition for judicial review. Petitioner insists that the superior court had jurisdiction to hear the constitutional issues. Following the precedent set by the North Carolina Supreme Court in *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 509 S.E.2d 165 (1998), we hold that the trial court had jurisdiction to hear Petitioner's constitutional challenges.

Under N.C. Gen. Stat. § 150B-43,

> Any party or person aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to the party or person aggrieved by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute . . . .

N.C. Gen. Stat. § 150B-43 (2022). According to *Meads*,

> that statute sets forth five requirements that a party must satisfy before seeking review of an adverse administrative

> determination: "(1) the person must be aggrieved; (2) there must be a contested case; (3) there must be a final agency decision; (4) administrative remedies must be exhausted; and (5) no other adequate procedure for judicial review can be provided by another statute."

349 N.C. at 669, 509 S.E.2d at 174 (quoting *Huang v. N.C. State Univ.*, 107 N.C. App. 710, 713, 421 S.E.2d 812, 814 (1992)).

Here, Petitioner satisfied all five requirements. First, Petitioner was aggrieved by the Retirement Systems Division's final agency decision concluding that "the [$401,763.96] assessment described in the March 8, 2019, letter is required by the laws governing TSERS, and will not be withdrawn." *See* N.C. Gen. Stat. § 150B-2(6) (2022) (defining "[p]erson aggrieved" as "[a]ny person or group of persons of common interest directly or indirectly affected substantially in his, her, or its person, property, or employment by an administrative decision"). Second, this is a contested case involving an administrative proceeding to resolve a dispute between the Retirement Systems Division and Petitioner regarding Petitioner's rights and duties under the Act. *See id.* § 150B-2(2) (defining "[c]ontested case" as "[a]n administrative proceeding pursuant to [the APA] to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges"). Furthermore, under the Supreme Court's analysis in *Meads*, the final three requirements are met because the ALJ's decision constituted a final agency decision which left Petitioner without an administrative remedy and no other adequate statutory procedure for judicial review. *See Meads*, 349 N.C. at 670, 509 S.E.2d at 174 (addressing the constitutionality of an administrative rule where the superior court addressed the constitutional challenge on a petition for judicial review from the Pesticide Board, an administrative agency subject to the APA); *see also In re Civil Penalty*, 92 N.C. App. 1, 7, 373 S.E.2d 572, 576 (1988) (reviewing the constitutionality of a statute on a petition for judicial review where the trial court addressed it sua sponte), *rev'd on other grounds*, 324 N.C. 373, 379 S.E.2d 30 (1989); *see also*, *e.g.*, *In re Redmond*, 369 N.C. 490, 497, 797 S.E.2d 275, 280 (2017) (holding that the Court of Appeals had jurisdiction to review the constitutionality of a statute on appeal from the Industrial Commission as "the first destination for the dispute in the General Court of Justice").

Respondents argue that a superior court has limited jurisdiction on a petition for judicial review and therefore may not determine the constitutionality of a statute. This argument, however, is contrary to well-settled law that the judiciary may determine the constitutionality

of a statute, but an administrative board may not. *See Meads*, 349 N.C. at 670, 509 S.E.2d at 174; *Great Am. Ins. Co. v. Gold*, 254 N.C. 168, 173, 118 S.E.2d 792, 796 (1961). Because it is the province of the judiciary to determine constitutional issues, any effort made by Petitioner to have the constitutionality of the Act determined by the ALJ would have been unsuccessful. Accordingly, following *Meads*, as Petitioner satisfied the requirements under N.C. Gen. Stat. § 150B-43, Petitioner was entitled to judicial review of its constitutional challenges to the Act.

B. Substantive Challenges to the Superior Court's Order

Respondents argue that the superior court erred by concluding that the Act violates Article I, Section 10, of the United States Constitution and Article IX, Section 7(a), of the North Carolina Constitution. Respondents also argue that the trial court erred by concluding that the statute was impermissibly retroactively applied to Petitioner.

1. Standard of Review

On a petition for judicial review, the superior court reviews de novo whether a final agency decision is "in violation of constitutional provisions" or "affected by other error of law[.]" N.C. Gen. Stat. §§ 150B-51(b), (c) (2022). Under de novo review, the court "considers the matter anew[] and freely substitutes its own judgment for the agency's." *Trayford v. N.C. Psychology Bd.*, 174 N.C. App. 118, 121, 619 S.E.2d 862, 864 (2005) (quotation marks and citation omitted). An appellate court reviewing a superior court's order regarding a final agency decision must determine whether the superior court exercised the appropriate scope of review and, if appropriate, determine whether the trial court did so properly. *EnvironmentaLEE v. N.C. Dep't of Env't & Nat. Res.*, 258 N.C. App. 590, 595, 813 S.E.2d 673, 677 (2018).

2. Article I, Section 10, of the United States Constitution

[2] Respondents argue that the superior court erred by concluding that the Act "is an unconstitutional impairment of an existing contract in violation of Article I, Section 10 of the US Constitution[.]"

The Contract Clause states, in relevant part, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]" U.S. Const. art. I, § 10. "[T]he Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties." *United States Tr. Co. v. New Jersey*, 431 U.S. 1, 17 (1977) (citations omitted). "In determining whether a contractual right has been unconstitutionally impaired, we are guided by the three-part test set forth in *U.S. Trust*[.]" *Bailey v. State*, 348 N.C. 130, 140-41, 500 S.E.2d 54, 60 (1998).

"The *U.S. Trust* test requires a court to ascertain: (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Id.* at 141, 500 S.E.2d at 60 (citation omitted).

Petitioner argues that "there were two contracts in existence that suffered impairment by the [Act]": the employment contract between Petitioner and the employee and "an implied contract" between Petitioner and the Retirement Systems Division.

a. Alleged Contract between Petitioner and the Employee

There is no employment contract between Petitioner and the employee in the record. Nonetheless, even assuming such contract exists, there is no evidence in the record that the contract has been unconstitutionally impaired by the Act. "When examining whether a contract has been unconstitutionally impaired, the inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. . . . Minimal alteration of contractual obligations may end the inquiry at [this] stage." *Id.* at 151, 500 S.E.2d at 66 (quotation marks and citation omitted).

The record contains an affidavit from Dr. Lane Mills, Superintendent of Wilson County Schools. Mills averred that the employee was first employed by Petitioner in 1985 and served in various roles through 2013. Petitioner entered into an employment contract with the employee on 1 July 2013 to serve as Assistant Superintendent of Instructional Services for $130,000. The employee's salary was increased by 5% pursuant to an amendment to the contract in 2014. The employee retired effective 1 January 2018.

Aside from the $401,763.96 invoice, there is no record evidence of Petitioner's contributions to TSERS during the employee's approximately 33 years of employment. Thus, there is no record evidence that the additional contribution was significant in relation to Petitioner's contributions to TSERS during the employee's career. Furthermore, there is no record evidence showing how the employee's salary increase affected the outcome of the contribution-based benefit cap analysis. The employee's salary was increased by 5% pursuant to an amendment to her employment contract in 2014, but Mills' affidavit does not state when the salary increase became effective. If the employee's salary increase took effect after the Act was enacted on 30 July 2014 and resulted in the contribution-based benefit cap factor analysis concluding that an additional contribution was required, then the Act did not impair the

employment contract. Accordingly, Petitioner has failed to establish that the Act substantially impaired its employment contract with the employee. As such, we need not analyze whether the impairment was reasonable and necessary to serve an important public purpose.

b. Alleged Implied Contract between Petitioner and the Retirement Systems Division

Petitioner argues that an implied contract "assumed that, in exchange for [Petitioner's] compliance with expected contributions on behalf of this [e]mployee, [Petitioner] had met its obligation under the law and there would not be a penalty down the road pursuant to legislation not in existence at the time [Petitioner] contracted to be bound for those contributions." However, Petitioner cites no authority to support its proposition that such an implied contract existed, or that it has a vested right in keeping constant its amount of contribution to the TSERS pension fund.

N.C. Gen. Stat. § 135-8(d)(1) provides that an employer is required to contribute "a certain percentage of the actual compensation of each member[,]" known as the "normal contribution," and "an additional amount equal to a percentage of the member's actual compensation[,]" known as the "accrued liability contribution." N.C. Gen. Stat. § 135-8(d)(1). By statute, the employer contribution rate fluctuates annually based upon an actuarial valuation, *see id.* § 135-8(d)(2a), and in recent years has steadily increased.[4] For an employee who became a member of TSERS before 1 January 2015, the employee's last employer must make an additional contribution "to restore the member's retirement allowance to the pre cap amount." *Id.* §§ 135-5(a3), 135-8(f)(2)(f). There is no set rate that an employer must contribute, but rather it fluctuates to remedy gaps in the pension fund. Petitioner has therefore failed to show that the General Assembly manifested a clear intention to be contractually bound to keep constant the amount an employer is required to contribute to the pension fund. *See N.C. Ass'n of Educators v. State*, 368 N.C. 777, 786-87, 786 S.E.2d 255, 262-63 (2016). Accordingly, Petitioner has failed to show that a contractual obligation was present. As such, we need not analyze whether the Act impaired a contract or whether

4. The employer contribution rate has increased from 10.78% of compensation for the fiscal year ending 30 June 2018, 2017 N.C. Sess. Laws 57, sect. 35.19(b); to 12.29% in the fiscal year ending 30 June 2019, 2018 N.C. Sess. Laws 5, sect. 35.27; to 12.97% in the fiscal year ending 30 June 2020, 2019 N.C. Sess. Laws 209, sect. 3.15(b); to 14.78% in the fiscal year ending 30 June 2021, 2020 N.C. Sess. Laws 41, sect. 1(a); to 16.38% in the fiscal year ending 30 June 2022, 2021 N.C. Sess. Laws 180, sect. 39.22(b); and to 17.38% for the fiscal year ending 30 June 2023, 2022 N.C. Sess. Laws 74, sect. 39.19.

the impairment was reasonable and necessary to serve an important public purpose.

Accordingly, the superior court erred by concluding that the Act violated Article I, Section 10 of the United States Constitution.

3. Article IX, Section 7(a), of the North Carolina Constitution

[3] Respondents argue that the superior court erred by concluding that the Act impaired the ability of Petitioner to provide a sound basic education, in violation of Article IX, Section 7(a), of the North Carolina Constitution.

Article IX, Section 7(a), of the North Carolina Constitution states:

> [A]ll moneys, stocks, bonds, and other property belonging to a county school fund . . . shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

N.C. Const. art. IX, § 7(a).

Petitioner has failed to present in its as-applied challenge any facts in the form of affidavits, testimony, or otherwise that the payment at issue in this case would undermine its ability to provide a sound basic education to Wilson County children. Furthermore, Petitioner has failed to show that paying its employees the deferred compensation to which they are entitled is not a use that maintains free public schools.

Accordingly, the superior court erred by concluding that the Act violates Article IX, Section 7(a), of the North Carolina Constitution.

4. Retroactivity

[4] Respondents argue that the superior court erred by concluding that the Act "operates in violation of the common law prohibition against retroactive statutes and rules, within the reasoning and ambit of the holdings in Hicks v. Kearney, 189 NC 316 (1925) and Pinehurst v. Derby, 218 NC 653 (1940)" because the Act applies prospectively to this retirement.

In *Bank of Pinehurst v. Derby*, our Supreme Court set forth the general proposition that a statute must be construed as prospective unless it specifically states otherwise:

> There is always a presumption that statutes are intended to operate prospectively only, and words ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to

> them, or unless the intention of the Legislature cannot be otherwise satisfied. Every reasonable doubt is resolved against a retroactive operation of a statute. If all of the language of a statute can be satisfied by giving it prospective action, only that construction will be given it. Especially will a statute be regarded as operating prospectively when it is in derogation of a common-law right, or the effect of giving it retroactive operations will be to destroy a vested right or to render the statute unconstitutional.

Bank of Pinehurst v. Derby, 218 N.C. 653, 658, 12 S.E.2d 260, 263-64 (1940) (quoting *Hicks v. Kearney*, 189 N.C. 316, 319, 127 S.E. 205, 207 (1925)).

Here, the Act provides that "every service retirement allowance . . . for members who retire on or after January 1, 2015, is subject to adjustment pursuant to a contribution-based benefit cap[.]" N.C. Gen. Stat. § 135-5(a3). The Act further provides that "the retirement allowance of a member who became a member before January 1, 2015 . . . shall not be reduced; however, the member's last employer . . . shall be required to make an additional contribution[.]" *Id.* The plain language of the Act indicates that it applies to any retirement allowance for a member who retires on or after 1 January 2015. Because the employee in this case retired on 1 January 2018, three years after Act took effect, the statute was not retroactively applied to Petitioner.

Petitioner argues that "the retroactivity of which Petitioner complains is the application of this statute and Rule to the rights that vested at the time these parties entered into employment contracts." However, as discussed above, Petitioner does not have a vested right in keeping constant its contributions to the TSERS pension fund.

Because the employee in this case retired on 1 January 2018 and the Act applies to retirements that occur on or after 1 January 2015, the superior court erred by concluding that the Act was impermissibly retroactively applied to Petitioner.

C. Dismissal of Action against Speaker Moore and President Pro Tempore Berger

[5] Respondents argue that the superior court erred by denying their Rule 12(b)(6) motion to dismiss because Speaker Moore and President Pro Tempore Berger "are not proper parties to this administrative action[.]" (capitalization altered).

North Carolina Rule of Civil Procedure 19 states, "The Speaker of the House of Representatives and the President Pro Tempore of the

Senate . . . must be joined as defendants in any civil action challenging the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law." N.C. Gen. Stat. § 1A-1, R. 19(d) (2022). "There is a difference between a challenge to the facial validity of a statute as opposed to a challenge to the statute as applied to a specific party." *State v. Shackelford*, 264 N.C. App. 542, 550, 825 S.E.2d 689, 695 (2018) (brackets and citations omitted). "The basic distinction is that an as-applied challenge represents a plaintiff's protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act, while a facial challenge represents a plaintiff's contention that a statute is incapable of constitutional application in any context." *Id.* (citations omitted). "Only in as-applied challenges are facts surrounding the plaintiff's particular circumstances relevant." *Id.* (citations omitted).

Here, Petitioner acknowledges that, although it did not challenge the facial validity of the Act, it added Speaker Moore and President Pro Tempore Berger as parties to its petition for judicial review "in an abundance of caution." Although Petitioner asserted as-applied constitutional challenges in its petition for judicial review, this alone did not convert it into a "civil action challenging the validity of a North Carolina statute[.]" N.C. Gen. Stat. § 1A-1, R. 19(d); *see also M.E. v. T.J.*, 380 N.C. 539, 564, 869 S.E.2d 624, 640 (2022). Because Petitioner did not challenge the facial validity of a North Carolina statute, Speaker Moore and President Pro Tempore Berger were not proper parties to the petition for judicial review and the superior court therefore erred by denying Respondents' Rule 12(b)(6) motion to dismiss.

III. Conclusion

We reverse the superior court's 13 June 2022 order reversing the ALJ's grant of summary judgment in Respondents' favor and granting summary judgment in Petitioner's favor because the Act does not violate Article I, Section 10, of the United States Constitution; does not violate Article IX, Section 7(a), of the North Carolina Constitution; and is not retroactively applied to Petitioner. Furthermore, we reverse the superior court's 18 March 2022 order denying Respondents' Rule 12(b)(6) motion to dismiss because Speaker Moore and President Pro Tempore Berger were not proper parties to the petition for judicial review.

REVERSED.

Judges DILLON and HAMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 AUGUST 2023)

ABBOTT v. ABERNATHY No. 22-901	Mecklenburg (19CVS16593)	Affirmed.
IN RE B.R.C. No. 23-34	Robeson (21JT132)	Reversed
IN RE CAMPBELL No. 22-842	Orange (22CVS19)	Dismissed
IN RE D.A. No. 23-15	Forsyth (19JT208-210)	Affirmed
IN RE G.P.C. No. 22-913	Wake (20JT91)	Affirmed
IN RE I.J.M. No. 22-1021	Vance (18JT15) (18JT16) (18JT17)	Reversed
IN RE K.H. No. 22-738	Durham (22SPC50027)	Affirmed in Part; Reversed and Remanded in part
IN RE M.G.G. No. 23-84	Chatham (21JT3)	Affirmed
IN RE P.W. No. 22-912	Forsyth (20JT205)	Affirmed
IN RE R.D. No. 22-826	Forsyth (14JT211)	Affirmed
IN RE R.L.R. No. 22-995	Iredell (22JT46)	AMENDED ORDER: VACATED. INITIAL ORDER: REVERSED.
LANGTREE DEV. CO., LLC v. JRN DEV., LLC No. 22-1016	Iredell (20CVS107)	No Error
LOWREY v. CHOICE HOTELS INT'L, INC. No. 22-837	Durham (19CVS3400)	Vacated and Remanded.

McLAUGHLIN v. ROYAL HOMES REALTY OF NC, LLC No. 22-941	Guilford (19CVS5691)	Affirmed
McMURRAY v. McMURRAY No. 22-904	Wake (21CVD5867)	Affirmed
MONELL v. HUBBARD No. 22-1071	Mecklenburg (22CVD600957)	Affirmed
OXFORD HOUS. AUTH. v. GLENN No. 22-841	Granville (21CVD799)	Reversed
SAVAGE v. N.C. DEP'T OF TRANSP. No. 22-673	Office of Admin. Hearings (20OSP01641)	Reversed
STATE v. BEATTY No. 22-948	Lincoln (20CRS51449)	Affirmed
STATE v. BRYANT No. 22-876	Bladen (20CRS50381)	No Error
STATE v. CONNELLY No. 22-789	Mecklenburg (19CRS231598-99) (19CRS28353)	No Error
STATE v. GRISSETT No. 22-200	Vance (17CRS51798)	No Error
STATE v. MARTIN No. 22-963	Wilkes (20CRS51076-77)	No Error; Remand on Attorney's fees
STATE v. RICHARD No. 22-357	Randolph (19CRS52463)	No Error
STATE v. RODGERS No. 22-632	Mecklenburg (19CRS236872-74)	No Error
TRULL v. CHAVEZ No. 22-729	Mecklenburg (19CVS19809)	Affirmed

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