290 N.C. App.—No. 3 Pages 244-367

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 6, 2024

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

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[1] Died 25 June 2022.

Clerk
EUGENE H. SOAR

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Executive Director
Jonathan Harris

Director
David Alan Lagos

Staff Attorneys
Michael W. Rodgers
Lauren T. Ennis
Caroline Koo Lindsey
Ross D. Wilfley
Hannah R. Murphy
J. Eric James
Megan Shook

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Ryan S. Boyce

Assistant Director
Ragan R. Oakley

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen
Jennifer C. Peterson
Niccolle C. Hernandez

COURT OF APPEALS

CASES REPORTED

FILED 5 SEPTEMBER 2023

CASES REPORTED WITHOUT PUBLISHED OPINIONS

ADMINISTRATIVE LAW

Contested case—termination of Medicaid contract—state agency's motion to dismiss—In a contested case initiated by petitioner—a healthcare provider, challenging the partial termination of its contract with a Local Management Entity/Managed Care Organization (LME/MCO) to provide certain mental health services to Medicaid beneficiaries—against the state agency charged with administering the Medicaid program in this state and against the LME/MCO contracted by the state to coordinate the provision of certain healthcare, the Office of Administrative Hearings did not err by denying the state agency's motion to dismiss, and the trial court properly affirmed that decision. Despite the agency's argument that it had no authority to overturn the decision of the LME/MCO to terminate some of petitioner's services, any discretion or authority of the LME/MCO—which operated as an agent of the State—regarding the contract with petitioner flowed directly from the agency. **B & D Integrated Health Servs. v. N.C. Dep't of Health & Hum. Servs., 244.**

Petition for judicial review—termination of Medicaid contract—post hoc rationalization—In a contested case hearing initiated by petitioner challenging the partial termination of its contract for the provision of mental health services to Medicaid beneficiaries, the trial court did not err when it affirmed the decision of the Office of Administrative Hearings (OAH) upholding the termination of the contract by respondent (a Local Management Entity/Managed Care Organization contracted by the State to coordinate certain healthcare under the Medicaid program). The trial court did not engage in impermissible post hoc rationalization by reviewing other contract provisions than the ones referenced by respondent, which had terminated services for cause based on allegations of petitioner's poor performance, since, even if those allegations were false, the contract allowed respondent to terminate for any reason, whether for cause or for convenience. **B & D Integrated Health Servs. v. N.C. Dep't of Health & Hum. Servs., 244.**

APPEAL AND ERROR

Interlocutory order—denying motion to dismiss constitutional challenges—sovereign immunity defense—substantial right—In a case brought by bar owners and operators (plaintiffs) alleging that a series of emergency executive orders issued in response to COVID-19 violated their rights under the state constitution, an interlocutory order denying legislative defendants' motion to dismiss under Civil Procedure Rule 12(b)(6) was immediately appealable, since the motion was at least partially based on a sovereign immunity defense and therefore affected a substantial right. Additionally, the trial court's denial of legislative defendants' Rule 12(b)(2) motion was also immediately appealable to the extent that it relied upon a sovereign immunity defense. Conversely, the denial of legislative defendants' Rule 12(b)(1) motion to dismiss based on sovereign immunity did not affect a substantial right and therefore was not immediately appealable. **Howell v. Cooper, 287.**

Preservation of issues—different theory of estoppel asserted on appeal—argument waived—In a marital dissolution matter, in which the wife appealed from the trial court's determination that no equitable distribution (ED) claims were pending (because, although both parties filed ED affidavits during discovery in the child custody action, neither party had properly applied for ED pursuant to N.C.G.S. § 50-20(a)), the wife's argument on appeal that the husband should be estopped from denying the existence of an ED claim on the bases of judicial estoppel and quasi-estoppel principles was not properly preserved, and was waived, where she had

argued a different theory (based on equitable estoppel) in the trial court. **Brown v. Brown, 254.**

CHILD CUSTODY AND SUPPORT

Custody action—between mother and grandparents—best interests of child—The trial court did not err when it granted defendant mother's motion to dismiss plaintiff grandparents' custody action seeking secondary custody of their granddaughter (defendant's daughter) several years after plaintiffs' son, the father of defendant's daughter, died, where plaintiffs argued that it was in their granddaughter's best interests to allow plaintiffs visitation. An analysis of a child's best interests is inappropriate and offends the Due Process Clause when the parent's conduct has not been inconsistent with his or her constitutionally protected status. **Rose v. Powell, 339.**

Custody action—between mother and grandparents—constitutionally protected status of parent—The trial court did not err when it granted defendant mother's motion to dismiss plaintiff grandparents' custody action seeking secondary custody of their granddaughter (defendant's daughter) several years after plaintiffs' son, the father of defendant's daughter, died, where plaintiffs argued that defendant acted in a manner inconsistent with her constitutionally protected parental status when she made plaintiffs an integral part of the granddaughter's life. Although plaintiffs provided some financial support to defendant, had weekly phone calls with her, and sometimes went to her house to let her dog out, defendant never represented that either plaintiff would be considered a parent to the granddaughter or that they would have guaranteed visitation. Furthermore, plaintiffs made no allegations that defendant was unfit or otherwise incapable of caring for the granddaughter. **Rose v. Powell, 339.**

Custody action—between mother and grandparents—N.C.G.S. § 50-13.1—required showing—The trial court did not err when it granted defendant mother's motion to dismiss plaintiff grandparents' custody action seeking secondary custody of their granddaughter (defendant's daughter) several years after plaintiffs' son, the father of defendant's daughter, died, where plaintiffs argued that they were entitled to bring a visitation claim under N.C.G.S. § 50-13.1. It is defendant's constitutionally protected right to decide with whom her daughter associates, and plaintiffs had no authority to seek visitation or custody under N.C.G.S. § 50-13.1 in the absence of a showing that defendant was unfit or had abandoned or neglected her daughter. **Rose v. Powell, 339.**

CIVIL PROCEDURE

Voluntary dismissal—attempted after adverse ruling—involuntary dismissal as sanction—abuse of discretion—In an action filed by two parents and their son (plaintiffs) against a church (defendant) to recover for injuries the son suffered as a child at defendant's summer camp, the trial court properly vacated plaintiffs' Rule 41(a)(1) voluntary dismissal without prejudice where, at a hearing on defendant's motion to dismiss for failure to prosecute, plaintiffs expressed a contingent desire to voluntarily dismiss the action if the court were to grant defendant's motion, but they did not attempt to take a voluntary dismissal until after the court had rendered its oral ruling granting the motion. However, the court abused its discretion by selecting involuntary dismissal with prejudice under Rule 41(b) as plaintiffs' sanction for failing to prosecute, where its reasons for doing so (unavailability and diminished

the agreed-upon portion of defendant's pension regardless of how the payments were delivered. Furthermore, the trial court did not abuse its discretion in ordering specific performance as plaintiff's remedy, since damages would be inadequate (because plaintiff would have to repeatedly sue to secure her monthly payments), defendant testified that he was capable of directly paying plaintiff, and plaintiff had already performed her obligations under the agreement. **Diener v. Brown, 273.**

CRIMINAL LAW

Guilty plea—motion to withdraw—denied—deviation from plea arrangement—Where defendant entered a plea arrangement with the State and the trial court accepted the plea—but subsequently announced it would impose a sentence other than the one in the plea arrangement—the trial court erred by denying defendant's motion to withdraw his guilty plea. To the extent that the terms of the plea arrangement may have been unclear, the trial court should have sought clarification from the parties. **State v. Robertson, 360.**

DIVORCE

Equitable distribution—claim requirements—filing of equitable distribution affidavits in custody case insufficient—In the course of a marital dissolution, in which the husband filed a complaint for custody of the parties' two children, and the wife later initiated a separate action in which she obtained an absolute divorce, where neither party included a claim of equitable distribution (ED) in their initial pleadings, the filing by each party of ED affidavits during discovery in the custody matter did not constitute an "application of a party" for ED as required by statute (N.C.G.S. § 50-20(a)), and, therefore, the trial court properly concluded that there were no pending ED claims in the matter. **Brown v. Brown, 254.**

FIDUCIARY RELATIONSHIP

Breach of fiduciary duty—constructive fraud—insurance agent—incorrect answers on insurance application—In a real property insurance dispute, where plaintiff filed a claim for hurricane damage and his homeowner's insurance company responded by cancelling his policy due to material misrepresentations in his application for insurance (because it did not disclose plaintiff's pond or that his property spanned five acres), the trial court did not err by dismissing, pursuant to Civil Procedure Rule 12(b)(6), plaintiff's claims against his insurance agent (defendant)—who had filled out plaintiff's insurance application—for constructive fraud and breach of fiduciary duty where the exhibits attached to plaintiff's complaint contradicted any allegation that defendant breached its legally imposed fiduciary duty as plaintiff's insurance agent, and where plaintiff did not allege facts and circumstances which created a relation of trust and confidence between himself and defendant in which defendant "held all the cards." **Jones v. J. Kim Hatcher Ins. Agencies Inc., 316.**

FRAUD

Proximate cause—no causal connection—procurement of homeowner's insurance—cancellation of policy—In a real property insurance dispute, where plaintiff filed a claim for hurricane damage and his homeowner's insurance company responded by cancelling his policy due to material misrepresentations in his application for insurance (because it did not disclose plaintiff's pond or that his

property spanned five acres), the trial court did not err by dismissing, pursuant to Civil Procedure Rule 12(b)(6), plaintiff's claims against his insurance agency and the insurance broker who together obtained the policy for him (together, defendants) as to plaintiff's claims for negligent misrepresentation, fraudulent concealment, and unfair and deceptive trade practices. Plaintiff alleged that defendants wrongfully failed to disclose the insurer's status as not licensed to do business in North Carolina (which meant that the insurer was not subject to the State's supervision and, in the event the insurer became insolvent, losses would not be paid by any State guaranty or solvency fund); however, the insurance policy noted the insurer's nonadmitted status, and persons entering contracts of insurance are charged with knowledge of their contents. Furthermore, even assuming plaintiff's ignorance was excusable, the insurer's status as a nonadmitted insurer bore no causal connection to plaintiff's alleged injuries (the uncompensated damage to his property and related losses). **Jones v. J. Kim Hatcher Ins. Agencies Inc., 316.**

INDECENT LIBERTIES

Multiple counts—three acts of kissing the victim—continuous transaction versus separate and distinct acts—In defendant's prosecution for taking indecent liberties with a thirteen-year-old girl—based on three acts of defendant kissing the victim—the trial court erred by denying defendant's motion to dismiss on one of three counts of the offense where there was sufficient evidence to support only two of the counts. The incidents of kissing, which constituted touching and were not "sexual acts" as defined by statute, were divided into two separate acts primarily divided by location: one act took place when defendant kissed the victim's neck, leaving bruising, outside of defendant's van and the other act took place when defendant kissed the victim twice on the mouth after they went into his van. Since there was no intervening act separating the two kisses inside the van, which occurred within fifteen minutes or less of each other, defendant's actions constituted a single, continuous transaction in that location. The matter was remanded for the trial court to arrest judgment on one of defendant's convictions for indecent liberties and to hold a new sentencing hearing. **State v. Calderon, 344.**

JURISDICTION

Office of Administrative Hearings—contested case—termination of Medicaid contract—adverse determination—The Office of Administrative Hearings (OAH) had subject matter jurisdiction to hear a contested case regarding the partial termination of a contract for the provision of mental health services to Medicaid beneficiaries because respondent—which, as a legally authorized agent of the state agency charged with administering the Medicaid program in North Carolina, was a "Department" as defined by statute—had initiated an "adverse determination," as defined by statute, against petitioner—a healthcare provider contracted by respondent to provide certain mental health services to respondent's plan members—by terminating three services provided by petitioner and seeking to recover a Medicaid overpayment. **B & D Integrated Health Servs. v. N.C. Dep't of Health & Hum. Servs., 244.**

JUVENILES

Privilege against self-incrimination—court's failure to advise—In an adjudicatory hearing on a juvenile petition alleging that respondent committed misdemeanor assault, the trial court erred by failing to have any colloquy with respondent to advise

her of her privilege against self-incrimination before she testified. As the State conceded, this violation of N.C.G.S. § 7B-2405(4) was prejudicial because respondent's testimony was self-incriminating and allowed the State to secure a simple assault adjudication. **In re S.C., 312.**

NEGLIGENCE

Insurance agent—inaccurate information on insurance application—contributory negligence—In a real property insurance dispute, where plaintiff filed a claim for hurricane damage and his homeowner's insurance company responded by cancelling his policy due to material misrepresentations in his application for insurance (because it did not disclose plaintiff's pond or that his property spanned five acres), plaintiff's allegations were sufficient to state a claim for negligence against his insurance agent (defendant), who had filled out the insurance application on plaintiff's behalf, where plaintiff alleged, among other things, that defendant acted as plaintiff's agent, that plaintiff provided accurate information to defendant for the application process, that defendant assured plaintiff that the new policy would provide the same coverage as his existing policy, that defendant told plaintiff he need only sign the signature page of the multi-page application, that defendant provided inaccurate information regarding plaintiff's property on the application (including its acreage and the presence of a pond), and that defendant breached his duty of care and proximately caused injury to plaintiff. Plaintiff's alleged failure to read the other pages of the insurance application before signing did not establish, as a matter of law, that plaintiff was contributorily negligent; rather, that was a question for a jury to determine. As for the issue of punitive damages, plaintiff's complaint failed to allege facts showing he was entitled to punitive damages based on the allegations concerning defendant's conduct in filling out the insurance application. **Jones v. J. Kim Hatcher Ins. Agencies Inc., 316.**

PLEADINGS

Complaint—refiled after voluntary dismissal—amended to identify correct plaintiff—no relation back—In a putative class action filed against defendant city for imposing allegedly ultra vires water capacity fees, where plaintiff—an individual running a construction business as a sole proprietorship—mistakenly named a Texas corporation with no interest in the lawsuit's subject matter as the plaintiff in both his original complaint, which he voluntarily dismissed without prejudice pursuant to Civil Procedure Rule 41, and his refiled complaint, which was later amended to correct plaintiff's mistake, the trial court properly granted summary judgment to defendant because plaintiff's claims were time-barred under the applicable statute of limitations. Plaintiff could not benefit from the one-year extension for refiling a voluntarily dismissed action under Rule 41(a), since the (amended) refiled complaint did not relate back to the original complaint where: firstly, the original complaint was a legal nullity because the named plaintiff lacked standing to bring the suit, and thus there was no valid complaint for the refiled complaint to relate back to; and secondly, the refiled action did not involve the "same parties" as those in identified in the original complaint. **Gantt v. City of Hickory, 279.**

TERMINATION OF PARENTAL RIGHTS

Grounds for termination—willful abandonment—lack of contact with child—restrictive parole conditions—The trial court erred by terminating respondent-

father's parental rights to his daughter based on willful abandonment where the court's findings were insufficient to establish willfulness. During the determinative six-month period immediately preceding the filing of the petition by the child's mother, respondent was subject to restrictive parole conditions in another state that prohibited him from engaging in any form of communication with his daughter, but his actions during that time period—including submitting several applications to modify the conditions of his parole, fulfilling certain precursor conditions in furtherance of those requests, and remaining current on his child support obligations—were not consistent with a willful determination to forego all parental duties or to relinquish all parental claims to his child. **In re C.J.B., 303.**

UNFAIR TRADE PRACTICES

Motion to dismiss—allegations in complaint—insurance agency—answering questions on clients' applications—In a real property insurance dispute, where plaintiff filed a claim for hurricane damage and his homeowner's insurance company responded by cancelling his policy due to material misrepresentations in his application for insurance (because it did not disclose plaintiff's pond or that his property spanned five acres), the trial court did not err by dismissing, pursuant to Civil Procedure Rule 12(b)(6), plaintiff's claim against his insurance agency (defendant) for unfair and deceptive trade practices. Plaintiff's general allegation that defendant violated N.C.G.S. § 75-1.1 by engaging in the practice of answering application questions without the insured's knowledge or consent was defeated by other allegations in the complaint, which demonstrated that plaintiff knowingly consented to defendant's practice of answering application questions. **Jones v. J. Kim Hatcher Ins. Agencies Inc., 316.**

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.

B & D INTEGRATED HEALTH SERVICES, PETITIONER
v.
NC DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE, AND ITS AGENT ALLIANCE HEALTH, RESPONDENT

No. COA23-44

Filed 5 September 2023

1. Jurisdiction—Office of Administrative Hearings—contested case—termination of Medicaid contract—adverse determination

The Office of Administrative Hearings (OAH) had subject matter jurisdiction to hear a contested case regarding the partial termination of a contract for the provision of mental health services to Medicaid beneficiaries because respondent—which, as a legally authorized agent of the state agency charged with administering the Medicaid program in North Carolina, was a "Department" as defined by statute—had initiated an "adverse determination," as defined by statute, against petitioner—a healthcare provider contracted by respondent to provide certain mental health services to respondent's plan members—by terminating three services provided by petitioner and seeking to recover a Medicaid overpayment.

2. Administrative Law—petition for judicial review—termination of Medicaid contract—post hoc rationalization

In a contested case hearing initiated by petitioner challenging the partial termination of its contract for the provision of mental health services to Medicaid beneficiaries, the trial court did not err when it affirmed the decision of the Office of Administrative Hearings (OAH) upholding the termination of the contract by respondent (a Local Management Entity/Managed Care Organization contracted by the State to coordinate certain healthcare under the Medicaid program). The trial court did not engage in impermissible post hoc rationalization by reviewing other contract provisions than the ones referenced by respondent, which had terminated services for cause based on allegations of petitioner's poor performance, since, even if those allegations were false, the contract allowed respondent to terminate for any reason, whether for cause or for convenience.

3. Administrative Law—contested case—termination of Medicaid contract—state agency's motion to dismiss

In a contested case initiated by petitioner—a healthcare provider, challenging the partial termination of its contract with a Local

Management Entity/Managed Care Organization (LME/MCO) to provide certain mental health services to Medicaid beneficiaries—against the state agency charged with administering the Medicaid program in this state and against the LME/MCO contracted by the state to coordinate the provision of certain healthcare, the Office of Administrative Hearings did not err by denying the state agency's motion to dismiss, and the trial court properly affirmed that decision. Despite the agency's argument that it had no authority to overturn the decision of the LME/MCO to terminate some of petitioner's services, any discretion or authority of the LME/MCO—which operated as an agent of the State—regarding the contract with petitioner flowed directly from the agency.

Appeal by defendant from judgment entered 10 August 2022 by Judge Stephan R. Futrell in Wake County Superior Court. Heard in the Court of Appeals 9 August 2023.

Ralph Bryant Law Firm, by Ralph T. Bryant, Jr., for the petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General, by Dylan C. Sugar, for the respondent-appellee.

Alliance Health, by Assistant General Counsel Jacqueline M. Perez, and John A. Parris, for the respondent-appellee.

TYSON, Judge.

B & D Integrated Health Services ("B & D Health") appeals from an order entered on 10 August 2022 denying its petition for judicial review. The petition sought review to reverse, vacate, or modify an Office of Administrative Hearings' ("OAH") decision entered on 22 December 2021, which upheld Alliance Health's ("Alliance") termination for three healthcare services B & D Health had provided to Alliance's plan members and assessed an $86,459.67 overpayment. We affirm.

I. Background

This dispute arises from a contractual agreement between B & D Health and Alliance. The contract outlined the mental health services B & D Health was permitted and obligated to provide to Alliance's plan members, who are Medicaid beneficiaries.

A complex set of statutory and regulatory provisions, enacted and promulgated by both the federal and state governments, govern Medicaid agreements. *See Friedman v. Berger*, 409 F. Supp. 1225, 1225-26 (S.D.N.Y. 1976) ("The Medicaid statute (as is true of other parts of the Social Security Act) is an aggravated assault on the English language, resistant to attempts to understand it. The statute is complicated and murky, not only difficult to administer and to interpret but a poor example to those who would like to use plain and simple expressions.").

Medicaid is a taxpayer-funded insurance program, which provides healthcare coverage and benefits to individuals and families whose income fall below certain thresholds. *Arkansas Dep't. of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 275, 164 L.Ed.2d 459 (2006). The North Carolina Department of Health and Human Services ("NC DHHS") is the state agency responsible for administering North Carolina's Medicaid program. N.C. Gen. Stat. § 108A-54 (2021); State Plans for Medical Assistance, 42 U.S.C. § 1396a(a)(5) (requiring each state to have an "establishment or designation of a single State agency to administer or to supervise the administration" of its Medicaid program).

NC DHHS contracts with organizations to coordinate and manage mental health services for Medicaid beneficiaries, instead of directly administering services or contracting with providers. Those organizations are referred to as a Local Management Entity/Managed Care Organization ("LME/MCO"). LMEs/MCOs are private organizations, which are paid a flat fee per plan member by the state to manage mental healthcare services for its members.

Alliance is an LME/MCO and is required to enroll, monitor, credential, and compensate providers to provide Medicaid mental health services. N.C. Gen. Stat. §§ 122C-115.4, 122C-3(20c) (2021). Alliance contracted with B & D Health to provide certain medically-necessary mental health services, as were provided in the contract.

Alliance issued a Notice of Termination of Services, Probation, and Overpayment to B & D Health on 21 April 2021. B & D Health requested a reconsideration hearing, which was held on 7 June 2021. Alliance partially overturned its original decision and reduced the overpayment amount due from $88,708.91 to $86,459.67, but the termination of three services and probationary period remained unchanged and in effect. Alliance again conducted a second-level consideration at B & D Health's request. Alliance upheld its termination of the contract and notified B & D Health the second decision was final.

B & D Health filed a Petition for a Contested Case in the OAH on 23 July 2021, contesting Alliance's termination of the contract under N.C.

Gen. Stat. § 108C-12 (2021) and seeking various remedies. B & D Health named Alliance and NC DHHS as respondents in its OAH petition.

Alliance filed a Motion for Summary Judgment on 29 November 2021. The OAH granted Alliance summary judgment regarding all issues on 22 December 2021.

B & D Health petitioned the Wake County Superior Court for judicial review on 20 January 2022. The Superior Court adopted the findings of fact and conclusions of law contained in the OAH decision and held B & D Health's arguments were without merit on 10 August 2022. B & D timely appeals.

II. Jurisdiction

Judicial review of the final decision of an administrative agency in a contested case is governed by N.C. Gen. Stat. § 150B-51 (2021), which "governs both trial and appellate court review of administrative agency decisions." *N.C. Dept. of Correction v. Myers*, 120 N.C. App. 437, 440, 462 S.E.2d 824, 826 (1995). *See also* N.C. Gen. Stat. § 150B-43 (2021).

Additionally, N.C. Gen. Stat. § 150B-45(a) (2021) provides any party wishing to appeal the final decision of an Administrative Law Judge ("ALJ") made pursuant to the NCAPA "must file a petition [in Superior Court] within 30 days after the person is served with a written copy of the decision." *See also* North Carolina Administrative Procedure Act ("NCAPA"), N.C. Gen. Stat. §§ 150B-1 to -52 (2021). This Court possesses jurisdiction over a final decision of the Superior Court. N.C. Gen. Stat. § 7A-27 (2021).

III. Issues

B & D Health argues the OAH lacked subject matter jurisdiction and the decision entered on 10 December 2021 should be vacated. B & D Health also asserts the Superior Court engaged in an impermissible *post hoc* rationalization to support the OAH' decision.

NC DHHS argues it was not a necessary party to the appeal, and the Wake County Superior Court properly held OAH erred by denying NC DHHS' motion to dismiss pursuant to N.C. Gen. Stat. § 122C-3(20c). NC DHHS asserts the portion of the Superior Court's order reversing OAH' decision to deny NC DHHS' motion to dismiss should be affirmed.

IV. Subject Matter Jurisdiction

[1] B & D Health argues the OAH lacked subject matter jurisdiction to hear its petition and the ALJ's decision to grant Alliance's motion for summary judgment and the superior court's affirmance thereof must be vacated.

A. Standard of Review

"The existence of subject matter jurisdiction is a matter of law and cannot be conferred upon a court by consent." *In re K.J.L.*, 363 N.C. 343, 345-46, 677 S.E.2d 835, 837 (2009) (quotation omitted).

"Subject matter jurisdiction is a question of law that this Court reviews *de novo*." *Tillett v. Town of Kill Devil Hills*, 257 N.C. App. 223, 224, 809 S.E.2d 145, 147 (2017).

B. Analysis

B & D Health's intentional decision to file a contested case in the OAH, to actively seek a decision from OAH, and to argue in its filings the OAH possessed subject matter jurisdiction over the matter pursuant to N.C. Gen. Stat. § 108C-12 does not waive any defects in subject matter jurisdiction. "Lack of subject matter jurisdiction cannot be waived and can be raised at any time, including for the first time on appeal to this Court." *Water Tower Office Assocs. v. Town of Cary Bd. of Adjust.*, 131 N.C. App. 696, 698, 507 S.E.2d 589, 591 (1998) (citation omitted).

Likewise, a forum selection clause does not determine whether a tribunal has subject matter jurisdiction. *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 143-44, 423 S.E.2d 780, 782-83 (1992). "When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, i.e., as if it had never happened." *Wellons v. White*, 229 N.C. App. 164, 176, 748 S.E.2d 709, 718 (2013) (citation omitted).

N.C. Gen. Stat. § 108C-12(b) governs the requirements for providers participating in the Medicaid Program: "(b) Appeals.—Except as provided by this section, a request for a hearing to appeal an adverse determination of the Department under this section is a contested case subject to the provisions of Article 3 of Chapter 150B of the General Statutes." The plain reading of this statute grants Providers the right to use the contested case procedures under the NCAPA to request a hearing before the OAH for any "adverse determination." *See* NCAPA, N.C. Gen. Stat. §§ 150B-1 to -52. "Adverse determination" is a term of art that incorporates two other definitions, "department" and "applicant," which are defined in Chapter 108C.

"Department" is a defined term in N.C. Gen. Stat. § 108C-2(3) (2021). Alliance is included in the definition of a "Department", as Alliance is a "legally authorized agent[ ], contractor[ ], or vendor[ ]" who "assess[es], authorize[s], manage[s], review[s], audit[s], monitor[s], or provide[s] services pursuant to . . . any waivers of the federal Medicaid Act granted by the United States Department of Health and Human Services." *Id.*

Alliance operates under "the combined Medicaid Waiver program authorized under Section 1915(b) and Section 1915(c) of the Social Security Act or to operate a BH IDD tailored plan." N.C. Gen. Stat. § 122C-3(20c). *See* Compliance with State Plan and Payment Provisions, 42 U.S.C. § 1396n(b)-(c) (outlining § 1915(b) and § 1915(c) waivers for certain components of § 1915 of the Social Security Act).

"Applicant" is also a defined term under N.C. Gen. Stat. § 108C-2(2). B & D Health qualifies as an "applicant" under this definition because it is a "partnership, group, association, corporation, institution, or entity that applies to the Department for enrollment as a provider in the North Carolina Medical Assistance Program." *Id.*

An "adverse determination" encompasses any "final decision by the *Department*," including Alliance, "to deny, terminate, suspend, reduce, or recoup a *Medicaid payment* or to *deny, terminate, or suspend a provider's or applicant's* participation in the Medical Assistance Program." N.C. Gen. Stat. § 108C-2(1) (emphasis supplied).

Here, Alliance, a statutorily-defined "Department", sought to reduce or recoup a Medicaid overpayment of taxpayer funds. Alliance also sought to deny, terminate, or suspend the ability of an "applicant", B & D Health, to provide certain services. *Id.* B & D Health argues the OAH' decision was not an "adverse determination" because its providers were still allowed to participate in the Medicaid program. Nevertheless, Alliance's termination and suspension of three of those services prevented B & D Health from providing those services to *all* Medicaid beneficiaries its providers could treat. Alliance is the sole LME/MCO for the region where B & D Health is located. Only providers, who contract with Alliance, can provide those services to Medicaid beneficiaries in that region.

The OAH possesses subject matter jurisdiction over this matter. N.C. Gen. Stat. §§ 108C-2(1)-(3), 108C-12. B & D Health was allowed to seek judicial review under the NCAPA from the Wake County Superior Court and further review from this Court. N.C. Gen. Stat. §§ 150B-45, 7A-27.

As the OAH possesses subject matter jurisdiction over the issues and the parties pursuant to the NCAPA, this matter is properly before us as a final judgment from review by the Superior Court. N.C. Gen. Stat. §§ 150B-1 to -52, 108C-2(1)-(3), 108C-12, 7A-27.

V. *Post Hoc* Rationalization

[2] B & D Health argues the Superior Court engaged in impermissible *post hoc* rationalization by examining other contract provisions

contained within the contract between B & D Health and Alliance, which allows either party to terminate the agreement at any time as long as proper prior notice was given. B & D Health asserts the OAH was prohibited from looking at any other contract provisions allowing Alliance to terminate the contract for "convenience," as Alliance had purportedly terminated the three mental health services for "cause."

A. Standard of Review

"We review a trial court's order granting or denying summary judgment *de novo*." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citation omitted).

B. Analysis

The OAH' decision granting summary judgment in favor of Alliance concluded:

> 50. Petitioner has raised the issue that Alliance purports to terminate the contract not for *convenience*, but for *cause* – Petitioner's alleged, and to date unproven, poor performance.
>
> . . .
>
> Put summarily, even if Petitioner proves that Alliance's allegations regarding its performance were inaccurate or even false, Alliance had the right to terminate the contract on 30 days' notice for any reason at all, or for no reason. Thus, as in *Family Innovations*, whether Alliance's allegations of poor performance are accurate is ultimately immaterial.

The OAH concluded, even if Alliance's allegations that B & D Health had poor performance on those three mental health services were false, B & D Health could not assert a successful claim. The contract permitted Alliance to terminate the contract for convenience or for any reason as long as 30 days' prior notice was given. *See* 10A N.C. Admin. Code 27A.0106(b)(6) (providing the mandatory contract provisions required between LMEs/MCOs and providers). This contractual agreement for termination is standard in all LME/MCO contracts and is required by state law. *See* N.C. Gen. Stat. § 122C-142(a) (2021). B & D Health could not show any genuine issue of material fact exists, and Alliance's motion for summary judgment was properly granted.

This Court has recently decided two factually similar, though non-precedential, cases. As cited by the ALJ, in *Family Innovations*, a provider disputed another LME's/MCO's decision to terminate certain mental health services that received a below-target score. *Fam. Innovations, LLC v. Cardinal Innovations Healthcare Sols.*, 277 N.C. App. 659, 858 S.E.2d 144, 2021 N.C. App. LEXIS 262, 2021 WL 2201606, at *1 (2021) (unpublished). This Court held:

> Under the unambiguous terms of the Contract, Cardinal [the LME/MCO] was expressly permitted to terminate a service with Family Innovations for "no reason or any reason." Cardinal was permitted to terminate a service from the Contract for no reason at all, and Family Innovations understood it was bound by these terms. Accordingly, it is immaterial whether Cardinal was mistaken in its evaluation of Family Innovations' performance.
>
> In a previous unpublished case from our Court, we reached the same conclusion. *See Serenity Counseling & Res. Ctr. v. Cardinal Innovations Healthcare Sols.*, 256 N.C. App. 399, 806 S.E.2d 74, 2017 N.C. App. LEXIS 927, 2017 WL 5146374 (2017) (unpublished). The case involved an almost identical contract between Cardinal and another provider, with whom Cardinal canceled a service. *Id.* at *2-4. Although the *Serenity Counseling* case involved more issues, our Court used the same reasoning to affirm the lower court's motion to dismiss. *Id.* at *7. We find the case persuasive here.

Id. at *2.

The facts at bar are similar to those in *Family Innovation*s. Even if Alliance's allegations regarding B & D Health's performance were shown to be false, Alliance was contractually allowed to terminate the contract without cause or any reason. No genuine issue of material fact exists. The trial court did not err by granting Alliance's motion for summary judgment. The Superior Court's order upholding the OAH' decision and to grant summary judgment in favor of Alliance is affirmed. *Id.*; *Craig*, 363 N.C. at 337, 678 S.E.2d at 354.

VI. NC DHHS' Motion to Dismiss

[3] NC DHHS filed a motion to dismiss on 4 August 2021, seeking dismissal from the matter initiated by B & D Health pending before the OAH. The OAH denied NC DHHS' motion to dismiss in a separate written order on 20 August 2021.

NC DHHS responded to B & D Health's petition to the Superior Court for judicial review on 24 February 2022. In its response, NC DHHS sought "review of the Final Decision and Order of Dismissal entered by the North Carolina Office of Administrative Hearings ("OAH") on December 22, 2021[.]" NC DHHS argued: (1) the OAH lacked subject matter jurisdiction over NC DHHS, and (2) it was "neither a proper or necessary party at OAH nor to the matter presently before [the Superior] Court."

In NC DHHS' appeal before this Court, the department purports to argue the Superior Court reversed the OAH' separate order, which had denied NC DHHS' motion to dismiss: "DHHS also contends that on alternative grounds, the Superior Court's decision should be affirmed as to DHHS because OAH erred when it denied DHHS' Motion to Dismiss." The record before us, however, does not include any written order reversing the OAH' separate decision, entered on 20 August 2021, to deny NC DHHS' motion to dismiss. The record on appeal only includes the Superior Court's order upholding the OAH' 22 December 2021 decision in all respects. The OAH decision entered on 22 December 2021, which is the subject of this appeal and was affirmed in all respects by the Superior Court on 10 August 2022, included NC DHHS as a party to the decision.

On appeal, NC DHHS argues the OAH improperly denied NC DHHS' motion to dismiss. The agency argues Alliance's conduct amounted to a discretionary decision, because Alliance, as the LME/MCO, has the discretion to enter into and terminate provider contracts. NC DHHS argues they do not have the authority to overturn Alliance's independent decision to terminate the contract with B & D Health for the three mental health services.

Upon a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, "[d]ismissal is warranted if an examination of the complaint reveals that no law supports the claim, or that sufficient facts to make a good claim are absent, or that facts are disclosed which necessarily defeat the claim." *State Employees Ass'n of N.C., Inc. v. N.C. Dep't. of State Treasurer*, 364 N.C. 205, 210, 695 S.E.2d 91, 95 (2010) (citation omitted); N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2021).

In implementing the requirement of 42 U.S.C. § 1396a(a)(5), which charges each state with a Medicaid program to designate a single agency in charge of administering the program, the U.S. Department of Health and Human Services ("US DHHS") has set forth the following regulation: "Authority of the single State agency. The Medicaid agency may not

delegate, to other than its own officials, the authority to supervise the plan or to develop or issue policies, rules, and regulations on program matters." 42 C.F.R. § 431.10(e)(3); *K.C. ex rel. Africa H. v. Shipman*, 716 F.3d 107, 112 (4th Cir. 2013) ("As implemented through this rule, the single state agency requirement reflects two important values: an efficiency rationale and an accountability rationale. From an efficiency perspective, the requirement ensures that final authority to make the many complex decisions governing a state's Medicaid program is vested in one (and only one) agency. The requirement thereby avoids the disarray that would result if multiple state or even local entities were free to render conflicting determinations about the rights and obligations of beneficiaries and providers.").

The OAH did not err as a matter of law by declining to dismiss NC DHHS, and the Superior Court did not err as a matter of law by affirming the OAH' decision. Because Alliance is an agent of NC DHHS, any discretion or authority Alliance exercises flows directly from NC DHHS as the "single State agency." 42 U.S.C. § 1396a(a)(5). *See also* N.C. Gen. Stat. § 108C-2(3); 42 C.F.R. § 431.10(e)(3); *Shipman*, 716 F.3d 107, 114-15 ("Put simply, by directing states to designate a single Medicaid agency the decisions of which may not be overridden by other state and local actors, the requirement prohibits precisely what PBH aims to achieve in this appeal: to place itself in the driver's seat and call the shots on how the state's Medicaid program is to be administered[.]"); *McCartney ex rel. McCartney v. Cansler*, 608 F.Supp.2d 694, 701 (E.D.N.C. 2009) (explaining NC DHHS, as North Carolina's "single state agency" in charge of the Medicaid program, "may not disclaim its responsibilities under federal law by simply contracting away its duties"). NC DHHS' argument is overruled.

VII. Conclusion

The OAH possessed subject matter jurisdiction, because Alliance initiated an "adverse determination" against B & D Health. N.C. Gen. Stat. §§ 108C-2(1)-(3), 108C-12(b) (explaining "a [provider's] request for a hearing to appeal an adverse determination of the Department under this section is a contested case subject to the provisions of" the NCAPA promulgated in N.C. Gen. Stat. §§ 150B-1 to -52).

Alliance was contractually allowed to terminate the contract, with or without cause or for any reason, upon 30 days' prior notice. *Fam. Innovations*, 277 N.C. App. 659, 858 S.E.2d 144, 2021 N.C. App. LEXIS 262, 2021 WL 2201606, at *1. The Superior Court correctly affirmed the OAH' decision to grant Alliance's motion for summary judgment. The

record does not show whether the OAH' separate order denying NC DHHS' motion to dismiss, entered on 20 August 2021, was properly before nor ruled on by the Superior Court. The 10 August 2022 Superior Court order B & D Health appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judges CARPENTER and FLOOD concur.

JAMES BROWN, PLAINTIFF
v.
TIFFANY BROWN, DEFENDANT

No. COA22-870

Filed 5 September 2023

1. Divorce—equitable distribution—claim requirements—filing of equitable distribution affidavits in custody case insufficient

In the course of a marital dissolution, in which the husband filed a complaint for custody of the parties' two children, and the wife later initiated a separate action in which she obtained an absolute divorce, where neither party included a claim of equitable distribution (ED) in their initial pleadings, the filing by each party of ED affidavits during discovery in the custody matter did not constitute an "application of a party" for ED as required by statute (N.C.G.S. § 50-20(a)), and, therefore, the trial court properly concluded that there were no pending ED claims in the matter.

2. Appeal and Error—preservation of issues—different theory of estoppel asserted on appeal—argument waived

In a marital dissolution matter, in which the wife appealed from the trial court's determination that no equitable distribution (ED) claims were pending (because, although both parties filed ED affidavits during discovery in the child custody action, neither party had properly applied for ED pursuant to N.C.G.S. § 50-20(a)), the wife's argument on appeal that the husband should be estopped from denying the existence of an ED claim on the bases of judicial estoppel and quasi-estoppel principles was not properly preserved, and was waived, where she had argued a different theory (based on equitable estoppel) in the trial court.

Appeal by defendant from order entered 25 March 2022 by Judge Tracy H. Hewett in Mecklenburg County District Court. Heard in the Court of Appeals 8 August 2023.

No brief filed on behalf of plaintiff-appellee.

Collins Family Law Group, by Rebecca K. Watts, for defendant-appellant.

ZACHARY, Judge.

Defendant Tiffany Brown ("Wife") appeals from the trial court's order dismissing any equitable distribution claims between her and her former husband, Plaintiff James Brown ("Husband"). After careful review, we affirm.

I. Background

Husband and Wife married in April 2007 and had two children. Their relationship deteriorated, and on 19 June 2017, Husband filed a complaint for custody of the children. Husband and Wife then separated on 30 June 2017. On 17 July 2017, Wife filed her answer, which raised a counterclaim for child custody. Neither Husband's complaint nor Wife's answer advanced any claim for or raised the issue of equitable distribution of the parties' marital estate.

On 9 January 2018, the trial court entered a temporary parenting arrangement order. On 28 March 2018, Husband filed a notice of pretrial conference, to be held on 11 May 2018. On 6 April 2018, Wife served Husband with a request for production of documents together with a set of interrogatories, both of which included several requests regarding the parties' property and finances. Wife filed her equitable distribution affidavit on 27 April 2018. On 1 May 2018, Husband filed his equitable distribution affidavit, and also served Wife with a set of interrogatories and a request for production of documents.

The equitable distribution matter came on for pretrial conference in Mecklenburg County District Court on 11 May 2018, and the trial court entered an "Initial Pretrial Conference, Scheduling, and Discovery Order in Equitable Distribution Matter" later that day. That order reflects, *inter alia*, that the parties had served their equitable distribution affidavits upon each other and would attend a mediated settlement conference with a court-appointed mediator. On 12 July 2018, the parties attended mediation, but the resulting report of the mediator filed on 23 July 2018 reflects that the parties reached an impasse.

In December 2018, in a separate proceeding, Wife obtained a judgment for absolute divorce from Husband. Nearly three years later, on 9 June 2021, Wife filed notice of hearing for a status conference in the equitable distribution matter.[1] After the status conference, the trial court entered a "Status Conference Checklist and Order for Equitable Distribution Matter" on 28 July 2021.

On 2 December 2021, the matter came on for calendar call. At the calendar call, Husband asserted that no equitable distribution claims were actually pending before the court; the trial court scheduled a hearing for 28 January 2022 to resolve that issue. On the day of the hearing, Wife filed a memorandum of law in support of her contentions that (1) an equitable distribution claim was pending, in that the parties' equitable distribution affidavits acted as applications for equitable distribution under N.C. Gen. Stat. § 50-20(a) (2021) and Rule 7(b)(1) of the North Carolina Rules of Civil Procedure, and (2) Husband should be equitably estopped from denying the existence of an equitable distribution claim.

On 25 March 2022, the trial court entered an order in which it made the following pertinent findings of fact:

> 23. The Court finds that it is undisputed that there is not, nor ever was, a claim or cross claim, by either party pending for Equitable Distribution.
>
> 24. The Court finds that both parties were represented by counsel at critical points during which a claim/cross claim could have been made and that both participated as if a claim was pending such that [Husband] did not intentionally misrepresent that a claim was pending and was apparently under the same false assumption, therefore, [Wife] cannot claim she depended on his representation.

Consequently, the trial court concluded and ordered, simply: "Equitable Distribution shall be dismissed." Wife timely filed notice of appeal.

II. Discussion

Wife raises similar arguments on appeal as she did before the trial court. Wife first argues that the trial court erred by concluding that no equitable distribution claim was pending "[b]ecause the parties had properly applied to the court for an equitable distribution through the

1. In her appellate brief, Wife notes that the record is silent as to "why it was nearly three years after mediation was concluded that the matter again began to move forward in the court system."

filing of their equitable distribution affidavits[.]" Then, Wife alleges that "[t]he trial court acted under a misapprehension of the law and so abused its discretion when it declined to estop [Husband] from denying the existence of an equitable distribution claim."

A. Application for Equitable Distribution

[1] Although Wife acknowledges that neither she nor Husband ever "filed a paper captioned as a complaint for equitable distribution, a counterclaim for equitable distribution, or a motion for equitable distribution," she nonetheless argues that she "sufficiently asserted a claim for equitable distribution through her pleadings which, when construed liberally, meet the statutory requirements for bringing an equitable distribution action by motion."

1. Standard of Review

Wife "presents an argument regarding the proper method for asserting an equitable distribution claim based upon an interpretation of [N.C. Gen. Stat.] § 50-11 and thus raises an issue of statutory construction." *Bradford v. Bradford*, 279 N.C. App. 109, 112, 864 S.E.2d 783, 786 (2021). We conduct de novo review of statutory construction issues. *Id.* "Pursuant to the de novo standard of review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the trial court." *Id.* (citation omitted).

2. Analysis

In this case, it is undisputed that neither Husband nor Wife raised an equitable distribution claim in their initial pleadings; he did not raise it as a claim in his original complaint, nor did she raise it as a counterclaim in her answer. Instead, Wife contends that "the documents that they did file and sign were equivalent to filing a motion for equitable distribution." We disagree.

The basic procedure for properly raising a claim for equitable distribution is prescribed by statute. N.C. Gen. Stat. § 50-20(a) provides: "Upon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section." N.C. Gen. Stat. § 50-20(a). Section 50-21(a) provides, in pertinent part:

> At any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed and adjudicated, either as a separate civil action, or together with any other action brought pursuant

> to Chapter 50 of the General Statutes, or as a motion in the cause as provided by [N.C. Gen. Stat. §] 50-11(e) or (f).

Id. § 50-21(a).

Notably, our General Statutes also provide: "An absolute divorce obtained within this State shall destroy the right of a spouse to equitable distribution under [N.C. Gen. Stat. §] 50-20 unless the right is asserted prior to judgment of absolute divorce . . . ." *Id.* § 50-11(e). As Wife obtained an absolute divorce during the pendency of this supposed equitable distribution claim, her right to equitable distribution is entirely reliant on whether she asserted that right prior to her absolute divorce.

"Equitable distribution is a property right. Therefore, a married person is entitled to maintain an action for equitable distribution upon divorce if it is properly applied for and not otherwise waived." *Hagler v. Hagler*, 319 N.C. 287, 290, 354 S.E.2d 228, 232 (1987) (citations omitted). However, our Supreme Court has recognized that "equitable distribution is not automatic. The statute provides that *a party seeking equitable distribution must specifically apply for it*." *Id.* (emphasis added). The question thus arises: does the filing of an equitable distribution affidavit in an ongoing child-custody action constitute an "application of a party" for equitable distribution? We conclude that it does not.

Wife relies in part upon our recent opinion in *Bradford*, in which this Court recognized that "[n]one of the statutes addressing equitable distribution limit the particular type of pleading for 'filing' (N.C. Gen. Stat. § 50-21) or 'asserting' (N.C. Gen. Stat. § 50-11) an equitable distribution claim." 279 N.C. App. at 121, 864 S.E.2d at 792. Wife reads our *Bradford* decision in tandem with the principle of broad construction of pleadings found in the North Carolina Rules of Civil Procedure, *see*, *e.g.*, N.C. Gen. Stat. § 1A-1, Rule 8(f) ("All pleadings shall be so construed as to do substantial justice."), to claim that, "[s]o long as the party has made assertions sufficient to put the other party on notice that an equitable distribution is being sought and the basis for that requested relief, the party has sufficiently applied for an equitable distribution."

However, in *Bradford* and each of the cases upon which Wife relies, the issue was whether a party sufficiently asserted an equitable distribution claim in the party's complaint, answer, or motion in the cause. *See Bradford*, 279 N.C. App. at 121, 864 S.E.2d at 792 (concluding that a wife's motion in the cause asserting a claim for equitable distribution in her husband's absolute divorce action was proper); *see also*, *e.g.*, *Coleman v. Coleman*, 182 N.C. App. 25, 29, 641 S.E.2d 332, 336 (2007) (concluding that a wife's " 'request' for 'equitable distribution' [in her

counterclaim] was sufficient to put [her husband] on notice that [the wife] was asking the court to equitably distribute the parties' marital and divisible property"); *Hunt v. Hunt*, 117 N.C. App. 280, 283, 450 S.E.2d 558, 561 (1994) (concluding that the husband, in his answer, "raised the issue of distribution of the parties' marital property and prayed for the affirmative relief of 'an order requiring [the husband] and [the wife] to distribute any and all assets in an equitable manner', in effect asserting a counterclaim for equitable distribution").

None of these cases, however, involved a supposed "application of a party" for equitable distribution, N.C. Gen. Stat. § 50-20(a), by means of filing an equitable distribution affidavit rather than raising an equitable distribution claim in "a separate civil action, or together with any other action brought pursuant to Chapter 50 of the General Statutes, or as a motion in the cause as provided by [N.C. Gen. Stat. §] 50-11(e) or (f)." *Id.* § 50-21(a).

Moreover, N.C. Gen. Stat. § 50-21(a) provides that "the party who first asserts the [equitable distribution] claim shall prepare and serve upon the opposing party an equitable distribution inventory affidavit" and that this affidavit must be filed "[w]ithin 90 days after service of a claim for equitable distribution[.]" N.C. Gen. Stat. § 50-21(a). Adopting Wife's argument would require us to accept the facially absurd position that an equitable distribution affidavit, by which a party may "first assert[ ] the claim[,]" must be filed "[w]ithin 90 days after service" of itself. *Id.* "It is well settled that in construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences . . . ." *Romulus v. Romulus*, 216 N.C. App. 28, 34, 715 S.E.2d 889, 893 (2011). Accordingly, we decline to accept Wife's argument, and affirm the trial court's conclusion that "there is not, nor ever was, a claim or cross claim, by either party pending for Equitable Distribution."

B. Estoppel

[2] Alternatively, Wife argues that "[t]he trial court acted under a misapprehension of the law and so abused its discretion when it declined to estop [Husband] from denying the existence of an equitable distribution claim." However, in her appellate brief, Wife relies upon arguments not made before the trial court below; accordingly, this argument is not properly before us.

At the 28 January 2022 hearing, Wife's counsel argued that Husband "should be equitably estopped from asserting that there's no valid [equitable distribution] claim." Wife's counsel further explained: "It's not fair for a litigant to notice a hearing, file the appropriate documents,

participate in it for four years, and then say, oh, there's nothing there, sorry. That's not fair."

On appeal, Wife challenges the trial court's conclusion of law #24, which states, *inter alia*, that both parties "participated as if a claim was pending such that [Husband] did not intentionally misrepresent that a claim was pending and was apparently under the same false assumption, therefore, [Wife] cannot claim she depended on his representation." In so deciding, the trial court clearly was referencing the elements of equitable estoppel, consonant with Wife's argument below.

To invoke the doctrine of equitable estoppel, a party must prove the following elements:

> (1) The conduct to be estopped must amount to false representation or concealment of material fact or at least which is reasonably calculated to convey the impression that the facts are other than and inconsistent with those which the party afterwards attempted to assert;
>
> (2) Intention or expectation on the party being estopped that such conduct shall be acted upon by the other party or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon;
>
> (3) Knowledge, actual or constructive, of the real facts by the party being estopped;
>
> (4) Lack of knowledge of the truth as to the facts in question by the party claiming estoppel;
>
> (5) Reliance on the part of the party claiming estoppel upon the conduct of the party being sought to be estopped; [and]
>
> (6) Action based thereon of such a character as to change his position prejudicially.

Beck v. Beck, 175 N.C. App. 519, 527, 624 S.E.2d 411, 416 (2006) (citation and emphasis omitted).

On appeal, however, Wife casts a broader net across several other estoppel doctrines. As our Supreme Court has explained: " 'Estoppel' is not a single coherent doctrine, but a complex body of interrelated rules, including estoppel by record, estoppel by deed, collateral estoppel, equitable estoppel, promissory estoppel, and judicial estoppel." *Whitacre*

P'ship v. Biosignia, Inc., 358 N.C. 1, 13, 591 S.E.2d 870, 879 (2004). "North Carolina has also adopted the doctrine of quasi-estoppel." *Snow Enter., LLC v. Bankers Ins. Co.*, 282 N.C. App. 132, 142, 870 S.E.2d 616, 624, *disc. review denied*, 382 N.C. 720, 878 S.E.2d 806 (2022).

Wife abandons the doctrine of equitable estoppel as a defense on appeal. Instead, from this roster of other estoppel doctrines, she has selected the doctrines of judicial estoppel and quasi-estoppel. Wife seeks to benefit from the fact that, unlike equitable estoppel, both judicial estoppel and quasi-estoppel lack the "requirement of detrimental reliance on the part of the party invoking the estoppel." *Whitacre*, 358 N.C. at 19, 591 S.E.2d at 882.

It is well settled that "the law does not permit parties to swap horses between courts in order to get a better mount" on appeal. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). Accordingly, where a party "impermissibly presents a different theory on appeal than argued at trial," the argument "is not properly preserved and is waived" on appeal. *Angarita v. Edwards*, 278 N.C. App. 621, 625, 863 S.E.2d 796, 800 (citation, brackets, and internal quotation marks omitted), *appeal dismissed*, 379 N.C. 159, 863 S.E.2d 601 (2021). Wife has impermissibly presented a pair of different theories on appeal than she argued at trial, theories which the trial court did not have opportunity or reason to consider below. As such, this argument is not properly preserved, and is waived on appeal. *See id.*

Moreover, assuming, *arguendo*, that Wife properly preserved her quasi-estoppel argument, she has not established that Husband should be estopped under that doctrine. Our Supreme Court has described quasi-estoppel as a "branch of equitable estoppel"—albeit one that "may be more closely related to judicial estoppel than any other equitable doctrine." *Whitacre*, 358 N.C. at 17, 18, 591 S.E.2d at 881, 882. "Under a quasi-estoppel theory, a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument." *Id.* at 18, 591 S.E.2d at 881–82. Wife has not shown here that Husband "accept[ed] a transaction or instrument" by responding to her equitable distribution affidavit, or that he has accepted a "benefit under" that affidavit. *Id.* Thus, Wife's reliance on the doctrine of quasi-estoppel is misplaced.

III. Conclusion

For the foregoing reasons, the trial court's order is affirmed.

AFFIRMED.

Judges COLLINS and RIGGS concur.

IAN COWPERTHWAIT, WILLIAM COWPERTHWAIT,
AND CATHERINE COWPERTHWAIT, PLAINTIFFS
v.
SALEM BAPTIST CHURCH, INC., DEFENDANT

No. COA22-374

Filed 5 September 2023

Civil Procedure—voluntary dismissal—attempted after adverse ruling—involuntary dismissal as sanction—abuse of discretion

In an action filed by two parents and their son (plaintiffs) against a church (defendant) to recover for injuries the son suffered as a child at defendant's summer camp, the trial court properly vacated plaintiffs' Rule 41(a)(1) voluntary dismissal without prejudice where, at a hearing on defendant's motion to dismiss for failure to prosecute, plaintiffs expressed a contingent desire to voluntarily dismiss the action if the court were to grant defendant's motion, but they did not attempt to take a voluntary dismissal until after the court had rendered its oral ruling granting the motion. However, the court abused its discretion by selecting involuntary dismissal with prejudice under Rule 41(b) as plaintiffs' sanction for failing to prosecute, where its reasons for doing so (unavailability and diminished memory of witnesses, along with the logistical burden on the court) related primarily to the eleven years that had passed since the son's injuries rather than the thirteen months that had elapsed between the filing of plaintiffs' complaint and the court's ruling on defendant's motion to dismiss.

Chief Judge STROUD concurring in result only in part and dissenting in part.

Appeal by Defendant from order entered 24 September 2021 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 4 October 2022.

Fox Rothschild LLP, by Troy D. Shelton and Elizabeth Brooks Scherer, and Smith Law Group, PLLC, by Steven D. Smith and Jonathan M. Holt, for plaintiffs-appellants.

Bovis, Kyle, Burch & Medlin, LLC, by Brian H. Alligood, for defendant-appellee.

MURPHY, Judge.

This appeal concerns Plaintiffs' attempt to take a voluntary dismissal without prejudice in accordance with Rule 41(a)(1) after the trial court had announced its ruling involuntarily dismissing the action under Rule 41(b). During the hearing, Plaintiffs had expressed a contingent desire to take a voluntary dismissal if the trial court were to allow Defendant's dismissal for failure to prosecute, but they did not actually attempt to take a voluntary dismissal until after an adverse ruling was rendered. Under these circumstances, we hold that the trial court correctly vacated Plaintiffs' attempted Rule 41(a)(1) voluntary dismissal.

However, the trial court could not impose dismissal with prejudice as a sanction under Rule 41(b) without explaining the prejudice Plaintiffs' failure to prosecute caused Defendant and the reason why sanctions short of dismissal would not suffice. Although we review the trial court's selection of sanction only for an abuse of discretion, we hold that the trial court's explanations for its selection of dismissal with prejudice as a sanction were manifestly unsupported by reason. Accordingly, we vacate the portion of the trial court's order dismissing the case with prejudice and remand for the trial court's consideration of which sanction short of dismissal with prejudice is appropriate.

BACKGROUND

On 9 July 2020, Plaintiffs Ian Cowperthwait and his parents, William and Catherine Cowperthwait, filed a complaint against Defendant for personal injuries Ian suffered as a child at Defendant's summer camp in June 2011. The relevant background concerns Plaintiffs' alleged failure to prosecute.

Two weeks before filing the lawsuit, Plaintiffs' counsel promised Defendant's liability insurance carrier he would try to produce copies of Ian's medical records as soon as possible. Six weeks later, on 19 August 2020, Defendant's insurer asked Plaintiffs' counsel again for the medical records. On 10 November 2020, after Defendant's insurer received an administrative session notice from the trial court, the claims handler reiterated the medical records request.

On 9 December 2020, Defendant's insurer retained counsel which, again, requested production of the medical records and proposed a joint request to remove the case from the approaching administrative session calendar. Plaintiffs' counsel agreed to remove the case from the court's administrative calendar and again said he would try to get the medical

records sent over as soon as possible. On 4 January 2021, Defendant's counsel served a request for statement of monetary relief sought, formal interrogatories, and requests for production of documents.

Defendant filed its answer, along with interrogatories and document requests, on 7 January 2021. Plaintiffs requested an extension of time to respond to the discovery requests on 26 January 2021; and, on 2 February 2021, Defendant's counsel again asked Plaintiffs' counsel to send the medical records. On 12 March 2021, Defendant's counsel wrote Plaintiffs' counsel about the discovery responses—by then a week overdue, even with the 30-day extension they requested—and said that, if a response wasn't given by 19 March 2021, Defendant's counsel would "understand the matter to be ripe for a motion to compel and possible additional relief." On 19 March 2021, Plaintiffs' counsel responded via email apologizing for the delay and saying he would have responses to Defendant's counsel by 24 March 2021.

On 16 June 2021, still having not received responses to discovery requests, Defendant moved to dismiss the case for failure to prosecute, or, in the alternative, to compel discovery responses. Plaintiffs eventually responded to the discovery requests on 15 July 2021, noting numerous objections throughout; however, Plaintiffs failed to serve a response to Defendant's request for statement of monetary relief sought.

On 10 August 2021, the trial court heard Defendant's *Motion to Dismiss or, in the alternative, Motion to Compel Discovery*. At the hearing, Plaintiffs' counsel offered to take a voluntary dismissal without prejudice if the court were inclined to dismiss for failure to prosecute and agreed to have Plaintiffs' discovery objections struck if the court deemed them untimely. The court orally announced it would grant Defendant's motion and asked Defendant's counsel to draft a proposed order. The court did not comment on a second offer by Plaintiffs to take a voluntary dismissal, nor did the court explicitly state whether the dismissal would be with or without prejudice.

After the hearing and before any written order was entered, Plaintiffs' counsel filed a *Notice of Voluntary Dismissal Without Prejudic*e. Defendant moved to set aside the voluntary dismissal, and the trial court held a hearing on the motion on 8 September 2021. The trial court orally granted Defendant's motion to set aside and, again, asked Defendant's counsel to prepare the order. Subsequently, the trial court entered a written order dismissing the case with prejudice for failure to prosecute, and Plaintiffs timely appealed.

ANALYSIS

On appeal, Plaintiffs make two arguments: (A) that the trial court erred in vacating their Rule 41(a)(1) voluntary dismissal without prejudice; and (B) that the trial court abused its discretion in selecting an involuntary dismissal with prejudice as Plaintiffs' sanction under Rule 41(b) of our Rules of Civil Procedure.[1] *See Meabon v. Elliott*, 278 N.C. App. 77, 80 ("[I]n reviewing the appropriateness of the particular sanction imposed [under Rule 41(b)], an abuse of discretion standard is proper . . . ."), *disc. rev. denied*, 379 N.C. 151 (2021).

A. Vacating Rule 41(a)(1) Voluntary Dismissal

As to Plaintiffs' argument that the trial court erred in vacating their voluntary dismissal, we disagree. While it is true that Rule 41(a) generally allows a plaintiff to take voluntary dismissal "without order of court [] by filing a notice of dismissal at any time before the plaintiff rests his case," N.C.G.S. § 1A-1, Rule 41(a)(1) (2021), this general rule is subject to the "limitations [] that the dismissal not be done in bad faith and that it be done prior to a trial court's ruling dismissing [the] plaintiff's claim or otherwise ruling against [the] plaintiff . . . ." *Brisson v. Santoriello*, 351 N.C. 589, 597 (2000) (emphasis added).

We have expressly held that "[t]aking a voluntary dismissal based on concerns about the *potential* for a future adverse ruling by the [trial court] is permissible." *Market America, Inc. v. Lee*, 257 N.C. App. 98, 106 (2017). However,

> [d]ismissing an action after such a ruling has actually been announced by the court is not. Once the trial court has informed the parties of its ruling against the plaintiff on the defendant's dispositive motion, Rule 41 does not permit the proceeding to devolve into a footrace between counsel to see whether a notice of voluntary dismissal can be filed before the court's ruling is memorialized in

1. In addition to these issues, Defendant argues in its brief that William and Catherine Cowperthwait's claims are barred by statute of limitations, seemingly as an alternative ground for upholding the trial court's order in accordance with N.C. R. App. P. 28(c) as to William and Catherine Cowperthwait's claims. While we agree that the applicable statute of limitations in all likelihood applies as to William and Catherine's claims, we devote no further discussion to this argument because the applicability of any statute of limitations was not the subject of the trial court's order, nor was it the basis of the motion to which that order responded; rather, the order on appeal solely concerned the propriety of the trial court's previous oral ruling on Defendant's motion to dismiss for failure to prosecute under Rule 41 and its vacation of Plaintiffs' motion for voluntary dismissal.

> a written order and filed with the clerk of court. To hold otherwise would make a mockery of the court's ruling.

Id. at 106-07 (marks omitted).[2]

Here, *Market America* is directly on point. During the hearing on Defendant's motion to dismiss, Plaintiffs' counsel stated the following: "[I]f for some reason Your Honor said that you were going to lean toward taking a dismissal on this, we would then dismiss without prejudice and have an opportunity to re-file." This was clearly a contingent statement, not an expression that Plaintiffs were, at that time, taking a Rule 41(a)(1) voluntary dismissal. Indeed, Plaintiffs' counsel later acknowledged the contingent nature of the earlier statement by remarking just after the trial court granted Defendant's motion to dismiss that "[he] asked the Court, if they were doing that, [Plaintiffs] would take a [voluntary] dismissal."

This is precisely the type of situation in which the principles discussed in *Market America* are designed to prohibit an attempt to take an untimely voluntary dismissal. If Plaintiffs had been concerned about the prospect of an adverse ruling, they were entitled to take a voluntary dismissal at any earlier point in the litigation. *Market America*, 257 N.C. App. at 106. They were *not* entitled to wait until the adverse ruling occurred, then use a voluntary dismissal as a proverbial escape hatch from whatever consequences that ruling may entail. "To hold otherwise would make a mockery of the [trial] court's ruling." *Id.* at 106-07 (marks omitted).

B. Trial Court's Selection of Rule 41(b) Sanction

As to Plaintiffs' next argument—that the trial court improperly selected dismissal with prejudice as its sanction under Rule 41(b)—we agree that the trial court abused its discretion. *See Egelhof v. Szulik*, 193 N.C. App. 612, 619 (2008) (citing *Turner v. Duke Univ.*, 325 N.C. 152, 165 (1989)) ("[I]n reviewing the appropriateness of the particular sanction imposed, an abuse of discretion standard is proper . . . ."). In relevant part, Rule 41(b) permits an involuntary dismissal "[f]or failure of the plaintiff to prosecute . . . ." N.C.G.S. § 1A-1, Rule 41(b) (2021). However, "dismissal with prejudice is the most severe sanction available to the court in a civil case, and thus, it should not be readily granted." *Lauziere v. Stanley Martin Communities, LLC*, 271 N.C. App. 220, 223 (2020), *aff'd*, 376 N.C. 789 (2021). "In general," then, "a trial court is required

2. While our research reveals no occasion on which either we or our Supreme Court have commented on the standard of review for issues such as these, we infer from the scope of the analysis in *Market America* that our standard of review in determining whether Plaintiffs' voluntary dismissal falls within one of these exceptions is de novo. *Id.* at 102-08.

to 'consider lesser sanctions before dismissing an action under Rule 41(b).' " *Wilder v. Wilder*, 146 N.C. App. 574, 575 (2001) (quoting *Goss v. Battle*, 111 N.C. App. 173, 176 (1993)). Moreover, in particular, we have held "that the trial court must [] consider lesser sanctions when dismissing a case pursuant to Rule 41(b) for failure to prosecute." *Id.* at 576 (emphasis omitted).

Three factors must inform a trial court's decision to impose dismissal or some other sanction under Rule 41(b): "(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice." *Id.* at 578. Here, in compliance with *Wilder*, the trial court offered the following conclusions of law in support of its ruling:

> 1. Rule 41(b) of the North Carolina Rules of Civil Procedure authorizes a court to dismiss an action for failure to prosecute or failure to comply with the Rules of Civil Procedure or any order of court. Before dismissing an action for failure to prosecute, Courts are to determine the following three factors: (1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice.
>
> 2. The Court finds that the Plaintiffs have unreasonably delayed this matter. Although Ian Cowperthwait has been admitted to treatment facilities since April of 2021, no explanation was given for the more than eight months that passed since the filing of the complaint before April of 2021. Moreover, the Court notes that Ian's parents, William and Catherine Cowperthwait are named Plaintiffs. No explanation has been offered for their failure to prosecute the action.
>
> 3. The Court finds that the delay has prejudiced the Defendant. The case is already unusually old by virtue of the tolling of the statute of limitations applicable to Ian Cowperthwait due to his minor status (age 11) at the time of the incident. That incident occurred more than ten (10) years ago. The additional year-long delay in prosecuting this action has prejudiced the Defendant by exacerbating the inordinate amount of time since the incident, during

> which witnesses have moved and witness memories have inevitably faded.
>
> 4. Sanctions short of dismissal would be insufficient because the adverse effects of witness unavailability and faded memories that inevitably accompany lengthy periods of time cannot be reversed. Additionally, the Court should not be expected to carry a personal injury action over multiple terms due to failure in prosecution.

While we are cognizant of the great deference owed to the trial court under an abuse of discretion standard, we are confident in this case that such an abuse of discretion occurred. *See Briley v. Farabow*, 348 N.C. 537, 547 (1998) ("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."). Although the trial court adequately and reasonably answered whether Plaintiffs acted in a manner which unreasonably delayed the matter, its rationale for the conclusions that Defendant suffered prejudice and that sanctions short of dismissal would be insufficient were based exclusively on the projected impact on witness availability and memory and the logistical burden on the court. However, no explanation is offered as to why the marginal impact on witness availability and memory would have been significant relative to the filing of the complaint, and we fail to see how the case's "unusual" age relative to the underlying injury would render the additional time elapsed since the filing of the complaint especially problematic.[3]

In substance, the reasons offered by the trial court appear to relate primarily to the total length of time elapsed since the events giving rise to the claims, concerning the eleven years since the injury rather than the thirteen months that had elapsed between the filing of Plaintiffs' complaint and the trial court's oral ruling on Defendant's Rule 41 motion. However, ten years being available to Ian to file his complaint after the events giving rise to his claims is a policy decision that has already been made by the General Assembly through its enactment of N.C.G.S. § 1-17(a)(1), not a valid discretionary basis on which the trial court may dismiss the action for failure to prosecute. *See* N.C.G.S. § 1-17(a)(1) (2021) ("A person entitled to commence an action who is

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3. If anything, the logical tendency of the case already being old would be to *lessen* the marginal impact of further time having elapsed, not increase it. Common sense and experience dictate that that the level of detail lost in an eleven-year-old memory relative to a ten-year-old memory is far less than the level of detail lost in, for example, a one-month-old memory relative to a thirteen-month-old memory.

under a disability at the time the cause of action accrued may bring his or her action . . . within three years next after the removal of the disability[.]"). Finally, to the extent the trial court also incurred a logistical burden from the delay, the trial court has offered no rationale or citation to authority explaining why that reason, standing alone, requires the extreme sanction of dismissal with prejudice. *Cf. Green v. Eure*, 18 N.C. App. 671, 672 (1973) ("Expedition for its own sake is not the goal.").

CONCLUSION

The trial court's selection of dismissal with prejudice as the Rule 41(b) sanction was "manifestly unsupported by reason . . . ." *Briley*, 348 N.C. at 547. While we affirm the portion of the trial court's order vacating Plaintiffs' Rule 41(a)(1) voluntary dismissal, we reverse the portion of the trial court's order dismissing the case with prejudice and remand for the trial court to further consider which sanction short of dismissal with prejudice is appropriate for Plaintiffs' failure to prosecute. *See Lauziere*, 271 N.C. App. at 228 (reversing and remanding for further proceedings where dismissing with prejudice for a failure to prosecute was predicated on an abuse of discretion).

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judge GORE concurs.

Chief Judge STROUD concurs in result only in part and dissents in part.

STROUD, Chief Judge, concurring in result only in part, dissenting in part.

I concur with the Majority Opinion in the result only as to the first issue and agree the trial court did not err in vacating Plaintiffs' notice of voluntary dismissal without prejudice, although I specifically dissent from Footnote 1 of the Majority Opinion. I also dissent as to the second issue. The trial court did not abuse its discretion by dismissing Plaintiffs' claim with prejudice under Rule 41(b).

As to Footnote 1, the claims of William and Catherine Cowperthwait were clearly barred by the statute of limitations. Their claims were for "medical bills and expenses" for their son's treatment for his injuries allegedly caused by Defendant's negligence, and these claims were not

tolled. Defendant properly pled the defense of expiration of the statute of limitations on their claims, and in the context of this case, which deals with delay and the failure to bring claims until ten years after the incident giving rise to the claim, the expiration of the statute of limitation on their claims, as opposed to Ian's claim, is certainly a factor the trial court might properly consider, but I will not address the issue further.

Turning to the Rule 41(b) issue, the Majority Opinion notes four of the trial court's conclusions of law provided to support its ruling as to dismissal with prejudice as a sanction. But the Majority Opinion overlooks the trial court's four pages of detailed findings of fact regarding the relevant procedural history of the case.

The trial court's findings of fact are not challenged on appeal and are thus binding on this court. *See Cohen v. McLawhorn*, 208 N.C. App. 492, 498, 704 S.E.2d 519, 524 (2010) ("Unchallenged findings of fact are presumed to be supported by competent evidence, and are binding on appeal." (citations and quotation marks omitted)). In summary, these findings address the Plaintiffs' repeated promises to produce medical records supporting the claim and failures to provide these records as well as Plaintiffs' failures to respond to formal discovery requests for the records. The trial court found Defendant had been attempting to obtain the medical records from Plaintiffs for *over seven years* as of the date of the hearing on Defendant's motion to dismiss or to compel discovery in 2021. Although some records were produced, the Plaintiffs never produced a full response to the discovery. The trial court also made findings regarding Ian Cowperthwait's arrests on various criminal charges in 2020 and 2021 and his admissions to treatment facilities in 2021 and addressed why these circumstances did not justify the Plaintiffs' failure to act during various periods of time. The trial court made findings regarding Plaintiffs' failure to produce: "complete medical records[;]" "any of his [Ian's] school records[;]" records from "recovery facilities[;]" "expert witness identification(s)[;]" and "social media content[.]"

We know the trial court was well-aware of the factors it must consider in determining the appropriate sanction, as the trial court's first conclusion of law notes that under Rule 41(b) "[c]ourts are to determine the following three factors:"

> (1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice. *Wilder v. Wilder*, 146 N.C. App. 574, [578], 553 S.E.2d 425, 428 (2001).

The trial court's order then clearly addresses all these factors. Specifically, the trial court concluded that Plaintiffs provided "no explanation" for the delay of "more than eight months that passed since the filing of the Complaint before April of 2021." The trial court concluded "the delay has prejudiced the Defendant" because the "case is already unusually old by virtue of the tolling of the statute of limitations" based on Ian's status as a minor child "at the time of the incident" over "ten (10) years ago." The additional year of delay in prosecuting the case "exacerbat[ed] the inordinate amount of time since the incident, during which witnesses have moved and witness memories have inevitably faded."

The Majority rejects these reasons on the grounds they "primarily" relate to the period of time when the statute of limitations as to Ian's claim was tolled rather than the period of time between the filing of the complaint and the ruling on Defendant's Rule 41 motion. But a plain reading of the conclusions of law refutes the Majority's interpretation. The trial court's discussion of Plaintiffs' unreasonable delay focuses on how "no explanation was given for the more than eight months that passed *since the filing of the complaint*[.]" (Emphasis added.) Similarly, in its conclusion on prejudice, the trial court noted "[t]he *additional year-long delay* in prosecuting this action has prejudiced the Defendant[.]" (Emphasis added.) As a result, the trial court properly relied on the period of time between the filing of the complaint and the ruling on Defendant's Rule 41 motion.

Finally, the trial court addressed "the reason, if one exists, that sanctions short of dismissal would not suffice." *Wilder*, 146 N.C. App. at 578, 553 S.E.2d at 428. The trial court concluded, based on all the unchallenged findings of fact, sanctions short of dismissal would not suffice because "the adverse effects of witness availability and faded memories that inevitably accompany lengthy periods of time cannot be reversed." Nor should the trial court "be expected to carry a personal injury action over multiple terms due to failure in prosecution."

The trial court adequately addressed the *Wilder* factors. The trial court is not required to list each potential sanction short of dismissal and explain why it rejected each one. *See Batlle v. Sabates*, 198 N.C. App. 407, 421, 681 S.E.2d 788, 798 (2009) ("[T]he trial court is not required to list and specifically reject each possible lesser sanction prior to determining that dismissal is appropriate." (quoting *Badillo v. Cunningham*, 177 N.C. App. 732, 735, 629 S.E.2d 909, 911 (2006)).

This court is required to review the trial court's ruling for abuse of discretion. *See Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) ("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."). The trial court made detailed findings of fact, clearly addressed all three *Wilder* factors, and in its discretion concluded that "[s]anctions short of dismissal would be insufficient" based on the facts and factors the trial court had already addressed. The Majority, had it been in the place of the trial court, might have made a different discretionary evaluation of the various factors in this case. But this sort of evaluation is actually *de novo* review, not a review for abuse of discretion.

> The abuse of discretion standard of review is applied to those decisions which necessarily require the exercise of judgment. The test for abuse of discretion is whether a decision "is manifestly unsupported by reason," *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985), or "so arbitrary that it could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985). The intended operation of the test may be seen in light of the purpose of the reviewing court. Because the reviewing court does not in the first instance make the judgment, the purpose of the reviewing court is not to substitute its judgment in place of the decision maker. Rather, the reviewing court sits only to insure that the decision could, in light of the factual context in which it is made, be the product of reason.

Little v. Penn Ventilator Co., 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986).

The trial court's decision is clearly supported by reason and is not arbitrary in any way. I concur in result only as to the Majority Opinion's affirming the trial court's order vacating the Plaintiffs' voluntary dismissal, dissent as to Footnote 1, and dissent as to the Majority Opinion's ruling on the portion of the trial court's order dismissing the case with prejudice.

AMANDA L. DIENER, PLAINTIFF
v.
ROBERT BROWN, DEFENDANT

No. COA23-66

Filed 5 September 2023

Contracts—breach—separation agreement—payments from ex-husband's military pension—specific performance

In an action regarding a separation agreement between a retired Marine (defendant) and his ex-wife (plaintiff), where the agreement provided that plaintiff would receive fifteen percent of defendant's monthly military pension for the remainder of defendant's life, the trial court did not err in ruling that defendant breached the agreement by refusing to pay plaintiff her portion of his pension after learning that plaintiff was statutorily barred from receiving the payments through the Defense Finance and Accounting Service (DFAS). Although the agreement stated that plaintiff was responsible for coordinating with DFAS to have the payments come to her, the parties' clear intention was that plaintiff receive the agreed-upon portion of defendant's pension regardless of how the payments were delivered. Furthermore, the trial court did not abuse its discretion in ordering specific performance as plaintiff's remedy, since damages would be inadequate (because plaintiff would have to repeatedly sue to secure her monthly payments), defendant testified that he was capable of directly paying plaintiff, and plaintiff had already performed her obligations under the agreement.

Appeal by Defendant from order entered 5 July 2022 by Judge Karen D. McCallum in Mecklenburg County District Court. Heard in the Court of Appeals 8 August 2023.

Epperson Law Group, PLLC, by Steven B. Ockerman and Lauren E. R. Watkins, for Plaintiff-Appellee.

Wofford Law, PLLC, by J. Huntington Wofford and Rebecca B. Wofford, for Defendant-Appellant.

COLLINS, Judge.

Defendant Robert Brown appeals from the trial court's order concluding that Defendant had breached the terms of a separation

agreement between himself and Plaintiff Amanda Diener and ordering that Defendant specifically perform the agreement by paying Plaintiff 15% of his monthly military retirement pay for the remainder of his life and $8,550 in arrearages. Defendant argues that, because the separation agreement states that Plaintiff is to receive her portion of his monthly military pension directly from the Defense Finance and Accounting Service ("DFAS"), and because she is statutorily barred from receiving these payments directly from DFAS as the parties were not married for at least ten years, Plaintiff is no longer entitled to her portion of his monthly military pension. Defendant's argument is perilously close to being frivolous, and we affirm.

I. Background

Plaintiff and Defendant were married on 17 April 2011. Defendant served in the United States Marine Corps during their marriage and retired in March 2016 after 15 years of service. The parties separated on 15 March 2018 and were divorced on 8 May 2019. Prior to their divorce, the parties attended mediation on 22 January 2019 and stipulated, inter alia, that Plaintiff was entitled to 15% of Defendant's monthly military retirement.

The parties entered into a separation agreement (the "Agreement") on 28 February 2019, which provided, in pertinent part, as follows:

> By this Agreement, the parties acknowledge that [Defendant] has military retirement and that [Defendant] did participate in this account prior to the marriage of the parties, making there a premarital component to the account. [Plaintiff] shall receive fifteen percent (15%) of [Defendant's] monthly military retirement for the remainder of his life. [Plaintiff's] attorney shall be responsible for preparing the documents necessary for her to receive this monthly allotment and [Defendant's] attorney shall have an opportunity to review the document prior to its submission to the military and the [c]ourt. In the event [Defendant's] signature is required for the distribution to take place, he shall execute any and all necessary documents within fifteen (15) days of receipt from [Plaintiff's] attorney. [Plaintiff] shall begin receiving the 15% of the military retirement effective February 1, 2019. [Defendant] shall monitor the monthly statements related to the retirement each month. Upon [Plaintiff's] retirement being deducted directly from the retirement, [Defendant] shall pay a make up payment for any months that were not

> deducted. Thereafter, [Plaintiff] shall be responsible for coordinating with DFAS for payments to come to her.

Plaintiff's counsel notified Defendant's counsel on 19 November 2019 that Plaintiff was unable to receive payments directly from the Defense Finance and Accounting Service ("DFAS") because the parties were not married for ten years or more, as required by 10 U.S.C. § 1408(d)(2).[1] Plaintiff's counsel suggested that Defendant set up automatic payments to Plaintiff so that he would not have to communicate directly with her. Defendant refused; Plaintiff did not receive any payments from Defendant's military pension.

Plaintiff filed suit for breach of contract and specific performance on 14 February 2020, alleging that Defendant had "failed to provide the military pension payments to Plaintiff as required by the Agreement." Defendant filed a motion to dismiss and an answer; the trial court denied the motion to dismiss on 8 March 2021. Plaintiff moved for summary judgment; the trial court denied the motion on 28 October 2021.

After a hearing on the division and payment of Defendant's military retirement pay, the trial court entered a consent order on 16 November 2021, concluding that "[Plaintiff] qualifies for direct payment from the appropriate military finance center for her monthly share of military retired pay attributable to [Defendant's] military service under Title 10, United States Code § 1408(d)(2)[.]" Plaintiff submitted to DFAS an Application for Former Spouse Payments from Retired Pay in December 2021. DFAS denied Plaintiff's application by letter dated 3 January 2022, confirming that it could not honor her request for direct payment because the parties were not married for 10 years or more, as required by 10 U.S.C. § 1408(d)(2).

After a bench trial on 24 March 2022, the trial court entered a written order on 5 July 2022 concluding that Defendant had breached the Agreement and ordering Defendant to specifically perform the Agreement by paying directly to Plaintiff 15% of his monthly military retirement pay for the remainder of his life and $8,550 in arrearages. Defendant timely appealed.

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1. "If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court . . . of disposable retired pay of the member as property of the member or property of the member and his spouse." 10 U.S.C. § 1408(d)(2).

II. Discussion

A. Breach of Agreement

Defendant argues that the trial court erred by concluding that "Defendant willfully violated and continues to violate the terms of the Agreement."

"The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether those findings support the conclusions of law and ensuing judgment." *Ward v. Ward*, 252 N.C. App. 253, 256, 797 S.E.2d 525, 528 (2017) (citation omitted). A trial court's conclusions of law are reviewable de novo. *Donnell-Smith v. McLean*, 264 N.C. App. 164, 168, 825 S.E.2d 672, 675 (2019). Furthermore, where the trial court labels as a finding of fact what is in substance a conclusion of law, we treat that finding as a conclusion and review it de novo. *Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012).

"Questions relating to the construction and effect of separation agreements between a husband and wife are ordinarily determined by the same rules which govern the interpretation of contracts generally." *Lane v. Scarborough*, 284 N.C. 407, 409, 200 S.E.2d 622, 624 (1973). "Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution." *Id.* at 409-10, 200 S.E.2d at 624 (citations omitted). "Our Supreme Court has long recognized that the heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Jones v. Jones*, 263 N.C. App. 606, 620, 824 S.E.2d 185, 195 (2019) (quotation marks, brackets, and citation omitted).

Here, the Agreement provides as follows:

> **Intangible Property.** Except as specifically provided for herein, the parties have divided to their satisfaction all intangible property owned by them, individually or jointly, including, but not limited to, checking and savings accounts, stocks, bonds, mutual funds, trusts, interest in pension and profit sharing plans, retirement benefits, promissory notes, IRA accounts, interest in businesses, partnerships, choses in action, certificates of deposit, money market accounts, cash management accounts, life insurance policies (including any cash values) and the like.

> By this Agreement, [Plaintiff] conveys and releases to [Defendant] any and all interest, marital or otherwise, which she may have in his Bank of America 401(k).
>
> By this Agreement, the parties acknowledge that [Defendant] has military retirement and that [Defendant] did participate in this account prior to the marriage of the parties, making there a premarital component to the account. [Plaintiff] shall receive fifteen percent (15%) of [Defendant's] monthly military retirement for the remainder of his life. [Plaintiff's] attorney shall be responsible for preparing the documents necessary for her to receive this monthly allotment and [Defendant's] attorney shall have an opportunity to review the document prior to its submission to the military and the [c]ourt. In the event [Defendant's] signature is required for the distribution to take place, he shall execute any and all necessary documents within fifteen (15) days of receipt from [Plaintiff's] attorney. [Plaintiff] shall begin receiving the 15% of the military retirement effective February 1, 2019. [Defendant] shall monitor the monthly statements related to the retirement each month. Upon [Plaintiff's] retirement being deducted directly from the retirement, [Defendant] shall pay a make up payment for any months that were not deducted. Thereafter, [Plaintiff] shall be responsible for coordinating with DFAS for payments to come to her.

The Agreement establishes that the intention of the parties at the moment of its execution was that, in exchange for releasing any interest in other intangible property, Plaintiff would be entitled to 15% of Defendant's monthly military retirement for the remainder of his life. Because Plaintiff has not received any payments from Defendant's military pension, the trial court did not err by concluding that Defendant had breached the Agreement.

B. Specific Performance

Defendant argues that the trial court erred by ordering specific performance because Defendant "had not breached the terms of the separation agreement[.]" (capitalization altered).

"The remedy of specific performance rests in the sound discretion of the trial court and is conclusive on appeal absent a showing of a palpable abuse of discretion." *Crews v. Crews*, 264 N.C. App. 152, 154, 826 S.E.2d 194, 196 (2019) (quotation marks and citation omitted). An abuse

of discretion results where the trial court's order is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. *Paynich v. Vestal*, 269 N.C. App. 275, 278, 837 S.E.2d 433, 436 (2020).

A separation agreement may be enforced through the equitable remedy of specific performance. *Reeder v. Carter*, 226 N.C. App. 270, 275, 740 S.E.2d 913, 917 (2013). Specific performance is appropriate if the remedy at law is inadequate, the obligor can perform, and the obligee has performed her obligations. *Crews*, 264 N.C. App. at 154, 826 S.E.2d at 196. Our Supreme Court has established that damages are usually an inadequate remedy in the context of separation agreements. *See Moore v. Moore*, 297 N.C. 14, 17, 252 S.E.2d 735, 738 (1979) ("[W]hen the defendant persists in his refusal to comply, the plaintiff must resort to this remedy repeatedly to secure her rights under the agreement as the payments become due and the defendant fails to comply. The expense and delay involved in this remedy at law is evident.").

Here, Plaintiff's remedy at law is inadequate because she would have to repeatedly sue to secure her portion of Defendant's monthly military pension that she is entitled to under the Agreement. *See id.* Furthermore, despite Defendant's testimony at trial that he was capable of paying Plaintiff through a check or direct deposit, Plaintiff has not received a single payment from Defendant's military pension. Finally, Plaintiff performed her obligations under the Agreement because she submitted to DFAS an Application for Former Spouse Payments from Retired Pay in December 2021, but her application was denied because the parties were not married for 10 years or more.

Accordingly, the trial court did not abuse its discretion by granting Plaintiff's claim for specific performance.

III. Conclusion

The trial court did not err by concluding that Defendant had breached the Agreement and ordering that Defendant specifically perform the Agreement by paying Plaintiff 15% of his monthly military retirement pay for the remainder of his life and $8,550 in arrearages. Accordingly, we affirm.

AFFIRMED.

Judges ZACHARY and RIGGS concur.

GANTT v. CITY OF HICKORY

[290 N.C. App. 279 (2023)]

GARY GANTT D/B/A GANTT CONSTRUCTION, PLAINTIFF
v.
CITY OF HICKORY, DEFENDANT

No. COA21-767-2

Filed 5 September 2023

Pleadings—complaint—refiled after voluntary dismissal—amended to identify correct plaintiff—no relation back

In a putative class action filed against defendant city for imposing allegedly ultra vires water capacity fees, where plaintiff—an individual running a construction business as a sole proprietorship—mistakenly named a Texas corporation with no interest in the lawsuit's subject matter as the plaintiff in both his original complaint, which he voluntarily dismissed without prejudice pursuant to Civil Procedure Rule 41, and his refiled complaint, which was later amended to correct plaintiff's mistake, the trial court properly granted summary judgment to defendant because plaintiff's claims were time-barred under the applicable statute of limitations. Plaintiff could not benefit from the one-year extension for refiling a voluntarily dismissed action under Rule 41(a), since the (amended) refiled complaint did not relate back to the original complaint where: firstly, the original complaint was a legal nullity because the named plaintiff lacked standing to bring the suit, and thus there was no valid complaint for the refiled complaint to relate back to; and secondly, the refiled action did not involve the "same parties" as those in identified in the original complaint.

Appeal by Plaintiff from judgment entered 15 July 2021 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Originally heard in the Court of Appeals 10 August 2022. Petition for Rehearing allowed 6 March 2023.

Milberg Coleman Bryson Phillips Grossman, PLLC, by James R. DeMay, Daniel K. Bryson, Scott C. Harris, and John Hunter Bryson, for Plaintiff-Appellant.

Young, Morphis, Bach & Taylor, LLP, by Paul E. Culpepper and Timothy D. Swanson, for Defendant-Appellee.

CARPENTER, Judge.

On 29 December 2022, this Court filed an opinion in *Gantt v. City of Hickory*, 287 N.C. App. 393, 881 S.E.2d 760 (Dec. 29, 2022) (unpublished) ("*Gantt I*"), in which we affirmed the trial court's order granting summary judgment for the City of Hickory ("Defendant") and dismissing the claims brought by Gary Gantt d/b/a Gantt Construction ("Plaintiff"). On 2 February 2023, Plaintiff filed a petition for rehearing (the "Petition") pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure. In the Petition, Plaintiff contends our holding in *Gantt I* "conflicts with the longstanding principle of relation back and a prior panel's published opinion." Due to the gravity of Plaintiff's contentions and the dearth of binding precedent concerning whether a plaintiff may benefit from the doctrine of relation back when an action is initiated under the name of a different, out-of-state entity that had no interest in the subject matter, and therefore lacked standing to bring the lawsuit, we allowed the Petition and supplemental briefing on 6 March 2023. After careful consideration of the Petition and the supplemental briefs, we again affirm the order of the trial court with a more robust explanation of our reasoning.

I. Factual and Procedural Background

The facts of this case are set out in *Gantt I*, and we will not fully restate them here. The relevant procedural history is as follows: This action commenced with the filing of a complaint in Catawba County under file number 19-CVS-106, with Gantt Construction Co. identified as the plaintiff, seeking a refund, on behalf of Plaintiff and a putative class of all natural persons, corporations, and other entities who at any time from 11 January 2016 through 30 June 2018 paid capacity charges to Defendant pursuant to the schedule of fees and/or Code of Ordinances adopted by Defendant. The complaint in the 19-CVS-106 action ("Original Complaint") was filed on 11 January 2019, within three years of the payment on 14 November 2016, the date Plaintiff alleges his injury occurred and his claim arose. On 18 February 2020, the Original Complaint was voluntarily dismissed without prejudice, and the complaint was refiled on or about 28 April 2020 ("Second Complaint") asserting identical claims.

Gantt Construction Co., a "corporation organized and existing under the laws of the State of Texas with its principal place of business in Texas[,]" was the named plaintiff in both the Original Complaint and the Second Complaint. Gary Gantt's 18 February 2020 affidavit indicated Gantt Construction Co. maintained a physical office in Hickory, North Carolina. Evidently, a Texas corporation named Gantt Construction Co. does exist; however, it is not owned, operated, or otherwise affiliated with the individual, Gary Gantt. Gary Gantt operates his construction

business as a sole proprietorship in North Carolina—filing tax returns for his business under his individual name—not a corporate entity. Deposition testimony also established that Gary Gantt had not filed an assumed business name certificate to transact business in North Carolina as Gantt Construction.

On 11 December 2020, after Gary Gantt's deposition testimony revealed the Texas corporation did not pay the capacity fees in question, a motion was filed seeking to amend the Second Complaint to substitute the name of the plaintiff to "Gary Gantt d/b/a Gantt Construction." The trial court granted the motion by order entered on 12 January 2021, and Plaintiff filed an amended complaint on 13 January 2021 ("Amended Complaint"), marking the first appearance of Gary Gantt d/b/a Gantt Construction as a party to the action and simultaneously removing the Texas corporation (Gantt Construction Co.) as a named plaintiff. Also on 11 December 2020, Gantt Construction Co. purported to file a motion for class certification, which was amended on 29 January 2021, heard on 15 February 2021, and granted in part on 22 February 2021.

Plaintiff, now Gary Gantt d/b/a Gantt Construction, filed a motion for summary judgment on 30 April 2021, which Defendant simultaneously opposed and moved that judgment be entered in its favor as the non-moving party per Rule 56(c). The trial court entered an order granting summary judgment for Defendant on 15 July 2021. On 19 July 2021, Plaintiff filed timely notice of appeal.

II. Analysis

A. Purported Conflict with Precedent

On rehearing, Plaintiff argues *Gantt I* conflicts with and alters precedent and established principles regarding the doctrine of relation back. Specifically, Plaintiff contends the initial opinion is inconsistent with *Burcl v. North Carolina Baptist Hospital, Inc.*, 306 N.C. 214, 293 S.E.2d 85 (1982) and *Estate of Tallman ex rel. Tallman v. City of Gastonia*, 200 N.C. App. 13, 682 S.E.2d 428 (2009). According to Plaintiff, the holdings of *Burcl* and *Tallman* compel this Court to hold that the Amended Complaint relates back to both the Original Complaint and the Second Complaint because each pleading gave Defendant full notice of the transactions and occurrences upon which Plaintiff's claim is based. We disagree.

In *Burcl*, the North Carolina Supreme Court held that where "the original pleading gives notice of the transactions and occurrences upon which the claim is based, a[n amended] pleading that merely changes

the capacity in which the plaintiff sues[,] relates back to the commencement of the action pursuant to Rule 15(c)." 306 N.C. at 228, 293 S.E.2d at 94. In *Tallman*, this Court held the appointment of the plaintiff as administratrix of her deceased husband's estate after the statute of limitations had run, related back to the filing of the summons pursuant to Rules 15(c) and 17(a) because the defendant had full notice of the transactions and occurrences upon which the claim was based. 200 N.C. App. at 22, 682 S.E.2d at 434.

This case is distinguishable from both *Burcl* and *Tallman* because those cases required amendments to alter a party's legal capacity to sue, and neither involved a voluntary dismissal under Rule 41. *See Burcl*, 306 N.C. at 216, 293 S.E.2d at 87; *Tallman*, 200 N.C. App. at 22, 682 S.E.2d at 434. Although notice may be the relevant inquiry under *Burcl* and *Tallman*, those cases only address relation back under Rules 15 and 17. *See Burcl*, 306 N.C. at 224, 293 S.E.2d at 91; *Tallman*, 200 N.C. App. at 23, 682 S.E.2d at 434–35.

Rule 41 does not pertain to amendments but instead concerns new filings of pleadings that have been voluntarily dismissed. N.C. R. Civ. P. 41(a). Plaintiff is incorrect in asserting that notice is also the determinative inquiry for the relation-back analysis under Rule 41. *See Cherokee Ins. Co. By & Through Weed v. R/I, Inc.*, 97 N.C. App. 295, 297, 288 S.E.2d 239, 240 (1990) (rejecting the plaintiff's argument that—although the two complaints named two separate and distinct legal entities, which shared an address and officers, as defendants—the plaintiff was entitled to relation back under Rule 41 because the initial filing and the surrounding circumstances provided actual notice to the correct defendant), *disc. review denied*, 326 N.C. 594, 393 S.E.2d 875 (1990).

Because the complaints in this case involve two separate and distinct legal entities as party plaintiffs—one of which lacked standing to bring the initial suit—rather than one party whose capacity to sue has changed, *Gantt I* neither conflicts with nor disrupts the precedent set forth in *Burcl* and *Tallman*.

B. Relation Back Under Rule 41(a)

Plaintiff's theory of this case requires us to read Rules 41, 15, and 17 of the North Carolina Rules of Civil Procedure in conjunction, and we must agree with Plaintiff's interpretation of each Rule as applied to this case for Plaintiff to prevail on appeal. For the reasons stated below, we conclude Plaintiff cannot clear the first of these procedural hurdles because he is not entitled to relation back under Rule 41.

The record is clear that the Original Complaint was filed with a corporation organized under the laws of Texas as the named plaintiff. The record is similarly clear that the Second Complaint was brought with the same Texas corporation as the named plaintiff in the action. It further appears from the record that Plaintiff's first purported appearance in the action came after the Original Complaint was dismissed, after the Second Complaint had been filed, and after the trial court granted a motion to amend the Second Complaint.

Plaintiff argues that under Rule 41, the Second Complaint, filed on or about 28 April 2020 and amended with leave of court on 13 January 2021, relates back to the Original Complaint, filed on 11 January 2019 and voluntarily dismissed on 18 February 2020, because the Original Complaint: (1) complied with all Rules governing its form and content,[1] (2) was filed prior to the expiration of the statute of limitations for the claims asserted, and (3) gave Defendant full notice of the transactions and occurrences that formed the basis of Plaintiff's claim in this action. Defendant avers Rule 41 may be invoked where a subsequent complaint relates back to an action previously dismissed without prejudice but argues Rule 41 may only be utilized if the second action involves the same parties. We agree with Defendant because where an initial action, as here, involves a plaintiff who lacked standing to bring suit, the initial complaint is a nullity, and thus, there is no valid complaint to which an amended complaint may relate back.

North Carolina Rule of Civil Procedure 41(a) provides, in relevant part:

> (a) Voluntary dismissal; effect thereof.--
>
> (1) By Plaintiff; by Stipulation. . . . If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

N.C. Gen. Stat. § 1A-1, R. 41(a) (2021).

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1. To benefit from the Rule 41 extension, "the initial complaint must conform in all respects to the rules of pleading contained in Rules 8, 9, 10, and 11 of the North Carolina Rules of Civil Procedure." *Murphy v. Hinton*, 242 N.C. App. 95, 100, 773 S.E.2d 355, 359 (2015). Rule 10 provides that a complaint "shall include the names of all the parties[.]" N.C. R. Civ. P. 10(a). Because a separate and distinct legal entity filed the initial pleadings as the named plaintiff in this case, the Original Complaint did not "conform in all respects" to the rules of pleading. *See Murphy*, 242 N.C. App at 100, 773 S.E.2d at 359.

"To benefit from the one[-]year extension of the statute of limitation [in Rule 41], the second action must be substantially the same, involving the same parties, the same cause of action, and the same right . . . ." *Cherokee*, 97 N.C. App. at 297, 388 S.E.2d at 240 (citations and internal quotations omitted); *see Royster v. McNamara*, 218 N.C. App. 520, 531, 723 S.E.2d 122, 130 (2012) (quoting *Holley v. Hercules, Inc.*, 86 N.C. App. 624, 628, 359 S.E.2d 47, 50 (1987) ("Rule 41(a)(1) extends the time within which a party may refile suit after taking a voluntary dismissal when the refiled suit involves the same parties, rights and cause of action as in the first action.")).

"Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter." *Coderre v. Futrell*, 224 N.C. App. 454, 457, 736 S.E.2d 784, 786 (2012) (quoting *Woodring v. Swieter*, 180 N.C. App. 362, 366, 637 S.E.2d 269, 274 (2006)). "A party has standing to initiate a lawsuit if he is a real party in interest." *Green Tree Servicing LLC v. Locklear*, 236 N.C. App. 514, 519, 763 S.E.2d 523, 526 (2014) (internal quotations and citation omitted). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Coderre*, 224 N.C. App. at 457, 736 S.E.2d at 786–87 (internal citations and quotations omitted). "The question of subject matter jurisdiction may be raised at any time," even for the first time on appeal. *See Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986) (internal citation omitted).

Furthermore, where a plaintiff lacked standing to file the initial complaint, that complaint is a "nullity" leaving "no valid complaint to which [an] amended complaint could relate back." *See Coderre*, 224 N.C. App. at 457, 736 S.E.2d at 787 (holding that where a shareholder of a corporation filed suit for breach of a contract to which he was not a party, the lack of standing rendered the initial complaint a nullity such that the amended complaint, adding the corporation as a plaintiff, could not relate back to the initial complaint to prevent the claim from being time-barred); *see also WLAE, LLC v. Edwards*, 257 N.C. App. 251, 260, 809 S.E.2d 176, 182–83 (2017) (holding where the trial court did not have subject matter jurisdiction over the proceeding at the time of filing, the court did not have authority to order substitution of the parties under Rule 17(a), and any attempt to do so would have been a nullity because no valid action existed for the real party in interest to ratify).

Plaintiff asserts this Court "erred in concluding that *Cherokee*, *Royster*, and *Holley* compelled it to deny relation back to Plaintiff's claims to the date the [Original Complaint] was filed." Specifically,

Plaintiff argues this case is distinguishable from those cases because "none of them involved the amendment of the capacity of the plaintiff when the defendant otherwise had full notice of the transactions and occurrences that formed the basis for the claims." We disagree.

Here, there is not a problem with the *capacity* of the correct plaintiff to sue. Rather, a wholly distinct, disinterested, and incorrect entity brought the action as the named plaintiff in both the Original Complaint and the Second Complaint. Although *Cherokee* involves a case where the plaintiff sought to amend the name of the defendant, the plain language of *Cherokee* is not limited to substitutions of a defendant. *See Cherokee*, 97 N.C. App. 295, 388 S.E.2d 239. As Defendant correctly notes, had the *Cherokee* Court intended for the rule to apply only to situations where the plaintiff seeks to change the name of the defendant, it would have specified the defendants must be the same rather than the *parties* must be the same. Indeed, the *Cherokee* opinion notes, "here the allegations and the plaintiff in both complaints are substantially the same" before holding that the plaintiff was not entitled to relation back under Rule 41 because the defendants were two separate and distinct entities. *See id.* at 299, 388 S.E.2d at 241.

Furthermore, this Court has suggested that to benefit from the one-year extension afforded by Rule 41(a), subsequent complaints must be filed by the same plaintiff. *See Revolutionary Concepts, Inc. v. Clements Walker PLLC*, 277 N.C. App. 102, 111, 744 S.E.2d 130, 136 (2013) (holding the trial court correctly concluded that where the original plaintiff RCI-NC merged with RCI-NV after taking a voluntary dismissal pursuant to Rule 41(a), "any claims RCI-NV acquired from RCI-NC by virtue of the merger had to be filed either by post-merger RCI-NV, identifying itself as the surviving entity . . . or by RCI-NC."). As discussed in subsection A, Plaintiff's reliance on the principle of notice is misguided; notice is not the determinative inquiry for relation back under Rule 41. *See Cherokee*, 97 N.C. App. at 297, 388 S.E.2d at 240.

We agree with Plaintiff that at all relevant times, "Gary Gantt d/b/a Gantt Construction" was the real party in interest in this matter.[2] Unfortunately for Plaintiff, "Gary Gantt d/b/a Gantt Construction" is not the entity that timely filed suit in 2019. Therefore, we reject Plaintiff's

2. On 12 January 2021, the trial court granted Plaintiff's motion to amend the Second Complaint allowing a substitution of the real party in interest pursuant to Rules 15 and 17 of the North Carolina Rules of Civil Procedure. Although Defendant did not cross-appeal from that order, we note the issue of a defect in subject matter jurisdiction may be raised at any time. *See Lemmerman*, 318 N.C. at 580, 350 S.E.2d at 85; *see also WLAE*, 257 N.C. App. at 260, 809 S.E.2d at 182–83.

argument that "as a practical matter the 2019 and 2020 actions [ ] involve the same parties" because the original named plaintiff lacked standing. In the instant case, two separate and distinct legal entities filed pleadings as the named plaintiff: "Gantt Construction Company[,] . . . a corporation organized and existing under the laws of the State of Texas with its principal place of business in Texas[,]" filed complaints on 11 January 2019 and on or about 28 April 2020; meanwhile, "Gary Gantt d/b/a Gantt Construction" filed the Amended Complaint with leave of court on 13 January 2021. It is "well established" under the law that to benefit from the one-year extension provided by Rule 41, following the first and only voluntary dismissal, the refiled suit must involve the "same parties[.]" *Renegar v. R.J. Reynolds Tobacco Co.*, 145 N.C. App. 78, 84, 549 S.E.2d 227, 232 (2001) (citing *Cherokee Ins. Co.*, 97 N.C. App. at 297, 388 S.E.2d at 240). "Gary Gantt d/b/a Gantt Construction" is neither a corporation nor incorporated under the laws of Texas and is therefore not the same party as Gantt Construction Co., the named plaintiff that initiated this action.

Here, Gantt Construction Co. was not a real party in interest because it neither owned the property subject to the capacity fees nor paid the capacity fees, and therefore had no standing to bring the initial claim. *See Locklear*, 236 N.C. App. at 519, 763 S.E.2d at 526. Gantt Construction Co. did not have standing to bring the Original Complaint; hence, the trial court lacked subject matter jurisdiction. *See Woodring*, 180 N.C. App. at 366, 637 S.E.2d at 274. The trial court's lack of subject matter jurisdiction rendered the Original Complaint a nullity. *See Coderre*, 224 N.C. App. at 457, 736 S.E.2d at 787. Because the Original Complaint was a nullity, there is no valid action to which Plaintiff's Amended Complaint could relate back under Rule 41(a). *See id.* at 457, 736 S.E.2d at 787. Accordingly, we conclude that Plaintiff cannot avail himself of relation back under Rule 41(a), because the second action does not involve the "same parties" as the first, and the named plaintiff in the first action lacked standing to bring suit against Defendant for assessing allegedly *ultra vires* water capacity fees. *See Cherokee Ins. Co.*, 97 N.C. App. at 297, 388 S.E.2d at 240; *see also Coderre*, 224 N.C. App. at 457, 736 S.E.2d at 787.

Since the Second Complaint was not filed until on or about 28 April 2020, after 14 November 2019—the last date Plaintiff could have timely brought his action—and Plaintiff may not benefit from relation back under Rule 41, Plaintiff's claims are barred by the statute of limitations. *See* N.C. Gen. Stat. § 1-52(15). Therefore, the trial court did not err in granting summary judgment for Defendant.

III. Conclusion

Based on the foregoing, we conclude *Gantt I* is not inconsistent with the holdings of *Burcl* and *Tallman* and was properly decided; Plaintiff is not entitled to relation back under Rule 41, and the party filing the Original Complaint and Second Complaint had no standing to bring the suit. Therefore, we again affirm the trial court's order granting summary judgment to Defendant.

AFFIRMED.

Judges MURPHY and STADING concur.

TIFFANY HOWELL; ET AL., PLAINTIFFS
v.
ROY COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR; ET AL., DEFENDANTS

No. COA22-571

Filed 5 September 2023

1. Appeal and Error—interlocutory order—denying motion to dismiss constitutional challenges—sovereign immunity defense—substantial right

In a case brought by bar owners and operators (plaintiffs) alleging that a series of emergency executive orders issued in response to COVID-19 violated their rights under the state constitution, an interlocutory order denying legislative defendants' motion to dismiss under Civil Procedure Rule 12(b)(6) was immediately appealable, since the motion was at least partially based on a sovereign immunity defense and therefore affected a substantial right. Additionally, the trial court's denial of legislative defendants' Rule 12(b)(2) motion was also immediately appealable to the extent that it relied upon a sovereign immunity defense. Conversely, the denial of legislative defendants' Rule 12(b)(1) motion to dismiss based on sovereign immunity did not affect a substantial right and therefore was not immediately appealable.

2. Constitutional Law—North Carolina—right to earn a living—executive orders—closing bars during global pandemic—sovereign immunity

In an action brought by bar owners and operators (plaintiffs) alleging that a series of emergency executive orders—which, in

response to COVID-19, initially closed bars and then repeatedly extended those closures—violated their rights under the state constitution to "the enjoyment of the fruits of their own labor" and to substantive due process under "the law of the land," the trial court properly denied legislative defendants' Rule 12(b)(6) motion to dismiss, which asserted a sovereign immunity defense. According to a landmark case, sovereign immunity cannot be used as a defense against alleged violations of constitutional rights guaranteed under the Declaration of Rights. Contrary to legislative defendants' argument, plaintiffs were not required to seek injunctive relief before stating a claim for monetary damages on grounds that the former remedy constituted the "least intrusive remedy available"; rather, the obligation to seek the "least intrusive remedy available" refers to the judiciary's duty to formulate remedies for constitutional violations in a way that minimizes its encroachment upon other branches of government. Further, legislative defendants could not rely on a sovereign immunity defense because plaintiffs stated colorable constitutional claims where they alleged that a blanket prohibition against conducting their bar businesses violated their right to earn a living—a right protected under both the "fruits of labor" clause and the "law of the land" clause.

Judge ARROWOOD dissenting.

Appeal by Defendant from an Order entered 16 February 2022 by Judge Joshua W. Willey, Jr., in Carteret County Superior Court. Heard in the Court of Appeals 10 January 2023.

Kitchen Law, PLLC, by S. C. Kitchen, for Plaintiffs-Appellees.

Attorney General Joshua H. Stein, by Special Deputy Attorneys General Matthew Tulchin and Michael T. Wood, for Roy A. Cooper, III, in his official capacity as Governor, and the State of North Carolina, Defendants-Appellants.

No brief filed for Tim Moore, in his official capacity as Speaker of the House of Representatives, and Phil Berger, in his official capacity as President Pro Tempore of the Senate, Defendants-Appellants.

WOOD, Judge.

Governor Roy Cooper (the "Governor"), the State of North Carolina (the "State"), and Speaker of the House Tim Moore and President Pro Tempore of the Senate Phil Berger ("Defendants Moore and Berger"), collectively referred to as "Defendants," appeal the trial court's denial of a motion to dismiss a complaint brought by individuals and incorporated entities owning or operating bars ("Plaintiffs"). Plaintiffs' complaint alleged causes of action under N.C. Const. art. 1, §§ 1, 19, regarding North Carolinians' right to "the enjoyment of the fruits of their own labor" and to substantive due process under "the law of the land." We hold sovereign immunity does not bar Plaintiffs' claims and Plaintiffs state colorable constitutional claims.

I. Factual and Procedural History

After the Governor declared a state of emergency in March 2020 in response to COVID-19 and issued a series of executive orders initially closing bars and repeatedly extending the closure, Plaintiffs filed their original complaint on 22 December 2020. In it, Plaintiffs alleged the executive orders made their businesses "unprofitable to operate" and caused "financial damages due to the closing of their respective businesses, or the severe restrictions placed on their respective businesses." Plaintiffs put forward five causes of action, alleging the following violations of their constitutional rights: (1) their right to earn a living ("the enjoyment of the fruits of their own labor") under N.C. Const. art. I, § 1 (the "fruits of labor clause"); (2) a purported as-applied challenge to N.C. Gen. Stat. § 166A-19.31(b)(2) (2020); (3) their substantive due process rights under N.C. Const. art. I, § 19 (the "law of the land clause"); (4) their right to equal protection of the laws under N.C. Const. art. I, § 19; and (5) a facial challenge to N.C. Gen. Stat. § 166A-19.30(c) (2020). Plaintiffs claimed damages "in excess of $25,000" and requested a permanent injunction preventing any further impairment on Plaintiffs' businesses.

On 29 January 2021, the Governor and the State filed a motion to dismiss Plaintiffs' complaint pursuant to N.C. R. Civ. P. 12(b)(1), 12(b)(2), and 12(b)(6) and noted any facial challenges to statutes would need to be heard by a three-judge panel of the superior court pursuant to N.C. Gen. Stat. § 1-267.1(a1) (2022). Accordingly, on 15 March 2021, the trial court transferred Plaintiffs' fifth cause of action, a facial challenge to the operative statute, to a three-judge panel.

On 11 May 2021, Plaintiffs filed an amended complaint adding Defendants Moore and Berger. On 12 July 2021, the Governor and the State filed a motion to dismiss Plaintiffs' amended complaint pursuant to N.C. R. Civ. P. 12(b)(1), 12(b)(2), and 12(b)(6). On 19 July 2021,

Defendants Moore and Berger answered Plaintiffs' amended complaint. On 28 January 2022, the trial court held a hearing on Defendants' motion to dismiss.

On 16 February 2022, the trial court entered an order denying Defendants' motion to dismiss as to Plaintiffs' first and third causes of action pursuant to the fruits of labor clause and law of the land clause of our Constitution. The trial court transferred the second cause of action, a constitutional challenge to the operative statute, to a three-judge panel of the superior court as it had done with Plaintiffs' fifth cause of action. Finally, the trial court dismissed Plaintiff's fourth cause of action relating to equal protection and determined Plaintiffs' request for permanent injunctive relief was moot due to the lifting of restrictions on businesses by the time the matter had been heard.

II. Jurisdiction

[1] N.C. Gen. Stat. § 1-277 allows an appeal from a determination of a superior court affecting a party's substantial rights. N.C. Gen. Stat. § 1-277 (2022).

> According to well-established North Carolina law, governmental immunity is an immunity from suit rather than a mere defense to liability. For that reason, this Court has held that denial of dispositive motions such as motions to dismiss that are grounded on governmental immunity affect a substantial right and are immediately appealable.

Doe v. Charlotte-Mecklenburg Bd. of Educ., 222 N.C. App. 359, 363, 731 S.E.2d 245, 248 (2012) (cleaned up). Specifically, the denial of a motion to "dismiss based on the defense of sovereign immunity pursuant to Rule 12(b)(6) . . . affects a substantial right and is immediately appealable under" N.C. Gen. Stat. § 1-277. *Murray v. Univ. of N.C. at Chapel Hill*, 246 N.C. App. 86, 92, 782 S.E.2d 531, 535 (2016). A party actually must rely on sovereign immunity in its motion to dismiss, and it may do so in its written motion or orally at the hearing on the motion to dismiss. *Id.*, 246 N.C. App. at 93, 782 S.E.2d at 536 ("[S]ince neither defendant's written motion nor its oral argument at the hearing relied on Rule 12(b)(6) in connection with the sovereign immunity defense, the case law authorizing interlocutory appeals for a denial of a Rule 12(b)(6) motion based on sovereign immunity does not apply").

Here, Defendants did not mention sovereign immunity in their original motion to dismiss or in their motion to dismiss Plaintiffs' amended complaint. However, Defendants' counsel raised sovereign immunity in the hearing on the motion to dismiss:

> [T]he plaintiffs' amended complaint fails to state a claim and must be dismissed for a couple of reasons . . . . The second reason . . . is that the plaintiffs are seeking damages in this case, and we would contend that the damages claims are barred by sovereign immunity.

Defendants' counsel's reference here indicates Defendants' motion to dismiss pursuant to Rule 12(b)(6) is based, at least partially, on a sovereign immunity defense. Accordingly, at a minimum, the trial court's denial of Defendants' Rule 12(b)(6) motion based on sovereign immunity affected Defendants' substantial rights, and therefore, their interlocutory appeal is properly before us. *Murray*, 246 N.C. App. at 92, 782 S.E.2d at 535.

We note that a "denial of a Rule 12(b)(1) motion based on sovereign immunity does not affect a substantial right [and] is therefore not immediately appealable under" N.C. Gen. Stat. § 1-277. *Can Am S., LLC v. State*, 234 N.C. App. 119, 122, 759 S.E.2d 304, 307 (2014). Therefore, the trial court's denial of Defendants' motion to dismiss pursuant to Rule 12(b)(1) is not properly before us as an interlocutory appeal. As for Defendants' motion to dismiss pursuant to Rule 12(b)(2), "to the extent [D]efendant[s] relied on Rule 12(b)([2]) in moving to dismiss on sovereign immunity grounds," that component of their motion to dismiss would support an immediate appeal. *Murray*, 246 N.C. App. at 92–93, 782 S.E.2d at 536.

Accordingly, Defendants' interlocutory appeal is proper pursuant to the trial court's denial of their Rule 12(b)(6) motion to dismiss.

III. Analysis

Defendants argue sovereign immunity bars Plaintiffs' claims, and Plaintiffs fail to state colorable constitutional claims. We disagree.

A. Sovereign Immunity

[2] We review "a trial court's decision to grant or deny a motion to dismiss based upon the doctrine of sovereign immunity using a de novo standard of review. Questions of law regarding the applicability of sovereign or governmental immunity are reviewed de novo." *Lannan v. Bd. of Governors of Univ. of N. Carolina*, 285 N.C. App. 574, 587, 879 S.E.2d 290, 301 (2022) (cleaned up).

We begin with a review of sovereign immunity:

> As a general rule, the doctrine of governmental, or sovereign immunity bars actions against, *inter alia*, the state,

> its counties, and its public officials sued in their official capacity. The doctrine applies when the entity is being sued for the performance of a governmental function. But it does not apply when the entity is performing a ministerial or proprietary function.

Herring ex rel. Marshall v. Winston-Salem/Forsyth Cnty. Bd. of Educ., 137 N.C. App. 680, 683, 529 S.E.2d 458, 461 (2000) (citations omitted). Sovereign immunity, at its core, immunizes the state when it is "exercising its judicial, discretionary, or legislative authority . . . or is discharging a duty, imposed solely for the benefit of the public," from "liability for the negligence of its officers . . . unless some statute" provides otherwise. *Steelman v. City of New Bern*, 279 N.C. 589, 593, 184 S.E.2d 239, 241–42 (1971).

The doctrine of sovereign immunity is

> firmly established in the law of our State today and has been recognized by the General Assembly as the public policy of the State. The doctrine of sovereign immunity has been modified, but never abolished. It has been said that the present day doctrine seems to rest on a respect for the positions of two coequal branches of government—the legislature and the judiciary. Thus, courts have deferred to the legislature the determination of those instances in which the sovereign waives its traditional immunity.

Corum v. Univ. of N. Carolina Through Bd. of Governors, 330 N.C. 761, 785, 413 S.E.2d 276, 291 (1992).

Still, North Carolina courts have a sacred duty to safeguard the constitutional rights of her citizens. "[I]t is the judiciary's responsibility to guard and protect those rights" enumerated in the Declaration of Rights. *Id.* at 785, 413 S.E.2d at 291. "The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights." *Id.* at 785-86, 413 S.E.2d at 291. And because "rights protected under the Declaration of Rights from violation by the State are constitutional rights," whereas the doctrine of sovereign immunity "is a common law theory or defense established by" our Supreme Court, "when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." *Id.* at 786, 413 S.E.2d at 292.

In *Corum*, a landmark sovereign immunity case, our Supreme Court stated:

> When called upon to exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right, . . . the judiciary must recognize two critical limitations. First, it must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power. Second, in exercising that power, the judiciary must minimize the encroachment upon other branches of government -- in appearance and in fact -- *by seeking the least intrusive remedy available and necessary to right the wrong.*

330 N.C. at 784, 413 S.E.2d at 291 (emphasis added). Defendants argue sovereign immunity bars Plaintiffs' claims because in seeking monetary damages, Plaintiffs did not seek the least intrusive remedy. Specifically, Defendants argue the mandate to "seek the least intrusive remedy available" applies at the pleading stage, and therefore requires a plaintiff to seek injunctive relief before the party may state a claim for damages. The *Corum* court specifically referred to the judiciary's responsibilities in formulating a remedy, however, not a party's obligations at the pleading stage: "It will be a matter for the trial judge to craft the necessary relief." *Id.* at 784, 413 S.E.2d at 290. Accordingly, *Corum* requires the judiciary to shape the remedy, not a plaintiff to seek injunctive relief as a prerequisite to reaching trial. When a constitutional violation occurs, and no statute provides redress for the violation, the constitutional provision "is self-executing, and the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance." *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 618, 89 S.E.2d 290, 296 (1955). We further conclude that any failure by Plaintiffs to seek injunctive relief prior to damages does not stand as a bar at the pleading stage to their claim for damages.

B. Stating a Constitutional Claim

"When reviewing a motion to dismiss, an appellate court considers whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Deminski on behalf of C.E.D. v. State Bd. of Educ.*, 377 N.C. 406, 412, 858 S.E.2d 788, 793–94 (2021).

Also relevant to whether Plaintiffs can survive Defendants' immunity defense is whether Plaintiffs have stated constitutional claims. The doctrine of sovereign immunity shall not operate to deprive North Carolinians of an opportunity to redress alleged constitutional

violations. *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 340, 678 S.E.2d 351, 356 (2009). Our Supreme Court has "carved out an express exception to sovereign immunity for constitutional injuries." *Town of Apex v. Rubin*, 277 N.C. App. 328, 352, 858 S.E.2d 387, 403 (2021). Specifically, "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Corum*, 330 N.C. at 782, 413 S.E.2d at 289. *Corum* specifically held sovereign immunity will not bar North Carolinians from seeking to remedy alleged violations guaranteed by the Declaration of Rights of our Constitution. *Id.* at 783, 413 S.E.2d at 290; *see also Bunch v. Britton*, 253 N.C. App. 659, 667, 802 S.E.2d 462, 469 (2017).

The very first Article of our Constitution reads: "We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, *the enjoyment of the fruits of their own labor, and the pursuit of happiness*." N.C. Const. art. I, § 1 (emphasis added). Later, our Declaration of Rights states:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

N.C. Const. art. I, § 19.

A plaintiff's complaint must sufficiently allege: (1) a state actor violated an individual's constitutional rights, (2) the claim is a colorable constitutional claim ("the claim must present facts sufficient to support an alleged violation of a right protected by the State Constitution"), and (3) there is no adequate state remedy apart from a direct claim under the Constitution. *Deminski*, 377 N.C. at 413–14, 858 S.E.2d at 793–94.

Here, first, we must determine whether the Complaint sufficiently alleges violations of Plaintiffs' constitutional rights. Regarding Plaintiffs' fruits of labor claim, their complaint states:

> 42. The Plaintiffs are each owners and operators of bars located in the State of North Carolina.
>
> 43. By his issuance of various Executive Orders . . . Defendant Cooper has ordered that the facilities of the

> Plaintiffs be closed, or so severely restricted as to make the facilities of the Plaintiffs unprofitable to operate. . . .
>
> 45. [The] Executive Orders . . . deprive the Plaintiffs of their inalienable right to earn a living as guaranteed by Art. I, sec. 1 and 19, of the North Carolina Constitution. . . .
>
> 48. [The] Executive Orders . . . are or were unconstitutional as applied to owners and operators of bars as neither the State of North Carolina nor the Governor of the State possess the authority to deprive the Plaintiffs of their right to earn a living.
>
> 49. Due to the unconstitutional executive orders, the Plaintiffs have been damaged in a sum in excess of $25,000.

Regarding Plaintiffs' substantive due process claim, their complaint states:

> 57. Plaintiffs have the fundamental right to earn a living.
>
> 58. Article I, sec. 19 of the North Carolina Constitution guaranties that the State does not issue orders that are unreasonable, arbitrary or capricious, and the law be substantially related to the valid object sought to be obtained. . . .
>
> 60. There is no rational basis for allowing restaurants, private clubs, breweries, wineries, and distilleries to reopen indoors while requiring the Plaintiffs' businesses to remain closed or only operating outdoors. Nor is there a rational basis for limiting alcohol sales between the hours of 9:00 pm and 7:00 am.
>
> 61. [The] Executive Orders . . . thus violate the substantive due process rights of the Plaintiffs and are invalid.

We conclude the Complaint sufficiently alleges state violations of Plaintiffs' constitutional rights because it coherently pleaded the Governor's orders violated their constitutional right to earn a living. *Deminski*, 377 N.C. at 413, 858 S.E.2d at 793.

Second, we must determine whether the Complaint sufficiently alleges a colorable constitutional claim pursuant to theories under the fruits of labor and law of the land clauses of our Constitution. We begin with determining whether Plaintiffs state a claim under the fruits of labor clause. We have held the "provision creates a right to conduct a lawful business or to earn a livelihood that is 'fundamental' for purposes of

state constitutional analysis." *Treants Enters., Inc. v. Onslow County*, 83 N.C. App. 345, 354, 350 S.E.2d 365, 371 (1986). "[T]he power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in it. When this field has been reached, the police power is severely curtailed." *State v. Harris*, 216 N.C. 746, 759, 6 S.E.2d 854, 863 (1940) (citations omitted). The *Harris* court held licensing requirements applicable to the dry cleaning industry were unconstitutional under the fruits of labor clause (among other constitutional provisions) for their "invasion of personal liberty and the freedom to choose and pursue one of the ordinary harmless callings of life—a right which we conceive to be guaranteed by the Constitution." *Id.* at 751, 753, 765, 6 S.E.2d at 858–59, 866.

The thrust of the fruits of labor clause is that the state "may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." *Cheek v. Charlotte*, 273 N.C. 293, 296, 160 S.E.2d 18, 21 (1968) (licensing requirements unconstitutionally targeted massage parlors). Although this State's courts often have analyzed the fruits of labor clause in the context of legislative licensing requirements, that context is not its only application. *See King v. Town of Chapel Hill*, 367 N.C. 400, 408–09, 758 S.E.2d 364, 371 (2014) (town council's fee schedule for vehicle towing services "implicates the fundamental right to earn a livelihood" under the fruits of labor clause) (quotation marks omitted); *see also Tully v. City of Wilmington*, 370 N.C. 527, 535–36, 810 S.E.2d 208, 215 (2018) ("Article I, Section 1 also applies when a governmental entity acts in an arbitrary and capricious manner toward one of its employees").

Here, Plaintiffs have a fundamental right to earn a living from the operation of their respective bar businesses. The constitutional right to produce a living from the income of one's business is a protected right under the fruits of labor clause. Where, as here, the complaint alleges that the blanket prohibition—rather than regulation—of an entire economic sector violates one's right to earn a living, that complaint states a colorable constitutional claim. *Deminski*, 377 N.C. at 413, 858 S.E.2d at 793.

Next, we turn to whether Plaintiffs state a claim under the law of the land clause. Our Supreme Court has held that the "law of the land" clause is North Carolina's version of the federal substantive due process clause. *McNeill v. Harnett Cnty.*, 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990); *see also Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004). Therefore, that clause protects those "fundamental rights

and liberties which are, objectively, deeply rooted in [this State's] history and tradition and implicit in the concept of ordered liberty." *State v. Dobbins*, 277 N.C. 484, 497, 178 S.E.2d 449, 457, (1971); *Matter of Bethea*, 255 N.C. App. 749, 754, 806 S.E.2d 677, 680–81 (2017). Our Supreme Court has described the right to enjoy the fruits of one's own labors as the inalienable right to earn a living as long as the business is not "within the category of social and economic ills." *State v. Harris*, 216 N.C. 746, 759, 6 S.E.2d at 854, 863 (1940). "The right to conduct a lawful business or to earn a living is regarded as fundamental." *Roller v. Allen*, 245 N.C. 516, 518–19, 96 S.E.2d 851, 854 (1957).

Here, Plaintiffs have a fundamental right to earn a living from the operation of their respective bar businesses. Accordingly, we conclude Plaintiffs' allegations that the executive orders violated their right to earn a living sufficiently pleaded a constitutional claim under the law of the land clause. *Deminski*, 377 N.C. at 413, 858 S.E.2d at 793–94.

Finally, Plaintiffs pleaded they do not have an adequate state remedy: "The Emergency Management Act under which the Defendants are operating does not provide for a plain, speedy, or adequate remedy at law. The [Plaintiffs] therefore do not have an adequate state remedy." We agree there is no other adequate state remedy now that any claim for injunction is moot as the executive orders are no longer in effect. Accordingly, we conclude Plaintiffs adequately pleaded lack of an adequate state remedy. *Deminski*, 377 N.C. at 413, 858 S.E.2d at 793–94.

In conclusion, we hold the trial court did not err in denying the Motion to Dismiss as to Plaintiffs' first and third causes of action for failure to state a claim upon which relief can be granted.

We do not address the validity of the Governor's actions under the Emergency Management Act, as the constitutionality of those statutes has yet to be determined. Two of Plaintiff's causes of action challenge the constitutionality of the statutes under which the Governor purported to act. The trial court transferred Plaintiffs' constitutional challenges to N.C. Gen. Stat. § 166A-19.30(c) and N.C. Gen. Stat. § 166A-19.31(b)(2) to a three-judge panel as required. Defendants did not appeal the trial court's transfer of Plaintiffs' second and fifth causes of action, thus, those matters remain pending before the three-judge panel. Therefore, we do not reach a determination of the validity of the Governor's actions under those statutes.

IV. Conclusion

We are tasked with determining whether sovereign immunity bars Plaintiff's claims at the pleading stage and whether Plaintiffs allege

colorable constitutional claims. We do not address the validity of the statutes being contested nor decide the merits of Plaintiffs' claims as those issues are not before us. To that end, we hold any alleged failure on the part of Plaintiffs to seek injunctive relief prior to damages does not bar their claims at the pleading stage under the theory of sovereign immunity. We further hold Plaintiffs have stated colorable constitutional claims where they allege a blanket prohibition against conducting their bar businesses violated both their right to earn a living and their substantive due process rights under N.C. Const. art. 1, §§ 1, 19. We affirm the trial court's denial of Defendants' Motion to Dismiss.

AFFIRMED.

Judge GORE concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent from the majority's holding that the trial court properly denied defendants' motion to dismiss. Accordingly, I would hold the trial court erred in denying defendants' motion to dismiss under Rule 12(b)(6) because plaintiffs failed to allege a colorable constitutional claim.

In order "to prevent the spread of COVID-19[,]" on 10 March 2020, Governor Roy Cooper ("Governor Cooper") declared a State of Emergency.[1] Following the State of Emergency, Governor Cooper entered several additional executive orders, pursuant to his authority under N.C. Gen. Stat. § 166A-19.30.

Under N.C. Gen. Stat. § 166A-19.30, during a "declared state of emergency, the Governor" has the authority:

> (1) To utilize all available State resources as reasonably necessary to cope with an emergency, including the transfer and direction of personnel or functions of State agencies or units thereof for the purpose of performing or facilitating emergency services.

1. Office of Governor Roy Cooper, Exec. Order No. 116, (Mar. 16, 2020), https://files.nc.gov/governor/documents/files/EO116-SOE-COVID-19.pdf.

(2) To take such action and give such directions to State and local law enforcement officers and agencies as may be reasonable and necessary for the purpose of securing compliance with the provisions of this Article and with the orders, rules, and regulations made pursuant thereto.

(3) To take steps to assure that measures, including the installation of public utilities, are taken when necessary to qualify for temporary housing assistance from the federal government when that assistance is required to protect the public health, welfare, and safety.

. . . .

(b) . . .

(2) To establish a system of economic controls over all resources, materials, and services to include food, clothing, shelter, fuel, rents, and wages, including the administration and enforcement of any rationing, price freezing, or similar federal order or regulation.

(3) To regulate and control the flow of vehicular and pedestrian traffic, the congregation of persons in public places or buildings, lights and noises of all kinds, and the maintenance, extension, and operation of public utility and transportation services and facilities.

. . . .

(5) To perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population.

N.C. Gen. Stat. § 166A-19.30(a)–(b) (2022). After executive orders affecting their business operations were put into place to slow the spread of COVID-19, plaintiffs filed a complaint, contending the orders violated their constitutional rights under Article I, Sections 1 and 19 of our Constitution.

Our Constitution states: "We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, *the enjoyment of the fruits of their own labo*r, and the pursuit of happiness." N.C. Const. art. I, § 1 (emphasis added). Furthermore, Article I, Section 19 holds that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19.

These rights, though highly important and fiercely protected, are not impenetrable. *See Roller v. Allen*, 245 N.C. 516, 518, 96 S.E.2d 851, 854 (1957); *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 64, 366 S.E.2d 697, 699 (1988) (citation omitted) (explaining Article I, Section 19 "serves to limit the state's police power *to actions which have a real or substantial relation to the public health, morals, order, safety or general welfare*") (emphasis added).

It has long been understood that "[t]he right to work and to earn a livelihood is a property right that cannot be taken away *except under the police power of the State in the paramount public interest for reasons of health, safety, morals, or public welfare*." *Roller*, 245 N.C. at 518, 96 S.E.2d at 854 (emphasis added) (citation omitted). As the majority recognizes, this right cannot be curtailed "under the guise of protecting the public interest[;]" however, the government can interfere with business operations as long as it is not done so "arbitrarily" and does not "impose unusual and unnecessary restrictions upon lawful occupations." *Cheek v. City of Charlotte*, 273 N.C. 293, 296, 160 S.E.2d 18, 21 (1968) (citation and internal quotation marks omitted).

"These constitutional protections have been consistently interpreted to permit the [S]tate, through the exercise of its police power, to regulate economic enterprises provided the regulation is *rationally related to a proper governmental purpose*. This is the test used in determining the validity of state regulation of business *under both* Article I, Section 1, and Article I, Section 19." *Poor Richard's, Inc.*, 322 N.C. at 64, 366 S.E.2d at 699 (emphasis added) (citation omitted); *Shipman v. N.C. Priv. Protective Servs. Bd.*, 82 N.C. App. 441, 443, 346 S.E.2d 295, 296 (citations omitted) ("For a statute to be within the limits set by the federal due process clause and the North Carolina 'law of the land' provision, all that is required is that the statute serve a legitimate purpose of state government and be rationally related to the achievement of that purpose."), *appeal dismissed and disc. review denied*, 318 N.C. 509, 349 S.E.2d 866 (mem.) (1986). This analysis is "twofold" and requires us

to consider both: (1) whether the governmental action is for "a proper governmental purpose"; and (2) whether "the means chosen to affect that purpose [are] reasonable[.]" *Poor Richard's, Inc.*, 322 N.C. at 64, 366 S.E.2d at 699.

In determining the legitimacy of the government interest for the rational basis test, "it is not necessary for courts to determine the actual goal or purpose of the government action at issue; instead, any conceivable legitimate purpose is sufficient." *Standley v. Town of Woodfin*, 362 N.C. 328, 332, 661 S.E.2d 728, 731 (2008) (brackets, citation, and internal quotation marks omitted). Furthermore, "in instances in which it is appropriate to apply the rational basis standard, the governmental act is entitled to a presumption of validity." *White v. Pate*, 308 N.C. 759, 767, 304 S.E.2d 199, 204 (1983) (citation omitted).

Here, the majority states that they did not recognize Governor Cooper's statutory authority under the State of Emergency statute because "the constitutionality of those statutes has yet to be determined[,]" given the plaintiffs challenges to those statutes "remain pending before the three-judge panel." Yet, "this Court must assume that acts of the General Assembly are constitutional and within its legislative power until and unless the contrary clearly appears." *State v. Anderson*, 275 N.C. 168, 171, 166 S.E.2d 49, 50 (1969) (citations omitted); *see also Holmes v. Moore*, 384 N.C. 426, 435, 886 S.E.2d 120, 129 (2023) (citation omitted) ("The presumption of constitutionality is a critical safeguard that preserves the delicate balance between this Court's role as the interpreter of our Constitution and the legislature's role as the voice through which the people exercise their ultimate power.").

By ignoring the presumption of constitutionality, the majority sidesteps the rational basis analysis, which is necessary to determine whether the actions complained of were appropriate and therefore whether the plaintiffs' claims were colorable. *See Al-Hourani v. Ashley*, 126 N.C. App. 519, 521, 485 S.E.2d 887, 889 (1997) (citing *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970) ("A complaint is not sufficient to withstand a motion to dismiss if an insurmountable bar to recovery appears on the face of the complaint.")); *see also Sutton*, 277 N.C. at 102–03, 176 S.E.2d 161, 166 (citation and internal quotation marks omitted) ("A (complaint) may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim[.]").

Failing the rational basis test is undoubtedly an insurmountable bar. Because there is no question that issuing the executive orders was

rationally related to a legitimate government purpose—here, combatting the spread of the COVID-19 virus and protecting the public's health and safety—Governor Cooper's action under the statute clearly satisfies the rational basis standard. Certainly, orders to combat a virus and protect the health and safety of the public during a pandemic cannot be considered "arbitrary."

I would hold Governor Cooper had the statutory authority to issue the executive orders in question and his actions during the pandemic easily meet the rational basis standard. Therefore, the complaint did not state a colorable claim. However, it is also of the utmost importance to consider the practical implications of the majority's holding. The COVID-19 pandemic was an unprecedented event that caused the death of over 29,000 North Carolina citizens.[2] It was a novel occurrence in modern times and put our national and state leaders in the position to have to make tough, effective choices to swiftly protect the health and safety of their constituents. Those actions are entitled to the presumption of validity which standard both the majority and the trial court failed to afford them, plaintiff's complaint, fails to clear this bar.

If and when we face such a crisis again, the Governor must be able to make rationally related choices to stem the effects of that emergency quickly, without concern that those hard choices will subject them or the State to protracted litigation. Curtailing the ability of our Governor to issue executive orders during a state of emergency sets a deadly precedent that will prove to have grave consequences in the future. While clearly arbitrary and capricious regulations that have no rational basis in fact would be actionable, the actions complained of here do not fall within that gambit; they are permitted under N.C. Gen. Stat. § 166A-19.30 to protect the public health by controlling the congregation of people in areas where such actions were known to spread the COVID-19 virus. Because they are rationally related to this purpose, they are entitled to the presumption of validity which the allegation on the face of this complaint cannot overcome.

For the foregoing reasons, I would reverse the trial court's order denying defendant's motion to dismiss. Therefore, I dissent.

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2. The North Carolina Department of Health and Human Services states that of the 3,501,404 cases of COVID since March 2020, 29,059 North Carolina citizens died due to the virus as of May 2023. https://covid19.ncdhhs.gov/dashboard/cases-and-deaths#COVID-19CasesandDeaths-7876.

IN RE C.J.B.

[290 N.C. App. 303 (2023)]

IN THE MATTER OF C.J.B.

No. COA22-853

Filed 5 September 2023

Termination of Parental Rights—grounds for termination—willful abandonment—lack of contact with child—restrictive parole conditions

The trial court erred by terminating respondent-father's parental rights to his daughter based on willful abandonment where the court's findings were insufficient to establish willfulness. During the determinative six-month period immediately preceding the filing of the petition by the child's mother, respondent was subject to restrictive parole conditions in another state that prohibited him from engaging in any form of communication with his daughter, but his actions during that time period—including submitting several applications to modify the conditions of his parole, fulfilling certain precursor conditions in furtherance of those requests, and remaining current on his child support obligations—were not consistent with a willful determination to forego all parental duties or to relinquish all parental claims to his child.

Appeal by Respondent-Father from order entered 27 July 2022 by Judge Marcus A. Shields in Guilford County District Court. Heard in the Court of Appeals 23 May 2023.

Garron T. Michael for Respondent-Appellant.

Spidell Family Law, by Megan E. Spidell, for Petitioner-Appellee.

CARPENTER, Judge.

Respondent-Father appeals from the trial court's 27 July 2022 Order Terminating Parental Rights ("Order"), which terminated his parental rights to the minor child, C.J.B. ("Crystal").[1] After careful review, we conclude the trial court erred by determining Respondent-Father willfully abandoned Crystal while Respondent-Father was subject to restrictive Indiana parole conditions, which barred him from any contact with

1. A pseudonym is used to protect the identity of the minor child and for ease of reading.

Crystal. Accordingly, we reverse the Order and remand the matter to the trial court.

I. Factual and Procedural Background

In 2010, Crystal was born to Petitioner and Respondent-Father during their marriage, and she was twelve years old at the time of the termination hearing. The couple separated in December of 2010, and by May of 2011, Petitioner and Respondent-Father executed a Consent Order by which the parties agreed to share joint custody of Crystal, with Petitioner having primary physical custody. Under the terms of this Consent Order, Respondent-Father was required to pay child support of $400 each month. Between May of 2011 and March of 2014, Respondent-Father exercised weekend visitations with Crystal and remained current on his monthly child-support obligation.

In May of 2014, Respondent-Father was convicted of two felonies related to sexual misconduct with a fourteen-year-old minor in Indiana. As a result of his conviction, Respondent-Father was incarcerated from 1 May 2014 until 3 July 2017. During his incarceration, Petitioner answered Respondent-Father's calls on one occasion, and she did not allow him to speak to Crystal. Upon Respondent-Father's release from prison, Indiana authorities placed him on parole through spring 2024, subject to restrictive conditions based on the nature of his conviction. Among the restrictions was an absolute bar to any form of communication with any minor child, including his biological child. Specifically, Respondent-Father's parole conditions provided as follows:

> [Y]ou shall not touch, photograph (still or moving), correspond with (via letter, email, text message or internet based communication or otherwise), and/or engage in any 'small talk' or unnecessary conversation with any child, including your biological or adopted children, either directly or via third-party, or an attempt to do any of the preceding without written approval in advance by your parole agent in consultation with your treatment provider. You must never be in a vehicle or any residence with any child, including your biological or adopted children, even if other adult(s) are present, without written approval in advance by your parole agent in consultation with your treatment provider. You must report any inadvertent contact with children, including your biological or adopted children, to your parole agent within 24 hours of contact. *If you have biological or adopted children, you may not*

> *have contact with them due to the nature and circumstances of your criminal convictions without advance written approval from the Indiana Parole Board in consultation with your parole agent and treatment provider*. 'Contact' includes, but not limited to, possessing photographs of children, writing and internet-based communicating, done either directly or through third parties. (emphasis added).

Following his release on 3 July 2017, Respondent-Father completed and passed the Abel Assessment and a lie-detector test, both of which were required by Indiana authorities before any modifications to his parole conditions would be considered. Respondent-Father first sought to modify his parole conditions in December of 2017, less than six months after his release, and his request was denied. Respondent-Father next petitioned for modifications to his parole conditions in 2019 and again shortly after Petitioner filed the termination petition in 2021. All three of Respondent-Father's requests—two before the filing of the petition and one after—were denied by the State of Indiana Parole Board.

Petitioner filed the termination petition on 2 June 2021, alleging Respondent-Father willfully abandoned Crystal pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) (2021). Respondent-Father filed an answer opposing the allegations on 20 August 2021. The termination hearing commenced on 1 July 2022. Respondent-Father appeared at the hearing despite being incarcerated in Guilford County on a charge of First-Degree Sexual Offense. The only witnesses during adjudication were Petitioner and Respondent-Father.

In her testimony, Petitioner acknowledged Respondent-Father was current on his child-support obligation and had no past-due arrearages. Counsel for Respondent-Father presented no evidence on adjudication but moved to dismiss at the close of Petitioner's evidence and at the close of all evidence, both of which were denied. Thereafter, Petitioner moved to recall Respondent-Father to testify further regarding the specific language of his parole restrictions and conditions. Without objection, the trial court briefly heard additional testimony from Respondent-Father.

At the close of evidence on adjudication, the court heard argument from counsel for Petitioner and counsel for Respondent-Father. Although the trial court afforded the Guardian ad Litem ("GAL") an opportunity to be heard, she declined, explaining: "Your Honor, in full candor to the Court, I'm being torn between what I believe the law is and what my wishes are on behalf of [Crystal], and as a result, I'm going to stay silent at this stage."

Having heard from all parties on adjudication, the trial court ruled Petitioner had met her burden by clear, cogent, and convincing evidence as to the asserted termination ground, N.C. Gen. Stat. § 7B-1111(a)(7). The trial court's findings as to willful abandonment provided, in relevant part:

> 10(d). Respondent[-Father] had avenues pursuant to his parole conditions that would allow him to seek approval for contact with [Crystal]. However, Respondent[-Father] only took affirmative actions to seek approval to allow contact with [Crystal] sometime in 2017, 2019 and after the filing [of] the Petition to Terminate Parental Rights.
>
> 10(e). Respondent[-Father] demonstrated familiarity with said avenues through his attempts to seek approval in 2017 and again in 2019. Respondent[-Father] failed to make any attempts to seek approval from the Indiana Parole Board during the relevant period of time.
>
> 10(f). Respondent[-Father] failed to make reasonable efforts, even annually, to request approval from the Parole Board to allow contact with the juvenile since his release from prison in July 2017.
>
> 10(g). During the relevant period of time, Respondent [-Father] failed to send any cards, letters, gifts or tokens of affection, nor did he send any birthday or Christmas gifts or otherwise acknowledge any of these events for [Crystal].

The trial court proceeded to the dispositional stage where Petitioner and her husband served as the only witnesses on the best interests of Crystal. The GAL submitted a report on disposition and provided the trial court with a summary of her report for the record. Counsel for Respondent-Father presented no evidence on disposition but argued against termination. After considering the dispositional evidence, the trial court determined termination of Respondent-Father's parental rights was in Crystal's best interest. The trial court's oral findings were reduced to writing, and the Order was formally filed on 27 July 2022. On 1 August 2022, Respondent-Father filed timely, written notice of appeal.

II. Jurisdiction

The Order terminating Respondent-Father's parental rights is appealable pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 7B-1001(a)(7) (2021).

III. Issue

The sole issue on appeal is whether the trial court erred in adjudicating Crystal willfully abandoned by Respondent-Father within the meaning of N.C. Gen. Stat. § 7B-1111(a)(7) under the facts and circumstances of this case.

IV. Standard of Review

"Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94, 839 S.E.2d 792, 796 (2020); *see* N.C. Gen. Stat. §§ 7B-1109(e), -1110(a) (2021). "[A]n adjudication of any single ground in [N.C. Gen. Stat.] § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 53 (2019); *see also* N.C. Gen. Stat. § 7B-1110(a).

"We review a trial court's adjudication that a ground exists to terminate parental rights under [N.C. Gen. Stat.] § 7B-1111 to determine whether the findings are supported by clear, cogent, and convincing evidence and the findings support the conclusions of law." *In re A.M.*, 377 N.C. 220, 225, 856 S.E.2d 801, 806 (2021) (citations and quotation marks omitted). "Findings of fact not challenged by [the] respondent are deemed supported by competent evidence and are binding on appeal. Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate [the] respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58–59 (2019) (citations omitted).

"A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re A.L.*, 378 N.C. 396, 400, 862 S.E.2d 163, 166 (2021) (citation omitted). "A trial court's finding of an ultimate fact is conclusive on appeal if the evidentiary facts reasonably support the trial court's ultimate finding [of fact]." *In re G.C.*, 384 N.C. 62, 65, 884 S.E.2d 658, 661 (2023) (citation omitted) (alteration in original).

"[W]hether a trial court's adjudicatory findings of fact support its conclusion of law that grounds existed to terminate parental rights . . . is reviewed de novo by the appellate court." *In re M.R.F.*, 378 N.C. 638, 641, 862 S.E.2d 758, 761–62 (2021) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re T.M.L.*, 377 N.C. 369, 375, 856 S.E.2d 785, 790 (2021) (quoting *In re C.V.D.C.*, 374 N.C. 525, 530, 843 S.E.2d 202, 205 (2020) (alteration in original)).

V. Analysis

On appeal, Respondent-Father challenges two findings of fact as unsupported by the evidence and argues that the remaining, supported findings of fact fail to support the trial court's conclusion that Respondent-Father willfully abandoned Crystal. Petitioner disagrees, asserting it is undisputed Respondent-Father did not attempt to contact Crystal in the determinative six-month period preceding the filing of the petition, and his prior efforts were not sufficient to obviate a finding of willfulness. After careful consideration, we tend to agree with Respondent-Father.

Our statutes are clear that before terminating parental rights on the ground of willful abandonment, a trial court must find that the petitioner has presented clear, cogent, and convincing evidence the respondent-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); *see* N.C. Gen. Stat. § 7B-1103(a)(1) (either parent is authorized to petition for the termination of parental rights of the other parent). "[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re B.R.L.*, 379 N.C. 15, 18, 863 S.E.2d 763, 767 (2021) (citation omitted).

A. Findings of Fact

In this case, the determinative six-month period was 2 December 2020 through 2 June 2021. First, Respondent-Father asserts that findings 10(f) and 10(g) are not supported by clear, cogent, and convincing evidence. We agree, in part.

Finding 10(f) provides: "Respondent[-Father] failed to make reasonable efforts, even annually, to request approval from the Parole Board to allow contact with [Crystal] since his release from prison in July 2017." We first note that because finding 10(f) contains a value judgment regarding the reasonableness of Respondent-Father's efforts reached by a process of natural reasoning, finding 10(f) is more properly considered an ultimate finding and will be reviewed as such. *See In re G.C.*, 384 N.C. at 66 n.3, 884 S.E.2d at 661 n.3 ("[A]n ultimate finding is a finding supported by other evidentiary facts reached by natural reasoning.").

As this ultimate finding looks beyond the determinative six-month period, the trial court was either assessing Respondent-Father's credibility or intentions. *See In re B.R.L.*, 379 N.C. at 18, 863 S.E.2d at 767.

Because ultimate finding 10(f) and the balance of the Order contain no credibility findings, adverse or favorable, our analysis presumes the trial court was discussing Respondent-Father's intentions regarding contact with Crystal. In reviewing the evidentiary facts contained within finding 10 and giving due deference to the trial court's fact-finding role, we conclude the trial court's evidentiary facts "reasonably support" its ultimate finding that Respondent-Father's efforts were not sufficiently reasonable to demonstrate his intent to reacquire the right to contact Crystal. *See In re G.C.*, 384 N.C. at 65, 884 S.E.2d at 661. Therefore, ultimate finding 10(f) is conclusive on appeal. *See id.* at 65, 884 S.E.2d at 661.

Next, finding 10(g) provides: "During the relevant period of time, Respondent[-Father] failed to send any cards, letters, gifts or tokens of affection, nor did he send any birthday or Christmas gifts or otherwise acknowledge any of these events for [Crystal]." Based on the testimony before the trial court, there appears to be no dispute this is a factually accurate statement. Nevertheless, this finding fails to address Respondent-Father's proffered explanation—he was barred from contacting his biological child "due to the nature and circumstances of [his] criminal convictions without advance written approval from the Indiana Parole Board[.]"[2] Therefore, to the extent this finding implies Respondent-Father possessed the ability to contact Crystal without subjecting himself to a real and significant risk of criminal prosecution, we disregard finding 10(g) on appeal. *See In re A.N.H.*, 381 N.C. 30, 44, 871 S.E.2d 792, 804 (2022).

B. Willful Abandonment

Second, we must determine whether the trial court's findings of fact support its conclusion of law that Respondent-Father willfully abandoned Crystal within the meaning of N.C. Gen. Stat. § 7B-1111(a)(7). For the reasons discussed below, the findings are inadequate to sustain the conclusion that the abandonment in this case was willful, despite there being no dispute Respondent-Father failed to contact Crystal during the determinative period.

"Abandonment implies conduct on the part of the parent which manifests a willful determination to [forgo] all parental duties and relinquish all parental claims to the child." *In re B.S.O.*, 234 N.C. App. 706, 710, 760 S.E.2d 59, 63 (2014). In this context, "[w]illfulness is more than an intention to do a thing; there must also be purpose and deliberation[,]" and the trial court's "findings must clearly show that the parent's

2. Petitioner appears to concede this on appeal.

actions are wholly inconsistent with a desire to maintain custody of the child." *In re S.R.G.*, 195 N.C. App. 79, 84, 87, 671 S.E.2d 47, 51, 53 (2009) (citation omitted).

"While the question of willful intent is a factual one for the trial court to decide based on the evidence presented, and while the trial court's factual determination is owed deference, it remains our responsibility as the reviewing court to examine whether the evidence in the case supports the trial court's findings and whether, as a legal matter, the trial court's factual findings support its conclusions of law." *In re B.R.L.*, 379 N.C. at 18, 863 S.E.2d at 767 (citing *In re B.C.B.*, 374 N.C. 32, 35, 839 S.E.2d 748, 751 (2020); *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)); *see In re T.M.H.*, 186 N.C. App. 451, 452, 652 S.E.2d 1, 1 (2007) (remanding after "the trial court failed to make findings of fact and conclusions of law concerning the willfulness of respondent's conduct").

Under a de novo review, we cannot conclude the trial court's adjudicatory findings of fact support its conclusion that Respondent-Father *willfully* abandoned Crystal. *See In re M.R.F.*, 378 N.C. at 641, 862 S.E.2d at 761–62. At all times relevant to this case, Respondent-Father was subject to highly restrictive parole conditions due to his conviction in Indiana. Violation of Respondent-Father's parole conditions would pose a real and significant risk of criminal prosecution. Although there is no dispute that there was no contact during the determinative period, we attribute this to Respondent-Father's restrictive parole conditions, consistent with his testimony.

It is undisputed that Respondent-Father completed the Abel Assessment and a lie-detector test promptly upon his release. Respondent-Father then promptly submitted his initial request to modify his parole conditions in December of 2017 through his first probation officer, Officer Mounts, which was denied. Respondent-Father filed a second request some time in 2019, through an Officer Foster, which was denied. Upon receiving the termination petition, Respondent-Father filed a third request in 2021, through an Officer Harris, which was similarly denied. Furthermore, Respondent-Father remained current on his modified child-support obligation during the determinative period. Such conduct is not consistent with a parent who has manifested a willful determination to forgo all parental duties and relinquish all parental claims to the child. *See In re B.S.O.*, 234 N.C. App. at 710, 760 S.E.2d at 63. Similarly, the findings do not establish purpose or deliberation, and are insufficient to demonstrate Respondent-Father's actions were wholly inconsistent with a desire to maintain custody of Crystal. *See In re S.R.G.*, 195 N.C. App. at 84, 671 S.E.2d at 51.

Juvenile and termination proceedings implicate significant constitutionally protected rights, including the right to the care, custody, and control of a parent's child. *In re B.R.W.*, 381 N.C. 61, 77, 871 S.E.2d 764, 775 (2022). In this arena, we must tread carefully to avoid diluting the protections guaranteed by our state and federal Constitutions.

In its Order, the trial court accurately noted Respondent-Father's efforts to modify his parole conditions, yet it concluded Respondent-Father had not tried reasonably—that is, frequently or earnestly—enough. To affirm such an Order runs contrary to binding precedent and risks undue infringement upon a fundamental constitutional right. The GAL's remarks in declining to give closing argument on adjudication are instructive of the problem in this case. Indeed, Respondent-Father's conduct in Indiana, and more recently in this state, if true, is reprehensible. Nevertheless, reprehensibility is not tantamount to willful abandonment, which is the sole ground before us on appeal. We do not speculate upon the result if Petitioner had alleged additional ground(s) for termination, and our holding today does not abridge Petitioner's right to bring a new petition in the future. *See In re Adoption of Maynor*, 38 N.C. App. 724, 727, 248 S.E.2d 875, 877 (1978) ("The fact that a parent commits a crime which might result in incarceration is insufficient, standing alone, to show a settled purpose to forego all parental duties.") (citation and internal quotations omitted); *see also B.S.O.*, 234 N.C. App. at 710, 760 S.E.2d at 63; *S.R.G.*, 195 N.C. App. at 84, 671 S.E.2d at 51.

VI. Conclusion

Because the trial court's findings are insufficient to support the conclusion that Respondent-Father's abandonment of Crystal was willful, as defined in our Juvenile statutes and precedent, we are constrained to reverse the Order.

REVERSED AND REMANDED.

Chief Judge STROUD and Judge DILLON concur.

IN THE MATTER OF S.C.

No. COA22-965

Filed 5 September 2023

Juveniles—privilege against self-incrimination—court's failure to advise

In an adjudicatory hearing on a juvenile petition alleging that respondent committed misdemeanor assault, the trial court erred by failing to have any colloquy with respondent to advise her of her privilege against self-incrimination before she testified. As the State conceded, this violation of N.C.G.S. § 7B-2405(4) was prejudicial because respondent's testimony was self-incriminating and allowed the State to secure a simple assault adjudication.

Appeal by Juvenile-appellant from order entered 23 June 2022 by Judge James L. Moore Jr. in Onslow County District Court. Heard in the Court of Appeals 9 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General, Janelle E. Varley, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for juvenile-appellant.

MURPHY, Judge.

Juvenile-appellant, Karen,[1] appeals the trial court's adjudication and disposition orders sentencing her to eight months' probation. Under N.C.G.S. § 7B-2405(4), a trial court must advise a juvenile of her right to remain silent against prejudicial self-incrimination during an adjudicatory hearing. We hold, as the State concedes, that Karen's statutory right under N.C.G.S. § 7B-2405(4) was violated when she testified without the trial court first conducting a colloquy regarding her right to avoid self-incrimination. Accordingly, we vacate the adjudication and disposition orders and remand for a new hearing.

BACKGROUND

On 10 November 2021, the State filed a juvenile petition alleging that Karen committed misdemeanor assault against Iris in violation of

1. We use pseudonyms to protect the identity of all juveniles and for ease of reading.

N.C.G.S. § 14-33(c)(1). At the 24 March 2022 adjudicatory hearing, Karen denied the allegation. Karen's attorney made a motion to dismiss after the close of the State's evidence, which the trial court denied. Karen's attorney then called her to the witness stand to testify. The trial court did not ask Karen any questions or engage in a colloquy with her before she testified about the assault allegation. Nor did the trial court inform Karen of her right to remain silent; that her testimony could be used against her; or that she was entitled to invoke her constitutional privilege against self-incrimination.

The contested adjudicatory hearing concluded in the trial court finding Karen responsible for the lesser included offense of simple assault. Karen's attorney gave notice of appeal from the trial court's adjudication, and no formal disposition order was entered until 23 June 2022. Karen was sentenced to probation for the simple assault and appealed. On 1 June 2023, we allowed Karen's *Motion for Peremptory Setting and Motion to Expedite Consideration*.

ANALYSIS

Karen argues that the trial court violated N.C.G.S. § 7B-2405(4) by allowing her to testify without first advising her regarding her privilege against self-incrimination. Additionally, Karen contends that the error was prejudicial because her testimony was self-incriminating.[2] We agree.

"Our courts have consistently recognized that the State has a greater duty to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution." *In re J.R.V.*, 212 N.C. App. 205, 207 (2011), *disc. rev. improvidentially allowed*, 365 N.C. 416 (2012) (quoting *In re T.E.F.*, 359 N.C. 570, 575 (2005)). N.C.G.S. § 7B-2405 provides, in pertinent part, that "the court *shall* protect the following rights of the juvenile and the juvenile's parent, guardian, or custodian to assure due process of law," including "[t]he privilege against self-incrimination." N.C.G.S. § 7B-2405(4) (2022) (emphasis added). "[B]y stating that the trial court *shall* protect a juvenile's delineated rights, [the General Assembly] places an affirmative duty on the trial court to protect . . . a juvenile's right against self-incrimination." *In re J.R.V.*, 212 N.C. App. at 208 (emphasis added). "The plain language of N.C.G.S. § 7B-2405 places an affirmative duty on the trial court to protect the rights delineated therein during a juvenile delinquency adjudication." *In re J.B.*, 261 N.C. App. 371, 373 (2018), *disc. rev. denied*, 372 N.C. 104 (2019).

2. The State agrees with Karen that the trial court did not comply with N.C.G.S. § 7B-2405(4) and thus did not properly adjudicate Karen. Further, the State does not dispute Karen's argument that the testimony was self-incriminatory and therefore prejudicial.

While N.C.G.S. § 7B-2405 "does not provide the explicit steps a trial court must follow when advising a juvenile of [her] rights, the statute requires, at the very least, *some* colloquy between the trial court and the juvenile to ensure that the juvenile understands [her] right against self-incrimination before choosing to testify at [her] adjudication hearing." *In re J.R.V.*, 212 N.C. App. at 208-209. Here, the trial court did not, at any time, discuss with, or inquire from, Karen whether she understood the implications of testifying. Karen incriminated herself when she testified to assaulting Iris both on direct and cross examination. On direct examination, Karen incriminated herself by giving the following testimony:

> [COUNSEL]: Based on her demeanor at the time did you believe that there was a chance she may strike you?
>
> [KAREN]: Yeah. That she might try to beat me?
>
> . . .
>
> [COUNSEL]: Did you ever hit her in the back of the head?
>
> [KAREN]: No. I just punched her face.

After the initial questioning by her attorney, Karen again incriminated herself by admitting on cross-examination that she "pushed" Iris:

> [STATE]: Yes, [Karen], just one—one question. You said before that "after she called me daddy long legs I"—something her. Did you say punched her or pushed?
>
> [KAREN]: Pushed.
>
> [STATE]: Pushed. Thank you.

The State also benefited from re-eliciting Karen's admission on cross-examination to secure a simple assault adjudication instead of an assault inflicting serious injury. The State's closing argument relied on Karen's incriminatory testimony:

> Your Honor, as to the facts that aren't in dispute that there was some kind of verbal negative interactions like an argument, cursing, shouting match, insults being thrown around, but by [Karen's] own admission "after she called me daddy long legs, I pushed her," so there's—there's no dispute per the testimony that the—that [Karen] put hands on [Iris] first. So because of that I would ask you to find her guilty.

After the State's closing argument, the trial court adjudicated Karen responsible for the simple assault, which Karen admitted to during her responses to the State's inquiries.

We held in *J.B.* that "failure to follow the statutory mandate when conducting an adjudication hearing constitutes reversible error unless proven to be harmless beyond a reasonable doubt." *In re J.B.*, 261 N.C. App. at 373–74 (citing *In re J.R.V.*, 212 N.C. App. at 209). Likewise, in *J.R.V.*, where "there was absolutely no colloquy between the juvenile and the trial court," it was determined that "the trial court's failure to follow its statutory mandate" was error. *In re J.R.V.*, 212 N.C. App. at 209. Nevertheless, we found harmless error beyond a reasonable doubt in *J.R.V.* because "the juvenile's eventual testimony was not incriminating[] [as] it was either consistent with the evidence presented by the State or favorable to the juvenile[.]" *Id.* at 210. The State has the burden of proving that a violation of a constitutional right is harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31, 44 (1990). Here, the State concedes reversible error.

In *J.B.*, "the State offered [the complaining party's] testimony to establish the basis of the assault charge that [the juvenile] threw the milk carton hitting [the complaining party] in the face." *In re J.B.*, 261 N.C. App. at 374. Later, when "[the juvenile] made incriminating statements as he admitted to throwing the milk carton out of frustration . . . the State used the admission to further support" its assertion against the juvenile. *Id.* We held that "[the juvenile's] testimony and the manner in which the State attempted to use the testimony was prejudicial." *Id.* Like in *J.B.*, here, Karen's testimony was undoubtedly incriminatory as she admitted having either "pushed" or "punched" Iris during their altercation. The State's re-eliciting of Karen's admission on cross-examination to secure a simple assault adjudication against her was prejudicial.

The trial court did not conduct the colloquy as required by statute, which violated Karen's rights, and rendered her testimony inadmissible and prejudicial. N.C.G.S. § 7B-2405(4) (2023). As the trial court failed in its duty to protect [Karen's] constitutional right against self-incrimination, we vacate the adjudication order and remand for rehearing.

CONCLUSION

The trial court erred by failing to comply with N.C.G.S. § 7B-2405(4). The trial court failed to have a colloquy with Karen to advise her of her privilege against self-incrimination before she testified. Further, Karen's self-incriminating testimony was not harmless beyond a reasonable doubt. We vacate the trial court's adjudication and disposition orders and remand for a new adjudicatory hearing on simple assault.

VACATED AND REMANDED.

Judges HAMPSON and WOOD concur.

DANIEL JONES, PLAINTIFF
v.
J. KIM HATCHER INSURANCE AGENCIES INC.; HXS HOLDINGS, INC.; GEOVERA SPECIALTY INSURANCE COMPANY, AND GEOVERA ADVANTAGE INSURANCE SERVICES, INC., DEFENDANTS

No. COA22-1030

Filed 5 September 2023

1. Fraud—proximate cause—no causal connection—procurement of homeowner's insurance—cancellation of policy

In a real property insurance dispute, where plaintiff filed a claim for hurricane damage and his homeowner's insurance company responded by cancelling his policy due to material misrepresentations in his application for insurance (because it did not disclose plaintiff's pond or that his property spanned five acres), the trial court did not err by dismissing, pursuant to Civil Procedure Rule 12(b)(6), plaintiff's claims against his insurance agency and the insurance broker who together obtained the policy for him (together, defendants) as to plaintiff's claims for negligent misrepresentation, fraudulent concealment, and unfair and deceptive trade practices. Plaintiff alleged that defendants wrongfully failed to disclose the insurer's status as not licensed to do business in North Carolina (which meant that the insurer was not subject to the State's supervision and, in the event the insurer became insolvent, losses would not be paid by any State guaranty or solvency fund); however, the insurance policy noted the insurer's nonadmitted status, and persons entering contracts of insurance are charged with knowledge of their contents. Furthermore, even assuming plaintiff's ignorance was excusable, the insurer's status as a nonadmitted insurer bore no causal connection to plaintiff's alleged injuries (the uncompensated damage to his property and related losses).

2. Unfair Trade Practices—motion to dismiss—allegations in complaint—insurance agency—answering questions on clients' applications

In a real property insurance dispute, where plaintiff filed a claim for hurricane damage and his homeowner's insurance company responded by cancelling his policy due to material misrepresentations in his application for insurance (because it did not disclose plaintiff's pond or that his property spanned five acres), the trial court did not err by dismissing, pursuant to Civil Procedure Rule 12(b)(6), plaintiff's claim against his insurance agency (defendant)

for unfair and deceptive trade practices. Plaintiff's general allegation that defendant violated N.C.G.S. § 75-1.1 by engaging in the practice of answering application questions without the insured's knowledge or consent was defeated by other allegations in the complaint, which demonstrated that plaintiff knowingly consented to defendant's practice of answering application questions.

3. Fiduciary Relationship—breach of fiduciary duty—constructive fraud—insurance agent—incorrect answers on insurance application

In a real property insurance dispute, where plaintiff filed a claim for hurricane damage and his homeowner's insurance company responded by cancelling his policy due to material misrepresentations in his application for insurance (because it did not disclose plaintiff's pond or that his property spanned five acres), the trial court did not err by dismissing, pursuant to Civil Procedure Rule 12(b)(6), plaintiff's claims against his insurance agent (defendant)—who had filled out plaintiff's insurance application—for constructive fraud and breach of fiduciary duty where the exhibits attached to plaintiff's complaint contradicted any allegation that defendant breached its legally imposed fiduciary duty as plaintiff's insurance agent, and where plaintiff did not allege facts and circumstances which created a relation of trust and confidence between himself and defendant in which defendant "held all the cards."

4. Conspiracy—civil—acting in concert—real property insurance agencies—claims dismissed as to one defendant

In a real property insurance dispute, where plaintiff filed a claim for hurricane damage and his homeowner's insurance company responded by cancelling his policy due to material misrepresentations in his application for insurance (because it did not disclose plaintiff's pond or that his property spanned five acres), plaintiff's claim for civil conspiracy necessarily failed because plaintiff failed to state a legally viable claim against one of the defendants, leaving one claim against one defendant.

5. Negligence—insurance agent—inaccurate information on insurance application—contributory negligence

In a real property insurance dispute, where plaintiff filed a claim for hurricane damage and his homeowner's insurance company responded by cancelling his policy due to material misrepresentations in his application for insurance (because it did not disclose plaintiff's pond or that his property spanned five acres), plaintiff's allegations were sufficient to state a claim for negligence against

his insurance agent (defendant), who had filled out the insurance application on plaintiff's behalf, where plaintiff alleged, among other things, that defendant acted as plaintiff's agent, that plaintiff provided accurate information to defendant for the application process, that defendant assured plaintiff that the new policy would provide the same coverage as his existing policy, that defendant told plaintiff he need only sign the signature page of the multi-page application, that defendant provided inaccurate information regarding plaintiff's property on the application (including its acreage and the presence of a pond), and that defendant breached his duty of care and proximately caused injury to plaintiff. Plaintiff's alleged failure to read the other pages of the insurance application before signing did not establish, as a matter of law, that plaintiff was contributorily negligent; rather, that was a question for a jury to determine. As for the issue of punitive damages, plaintiff's complaint failed to allege facts showing he was entitled to punitive damages based on the allegations concerning defendant's conduct in filling out the insurance application.

Judge COLLINS concurring in result in part and dissenting in part as to Part II.

Appeal by Plaintiff from order entered by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 10 May 2023.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III, for Plaintiff-Appellant.

McAngus Goudelock & Courie, PLLC, by John T. Jeffries and Jared M. Becker, for Defendant-Appellee J. Kim Hatcher Insurance Agencies, Inc.

Martineau King PLLC, by Joseph W. Fulton and Je'vonne V. Knox, for Defendant-Appellee HXS Holdings, Inc.

STADING, Judge delivers the opinion of the Court in part II and announces the judgment of the Court, in which Judge DILLON concurs and Judge COLLINS concurs in result in part and dissents in part by separate opinion. COLLINS, Judge delivers the opinion of the Court in part I in which Judges DILLON and STADING concur.

This appeal arises out of a real property insurance dispute. Daniel Jones ("Plaintiff") appeals from an order dismissing his claims against

J. Kim Hatcher Insurance Agencies, Inc. ("Hatcher") and HXS Holdings, Inc. ("HXS") (collectively "Defendants")[1] pursuant to civil procedure rule 12(b)(6) for failure to state a claim upon which relief can be granted. The Court affirms the dismissal order as to the claims against HXS and affirms the dismissal order as to all but the negligence claim against Hatcher. A majority of the Court concludes, however, that the trial court erred by dismissing Plaintiff's negligence claim against Hatcher and thus reverses the order as to that claim and remands the case to the trial court. By dissent, Judge Collins would hold that any negligence on Hatcher's part was defeated by Plaintiff's contributory negligence as a matter of law and thus would affirm the order in its entirety.

I.

COLLINS, Judge.

A. Factual and Legal Background

The facts of this case, as Plaintiff alleged, are as follows: Plaintiff is a Pender County resident who lived on a five-acre property that included a half-acre pond directly in front of his home. Plaintiff maintained homeowner's insurance through North Carolina Farm Bureau until 2016, when Hatcher, an insurance agency licensed to do business in North Carolina, worked with Plaintiff to procure a homeowner's policy through Nationwide. Hatcher advised Plaintiff of the Nationwide policy's coverage limits and premium costs, then asked Plaintiff to sign a single page application form. Hatcher then inspected and photographed Plaintiff's property and has maintained Plaintiff's information in its files since 2016. In early 2017, Plaintiff returned to North Carolina Farm Bureau for homeowner's insurance.

In August 2017, Hatcher again worked with Plaintiff to procure a homeowner's insurance policy, this time through GeoVera. At all relevant times, GeoVera was not licensed to do business in North Carolina, and thus was subject to the Surplus Lines Act as a nonadmitted insurer. *See* N.C. Gen. Stat. § 58-21-10(5) (2018). Pursuant to the Surplus Lines Act, nonadmitted insurers are not subject to the State's supervision and, in the event the insurer who issued the policy becomes insolvent, losses will not be paid by any State guaranty or solvency fund. *Id.* § 58-21-50 (2018). Moreover, nonadmitted insurers may only issue policies in North Carolina through surplus lines brokers. *See id.* § 58-21-65(a)

1. Defendants GeoVera Specialty Insurance Company and GeoVera Advantage Insurance Services, Inc., are not parties to this appeal.

(2018). Though Hatcher was licensed to do business in North Carolina, Hatcher did not hold a surplus lines license and consequently could not directly sell GeoVera's homeowner's policies. Accordingly, Hatcher procured the GeoVera policy through HXS, who was a licensed surplus lines insurance broker.

Hatcher advised Plaintiff that the GeoVera policy provided the same coverage as Plaintiff's existing policy but at a lower premium. Without sharing any additional information about GeoVera, its status as a non-admitted insurer, or HXS's involvement, Hatcher presented Plaintiff a single page insurance application to sign, which included the statement, "I have read the above application and any attachments and declare that the information is true and complete." The single page did not include any questions regarding Plaintiff's home or property, and Hatcher did not ask Plaintiff any questions. Plaintiff, trusting that Hatcher had the information it needed to apply for the GeoVera policy, signed the page.

Through HXS and Hatcher, GeoVera issued Plaintiff a homeowner's policy effective 18 August 2017 until 18 August 2018. Plaintiff renewed this policy in August 2018. Plaintiff received a copy of the renewed policy, which detailed the policy's coverage, liability limits, and applicable deductibles. The policy also noted:

> The insurance company with which this coverage has been placed is not licensed by the State of North Carolina and is not subject to its supervision. In the event of the insolvency of the insurance company, losses under this policy will not be paid by any State insurance guaranty or solvency fund.

In September 2018, Hurricane Florence made landfall in North Carolina causing substantial damage to Plaintiff's home and personal belongings. Plaintiff filed a claim with GeoVera, who evaluated the damage and initially advised Plaintiff that the damage was covered by his homeowner's policy. However, on 23 October 2018, GeoVera cancelled Plaintiff's policy stating that Plaintiff's application for insurance contained material misrepresentations because it did not disclose Plaintiff's pond or that his property spanned five acres. GeoVera stated that, had this information been disclosed, it would not have issued Plaintiff's policy.

B. Procedural History

On 31 July 2020, Plaintiff filed a complaint in New Hanover County Superior Court naming Hatcher, HXS, and GeoVera as defendants. Plaintiff alleged that Defendants conspired together to sell GeoVera policies in North Carolina without disclosing that GeoVera was not licensed

in North Carolina as part of a "Bait & Switch Scheme" to obtain premiums Defendants otherwise would not have obtained had GeoVera's nonadmitted status been fully disclosed. The complaint included claims for breach of contract and unfair and deceptive trade practices against GeoVera; negligent misrepresentation, fraudulent concealment, and unfair and deceptive trade practices against HXS; negligent misrepresentation, fraudulent concealment, unfair and deceptive trade practices, negligence, constructive fraud/breach of fiduciary duty, and punitive damages against Hatcher; and civil conspiracy against all Defendants. Plaintiff attached a picture of his property, the signature page from his insurance application, and a partial copy of his August 2018 homeowner's policy denoting GeoVera's nonadmitted status to the complaint.

HXS moved to dismiss Plaintiff's complaint on 16 October 2020 pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Hatcher answered on 21 October 2020, denying the material allegations against it, and also moved to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6). Plaintiff discovered that he had named the incorrect GeoVera entity in his initial complaint and filed an amended complaint on 11 December 2020, which was the same in all respects except that it named the correct GeoVera entity.

After hearing argument from the parties, the trial court entered an order on 22 February 2021, dismissing all of Plaintiff's claims against each defendant except for Plaintiff's breach of contract claim against GeoVera and stating, "This Order is a final judgment as to one or more but fewer than all of the claims or parties, and that there is no just reason for delay of an appeal." On 23 February 2021, the trial court entered an amended order removing the statement that there is no just reason for delay of an appeal. On 15 September 2022, Plaintiff voluntarily dismissed his breach of contract claim against GeoVera with prejudice and, on 27 September 2022, filed notice of appeal from the trial court's 23 February 2021 order.

C. Standard of Review

In ruling on a Rule 12(b)(6) motion to dismiss, "the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citation omitted). "[T]he well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted."

Sutton v. Duke, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (quotation marks and citation omitted). "When documents are attached to and incorporated into a complaint, they become part of the complaint and may be considered in connection with a Rule 12(b)(6) motion . . . ." *Laster v. Francis*, 199 N.C. App. 572, 577, 681 S.E.2d 858, 862 (2009) (citation omitted). "Although it is true that the allegations of [the] complaint are liberally construed and generally treated as true," the court may "reject allegations that are contradicted by documents attached, specifically referred to, or incorporated by reference in the complaint." *Id.* (citations omitted).

Dismissal under Rule 12(b)(6) is proper when, "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted). We review de novo a trial court's order allowing a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). *Cheryl Lloyd Humphrey Land Inv. Co. v. Resco Prods., Inc.*, 377 N.C. 384, 387, 858 S.E.2d 795, 798 (2021) (citation omitted).

D. Claims against HXS

[1] Plaintiff argues that he stated valid claims against HXS for negligent misrepresentation, fraudulent concealment, and unfair and deceptive trade practices. Specifically, Plaintiff argues that HXS wrongfully failed to disclose GeoVera's status as a nonadmitted insurer, and that the failure to disclose GeoVera's status proximately caused his injury.[2]

As an initial matter, "[p]ersons entering contracts of insurance, like other contracts, have a duty to read them and ordinarily are charged with knowledge of their contents." *Baggett v. Summerlin Ins. & Realty, Inc.*, 143 N.C. App. 43, 53, 545 S.E.2d 462, 468 (Tyson, J. dissenting), *rev'd per curiam*, 354 N.C. 347, 554 S.E.2d 336 (2001) (adopting the dissenting opinion). Plaintiff attached to his complaint a partial copy of the homeowner's policy that was in effect when Hurricane Florence made landfall. The first page of the policy noted:

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2. Plaintiff makes several additional arguments in his brief based on allegations that were not included in his complaint, including that HXS fraudulently concealed its involvement. We disregard those arguments as our review of a motion to dismiss is limited to the allegations appearing in the complaint. *See Stanback*, 297 N.C. at 185, 254 S.E.2d at 615 ("In ruling on the motion [to dismiss] the allegations of the complaint must be viewed as admitted, and *on that basis* the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." (emphasis added) (citation omitted)).

> The insurance company with which this coverage has been placed is not licensed by the State of North Carolina and is not subject to its supervision. In the event of the insolvency of the insurance company, losses under this policy will not be paid by any State insurance guaranty or solvency fund.

Accordingly, Plaintiff was charged with the knowledge of GeoVera's status whether HXS disclosed it or not. Even assuming arguendo that Plaintiff's ignorance was excusable, GeoVera's status as a nonadmitted insurer was not the proximate cause of Plaintiff's alleged injuries.

To state a claim for negligent representation, a plaintiff must allege that they "justifiably relie[d] to [their] detriment on information prepared without reasonable care by one who owed the [plaintiff] a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988) (citation omitted).

To state a claim for fraudulent concealment, a plaintiff must allege (1) concealment of a past or existing material fact, (2) that is reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, and (5) which results in damage to the plaintiff. *Hardin v. KCS Intern., Inc.*, 199 N.C. App. 687, 696, 682 S.E.2d 726, 733 (2009) (citations omitted).

To state a claim for unfair and deceptive trade practices, a plaintiff must allege "(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff[.]" *Spartan Leasing, Inc. v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991) (citations omitted).

Although the elements of each claim differ, each requires that the defendant's conduct proximately caused the plaintiff's injury. *See Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 40, 626 S.E.2d 315, 322 (2006) (affirming dismissal of negligent misrepresentation claim that lacked allegation of proximate cause); *Jay Grp., Ltd. v. Glasgow*, 139 N.C. App. 595, 599-601, 534 S.E.2d 233, 236-37 (2000) (noting that a fraud claim "requires that plaintiff establish the element of proximate causation"); *Spartan Leasing*, 101 N.C. App. at 460-61, 400 S.E.2d at 482 (including proximate cause as an element of an unfair and deceptive trade practices claim). Ordinarily, when a complaint "adequately recites the element of causation . . . plaintiff has made a sufficient pleading of causation under Rule 12(b)(6)." *Estate of Long ex rel. Long v. Fowler*, 270 N.C. App. 241, 252, 841 S.E.2d 290, 299 (2020) (citation omitted).

However, dismissal is appropriate as a matter of law when it "appears affirmatively from the complaint that there was no causal connection between the alleged [misconduct] and the injury." *Reynolds v. Murph*, 241 N.C. 60, 64, 84 S.E.2d 273, 275-76 (1954).

Here, Plaintiff alleged:

> 82. In September 2018, Hurricane Florence slammed eastern North Carolina with high winds and torrential rain (Hurricane Florence).
>
> 83. Hurricane Florence caused substantial damage to [Plaintiff's] home and personal belongings inside the home.
>
> . . . .
>
> 96. After Hurricane Florence, [Plaintiff] promptly filed a claim with GeoVera Insurance through Hatcher.
>
> 97. GeoVera Insurance . . . evaluated the damage to [Plaintiff's] home and personal belongings.
>
> 98. GeoVera Insurance . . . initially advised [Plaintiff] that the damage to his home was covered.
>
> . . . .
>
> 102. [On 23 October 2018], GeoVera Insurance . . . cancelled [Plaintiff's] policy on the alleged basis that [Plaintiff's] application, which did not list his pond or that his property was five (5) acres, contained "material misrepresentations."
>
> 103. GeoVera Insurance . . . contended that if these answers on the application had identified the pond and the acreage, GeoVera Insurance would not under its underwriting guidelines have issued the policy.
>
> 104. As a proximate result of defendants' conduct, [Plaintiff] has been injured and damage by the uncompensated cost of repair of his home, the uncompensated loss of his personal belongings, the loss of use of his home and personal belongings, his physical injuries, and his mental and emotional distress, anxiety, insecurity, fear, humiliation, and depression caused these losses.

In his claims against HXS, Plaintiff also alleged:

> 141. HXS had a duty to disclose to [Plaintiff] that GeoVera Insurance did not have a Certificate of Authority to do

business in North Carolina, was not licensed to sell insurance in North Carolina, was not subject to North Carolina's supervision, and that losses (due to insolvency) would not be paid by any state insurance guaranty or solvency fund.

142. HXS breached its duty by failing to disclose [these facts to Plaintiff].

. . . .

148. As a proximate result of the HXS's[] negligent failure to disclose, [Plaintiff] has been damaged and is entitled to recover from HXS in excess of $25,000.

. . . .

150. As part of Defendants' Bait & Switch Scheme:

a. HXS intentionally concealed that GeoVera Insurance was not licensed to sell insurance in North Carolina.

b. HXS intentionally concealed that GeoVera Insurance was not subject to North Carolina's supervision.

c. HXS intentionally concealed that because GeoVera Insurance was a surplus line, losses (due to insolvency) would not be paid by any state insurance guaranty or solvency fund.

d. HXS intentionally concealed that GeoVera Insurance did not have a certificate of authority to do business in North Carolina.

151. HXS's intentional concealment of GeoVera Insurance's status as a licensed insurer described above constitutes fraudulent concealment.

. . . .

157. As a proximate result of HXS's intentional concealment, [Plaintiff] has been damaged and is entitled to recover from HXS in excess of $25,000.

. . . .

163. HXS's conduct in the Bait & Switch Scheme including its fraudulent concealment described above violated N.C.

> Gen. Stat. §75-1.1, in that its acts were unfair, deceptive, immoral, unethical, oppressive, unscrupulous, and substantially injurious to [Plaintiff].
>
> . . . .
>
> 168. As a proximate result of HXS's wrongful conduct, [Plaintiff] has been injured and damaged and is entitled to recover from HXS in excess of $25,000.

Plaintiff alleged that HXS's failure to disclose GeoVera's status as a nonadmitted insurer was the proximate cause of his injury. However, Plaintiff's alleged injury was "the uncompensated cost of repair of his home, the uncompensated loss of his personal belongings, the loss of use of his home and personal belongings, his physical injuries, and his mental and emotional distress, anxiety, insecurity, fear, humiliation, and depression[.]" Plaintiff did not allege that GeoVera was insolvent, or that GeoVera otherwise failed to compensate Plaintiff for his losses due to its status as a nonadmitted insurer. Indeed, GeoVera's status as a nonadmitted insurer bore no causal connection to these losses. Thus, it appears affirmatively from the complaint that there was no causal connection between HXS's failure to disclose GeoVera's status and Plaintiff's injury. Accordingly, Plaintiff's claims against HXS were properly dismissed. *See Reynolds*, 241 N.C. at 64, 84 S.E.2d at 275-76.

E. Claims against Hatcher

Plaintiff repeats his claims for negligent misrepresentation, fraudulent concealment, and unfair and deceptive trade practices against Hatcher. Plaintiff additionally argues that Hatcher's actions constituted a breach of fiduciary duty and negligence and entitled Plaintiff to punitive damages.[3]

1. Negligent Misrepresentation and Fraudulent Concealment

Plaintiff's claims for negligent misrepresentation and fraudulent concealment against Hatcher mirror his claims against HXS. Specifically, Plaintiff argues that Hatcher wrongfully failed to disclose GeoVera's status as a nonadmitted insurer, and that the failure to disclose GeoVera's status proximately caused his injury. In his complaint Plaintiff alleged:

> 171. Hatcher had a duty to disclose to [Plaintiff] that GeoVera Insurance did not have a Certificate of Authority

3. Plaintiff's negligence and punitive damages claims are addressed in part II and the dissent.

to do business in North Carolina, was not licensed to sell insurance in North Carolina, was not subject to North Carolina's supervision, and that losses (due to insolvency) would not be paid by any state insurance guaranty or solvency fund.

172. Hatcher breached its duty by failing to disclose [these facts to Plaintiff].

. . . .

178. As a proximate result of Hatcher's negligent failure to disclose, [Plaintiff] has been damaged and is entitled to recover from Hatcher in excess of $25,000.

. . . .

180. As part of Defendants' Bait & Switch Scheme:

a. Hatcher intentionally concealed that GeoVera Insurance was not licensed to sell insurance in North Carolina.

b. Hatcher intentionally concealed that GeoVera Insurance was not subject to North Carolina's supervision.

c. Hatcher intentionally concealed that because GeoVera Insurance was a surplus line, losses (due to insolvency) would not be paid by any state insurance guaranty or solvency fund.

d. Hatcher intentionally concealed that GeoVera Insurance did not have a certificate of authority to do business in North Carolina.

181. Hatcher's intentional concealment of GeoVera Insurance's status as a licensed insurer described above constitutes fraudulent concealment.

. . . .

187. As a proximate result of Hatcher's intentional concealment, [Plaintiff] has been damaged and is entitled to recover from Hatcher in excess of $25,000.

As with Plaintiff's claims against HXS, Plaintiff was charged with the knowledge of GeoVera's status whether Hatcher disclosed it or not. Additionally, although Plaintiff alleged that Hatcher's failure to disclose

GeoVera's status as a nonadmitted insurer was the proximate cause of his injury, Plaintiff's alleged injury was "the uncompensated cost of repair of his home, the uncompensated loss of his personal belongings, the loss of use of his home and personal belongings, his physical injuries, and his mental and emotional distress, anxiety, insecurity, fear, humiliation, and depression[.]" Plaintiff did not allege that GeoVera was insolvent, or that GeoVera otherwise failed to compensate Plaintiff for his losses due to its status as a nonadmitted insurer. Indeed, GeoVera's status as a nonadmitted insurer bore no causal connection to these losses. Thus, it appears affirmatively from the complaint that there was no causal connection between Hatcher's failure to disclose GeoVera's status and Plaintiff's injury. *See Reynolds*, 241 N.C. at 64, 84 S.E.2d at 275-76.

2. Unfair and Deceptive Trade Practices

Plaintiff argues that Hatcher violated N.C. Gen. Stat. § 75-1.1 by fraudulently concealing GeoVera's status as a nonadmitted insurer and by "unfairly or deceptively provid[ing] false information on the insurance application, contrary to Jones' consent and reliance on Hatcher to provide correct information."

To state a claim for unfair and deceptive trade practices, a plaintiff must allege "(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff." *Spartan Leasing*, 101 N.C. App. at 460-61, 400 S.E.2d at 482 (citations omitted).

Here, Plaintiff alleged:

> 193. Hatcher's conduct in the Bait & Switch Scheme including its fraudulent concealment as well as its practice to answer application questions without the insured's knowledge or consent described above violated N.C. Gen. Stat. §75-1.1, in that its acts were unfair, deceptive, immoral, unethical, oppressive, unscrupulous, and substantially injurious to [Plaintiff].
>
> . . . .
>
> 195. Hatcher's unfair and deceptive acts or practices were in or affecting commerce and were accomplished in the regular course of their business of selling insurance, and as such, had a substantial impact on the marketplace.
>
> . . . .

> 198. As a proximate result of Hatcher's wrongful conduct, [Plaintiff] has been injured and damaged and is entitled to recover from Hatcher in excess of $25,000.

a. Fraudulent Concealment

As discussed above, GeoVera's status as a nonadmitted insurer lacks a causal nexus to Plaintiff's injury. Thus, even if Hatcher's failure to disclose GeoVera's status constituted unfair and deceptive trade practices, it appears affirmatively from the complaint that there was no causal connection between Hatcher's failure to disclose GeoVera's status and Plaintiff's injury. *See Reynolds*, 241 N.C. at 64, 84 S.E.2d at 275-76.

b. Incorrect Insurance Application Information

[2] In addition to Plaintiff's general allegation that Hatcher's "practice to answer application questions without the insured's knowledge or consent . . . violated N.C. Gen. Stat. §75-1.1," Plaintiff alleged:

> 72. Hatcher presented [Plaintiff] with a single page document with a signature line. . . .
>
> 73. The signature page did not include the rest of the application, any factual questions for [Plaintiff] to answer regarding [his] home or property, or any answers to such questions . . . .
>
> 74. Hatcher did not ask [Plaintiff] any of the application questions relating to [his] home or property.
>
> 75. Based on Hatcher's prior inspection, photographing and knowledge of [Plaintiff's] property, [Plaintiff] reasonably trusted that Hatcher had all the information sufficient to apply for the GeoVera Insurance coverage.
>
> 76. [Plaintiff] trusted that Hatcher would accurately reflect its knowledge on the application to the extent necessary.
>
> 77. Based on Hatcher's instruction to sign and [Plaintiff's] trust that Hatcher would accurately complete the application, [Plaintiff] signed the blank application.

These allegations, taken as true, demonstrate that Plaintiff knowingly consented to Hatcher's practice of answering application questions. Accordingly, the complaint discloses a fact that necessarily defeats Plaintiff's claim that it was Hatcher's practice to answer application questions without the insured's knowledge or consent. *See Wood*, 355 N.C. at 166, 558 S.E.2d at 494.

3. Breach of Fiduciary Duty/Constructive Fraud

[3] Plaintiff argues that Hatcher owed him a fiduciary duty and breached that duty by failing to disclose all material facts regarding the insurance policy. Plaintiff also argues that Hatcher's conduct amounted to constructive fraud because Hatcher wrongfully benefitted from its breach.

Breach of fiduciary duty and constructive fraud are related, though distinct, causes of action. *White v. Consol. Plan., Inc.*, 166 N.C. App. 283, 293, 603 S.E.2d 147, 155 (2004) (citation omitted). Each requires the existence and subsequent breach of a fiduciary duty resulting in the plaintiff's injury. *See id.* at 293-94, 603 S.E.2d at 155-56. Constructive fraud requires the additional element that the defendant benefit himself from the breach. *Id.* at 294, 603 S.E.2d at 156.

Fiduciary duties may arise by operation of law or based on the facts and circumstances of the relationship between the parties. *Lockerman v. S. River Elec. Membership Corp.*, 250 N.C. App. 631, 635-36, 794 S.E.2d 346, 351 (2016) (citation omitted). By operation of law, "[a]n insurance agent acts as a fiduciary with respect to procuring insurance for an insured, correctly naming the insured in the policy, and correctly advising the insured about the nature and extent of his coverage." *Phillips ex rel. Phillips v. St. Farm Mut. Auto. Ins. Co.*, 129 N.C. App. 111, 113, 497 S.E.2d 325, 327 (1998) (citation omitted). An insurance agent's legally imposed fiduciary duty does not extend to properly answering the questions on the insured's application for insurance, particularly when the insured has asserted that the answers are accurate. That duty rests with the insured, and the insured is only excused from their duty in limited circumstances. *See Jones v. Home Sec. Life Ins. Co.*, 254 N.C. 407, 413, 119 S.E.2d 215, 220 (1961) ("[T]he rule that the insured is not responsible for false answers in the application where they have been inserted by the agent . . . applies only if the insured is justifiably ignorant of the untrue answers, has no actual or implied knowledge thereof, and has been guilty of no bad faith or fraud." (citation omitted)); *Goodwin v. Inv'rs Life Ins. Co. of N. Am.*, 332 N.C. 326, 330-31, 419 S.E.2d 766, 768-69 (1992) (holding that plaintiff was responsible for incorrect insurance application answers supplied by agent where plaintiff signed the application); *Cuthbertson v. N.C. Home Ins. Co.*, 96 N.C. 480, 486, 2 S.E. 258, 261 (1887) (finding no error where trial court excluded proof that plaintiff was not asked application questions before signing the application because, "[i]n the absence of fraud or mistake, a party will not be heard to say that he was ignorant of the contents of a contract signed by him").

However, a fiduciary duty may arise from a relationship "where there has been a special confidence reposed in one who in equity and

good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Lockerman*, 250 N.C. App. at 635, 794 S.E.2d at 351 (citation omitted). The standard for such a relationship is demanding; "[o]nly when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the special circumstance of a fiduciary relationship has arisen." *Id.* at 636-37, 794 S.E.2d at 352 (citations omitted). To establish a fiduciary duty in this manner, a plaintiff must allege facts and circumstances which created a relation of trust and confidence. *Watts v. Cumberland Cnty. Hosp. Sys., Inc.*, 317 N.C. 110, 116, 343 S.E.2d 879, 884 (1986) (citation omitted).

Here, Plaintiff alleged:

> 211. . . . Hatcher owed a fiduciary duty to [Plaintiff] to procure appropriate insurance coverage in [Plaintiff's] best interests.
>
> 212. [Plaintiff] reposed actual trust and confidence in Hatcher to procure appropriate insurance coverage as requested, which Hatcher knew and relied upon when procuring the GeoVera Insurance policy.
>
> 213. Hatcher took advantage of this confidence and position of trust to procure an insurance policy which, according to GeoVera Insurance, would never have been issued if Hatcher properly answered [Plaintiff's] application questions and/or disclosed the information Hatcher knew.
>
> 214. Hatcher used this confidence and position of trust to benefit itself by securing its portion of [Plaintiff's] premium payments (which Hatcher would not have received if it could not obtain a cheaper policy for [Plaintiff]).
>
> 215. As a proximate result of Hatcher's breach of fiduciary duty and constructive fraud, [Plaintiff] has been damaged and is entitled to recover from Hatcher in excess of $25,000.

Plaintiff did not allege that Hatcher breached its legally imposed fiduciary duty as an insurance agent, nor could he have. Exhibit 2, attached to Plaintiff's complaint, is a copy of the signature page from Plaintiff's application for insurance bearing his signature and representing that he accepts responsibility for the answers to the application questions. Exhibit 3, also attached to Plaintiff's complaint, is a partial copy of the insurance policy in question, which correctly names Plaintiff

and describes the nature and extent of his coverage under the policy. These exhibits contradict any allegation that Hatcher breached its legally imposed fiduciary duty as Plaintiff's insurance agent.

Furthermore, Plaintiff did not allege facts and circumstances which created a relation of trust and confidence between himself and Hatcher, where Hatcher figuratively held all the cards. Plaintiff had all the information available to him as demonstrated by the exhibits attached to his complaint. Thus, Plaintiff's complaint "reveals the absence of facts sufficient to make a good claim" and was properly dismissed. *Wood*, 355 N.C. at 166, 558 S.E.2d at 494.

F. Conspiracy

[4] Plaintiff argues that Defendants acted in concert, constituting civil conspiracy.

"In civil conspiracy, recovery must be on the basis of sufficiently alleged wrongful overt acts." *Dove v. Harvey*, 168 N.C. App. 687, 690, 608 S.E.2d 798, 800 (2005) (citations omitted). Thus, where a plaintiff fails to sufficiently state claims against the defendants for wrongful acts, the civil conspiracy claim must also fail. *See Esposito v. Talbert & Bright, Inc.*, 181 N.C. App. 742, 747, 641 S.E.2d 695, 698 (2007) (affirming summary judgment for defendants on civil conspiracy claim because summary judgment for defendants on individual claims was proper).

Because Plaintiff failed to state a legally viable claim for compensatory damages against HXS, Plaintiff cannot state a legally viable claim for civil conspiracy. Accordingly, the claim was properly dismissed.

II.

STADING, Judge.

A. Negligence Claim Against Hatcher

[5] This portion of the opinion concerns the trial court's dismissal of Plaintiff's negligence claim against the insurance agent, Defendant Hatcher, for negligently completing Plaintiff's application for insurance on his behalf. Here, Plaintiff alleges that Hatcher acted as his agent; that Plaintiff provided accurate information regarding his property to Hatcher, including its acreage and the presence of a pond; that Hatcher assured Plaintiff that the policy he procured provided the same coverage as his existing homeowner's policy; that Hatcher told Plaintiff he need only sign the signature page of the multi-page insurance application; that Hatcher filled out the rest of the application for Plaintiff, including information about Plaintiff's property; that Hatcher did not provide

accurate information regarding Plaintiff's property on the application, including inaccurate information about its acreage and the presence of a pond; that Hatcher had a duty to use reasonable care when applying for and undertaking to procure insurance for Plaintiff; that Hatcher breached that duty; and, that as a proximate cause of Hatcher's negligence, Plaintiff's suffered damages.

We conclude that Plaintiff's allegations are sufficient to state a claim for negligence against Hatcher. The allegation that Plaintiff, himself, failed to read the other pages of the insurance application filled out by Hatcher before signing does not establish, as a matter of law, that Plaintiff was contributorily negligent vis-à-vis his negligence claim against Hatcher. In reaching our conclusion on this issue, we are guided by our Court's decision in *Holmes v. Sheppard*, 255 N.C. App. 739, 805 S.E.2d 371 (2017), and the cases cited therein, which held that, in some circumstances, it is a question for the jury to determine whether one is contributorily negligent for failing to read the document he is signing.

In *Holmes*, the insurer denied the insured coverage when his vacant building was damaged. *Id.* at 742, 805 S.E.2d at 373–74. Consequently, the insured sued the insurance agent for negligence because, unbeknownst to him, the procured policy did not cover damages to vacant buildings. *Id.* at 742, 805 S.E.2d at 374. In procuring the underlying policy, the insured claimed, and the insurance agent denied, that he requested a policy without a vacancy exclusion. *Id.* at 744, 805 S.E.2d at 375. We held that, if a trier of fact were to believe the evidence that the insured requested a vacancy exclusion and the agent sought to secure a policy based on this request, then the agent undertook a duty to procure such a policy. *Id.* at 745, 805 S.E.2d at 375. Therefore, summary judgment was not appropriate on the claim of negligence. *Id.*

Moreover, when addressing contributory negligence in that case, we cited our Supreme Court's holding that though a person generally has a duty to read what he signs, *id.* at 745, 805 S.E.2d at 376 (citing *Elam v. Smithdeal Realty & Ins. Co.*, 182 N.C 599, 603, 109 S.E. 632, 634 (1921)), this duty "is subject to the qualification that nothing has been said or done to mislead him or to put a man of reasonable business prudence off his guard." *Id.* (citing *Elam*, 182 N.C. at 603, 109 S.E. at 634). Therefore, we reasoned that "where an agent or broker says or does something to mislead an individual or to put a person of reasonable business prudence off guard, the cause should be submitted to the jury on the question whether the failure to hold an adequate policy is due to plaintiff's own negligence in not reading his policy and taking out one sufficient to protect him." *Holmes*, 255 N.C. App. at 745, 805 S.E.2d at 375–76 (internal quotation marks and citation omitted).

Here, Plaintiff alleged that Hatcher—based on an assurance—was entrusted to correctly complete the application for Plaintiff with the correct information that Hatcher had been provided. Plaintiff's failure to read the application in full may be grounds to excuse the insurer from covering Plaintiff's loss on a contract claim where the application contained incorrect information about his property. But here, like *Holmes*, it is for the jury to determine whether Plaintiff was contributorily negligent in relying on the agent rather than reading the application himself before signing.

Our dissenting colleague cites five insurance cases in support of the result reached by the trial court. However, none of them are on point.

Two of the cases held essentially that an insurance agent does not have the duty to advise an insured about the contents of a policy or to advise an insured about the types of coverage the insured should seek—absent some special relationship. In one of the cases, we held that the fact an insured has purchased various insurance products through the same agent for twenty-eight years "would not put an objectively reasonable agent on notice that his advice is being sought or relied on." *Bigger v. Vista Sales & Mktg., Inc.*, 131 N.C. App. 101, 105, 505 S.E.2d 891, 893-94 (1998) (noting that an agent generally does not have any duty to procure coverage "which has not been requested"). In the other case, our Supreme Court adopted a dissent from our Court which stated that an agent has "a duty to make an application for the insurance coverage specifically requested by [the insured]" and that the insured has "a duty to read their insurance policy." *Baggett v. Summerlin*, 143 N.C. App. 43, 53, 545 S.E.2d 462, 468 (Tyson, J., dissenting), *rev'd per curiam*, 354 N.C. 347, 554 S.E.2d 336 (2001) (adopting the dissenting opinion).

The other three cases involve disputes by an insured against the insurer—and not the agent—for coverage under a policy. In two of the cases, our Supreme Court held that an insured could not recover against the insurer where the insured had provided false information in the insurance application. *Jones v. Home Sec. Life Ins. Co.*, 254 N.C. 407, 119 S.E.2d 215 (1961); *Goodwin v. Inv'rs Life Ins. Co. of N. Am.*, 332 N.C. 326, 419 S.E.2d 766 (1992). We note that, in *Goodwin*, the plaintiffs sued an insurance agent as well; however, the opinion expressly states that the agent was acting on behalf of the insurance company and *not* the insured. *Id.* at 327, 419 S.E.2d at 767 (stating that the agent defendant was acting as agent for the defendant insurance company). In the remaining case, we held that an insurer could avoid coverage on a policy based on a misrepresentation by the insured on the application. *Bell v. Nationwide Ins. Co.*, 146 N.C. App 725, 554 S.E.2d 399 (2001). In that

case, the agent never asked the insured about whether the insured had ever declared bankruptcy, but simply checked "no" on the application. *Id.* at 727, 554 S.E.2d at 401. The insured, however, signed the application with the incorrect information without reading the application. *Id.* Here, in contrast, Plaintiff provided the correct information to the agent, who in turn affirmatively took on a duty to accurately complete an application to procure the requested insurance policy, but inaccurately completed the application, thereby permitting a jury to find causation and harm.

In the foregoing sections of this opinion, we have already held that Plaintiff cannot recover from the insurer. Plaintiff certainly had a duty to the insurer to see to it that the application contained accurate information. And though, based on the complaint, Plaintiff may not have done anything for which he is personally negligent, he is charged with the negligence of his agent dealing with third parties on his behalf. In this matter, consistent with the ruling in *Holmes*, we are simply sustaining Plaintiff's claim against the agent, who he claims was acting as his agent. Based on the allegations, considering Plaintiff's relationship with Hatcher, Plaintiff merely had an obligation to supply Hatcher with accurate information about his property—which he did. And since Hatcher was provided with accurate information and assumed the duty to fill out the application, it was to be completed accurately—which was not done. In sum, while Plaintiff's conduct may have played a role in the denial of the claim by the insurer, we cannot say that his conduct was contributorily negligent and caused the agent to improperly complete the application for insurance.

B. Punitive Damages

Though we conclude the complaint alleges a claim for negligence against Hatcher, we agree with Hatcher that Plaintiff has failed to allege a claim for punitive damages for any alleged conduct on his part in improperly filling out Plaintiff's insurance application. To recover punitive damages under the law of our State, a claimant must prove that an aggravating factor of fraud, malice, or willful or wanton conduct is present and related to the injury subject to the compensatory damages. *See* N.C. Gen. Stat. § 1D-15(a) (2021). Here, at the end of his complaint, Plaintiff alleges that "Hatcher's conduct was aggravated and outrageous, willful and wanton, malicious and in reckless disregard of Plaintiff's rights," without reference to the conduct of Hatcher that he claims to be an aggravating factor. Plaintiff makes no allegation that Hatcher acted willfully in filling out the insurance application.

Further, as Hatcher correctly notes: "Plaintiff has failed to allege that any officer, director, or manager of Hatcher – an insurance agency – participated in or condoned any conduct that constitutes an aggravating factor giving rise to punitive damages." In North Carolina, punitive damages may be awarded if the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor that gave rise to punitive damages. *See* N.C. Gen. Stat. § 1D-15(c). The amended complaint in this matter does not provide that an officer, director, or manager of Hatcher was responsible for the negligence at the time of the alleged conduct.

Considering the foregoing reasoning, we conclude that Plaintiff has failed to allege facts showing that he is entitled to punitive damages based on the allegations concerning Hatcher's conduct in filling out the insurance application.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judge DILLON concurs.

Judge COLLINS concurs in result in part and dissents in part by separate opinion.

COLLINS, Judge, concurring in result in part and dissenting in part.

I concur in the result of part II affirming the dismissal of Plaintiff's punitive damages claim. However, because I would hold that any negligence on Hatcher's part was defeated by Plaintiff's contributory negligence as a matter of law, I respectfully dissent from part II of the majority opinion concluding that Plaintiff's contributory negligence was a matter for the jury and reversing the trial court's dismissal of Plaintiff's negligence claim.

Here, Plaintiff alleged, in pertinent part, as follows:

> 72. Hatcher presented [Plaintiff] with a single page document with a signature line. (Exhibit 2) (the signature page).
>
> 73. The signature page did not include the rest of the application, any factual questions for [Plaintiff] to answer regarding [his] home or property, or any answers to such questions . . . .

> 74. Hatcher did not ask [Plaintiff] any of the application questions relating to [his] home or property.
>
> 75. Based on Hatcher's prior inspection, photographing and knowledge of [Plaintiff's] property, [Plaintiff] reasonably trusted that Hatcher had all the information sufficient to apply for the GeoVera Insurance coverage.
>
> 76. [Plaintiff] trusted that Hatcher would accurately reflect its knowledge on the application to the extent necessary.
>
> 77. Based on Hatcher's instruction to sign and [Plaintiff's] trust that Hatcher would accurately complete the application, [Plaintiff] signed the blank application.

Exhibit 2, attached to Plaintiff's amended complaint, bears Plaintiff's signature beneath the following attestation:

> I have read the above application and any attachments and declare that the information is true and complete. This information is being offered to the company as an inducement to issue the policy for which I am applying.

North Carolina recognizes the defense of contributory negligence; "thus, a plaintiff cannot recover for injuries resulting from a defendant's negligence if the plaintiff's own negligence contributed to his injury." *Draughon v. Evening Star Holiness Church of Dunn*, 374 N.C. 479, 483, 843 S.E.2d 72, 76 (2020) (citation omitted). "In order to establish contributory negligence, it must be shown (1) that the plaintiff failed to act with due care and (2) such failure proximately caused the injury." *Mohr v. Matthews*, 237 N.C. App. 448, 451, 768 S.E.2d 10, 12 (2014) (quotation marks and citation omitted). "[A] court may dismiss a complaint based on contributory negligence pursuant to Rule 12(b)(6) when the allegations of the complaint taken as true show negligence on the plaintiff's part proximately contributing to his injury, so clearly that no other conclusion can be reasonably drawn therefrom." *Id.* at 451, 768 S.E.2d at 12-13 (quotation marks and citation omitted).

"Persons entering contracts of insurance, like other contracts, have a duty to read them and ordinarily are charged with knowledge of their contents." *Baggett v. Summerlin Ins. & Realty, Inc.*, 143 N.C. App. 43, 53, 545 S.E.2d 462, 468 (Tyson, J., dissenting), *rev'd per curiam*, 354 N.C. 347, 554 S.E.2d 336 (2001) (adopting the dissenting opinion). This applies to applications for insurance policies as well as insurance policies themselves. *See, e.g.*, *Goodwin v. Inv'rs Life Ins. Co. of N. Am.*, 332 N.C. 326, 330-31, 419 S.E.2d 766, 768-69 (1992) (holding that plaintiff

was responsible for incorrect insurance application answers supplied by agent where plaintiff signed the application); *Bell v. Nationwide Ins. Co.*, 146 N.C. App. 725, 727-28, 554 S.E.2d 399, 401-02 (2001) (same). Where an insurance agent provides incorrect answers on an insurance application, the insured's ignorance is excused "only if the insured is justifiably ignorant of the untrue answers, has no actual or implied knowledge thereof, *and* has been guilty of no bad faith or fraud." *Jones v. Home Sec. Life Ins. Co.*, 254 N.C. 407, 413, 119 S.E.2d 215, 220 (1961) (citation omitted) (emphasis added).

By signing the application, Plaintiff affirmatively represented that he had read it and that the information it contained was true and accurate. Plaintiff did not allege that Hatcher said or did anything to mislead him or put him off his guard; he alleged only that Hatcher provided the signature page without the application, and that he trusted that Hatcher would accurately complete the application. Even if Plaintiff had alleged facts showing that he justifiably relied on Hatcher to answer the application questions, Plaintiff's signature on the application form shows that he had implied knowledge of the application answers. *See Jones*, 254 N.C. at 413, 119 S.E.2d at 220 (explaining that an insured's ignorance is excused "only if the insured is justifiably ignorant of the untrue answers, has no actual or implied knowledge thereof, and has been guilty of no bad faith or fraud"). Furthermore, Plaintiff has alleged no facts justifying his failure to read the insurance policy upon its renewal.

The majority states that "Plaintiff alleges that Hatcher acted as his agent" and suggests that Plaintiff's trust in Hatcher amounts to justified reliance because Plaintiff had trusted Hatcher once before. However, Plaintiff neither made nor incorporated such an allegation in his negligence claim, and even if he had, one instance of uninduced trust is insufficient to relieve a plaintiff of his duty to read the contracts he signs. *See, e.g.*, *Bigger v. Vista Sales & Mktg., Inc.*, 131 N.C. App. 101, 105, 505 S.E.2d 891, 893-94 (1998) (refusing to acknowledge a 28-year relationship between agent and insured as justifying the insured's reliance on the agent).

Accordingly, Plaintiff's conduct, or lack thereof, as alleged in his amended complaint constituted contributory negligence as a matter of law. Thus, I would hold that Plaintiff's complaint was properly dismissed because it "discloses some fact that necessarily defeats [his] claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

Plaintiff additionally argues that Hatcher's conduct was willful and wanton, rendering Plaintiff eligible to recover punitive damages.

"Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages . . . ." N.C. Gen. Stat. § 1D-15 (2022). Because I would hold that Plaintiff's negligence claim was properly dismissed, I would also hold that Plaintiff's claim for punitive damages was properly dismissed as Plaintiff did not state a claim for compensatory damages.

For the foregoing reasons, I would hold that the trial court did not err by dismissing Plaintiff's claims against HXS and Hatcher and would affirm the order in its entirety.

KYNA K. ROSE, MICHAEL ROSE, PLAINTIFFS
v.
JENNIFER LYNN POWELL, DEFENDANT

No. COA23-163

Filed 5 September 2023

1. Child Custody and Support—custody action—between mother and grandparents—constitutionally protected status of parent

The trial court did not err when it granted defendant mother's motion to dismiss plaintiff grandparents' custody action seeking secondary custody of their granddaughter (defendant's daughter) several years after plaintiffs' son, the father of defendant's daughter, died, where plaintiffs argued that defendant acted in a manner inconsistent with her constitutionally protected parental status when she made plaintiffs an integral part of the granddaughter's life. Although plaintiffs provided some financial support to defendant, had weekly phone calls with her, and sometimes went to her house to let her dog out, defendant never represented that either plaintiff would be considered a parent to the granddaughter or that they would have guaranteed visitation. Furthermore, plaintiffs made no allegations that defendant was unfit or otherwise incapable of caring for the granddaughter.

2. Child Custody and Support—custody action—between mother and grandparents—N.C.G.S. § 50-13.1—required showing

The trial court did not err when it granted defendant mother's motion to dismiss plaintiff grandparents' custody action seeking secondary custody of their granddaughter (defendant's daughter) several years after plaintiffs' son, the father of defendant's daughter, died,

where plaintiffs argued that they were entitled to bring a visitation claim under N.C.G.S. § 50-13.1. It is defendant's constitutionally protected right to decide with whom her daughter associates, and plaintiffs had no authority to seek visitation or custody under N.C.G.S. § 50-13.1 in the absence of a showing that defendant was unfit or had abandoned or neglected her daughter.

3. Child Custody and Support—custody action—between mother and grandparents—best interests of child

The trial court did not err when it granted defendant mother's motion to dismiss plaintiff grandparents' custody action seeking secondary custody of their granddaughter (defendant's daughter) several years after plaintiffs' son, the father of defendant's daughter, died, where plaintiffs argued that it was in their granddaughter's best interests to allow plaintiffs visitation. An analysis of a child's best interests is inappropriate and offends the Due Process Clause when the parent's conduct has not been inconsistent with his or her constitutionally protected status.

Appeal by plaintiffs from judgment entered 15 August 2022 by Judge C. Ashley Gore in Brunswick County District Court. Heard in the Court of Appeals 9 August 2023.

James W. Lea, III of the LEA/SCHULTZ LAW FIRM, PC, for plaintiffs-appellants.

Matthew Geiger, for defendant-appellee.

FLOOD, Judge.

Kyna and Michael Rose (collectively, "Plaintiffs") appeal from the trial court's dismissal of their action seeking secondary custody of their granddaughter, Aubrey Rose Chandler ("Aubrey"). On appeal, Plaintiffs argue that Aubrey's mother, Jennifer Powell ("Defendant"), acted inconsistently with her constitutionally-protected status as a parent when she allowed Plaintiffs to form a close relationship with Aubrey, then suddenly ceased all communications between the parties. After careful review, we conclude the trial court did not err when it dismissed Plaintiffs' action and, accordingly, we affirm the trial court's order.

I. Factual and Procedural Background

The case before us began with tragedy when, on 27 October 2018, Plaintiffs' son, Jacob Chandler Rose, ("Jacob"), died unexpectedly. At

the time of Jacob's death, Defendant was pregnant with his child. A reprieve from grief came on 30 April 2019 when Defendant gave birth to a healthy baby—Aubrey. By all accounts, Plaintiffs delighted in becoming grandparents to Aubrey. Between Aubrey's birth in 2019 and May of 2021, Plaintiffs, Defendant, and Aubrey spent time together, had weekly dinners, went shopping, and took occasional trips to Myrtle Beach. Plaintiffs assisted Defendant with filing a social security claim related to Jacob's death, which would provide funds for Aubrey. Plaintiffs also provided financial assistance for Aubrey's baptism. In May of 2021, Defendant chose to end contact with Plaintiffs and visitation between Plaintiffs and Aubrey stopped.

On 29 November 2021, Plaintiffs initiated an action seeking secondary custody of Aubrey. On 2 February 2022, Defendant filed a motion to dismiss, an answer, and, in the alternative, counterclaims for temporary and permanent custody, and retroactive and prospective child support. The matter was heard in Brunswick County District Court and, on 15 August 2022, an order dismissing the case was entered. Plaintiffs timely appealed.

II. Jurisdiction

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

III. Analysis

The primary question this Court must answer is whether the trial court improperly granted Defendant's motion to dismiss. Under N.C. R. Civ. P. 12(b)(6), the trial court has the discretion to dismiss a claim that, on its face, fails to allege sufficient facts upon which relief can be granted. *See* N.C. R. Civ. P. 12(b)(6) (2021). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

Plaintiffs argue the trial court erred when it dismissed their claims because: (1) Defendant acted in a manner inconsistent with her constitutionally-protected status as a parent; (2) Defendant's family being considered "intact" does not preclude Plaintiffs from asserting visitation rights; and, (3) it is in Aubrey's best interest to continue visitation with Plaintiffs. We disagree.

A. Constitutionally-Protected Status

[1] First, Plaintiffs claim that Defendant acted in a manner inconsistent with her protected parental status when she "essentially adopted Plaintiffs and their family as an integral part of [Aubrey's] life."

"A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child . . . is based on a presumption that he or she will act in the best interest of the child." *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997). A parent acts inconsistently with their constitutionally-protected status when they are unfit or if they neglect or abandon the child. *See id.* at 79, 484 S.E.2d at 534. Another way in which a parent's actions may be deemed inconsistent with their constitutionally-protected interest is if he or she "brings a nonparent into the family unit, represents that the nonparent is a parent, and voluntarily gives custody of the child to the nonparent without creating an expectation that the relationship would be terminated[.]" *Boseman v. Jarrell*, 364 N.C. 537, 550, 704 S.E.2d 494, 503 (2010).

Here, Plaintiffs allege the constitutional presumption that Defendant should have custody was overcome by "demonstrating in their [c]omplaint that Defendant[] acted inconsistently with her parental status when she brought them into the family unit and represented them as an integral part of the family unit without creating an expectation that the relationship would be terminated." Plaintiffs liken themselves to the plaintiff in *Boseman v. Jarrell*, a case in which domestic partners "intentionally and voluntarily created a family unit in which plaintiff was intended to act—and acted—as a parent." *Id.* at 552, 704 S.E.2d at 505. This argument misses the mark. Unlike the plaintiff in *Boseman*, here, Defendant never had a romantic relationship with either Plaintiff nor did Defendant conceive a child with either Plaintiff. The facts in the Record show that Plaintiffs provided some financial support to Defendant, introduced Defendant to their family in Ohio, had weekly phone calls with Defendant, and for a time would come over to Defendant's house to let her dog out. At no point did Defendant represent that either Plaintiff would be considered a parent to Aubrey or that they would have guaranteed visitation with Aubrey. Further, no allegations assert Defendant was unfit or otherwise incapable of caring for Aubrey. For those reasons, we hold the trial court did not err when it dismissed Plaintiffs' claim that Defendant was acting in a manner inconsistent with her protected parental status. *See Price*, 346 N.C. at 79, 484 S.E.2d at 534; *see also* N.C. R. Civ. P. 12(b)(6).

B. Grandparent Visitation Under N.C. Gen. Stat. § 50-13.1

[2] Next, Plaintiffs argue they are entitled to bring a visitation claim under N.C. Gen. Stat. § 50-13.1. We disagree.

As potential avenues for asserting visitation rights, Plaintiffs cite to N.C. Gen. Stat. §§ 50-13.1, 13.2(b1), 13.5(j), and 13.2(a). The majority of

these statutes, however, provide grandparents with potential visitation rights only if there is a claim pending between the parents of the minor child, when modifying a custody order, or if there has been a stepparent or relative adoption. *See* N.C. Gen. Stat. §§ 50-13.1, 13.2(b1), 13.5(j), and 13.2(a) (2021). N.C. Gen. Stat. § 50-13.1, on the other hand, allows "[a]ny parent, relative, or other person . . . claiming the right to custody of a minor child [to] institute an action or proceeding for the custody of such child[.]" N.C. Gen. Stat. § 50-13.1 (2021). Claims for grandparent custody or visitation made under N.C. Gen. Stat. § 50-13.1 are permissible only "in those situations where a parent's paramount right to custody may be overcome[—]for example, when the parent is unfit, has abandoned or neglected the child, or has died[.]" *McIntyre v. McIntyre*, 341 N.C. 629, 632, 461 S.E.2d 745, 748 (1995). Most importantly for this case, grandparents do not have the right to seek visitation "against parents whose family is intact and where no custody proceeding is ongoing." *Id.* at 635, 461 S.E.2d at 750.

Here, Plaintiffs do not claim that Defendant is unfit, nor do they claim she has abandoned or neglected Aubrey. Further, there is no ongoing custody proceeding with respect to Aubrey. Instead, Plaintiffs' claim hinges on the untimely death of their son, Jacob, and the "de facto" family created when Defendant allowed Plaintiffs to participate in Aubrey's life. Plaintiffs assert that this is a case of first impression because, unlike other cases in which this Court has held that a *surviving parent* remains entitled to a constitutional protection following the death of another parent, here it is the *grandparents* making such a claim.

While Plaintiffs' desire to be included in Aubrey's life is understandable, Defendant is not unfit, nor has she abandoned or neglected Aubrey. In fact, Defendant's family remains "intact." *See McIntyre*, 341 N.C. at 635, 461 S.E.2d at 750. Further, given our conclusion above regarding Defendant's constitutionally-protected right to determine with whom Aubrey associates, we hold that Plaintiffs do not have any authority to seek visitation or custody under N.C. Gen. Stat. § 50-13.1, in the absence of showing Defendant is unfit, or has abandoned or neglected Aubrey. The trial court did not err when it dismissed Plaintiffs' claim. *See McIntyre*, 341 N.C. at 635, 461 S.E.2d at 750.

C. Best Interests

[3] Finally, we turn to Plaintiffs' argument that the trial court erred in dismissing their claim because it was in Aubrey's best interests to allow them and her continued visitation. We disagree.

While the court applies the best interest of the child analysis in a custody action between parents, doing so when the custody dispute is

between a parent and a non-parent offends the Due Process Clause if the "parent's conduct has not been inconsistent with his or her constitutionally protected status[.]" *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997).

As we concluded above, Defendant's conduct has not been inconsistent with her constitutionally-protected status; therefore, this Court need not apply the best interest of the child analysis to the case *sub judice*. *See id.* at 79, 484 S.E.2d at 534.

IV. Conclusion

For the reasons stated above, we hold the trial court did not err when it granted Defendant's motion to dismiss for failure to state a claim upon which relief can be granted.

AFFIRMED.

Judges TYSON and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
PEDRO ISAIAS CALDERON, DEFENDANT

No. COA22-822

Filed 5 September 2023

Indecent Liberties—multiple counts—three acts of kissing the victim—continuous transaction versus separate and distinct acts

In defendant's prosecution for taking indecent liberties with a thirteen-year-old girl—based on three acts of defendant kissing the victim—the trial court erred by denying defendant's motion to dismiss on one of three counts of the offense where there was sufficient evidence to support only two of the counts. The incidents of kissing, which constituted touching and were not "sexual acts" as defined by statute, were divided into two separate acts primarily divided by location: one act took place when defendant kissed the victim's neck, leaving bruising, outside of defendant's van and the other act took place when defendant kissed the victim twice on the mouth after they went into his van. Since there was no intervening act separating the two kisses inside the van, which occurred

within fifteen minutes or less of each other, defendant's actions constituted a single, continuous transaction in that location. The matter was remanded for the trial court to arrest judgment on one of defendant's convictions for indecent liberties and to hold a new sentencing hearing.

Judge STADING concurring in part and dissenting in part.

Appeal by defendant from judgments entered 8 September 2021 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 26 April 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Sarah Grace Zambon, for the State.

Leslie Rawls for Defendant-Appellant.

CARPENTER, Judge.

Pedro Isaias Calderon ("Defendant") appeals from judgments entered after a jury convicted him of three counts of indecent liberties with a child. On appeal, Defendant argues the trial court erred by: (1) denying his motions to dismiss for insufficient evidence; (2) instructing the jury on three charges of indecent liberties with a child, which were based on three acts of kissing a minor child ("Jocelyn")[1] on the same date; and (3) failing to arrest judgment on two of the three charges for indecent liberties. As to all three issues, Defendant contends the evidence of Defendant kissing Jocelyn supports only a single, continuous act rather than three separate and distinct acts. Consequently, Defendant argues the three indecent-liberties-with-a-child convictions violate his right to be free from double jeopardy. To the extent Defendant argues the evidence does not support three convictions of indecent liberties, we agree. We conclude the evidence relating to acts of kissing supports only two counts of indecent liberties. Accordingly, we remand to the trial court with instructions to arrest judgment on one of the indecent-liberties convictions and for resentencing.

1. Pseudonyms are used for all relevant persons throughout this opinion to protect the identity of the minor child.

I. Factual & Procedural Background

The events giving rise to the charges in this case occurred on 5 July 2019. The evidence presented at trial tended to show the following: Between June and July 2019, Jocelyn was thirteen years old and lived with her mother, grandmother, and three younger siblings in a townhome located in Raleigh, North Carolina. Jocelyn's grandmother took care of Jocelyn and her siblings, while Jocelyn's mother worked to support the family. During June and July, Jocelyn attended church services and youth church events, which were held about once per month at "Mary's" home.

"Marvin" and Defendant both rented a room in Mary's home. Marvin sometimes worked with Defendant, and the two became friends. Marvin was an "old friend" of Jocelyn's grandmother and family and was like "an older brother" to Jocelyn. Marvin would take Jocelyn and her sister to the store to "buy stuff for the house."

In June 2019, Jocelyn first met Defendant after a church service in Mary's home. Defendant approached Jocelyn while she was eating, sat next to her, and asked her if she "liked [Marvin]." Defendant also asked Jocelyn "if [she] was 18 [years old]," to which she responded, "no." Outside Jocelyn's presence, Defendant told Marvin that Jocelyn "had a big ass," and Marvin told Defendant "not to joke around that way because [Jocelyn] was young." Nothing else happened that day between Defendant and Jocelyn.

Jocelyn next saw Defendant about four days later at a church-run youth pool party at Mary's house, following a Sunday church service. Defendant had a conversation with Jocelyn and "asked for [her] Instagram." He also asked for her Facebook profile, and they "be[came] friends" on the social media platform. Defendant and Jocelyn messaged daily through Facebook Messenger for "a week or two." Through these messages, Defendant asked Jocelyn if they could go to the movies together, sent her photos, and told Jocelyn he wanted to touch her.

On the morning of 5 July 2019, Jocelyn saw Defendant in person for a third time when he came to her home. Prior to Defendant's arrival, Jocelyn's grandmother had left their home in a taxi, taking Jocelyn's oldest sibling to a dental appointment, and leaving Jocelyn and her younger siblings asleep in the home. Jocelyn, and her neighbors who witnessed Defendant in the parking lot of Jocelyn's home, testified for the State and recalled the events that transpired on 5 July 2019. Defendant also took the stand and testified on his own behalf. Jocelyn's version of events differed from those of Defendant and the neighbors.

Jocelyn testified that on the morning of 5 July 2019, she went outside to take out the trash and saw an old, dark-blue van parked in front of her home. Jocelyn saw someone in the van and recognized that person as Defendant. According to Jocelyn, she started to walk back to her home, and Defendant got out of the van, "grabb[ing]" her. She told Defendant that her "grandmother was going to come back any second . . . ." Defendant "started kissing [her] neck," which left bruising, or "hickeys," on her neck.

Defendant pulled Jocelyn in the driver's seat, lifted her shirt, and licked her breasts. Jocelyn tried to push Defendant off her, but he would not let her go. Defendant "got on top" of Jocelyn to close the passenger door. He then pulled down her pants, licked her vagina, and "put his two fingers in." Defendant moved to the passenger seat where he asked Jocelyn if she "wanted to get on top of him" or perform oral sex on him; Jocelyn responded "no" to both questions. Defendant kissed her again on the neck while inside the van. A taxi pulled up beside Defendant's van, carrying Jocelyn's grandmother and sister. Jocelyn got out of the van and went to the home of her next-door neighbors, "Natalie" and "Danielle," who were standing outside. Jocelyn admitted she had never spoken to these neighbors before this date, and she did not tell them what happened in the van.

Natalie witnessed Jocelyn and Defendant together on 5 July 2019 and testified to the following: Natalie was standing on her porch, about ten steps away from a blue van, when she noticed Jocelyn was inside the vehicle with an older man. Jocelyn and the man were "laying in the car, kind of cuddled up," laughing, and "holding a conversation." She witnessed Jocelyn and Defendant kiss twice; "six to seven minutes" passed between the two kisses. Natalie did not observe: (1) any sexual act take place, (2) Defendant touching Jocelyn's chest, (3) Jocelyn sitting on Defendant's lap, or (4) Jocelyn attempt to push or kick Defendant. Defendant and Jocelyn remained in the vehicle for a total of forty-five minutes, until a taxi pulled up carrying members of Jocelyn's family. Jocelyn quickly crawled over Defendant's lap and stepped outside the van from the front passenger door. Jocelyn approached Natalie, Danielle, and their young nephew, and began to speak with them, although Jocelyn had never interacted with them before. Defendant drove away.

Natalie's sister, Danielle, who was seventeen years old at the time, also witnessed Jocelyn with Defendant on 5 July 2019. Danielle testified she had not spoken to Jocelyn before the 5 July incident but was aware of Jocelyn's approximate age because Danielle observed Jocelyn "getting off the middle school bus" with Danielle's younger brother. Danielle

witnessed Defendant kiss Jocelyn "at least once or twice." She believed Jocelyn was in the van for ten or fifteen minutes.

Lastly, Defendant recollected the events of 5 July 2019. Defendant testified Jocelyn sent him a message stating, "[c]ome save your girlfriend," before he left for her townhome on the morning of 5 July 2019. Defendant went to the address Jocelyn gave him, and he texted her when he arrived. Jocelyn responded, "I'll be right out." Defendant waited outside of the van for about a minute before Jocelyn came out of the home, "came right straight to [Defendant], threw her arms around [Defendant], and . . . starting kissing [him]." Jocelyn asked Defendant to "[k]iss [her] on the neck" while they were in the parking lot outside the van, and he did so. Defendant admitted to kissing Jocelyn on the lips as well as on the neck, and that the bruising on Jocelyn's neck was "probably from [him] kissing her . . . ."

Defendant could see a man looking out the window of Jocelyn's home, and Jocelyn stated it was her uncle, whom she did not want Defendant to meet at that time. Defendant and Jocelyn entered the van through the driver's side door at Jocelyn's request because she did not want her grandmother to see her outside, and they kissed again once inside. Defendant took a photo of himself with Jocelyn as they sat in the front seat of the van. Defendant and Jocelyn's meeting came to an end when Jocelyn's grandmother arrived home. Defendant asked if could meet Jocelyn's grandmother, to which Joycelyn responded, "[n]ot yet." Jocelyn got out of the van and went towards her neighbors who were standing outside.

Defendant further testified he did not: (1) try to pull off Jocelyn's pants; (2) perform oral sex on Jocelyn; (3) digitally penetrate Jocelyn's vagina; (4) lick or touch Jocelyn's breasts; or (5) try to have sexual contact with Jocelyn. Defendant believed Jocelyn was twenty years old because "she looked like she was 20 and she told [him that]." He also believed Jocelyn had children because he saw Jocelyn taking care of children at a prior church service. Defendant admitted asking Marvin at the church service where Defendant first met Jocelyn, if Jocelyn was married or had children; Marvin explained the children were Jocelyn's siblings, and Marvin told Defendant not to get involved with Jocelyn.

On 5 July 2019, Jocelyn's grandmother, Jocelyn's mother, and Marvin discovered Defendant's relationship with Jocelyn. Marvin and Jocelyn's grandmother arrived at Mary's home to confront Defendant. Defendant "took off running" and drove away; he did not return to Mary's home. Defendant was reported to the police.

On 29 August 2019, a Wake County grand jury indicted Defendant on three counts of indecent liberties with a child, in violation of N.C. Gen. Stat. § 14-202.1(a)(2), and one count of second-degree kidnapping, in violation of N.C. Gen. Stat. § 14-39. On 21 October 2019, a Wake County grand jury indicted Defendant on two additional counts of indecent liberties with a child, in violation of N.C. Gen. Stat. § 14-202.1(a)(2). Both indictments alleged that the offenses charged were committed on 5 July 2019.

On 17 September 2019, two arrest warrants were issued against Defendant. The first warrant was based on two counts of statutory sex offense with a child, and the second warrant was based on two counts of indecent liberties with a child. On 30 September 2020, Defendant was arraigned in open court and pled not guilty to all counts.

On 30 August 2021, a jury trial began before the Honorable Keith O. Gregory in Wake County Superior Court. The trial court instructed the jury on five counts of indecent liberties with a child, one count of second-degree kidnapping, and two counts of statutory sex offenses.

The jury found Defendant guilty of three counts of indecent liberties with a child. The jury's verdicts specified they found: (1) "that [D]efendant kissed the alleged victim on the neck, outside of the van," (2) "that [D]efendant kissed the alleged victim on the mouth, inside of the van," and (3) "that [D]efendant kissed the alleged victim on the mouth for a second time, inside of the van." The jury found Defendant not guilty of: (1) one count of second-degree kidnapping, (2) two counts of statutory sex offense, and (3) two counts of indecent liberties with a child based on the actions of "pull[ing] up the alleged victim's bra and lick[ing] and kiss[ing] her breast" and "ask[ing] the alleged victim to perform oral sex[.]"

The trial court sentenced Defendant to three consecutive active sentences of imprisonment for a minimum of sixteen months and a maximum of twenty-nine months each (counts one and two in file number 19 CRS 212773 and count three in file number 19 CRS 217371). Defendant gave notice of appeal in open court following the entry of judgment.

II. Jurisdiction

This Court has jurisdiction to address Defendant's appeal pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021) and N.C. Gen. Stat. § 15A-1444(a) (2021).

III. Issues

The issues before this Court are whether the trial court erred in: (1) denying Defendant's motions to dismiss on the basis the evidence established a single, continuous act that could not support three separate

counts of indecent liberties; (2) instructing the jury on three indecent liberties charges—all based on the acts of kissing; and (3) failing to arrest judgment on any of the three counts of indecent liberties.

IV. Motion to Dismiss

We first consider Defendant's argument as to his motions to dismiss the charges. As a preliminary matter, we consider Defendant's preservation of this issue. Here, at the close of the State's evidence, Defendant moved to dismiss based on insufficient evidence and alleged the charges violated his rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Section 19 of the North Carolina Constitution. Defendant renewed his motion to dismiss at the close of all evidence. We conclude Defendant properly preserved his argument for appeal. *See* N.C. R. App. P. 10(a)(1).

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is 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. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)).

"In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted).

B. Analysis

Defendant maintains the evidence to support the indecent-liberties charges establishes "a single, continuous act" because he kissed Jocelyn three times "in a very brief period," and his conduct only constituted a single type of act: kissing. The State counters that it "provided substantial evidence to support three counts of indecent liberties with a child that are at issue in this appeal." The State points to Jocelyn's testimony that Defendant kissed her neck and left bruising; Natalie's and Danielle's testimonies, which showed Defendant kissed Jocelyn once or twice in the van; and Defendant's brief on appeal in which he admits to kissing Jocelyn three times. For the reasons explained below, we agree with Defendant that the evidence does not support three separate and distinct acts for purposes of determining counts of indecent liberties.

North Carolina General Statute Section 14-202.1 provides:

> A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C. Gen. Stat. § 14-202.1(a) (2021). "[T]he State must present substantial evidence of each of the following elements: (1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire." *State v. Every*, 157 N.C. App. 200, 205, 578 S.E.2d 642, 647 (2003) (citation omitted); *see also* N.C. Gen. Stat. § 14-202.1(a).

Here, the uncontested evidence shows Defendant was forty years old, and Jocelyn was thirteen years old at all relevant times. Thus, Defendant was older than sixteen years of age and "at least five years older" than Jocelyn, and Jocelyn was "under the age of [sixteen] years." *See* N.C. Gen. Stat. § 14-202.1(a). Defendant does not dispute that he took indecent liberties with Jocelyn or that the action was "for the purpose of arousing or gratifying sexual desire." *See Every*, 157 N.C. App. at 205, 578 S.E.2d at 647; *see also* N.C. Gen. Stat. § 14-202.1(a). Instead, Defendant only contests the number of indecent-liberties counts with which he was charged and convicted. With respect to the three indecent-liberties counts at issue on appeal, there was testimony from Jocelyn, two neighbors of Jocelyn, and Defendant, which tended to show that Defendant kissed: (1) Jocelyn's neck, leaving bruising; and (2) Jocelyn on the mouth twice, while inside the van.

1. No Sexual Acts

As a threshold issue, we must consider whether the kissing in this case was a "touching" or a "sexual act." Because Defendant's conduct falls outside the statutory definition of "sexual act," we conclude

Defendant's acts underlying his convictions for indecent liberties constitute non-sexual acts.

In indecent-liberties cases in North Carolina, our Appellate Courts have utilized a different analytical approach when considering acts of touching as opposed to sexual acts. *State v. Williams*, 201 N.C. App. 161, 185, 689 S.E.2d 412, 425 (2009). We note a physical touching is not a required element of indecent liberties with a child under N.C. Gen. Stat. § 14-202.1. *State v. Nesbitt*, 133 N.C. App. 420, 423, 515 S.E.2d 503, 506 (1999). Furthermore, Section 14-202.1 neither defines nor requires a "sexual act," although the North Carolina General Statutes define "sexual act" under Chapter 14, Article 7B – Rape and other Sex Offenses. *See* N.C. Gen. Stat. § 14-27.20(4) (2021) (A "sexual act" means "[c]unnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body").

Hence, an act taken "for the purpose of arousing or gratifying sexual desire," *see* N.C. Gen. Stat. § 14-202.1(a)(1), is not necessarily a "sexual act," as defined by N.C. Gen. Stat. § 14-27.20(4). *See* N.C. Gen. Stat. § 14-27.20(4); *see also State v. James*, 182 N.C. App. 698, 705, 643 S.E.2d 34, 38 (2007) (acknowledging the defendant's act of fondling the victim's breast was a "touching," whereas the defendant's acts of oral sex and intercourse with the child were "sexual acts"). A sexual act may concurrently support charges for both a first-degree sexual offense and an indecent-liberties offense. *State v. Manley*, 95 N.C. App. 213, 217, 381 S.E.2d 900, 902 (holding "the definitional elements of first-degree sex offense [under Section 14-27.4(a)(1)] and indecent liberties are different," and therefore, concurrent convictions do not violate double jeopardy principles), *disc. rev. denied*, 325 N.C. 712, 388 S.E.2d 467 (1989).

The State relies on numerous cases involving sexual acts in arguing that there is "overwhelming evidence" in the instant case of three indecent liberties counts because "the kissing was not continuous and was broken up by talking[and] hugging[.]" *See, e.g.*, *James*, 182 N.C. App. at 704–05, 643 S.E.2d at 38 (characterizing the defendant's conduct as sexual acts where the defendant performed oral sex on the victim and forced sexual intercourse upon her); *State v. Midyette*, 87 N.C. App. 199, 202, 360 S.E.2d 507, 509 (1987) ("[T]he evidence showed [the] defendant penetrated the victim's vagina with his penis on three distinct occasions . . . ."); *State v. Small*, 31 N.C. App. 556, 558, 230 S.E.2d 425, 426 (1976) (holding the trial court did not err in denying the defendant's motion for nonsuit on a charge of rape); *State v. Coleman*, 200 N.C. App. 696, 706, 684 S.E.2d 513, 520 (2009) (concluding the defendant completed two

separate acts: touching the victim's breasts and "watching and facilitating" the victim engage in sexual intercourse with a third person). After careful examination of the cases upon which the State relies, we find the State's argument unpersuasive in light of the issues before this Court involving a "touching" as opposed to a "sexual act." Although there may be overlap between indecent liberties cases involving touching and cases concerning sexual acts, we note the challenged convictions in the instant case exclusively involve touching. Therefore, our analysis falls in line with our jurisprudence regarding acts of touching in the context of an indecent-liberties offense. *See Williams*, 201 N.C. App. at 185, 689 S.E.2d at 425.

2. Separate & Distinct Acts

Having concluded the three kisses were not sexual acts, we now must determine whether the three acts were separate and distinct occurrences, or one continuous occurrence, with respect to the charges for indecent liberties under N.C. Gen. Stat. § 14-202.1. In doing so, this Court must examine the facts underlying each charge. *State v. Rambert*, 341 N.C. 173, 176, 459 S.E.2d 510, 512 (1995). It is well established that "a defendant may be found guilty of multiple crimes arising from the same conduct so long as each crime requires proof of an additional or separate fact." *James*, 182 N.C. App. at 704, 643 S.E.2d at 38 (citation omitted); *see also State v. Lawrence*, 360 N.C. 368, 374, 627 S.E.2d 609, 612–13 (2006) (affirming three indecent-liberties convictions where the jury heard testimony regarding at least three specific acts on three separate occasions, and the jury returned a guilty verdict for each count of indecent liberties). In interpreting criminal statutes, our Court "must . . . strictly construe[the statutes] against the State." *State v. Smith*, 323 N.C. 439, 444, 373 S.E.2d 435, 438 (1988) (citations omitted).

Generally, "a single act [of taking indecent liberties] can support only one conviction." *State v. Jones*, 172 N.C. App. 308, 315, 616 S.E.2d 15, 20 (2005). Nonetheless, this Court has held "multiple *sexual acts* even in a single encounter, may form the basis for multiple [counts] of indecent liberties." *James*, 182 N.C. App. at 705, 643 S.E.2d at 38 (emphasis added). Similarly, we have held rape is generally "not a continuous offense, but each act of intercourse constitutes a distinct and separate offense." *Small*, 31 N.C. App. at 559, 230 S.E.2d at 427. "A continuing offense . . . is a breach of the criminal law *not terminated by a single act or fact*, but which subsists for a definite period and is intended to cover or apply to successive similar obligations or occurrences." *State v. Johnson*, 212 N.C. 566, 570, 230 S.E. 319, 322 (1937) (emphasis added).

In *State v. James*, the defendant touched the victim's breasts, performed oral sex on the victim, and then had sexual intercourse with her. *James*, 182 N.C. App. at 704, 643 S.E.2d at 38. Even though we concluded the act of touching the victim occurred within the "same transaction" as the two sexual acts upon the victim, we upheld the defendant's three convictions of indecent liberties with a child, counting the touching act and the two sexual acts each as additional or separate facts for purposes of charging the defendant. *Id.* at 705, 643 S.E.2d at 38.

This Court has yet to annunciate specific factors the trial court should consider in determining whether multiple, non-sexual acts constitute separate and distinct acts for purposes of an indecent-liberties prosecution. Rather, we have focused on the temporal proximity of the acts and any intervening events. *See State v. Laney*, 178 N.C. App. 337, 341, 631 S.E.2d 522, 525 (2006). In *Laney*, the defendant touched the victim's breasts while she slept in her bed. *Id.* at 338, 631 S.E.2d at 523. After the victim pushed the defendant's hand away, the defendant touched the victim under the waistband of her pants. *Id.* at 338, 631 S.E.2d at 523. On appeal, this Court analyzed the trial court's denial of the defendant's motion to dismiss. *Id.* at 339–41, 631 S.E.2d at 523–25. We held that two acts of touching, where "there was *no gap in time* between two incidents of touching," constituted a single act that could only support one conviction. *Id.* at 341, 631 S.E.2d at 525 (emphasis added). In vacating one judgment for an indecent liberties conviction, we reasoned that "[t]he sole act [supporting the conviction] was touching—not two distinct *sexual acts*." *Id.* at 341, 631 S.E.2d at 525 (emphasis added).

Our Supreme Court considered the question of what constitutes a continuous transaction, as opposed to three separate and distinct acts, in the context of analyzing three counts of discharging a firearm, which we believe is relevant to our analysis in the case *sub judice*. *Rambert*, 341 N.C. at 176–77, 459 S.E.2d at 513. The Court examined the defendant's firing of three shots from a non-automatic weapon and explained: (1) the defendant "*employ[ed] his thought processes* each time he fired the weapon," (2) each firing of the gun was "*distinct in time*," and (3) each bullet hit the vehicle in a "*different place*." *Id.* at 177, 459 S.E.2d at 513 (emphasis added). Based on these facts, the Court "conclude[d] that [the] defendant's conviction and sentencing on three counts of discharging a firearm into [an] occupied property did not violate double jeopardy principles." *Id.* at 177, 459 S.E.2d at 513.

Similarly, the Kansas Supreme Court has set out "four guiding factors" in determining whether convictions arise from the same conduct, which we believe consolidate the relevant factors set forth by the

Rambert Court with the factors this Court has previously used in indecent liberties cases where no sexual act is at issue:

> (1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct.

State v. Sellers, 292 Kan. 346, 357, 253 P.3d 20, 28 (2011) (citation omitted). We believe the "fresh impulse" factor closely aligns with the *Rambert* factor concerning a defendant's employing his thought process and making a conscious decision to act. *See Rambert*, 341 N.C. at 177, 459 S.E.2d at 513. Likewise, the temporal and location factors mirror the *Rambert* factors applied to the discharging-of-a-firearm offense. Finally, our line of indecent liberties cases involving touching has previously considered gaps in time and the presence of intervening events, or lack thereof. *See Laney*, 178 N.C. App. at 341, 631 S.E.2d at 525 (concluding "there was no gap in time between two incidents of touching"); *see also State v. Ramos*, No. COA05-1109, 2006 N.C. App. LEXIS 671, *9 (N.C. Ct. App. 2006) (unpublished) (concluding "arrest of judgment was not warranted as the evidence shows an intervening event"—the child sleeping—"between the initial acts of kissing and the subsequent acts of kissing and touching of the child's breast"); *State v. Crosby*, No. COA16-172, 2016 N.C. App. LEXIS 1182, *10 (N.C. Ct. App. 2016) (unpublished) (distinguishing the facts from *Laney* on the grounds the State's evidence tended to show "at least three separate and distinct indecent liberties taken by [the] defendant, separated by gaps of time"). We therefore adopt these four factors annunciated in *Sellers* with respect to our analytical framework for indecent liberties offenses involving multiple, non-sexual acts.

In *Sellers*, the defendant touched the victim on the breast while lying next to her in her bed. *Sellers*, 292 Kan. at 358, 253 P.3d at 29. The defendant got up from the bed and left the room to check on a barking dog. *Id.* at 358, 253 P.3d at 29. About thirty to ninety seconds later, the defendant returned to the bed and touched the victim's vagina with his fingers. *Id.* at 358, 253 P.3d at 29. The *Sellers* court reasoned that the defendant "had to make a second conscious decision to touch [the victim]"; thus, both counts of indecent liberties were supported by separate and distinct acts by the defendant. *Id.* at 360, 253 P.3d at 29–30.

Here, viewing the evidence in the light most favorable to the State, Defendant kissed Jocelyn on her neck, leaving bruising, when they were

outside of the van. Shortly thereafter, Defendant and Jocelyn climbed into the van, where they remained for up to forty-five minutes. In the van, they talked, cuddled, and kissed twice on the mouth—the two kisses occurring within a timeframe of fifteen minutes or less. Based on this evidence, the acts of Defendant kissing Jocelyn on the neck and kissing Jocelyn on the mouth occurred in two separate locations. *See Sellers*, 292 Kan. at 357, 253 P.3d at 28. After Defendant got into the van, Defendant had an opportunity to consider his conduct—and leave the scene—yet chose to kiss Jocelyn again. Like the defendant in *Sellers*, Defendant made a conscious decision—after an intervening event, i.e., relocating inside the private area of the van—to take indecent liberties again. *See id.* at 357, 253 P.3d at 28. Thus, there is substantial evidence to support one count of indecent liberties based on kissing outside the van and one count of indecent liberties based on kissing inside the van. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

Nevertheless, because the two kisses that occurred inside the van took place in fifteen minutes or less and were not separated by any intervening act, we conclude these actions by Defendant constituted a single, "continuing offense." *See Johnson*, 212 N.C. at 570, 230 S.E. at 322; *Sellers*, 292 Kan. at 357, 253 P.3d at 28. Accordingly, there was not substantial evidence of two counts of indecent liberties with a child occurring inside the van. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455. Therefore, we conclude the trial court erred by denying Defendant's motions to dismiss as to one charge. *See id.* at 378, 526 S.E.2d at 455. We remand to the trial court with instructions to arrest judgment upon one of Defendant's convictions for indecent liberties with a child under file number 19 CRS 212773 and for a new sentencing hearing. *See State v. Posner*, 277 N.C. App. 117, 123, 857 S.E.2d 870, 873 (2021) (remanding to the superior court for arrest of judgment and resentencing where the defendant's two larceny convictions were based on the same transaction); *see also State v. Fields*, 374 N.C. 629, 636, 843 S.E.2d 186, 191 (2020) (quoting *State v. Pakulski*, 326 N.C. 434, 439–40, 390 S.E.2d 129, 131–32 (1990) ("While we agree in certain cases an arrest of judgment does indeed have the effect of vacating the verdict, we find that in other situations an arrest of judgment serves only to withhold judgment on a valid verdict which remains intact.")).

V. Conclusion

We conclude the trial court erred by denying Defendant's motion to dismiss because there was not substantial evidence of three counts of indecent liberties with a child; rather, the evidence supported only two counts. We therefore remand the matter to the trial court with

instructions to arrest judgment upon one of Defendant's convictions for indecent liberties and conduct a new sentencing hearing.

NO ERROR IN PART; REMANDED FOR ARRESTING JUDGMENT AND RESENTENCING.

Judge HAMPSON concurs.

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

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

Being bound by the decisions of this Court in *State v. Laney*, 178 N.C. App. 337, 631 S.E.2d 522 (2006), *State v. James*, 182 N.C. App. 698, 643 S.E.2d 34 (2007), and *State v. Williams*, 201 N.C. App. 161, 689 S.E.2d 412 (2009), I accept as presently authoritative the majority's position that there is a different analytical path applied to "sexual acts" and "touching" in the context of charges of indecent liberties. This being so, I concur in the majority's conclusion that the adopted test is imperative to distinguish between multiple acts of touching. However, I would note that panels of this Court and future litigants could benefit from the guidance of our Supreme Court concerning whether the judicially-constructed distinction between "sexual acts" and "touching," not found in the statute, is appropriate. I respectfully dissent from the ultimate holding of the majority opinion and would find that there are three separate and distinct acts when applying the adopted test.

"Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted). Therefore, we are required to remain on the trail first blazed in *State v. Laney*, in which a panel of our Court decided that a "defendant's acts of touching the victim's breasts and putting his hand inside the waistband of her pants were part of one transaction" and "[t]he sole act involved was touching—not two distinct sexual acts." 178 N.C. App. at 341, 631 S.E.2d at 525. The Court also noted that "there was no gap in time between two incidents of touching, and the two acts combined were for the purpose of arousing or gratifying defendant's sexual desire." *Id*. While the Court's consideration of "no gap in time" between

the two incidents merits weight, the emphasis on "touching" may have been improvident. *Id.*

A year later, in *State v. James*, this trajectory continued when a panel of our Court wrestled with "a fact pattern similar to" *State v. Laney*. *James*, 182 N.C. App. at 704, 643 S.E.2d at 38. Although, the facts of *State v. James* were different in that "[h]ere, there was both touching and two distinct sexual acts in a single encounter." *Id.* at 705, 643 S.E.2d at 38. The Court upheld the defendant's conviction of three counts of indecent liberties and distinguished the case in "that the *Laney* Court emphasized the sole act alleged was touching, and 'not two distinct sexual acts' " and "[t]his language indicates that multiple sexual acts, even in a single encounter, may form the basis for multiple indictments for indecent liberties." *Id.* (quoting *Laney*, 178 N.C. App. at 341, 631 S.E.2d at 524). While the panel of this Court in *State v. James* was required to reconcile *Laney* with their decision, it continued the legacy of delineation between "touching" and "sexual acts." *Id.*

Shortly thereafter, in *State v. Williams*, another panel of our Court was faced with deciding whether the result of *State v. Laney* permitted a defendant's "conviction of, and punishment for, two counts of [a] first degree sexual offense . . . during a single incident" or "violate[d] his double jeopardy rights." *Williams*, 201 N.C. App. at 184, 689 S.E.2d at 425. There, this Court quoted the language of *State v. James* differentiating "mere touching" and "sexual acts." *Id.* at 185, 689 S.E.2d at 425 (quoting *James*, 178 N.C. App at 705, 643 S.E.2d at 38). Further continuing down the path of its quoted predecessor panels, the opinion ordained "that a different analytical path should be applied when dealing with 'sexual acts' as opposed to touching in the context of indecent liberties." *Id.*

Going forward under the existing paradigm presents a concerning requirement for the appellate courts to distinguish between "touching" and "sexual acts" when applying the indecent liberties statute. As the facts present in this case—a 40-year-old man kissing a 13-year-old-child in this context—is the exact type of perverse, criminal behavior anticipated by the statute. As recognized by the panel in *State v. James*:

> The evil the legislature sought to prevent in this context was the defendant's performance of any immoral, improper, or indecent act in the presence of a child "for the purpose of arousing or gratifying sexual desire." Defendant's purpose for committing such act is the gravamen of this offense; the particular act performed is immaterial.

182 N.C. App. at 704, 643 S.E.2d at 38 (quoting *State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990)). Here, after determining that the acts are covered by the statute, the only remaining question should be whether the acts are distinct for purposes of double jeopardy. However, existing jurisprudence from the Court of Appeals forces current and future panels to draw lines between the types of acts to reach a result. And, absent the analysis required by our Court's precedent, such distinction between "touching" and "sexual acts" is not necessary—if acts occur within a single encounter, then such acts form the basis for a separate conviction if: (1) "the indictments each spell[ ] out a separate and distinct fact . . . to be proven by the State[,]" or (2) the same act ends and begins as determined by the test adopted in this opinion. *James*, 182 N.C. App. at 705, 643 S.E.2d at 38. Therefore, to prevent confusion for future courts and litigants, clarification from above would be beneficial.

Nonetheless, at the present time, we must analyze the case *sub judice* in accordance with existing precedent. To reach its conclusion, the majority prudentially applies an analytical framework adopted from *State v. Sellers*, 292 Kan. 346, 357, 253 P.3d 20, 28 (2011). In doing so, the majority weighs the four guiding factors and reaches the conclusion that defendant committed two separate and distinct acts of indecent liberties with a minor. While I agree that the test adopted by the majority is appropriate for determining when the same act ends and begins, I would find that defendant committed three separate and distinct acts.

In the matter before us, in a light most favorable to the State, defendant kissed Jocelyn on her neck outside of the van once and then inside of the van "twice, and it was not back to back." *See State v. Irwin*, 304 N.C. 93, 98, 282 S.E.2d 439, 443 (1981) (citations omitted). There was a "break in between" the kisses in the van of "six to seven minutes." In applying the guiding factors from *Sellers* to the particular facts presented by this case, I would conclude that the separation of six to seven minutes is distinct in time, permitting defendant to employ his thought process and make a conscious decision to engage in the same act a second time. *See State v. Sellers*, 292 Kan. at 357, 253 P.3d at 28; *State v. Rambert*, 341 N.C. 173, 176, 459 S.E.2d 510, 512 (1995). This conclusion squares with the demands of double jeopardy as well as the result of *State v. Laney*, in which "there was no gap in time between two incidents of touching. . . ." 178 N.C. App. at 341, 631 S.E.2d at 525. Accordingly, I would find that the trial court did not err by denying defendant's motion to dismiss, by instructing the jury on three charges of indecent liberties with a child, nor by declining to arrest judgment upon one of the three convictions for indecent liberties.

STATE OF NORTH CAROLINA
v.
JON ROSS ROBERTSON

No. COA23-24

Filed 5 September 2023

Criminal Law—guilty plea—motion to withdraw—denied—deviation from plea arrangement

Where defendant entered a plea arrangement with the State and the trial court accepted the plea—but subsequently announced it would impose a sentence other than the one in the plea arrangement—the trial court erred by denying defendant's motion to withdraw his guilty plea. To the extent that the terms of the plea arrangement may have been unclear, the trial court should have sought clarification from the parties.

Appeal by Defendant from judgment entered 23 August 2022 by Judge Gregory R. Hayes in Cabarrus County Superior Court. Heard in the Court of Appeals 8 August 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alan D. McInnes, for the State-Appellee.

Richard Croutharmel for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from judgment entered upon his guilty plea pursuant to a plea arrangement. Defendant argues, and the State concedes, that the trial court erred by denying Defendant's motion to withdraw his guilty plea when the trial court accepted the plea and subsequently announced that it would impose a sentence other than the one agreed to by the State and Defendant in the plea arrangement. Because the trial court erred by denying Defendant's motion to withdraw his guilty plea, the judgment is vacated, and the matter is remanded for further proceedings.

I. Background

On 13 September 2021, Defendant was indicted for felony fleeing to elude arrest with a motor vehicle. Defendant entered a plea arrangement with the State on 23 August 2022, which stated, "Defendant will

plea as charged to Felony Flee/Elude Arrest w/ a Motor Vehicle and receive a suspended sentence in the presumptive range." At Defendant's plea hearing, the trial court questioned Defendant, in relevant part, as follows:

> THE COURT: Are you pleading guilty as a result of a plea bargain or plea arrangement?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And that says, Defendant will plead guilty as charged to felony fee to elude arrest with a motor vehicle, receive a suspended sentence in the presumptive range.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Is that correct as being your full plea arrangement?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you now personally accept that arrangement?
>
> THE DEFENDANT: Yes, sir.

The trial court accepted the plea arrangement, then announced:

> THE COURT: Class H felony, zero points, prior record level one. A presumptive sentence, presumptive sentence of 6 to 17, 6 to 17 months, suspended. Special supervised probation for 24 months, 24 months on these conditions. That he pay the cost, that he pay the costs, that he serve a split sentence of 30 days, 30 days in the Cabarrus County jail, pay fees for that.
>
> Comply with all the regular conditions of probation. Surender his driver's license pursuant to this felony fleeing to elude arrest conviction. And the case will transfer to Mecklenburg County for supervision.

Defense Counsel immediately sought clarification that the trial court intended to impose 24 months of probation with a 30-day split sentence and the trial court confirmed that it did. The following exchange then took place:

> [DEFENSE COUNSEL]: Our understanding of what the agreement was with the State was just plead to supervised.

> THE COURT: Wasn't on here. I looked. There's nothing tieing (sic) my hands. I could have given a longer split than that. That's the sentence.
>
> [THE STATE]: Your Honor, the agreement was for --
>
> [DEFENSE COUNSEL]: It's for a suspended sentence.
>
> THE COURT: It is, I gave him a suspended. I gave him a 24-month suspended sentence. Did I not? Did I give him a suspended sentence?
>
> THE CLERK: Yes, sir.
>
> THE COURT: I thought I did.
>
> [DEFENSE COUNSEL]: I'd ask to strike the plea, Your Honor?
>
> THE COURT: Denied.

After a brief discussion with the clerk, the trial court announced that "[t]he 30-day split is effective now" and that any credit for pretrial incarceration "can go towards . . . the suspended sentence when it's activated."[1]

Based on Defendant's prior record level of one, the trial court entered written judgment imposing a sentence of 6 to 17 months' imprisonment, suspended subject to 24 months' supervised probation. In addition, the judgment imposed an active sentence of 30 days in the county sheriff's custody as a special condition of probation. Defendant appealed.

II. Discussion

Defendant argues that the trial court violated N.C. Gen. Stat. § 15A-1024 when it denied Defendant's motion to withdraw his guilty plea after the trial court accepted the plea and subsequently announced that it would impose a sentence other than the one agreed to by the State and Defendant in the plea arrangement.

"Whether a trial court violated a statutory mandate is a question of law, subject to de novo review on appeal." *State v. Hood*, 273 N.C. App. 348, 351, 848 S.E.2d 515, 518 (2020) (citation omitted).

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1. The trial court misspoke here as any credit for pretrial incarceration would go towards the suspended sentence *if* the sentence is activated. We do not presume that a defendant will violate probation.

The State and a defendant may agree to a plea arrangement wherein the prosecutor agrees to recommend a particular sentence in exchange for the defendant's guilty plea. *See* N.C. Gen. Stat. § 15A-1021(a) (2022). A plea arrangement is contractual in nature but differs from an ordinary commercial contract "as it involves the waiver of fundamental constitutional rights, including the right to a jury trial." *State v. Wentz*, 284 N.C. App. 736, 739, 876 S.E.2d 814, 816-17 (2022) (citations omitted). Because a plea arrangement involves the waiver of fundamental constitutional rights, when the trial court accepts a defendant's plea pursuant to a plea arrangement, "the right to due process and basic contract principles require strict adherence" to the terms of the arrangement. *Id.* at 740, 876 S.E.2d at 817 (citation omitted).

"Before accepting a plea pursuant to a plea arrangement in which the prosecutor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly." N.C. Gen. Stat. § 15A-1023(b) (2022).

> If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

Id. § 15A-1024 (2022). "Under the express provisions of this statute a defendant is entitled to withdraw his plea and as a matter of right have his case continued until the next term." *State v. Williams*, 291 N.C. 442, 446-47, 230 S.E.2d 515, 518 (1976). "[A]ny change by the trial judge in the sentence that was agreed upon by the defendant and the State . . . requires the judge to give the defendant an opportunity to withdraw his guilty plea." *State v. Marsh*, 265 N.C. App. 652, 655, 829 S.E.2d 245, 247 (2019) (emphasis omitted).

Here, Defendant entered a plea arrangement with the State wherein the prosecutor agreed to recommend that Defendant "receive a suspended sentence in the presumptive range" in exchange for Defendant's guilty plea. The trial court accepted Defendant's guilty plea and, pursuant to the arrangement, entered a suspended sentence within the presumptive range for the offense and Defendant's prior record level. However, the trial court imposed an additional active sentence of 30 days in the county sheriff's custody as a special condition of probation. This additional sentence deviates from the sentence that was

agreed upon by Defendant and the State; thus, Defendant was entitled to withdraw his plea and have his case continued until the next term. *See id.*; *Williams*, 291 N.C. at 446-47, 230 S.E.2d at 518.

The trial court's justification for the sentence it imposed was that supervised probation "[w]asn't on [the arrangement]. I looked. There's nothing tieing (sic) my hands. I could have given a longer split than that. That's the sentence." This justification misconstrues the meaning of "strict adherence." Our courts have held that strict adherence to plea arrangements means giving the defendant what they bargained for. *See, e.g.*, *State v. Carriker*, 180 N.C. App. 470, 471, 637 S.E.2d 557, 558 (2006) (vacating sentence where the trial court required defendant to surrender her nursing license, which was not contemplated in defendant's plea arrangement); *State v. Wall*, 167 N.C. App. 312, 317, 605 S.E.2d 205, 209 (2004) (vacating sentence where trial court entered a shorter sentence than agreed upon by the parties); *Marsh*, 265 N.C. App. at 656, 829 S.E.2d at 248 (vacating sentence where trial court imposed two concurrent sentences when the plea arrangement recommended only one).

To the extent the terms of the arrangement—including whether the parties had agreed to the imposition of a special condition of probation—were unclear, the trial court should have sought clarification from the parties rather than impose a sentence it decided was appropriate. This is especially true as both the State and Defendant objected to the trial court's understanding of the arrangement.

Accordingly, because the sentence imposed by the trial court deviates from the sentence that was agreed upon by Defendant and the State, the trial court erred by denying Defendant's motion to withdraw his guilty plea.

III. Conclusion

Because the trial court erred by denying Defendant's motion to withdraw his guilty plea, the judgment is vacated, and the matter is remanded for further proceedings.

VACATED AND REMANDED.

Judges ZACHARY and RIGGS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 SEPTEMBER 2023)

BANK OF AM., N.A. v. LEMAGNI No. 22-1019	Mecklenburg (21CVD2062)	Affirmed
BURNS v. LUTH No. 23-251	Mecklenburg (20CVS6930)	Reversed and Remanded
CASA ADVISORS, LLC v. SHEETS No. 22-1039	Iredell (22CVS201)	Dismissed
COLONIAL PLAZA PHASE TWO, LLC v. CHERRY'S ELEC. TAX SERVS., LLC No. 23-159	Edgecombe (15CVD51)	Dismissed
DeATLEY v. DeATLEY No. 22-1070	Mecklenburg (19CVD3065)	Affirmed in Part, Vacated In Part and Remanded
HOLMES v. BLACKMON No. 23-119	Mecklenburg (20CVS12782)	Affirmed
IN RE B.C. No. 23-75	Union (18JT154)	Affirmed
IN RE B.C.B. No. 23-79	Chatham (20JT61)	Affirmed
IN RE E.I.H. No. 22-928	Catawba (21JA63)	Affirmed
IN RE I.M. No. 22-966	Durham (17JT1433) (17JT144)	Affirmed
IN RE S.R.A. No. 22-1009	Onslow (19JT19)	Affirmed
IN RE Z.H.T. No. 22-979	Alamance (21JT104) (21JT45)	Affirmed
LAKEMPER v. N.C. DEP'T OF PUB. SAFETY No. 23-87	N.C. Industrial Commission (TA-29116)	Affirmed
LATHAM-HALL TECHS. v. VECOPLAN, LLC No. 23-286	Davidson (22CVS2161)	Dismissed

ROBERTS v. ROBERTS No. 23-54	Durham (22CVS2251)	Dismissed In Part; Affirmed In Part.
ROSEWOOD ESTS. I, LP v. DRUMMOND No. 23-118	Bladen (22CVD60)	Reversed
SEYMORE v. HARTMAN No. 23-144	Mecklenburg (19CVS8071)	Affirmed
SHOOK v. N.C. DEP'T OF PUB. SAFETY No. 22-755	Office of Admin. Hearings (21OSP4777) (21OSP4783)	Affirmed
STATE v. BACOT No. 23-172	Davidson (22CRS50813)	Affirmed
STATE v. CARVER No. 22-1040	Cleveland (20CRS55158) (21CRS50126)	No Error
STATE v. GATLING No. 22-821	Wilson (20CRS52052)	New Trial
STATE v. GILL No. 23-50	Cleveland (20CRS53451)	Dismissed
STATE v. GOINGS No. 23-128	Surry (19CRS53071)	No Error
STATE v. GONZALEZ No. 22-1022	Johnston (21CRS1333) (21CRS53519) (21CRS53521)	No Error
STATE v. HAIRSTON No. 22-939	Forsyth (20CRS62383-87) (20CRS62389-94) (20CRS62396)	No Prejudicial Error
STATE v. JOHNSON No. 23-52	Jackson (21CRS481) (21CRS50374-75)	No Error
STATE v. JORDAN No. 23-2	Wake (14CR215561)	Affirmed
STATE v. MARLER No. 22-964	Buncombe (18CRS92717-18)	No error in part; remanded for resentencing.

STATE v. MOORER No. 23-281	Buncombe (19CRS81058)	No Plain Error
STATE v. PARKER No. 22-764	Haywood (21CRS51192)	No Error
STATE v. PARRY No. 23-292	Cherokee (17CRS50777)	Remanded
STATE v. PRATT No. 22-937	Randolph (21CRS51083)	No Error
STATE v. PRITCHETT No. 22-805	Pitt (19CRS55325)	No Error
STATE v. RECTOR No. 22-803	Columbus (20CRS408) (20CRS50740)	No Error
STATE v. SUMMERS No. 22-980	Forsyth (18CRS51677-78) (18CRS53397)	No prejudicial error in part; no plain error in part; dismissed in part
STATE v. THOMPSON No. 23-61	Lincoln (20CRS52458) (20CRS657)	Affirmed
STATE v. WHITCHER No. 22-871	Brunswick (19CRS163)	No Error
STATE v. WILLIAMS No. 22-1015	Buncombe (19CRS86220)	No Error
TOWN OF RURAL HALL v. GARNER No. 23-185	Forsyth (21CVS5345)	Affirmed
WR IMAGING, LLC v. N.C. DEP'T OF HEALTH & HUM. SERVS. No. 22-1008	Office of Admin. Hearings (22DHR415)	Affirmed

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