291 N.C. App.—No. 1 Pages 1-135

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

APRIL 23, 2024

MAILING ADDRESS: The Judicial Department
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OF
NORTH CAROLINA

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COURT OF APPEALS

CASES REPORTED

FILED 17 OCTOBER 2023

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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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.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

EARNHARDT PLUMBING, LLC, PLAINTIFF
v.
THOMAS BUILDERS, INC. AND THOMAS PROPERTIES OF NORTH CAROLINA, LLC, DEFENDANTS

No. COA23-228

Filed 17 October 2023

1. Appeal and Error—interlocutory order—substantial right—contract dispute—forum for arbitration

In a contract dispute between plaintiff (a North Carolina plumbing company) and defendants (a Tennessee building corporation and a North Carolina property company), the trial court's order requiring the parties to conduct arbitration in North Carolina was immediately appealable as affecting a substantial right. The court's determination that the forum-selection clause in the contract (allowing arbitration to be held in another state) was unenforceable as against public policy deprived defendants of their contractual right to select an arbitration forum, and this right would be lost absent immediate review.

2. Arbitration and Mediation—arbitration agreement—forum selection clause—federal preemption—interstate commerce—findings required

In a contract dispute between plaintiff (a North Carolina plumbing company) and defendants (a Tennessee building corporation and a North Carolina property company) over payment for services rendered, the trial court's order compelling arbitration in North Carolina was vacated and the matter was remanded for further findings of fact regarding whether the contract involved interstate

commerce. Without those findings—required to support the court's conclusion that the Federal Arbitration Act (FAA) did not preempt state law and, therefore, that the forum-selection clause in the parties' contract was unenforceable as against public policy—the appellate court could not properly evaluate whether the FAA applied in this instance.

Appeal by Defendants from Order entered 17 November 2022 by Judge Patrick T. Nadolski in Cumberland County Superior Court. Heard in the Court of Appeals 23 August 2023.

Vann Attorneys, PLLC, by James R. Vann, for Plaintiff-Appellee.

Penn Stuart & Eskridge, P.C., by M. Shaun Lundy, for Defendant-Appellants.

HAMPSON, Judge.

Factual and Procedural Background

Thomas Builders, Inc. (Thomas Builders) and Thomas Properties of North Carolina (Thomas Properties) (collectively, Defendants) appeal from an Order, which compelled Earnhardt Plumbing, LLC (Plaintiff) to arbitrate its claims, but denied Defendants' request to compel enforcement of a contractual provision allowing them to require arbitration take place in Tennessee. The Record before us tends to reflect the following:

Plaintiff is a North Carolina limited liability company. Thomas Builders is a Tennessee corporation and maintains a registered office in Wake County, North Carolina. Thomas Properties is a North Carolina limited liability company. Plaintiff entered into a contract with Defendants to provide services related to the construction of a Tru by Hilton hotel at a property owned by Thomas Properties in Fayetteville, North Carolina (the Contract). Under the Contract, Plaintiff agreed to provide and install plumbing and gas line systems for the hotel. Plaintiff alleges Thomas Builders accepted Plaintiff's performance without complaint and has breached the Contract by failing to pay Plaintiff in full for services rendered under the Contract. Specifically, Plaintiff alleges that it is owed $159,588.50 under the Contract.

Paragraph 20b of the Contract provides claims arising "out of or related to this Subcontract . . . shall be subject to arbitration." Further, "[t]he Arbitration shall be held at the discretion of the Contractor either at Contractor's principle [sic] place of business or where the Project is located."

Plaintiff filed a Complaint on 7 March 2022. On 5 May 2022, Defendants filed a Pre-Answer Motion to Dismiss or in the alternative to Stay Proceedings Pending Mediation and/or Arbitration. The trial court heard arguments on Defendants' Motion on 1 November 2022. The focus of the parties' arguments during this hearing was not whether the matter should be arbitrated, but rather whether Defendants could require arbitration take place in Tennessee under the terms of the Contract permitting "[t]he Arbitration shall be held at the discretion of the Contractor either at Contractor's principle [sic] place of business or where the Project is located."

On 17 November 2022, the trial court entered its Order Denying Defendants' Motion to Dismiss and Granting Defendants' Alternative Motion to Stay Proceedings Pending Arbitration. The Order stayed judicial proceedings for six months to allow the parties to arbitrate the dispute. However, while the trial court concluded the parties' Contract included a valid arbitration agreement, the trial court further concluded the provision allowing Defendants to require Tennessee be the forum for arbitration was unenforceable under N.C. Gen. Stat. § 22B-3, which provides: "any provision in a contract entered into in North Carolina that requires . . . the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable." N.C. Gen. Stat. § 22B-3 (2021). The trial court further concluded the Federal Arbitration Act (FAA) did not preempt the application of N.C. Gen. Stat. § 22B-3. In its decree, the trial court ordered the arbitration "shall be conducted in the State of North Carolina." Defendants filed Notice of Appeal from the trial court's Order on 28 November 2022.

Appellate Jurisdiction

[1] As Defendants acknowledge, the trial court's Order is interlocutory and not final in nature. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). "Generally, a party has no right to appeal an interlocutory order." *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 775, 501 S.E.2d 353, 354 (1998).

However, under N.C. Gen. Stat. § 7A-27(b)(3)(a), an interlocutory order may be appealed as of right if it "[a]ffects a substantial right." N.C. Gen. Stat. § 7A-27(b)(3)(a) (2021). "A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." *Turner v. Norfolk S. Corp.*, 137 N.C.

App. 138, 142, 526 S.E.2d 666, 670 (2000) (citation and quotation marks omitted). As such, "an appeal is permitted . . . if the trial court's decision deprives the appellant of a substantial right would be lost absent immediate review." *Cox*, 129 N.C. App. at 775, 501 S.E.2d at 354 (citation and quotation marks omitted).

"[A]n order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime S. Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991); *see also Gay v. Saber Healthcare Grp., LLC.*, 271 N.C. App. 1, 5, 842 S.E.2d 635, 638 (2020). Likewise, orders addressing the validity of a forum-selection clause also affect a substantial right. *US Chem. Storage, LLC v. Berto Constr., Inc.*, 253 N.C. App. 378, 381, 800 S.E.2d 716, 719 (2017).

Here, Defendants contend the trial court's Order affects a substantial right because it deprives them of their contractual right to select the forum for arbitration. We agree with Defendants that this is a right which "might be lost, prejudiced, or inadequately preserved in the absence of an immediate appeal" from the Order. *Clements v. Clements ex rel. Craige*, 219 N.C. App. 581, 584, 725 S.E.2d 373, 376 (2012) (quotation marks omitted).

Thus, the trial court's Order affects a substantial right. Therefore, Defendants have a right of appeal from the trial court's interlocutory Order. Consequently, this Court has jurisdiction to review this matter pursuant to N.C. Gen. Stat. § 7A-27(b)(3).

Issue

[2] The dispositive issue is whether the trial court properly concluded the FAA did not preempt N.C. Gen. Stat. § 22B-3 in this case and that the forum-selection clause in the arbitration agreement was unenforceable under North Carolina law.

Analysis

"[W]hether a particular dispute is subject to arbitration is a conclusion of law, reviewable de novo by the appellate court." *Epic Games, Inc. v. Murphy-Johnson*, 247 N.C. App. 54, 61, 785 S.E.2d 137, 142 (2016) (quoting *Carter v. TD Ameritrade Holding Corp.*, 218 N.C. App. 222, 226, 721 S.E.2d, 256, 260 (2012)). Likewise, "[i]ssues relating to the interpretation of terms in an arbitration clause are matters of law, which this Court reviews *de novo*." *Id.* at 61-62, 785 S.E.2d at 142-43.

Here, Defendants contend the trial court erred in failing to enforce the forum-selection clause of the arbitration agreement in the parties'

Contract. Defendants argue, presuming N.C. Gen. Stat. § 22B-3 applies to void the forum-selection clause, the FAA preempts state law in this instance because the Contract necessarily involves interstate commerce—allegedly arising from Plaintiff's dealings under the Contract with Thomas Builders, a Tennessee company. Thus, Defendants posit the arbitration clause and its forum-selection clause fall within the purview of the FAA.

Under the FAA,

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4 [of the FAA].

9 U.S.C. § 2 (2022). In relevant part to this case, the FAA defines "commerce" as "commerce among the several States[.]" 9 U.S.C. § 1 (2022).

N.C. Gen. Stat. § 22B-3 provides: "any provision in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable." N.C. Gen. Stat. § 22B-3 (2021). However, when the contract at issue involves commerce among the States, "the FAA preempts North Carolina's statute and public policy regarding forum selection." *Goldstein v. Am. Steel Span, Inc.*, 181 N.C. App. 534, 538, 640 S.E.2d 740, 743 (2007).

"The FAA will apply if the contract evidences a transaction involving interstate commerce." *Hobbs Staffing Servs., Inc. v. Lumbermens Mut. Cas. Co.*, 168 N.C. App. 223, 226, 606 S.E.2d 708, 711 (2005). Whether a contract evidences a transaction involving interstate commerce is a question of fact, which an appellate court should not initially decide. *Id.*

In this case, the trial court concluded "[t]he Federal Arbitration Act does not preempt the applicable North Carolina law." However, the trial court made no findings of fact to support that conclusion. The only facts the trial court found were that there was a valid arbitration agreement and that the dispute in this case falls within the substantive scope of the parties' agreement. Specifically, the trial court made no findings as to whether the parties' Contract evidences a transaction involving interstate commerce.

Thus, without additional findings of fact, we cannot evaluate the underlying question of whether the FAA applies in this case. Therefore, we cannot properly consider the trial court's ruling that the FAA does not preempt applicable North Carolina law. Consequently, we must remand the case to the trial court to make findings of fact as to whether the Contract at issue evidences a transaction involving interstate commerce—or not—and, based on its fact-finding, apply the applicable law to the forum-selection clause in the arbitration agreement contained in the parties' Contract.[1]

Conclusion

Accordingly, for the foregoing reasons, we vacate and remand this case to the trial court for additional findings of fact as to whether the Contract evidences a transaction involving interstate commerce and whether the Federal Arbitration Act applies to the Contract. The trial court should then apply the applicable federal or state law to the arbitration provision of the Contract.

VACATED AND REMANDED.

Judges MURPHY and WOOD concur.

1. There is another related issue which we do not reach in this case, but which may become relevant to the trial court's analysis on remand: whether the forum-selection clause is mandatory or permissive. At the hearing on Defendant's Motion below, the trial court aptly picked up on this issue; however, the trial court's Order does not address the issue, because it was, ultimately, not relevant to its legal analysis. On remand, however, should the trial court deem that issue necessary to its analysis, the trial court is certainly free to revisit it.

GOUCH v. ROTUNNO

[291 N.C. App. 7 (2023)]

HARVEY W. GOUCH, PLAINTIFF
v.
CLIFFORD ROTUNNO AND DOLORES ROTUNNO, DEFENDANTS

No. COA23-283

Filed 17 October 2023

Deeds—residential restrictive covenants—enforceability—sufficiency of pleadings—instrument in chain of title

In an action for injunctive relief and monetary damages for alleged violations of restrictive covenants in a residential neighborhood, plaintiff adequately pleaded a claim for relief to survive defendants' motion to dismiss where, although the deed by which plaintiff conveyed one lot in the subdivision to defendants did not reference plaintiff's previously registered Declaration of Covenants, the instrument was in the chain of title for defendants' lot discoverable upon a proper examination of the public records for that subdivision; there was no ambiguity about which subdivision was subject to the Declaration; and plaintiff's Declaration, which was applicable to the eleven (out of sixteen total) lots that plaintiff owned at the time of its registration, was evidence of a general plan and scheme to impose uniform characteristics on the subject lots.

Appeal by Plaintiff from an order entered 28 December 2022 by Judge Carla Archie in Gaston County Superior Court. Heard in the Court of Appeals 23 August 2023.

Winfred R. Ervin, Jr. and Isaac Cordero, for Plaintiff-Appellant.

Brett E. Dressler, for Defendants-Appellees.

WOOD, Judge.

Mr. Harvey Gouch ("Plaintiff") appeals an order granting Clifford and Dolores Rotunno's ("Defendants") motion to dismiss pursuant to Rule 12(b)(6). After careful review, we reverse the trial court's order.

I. Factual and Procedural Background

Defendants live in a single-family residence on a lot in the Stoney Brook Estates subdivision in Gaston County. The issue on appeal is whether Defendants' lot is subject to certain recorded covenants.

In 2007, Defendants' lot was part of a larger undeveloped tract previously owned by Integrity Builders of NC, LLC ("Integrity"). On 15 March 2007, Integrity recorded a plat in Book 73 at page 85 of the Gaston County Public Registry, subdividing its larger tract into sixteen residential building lots. This plat designated the name of the subdivision as Stoney Brook Estates and depicted the sixteen lots as Lots 1-11, 30-34. The plat itself does not reference or refer to any type of restrictions. Defendants are the current owners of Lot 32, a property located in Stoney Brook Estates, a residential subdivision in Gaston County.

On 15 August 2008, Integrity deeded eleven of the sixteen lots in Stoney Brook Estates to Plaintiff by deed recorded in Book 4423 at Page 1654 in the Gaston County Public Registry. Because Integrity conveyed only eleven of the sixteen lots to Plaintiff, Integrity's deed to Plaintiff specifically exempts the lots not purchased, lots 6-10:

> THERE IS EXCEPTED from this conveyance Lots 6, 7, 8, 9 and 10 as shown on plat of Stoney Brook Estates, Phase 1, which map is recorded in Map Book 73 at Page 85 of the Gaston County Public Registry.

Nine years later, on 10 July 2017, Plaintiff executed and recorded in the Gaston County Register of Deeds a "Declaration of Covenants, Conditions and Restrictions for Stoney Brook Estates" ("Declaration") which purported to place restrictions on the lots in "Stoney Brook Estates." The Declaration states, "[t]he subdivision of Stoney Brook Estates is made subject to these protective covenants." However, the Declaration does not reference the lots within Stoney Brook Estates subject to the Declaration, offer the legal description of property comprising Stoney Brook Estates or reference the 2007 plat recorded by Integrity or any other map. The Declaration includes a setback covenant, requiring all construction within Stoney Brook Estates to be built at least 110 feet from the lot's front property line and requires the front and sides of each residence be constructed of brick, stone, or a combination of both. At the time of the recording of the Declaration, Plaintiff continued to own the same eleven lots in Stoney Brook Estates which it had acquired from Integrity.

On 8 October 2019, over two years after filing the Declaration, Plaintiff sold and conveyed Lot 32 of Stoney Brook Estates to Defendants as tenants by the entirety. The deed contains a description of the land being conveyed, specifically Lot 32, references the 2007 Plat map recorded by Integrity showing Lot 32 as appearing on page 85 of Plat Book 73, and

references the Plat book and page number of the deed transferring Integrity's interest to Plaintiff. The deed states, as a general warranty deed, the "Grantor will warrant and defend the title against the unlawful claims of all persons whomsoever, other than the following exceptions: Restrictions and easements of record, and the lien of 2019 ad valorem taxes." The deed, however, did not expressly reference Plaintiff's 2017 Declaration.

In 2020, Defendants constructed their home and garage within the Declaration's 110-foot setback. Additionally, the front and sides of their home were constructed with material other than brick and stone.

In a letter dated 16 November 2020, Plaintiff provided notice to Defendants of the purported violations of the Declaration and demanded Defendants bring their Lot into compliance with the Declaration. Defendants refused to make the requested changes to Lot 32. Thereafter, Plaintiff filed a summons and complaint for injunctive relief and monetary damages on 5 April 2021. On 10 June 2021, Defendants filed a motion to dismiss pursuant to Rule 12(b)(6), alleging the Declaration is not applicable to Lot 32, "did not create a North Carolina Planned Community, is not enforceable, and is not enforceable by Plaintiff."

On 18 October 2021, the trial court filed its order on Defendant's motion to dismiss, granting with prejudice Defendant's motion to dismiss pursuant to Rule 12(b)(2). The trial court's written order made no reference to Defendant's Rule 12(b)(6) motion. Plaintiff gave written notice of appeal from the trial court's order on 9 November 2021. On 4 October 2022, this Court vacated the trial court's order of dismissal and remanded the case for further proceedings based upon the discrepancy between Defendant's 12(b)(6) motion and the trial court's order based upon 12(b)(2). *Gouch v. Rotunno*, 285 N.C. App. 559, 562, 878 S.E.2d 324, 327 (2022).

On remand, Plaintiff's counsel issued a notice of hearing on Defendant's Rule 12(b)(6) motion for 26 October 2022. On 12 December 2022, Defendants filed an objection to "any judge considering Defendants' motion to dismiss other than Judge Carla Archie" which the trial court subsequently granted on 13 December 2022. On 28 December 2022, Judge Archie filed an amended order on Defendant's motion to dismiss. The trial court clarified that the 18 October 2021 order's reference to Rule 12(b)(2) "was a scrivener's error" and that the motion to dismiss was pursuant to Rule 12(b)(6). The trial court thus granted with prejudice Defendant's motion to dismiss. Plaintiff filed a written notice of appeal on 5 January 2023.

II. Analysis

First, Plaintiff argues the trial court erred in granting Defendants' motion to dismiss because the facts alleged in his complaint are sufficient to state a cause of action to enforce the residential restrictive covenant contained in the Declaration against Defendants. Plaintiff also contends the trial court treated Defendants' motion to dismiss as a motion for summary judgment, notwithstanding the absence of "any evidence presented by either party by way of verified pleadings, affidavits, or otherwise." We agree. The trial court erred in granting Defendants' 12(b)(6) motion to dismiss because Plaintiff's complaint sufficiently stated a cause of action upon which relief may be granted.

A trial court's order allowing a Rule 12(b)(6) motion to dismiss is reviewed *de novo*. *Locklear v. Lanuti*, 176 N.C. App. 380, 384, 626 S.E.2d 711, 714 (2006). The standard of review of an order allowing a motion to dismiss is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. *New Bar P'ship v. Martin*, 221 N.C. App. 302, 306, 729 S.E.2d 675, 680 (2012) (citation omitted). In ruling upon a motion to dismiss, the complaint is to be liberally construed, viewing all permissible inferences in the light most favorable to the nonmovant, "and the court should not dismiss the complaint unless it appears beyond doubt the plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Id.* (citation omitted). A complaint is without merit if: "(1) there is an absence of law to support a claim of the sort made; (2) there is an absence of fact sufficient to make a good claim; or (3) there is the disclosure of some fact which will defeat a claim." *Home Elec. Co. v. Hall & Underdown Heating & Air Conditioning Co.*, 86 N.C. App. 540, 542, 358 S.E.2d 539, 540 (1987) (citation omitted), *aff'd*, 322 N.C. 107, 366 S.E.2d 441(1988).

While homeowners enjoy certain property rights, these rights can be limited through restrictive covenants so that homeowners are restrained from making certain use of their properties. *Hair v. Hales*, 95 N.C. App. 431, 433, 382 S.E.2d 796, 797 (1989). A restrictive covenant is defined as a "private agreement, usually in a deed or lease, that restricts the use or occupancy of real property, especially by specifying lot sizes, building lines, architectural styles, and the uses to which the property may be put." *Wal-Mart Stores, Inc. v. Ingles Markets, Inc.*, 158 N.C. App. 414, 420, 581 S.E.2d 111, 116 (2003) (citations omitted). Courts generally enforce restrictive covenants as it would any other valid contractual relationship. *Bodine v. Harris Vill. Prop. Owners Ass'n*, 207 N.C. App. 52, 60, 699 S.E.2d 129, 135 (2010) (citations omitted).

Our Supreme Court has stated, "Covenants accompanying the purchase of real property are contracts which create private incorporeal rights, meaning non-possessory rights held by the seller, a third-party, or a group of people, to use or limit the use of the purchased property." *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 554, 633 S.E.2d 78, 85 (2006) (citations omitted). A restrictive covenant is enforceable at law if it is made in writing, properly recorded, and does not violate public policy. *Id.* at 555, 633 S.E.2d at 85 (citation omitted). While "all ambiguities will be resolved in favor of the unrestrained use of land," *J.T. Hobby & Son, Inc. v. Fam. Homes of Wake Cnty., Inc.*, 302 N.C. 64, 70, 274 S.E.2d 174, 179 (1981) (citations omitted), restrictive covenants "must be reasonably construed to give effect to the intention of the parties, and the rule of strict construction may not be used to defeat the plain and obvious purposes of a restriction." *Black Horse Run Prop. Owners Ass'n. v. Kaleel*, 88 N.C. App. 83, 85, 362 S.E.2d 619, 621 (1987).

Our case law has long held a restraint on a homeowner's property may not be effectively imposed except by deed or other writing duly registered in the office of the Register of Deeds. *Davis v. Robinson*, 189 N.C. 589, 601, 127 S.E.2d 697, 703 (1925). Thus, if the restrictive covenant is "contained in a separate instrument or rests in parol and not in a deed in the chain of title and is not referred to in such deed, a purchaser has no constructive notice of it and is not bound." *Hair*, 95 N.C. App. at 433, 382 S.E.2d at 797. Our law has consistently held "registration is the one and only means of giving notice of an instrument affecting title to real estate." *Massachusetts Bonding & Insurance Co. v. Knox*, 220 N.C. 725, 730, 18 S.E.2d 436, 440 (1942). Accordingly, a purchaser of real property "is not required to take notice of and examine recorded collateral instruments and documents which are not muniments of his title and are not referred to by the instruments in his chain of title." *Morehead v. Harris*, 262 N.C. 330, 340, 137 S.E.2d 174, 184 (1964).

"A purchaser is chargeable with notice of the existence of the restriction only if a proper search of the public records would have revealed it, and it is conclusively presumed he examined each recorded deed or instrument in his line of title to know its contents." *Turner v. Glenn*, 220 N.C. 620, 625, 18 S.E.2d 197, 201 (1942) (citations omitted). Therefore, a purchaser "has constructive notice of all duly recorded documents that a proper examination of the title should reveal." *Stegall v. Robinson*, 81 N.C. App. 617, 619, 344 S.E.2d 803, 804 (1986) (citations omitted). Plaintiff's assertions in his complaint, taken as true, allege Defendants had knowledge of the existence of the Declaration from both the title search they commissioned on Lot 32 and the title insurance policy

purchased in association with the purchase of Lot 32, which specifically listed the Declaration as "an insured exception upon that Policy."

Defendants argue the Declaration's "restrictions do not appear in [their] chain of title because [Plaintiff] chose not to refer to the restrictions in [their] deed and chose not to add a legal description or map reference to the Declaration he filed." However, the Declaration is a recorded public record with the Gaston County Register of Deeds. Therefore, a "proper search of the public records pertaining to the subdivision would have revealed" the Declaration applying to the Stoney Brook Estates. *Harborgate Prop. Owners Ass'n v. Mt. Lake Shores Dev. Corp.*, 145 N.C. App. 290, 294, 551 S.E.2d 207, 210 (2001). Furthermore, as Plaintiff notes, Chapter 13 of the Gaston County Unified Development Ordinance mandates that "names of new subdivisions and subdivisions roads shall not duplicate or be phonetically similar to the names of existing subdivisions and road names in Gaston County." Gaston County, N.C., Unified Development Ordinance ch. 13, § 13.13A (2023).

By controlling ordinance, there can only be one Stoney Brook Estates subdivision in Gaston County, the subdivision in question here. There is no ambiguity regarding the identification of the real property intended to be subject to the Declaration when there can be no other subdivisions with that name in Gaston County. The Declaration was made by and recorded by the owner of the lot at issue prior to the conveyance of the lot to Defendants. Thus, because the Declaration appears in Lot 32's chain of title and there are no other subdivisions titled "Stoney Brook Estates" in Gaston County, the pleadings support a reasonable inference that Defendants had constructive notice of the restrictive covenant's existence.

Defendants also contend the Declaration is unenforceable because the subdivision lots in Stoney Brook Estates are not under a uniform plan of development. According to Defendants, because Plaintiff "only owned a portion of the subdivision when the Declaration was recorded, [his] stated purpose in recording the restrictions is impossible. One-third of the subdivision remains unencumbered and unrestricted, undermining any argument that there is a common plan or development." In making this assertion, Defendants rely upon *Reed v. Elmore* for the proposition that a restrictive covenant must be part of a general plan or scheme of development "which bears uniformly upon the area affected." 246 N.C. 221, 233, 98 S.E.2d 360, 369 (1957) (Denny, J., dissenting) (citations omitted). However, Defendants' reliance on *Reed* is misplaced. *Reed* states,

> Uniformity of pattern with respect to a development furnishes evidence of the intent of the grantor to impose

> restrictions on all of the property and when the intent is ascertained it becomes binding on and enforceable by all immediate grantees as well as subsequent owners of any part of the property; but the fact that there is an absence of uniformity in the deeds does not prevent the owner of one lot from enforcing rights expressly conferred upon him by his contract.

Id. at 226, 98 S.E.2d at 364. Furthermore, "[c]ontractual relations do not disappear as circumstances change." *Id.* (citation omitted).

Here, Plaintiff was conveyed all of Integrity's interests in Stoney Brook Estates in 2008. On 10 July 2017, prior to Defendant's purchase of Lot 32, Plaintiff filed the Declaration for all remaining parcels of land in the Stoney Brook Estates. Although Plaintiff did not own five of the lots in Stoney Brook Estates, Plaintiff was permitted to impose restrictions on the eleven parcels he did own. There is no requirement he own all of the lots in Stoney Brook Estates in order to impose restrictions on the lots he does own. The restrictions imposed in the Declaration show his plan to require structures on the eleven lots he owned to have uniform and defined characteristics. We agree with Plaintiff that his decision to make "all of his interest in Stoney Brook Estates subject to the restriction contained in the Declaration shows evidence of a general plan and scheme." Based upon this permissible inference, the pleadings suggest that a general plan and scheme was intended. Thus, the allegations in Plaintiff's complaint, taken as true, are sufficient to state a claim of enforcing the restrictive covenant against Defendant's property. *New Bar P'ship*, 221 N.C. App. at 306, 729 S.E.2d at 680 (citation omitted).

III. Conclusion

Because Plaintiff's complaint sufficiently stated a cause of action upon which relief may be granted, we reverse the order granting Defendants' motion to dismiss and remand to the trial court for further proceedings.

REVERSED AND REMANDED.

Judges DILLON and ZACHARY concur.

HARNETT COUNTY BOARD OF EDUCATION, PETITIONER
v.
RETIREMENT SYSTEMS DIVISION, DEPARTMENT OF STATE TREASURER, RESPONDENT

No. COA22-750

Filed 17 October 2023

1. Administrative Law—state employee retirement—contribution-based cap factor—rule-making requirements—substantial compliance

In a contested case filed by a county board of education (petitioner) challenging the validity of the "Cap-Factor Rule" in the Contribution-Based Benefit Cap Act—which established a benefit cap (calculated using a statutory cap factor) on certain members of the Teachers' and State Employees' Retirement System (TSERS) while requiring employers to make additional contributions (also calculated using the statutory cap factor) to cap-exempt employees—the superior court properly ruled against petitioner where the Retirement Systems Division of the Department of the State Treasurer (respondent) had substantially complied with the rule-making requirements of the Administrative Procedure Act (APA) in adopting the Rule. Specifically, where the Rule undisputedly had a "substantial economic impact" as defined under the APA, respondent properly prepared a fiscal note identifying the entities subject to the Rule—namely, all public agencies participating in TSERS—and the types of expenditures they would be expected to make. Additionally, respondent was not required to consider the Rule's impact on every individual school system when crafting the Rule—it was sufficient that respondent had acknowledged the greater impact the Rule would have on school systems compared to other state agencies. Finally, respondent adequately considered potential alternatives to the Rule by considering different values for the cap factor.

2. Administrative Law—state employee retirement—contribution-based cap factor—application—not retroactive

In a contested case filed by a county board of education (petitioner) challenging the validity of the "Cap-Factor Rule" in the Contribution-Based Benefit Cap Act (the Act)—which established a benefit cap for certain state employees while requiring employers to make additional contributions to cap-exempt employees—where the Retirement Systems Division of the Department of the

State Treasurer (respondent) refunded petitioner's additional contribution to an employee after the Rule was declared invalid in a different litigation, validly re-adopted the Rule under the requisite rule-making procedures, and then informed petitioner that it would have to pay the additional contribution under the re-adopted Rule, respondent's actions did not constitute an impermissible retroactive application of the Rule. Rather, under the plain language of the Act, the benefit cap applied to all retirements occurring after January 2015, and therefore respondent properly required petitioner to make an additional contribution where the employee at issue had retired in 2017. Further, petitioner's contention that the Act only applied to retirements occurring after the validly-adopted Rule's effective date in 2019 lacked merit.

Appeal by Petitioner from Order entered 30 June 2022 by Judge James M. Webb in Harnett County Superior Court. Heard in the Court of Appeals 13 February 2023.

Tharrington Smith, L.L.P., by Deborah R. Stagner and Patricia R. Robinson, for Petitioner-Appellant.

Attorney General Joshua H. Stein, by Solicitor General Ryan Y. Park and Special Deputy Attorney General Olga E. Vysotskaya de Brito, for Respondent-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

Harnett County Board of Education (Harnett BOE) appeals from an Order entered by the Superior Court on judicial review affirming the Final Decision of the Administrative Law Judge (ALJ) granting Summary Judgment in favor of the Retirement Systems Division, Department of State Treasurer (Retirement System). The Retirement System manages the Teachers' and State Employees' Retirement System (TSERS), which pays eligible retired teachers and state employees a fixed monthly pension calculated by a statutory formula which includes the retiree's four highest-earning consecutive years of state employment. The Final Decision in this case upheld an assessment against Harnett BOE for an additional contribution to the Retirement System to fund a pension for one of Harnett BOE's retired employees pursuant to anti-pension-spiking legislation (Contribution-Based Benefit Cap Act or the Act) applicable to TSERS.

The backdrop of this case is the Opinion of the Supreme Court of North Carolina—and preceding litigation—in *Cabarrus Cnty. Bd. of Educ. v. Dep't of State Treasurer*, 374 N.C. 3, 839 S.E.2d 814 (2020) (the Cabarrus County litigation). There, our Supreme Court described the Contribution-Based Benefit Cap Act:

> In 2014, the General Assembly enacted An Act to Enact Anti-Pension-Spiking Legislation by Establishing a Contribution-Based Benefit Cap, S.L. 2014-88, § 1, 2014 N.C. Sess. Laws 291, which is codified, in pertinent part, at N.C.G.S. § 135-5(a3). The Act establishes a retirement benefit cap applicable to certain employees with an average final compensation of $100,000 or more per year whose retirement benefit payment would otherwise be significantly greater than the contributions made by that retiree during the course of his or her employment with the State. *Id.* In order to calculate the benefit cap applicable to each retiree, the Act directs the Retirement System's Board of Trustees to "adopt a contribution-based benefit cap factor recommended by the actuary, based upon actual experience, such that no more than three-quarters of one percent (0.75%) of retirement allowances are expected to be capped" and to calculate the contribution-based benefit cap for each retiring employee by converting the employee's total contributions to the Retirement System to a single life annuity and multiplying the cost of such an annuity by the cap factor. *Id.* In the event that the retiree's expected pension benefit exceeds the calculated contribution-based benefit cap, the Retirement System is required to "notify the [retiree] and the [retiree's] employer of the total additional amount the [retiree] would need to contribute in order to make the [retiree] not subject to the contribution-based benefit cap." N.C.G.S. § 135-4(jj) (2019). At that point, the retiree is afforded ninety days from the date upon which he or she received notice of the additional payment amount or the date of his or her retirement, "whichever is later, to submit a lump sum payment to the annuity savings fund in order for the [R]etirement [S]ystem to restore the retirement allowance to the uncapped amount." *Id.* The retiree's employer is entitled to "pay[ ] all or part of the . . . amount necessary to restore the [retiree's] retirement allowance to the pre-cap amount." *Id.*

Id. at 4-5, 839 S.E.2d at 815-16. While the Act applies to retirements occurring on or after 1 January 2015, relevant to this appeal, the Act further provides that for retirees who became members of TSERS prior to 1 January 2015, however, the retiree's pension will not be capped; instead, the retiree's last employer must contribute the amount "that would have been necessary in order for the retirement system to restore the member's retirement allowance to the pre cap amount." N.C. Gen. Stat. §§ 135-5(a3); 135-8(f)(2)(f).

Here, Harnett BOE's employee retired in February 2017 and had become a member of TSERS prior to January 2015. There appears to be no dispute in the Record that the Act applies to this retirement. At the time, the Retirement System was using a cap factor of 4.5 to calculate the contribution-based benefit cap, which in turn was used to calculate the additional contribution assessed to Harnett BOE. On 19 April 2017, the Retirement System sent a notice to Harnett BOE requiring payment of $197,805.61 as the additional contribution required to fund Harnett BOE's employee's pension. Harnett BOE paid the assessment in full.

The Cabarrus County litigation began in 2016 when Cabarrus County Board of Education along with several other Boards of Education filed administrative challenges to the validity of cap factors adopted in 2014 and 2015, including the 4.5 cap factor utilized to calculate the 2017 assessment to Harnett BOE. The Boards argued the cap factors were invalid because they had not been adopted through the rule-making process required by the North Carolina Administrative Procedure Act (APA). After a final agency decision against the Cabarrus County Board, the Board petitioned for judicial review, and in May 2017, a Superior Court declared the cap factors invalidly adopted. *See id.*

In the wake of the Superior Court decision, the Retirement System initiated the formal rule-making process to adopt a cap factor in December 2017. After holding a public hearing in January 2018 and receiving written comments on the proposed cap-factor rule, at a 7 March 2018 meeting, the Retirement System's Board of Trustees adopted the cap-factor rule, again setting the cap factor at 4.5. The administrative rule was codified at 20 NCAC 02B .0405 (Cap-Factor Rule).[1]

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1. Shortly after adoption of the Cap-Factor Rule, the General Assembly amended the statute to expressly make clear the cap-factor calculation was not subject to the rule-making provisions of the APA. *See* 2021 N.C. Sess. Laws ch. 70 § 3.2. However, for purposes of this appeal, the parties appear in agreement that amendment does not apply to this case and that the Supreme Court's decision in the Cabarrus County litigation remains controlling. The Cap-Factor Rule itself has been repealed.

Meanwhile, the Cabarrus County litigation continued. On 18 September 2018, this Court issued its Opinion affirming the Superior Court holding that the rule-making provisions of the APA applied to the adoption of cap factors and, thus, assessments made using a cap factor adopted outside of the rule-making process were invalid. *Cabarrus Cnty. Bd. of Educ. v. Dep't of State Treasurer*, 261 N.C. App. 325, 345, 821 S.E.2d 196, 210 (2018). The Supreme Court of North Carolina subsequently affirmed our Court and the trial court in 2020. *Cabarrus Cnty. Bd.*, 374 N.C. 3, 839 S.E.2d 814.

Following this Court's decision in the Cabarrus County litigation, Harnett BOE sought a refund of the 2017 assessment. In October 2020, a Wake County Superior Court ordered the Retirement System to issue a refund to Harnett BOE. On 16 December 2020, however, the Retirement System sent a new invoice notifying Harnett BOE that it again owed $197,805.61 to fund the retirement of its employee. This time the Retirement Division relied on the 4.5 cap factor it had adopted in 2018. Harnett BOE submitted a request to the Retirement System demanding withdrawal of the new assessment, contending it constituted improper retroactive application of the 2018 Cap-Factor Rule to the 2017 retirement. In February 2021, the Retirement System issued a Final Agency Decision rejecting Harnett BOE's demand.

Harnett BOE then filed a Contested Case Petition in the Office of Administrative Hearings. On 10 September 2021, an ALJ denied the Board's Motion for Summary Judgment and granted Summary Judgment to the Retirement System. The ALJ concluded the 2018 Cap-Factor Rule was properly applied retroactively to retirements occurring after 1 January 2015 consistent with the purpose of the Contribution-Based Benefit Cap Act and specifically N.C. Gen. Stat. § 135-5(a). The ALJ also concluded the 2018 Cap-Factor Rule was adopted in substantial compliance with the requirements for adopting a rule under the APA.

On 11 October 2021, Harnett BOE filed a Petition for Judicial Review in Harnett County Superior Court, seeking a declaratory ruling that (1) "20 NCAC 02B .0405 is void and of no effect because of the failure of the . . . [Retirement System] Board of Trustees to comply with the requirement of Chapter 150B of the North Carolina General Statutes"; (2) "[Retirement System]'s assessment against the Board in the amount of $197,805.61 is void and unenforceable because 20 NCAC 02B .0405 was not lawfully adopted"; (3) 20 NCAC 02B .0405 may not be applied retroactively to assess additional amounts for retirements that occurred prior to March 21, 2019"; and (4) [Retirement System]'s assessment against the Board in the amount of $197,805.61 is void

and unenforceable because [Retirement System] improperly applied 20 NCAC 02B .0405 retroactively."

On 13 June 2022, the Superior Court heard arguments by both parties on the Petition for Judicial Review. On 30 June 2022, the Superior Court entered an Order affirming the final decision of the ALJ. Petitioner timely filed Notice of Appeal on 28 July 2022.

Issues

The issues on appeal are whether: (I) the Retirement System substantially complied with the rule-making requirements of the APA in adopting the Cap-Factor Rule; and (II) the Cap-Factor Rule was properly applied to retroactively calculate the amount Harnett BOE owed to fund its employee's retirement under the Contribution-Based Benefit Cap Act.

Analysis

"The North Carolina Administrative Procedure Act (APA), codified at Chapter 150B of the General Statutes, governs trial and appellate court review of administrative agency decisions." *Amanini v. N.C. Dep't of Hum. Res.*, 114 N.C. App. 668, 673, 443 S.E.2d 114, 117 (1994). The APA provides a party aggrieved by a final decision of an ALJ in a contested case a right to judicial review by the superior court. N.C. Gen. Stat. § 150B-43 (2021). A party to the review proceeding in superior court may then appeal from the superior court's final judgment to the appellate division. N.C. Gen. Stat. § 150B-52 (2021). The APA sets forth the scope and standard of review for each court.

The APA limits the scope of the superior court's judicial review as follows:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;

> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2021). The APA also sets forth the standard of review to be applied by the superior court as follows:

> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(c) (2021).

"The scope of review to be applied by the appellate court under [the APA] is the same as it is for other civil cases." N.C. Gen. Stat. § 150B-52 (2021). "Thus, our appellate courts have recognized that '[t]he proper appellate standard for reviewing a superior court order examining a final agency decision is to examine the order for errors of law.' " *EnvironmentaLEE v. N.C. Dep't of Env't & Nat. Res.*, 258 N.C. App. 590, 595, 813 S.E.2d 673, 677 (2018) (quoting *Shackleford-Moten v. Lenoir Cnty. Dep't of Soc. Servs.*, 155 N.C. App. 568, 572, 573 S.E.2d 767, 770 (2002)). "Our appellate courts have further explained that 'this "twofold task" involves: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' " *Id.* (quoting *Hardee v. N.C. Bd. of Chiropractic Exam'rs*, 164 N.C. App. 628, 633, 596 S.E.2d 324, 328 (2004) (citations and quotation marks omitted)). "As in other civil cases, we review errors of law de novo." *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 596, 620 S.E.2d 14, 17 (2005).

In this case, consistent with N.C. Gen. Stat. § 150B-34(e), the ALJ granted Summary Judgment for the Retirement System. *See* N.C. Gen. Stat. § 150B-34(e) (2021). The superior court, in turn, reviewing the ALJ's decision to grant Summary Judgment applied a de novo standard of review and determined Summary Judgment was properly entered for the Retirement System. *See* N.C. Gen. Stat. § 150B-51(d) (2021).

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021). "On appeal, this Court reviews an order granting summary judgment de novo." *Cabarrus Cnty.*, 261 N.C. App. at 329, 821 S.E.2d at 200 (citation and quotation marks omitted). Findings of fact and conclusions of law are not required in an order granting summary judgment, and " '[i]f the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered.' " *Id.* (quoting *Save Our Schs. of Bladen Cnty. v. Bladen Cnty. Bd. of Educ.*, 140 N.C. App. 233, 237-38, 535 S.E.2d 906, 910 (2000)).

I. Substantial Compliance with Rule-Making Requirements

[1] Harnett BOE argues the Superior Court erred in affirming the ALJ's grant of Summary Judgment on the question of whether the Retirement System validly adopted the Cap-Factor Rule as required by our Supreme Court in the Cabarrus County litigation. Specifically, Harnett BOE contends the Retirement System—in adopting the Cap-Factor Rule—failed to substantially comply with the rule-making provisions of the APA.

The purpose of the APA is to establish "a uniform system of administrative rule making and adjudicatory procedures for agencies." N.C. Gen. Stat. § 150B-1(a) (2021). Article 2A of the APA governs the requirements for agency rule-making. *See* N.C. Gen. Stat. § 150B-18, *et seq.* "A rule is not valid unless it is adopted in substantial compliance with this Article [2A]." N.C. Gen. Stat. § 150B-18 (2021). "The necessary procedures for substantial compliance are outlined in G.S. § 150B-21.2[.]" *Jackson v. N.C. Dep't of Hum. Res.*, 131 N.C. App. 179, 184, 505 S.E.2d 899, 902 (1998).

N.C. Gen. Stat. § 150B-21.2(a) provides:

> Before an agency adopts a permanent rule, the agency must comply with the requirements of G.S. 150B-19.1, and it must take the following actions:
>
> (1) Publish a notice of text in the North Carolina Register.
>
> (2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.

> (3) Repealed by S.L. 2003-229, § 4, eff. July 1, 2003.
>
> (4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.
>
> (5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.

N.C. Gen. Stat. § 150B-21.2(a) (2021). In this case, Harnett BOE asserts the Retirement System acted contrary to these statutory mandates by: (A) failing to comply with Section 150B-21.2(a)(2) by, in turn, failing to comply with the requirements of Section 150B-21.4 concerning the fiscal note; and (B) failing to comply with the requirements of Section 150B-19.1 related to consideration of the burdens imposed by the proposed rule and alternatives to the proposed rule.

A. Fiscal Note Requirements

Relevant to this case, N.C. Gen. Stat. § 150B-21.4 provides:

> Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would have a substantial economic impact and that is not identical to a federal regulation that the agency is required to adopt, the agency shall prepare a fiscal note for the proposed rule change and have the note approved by the Office of State Budget and Management.

N.C. Gen. Stat. Ann. § 150B-21.4 (2021). A substantial economic impact is an "aggregate financial impact on all persons affected of at least one million dollars . . . in a 12-month period." N.C. Gen. Stat. § 150B-21.4(b1) (2021). N.C. Gen. Stat. § 150B-21.4(b1) further provides:

> In analyzing substantial economic impact, an agency shall do the following:
>
> (1) Determine and identify the appropriate time frame of the analysis.
>
> (2) Assess the baseline conditions against which the proposed rule is to be measured.
>
> (3) Describe the persons who would be subject to the proposed rule and the type of expenditures these persons would be required to make.
>
> (4) Estimate any additional costs that would be created by implementation of the proposed rule by measuring

> the incremental difference between the baseline and the future condition expected after implementation of the rule. The analysis should include direct costs as well as opportunity costs. Cost estimates must be monetized to the greatest extent possible. Where costs are not monetized, they must be listed and described.
>
> (5) For costs that occur in the future, the agency shall determine the net present value of the costs by using a discount factor of seven percent (7%).

N.C. Gen. Stat. § 150B-21.4(b1) (2021).

Here, there is no dispute that during the rule-making process the Retirement System determined the proposed Cap-Factor Rule would have a substantial economic impact. There is also no dispute the Retirement System did, in fact, prepare a Fiscal Note in accordance with Section 150B-21.4. Likewise, there is no dispute the Fiscal Note was, in fact, approved by the Office of State Budget and Management.

Harnett BOE, however, specifically argues the Retirement System failed to substantially comply with Section 150B-21.4(b1)(3) by failing to identify "the persons who would be subject to the proposed rule and the type of expenditures these persons were required to make." Harnett BOE asserts the Retirement System failed to consider the impact of the proposed Cap-Factor Rule on individual school systems or, indeed, any individual employer. Harnett BOE, however, cites no authority in specific support of its argument.

Indeed, to the contrary, the Fiscal Note prepared by the Retirement System—and approved by the Office of State Budget and Management—acknowledges the contribution-based benefit cap requirement of the anti-pension spiking statute impacts—and protects—all employing public agencies participating in TSERS. The Note "estimates spiking employers will pay $73.6 [million] to the Retirement Systems over 15 years in additional employer contributions . . . while all employers that do not incur additional contributions . . . will avoid bearing a pro-rata share in present value terms of the unforeseen liabilities that these additional contributions serve to offset."

Moreover, the Fiscal Note further expressly acknowledges types of employing agencies subject to the cap including school systems, the UNC system, local governments, community colleges, and state agencies. The Note further recognizes "school systems had incurred $2.8 million by the end of 2016, or 41% of all CBBC liabilities, the largest share among agencies affected by the legislation." Indeed, the Note

also recognizes the Cabarrus County litigation and that, specifically, the four school boards involved in the litigation had been invoiced for a total of $1.8 million incurred from five retirements. Additionally, the Note contemplates the potential impact, not just on the employers, but member-employees, including identifying specific types of employees covered by the Retirement System. As such, we conclude the Retirement System's Fiscal Note is in substantial compliance with N.C. Gen. Stat. § 150B-21.4(b1)(3).

B. Burden Imposed and Consideration of Alternatives

Harnett BOE also contends the Retirement System's rule-making process for the Cap-Factor Rule was contrary to two requirements of N.C. Gen. Stat. § 150B-19.1. This Section sets forth a number of requirements an agency must follow when drafting and adopting a proposed administrative rule. N.C. Gen. Stat. § 150B-19.1(a) provides:

> (a) In developing and drafting rules for adoption in accordance with this Article, agencies shall adhere to the following principles:
>
> (1) An agency may adopt only rules that are expressly authorized by federal or State law and that are necessary to serve the public interest.
>
> (2) An agency shall seek to reduce the burden upon those persons or entities who must comply with the rule.
>
> (3) Rules shall be written in a clear and unambiguous manner and must be reasonably necessary to implement or interpret federal or State law.
>
> (4) An agency shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed. The agency shall not adopt a rule that is unnecessary or redundant.
>
> (5) When appropriate, rules shall be based on sound, reasonably available scientific, technical, economic, and other relevant information. Agencies shall include a reference to this information in the notice of text required by G.S. 150B-21.2(c).
>
> (6) Rules shall be designed to achieve the regulatory objective in a cost-effective and timely manner.

N.C. Gen. Stat. § 150B-19.1(a) (2021). Further relevant to this case, N.C. Gen. Stat. § 150B-19.1(f) requires: "If the agency determines that a proposed rule will have a substantial economic impact as defined in G.S. [§] 150B-21.4(b1), the agency shall consider at least two alternatives to the proposed rule. The alternatives may have been identified by the agency or by members of the public." N.C. Gen. Stat. § 150B-19.1(f) (2021).

First, Harnett BOE argues the Retirement System acted contrary to Section 150B-19.1(a)(2) by failing to seek to reduce the burden on those entities who must comply with the Cap-Factor Rule. Specifically, Harnett BOE asserts the Retirement System failed to consider the burden imposed on individual school systems. Harnett BOE cites no specific authority to support its contention that the Retirement System was required to consider the particular impact to every individual school system or entity impacted by the proposed Cap-Factor Rule.

However, the Fiscal Note itself illustrates the Retirement System was grappling with its duty to carry out a statutory mandate, reduce system-wide costs caused by alleged pension-spiking, thus, reducing costs across all impacted agencies and retirees (particularly those not engaged in alleged pension-spiking), and striking a balance by adopting a cap-factor that resulted in a Contribution-Based-Benefit Cap was neither underinclusive nor overinclusive. Again, the Retirement System did acknowledge the anti-pension-spiking legislation had had a greater impact on school systems compared to other agencies. Indeed, as the Retirement System explained through affidavits submitted below and in briefing to this Court, there is simply a tension in adopting a cap-factor between maximizing the effectiveness of the Contribution-Based Benefit Cap Act—with the goal of decreasing the likelihood of higher system-wide employer contributions—and minimizing the burden on specific employers subject to the Act.[2] The Retirement System's analysis, as demonstrated throughout the Fiscal Note, attempts to balance its obligation to reduce the burdens on all agencies and members system-wide with its obligation to fulfill the statutory mandates of the Act. In so doing, the Retirement System relied on the same actuarial information and presentations from consultants used to determine the original 2015 cap-factor prior to the Cabarrus County litigation. Harnett BOE cites no authority for the proposition this information was

2. As a general proposition, adoption of a higher value for the cap factor results in fewer pensions being subject to capping—with the commensurate potential increase in system-wide employer contributions being required—while a lower cap factor would result in more pensions being subject to the cap increasing the burden on individual employers and/or retirees.

improperly considered or that this data was erroneous or invalid. As such, we conclude the Retirement System substantially complied with Section 150B-19.1(a)(2).

Second, and relatedly, Harnett BOE argues the Retirement System failed to comply with Section 150B-19.1(f) by failing to consider at least two alternatives to the cap factor of 4.5. However, the Retirement System—as evidenced both in the data and presentations it considered along with the Fiscal Note—plainly did consider the potential impacts of different values for the cap-factor. The Retirement System considered cap-factors ranging from 4.1 to 5.0. Thus, the Retirement System substantially complied with N.C. Gen. Stat. § 150B-19.1(f).

II. Application of the Cap-Factor Rule

[2] Harnett BOE further contends the 2018 Cap-Factor Rule was impermissibly applied retroactively to the 2017 retirement of its employee. Harnett BOE argues the intent of the Contribution-Based Benefit Cap Act was not to apply to all applicable retirements occurring after 1 January 2015 but only those occurring after a validly-adopted Cap-Factor Rule became effective. Thus, Harnett BOE asserts—because of the Cabarrus County litigation—there was no validly-adopted cap factor in 2017 when its employee retired. Therefore, Harnett BOE argues it should not be subject to the additional contribution for its retired employee in this case at all.

"A statute will not be construed to have retroactive effect unless that intent is clearly expressed or arises by necessary implication from its terms." *In re Mitchell's Will*, 285 N.C. 77, 79-80, 203 S.E.2d 48, 50 (1974). "A statute is not necessarily unconstitutionally retroactive where its application depends in part upon a fact that antedates its effective date. The proper question for consideration is whether the act as applied will interfere with rights which had vested or liabilities which had accrued at the time it took effect." *State ex rel. Lee v. Penland-Bailey Co., Inc.*, 50 N.C. App. 498, 503, 274 S.E.2d 348, 352 (1981).

This Court, in a related matter, recently held:

> Here, the Act provides that "every service retirement allowance . . . for members who retire on or after January 1, 2015, is subject to adjustment pursuant to a contribution-based benefit cap[.]" N.C. Gen. Stat. § 135-5(a3). The Act further provides that "the retirement allowance of a member who became a member before January 1, 2015 . . . shall not be reduced; however, the member's last employer . . . shall be required to make an additional contribution[.]" *Id.* The

> plain language of the Act indicates that it applies to any retirement allowance for a member who retires on or after 1 January 2015.

Wilson Cnty. Bd. of Educ. v. Ret. Sys. Div., 290 N.C. App. 226, 240, 891 S.E.2d 626, 635-36 (COA22-1027, filed Aug. 15, 2023). There, we concluded: "Because the employee in this case retired on 1 January 2018, three years after Act took effect, the statute was not retroactively applied to Petitioner." *Id.*

In this case, Harnett BOE's employee retired in 2017, after the 1 January 2015 effective date of the Act. Therefore, by its plain language, the Act applied to the retirement at issue in this case. Thus, there was no retroactive application of the Contribution-Based Benefit Cap Act in this case.

Nevertheless, Harnett BOE contends even if the Act theoretically applies to all retirements occurring after 1 January 2015, the Cap-Factor Rule itself cannot be applied to retirements occurring before its effective date in 2019. Harnett BOE posits this is so because retroactive application of the Cap-Factor Rule would impair Harnett BOE's vested right by interfering with liabilities which had accrued at the time the Cap-Factor Rule took effect. *See Penland-Bailey*, 50 N.C. App. at 503, 274 S.E.2d at 352. Specifically, Harnett BOE asserts that in the absence of a valid cap factor at the time of the 2017 retirement, it could not have known, at that time, either whether its employee's retirement would be subject to the cap or, if so, the amount of its liability.

Harnett BOE's argument fails. Here, again, by its plain language, the Contribution-Based Benefit Cap Act applies to "every service retirement allowance . . . for members who retire on or after January 1, 2015," and makes plain those retirement allowances are "subject to adjustment pursuant to a contribution-based benefit cap[.]" N.C. Gen. Stat. § 135-5(a3) (2021). It further provides that upon the retirement of any employee who became a TSERS member prior to 2015, the employer would be liable for the additional contribution. *Id.*

Here, the Retirement System—by adopting the Cap-Factor Rule and calculating the additional contribution owed by Harnett County BOE for the 2017 retirement—was simply carrying out the statutory mandate of the Contribution-Based Benefit Cap Act. Harnett County BOE was on notice of the Act and on notice that it would apply to determine whether the retirement of its employee in 2017 would be subject to a cap. Harnett BOE's argument that the Retirement System's calculation of the assessment of the additional contribution following adoption of

the Cap-Factor Rule interfered with an already accrued liability does not follow. No liability accrued until the Retirement System—applying a valid cap factor—calculated and invoiced the additional contribution owed as required under the statute.[3]

This Court's prior decision in *State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau* is instructive here. There, after this Court had previously vacated an order setting new vehicle insurance rates effective 1 January 1995 and remanded the matter to the Commissioner to set new rates, the Commissioner did so by an order entered in 1997 but made effective 1 January 1995. *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 131 N.C. App. 874, 875-76, 508 S.E.2d 836, 836-37 (1998), *review allowed in part and remanded*, 350 N.C. 850, 539 S.E.2d 10 (1999), and *review allowed in part and remanded*, 543 S.E.2d 482 (1999).

In that case, we acknowledged "the general principle that retroactive rate making is improper." *Id.* at 876, 508 S.E.2d at 837. Nevertheless, we further concluded: "The recalculation of rates, however, pursuant to a remand order of an appellate court and the application of those rates back to the effective date of the Order reversed on appeal does not constitute unlawful retroactive rate making." *Id.* We further observed:

> To hold otherwise essentially would bind the parties, for a period of time between the entry of the appealed Order and the rehearing on remand pursuant to the appellate court, to a rate declared invalid by the appellate court. This cannot represent sound public policy, and, furthermore, is inconsistent with the purpose of the remand order, which is to correct the error requiring the remand.

Id.

Likewise, here, given the statutory mandate that the contribution-based benefit cap apply to every retirement after 1 January 2015, the Retirement System was required to calculate and apply a contribution-based benefit cap to those retirements occurring after that effective date. Following the Cabarrus County litigation which declared the cap factor invalid, the Retirement System was required to validly adopt a cap-factor through rule-making and apply it as required

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3. Harnett BOE contends this leads to an absurd result in which the Retirement System may simply and continuously retroactively change the cap factor to apply to post-2015 retirements. However, now that a cap factor has been adopted and applied to those retirements, particularly the one at issue here, the liability has accrued.

by statute to those retirements occurring after 1 January 2015—including the one at issue here. To conclude otherwise would not represent sound public policy—as it would undermine the purpose and express language of the statute to exclude retirements between 2015 and the 2019 effective date of the Cap-Factor Rule from application of the statute. Likewise, applying an invalidly adopted cap factor would be inconsistent with the judicial mandates from the Cabarrus County litigation, including from our Supreme Court. *See id.* As such, we conclude application of the Cap-Factor Rule to calculate the additional contribution owed by Harnett BOE in this case does not constitute an impermissible retroactive application of the cap-factor in this case.

Thus, the Retirement System substantially complied with the rule-making requirements of the APA in adopting the Cap-Factor Rule, and the Rule is properly applied to the retirement of Harnett County's employee in this case. Therefore, the ALJ properly granted Summary Judgment to the Retirement System. Consequently, the Superior Court, correctly applying a de novo review, did not err by affirming the ALJ's Final Decision.

Conclusion

Accordingly, for the foregoing reasons, we affirm the Superior Court's Order entered 30 June 2022 affirming the Final Decision of the ALJ.

AFFIRMED.

Judges MURPHY and STADING concur.

IN THE MATTER OF THE FORECLOSURE OF THE DEEDS OF TRUST OF MICKEY W. SIMMONS AND WAYNE SIMMONS AND HIS WIFE SALLY SIMMONS, GRANTORS, TO J. GREGORY MATTHEWS ORIGINAL DEEDS OF TRUST IN BOOK 1123, PAGE 573, RECORDED ON MAY 2, 2014 AND IN BOOK 1158, PAGE 67, RECORDED JUNE 12, 2015

No. COA21-682-2

Filed 17 October 2023

Mortgages and Deeds of Trust—foreclosure—power of sale—alleged violations of Chapter 45—applicability of Civil Procedure Rules

Where grantors, who had defaulted on a loan, attempted to challenge the foreclosure sale by seeking relief pursuant to Civil Procedure Rule 60(b)—arguing that there were violations of N.C.G.S. §§ 45-10 and 45-21.16(c)—the trial court did not err by denying the motion. Because the General Assembly made Chapter 45 of the General Statutes to be the comprehensive and exclusive statutory framework governing non-judicial foreclosures by power of sale, and because the Rules of Civil Procedure were not specifically engrafted into the statutory sections at issue, Rule 60 relief was not available to grantors.

Appeal by Grantors from order entered 3 May 2021 by Judge Michael D. Duncan in Yadkin County Superior Court. Heard in the Court of Appeals 23 August 2023. Petition for Rehearing allowed 5 December 2022. The following opinion supersedes and replaces the prior opinion filed 4 October 2022.

Blanco Tackabery & Matamoros, P.A., by Chad A. Archer and Henry O. Hilston, for Grantors-Appellants.

Hutchens Law Firm, LLP, by Hilton T. Hutchens, Jr., and Jeffrey A. Bunda, for Petitioners-Appellees.

GRIFFIN, Judge.

Grantors Mickey W. Simmons and Wayne and Sally Simmons appeal from an order denying their motion to vacate and set aside the foreclosure sale filed pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. Grantors argue the trial court erred in denying their motion pursuant to Rule 60(b) as: J. Gregory Matthews improperly served as both the closing attorney for the loan and the foreclosure trustee and

otherwise failed to include a notice of neutrality in the notice of hearing per N.C. Gen. Stat. §§ 45-10 and 45-21.16, respectively; and failed to notice Grantors, Wayne and Sally Simmons, of the 26 November 2019 foreclosure sale. Upon review, we hold the trial court did not err.

I. Factual and Procedural History

In May 2014, Grantors refinanced a loan with Petitioners, Donald and Betty Groce, which was secured by a deed of trust encumbering three tracts of land located at 1708 Rudy Road in Yadkinville, North Carolina. Then, on or about 12 June 2015, Mickey Simmons took out a second loan secured by a deed of trust encumbering the same three tracts of land. Matthews served as trustee in each of these transactions.

On 12 April 2016, Matthews, acting as counsel for Petitioners, sent a letter to Grantors noting Grantors were in default for failing to make payments. On 22 April 2016, Matthews sent a statutory payoff notice. Matthews filed a notice of foreclosure hearing on 22 July 2016 which set the hearing for 18 August 2016. After being continued, the foreclosure hearing was held on 6 October 2016. On 7 October 2016, the Clerk of Superior Court in Yadkin County, Beth Williams Holcomb, entered an order allowing foreclosure. The foreclosure sale was set to occur on 26 November 2016. Subsequently, Grantors filed for bankruptcy three times which stayed the foreclosure proceedings until 23 September 2019.

On 15 October 2019, Matthews filed a notice of sale. The foreclosure sale was held 26 November 2019, at which time Petitioners became the last and highest bidder. On 6 December 2019, the foreclosure sale was confirmed and the rights of the parties became fixed. On 10 December 2019, a trustee's deed was recorded.

On 5 October 2020, Wayne and Sally Simmons attempted to file a "Motion to Vacate the Foreclosure Sale," which the Clerk refused. On 25 November 2020, Mickey Simmons refiled the motion seeking relief from the foreclosure pursuant to Rule 60(b)(1), (3), and (6) arguing: the notice of foreclosure hearing did not contain a statement of neutrality as required under N.C. Gen. Stat. § 45-21.16(c)(7)(b); Matthews served as both Petitioners' attorney and foreclosure trustee in violation of N.C. Gen. Stat. § 45-10; and Wayne and Sally Simmons did not receive notice of the 26 November 2019 foreclosure sale.

On 19 January 2021, Clerk Holcomb entered an order denying the motion. Mickey Simmons appealed to the Yadkin County Superior Court. On 3 May 2021, Judge Michael D. Duncan entered an order denying the motion. On 1 June 2021, Grantors filed notices of appeal.

II. Analysis

Grantors argue the trial court erred in denying the motion to vacate and set aside the foreclosure sale pursuant to Rule 60(b) because Matthews improperly served as both the closing attorney for the loan and the foreclosure trustee, and otherwise failed to include a notice of neutrality in the notice of hearing per N.C. Gen. Stat. §§ 45-10 and 45-21.16, respectively; and failed to notice Wayne and Sally Simmons of the 26 November 2019 foreclosure sale. We disagree.

A. Standard of Review

Typically, this Court reviews the trial court's denial of a motion for relief under Rule 60(b) to determine whether the court abused its discretion. *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975). The trial court will be reversed for abuse of discretion "only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citations omitted).

B. Chapter 45 Foreclosure Proceedings and the North Carolina Rules of Civil Procedure

North Carolina law provides for two methods under which a foreclosure proceeding may be brought: civil action or power of sale. *Phil Mech. Constr. Co. v. Haywood*, 72 N.C. App. 318, 321, 325 S.E.2d 1, 3 (1985); *see also Banks v. Hunter*, 251 N.C. App. 528, 534, 796 S.E.2d 361, 367 (2017) (citations omitted). In pertinence, "power of sale is a contractual provision in a deed of trust conferring upon the trustee the power to sell real property pledged as collateral for a loan in the event of default." *In re Worsham*, 267 N.C. App. 401, 407, 833 S.E.2d 239, 244 (2019) (citation omitted). As such, the right to foreclose by power of sale is contractual in nature and "permit[s] parties to expeditiously resolve mortgage defaults [through] a non-judicial [proceeding] if authorized in the parties' mortgage or deed of trust." *In re Frucella*, 261 N.C. App. 632, 635, 821 S.E.2d 249, 252 (2018). Because a power of sale foreclosure is achieved through non-judicial proceedings, our General Assembly has prescribed, in Chapter 45 of our General Statutes, a comprehensive framework governing power of sale foreclosures. *See* N.C. Gen. Stat. § 45 (2021).

Although our North Carolina Rules of Civil Procedure typically "apply in all actions and proceedings of a civil nature[,]" the Rules do not apply "when a differing procedure is prescribed by statute." N.C. Gen. Stat. § 1A-1, Rule 1. In reiterating the essence of this Rule, our Supreme Court in *In re Ernst & Young* pointedly stated: "[w]hen the legislature has prescribed specialized procedures to govern a particular proceeding, the Rules of Civil Procedure do not apply." *In re Ernst & Young*,

363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citation omitted). Drawing from the Court's reasoning in *Ernst & Young*, our Supreme Court in *In re Lucks* explicitly applied this principle to Chapter 45, power of sale foreclosures. *See In re Lucks*, 369 N.C. 222, 794 S.E.2d 501 (2016).

In *Lucks*, our Supreme Court stated: "The General Assembly has crafted Chapter 45 to be the comprehensive and exclusive statutory framework governing non-judicial foreclosures by power of sale." *Id.* at 226, 794 S.E.2d at 505 (citations omitted). Further, the Court clearly stated "[t]he Rules of Civil Procedure do not apply unless explicitly engrafted into the statute[,]" while recognizing the Rules would apply in sections such as 45-21.16(a) where the statute clearly requires notice of the foreclosure hearing as provided by the Rules. *Id.*; *see also* N.C. Gen. Stat. § 45-21.16(a) (2021) ("The notice shall be served and proof of service shall be made in any manner provided by the Rules of Civil Procedure[.]"). Similarly, Justice Hudson, while concurring in result only, specifically noted the Rules did not apply in section 45-21.16(c)(7). *In re Lucks*, 369 N.C. at 230, 794 S.E.2d at 507 (Hudson, J., concurring in result). This idea is supported by the fact that she stated: "I would clarify that since N.C.G.S. § 45-21.16 prescribes a different procedure for the hearing before the clerk, see N.C.G.S. § 45-21.16(c)-(d1) (2015), the Rules of Civil Procedure do not apply[.]" *Id.* at 230, 794 S.E.2d at 508 (Hudson, J., concurring in result).

Here, Grantors sought relief from the foreclosure pursuant to our North Carolina Rules of Civil Procedure, Rule 60(b), contending Matthews improperly served as both the closing attorney for the loan and the foreclosure trustee and otherwise failed to include a notice of neutrality in the notice of hearing per N.C. Gen. Stat. §§ 45-10 and 45-21.16(c). Further, Grantors also sought relief pursuant to Rule 60(b) by arguing that although Mickey Simmons received notice of the 26 November 2019 foreclosure sale, Wayne and Sally Simmons were never noticed.

Under Rule 60(b) of our Rules of Civil Procedure, a trial court may relieve a party from a final judgment, order, or proceeding for, among other reasons: "Mistake, inadvertence, surprise, or excusable neglect; . . . Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . [or] Any other reason justifying relief from the operation of the judgment." N.C. R. Civ. P. 60(b).

Further, our General Statutes, section 45-10, states, in relevant part: "An attorney who serves as the trustee or substitute trustee shall not represent either the noteholders or the interests of the borrower while

initiating a foreclosure proceeding." N.C. Gen. Stat. § 45-10 (2021). This portion of section 45-10 did not exist at the time the foreclosure proceedings here were initiated, as the relevant portion of the statute was amended to include the above statement in 2017. *See* 2017 N.C. Sess. Laws 206. While not in existence at the time of the foreclosure hearing in 2016, the amended portion of the statute was relevant law at the time of the foreclosure sale in 2019. Nevertheless, at no time were the Rules of Civil Procedure specifically engrafted in the statute and therefore do not apply.

Further, section 45-21.16(c) states that notice of foreclosure hearing shall, in relevant part, contain "[a] statement that the trustee, or substitute trustee, is a neutral party and, while holding that position in the foreclosure proceeding, may not advocate for the secured creditor or for the debtor in the foreclosure proceeding." N.C. Gen. Stat. § 45-21.16(c)(7)(b) (2021). While Matthews concedes the notice did not contain such a statement, the Rules of Civil Procedure are not specifically engrafted in the statute, and therefore Rule 60 does not apply.

In their final contention, Grantors argue Matthews's failure to notice Wayne and Sally Simmons of the foreclosure sale was in contravention of the requirements of service under section 45-21.16(a)—to which the Rules do apply. *See* N.C. Gen. Stat. § 45-21.16(a) (2021) (engrafting the North Carolina Rules of Civil Procedure). However, Grantors' contention does not concern the service itself but is in regard to Wayne and Sally Simmons not being served as required by section 45-21.16(b). Section 45-21.16(b) states notice must be served upon:

> (1) Any person to whom the security interest instrument itself directs notice to be sent in case of default.
>
> (2) Any person obligated to repay the indebtedness against whom the holder thereof intends to assert liability therefor, and any such person not notified shall not be liable for any deficiency remaining after the sale.
>
> (3) Every record owner of the real estate whose interest is of record in the county where the real property is located at the time the notice of hearing is filed in that county.

N.C. Gen. Stat. § 45-21.16(b) (2021). Here, again, our General Assembly, in section 45-21.16(b), prescribed specific rules as to who should be noticed without engrafting our Rules of Civil Procedure. As such, Rule 60 does not apply.

Although Grantors sought relief from foreclosure pursuant to Rule 60(b) of our North Carolina Rules of Civil Procedure, the Rules do not

apply to foreclosure proceedings such as these, initiated under Chapter 45, unless specifically engrafted into the statute. Because the Rules are not engrafted into N.C. Gen. Stat. §§ 45-10 or 45-21.16(b)-(c), the Rules of Civil Procedure do not apply to those statutes, and therefore, Rule 60 relief can neither be sought nor granted in wake of a violation thereof. Thus, the trial court did not abuse its discretion in denying Grantors' motion to vacate and set aside the foreclosure pursuant to Rule 60(b).

III. Conclusion

We hold the trial court did not err in denying Grantors' motion to vacate and set aside foreclosure.

AFFIRMED.

Judges WOOD and FLOOD concur.

IN THE MATTER OF M.A.C., S.X.C.

No. COA23-30

Filed 17 October 2023

Termination of Parental Rights—subject matter jurisdiction—allegations in verified pleadings—juveniles "found in" judicial district where petition filed—at time of filing

The trial court had subject matter jurisdiction over a private termination of parental rights action, where petitioner-grandparents alleged in their verified petitions that the children were in their legal custody and resided with them in a different county than the one where the petitions were filed, but that the children "were present" in the same county where the petitions were filed at the time of filing. The grandparents' allegations established the jurisdictional requirement under N.C.G.S. § 7B-1101 that the children be "found in" the same judicial district where the petitions were filed; and, because the allegations came from verified pleadings, they were competent evidence for the prima facie presumption that the trial court rightfully exercised jurisdiction in the case. Conversely, respondent-mother's unverified answers to the petitions did not constitute competent evidence rebutting the presumption of rightful jurisdiction.

Judge HAMPSON dissenting.

Appeal by respondent-mother from order entered 30 August 2022 by Judge Jason Coats in Harnett County District Court. Heard in the Court of Appeals 5 September 2023.

Robert L. Schupp for petitioners-appellees.

Jeffrey L. Miller for respondent-appellant mother.

ZACHARY, Judge.

Respondent-Mother appeals from the trial court's order terminating her parental rights to her minor children, "Mona" and "Sid."[1] Respondent-Mother raises no arguments concerning the merits of the trial court's order; rather, she only challenges the trial court's subject-matter jurisdiction over these proceedings. After careful review, we affirm.

I. Background

This case concerns private petitions for the termination of Respondent-Mother's parental rights to Mona and Sid, filed by the juveniles' paternal grandparents ("the Grandparents"). The juveniles have resided with the Grandparents since August 2017, when their son—the juveniles' father—obtained custody of Mona and Sid pursuant to a consent order. Respondent-Mother moved to South Carolina following the entry of the consent order; she has neither seen nor spoken with the juveniles since. The juveniles, meanwhile, have resided exclusively with the Grandparents since their father's death in March 2019. The Grandparents obtained temporary legal custody of the juveniles on 31 August 2020 in another proceeding.

After the trial court dismissed their prior termination petitions for lack of standing, on 24 June 2021, the Grandparents filed verified termination petitions ("the Petitions") in Harnett County for both Mona and Sid. The Grandparents filed amended Petitions on 17 August 2021.[2] In the Petitions, the Grandparents averred that they lived in Delco, North

1. We use the pseudonyms adopted by the parties for ease of reading and to protect the juveniles' identities.

2. In that the dispositive allegation of fact—that the juveniles were "present in Harnett County, North Carolina as of the time of the filing of this Petition"—is identical in both the original and amended sets of petitions, for ease of reading we refer simply to "the Petitions."

Carolina,[3] that each juvenile resided with them, and that each juvenile was "present in Harnett County, North Carolina, as of the time of the filing of this Petition."

The trial court permitted the Grandparents to serve Respondent-Mother with the Petitions by publication; the requisite notices were published over a three-week period in September and October. On 10 December 2021 and 7 February 2022, Respondent-Mother filed unverified answers that contained motions to dismiss the Petitions for lack of personal jurisdiction, insufficiency of service of process, and failure to state a claim.

On 25 February 2022, the matter came on for hearing in Harnett County District Court. On 30 August 2022, the trial court entered an order denying Respondent-Mother's motions to dismiss. Pertinent to the case before us, the trial court found as fact that "[t]he children were present in Harnett County, North Carolina as of the time of the filing of the Petition[s.]" Consequently, the trial court concluded that it had "jurisdiction over the subject matter and the parties."

The trial court concluded that grounds to terminate Respondent-Mother's parental rights had been established, and that termination was in the juveniles' best interests. Accordingly, the court terminated Respondent-Mother's parental rights to Mona and Sid. Respondent-Mother timely filed notice of appeal.

II. Discussion

On appeal, Respondent-Mother argues that the trial court lacked subject-matter jurisdiction to terminate her parental rights to Mona and Sid. We disagree.

A. Standard of Review

Subject-matter jurisdiction is "the power of the court to deal with the kind of action in question." *In re N.T.U.*, 234 N.C. App. 722, 724, 760 S.E.2d 49, 52 (citation omitted), *disc. review denied*, 367 N.C. 826, 763 S.E.2d 517 (2014). "Absent subject-matter jurisdiction, a trial court cannot enter a legally valid order infringing upon a parent's constitutional right to the care, custody, and control of his or her child." *In re A.L.L.*, 376 N.C. 99, 101, 852 S.E.2d 1, 3–4 (2020). "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. Thus the trial court's subject-matter jurisdiction may be challenged at any stage

3. Delco is located in Columbus County.

of the proceedings, even for the first time on appeal." *In re J.H.*, 244 N.C. App. 255, 259, 780 S.E.2d 228, 233 (2015) (emphasis omitted) (citation omitted).

Whether "a trial court possesses subject-matter jurisdiction is a question of law that is reviewed de novo." *A.L.L.*, 376 N.C. at 101, 852 S.E.2d at 4. When conducting de novo review, "this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *In re T.N.G.*, 244 N.C. App. 398, 402, 781 S.E.2d 93, 97 (2015) (cleaned up). However, unchallenged findings of fact are binding on appeal. *N.T.U.*, 234 N.C. App. at 733, 760 S.E.2d at 57.

"Although the question of subject[-]matter jurisdiction may be raised at any time where the trial court has acted in a matter, every presumption not inconsistent with the record will be indulged in favor of jurisdiction." *In re N.T.*, 368 N.C. 705, 707, 782 S.E.2d 502, 503 (2016) (cleaned up). "Nothing else appearing, we apply the *prima facie* presumption of rightful jurisdiction which arises from the fact that a court of general jurisdiction has acted in the matter. As a result, the burden is on the party asserting want of jurisdiction to show such want." *Id.* at 707, 782 S.E.2d at 503–04 (cleaned up).

B. Analysis

Respondent-Mother argues that the trial court lacked subject-matter jurisdiction because "[t]here was no competent or unambiguous evidence in the record to support a finding or conclusion that the juveniles were present in Harnett County at the time of the filing of the Petitions." Her argument is premised on the fact that although both Petitions contain a statement that the relevant child was "present in Harnett County, North Carolina as of the time of the filing of th[e] Petition[,]" it is undisputed that the juveniles resided with the Grandparents in Columbus County at that time.

Under our Juvenile Code, a trial court's subject-matter jurisdiction "arises upon the filing of a properly verified juvenile petition and extends through all subsequent stages of the action." *In re K.S.D.-F.*, 375 N.C. 626, 633, 849 S.E.2d 831, 836 (2020) (cleaned up). "The allegations of a complaint determine a court's jurisdiction over the subject matter of the action." *In re K.J.L.*, 363 N.C. 343, 345, 677 S.E.2d 835, 837 (2009). "A trial court's subject-matter jurisdiction over a petition to terminate parental rights is conferred by [N.C. Gen. Stat.] § 7B-1101." *A.L.L.*, 376 N.C. at 104, 852 S.E.2d at 6. Section 7B-1101 provides, in pertinent part:

> The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination

> of parental rights to any juvenile who resides in, *is found in*, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district *at the time of filing of the petition or motion.*

N.C. Gen. Stat. § 7B-1101 (2021) (emphases added).

It is undisputed that at the time of the filing of the Petitions, the juveniles were in the Grandparents' legal custody and resided with them in Columbus County, and that Columbus and Harnett Counties are not in the same judicial district. *See id.* § 7A-133. Therefore, the question presented in the case at bar is whether the juveniles were "found in" Harnett County at the time of the Petitions' filing, and therefore, the Harnett County District Court properly exercised subject-matter jurisdiction. *Id.* § 7B-1101.

We first address Respondent-Mother's assertion that "[b]eing 'present in' is not the same as being 'found in.' " This Court has previously determined that, as used in § 7B-1101, the phrase "found in" means "physically present in[.]" *In re J.L.K.*, 165 N.C. App. 311, 320, 598 S.E.2d 387, 393, *disc. review denied*, 359 N.C. 68, 604 S.E.2d 314 (2004), *motion to reconsider dismissed*, 359 N.C. 281, 609 S.E.2d 773 (2005).

Our dissenting colleague questions the soundness of this precedent; however, we all agree "that we are bound by the prior decisions of this Court." *In re J.D.M.-J.*, 260 N.C. App. 56, 63, 817 S.E.2d 755, 760 (2018). The concern raised by Respondent-Mother and echoed by our dissenting colleague is for our Supreme Court to consider rather than this Court. "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 Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Therefore, we may set aside Respondent-Mother's linguistic distinction and turn to the dispositive question of fact as concerns the proper invocation of the trial court's subject-matter jurisdiction: whether the juveniles were physically present in Harnett County at the time of the filing of the Petitions. This, in turn, raises the issue of whether the trial court's finding of fact to that effect—which supported the trial court's conclusion of law that it had subject-matter jurisdiction under § 7B-1101—was properly supported where the only competent record evidence was the Grandparents' allegations in their verified Petitions that the juveniles were present when the Petitions were filed. We conclude that it was.

A verified pleading containing factual allegations that satisfy the statutory requirements for invoking the trial court's subject-matter

jurisdiction is sufficient to raise "the *prima facie* presumption of rightful jurisdiction" at the time of filing. *N.T.*, 368 N.C. at 707, 782 S.E.2d at 504 (citation omitted). In *Wilson v. Wilson*, this Court held that the trial court properly exercised jurisdiction over the parties' divorce action where the "court's findings [we]re supported by [the] plaintiff's verified complaint," because a verified pleading "may be treated as an affidavit." 191 N.C. App. 789, 792, 666 S.E.2d 653, 655 (2008); *see also Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) ("A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein."). Just as § 7B-1104 requires that termination petitions be verified, complaints in divorce actions must also be verified. N.C. Gen. Stat. § 50-8.

Here, the Petitions were verified, as required by § 7B-1104, and each contained a factual allegation sufficient to satisfy the jurisdictional requirement that the juveniles be "found in" the judicial district where the termination action was filed—i.e., Harnett County. N.C. Gen. Stat. § 7B-1101. Petitioners thus successfully invoked "the *prima facie* presumption of rightful jurisdiction" upon the filing of the Petitions. N.T., 368 N.C. at 707, 782 S.E.2d at 504 (citation omitted).[4] Therefore, Respondent-Mother bore the burden of presenting competent evidence to rebut this presumption.

Respondent-Mother cites the well-established principle that "[t]he trial court's factual findings must be more than a recitation of allegations. They must be the specific ultimate facts sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." *In re H.P.*, 278 N.C. App. 195, 202, 862 S.E.2d 858, 865 (2021) (cleaned up). However, "[i]t is not *per se* reversible error for a trial court's fact findings to mirror the wording of a petition or other pleading prepared by a party." *Id.* at 202, 862 S.E.2d at 865–66 (cleaned up). Indeed, *Wilson* demonstrates that jurisdictional findings of fact may be properly supported by the factual allegations of a verified pleading.

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4. Although it appears that Petitioners did not introduce the Petitions into evidence at the hearing or that the trial court took judicial notice of them, we note that "[i]t is well-established that a trial court may take judicial notice of its own proceedings." *In re J.C.M.J.C.*, 268 N.C. App. 47, 56, 834 S.E.2d 670, 676 (2019). "Further, while it is the better practice to give express notice to the parties of the intention to take judicial notice of matters contained in the juvenile's file, it is not required." *Id.* (citation omitted). In this case, "the record tends to show the court took judicial notice of the" Petitions. *Id.* at 56, 834 S.E.2d at 676–77.

The heart of Respondent-Mother's argument is that she specifically denied the Grandparents' allegation that the juveniles were "present in Harnett County, North Carolina as of the time of the filing of th[e] Petition[s]" in her unverified answers, thereby "placing the matter of the juveniles' 'presence' in dispute." Thus, according to Respondent-Mother, the trial court erred by "merely recit[ing] the Petitions' allegation without any evidence in the record to support its finding concerning this denied and disputed issue."

Unlike the Grandparents' Petitions, however, Respondent-Mother's answers were *not* verified. "Factual allegations in [Respondent-Mother's] unverified answer[s] are not competent evidence; therefore, we assume the trial court did not consider these and do not consider them on appeal." *Brown v. Refuel Am., Inc.*, 186 N.C. App. 631, 634, 652 S.E.2d 389, 392 (2007). That there was no statutory requirement that her answers be verified is immaterial to the issue of whether the factual allegations in her unverified answers were competent evidence. Moreover, Respondent-Mother did not argue at the hearing that the juveniles were not present in Harnett County at the time of the filings. Therefore, disregarding the denial of the Grandparents' allegation in her unverified response, as we must, *id.*, Respondent-Mother did not properly raise any dispute over the presence of the children in Harnett County at the time of the filing of the Petitions. As a result, Respondent-Mother did not carry her burden to rebut "the *prima facie* presumption of rightful jurisdiction[.]" *N.T.*, 368 N.C. at 707, 782 S.E.2d at 504 (citation omitted).

Our dissenting colleague notes that the "presumption of rightful jurisdiction" applies only when it is "not inconsistent with the record." *Id.* at 707, 782 S.E.2d at 503–04. The dissent contends that "the Record in this case reflects only that the juveniles were in the legal and physical custody of Petitioners in Columbus County—not Harnett County—at the time of the filing of the Petitions." *Dissent* at 45. This much is true, yet it is immaterial to the dispositive question of whether the juveniles were "found in" Harnett County at the time of the filing of the Petitions. As previously discussed, we are bound by precedent to interpret "found in" to mean "physically present in[.]" *J.L.K.*, 165 N.C. App. at 320, 598 S.E.2d at 393. The *only* competent record evidence that directly addresses *the juveniles' physical presence at the time of the filing*—rather than their residence or legal and actual custody—is the Grandparents' allegations in the Petitions.

The dissent cites *In re D.L.A.D.*, in which "there [wa]s no evidence in the record from which we c[ould] determine that D.L.A.D. was found in Surry County the day the Petition was filed[,]" 254 N.C. App. 344, 802

S.E.2d 620, 2017 WL 2950772, at *3 (2017) (unpublished), to distinguish our application of *J.L.K.* However, the Grandparents in this case specifically alleged in the verified Petitions that each juvenile was "present in Harnett County, North Carolina, as of the time of the filing of" the relevant Petition. This distinguishes the case before us from *D.L.A.D.*—an unpublished, and therefore, unbinding decision of this Court—because the juvenile petition in that case contained no such specific allegation. *Id.*

We also note that nothing in this opinion should be construed as applying to a trial court's findings of fact relating to any topic other than subject-matter jurisdiction. As our dissenting colleague astutely notes, "Chapter 7B of the North Carolina General Statutes contains absolutely no provision allowing for the use of a summary judgment motion in a juvenile proceeding" and the trial court maintains "the duty to hear the evidence and make findings of fact on the allegations contained in the juvenile petition." *In re J.N.S.*, 165 N.C. App. 536, 539, 598 S.E.2d 649, 650–51 (2004) (citation omitted).

It is manifest that subject-matter jurisdiction holds a unique position in our law. For example, unlike every other ground upon which a motion to dismiss may be based, "the trial court's subject-matter jurisdiction may be challenged *at any stage of the proceedings*, even for the first time on appeal." *J.H.*, 244 N.C. App. at 259, 780 S.E.2d at 233 (citation omitted); *accord* N.C. Gen. Stat. § 1A-1, Rule 12(h)(3). Furthermore, "unlike a Rule 12(b)(6) motion [for failure to state a claim], consideration of matters outside the pleadings does not convert the Rule 12(b)(1) motion [for lack of subject-matter jurisdiction] to one for summary judgment." *Bassiri v. Pilling*, 287 N.C. App. 538, 543–44, 884 S.E.2d 165, 169 (2023) (cleaned up). Indeed, "the court need not confine its evaluation of a Rule 12(b)(1) motion to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing." *Id.* at 543, 884 S.E.2d at 169 (citation omitted).

Additionally, it is well established that "[t]he allegations of a complaint determine a court's jurisdiction over the subject matter of the action." *K.J.L.*, 363 N.C. at 345, 677 S.E.2d at 837. This is unlike the other allegations of a juvenile petition, which our dissenting colleague correctly observes must be proved "by clear, cogent, and convincing evidence." *In re R.B.B.*, 187 N.C. App. 639, 643, 654 S.E.2d 514, 518 (2007), *disc. review denied*, 362 N.C. 235, 659 S.E.2d 738 (2008). The allegations of a verified juvenile petition that support the trial court's subject-matter jurisdiction, and which remain uncontested by competent evidence throughout the proceedings, may sufficiently determine the threshold

issue of the court's jurisdiction. However, in light of the unique nature of subject-matter jurisdiction, we confine our holding to the sole issue of the sufficiency of competent record evidence to support the trial court's conclusion that it possessed subject-matter jurisdiction.

Lastly, we note that Respondent-Mother has not challenged any of the trial court's findings of fact or conclusions respecting the merits of its determination that termination of her parental rights was in the best interests of the juveniles. As Respondent-Mother has not put forth "any challenge to the merits of the trial court's termination order, we affirm the trial court's order terminating [her] parental rights" to Mona and Sid. *In re C.N.R.*, 379 N.C. 409, 420, 866 S.E.2d 666, 674 (2021).

III. Conclusion

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

AFFIRMED.

Judge FLOOD concurs.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.

N.C. Gen. Stat. § 7B-1101 entitled "Jurisdiction" provides "[t]he court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion." N.C. Gen. Stat. § 7B-1101 (2021).

> In matters arising under the Juvenile Code, the court's subject matter jurisdiction is established by statute. N.C.G.S. §§ 7B-200, -1101 (2007). The existence of subject matter jurisdiction is a matter of law and " ' "cannot be conferred upon a court by consent." ' " *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (quoting *In re Custody of Sauls*, 270 N.C. 180, 187, 154 S.E.2d 327, 333 (1967)). Consequently, a court's lack of subject matter jurisdiction is not waivable and can be raised at any time. N.C.G.S. § 1A-1, Rule 12(h)(3) (2007).

In re K.J.L., 363 N.C. 343, 345-46, 677 S.E.2d 835, 837 (2009). "If a petitioner or movant fails to meet all of the requirements for establishing the court's jurisdiction over a termination proceeding, then the court lacks jurisdiction to conduct a termination proceeding, regardless of whether the trial court previously exercised jurisdiction over the child for other purposes." *In re O.E.M.*, 379 N.C. 27, 36, 864 S.E.2d 257, 263 (2021).

Here, Petitioners sought to invoke the subject-matter jurisdiction of the trial court in Harnett County by alleging in their Petitions that the juveniles were present in Harnett County at the time of the filing of the Petitions. While it is true these Petitions were verified, this is required by statute. N.C. Gen. Stat. § 7B-1104 (2021). Respondent filed Answers which denied the Juveniles were present in Harnett County at the time of the filing of the Petitions. It is likewise true these Answers were not verified. However, there is no statutory requirement for these Answers to be verified. *See* N.C. Gen. Stat. § 7B-1108 (2021). To the contrary, the simple denial of "any material allegation of the petition" triggers the trial court's duty to appoint a guardian ad litem to represent the best interests of the child. *Id.*

The majority here relies on the fact the Answers filed by Respondent were unverified to support its determination Respondent failed to create any evidentiary question as to where the children were found or present. However, "Chapter 7B of the North Carolina General Statutes contains absolutely no provision allowing for the use of a summary judgment motion in a juvenile proceeding." *In re J.N.S.*, 165 N.C. App. 536, 539, 598 S.E.2d 649, 650-51 (2004). "In fact, the provisions of Chapter 7B implicitly prohibit such use by imposing on the trial court the duty to hear the evidence and make findings of fact on the allegations contained in the juvenile petition." *Id.* at 539, 598 S.E.2d at 651 (citation omitted). "The burden is on the petitioner to prove the allegations of the termination petition by clear, cogent, and convincing evidence." *In re R.B.B.*, 187 N.C. App. 639, 643, 654 S.E.2d 514, 518 (2007) (citing N.C. Gen. Stat. § 7B-1109(f) (2005)); *see also In re A.M.*, *J.M.*, 192 N.C. App. 538, 542, 665 S.E.2d 534, 536 (2008).

Unlike our Court's earlier decision, *In re J.L.K.*, 165 N.C. App. 311, 320, 598 S.E.2d 387, 393 (2004)[1], where it was "undisputed that at the

1. As the majority notes, we are bound by the prior panel's decision in *J.L.K.*, which: (a) viewed the jurisdictional question as a waivable venue issue; and (b) suggests the juvenile's momentary physical presence in the county of filing as dispositive of whether the juvenile was "found in" the county of filing. I would at least raise the question of *J.L.K.*'s continued viability in light of our Supreme Court's jurisprudence acknowledging the jurisdictional nature of § 7B-1101. I further question whether the statutory concept of

moment the TPR petition was filed on 11 March 2002, J.L.K. was physically present in Johnston County[,]" here, the juveniles' location at the time of the filing of the Petitions was disputed on the pleadings. *See also In re D.L.A.D.*, 254 N.C. App. 344, 802 S.E.2d 620 (2017) (unpublished) (citing *J.L.K.* and vacating TPR where "there is no evidence in the record from which we can determine that D.L.A.D. was found in Surry County the day the Petition was filed."). In the Answers, Respondent validly denied the jurisdictional allegations in the Petitions. Petitioners presented no evidence to support a finding the juveniles were present in Harnett County at the time of the filing of the Petitions. Therefore, there is no evidence in the Record to support the trial court's finding mirroring the allegations of the Petitions that the juveniles were found in Harnett County at the time of the filing of the Petitions.

The majority applies "the *prima facie* presumption of rightful jurisdiction," however, this presumption applies only when it is "not inconsistent with the record." *In re N.T.*, 368 N.C. 705, 707, 782 S.E.2d 502, 503-04 (2016). Beyond the conclusory allegations of the Petitions[2], the Record in this case reflects only that the juveniles were in the legal and physical custody of Petitioners in Columbus County—not Harnett County—at the time of the filing of the Petitions. This is inconsistent with the Harnett County trial court's exercise of jurisdiction in this case.

Thus, the trial court's finding the juveniles were present in Harnett County at the time of the filing of the Petitions is not supported by clear, cogent, and convincing evidence in the Record. Therefore, this finding cannot support the trial court's conclusion it had subject-matter jurisdiction in these cases. Consequently, the trial court erred in exercising jurisdiction to terminate Respondent's parental rights. Accordingly, the trial court's Order should be vacated and the Petitions dismissed for lack of subject-matter jurisdiction.

"found in" equates with momentary physical presence of the child in the judicial district. Rather, I would suggest "found in" acknowledges that while a juvenile may reside elsewhere, the juvenile may actually be found in the judicial district where the circumstances giving rise to the petition occurred (e.g., abandonment or abuse). As Respondent points out: to read the statute otherwise would allow a parent to remove a child from their residence in Dare County to Buncombe County and file a petition in Buncombe County seeking to terminate the other parent's rights without Buncombe County having any connection to the parents or child—and then return the child to Dare County pending the termination hearing.

2. It bears mentioning that over the course of these two termination proceedings, Petitioners, through counsel, filed six separate petitions each alleging the presence of the juveniles in Harnett County at the time of the filing of each petition. The trial court effectively found the juveniles were present in Harnett County at the time of the filing of 4 of the 6.

JDG ENVIRONMENTAL, LLC D/B/A ADVANTACLEAN OF OKC, PLAINTIFF
v.
BJ & ASSOCIATES, INC. D/B/A G.A. JONES CONSTRUCTION AND THE COVES AT NEWPORT II ASSOCIATION, INC., DEFENDANTS

No. COA21-692

Filed 17 October 2023

Corporations—foreign LLC—transacting business—certificate of authority—summary judgment

In a lawsuit alleging breach of contract, the superior court erred by granting summary judgment—on the basis that the out-of-state plaintiff LLC lacked a certificate of authority to transact business in North Carolina and therefore could not maintain any proceeding in a state court (N.C.G.S. § 57D-7-02(a))—in favor of defendant. Section 57D-7-02(a) requires any foreign LLC transacting business in North Carolina to obtain a certificate of authority prior to trial, and it gives the trial judge (not the summary judgment judge, who might not be the same judge who presides over the trial) the authority to determine the foreign LLC's compliance with the statute; therefore, summary judgment was a premature stage to conclude that the non-moving party had failed to satisfy section 57D-7-02(a). Indeed, plaintiff obtained the requisite certificate of authority before the superior court entered its written order granting defendant's motion for summary judgment.

Judge MURPHY dissenting.

Appeal by Defendant from order entered 26 July 2021 by Judge Clinton Rowe in Carteret County Superior Court. Heard in the Court of Appeals 25 May 2022.

Bell, Davis, & Pitt, P.A., by Joshua B. Durham, for Plaintiff-Appellant.

Harvell & Collins, P.A., by Wesley A. Collins, for Defendant-Appellee BJ & Associates, Inc.

White & Allen, P.A., by Brian Z. Taylor and Christopher J. Waivers, for Defendant-Appellee The Coves At Newport II Association, Inc.

CARPENTER, Judge.

JDG Environmental, LLC ("Plaintiff") appeals from the superior court's grant of summary judgment in favor of BJ & Associates, Inc. ("Defendant BJ") and The Coves at Newport II ("Defendant Coves").[1] On appeal, Plaintiff asserts the superior court prematurely granted summary judgment because Plaintiff maintained an opportunity to obtain a certificate of authority until the beginning of trial. After careful review, we agree with Plaintiff. Therefore, we vacate the superior court's order and remand this case for further proceedings.

I. Factual & Procedural Background

On 13 September 2018, Hurricane Florence damaged Defendant Coves, a residential community in Newport, North Carolina. In order to clean and repair the community, Defendant Coves hired Defendant BJ. Defendant BJ hired Plaintiff, an Oklahoma LLC, as a subcontractor on the project. On 15 May 2020, after a dispute between Plaintiff and Defendant BJ concerning payment, Plaintiff initiated this lawsuit, asserting claims for breach of contract and unjust enrichment.

On 24 March 2021, Plaintiff filed a motion for summary judgment. During a hearing on the motion, Defendant BJ orally moved for summary judgment, arguing that judgment should instead be entered against Plaintiff because Plaintiff lacked a "certificate of authority," a statutory requirement for certain out-of-state companies to litigate in North Carolina courts. Indeed, Plaintiff had yet to obtain a certificate of authority. But on 2 June 2021, Plaintiff obtained a certificate of authority. In an order entered 26 July 2021, the superior court granted Defendant BJ's motion for summary judgment against Plaintiff. Plaintiff timely appealed from the superior court's order. Plaintiff has not challenged that it is was required to register as a foreign entity based on the facts of this case; thus, the trial courts findings and conclusions on this issue are binding on appeal.

II. Jurisdiction

This Court has jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

The issues on appeal are whether the superior court erred by: (1) granting Defendant BJ's motion for summary judgment; (2) failing to make requisite findings of fact in its order granting summary judgment; and (3) dismissing Plaintiff's action with prejudice.

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1. We will refer to Defendant BJ and Defendant Coves collectively as "Defendants."

IV. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

V. Analysis

On appeal, Plaintiff argues the superior court erred in granting Defendants' motion for summary judgment. Plaintiff asserts it had until trial to obtain a certificate of authority, so granting Defendants summary judgment prematurely deprived Plaintiff of its ability to do so. After careful review, we agree with Plaintiff: The superior court erred in granting Defendants summary judgment.[2]

Under N.C. Gen. Stat. § 57D-7-02:

> No foreign LLC transacting business in this State without permission obtained through a certificate of authority may maintain any proceeding in any court of this State unless the foreign LLC has obtained a certificate of authority prior to trial. An issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial.

N.C. Gen. Stat. § 57D-7-02(a) (2021). In other words, a foreign LLC must obtain a certificate of authority before the trial of its case in North Carolina. *See* N.C. Gen. Stat. § 57D-7-02(a).

Here, Plaintiff is a foreign LLC transacting business in North Carolina. Therefore, Plaintiff is required to obtain a certificate of authority prior to trial. *See* N.C. Gen. Stat. § 57D-7-02(a). Because Plaintiff lacked a certificate of authority at the summary-judgment stage, the superior court granted Defendant BJ's motion for summary judgment, ending the litigation and Plaintiff's ability to obtain the requisite certificate.

Procedurally, summary judgment is "a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021). When summary judgment is granted on an issue, that issue is not tried: Receiving summary judgment

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2. For this reason, we need not address Plaintiff's arguments concerning whether the superior court made the necessary findings of fact, or whether it was appropriate for the court to dismiss Plaintiff's case with prejudice.

has the same effect as winning at trial—but without going to trial. *See Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971) ("The purpose of summary judgment can be summarized as being a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue.").

The obligation to obtain a certificate of authority is statutory. *See* N.C. Gen. Stat. § 57D-7-02(a). In statutory interpretation, "[w]e take the statute as we find it." *Anderson v. Wilson*, 289 U.S. 20, 27, 53 S. Ct. 417, 420, 77 L. Ed. 1004, 1010 (1933). This is because "a law is the best expositor of itself." *Pennington v. Coxe*, 6 U.S. (2 Cranch) 33, 52, 2 L. Ed. 199, 205 (1804). And when examining statutes, words that are undefined by the legislature "must be given their common and ordinary meaning." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202–03 (1974).

Again, N.C. Gen. Stat. § 57D-7-02 states "[n]o foreign LLC transacting business in this State without permission obtained through a certificate of authority may maintain any proceeding in any court of this State unless the foreign LLC has obtained a certificate of authority prior to trial." N.C. Gen. Stat. § 57D-7-02(a) (emphasis added). The phrase "*prior to trial*" is not defined in the statute. *See* N.C. Gen. Stat. § 57D-7-02. Therefore, the phrase must be given its "common and ordinary meaning." *See In re Clayton-Marcus Co.*, 286 N.C. at 219, 210 S.E.2d at 202–03.

Given its ordinary meaning, "prior to trial" means exactly that: any time before the trial commences. Generally, a trial commences when a jury is empaneled. *Pratt v. Bishop*, 257 N.C. 486, 504, 126 S.E.2d 597, 610 (1962).[3] If the General Assembly wants "prior to trial" to mean something other than the generally understood meaning, it must say so. *See Appeal of Clayton-Marcus Co., Inc.*, 286 N.C. at 219, 210 S.E.2d at 202. Otherwise, we must "take the statute as we find it." *See Anderson*, 289 U.S. at 27, 53 S. Ct. at 420, 77 L. Ed. at 1010.

We must also give the last sentence of N.C. Gen. Stat. § 57D-7-02 its ordinary meaning. It reads as follows: "An issue arising under this subsection must be raised by motion and determined by the *trial judge* prior to trial." N.C. Gen. Stat. § 57D-7-02(a) (emphasis added). In North Carolina courts, the judge who hears a summary-judgment motion may

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3. Alternatively, in a bench trial, trial commences when a judge "begins to hear evidence." *See State v. Brunson*, 96 N.C. App. 347, 350–51, 385 S.E.2d 542, 544 (1989). Our analysis, however, remains the same because in a jury trial, the jury must be empaneled before it can hear evidence. In other words, whatever is "prior to" a jury trial is also "prior to" a bench trial.

not be the judge who presides over the trial. In fact, this is quite common. So, when the General Assembly says the "trial judge," we must assume they meant the judge presiding over the trial, and not the judge hearing a summary-judgment motion. *See* N.C. Gen. Stat. § 57D-7-02(a); *In re Clayton-Marcus Co.*, 286 N.C. at 219, 210 S.E.2d at 202–03.

Harold Lang Jewelers, Inc. v. Johnson illustrates how this works in practice. 156 N.C. App. 187, 576 S.E.2d 360 (2003). In *Harold Lang*, this Court wrestled with N.C. Gen. Stat. § 55-15-02(a) (2021), the corporation analogue to N.C. Gen. Stat. § 57D-7-02. *Id.* at 189, 576 S.E.2d at 361; *see also* N.C. Gen. Stat. § 55-15-02(a) ("No foreign corporation transacting business in this State without permission obtained through a certificate of authority under this Chapter . . . shall be permitted to maintain any action or proceeding in any court of this State unless the foreign corporation has obtained a certificate of authority prior to trial."). This Court stated: "On January 7, 2002, the case was called for trial. At that time, Johnson orally raised the defense of Lang's failure to obtain a certificate of authority and requested a hearing on that issue. After hearing evidence and argument, the district court granted the motion and dismissed Lang's action." *Harold Lang*, 156 N.C. App. at 188, 576 S.E.2d at 361. Lang lacked a certificate of authority, and this Court found "the trial court acted within its discretion when it addressed this dispositive issue as it did—prior to commencing trial . . . ." *Id.* at 189, 576 S.E.2d at 361. In *Harold Lang*, the *trial* judge properly ruled on the motion. *Id.* at 189, 576 S.E.2d at 361.

Likewise, this is how N.C. Gen. Stat. § 57D-7-02—the LLC analogue to N.C. Gen. Stat. § 55-15-02(a)—operates. Failure to obtain a certificate of authority "must be raised by motion and determined by the trial judge prior to trial." N.C. Gen. Stat. § 57D-7-02(a). Summary judgment is not necessarily determined by the trial judge. And the plain language of N.C. Gen. Stat. § 57D-7-02 requires the judge presiding over trial—not summary judgment—to determine whether the non-moving party obtained a certificate of authority. *See Harold Lang*, 156 N.C. App. at 188, 576 S.E.2d at 361; N.C. Gen. Stat. § 57D-7-02(a).

Here, Plaintiff could have obtained a certificate any time before the trial court empaneled a jury—which includes time after the summary-judgment stage. *See Pratt*, 257 N.C. at 504, 126 S.E.2d at 610. And Plaintiff did so. Regardless, if Defendant BJ wanted a determination of whether Plaintiff obtained a certificate, it was required to raise a motion to the trial judge, not the summary-judgment judge. *See Harold Lang*, 156 N.C. App. at 188, 576 S.E.2d at 361; N.C. Gen. Stat. § 57D-7-02(a). Defendant BJ did not do so. Thus, granting Defendant

BJ's summary-judgment motion deprived Plaintiff of its legislatively allotted time to obtain a certificate and infringed on the trial judge's statutory authority to determine Plaintiff's compliance with N.C. Gen. Stat. § 57D-7-02(a).

In *Leasecomm*, this Court also addressed N.C. Gen. Stat. § 55-15-02(a). *See Leasecomm Corp. v. Renaissance Auto Care, Inc.*, 122 N.C. App. 119, 122, 468 S.E.2d 562, 564 (1996). The *Leasecomm* Court did not directly address the issue before us: whether a court may grant summary judgment against a non-moving party because the non-moving party lacks a certificate of authority. The issue before the *Leasecomm* Court was whether a court could grant summary judgment to a moving party who lacked a certificate of authority. *See id.* at 121, 468 S.E.2d at 564. Regardless of the precise issue in *Leasecomm*, the Court's reasoning concerning N.C. Gen. Stat. § 55-15-02(a) supports our plain reading of N.C. Gen. Stat. § 57D-7-02(a). *See id.* at 122, 468 S.E.2d at 563. The Court held that under N.C. Gen. Stat. § 55-15-02(a), a moving party lacking a certificate of authority cannot prevail at summary judgment without first obtaining the required certificate of authority. *See id.* at 122, 468 S.E.2d at 564.

The *Leasecomm* holding is based on this premise: If a court grants summary judgment to a moving party that lacks a certificate of authority, the court prematurely assumes the moving party will gain a certificate before trial. *See id.* at 122, 468 S.E.2d at 564. Although our issue was not before the *Leasecomm* Court, it follows that if a lower court grants summary judgment because the non-moving party lacks a certificate of authority, the court also prematurely assumes the non-moving party *will not* gain one before trial. *See id.* at 122, 468 S.E.2d at 564. In other words, just as a moving party lacking a certificate of authority cannot prevail at summary judgment without first obtaining the required certificate of authority, a moving party cannot prevail at summary judgment merely because the non-moving party lacks a certificate of authority. *See id.* at 122, 468 S.E.2d at 564. This is correct because the trial judge must make the certificate-of-authority determination, and both scenarios take the determination away from the trial judge. *See id.* at 122, 468 S.E.2d at 564; *Harold Lang*, 156 N.C. App. at 188, 576 S.E.2d at 361; N.C. Gen. Stat. § 57D-7-02(a).

Here, when the superior court indicated in open court its intention to grant Defendant BJ's motion for summary judgment, the court prematurely assumed Plaintiff would not satisfy N.C. Gen. Stat. § 57D-7-02 before trial. *See Leasecomm*, 122 N.C. App. at 122, 468 S.E.2d at 564. And notably, before the court entered its written order granting Defendant

BJ's motion for summary judgement on 26 July 2021, Plaintiff obtained a certificate of authority. So not only did the superior court not have the authority to grant summary judgment; it purported to do so after Plaintiff actually obtained the requisite certificate of authority. *See* N.C. Gen. Stat. § 57D-7-02(a).

Accordingly, the superior court erred in granting Defendants summary judgment, rather than allowing the trial judge to make the certificate-of-authority determination. Such a judgment contradicts the plain text of the statute and our caselaw. *See* N.C. Gen. Stat. § 57D-7-02; *Leasecomm*, 122 N.C. App. at 122, 468 S.E.2d at 564; *Harold Lang*, 156 N.C. App. at 188, 576 S.E.2d at 361; *Pratt*, 257 N.C. at 504, 126 S.E.2d at 610.

VI. Conclusion

We hold the superior court's entry of summary judgment against Plaintiff was improper. Therefore, we vacate the associated order and remand this case to the lower court. Because the court erred in granting summary judgment, we need not consider whether the requisite findings were made, or whether the case should have been dismissed with or without prejudice.

VACATED AND REMANDED.

Judge ARROWOOD concurs.

Judge MURPHY dissents in a separate opinion.

MURPHY, Judge, dissenting.

While I would also reverse the order of the trial court, I dissent from the Majority's interpretation of N.C.G.S. § 57D-7-02(a) and its conclusions as to the procedural steps that follow the order's reversal. The contention that N.C.G.S. § 57D-7-02(a) allows an uncertified business plaintiff until the moment the jury is empaneled to obtain a certificate of authority is not only impossible to reconcile with the plain text of the whole statute, but also squarely contradicts our holding in *Leasecomm*, conflicts with the official comment to the analogous certification statute regarding corporations, and undermines the statute's own function.

N.C.G.S. § 57D-7-02(a) reads as follows:

> No foreign LLC transacting business in this State without permission obtained through a certificate of authority may

> maintain any proceeding in any court of this State unless the foreign LLC has obtained a certificate of authority prior to trial. An issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial.

N.C.G.S. § 57D-7-02(a) (2022). N.C.G.S. § 57D-7-02(a) thus contains two provisions pertaining to the timing of certification relative to trial: first, it makes maintaining a proceeding in this State contingent upon "obtain[ing] a certificate of authority prior to trial"; and, second, it provides that "[a]n issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial." *Id.* As the Majority explains, both of these provisions must "be given their common and ordinary meaning." *Appeal of Clayton-Marcus Co., Inc.*, 286 N.C. 215, 219 (1974).

"Prior to trial" means any time before trial commences, and trial commences at the moment the jury is empaneled. *See Pratt v. Bishop*, 257 N.C. 486, 504 (1962). The Majority, without specific analysis, augments this explanation with the unstated proposition that an uncertified business Plaintiff is statutorily *entitled* to a period that runs until the jury is empaneled to receive the certificate. Therefore, as the Majority reads the statute, the trial court may not grant summary judgment against an uncertified business plaintiff until the moment the jury is empaneled. And, using the same interpretation, the plain meaning of the requirement that "[a]n issue arising under [N.C.G.S. § 57D-7-02(a)] must be raised by motion and determined by the trial judge prior to trial" is that the window of time allotted to trial judges to rule on a motion concerning a certification issue is until the moment the jury is empaneled. N.C.G.S. § 57D-7-02(a) (2022).

This interpretation results in a total impasse: the Majority's reading of the statute makes it impermissible for the trial court to *ever* rule on a motion concerning a business plaintiff's lack of certification. Summary judgment, it holds, is rendered "prematurely" if entered against a plaintiff before the moment the jury is empaneled. *See supra*. Likewise, the trial court is statutorily stripped of its ability to render any such judgment the moment the jury is empaneled. Following the Majority's logic to its necessary end, the result is a totally unenforceable statutory scheme.

Perhaps realizing the absurdity of this reading, we have, on multiple occasions in the past, permitted trial courts to enter summary judgment against an uncertified business plaintiff prior to trial. In *Harold Lang Jewelers, Inc. v. Johnson*, for example, we affirmed the dismissal of an

action, prior to trial, by a corporation that failed to satisfy the analogous certification requirement arising under N.C.G.S. § 55-15-02(a):

> [The defendant] argued that [the uncertified corporation] could not sue in a North Carolina court because [it] was transacting business in the state without a certificate of authority to do so. The trial court agreed and dismissed the suit prior to trial.
>
> . . . .
>
> [The corporation] contends that the trial court erred when it dismissed the action, arguing that the court should have continued the case to permit [it] to obtain the requisite certificate of authority. The applicable statute, [N.C.G.S.] § 55-15-02, does not specify the procedure in the event of failure to obtain a certificate of authority. The statute simply indicates that an action cannot be maintained unless the certificate is obtained prior to trial. [N.C.G.S.] § 55-15-02(a). [The corporation] has not cited, nor have we found, a case where a continuance has been granted by a court in these circumstances. Moreover, [the corporation] was aware that [the defendant's] motion was pending and could have obtained the certificate in the year and a half that passed between the filing of the motion and the court's dismissal of the case. In the absence of statutory or other authority dictating a continuance, we hold that the trial court acted within its discretion in dismissing the action.

Harold Lang Jewelers, Inc. v. Johnson, 156 N.C. App. 187, 188, 192, *disc. rev. denied*, 357 N.C. 458 (2003); *see also* N.C.G.S. 55-15-02(a) (2022) ("No foreign corporation transacting business in this State without permission obtained through a certificate of authority under this Chapter or through domestication under prior acts shall be permitted to maintain any action or proceeding in any court of this State unless the foreign corporation has obtained a certificate of authority prior to trial. An issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial."). Moreover, in *Leasecomm Corp. v. Renaissance Auto Care, Inc.*, we reversed the determination of a trial court that denied a motion for summary judgment against an uncertified corporate plaintiff under the same statute:

> Defendants argue that the trial court erred in granting plaintiff's summary judgment motion because plaintiff

> lacked authority to maintain an action in North Carolina to enforce the foreign judgment. We agree.
>
> . . . .
>
> [The] plaintiff had no authority to maintain an action to enforce its foreign judgment in North Carolina because [the plaintiff's assignor] has never been granted authority to do business here . . . . Accordingly, we hold that the trial court erred in granting summary judgment for plaintiff and denying defendant's summary judgment motion.

Leasecomm Corp. v. Renaissance Auto Care, Inc., 122 N.C. App. 119, 121-22 (1996).

The Majority cites *Leasecomm* for the proposition that, "[i]f a trial court grants summary judgment to a moving party that lacks a certificate of authority, the trial court prematurely assumes the moving party will gain a certificate before trial"; and, by extension, that "if a trial court grants summary judgment because the non-moving party lacks a certificate of authority, the trial court prematurely assumes the non-moving party *will not* gain one before trial." Neither of these supposed holdings is apparent from the face of *Leasecomm*, and the attempt to extrapolate them from the opinion obscures its actual, unambiguous holding: that a business plaintiff seeking to register a foreign judgment in North Carolina should, prior to trial, have summary judgment rendered *against* it if it fails to comply with relevant certification requirements. *Leasecomm*, 122 N.C. App. at 122. The Majority's contention that "[t]he *Leasecomm* Court did not directly address . . . whether a court may grant summary judgment against a non-moving party because the non-moving party lacks a certificate of authority" obfuscates the fact that the panel addressing *Leasecomm* treated the grant and denial of summary judgment as two sides of the same legal issue, and its holding is no less binding as to the former than it is the latter.

Similar problems exist with its reading of *Harold Lang*. The Majority cites *Harold Lang* for its position that the incorrect official ruled on Defendant's motion and purportedly as an example of how its own interpretation operates in practice, *see supra*, but *Harold Lang* is fully irreconcilable with its holding. Despite directly quoting *Harold Lang*'s holding that "the trial court acted within its discretion when it addressed this dispositive issue . . . prior to commencing trial[,]" *Harold Lang*, 156 N.C. App. at 189, the Majority's interpretation of N.C.G.S. § 57D-7-02(a) would necessarily dictate that a trial court may *not* dismiss an uncertified business plaintiff's case prior to trial and that the trial court has

no discretion to do so. *See supra* ("[W]hen the [S]uperior [C]ourt indicated in open court its intention to grant Defendant BJ's motion for summary judgment, the court prematurely assumed Plaintiff would not satisfy [N.C.G.S.] § 57D-7-02 before trial. . . . [N]ot only did the [S]uperior [C]ourt not have the authority to grant summary judgment; it purported to do so after Plaintiff actually obtained the requisite certificate of authority."). With both *Harold Lang* and *Leasecomm*, the Majority's attempts to harmonize our precedent with its holding misses the forest for the trees, passing over core procedures and applications of law that contradict its interpretation of N.C.G.S. § 57D-7-02 in favor of magnifying minutiae.

Neither our caselaw nor the meaning of the statute as a whole are reconcilable with the Majority's holding. Neither still can the Majority's holding account for the procedures described in the official comment to N.C.G.S. § 55-15-02, which allow an *optional* stay of proceedings in the event that a foreign corporate plaintiff is deemed to require certification under circumstances analogous to those in N.C.G.S. § 57D-7-02. *See* N.C.G.S. § 55-15-02 (2022) (official comment) ("[S]ection 15.02(c) authorizes a court to stay a proceeding to determine whether a corporation should have qualified to transact business and, if it concludes that qualification is necessary, it may grant a further stay to permit the corporation to do so."). If uncertified business plaintiffs were truly entitled to wait until trial to receive a certificate of authority, a stay of proceedings in such circumstances would be mandatory, not permissive. Finally, while less significant than the interpretive problems discussed above, there is serious reason to doubt that the General Assembly would have drafted a statute affirmatively requiring foreign businesses to comply with a certification requirement in order to access the courts of this State, only to permit the gamesmanship that would inevitably arise from *forbidding* a trial court from taking action to ensure that the requirement is met until the moment the jury is empaneled.[1]

Nothing in the language of N.C.G.S. § 57D-7-02(a) entitles an uncertified LLC plaintiff to wait until the moment the jury is empaneled to receive a certificate of authority or forbids a trial court from taking action to address such a plaintiff's lack of certification. Our caselaw and

1. Indeed, even setting aside the conflict the Majority's interpretation would create with the statutorily mandated timeframe in which a trial court must resolve certification issues, there are cases—like *Leasecomm* itself—which have no realistic possibility of ever reaching trial. *See Leasecomm*, 122 N.C. App. 119, 121 (concerning the registration of a foreign judgment). If a trial court were not permitted to dismiss until the empanelment of the jury, a foreign business plaintiff would be functionally exempt from certification requirements in any such case.

the analogous procedure described in the official comment to N.C.G.S. § 55-15-02 is instead consistent with a flexible, discretionary approach in which a trial court may, prior to trial, take appropriate action to address a plaintiff's lack of certification. At times, that may result in a stay of proceedings to allow the plaintiff time to obtain a certificate of authority. *See id.*; *cf. Kyle & Assocs., Inc. v. Mahan*, 161 N.C. App. 341, 344 (2003) (affirming the trial court's denial of the defendant's motion to strike on the basis of the plaintiff corporation's lack of certification where the plaintiff received its certificate prior to the hearing on the motion), *aff'd*, 359 N.C. 176 (2004). At others, dismissal or summary judgment may be appropriate. *Harold Lang*, 156 N.C. App. at 192; *Leasecomm*, 122 N.C. App. at 122. In any event, these are matters we have previously recognized as within the discretion of our trial courts so that they can ensure foreign business plaintiffs do not eschew our State's certification requirements before "utilizing the courts of North Carolina." *Kyle & Assocs.*, 161 N.C. App. at 343. While permitting such an exercise of discretion in no way conflicts with such plaintiffs' statutory *obligation* to "obtain[] a certificate of authority prior to trial[,]" N.C.G.S. § 57D-7-02(a) (2022), a reading of the statute that ties the hands of our trial courts renders the entirety of N.C.G.S. § 57D-7-02 a dead letter.

In an attempt to evade the cascade of irreconcilable conflicts with our existing law arising from its interpretation of N.C.G.S. § 57D-7-02(a), the Majority accepts perhaps the most dubious of Plaintiff's arguments: that the "trial judge" should have resolved the matter rather than what Plaintiff terms the "motions judge." Even setting aside the fact that all of the aforementioned problems with its reading of N.C.G.S. § 57D-7-02(a) still exist—*Harold Lang*, as explained previously, would be incorrectly decided by the Majority's logic since the trial court dismissed that plaintiff's case before the jury was empaneled, *see Harold Lang*, 156 N.C. App. at 189—neither the Majority nor Plaintiff point to any controlling cases in which a "trial judge" has meant something other than a judge presiding over the trial court or has constituted limiting language differentiating one judge from another within the same tribunal. And, for Plaintiff's part, the term "motions judge" has never appeared in either our statutes or our caselaw.

What our caselaw does reveal is that, in in judicial writing and statutory construction, just as in practice, "trial court" and "trial judge" are generally synonymous unless it is contextually clear that "judge" refers to the particular official presiding over the court. *See State v. Thompson*, 254 N.C. App. 220, 223 (2017) (marks omitted) ("In reviewing whether a trial judge abused his discretion, we consider not whether we might disagree with the trial court, but whether the trial court's actions are

fairly supported by the record."); *State v. VanCamp*, 150 N.C. App. 347, 354 (2002) ("In *Boykin*, the trial court polled the jurors as to what they had seen, as in the present case, the trial judge asked counsel if they had any questions and they indicated that they did not have any."); *Matter of E.D.*, 372 N.C. 111, 119 (2019) (citations omitted) ("In each of these cases we concluded that there was a statutory mandate that automatically preserved an issue for appellate review when the mandate was directed to the trial court either: (1) by requiring a specific act by the trial judge; or (2) by requiring specific courtroom proceedings that the trial judge has authority to direct."); *State v. Chandler*, 376 N.C. 361, 366 (2020) (same). *But see Daughtridge v. N. Carolina Zoological Soc'y, Inc.*, 247 N.C. App. 33, 36 (2016) (marks omitted) ("[O]ne trial judge may not reconsider and grant a motion for summary judgment previously denied by another judge."). Our best available legal definitions recognize this interchangeability. *Court*, Black's Law Dictionary 444 (11th Ed. 2019) (emphasis added) ("A place where justice is judicially administered; the locale for legal proceedings . . . . *The judge or judges who sit on such a tribunal*[.]"); *Judge*, Black's Law Dictionary 1005 (11th Ed. 2019) (emphasis added in part) ("A public official appointed or elected to hear and decide legal matters in court; a judicial officer who has the authority to administer justice. . . . [I]n ordinary legal usage, the term is limited to the sense of an officer who (1) is so named in his or her commission, and (2) presides in a court. *Judge is often used interchangeably with court*.").

Indeed, North Carolina has, for nearly four decades, rejected the Majority's understanding of the term "trial judge." Between 1970 and 1975, we consistently interpreted "trial judge," as used in N.C.G.S. § 1-282 and Rule 50 of the Rules of Practice in the Court of Appeals, to invalidate orders extending the time for service of cases on appeal by judges who did not personally preside over the trials at issue. *See, e.g.*, *State v. Lewis*, 9 N.C. App. 323 (1970); *State v. Baker*, 8 N.C. App. 588 (1970); *Keyes v. Hardin Oil Co.*, 13 N.C. App. 645 (1972); *State v. Taylor*, 14 N.C. App. 703, *cert. denied*, 281 N.C. 763 (1972); *see also* N.C.G.S. § 1-282 (1969) ("If it appears that the case on appeal cannot be served within the time prescribed above, the trial judge may, for good cause and after reasonable notice to the opposing party or counsel, enter an order or successive orders extending the time for service of the case on appeal and of the countercase or exceptions to the case on appeal."). Our Supreme Court and General Assembly abrogated these cases in 1975 with the repeal of N.C.G.S. § 1-282 and the enactments of Rule 36 of the Rules of Appellate Procedure and N.C.G.S. § 1-283, clarifying that "trial judge," for purposes of our interpretation, means "the judge of

[S]uperior [C]ourt or of [D]istrict [C]ourt from whose order or judgment an appeal has been taken . . . ." N.C.G.S. § 1-283 (2022); cf. N.C. R. App. P. 36(a)(1)-(2) (2023) ("The judge who entered the judgment, order, or other determination from which appeal was taken . . ."). [2] The Majority's resurrection of this Court's long-corrected, half-century-old interpretation of "trial judge" solves none of the outstanding conceptual problems with its reading of N.C.G.S. § 57D-7-02 and presents an open invitation for appellants to engage in the type of gamesmanship the 1975 clarifications sought to avoid.

Although the Majority's analysis of N.C.G.S. § 57D-7-02 and perplexing readings of *Leasecomm* and *Harold Lang* do not, in my view, justify our holding, I agree the trial court's order should be reversed because, in order for Plaintiff to have been required to obtain a certificate of authority at all, the trial court must have found sufficient facts on the Record to support its conclusion that Plaintiff was actually "transacting business" in North Carolina. Here, as the trial court's findings on the Record did not support a determination that Plaintiff was transacting business in North Carolina, I would reverse the trial court's order on that basis.

"[T]ransacting business in this State[,]" for purposes of N.C.G.S. § 57D-7-02(a), requires more than an isolated act or acts. N.C.G.S. § 57D-7-02(a) (2022). Without more,

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2. N.C.G.S. § 1-283, entitled "[t]rial judge empowered to settle record on appeal; effect of leaving office or of disability[,]" reads in full as follows:

> Except as provided in this section, only the judge of superior court or of district court from whose order or judgment an appeal has been taken is empowered to settle the record on appeal when judicial settlement is required. A judge retains power to settle a record on appeal notwithstanding he has resigned or retired or his term of office has expired without reappointment or reelection since entry of the judgment or order. Proceedings for judicial settlement when the judge empowered by this section to settle the record on appeal is unavailable for the purpose by reason of death, mental or physical incapacity, or absence from the State shall be as provided by the rules of appellate procedure.

N.C.G.S. § 1-283 (2022). "Although the title given to a particular statutory provision is not controlling, it does shed some light on the legislative intent underlying the enactment of that provision." *State v. James*, 371 N.C. 77, 87 (2018). Here, the recapitulative function of N.C.G.S. § 1-283's title signals that, since the General Assembly and our Supreme Court corrected our jurisprudence with respect to the term "trial judge" in 1975, "trial judge" means "the judge of superior court or of district court from whose order or judgment an appeal has been taken . . . ." N.C.G.S. § 1-283 (2022); *see also id.* (marks omitted) ("[E]ven when the language of a statute is plain, the title of an act should be considered in ascertaining the intent of the legislature.").

> a foreign LLC is not considered to be transacting business in this State for the purposes of this Chapter by reason of . . . [m]aintaining or defending any proceeding . . . [,] [t]ransacting business in interstate commerce[,] [or] [c]onducting an isolated transaction completed within a period of six months but not repeated transactions of a similar nature.

N.C.G.S. § 57D-7-01(b)(1), (8), (9) (2022); *see also Quantum Corporate Funding, Ltd. v. B.H. Bryan Bldg. Co.*, 175 N.C. App. 483, 486 (2006) (remarking that, with respect to the analogous registration requirements for corporations, "a foreign corporation need not obtain a certificate of authority in order to maintain an action or lawsuit so long as the company is not otherwise transacting business in this State"). Rather, "[o]ur Court has interpreted transacting business to 'require the engaging in, carrying on or exercising, in North Carolina, some of the functions for which the [business] was created.' " *Harbin Yinhai Tech. Dev. Co. v. Greentree Fin. Grp., Inc.*, 196 N.C. App. 615, 624 (2009) (quoting *Harold Lang*, 156 N.C. App. at 190). "The activities carried on by a corporation in North Carolina must be substantial, continuous, systematic, and regular" to qualify, and "[t]ypical conduct requiring a certificate of authority includes maintaining an office to conduct local intrastate business, selling personal property not in interstate commerce, entering into contracts relating to the local business or sales, and owning or using real estate for general [business] purposes." *Id.*

In its findings of fact, the trial court noted that "Plaintiff entered a contract with The Coves at Newport II Association . . . to perform remediation and repair services for damaged units" and that "Plaintiff . . . contracted with BJ & Associates, Inc., d/b/a G.A. Jones Construction (G.A. Jones), a North Carolina Corporation transacting business in North Carolina[] [and] serv[ing] as general contractor for the Coves." The trial court also remarked that, "[i]n entering the transactions at issue in this litigation, Plaintiff engaged in, carried on, and exercised in North Carolina, the functions for which Plaintiff was created, namely, emergency services for real properties that have incurred water losses, as well as mold testing and remediation, moisture control, restoration services, and air duct cleanings." From this, the trial court concluded as a matter of law that "[t]here is no genuine issue of material fact that Plaintiff is a foreign [LLC] for purposes of [certification], transacting business in North Carolina."

This analysis does not justify the trial court's conclusion. N.C.G.S. § 57D-7-01(b)(10) specifies that "a foreign LLC is not considered to be

transacting business in this State . . . by reason of . . . [c]onducting an isolated transaction completed within a period of six months but not repeated transactions of a similar nature." N.C.G.S. § 57D-7-01(b)(10) (2022). Assuming, *arguendo*, that entering into two distinct contracts in North Carolina qualifies as engaging in "repeated transactions"—which is itself doubtful given that the two contracts were only entered into to secure the completion of a singular project—N.C.G.S. § 57D-7-01(b) is a *non-exhaustive* list of activities a foreign LLC may perform without technically transacting business in North Carolina. *See* N.C.G.S. § 57D-7-01(b) (2022) (emphasis added) ("*Without excluding other activities that may not constitute transacting business in this State*, a foreign LLC is not considered to be transacting business in this State for the purposes of this Chapter by reason of conducting in this State any one or more of the following activities . . ."). By specifying in a non-exhaustive list that "an isolated transaction completed within a period of six months" does not itself qualify as transacting business but excluding "repeated transactions of a similar nature[,]" N.C.G.S. § 57D-7-01(b)(10) is not communicating that any foreign LLC technically engaging in multiple transactions in North Carolina automatically transacts business for certification purposes; rather, it is communicating that those multiple transactions are not *necessarily exempt* from the meaning of "transacting business." N.C.G.S. § 57D-7-01(b)(10) (2022).

The applicable standard remains that "[t]he activities carried on by [an LLC] in North Carolina must be substantial, continuous, systematic, and regular" to qualify as "transacting business." *Harbin Yinhai*, 196 N.C. App. at 624. The trial court's order, which specified only that Plaintiff entered into two contracts in North Carolina in order to complete a single repair project, supported no such conclusion. However, as insufficient information exists in the Record from which we can discern whether Plaintiff's other business activities in North Carolina, if any, either in isolation or in combination with those discussed above, qualify as "substantial, continuous, systematic, and regular," *id.*, or whether "any party [was otherwise] entitled to a judgment as a matter of law[,]" N.C.G.S. § 1-A1, Rule 56(c) (2022), I would reverse the order of the trial court and remand for further findings of fact adequately supporting a determination of whether Plaintiff was transacting business in North Carolina. In the event the trial court found Plaintiff had conducted sufficient activities in North Carolina to require certification, dismissal at this point in the proceedings would be proper. However, if the trial court's factfinding revealed no further instances in which Plaintiff had conducted business activities in North Carolina, Plaintiff would not be required to obtain a certificate of authority.

PETRILLO v. BARNES-JONES

[291 N.C. App. 62 (2023)]

THERESA PETRILLO, PLAINTIFF
v.
TIMISHA BARNES-JONES AND ANDREW B. STRONG, IN THEIR INDIVIDUAL CAPACITIES AND AS PUBLIC EMPLOYEES OF THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, DEFENDANTS

No. COA23-331

Filed 17 October 2023

1. Appeal and Error—interlocutory order—substantial right—denial of motion to dismiss—public official immunity

In plaintiff's negligence action against a school principal and a school employee regarding an injury sustained on the grounds of a public high school, the trial court's order denying the school principal's second motion to dismiss was immediately appealable as affecting a substantial right where the motion asserted the defense of public official immunity. Further, although the principal's first motion to dismiss (based on governmental immunity) had also been denied, she was not estopped from pursuing her second motion because it asserted a different basis for immunity.

2. Immunity—public official—school principal—negligence action—injury on school grounds—no malice or corruption alleged

In plaintiff's negligence action brought against a school principal in her individual capacity (defendant) regarding an injury sustained on the grounds of a public high school, the trial court erred by denying defendant's motion to dismiss, in which defendant asserted the defense of public official immunity, since defendant was a public official entitled to the protections of that defense and, further, plaintiff did not include allegations of malice or corruption in her complaint that would have overcome the defense.

Appeal by defendant from judgment entered 5 December 2022 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 September 2023.

Ted A. Greve & Associates, PA, by Justin L. Lowenberger, for the plaintiff-appellee.

Charlotte-Mecklenburg Board of Education, by Senior Associate General Counsel Oksana K. Cody, for the defendant-appellant.

TYSON, Judge.

Timisha Barnes-Jones ("Barnes-Jones") appeals the denial of her Rule 12(b)(6) motion to dismiss, in which she asserted public official immunity barred Theresa Petrillo ("Plaintiff" or "Petrillo") from suing her in her individual capacity for negligence purportedly committed in the course and scope of her public employment. We reverse the trial court's denial of Barnes-Jones' motion to dismiss and remand for entry of an order of dismissal.

I. Background

Barnes-Jones was the principal of West Charlotte High School ("WCHS") in 2018. Andrew Strong ("Strong") was a member of the custodial staff at WCHS. Both Barnes-Jones and Strong were public employees.

Petrillo attended the University Instructors' training to become an instructor for their summer camp program, which was held on the campus of WCHS in June of 2018. Petrillo asserts she tripped and fell while walking on an outdoor, concrete pathway between two WCHS buildings.

Petrillo filed a complaint against Barnes-Jones and Strong on 16 June 2021. She alleged the concrete pathway between the two buildings was "raised and unleveled," which caused her to "fall to the ground" and severely injure herself.

Petrillo's complaint alleges she is suing Barnes-Jones "solely in her individual capacity" for negligence that occurred while Barnes-Jones was "acting in the course and scope of her employment, as an agent and public employee" of the Charlotte-Mecklenburg Board of Education and as principal of WCHS.

Petrillo's complaint proffers Barnes-Jones "operated, managed, maintained[,] and supervised the property and premises of WCHS." She also cites Barnes-Jones' and Strong's duty to "exercise ordinary and reasonable care in the maintenance of the property and premises of WCHS[,]" and claims her injuries were "proximately caused by the careless, negligent[,] and unlawful conduct" of Barnes-Jones and Strong.

On 1 April 2022, Barnes-Jones filed a Rules 12(b)(1), 12(b)(2), and 12(b)(6) motions to dismiss the suit pursuant to *governmental* immunity. The trial court denied her motion to dismiss because "the action name[d] Defendant Timisha Barnes-Jones in her individual capacity." *See Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 279 (1993) ("Governmental immunity protects the governmental entity and

its officers or employees sued in their '*official capacity*.' " (emphasis supplied) (citation omitted)).

On 6 October 2022, Barnes-Jones filed a second 12(b)(1), 12(b)(2), and 12(b)(6) motions to dismiss. In her second motions to dismiss, Barnes-Jones asserted Petrillo "fail[ed] to state a claim upon which relief can be granted pursuant to the doctrine of *public official* immunity." (emphasis supplied). The trial court entered an order after hearing, which denied Barnes-Jones' second motions to dismiss on 5 December 2022.

Barnes-Jones filed a notice of appeal on 12 December 2022.

II. Jurisdiction - Interlocutory Appeal

[1] The trial court's order is interlocutory. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court to settle and determine the entire controversy." *Bartley v. City of High Point*, 381 N.C. 287, 293, 873 S.E.2d 525, 532 (2022) (citing *Veazey v. City of Durham*, 231 N.C. 354, 357, 362, 57 S.E.2d 377, 381 (1950)). "As a general rule, interlocutory orders are not immediately appealable." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citation omitted).

Interlocutory orders can be immediately appealable "when the appeal involves a substantial right of the appellant[,] and the appellant will be injured if the error is not corrected before final judgment." *N.C. Dep't of Transp. v. Stagecoach Vill.*, 360 N.C. 46, 47-48, 619 S.E.2d 495, 496 (2005) (citations omitted). *See also* N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)(a) (2021).

"Orders denying dispositive motions based on the defenses of governmental and public official's immunity affect a substantial right and are immediately appealable." *Thompson v. Town of Dallas*, 142 N.C. App. 651, 653, 543 S.E.2d 901, 903 (2001) (citation omitted); *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999) (explaining "this Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review"); *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010) (extending this Court's holding "that a denial of a Rule 12(b)(6) motion to dismiss on the basis of *sovereign immunity* affects a substantial right and is immediately appealable" to allow interlocutory review of a public official asserting *public official immunity* (emphasis supplied) (citing *Price*, 132 N.C. App. at 558-59, 512 S.E.2d at 785)); *Bartley*, 381 N.C. at 293, 873 S.E.2d at 532 ("The

denial of summary judgment on the ground of public official immunity is immediately appealable because it affects a substantial right.").

"Public official immunity is more than a mere affirmative defense to liability as it shields a defendant entirely from having to answer for his conduct in a civil suit for damages." *Bartley*, 381 N.C. at 293, 873 S.E.2d at 532 (citations omitted).

"Nevertheless, this Court has declined to address interlocutory appeals of a lower court's denial of a Rule 12(b)(1) motion to dismiss despite the movant's reliance upon the doctrine of sovereign immunity." *Green*, 203 N.C. App. at 265-66, 690 S.E.2d at 760 (citations omitted).

Barnes-Jones seeks review of the trial court's denial of her Rule 12(b)(6) motion to dismiss asserting public official immunity from Petrillo's action. Although Barnes-Jones' appeal is interlocutory, her claim involves a "substantial right." *Stagecoach Vill.*, 360 N.C. at 47-48, 619 S.E.2d at 496; *Thompson*, 142 N.C. App. at 653, 543 S.E.2d at 903; *Price*, 132 N.C. App. at 558-59, 512 S.E.2d at 785; *Green*, 203 N.C. App. at 266, 273, 690 S.E.2d at 761; *Bartley*, 381 N.C. at 293, 873 S.E.2d at 532.

Petrillo argues collateral estoppel barred Barnes-Jones from bringing her second Rule 12(b)(6) motion to dismiss, in which she asserted public official immunity. "The elements of collateral estoppel . . . are as follows: (1) a prior suit resulting in a *final judgment* on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 678, 657 S.E.2d 55, 61 (2008) (emphasis supplied) (citation and internal quotation marks omitted).

The status of Barnes-Jones' interlocutory appeal defeats Petrillo's argument. An interlocutory order is, by definition, not a *final judgment*. *Bartley*, 381 N.C. at 293, 873 S.E.2d at 532. *But see Fox v. Johnson*, 243 N.C. App. 274, 285, 777 S.E.2d 314, 324 (2015) ("It is well settled that '[a] *dismissal* under [North Carolina Rule of Civil Procedure] Rule 12(b)(6) operates as an adjudication on the merits unless the court specifies that the dismissal is without prejudice.' " (emphasis supplied) (citation omitted)). Further, Barnes-Jones' second motions to dismiss asserted a different basis of immunity than her first motions. Petrillo's argument is without merit. *Bluebird*, 188 N.C. App. at 678, 657 S.E.2d at 61.

This court possesses appellate jurisdiction to review Barnes-Jones' arguments. N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)(a) (2021); *Stagecoach Vill.*, 360 N.C. at 47-48, 619 S.E.2d at 496; *Thompson*, 142

N.C. App. at 653, 543 S.E.2d at 903; *Price*, 132 N.C. App. at 558-59, 512 S.E.2d at 785; *Green*, 203 N.C. App. at 266, 273, 690 S.E.2d at 761, 765; *Bartley*, 381 N.C. at 293, 873 S.E.2d at 532.

III. Issue

A. Public Official Immunity

[2] Barnes-Jones argues the trial court erred by denying her 12(b)(6) motion to dismiss on the grounds of public official immunity.

1. Standard of Review

We review a Rule 12(b)(6) motion to dismiss *de novo*. *Green*, 203 N.C. App. at 266, 690 S.E.2d at 761.

> The standard of review of an order granting a [motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)] is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true.

Bissette v. Harrod, 226 N.C. App. 1, 7, 738 S.E.2d 792, 797 (2013) (citations omitted).

2. Analysis

The doctrines of sovereign immunity, governmental immunity, and public official immunity overlap and are directly related:

> In general, the doctrine of sovereign/governmental immunity "provides the State, its counties, and its public officials with absolute and unqualified immunity from suits against them in their official capacity." Under the doctrine of *sovereign* immunity, it is the State of North Carolina which "is immune from suit [in the absence of] waiver[,]" whereas under the doctrine of *governmental* immunity, counties and cities are "immune from suit for *negligence* of [their] employees in the exercise of governmental functions absent waiver of immunity."

Wray v. City of Greensboro, 247 N.C. App. 890, 892, 787 S.E.2d 433, 436 (2016) (citations omitted). In other words, whether sovereign immunity or governmental immunity applies depends upon the identity and status of the *defendant*.

Public official immunity is derived and stems from both sovereign immunity and governmental immunity, and its applicability depends upon whether the public official's employment and authority flows from the state *or* from a city or county. If the public employee works for a city or county, their *individual* immunity for acts committed within their scope of employment arises under and from the city or county's *governmental* immunity. *See Fullwood v. Barnes*, 250 N.C. App. 31, 38, 792 S.E.2d 545, 550 (2016) ("The defense of public official immunity is a 'derivative form' of governmental immunity." (citation omitted)); *Bartley*, 381 N.C. at 294, 873 S.E.2d at 533 ("Public official immunity, a judicially-created doctrine, is 'a derivative form' of governmental immunity which shields public officials from personal liability for claims arising from discretionary acts or acts constituting mere negligence, by virtue of their office, and within the scope of their governmental duties.").

If the public official's employment or authority flows from the State or a State agency, whether the official may assert public official immunity as a defense to any *individual* liability for purported negligent acts committed within the scope of their employment derives from the state's *sovereign* immunity. *See Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 203, 468 S.E.2d 846, 850 (1996) (explaining "[a] suit against a public official in his official capacity is basically a suit against the public entity (i.e., the state) he represents" and that "[o]fficial immunity is a derivative form of sovereign immunity" (citations omitted)).

Public official immunity shields individuals, while serving as "public officials," from *individual* liability for negligence, "[a]s long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption[.]" *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976) (citation omitted). "Actions that are malicious, corrupt or outside of the scope of official duties will pierce the cloak of official immunity[.]" *Moore v. Evans*, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996) (citations omitted).

Public official immunity may be asserted by "public officials," but not by "public employees." *Hare v. Butler*, 99 N.C. App. 693, 699-700, 394 S.E.2d 231, 236 (1990) (explaining "[w]hen a governmental worker is sued individually, or in his or her personal capacity, our courts distinguish between public employees and public officials in determining negligence liability" (citations omitted)).

"Officers exercise a certain amount of discretion, while employees perform ministerial duties." *Cherry v. Harris*, 110 N.C. App. 478,

480, 429 S.E.2d 771, 773 (1993) (citation omitted). "Discretionary acts are those requiring personal deliberation, decision[,] and judgment. Ministerial duties, on the other hand, are absolute and involve merely the execution of a specific duty arising from fixed and designated facts." *Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999) (citations and quotations omitted).

Whether a public official may assert public official immunity depends upon which *capacity* the public official is being sued. *See Patrick v. N. Carolina Dep't of Health & Hum. Servs.*, 192 N.C. App. 713, 716, 666 S.E.2d 171, 173 (2008) (providing "public official immunity only applies to claims brought against public officials in their *individual* capacities" (emphasis supplied)); *Taylor*, 112 N.C. App. at 607, 436 S.E.2d at 279 (explaining governmental immunity only applies to county or city officials sued in their *official* capacity).

Principals constitute "public officials" and are entitled to assert the absolute defense of public official immunity. *Farrell v. Transylvania Cty. Bd. of Educ.*, 175 N.C. App. 689, 695, 625 S.E.2d 128, 133 (2006) ("[T]his Court has recognized [ ] school officials such as superintendents and principals perform discretionary acts requiring personal deliberation, decision, and judgment." (citing *Gunter v. Anders*, 114 N.C. App. 61, 67-68, 441 S.E.2d 167, 171 (1994))).

Petrillo's complaint specifically alleges she was suing Barnes-Jones "solely in her individual capacity" for negligence that occurred while Barnes-Jones was "acting in the course and scope of her employment, as an agent and public employee" of the Charlotte-Mecklenburg Board of Education and as the principal of WCHS. Under our precedents, Barnes-Jones' employment as a high school principal qualifies her as a public official. *Id.* She may properly assert public official immunity as an absolute defense to suit. *Smith*, 289 N.C. at 331, 222 S.E.2d at 430; *Moore*, 124 N.C. App. at 42, 476 S.E.2d at 421.

Public official immunity shields Barnes-Jones from alleged negligent activities conducted within the scope of her employment, if her official acts were taken without malice or corruption. *Id.* Petrillo's complaint does not specifically allege Barnes-Jones' alleged acts were malicious or corrupt. The trial court erred in denying Barnes-Jones' motions to dismiss based upon assertion of public official immunity.

IV. Conclusion

Barnes-Jones is not collaterally estopped from bringing her second Rule 12(b)(6) motion to dismiss, asserting public official immunity. This interlocutory appeal is properly before us.

Petrillo's failure to allege Barnes-Jones acted with malice or corruption bars and defeats her negligent claim upon proper assertion of public official immunity. *Id.* *See also White*, 366 N.C. at 363, 736 S.E.2d at 168; *Green*, 203 N.C. App. at 266-67, 690 S.E.2d at 761. The trial judge erred by denying Barnes-Jones' Rule 12(b)(6) motion to dismiss asserting public official immunity. *Id.* We reverse the trial judge's order and remand for entry of an order granting Barnes-Jones' motion to dismiss. *It is so ordered.*

REVERSED AND REMANDED.

Judges COLLINS and WOOD concur.

WILLIE RAY ROBERTS, Plaintiff
v.
JOHN KYLE, Executor of the Estate of CAROLYN GAIL ROBERTS, Defendant

No. COA22-383

Filed 17 October 2023

1. Divorce—equitable distribution—classification of property—subdivision property—marital presumption—rebuttal

In an equitable distribution matter, the trial court did not err by classifying certain real property as plaintiff husband's separate property. Although the deceased wife's son (defendant, who was executor of the wife's estate) argued that Section Two of the subdivision that plaintiff and his cousin had developed together was acquired during marriage through repayment of marital debt and active appreciation, defendant failed to offer evidence to rebut plaintiff's evidence that the subdivision was not purchased or otherwise originally acquired with marital property. Plaintiff's evidence showed that he acquired the property with his separate funds and that he used his separate funds to pay down his portion of the notes secured by the deeds of trust; finally, defendant failed to offer any credible evidence showing the amount or nature of any increase in value of the property during the marriage.

2. Divorce—equitable distribution—classification of property—personal property—evidence—trial court's discretion

In an equitable distribution matter, the trial court did not err by classifying certain personal property as the plaintiff husband's separate property. Although the deceased wife's son (defendant,

who was executor of the wife's estate) argued that he relied to his detriment on plaintiff's pre-trial equitable distribution affidavits and discovery responses describing the items as marital property, plaintiff's trial testimony that he had acquired all of the items before the marriage was competent evidence of the items' status as separate property, and any contradictions in the evidence were for the trial court to resolve. In addition, defendant failed to rebut plaintiff's testimony regarding his pre-marital acquisition of the items.

3. Appeal and Error—abandonment of issues—Rule 28(b)(6)—no authority

In an equitable distribution matter, where defendant provided no authority in support of his argument regarding a debt, the argument was deemed abandoned pursuant to Appellate Rule 28(b)(6).

Appeal by Defendant from order filed 17 August 2021 by Judge Andrew Kent Wigmore in Carteret County District Court. Heard in the Court of Appeals 29 November 2022.

Law Offices of Bill Ward & Kirby Smith, P.A., by Kirby H. Smith, III, for Plaintiff-Appellee.

Valentine & McFadyen, P.C., by Stephen M. Valentine for Defendant-Appellant.

CARPENTER, Judge.

John Kyle ("Defendant"), Executor of the Estate of Carolyn Gail Roberts ("Wife"), appeals from the trial court's "Equitable Distribution Judgment" (the "Judgment"), allocating certain real and personal property to Willie Ray Roberts ("Plaintiff"). Defendant argues the trial court erred in classifying certain real and personal property as Plaintiff's separate property before allocating same to Plaintiff. After careful review, we affirm the Judgment.

I. Factual & Procedural Background

Plaintiff and Wife were married on 24 December 1998 and separated on 1 December 2014. Plaintiff filed a complaint for absolute divorce on 24 March 2017. Wife subsequently answered and counterclaimed for equitable distribution. Plaintiff and Wife were granted an absolute divorce on 12 July 2017,[1] with equitable distribution issues reserved for

1. The order granting absolute divorce is not included in the Record.

hearing at a later date. On 15 April 2018, Wife passed away, and her son, Defendant, entered this matter by substitution on 11 September 2018.

On 19 December 1997, Plaintiff and his cousin, Walter,[2] purchased a 13.9-acre tract of property for $55,600.00, intending to develop a subdivision called "Tar Kiln Ridge." Plaintiff and Walter paid $11,600.00 down and financed the balance with a note and loan from BB&T, secured by deed of trust. Plaintiff's portion of the down payment came from his personal savings. Plaintiff's primary role in the project involved clearing and preparing the land for development with heavy machinery, while Walter handled the surveying and permits. On 16 June 1998, Walter filed his final plan for Section One of Tar Kiln Ridge, which contained seven lots—three developed lots and four designated as "future development." Plaintiff and Walter sold the first lot on 17 August 1998, prior to Plaintiff's marriage, and applied the sale proceeds to pay down the initial BB&T note.

On 29 December 1998, four days after Plaintiff's marriage, Plaintiff and Walter obtained a second BB&T loan for $110,000.00, secured by deed of trust on the remaining unsold lots, to pay off the original loan and fund infrastructure development. The Final Plat for Section Two of Tar Kiln Ridge was recorded on 20 April 1999. Plaintiff and Walter began selling the remaining lots in September 1999, paying down the loan principal with sale proceeds, as evidenced by BB&T release deeds. The second BB&T deed of trust was cancelled on 3 March 2001.

Occasionally, Plaintiff and Walter accepted nearby parcels of land as consideration for the sale of Tar Kiln Ridge lots, acquiring Tracts 8A and 9A in exchange for Lots 15, 19, and 21. Plaintiff and Walter then swapped their interests in certain parcels between themselves to acquire full ownership, which is how Plaintiff acquired 100% ownership of Tract 8A and Lot 13. Plaintiff and Walter each continued to own a 50% undivided interest in an undeveloped residual lot at the northeast corner of Tar Kiln Ridge. Accordingly, Plaintiff acquired the properties at issue, Tract 8A and Lot 13, in his sole name, and a 50% interest in the residual lot with Walter.

Plaintiff's preliminary equitable-distribution affidavit filed on 22 June 2020 lists certain vehicles and trailers as marital property. Plaintiff's answers to interrogatories described each disputed vehicle: a 1957 Farmall tractor, a 1963 Farmall tractor, a twenty-two-foot 1995 Core Sounder boat, a 1996 boat trailer, a 1995 Caterpillar

2. Walter D. Roberts, Jr. is named in the Judgment as "Danny" Roberts.

bulldozer, and a 1993 Caterpillar backhoe. Plaintiff's 24 November 2020 amended equitable-distribution affidavit again described all vehicles as marital property.

A bench trial on equitable distribution was held before the Honorable Andrew Kent Wigmore on 30 and 31 March 2021 in Carteret County District Court. The Judgment was filed on 17 August 2021, including, *inter alia*, the following findings[3]:

> **5)** On 19 December 1997, the Plaintiff and his cousin, [Walter,] purchased a 13.9-acre tract of land located on State Road 1140 hereafter known as "Tar Kiln Ridge[.]"
>
> **6)** The purchase price of Tar Kiln Ridge was $55,600. The Plaintiff and [Walter] entered into a deed of trust with BB&T on 19 December 1997 for $44,000. Funds from this loan were used, in part, to purchase said 13.9-acre tract.
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> **7)** Plaintiff and [Walter] testified to beginning work on a subdivision which they called Tar Kiln Ridge and doing the surveying and land clearing and line cutting themselves, on Tar Kiln Ridge, right after purchasing the property, in the winter, which began by the calendar a couple days after purchase.
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> **8)** There was no evidence to refute [Plaintiff's and Walter's] testimony[ies] that they did all the work themselves on the Tar Kiln Ridge property.
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> **9)** Too much work had been done on the property prior to DOT's first road inspection of 12 April 1999 to believe that all the work completed had been done solely after the date of marriage, 24 December 1998.
>
> **10)** The first lot sold in Tar Kiln Ridge, Lot #2, was sold on 17 August 1998, prior to the 24 December 1998 date of marriage of the parties.
>
> **11)** The sale of the first lot in Tar Kiln Ridge, Lot #2 on 17 August 1998 is the "defining moment" when the property had become a subdivision, and thus, the time in which the property value increases to the sum of all the lots to be sold.

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3. The Findings in the Judgment are not numbered sequentially. The Findings skip numbers 16 and 18, meaning they read, in order, Finding 15, Finding 17, Finding 19, Finding 20 . . . .

12) Further proof of this increased value is BB&T's willingness to loan $110,000.00 – twice the purchase price on the original deed, upon just the signatures of Plaintiff and [Walter] and their collateral which is solely the Tar Kiln Ridge lots.

13) The Deed of Trust for the $110,000.00 loan on 29 December 1998, four days after the marriage, does not include [Wife's] name or signature, nor does it subject the Defendant to a single penny of indebtedness.

14) No marital funds [were] expended to repay the indebtedness as each payment made comes directly from the sale of a Tar Kiln Ridge lot.

15) Therefore, the court finds that the Tar Kiln Ridge Subdivision and its lots, were fully acquired as separate property when the first lot was sold bringing to fruition the subdivision itself, and its increase in separate property value above and beyond the indebtedness later placed on said property by the $110,000.00 loan on 29 December 1998.

17) Therefore, the remaining lots of Tar Kiln Ridge, lot 13 and the [residual lot] are classified as the Plaintiff's separate property as the Plaintiff has overcome the burden of marital property placed on said property by the Defendant's Equitable Distribution claim.

19) During the marriage and prior to the date of separation, the Plaintiff obtained in his separate name a parcel of real estate off Roberts Road in Newport, NC containing 18.41 acres and known as "Tract 8A[.]"

20) Hence, the separate property lots traded for [Tract 8A] without monetary payment or indebtedness of any form, retained the separate property classification previously found in the Tar Kiln lots.

21) Tract 8A is presumed to be marital property because it was acquired during the marriage and prior to the date of separation. However, the Plaintiff has overcome the burden of marital property placed on said property by the Defendant's equitable distribution claim. Therefore, Tract 8A is classified as Plaintiff's separate property.

Based upon its findings, the trial court concluded, *inter alia*:

> **3)** Although the lots in Tar Kiln Ridge (with the exception of Lot #2) were sold during the marriage, [the] court finds the Plaintiff has overcome the presumption that these lots are [marital].
>
> **4)** The court finds that the Plaintiff has overcome the presumption that Tract 8A is a marital asset.
>
> **5)** The court finds that the Plaintiff has overcome the presumption that lot 13 and the residual lot in the Tar Kiln Ridge Subdivision are marital assets.

Defendant filed timely, written notice of appeal on 7 September 2021.

II. Jurisdiction

This Court has jurisdiction over an appeal from a final equitable-distribution judgment pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2021).

III. Issues

The issues before this Court are whether the trial court erred by: (1) classifying Lot 13, the residual lot of Tar Kiln Ridge, and Tract 8A as Plaintiff's separate property; (2) classifying certain vehicles as Plaintiff's separate property; and (3) finding the second BB&T loan did not subject Wife's estate to any financial responsibility.

IV. Standard of Review

The standard of review for a trial court's classification of property during equitable distribution is "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Foxx v. Foxx*, 282 N.C. App. 721, 724, 872 S.E.2d 369, 372–73 (2022) (citing *Carpenter v. Carpenter*, 245 N.C. App. 1, 11, 781 S.E.2d 828, 837 (2016)). "The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary." *Kabasan v. Kabasan*, 257 N.C. App. 436, 440, 810 S.E.2d 691, 696 (2018) (citation omitted). Unchallenged findings of fact "are presumed to be supported by competent evidence and are binding on appeal." *Peltzer v. Peltzer*, 222 N.C. App. 784, 787, 732 S.E.2d 357, 360 (2012).

"While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*." *Carpenter*, 245 N.C. App. at 11, 781 S.E.2d at 837. "Because the classification of property in an equitable

distribution proceeding requires the application of legal principles, this determination is most appropriately considered a conclusion of law." *Romulus v. Romulus*, 215 N.C. App. 495, 500, 715 S.E.2d 308, 312 (2011) (citation omitted). Therefore, we review the trial court's classification of property in this equitable distribution case *de novo*. *See Carpenter*, 245 N.C. App. at 11, 781 S.E.2d at 837.

V. Analysis

A. Classification of Real Property

[1] In his first arguments, Defendant challenges various findings of fact and the trial court's conclusions of law that Lot 13 and the residual lot of Tar Kiln Ridge, as well as Tract 8A, were Plaintiff's separate property.[4] Specifically, Defendant asserts that Section Two of Tar Kiln Ridge was acquired during the marriage through repayment of marital debt and active appreciation; therefore, Lot 13, the residual lot, and Tract 8A—acquired in exchange for Lot 19 of Tar Kiln Ridge and Plaintiff's 50% interest in Tract 9A—are marital property subject to equitable distribution. Plaintiff avers that separate property brought into a marriage remains separate property, and the evidence and findings established that Plaintiff successfully rebutted the marital presumption regarding the disputed real property. There is merit to portions of the arguments raised by each party.

"In an action for equitable distribution, the trial court is required to conduct a three-step analysis: 1) identification of marital and separate property; 2) determination of the net market value of the marital property as of the date of separation; and 3) division of the property between the parties." *Est. of Nelson ex rel. Brewer v. Nelson*, 179 N.C. App. 166, 168, 633 S.E.2d 124, 126–27 (2006), *aff'd*, 361 N.C. 346, 643 S.E.2d 587 (2007). The dispute in this case concerns the trial court's analysis of step one—identifying or classifying the marital and separate property. Our General Statutes define marital property and separate property as follows:

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4. It is apparent Defendant disputes certain findings and conclusions on this issue, but aside from Findings 11 and 15, he failed to specify their respective numbers to aid our review. Given the nature of his argument and authorities cited, we additionally infer his challenges to Findings 17, 20, and 21, and Conclusions 4 and 5. As previously discussed, "findings" which classify property or apply burden-shifting principles are more properly considered conclusions of law. *See Romulus*, 215 N.C. App. at 500, 715 S.E.2d at 312. We review them as such. *See Cox v. Cox*, 238 N.C. App. 22, 31, 768 S.E.2d 308, 314 (2014) ("When this Court determines that findings of fact and conclusions of law have been mislabeled by the trial court, we may reclassify them, where necessary, before applying our standard of review.").

> (1) "Marital property" means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with subdivision (2) or (4) of this subsection. . . . *It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property under subdivision (2) of this subsection.* It is presumed that all real property creating a tenancy by the entirety acquired after the date of marriage and before the date of separation is marital property. *Either presumption may be rebutted by the greater weight of the evidence.*
>
> (2) "Separate property" means all real and personal *property acquired by a spouse before marriage* or acquired by a spouse by devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. *Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property.*

N.C. Gen. Stat. § 50-20(b)(1)–(2) (2021) (emphasis added). The statute contains a presumption that property acquired after the date of marriage and before separation is marital property, which may be rebutted by a preponderance of evidence. N.C. Gen. Stat. § 50-20(b)(1).

> The burden of showing the property to be marital is on the party seeking to classify the asset as marital and the burden of showing the property to be separate is on the party seeking to classify the asset as separate. A party may satisfy her burden by a preponderance of the evidence. If the party claiming property should be classified as marital property meets the burden by a preponderance of the evidence, then the burden shifts to the other party

> to prove the property is separate. If both parties meet their burdens then the property is separate property.

Atkins v. Atkins, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787 (1991).

Moreover, if separate property increases in value during the marriage, such increase may become marital property, depending on whether the increase is due to active efforts or passive forces. The statutory "provision concerning the classification of the increase in value of separate property has been interpreted as referring only to passive appreciation of separate property, such as that due to inflation, and not to active appreciation resulting from the contributions, monetary or otherwise, by one or both spouses." *Lawrence v. Lawrence*, 75 N.C. App. 592, 595, 331 S.E.2d 186, 188 (1985). With respect to active appreciation of separate property, any increase in value between the date of acquisition and the date of separation is presumptively marital property unless it is shown to be the result of passive appreciation. *Conway v. Conway*, 131 N.C. App. 609, 616, 508 S.E.2d 812, 817 (1998).

"In making an equitable distribution determination, all property must be classified as marital or separate, and when property has dual character, the component interests of the marital and separate estates must be identified[.]" *Crago v. Crago*, 268 N.C. App. 154, 159, 834 S.E.2d 700, 705 (2019) (citation and internal quotations omitted), *rev. denied*, 373 N.C. 592, 838 S.E.2d 181 (2020). "North Carolina recognizes the 'source of funds' rule, under which assets purchased with, or comprised of, part marital and part separate funds are considered 'mixed property' for equitable distribution purposes." *Carpenter*, 245 N.C. App. at 11, 781 S.E.2d at 837.

Where separate property is invested along with marital property in an asset during marriage but before separation, such commingling does not necessarily transmute the separate property into marital property; however, commingled separate property may be transmuted into marital property if the party making the separate contribution is unable to trace the initial deposit into its form at the date of separation. *See Carpenter*, 245 N.C. App. at 12, 781 S.E.2d at 837 (citations and internal quotations omitted); *see also O'Brien v. O'Brien*, 131 N.C. App. 411, 418–19, 508 S.E.2d 300, 306 (1998), *rev. denied*, 350 N.C. 98 (1999) (rejecting the common-law theory of transmutation, defined as the creation of a rebuttable presumption that all the property has been transmuted into marital property, after nonmarital property is commingled with marital property).

Here, Defendant failed to offer evidence to rebut Plaintiff's evidence that Tar Kiln Ridge was not purchased or otherwise originally acquired

with marital property. In light of Wife's passing, it is understandable why Defendant encountered difficulties with the applicable burden-shifting principles. *See Atkins*, 102 N.C. App. at 206, 401 S.E.2d at 787.

Defendant's primary argument on this point was Plaintiff's payments on the second deed of trust created marital equity, and thus, ongoing acquisition during the marriage for purposes of equitable distribution. *See Wade v. Wade*, 72 N.C. App. 372, 380, 325 S.E.2d 260, 268–69 (1985) (Acquisition is "the ongoing process of making payment for property or contributing to the marital estate rather than being fixed on the date that legal title to property is obtained.").

In *Wade*, the husband acquired a parcel of undeveloped land before the marriage, and the husband and wife jointly contributed to the construction of a home on the parcel to serve as the marital residence. *See id.* at 377, 325 S.E.2d at 266. Because the husband and wife each contributed to the parcel's increase in value, this Court noted "the marital estate invested substantial sums in improving the real property by constructing a house on it; therefore, the marital estate is entitled to a proportionate return of its investment." *See id.* at 380, 325 S.E.2d at 268. Unlike the facts in *Wade*, no evidence tends to show Wife contributed to the development of Tar Kiln Ridge, and Plaintiff's efforts increased the value of a separate investment property which he jointly-held with a third-party, not a shared marital residence. *Wade* is factually distinguishable on both bases.

On the other hand, Plaintiff provided ample testimony to support his contention and burden to show that Tar Kiln Ridge was acquired exclusively with his separate property: Plaintiff began saving money as a child working on his grandfather's tobacco farm; Plaintiff used personal savings to fund his portion of the down payment of the initial purchase price and a pre-marital personal checking account for his portion of monthly payments on both deeds of trust; and Plaintiff and Wife had kept their finances separate during the marriage.

Here, the trial court's findings carefully traced the timing, source of funds expended and any additional indebtedness, which may have altered the character of Plaintiff's separate property, through acquisition. *See Crago*, 268 N.C. App. at 159–60, 834 S.E.2d at 705. While one could reasonably argue there were two distinct phases to the subdivision development, the trial court determined in Finding 11 that the sale of the first lot before the marriage marked the point at which the value of the subdivision had reached its full potential, as evidenced by the increased BB&T loan, despite ongoing work to complete development. We note Finding 12, discussing the second, substantially larger BB&T

loan which closed four days after the marriage for no additional collateral, is unchallenged and therefore binding on appeal. *See Peltzer*, 222 N.C. App. at 787, 732 S.E.2d at 360. This unchallenged finding also tends to support a portion of the trial court's conclusion labeled as Finding 15, that the pre-marital sale of the first lot on 17 August 1998 was the moment Plaintiff acquired his share of the subdivision as separate property.

Next, in an apparent challenge to Finding 11, Defendant expounds regarding conditions precedent to local government recognition of a subdivision. We do not dispute the legal validity of Defendant's citations to our General Statutes or the Carteret County Subdivision Ordinances; however, Defendant has not provided, nor are we aware of binding precedent holding that a real estate development cannot be acquired as separate property for purposes of equitable distribution before a local governmental entity would formally recognize the development as a subdivision within the meaning of our General Statutes. Although there are various ways to legally subdivide a parcel outside of plat recordation, at the time, the development in this case would not have become a subdivision within the meaning of our General Statutes until it was properly platted and approved by various state and local entities as provided by the applicable county subdivision ordinance. *See* N.C. Gen. Stat. § 153A-330 *et seq*. (1997) (repealed by S.L. 2019-111, § 2.2, as amended by S.L. 2020-25, § 51(b), eff. June 19, 2020). Accordingly, to the extent Finding 11 implies Tar Kiln Ridge became a subdivision as a matter of law on 17 August 1998—before the final plat was approved and recorded—this finding is not supported by competent evidence, and we disregard it on appeal. *See Foxx*, 282 N.C. App. at 724, 872 S.E.2d at 372–73. Nevertheless, for purposes of our equitable-distribution analysis, we discern no prejudicial error in Finding 11 regarding the "defining moment" the property became a subdivision and maximized its potential value.

We similarly do not discern error in the trial court's reasoning in the conclusion labeled as Finding 15, that Tar Kiln Ridge was acquired as Plaintiff's separate property upon the pre-marital sale of the first lot. The record reflects that Plaintiff and Walter invested significant time and resources prior to the marriage in acquiring and improving the land that became Tar Kiln Ridge, including the sale of the first lot to a *bona fide* purchaser for value. Furthermore, Plaintiff's unrebutted testimony established he exclusively used separate, pre-marital funds to pay down his portion of the notes secured by the deeds of trust. Therefore, the trial court properly concluded Plaintiff had rebutted the marital presumption. *See Atkins*, 102 N.C. App. at 206, 401 S.E.2d at 787.

We next consider Defendant's active appreciation argument, in relation to the conclusion contained in the second portion of Finding 11—namely, that the pre-marital sale of the first lot marked "the time in which the property value increase[d] to the sum of all the lots to be sold." For purposes of this argument, we presume, without deciding, Defendant's argument was properly preserved.[5]

"When marital efforts actively increase the value of separate property, the increase in value is marital property and is subject to distribution." *Blair v. Blair*, 260 N.C. App. 474, 491, 818 S.E.2d 413, 424 (2018) (quoting *Conway*, 131 N.C. App. at 615–16, 508 S.E.2d at 817–18). "To demonstrate active appreciation of separate property, there must be a showing of the (1) value of asset at time of acquisition, (2) value of asset at date of separation, (3) difference between the two. . . . In order for the court to value active appreciation of separate property and distribute the increase as marital property, the party seeking distribution of the property must offer credible evidence showing the amount and nature of the increase." *See id.* at 491, 818 S.E.2d at 424.

Plaintiff's and Walter's active efforts ultimately increased the value of the Tar Kiln Ridge lots to a sum in excess of $600,000. At first glance, we were curious as to the evidentiary basis for Finding 11 and the trial court's failure to identify the marital component of Tar Kiln Ridge, in the form of the active appreciation of the disputed lots attributable to Plaintiff's active efforts during the marriage. Because Plaintiff's time and manual labor in constructing the subdivision during the marriage were "contributions, monetary or otherwise, by one or both spouses," any increase in value of the disputed lots due to Plaintiff's efforts during the marriage would normally constitute active appreciation. *See Lawrence*, 75 N.C. App. at 595, 331 S.E.2d at 188. Tar Kiln Ridge may arguably be more properly classified as a divisible or "mixed" asset, *see Carpenter*, 245 N.C. App. at 11, 781 S.E.2d at 837, comprised of a separate (partially-improved land) and a marital (active appreciation during marriage) component as a result of its dual character, *see Crago*, 268 N.C. App. at 159, 834 S.E.2d at 705.

As recognized in unchallenged Findings 8 and 9, Plaintiff and Walter "did all the work themselves on the Tar Kiln Ridge property," and their ongoing work to develop Section Two, where the disputed lots were located, continued well into the marriage. Defendant offered evidence

5. The transcripts reveal the phrase "active appreciation" was uttered precisely once during the hearing, by Defendant's counsel in the form of a relevance objection.

of the property values on the date of separation and near the date of distribution; however, the record is silent concerning their value until 2014. Critically, no evidence tends to show their value anywhere remotely approaching the date of acquisition, as determined by the trial court, 17 August 1998. Therefore, because Defendant did not "offer credible evidence showing the amount and nature of the increase," the trial court did not reversibly err by failing to value and distribute the purported marital component of Plaintiff's separate, real property. *See Blair*, 260 N.C. App. at 491, 818 S.E.2d at 424.

Because the development of Tar Kiln Ridge was partly funded by a debt incurred by Plaintiff during the marriage, and the disputed properties were still owned on the date of separation, the trial court correctly concluded the marital presumption applied. *See* N.C. Gen. Stat. § 50-20(b)(1). Nevertheless, the trial court properly found that Plaintiff had acquired the property using separate funds and traced his contributions through his subsequent acquisition of Tract 8A during the marriage. *See Atkins*, 102 N.C. App. at 206, 401 S.E.2d at 787.

Based on the evidence of record, the trial court correctly concluded Plaintiff rebutted the marital presumption by the greater weight of the evidence. *See* N.C. Gen. Stat. § 50-20(b)(1)–(2). Furthermore, the trial court did not reversibly err in failing to identify the "dual character" of Tar Kiln Ridge, because Defendant failed to meet his burden to show the amount and nature of the purported increase in value. *See Crago*, 268 N.C. App. at 159, 834 S.E.2d at 705; *Blair*, 260 N.C. App. at 491, 818 S.E.2d at 424.

We affirm the trial court's classification of the disputed real property as Plaintiff's separate property and hold the trial court did not err in failing to value and distribute any purported marital component of the disputed properties where Defendant failed to meet his burden to establish the active appreciation of Plaintiff's separate property. *See Nelson*, 179 N.C. App. at 168, 633 S.E.2d at 126–27.

B. Classification of Personal Property

[2] Next, Defendant argues the trial court erred in classifying the 1957 Farmall tractor, the 1963 Farmall tractor, the 1995 Core Sounder boat, the 1996 boat trailer, the 1995 Caterpillar bulldozer, and the 1993 Caterpillar backhoe as Plaintiff's separate property. Defendant asserts reliance to his detriment on Plaintiff's pre-trial equitable-distribution affidavits and discovery responses describing the items as marital property. We disagree.

Plaintiff testified: he inherited the Farmall tractors from his father and grandfather before the marriage; he acquired the Core Sounder boat and built the trailer in 1995; he acquired the bulldozer in 1994; and he acquired the backhoe in either August or September of 1998—all prior to the marriage.

Defendant's argument fails for several reasons. First, Plaintiff's testimony regarding acquisition of these vehicles—to which Defendant did not object at trial— was competent evidence before the trial court, as were Plaintiff's affidavits and discovery responses. Any contradictions or discrepancies in the evidence were for the trial court to resolve. *See Smallwood v. Smallwood*, 227 N.C. App. 319, 322, 742 S.E.2d 814, 817 (2013) ("Evidentiary issues concerning credibility, contradictions, and discrepancies are for the trial court—as the fact-finder—to resolve[.]"); *see also Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994) ("[T]he trial judge, sitting without a jury, has discretion as finder of fact with respect to the weight and credibility that attaches to the evidence.").

Second, Defendant did not rebut Plaintiff's competent testimony regarding his pre-marital acquisition of the disputed vehicles. *See Atkins*, 102 N.C. App. at 206, 401 S.E.2d at 787. Defendant's testimony was limited to the purported value of certain vehicles.

Third, Defendant advances no legal authority tending to support this argument, subjecting the issue to abandonment. *See* N.C. R. App. P. 28(b)(6). We affirm the trial court's classification of the disputed vehicles as Plaintiff's separate property. *See Nelson*, 179 N.C. App. at 168, 633 S.E.2d at 126–27.

C. Marital Debt

[3] Finally, Defendant contends the trial court erred in finding the second BB&T deed of trust did not subject Defendant "to a single penny of indebtedness," a statement located in Finding 13. Specifically, Defendant argues "the debt was incurred during the marriage for a marital purpose[; c]onsequently . . . Defendant *would have* certainly shared responsibility for the debt *had any of the debt remained outstanding* on the date of separation," despite Wife not co-signing the note or deed of trust. (Emphasis added).

Defendant advances no authority in support of this argument, and we deem it abandoned. *See* N.C. R. App. P. 28(b)(6). To the extent this issue is an extension of Defendant's argument regarding the trial court's classification of Tar Kiln Ridge, our analysis is unchanged. Defendant concedes no debt remained outstanding on the date of separation, and

Wife's estate was not subject to any financial responsibility for the second BB&T note and deed of trust.

VI. Conclusion

In sum, the trial court properly concluded the disputed lots were Plaintiff's separate property. Defendant failed to meet his burden to establish a marital component attributable to active appreciation. Furthermore, we affirm the trial court's classification of the disputed vehicles and marital debt. Accordingly, we affirm the trial court's equitable distribution judgment.

AFFIRMED.

Judges TYSON and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
TOMMY LYNN BURLESON

No. COA23-212

Filed 17 October 2023

1. Search and Seizure—motion to suppress—vehicle search—lawfulness—conflicting evidence—sufficiency of findings

In a drug prosecution, the trial court properly denied defendant's motion to suppress evidence of drugs found by law enforcement during the search of a vehicle that had been stopped at a license checkpoint and in which defendant had been riding as a passenger. The court's determination that the vehicle search was lawful—based on consent given by the vehicle's driver—was supported by the unchallenged findings of fact, which in turn were supported by competent evidence and resolved the material conflicts in the evidence.

2. Drugs—possession—constructive—other incriminating circumstances—suspicious actions

The State presented substantial evidence in a drug prosecution from which a jury could conclude that defendant constructively possessed marijuana and methamphetamine that law enforcement discovered in the center console of a truck in which defendant had

been riding as a passenger. While defendant did not have exclusive possession of the vehicle, other incriminating circumstances supported a finding of constructive possession, including that, when defendant gave consent for a pat down of his person after he exited the vehicle, he reached into his pockets, pulled out his cupped hand, turned and made a throwing motion, and admitted to the officer that he had thrown a marijuana blunt.

Appeal by Defendant from judgment entered 3 May 2022 by Judge Peter B. Knight in McDowell County Superior Court. Heard in the Court of Appeals 20 September 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General G. Mark Teague, for the State-Appellee.

Shawn R. Evans for Defendant-Appellant.

COLLINS, Judge.

Defendant Tommy Lynn Burleson appeals from the trial court's judgment entered upon guilty verdicts of drug-related crimes and having obtained habitual felon status. Defendant argues that the trial court erred by denying his motion to suppress and his motion to dismiss the substantive charges. The trial court did not err by denying Defendant's motion to suppress because the trial court's findings of fact resolved the material conflicts in the evidence and are supported by competent evidence, and those findings of fact support its conclusions of law. Furthermore, the trial court did not err by denying Defendant's motion to dismiss because there was sufficient evidence from which the jury could find that Defendant constructively possessed the controlled substances. Accordingly, we find no error.

I. Background

On 6 April 2021, Defendant and Wesley Rogers were driving from Fairview Road towards Harmony Grove Road in a burgundy truck when they approached a driver's license checkpoint conducted by the McDowell County Sheriff's Department. Rogers was in the driver's seat, and Defendant was in the front passenger seat. McDowell County Sheriff's Deputy Robert Watson asked Rogers if he had a driver's license, and Rogers stated that he did not. Watson told Rogers to pull off into a thrift store parking lot where another officer would issue Rogers a citation.

As the citation was being issued, Watson approached the truck and spoke with Rogers and Defendant. Watson asked if either Rogers or Defendant were on probation; Rogers stated that he was on probation, and Defendant stated that he was not. Watson asked Rogers "if there was anything in the vehicle that was illegal that he should not have and for consent to search the vehicle." Rogers gave Watson verbal consent to search the truck. Watson directed Rogers to exit the truck and Watson conducted a pat down of Rogers for weapons.

Watson then directed Defendant to exit the truck. As Defendant was exiting the truck, Watson noted the odor of marijuana. Watson asked to conduct a pat down of Defendant, and Defendant consented. Defendant then began reaching into his pocket, and Watson observed that Defendant's right hand was cupped. Watson asked Defendant to "open his hands up flat where [he] could see that there was nothing in them." Defendant turned away from Watson and "made a throwing motion with [his] right hand." At that point, Watson detained Defendant "for the safety of officers and other persons on and around the scene." Watson asked Defendant if he had thrown anything, and Defendant stated that he had thrown a marijuana blunt. Watson placed Defendant in front of his patrol car located behind the truck.

McDowell County Sheriff's Deputy Jonathan Carter watched Rogers and Defendant while Watson searched the truck. Watson discovered a small bag of a leafy green substance between the passenger seat and center console; a small bag of a leafy green substance in the top of the center console; and a bag of a white crystalline substance, which was confirmed to be approximately 38 grams of methamphetamine, underneath the center console. Watson advised Defendant that he was under arrest and placed him in the back seat of Carter's patrol vehicle. Defendant told Carter on the way to the magistrate's office that he and Rogers were going to pick up the drugs and sell them but asserted that the drugs belonged to Rogers.

Defendant was indicted for trafficking in methamphetamine by possession, trafficking in methamphetamine by transportation, possession with intent to sell or deliver methamphetamine, and for having obtained habitual felon status. Defendant filed a motion to suppress, alleging that "[t]he detention, questioning and search of the Defendant on the alleged date were conducted by law enforcement officers without valid consent of the owner or any occupant of the vehicle and without reasonable suspicion[.]" After a hearing, the trial court denied the motion by written order entered 28 April 2022.

The matter came on for trial on 2 May 2022. At the close of the State's evidence, Defendant moved to dismiss the charges for insufficient evidence. The trial court denied the motion. The jury returned guilty verdicts on all charges, and the trial court sentenced Defendant to an active term of 117 to 153 months of imprisonment. Defendant appealed.

II. Discussion

A. Motion to Suppress

[1] Defendant argues that the trial court erred by denying his motion to suppress. Specifically, Defendant argues that the trial court erred by failing to address conflicting testimony between him and Watson in its findings of fact.

We review a trial court's denial of a motion to suppress to determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (quotation marks and citation omitted). "When supported by competent evidence, the trial court's factual findings are conclusive on appeal, even where the evidence might sustain findings to the contrary." *State v. Hall*, 268 N.C. App. 425, 428, 836 S.E.2d 670, 673 (2019) (citation omitted). Unchallenged findings of fact are binding on appeal. *State v. Fizovic*, 240 N.C. App. 448, 451, 770 S.E.2d 717, 720 (2015). A trial court is only required to make findings of fact resolving material conflicts in evidence; a conflict is material if it affects the outcome of the suppression motion. *See State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015).

We review the trial court's conclusions of law de novo. *State v. Wiles*, 270 N.C. App. 592, 595, 841 S.E.2d 321, 325 (2020). Under de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower court. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

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

> 8. The court finds the testimony of both Deputy Watson and Deputy Carter to be credible.
>
> . . . .
>
> 10. On April 6, 2021, the Defendant was a passenger in a vehicle driven by Wesley Rogers and that vehicle was stopped pursuant to a checkpoint . . . .
>
> 11. Deputy Watson operated the checkpoint according to the checkpoint plan . . . .

12. The driver, Wesley Rogers, acknowledged to Deputy Watson that he did not have a valid driver's license.

13. Deputy Watson asked Wesley Rogers to pull his vehicle over to the side of the road where they engaged in conversation about the search of the vehicle.

14. Deputy Watson asked if either Mr. Rogers or the Defendant were on probation, to which Mr. Rogers responded that he was, and the Defendant responded that he was not.

15. Wesley Rogers gave Deputy Watson verbal consent to search the vehicle.

16. Mr. Rogers was asked to exit the vehicle and was patted down for weapons, which Mr. Rogers gave Deputy Watson consent to do.

17. Due to the search of the vehicle, Deputy Watson asked the Defendant to exit the vehicle.

18. At that time, Deputy Watson noted the odor of marijuana.

19. The Defendant then consented to a search of his person.

20. Deputy Watson observed the Defendant putting his hands into his garment pockets and that the Defendant's right hand was cupped.

21. Deputy Watson asked the Defendant to open his hand and then the Defendant threw a marijuana blunt onto the ground.

22. At that time, the Defendant was then detained by Deputy Watson for the safety of officers and other persons on and around the scene.

23. The Defendant was then placed in front of Deputy Watson's patrol car.

24. Deputy Watson then continued to search the vehicle pursuant to the consent given by Wesley Rogers.

25. Marijuana was found in the vehicle as well as what appeared to be 38 grams of what appeared to be methamphetamine.

26. At that point, Wesley Rogers was placed under arrest and contested his arrest and placement into custody. Mr. Rogers indicated that the drugs were not his and that he should not be arrested.

. . . .

28. Deputy Carter came to the area where the Defendant was standing in front of the patrol car due to officer safety.

. . . .

30. Deputy Carter heard Wesley Rogers state that he had given consent to the search, allegedly, because "he did not know the drugs were in there".

31. Deputy Watson advised the Defendant that he was being placed under arrest and then placed the Defendant into Deputy Carter's patrol vehicle.

32. On the way to the magistrate's office and without questioning from Deputy Carter, the Defendant made the statement to Deputy Carter that he and Mr. Rogers picked up the drugs and were going to sell them, but that the drugs belonged to Mr. Rogers.

33. However, Deputy Carter did not ask the Defendant any questions to elicit the above statement.

34. The Defendant testified that he heard the deputies ask Mr. Rogers for consent to search the pickup truck driven by Mr. Rogers and occupied by the Defendant.

35. The Defendant testified that Mr. Rogers never gave consent for the officers to search the vehicle, however the court finds his testimony to be noncredible.

36. Paragraph six of the affidavit filed December 6, 2021, signed by the Defendant under oath before the clerk of court, states "Defendant was made to exit the vehicle by Deputy Watson. Without consent of the Defendant, Defendant was patted down and searched by Deputy Watson. Defendant, as well as Wesley Adam Rogers were charged by Deputy Watson with multiple criminal offenses."

37. The testimony of the Defendant is contradictory to the sworn affidavit in that the defendant stated under oath at

this hearing that he gave Deputy Watson consent to search his person.

Defendant does not challenge any findings of fact and they are thus binding on appeal. *See Fizovic*, 240 N.C. App. at 451, 770 S.E.2d at 720. Rather, Defendant argues that the trial court erred by failing to make additional findings of fact resolving conflicting testimony between Watson and himself.

Watson testified that he asked Rogers or Defendant if either were on probation and whether "there was anything in the vehicle that was illegal that he should not have and for consent to search the vehicle." Defendant testified that while he was still in the truck, Watson asked him, "Are there anything I need to know about in the truck?" Defendant argues that "[t]he trial court made no findings about this, making it impossible for this Court to properly analyze this issue to determine of (sic) Mr. Burleson was detained and whether he was questioned without a *Miranda* warning." However, the trial court found that Watson's testimony was credible and, in doing so, resolved any testimonial conflicts in Watson's favor. Moreover, even assuming arguendo that Watson asked Defendant whether there was "anything [he] need[ed] to know about in the truck[,]" neither Defendant nor Watson testified that Defendant made incriminating statements in response to this question. Rather, Defendant's statement that "he and Mr. Rogers picked up drugs and were going to sell them" was made spontaneously and without questioning from Watson after Watson had searched the truck. *See State v. Burton*, 251 N.C. App. 600, 607, 796 S.E.2d 65, 70-71 (2017) ("It is well established that spontaneous statements made by an individual while in custody are admissible despite the absence of *Miranda* warnings." (quotation marks, brackets, and citation omitted)).

The trial court's findings of fact resolved the material conflicts in the evidence and support the trial court's conclusions of law that "[t]he stop of the vehicle driven by Wesley Rogers and occupied by Tommy Burleson, the Defendant, was lawful" and that "[t]he search of the vehicle by Deputy Watson was authorized and lawful." Accordingly, the trial court did not err by denying Defendant's motion to suppress.

B. Motion to Dismiss

[2] Defendant argues that the trial court erred by denying his motion to dismiss because the State "failed to present sufficient incriminating circumstances which would have allowed a jury to make an inference of constructive possession."

We review a trial court's denial of a motion to dismiss de novo. *State v. Chavis*, 278 N.C. App. 482, 485, 863 S.E.2d 225, 228 (2021). "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549 (2018) (quotation marks and citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Rivera*, 216 N.C. App. 566, 568, 716 S.E.2d 859, 860 (2011) (quotation marks and citation omitted).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *Chekanow*, 370 N.C. at 492, 809 S.E.2d at 549-50 (quotation marks and citation omitted). Any contradictions or discrepancies in the evidence are for the jury to decide. *State v. Wynn*, 276 N.C. App. 411, 416, 856 S.E.2d 919, 923 (2021).

Here, Defendant was convicted of possession with intent to sell or deliver methamphetamine pursuant to N.C. Gen. Stat. § 90-95(a)(1), and trafficking in methamphetamine by possession and by transportation pursuant to N.C. Gen. Stat. § 90-95(h)(3b). To convict a defendant of possession with intent to sell or deliver methamphetamine, the State must prove that the defendant (1) possessed, (2) methamphetamine, (3) with intent to sell or deliver methamphetamine. *State v. Blagg*, 377 N.C. 482, 489, 858 S.E.2d 268, 274 (2021). To convict a defendant of trafficking in methamphetamine, the State must prove that the defendant (1) knowingly possessed or transported methamphetamine, and (2) that the amount possessed was greater than 28 grams. *State v. Shelman*, 159 N.C. App. 300, 305, 584 S.E.2d 88, 93 (2003).

Possession of a controlled substance may be either actual or constructive. *State v. Nettles*, 170 N.C. App. 100, 103, 612 S.E.2d 172, 174 (2005); *see also State v. Diaz*, 155 N.C. App. 307, 313, 575 S.E.2d 523, 528 (2002). "A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use." *State v. Ferguson*, 204 N.C. App. 451, 459, 694 S.E.2d 470, 477 (2010) (quotation marks and citations omitted). "Constructive possession occurs when a person lacks actual physical possession, but nonetheless has the intent and power to maintain control over the disposition and use of the substance." *State v. Acolatse*, 158 N.C. App. 485, 488, 581 S.E.2d 807, 810 (2003) (quotation marks and citation omitted).

"Constructive possession depends on the totality of the circumstances in each case." *State v. Taylor*, 203 N.C. App. 448, 459, 691 S.E.2d 755, 764 (2010) (citation omitted). "Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citation omitted). When determining whether other incriminating circumstances exist to support a finding of constructive possession, we consider, among other things: (1) "the defendant's ownership and occupation of the property"; (2) "the defendant's proximity to the contraband"; (3) "indicia of the defendant's control over the place where the contraband is found"; (4) "the defendant's suspicious behavior at or near the time of the contraband's discovery"; and (5) "other evidence found in the defendant's possession that links the defendant to the contraband." *Chekanow*, 370 N.C. at 496, 809 S.E.2d at 552 (citations omitted).

As Defendant did not have exclusive possession of the truck in which the drugs were found, the State was required to provide evidence of other incriminating circumstances. *Miller*, 363 N.C. at 99, 678 S.E.2d at 594.

When viewed in the light most favorable to the State, the following other incriminating circumstances were sufficient to support a finding of constructive possession: Watson testified at trial that, after Rogers gave consent to search the truck, he directed Defendant to exit the truck and asked for consent to conduct a pat down. Defendant "gave consent and then he immediately began reaching in his pockets." Watson told Defendant to put his hands on the truck and noticed that Defendant's "right hand was in the cupped form folded over like he was trying to hide something." Watson asked Defendant to put his hands flat, and Defendant "turned away and made a throwing motion with his right hand and threw something."

At that time, Watson detained Defendant. Watson asked Defendant what he threw, and Defendant "stated that he threw a blunt." Watson placed Defendant in front of his patrol car and began searching the truck. Watson began his search on the passenger side of the truck and "located a small bag of marijuana, a very small bag of marijuana, on top of the center console area." Watson also found a "small bag of a green leafy substance, believed to be marijuana, that was in between the passenger seat and the center console area[.]" Furthermore, "underneath that console there was a plastic bag with a white crystal like substance that weighed out to be 38 grams believed to be methamphetamine."

Defendant's actions of cupping his hand, making a throwing motion with his back turned, and admitting to throwing a marijuana blunt, when viewed in conjunction with the subsequent discovery of marijuana and methamphetamine in the center console next to the passenger seat in which Defendant was sitting, constitute sufficient incriminating circumstances to support a finding of constructive possession. *See State v. Butler*, 147 N.C. App. 1, 12-13, 556 S.E.2d 304, 312 (2001) (holding that there were incriminating circumstances supporting an inference of constructive possession where the defendant acted suspiciously by fleeing after seeing police, moving around like he was "struggling" at the location where the drugs were later found, and bending down "so that his arms and hands were not visible to the officers").

Accordingly, the trial court did not err by denying Defendant's motion to dismiss.

III. Conclusion

The trial court did not err by denying Defendant's motion to suppress because the trial court's findings of fact resolved the material conflicts in the evidence and are supported by competent evidence, and those findings of fact support its conclusions of law. Furthermore, the trial court did not err by denying Defendant's motion to dismiss because there was sufficient evidence from which the jury could find that Defendant constructively possessed the controlled substances. Accordingly, we find no error.

NO ERROR.

Judges TYSON and WOOD concur.

STATE OF NORTH CAROLINA
v.
RAY SHAWN DANIELS

No. COA23-22

Filed 17 October 2023

Sentencing—prior record level—out-of-state conviction—substantial similarity—federal carjacking and common law robbery

In sentencing defendant for numerous convictions arising from a shooting and high-speed chase, the trial court did not err by concluding that the federal offense of carjacking—which defendant stipulated he had been previously convicted of—and the state offense of common law robbery were substantially similar, resulting in defendant being sentenced at a higher prior record level. Although defendant argued that the two offenses bore substantial dissimilarities—in that the federal carjacking statute required that the stolen property be connected to interstate commerce, the federal carjacking statute contained sentencing enhancements, and the state common law robbery offense was broader in scope (applying to any property)—the offenses nonetheless were substantially similar based on holdings in previous cases.

Appeal by defendant from judgment entered 16 May 2022 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 October 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Stuart (Jeb) M. Saunders, for the State.

Richard J. Costanza, for the defendant-appellant.

TYSON, Judge.

Ray Shawn Daniels ("Defendant") appeals from a final judgment entered upon the jury's verdicts for: (1) assault on a law enforcement official with firearm; (2) assault with a deadly weapon with intent to kill; (3) attempted first-degree murder; (4) assault with a deadly weapon with intent to kill inflicting serious injury; (5) attempted first-degree murder; (6) possession of a firearm by a felon; and (7) ten counts of attempted discharge of a firearm into an occupied moving vehicle. Our review reveals no error.

I. Background

Thomas Gilmore ("Gilmore"), a minor child, was waiting at a school bus stop with his friend during the morning of 20 September 2018. (Pseudonym used to protect identity of minor, per N.C. R. App. P. 42(b)). While waiting, Gilmore heard multiple gunshots, and he and his friend ran into a nearby convenience store. After entering the convenience store, Gilmore's friend realized Gilmore was bleeding and had been struck by a bullet. Gilmore was transported to the hospital by ambulance, where it was determined a bullet entered the back of his right thigh and passed through his leg, injuring his thigh and scrotum. Gilmore did not see who had shot him, nor did he observe anyone with a firearm nearby.

That same morning, Mecklenburg County Sheriff's Deputy Corey Thompson ("Deputy Thompson") was wearing his uniform and driving to an off-duty assignment in a marked patrol vehicle. Upon reaching the four-way intersection of West Sugar Creek Road and Reagan Drive, he heard gunshots. On his right, Deputy Thompson saw a crowd of fifteen to twenty people running towards him. He made a right-hand turn and observed a person on the ground and a man wearing a light-colored shirt and blue jeans standing over him.

Deputy Thompson activated his emergency equipment and saw the man, who had been standing, run and jump into the passenger side of a black Cadillac stopped a couple of feet away. The Cadillac sped away from the area, and Deputy Thompson initiated a chase of the vehicle. During the chase, the person occupying the front passenger seat of the Cadillac began shooting a pistol at Deputy Thompson's patrol vehicle. At least ten shots were fired by the shooter. Deputy Thompson slowed to gain distance between himself and the Cadillac, so the projectiles would not hit him. Neither Deputy Thompson nor his patrol vehicle were struck by any bullets fired by the shooter inside the Cadillac. During the chase, the Cadillac reached speeds of "upwards of a hundred" miles per hour and weaved in and out of heavy traffic.

At one point during the chase, the Cadillac pulled into a gas station. A person, who was later identified by Deputy Thompson as the Defendant, attempted to exit the front passenger side of the Cadillac, but he realized Deputy Thompson was nearby. Defendant immediately re-entered the Cadillac, and the chase continued. After a few minutes, Deputy Thompson's superior officer advised him to cease pursuit of the Cadillac. Deputy Thompson stopped his pursuit and deactivated his patrol vehicle's emergency equipment. He had observed the Cadillac exit from Interstate 85. Deputy Thompson took the same exit and patrolled

the area to search for the Cadillac. He located the Cadillac parked in a restaurant parking lot, unoccupied.

The same morning, Mecklenburg County Sheriff's Deputy Joseph Beckham ("Deputy Beckham") was on duty when he heard radio traffic indicating another deputy was involved in a chase. Deputy Beckham testified he activated his lights and sirens and drove to Interstate 85 South towards Graham Street, the suspect's last known location. As he approached the area, he heard radio traffic indicating Charlotte-Mecklenburg police officers were chasing a suspect through an ABC store parking lot. He also saw an officer pointing across the street. He observed a black male with dreadlocks running away from that officer.

Deputy Beckham activated his patrol vehicle's emergency equipment and chased the suspect. He observed the suspect run behind a retail center and through some bushes. Deputy Beckham exited his vehicle, followed the suspect, and found him hiding in the bushes in a "surrendered position." Deputy Beckham held the suspect at gunpoint until other officers arrived. He handcuffed the suspect, who he later determined was unarmed. At trial, Deputy Beckham identified Defendant as the man he had arrested.

Deputy Beckham and his K-9 dog searched the immediate area for a gun. Other officers assisted, including Mecklenburg County Sheriff's Sergeant J.M. Whitmore ("Sergeant Whitmore"). The K-9 dog "found a track" and pursued it. Sergeant Whitmore was walking behind the dog, flipped open a green recycling bin, and found a bulletproof vest inside. A handgun was "sandwiched" in the vest, with an extended magazine protruding "out [of] the butt of the gun."

Forensic DNA testing was conducted on the firearm, which indicated a mixture of DNA from at least three individuals. The Defendant's DNA was the major profile contributor to the mixture. The State Crime Lab's analyst could not determine the identity of the other contributors. Additionally, forensic DNA testing was conducted on the bulletproof vest, also indicating a mixture of DNA from at least three individuals. Again, Defendant's DNA was the major profile contributor to the mixture, and the Lab's analyst was unable to make any determinations regarding the other contributors.

Charlotte-Mecklenburg Police Officer Shannon Foster collected discharged cartridge casings and projectiles at various locations where the shootings had occurred. Gene Rivera, a Charlotte-Mecklenburg Police Department firearm examiner, examined the casings and projectiles and

compared them with the recovered handgun. He determined ten of the projectiles were fired from the handgun, but the remaining two projectiles were too damaged to allow an accurate determination of whether or not they were fired from the recovered handgun. A jury convicted Defendant of all charges.

During the sentencing hearing, the parties stipulated that Defendant had been previously convicted of the federal offense of "carjacking," as codified at 18 U.S.C. § 2119. On 10 March 2009, Defendant pled guilty to Count I of the indictment, which tracked the language of 18 U.S.C. § 2119, alleging Defendant and others while:

> aiding and abetting each other, did knowingly and with intent to cause death and serious bodily harm, take a motor vehicle, that is, a 1989 Chevrolet Caprice, North Carolina Registration WVJ-8022, that had been transported, shipped, and received in interstate and foreign commerce, from the person and presence of another by force and violence by intimidation[.]

Defendant did not stipulate to the finding the carjacking conviction was substantially similar to common law robbery. In addition to the guilty verdicts, the jury also found as an aggravating factor the Defendant possessed a bulletproof vest during the commission of these offenses.

The trial court gave the State and Defendant the opportunity to be heard on the issue of whether the offenses of carjacking and common law robbery are substantially similar. The trial court ruled the State had satisfied its burden of proving by a preponderance of the evidence that the offenses are substantially similar. The trial court stated:

> So U[.]S[.] code 18 – 18 U[.]S[.] code, sections 2119, the offense of carjacking is reflected in State's motion Exhibit 2. The description of that, under the code, is whoever takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person, or presence of another by force and violence, or by intimidation or attempts to do so. And I find that that description, those elements, are substantially similar to North Carolina offense of common law robbery, and that is reflected as a Class G felony on the worksheet[.]

The trial court's finding resulted in the assessment of four sentencing points. The assessment added up to ten sentencing points total. The

trial court consolidated three of Defendant's offenses, including his convictions for attempted first-degree murder, assault on a law enforcement official with firearm, and assault with a deadly weapon with intent to kill, into one sentence. The trial court determined Defendant's attempted first-degree murder conviction would be sentenced under a Class B-1 felony with the addition of the sentencing enhancement. Defendant was sentenced as a prior record level IV offender to an active term of 300 to 372 months, with credit for 1,219 days served in custody.

The trial court also consolidated all of Defendant's other offenses into a separate judgment, which incorporated Defendant's convictions for attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, possession of a firearm by a felon, and all ten counts of attempted discharge of a firearm into an occupied moving vehicle. Defendant's attempted first-degree murder conviction was classified as a Class B-2 felony "with the sentencing enhancement of a B-1." Defendant received a sentence of 300 to 372 months to run consecutively to his previous sentence. Defendant appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issue

Defendant argues the trial court erred as a matter of law when it determined Defendant's federal carjacking conviction was substantially similar to our state's common law robbery, which resulted in the Defendant being sentenced at a higher prior record level.

A. Standard of Review

"The standard of review relating to the sentence imposed by the trial court is whether the sentence is supported by evidence introduced at the trial and sentencing hearing. However, 'the question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law' requiring *de novo* review on appeal." *State v. Fortney*, 201 N.C. App. 662, 669, 687 S.E.2d 518, 524 (2010) (citations omitted).

Determining "whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law" and requires comparing the elements of the offenses. *Id.* at 671, 687 S.E.2d at 525 (citation omitted). The trial court "may accept a stipulation that the defendant in question has been convicted of a particular out-of-state

offense and that this offense is either a felony or a misdemeanor under the law of that jurisdiction[,]" but it "may not accept a stipulation to the effect that a particular out-of-state conviction is 'substantially similar' to a particular North Carolina felony or misdemeanor[.]" *State v. Bohler*, 198 N.C. App. 631, 637-38, 681 S.E.2d 801, 806 (2009).

B. Analysis

Our State's sentencing statute provides guidance to determine whether a defendant's conviction for an offense committed in another jurisdiction may be calculated in a defendant's prior record level:

> If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e) (2021).

Our precedents define common law robbery as "the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Porter*, 198 N.C. App. 183, 186, 679 S.E.2d 167, 169-70 (2009) (quoting *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270 (1982)).

The federal carjacking statute provides:

> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and

> territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

18 U.S.C. § 2119 (2018).

Both the federal carjacking statute and North Carolina's common law robbery require the forceful and violent taking of property. The federal carjacking statute requires the taking to be accompanied "by force and violence or by intimidation[.]" *Id.* Our State's common law robbery statute similarly requires the taking of property "by means of violence or fear." *Porter*, 198 N.C. App. at 186, 679 S.E.2d at 169-70 (citation and internal quotation marks omitted).

1. State v. Sanders

Defendant, relying on *State v. Sanders*, argues our Supreme Court has adopted an elements comparison test when evaluating whether a foreign conviction is substantially similar to a North Carolina offense. *State v. Sanders*, 367 N.C. 716, 720, 766 S.E.2d 331, 334 (2014) ("The Court of Appeals has stated, and we agree, that '[d]etermination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense.' " (citation omitted)).

Defendant argues the similarity of the federal carjacking offense and common law robbery fails to pass the test outlined in *Sanders*. In *Sanders*, the Supreme Court found the Tennessee offense of domestic assault was not substantially similar to the North Carolina offense of assault on a female:

> [A] woman assaulting her child or her husband could be convicted of "domestic assault" in Tennessee, but could not be convicted of "assault on a female" in North Carolina. A male stranger who assaults a woman on the street could be convicted of "assault on a female" in North Carolina, but could not be convicted of "domestic assault" in Tennessee.

Id. at 721, 766 S.E.2d at 334.

The Court in *Sanders* found the two offenses were not substantially similar, because the conduct that is criminalized in each offense was different. *Id.* Domestic assault and assault on a female both involve two different, specifically defined victims. *Id.* at 720, 766 S.E.2d at 334 ("The [Tennessee] offense thus requires that the person being assaulted fall within at least one of these six enumerated categories of domestic relationships. The offense does not require the victim to be female or the assailant to be male and of a certain age.").

Here, unlike in *Sanders*, the elements of carjacking and common law robbery require similar conduct, and no elements are mutually exclusive. Both offenses share two essential elements: (1) there is a non-consensual taking and theft of property; and (2) the taking is accompanied by force, violence, fear, or intimidation. 18 U.S.C. § 2119; *Porter*, 198 N.C. App. at 186, 679 S.E.2d at 169-70. When a victim is being dispossessed of property, use of intimidation and force invoke violence or fear, which are requirements of both offenses. It is hard to envision the lack of presence or occurrence of any or all factors in the commission of either crime.

2. Interstate Commerce Requirement

Defendant next argues carjacking and common law robbery are not substantially similar because the federal carjacking offense requires the stolen property be connected to interstate commerce. North Carolina's common law robbery does not contain an interstate commerce requirement, as that element invokes federal jurisdiction.

The State relies on the analysis in *State v. Graham* in arguing the elements of carjacking and North Carolina common law robbery are substantially similar. *State v. Graham*, 379 N.C. 75, 863 S.E.2d 752 (2021). The defendant in *Graham*, like the Defendant in the present case, argued "if the difference between the two statutes renders the other state's law narrower or broader, 'or if there are differences that work in both directions, so that each statute includes conduct not covered by the other, then the two statutes will not be substantially similar[.]' " *Id.* at 81, 863 S.E.2d at 756. Our Supreme Court found this argument unpersuasive and concluded the defendant's position "conflates the requirement that statutes subject to comparison be substantially similar to one other with [the] erroneous perception that the two statutes must have identicalness to each other." *Id.* at 82, 863 S.E.2d at 756.

The Court further concluded "substantially similar" does not mean "literalness," "identicalness," or "exactitude." *Id.* The Court explained:

> Standing alone, neither word—"substantially" or "similar" —connotes literalness; therefore, when these words are combined to create the legal term of art "substantially similar," this chosen phraseology reinforces the lack of a requirement for the statutory language in one enactment to be the same as the statutory language in another enactment in order for the two laws to be treated as "substantially similar." Yet, the dissent here—despite the obvious essential pertinent parallels between the Georgia statute and the North Carolina statute—would withhold a recognition that the two statutes are substantially similar because *all* of the same provisions are not common to each of them. In this respect, although the dissent professes that it understands the difference between "substantially similar" and identicalness, nonetheless it appears that the dissent is so ensnared and engulfed by a need to see a mirrored reflection mutually cast between the two statutes that the dissent is compelled to promote this erroneously expansive approach.

Id. at 82-83, 863 S.E.2d at 756-57.

This Court in *State v. Riley* compared N.C. Gen. Stat. § 14-415.1(a), which criminalizes possession of a firearm by a felon, with its federal counterpart, 18 U.S.C. § 922(g)(1). *State v. Riley*, 253 N.C. App. 819, 820, 802 S.E.2d 494, 495-96 (2017). North Carolina's offense of possession of a firearm by a felon "requires proof that (1) the defendant had been convicted of a felony and (2) thereafter possessed (3) a firearm." *Id.* at 825, 802 S.E.2d at 499 The federal statute, codified in 18 U.S.C. § 922(g)(1), "requires proof that (1) the defendant had been convicted of a crime punishable by more than one year in prison, (2) the defendant possessed (3) a firearm, and (4) the possession was in or affecting commerce." *Id.* at 825, 802 S.E.2d at 498-99.

This Court held the statutes are substantially similar, even though the federal law contains the additional element requiring possession of the firearm "in or affecting commerce" to invoke federal jurisdiction. *Id.* at 825-27, 802 S.E.2d at 498-500. Here, as in *Riley*, Defendant's argument asserting the additional element of interstate commerce distinguishes the crimes fails. *Id.*

3. Sentencing Requirements

Defendant argues the sentencing enhancements in the federal carjacking statute, which are not present in North Carolina common law

robbery, require this Court to hold the two offenses are not substantially similar. *Compare* 18 U.S.C. § 2119(1)-(3) *with Porter*, 198 N.C. App. at 186, 679 S.E.2d at 169-70.

The defendant in *Riley* argued the federal offense of being a felon in possession of a firearm was not substantially similar to the North Carolina offense of possession of a firearm by a felon based upon the sentencing disparities between the two offenses. *Riley*, 253 N.C. App. at 826, 802 S.E.2d at 499. The federal offense required the person to have been previously convicted of a crime "punishable by imprisonment for a term exceeding one year," whereas the North Carolina offense required the person to have previously been "convicted of a felony." *Id.* (internal quotations omitted). Notwithstanding those differences, the Court found substantial similarity existed between the two crimes:

> There may be other hypothetical scenarios which highlight the more nuanced differences between the two offenses. But the subtle distinctions do not override the almost inescapable conclusion that both offenses criminalize essentially the same conduct—the possession of firearms by disqualified felons. Both statutes remained unchanged in the 2012 to 2015 time period, and despite the differences we have discussed, the federal offense of being a felon in possession of a firearm is substantially similar to the North Carolina offense of possession of a firearm by a felon, a Class G felony.

Id. at 827, 802 S.E.2d at 500.

Similarly, in *Graham*, the defendant argued the North Carolina and Georgia offenses for statutory rape were not substantially similar because of how the two statutes treated "the age difference between the two participants." *Graham*, 379 N.C. at 81, 863 S.E.2d at 755. The Georgia statute provided different punishment ranges depending on the age of the offender and the age of the victim, "which impact[ed] the perpetrator's degree of punishment." *Id.* (explaining the Georgia statute provided " '[a] person convicted of the offense of statutory rape shall be punished by imprisonment for not less than one nor more than 20 years; provided, however, that if the person so convicted is 21 years of age or older, such person shall be punished by imprisonment for not less than ten nor more than 20 years; provided, further, that if the victim is 14 or 15 years of age and the person so convicted is no more than three years older than the victim, such person shall be guilty of a misdemeanor' "). The North Carolina statute differentiated between the class of felony an offender could be punished under, depending on the age of

the victim, the age of the offender, and the disparity between the victim's and the offender's ages. *Id.* at 81, 863 S.E.2d at 755-56.

Our Supreme Court held "the statutory wording of the Georgia provision and the North Carolina provision do not need to precisely match in order to be deemed to be substantially similar." *Id.* at 82, 863 S.E.2d at 756. The test in *Sanders* does not "require identicalness between compared statutes from different states and mandate identical outcomes between cases which originate both in North Carolina and in the foreign state." *Id.* at 84, 863 S.E.2d at 757.

Here, the offenses are substantially similar, despite the sentencing enhancements present in the federal carjacking statute, which are not present in North Carolina common law robbery. *Id.*; *Riley*, 253 N.C. App. at 825-27, 802 S.E.2d at 498-500; 18 U.S.C. § 2119; *Porter*, 198 N.C. App. at 186, 679 S.E.2d at 169-70. Defendant's objection and argument is overruled.

4. Broader Scope

Defendant finally argues the two offenses are not substantially similar because the scope of North Carolina common law robbery is broader than the federal carjacking offense. He asserts the common law offense of robbery involves the violent taking of any property, while federal carjacking is limited to forcible theft of a motor vehicle.

In *State v. Key*, this Court found an out-of-state statute was substantially similar to a North Carolina common law offense, despite the absence of an intent element in the sister-state's statute. *State v. Key*, 180 N.C. App. 286, 293-96, 636 S.E.2d 816, 822-23 (2006). The common law offense in North Carolina required the offender to have intended "to deprive the owner of his property permanently." *Id.* at 294, 636 S.E.2d at 823 (citation and internal quotation marks omitted). Both the Maryland statute and North Carolina common law larceny focused on "the perpetrator placing the property under his control and depriving the owner of control over it." *Id.* at 294, 636 S.E.2d at 823. Because the two offenses had similar elements with respect to taking the property, this Court held the two offenses were substantially similar. *Id.*

Here, both the federal carjacking statute and North Carolina common law robbery require a non-consensual taking of property under threat, force, or intimidation. 18 U.S.C. § 2119; *Porter*, 198 N.C. App. at 186, 679 S.E.2d at 169-70. Following the reasoning in *Key*, Defendant's argument that common law robbery and the carjacking statute are not substantially similar, because the scope of common law robbery is

broader, fails and is overruled. *Key*, 180 N.C. App. at 293-95, 636 S.E.2d at 822-23.

IV. Conclusion

The trial court properly concluded federal carjacking is a substantially similar offense to the North Carolina offense of common law robbery, a Class G Felony. Defendant was sentenced as a Habitual Felon at the proper prior record level and has not demonstrated error by the trial court's classification to warrant re-sentencing.

Defendant received a fair trial, free from prejudicial errors he preserved and argued on appeal. We find no error in the jury's verdict or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges HAMPSON and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
WAYNE HANSEN HSIUNG, DEFENDANT

No. COA22-801

Filed 17 October 2023

1. Jury—selection—challenge for cause—failure to preserve issue on appeal—use of peremptory strikes

In a prosecution for felony larceny and felony breaking and entering arising from an incident where defendant—an attorney and animal rights activist—stole a baby goat from a family farm as part of an "open rescue," defendant failed to preserve for appellate review his argument that the trial court erred in denying his request to dismiss a juror for cause (based on the juror's alleged bias against animal rights activists). To preserve his argument, defendant needed to have exhausted all of his peremptory strikes and then attempted to exercise an additional peremptory strike on another juror after this exhaustion. Instead, after the court denied defendant's request to remove the juror for cause, defendant used his last available peremptory strike on that juror and did not attempt to exercise any other peremptory strikes afterward.

2. Larceny—common law—jury instructions—elements—stolen property—value

In a prosecution for felony larceny and felony breaking and entering arising from an incident where defendant—an attorney and animal rights activist—stole a baby goat from a family farm as part of an "open rescue," the trial court did not commit plain error by denying defendant's request for a special jury instruction stating that, to find defendant guilty of larceny, the jury needed to find that the stolen goat had value. Despite older case law stating otherwise, the Supreme Court's more recent (and, therefore, binding) precedent states that the essential elements of common law larceny do not include a requirement that the stolen property have some monetary value.

Appeal by Defendant from judgments entered 6 December 2021 by Judge Peter B. Knight in Transylvania County Superior Court. Heard in the Court of Appeals 9 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert P. Brackett, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

MURPHY, Judge.

To preserve a challenge to the trial court's decision not to dismiss a juror for cause, the defendant must (1) have exhausted all of his peremptory challenges and (2) attempt to exercise another peremptory challenge after this exhaustion. Defendant failed to properly preserve under the second prong, and we accordingly do not consider the merits of his argument on this issue.

To preserve a request for special jury instructions, the defendant must submit his request to the trial court in writing; however, we may review the trial court's jury instructions for plain error. Larceny remains a common law crime in North Carolina, but the essential elements of larceny do not require the subject property to have value. Accordingly, the trial court did not err by denying Defendant's request for special jury instructions regarding the value of a baby goat taken from victim's property.

BACKGROUND

Defendant Wayne Hansen Hsiung is an animal rights activist and an attorney licensed in California who appeals from convictions of felonious breaking or entering in violation of N.C.G.S. § 14-54(a) and felonious larceny after breaking or entering in violation of N.C.G.S. § 14-72(b)(2). Complainant Curtis Burnside is the owner of a 15-acre family farmstead, where he breeds and raises goats and chickens primarily for personal consumption. Burnside raises his baby goats in a barn on the ranch, and he occasionally sells these goats to the community.

On 10 February 2018, based on his personal belief that Burnside's goats were being mistreated, Defendant and three others video-streamed their "open rescue" of a baby goat from Burnside's farm on Facebook Live. They entered Burnside's farm, unlatched a gate, and entered the barn. Defendant and the others found a baby goat (referred to by Defendant as "baby goat Rain") which they believed was ill due to its lethargy and white discharge coming from its eye. Defendant took the goat away with him, accidentally dropping his driver's license at some time during these events. Defendant then gave the goat to an animal rescue that facilitates foster homes and adoptions for animals.

On 11 February 2018, Burnside discovered that the gate was not fastened properly and that a goat was missing. He found Defendant's driver's license and called law enforcement. Both Burnside and law enforcement officers looked online and found a Facebook page, believed to be owned by Defendant, with the video of the livestreamed "rescue." Defendant was charged with felonious breaking or entering under N.C.G.S. § 14-72(a) and felonious larceny after breaking or entering under N.C.G.S. § 14-72(b)(2) in connection with the events.

On 29 November 2021, Defendant's jury trial began. During voir dire, Defendant attempted to challenge a potential juror, Juror Stoll, for cause based on the contention that she was biased against animal rights activists. Prior to this challenge, Defendant had exercised five of his six peremptory challenges. The voir dire of Juror Stoll was as follows:

> [DEFENDANT]: Ms. Stoll, do you have any preexisting views about animal advocates or animal farmers strongly, one way or the other?
>
> [STOLL]: Well, I don't understand a lot of it, you know, what – . . . they're for, what they're against. You know, we take care of animals. And, you know, I have been in – my family has killed pigs for years. My brother still does for the hams for Christmas, you know.

[DEFENDANT]: Uh-huh. So your family is involved in, a little bit, in animal production?

[STOLL]: My dad always was, yes. And a coworker I work with, she raises pigs to sell. And she raises fish, you know, and she has had goats, you know. And I've had goats over the years, you know. They are fun animals, you know.

[DEFENDANT]: They are.

[STOLL]: It's what you make out of it, you know.

[DEFENDANT]: Sure. And can you just share a little bit more about -- what family member did you say was raising pigs?

[STOLL]: My brother.

[DEFENDANT]: What is your involvement in that, if any?

[STOLL]: My husband goes and helps me sometimes. And my grandson does. You know, he brings all of the boys out and they do it.

. . . .

[DEFENDANT]: And would you say you have a strong opinion about raising animals and production of animals one way or the other?

[STOLL]: No. I mean, I take care of them, gate them. You know, so a dog or cat, you take care of them in the proper way.

. . . .

[DEFENDANT]: And what is your impression of the critics? Are they usually animal rights activists, people in the community?

[STOLL]: Oh, just people. I never had nothing to do with people that are bad.

. . . .

What -- what they do or what their rights are or how they feel about it. You know, I don't know. I think it's maybe a little foolish maybe, but that's not – that's just my opinion, you know.

[DEFENDANT]: That's fair.

[STOLL]: People mind their business, you know, on both sides, you know.

. . . .

[DEFENDANT]: Do you think you would have a preexisting view of animal rights activists or critics of the industry who, you know --

[STOLL]: A little bit, yes, I guess I do.

[DEFENDANT]: You do? Okay.

[STOLL]: Them not minding their business, you know.

. . . .

I don't think I would be biased. But I don't really know exactly what it's all about yet. So, you know, that -- I mean, you know, it's always that chance, but I don't think I would. I think I just wouldn't say anything, you know.

. . . .

[DEFENDANT]: Do you think you'd have a bias in a case like this involving an animal advocate who removed --allegedly removed a goat from a farm?

[STOLL]: Yes.

[DEFENDANT]: And if the Judge instructed you that you should try to set your opinion aside, would you have a difficult time doing that given your prior experiences in animal farming?

[STOLL]: No.

[DEFENDANT]: You think you could if the Judge instructed you?

[STOLL]: Yeah.

. . . .

[DEFENDANT]: So you think you have a bias, but -- which is understandable, given your family business.

[STOLL]: Yeah. But if the Judge asks me to do my best, I got to do my best.

> [DEFENDANT]: You can do your best?
>
> [STOLL]: Yes, sir.
>
> . . . .
>
> [DEFENDANT]: And so the question is before you know anything about it, do you think you would have a bias, even if a Judge instructed you, that would prevent you from rendering a fair and impartial verdict?
>
> [STOLL]: I guess I would.
>
> [DEFENDANT]: Yeah? So the answer is yes, then?
>
> [STOLL]: Uh-huh. Yes, sir.

After this exchange, Defendant challenged Juror Stoll for cause based on her alleged bias. The trial court denied this challenge after a colloquy with Juror Stoll:

> [COURT]: And the fact that your husband may go and help, your grandchild may go over and help to feed the pigs or otherwise . . . will that have any effect on your ability to listen to the evidence in this case?
>
> [STOLL]: Yeah, I could listen to the evidence, yes, sir.
>
> [COURT]: Will it have any [e]ffect on your ability to listen to the law as I give you the law?
>
> [STOLL]: No, I could listen to the law.
>
> [COURT]: And do you believe that you could consider the facts as you find those facts to be and apply the law that I will give you to those facts as you find those facts to be in arriving . . . at what you say the verdict in this case should be?
>
> [STOLL]: I would do my best, yes, sir.
>
> . . . .
>
> [COURT]: Do you believe that you could set aside anything you know about or any feelings you have about the raising of pigs and consuming those pigs raised by your brother, I'm not saying you have consumed them, I'm just saying any feelings you have about the fact that he raised them for consumption, could you set aside those feelings

> during the course of this trial and, like I said, listen to the evidence?
>
> [STOLL]: I would listen to the evidence, yes, sir.
>
> [COURT]: And can you set aside those -- any feelings you have about it, either -- whatever feelings they are and just listen to the evidence without considering any feelings about your -- about the fact that your brother has raised pigs?
>
> [STOLL]: Yeah. I mean, I would do my best, you know. Yes, sir.
>
> [COURT]: I'll deny the motion at this time, then.

Defendant then addressed Juror Stoll again:

> [DEFENDANT]: So I will say more general, then, in a case involving animal rights activists, it sounds like even if the Judge instructed you, you feel you would have a bias, is that correct, based on these prior experiences?
>
> [STOLL]: Well, I don't know what the person -- it's criminal, I thought, if they took something, if it's about animal cruelty or if it's about stealing something, you know.
>
> . . . .
>
> Yes. Yes, I guess I would be biased against it.
>
> [DEFENDANT]: Even if a judge instructed you, you have to try to get that bias out?
>
> [STOLL]: Yes.

Defendant renewed his challenge of Stoll for cause. The trial court again denied Defendant's challenge, and Defendant used his final peremptory challenge to excuse Stoll from the jury.

At trial, Dr. Sherstin Rosenberg, a doctor of veterinary medicine, testified that white discharge in the baby goat's eyes could indicate it had pneumonia. Dr. Rosenburg also testified that treating a goat for pneumonia would cost between $700.00 and $1,000.00. Burnside had previously testified that the goat was healthy when taken, and that he typically sells a healthy goat for between $250.00 and $300.00. After closing arguments, Defendant orally requested that the trial court modify its pattern felony larceny instruction to include that, in order to find Defendant guilty of felony larceny, the jury must find that the stolen baby goat "had some

value[.]" The trial court denied Defendant's request for a special jury instruction and noted his objection to its final jury instructions.

At the conclusion of the trial, the jury found Defendant guilty of both felonious breaking or entering and felonious larceny after breaking or entering. The trial court sentenced Defendant to serve a sentence of 6 to 17 months, suspended for 24 months, and placed him on supervised probation. Defendant timely appealed.

ANALYSIS

Defendant raises two arguments on appeal: (A) the trial court erred by denying his request to dismiss Juror Stoll for cause based on her bias against animal rights activists and (B) the trial court plainly erred in giving jury instructions which did not require the jury to find that baby goat Rain had "value" in order to find Defendant guilty of larceny.

A. Challenge of Juror Stoll for Cause

[1] "The determination of whether excusal for cause is required for a prospective juror is vested in the trial court, and the standard of review of such determination is abuse of discretion." *State v. Reed*, 355 N.C. 150, 155 (2002) (citation omitted). Abuse of discretion occurs when the trial court's decision is "manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (marks omitted). However, when a challenge for cause is not properly preserved for appeal, we do not review the merits of the appellant's argument. *State v. Clemmons*, 181 N.C. App. 391, 395-96, *aff'd*, 361 N.C. 582 (2007).

Defendant argues that Stoll was unable to render a fair verdict because she stated she was biased against animal rights activists and was unsure if she could set aside her biases at trial. Based on this argument, Defendant requests a new trial. Defendant failed to properly preserve this issue for appeal; accordingly, we do not discuss the merits of Defendant's argument.

N.C.G.S. § 15A-1214 details the proper procedure for preserving an alleged error in denying a party's for cause challenge as follows:

> (h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:
>
> (1) *Exhausted the peremptory challenges available to him;*

> (2) Renewed his challenge as provided in subsection (i) of this section; and
>
> (3) Had his renewal motion denied as to the juror in question.
>
> (i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:
>
> (1) Had peremptorily challenged the juror; or
>
> (2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

N.C.G.S. §§ 15A-1214(h)-(i) (2022) (emphasis added).

Defendant used his last peremptory challenge on Juror Stoll. Under N.C.G.S. § 15A-1214(h), a defendant may seek a new trial only if the trial court refused to grant his motion to excuse a juror for bias *after* the defendant has already exhausted all of his peremptory challenges. N.C.G.S. § 15A-1214(h) (2022). In other words, Defendant would have had to attempt to use another peremptory challenge on another specific juror after exhausting his last peremptory challenge on Juror Stoll to properly preserve the issue for appeal. *Clemmons*, 181 N.C. App. at 395 ("[I]t is clear that a defendant must make a futile effort to challenge a juror after exhausting peremptory challenges in order to demonstrate prejudice. It is insufficient for a defendant to simply challenge a juror for cause, exhaust all peremptory challenges, and then renew his previous challenge for cause in order to preserve his exception."); *see State v. Allred*, 275 N.C. 554, 563 (1969) (holding Defendant must "thereafter assert his right to challenge peremptorily an additional juror"). "The purpose for challenging the additional juror is to establish prejudice by showing that [the] appellant was forced to seat a juror whom he did not want because of the exhaustion of his peremptory challenges." *Clemmons*, 181 N.C. App. at 395 (quoting *State v. Hartman*, 344 N.C. 445, 459-60 (1996)).

Defendant argues that he wished to use additional peremptory strikes against other jurors; however, Defendant did not attempt to exercise any peremptory challenges after using his last permissible challenge on Juror Stoll. Defendant has not preserved the issue for appeal, and we do not analyze Defendant's argument on its merits.

B. Denial of Oral Request for Special Jury Instruction

[2] Defendant next contends that, in order to find a defendant guilty of larceny, the jury must find that the item allegedly taken by the defendant

had monetary value. Defendant argues that the trial court erred by denying his request for special jury instructions regarding the value of baby goat Rain because, "[u]nder the common law, to be the subject to a larceny, property must have some value." Defendant argues that baby goat Rain did not have any monetary value because the cost to treat a goat for pneumonia according to Dr. Rosenburg's testimony—between $700.00 and $1000.00—substantially exceeds the price at which Burnside typically sells a baby goat—between $250.00 and $300.00.

1. Standard of Review

"If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference." N.C. R. Super. and Dist. Cts. Rule 21 (2023). "A request for a . . . deviation from the pattern jury instruction[] qualif[ies] as a special instruction, and would have needed to be submitted to the trial court in writing." *State v. Brichikov*, 281 N.C. App. 408, 414 (citing *State v. McNeill*, 346 N.C. 233, 240 (1997) ("We note initially that [the] defendant's proposed instructions were tantamount to a request for special instructions. . . . [A] trial court's ruling denying requested instructions is not error where the defendant fails to submit his request for instructions in writing. Defendant here did not submit either of his proposed modifications in writing, and therefore it was not error for the trial court to fail to charge as requested."), *aff'd*, 383 N.C. 543 (2022). To preserve his request for special instructions, Defendant must have submitted the request in writing. *See State v. McVay*, 287 N.C. App. 293, 300 (2022) (marks omitted) ("A trial court's ruling denying requested special instructions is not error where the defendant fails to submit his request for instructions in writing."), *disc. rev. denied*, 384 N.C. 671 (2023). However, "[i]f an instructional issue is unpreserved in a criminal case, we may review the trial court's decision for plain error, but only if 'the defendant [] specifically and distinctly contends that the alleged error constitutes plain error.' " *Id.* at 301 (marks and emphasis omitted) (quoting *State v. Lawrence*, 365 N.C. 506, 516 (2012)).

On appeal, Defendant "specifically and distinctly contends" that "[t]he trial court plainly erred because the jury likely would have found that [the goat] had no value at the time of the taking due to needing expensive medical treatment[,] and they would not have convicted [Defendant] of felony larceny." Our Supreme Court has adopted the principle that

> the plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is

> a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

Lawrence, 365 N.C. at 516-17 (marks omitted) (quoting *State v. Odom*, 307 N.C. 655, 660 (1983)).

2. Essential Elements of Larceny

Defendant was convicted of felony larceny under N.C.G.S. § 14-72(b)(2). N.C.G.S. § 14-72 reads in pertinent part as follows:

> (a) Larceny of goods of the value of more than one thousand dollars ($1,000[.00]) is a Class H felony. . . . Larceny as provided in subsection (b) of this section is a Class H felony. . . . Except as provided in subsections (b) and (c) of this section, larceny of property, or the receiving or possession of stolen goods knowing or having reasonable grounds to believe them to be stolen, where the value of the property or goods is not more than one thousand dollars ($1,000[.00]), is a Class 1 misdemeanor. In all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen.
>
> (b) The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is any of the following:
>
> . . . .
>
> (2) Committed pursuant to a violation of [N.C.G.S. §] 14-51, 14-53, 14-54, 14-54.1, or 14-57.

N.C.G.S. § 14-72 (2022). "The purpose of [N.C.G.S. §] 14-72 is to establish levels of punishment for larceny based on the value of the goods stolen, the nature of the goods stolen or the method by which stolen, not to create new offenses. Thus, larceny from the person and larceny of goods worth more than $1,000[.00] are not separate offenses, but alternative ways to establish that a larceny is a Class H felony." *State v. Sheppard*, 228 N.C. App. 266, 270-71 (2013) (citation and marks omitted). "[T]he

statutory provision [elevating] misdemeanor larceny to felony larceny does not change the nature of the crime; elements of proof remain the same." *State v. Ford*, 195 N.C. App. 321, 323, *disc. rev. denied*, 363 N.C. 659 (2009) (marks omitted). In *Ford*, we held the statute codifying larceny as an offense did not describe its essential elements; accordingly, "in North Carolina, larceny remains a common law crime[.]" *Id.* (marks omitted).

Defendant argues that, "[u]nder the common law, to be the subject to a larceny, property must have some value." For the purposes of elevating a larceny, "value" refers to "fair market value" or its "reasonable selling price." *State v. McCambridge*, 23 N.C. App. 334, 336 (1974); *State v. Dees*, 14 N.C. App. 110, 112 (1972). Defendant contends that the statutory language "without regard to the value of the property in question," N.C.G.S. § 14-72(b) (2022), "does not imply that a thing can be completely lacking in value and nonetheless be the subject of a larceny prosecution." To support his contention, he cites *State v. Butler*, 65 N.C. 309, 309 (1871) (per curiam) ("To cut off and take away the ears or tail of a cow, might be malicious mischief, or might be indictable under [another law]; but it would not be larceny, as they are of no value as articles of property.") and *State v. Bryant*, 4 N.C. 249, 249 (1815) (holding that theft of currency that is not currency of the State is not larceny because the currency has no value within the State). However, Defendant ignores more recent case law from our Supreme Court, which indicates the four essential elements of larceny are "that [the defendant] (a) took the property of another; (b) carried it away; (c) without the owner's consent; and (d) with the intent to deprive the owner of his property permanently." *State v. Jones*, 369 N.C. 631, 633 (2017) (quoting *State v. White*, 322 N.C. 506, 518 (1988)).

Unlike opinions by our Court, under which we are bound by our earliest interpretation of the law, we are bound by our Supreme Court's most recent exposition of the elements of larceny, a common law crime, even if they conflict with its earlier declarations of the elements of larceny. *See In re Civil Penalty*, 324 N.C. 373, 384 (1989) ("[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.") Our Supreme Court's holdings in *Butler* and *Bryant*, which predate its holding in *Jones*, indicate that, at the time these cases were decided, stolen property must have had "value as [an] article[] of property" within our State to be subject to a larceny. *Butler*, 65 N.C. at 309; *see Bryant*, 4 N.C. at 249. However, our Supreme Court's more recent exposition of the elements necessary to prove common law larceny contains no such

requirement. As such, an item's "value" need not be proven for the purpose of establishing that a violation of N.C.G.S. § 14-72(b)(2) occurred. *See Sheppard*, 228 N.C. App. at 270-71.

The trial court did not err when it declined to give Defendant's special jury instructions regarding the value of the baby goat, where the instructions it gave correctly reflected the common law definition of larceny.

CONCLUSION

We dismiss Defendant's argument that the trial court erred by refusing to dismiss Juror Stoll for cause because Defendant did not properly preserve this issue. Furthermore, we find no plain error in the trial court's jury instructions.

DISMISSED IN PART; NO ERROR IN PART.

Judges HAMPSON and WOOD concur.

STATE OF NORTH CAROLINA
v.
QUENTIN JACKSON

No. COA22-984

Filed 17 October 2023

1. Probation and Parole—extension of probation—after expiration of probationary term—finding of good cause

The trial court erred by extending defendant's probation after his probationary term had expired, where the court failed to make a specific finding of good cause pursuant to N.C.G.S. § 15A-1344(f)(3). The matter was vacated and remanded to the trial court for a determination of whether good cause existed.

2. Probation and Parole—special probation—active term—maximum length—statutory deadline

The trial court erred by ordering defendant probationer, who had willfully violated the conditions of his probation, to serve an active term of 45 days as a condition of special probation where the maximum sentence of imprisonment for the convicted offense was 60 days and therefore, pursuant to N.C.G.S. § 15A-1351(a), the

maximum period of confinement that could have been imposed as a condition of special probation was 15 days. Furthermore, at the time the active term of 45 days was imposed as a condition of special probation, two years had already passed since defendant's conviction; thus, the 45-day active term also violated N.C.G.S. § 15A-1351(a)'s deadline for confinement other than an activated suspended sentence.

Appeal by Defendant from order entered 14 March 2022 by Judge Jerry Tillett in Perquimans County Superior Court. Heard in the Court of Appeals 20 September 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Carolyn McLain, for the State-Appellee.

Hynson Law, PLLC, by Warren D. Hynson, for Defendant-Appellant.

COLLINS, Judge.

Defendant Quentin Jackson appeals from the trial court's order finding that he had willfully violated the conditions of his probation, extending his probation by 12 months, and ordering him to serve a 45-day active term as a condition of special probation. Defendant argues that the trial court erred by extending his probation after his probationary term had expired and by ordering him to serve an active term. The trial court erred by extending Defendant's probation after his probationary term had expired, absent a specific finding of good cause. Furthermore, the trial court erred by ordering Defendant to serve an active term as a condition of special probation. Accordingly, we vacate the order and remand the case to the trial court to determine whether good cause exists to extend Defendant's probation beyond the expiration of his probationary term.

I. Background

Defendant, a town council member, was at a Hertford Town Council meeting on 1 October 2018. At the end of the meeting, Defendant struck another council member in the side of the face following a verbal altercation. Defendant was arrested for assault of a government official and entered an *Alford* plea to simple assault on 16 December 2019. The trial court sentenced Defendant to 60 days of imprisonment, suspended for 24 months of supervised probation. As a condition of special probation, Defendant was required to serve an active term of 15 days. Upon release,

Defendant was required to abide by a curfew from 7 p.m. to 6 a.m., except to attend town council meetings.

Defendant's probation officer filed the following violation reports: on 21 January 2020, alleging that Defendant had violated his curfew and requiring Defendant to submit to electronic monitoring; on 28 January 2020, alleging that Defendant had violated his curfew, left the county without prior approval, and failed to comply with electronic monitoring; on 21 February 2020, alleging that Defendant had violated his curfew; and on 12 March 2020, alleging that Defendant had violated his curfew and left the county without prior approval.

A probation violation hearing was calendared for 27 August 2020 and Defendant moved for a continuance. The trial court granted the motion and entered an order modifying Defendant's probation to require him to comply with his curfew and electronic monitoring and continuing the hearing until 6 October 2020. Defendant's probationary term expired on 16 December 2021. A probation violation hearing was ultimately held on 24 February 2022, and the trial court entered an order on 14 March 2022 finding that Defendant had willfully violated the conditions of his probation in the violation reports filed 28 January 2020 and 21 February 2020. The trial court extended Defendant's probation by 12 months and ordered him to serve an active term of 45 days as a condition of special probation. Defendant appealed.

II. Discussion

A. Probation Extension

[1] Defendant argues that the trial court erred by extending his probation after his probationary term had expired absent a specific finding of good cause.

Whether a trial court has the authority to extend a defendant's probation after the defendant's probationary term has expired is a jurisdictional question, which we review de novo. *State v. Geter*, 383 N.C. 484, 488-89, 881 S.E.2d 209, 213 (2022). Under de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower court. *Archie v. Durham Pub. Sch. Bd. of Educ.*, 283 N.C. App. 472, 474, 874 S.E.2d 616, 619 (2022).

The trial court may extend, modify, or revoke probation after the probationary term has expired if:

> (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk

> indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
>
> (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
>
> (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.
>
> (4) If the court opts to extend the period of probation, the court may extend the period of probation up to the maximum allowed under G.S. 15A-1342(a).

N.C. Gen. Stat. § 15A-1344(f) (2021).

In other words, to extend a defendant's probation after the probationary term has expired, "the trial court must first make a finding that the defendant did violate a condition of his probation." *State v. Morgan*, 372 N.C. 609, 617, 831 S.E.2d 254, 259 (2019). "After making such a finding, trial courts are then required by subsection (f)(3) to make an *additional* finding of 'good cause shown and stated' to justify the [extension] of probation even though the defendant's probationary term has expired." *Id.* A finding of good cause "cannot simply be inferred from the record." *Id.*

Here, Defendant's probationary term expired on 16 December 2021. A probation violation hearing was held on 24 February 2022, over two months after Defendant's probationary term had expired. The trial court's order extending Defendant's probation contains no finding of good cause to do so. Thus, the trial court erred by extending Defendant's probation by 12 months after his probationary term had expired without making a specific finding that good cause exists to extend his probation. *See id.*

We are unable to say from our review of the record that no evidence exists that would allow the trial court on remand to make a finding of good cause under subsection (f)(3). Accordingly, we vacate the order and remand the case to the trial court to determine whether good cause exists to extend Defendant's probation despite the expiration of his probationary term and, if so, to make a finding in conformity with N.C. Gen. Stat. § 15A-1344(f)(3). *See id.* at 618, 831 S.E.2d at 260.

B. Active Term

[2] Defendant also argues that the trial court erred by ordering him to serve an active term of 45 days as a condition of special probation

because "the maximum sentence of imprisonment for the convicted offense was 60 days" and "it results in imprisonment two years past conviction[.]"[1] (capitalization altered).

Although a challenge to a trial court's decision to impose a condition of probation is generally reviewed on appeal for abuse of discretion, an alleged error in statutory interpretation is an error of law, which we review de novo. *State v. Ray*, 274 N.C. App. 240, 246, 851 S.E.2d 653, 658 (2020).

"When a defendant has violated a condition of probation, the court may modify the probation to place the defendant on special probation[.]" N.C. Gen. Stat. § 15A-1344(e) (2021).

> Under a sentence of special probation, the court may suspend the term of imprisonment and place the defendant on probation . . . and in addition require that the defendant submit to a period or periods of imprisonment . . . at whatever time or intervals within the period of probation, consecutive or nonconsecutive, the court determines . . . .

N.C. Gen. Stat. § 15A-1351(a) (2021). However, in doing so,

> the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed one-fourth the maximum sentence of imprisonment imposed for the offense, and no confinement other than an activated suspended sentence may be required beyond two years of conviction.

Id. Thus, the statute sets an outside deadline for an active term as a condition of special probation as the end of the probationary term or two years after the date of conviction, whichever comes first. *Ray*, 274 N.C. App. at 247, 851 S.E.2d at 658.

Here, the trial court sentenced Defendant to 60 days of imprisonment, suspended for 24 months of supervised probation. Therefore, under section 15A-1351(a), the maximum period of confinement that could have been imposed as a condition of special probation was 15 days. In the original judgment entered 16 December 2019, the trial

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1. The State contends that this argument is moot because "[i]nformation from the Perquiman County's Superior Court clerk's office indicates that defendant served the sentence, beginning on 24 February 2023 and ending 10 April 2023." This information does not appear in the record before us. Nevertheless, Defendant's argument is not moot because his probation violation may be used as an aggravating factor in a subsequent sentencing hearing. *See State v. Black*, 197 N.C. App. 373, 377, 677 S.E.2d 199, 202 (2009).

court ordered Defendant to serve an active term of 15 days as a condition of special probation. By its probation violation order entered 14 March 2022, the trial court ordered Defendant to serve an additional active term of 45 days as a condition of special probation. Thus, the total period of confinement as a condition of special probation was 60 days, a duration in excess of the maximum period of confinement allowed by N.C. Gen. Stat. § 15A-1351(a).

Furthermore, Defendant pled guilty to simple assault pursuant to *Alford* on 16 December 2019. Defendant's probationary term expired on 16 December 2021. Thus, under section 15A-1351(a), the deadline for Defendant to serve an active term as a condition of special probation was 16 December 2021. By its probation violation order entered 14 March 2022, Defendant was ordered to serve an additional active term of 45 days as a condition of special probation, which was after his probation had expired and more than two years after his conviction.

Accordingly, the trial court erred by ordering Defendant to serve an active term of 45 days as a condition of special probation.

III. Conclusion

The trial court erred by extending Defendant's probation by 12 months after his probationary term had expired, absent a specific finding of good cause. Furthermore, the trial court erred by ordering Defendant to serve an active term as a condition of special probation. Accordingly, we vacate and remand to the trial court to determine whether good cause exists to extend Defendant's probation beyond the expiration of his probationary term.

VACATED AND REMANDED.

Judges TYSON and WOOD concur.

STATE OF NORTH CAROLINA
v.
YOUSEF BARAKAT MOHAMMED, DEFENDANT
1ST ATLANTIC SURETY COMPANY, SURETY

No. COA23-198

Filed 17 October 2023

Bail and Pretrial Release—bond forfeiture—petition for relief—statutory requirements—extraordinary circumstances not shown

The trial court's order granting a surety's petition for relief from a final judgment of forfeiture was reversed where there was no showing by the surety or evidence in the record that extraordinary circumstances existed to provide the relief requested. After a prior motion to set aside forfeiture was denied and sanctions were imposed because no documentation supported the bail agent's statement that defendant had died, the surety filed its petition two months later with only a photograph of defendant's death certificate attached. Although the surety argued during the hearing that the bail agent was unable to obtain a copy of the death certificate from the out-of-state county clerk where defendant had died and therefore had to locate defendant's family to get a copy, the bail agent did not appear at the hearing and there was no sworn evidence to support the surety's assertions.

Appeal by Durham Public Schools Board of Education from order entered 16 November 2022 by Judge Clayton Jones, Jr., in Durham County District Court. Heard in the Court of Appeals 20 September 2023.

Tharrington Smith, LLP, by Stephen G. Rawson and Richard A. Paschal, for Durham Public Schools Board of Education-Appellant.

The Law Offices of Elston, Donnahoo & Williams, P.C., by Brian D. Elston, for Surety-Appellee.

COLLINS, Judge.

Durham Public Schools Board of Education ("Board") appeals from an order granting 1st Atlantic Surety Company's ("Surety") petition for relief from a final judgment of bond forfeiture. The Board argues that the trial court abused its discretion by granting relief because Surety failed to make a showing of extraordinary circumstances as required by statute. Because the record contains no evidence that extraordinary circumstances existed, the order is reversed.

I. Background

Yousef Barakat Mohammed ("Defendant") was arrested on 19 February 2020. On 29 February 2020, Defendant was released on $5,000 secured bond under bail agent Ashraf M. Mubaslat ("Mubaslat") and Surety's custody. Defendant failed to appear for court on 13 January 2022, and the trial court issued a bond forfeiture notice on 14 January 2022 with a final judgment date of 16 June 2022.

On 16 June 2022, Mubaslat filed a motion to set aside the forfeiture, indicating that "[t]he defendant died before or within the period between the forfeiture and this Motion, as evidenced by the attached copy of the defendant's death certificate." Mubaslat did not attach a death certificate to the motion, but instead he attached a hand-written note that stated, "Defendant died and we are getting a copy of death certificate." The Board objected to Mubaslat's motion and moved for sanctions against Surety for failure to provide actual documentation of Defendant's death. On 14 July 2022, the trial court denied Mubaslat's motion to set aside the forfeiture. The trial court entered a separate order finding grounds for sanctions and ordering Surety to pay $2,500. Surety paid the bond but did not pay the sanctions.

On 26 August 2022, the State moved to abate the criminal charges against Defendant on the ground that Defendant had died on or about 23 February 2022. The trial court allowed the State's motion and ordered that the case be dismissed. On 29 August 2022, Mubaslat and Surety filed a petition seeking relief from the final judgment of forfeiture, arguing:

> 7. The Defendant died before or within the period between the forfeiture and this Motion, as evidenced by the attached copy of the defendant's death certificate.
>
> 8. Filed Motion to set aside knowing the Defendant had died but was not able to produce documentation.
>
> 9. Surety Paid Bond
>
> 10. Surety was able to produce the death certificate after the final Judgment date and Bond was paid.

A photograph of Defendant's death certificate issued by the Cook County Clerk in Chicago, Illinois, was attached to the petition. On 14 September 2022, Surety withdrew and refiled the petition.[1]

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1. The petition was originally signed by Mubaslat. The refiled petition was signed by counsel for Surety.

The matter was heard on 9 November 2022. At the hearing, Surety's counsel argued that Mubaslat was unable to obtain a copy of Defendant's death certificate and had to find Defendant's family members to get a copy of his death certificate. However, Mubaslat was not present at the hearing, and no sworn testimony or affidavits were presented to the court. On 16 November 2022, the trial court entered an order granting Surety relief from the final judgment of forfeiture. The trial court found, in relevant part:

> 4. On or about February 13, 2022, Defendant Mohammed died.
>
> 5. Surety filed a motion to set aside on June 16, 2022, but did not attach a death certificate to the motion. The Board attorney filed an objection to said motion and motion for sanctions and noticed same for hearing on July 13, 2022. At the July 13, 2022 hearing, the Honorable Judge Dorothy Mitchell entered an order denying the motion to set aside and an order awarding sanctions to the Board in the amount of 50% of the bond for failure to attach the required documentation. Neither of those orders was appealed.
>
> 6. The bond was paid in full on July 15, 2022. The sanctions had not been paid as of November 9, 2022.
>
> 7. On September 14, 2022, counsel for the Surety filed a Petition for Relief from Final Judgment and included a photograph of the death certificate for Defendant Mohammed.
>
> 8. At the November 9, 2022, hearing on Surety's Petition to Remit, counsel for the Surety argued that the bail agent was unable to obtain the death certificate from the Cook County, Illinois clerk in time to attach it to the original motion to set aside, and had to find family members of the deceased in order to get a copy of the record.
>
> 9. The Court finds that the Defendant died during the 150-day period following the failure to appear, and that the Surety's difficulty in getting the death certificate from Cook County along with efforts to contact the Defendant's family to obtain the same represent extraordinary circumstances that entitle the Surety to relief from the final judgment of forfeiture.
>
> 10. Because the July 13, 2022, sanctions order was not appealed, the Court finds that it has no ability to revisit that judgment.

Based upon its findings of fact, the trial court concluded that the 13 July sanctions order should remain in place, but "[t]he circumstances described by Surety constitute extraordinary circumstances . . ., and the Surety is entitled to relief in full from the final judgment of forfeiture." The Board appealed.

II. Discussion

A. Standard of Review

A trial court's decision to grant relief based on the existence of extraordinary circumstances is reviewed for abuse of discretion. *State v. Edwards*, 172 N.C. App. 821, 825, 616 S.E.2d 634, 636 (2005) (citation omitted). "A trial court may be reversed for abuse of discretion only upon a showing that it[s ruling] was so arbitrary that it could not have been the result of a reasoned decision." *State v. Escobar*, 187 N.C. App. 267, 271, 652 S.E.2d 694, 698 (2007) (quotation marks and citation omitted).

B. Extraordinary Circumstances

The Board argues that the trial court abused its discretion by granting Surety's petition for relief because Surety presented no evidence of extraordinary circumstances that prevented it from obtaining and furnishing Defendant's death certificate with its initial motion to set aside the judgment.

A trial court may grant relief from a final judgment of forfeiture if "extraordinary circumstances exist that the court, in its discretion, determines should entitle that person to relief." N.C. Gen. Stat. § 15A-544.8(b)(2) (2022). "Extraordinary circumstances in the context of bond forfeiture has been defined as going beyond what is usual, regular, common, or customary . . . of, relating to, or having the nature of an occurrence or risk of a kind other than what ordinary experience or prudence would foresee." *Edwards*, 172 N.C. App. at 825, 616 S.E.2d at 636 (quotation marks and citation omitted). "Whether the evidence presented rises to the level of showing extraordinary circumstances is a heavily fact-based inquiry and therefore, should be reviewed on a case by case basis." *Escobar*, 187 N.C. App. at 270, 652 S.E.2d at 697 (quotation marks and citation omitted). "[T]he arguments of counsel are not evidence." *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996) (citations omitted).

At the hearing on Surety's petition, Surety's counsel argued that Mubaslat was unable to obtain a copy of Defendant's death certificate and had to find Defendant's family members to get a copy of the death certificate. However, Mubaslat was not present at the hearing, and no sworn

testimony or affidavits were presented to the court to support counsel's assertions. The record evidence indicates that Defendant died, and that Surety did not produce evidence of Defendant's death until two months after the bond forfeiture judgment became final. Counsel's arguments were not evidence, and the record is devoid of evidence to support the trial court's finding of "Surety's difficulty in getting the death certificate from Cook County along with efforts to contact the Defendant's family to obtain the same" or any other circumstances "going beyond what is usual, regular, common, or customary . . . of, or relating to, or having the nature of an occurrence or risk of a kind other than what ordinary experience or prudence would foresee," *Edwards*, 172 N.C. App. at 825, 616 S.E.2d at 636 (quotation marks and citation omitted). Without such evidence, the trial court's conclusion that extraordinary circumstances existed could not have been the result of a reasoned decision.

III. Conclusion

For the foregoing reasons, the order granting Surety's petition for relief from the judgment is reversed.

REVERSED.

Judges TYSON and WOOD concur.

JERMOND WILLIAMS, Plaintiff
v.
CHARLOTTE-MECKLENBURG SCHOOLS BOARD OF EDUCATION, Defendant

No. COA22-893

Filed 17 October 2023

1. Appeal and Error—interlocutory order—substantial right—denial of summary judgment—Tort Claims Act—sovereign immunity

In a property-damage case filed against a county board of education under the Tort Claims Act, where a bus driver employed by the board accidentally crashed his bus into plaintiff's vehicle while en route to deliver food to students learning remotely during the Covid-19 pandemic, the Industrial Commission's interlocutory order denying the board's motion for summary judgment based on sovereign immunity was immediately appealable because the order affected a substantial right.

2. Immunity—sovereign—waiver—Tort Claims Act—school bus accident—emergency management exception—applicability

In a property-damage case filed against a county board of education under the Tort Claims Act (TCA), where a bus driver employed by the board accidentally crashed his bus into plaintiff's vehicle while en route to deliver food to students learning remotely during the Covid-19 pandemic, the Industrial Commission properly denied the board's motion for summary judgment based on sovereign immunity. Importantly, under the TCA, the State waives sovereign immunity for claims resulting from the alleged negligence "of the driver" of a "school bus," but under the North Carolina Emergency Management Act (EMA), neither the State nor any of its agencies may be sued concerning accidents involving "school buses" used for "emergency-management activity." Here, although it was undisputed that the crash occurred during a state of emergency, a genuine issue of material fact existed as to whether the bus involved in the crash was a "school bus" such that the EMA would apply to the bus driver's conduct in this case.

Appeal by Defendant from the order entered 14 July 2022 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 April 2023.

Jermond Williams, Pro Se Plaintiff-Appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Carl Newman, for Defendant-Appellant.

CARPENTER, Judge.

The Charlotte-Mecklenburg Schools Board of Education (the "Board") appeals from the North Carolina Industrial Commission's (the "Commission's") denial of the Board's motion for summary judgment. After careful review, we affirm the Commission's denial of summary judgment.

I. Factual & Procedural Background

On 10 March 2020, Governor Roy Cooper issued Executive Order 116 and declared a state of emergency because of the Covid-19 pandemic. On 14 March 2020, Governor Cooper issued Executive Order 117, which closed North Carolina schools and ordered "the North Carolina Department of Public Instruction . . . to implement measures to provide

for the health, nutrition, safety, educational needs, and well-being of children during the school closure period." Governor Cooper then issued Executive Order 169, which extended these provisions through 23 October 2020.

On 22 October 2020, Gerald Rand, a bus driver for the Board, drove a bus[1] for the purpose of delivering meals to remote-learning students. That day, Rand's bus collided with Jermond Williams' ("Plaintiff's") parked car in Charlotte, North Carolina. On 7 January 2021, under North Carolina's Tort Claims Act (the "TCA"), Plaintiff filed a property-damage claim with the Commission against the Board. After discovery, the Board moved for summary judgment based on sovereign or governmental immunity.[2] Specifically, the Board argued that it maintained immunity because Rand, pursuant to the North Carolina Emergency Management Act (the "EMA"), was performing an emergency-management activity during the alleged negligence. The Board further argued the EMA explicitly maintains immunity for such incidents. In other words, the Board acknowledged that the TCA and the EMA conflict concerning waiver of immunity, but the Board argued that the EMA should control.

A deputy commissioner denied the Board's motion for summary judgment, and the Board timely appealed to the full Commission. On 14 July 2022, the full Commission panel agreed that the EMA conflicts with the TCA concerning waiver of sovereign immunity for bus-accident claims. Nevertheless, the Commission concluded the Board's immunity is waived by the TCA. Thus, the full Commission affirmed the deputy commissioner's denial of summary judgment. On 15 August 2022, the Board timely appealed to this Court.

II. Jurisdiction

[1] As an initial matter, we must consider whether this Court has jurisdiction over an interlocutory order from the Commission. Under N.C. Gen. Stat. § 143-293 (2021), we conclude that we do. *See Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 383 N.C. 31, 44, 881 S.E.2d 558, 568–69 (2022) (acknowledging appellate jurisdiction of an interlocutory appeal from the Commission's denial of a motion

1. In his complaint, Plaintiff refers to Rand's bus as simply a "bus."

2. Here, the Board is a county agency. Therefore, the applicable immunity is more precisely labeled "governmental immunity." *See Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016). In this case, however, the distinction is immaterial, as "this claim implicates sovereign immunity because the State is financially responsible for the payment of judgments against local boards of education for claims brought pursuant to the Tort Claims Act . . . ." *See id.* at 611, 781 S.E.2d at 284.

to dismiss a TCA claim because the appeal involved a substantial right); *Multiple Claimants v. N.C. Dep't of Health & Hum. Servs., Div. of Facility & Det. Servs.*, 176 N.C. App. 278, 282, 626 S.E.2d 666, 669 (2006) (acknowledging appellate jurisdiction of an interlocutory appeal from the Commission's denial of a motion to dismiss a TCA claim because the appeal involved a substantial right). As we typically lack jurisdiction to address interlocutory appeals from the Commission, we will detail why we have jurisdiction over this case.

Appeals from the Commission concerning claims brought through the TCA are made "under the same terms and conditions as govern ordinary appeals in civil actions." N.C. Gen. Stat. § 143-293. Therefore, our analysis begins with the premise that, as in ordinary civil appeals, there generally is "no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). Similarly, this Court lacks jurisdiction over interlocutory appeals from the Commission. *See* N.C. Gen. Stat. § 7A-29 (2021); *Vaughn v. N.C. Dep't of Hum. Res.*, 37 N.C. App. 86, 89, 245 S.E.2d 892, 894 (1978) ("No appeal lies from an interlocutory order of the Industrial Commission.") (citing N.C. Gen. Stat. § 7A-29).

There is an exception to this rule, however, when an interlocutory appeal affects a "substantial right." *Sharpe v. Worland*, 351 N.C. 159, 161–62, 522 S.E.2d 577, 579 (1999) (stating that North Carolina's appellate courts have jurisdiction over interlocutory appeals that affect a substantial right). A "[d]enial of a summary judgment motion is interlocutory and ordinarily cannot be immediately appealed." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009). But "the denial of summary judgment on grounds of sovereign immunity is immediately appealable, though interlocutory, because it represents a substantial right . . . ." *Id.* at 338, 678 S.E.2d at 354.

This case involves a TCA claim, and the Board appeals from the denial of summary judgment based on sovereign immunity. Because "the denial of summary judgment on grounds of sovereign immunity" affects a "substantial right," this Court has jurisdiction. *See id.* at 338, 678 S.E.2d at 354; *see also* N.C. Gen. Stat. § 143-293; *Cedarbrook Residential*, 383 N.C. at 44, 881 S.E.2d at 568–69. Thus, despite our general rule against hearing interlocutory appeals, this Court has jurisdiction in this case under N.C. Gen. Stat. § 143-293.

III. Issue

[2] The issue on appeal is whether the Commission erred in denying the Board's motion for summary judgment.

IV. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

V. Analysis

On appeal, the Board argues the Commission erred in denying its motion for summary judgment because the Board maintains sovereign immunity under the EMA. After careful review, we disagree: The Commission did not err in denying the Board's motion for summary judgment because genuine issues of material fact remain.

Summary judgment is appropriate when "there is no genuine issue as to any material fact," and a party is "entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, R. 56(c) (2021). Concerning summary judgment, courts "must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). Indeed, "[s]ince this rule provides a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

Therefore, we must separate factual questions from legal questions to discern the applicability of summary judgment. *See* N.C. Gen. Stat. § 1A-1, R. 56(c). Generally, "[a]ny determination reached through 'logical reasoning from the evidentiary facts' is more properly classified as a finding of fact." *IPayment, Inc. v. Grainger*, 257 N.C. App. 307, 315, 808 S.E.2d 796, 802 (2017) (quoting *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657–58 (1982)). And when an answer requires application of legal principles to the facts, the prompting question is a mixed one of both law and fact. *See Town of Apex v. Rubin*, 277 N.C. App. 328, 332 n.5, 858 S.E.2d 387, 392 n.5 (2021).

The central issue here concerns sovereign immunity. Generally, "[u]nder the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity." *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997). "The State and its governmental units" do not waive sovereign immunity except "by a plain, unmistakable mandate of the [General Assembly]." *Orange County v. Heath*, 282 N.C. 292, 296, 192 S.E.2d 308, 310 (1972). Further, "statutes waiving this immunity,

being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537–38, 299 S.E.2d 618, 627 (1983).

The TCA "provides a limited waiver of immunity and authorizes recovery against the State for negligent acts of its 'officer[s], employee[s], involuntary servant[s] or agent[s].' " *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013) (quoting N.C. Gen. Stat. § 143-291(a)). Specifically, the State has waived immunity for claims that are the "result of any alleged negligent act or omission of the driver" of a school bus. N.C. Gen. Stat. § 143-300.1(a) (2021).

Under the EMA, however, "[n]either the State nor any political subdivision thereof . . . shall be liable for the death of or injury to persons, or for damage to property as a result of any [emergency management] activity." N.C. Gen. Stat. § 166A-19.60(a) (2021). "Emergency management" includes "[t]hose measures taken by the populace and governments at federal, State, and local levels to minimize the adverse effects of any type of emergency . . . ." N.C. Gen. Stat. § 166A-19.3(8) (2021). "School buses" may be used for "emergency management activity." N.C. Gen. Stat. § 115C-242(6) (2021). But there is a distinction between "school buses" and other buses, like activity buses. *Irving*, 368 N.C. at 615, 781 S.E.2d at 286 ("Therefore, we must conclude that the General Assembly and the State Board have defined and managed school buses, activity buses, and school transportation service vehicles as distinct categories of vehicles."). The General Assembly defines a "school bus" as a:

> vehicle whose primary purpose is to transport school students over an established route to and from school for the regularly scheduled school day, that is equipped with alternately flashing red lights on the front and rear and a mechanical stop signal, that is painted primarily yellow below the roofline, and that bears the plainly visible words "School Bus" on the front and rear. The term includes a public, private, or parochial vehicle that meets this description.

N.C. Gen. Stat. § 20-4.01(27)(n) (2021).

Here, the record tends to show that Rand drove a "bus" to deliver food to students during the Covid-19 pandemic. During his delivery route, Rand collided with Plaintiff's vehicle, and under the TCA, Plaintiff sued the Board, the owner of the bus. It is undisputed that North Carolina was in a state of emergency during the incident, and *school buses* may be used for "emergency management" activity. *See* N.C. Gen.

Stat. § 115C-242(6). Now, the question before us is whether the Board is immune from suit stemming from Rand's alleged negligence.

We start with the premise that, generally, the Board is immune. *See Meyer*, 347 N.C. at 104, 489 S.E.2d at 884. And we acknowledge the TCA clearly waived immunity for school-bus accidents. *See* N.C. Gen. Stat. § 143-300.1(a). That clarity, however, has faded with the passage of the EMA, which says the State is not liable for injury caused during emergency-management activity. *See* N.C. Gen. Stat. § 166A-19.60(a). The TCA waived immunity, *see Heath*, 282 N.C. at 296, 192 S.E.2d at 310, but the EMA qualified the waiver, *see* N.C. Gen. Stat. § 166A-19.60(a). In other words, school boards may be sued in tort concerning school-bus accidents, but they may not be sued concerning accidents involving school buses used for emergency-management purposes.[3]

In this case, however, it is unclear whether Rand's bus was indeed a "school bus" under N.C. Gen. Stat. § 20-4.01(27)(n). Neither party asserts the "bus" is "equipped with alternately flashing red lights," is "primarily yellow below the roofline," that it "bears the plainly visible words 'School Bus' on the front and rear," or that its "primary purpose is to transport school students." *See* N.C. Gen. Stat. § 20-4.01(27)(n). And because N.C. Gen. Stat. § 115C-242 applies to school buses, it is unclear whether the EMA applies to Rand's conduct, and it is therefore unclear whether the Board maintains sovereign immunity. *See* N.C. Gen. Stat. § 115C-242; *Irving*, 368 N.C. at 615, 781 S.E.2d at 286; N.C. Gen. Stat. § 166A-19.60(a).

In our view, discerning the type of "bus" driven by Rand requires an application of legal principles to the facts, so the question is at least a mix of law and fact. *See Rubin*, 277 N.C. App. at 332 n.5, 858 S.E.2d at 392 n.5. Indeed, viewed in a light most favorable to Plaintiff, an answer requires "logical reasoning from the evidentiary facts," so the question tends to be a factual one. *See IPayment, Inc.*, 257 N.C. App. at 315, 808 S.E.2d at 802. Thus, the label of the bus is, at least partly, a remaining issue of fact. *See* N.C. Gen. Stat. § 1A-1, R. 56(c).

Further, the label of Rand's bus is a "material fact" because if the bus was a "school bus" operated for an emergency-management purpose, the Board may maintain sovereign immunity. *See* N.C. Gen. Stat. § 166A-19.60(a). And if it was not a "school bus," the Board likely does not maintain immunity. *See* N.C. Gen. Stat. § 143-300.1(a). Because the

3. Although we need not reach whether the bus in this case was used for an emergency-management purpose, we think that question is, at least partially, a factual one. *See Rubin*, 277 N.C. App. at 332 n.5, 858 S.E.2d at 392 n.5.

bus's label remains unclear, we think the "drastic" measure of summary judgment is improper. *See Kessing*, 278 N.C. at 534, 180 S.E.2d at 830. Therefore, the Commission did not err in denying the Board's motion for summary judgment because an issue of material fact remains. *See* N.C. Gen. Stat. § 1A-1, R. 56(c).

VI. Conclusion

Accordingly, we hold the Commission did not err in denying the Board's motion for summary judgment.

AFFIRMED.

Judges ZACHARY and MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 OCTOBER 2023)

BRANN v. BRANN No. 22-762	Pitt (18CVD3478)	Affirmed
BRAXTON v. OCEAN VIEW LANDING PROP. OWNERS ASS'N No. 23-177	Brunswick (19CVS1685)	Affirmed
FOXX v. RAMSEY No. 23-202	Mitchell (22CVS135)	Dismissed In Part; Affirmed In Part.
IN RE M.B. No. 23-140	Surry (19JT29-31)	Affirmed
IN RE R.C.D.-T. No. 23-268	Henderson (20JT93)	Affirmed
IN RE V.Z.D.T. No. 23-214	Mecklenburg (17JT155) (17JT211)	Affirmed
KNUDSON v. LENOVO (U.S.) INC. No. 22-955	Wake (22CVS1818)	Modified and Affirmed
MAYMEAD, INC. v. ALEXANDER CNTY. BD. OF EDUC. No. 22-953	N.C. Industrial Commission (TA-29127)	Affirmed
MOORE v. PRITCHARD No. 23-304	Mecklenburg (21CVS650)	Affirmed
STATE v. BARTLEY No. 22-806	McDowell (17CRS51791-93) (17CRS554)	No Abuse of Discretion; No Error.
STATE v. DOBSON No. 23-288	Orange (19CRS51030-31)	No Error
STATE v. FIELDS No. 23-155	Columbus (19CRS662)	No Error
STATE v. JACKSON No. 23-157	Cumberland (17CRS63313)	Affirmed and Remanded
STATE v. KING No. 23-120	Columbus (18CRS52489)	No Error

STATE v. NIEVES No. 22-993	Surry (20CRS52655) (20CRS52711) (20-CRS52712) (20CRS52713) (21CRS3)	No Error
STATE v. PEAK No. 23-312	Buncombe (19CRS83285)	No Error
STATE v. RUFFOLO No. 23-178	New Hanover (21CRS54397) (21CRS54420-23)	No Error
STATE v. SIMPSON No. 23-35	Swain (19CRS50187) (20CRS29-30)	No Error

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